IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC 00-2043

PABLO IBAR,

Appellant,

vs.
STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR BROWARD COUNTY

INITIAL BRIEF OF APPELLANT

Peter Raben, Esquire
Counsel for Appellant
Florida Bar No.: 231045
First Union Financial Center
200 South Biscayne Boulevard
Suite 5100
Miami, Florida 33131
Telephone: (305) 379-1401

Facsimile: (305) 530-8557

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTORY AUTHORITIES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

This is a direct appeal from judgments of conviction and sentences of death following a trial by jury held before the Honorable Lance True Andrews in the Seventeenth Judicial Circuit in and for Broward County, Florida. The trial transcript will be referred to here by the letter "T", the Clerk's record by the letter "R", and the supplemental record and transcripts by the letters "SR" and "ST", followed by the volume and page numbers. The parties will be referred to here as they stood in the lower court; all emphasis will be supplied unless otherwise indicated.

STATEMENT OF THE CASE

In late June of 1994, police entered a residence in Miramar, Florida and discovered the bodies of the homeowner, Casimir Sucharski, and two females, Sharon Anderson and Marie Rogers. An investigation culminated in the indictment, returned on August

25, 1994, of the Appellant, Pablo Ibar, and co-defendant Seth Penalver, for three counts of first degree murder and single counts of armed burglary, armed robbery and attempted armed robbery. R.1.2-4.

The two men were tried together in Ft. Lauderdale on May 5, 1997. R.125. On January 25, 1998, the jury deadlocked and a mistrial was declared. R.2.393.

A second trial began with both defendants on January 11, 1999.During jury selection, Mr. Ibar's lawyer was arrested for domestic battery on a pregnant woman in a highly publicized incident. The Defendant's motion for a severance was denied, but his motion for a continuance was granted. R.3.429-430,437-438. Mr. Penalver's trial continued, and he was convicted as charged.

Mr. Ibar's third trial began on April 17, 2000. R.3.499. The jury returned guilty verdicts on each charge on June 14, 2000. R. 6. 1000-05. A penalty phase commenced on July 24, 2000, and the jury voted nine to three to recommend a sentence of death on each murder count. R.6.1021-23. A Spencer hearing was conducted on August 14th; the trial court filed its Sentencing Order two weeks later, R.6.1094-1116, and sentenced Mr. Ibar to death on the three counts of first degree murder and concurrent terms of twenty five and ten years on the other felonies. R.6.1117-35. A timely notice of appeal was filed. R.6.1138.

STATEMENT OF THE FACTS

Casimir Sucharski was a popular figure in Miramar, Florida. He owned a restaurant/bar called Casey's Nickelodeon and was renown as an entertainer and ladies man. He owned and wore

expensive jewelry, drove two Mercedes' and had a reputation for escorting women home from his club for sexual adventure. T. 17. 2337,2349-52. His lifestyle allowed for a variety of enemies; his hero was Adolph Hitler, he had a felony conviction and lost his liquor license due to drug activity in the bar, and he had problems with bar employees and patrons to the point that he carried a firearm and once used it to quell an argument in the bar. T. 18. 2371-83.

Sucharski had a fondness for surveillance cameras. He video- taped women he brought home as they cavorted in his bedroom. He also had a live-in girlfriend in 1994, Kristal Fisher, with whom he had a bitter falling-out. Sucharski was afraid that Fisher and her "drug-dealer boyfriend" would come to his home for jewelry, his car, or the sex tapes; he had installed in his living room a camera similar to the one in his bedroom. T.18.2343,2391-2407.

This case began when a Palm Beach County policeman discovered a Mercedes SL convertible on fire on a road twelve miles south of South Bay on Sunday, June 26th. The car was registered to Sucharski; a search revealed spent casings from two firearms, a wallet, and newspapers from the day before. The car and its contents were sent to a lab for processing. T. 13. 1737-58. The officer who discovered the car notified the Miramar Police Department. A Miramar officer knocked on the door to the Sucharski residence that afternoon; no one answered, he saw nothing unusual and he left his card in the door. He did not see a t-shirt on the front porch. T. 13. 1763-69.

Meanwhile, a Broward County police officer took a missing person's report on June 27th at 12:57 a.m. from a mother who said her daughter, Marie Edwards, went to Casey's Nickelodeon on Saturday night with a friend, Sharon Anderson, and had not returned. Officer Shaub went to the club and learned that Casey left the club Sunday morning around 6:00 a.m. with Marie and Sharon. Shaub drove by the Sucharski residence around 2:00a.m. Monday; Anderson's car was in the driveway, but no one answered the door. Shaub found a Miramar Police Department business card in the door and a blue t-shirt on the porch. He peered inside, saw the bodies , gained access to the house and called for back-up. T. 14. 1773-1811.

Crime scene technicians entered with a search warrant. A detective noticed a hidden video camera and discovered that the home invasion/murders were caught on tape. This tape, introduced into evidence at trial without objection, became the key to the investigation and trial. T. 13. 1662-72.

An exhaustive crime scene investigation began. The grainy, black and white, soundless video depicted two intruders ransacking the home and the homicides. Police found outside a black costume mask and a blue t-shirt with the lettering "CES", Halo and Consolidated Electrical Supplies (noticed by the officer on Monday morning but curiously not seen by the Miramar officer on Sunday afternoon), and the Miramar officer's business card. T.13.1678-1734, 1867.

Investigators collected 114 items of evidence inside the home. The video depicted two men entering the home: one wore

sunglasses and a hat and carried a firearm, a second wore a shirt over his head and carried a stick. The men touched many surfaces and wiped down areas as if to eradicate fingerprints. Technicians lifted dozens of prints from door knobs, safes, and the stick (suggesting the intruders did not wear gloves). They found live and spent 9mm and .38 casings, three locked safes, a second costume mask, business cards, and approximately 200 videos of Sucharski having sex with Ms. Fisher and other females; several patent footwear impressions were left in blood. The t-shirt worn by the second assailant was dispatched to a lab for hair and DNA analysis. T. 14. 1856-1937;15. 1979-2099.

The medical examiner also processed the scene. He opined, and the video depicted, that Ms. Rogers and Ms. Anderson both died from close-range gunshots to the back of the head and neck causing instantaneous death. Mr. Sucharski was shot once in the back, twice in the head, and had head trauma. T. 14. 1816-1842.

The video was the hallmark of the investigation. The tape reflected the arrival of Sucharski and his two guests early Sunday morning, and their consumption of champagne and marihuana. The tape showed two men enter around 7:18 a.m.T.27.3723. The three occupants were forced to lay down while the two men searched the house. The man with the stick armed himself with a gun he found. A search of Sucharski began; he fought back and was beaten and shot in the back. The video ended with the two men shooting the three victims and leaving; the man with the headcover removed the item from his head and one

could briefly glimpse a face in the grainy and clouded footage. T. 12. 1561-70; 23. 3172, 32. 4258, 37. 4772.

Miramar police had only one other homicide that year, and never a case of this magnitude. The case was further complicated by the discovery that the intruders left behind narcotics, expensive jewelry on the victims, and over five thousand dollars in cash. T. 27. 3706-19. An area canvas led to Gary Foy, who claimed he saw two men leaving the Sucharski home early Sunday morning in the victim's Mercedes.T.18.2458-62. Police learned from the Nickelodeon manager about animosity then ongoing between Sucharski and Kristal Fisher, T.27.3730, and Sucharski's fear that Fisher and her boyfriend would visit with ill intent .T. 18. 2415-19. The manager, Peter Bednarz, also gave police his belief that a man named Stanley may have committed the murders. T. 18. 2343,2387-89.

Miramar police had the tape analyzed by the F.B.I. crime lab. Forensic video analyst Evans culled fifteen still photographs from the video.[1] The police created a "wanted flyer" with still pictures of the two men and a description of the crime and dispatched it to over 130 police departments.

[1]Evans testified that the reproduction process, whereby the images are converted from analog to digital, and the pixels significantly magnified, creates a distortion called "aliasing" which alters the original image. T. 16. 2215–41. A second F.B.I. technician created more stills and enhancements years later, in 1997; her photographs of the perpetrator's hands and shoes were introduced. She testified that the tape's reliability erodes with age, and that illusions and distortions can occur –known as photogrammetry– through use of lighting, camera angles and placement, and lens type. T. 17. 2249-2322.

T.18.2454-81. Miramar police got a call from a Metro-Dade detective two weeks later suggesting that a man in custody on an unrelated matter might be one of the men depicted in the wanted flyer. Miramar detectives drove to Miami and met Pablo Ibar. T. 19. 2490-98.

Mr. Ibar waived his Miranda rights and was advised police were investigating the highly publicized triple homicide from Miramar. The conversation lasted a few minutes and was not recorded. Mr. Ibar consented to being photographed and signed a residential consent to search. He had frequented Casey's Nickelodeon before, but denied committing the homicides. The detectives left in possession of the stills taken from the video and Polaroid photos of Pablo to search his home. T.19.2490-2674.

The two detectives immediately went to search the home of Pablo's mother, Maria Casas. T. 19. 2507-19. Nothing was recovered connecting Mr. Ibar to the homicides . T. 25. 3447, 3470. Detective Scarlett testified that while there, he displayed the still photograph to Ms. Casas and two friends of hers who were present and asked these women if they recognized the person. T.19. 2520-26; 20. 2695-2705. None of the other officers present witnessed these photo presentations. This scenario became a feature of the trial.

The police visited Foy the next day to conduct a photo-lineup with the Polaroid of Mr. Ibar. T. 20.2693, 2722-30. Foy immediately discounted four of the six pictures and wanted to see two of the men in person. T. 21. 2815-17. Foy viewed a live lineup on July 21st; the only participant whose picture was

repeated from the photo-lineup six days earlier was Pablo Ibar. Mr. Ibar had retained counsel, and requested his attorney's presence at the lineup; nonetheless, counsel was not present. T. 21. 2825-29, 22. 2983. Foy identified the Defendant at this lineup. T. 21. 2828. Police obtained statements and conducted photographic displays over the next two weeks. Co-defendant Seth Penalver was arrested on August 3rd; Pablo Ibar and Penalver were indicted on August 25, 1994, on the three counts of homicide and related felonies. R. 1. 1-26. Three separate trials occurred: a joint trial ended in a hung jury in 1997-98; a second trial in 1999, where Mr. Ibar's case was continued in voir dire because of the arrest of his lawyer; and a third trial in 2000, which is the subject of this appeal.

Jury selection began on April 17, 2000. T. 1-9. 2-1320. From opening statements forward, both counsel agreed the only issue was identification.T.12.1561-88;1603-57. Although 114 items of evidence were collected at the crime scene, no physical evidence linked the Defendant to the crime. The Broward County Sheriff's DNA Unit analyzed various blood samples and the t-shirt left behind by the intruder alleged to be Pablo Ibar; scientific analysis of sweat and hair specimens from the shirt excluded Mr. Ibar as the source of DNA found on the shirt. T. 33. 4383-4418.[2] The t-shirt had animal, Caucasian and Negroid hair samples; none were consistent with samples provided by Mr.

[2]The analyst, Donna Marchese, was recalled as a defense witness, and testified that further presumptive testing excluded Mr. Ibar as the source of any specimens on the shirt. T. 48. 6295-6303; 52. 6767-74

Ibar. T. 35. 4554-86. A Broward County fingerprint examiner testified that none of the 145 latent impressions lifted from the crime scene (13 latents were unidentified) belonged to Mr. Ibar. T. 39. 5073-5120.

The prosecution's case was purported eye-witness testimony, circumstantial evidence from a house where Mr. Ibar used to live with other suspects, and testimony of former acquaintances of their observations during the relevant time-frames. The prosecution's use of eye-witness testimony was unorthodox. Only Gary Foy offered traditional testimony. The State called six other witnesses, knowing they would deny alleged pre-trial identifications of Mr. Ibar, for the sole purpose of impeaching them with detectives, so the State could offer disputed out-of-court identifications as substantive evidence. T.19. 2516. This tactic allowed the prosecutor to tell the jury that the Defendant's own mother believed he was the killer. This compelling testimony went unrebutted; Pablo's mother was not alive to condemn the detectives as untruthful, as she had successfully done in the first trial, where a jury hung on the same evidence.

Gary Foy left his home Sunday morning and drove by the Sucharski residence between 7:00 and 7:30 a.m. His recollection was immediately undermined, as the intruders did not leave the house until 7:42 a.m. T. 40.5399. He saw two young, Latin/ white men leaving in Sucharski's Mercedes. He drove ahead and was along-side the Mercedes at an intersection where the passenger stared hard at him for 20-30 seconds. He saw police activity

outside the victim's home the next day and came forward. T. 21. 2784-2807.

Detectives visited Foy on July 15th (the day after detectives met Mr. Ibar) showed him a photo spread and took his statement. Foy conceded "that it was obvious that the police had a suspect in these pictures." T. 21-22. 2810, 2981. Foy eliminated four photos immediately. T. 21. 2909. He testified: "I thought I recognized an individual, and there were two people that were pretty close. . . and I wanted to look at the individual, front and back, before I said exclusively this is the individual." T. 21. 2815. Foy qualified his remarks because he only saw the men from "the left side and the back" and he was scared. T. 21. 2818,2910.

The identification and the line-ups came under considerable attack in cross-examination. Foy admitted that he only saw the passenger in the Mercedes for "10 or 15 seconds", looking at an angle through tinted car windows. Foy said, "every time I looked back I did see him. But I didn't really pay real real close attention, like you said." T. 22. 2959-63. On June 27th, he said the man he saw was "shaved, he had a shaven face"; the man was not scruffy looking. T. 21. 2930. But on July 15th, he told detectives the man had a "scruffy" face; not surprisingly, Foy selected the two pictures in the photo spread of men with facial hair. Foy admitted this was "probably why I was directed towards it." T. 21. 2914. Foy testified it was obvious the police had a suspect in custody a week later at the live lineup; the reactions given him by the police made him believe he was on

the right track. T.22. 2981. Foy also conceded that the only person who appeared in both the photo lineup and the live lineup was Pablo Ibar. T. 22. 2983-86; 28. 3885. When asked whether the prior exposure may have influenced his identification, Foy said, “[a]nything is possible, sir, but I was trying to do the best of my recollection to what I remember the person looked like in the car.” T. 22. 2989.

The picture used in the photo spread was the Polaroid taken of Mr. Ibar on June 14th.T 20.2693, 2724. At trial, the defense asked Foy to look at the still photograph from the video used to prepare the wanted flyer. Foy observed that the photo was shady and grainy, and although it looked like Pablo Ibar, he opined that “it could be similar to many people.” T.21.2836-38. Foy also described the aggressiveness of the police. Regarding the second suspect, "they asked me to pick somebody out. No matter what, pick somebody out. And I said I really didn't see him." T. 22. 3022. He acceded to the detectives and picked out a second suspect, even though he protested that he did not see him.

The next phase of the trial entailed the unorthodox use of prior out-of-court identification confrontations. Two witnesses were called to testify concerning an identification procedure from six years earlier for the sole purpose of having a detective impeach them.T.19.2516. The State also read into evidence the prior testimony of Pablo's mother. Ms. Casas had denied identifying her son as the man in the video; this testimony was only read to enable the State to call a detective to impeach her. The defense was unable to contradict the

officer, as Ms. Casas had died in 1998. This was a monumental benefit to the prosecution.

Roxana Peguera was fourteen in 1994. She accompanied her mother to Maria Casas' on July 14, 1994.T.22.3037-42. Police arrived that evening and showed them a picture. She recalled, although not verbatim, the officer asking, "do you know this person [or] does this look like Pablo?" She remembered saying it looks like Pablo. T.22.3055-60. Roxana did not sign the picture; the officer wrote her name on the back. T.23.3107-08. Police visited her on September 1st, showed her a photograph again and took a statement. She testified that she again said," he looks like Pablo but I really haven't seen him in a long time, so I really don't know." T.22.3067-70. Roxana believed the man in the picture resembled Pablo but denied ever identifying the man. The prosecutor repeatedly attempted to impeach his own witness.

Marlene Vindel, Roxana's mother, was called next to be impeached by the State. Ms. Vindel, a native Honduran, testified through an interpreter about a police interview conducted in English six years earlier. T.23.3184. Ms. Vindel was at Maria's house when the police arrived and showed her a very cloudy picture. She told police "it looked like [Pablo]--but I wasn't really sure, because it wasn't very clear." T.23. 3173. She did not sign the picture and could not recall the conversation verbatim. T.23.3174. Police revisited Ms. Vindel to take a statement and show photos. Ms. Vindel thought she was shown a different picture on August 23rd; she told the police,

"I remember when I say it's Pablo", but reiterated she does not believe it was Pablo in the picture. T. 23. 3174-83. She denied telling the police that the man was Pablo; she agreed, upon police suggestion, there was a resemblance because of the hair styles. T. 23. 3193-40.

Mr. Ibar was first tried in 1997 with co-defendant Penalver. The theory of both the State and Penalver was that Mr. Ibar was guilty. T. 30. 3998. A critical witness for Mr. Ibar at that trial was his mother, described as “beautiful and credible”, who flatly contradicted the claim that she told the police the man in the video was her son. That case resulted in a hung jury; the defense attributed its success to the power of Ms. Casas' testimony. T.24. 3270-89. Ms. Casas died in 1998. T. 23. 3164. The State wanted to read Ms. Casas' prior testimony to this jury for the avowed purpose of having an officer impeach her concerning the disputed identification . The defense complained that this procedure left it unable to rebut the officer-- no reliable credibility determination by the jury could occur as the defense had successfully done in the first trial. Over a defense objection, the court permitted a transcript of her testimony to be read to the jury.T.24.3265-3325.

Ms. Casas lived in Hollywood, Florida in 1994. Pablo lived at another residence that summer. T.24.3326,27. On July 14th, 1994, Miramar police came with written consent to search Pablo’s room. The police searched an upstairs bedroom where Pablo had resided. T.24.3327-32. The prosecutor then asked her,“[o]n that day did you identify a photograph shown to you by police?” She

answered, “No, sir.” T.24.3333,34. Coincidentally, Ms. Casas’ name was not on the picture as had been done with the other two women. T.9.2523,2626.

