

SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC00-1602

**SETH PENALVER,**

Appellant,

- versus -

**STATE OF FLORIDA,**

Appellee.

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

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## **Preliminary Statement**

Appellant, defendant in the trial court below, will be referred to as “Appellant”, “Defendant” or “Penalver”. Appellee, the State of Florida, will be referred to as the “State”. References to the record will be by the symbol “R”, to the transcript will be by the symbol “T”, to any supplemental record or transcript will be by the symbols “SR” or “ST”, and to Penalvers’ brief will be by the symbol “IB”, followed by the appropriate page numbers.

## **Statement Of The Case and Facts**

Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications in the Argument section.

## **Summary of the Argument**

**POINT I:** The trial court properly allowed Ian Milman to testify that Alex Hernandez told him that he was going to North or South Carolina on the weekend the murders occurred. This testimony was admissible pursuant to Fla. Stat. Sec. 90.803 (3) because it was offered to prove Alex Hernandez's subsequent conduct.

**POINT II:** The trial court properly allowed the State to question Melissa Munroe about her conversation with Penalver's prior defense counsel.

**POINT III:** The trial court properly admitted the visitation records from the jail. The records were relevant to prove when Penalver learned that a photograph had been enhanced from the video of the crime.

**POINT IV:** The trial court properly found that Detective Manzella could not give his opinions regarding Pablo Ibar's truthfulness. However, the trial court properly denied Penalver's motion for mistrial.

**POINT V:** The trial court properly allowed Detective Manzella to testify about why he continued his investigation because defense counsel had attacked him about why he conducted his investigation in a certain manner.

**POINT VI:** The trial court properly allowed Detective Bonis to testify that Penalver resisted the taking of his sneakers because such testimony was relevant to show Penalver's consciousness of guilt.

POINT VII: The trial court properly allowed Melissa Munroe to testify that Penalver threatened suicide because the testimony was relevant to show Penalver's consciousness of guilt.

POINT VIII: Dr. Birkby was properly allowed to testify that a person who is familiar with an unknown individual in a poor quality photograph could possibly identify the unknown individual.

POINT IX: The prosecutor's closing argument was proper.

POINT X: The trial court did not abuse its discretion when it allowed the State to introduce Jean Klimeczko's former testimony because Klimeczko testified that he could not recall any prior statements he had made regarding this case.

POINT XI: The trial court did not abuse its discretion when it admitted testimony that Melissa Munroe and Jean Klimeczko identified Penalver in the photo that was enhanced from the video of the murders.

POINT XII: The trial court properly excluded the audiotape of the conversation between Kristal Fisher and Casimir Sucharski as the audiotape was made without Kristal Fisher's consent.

POINT XIII: The trial court properly admitted Jean Klimeczko's prior testimony.

POINT XIV: The evidence in this case was sufficient for conviction.

POINT XV: The trial court properly allowed Jasmine McMurt ry to testify that Kim San had told her that Penalver was involved in the murders because Penalver opened the door because he asked Jasmine McMurt ry about another conversation when Kim San had said she believed that Penalver was innocent.

POINT XVI: The trail court properly admitted Maria Casas' former testimony because she was unavailable as the State proved that she was dead at the time of trial.

POINT XVII: The trial court did not avbuse it's discretion when it admitted the prior testimony of Melissa Munroe, Jean Klimeczko, and Maria Casas.

POINT XVIII: The trial court properly allowed Detective Lillie to testify that Kim San did not ask for leniency for her Fiancé, Bill Grace, when she gave him information about this case.

POINT XIX: The trial court properly excluded Herschel Kinnaman's deposition.

POINT XX: Florida's capital sentencing scheme is constitutional.

POINT XXI: The death penalty in this case is reliable because the trial court was not required to appoint public counsel, the trial court properly gave great weight to the jury recommendation, and the trial court was not required to order a PSI.

POINT XXII: The trial court properly denied Penalver's request to present residual doubt evidence.

POINT XXIII: The death sentence is proportionate.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY ALLOWED IAN MILMAN TO TESTIFY THAT ALEX HERNANDEZ TOLD HIM THAT HE WAS GOING TO NORTH CAROLINA ON THE WEEKEND OF THE MURDERS. (RESTATED).

Penalver argues that the trial court improperly allowed Ian Milman (“Milman”) to testify that Alex Hernandez (“Hernandez”) told him that he was going to North or South Carolina the weekend the murders occurred. Penalver claims that evidence of an independent act by Hernandez is required to make the testimony of Milman admissible and that the hearsay statements are not trustworthy.

Primarily, any claim that the hearsay statement was untrustworthy was not properly preserved below. In this case, defense counsel never argued that the statement was untrustworthy, rather he only argued there has to be some evidence that Hernandez was actually in North Carolina in order to allow the statement into evidence (T. Vol. 73 pp. 9598-9639). It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and “the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.” Archer v. State, 613 So. 2d 446 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). See also, Steinhorst v. State, 412 So. 2d 332,

338 (Fla. 1982). Hence, because he failed to raise an objection below, Penalver's claim is not properly before this court.

Furthermore, the claim is meritless because the testimony was admissible pursuant to Florida Statutes Section 90.803 (3).<sup>1</sup> The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981); General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion"). Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Discretion is

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<sup>1</sup>Penalver argues that the standard of review is de novo because the trial court's ruling is contrary to the evidence code. The State disagrees because it is apparent that the trial court properly applied the rules of evidence.

abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

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

(3) Then-existing mental, emotional, or physical condition.

