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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This is a reply brief in a direct appeal from judgments of conviction and sentences of death following a trial by jury in the Seventeenth Judicial Circuit in and for Broward County, Florida. The trial transcript will be referred to 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 Appellant's initial brief will be referred to by the letters "IB"and the Answer Brief filed by the State of Florida will be referred to by the letters "AB", followed by the appropriate page number. 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 FACTS

The Statement of the Facts in Appellee's brief makes reference to facts which are not borne out on this record. Those instances which are material to this case are briefly reviewed.

One issue concerns the unresolved motive of the invaders; while a gun and automobile were taken to effectuate the escape, the fact that a considerable sum of currency and jewelry was left behind clouds their motive, and inferentially the identity, of the men. The State asserts that the video depicts the men "were seen putting things in their pockets". AB at 2. But the record reference in support of that assertion reflects the

prosecutor asking a criminalist if the men appear to be putting items in their pockets; the witness responded, "Could be".T.15-1988. The evidence that the intruders were there primarily to steal or rob was not convincing. In fact, the prosecutor told the jury in closing:"We cannot say from evidence in this particular case if anything in particular was taken. We don't know."T52.6831.

While motive was equivocal, the physical evidence was not. The State asserts:"No fingerprints, blood or hair was matched to Ibar". AB at 3.In fact, the evidence of innocence was far more compelling. Police technicians testified that the DNA evidence **excluded** Pablo Ibar as the donor of the hair and cellular specimens discovered by the police on the items left behind by the intruders. T. 33-4394,4418;48-6238. The prosecutor conceded in closing that "there is no question in this particular case there was no physical evidence to connect the defendants to this particular case." T.52.6891. This significant fact highlights the fragile nature of a case built upon contested identifications.

The State's brief offers that the absence of fingerprint evidence stems from a photograph "of an assailant's hands wearing gloves". AB at 3. That claim is inaccurate, as the record reference supplied by the State does not support that statement. A state witness was asked if the man in the video was

wearing gloves; the witness answered, "I'm saying that could be a cause for not having blood transfer". T.15-2060. The same witness observed that the video depicted the men wiped down surfaces as if to erase fingerprints, acts inconsistent with wearing gloves.T.15-2061.The claim by the State that the men wore gloves is unfounded.

The State has also taken liberties with the testimony of Klimeczko; in its brief, the State writes that Klimeczko **testified** that he went to the Nickelodeon with Pablo and Penalver on June 24th, that he identified Ibar and Penalver as being depicted in the photos he was shown by police, that he saw a Tec-9 gun in the Lee Street home, and that on the morning of the homicides, he saw Penalver and Ibar come home, take the Tec-9, leave, then return in a big, black, shiny car before leaving again later that day. AB at 5,6. **However, Klimeczko did not testify to any of these statements**. He had no recollection of any of these events, and doubted whether they had occurred. These events were elicited by the prosecutor reading Klimeczko statements he allegedly made six years earlier and having him acknowledge that the statements were made. However, Klimeczko did not testify that the statements were true, nor did he recall making the statements. T.30-4078,4101,4110,4137,4144,4161-66,4175,4185.

The same claim is made by the State concerning the testimony

of Ms. Monroe; the State writes that she "averred she had seen Penalver and Ibar at Casey's Nickelodeon the weekend before the murders (T59 7862-7864)". AB at 6. The record citation does not reflect this testimony. Ms. Monroe testified that she never said she saw these men the weekend before the homicide; she said it was some weekend before the homicide and the police twisted her words to benefit their theory. T.36-4652-4673. The State's factual rendition in its brief mirrors the trial- a recitation of evidence without a clear distinction between courtroom testimony, prior inconsistent statements, unrecollected police interviews, and disavowed or disputed prior sworn testimony.

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 correctly recognizes that the issue raised by Mr. Ibar in Point I is whether police impeachment testimony of witnesses who never made an "identification of a person after perceiving that person" is substantive evidence of identification under Section 90.801(2)(c). AB at 11. However, after requisite assertions that the error was not preserved or was harmless, the State never again directly addresses the issue. Instead, the State expends its energy defending the

admissibility of the impeachment testimony. That defense is unnecessary, and begs the question. Mr. Ibar does not challenge admissibility of the impeachment; he contends that the trial court erred when it told the jury that the police testimony of what Pablo's mother and her friends and Pablo's friends allegedly said when they looked at a fuzzy and grainy photograph could be argued to the jury as substantive evidence of guilt. The court erred by instructing the jury the impeachment testimony was substantive, and erred by allowing the prosecutor to make that argument to the jury. The error was preserved, and cannot be harmless on this record.

A. THE ERROR WAS PRESERVED

The State first loses its grasp on the issue when it argues that"Ibar failed to object to either Officer Scarlett's or Detective Manzella's testimony regarding these identifications," AB at 12, and that defense counsel's repeated objections to the substantive evidence instruction "could not preserve Ibar's complaint about the officers being able to testify to out-of-court identifications made by six witnesses prior to trial". AB at 12, fn.3. This position by the State is an acknowledgment that the issue we raise, not the issue characterized by the State, was preserved by defense objections.