Ms. Casas was a self-employed lighting consultant. She was formerly employed by Southeast Lighting until 1992. She was familiar with Consolidated Electric Supply,[3] and acknowledged that the two companies may have had business together. T.24.3334-43. Ms. Casas was shown the t-shirt from the crime scene and did not recognize it.T.24.3344. On cross-examination by her son’s attorney, Ms. Casas said she has no contact with lighting suppliers as a consultant and would not have received a t-shirt from C.E.S. or Halo, a business competitor .[4] T.24.3344-46. Ms. Casas said the police showed her a photo and insisted,“Isn’t this Pablo?” and “ I kept saying no, it’s not. You know, it’s not Pablo. I don’t see no resemblance.”T.24.3354. Ms. Casas maintained to the police and in the trial transcript read to the jury that the man depicted in the video was not her son. T. 24. 3353-55.

This set the stage for the State to call its detective to testify to the disputed identifications . The defense objected to permitting the impeachment of Ms. Casas, as her testimony

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[3]The t-shirt found outside the Sucharski had on it the logo of two lighting companies, Halo and C.E.S..

[4] An employee of C.E.S. testified that Southeast was a customer, and the logo shirt was given to customers, although he did not know if consultants like Ms. Casas would get them. He also confirmed that Halo and Ms. Casas’ company were competitors. T. 24. 3368-77.

was not specifically detailed enough to allow for impeachment, and the defense was denied the opportunity to confront and rebut the detective with a live witness. T.25.3385-96. The court permitted the evidence. T.25. 3396. Detective Scarlett testified that on July 14th, he showed Ms. Casas, Ms. Vindel and Roxana the still photograph of the man from the video, and all three identified Pablo Ibar. T. 25.3397-3403. Later, Scarlett visited the two Vindel women at their homes and he claimed they made the same identifications. T.25.3404.

Scarlett admitted that none of the women signed the back of the photos, their unwitnessed identifications were critical, as the police found no evidence in their search linking the Defendant to the crime, T. 25.3470-72, and the surveillance photo was "a little grainy, a little blurry." T.25.3487. Scarlett took statements from the Vindel women weeks later; they stated that they were not sure the man depicted in the photo was Mr. Ibar, and could not make an identification. T.25.3493-3520.[5] Scarlett confirmed that Ms. Vindel recalled that Ms. Casas looked at the surveillance photo "and did not recognize the picture" as being her son. T. 26. 3562-67.

Scarlett provided insight into his contact with Gary Foy. Foy had originally said, "I didn't get that good a look at the driver, but the passenger I did get a pretty good look at. I mean a fair look." T. 26. 3591. After the photo line-up,

[5] Scarlett believed that the women changed their minds because they learned the photo was from the crime scene. T. 25. 3493-95.Both witnesses denied this. T. 22-23. 3072,3231-38.

Scarlett asked Foy if he would assist if an arrest was made. T.26.3605. When asked at trial if the detectives may have signaled to Foy who their suspect was, Scarlett replied, "[i]t may have been communicated to him. I have no idea." T. 26. 3656,57.

The prosecution's case then returned to the initial meeting the police had with Pablo Ibar. Detective Paul Manzella testified he received a tip from the Metro-Dade Homicide Unit[6] on July 14th to come look at some individuals. Manzella met Mr. Ibar; a waiver of rights form was signed, and a brief interview was conducted. T. 27. 3739-42, 28. 3817,18.

The police told Pablo they were investigating the Miramar triple homicide. He was questioned about his whereabouts the last weekend in June, who he was with, and his knowledge of Casey's Nickelodeon. Pablo's best recollection (three weeks had passed and Pablo was on medication)was being at Cameo's nightclub on Saturday night, June 26th, until early Sunday morning with Jean Klimeczko and a woman named Latasha. They went from Cameo's to Casey's on Sunday before dawn. Manzella said Pablo told him he argued with Latasha, then went to her house and slept until Monday morning. T.28.3820-24. Manzella said the interview then ended:

A. Getting the sense that Pablo really

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[6] When there was a break in the proceedings, the defense moved for a mistrial based upon the unsolicited comment by the witness that a Metro-Dade Homicide Unit officer called, suggesting "my guy's involved in killing somebody in Miami." T. 27. 3774-78. The motion was denied. T. 27. 3803.

> 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 the day of the homicides.

T.28.3826. A motion for mistrial, claiming an inappropriate comment on silence, was denied. T.28. 3826-33. Manzella continued: Pablo denied his guilt, so he displayed the still photo to Mr. Ibar and, in a confrontational manner, “ I asked, then Pablo, how did I get this picture?” T.28.3835. This prompted a second mistrial motion; the officer’s accusation, with no evidence of a response by the Defendant, was another implicit comment on silence. This strategy forced the defense to concede the silence or place Pablo on the stand. The second mistrial motion was denied. T.28.3839-52.

Manzella took sneakers from Pablo and two other men there with Mr. Ibar (Rincon and Hernandez) and acquired a consent to search. He learned that the men had lived on Lee Street in Hollywood. Manzella requested Broward police technicians process this home. T.28.3872. Manzella later displayed the surveillance photo to three other people: Jean Klimeczko, Melissa Monroe and Ian Milman, T.28.3890-3931, and said the existence of the video was not public at the time of the interviews. T.29.3935-39.

These three were the next State witnesses. Jean Klimeczko had just left prison and briefly stayed on Lee Street in Hollywood with Pablo and two roommates, Hernandez and Rincon. T.30.4005-12. He proved a thorny witness for the prosecutor, who wanted to elicit statements Klimeczko had made in police

interviews and court hearings from years before. Klimeczko recalled little without prompting. He used drugs daily in 1994, and six years of memory erosion had occurred. The State tried hard to refresh his memory; he read his prior statements but could not remember what he had said in the past and feared that what he "recalled" may be what he had read or been told by others. T.30.4005-21,4041.

Klimeczko did not recall when he had last visited Casey's Nickelodeon with Mr. Ibar.[7] The prosecutor read a statement from 1994 that he was there with Pablo and Seth Penalver on Friday, June 24,1994. T. 30. 4065-79.[8] Klimeczko said police came to him after the homicides with photos and said the pictures were of Pablo and Alex Hernandez; he thought the photos looked " like

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[7]A former waitress, Jeanne Smith, testified that the Wednesday before the homicides, she served a group (including a man who claimed to know the owner) who had a dispute over a credit card. Sucharski came to the table and settled the dispute in the customer's favor. The waitress was fired that evening. She identified a picture of Pablo Ibar as the customer with whom she quarreled and who caused her termination. T. 38. 4936-66.

[8] Both parties requested a limiting instruction on impeachment. The jury was instructed, over a defense objection, that prior statements of the witness concerning identification are admissible to both impeach the witness and as evidence of the identification, and all other prior statements are admissible not to prove the truth of the statement but only to impeach the witness' credibility. T. 30. 4060. The court announced that prior statements read to impeach Klimeczko from depositions or police statements were for impeachment only, but prior statements from prior sworn testimony from the witness, who was declared a "turncoat witness" by the court, were admitted as substantive evidence. T. 32. 4201-10.

Pablo and Seth." T.30.4081-84. But Klimeczko believed he was shown a Polaroid, not a video still; he recalled the pictures he identified were clear, while the video still he saw on the flyer "was not easily recognizable as Pablo." T. 30.4096-4104.[9] He did not recall guns in the house; his memory was refreshed by prior statements concerning Alex having a gun similar to one seen in the surveillance video. T.31.4149-66.

Klimeczko's appearance on the stand enabled the prosecutor to read, over a defense objection, unrecalled portions of prior statements from a police interview and Penalver's bail/probable cause hearing on August 31,1994. Mr. Ibar and his counsel were not at this hearing, and the State conceded that Penalver did not have the same issues or motives as Ibar at that hearing in examining Klimeczko. T.31-32.4186,4203. The statements from 1994 from Klimeczko were that Pablo and Seth went out together Saturday night, and came home about 5:00 Sunday morning acting funny and paranoid. Pablo took a Tec-9 firearm and they left; they (and possibly two other people) returned around 7:00 a.m. in Seth's car and a new black car (Pablo said it was some girls), they left again and returned at noon. T.31.4167-86. He did not recall the roommates wearing each others shoes or clothing; a prior statement to police indicating that they may have was read to the jury. T.32.4219-35.[10]

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[9]This prompted impeachment by the State from prior police interviews and court proceedings wherein identifications were made. T. 31. 4111-4137;4188-90.

[10] This was important to the prosecution's theory, as bloody shoeprints found at the crime scene were similar to

Klimeczko gave four reasons why his prior statements were unreliable and untrustworthy. First, he was a chronic abuser of LSD, cocaine (powder and crack), marihuana and alcohol in 1994; indeed, he believed he was high and possibly hallucinating when he gave his police interview and testified in court. His prior statements were "half speculation, you know, half knowledge, the best I could remember." T.32.4235-39;4270-78. Second, he was angry at Pablo when he gave those statements. Klimeczko was caught using crack cocaine and stealing money and was thrown out by Pablo. He felt falsely accused and he and Pablo did not speak again. T.30. 4018-34. Third, he was angry at Pablo when the police interviewed him, as he thought the police were trying to implicate him in the crime. T.33.4338-41. Finally, after he was thrown out of the house, someone drove by his house and fired a gun through a front window. He believed Pablo was responsible (he later learned Pablo was not involved)so was angry at Pablo when the police interviews and photo procedures were conducted because of this shooting. T.31. 4141; 33.4329-41. Klimeczko looked at the video still while on the witness stand; he testified that the photo was too blurry and fuzzy to identify anyone. T.32.4248-68. He testified that he had no knowledge of people swapping clothes or shoes and no recollection of seeing a black car or anyone with guns. T.33.4342-52.

Ian Milman, a friend of Mr. Ibar, was called as a State witness to be impeached. T.34.4426-30. He was "harassed" by the

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sneakers found in the Lee street home which did not belong to Mr. Ibar. T. 62.6214.

police into giving a statement; they showed him "gray and shady" photos and he only placed his initials on the back to indicate that he had looked at, but could not identify, the people. T.34. 4437-39. He claimed he did the same before the grand jury. T.34. 4442-43. He was confronted with police interviews and grand jury testimony of past identifications, but Milman persisted in his denial of any identification. T.34.4440-55. Milman had been to Casey's Nickelodeon and met Sucharski while with Pablo. He stayed on Lee Street on occasion. He believed Klimeczko was kicked out of the house on a Monday, that Alex Hernandez owned a Tec-9 and was out of town the last weekend in June. T.34.4440-77.

Milman had consistently testified that Klimeczko was thrown out of the house on a Monday. T.34.4485-4501. Klimeczko claimed he was thrown out of the house the same day he saw Pablo and Seth with guns and a black car; being thrown out on Monday made Klimeczko's claim of seeing Pablo and Seth with a gun or black car unlikely, as the homicides were on a Sunday. T.33.4307-09.[11] Milman said that the man in the surveillance photo had a haircut which was popular at the time, and was worn by Pablo and others who lived on Lee Street. He was sure the man in the photo was not Mr. Ibar. T.34. 4492-4500.

The next witness called to be impeached was Melissa Monroe, the ex-girlfriend of Penalver. They were a couple briefly in the

[11] A Hollywood police officer who took a report from Klimeczko on the drive-by shooting incident on Wednesday, June 29th, wrote in his report that Klimeczko left the Lee street home on June 27th, a Monday. T. 35. 4588-98.

early 1990's; her mother died on July 7, 1994, and Penalver moved in until his arrest on August 3rd. T.35.4605-15. Police visited her the next day, searched her home, and took her statement. Her testimony concerned when she had last seen the two defendants and a sixth disputed identification was elicited. T.36.4678-4703.

Ms. Monroe first learned about the homicides from the newspaper. She had seen Mr. Ibar and a drunken Penalver dancing at Casey's Nickelodeon until dawn on a Saturday night/Sunday morning, but did not recall which weekend. T.36.4621-26;4652.In prior police statements and court testimony, she stated that it was the weekend of the homicides, but claimed she was pressured and misled by the police and prosecutor to recall this time period. T. 36. 4652-74.

Ms. Monroe said that in her first contact with police, she was shown pictures of two men whom she could not positively identify. T.36.4688-90. Police told her to sign the photos: "if I sign it, it didn't mean I'm identifying it. It meant that I said, yes, that it could resemble either one of them." T.36.4692. Her recorded statement that day was consistent. T.36.4714. Her testimony before the grand jury was consistent; referring to the suspect the police believed was Mr. Ibar, she said, "his head is down, you know, so you really can't see. But just knowing them both, yes, it resembles both." T.37.4764. She reiterated at trial that the photos were unclear and fuzzy and she did not, nor did she ever, positively identify anyone in the

photo. T.37.4763-4820; 4876-95.[12]

The abandoned Lee Street residence was searched on July14th. Photos of rubber gloves from the kitchen, a pamphlet for a Tec-9 firearm, unspent ammunition, and footwear were introduced. Apparent bloodstains were observed on a boot; sneakers were seized which tested negative for blood. T.38.4991-5032. The boots and ammunition were found in the west bedroom of the home. T.38.5043-45. Alex Hernandez occupied this bedroom; Mr. Ibar had stayed in the east bedroom, where nothing of value was recovered. T. 41.5491-98.

Manzella was recalled to impeach other State witnesses and to recount his interviews with Foy and Mr. Ibar. Manzella testified that Klimeczko, Milman and Monroe identified Mr. Ibar from the video. T.39.5180-5204;5219-26;5235-40. He said the existence of the video was first revealed to counsel for Penalver on August 9th, and to the public on August 26th (although Mr. Ibar was made aware on July 14th).T.39.5248-61. Manzella was repeatedly impeached with different responses he had given to the same questions (i.e., he said Pablo did (did not) mention the Lee Street address; he said Pablo did (did not) acknowledge awareness of C.E.S.; he said Pablo did(did not) deny his involvement to other detectives from Miramar; he said his interview with Pablo was(was not) recorded; he said the ex-

[12] Over a defense objection, the State was permitted to elicit that when Penalver read in the newspaper on July 30th that he was wanted for questioning (although not a suspect) in the homicides, “he was real upset...that he wanted to kill himself.” T. 37. 4747-61.

boyfriend of Marie Rogers did (did not) once argue with Sucharski over a large sum of money; he said Pablo did (did not) give him the name and telephone number of the woman he was with that weekend. T.40-41.5269-5279,5283-95,5429,5440.

Manzella was alone when he interviewed Mr. Ibar for twenty-five minutes in an unrecorded conversation. Mr. Ibar waived his Miranda rights and denied any involvement in the homicides. T. 40.5355-66. Mr. Ibar tried to recall his whereabouts for a weekend three weeks earlier; Manzella said Pablo told him he was out with a friend on Saturday night/Sunday morning [the homicides were Sunday at 7:15-45a.m.] at two nightclubs until dawn, then out Sunday night/Monday morning with Klimeczko and a girlfriend to Cameo's, then to Casey's Nickelodeon until he went home to sleep. His explanation was "to the effect that he did not and could not have committed those murders." T.40.5395-5400. The interview ended when Manzella confronted Mr. Ibar with a surveillance video still, told him where the picture was from, and in response to Pablo's denials, said in an accusatory fashion, "[t]hen how did I get this photograph of you?" Manzella said he ended the interview when Mr. Ibar did not respond. T.40.5412-17.

The defense impeached Foy's identifications through Manzella. Foy had described the passenger as scruffy; only two men in the photo line-up were "scruffy"-- the two photos selected by Foy. T. 41.5512-14. Foy said he only "got a fair look at the passenger... for about 15 to 30 seconds." T.41.5515-16. Foy did not make a positive identification from the photo

spreads but asked for a live line-up. The only person from the photo line-up who reappeared in the live lineup was Pablo Ibar. T.41.5554. The defense did not question Manzella about the live line-up for a tactical reason–to avoid a hearsay declaration made by Foy. Nevertheless, over a defense objection, Manzella read from a report that when the line-up began, Foy "immediately positively identified [Ibar] prior to the actual start of the line-up..." T.42.5679-86.

Three years after the homicides, Kim Sans approached a Margate detective and a State Attorney investigator and said she had seen Penalver and another man at her home in Sunrise the last weekend in June, 1994. T.43.5828-32. Ms. Sans testified that she lived with Penalver in May, 1994, and had boxed up all of her belongings and was moving to Tennessee. On the last Sunday in June, around 8:00 a.m., Seth came by with another guy who said his name was Pablo. She allegedly saw a tan and black Mercedes Benz in the garage. T. 44.5925-50;45.6027. She later learned of the homicides and arrests in 1994, and suspected the car was Sucharski's, but did not come forward. T.44.5952-60. Ms. Sans said her conscience made her come forward three years later. That, and her fiancé was charged with spousal battery in 1997, she "didn't want him to go to prison", so she told his lawyer to tell the authorities, "I knew great details on a triple murder case, you know, and if they could do anything to get Bill house arrest or, you know, to keep him home", she would cooperate. T.44.5990.Her fiancé did not get a deal, but Ms. Sans received free housing and food for a year by becoming a witness.

She identified Penalver as the man in the video and identified Mr. Ibar as the man she saw at her house. T.44-45.5993-6007.

The State called two witnesses in an effort to corroborate Ms. Sans. David Phillips recalled seeing Penalver, a black Mercedes, and a tall, thin Latin man with medium length hair [the man in the video had close-cropped hair] at the Sunrise home one weekend (probably Saturday) morning in 1994. T.43.5836-83. Phillips was drinking that morning and was in a drug rehabilitation center when he came forward as a witness. T.43.5866-85. Ms. Sans' mother, (after confessing to perjury), said she also saw Penalver, a Latin man, and a black car at the house. She did not identify Mr. Ibar as the man at the house. T.44.5901-23; 46.6084-92.[13]

The last State witness was a footwear examiner. He compared photographs of bloody footprints left at the scene against sneakers submitted by Manzella from the Lee Street home. Over a defense objection, Fred Boyd testified that two separate outsoles were depicted in the blood stains, and one print was consistent with the sole from a pair of sneakers seized from

[13] A detective offered time and distance estimations between the Miramar crime scene, the Lee street address, the Sans residence, and the Palm Beach county roadside . T. 45. 6066-72. The evidence suggested that the perpetrators left Sucharski's home at 7:42 a.m.; Ms. Sans saw Penalver and a second man in Sunrise around 8:00a.m.; Sucharski's Mercedes was left burning by the side of the road sometime between 10:00 and 10:45 a.m. T. 46. 6095-6111. Tire impressions from the roadway indicated the presence of a second car with a 57inch distance between the tires, a distance consistent with every intermediate vehicle manufactured by General Motors (Penalver owned a 1985 Oldsmobile). T. 46. 6112-33.