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

The state-of-mind exception to the hearsay rule permits the admission of extrajudicial statements to show the declarant's state of mind at the time the statement is made when it is an issue in the case. See United States v. Brown, 490 F.2d 758 (D.C.Cir.1974); Kennedy v. State, 385 So.2d 1020 (Fla. 5th DCA 1980); Van Zant v. State, 372 So.2d 502 (Fla. 1st DCA 1979). In addition, the state-of-mind exception allows the introduction of the declarant's statement of future intent to perform an act, if the occurrence or performance of that act is at issue. Morris v. State, 456 So.2d 471, 475 (Fla.App. 3 Dist. 1984) citing United States v. Brown, 490 F.2d 758 (D.C.Cir.1974), Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

Here, Penalver has failed to show that the trial court abused its discretion when it admitted the hearsay statement. In the instant case, the trial court held a hearing to determine whether Milman could testify about Hernandez's statement of future conduct. Defense counsel argued that in order to admit the testimony, there had to be some evidence that Hernandez actually went to North or South Carolina. (T. Vol. 72 pp. 9572-9594). The State argued that the plain meaning of the statute does not require that there must be some evidence that the future act was done, rather the key is whether the hearsay evidence is relevant to a fact in issue ( T. Vol. 72 p. 9574). In

this case, the issue is the defense theory that Alex Hernandez participated in the crimes, and the hearsay statement was properly admitted to refute that theory. The trial court ruled that based on the plain meaning of the statute and the United States Supreme Court decision in Hillmon, the hearsay testimony regarding Hernandez's statement to Milman was admissible.

Here, Penalver can not show that no reasonable person would take the view adopted by the trial court. Rather, the record reflects that the trial court reviewed the caselaw and statutes presented, carefully considered the arguments made, and properly exercised his discretion in admitting the testimony. Hence, the conviction and death sentence must affirmed.

However, should this court find that the trial court improperly admitted the testimony, any error was harmless beyond a reasonable doubt. The focus of a harmless error analysis "is on the effect of the error on the trier-of fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the verdict." Id.

The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court

to substitute itself for the trier-of-fact by simply weighing the evidence.

In this case, there is no reasonable possibility that the error affected the verdict. Here, Penalver argued that he was not the man on the surveillance video and that it could have been Alex Hernandez. However, Detective Paul Manzella testified that he ruled Alex Hernandez out as a suspect because video reflects that the other perpetrator was shorter than Pablo Ibar and Alex Hernandez is taller than Pablo Ibar (T. Vol. 56 pp. 7412-7414).

Moreover, Gary Foy, Casimir Sucharski's neighbor, testified that the morning of the murders he was leaving his home early to go bowling and he drove past Mr. Sucharski's home (T. Vol. 47 pp. 6025-6031). Mr. Foy saw two men get into Mr. Sucharski's Black Mercedes, back out, and pull behind him (T. Vol. 47 pp. 6031-6035). Mr. Foy said that the two men were white/Latin, and he thought it was unusual because Mr. Sucharski never let people drive his car (T. Vol. 47 p. 6041). Mr. Foy was able to positively identify Pablo Ibar as the passenger but did not get a good look at the driver (T. Vol. 47 6042).

Melissa Munroe testified that she had seen Penalver and Ibar at Casey's Nickelodeon, the victims night club, the weekend before the murders (T. Vol. 59 pp. 7862-7864). The State established that Munroe had identified Penalver in the enhanced

photo taken from the video that police showed her when they searched her home (T. Vol. 63 p. 8473-8496). Munroe also testified that Penalver was upset when he found out he was a suspect and said he wanted to kill himself because his life was ruined (T. Vol. 63 p. 8413).

Jean Klimeczko testified that in 1994 he was living at the Lee Street house with Pablo Ibar, Alberto Rincon, and Alex Hernandez (T. Vol. 67 p. 8915-8917). Klimeczko was found to be unavailable as a witness because he could not recall any prior statements or testimony that he had given in this case, therefore the State was permitted to read his prior testimony into the record. Jean Klimeczko had previously testified that on Saturday, June 25, 1994, Seth Penalver and Pablo Ibar went out together (T. Vol. 67 p. 8992). Klimeczko testified that at 5a.m. Pablo came into the Lee Street residence and grabbed a tec .9 gun and left (T. Vol. 67 p. 8994). Klimeczko woke up and saw Seth Penalver and Pablo Ibar at daybreak and he saw Seth in a new, shiny black car (T. Vol. 67 p. 8998). Klimeczko identified Seth Penalver in the enhanced photo (T. Vol. 70 p. 9308).

Ian Milman testified that the photo looked like Seth but he could not be sure (T. Vol. 72 p. 9547). Milman also testified that there was a tec .9 gun at the Lee Street house (T. Vol. 72 p. 9553-9569, 9657). Chris Bass testified that on September 2, 1994 he met Seth Penalver and Pablo Ibar in court (T. Vol. 74 p. 9793). Bass

overheard Penalver tell Ibar “that his Lawyer said he had a shot because he didn’t take his mask off” (T. Vol. 74 p. 9798).

David Phillips testified that he knew Seth Penalver through Kim San (T. Vol. 79 p. 10490). Phillips said that he was helping Kim move one weekend and he saw Seth Penalver and another guy at her house and they were driving a black Mercedes (T. Vol. 79 p. 10499).