Indeed, the State concedes that the defense objected to instructions to the jury that the identification impeachment

testimony was substantive evidence. AB at 13,fn.3. <u>See</u> T.30.4052-60;T.36.4646,4711 and 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.[1]

The issue we raise, having been preserved by a timely objection, is before this Court on <u>de</u> <u>novo</u> review concerning the legal construction of Section 90.803(2)(c).[2]

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[1] 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.

[2] In any event, any objection to the admissibility of the impeachment testimony under 90.803(2)(c) would have been useless; the court announced, early and often, that it had conducted its own research and found Section 90.803(2)(c) allowed the police impeachment testimony. <u>See</u> T.25.3394-96;30.3987-96,4052-60;36.4711-13;32.4203-05,4210.

B. THE OUT-OF-COURT STATEMENTS WERE NOT MADE BY A DECLARANT AFTER PERCEIVING A PERSON, SO IMPEACHMENT OF THOSE STATEMENTS WAS NOT SUBSTANTIVE EVIDENCE UNDER SECTION 90.803(2)(C).

Mr. Ibar's primary argument concerns the erroneous construction placed on Section 90.801(2)(c) by the court and prosecutor which bootstrapped the prosecution's identification evidence from one weak to seven strong witnesses. This sleight of hand was accomplished when the court instructed the jury and the prosecutor argued to the jury that police impeachment testimony that Pablo's friends and family had positively identified him from the crime video was substantive evidence of guilt, notwithstanding the fact that each witness testified that they had not made such an identification and where none of the witnesses had made a statement"of identification of a person made after perceiving the person" as required by Section 90.801(2)(c).

Mr. Ibar did not challenge whether the police could testify, nor whether they could impeach the witnesses concerning their disputed opinions of who may have depicted in the video still; he contested how that impeachment was received by the jury. Yet the State's brief deals with these non-issues and, remarkably, the State does not directly address the sole issue raised: whether the out-of-court statements of opinion by a non-occurrence witness concerning the identity of a person in a photograph is a statement within Section 90.801(2)(c) so as to

allow impeachment of those out-of-court opinions to be admissible as substantive evidence. The State begins by outlining the parameters of Section 90.801(2)(c)and basic Florida law allowing out-of-court statements of identification to be admitted as substantive evidence. AB at12-15. See, State v. Freber, 366 So.2d 426 (Fla.1978). After discussing various nuances in the law (i.e., the declarant must testify, but need not make an in court identification; the identification need not be from immediately after the crime; the identification can be from a photograph), the State asserts that "the identifications in this case are akin to photo identifications and are therefore, admissible." AB at 15. **This statement is the State's sole effort at discussing Point I**. There is no attempt to explain how individuals who never perceived a person in the first place can be shoe-horned into Section 90.801(2)(c)'s literal language. There is no attempt to discuss the difference between occurrence and non-occurrence witnesses; no attempt to distinguish the line of cases holding that a non-occurrence witness' opinion on identity is admitted under Section 90.701. See, State v. Benton,567 So.2d 1067 (Fla. 2d DCA 1990); State v. Early, 543 So.2d 868 (Fla. 5th DCA 1989); Edwards v. State, 583 So.2d 740 (Fla. 1991). Indeed, every case cited by the State concerns identifications made by a victim or witness to a crime.

The State is unable to present a single case in support of

its theory that the literal language of Section 90.801(2)(c) applies to people asked to make an identification from a picture despite never having first "perceived the person". This Court did not pursue an expansion of Section 90.801(2)(c) in Puryear v. State, 810 So.2d 901 (Fla. 2002), where this Court held that an out-of-court description of a perpetrator was not a statement of identification. Mr. Ibar would encourage this Court to be as circumspect here, or else risk opening a Pandora's box of unintended abuses of the rule. 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.

C. THE HARMLESS ERROR DOCTRINE IS INAPPLICABLE ON THIS RECORD

Invocation of the harmless error doctrine is impossible on this record. First, the jury was told by both parties in opening statement that identity of the perpetrator was the only issue. The video tape, and the still photographs from it, were described by state witnesses as fuzzy, grainy, gray, shady,

blurry and distorted; indeed, an earlier jury with access to that video had hung, as the video was not clear enough to depict the identity of the actors. The State's suggestion that the entire trial was but window dressing for the video is misplaced. T.24.3270-89.Second, the physical evidence introduced from the crime scene **excluded** Mr. Ibar as the donor of the hair, blood, or fingerprints found by criminalists.T.33.4383-4418;35.4554-86;39.5073-5120. The harmless error doctrine is particularly inappropriate where the defense is mis-identification and the physical evidence points away from the accused. Third, the State's evidence outside of the challenged identification testimony and instruction was significantly diminished by cross-examination. Mr. Foy acknowledged the suggestive prompting by the police, T.21-22.2810,2914,2981-89 and 26.3656-57,and that his view of the suspect was for seconds at a time, at an angle, through two sets of tinted car windows.T.22.2962-65.Kim Sans was burdened by the fact that she did not come forward for three years, and even then, did so to acquire leniency or financial benefits.T.44.5990-6000. These factors, in conjunction with the alibi testimony and Pablo's initial and repeated denials of culpability, preclude excusing the trial error as harmless.