Francisco Rincon. T.47. 6145-98. The State rested with this testimony. T.47.6224.

The defense presented a case.[14] A Broward Crime Lab technician testified that the hairs taken from the t-shirt worn by the intruder and the samples submitted by Mr. Ibar were not consistent. T.48.6236-38. A police DNA expert testified that the prosecution never requested that the hairs from the shirt be analyzed. T.48. 6304.[15] The defense called a professor of forensic science, Dr. Dale Nute, who testified that Boyd's footwear opinion was unreliable and that it was unlikely that the sneaker in question left the bloody print at the crime scene. T.48.6382-6416.

The defense also established an alibi. Tanya Quinones met Pablo in 1993. They dated for months and Tanya became pregnant. Pablo, a Catholic, wanted her to keep the baby; Tanya was young and continually sick and did not want to continue the pregnancy. This disagreement brought about a hiatus in their relationship and Tanya later terminated the pregnancy. T.49.6434-47;6509-16.

Tanya's mother, Alvin Quinones, is a travel agent. She

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[14] Two defense witnesses were excluded. The attorney for the fiancé of Ms. Sans was precluded from testifying as an impeachment witness concerning inconsistent statements made by Sans in her testimony, T. 48. 6247-61, and the court disallowed the testimony of the detective who interviewed Ms. Sans who would have opined of her poor reputation for truthfulness. T. 48. 6311-14.

[15] This testing was done later. The State called this witness on rebuttal; Analyst Marchese testified there was no match between Mr. Ibar and any items submitted for analysis. T. 52. 6767-72.

escorted a group to Ireland in 1994 for a two week trip. Her passport reflects she left for Ireland with daughter Mimi on June 24th. Mrs. Quinones' niece, Elizabeth Claytor, stayed with daughters Tanya and Heather for this two week period. Tanya testified that she saw Pablo and mentioned that her mother was out of town. T.49.6451-55;6516. Late one Saturday, while her mother was in Ireland, Pablo knocked on her window a few hours past midnight, and they spent the night together. Tanya got in trouble Sunday morning when her younger sister and her aunt came into the bedroom and saw Pablo. T.49.6482-6503.

Tanya later married Pablo. When the case was first tried in 1997, Tanya and her family realized the crime occurred on the last Sunday morning in June. Mrs. Quinones recalled that she and Mimi had telephoned from Ireland the first week of the trip and Mimi was told by Elizabeth that Tanya had a man sleep over. T.49.6526-29; 6484-90. The family put these recollections together and realized that the night Pablo spent in Tanya's room was Sunday morning, June 26th–the time of the homicides. Mrs. Quinones, Tanya, Heather and Elizabeth all testified to this alibi, and the passport was introduced as corroboration. T.49.6434-6550.

Pablo Manual Ibar took the witness stand to deny the crimes. He explained where he was the entire weekend, including spending the night with Tanya. He testified that when he was confronted with the photograph by Manzella, he denied the crime and said the picture was not of him. T.50.6573-87. He knew Penalver, and he lived on Lee Street with Alex Hernandez. Alex's gun, the Tec-

9, was sold and gone by March, 1994. He had no knowledge or connection to Consolidated Electric; he did not exchange shoes with anyone; he threw Klimeczko out of the house for smoking crack; he shaved his moustache before court; and he did not know, and never met, Casimir Sucharski. T.50.6591-6636. He repeated his itinerary from the weekend. Although the police told him he was caught on tape, he denied the crime and allowed the police to search his home, take his picture and seize his sneakers. T.50.6620-31.

The State called two rebuttal witnesses concerning the telephone call from Ireland which spurred the alibi/memory recollection of Pablo being with Tanya. The prosecutor called Mimi as a witness to impeach her. Mimi testified in deposition that she used a phone card she bought in a vending machine at an Irish hotel; T.52.6775-6780; the State called a representative of the Irish telephone company to testify that phone cards were not sold in hotels in Ireland, and international calls are very expensive with a phone card.T.52.6787-95. This concluded all the testimony.

The deliberating jury asked to hear the testimony of Pablo's mother, Ian Milman, Melissa Monroe ,John Klimeczko, and the waitress from Casey's Nickelodeon. T.54.7106-08. The read-back was interrupted by the jury's request to limit the cumbersome process; a list of desired excerpts was submitted. The next day, the jury complained of the accommodations at the hotel and no longer wanted to hear any testimony except the waitress. They convicted Mr. Ibar on all charges on June 14,

2000. T.54.7106-55.

A charge conference for the penalty phase was held the next day; the jury was to return on June 28th. Defense counsel had been bedridden off and on for two years, was sick throughout the trial, and was now confined to bed rest. The case was reset until July 24th. T.57.7168-7286.

The State called several family members at the penalty phase and argued to the jury the existence of four aggravating factors under the statute: the contemporary multiple convictions, homicides in the course of enumerated felonies, homicides to avoid arrest, and especially heinous, atrocious or cruel homicides. T.59.7293-95. The defense called family members and friends to tell the jury about the loving, giving, and caring nature of Mr. Ibar and his lack of prior significant criminal history. T.59.7329-7520. The jury retired to deliberate; after a note from a juror asking about abstention, a recommendation of death was returned by a vote of nine to three. T.60.7531-53. A Spencer hearing was held. A defense request for a new penalty phase and to interview jurors was denied. T.61.7562-82. Memorandums were submitted by each party on the existence of statutory aggravators and mitigators. R.6.1030-79. In a sentencing order filed on August 28,2000, R.6.1094-1116, the court found the four aggravators argued by the State and a fifth aggravator (cold, calculated and premeditated which was not argued or submitted to the jury). T.61.7595. The court considered 21 separate defense mitigating factors and found that the aggravating factors outweighed the mitigating factors,

and imposed the death penalty on the three homicide counts. This appeal ensues.

SUMMARY OF THE ARGUMENTS

1. Mr. Ibar's mother and other acquaintances testified that they could not and never did identify Pablo from the video. Police impeachment testimony that they had was not substantive evidence , where the prior out-of-court declarations by the witnesses were not statements "of identification of a person made after perceiving the person", and the court's instructions and prosecutorial argument to the contrary created reversible error.

2. The trial was fundamentally flawed where critical State witnesses were called for the sole purpose of impeachment, and a subterfuge to bring before the jury disputed, disavowed, or unrecollected statements.

3. The impeachment of Ms. Casas was also improper because she had passed away and a transcript of her prior testimony was introduced instead. It was error to allow impeachment of her out-of-court declaration of identity as substantive evidence of guilt under Section 90.801(2)(c), when she was not a trial witness.

4. Evidentiary rulings infected the fairness of the trial. A hearsay statement establishing an alibi for another suspect, a hearsay statement concerning the identity of a person, and expert testimony concerning shoe print patterns, were all improperly admitted into evidence to the prejudice of Mr. Ibar.

5. A fair trial was denied when the court precluded

evidence of the motive and animosity of the victim's ex-girlfriend and the poor reputation for truthfulness of a key State witness.

6. Mr. Ibar was represented by counsel when he was compelled by a warrant to stand in a lineup. He requested the presence of his lawyer, and his lawyer was contacted and requested to be present. The police dishonored his right to counsel by ignoring this request, and all evidence derived from the lineup was inadmissible. 7. Testimony insinuating the commission of extrinsic crimes and silence in the face of a confrontation of guilt by the Defendant, opinion of guilt testimony by a detective, and gang membership and a consciousness of guilt declaration by his co-defendant, deprived Mr. Ibar of his right to a fair trial.

8. The imposition of the death penalty violated the Defendant's guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2,9,16, and 17 of the Florida Constitution.

STANDARDS OF REVIEW

The evidentiary rulings made in the trial court are reviewed under an abuse of discretion standard. White v. State, 817 So.2d 799(Fla. 2002). The same standard applies to a trial judge's decision concerning a mistrial motion, Mansfield v. State, 758 So.2d 636 (Fla. 2000), a jury instruction, Card v. State,803 So.2d 613 (Fla. 2001), or allowing expert testimony. Finney v. State, 660 So.2d 674 (Fla. 1995). Where an issue involves the application of the evidence code, a court's discretion is

"narrowly limited by the rules of evidence." Taylor v. State, 601 So.2d 1304,1305 (Fla. 4th DCA 1992). A court has no discretion to make a ruling on the admissibility of evidence which is contrary to the evidence code. Nardone v. State, 798 So.2d 870 (Fla. 4th DCA 2001). Mr. Ibar would contend that the trial court's construction of the rules of evidence were purely matters of law, and should be reviewed de novo. A motion to suppress is reviewed de novo on questions of law, with due deference to factual findings by the court. Harris v. State, 761 So.2d 1186 (Fla. 4th DCA 2000).

ARGUMENTS

I.

AN OUT-OF-COURT OPINION BY A NON-WITNESS OF THE IDENTITY OF A PERSON DEPICTED IN A PHOTOGRAPH IS NOT A STATEMENT "OF IDENTIFICATION OF A PERSON MADE AFTER PERCEIVING THE PERSON", RENDERING THE IMPEACHMENT OF THAT OPINION NON-HEARSAY AND ADMISSIBLE AS SUBSTANTIVE EVIDENCE UNDER SECTION 90.801(2)(C)

The State and Mr. Ibar both agreed, from voir dire through closing arguments, that the sole issue in the case was identity. T.1.6; 12.1608;52.6846,6854. The absence of any physical evidence linking Mr. Ibar to the crime magnified the issue. Fingerprints appeared to have been left by the intruders; DNA was recovered from a shirt used by one of the men as a head cover. Nevertheless, latent fingerprints recovered at the scene were not Mr. Ibar's, and a DNA expert testified that trace evidence collected from the shirt eliminated Mr. Ibar as the

donor. T. 39.5073-5120; 48.6295-6303;52.6767-74.

Identity was the sole issue even though the crime was caught on tape. One man wore a disguise and the second a head cover until the closing moments. The tape, and photographs culled from the tape for identification displays, were routinely described as grainy, blurry, fuzzy, and unclear.T.25.3487;37.4763-87. The enhancement process created distortions which complicated simple visual comparison. T. 17. 2231,2322,2325. The poor quality of the tape and the absence of physical evidence encumbered the prosecution. The State's evidence was further weakened as the sole traditional eyewitness, Gary Foy, only saw the perpetrators briefly while driving his vehicle, for seconds at a time, at an angle, through two sets of tinted windows; his identifications came under considerable attack. Foy described the passenger as "scruffy"; not surprisingly, he selected two unshaven men in a photo spread.T.22.2902-65. Foy presumed the police had a suspect in custody at the live lineup days later. The only person in the live lineup repeated from the photo spread was Pablo Ibar, whom Foy selected. T. 21.2930-68.The prosecution turned these weaknesses into an asset by impermissibly expanding Section 90.801(2)(c).

A. THE MISAPPLICATION OF SECTION 90.801(2)(C)TO NON-OCCURRENCE WITNESSES

Section 90.801(2)(c),Fla.Stat.(1995), permits the introduction of an out-of-court declaration as non-hearsay, admitted for its truth, when the declarant testifies at trial and the statement is "[O]ne if identification of a person made after perceiving the person". Only Gary Foy made an "identification of

a person... after perceiving the person". His testimony, and police testimony of his out-of-court identifications, met the criteria of Section 90.801(2)(c). Six other people – - none of whom were witnesses to the crime – - were asked by the police to look at a picture from the video. All six testified they did not identify Pablo Ibar. But the court ruled these six people made statements of "identification of a person made after perceiving the person". However, they had not; an identification process whereby non-occurrence witnesses look at a photograph is not a procedure envisioned within the scope of Section 90.801(2)(c). This rule interpretation devastated the defense. Despite the testimony of the six witnesses that they did not identify Pablo, the court and the prosecutor told the jury that police impeachment testimony [that all six identified Pablo] was substantive evidence of guilt. The prosecution's case grew from one weak eyewitness to seven strong eyewitnesses through this novel application of Section 90.801(2)(c). The prosecution's closing argument became: we called witnesses who lied to you; listen not to what they said, but to what the police say they said. This unorthodox scenario of impeaching disputed identifications from people who were not witnesses was erroneous.

B. THE NON-OCCURRENCE WITNESS EVIDENCE

Roxanne Peguera testified that police twice showed her a picture and asked if it looked like Pablo. She said it did, but was not sure, and was only acknowledging a resemblance.T.22.3037-3147. Detective Scarlett testified that Ms. Peguera made a positive identification of Mr. Ibar on his first

visit, but later equivocated. T. 25.3398-3402;3495-3500. Ms. Peguera denied that the hedging was a result of her learning the picture she was shown was from the surveillance video. T.23.3070-73.

Marlene Vindel testified she saw a cloudy picture and said it resembled Pablo, but could not be sure. She gave a statement saying it was Pablo, but testified at trial that she never made an identification, only acknowledged a similarity. A language difficulty existed, and she did not identify Pablo as the man in the photo.T.23.3166-3240. Scarlett testified that Ms. Vindel made a positive identification at first, but later hedged in a police statement.T.25.3398-3402;3508-10.

The testimony of Mr. Ibar's deceased mother was read to the jury. The police had shown her a picture and insisted it was Pablo. She told the police, and testified at trial, the person was not her son, and she did not make an identification. T.24.3330-59. Again, Detective Scarlett was called to testify that Ms. Casas identified her son from the video still. T. 339897-99.

Jean Klimeczko testified that he could not identify Mr. Ibar from the video picture. T. 32.4260. The police had shown him photos years ago, and he had previously identified the men as Pablo and Penalver. However, he recalled the photograph he identified in 1994 was very clear; the video photo he was shown in court was very fuzzy. He believed the picture he identified as Pablo may have been a "file" picture, or the Polaroid taken by the police, and not the video still the police claim he

identified.T.30.4041,4083-4104;31.4109,4125-39. Manzella testified that Klimeczko positively identified Mr. Ibar from the video photo twice. T.39.5186-87.

Ian Milman testified the man in the still is not Mr. Ibar, and he never said it was. He admitted saying the photo resembled Pablo, and he signed the photo to signify he looked at it. He denied making an identification before the grand jury, and was impeached by a court reporter's transcript. T.34.4439-554492-4500;35.4517-20. Manzella was recalled and testified that Milman positively identified Mr. Ibar from the surveillance picture. T.39.5230-36.

The sixth State witness called to be impeached concerning an alleged identification was Melissa Monroe. Her trial testimony was that Pablo resembles the man in the photo, but she could not make an identification. She told this to the police; they tricked her into signing a picture by asking which photo most resembled Pablo. The picture was fuzzy and unclear and she did not make an identification at trial. She explained her prior testimony was consistent, and fought the prosecutor's impeachment.T.35.4664-70;4687-95;4706-16; 37.4763-81;4794-4802.The prosecutor insinuated her retraction was because she learned the photo was from the crime scene, but Ms. Monroe denied the accusation.T.4787-4822. Manzella testified that Ms. Monroe twice identified Mr. Ibar. T. 39.5215-26.

These six witnesses and the erroneous interpretation of Section 90.801(2)(c) bootstrapped the identification evidence against Mr. Ibar from a weak one witness case to a compelling

seven people–including his own mother. The prosecutor brought this home to the jury in his summation: he repeatedly told the jurors that all testimony concerning out-of-court identifications was substantive evidence and admissible both to impeach the witness and as evidence of guilt. T.53.6859-62;6888-89;7018-26. The trial was fundamentally flawed by this interpretation of Section 90.801(2)(c);still, a general defense objection to the instructions preserved the issue for this Court. T.30.4052-60;T.36.4646,4711; see also, T.37.4812-13:

> THE COURT: It [identification impeachment] is allowed under the rules.
> [Defense Counsel]: I object to that construction of the rules.
> [Prosecutor] " Question: Let me read to you the questions and ...
> [Defense Counsel]:Is this impeachment, Judge? Does the Court see this as impeachment?
> [Prosecutor]: No, it is not impeachment. It is statements concerning identification, which is admissible answers."
> [Defense Counsel]:Is my objection overruled?
> THE COURT: Yes.
> BY [Prosecutor]:
> Q.–" and the answers concerning your identification of photographs and tell me if you in fact said this in a recorded statement."
> THE COURT: Just for a second. It is 90.801 sub section 2,subsection C. Go ahead.
> [Defense Counsel] Same objection to those numbers.
> THE COURT: You're overruled.[16]

C. THE IMPROPER CONSTRUCTION OF SECTION 90.801(2)(c)

When a witness to a crime perceives a perpetrator, the in

[16] The defense convinced the court not to instruct the jury that statements of identification were substantive, but the court allowed the State to argue that legal principle in closing argument. R.897,T.51.6747-49.

and out-of-court statements of identity are admissible as substantive evidence. This traditional " That's the man" statement is always admissible by an "occurrence" witness. Stanford v. State, 576 So.2d 737 (Fla. 4th DCA 1991). 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." Simmons v. State, 782 So.2d 1000(Fla. 4th DCA 2001). This testimony is a "statement" as defined in Section 90.801(1)(a)1 and not hearsay so long as the person testifies at trial. A third party(i.e.,a police officer)who witnesses the out-of-court identification may repeat the declaration in court. State v. Ferber, 366 So.2d 426 (Fla.1978). Section 90.801(2)(c) permits this testimony as substantive evidence, whether the declarant admits, denies, or cannot recall the prior identification. Miller v. State, 780 So.2d 277 (Fla. 3rd DCA 2001). The evidence concerning Foy followed these rules.

A person who is not a witness to a crime may be asked to view a tape or photograph to attempt an identification when a crime has been captured on camera. This practice is permissible in Florida where the proponent can demonstrate a familiarity between the viewer and the subject. See, State v. Benton, 567 So.2d 1067(Fla. 2d DCA 1990); State v. Early, 543 So.2d 868(Fla. 5th DCA 1989(accord); Edwards v. State,583 So.2d 740 (Fla. 1st DCA 1991). However, this testimony is not admitted under Section 90.801, but under Section 701 - - a lay opinion from a non-occurrence witness. See, Ehrhardt, Florida Evidence,§ 701.1(2002

ed.);Benton, supra; Edwards, supra; Robinson v. People, 927 P.2d 381 (Colo.1996); United States v. Bannon, 616 F.2d 413 (9th Cir.1980). These non-occurrence witnesses are allowed to testify at trial and make an identification so long as their opinion does not invade the province of the jury. See, Commonwealth v. Anderson, 473 N.E.2d 1165(Mass. App. 1985)(opinion by non-witness of identity of robber in photo invaded province of jury);People v. Gee, 286 A.2d 62 (N.Y. App. 2001)(viewing surveillance video not an identification process).