Kim San testified that Seth moved in with her in January of 1994 and they were just friends (T. Vol. 83 p. 10899). On June 26, 1994 she was moving out of the four bedroom home they were sharing (T. Vol. 83 p. 10904). On June 25, Penalver was mad because she was moving out and when he called her from the car she knew Pablo Ibar was with him because she heard Penalver tell him to hang up the phone (T. Vol. 83 p. 10914). On Sunday morning, while she was moving out, Penalver and Ibar were at the house and they had a black Mercedes (T. Vol. 83 p. 10918-10919). Kim San identified Penalver as the man in the surveillance video of the murders (T. Vol. 83 p. 10955). Brenda Kinnaman testified that Kim San is her daughter and she was at the home in Sunrise helping Kim move (T. Vol. 86 p. 11396). Brenda Kinnaman saw Penalver and another man at home that morning (T. Vol. 86 p. 11400).

Hence, based on the evidence presented in this case coupled with the fact the jurors were able to watch the surveillance video of the murders, there is no reasonable

possibility that the error affected the verdict. The conviction and sentence must be affirmed.

## POINT II

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT MELISSA MUNROE HAD CONVERSATIONS WITH PENALVER'S ATTORNEY. (RESTATED).

Penalver argues that the trial court abused its discretion when it allowed Melissa Munroe to testify that she spoke to Mr. Roderman (Appellant's prior defense attorney). Here, the State was proving that Penalver had discovered that an enhanced photo of the video existed. The reasonable inference is that Penalver told Munroe that she had identified him at the scene of the crime, in an effort to convince her to change her testimony. Appellant claims that such testimony was irrelevant and any probative value was outweighed by undue prejudice arguing that such testimony suggested that defense counsel acted improperly.

The State would submit that although the trial court ruled that the State could ask Munroe about her conversations with Roderman, there was no error because the State was unable to establish that Roderman violated a court order and revealed secret information to Munroe in order to get her to change her testimony (T. Vol. 64 pp. 8614-8631). When questioned by the State about the subject matter of her

conversations with Roderman, Munroe testified that she didn't recall the subject matter of any conversation she had with him (T. Vol. pp. 8631-8639). Moreover, the fact that a gag order was in place was never revealed to the jury. Hence, there is no error in this case, as the State was not able to establish before the jury that Roderman violated a gag order and told Munroe that the police had a tape of the crime in order to get her to change her testimony. Moreover, the State never addressed the subject matter of the conversation during closing argument and never argued that Roderman tampered with Munroe's testimony (T. Vol. 1466-1469). Hence, there is no error and the conviction and death sentence must be affirmed.

### POINT III

THE TRIAL COURT PROPERLY ADMITTED  
VISITATION RECORDS FROM THE JAIL.  
(RESTATED).

Penalver argues that the trial court improperly admitted jail records showing the number of visits that occurred between Penalver and prior defense counsel Tim Day. Penalver claims that the State was improperly implying that Day relayed information to him about the existence of a video tape and that a phot had been enhanced from the tape. Melissa Munroe identified Penalver as the person in the enhanced photo. The reasonable inference is that Penalver, in turn told Munroe that such a tape existed, in an effort to change her testimony regarding her identification of Penalver.

This claim is meritless. A trial court has broad discretion in determining the relevance of evidence, and such a determination will not be disturbed absent an abuse of discretion. Sexton v. State, 697 So. 2d 833, 837 (Fla. 1997); Heath v. State, 648 So. 2d 660, 664 (Fla. 1994). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). “The test for admissibility of evidence is relevance. Generally, any facts relevant to prove a fact in issue are admissible unless admission is precluded by a specific rule.” Council v. State, 691 So. 2d 1192, 1194 (Fla. 4th DCA 1997). Florida Statute § 90.401 defines relevance: “Relevant evidence is evidence tending to prove or disprove a material fact.” Florida Statute §90.402 provides that “[a]ll evidence is admissible, except as provided by law.”

In this case, the jail records of visitation Penalver received from his attorney Tim Day were relevant to establish when Penalver found out that a photo had been enhanced from the video tape. In the instant case, Munroe identified Penalver in the enhanced photograph. Munroe testified that she spoke to Penalver after he turned himself in and she spoke to his attorneys (T. Vol. pp. 8614-8631). At the grand jury Munroe changed her statement and testified that she never identified Penalver that she only said the photo looked like him because she was forced to do so and at trial Munroe also testified that she was coerced into identifying Penalver(T. Vol. 63 pp.

8483-8396) . Here, the State was proving that once Munroe discovered that she had identified Penalver at the crime scene she changed her testimony. Hence, the jail records were relevant to show that there was a possibility that Melissa Munroe became aware that a video of the crime existed and that she changed her testimony thereafter. Therefore, Penalver has failed to show that the trial court abused it's discretion when it allowed the jail visitation records into evidence.

However, should this court find error, such error is harmless as argued in point I. Hence, the conviction and sentence must be affirmed.

#### POINT IV

THE TRIAL COURT PROPERLY FOUND THAT DETECTIVE MANZELLA COULD NOT TESTIFY ABOUT HIS OPINIONS WITH RESPECT TO CO-DEFENDANT IBAR. (RESTATED).

Penalver argues that the trial court improperly allowed Detective Paul Manzella (“Manzella”) to testify that he believed that Ibar was only telling him what he wanted to hear. Penalver claims that such testimony was an improper opinion.

Penalver's claim is not properly before this court. Here, Penalver has improperly argued that the trial court overruled his objection that the testimony was improper opinion testimony. In this case, there is no error because the trial court sustained Penalver's objection finding that Detective Manzella could not give his

opinion about what Ibar was telling him (T. Vol. 52 p. 6742). In this case, Penalver moved for a mistrial. (T. Vol. 52 p. 6735, 6743). The following day, the trial court addressed the defense motion for mistrial regarding Detective Manzella's opinion and found that Detective Manzella did not testify that he believed Ibar was lying, and denied the motion for mistrial (T. Vol. 53 p. 6893). Here, after the trial court denied the motion for mistrial, Penalver failed to ask the court to strike the testimony and cure the error. Hence, there is no error.