The most significant reason the error was not harmless is the effect of the error on the trial and the jury. Six witnesses– Marlene Vindel, Roxanne Peguera, Maria Casas, Ian

Milman, Melissa Monroe, and Jean Klimeczko- testified that they looked at the still picture and said that the person either was not or may resemble Pablo; no one testified that they identified Pablo as the man in the photo. It is evident that Pablo Ibar would not be on trial if he did not resemble the man in the picture. However, people do not go to prison based upon who they resemble. Two police detectives then swore to the jurors that all six had positively identified Pablo. This was more than a simple conflict in testimony; the prosecutor asked the jurors not to believe the trial testimony of these friends and family members in favor of the policemen and told the jury the law allowed the jury to find the police testimony of identification was substantive evidence and could be considered by them as evidence of guilt.T.52.6859-63 (see, T.52.6889: "Come on. Common sense. They were from a video tape. You decide what's reliable in this particular case and all those identifications and all those people who know the Defendant, who's identified the Defendant, reviewing that murder scene photograph and all the circumstances that- surrounding that, you decide what is reliable and what is said in this particular courtroom today...And as the investigation continued, it just so happens now that we got 1,2,3,4,people looking at Melissa Monroe [sic]. The mother, the housekeeper, the housekeeper's daughter, looking at those photo's and saying, "It's Pablo.").This legal error and

the boost it gave the prosecution allowed the jury to ponder why their deliberations should be prolonged **where his own mother thinks he is guilty**. The harmless error rule is saved for those instances where there is no "reasonable possibility that the error effected the verdict." State v. DiGuilo, 491 So.2d 1129,1139 (Fla. 1986).That cannot be said here.

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 WITNESS' MEMORIES,PREJUDICIAL AND INADMISSIBLE EVIDENCE

This point concerns the manner in which the State was able to introduce prior disavowed, disputed and unreliable statements through the tactic of a prosecutor calling these declarants as witnesses for the sole purpose of having them deny prior utterances so they could be impeached. The practice of strawman impeachment–calling witnesses for the sole purpose of impeaching them-prohibited by this Court in Morton v. State, 689 So.2d 259, receded from on other grounds, Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), constitutes plain error because of the invidious effect it had on the trustworthiness of the trial. The error concerning the manner in which the State impeached Kliemeczko

was preserved.T.30.4037,4060-64, 4075, 4111-14, 4186-90.

The State asserts that "Peguera, Vindel, Klimeczko, and Casas, were not called with the intent of impeaching them with 'otherwise inadmissible evidence', but were called, in part, to testify about identifications they made of Ibar from photographic evidence." AB at 24. That is not what the prosecutor told the trial court; he knew these witnesses were not going to testify that they had ever identified Pablo. Knowing this, the prosecutor told the judge "when they [the witnesses] come in and testify I will bring him [the policeman] back to rebut that." T.19.2517.

The State does not even attempt to argue that Peguera and Vindel had a legitimate purpose on the stand, other than to be impeached. Their prior statements had not been of identification, only that Pablo Ibar resembled the man in the photo. They were called as witnesses to enable a detective to testify they had positively identified Mr. Ibar. Morton was decided because a party should not be able to bring before a jury inadmissible evidence under the guise of impeachment, unless the witness has other evidence to offer. Peguera and Vindel did not, nor were their prior declarations otherwise admissible.

The subterfuge to allow introduction of Pablo's mother's testimony was equally transparent. The State posits that Ms.

Casas offered some non-impeachment testimony. AB at 26. Yet this testimony concerned irrelevant matters (i.e., how Pablo wore his hair, which was otherwise apparent from contemporaneous pictures introduced, or that he may have left some personal items at her home); the State's brief also includes a misstatement of this testimony-the State asserts that Ms. Casas "may have done business with [Consolidated Electric Supply]", AB at 27;her testimony was the opposite: "Q.: Do you do any business with C.E.S., Consolidated Electric Supply? A.: No, I don't." T. 24.3345.Finally, when asked by the court if the defense objected to the introduction of Ms. Casas' prior testimony, the defense argued it was irrelevant and immaterial, as standing alone it did not advance any fact, save allowing it in to be impeached.T.24.3264.

The State's attempt to justify the improper impeachment of Klimeczko also fails. The prosecution's strongest evidence came, not from Klimeczko's testimony, but from statements Klimeczko had made six years earlier which the prosecutor knew he would disavow and not recall from the stand: that Mr. Ibar had been at Casey's nightclub the weekend of the homicide, that Pablo was the man in the photo, that he had seen a Tec-9 at the house, that the men exchanged clothes, and most importantly, that he had seen Pablo and Penalver leave Sunday morning with a gun and return in a car similar to Sucharski's. Klimeczko never

testified to any of this evidence; yet all of these unrefreshed memories were read to the jury by the prosecutor when Klimeczko evinced no recollection, or denied that he had seen or said these things. The State admits that this form of impeachment was improper under Section 90.613, but defends with the claim that "Klimeczko subsequently adopted the information as correct." AB at 30. No record reference follows that statement, as it is wholly incorrect. For hours on end, the prosecutor read to Klimeczko his prior words; while the witness agreed that they had been uttered, he never acquiesced to the truth of the assertions.[3] In fact, he said the opposite: that his drug usage, his anger at Pablo, and his fear the police were accusing him of the murders made him doubt his prior statements were true or reliable. T.32.4235-39,4270-78;30.4018-34;33.4338-41;31.4141.