These lay opinions are admitted under Section 90.701, rather than Section 90.801(2)(c), because these non-occurrence witnesses are not making an "identification of a person made after perceiving the person". These people offer an opinion on identity after having never perceived the perpetrator in the first place. However, when a non-occurrence witness takes the stand and does not make an identification, and does not repeat a prior out-of-court identification, impeachment under Section 90.801(2)(c) is inappropriate; this is where the trial court erred.

The State knew before trial these six witnesses would not repeat their opinions in court; impeachment with prior inconsistencies should have proceeded under Section 90.608(1). But prior inconsistent opinions under Section 90.608(1), unless under oath at a prior trial or proceeding, are not substantive evidence and not independently admissible. The court erred by applying Section 90.801(2)(c) to prior, disputed out-of-court expressions of opinion by non-witnesses who had not made

identifications “after perceiving the person”. Police were called to impeach Roxanne Peguera, Marlene Vindel, Maria Casas, Jean Klimeczko, Ian Milman and Melissa Monroe with opinions they made [or did not make] while reviewing a photograph. None of the six made a statement of identification of a person “after perceiving the person" under Section 90.801(2)(c). All six offered an opinion concerning who the person in the picture might be. Impeachment of these witnesses was permissible, but the police recounting of these conversations should not have been considered as substantive evidence.

D. THE ERRONEOUS ARGUMENT AND INSTRUCTION

The prosecutor was permitted to argue, and the court instructed the jury, that the impeachment of the disputed out-of-court identifications were to be considered as substantive evidence of guilt. The State argued to the jury:

> One thing I must point out, that on any prior statement made by a person or by a witness who testified concerning the identification of a person after perceiving that person at some point, either looking at them personally or looking at an image of them, those prior statements admissible and can be used as evidence, both for you to determine the reliability of that identification, as well as to impeach anything that that person says to you in the courtroom. As to whether his or her in court testimony as to identity is reliable. Any statement concerning identification, no matter what the circumstances are.

T.52.6858-60. The court initiated this error by finding that all statements concerning identity fell within Section 90.801(2)(c). T.25.3385-94; 30.4052-60;41.5516 (i.e.,”THE COURT: Okay. It is -- anything dealing with identification is not hearsay. Under the rules. 90.801 sub section something, C.”). The error was

compounded when the court instructed the jury: “[P]rior 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 its identification.”T. 30.4060.

E. THE POLICY REASONS FOR THE DISTINCTION BETWEEN OCCURRENCE AND NON-OCCURRENCE WITNESSES

The difference between an eyewitness' identification and an acquaintances' opinion of who is depicted in a photograph is self- evident. A crime witness has an indelible impression with which to make an identity. When a crime witness looks at a photo, there is a mental process whereby the retained image is compared against the photo image. But when an acquaintance is asked to recognize a person depicted in a grainy and blurry videotape, a different and unreliable process occurs. First, the viewer immediately attempts to recognize the person; a mental process begins: "who do I know that looks like this?" This is the opposite of an identification process, and highly suggestive. Whereas an occurrence witness will look at a group of pictures to compare against a retained mental image, the non-occurrence witness looks at a single picture and attempts to recognize someone. This, alone, is an unreliable and suggestive process. Second, every person has their own mental recollection of how another person looks. Pablo Ibar has had short hair and long hair; has or hasn’t shaved; been tanned or pale. An acquaintance has an image which constantly evolves with exposure to a person, unlike a crime witness, where the image is constant.

Courts are also justified in treating prior witness

statements apart from prior opinions because of the different weight the law accords the two; opinion testimony, even if under oath, is not subject to perjury. Vargas v. State, 795 So.2d 270 (Fla. 3rd DCA 2001). Under the interpretation of Section 90.801(2)(c) below, a person could cavalierly offer an opinion without regard to its truthfulness, concede the mistake at trial, yet have the opinion argued to the jury as "written in stone" through the impeachment testimony of a policeman. Such a process denied Mr. Ibar due process and the right to confrontation. Fifth, Sixth and Fourteenth Amend., U.S. Const.; Article I, Sections 9 and 16, Fla. Const.

The unreliability inherent in non-occurrence witness identifications is so strong that the literal wording of Section 90.801(2)(c) should not be expanded to include witnesses who never first "perceived a person". The pitfalls of allowing the expansion are enormous. Indeed, it would allow the manufacturing of witnesses. For example, police often publish a photo of an unidentified perpetrator caught committing a crime, hoping for someone to call with a name. Helpful citizens call and offer an opinion on the identity of the suspect; often, several names are posited and police run down these leads. Can a defendant on trial, advancing misidentification as a defense, call these citizens as defense witnesses to repeat the out-of-court identifications they made of other suspects? When those citizens are called at trial and recant or profess a mistake, can the officers who first heard the identifications be called to impeach these citizens? And is the police impeachment testimony

substantive evidence, admitted for its truth under Section 90.801(2)(c)? The possibility for confusion, not to mention the creation of a parade of non-witnesses which undermines the integrity of the proceeding, is sufficient to condemn this expansion of the rules. See, United States v. Jackson, 688 F.2d 1121,1127(7th Cir. 1982)(Skadur,J.,dissenting):

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

F. FUNDAMENTAL FLAW OF THE TRIAL

One thing is certain; the court's construction of Section 90.801(2)(c) allowed the State's case to improve dramatically and overwhelmingly tipped the scales in favor of the prosecution. While the defense objected to the instruction of which we complain, this Court must also find that the error went to the "foundation of the case", and "the interests of justice present a compelling demand" for this Court to find fundamental error occurred. Goodwin v. State,751 So.2d537,538 (Fla. 1999).

II.

THE TRIAL WAS FUNDAMENTALLY FLAWED WHERE THE STATE CALLED WITNESSES FOR THE SOLE PURPOSE OF IMPEACHMENT TO ELICIT INADMISSIBLE TESTIMONY, AND READ TO THE JURY, IN THE GUISE OF REFRESHING WITNESSES MEMORIES, PREJUDICIAL AND INADMISSIBLE EVIDENCE

The State called several key witnesses for the sole and

admitted purpose of impeaching their testimony. The most damaging evidence against Mr. Ibar was the testimony of a policeman called to the stand to impeach other State witnesses. The State admitted its strategy was to call a detective to the stand to testify that identification procedures occurred, and "when they [the witnesses] come in and testify I will bring him [the officer] back to rebut that."T.19.2517. Then, the State called witness Klimeczko, knowing he did not recall and would not repeat prior statements, for the sole purpose of enabling the prosecutor to read to the jury portions of earlier statements that furthered the prosecution. This tactic was utilized again to destroy the alibi advanced by the defense. T.19.2517. These tactics went to the fundamental fairness of the trial and deprived Mr. Ibar of due process of law. Fifth, Sixth and Fourteenth Amend., U.S. Const.; Article I, §§ 9 and 16, Fla. Const.

A. THE IDENTIFICATION IMPEACHMENT

The only reason the State called Roxana Peguera and Marlene Vindel was to impeach them. They had no substantive testimony to offer; unfortunately for them, they were at Ms. Casas' house when police arrived to conduct a search and by happenstance, a detective showed them a picture and asked their opinion on the identity of the subject depicted. They were not very familiar with Mr. Ibar at the time, and only saw him infrequently through

the years. Both women testified on direct examination that they told the policeman then, and at subsequent interviews, that the person in the photo looked like Pablo, but neither could be sure because the picture was poor and they had not seen Pablo recently enough to make an identification. T. 22.3040-69; 3173-3238. The prosecutor knew before trial what each woman would say, as they had been deposed and had testified in the first trial. They were only called to establish a predicate for the testimony of Detective Scarlett. After the women left the stand, he contradicted their testimony and told the jury both women positively identified Mr. Ibar on July 14th and thereafter. T.25.3398-3402.

This strawman tactic was even more egregious concerning Mr. Ibar's mother. In the first trial, Scarlett testified that on July 14th, Ms. Casas identified her son as the man in the video still. But Ms. Casas testified at that trial; she convincingly refuted that testimony and told that jury that her son was not the person captured on that video, and Scarlett was not truthful. She was a highly credible witness, and the defense attributed its success in achieving a hung jury (where both the State and Penalver were prosecuting him) to the power of her testimony. T. 30.3270-89.

The State wanted to repeat its impeachment procedure in the second trial. The defense objected, complaining that the jury was

denied the opportunity to make credibility evaluations which had been so meaningful in the first trial. T. 24. 3256,3263-3325. See Point III, infra. The court permitted the procedure. The State read Ms. Casas' testimony into evidence for the sole purpose of impeaching her testimony. T.24.3265,68. Ms. Casas' testimony was that she never identified a photograph shown to her by police; in fact, although the police insisted the picture was of Pablo, she clearly told them it was not her son. T. 24.3350-55. Scarlett was immediately called to the stand to contradict the evidence the State had just introduced; he testified that Ms. Casas had identified her son from the surveillance video. T.25.3397-3403. The gravity of this evidence cannot be understated; the State called a policeman to tell the jury that Pablo's mother believed her son was guilty, knowing the mother was not alive to rebut the accusation.

The sole purpose the State had in calling these three women was to impeach them. They offered no other evidence on any other material issue. This "setting up a strawman to knock down" tactic was trotted out one more time to attack the alibi defense.

B. THE ALIBI IMPEACHMENT

One weekend in the summer of 1994, Pablo surreptiously snuck into the bedroom of Tanya Quinones, his future wife, and they spent the night together; they were caught in the morning by Tanya's aunt and her sister. This rendevous was when Tanya's

mother, Alvin, and sister, Mimi, were in Ireland. A passport was introduced, as well as the testimony of Tanya, Alvin, the aunt and the sister, to prove the weekend in question was the weekend of the homicides. This was established by a two-step process of deduction. Mimi and her mother had arrived in Ireland on June 25th. Mimi called home days later and was told that Tanya had snuck a boy into her room. Therefore, the Sunday morning that Pablo and Tanya spent together was the morning of the homicides. This evidence and testimony was direct and circumstantial evidence of an alibi. T.49.6434-6550.

The prosecutor had deposed Mimi and elicited from her the recollection that the telephone call from Ireland which pinpointed the morning Pablo had been with Tanya was made with a calling card she purchased in an Irish hotel. R. 911-914. At the conclusion of the defense alibi testimony, the prosecutor announced he would call Mimi on rebuttal to repeat her deposition testimony concerning the calling card purchased in an Irish hotel, and the State would then impeach Mimi with a witness from Ireland who would testify calling cards were not sold in Irish hotels in 1994.T. 50.6562-64. As promised, the State called Mimi and she reiterated her belief that she had called home from Ireland using a calling card purchased from a vending machine in an Irish hotel. T. 52.6775-83. The State promptly called a representative of vending machines in Ireland to impeach Mimi

Quinones' testimony, and the alibi itself, with testimony that calling cards were not sold in Irish hotels in 1994. T. 52.6787-95. The State successfully called a witness for the sole purpose of impeaching testimony it had elicited.

C. IMPEACHMENT OF KLIMECZKO

The State called Jean Klimeczko to enable the prosecutor to read his prior statements to the jury. He did not recall when he had been at the nightclub with Mr. Ibar; his prior statement was read to the jury; T.30.4038-79; he did not recall making any identifications; his prior statements were read to the jury ;T. 31.4109-39;4251-60; he did not recall seeing a gun at the Lee Street house; his prior statements were read to the jury; T.31.4149-660; he did not recall saying that he saw Pablo and Seth come home early Sunday, acting paranoid, leave with the gun and return later in a new black car; his prior statements were read to the jury; T. 31.4166-90; he did not recall people in the house exchanging clothes; his prior statements were read to the jury; T. 32.4226-38. The defense repeatedly objected to this form of impeachment. T. 30.4037,4060-64,4075,4111-14,4186-90.

Section 90.608, Fla. Stat.(1989) permits a party to impeach its own witness by introducing prior inconsistent statements of the witness. The potential for abuse of this rule--calling a witness as a subterfuge for the sole purpose of parading before a jury inadmissible testimony--led this Court in Morton v. State,

689 So.2d 259 (Fla. 1997), receded from on other grounds, Rodriguez v. State, 753 So.2d 29(Fla.2000), to hold that "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." See, United States v. Peterman, 841 F.2d 1474 (10th Cir.1988); United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); Ehrhardt, Florida Evidence, § 608.2,at 459-61 (2002 ed.). This Court explained the potential for abuse with the following hypothetical:

> A prosecutor calls a witness who has made a previous statement implicating the defendant in a crime; that statement would be excluded as hearsay if offered for its truth; the prosecutor knows that the witness has repudiated the statement and if called, will testify in favor of the defendant; nonetheless, the prosecutor calls the witness for the ostensible purpose of "impeaching" him with the prior inconsistent statement. The reason that this practice appears abusive is that there is no legitimate forensic purpose in calling a witness solely to impeach him. If impeachment were the real purpose, the witness would never be called, since the most that would be accomplished is a net of zero. As one Court put it: 'The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer.'

Morton, 689 So. 2d at 263, quoting 2 Stephen A. Saltzberg et al., Federal Rules of Evidence Manual 800 (6th ed. 1994).

The prosecutor called Roxana Peguera and Marlene Vindel to the stand and introduced the prior testimony of Maria Casas, knowing they would not identify Pablo Ibar as the man in the

surveillance photograph, and they would not say they had previously done so to the police in interviews or statements; the prosecutor admitted as much. He called them, nevertheless, to set up their impeachment by the detective's testimony that they had made an identification. The prior out-of-court statements by these women were not independently admissible as substantive evidence under Section 90.801(2)(c), as these women did not make a statement of identification "after perceiving the person"; the inapplicability of this theory is Point I of our brief. Impeachment was only permissible under Section 90.608--this Court's holding in Morton is directly on point, as these prior statements were not substantive evidence.

The balancing test espoused in Morton requires this Court to conclude that the prejudicial nature of this testimony unfairly tipped the scales against a fair verdict. This was not a situation where the State was surprised by the witnesses, or had to contend with the sudden introduction of harmful testimony. Ms. Peguera and Ms. Vindel repeated at trial that they never made an identification; this testimony did not harm the State's case. See, James v. State, 765 So.2d 763 (Fla. 1st DCA 2000)(where prosecution not surprised by testimony and not affirmatively harmful to it's case, no evidentiary basis to introduce except "in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence--or, if it didn’t

miss it, would ignore it."). United States v. Webster, 734 F.2d 1191,1192 (7th Cir.1984). The misuse of Ms. Casas' testimony is the hypothetical abuse foreseen in Morton; her testimony was harmful yet expected by the State, and was read for the sole purpose of it being impeached. But the powerfulness of the tactic did not leave a "net effect of zero"; it left the prosecutor the compelling claim that Pablo's mother believes he is guilty.

There was no specific Morton claim to the impeachment, only a general objection; however, the facts of this case implicate fundamental error. See, Doorbal v. State,___ So.2d ___(Fla. 2002)(27 Fla. L. Weekly S839,Oct.18,2002)(error so prejudicial that it vitiates fairness of entire trial);McDonald v.State,743 So.2d 501,505(Fla.1999)(offending comment reached down into the validity of the trial so that verdict could not have been obtained without assistance of error). The only trial issue was identity; the only traditional eyewitness, Gary Foy, was significantly impeached. The physical evidence gathered at the scene excluded Pablo Ibar as a suspect-unidentified latent fingerprints were not his, and trace DNA recovered from a shirt used by a perpetrator as a headcover and to wipe off his face excluded Mr. Ibar as a donor. The balance of the State's evidence was either circumstantial or unworthy of strong consideration.(i.e., Ms. Sans' belated recollections to help her boyfriend escape jail). Recent studies reveal that

misidentification in cases bereft of physical evidence is the primary source of wrongful imprisonment. See, Sheck, Neufeld and Dwyer, Actual Innocence (Doubleday 2000). This case is a prime candidate for application of the plain error doctrine.

The second utilization of this "addition by subtraction" prosecution was when the State called Mimi Quinones on rebuttal to introduce her recollection that she called Florida from Ireland using a calling card purchased in an Irish hotel. The State promptly called a second witness to prove Mimi was incorrect; in other words, the State proved a fact in order to prove the fact was not true. The State is not permitted to impeach its own rebuttal witness. See, Stoll v.State , 762 So. 2d 870 (Fla. 2000)(State may not introduce rebuttal evidence to explain or contradict evidence that the State itself offered). Again, the plain error rule must be implicated under the facts of this case. The entire alibi fell with the impeachment of its foundation - that Mimi learned Tanya had been with Pablo the first week she and her mother were in Ireland. The justifications for the holding in Morton applies to this factual variation, where a witness is only called to be impeached, not by a prior inconsistent statement, but by another witness.

Finally, the reliability of the entire trial was eroded by the unusual procedures involved in the State's presentation of the testimony of Klimeczko. He was unhappily on the witness stand

because of the passage of time, his fear of perjury, and his inability to distinguish between what he had perceived six years before and what memories were implanted by repeated police pressure and court hearings. He had allegedly made statements six years before which he did not recall, did not believe to be true, and were made under the influence of drugs. Over the repeated objections of the defense, he was forced to sit on the witness stand for days, having his prior statements(both sworn and unsworn) read to him. He had no ability to recall, nor was his memory refreshed by reading his aged statements. His demeanor and body language led the court to declare him a "turncoat", which enabled the prosecutor to read voluminous prior testimony and statements to the jury, including his account of Messrs. Ibar and Penalver coming home early one morning with a gun and a black Mercedes Benz.