Furthermore, although Penalver has not addressed whether the trial court properly denied the motion for mistrial, the State submits that the trial court did not abuse its discretion when it denied the motion for mistrial. A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. Goodwin v. State, 751 So. 2d 537, 546 (Fla. 1999); Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); Hamilton v. State, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within the trial court's discretion); United States v. Puentes, 50 F.3d 1567, 1577 (11th Cir. 1995) (stating that a district court's ruling on a motion for a mistrial is reviewed for abuse of discretion); United States v. Honer, 225 F.3d 549, 555 (5th Cir. 2000) (reviewing the denial of a motion for mistrial for abuse of discretion).

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. A trial court's determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

Here, Detective Manzella never testified that Ibar was lying. Rather, the record reflects that Manzella spoke to Ibar at the Metro-Dade Police Department where he was being held on an unrelated crime. (T. Vol. 52 p. 6728). Ibar waived his rights and agreed to speak to Manzella regarding the murders (T. Vol. 52 p. 6729). Ibar told him that on June 26, 1994 he was at the Cameos Nightclub until three or four in the morning and then went to Casey's lounge, and at both locations he was with Jean Klimeczko and a girl named Latisha but could not give Manzella any additional information about Latisha (T. Vol. 52 p. 6730). Ibar told him that he slept at the Lee Street house and did not wake up until Monday, June 27th (T. Vol. 52 p. 6732). Manzella testified that he did not continue to question Ibar because "it had gotten to a point where I felt he was only telling me what he wanted me to hear" (T. Vol. 52 p. 6734). Penalver objected and requested a sidebar conference and the State argued that

the testimony is relevant because it helps establish that Ibar became more confrontational, and the tone and method of questioning that Manzella employed while talking to Ibar was relevant (T. Vol. 52 pp. 6737-6741). The trial court agreed with the defense that Detective Manzella's opinions were inadmissible (T. Vol. 52 p. 6742). However, the trial court denied the motion for mistrial, finding that Manzella never testified that he did not believe Ibar, ruling that there is a big difference between such a concept and the testimony that Manzella felt that Ibar was only telling him what he wanted to hear (T. Vol. 53 p. 6893). Moreover, the cases relied upon by Penalver to support his claim that the officer's opinion was improper are distinguishable from the instant case, as the opinion testimony in those cases was improper because the evidence was used to prove the ultimate issue of guilt.

In Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001), Sarah Riley, a non-charged co-defendant, admitted her complicity in committing the crimes with Acosta and the officer testified that he believed Riley had been truthful. The Fourth District reasoned that because Riley was the State's key witness against Acosta and the State's case hinged on her credibility, it was error for the officer to vouch for her credibility. Id. In the instant case, Ibar never testified at trial against Penalver and the State's case against Penalver did not hinge upon Ibar's credibility, hence there is no error in this case.

Additionally, in Gore v. State, 706 So. 2d 1328, 1336 (Fla. 1998), this court found that it was error for the officer to express an opinion about whether or not Gore lied to him. This case is inapplicable because here, Manzella never testified that Penalver had lied to him. Lastly, in Olsen v. State, 778 So. 2d 422 (Fla. 5th DCA 2001), the officer opined that he believed the victims version of the crime, this opinion went to the ultimate issue of guilt, whereas here, the opinion testimony in the instant case had nothing to do with Penalver's guilt.

In this case, there is no error in denying the motion for mistrial because Manzella's opinion did relate to the ultimate issue of Penalver's guilt. Hence, the trial court did not abuse its discretion in denying the motion for mistrial. Moreover, as argued in Point I, any error is harmless beyond a reasonable doubt.

#### POINT V

THE TRIAL COURT PROPERLY PERMITTED  
DETECTIVE MANZELLA TO TESTIFY ABOUT  
WHAT KLIMECZKO AND MILMAN TOLD HIM.  
(RESTATED).

Penalver claims that Detective Manzella's testimony about consistent facts he learned from Klimeczko and Milman was improper hearsay which entitles him to a new trial. Such a claim is meritless as the testimony was relevant to show why Detective Manzella continued his investigation in a certain manner. Moreover, the

testimony was also properly admitted to rehabilitate the witness after defense counsel attacked his methods of investigation.

“The test for admissibility of evidence is relevance. Generally, any facts relevant to prove a fact in issue are admissible unless admission is precluded by a specific rule.” Council v. State, 691 So. 2d 1192, 1194 (Fla. 4th DCA 1997). Florida Statute Section 90.401 defines relevance: “Relevant evidence is evidence tending to prove or disprove a material fact.” Florida Statute Section 90.402 provides that “[a]ll evidence is admissible, except as provided by law.”

Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court’s ruling. A trial court’s determination will be upheld by the appellate court "unless the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000), citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990).