The State completely confuses what Klimeczko testified to at trial(he had no recollection of any of these incidents)with the police interviews or grand jury/bail hearing testimony repeatedly read to the jury. For example, the State claims, "Ibar admitted to Klimeczko he possessed the car (T31.4166-90)". But that record reference is to the prosecutor reading prior

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[3] The following record references detail the opportunities the prosecutor read to the jury prior testimony by Klimeczko that the witness did not admit or recall: T.30.4021,22,24;4065;4079-80;31.4111-14;4123-24;4128-29;4136-37;4145-46;4155-60;4167-75;4176-85;4187-92;31.4229-31;4234-35;4253-55.

testimony; in fact, Klimeczko said he never saw that, nor did he recall Ibar saying it. When the State writes, "Clearly, the witness offered testimony in furtherance of the State's case, thus, the area of impeachment was not improper",AB at 31, the State is taking wide liberties with the record.

The State's justification for the prosecution calling Mimi Quinones on rebuttal was to prove she bought a calling card in an Irish hotel, simply to prove she could not have done so. This was a clear Morton violation and violated the prohibition against the State rebutting its own evidence. See, Stoll v. State,762 So.2d 870 (Fla. 2000). The basis of the alibi was a telephone call from Ireland. Alvin Quinones testified that the call was made with a phone card purchased in Ireland by her daughter Mimi; she did not know where the cards were purchased.T49.6457.But Mimi had said in a deposition it was purchased in an Irish hotel. The State leapt upon this statement as an opportunity to impeach the alibi; it called Mimi on rebuttal to say she bought the card in a hotel, then called an Irish telephone expert to testify that cards were not sold in Irish hotels. However, no evidence was introduced that the call was not made, which would have undermined the alibi.

First, this violated Stoll. The State called the Irish expert to rebut its own evidence. The testimony did not impeach the alibi-only Mimi's recollection as to where she had purchased

the card. Second, this violated Morton. The State only called Mimi so it could impeach her. The State asserts that Morton is not violated unless a witness is called to enable the introduction of otherwise admissible evidence, and "McEvoy's testimony was admissible". AB at 34. That argument is a stretch; where calling cards are sold in Ireland was not relevant to anything, other than to impeach Mimi.

Finally, any claim that these errors were harmless quickly dissolves when a review of the prosecutor's closing argument is examined. The prosecutor argued that all of Klimeczko's testimony was lies, and that his prior statements, read to the jury once again in closing concerning the identifications and seeing Pablo with a gun, was the truth. T.53.7020,7025-27,7043.The prosecutor argued that the alibi was a "castle of sand falling into the sea" because the calling card Mimi claims she bought in a Irish hotel was an impossibility. T.53.7033. The State cannot argue facts to a jury, then carry its burden of proving harmless error by complaining that its argument fell on deaf ears.

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 State characterizes this issue as whether it was

"improper to permit Detective Scarlett to testify that Maria Casas made a positive identification of her son under Section 801(2)(c) where Casas did not testify live in the instant trial.(IB 55)." AB at 36. In other words, whether the introduction of prior sworn testimony of a deceased witness satisfied the requirement of Section 90.801(2) that "the declarant testify at the trial or hearing...".

The State expends its efforts arguing that the prior testimony was admissible under Section 90.804(2); that is not at issue. The State argues that the officer's impeachment testimony was permissible; that also is not at issue. Mr. Ibar raises the claim that the impeachment testimony was not substantive evidence of identification(the prosecutor told the jury it was)because Maria Casas did not testify at the trial, thus the impeachment did not qualify as substantive non-hearsay under Section 90.801(2)(c).

The State defends the trial court ruling with traditional case law where the declarants were available as witnesses, AB at 39-41,then suggests that "[W]hile these cases involve instances where a witness was present to give live testimony, they should not give this Court pause."AB at 41.The State claims this trust is justified because prior sworn testimony is inherently reliable, and "many of the defects in the declarant's credibility will be demonstrated to the trier of fact."

[citations omitted] AB at 41. The problem with this proposed expansion of Section 90.801(2)(c) in this case is that the declarant, Maria Casas, had passed away and was unable to demonstrate her credibility. Her prior sworn testimony from the first trial had been perfunctory--she was asked on direct examination by a prosecutor if the man in the picture was her son, she said no, and there was little for the defense to ask on cross-examination. Presenting this sworn testimony at the second trial, done solely to allow the police impeachment, does not meet the underlying reason for allowing prior evidence of identification as substantive non-hearsay.