This impeachment was preserved error. T. 30.4037,4060-4190. Klimeczko offered no harmful testimony to the State; the State called him to the stand knowing he would profess no recall of any material events. See, James v. State, supra;("we also hold that it was error to allow the impeachment because Jones' trial testimony that he had no recollection was not truly inconsistent with his previous statement made to Brown"); Calhoun v. State, 502 So.2d 1364 (Fla. 2d DCA 1987); State v. Staley, 995 P.2d 1217,1220(Ore. 2000)(impeachment by a previous statement the

witness no longer remembers not permitted; see, Anno.99 A.L.R.3d 934 Sections 6(a)). Where impeachment evidence contains damaging evidence likely to be considered by the jury for its truth, the prejudicial effect of "bombshell" impeachment outweighs its probative value. See, United States v. Ince, 21 F.3d 576 (4th Cir. 1994)(courts should not permit prosecutor to impeach its own witness with confession by defendant); Pickett v. State, 707 A.2d 941 (Md. 1998)(introduction of confession through impeachment of State's own witness error where witness did not harm State, witness only refused to provide anticipated testimony). This abuse, foreshadowed in Morton, denied the Defendant his rights to confrontation and due process. Article I, §§ 9 and 16, Fla. Const.; Amends. 5,6 and 14, U.S. Const.

III.

INTRODUCING A TRANSCRIPT OF MR. IBAR'S LATE MOTHER'S PRIOR SWORN TESTIMONY WAS NOT EQUIVALENT TO HER"TESTIFYING AT THE TRIAL" UNDER SECTION 90.801(2) TO ENABLE THE STATE TO INTRODUCE A DISPUTED PRIOR OPINION AS SUBSTANTIVE EVIDENCE OF GUILT

The deck was stacked against Mr. Ibar at his first trial. The State's prosecution was abetted by the defense theory of co-defendant Penalver that Mr. Ibar committed the crime with someone other than Penalver. Ms. Casas testified at that trial that the picture shown her by the police was not her son; she flatly

refuted police testimony that she had identified Pablo. Besieged on both fronts, defense counsel declared the hung jury a success and openly credited the testimony of Pablo's mother, Maria Casas, for the jury deflecting the thrust of the two-pronged attack. T. 24.3270-89. Ms. Casas lost her battle with cancer and Pablo faced a second trial without his key witness-or so he thought.

In the State's opening statement, the prosecutor told the jury "that on one occasion when [the police] were at the home of Pablo Ibar, Maria Christina Casas, Mr. Ibar's mother who is deceased now, was shown that photograph. She said that was Pablo."T.12.1582. The defense objected and moved for a mistrial for several reasons. First, Ms. Casas' testimony had been the opposite; second, the State had not filed a notice indicating its intent to introduce the prior testimony of the unavailable Ms. Casas; and third, when the State proffered that the testimony would be introduced to set up impeachment by the officer, the defense objected, using the terminology of Section 90.801: "How does he do that without the declarant testifying? The declarant is dead. It's in bad faith. He needs to proffer how he is going to do it." T. 12.1586-87. The court indicated its belief that the anticipated testimony of Ms. Casas was admissible. T. 12.1588-89.

The State eventually sought to introduce Ms. Casas' prior opinion [that the photo was not of Pablo] as a predicate to the

police impeachment testimony. The defense claimed her prior testimony was not adequately specific to allow for impeachment and that introducing her testimony was simply "creating a strawman on this record". The testimony was introduced to precede the police impeachment, and the defense raised a general objection to preserve its opposition to this procedure. The court distinguished between admitting the prior sworn testimony now at issue and the subsequent issue of admitting anticipated and objected to police impeachment. The court acknowledged, "You got your record", and admitted the prior testimony of Ms. Casas.T.24.3251-68.

The testimony was read to the jury. Ms. Casas' testimony was that she did not identify a photograph shown to her by police. The police did show her a photograph and insisted to her that it was her son. She "kept saying no, it's not. You know, it's not Pablo. I don't see a resemblance." T. 24.3333-34;3354-55.

The issue here arose when the State called Detective Scarlett to impeach Ms. Casas' testimony. The defense renewed its objections; regarding the specific claim that the unavailability of Ms. Casas left the defense unable to set up a credibility choice for the jury, defense counsel argued:

> The jury has to be understanding and cognizant that that is what the issue was being drawn to. We can't draw the issue in our– in our minds hypothetically and then throw it up to the jury to assume it. Because it might be very misleading what she was responding to was. She never identified a photograph. No, sir. She

> never got an opportunity to admit or deny that which Scarlett would say. So how can I cross examine Scarlett on it? How can I? You can't. It's almost like his testimony goes unrebutted. So she is basically admitting it. Because she never–issue was never drawn for her to even deny it. So–so, you know, it is a false issue. It's a straw issue.

The court overruled the objection and permitted the impeachment. T. 25.3395-96. Scarlett testified that he showed Ms. Casas the photo from the video of the intruder who took the cover from his head and said, "Do you recognize this picture?" She said, "Yes, it's Pablo." She did not sign the back of the picture. T.25.3399;3468. Scarlett conceded that his unwitnessed claim that a mother had identified her son was a compelling piece of evidence for the State, especially where the police had no physical evidence linking Mr. Ibar to the crime. T. 25.3470.

The prosecutor was keenly aware that Section 90.801(2)(c) conferred a significant twist on this impeachment which benefitted the State. He told the jury in closing that whereas prior inconsistent statements normally are only admitted for purposes of credibility, all prior statements concerning identity are admitted for its truth.T.52.6858-60.The prosecutor told the jury that this law applied to "the identifications of the housekeeper, of Marlene Martinez. The housekeeper's daughter, Roxana Peguero, I believe it is, if I am pronouncing that correctly, and the defendant's own mother... The mother, the housekeeper, the housekeeper's daughter, looking at those photos and saying, 'It's Pablo'." T. 52.6887,6889. The strategy benefit conferred upon the prosecution by the court's construction of Section 90.801 enabled the State to argue to the jury that Mr.

Ibar's own mother believed he was guilty, notwithstanding the fact that her testimony was the exact opposite of that portrayed by the State.

We have argued in Point I that the out-of-court opinions of the six non-witnesses should not have been admitted for its truth under Section 90.801(2)(c).Point II sets forth the claim that certain witnesses were only called to be impeached in violation of the holding in Morton v. State, supra. The introduction of the prior testimony of Maria Casas was prohibited for a third reason.

The prior testimony was read to enable the detective's impeachment testimony. The court permitted the impeachment under Section 90.801: "if the declarant **testifies at the trial** or hearing and is subject to cross-examination concerning the statement and the statement is: (c) One of identification made after perceiving the person." The glaring defect in this position is that Maria Casas did not testify at this trial; she was not subject to cross-examination, and her credibility and demeanor were not available for the jury to evaluate. Allowing this evidence under Section 90.801(2)(c) permitted impeachment by Manzella to be admitted as substantive evidence, for its truth. Because Ms. Casas did not testify, it was error to allow Manzella's impeachment for its truth.

A declaration of identification is only permitted under Section 90.801(2)(c) when the declarant testifies at trial. United States v. Owens, 484 U.S. 554(1988); State v. Freber,366 So.2d 426 (Fla.1978). Even if the declarant has no recollection of the statement, or disavows the statement, the declaration of

identity is admitted as substantive evidence–provided the declarant takes the stand to enable cross-examination by the accused and evaluation by the jury. Brown v. State,413 So.2d 414(Fla. 5th DCA 1987); A.T. v. State,448 So.2d 613 (Fla. 3rd DCA 1984).The common thread in every case allowing substantive impeachment is the presence of the declarant at trial.

Ms. Casas died prior to trial. The State did not move to perpetuate her testimony under Fla.R.Cr.Proc. Rule 3.190(j) to enable her demeanor to be available for jury evaluation. The credible witness who contradicted the police concerning her alleged identification, and in the mind of the defense, hung a jury against a two-headed prosecution, was absent. A wide gulf separates introducing a witness' testimony from the testimony of a witness. The advent of psychological involvement in the courtroom process has taught lawyers and judges alike that a witness' appearance, manner of speech, dress, friendliness, eye contact, grace under fire, and scores of other subjective variables all contribute to a juror's determination of credibility. See, Kalven and Zeisel, The American Jury,(Little, Brown and Co. 1966).

Section 90.801(2)(c) allows prior declarations to be admitted for their truth only because a jury can be trusted with the task of evaluating a witness who either adopts or disavows a prior declaration. The engine of cross-examination works to untangle the knot created by differences in testimony emanating from bias, prejudice or the passage of time. But this machine breaks down when the declarant is not present, as happened here.

Under the unique facts of this case, where the State introduced an out-of-court declaration for the sole purpose of impeaching that statement, and the impeachment was admitted for its truth–-that a mother believed her son committed a crime when her testimony was the opposite–-the Defendant was denied due process of law and the right of confrontation. Fifth, Sixth and Fourteenth Amend.,U.S. Const.;Article I,§§ 9 and 16, Fla. Const.

IV.

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO INTRODUCE(A) HEARSAY CONCERNING THE ALLEGED ALIBI OF ANOTHER SUSPECT, (B) HEARSAY CONCERNING THE IDENTITY OF A PERSON SEEN WITH THE CO-DEFENDANT, AND (C) EXPERT TESTIMONY CONCERNING SHOE PRINTS

The introduction of improper evidence is harmful in direct proportion to the strength of the State's case. The absence of any physical evidence linking Mr. Ibar to the crime, especially where the perpetrators seemed to have left fingerprint and DNA evidence, made the introduction of certain troubling testimony all the more critical. Mr. Ibar challenges here three separate rulings which militated against his receiving a fair trial.

A. THE WHEREABOUTS OF ALEX HERNANDEZ

The identity of the men in the video was the focus of the entire trial. The existence of other suspects was critical to the defense of Mr. Ibar. The intruders left bloody footprint impressions, which led to testimony concerning sneakers and other potential suspects. T. 14.1870,1909-11. When police were first called to look at suspects in Dade County, they encountered Mr. Ibar and his roommates on Lee Street, Alex Hernandez and

Francisco Rincon. They seized their footwear for comparison; Hernandez wore a size 10 Fila style sneaker and Mr. Ibar wore a size 10 1/2 Vans style sneaker.T.27.3740;28.3858-64. An expert witness testified that a bloody sneaker outsole imprint from the crime scene was consistent with the outsole from a size 10 Fila sneaker taken from Rincon. T. 47.6192-98. Thus, the footwear evidence created a focus on Hernandez and Rincon, not Mr. Ibar. Also, evidence was introduced that bloody footwear and a live round was found in Hernandez' bedroom. T. 38.5043-45;41.5492-98.

The State sought to avoid the doubt created by this evidence linking Rincon and Hernandez by eliciting from Klimeczko that he once said (he denied it on the stand) that the inhabitants of Lee Street interchanged shoes and clothing. T. 32.4238;33.4312. Then, the State tried to establish that Hernandez, who the police once considered a suspect and the defense tried to establish was a possible perpetrator, had an alibi for the weekend of the crime. The State proved this alibi under Section 90.803(3),a hearsay declaration introduced to prove "acts of subsequent conduct of the declarant". Over a defense hearsay objection, T. 34.4422-24, Ian Milman testified that Hernandez told him he was going to a nephew's communion in North Carolina that weekend. T. 34.4474-76. The trial court erred in allowing this hearsay; the Defendant was denied his rights to confrontation and due process. Fifth, Sixth, and Fourteenth Amend., U.S. Const.; Art.1,§§ 2,9,16 and 22,Fla. Const.

Section 90.803(3) permits out-of-court declarations of then existing state of mind to "prove or explain acts of subsequent

conduct of the declarant". The State argued this hearsay exception to negate consideration of Hernandez as a suspect. Because a declarant may not actually effectuate a planned trip (i.e., "I'm going to North Carolina this weekend" vis a vis "My trip was canceled "),Section 90.803(3)(b)2 excludes declarations "made under circumstances that indicate its lack of trustworthiness". Section 90.803(3)(b)2. Courts have engrafted on this rule a need for some indicia of corroboration to ensure that the speaker's intention of doing a future act was not an idle comment not carried to fruition. See, Mutual Life Insurance Co. v. Hillman, 12 S.Ct. 909 (1892)(letters were admitted as proof of future travel in conjunction with other evidence); People v. D'Arton, 289 A.D.2d 711, 734 N.Y.S.2d 309(S. Ct. App. N.Y. 2001)(error to receive evidence without independent evidence of reliability); United States v. Badalamenti, 794 F.2d 821(2d Cir.1986)(declaration of intent to do subsequent act admitted with independent evidence). The court erred in admitting this evidence, an objection was timely, and the prejudice to the Defendant––in a case with insubstantial evidence when the ruling eliminated the plausibility of another suspect being implicated––was not harmless.

B. A HEARSAY DECLARATION OF IDENTITY

Kim Sans testified that Penalver and another man were at her home the morning of the homicides with a black Mercedes Benz; her identification of Mr. Ibar as the second man came under considerable attack from the defense, as Ms. Sans had not come forward with her claim for years and only did so to benefit her

fiancé, or for subsistence payments. T.44.5944-49;5984-6000. Her identification was also undermined by her admission that she had seen Mr. Ibar's picture on television and in the newspapers. T.44.6027-32. These shortcomings highlight the critical ruling the court made concerning a hearsay declaration. Ms. Sans' testified:

> Ms. Sans: But as I went through the house, I went into the kitchen and I see this guy standing there.
> Q. Did you know the guy?
> A. No. I asked, I said who the hell are you?
> [Defense Counsel].Objection to hearsay.
> THE COURT : She said what she testified to, she is right there, not hearsay.
> Overruled.
> BY [PROSECUTOR]:
> Q. Well, how did this person respond?
> A. He said, yes, I'm Pablo.

T.44.5941. The State argued the declaration was a spontaneous statement admissible for its truth. The court overruled a hearsay objection and a motion to strike. T.44.5942-44. The justification advanced by the State was erroneous and cannot be deemed harmless.

The statement was clearly not a "spontaneous statement" under Section 90.803(1),Fla. Stat.(1995), as "I'm Pablo" is not a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition. . . ". The court held in Weinstein v. LPI-The Shoppes, Inc., 482 So.2d 520 (Fla. 3rd DCA 1986), that testimony by a process server that a man identified himself as "Tom Reynolds" was inadmissible hearsay when introduced for the truth of the assertion. Nor is the statement of ones name a declaration of identity under

Section 90.801(2)(c); in Zimmerman v. Greate Bay Hotel and Casino, Inc,683 So.2d 1160(Fla. 3rd DCA 1996), the court held that a process servers recounting of a person's avowed name cannot be characterized as "a statement of identification of a person made after perceiving him. . .".Finally, the statement is not an excited utterance; this exception requires the occurrence of a stressful event prompting the utterance to render it admissible. Stoll v. State, 762 So.2d 870 (Fla. 2000); Hamilton v. State, 547 So.2d 630 (Fla.1989). This hearsay statement, admitted through the less than reliable personage of Ms. Sans, denied Mr. Ibar due process of law under the Florida and federal constitutions.

C. EXPERT TESTIMONY ON FOOTWEAR IMPRESSIONS WAS IMPROPER

Police found footwear impressions at the crime scene and seized the shoes of suspects for comparison purposes. The State did not use this evidence at the first trial to avoid a severance problem. T.10.1370-76. Prior to this second trial, the defense moved in limine to exclude reference to the sneakers taken from Rincon which had "similar sole patterns as sneaker prints found at the crime scene" where "there is no evidence that the sneakers in question even fit the feet of the Defendant, or either defendant in this cause." R. 146. Just prior to opening statements, the State announced that it intended to introduce shoe print evidence in this trial. A surprised defense counsel moved for a continuance to depose the shoe expert and to find its own expert. T.10.1370-8). The State proffered the testimony of Fred Boyd was that he "examined the shoe; the pattern is similar to the pattern found at the scene. It could have made those

prints. But like fingerprints, they are not sufficient unique patterns to say that exact shoe made that print." T.10.1380. A brief continuance was granted.

The defense was again surprised when the prosecutor announced in opening statements that an expert "concluded in looking at some individual wear marks or characteristics that are individual to each shoe. That though he couldn't positively say these wear marks were so unique that he could make a 100 per cent identification that those shoes left that print . . .Could have left that print to the point where he can say 90 per cent those shoes–."T.12.1577-82.

The State expert, Fred Boyd, was the State's last witness in its case-in-chief. The defense had originally deferred on a Frye hearing. T. 11.1521. Instead, the defense voir dired Boyd when he was proffered as an expert on shoe pattern identification. The defense attempted to establish that Boyd's testimony did not meet the test for the introduction of foot impression opinion testimony.

Boyd said he was trained as a fingerprint and footwear impressions analyst in the Army, and spent 10 years as a field agent and 10 years in the crime laboratory. He retired and went to work with the Broward Sheriff's Office, and was currently with the Las Vegas Police Department. He attended various seminars, but the bulk of his experience "is hands on training being an examiner." T. 47.6145-46. He testified that a footwear examiner can offer the opinion that a patent impression either was or was not left by an identified shoe, or the intermediate

view that the impression "could or could not" have been left by a particular shoe. T.47.6147-52. Boyd conceded that there is no standard that has evolved delineating a "set number of points" necessary to render an opinion as in fingerprints; he is not a scientist, and his expertise was simply: "I will see marks from the crime scene impression to that of the shoe and I don't guess, I report what I see."T.47.6150-53. The defense objected to this opinion using the language from Frye:

> I object to him as an expert in this area because there is no premise in which, he is not testify [sic] as a scientist. There is no basis on which we can judge any opinions that he might offer this 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, Judge. It's absolutely inappropriate. . . . It has to do with his judgment call, him arriving at a conclusion or judgement personally as opposed to scientifically and objectively.

T.47.6155,6158. The court overruled the objection and declared Boyd an expert witness. T.47.6158.Boyd was permitted to testify that the Fila shoe outsole was consistent with the bloody print left at the crime scene, and could not be eliminated as the shoe that made the impression. T.62.6214.The court erred in allowing this testimony without the predicate required under Florida law for the introduction of expert testimony.