In this case, during cross-examination of Detective Manzella, Penalver established that Milman and Klimeczko gave conflicting statements regarding their whereabouts the night the murders occurred. Klimeczko told Manzella that he was at the Lee street house with Milman and some girls. Milman told Manzella that he was

not at the house with Klimeczko. (T. Vol. 76 pp. 10107-10108). Defense counsel argued that this information threw a wrench into Klimeczko's alibi (T. Vol. 76 p. 10110). However, Manzella also testified during cross that although the statements had conflict, there were other statements that Milman made that were consistent with the facts that Klimeczko had given him (T. Vol. 76 p. 10113). On re-direct, the State wanted to establish what the consistency was between what Klimeczko and Milman said. Defense objected to this line of questioning arguing that it was inadmissible hearsay. The State argued that such evidence was admissible because Defense counsel had attacked Manzella's state of mind with respect to how he conducted the investigation by showing that Klimeczko and Milman made inconsistent statements and questioning why Klimeczko's version was more believable (T. Vol. 76 p. 10168). The State also argued that the consistent statements are not being offered for the truth of the matter asserted, but rather to explain Manzella's conduct as to why he continued the investigation and accepted Klimeczko's information. (T. Vol. 76 p. 10168). Defense counsel conceded that the issue surrounded the fact that he had attacked how Manzella conducted his investigation (T. Vol. 76 p. 10169). The trial court accepted the State's argument and allowed Manzella to testify that Milman and Klimeczko had both told him that the people who lived at the Lee Street home shared clothing and that there was a .9 millimeter gun and a .9 gun at the residence (T. Vol. 76 p. 10177).

Moreover, Penalver invited the State to rehabilitate Manzella when he attacked why Manzella followed Klimeczko's version over Milman's. A defendant cannot take advantage on appeal of a situation which he has created at trial. McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980); Czubak v. State, 570 So.2d 925,928 (Fla. 1990) Here, the record reflects that the defense theory throughout the trial was police misconduct/mistakes (T. Vol. 105 p. 13972). During cross examination, defense counsel attacked Manzella asking him why he believed Klimeczko over Milman (T. Vol. 76 p. 10112). Hence, it was proper for the State to establish why Manzella believed Klimeczko.

Additionally, should this court find any error, such error is harmless as argued in point I. The conviction and sentence must be affirmed.

#### POINT VI

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT PENALVER RESISTED THE TAKING OF HIS SNEAKERS AT THE JAIL. (RESTATED).

Penalver claims that the fact that he resisted the taking of his shoes is irrelevant and alternatively argues that any relevance was substantially outweighed by the undue prejudice. This claim is meritless as Penalver's resistance was properly admitted to

show his consciousness of guilt.

This Court has stated that the admission of evidence is within the trial court's discretion and will not be reversed unless a defendant demonstrates an abuse of discretion. See Medina v. State, 466 So.2d 1046 (Fla.1985); Jent v. State, 408 So.2d 1024 (Fla.1981). The law is well settled that "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such a fact is admissible, being relevant to the consciousness of guilt which may be inferred from such a circumstance." Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); Straight v. State, 397 So.2d 903, 908 (Fla.1981). In order to admit this evidence, there must be a nexus between the flight, concealment, or resistance to lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So.2d 988 (Fla.1997). Moreover, such an interpretation should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So.2d 9 (Fla.1985) (citing United States v. Borders, 693 F.2d 1318, 1325 (11th Cir.1982)).

In the instant case, the trial court held a lengthy hearing on whether or not the State should be allowed to admit evidence that Penalver resisted the taking of his shoes at the jail. In this case, the issue was first raised on October 4, 1999, and the State

argued that Penalver refused to give his shoes up the day he turned himself in to the police. The State also argued that pursuant to a search warrant, the police were properly requesting that Penalver give them his sneakers (T. Vol. 87 pp. 11604-11606). On October 5, 1999 the trial court held a hearing to determine whether or not evidence that Penalver resisted the taking of his sneakers was admissible (T. Vol. 88 p. 11730). Defense counsel argued that it is irrelevant whether Penalver turned the shoes over or not because the sneakers that were taken were never linked to the homicide (T. Vol. 88 p. 11731). The trial court ruled that the issue was whether Penalver believed the shoes had evidentiary value, and that so long as the State laid the proper evidentiary predicate, and shows that there was a search warrant, the testimony that Penalver resisted the taking of his shoes was admissible( T. Vol. 88 pp. 11740-11741).

Detective Mario Bonis (“Bonis”) testified that he went to the jail on August 4, 1994 to see Mr. Penalver because he had a search warrant directing him to go to the jail and remove Penalver’s shoes (T. Vol. 88 p. 11892, 11894). Bonis stated that he read the warrant to Penalver and instructed him that they were there to seize his shoes (T. Vol. 88 p. 11893, 11900). Bonis testified that there was evidence at the crime scene that indicated that certain shoes were worn by the perpetrators and the police were looking to obtain all of the footwear that belonged to the suspects in the case (T. Vol. 88 p. 11894). Bonis went to the jail at approximately 6:30 AM to obtain the shoes

(T. Vol. 88 p. 11897). Penalver refused to give Bonis his sneakers and refused to cooperate (T. Vol. 88 p. 11902). Bonis and another officer, Detective Ray, had to restrain Penalver and forcibly remove his shoes, while he kicked, flailed, and screamed (T. Vol. 88 p. 11902).

Here, Penalver has failed to show that the trial court abused its discretion by allowing testimony that Penalver resisted the taking of his shoes. In this case, a bloody shoe print was lifted from the scene of the crime, and Penalver was a suspect in the crime. Hence, there was a sufficient nexus between Penalver resisting the taking of his sneakers and the crime for which he is charged. Hence, the trial court did not abuse its discretion by allowing testimony that Penalver resisted the taking of his sneaker. The conviction and sentence must be affirmed.

Moreover, should this court find error, any error is harmless beyond a reasonable doubt as argued in Point I.

## POINT VII

THE TRIAL COURT PROPERLY ADMITTED STATEMENTS PENALVER MADE TO MELISSA MUNROE. (RESTATED).