Section 90.801(2)(c) allows this testimony as substantive non-hearsay because the jury is free to make its own credibility assessment, as both the declarant and the impeaching witness must testify. Expansion of the rule to substitute a transcript for the live appearance of a witness will defeat the justification for the rule, and can not be tolerated–especially in a case where identification testimony was the linch-pin of the case. The State is unable to present a single case allowing a transcript to substitute for the live witness envisioned by Section 90.801(2)(c); this is an inappropriate case to push that rule beyond its literal language.

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

A. THE WHEREABOUTS OF ALEX HERNANDEZ

The absence of physical evidence and the contradictory and weak testimony elicited concerning identity required the State to do all it could to eliminate other suspects. This strategy focused on a roommate at the Lee street home, Alex Hernandez. First, he wore the exact shoe size of a bloody shoe print found at the crime scene.T.27.3740;28.3858-64;47.6192-98. Second, a search of Hernandez' room uncovered bloody footwear and a live round.T.38.5043-45;41.5492-98. Third, the police originally considered Hernandez a suspect and the defense put him forward as a possible perpetrator. IB at 58. These circumstances led the State to ask the trial judge to allow it to elicit from Ian Milman (whom the State considered a perjurer) testimony that Hernandez had told him he was going to North Carolina the last weekend in June- an out of court declaration, admitted for its truth, which established an alibi for Hernandez and eviscerated a part of the defense. The trial court erred in allowing this hearsay under Section 90.803(3): a hearsay declaration to prove "acts of subsequent conduct of the declarant".

Mr. Ibar raised this issue in his initial brief and argued that 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".IB at 59. The State responds that this issue was not raised below. However, when the State sought a ruling from the judge, this colloquy occurred:

> THE COURT: You are offering it to show that this guy was out of town, therefore, he couldn't have been one of the suspects.
> [The Prosecutor]: Or he couldn't have been one of the persons that committed the murder.
> [Defense Counsel]: Doesn't prove that, just a circumstance you can put in the case, it hardly proves that he didn't go or they did go. A statement of future intendment. He is not going to be able to adduce from that, that that person couldn't have been available to commit the crime. We would be able to argue that that is proof of that. No corroboration.
> THE COURT: Anything else from the defense?
> [Defense Counsel]: No.
> THE COURT: I'm allowing it under that exception.

T.34.4476. Clearly, this issue was preserved.

The State next claims that an indicia of corroboration was shown; however, saying it does not make it so. First, the State points out Milman and Hernandez were roommates, and Milman said he dropped Hernandez off at his mother's house "so he could leave for the trip," and Hernandez told him he took a flight home. AB at 44,45.The corroboration, therefore, comes from the same out-of-court declarant which makes the statements all hearsay. Also, Milman's testimony is not the corroboration the

State can rely upon; after testifying that he took Hernandez to his mother's, this colloquy occurred:

> Q.: When did you talk to him about it that weekend?
> A.: He was not there that weekend.
> Q.: What day did you talk to him about it before the weekend came as to what he was going to do?
> A.: About three, four days prior to that.

T.34.4476. In other words, the statement of future conduct attributed to Hernandez by Milman was stale by the weekend, and is the reason why the law requires corroboration.

B. A HEARSAY DECLARATION OF IDENTITY

The State's effort to categorize its elicitation of a hearsay declaration as a spontaneous statement or an excited utterance should fail. Kim Sans testified that she entered her home and asked a man "Who the hell are you?" The alleged response–"I'm Pablo"- was not a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition", see Section 90.803(1), nor was the statement made by the declarant "while the declarant was under the stress of excitement caused by the event or condition". See, Section 90.803(2). Clearly, the excited utterance exception, which requires that the declarant be excited, is inapplicable. Henyard v. State, 689 So.2d 239 (Fla.1996). Ms. Sans' recounting of the encounter ascribed no sense of anxiety or stress to the encounter. Nor does the

spontaneous statement exception apply. This exception allows an out-of-court declaration (here, "I'm Pablo")of what a declarant said "while the **declarant** was perceiving the event or condition...". The declarant was Pablo Ibar; his alleged response to "who the hell are you" does not describe or explain an event or condition that **he** is perceiving.

The State relies on McGauley v. State, 638 So.2d 973 (Fla. 4th DCA 1994). In McGauley, a policeman asked a woman who had just seen a man jump through a window who the man was, and she identified her husband. This statement was admitted as a spontaneous statement. But there, the declaration was made by the woman concerning an event she perceived; that is unlike this case, where the declarant (purportedly Pablo Ibar) is not perceiving or describing anything. The error was preserved, and under the circumstances of this case, cannot be harmless.