This is a case of first impression in Florida. The time has come for shoe print comparison testimony to be scrutinized under what Professor Ehrhardt refers to as the Ramirez/Frye test. See, Ehrhardt, Florida Evidence § 702 (2002 ed.)and Frye v. United States, 293 F. 1013 (D.C. Cir. 1923);Ramirez v. State, 810 So.2d

836 (Fla. 2001). Shoe print comparison testimony is devoid of scientific standards; there are no generally recognized criteria for analysis, no peer review, no statistical process for determining reliability or detecting falsifiabilty -no standard to enable the defense to challenge a prosecutor when he tells the jury there is a 90% certainty that the sneaker taken from the Lee Street home made the crime scene impression. Across the country, courts are re-examining whether policemen masquerading as experts should be invading the courtrooms with their opinions. See, United States v. Hines, 55 F.Supp. 2d 62 (D.Ma. 1999)(handwriting);United States v. Horn, 185 F.Supp. 2d 530 (D.Md.2002)(field sobriety tests); Williamson v. Reynolds, 904 F.Supp. 1529 (E.D.Okla. 1995),rev'd on other grounds, Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997)(hair analysis); United States v. Bahena, 223 F.3d 797 (8th Cir. 2000)(voice spectrography); Howard v. State, 701 So.2d 274 (Miss. 1997)(bite mark comparison).

The absence of any indicia of reliability to Boyd's "expert" opinion–-especially when buttressed by the prosecutor's quantifying the comparison to 90%-–was error. See, Brim v. State,695 So.2d 268 (Fla. 1997)(linchpin is reliability); Stokes v. State, 548 So.2d 188 (Fla.1989)(refreshed testimony inadmissible until capable of definite interpretation); Hadden v. State, 690 So.2d 573 (Fla.1997)(syndrome evidence not generally accepted in relevant scientific community). The jury was fully capable of comparing the photograph of the latent footprint to the impounded sneaker without the "battle of the experts". See,

Louisiana v. Cosey, 779 So.2d 675(La. 2000)(expert shoe print testimony excluded but jury could do its own lay comparisons). The introduction of this evidence deprived the Defendant of his right to confront and to due process of law. Fifth, Sixth and Fourteenth Amend., U.S. Const.; Art 1, §§ 2,9,16,Fla. Const.

V.

THE TRIAL COURT ERRONEOUSLY PRECLUDED THE DEFENSE FROM ELICITING EVIDENCE OF THIRD PARTY MOTIVE AND ANIMOSITY, AND THE POOR REPUTATION FOR VERACITY OF A CRITICAL STATE WITNESS

A. The Fisher Tape

Kristal Fisher lived in the Sucharski home until weeks before the homicide. The two had a bitter argument, Ms. Fisher was thrown out, and his home was soon burglarized. Sucharski suspected Ms. Fisher and he installed a surveillance camera, expecting to catch Ms. Fisher or her" white, male, 5'9" tall, drug-dealer boyfriend". T.17.2345-46;2407. Ms. Fisher telephoned Sucharski after the eviction about her clothing and jewelry and his possession of her participation in 170-200 sex videos. T. 16.2123;17.2419. Police found an answering machine tape of the telephone call from June 22nd between her and Sucharski, T. 27.3730, which was described as "an argument that was an angry one between the two of them..." T. 27.3730. That was a mild understatement. An employee and friend of Sucharski told police he considered Fisher a suspect.T.18.2419.

The defense sought to either introduce the tape or explore

whether the police considered this animosity in their investigation. In this taped call, Sucharski called Ms. Fisher vulgar names, "daring her to come over, bring her piece of shit boyfriend, bring them over...They get in this violent tirade over the phone, making threats to each other...". T. 18.2392-93. The court excluded the contents of the conversation under Chapter 934 of the Florida Statutes. The court erred in not allowing the defense to introduce to the jury this hostile and provocative conversation demonstrating Ms. Fisher's animosity and motive from just days before the deaths.

A defendant is entitled to confront the evidence against him and to adduce a defense. Davis v. Alaska,415 U.S. 308 (1974); Taylor v. Illinois, 484 U.S. 400 (1988). A statute which denies an accused a fair trial violates due process. Chambers v. Mississippi, 410 U.S. 284 (1973). The trial courts ban on the defense use of the critical tape was error for several reasons and denied Mr. Ibar his rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1,§§ 9 and 16 of the Florida Constitution. First, the State did not establish that the taping of the conversation by Sucharski had been intentional. Section 934.03 only prohibits the use at trial of "intentional" interceptions. See, Section 934.03(1)(a) and (b). Florida, and other courts that have considered the issue, allow the use of answering machine tapes where it is not shown that the recording was on purpose. Otero v. Otero, 736 So.2d 771 (Fla. 3rd DCA 1999); United States v. Ross, 713 F.2d 389 (8th Cir. 1983); United States v. Wuliger, 981 F.2d 1497 (6th Cir.

1992); State v. Johnson-Howell, 881 P.2d 1288 (Kan.1994).It was the State's burden to establish the applicability of the exclusionary provision of Section 934, and it did not carry that burden. Second, interceptions are lawful when all parties consent. See, Section 934.03(2)(d).The record fails to show that Ms. Fisher was unaware the answering machine had activated; she lived in the home for a year and presumably was aware of how the phone, or Sucharski, operated the answering machine. See, Commonwealth v. Proetto, 771 A.2d 823 (Pa. Super. 2001)(court will presume mutual consent to statements left on answering machine tape). Third, the defense sought to use the tape to impeach the police investigator who denied knowledge of the tape, and its contents, when the officer had testified to the contrary on deposition. T. 20.2708. The court refused to allow reference to the tape and its contents for impeachment. T. 18.2399.20.2706. However, in Morales v. State, 513 So.2d 695 (Fla. 3rd DCA 1987), the court held that a tape recording, even if illegal under Section 934, may nevertheless be admissible for impeachment purposes under the same logic which allows the government to impeach a testifying defendant with an illegally obtained statement. See, Walder v. United States, 347 U.S. 62 (1954); Nowlin v. State, 346 So.2d 1020(Fla. 1977)(statements taken in violation of Miranda can be used to impeach defendant).Fourth, the contents of the tape are only excluded if the words were uttered in the expectation of privacy. State v. Inciarrano, 473 So.2d 1272 (Fla.1985)(defendant could not exclude surreptitious taping of his killing).Only Ms. Fischer could demonstrate she had

such an expectation to bar introduction of the captured conversation; the State did not carry its burden of exclusion when it failed to call her as a witness. This is especially so when the police were allowed to disclaim any knowledge of animosity or threats between Fisher and Sucharski, when the tape in the possession of the police was to the contrary. T. 20. 2706-15. Where the police minimized the degree of conflict between Sucharski and a third party suspect in the telephone call, the court was required to allow the defense to correct the misleading testimony introduced by the State.

B. The Reputation Testimony

The final phase in the State's case concerned the presentation of three family members and their claim that they saw Seth Penalver and another man at their home in Margate with a large black Mercedes Benz the morning of the homicides. The testimony was significantly challenged; one witness had been drinking and was in a drug rehabilitation center when he came forward as a witness; T. 43.5865-68; a second witness had her testimony interrupted to allow her to confess to perjury; T. 43.5911-15; the third witness was Kimberly Sans. Ms. Sans claimed she saw Penalver and Mr. Ibar together the Sunday morning of the homicides but conceded she first came forward three years after the fact because her fiancé was in trouble and she tried to parlay this information into a deal to keep him out of jail. She was unsuccessful for her fiancé, but she acquired free rent and food for a year by gaining entry into a witness protection program. T.44.5935-60;45.5984-98.

Detective Robert Lillie is a Margate police officer with twenty years experience who knew Ms. Sans and her family from many domestic incidents. He testified in the 1997 Penalver trial that "by talking to other people in the community [he] learned her reputation for truth telling ". . . Ms. Sans is "not a truth telling person. She's a liar." T. 48.6333. The defense called Lillie to repeat his testimony, and the State demanded an in limine proffer.

Lillie proffered that as a result of his involvement with Ms. Sans in this case, he had several conversations with her two brothers, her mother, another woman who lived in the house, and a member of the State Attorney's Office. These inquiries led him to the opinion that Ms. Sans had a poor reputation for truthfulness. The court first found the testimony admissible; however, the State was able to convince the court that the "community" from which Lillie drew his opinion was too small, and the court excluded the testimony. T. 48. 6312-68.

A party may attack the credibility of a witness by proving a poor reputation for truthfulness. Section 90.609, Fla. Stat.(1995); see, Ehrhardt, Florida Evidence, § 609.1 (2002 ed.). This testimony is relevant to enlighten a jury with the fact that one's peers do not consider a person truthful; the reputation evidence is a distillation of a community's perception. Larzelere v. State, 676 So.394 (Fla.1996). The community must be broad enough to avoid personal opinion or fleeting rumor. Lillie based his opinion on his conversations with five separate people; indeed, the trustworthiness of the opinion is fostered by the

fact that the five all knew Ms. Sans very well. In Nelson v. State, 739 So.2d 1177 (Fla. 4th DCA 1999), the court reversed the conviction because of the exclusion of reputation testimony where the witness had acquired his opinion from talking to "four or five" people. The court abused its discretion here in excluding this defense evidence; given the damaging nature of Ms. Sans' testimony, the error was not harmless.

VI.

THE INTRODUCTION OF EVIDENCE REGARDING A LIVE LINEUP WAS IN VIOLATION OF THE FLORIDA AND FEDERAL CONSTITUTIONS WHERE MR. IBAR WAS DENIED THE RIGHT TO THE PRESENCE OF HIS RETAINED COUNSEL AND THE WITNESS' MANNER OF IDENTIFICATION WAS IMPROPERLY CONVEYED TO THE JURY

The inherently problematic nature of eye-witness identifications raises its head here where no physical evidence corroborated Mr. Ibar's involvement in the crimes. See, Rimmer v. State, 825 So.2d 304 (Fla. 2002)(Pariente, J.,concurring in part and dissenting in part, quoting Connie Mayer, Due Process Challenges to Eyewitness Identifications Based on Pretrial Photographic Arrays, 13 Pace L. Rev. 815 (1994)("studies have shown that approximately fifty percent of those wrongly convicted were convicted based on eyewitness identification evidence. This makes identity the factor most often responsible for wrongful conviction"). The parties agreed, from voir dire through closing argument, that the sole trial issue was identity. T. 1.6;12.1603;52.6846. The only traditional identification witness was Gary Foy; the defense moved to exclude Foy's testimony concerning the live line-up and a declaration he made prior to

that line-up.

Gary Foy told police he saw two men leave Sucharski's home and he drove behind and alongside their car for a few minutes. He described the passenger as a young white or Latin male with a shaven face; he saw the man at an angle for "10 or 15 seconds" through tinted windows of his car and the tinted windows of the Mercedes. He testified, "every time I looked back I did see him. But I didn't pay real close attention, like you said." T. 21.2959-65. Police acquired a Polaroid of Mr. Ibar on July 14th and conducted a photo spread for Foy the next day. Foy testified "that it was obvious that the police had a suspect in these pictures". Foy told the police on July 15th that the passenger had a "scruffy" face. The detectives and Foy later admitted that only two of the six men in the photo spread were unshaven–one was Pablo Ibar. T. 21.2902-29;26.3646;41.5511-14. Foy selected two pictures--the two unshaven men--and asked to see a live lineup.

Police first met Mr. Ibar while he was at the Dade County Jail in custody on a Miami arrest. T. 19.2495-98. He was represented by private counsel on that case. Following Foy's request, Miramar detectives procured a search warrant from a Dade County judge to compel Mr. Ibar's appearance in a line-up. Mr. Ibar requested the presence of his attorney at the line-up; counsel for Mr. Ibar was contacted and requested to be present.[17]

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[17]At a hearing on the motion to suppress, the defense proffered that the lawyer "maintains that he had expressed a desire to attend the physical lineup but was excluded therefrom by the police who determined to conduct the same without according Defendant the benefit of counsel." The prosecutor responded, "No one is challenging that. That's a

Notwithstanding the Defendant's request for the assistance of his retained counsel, and counsel's request to be present, the lineup occurred without the lawyer because the police did not want to wait. S.T.11.204.

The only participant in the lineup whose picture had been in the photo spread from six days earlier was Mr. Ibar. T. 22.2983;41.5554. Foy identified Mr. Ibar at this line-up; when asked at trial if his identification may have been influenced by his exposure to Pablo in the photo spread, he answered, "I don't believe so . . . [A]nything is possible, sir, but I was trying to do to the best of my recollection to what I remember the person looked like in the car." T. 22.2989.

Foy did not recall anything in particular about his identification at the live lineup. Nevertheless, over a defense objection, a detective was permitted to testify that as the men were entering the room, Foy "tapped me on the shoulder and pointed and said ' That's him'. Number 4'." The detective jotted down this comment on a photograph of the line-up and was allowed to read to the jury: "As soon as the witness viewed the participants, he immediately positively identified number 4 prior to the actual start of the line-up at 1938 hours." T. 42.5686-87. The testimony concerning the spontaneous identification by Foy was utilized by the prosecutor in closing argument when he reminded the jurors that "[A]s soon as the witness viewed the

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fact, and those facts will come out. So what does...". Supp. Vol.11.169-206 at 200, and Supp. Vol 12.3-46; Motion to Suppress hearings of June 12-13, 1997, adopted at 10.1401-18 and 11.1432-1506).

participants he immediately and positively identified number 4 [Pablo Ibar] prior to the actual state of the lineup." T. 52.6880.

The Defendant moved to suppress testimony concerning the photo spread because of its suggestive nature, the live line-up as it was tainted by the photo spread and the Defendant was denied his right to the presence of requested counsel, and the testimony by the police concerning the statements attributed to Foy before the line-up. R. 143-45;199-215; T. 10.1401-18;11.1432-1506;42.5679-86. He also raised the issues in his motion for new trial. R. 1008. The motions and objections were denied. T. 11.1479-88.

Introduction of testimony concerning the live lineup denied Mr. Ibar his rights to counsel and due process under Article 1,§§ 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Mr. Ibar was in jail on a Miami case and had retained counsel. Miramar police interviewed him on July 14th on the Miramar case. That interview did not implicate any constitutional violations. Texas v. Cobb,532 U.S. 162 (2001). But when Miramar police thereafter secured a search warrant to compel Mr. Ibar to appear in a lineup, the constitutional landscape changed.

The basic concern with respect to procedures employed in pretrial identifications has been to eliminate or minimize the risk of convicting the innocent. In United States v. Wade , 388 U.S. 218, 228 (1967), Justice Brennan addressed the very real danger of a mistaken identification arising from utilizing an

unduly suggestive identification procedure when he wrote, “The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification.” Justice Brennan also distinguished a lineup from other investigatory steps such as the taking of blood samples or fingerprints because a pretrial lineup is "peculiarly riddled with innumerable dangers and variable factors." Wade, 388 U.S. at 226. Justice Brennan observed:

> the presence of counsel is necessary to assure a defendant a meaningful ability to cross-examine the victim or witness making the identification and to protect against potential unfairness which might occur at the time of the lineup: Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . the post-indictment lineup was a critical stage of the prosecution at which [the defendant] was "as much entitled to such aid (of counsel) *** as at the trial itself.

Id. at 236 (footnote and citation omitted).

The assistance of defense counsel at a lineup is critical to ensure the fairness of the proceedings and clearly enhances the reliability of the event. This is especially true here, where the State introduced a disputed hearsay declaration by a police officer that the declarant did not recall having uttered.

The right to counsel at a lineup under the federal constitution attaches to “critical stages” of pre-trial proceedings, but only post-indictment. See, Kirby v. Illinois,

406 U.S. 682 (1972). Article 1, Section 16 of the Florida Constitution has created a broader right to counsel in Florida . This Court held in Traylor v. State, 576 So.2d 957 (Fla.1992), that the right to counsel arises under the Counsel Clause of the Florida Constitution for indigent and non-indigents" when a person is formally charged with an offense, **or as soon as feasible after custodial restraint** or upon his first appearance before a committing magistrate, which ever occurs earliest." The Traylor Court acknowledged that the right to counsel in Florida begins at an earlier stage than its federal counterpart. See, Peoples v. State, 612 So.2d 555 (Fla.1992)(accord).In Florida, the right begins at the earliest "crucial stage"; a crucial stage is defined as a stage in the proceedings that may affect the outcome of the proceedings. See, Traylor, supra; State v. Burns, 661 So.2d 842 (Fla. 5th DCA 1995). That difference is critical here.

Mr. Ibar was seized and judicially ordered to appear in a lineup; he clearly was under custodial restraint. It is also undisputed that Mr. Ibar had retained counsel when he was seized, he invoked his right to the presence of counsel, and an informed counsel requested to be present. In State v. Stanley, 754 So.2d 869 (Fla. 1st DCA 2000), the defendant retained an attorney before surrendering on a warrant, and the lawyer secured a commitment that the client would not be interviewed. The lawyer then learned an interview had begun; he attempted to intercede and was rebuffed. The First District held, "Because Ms. Stanley had retained her right to counsel before she turned herself in on

account of an outstanding arrest warrant, her right to counsel arose under the state constitution [article 1, sections 2 and 16]at the moment she was taken into custody." Id. at 872.Mr. Ibar had a right to counsel at the Miami-Dade lineup; the lineup was judicially compelled, he was in custody, and he had counsel.

Mr. Ibar's right to counsel under the state constitution was infringed when the police opted not to honor his right to counsel. The violation was unnecessary; counsel was available, and requested to be present. A defendant's request for the guiding presence of counsel is reasonable at an identification procedure, where counsel can protect a client's rights. See, Sobczak v. State, 462 So. 2d 1177 (Fla. 4th DCA 1984)(evidence from lineup suppressed when counsel denied).The trial judge denied Mr. Ibar's motion to suppress, analogizing a lineup to an order compelling the taking of a blood or hair exemplar, where scientific measures ensure a reliable result. See, Taylor v. State, 630 So.2d 1038 (Fla.1994)(no right to appointed counsel for pre-arrest compelled taking of blood sample).That comparison was misplaced. No scientific measures are in place to retroactively ensure the reliability of a lineup, unlike the taking of hair or blood.

The recklessness of the police also violated the due process clauses of the federal and state constitutions. In State v. Smith, 547 So.2d 131 (Fla. 1989), the accused told the court at his first appearance that he was retaining an attorney. He was thereafter compelled to stand in a lineup without counsel. This Court held that conducting the lineup without counsel offended

the due process provision of the state constitution. Any procedure wherein an individual with an attorney is unable to have access to that lawyer when dealing with the prosecution is intolerable.