Penalver claims that the trial court improperly allowed Melissa Munroe to testify that Penalver told her that he did not commit the murders, but there was nothing he could do because his name had become public and said that he might as well kill himself. Penalver claims that such evidence is irrelevant. This claim is meritless as Penalver's statement was relevant to show consciousness of guilt.

This Court has stated that the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. See Medina v. State, 466 So.2d 1046 (Fla.1985); Jent v. State, 408 So.2d 1024 (Fla.1981). The law is well settled that "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." Thomas v. State, 748 So.2d 970, 982 (Fla. 1999); Straight v. State, 397 So.2d 903, 908 (Fla.1981). In order to admit this evidence, there must be a nexus between the flight, concealment, or resistance to lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So.2d 988 (Fla.1997).

Moreover, the threat of suicide can be considered as consciousness of guilt

evidence. In Walker v. State, 483 So. 2d 791, 796 (Fla. 1st DCA 1986), relying on Straight, the court found that Walker's attempted suicide after he was suspected of murdering and sexually assaulting the victim could be considered by the jury as an indication of his desire to evade prosecution.

In the instant case, over objection, the trial court allowed Munroe to testify that Penalver was very upset that his name was in the paper regarding the instant murders (T. Vol. 63 p. 8412). Munroe testified that Penalver felt like there was nothing he could do and he was upset that his name was public (T. Vol. 63 pp. 8412-8413). Penalver told Munroe the he wanted to kill himself (T. Vol. 63 p. 8413-8414). It was not error for the trial court to allow Munroe to testify that Penalver threatened suicide as such evidence is admissible to prove consciousness of guilt. Moreover, at the time Penalver made the statement that he wanted to kill himself, he did so because he was aware that he was a suspect for the crimes and that the police wanted to question him. Hence, the trial court did not abuse its discretion when it admitted the testimony because there was a sufficient nexus between the statement and the crime. The conviction and sentence must be affirmed.

However, should this court find error, any error is harmless beyond a reasonable doubt as argued in point I. The conviction and sentence must be affirmed.

#### POINT VIII

DR. BIRKBY DID NOT TESTIFY BEYOND HIS  
EXPERTISE. (RESTATED)

Penalver claims that Dr. Walter Birky was improperly permitted to testify that someone who may be familiar with a person might recognize them in a poor quality photograph while a scientist is unable to. This testimony was properly admitted into evidence as Dr. Birkby was qualified as an expert in forensic anthropology.

The determination of witness's qualifications to express expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. Terry v. State, 668 So.2d 954 (Fla. 1996). A trial court has broad discretion in determining the range of subjects on which an expert witness can testify, and, absent a clear showing of error, the court's ruling on such matters will be upheld. Holland v. State 773 So.2d 1065 (Fla. 2000).

In this case, it is apparent from the record that the trial court did not abuse its discretion when it found that Birkby was qualified to render an opinion that it is possible for someone who is familiar with an unknown person to look at a poor quality photograph and recognize the person. Penalver claims that Dr. Birkby was never qualified as an expert in the field of witness perception. However, a review of the record shows that Dr. Birkby has been a forensic anthropologist for 35 years specializing in human identification (T. Vol. 99 p. 13170). Dr. Birkby has been

certified by the Board of Forensic Anthropology since 1978 (T. Vol. 99 p. 13172). Dr. Birkby teaches various seminars, as well as graduate teaching at the University of Kansas and has published articles and various papers on the subject of human identification (T. Vol. 99 pp. 13172-13174). Dr. Birkby received the DDL Stewart Award, which is awarded to anthropologists who work on human identification cases (T. Vol. 99 p. 13173). Dr. Birkby was accepted as an expert in the field of Forensic Anthropology without objection by the defense (T. Vol. 99 p. 13174).

Dr. Birkby testified that he was asked to examine various photographs of Penalver and some videotape (T. Vol. 99 p. 13178). Dr. Birkby also examined the videotape that was done by Dr. Iscan using superimposition (T. Vol. 99 p. 13180). Dr. Birkby reviewed various metric comparisons of images with a photo of Penalver and reviewed a comparison of Penalver's face with other images and compared various morphological features (T. Vol. 99 p. 13181). Dr. Birkby was unable to determine that the image in the videotape was Penalver (T. Vol. 99 pp. 13181-13182, 13209). Thereafter, the following colloquy occurred;

Prosecutor: Now, obviously, you're trying to identify using your scientific methods of an unknown photograph or the person in that photograph is unknown. Now, in the identification process of a person that is known, you know, the imaging of the photograph, as far as detail is concerned, were there enough there for conclusions to be reached, if a person knows that--if I know that the person there--that

image?

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

(T. Vol. 99 p. 13210).

Defense counsel objected and asked to strike the testimony (T. Vol. 99 p. 13211). Defense counsel argued that it was outside of Dr. Birkby's expertise to testify that a lay person would have greater ease in making an identification (T. Vol. 99 p. 13215). However, defense counsel's argument is wrong because Dr. Birkby never testified that a lay witness could make the identification with greater ease. Rather, he simply testified that it was possible for a lay person to be able to identify someone they know in a poor quality photograph.

Here, Dr. Birkby was qualified as an expert in human identification and the trial court did not abuse its discretion when it allowed the Doctor to testify that it was possible that someone who knows the unknown subject of a photo to recognize that person in a poor quality photo. Moreover, it is apparent from the record that Dr. Birkby was qualified to testify about whether or not a lay person could possibly make

an identification. The conviction and death sentence should be affirmed.

## POINT IX

### THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER. (RESTATED).

Penalver claims that the prosecutor made egregious comments during closing arguments and he is entitled to a new trial. This claim is meritless.

Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. See, Esty v. State, 642 So. 2d 1074, 1079 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995). "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982). In arguing to a jury "[p]ublic prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws." Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. denied, 372 U.S. 904 (1963). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So. 2d 486, 488 (Fla. 1993); Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992). Reversal is not required for comments which do not vitiate the whole trial or "inflame the minds and

passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti, 476 So. 2d at 134. The harmless error analysis applies to prosecutorial misconduct claims. State v. Murray, 443 So. 2d 955, 956 (Fla. 1984).

... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [c.o.] The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18 ... and its progeny....

Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So. 2d at 956. In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id. "In order for the prosecutor's comments to merit a new trial, the comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994).

A) Defense was putting blinders on the jury.

Penalver argues that the prosecutor improperly disparaged the defense when he argued that “...the defense attorney wants to put blinders on you so that he can limit the search to his own particular brand of truth” (T. Vol. 108 p. 14431). When read in context, the argument was simply fair reply to defense counsel’s claim that the prosecutor and police had made too many mistakes in the investigation of the case. Moreover, it is notable that the prosecutor prefaced his argument with the following:

The defense attorney has accused me, the police, and the witnesses of making mistakes and of trying to mislead you.

(T. Vol. 108 p. 14431).

Specifically, during his closing argument, defense counsel Moldof made the following accusations:

Sometimes we get these sidebars. Sometimes there’s better times than others. It wasn’t a particular good time for me, but what I was saying was Mr. Morton tells you this case is not about the Miramar Police Department, this case is not about Kristal Fisher, this case is not about drugs, this case is not about sex. And I agree with him, it’s not about that. **But what Mr. Morton wants to do again is have you ignore all those things and say they have no place in your consideration with your head. And the reality is that’s exactly what this case is about. It’s about the entirety of this case, it’s about the investigation.**

(Emphasis added)(T. Vol. 105 p. 13978).

[T]his entire case is rought with mistakes the police have made about Seth Penalver and these other people. They hid this photo from you for a long time.

(T. Vol. 106 p. 14132).

This is—Ladies and gentleman, if you take nothing else from my closing argument, please take this, **have Mr. Morton get up here and tell you how it could be that every civilian witness in this case tells you the police did something wrong when the tape wasn't on.** Have him explain that to you, have him explain how it is that every officer got up here, swore to you they didn't do it, and every single witness that supports the defense, that this is the wrong guy, that comes in and says well, here's what really happened, the State wants to say, it didn't happen.

(Emphasis added)(T. Vol. 106 p. 14151).

And this gives you perhaps a little insight to the conversation that Chuck Morton had with Kim San before she testified. Because Chuck Morton knew what was coming also with the forensic blood spatter identification expert. Basically, to a person, they're going to say that doesn't happen, You don't get red, pink bubbles—red or pink anything in the suds when you wash bloody clothes, but **Chuck Morton told Kim San listen, tomorrow, when you take the stand, if I don't ask you about the bubbles don't tell us about them,** otherwise when that question came out what did you see?

(Emphasis added)(T. Vol. 107 p. 14306).

It is apparent that after a review of the record, when taken in context, the prosecutors argument was a fair response to Defense Counsel Moldof's improper accusations and comments. See Garcia v. State, 644 So.2d 59, 63 (Fla. 1994)(finding that although the complained-of statements were improper when read out of context,

these comments must be considered as a response to defense counsel's direct comments against the prosecutor).

B. The prosecutor misquoted a witness.

Penalver next claims that the prosecutor misquoted a witness and improperly informed the jury that there had been a prior trial. While the record reflects that the prosecutor misstated the witnesses testimony, it is also apparent that the prosecutor immediately corrected the error. Moreover, the trial court ruled that the comment was unintentional and overruled Penalver's objection and motion (T. Vol. 108 p. 14464).

Here, Penalver has failed to establish that the comment contributed to the guilty verdict. Moreover, any error is harmless as the trial court instructed the jury the Seth Penalver had "...previously stood trial for this Indictment and that, that trial resulted in a mistrial" (T. Vol. 109 p. 14658). Therefore, because the jury was informed that another trial had occurred Penalver cannot show that he was prejudiced by the inadvertent comment. Hence, the conviction and sentence must be affirmed.

C. Prosecutor told the jury that evidence was being withheld by the defense.

Penalver claims that the prosecutor improperly argued that there was evidence that the defense and it's expert would not allow the jury to see. Here, defense counsel has misrepresented the tenor of the record, because when reviewed in the proper

context, it is apparent that the prosecutor's argument was proper. This claim is meritless as the prosecutor was merely commenting on the evidence presented at trial.

The record reflects the following argument regarding Dr. Iscan's testimony:

As far as the defense attorney talking about Foy proves that the cops manipulated Munroe, just right in ths testimony, this so-called pattern, if you talk about manipulating in this particular case, let's look at even Doctor Iscan. I'll talk about him a little more later, manipulating, coming up with things he says he's done.

(T. Vol. 108 p. 14462).

Thereafter the State reviewed Dr. Iscan's testimony during which he was impeached and argued that now Dr. Iscan says he sees landmarks in the video while at the prior proceeding he testified that no measurements had been done. The State argued that Dr. Iscan did not think the measurements were important enough for the jury to see (T. Vol. 108 p. 14464). These arguments cannot be interpreted as an attack on the defense for withholding evidence, rather, the comments are merely a review of the testimony that was given by Dr. Iscan.