C. EXPERT TESTIMONY ON FOOTWEAR IMPRESSION WAS IMPROPER

The advantage conferred upon the State by the court allowing expert opinion testimony concerning shoe prints was prejudicial. The harm began when the prosecutor told the jury in opening statement, over a defense objection, that shoes taken from Alberto Rincon "[C]ould have left that [bloody] print to the point where he[the expert] can say 90 per cent those shoes–...[and] that the shoes worn by Alberto Rincon, his roommate, also the same size shoes that Pablo wears, and you

will see from the evidence in this case as roommates they exchanged items of clothing from time to time." T.12.1577,78,1583. This point was reinforced in closing, when the prosecutor reminded the jury that Pablo Ibar shared a residence with Hernandez and Rincon "who happened to have on them shoes, state's exhibit 230, that can't be eliminated from leaving a print in blood at the crime scene."T.52.6873.Clearly, the State utilized the expert shoe print testimony to its advantage.

The State conceded the whole case was identity, and its evidence of identity was not compelling. The State's strategy was that physical evidence (shoes, a Tec-9 pamphlet, Oldsmobile car axle widths) circumstantially supported its case. A link in its argument was expert testimony that a shoe print left at the scene could have been left by shoes Pablo may have worn. The introduction of that expert testimony, over a defense objection, was erroneous.

Section 90.702 allows a witness qualified to impart to a jury "scientific, technical, or other specialized knowledge" to testify in the form of an opinion. Yet Boyd was unable to attribute any "scientific, technical or specialized knowledge" to what he did; he simply" 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.He does not require a set number of

comparison points (as in fingerprint analysis) nor is there an industry standard which sets guidelines to discourage discrepancies between experts. He is answerable to no association of peer review, nor is there any ultimate review to calculate reliability or falsifiability. The absence of these safeguards led defense counsel to make a Frye objection, and should require this Court to be troubled by the expert shoe print testimony in this case.

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 COURT ERRED BY PRECLUDING IMPEACHMENT OF A STATE WITNESS WITH A TAPED TELEPHONE CALL UNDER SECTION 934 OF THE FLORIDA STATUTES

Mr. Sucharski installed a surveillance camera in his living room because of a bitter falling out with his live-in girlfriend, Kristal Fisher. Police found a tape of a telephone conversation between these two containing violent threats which the defense characterized as "very significant to explaining how persons unrelated to Pablo Ibar may very well explain, be the perp that perpetrated this offense and not Pablo...".T.18.2393. The defense unsuccessfully attempted to introduce this tape through an employee of the nightclub, who was able to recognize

the voices on the tape.T.18.2392-2402.

The tape served a second purpose for the defense. Detectives had interviewed Ms. Fisher and discounted her as a suspect. The defense wanted to explore whether the police had listened to the tape, and the threats contained therein by Fisher and Sucharski, before absolving her in the investigation. The defense asked the court whether its exclusion of the tape barred its use as a device to impeach the police; the court ruled "I'm not sure you can do it on impeachment. I thought it was prohibited, period." T.18.2399. The issue came to fruition during the cross-examination of the detective when the defense asked the officer if he was aware of the recording when he spoke to Ms. Fisher. The State raised the Section 934 objection, and the defense argued that he should be able to ask the officer if he played the tape for her during their interview, as the officer said in a deposition that he had. The court disallowed any questions, over a defense objection.T.20.2707-09.

The State claims the error by the court in precluding the use of the tape to impeach the officer was not preserved error, and was harmless. Both of these defenses must fail. First, the ban on impeachment was objected to by the defense.T.20.2709. Second, any suggestion that the error was harmless goes out the window when a review of the detective's testimony occurs. The tape demonstrated extreme hostility between Sucharski and

Fisher. The officer had testified in deposition that he had heard the tape recording. Yet the officer told the jury he discounted Fisher as a suspect because he was unaware of any hatred, hostility,or despisement between the two, and he did not recall playing the tape. The court barred the defense from impeaching the officer and from showing him a transcript of the recording to refresh his memory.T.20.2709-16.

The court erred in prohibiting the defense from cross-examining the detective about the recorded argument between Sucharski and Fisher. The defense was entitled to show the officer was untruthful about having heard the tape, was minimizing the nature of the violent threats, and was caught lying about his failure to pursue a legitimate suspect. The statutory exclusionary rule of Section 934 did not bar the cross-examination attempted by Mr. Ibar. Any conflict between evidentiary rules and the Confrontation Clause is decided in favor of the accused. Davis v. Alaska,415 U.S. 308 (1974). Also, inadmissibility of the tape did not create a license to commit perjury by the officer. A statement or piece of evidence may be inadmissible yet properly utilized to cross-examine and impeach a dishonest witness. See, Harris v. New York, 401 U.S.222 (1971); Bedoya v. State, 604 So.2d 3 (Fla. 3rd DCA 1992)(statements excluded under Miranda admissible to impeach).The error was harmful and preserved and warrants a new

trial.

B. THE REPUTATION TESTIMONY

The best evidence of Kim Sans' importance to the prosecution is the amount of times the State argues that other errors are harmless because of the testimony of Kim Sans. Brief of Appellee at 20,35,42 and 46. The defense proffered the testimony of a detective who had testified at a previous trial that Ms. Sans' reputation was that of a liar. That opinion was based upon the detective's conversations with five people, including those who knew her best- her mother, her brothers and a friend. The court erred in excluding that testimony by finding the pool of community members too small and too intimate. Indeed, it is rare for strangers to know a person's reputation; reputation evidence would be scarce if the predicate for its admission is many community members who have knowledge of more than one incident. The transience of modern living all but precludes establishing this foundation without resort to those closest to a subject. Detective Lillie was prepared to testify that Ms. Sans was a known liar; given the importance of her credibility, both in the trial and on this appeal, the court abused its discretion in excluding this testimony.