This Court's holding in Haliburton v. State, 514 So.2d 1088 (Fla. 1987), is instructive by analogy. Haliburton was interrogated, unaware that his lawyer was attempting to speak with him and had been turned away by the police. This Court expanded Florida's due process clause beyond that of the federal constitution's, rejected the reasoning of Moran v. Burbine, 474 U.S. 412 (1964)(no fifth amendment violation when Burbine not informed of lawyers effort to interrupt questioning), and adopted the view of Justice Stevens from Moran, wherein he wrote:

> Due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections . . . . Police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits . . . . Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.

106 S. Ct. at 1165-66 (Stevens, J., dissenting).

Mr. Ibar lost the significant aid of the lawyer he had hired to assist him at the compelled lineup; the lineup was unconstitutional, and testimony at the trial concerning this procedure was constitutionally barred. Gilbert v. California, 388 U.S. 263 (1967); Edwards v. State, 538 So.2d 440 (Fla. 1989).

The need for the presence of counsel was particularly important here, where the trial court allowed the police to tell the jury the immediate manner in which Foy made an identification pursuant to Section 90.801(2)(c),a statement of identification. But testimony that Foy made an identification is far different than the manner in which an identification was made. In other words, whether an identification occurs is not the same as how and when it occurs. The prosecutor realized the difference and powerfully conveyed the difference in his closing argument. The trial judge broadly construed Section 90.801(2)(c) to include everything a declarant says if an identification is included. But this Court narrowed the breadth of Section 90.801(2)(c) in Puryear v. State, 810 So.2d 901 (Fla. 2002), holding that a description is not an identification under Section 90.801(2)(c).Likewise, how an identification occurred should not be permitted, especially where Foy had no recollection of this immediate outcry.T.42.5679-86. This hearsay statement was inadmissible.

VII.

THE INTEGRITY OF THE TRIAL WAS AFFECTED BY PREJUDICIAL REFERENCES TO EVIDENCE OF EXTRINSIC CRIMES, BY OPINION OF GUILT TESTIMONY AND SILENCE UPON CONFRONTATION, AND BY CHARACTER AND CONSCIOUSNESS OF GUILT EVIDENCE AGAINST THE CO-DEFENDANT, WHICH DENIED MR. IBAR DUE PROCESS OF LAW UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS

A.

INFORMING THE JURY THAT THE ORIGINAL TIP IN THE CASE CAME FROM A HOMICIDE UNIT IN ANOTHER CITY, THE INSINUATION OF OTHER EVIDENCE NOT

BEFORE THE JURY, AND SUGGESTING TO THE JURY MR. IBAR'S INVOLVEMENT WITH NARCOTICS, WAS ERRONEOUS

Miramar detectives were pursuing several leads following the homicides and were hopefully awaiting responses from the flyer poster containing the still photographs from the surveillance video. The prosecution introduced this stage in the investigation by asking Detective Manzella on direct examination:

> Q. All right. 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?
>
> A. That was on the 14th of July, 1994. Miramar Police Department had received a call from Detective Dean Surman of the, at that time, Metro- Dade Homicide Unit in Dade County.

T.28.2738-39.

Manzella testified that he "respond[ed] to Detective Surman's location" where he first encountered Pablo Ibar. T. 28.3739. Direct-examination was interrupted moments later as the defense objected to the detective's testimony that the present location of the Defendant was the Homicide Unit in another city, and the prosecutor's insinuation that the lead was "of some substance". The defense moved for a mistrial as the unnecessary references by the prosecutor and the detective clearly implied to the jury that Mr. Ibar was implicated in other uncharged conduct within the purview of a Homicide Unit of another county, and a detective in that Unit had "substantial" information connecting Mr. Ibar to the Miramar homicides. The trial court denied the motion. T. 28.3777-3803.

Detective Manzella took the opportunity again in cross-

examination to spontaneously mention uncharged misconduct to the detriment of Mr. Ibar. Jean Klimeczko had testified that he had been thrown out of the Lee Street house by Mr. Ibar in an argument over drugs and money; in an abundance of caution, Mr. Klimeczko was instructed in limine by the court not to mention drugs and to avoid any reference to uncharged extrinsic crimes. T. 30.4020-33. Klimeczko obliged and testified the argument was over his stealing money and his using crack cocaine. T. 30.4034. But Manzella put the inference back into play with this unprovoked exchange:

> Q. Okay. And you indicated that that is exactly what he told you to do on the porch when you asked him when he moved out. True?
> Didn't you testify just a –shortly ago, that after you left him on the porch between–between then and when you did the taped statement with him, that you went down to the police station and got a copy of the report that I have in front of you?
> A. 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.
> [Defense Counsel]: Wait. Let me have a sidebar.

T. 41.5580. The defense moved for a mistrial because of this "gratuitous, unresponsive commentary that is violative of a prior court order." The court denied the motion. T. 41.5583-88.

Evidence of extrinsic crimes is inadmissible unless within the ambit of Section 90.404(b), Fla. Stat.(1995). Williams v. State, 110 So.2d 654 (1959); Czubak v. State, 570 So.2d 925 (Fla.1990). Admission of improper collateral crimes evidence is presumptively harmful. Holland v. State, 636 So.2d 1289 (Fla.1994); Goodwin v. State, 751 So.2d 537 (Fla. 1999). The unsolicited comments by the detective that Mr. Ibar could be

located at another Homicide Unit because another detective had a lead of some substance was presumptively prejudicial; the narcotics reference added salt to the wound.

Testimony which insinuates the accused committed other crimes is erroneous. See, Williams v. State, 692 So.2d 1014 (Fla. 4th DCA 1997)(implication of other crimes error); Ford v. State, 702 So.2d 279 (Fla. 4th DCA 1997)(statements concerning other crimes "particularly condemned"). The jury was permitted to infer from the detective's inappropriate remarks that Mr. Ibar was being held on another homicide. This nefarious implication was highly inflammatory. See, Drayton v. State, 763 So.2d 522 (Fla. 3rd DCA 2000)(error to allow statement that defendant in jail on another charge); Chambers v. State, 742 So.2d 839 (Fla. 3rd DCA 1999)(detective's testimony that he called "robbery clearinghouse" to exchange information on defendant was error).

Another layer of extrinsic crimes evidence was added by the detective's reference to drugs having been stolen by Klimeczko from Mr. Ibar's house. Clearly, the taint of uncharged drug evidence infects the fairness of any proceeding. See, Adams v. State, 743 So.2d 1216 (Fla. 4th DCA 1999)(evidence of drugs at defendant's home in robbery case presumptively harmful); Freeman v. State, 630 So.2d 1225 (Fla. 4th DCA 1994)(error to show defendant a drug-dealer in murder prosecution). The drug reference blurted out by the detective was particularly offensive, given the in limine ruling by the court which excluded any drug evidence. See, Halsell v. State, 672 So.2d 869 (Fla. 3rd DCA 1996)("fidelity to rules" required, error to violate in

limine ruling).

Finally, there was no legitimate reason for the prosecutor to advertise the call from the Miami-Dade Homicide Unit as the "first lead. . . of some substance". This Court has condemned a prosecutor's implication that other evidence exists which the jury may not hear. Ruiz v. State, 743 So.2d 1 (Fla. 1999); Martinez v. State, 761 So.2d 1074 (Fla. 2000).

The absence of physical evidence against Mr. Ibar, and the unusual presentation of identification testimony as the crux of the case, made every scintilla of evidence critical. Left hanging in the air by the State's missteps is the foul odor of another homicide and drugs. An accumulation of prejudice permeated the proceedings and requires a new trial. See, Brooks v. State, 787 So.2d 765 (Fla. 2001)(prejudicial admission of erroneous evidence accumulated to deny defendant a fair trial).

B.

TESTIMONY FROM A POLICE OFFICER THAT HE BELIEVED MR. IBAR WAS GUILTY, WAS NOT TRUTHFUL, AND WAS SILENT WHEN CONFRONTED BY AN ACCUSATION OF GUILT, VIOLATED THE FLORIDA AND FEDERAL CONSTITUTIONS

Miramar detectives first met Mr. Ibar on July 14th . He was read his Miranda warnings and answered some general questions about his whereabouts during the weekend of the homicides in an unrecorded interview. Scarlett testified that Pablo was cooperative and denied culpability. T.19.2506-07;2560-74. Detective Manzella subsequently testified and made comments amounting to opinions concerning Mr. Ibar's credibility, his guilt, and Mr. Ibar's silence following an accusation which

warranted the granting of defense motions for mistrial.

Manzella testified that Pablo attempted to recall both where and with whom he was on the last weekend in June. Manzella believed Mr. Ibar was vague and evasive; he testified his interview ended with this exchange:

> Q. Well, after you talked to him 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 the Sucharski home the day of the homicides.

A prompt motion for mistrial ensued, challenging the officer's comment on Mr. Ibar's statement. T. 28. 3825-26. The officer's comment was invidious as he conveyed to the jury that he stopped his questioning because he did not believe Mr. Ibar.

A comment susceptible of being interpreted by the jury as an opinion on another witness's credibility is error. Acosta v. State, 798 So.2d 809 (Fla. 4th DCA 2001)(reversible error for police officer to testify that "up until that point, everything [witness] told me appeared to be the truth"); Olsen v. State, 778 So.2d 422 (Fla.5th DCA 2001)(error for police witness to say he believed victim). This evidence is particularly harmful from a police officer, whose testimony is afforded great weight by a jury. Martinez v. State, supra; Page v. State, 733 So.2d 1079 (Fla. 4th DCA 1999). This brief but damaging assertion by Manzella concerning why his interview with Mr. Ibar abruptly ended was constitutionally infirm. Fifth, Sixth and Fourteenth Amend.,U.S. Const.;Art. I,§§ 9,16,and 22,Fla. Const.

Manzella went on to say that when Mr. Ibar denied his involvement, the detective became confrontational:

> Q. Well, how did you, just using this photograph 139, if it's a similar photograph, tell us when you pulled it out, what did you do?
> A. Once I pulled it out, I don't know if I had it in my shirt pocket up here or if I had a little envelope inside of my notebook that I kept photographs in. I pulled the photograph out and I asked, then Pablo, how did I get this picture?
> Q. Let me stop you right there. How would you describe your demeanor, would it be sort of an interview or more confrontational?
> A. More confrontational.
> Q. So you just pulled it out and showed it to him and said how did I get this picture?
> A. Yes.
> Q. Is that all you said?
> A. Yes.
> Q. Stop right there.
> Now, Mr. Ibar continued to cooperate with you and give you a consent form?
> A. Yes, he did.

T. 28.3834-35. This exchange prompted a second mistrial motion. The detective's comment was impermissible opinion of guilt testimony - a direct statement that Manzella believed the person depicted in the photograph was Pablo Ibar. The court denied the motion. T. 28.3836-52.

Manzella's confrontation was the bold accusation that the man in the photo was Pablo. No one, let alone a police officer, may offer an opinion to the jury concerning the guilt of the defendant. Martinez v. State, supra; Glendenning v. State, 536 So.2d 212 (Fla. 1988); Sosa-Valdez v. State, 785 So.2d 633 (Fla. 3rd DCA 2001)(indirect opinion from detective that defense not valid was reversible error).

Finally, the testimony created a huge void-an accusation

followed by silence. The jury was flatly led to believe that Pablo stood silent in the face of this accusation, leaving an irremediable prejudice and a constitutional violation. See, Miranda v. Arizona, 384 U.S. 436,468 (1966); Clark v. State, 780 So.2d 184 (Fla. 3rd DCA 2001)(prosecution cannot use fact defendant stood mute in face of accusation). The defense complained about the stench of silence in the face of accusation created by the prosecutor's foul approach, designed to compel Mr. Ibar to take the stand. This evidence of silence cannot be excused as an adoptive admission; silence during a police interrogation, once Miranda warnings have been given, is not admissible. Ehrhardt, Florida Evidence, § 803.18c (2002 ed.); Brown v. State, 367 So.2d 616 (Fla. 1979); Nelson v. State, 748 So.2d 237 (Fla. 1999); Dickey v. State, 785 So.2d 617 (Fla. 1st DCA 2001)(statement that defendant refused to answer any more questions because he was tired was reversible error). Art. 1, Sec. 9, Fla. Const.; Amends. 5,6, and 14, U.S. Const. The triple blow inflicted on Mr. Ibar by the detective–-the opinions by the detective that Pablo was lying, was the man in the photo, and Pablo did not deny the accusation–-was reversible error.

C.

INFORMING THE JURY THAT CO-DEFENDANT PENALVER WAS INVOLVED IN A GANG, HAD A CRIMINAL HISTORY, AND HAD EXPRESSED THE DESIRE TO KILL HIMSELF UPON LEARNING HE WAS WANTED FOR QUESTIONING, WAS REVERSIBLE ERROR.

While Penalver and Ibar were tried separately, the prosecution's strategy was that proving the guilt of Penalver corroborated its case against Mr. Ibar. Ms. Monroe placed the two

men together at Casey's Nickelodeon and the men were friends; introducing evidence of guilt against an absent Penalver inured to the detriment of Mr. Ibar. This strategy crossed the line when the State introduced evidence of Penalver's criminal past, his gang affiliation, and a consciousness of guilt inferred from a comment Penalver made concerning suicide upon learning he was sought by the police for questioning. These prejudicial attacks were irrelevant and unnecessary at the trial of Mr. Ibar.

First, Miramar Detective Suchamel testified that he executed a search warrant at Melissa Monroe's apartment, knowing that Penalver had lived there. He was indiscreetly asked by the prosecutor to read from his inventory report. Suchomel told the jury he found a "Franklin soccer ball bearing gang graffiti [fee] Zulu" and "one Florida Department of Corrections Offender ID card with his [Penalver's] name and date of birth." T 29.3959-60. The defense objected and moved for mistrial, as the State was "trying to associate my client with a known convicted Zulu [a local gang] gang member, and I have an objection and move for a mistrial because of that. . . ". T. 29.3964-65. The court noted the objection and denied the request.

Introduction of evidence of gang membership is erroneous. Evans v. State, 800 So.2d 182 (Fla. 2001); Reyes v. State, 783 So.2d 1129 (Fla. 3rd DCA 2001);Garcia v. Konckier, 771 So.2d 550 (Fla. 3rd DCA 2000); People v. Arrington, 843 P.2d 62 (Colo. App. 1992); State v. Stone, 802 P.2d 668 (Ore. 1990). The harm that this cloud cast over the jury is incalculable; gang membership insinuates an invidious criminal association. Florida law defines

gang membership as a "group that has as one of its primary activities the commission of criminal or delinquent acts..." Section 874.03, Fla. Stat. (2001). Admission of this improper "guilt by association" evidence was harmful . See, Fulton v. State, 335 So.2d 280 (Fla. 1976)(jury's perception of defendant can be colored by friend's collateral criminal conduct and "guilt by association" must be minimized). Doherty v. State, 726 So.2d 836 (Fla. 4th DCA 1999). This genre of evidence is particularly harmful here; gang membership, as defined by Florida law, connotes a criminal association with others–it allowed the jury to prejudicially link Mr. Ibar with Penalver's illicit gang membership, and was harmful error under the unique facts of this case.

Similarly, advising the jury that Penalver was an alumni of the Florida Department of Corrections was erroneous and harmful. Evidence of a person's prior criminal conduct is presumptively harmful . See, Section 90.404(b), Fla. Stat. (1995); Williams v. State, 110 So.2d 654 (Fla. 1959); Czubak v. State, 570 So.2d 925 (Fla. 1995). This attack upon the criminal proclivities of Penalver was a collateral attack on Mr. Ibar, an effort to smear the Defendant by presenting an inadmissible fact before the jury which created the invalid assumption that Mr. Ibar and Penalver may have met in jail. It is well established that, "as a general rule, evidence of wrongdoing on the part of a third party is inadmissible as irrelevant to a given case." Hirsch v. State, 279 So.2d 866 (Fla. 1973);Jenkins v. State, 533 So.2d 297,300 (Fla. 1st DCA 1988). Such evidence "is not relevant to the crime

charged and is highly prejudicial by inferring criminal conduct on the part of the defendant from criminal conduct of a third party." Armstrong v. State, 377 So. 2d 205,206 (Fla. 2d DCA 1979).The court in Denmark v. State, 646 So.2d 754,757 (Fla. 2nd DCA 1994),held that introducing collateral criminal conduct of men associated with Denmark created the "real danger of establishing guilt by societal association and should not be allowed because of its tendency to prejudicially distort a jury's perception of an accused." The prosecution should not have been able to bootstrap its case against Mr. Ibar with evidence of Penalver having been previously incarcerated. Nowitzke v.State, 572 So.2d 1346 (Fla. 1990)(evidence of past crimes that did not involve defendant prejudicial).

Having shown Penalver's prior criminal past and gang associations, the prosecution took aim at his consciousness of guilt. The police investigation received substantial media attention. An article indicating that Penalver was "wanted for questioning, but he was not a suspect" appeared in the newspaper. T. 37.4746-47. Ms. Monroe was asked by the State how Penalver reacted to the article and, over a defense objection, under the rubric of a consciousness of guilt declaration, she testified that Penalver "was upset because his name was in the paper and, having to do with that and, um – that he wanted to kill himself . . .". T. 37.4747-61. This evidence deprived Mr. Ibar of a fair trial and the right to confront the evidence against him. See, Sixth and Fourteenth Amend.,U.S. Const.;Art.1,Sec.16, Fla. Const.

Generally, "evidence that the accused attempted to commit

suicide is relevant as a circumstance tending to show consciousness of guilt." 1 Wharton's Criminal Evidence § 159 (14th ed. 1986). "With a single exception, courts have unanimously held that an accused's attempt to commit suicide is probative of a consciousness of guilt and is therefore admissible." Annotation, Admissibility of Evidence Relating to Accused's Attempt to Commit Suicide, 73 A.L.R.5th615,624 (1999). See, Walker v. State, 483 So.2d 791 (Fla. 1st DCA 1989)(instruction on consciousness of guilt proper if suicide attempt indicative of intent to avoid prosecution). However, the modern trend is to exclude this damaging evidence unless the proponent of the evidence can establish (1) an actual attempt, (2) due to an unwillingness of the actor to face prosecution, (3) with a jury instruction to allow the jury to address the significance, if any, of the evidence. See, State v. Mann, 625 A.2d 1102 (N.J. 1993); Pettie v. State, 560 A.2d 577 (Md.1989)(facts must establish an attempt related to desire to escape punishment).This requirement is because a simple expression of suicide, as opposed to an act, is a reflection of many amorphous fears, and incomprehensible to most people. Snyder v. State, 762 A.2d 125, 135 (Md.App. 2000); Vermont v. Onorato, 762 A.2d 858 (Vt. 2000); Vannier v. State, 714 So.2d 470 (Fla. 4th DCA 1998). The jury heard, over a defense objection, that Penalver spoke of suicide when he learned the police were looking for him. No self-destructive conduct occurred; no jury instruction was given. Introduction of this evidence was error, as it allowed the jury to consider Penalver's statement as evidence of Mr. Ibar's guilt. Meggison v. State, 540

So.2d 258 (Fla. 5th DCA 1989)(suicide only relevant if probative of flight from a pending prosecution).

The constitutional prohibition against this evidence is also compelling. The legal justification for allowing a "'consciousness of guilt' statement of suicide is because it is an admission". See, McCormick, Law of Evidence, § 144 (2d ed. E. Cleary 1972); State v. Hunt, 287 S.E.2d 818 (N.C. 1982). Indeed, Daniel Webster once argued: "When suspicions from without begin to embarrass him, and the net of circumstances to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed! It WILL be confessed! There is no refuge from confession, but suicide, -- and suicide IS confession." See, State v. Reyes, 705 A.2d 1375(R.I. 1998); State v. Mann, supra.

This "admission" by Penalver was introduced against Mr. Ibar; because the declarant was not available for cross-examination, Mr. Ibar could not explore whether the suicide threat was actually made, whether it was genuine or facetious, or whether it was a product of an accusation or a reflection of other unpleasantness then ongoing in his life. This hearsay could not be confronted. Hearsay which deprives the defendant of the right to confront evidence is a denial of the right to confront one's accusers. Ohio v. Roberts, 448 U.S. 56 (1980). Unless the hearsay contains an adequate "indicia of reliability", the hearsay is presumptively unreliable and a confrontation clause violation. Idaho v. Wright, 497 U.S. 805 (1990). The hearsay declaration here is also troubling as double hearsay; Melissa

Monroe recalls Penalver expressing the idea of suicide. Mr. Ibar bore the brunt of the prejudice without being able to explore the mind-set of the declarant. The hearsay was invalid as an admission against Mr. Ibar. Likewise, the hearsay was not within Section 90.803(18)(e)'s co-conspirator exception umbrella, as the statement was not "during the course, and in furtherance of the conspiracy." Brooks v. State, 787 So.2d 765 (Fla. 2001)(error to admit statement after murder as a conspiracy ends when crime completed); Usher v. State, 642 So. 2d 29 (Fla. 2d DCA 1994)(statements of co-perpetrator after crime completed not admissible against defendant); Burnside v. State, 656 So.2d 241 (Fla. 5th DCA 1995)(accord). Where a statement of suicide is ambiguous and there was no indicia of reliability to permit this evidence, a new trial is necessary.

VIII.

THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE, AND FLORIDA'S CAPITAL SENTENCING STATUTE, VIOLATE THE FLORIDA AND FEDERAL CONSTITUTIONS

This argument addresses the numerous constitutional flaws inherent in Florida's capital sentencing statute and the misapplication of that statute under the facts of this case.

The prosecution sought the death penalty against Mr. Ibar. A charge conference was held on June 15th.T.57.7168-7223. The court agreed to instruct the jury under Section 921.141(5) on the aggravating circumstances of: (b) previously convicted of another capital felony[the contemporaneous convictions];(d) the commission of a contemporaneous felony;(e) avoiding arrest; and (h) heinous, atrocious, and cruel. T.57.7170-93.The court

declined to instruct on the aggravator of cold, calculated and premeditated [subsection (5)(i)], but reserved the right to make such a finding on its own.T.587244-46.The court sustained the State's objection to any defense argument asking the jury to be merciful or to pardon the Defendant, or to consider proportionality or lingering doubt, notwithstanding proof of aggravating circumstances.T.57.7207-23.

A penalty phase hearing was convened on July 24, 2000, where the State presented victim impact statements from family members of the deceased and relied on the trial evidence. The State argued the four statutory factors instructed by the court were proven. The defense presented eight family members and friends, including Pablo's wife, father and brother, who testified to the good nature, loving relationships, work habits and close family ties of Pablo Ibar and his family.T.59.7329-7422. The jury retired to deliberate and sent out a question asking about the power of a juror to abstain; a verdict was returned before the court could respond, and a recommendation of death was returned by a vote of nine to three.T.60.7543-56. A Spencer hearing was convened on August 14th; the court's written order was filed on August 28th, accepting the jury's recommendation and finding proof was established on the four aggravating circumstances instructed to the jury and the additional circumstance of cold, calculated, and premeditated. T.62.7595-97.The court found as proven the statutory mitigating factors of no significant prior criminal history and chronological age, as well as sixteen non-statutory circumstances(i.e., good deeds, loving relationships, prospect

for rehabilitation and good behavior),and ruled that the aggravating factors far outweighed the mitigating factors so as to warrant the imposition of the death penalty.T.62.7586-93.

A. FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

The decision by the United States Supreme Court in Ring v. Arizona, 122 S.Ct.2428,(2002), that the Sixth and Fourteenth Amendment protections announced in Apprendi v. New Jersey, 530 U.S. 466(2000), apply to state capital sentencing statutes, has created a watershed reexamination of Section 921.141,Fla.Stat.(2001), Florida's death penalty statute. See, Bottoson v. Moore, __ So. 2d __, (Fla. 2002)(27 Fla. L.Weekly S891, Op. Filed Nov. 1, 2002). Mr. Ibar challenges here the constitutionality and application in his case of Section 921.141, as Ring requires this Court to conclude that Section 921.141 violates the Fifth, Sixth, Eighth and Fourteenths Amendments to the United States Constitution and Article I, Sections 2,9,16,17, and 22 of the Florida Constitution.

In Ring, the Supreme Court held that Arizona's capital sentencing scheme, as construed in Apprendi, violated the Sixth Amendment because it allocated to the judge rather than the jury the responsibility of making the findings necessary to impose a sentence of death. The Ring Court held Arizona's statute unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty." Ring, 122 S.Ct. at 2443.That Court held: "If a State makes an increase in a defendant's authorized punishment contingent on the

finding of a fact, that fact...must be found by a jury beyond a reasonable doubt [and]... that [A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Id. at 122 S.Ct.2440. This Court construed Section 921.141 in light of Ring in Bottoson v. Moore, supra, and King v. Moore, __ So.2d __ (Fla. 2002)(27 Fla. L. Weekly S906,Op. Filed Oct. 24,2002), where several members of this Court expressed doubts concerning the constitutional validity of Florida's present capital statute. Mr. Ibar now raises[18] those same concerns first addressed by Chief Judge Anstead and Judges Shaw, Pariente and Lewis in their concurring opinions in Bottoson, supra at 27 F.L.W. S894.

1. The reliance upon judicial findings: Ring and Apprendi unequivocally stand for the proposition that defendants are entitled to a jury determination and findings of fact as to the existence of any aggravating circumstance necessary to increase a sentence. Section 921.141 does not include that constitutional requirement, and the jury verdict/recommendation returned in this case contains no findings of fact.[19] "Ring requires that the aggravating circumstances necessary to enhance a particular

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[18] Mr. Ibar adopted in the trial court co-defendant Penalver's pre-trial motions attacking Florida's death penalty. R.122. Those motions, which were all denied, are included in the Supplemental Record filed with this Court on September 20, 2002 at Volume 1, pp. 11-138.

[19] The Defendant argued in his pretrial motions that "[O]ur law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible...".S.T.1 at 22.

defendant's sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase."Bottoson, supra at 27 F.L.W.S895(Anstead,C.J. concurring).This constitutional infirmity infects Section 921.141; Florida's entire scheme is predicated on judicial findings, from Section 921.141 all the way through judicial review by this Court. Where the legitimacy of a death sentence is tied to judicial findings, rather than a jury's, the system is unconstitutional.

2. The trial judge's independent fact-finding: A death sentence in Florida is only imposed under Section 921.141 if a judge makes specific findings that the aggravating circumstances in subsection(5)outweigh the mitigating circumstances in subsection(6). Spencer v. State, 615 So.2d 688(Fla. 1993). A Florida judge is even empowered to find the existence of an aggravating circumstance which was not presented to the jury. Davis v. State, 703 So.2d 1055 (Fla. 1997). The trial court here declined to instruct the jury on the cold, calculated and premeditated circumstance, finding the evidence too close. T.58.7246. The trial court's sentencing order noted:" The 'CCP' aggravating factor was not given to the jury for consideration; however, the Court is permitted to consider the factor if it is warranted." R.1100.This procedure is precisely what Ring precludes; the trial judge took an issue away from jury consideration because the evidence was too equivocal, then concluded that the factor was proven beyond a reasonable

doubt.R.1104. Ring requires that only aggravating circumstances found by a properly instructed jury can justify an enhanced penalty. See, Bottoson, supra;(Shaw,J.,concurring).

3. The absence of jury fact findings: The holding from Apprendi that Ring applied to capital statutes is the requirement that any factual element which increases the penalty for a crime must be presented to a jury as an element of the offense. Therefore, the existence of an aggravating circumstance, which distinguishes first degree murder with a maximum penalty of life from capital murder, must be either found or rejected by a jury. Florida's capital statute can only survive Ring by requiring special verdicts on aggravating circumstances. See, Bottoson, supra;(Pariente, J.,concurring).The absence of any jury findings renders the penalty in this case unconstitutional under the federal and Florida constitutions. Moreover, an advisory recommendation of death is the product of the jury's belief that any aggravating circumstances "outweigh" any mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla.1973). The failure of Florida's capital scheme to accommodate this constitutional requirement by requiring an instruction to the jury that any aggravating circumstance must outweigh any mitigating circumstance beyond a reasonable doubt invalidates the statute.

4. The advisory role of the jury: A principal tenet of the jury clauses of the federal and Florida constitutions is the unimpeachable power of the jury to resolve factual issues without judicial intervention or post hoc avoidance. See, Apprendi,

supra. In Florida, however, a jury merely renders an advisory recommendation to the sentencing court; indeed, Mr. Ibar's jury was told at least a dozen times that its verdict was but a recommendation. T.59.7291-93l;60.7531-39.This facet of the statute renders it unconstitutional. The failure of Florida's statute to mandate any finding of fact, or permitting a sentencing court to ignore a jury, or add aggravating circumstances not considered or found by the jury, violates Ring and Apprendi.

5. The jury's misunderstanding of its role: Advising the jury, repeatedly, that it is but making a recommendation, renders Florida's statute defective for another reason; this part of Florida's law is also unconstitutional and this Court must examine the continued vitality of Section 921.141 in light of Caldwell v. Mississippi, 472 U.S. 320(1985). The U.S. Supreme Court held in Caldwell that a death sentence cannot rest "on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's sentence rests elsewhere." Id. at 328-29.Yet Florida capital jury instructions repeatedly enforce upon jurors the diminishing fact that they are but advisors, not sentencers. Judge Lewis noted the conflict created between Ring and Caldwell in his concurring opinion in Bottoson:

> Ring clearly requires that the jury play a vital role in determining the factors upon which the Sentence will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe that they are less responsible for a death sentence than they really are.

Id., Bottoson at 27 F.L.W.S904.This unique aspect of Florida law, where jurors were once the Greek chorus and are now center stage, renders the statute unconstitutional.

6. Limitations on defense arguments to the jury: The new and critical role juries now have in capital sentencing requires re-evaluation of many other previously imposed limitations on defense evidence and argument. The trial court held that Mr. Ibar could not ask the jury for mercy; he could not ask the jury to pardon him, irrespective the existence of aggravating circumstances; he could not discuss whether any juror harbored a lingering doubt; he could not elicit from witnesses their personal opinion on the application of the death penalty to Mr. Ibar.T.57.7208-23,7346. Ring now requires re-analysis of these past prohibitions, given the inherent power a jury has to consider all aspects of a defendant's character, all manner of evidence, and the evolving nature of a civilized society. Gregg v. Georgia, 428 U.S.153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978). A jury "is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Henyard v. State, 689 So.2d 239(Fla. 1996); Franqui v. State, 804 So.2d 1185(Fla. 2002).A jury cannot fulfill its duty if left unaware of its powerful role in finding facts and rendering a verdict on punishment. The court erred in precluding the defense from arguing these issues, or instructing the jury (the defense requested an instruction advising the jury of its right to mercifully recommend a life sentence at T.57.7208-13) on its ability to return a verdict of life, notwithstanding the

existence or absence of statutory circumstances.

7. The lack of unanimity in the jury recommendation: The second key component to the jury clauses of the federal and Florida constitutions is requirement of a unanimous verdict; no court has ever approved non-unanimous verdicts in a capital case. Cf., Johnson v. Louisiana,406 U.S. 356(1972);Apodaca v. Oregon, 406 U.S.404(1972)(non-capital cases).Chief Judge Anstead noted in his concurring opinion in Bottoson:

> However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by a mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Bottoson, supra at 27 F.L.W.S896.This provision of Ring is critical to Mr. Ibar; three jurors believed the death penalty inappropriate, and rendered a verdict decrying that punishment. Indeed, three judges of this Court would constitutionally require unanimous jury verdicts in capital sentencing. Bottoson, supra;(see, concurring opinions of Chief Judge Anstead and Judges Shaw and Pariente).The unique application of Ring to this case, where the jury recommendation was not unanimous, requires a vacating of the death sentence.

8. The indictment was defective: There exist necessary corollaries to the holding in Ring that the jury clause of the federal constitution applies to death penalty proceedings. Because an aggravating circumstance enhances the maximum penalty

for first degree murder, it must be alleged in the charging document as an element of the offense. See, Apprendi, supra; Overfelt v. State, 457 So.2d 1385 (Fla. 1984)(finding that firearm used in offense which implicates mandatory minimums must be made by jury). The absence of this element rendered the indictment incapable of allowing any penalty greater than life imprisonment.

9. The insufficient evidence of aggravating circumstances:

A. The trial court found the murders were committed in a cold, calculated and premeditated manner . First, it was error under Ring to consider this factor when this circumstance was not submitted to the jury. Nevertheless, the evidence was insufficient to prove this circumstance. This circumstance requires proof of a heightened state of premeditation to kill; that the killing was the product of cool, calm reflection. Rogers v. State, 511 So.2d 526 (Fla.1987). Extensive planning to commit the underlying felonies is not enough. Guzman v. State, 721 So.2d 1161 (Fla.1998); Valdes v. State, 626 So.2d 1316(Fla.1993).The video demonstrated the intruders entered with faces covered and foraged for personal items. The three victims were immobilized; Sucharski struggled to get free, and was shot once in the back. Minutes later, as the men left, the three were shot and killed. The court declined to instruct the jury on this issue as the evidence was close; T.57.7193; the subsequent finding by the court that the circumstance was shown beyond a reasonable doubt highlights the problems inherent in Florida's hybrid scheme.

B. The trial court found, over a defense objection,

T.57.7175, the homicides were committed for the purpose of avoiding arrest. Where the victim is not a law enforcement officer, this factor requires proof that witness elimination was the dominant motive for the killings. Jackson v. State, 592 So.2d 409 (Fla.1986). The intruders wore a mask and a disguise; one can only guess as to why the victims were shot. There must be positive evidence of witness elimination, not hypothesis by default. Scull v. State, 533 So.2d 1137 (Fla.1988).Evidence of this circumstance was lacking.

C. The court found, over a defense objection, T.57.7176 ,the murders were heinous, atrocious and cruel. However, the State argued the murders were an execution; this Court noted in Hartley v. State, 686 So.2d 1316 (Fla.1996), that [E]xecution style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim." That ingredient is absent here; the victims instantaneous death by gunfire, which occurred within seconds, is insufficient. Robinson v. State, 574 So.2d 108 (Fla. 1991)(instant death by gunfire not HAC). The murders were not torturous, see Cheshire v. State, 568 So.2d 908 (Fla/1990), nor were the actions both conscienceless or pitiless. See, Richardson v. State, 604 So.2d 1107 (Fla. 1992).

D. This Court is obliged to undertake a review of the proportionality of the ultimate penalty in every case. Porter v. State, 564 So.2d 1060 (Fla.1990). The unusual advantage the surveillance video offers is the nature of the events which occurred. The men entered disguised; it is unlikely, therefore,

that the original plan was to kill. During the search of the residence, Sucharski resisted and was shot during a spontaneous struggle; the deaths then followed as the intruders made a quick exit. Of the five aggravating circumstances, two were automatic by virtue of the multiple deaths and the underlying felony. On the other hand, the mitigating circumstances were compelling; Pablo had no significant prior criminal history, was but 22 when these events occurred, is married, and has a large, loving and supportive family. Whether this Court draws an analogy to the "robbery gone bad" cases, see, Terry v. State, 668 So.2d 954 (Fla.1996), or simply re-weighs the numerous mitigating circumstances against the statutorily required aggravators, see, Nibert v. State, 574 So.2d 1059 (Fla. 1990), the penalty of death is disproportionate for Pablo Ibar under the facts of this case.

CONCLUSION

Mr. Ibar was denied a fair trial as a result of erroneous rulings by the trial court which infected the reliability of the proceedings and undermine confidence in the verdicts. The State's evidence was a potpourri of hearsay exceptions and circumstantial evidence which precludes application of the harmless error doctrine. Brooks v. State, 787 So.2d 765 (Fla. 2001). Also, the imposition of the death penalty was by virtue of a statutory process which does not pass constitutional muster.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. mail this ____ day of December, 2002 to: **CLERK OF THE COURT**, Florida Supreme Court, Supreme

Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925; **MS. LESLIE CAMPBELL**, Office of the Attorney General, Criminal Appeals,1655 Palm Beach Lakes Blvd., 3rd Floor, West Palm Beach, Florida 33401-2299; and **MR. PABLO IBAR**, L31274 - P6105, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026-4460.

Respectfully submitted,

PETER RABEN, P.A.
First Union Financial Center
200 South Biscayne Boulevard
Suite 5100
Miami, Florida 33131
Telephone: (305) 379-1401
Facsimile: (305) 530-8557

By: _____
PETER RABEN, ESQUIRE
FLORIDA BAR NO.: 231045

CERTIFICATE OF FONT COMPLIANCE

Counsel would certify that the typeset used in the printing this brief is Proportional Courier New 12 pitch.