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

The State's response enables this Court to decide this point on a narrow legal issue: whether a person compelled to stand in a line-up by a judicial warrant is in "custodial restraint" as that term is utilized in Rule 3.111 of the Florida Rules of Criminal Procedure. If so, Mr. Ibar's right to counsel under Article 1,Section 16 of the Florida Constitution was violated when he was forced to appear in a live line-up without counsel, especially where harmful evidence flowing from that identification procedure was introduced into evidence at his trial.

The State acknowledges that the right to counsel in Florida attaches "as soon as feasible after custodial restraint". See, Smith v. State, 699 So.2d 629 (Fla.1997); Traylor v. State, 596 So.2d 957 (Fla. 1992); Rule 3.111, Fla. R.Crim.P.;Brief of Appellee at 64. The State also concedes that (1) Mr. Ibar was forcibly put in the line-up by police,(2) that Mr. Ibar requested the presence of his attorney,(3) the police contacted his attorney who asked to be present at the line-up, and(4) the police nevertheless decided to proceed with the line-up without the lawyer. AB at 63;IB at 71-72. These undisputed facts allow for de novo resolution of the legal issue at hand. Killian v. State, 761 So.2d 1210 (Fla. 2d DCA 12000).

It is not surprising that there is little precedent on this

issue. Generally, a person will volunteer to appear in a line-up or the procedure occurs post-arrest, so the right to counsel issue is clear. This issue arises because Mr. Ibar did not consent to the procedure and he had not yet been arrested on the Miramar homicides; therefore, the police obtained a search warrant and compelled him to stand in the line-up.

This Court can interpret the meaning of "custodial restraint" in Rule 3.111 by analyzing those cases decided when a suspect is interrogated without Miranda warnings and the State defends the police by contending the suspect was not in custody. See, Ramirez v. State, 739 So.2d 568 (Fla.1999). Those cases hold that a person is in custody when a reasonable person would consider himself in custody after consideration of the manner in which police summon the suspect, the purpose of the detention, whether the person is confronted with evidence of guilt, and whether the suspect is informed of their right to leave the place of questioning. Mansfield v. State, 758 So.2d 636 (Fla. 2000). Consideration of these criteria on the facts of this case mandates the conclusion that Mr. Ibar was in "custodial restraint" when compelled to stand in a line-up. First, he could not refuse the warrant's command, nor was he free to leave. The manner in which he was forced to participate in the line-up reeks of custodial restraint. See, United States v. Byram, 145 F.2d 405 (1st Cir. 1998)(defendant in custody on unrelated matter

subjected to custodial interrogation when removed from cell to be interviewed by police). Second, he was powerless to assert his rights; his request for counsel was summarily denied. Also, Mr. Ibar was clearly advised that his freedom was curtailed–a significant indicator that a person is in custody. Bedoya v. State,779 So.2d 574 (5th DCA 2001); Killian, supra;(directing man to stand in a certain spot while a search warrant is executed was custodial). This Court must conclude that Article 1, Section 16 was implicated and violated by the police conduct in this case.

It is equally evident that the line-up evidence was harmful. Gary Foy told police he saw two men leaving the Sucharski residence, and saw the passenger [purportedly Ibar] for seconds at a time through two sets of tinted windows and at an angle.T.21.2959-65.He was unable to positively identify the Defendant’s picture in a photo spread two weeks later. Yet he did make a positive identification at the subsequent live line-up; coincidentally, Mr. Ibar was the only person in the line-up whose picture had been in the earlier photo spread. Also, the jury was advised by a police officer that Foy spontaneously selected Mr. Ibar before the line-up began, a fact Foy did not recall. Indeed, the prosecutor harped on this in his closing statement, when he reminded the jury of Foy’s line-up identification and his remarkable spontaneous declaration even

before the procedure began. T.52.6879,80. It is axiomatic, in a case when identity was the only issue, that the harmless error rule cannot excuse this constitutional violation.

A finding that a person taken by warrant to stand in a line-up is entitled to counsel will have little effect on the administration of justice yet will safeguard the constitutional right to counsel and protect against factual disputes which arise at line-ups (which occurred in this case). The result of such a holding will simply require police to read a person a Miranda advisement which informs the suspect that he or she has the right to counsel at the line-up, or the right to waive counsel. This procedure is a small price to pay to ensure devotion to the Florida Constitution.

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

The prejudicial remarks by the witness occurred on page 3738 of Volume 27 of the trial transcript. Moments later, at page 3743, the State asked for a side-bar as the prosecutor broached

“a delicate matter” and a long bench conference ensued. The defense made its objection to the officer’s comment during this side-bar break.T.27.3777. Therefore, the objection met the requirement that the claim be raised in a timely fashion.

The comments– that police received a substantial lead from the Miami-Dade Homicide Unit– was an invidious invitation for the jury to ponder the existence of other homicides and Mr. Ibar. This error, taken in conjunction with the testimony from Gary Foy that he traveled to Miami to view the line-up, T.21.2826,assuredly left the jury to wonder if other murders were on Mr. Ibar’s slate.

The prospect of Mr. Ibar’s involvement in drugs was also visited upon the jury; an immediate objection and motion for mistrial ensued.T.41.5583-88. Despite being warned not to mention drugs, a detective told the jury that Jean Klimeczko had been thrown out of the Lee street home by Pablo after Klimeczko stole “money and drugs” from a safe within the home.

The State defends this comment of extrinsic evidence by arguing that others lived in the home, and the comment did not directly impute the drugs to Mr. Ibar. AB at 72-74. The irony of this attempt to minimize the error is the fact that the prosecution spent all of its efforts tying everything found in that home to Mr. Ibar; indeed, the Tec-9 pamphlet, the ammunition, kitchen gloves, and the sneakers were not found in

Pablo's room, but the State held him responsible for each item in arguing its circumstantial evidence case to the jury. Now, the State suggests, to avoid error, that everything in the house except the drugs belonged to Mr. Ibar. The State cannot have it both ways.

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

A Miramar detective met Pablo Ibar a few weeks after the homicides to ask him his whereabouts and who he had been with the last weekend in June. Pablo waived his Miranda rights, answered questions for several minutes and denied complicity. This did not sit well with the officer; frustrated by the denials and Pablo's inability to recite his friend's addresses and telephone numbers by heart, the detective told the jury that he got "the sense Pablo really didn't want to communicate with me" so he pulled from his pocket a still picture of the unmasked perpetrator and in a confrontational manner responded to Pablo's assertions of innocense,"then Pablo, how did I get this picture?"T.283825-26,3834-35.The thud of this accusation resounded loudly in the courtroom, as the prosecutor elicited this remark without asking how Pablo responded, leaving the jury to hear only the sounds of silence in the face of an accusation.

The State excuses these improprieties by contending that Mr. Ibar never invoked his right to remain silent. However, this

defense suggests that when a person chooses to talk to the officer, a detective can offer an opinion to the jury that the accused "didn't really want to communicate with me", thereby excusing this comment on silence. State v. Kinchen, 490 So.2d 21 (Fla. 1985) forbids any comment "fairly susceptible" of being a comment on silence. The unprovoked statement by the officer certainly qualifies.

The detective also managed to insinuate his unsolicited opinion that he believed Mr. Ibar was the man depicted in the crime scene video. Clearly, opinion of guilt testimony is prohibited. Martinez v. State, 761 So.2d 1078 (Fla. 2000). The officer directly told the jury, in his retort to Pablo's denials of guilt," then Pablo, how did I get this picture?" The State explains that the ban on a witness offering an opinion on guilt does not apply here, as Manzella's attack was not a direct comment. AB at 80. This side-step should fail; the scenario of the picture confrontation allowed the jury to hear the threefold opinion from the lead detective that (1) Pablo was lying, (2) Pablo wanted to remain silent, and(3) Pablo was guilty. A prompt defense objection preserved these errors, and warrant a new trial.

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

The defense objected to the introduction by the State of

Penalver's gang membership and criminal past as a witness finished imparting this information to the jury. The requirement that the issue be timely presented for a judicial ruling was met. Jackson v. State, 451 So.2d 458 (Fla.1984).

The State posits that a single gang reference is not so invidious as to undo an entire trial. Indeed, that is why this claim is together with the evidence of Penalver's criminal past and his expression of suicide; a pile of improprieties can accumulate to an unavoidable impediment to a fair trial. There was no excuse for tarring Mr. Ibar with Penalver's distraught reaction to his name being in a newspaper article connected to the crimes. The position of the State is that the evidence was admissible against Mr. Ibar as Penalver was a party-opponent under Section 90.803(18)(e), see AB at 89; this discussion omits any discussion of the Confrontation Clause. In any event, fatal to that claim is the fact that the statement was not uttered by the Defendant, nor made in his presence, precluding application of this genre of hearsay exceptions. The accumulation of these attacks on Penalver, designed to prejudice Mr. Ibar, was harmful error.

VIII.

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

Mr. Ibar would rely on those arguments of fact and law set

forth in his initial brief on this Point. He would contest, however, the statement made by the State that he did not raise in the trial court the claims that his Sixth Amendment right to a jury trial was violated by the lack of findings of fact in the jury recommendation and the lack of specific findings by the jury as to aggravating factors. AB at 91.However, the Supplemental Record at Volume 1 contains co-defendant Penalver's Motion to Declare Section 921.141, Florida Statutes Unconstitutional For Lack of Adequate Appellate Review, which Mr. Ibar adopted below. That motion argues that the absence of special verdicts in Florida regarding aggravating factors denies a defendant due process of law and violates the sixth amendment, thus preserving the issue for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. mail this _______ day of September, 2003 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,1515 North Flagler Drive, 9th 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,

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CERTIFICATE OF FONT COMPLIANCE

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