D. Prosecutor improperly commented that Penalver had the same subpoena power.

Penalver claims that it was improper for the State to argue that the defense has the same subpoena power as the State. However, this claim is meritless as the prosecutor's argument when taken in the proper context was fair response to defense

counsel improper arguments. Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995) (finding argument proper where it is fair reply and directs jury to consider evidence). Where defense counsel commented upon the State's failure to call a witness who was demonstrably competent and available, a reply by the prosecuting attorney that the defense had the same ability to put on the witness was held not to prejudice the defendant's right to a fair trial. Dixon v. State, 206 So.2d 55 (Fla. 4th DCA 1968). Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983); Crowley v. State, 558 So. 2d 529, 530( Fla. 4th DCA 1990).

In this case, defense counsel made the following arguments;

But Rincon is exactly the size of the suspect they are looking for. Exactly, But they don't even bring Rincon in. They don't even march in Rincon or Hernandez for you to see them in the flesh.

(T. Vol. 105 p. 13998)

Now I've challenged the State a lot to do some things tomorrow. And I'll tell you some other things that provide doubts in this case. Where is Brian Kinnaman if he saw this Mercedes, or where's Dave Phillips or where's Miss Kinnaman talking about seeing a Mercedes.

(T. Vol. 107 p. 14408).

In this case, Alberto Rincon, Alex Hernandez, and Brian Kinnaman were never called to testify. Hence, based on the record in this case, it is apparent that the State

properly argued that the defense has the same subpoena power to call Rincon, Hernandez, or Brian Kinnaman.

E. “Good Citizens”, “Owe it to yourselves and the people of this community”, “Not a case of lesser included offenses”.

Penalver claims that the prosecutor improperly argued that the jury owed it to the community to come back with a guilty verdict and that it was not a case of lesser included offenses. This claim is meritless.

In this case the prosecutor made the following argument:

And now it's time, as good citizens, to be courageous and be just and you owe it to yourselves and the people of this community and I'm sure you will, and **I'm simply asking you, based on the law, and based on the evidence and the reasonable inferences that can be drawn**, you should return a verdict of guilty as charged to each count. This is not a case of lesser included offenses. It's guilty as charged, as to each count.

(Emphasis added)(T. Vol. 109 p. 14584).

It is apparent that the prosecutor never told the jury that they owed it to the community to find Penalver guilty. Rather, this was proper argument as the prosecutor was merely telling the jury to base their verdict on the law and the evidence as it was presented and that the lesser included offense do not apply to this case. In the instant case, Penalver has failed to show that any of the complained of comments materially contributed to the conviction.

Moreover, should this Court find error, any error is harmless beyond a reasonable doubt as argued in Point I. Hence, the conviction and sentence must be affirmed.

#### POINT X

#### THE TRIAL COURT PROPERLY ADMITTED KLIMECZKO'S PRIOR TESTIMONY. (RESTATED)

Penalver argues that Klimeczko's former testimony from the adversary preliminary hearing was improperly admitted pursuant to Fla. Stat. Sec. 90.803 (22). Penalver claims that the admission of such testimony violated his rights to confrontation, due process and a fair trial. This claim is meritless.

Primarily, the State would submit that Penalver has misrepresented the trial court findings. In the instant case, the trial court found that the former testimony was admissible pursuant to Fla. Stat. Sec. 90.804 because Klimeczko testified that he could not recall anything and alternatively found that the testimony was admissible pursuant to 803.22 (T. Vol. 67 p. 8956, 8978).

Moreover, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State,

408 So. 2d 1024, 1039 (Fla. 1981).

Florida Statutes Section 90.804 states:

(1) DEFINITION OF UNAVAILABILITY. “Unavailability as a witness” means that the declarant:

(a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of his statement;

(b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

(c) **Has suffered a lack of memory of the subject matter of his statement so as to destroy his effectiveness as a witness during the trial;**

(d) Is unable to be present or to testify at the hearing because of death or because of then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.

However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent of his statement in preventing the witness from attending or testifying.

(Emphasis added).

The burden of showing unavailability is on the party who seeks to use the testimony. Thompson v. State, 619 So.2d 261 (Fla.), Jackson v. State, 575 So.2d 181, 187 (Fla.1991); Lawrence v. State, 691 So.2d 1068 (Fla. 1997). Moreover, in Thompson, 619 So.2d at 265 (Fla.1993), this Court held that where a party intends to

admit former testimony of a witness, the confrontation clause requires that the party against whom the testimony is admitted "have an opportunity at the prior proceeding to cross-examine the witness". If the party challenging the admission of former testimony had the opportunity to cross-examine the witness, there is no confrontation clause violation. Id.; See Happ v. Moore, 784 So.2d 1091, 1100-1101 (Fla. 2001)(finding that where entire transcript of former testimony was read into the record, including the cross-examination, there is no confrontation clause violation, and no abuse of discretion by the trial court).

In the case at bar, Penalver has failed to show that the trial court abused its discretion when it admitted Klimeczko's former testimony. Direct examination by the State established that Klimeczko could not recall any of his prior statements, to the police, about the night the crimes occurred, nor could he recall anything he had previously testified about (T. Vol. 67 pp. 8948-8955). The trial court found that Klimeczko suffered from a loss of memory therefore, the former testimony was admissible pursuant to 90.804 and alternatively found the prior testimony under 90.803 (22) (T. Vol. 67 p. 8956, 8978).

Additionally, the entire direct and cross examination of Klimeczko was read into the record (T. Vol. 67 pp. 8957, 8981-9011, Vol. 68 9087-9108). The record reflects that Penalver had not only the right to cross-examination, but he exercised that right

in the prior proceeding. Klimeczko was under oath and subject to the penalty of perjury at the Adversary Preliminary hearing. Hence, in this case, Penalver had made absolutely no showing that the trial court abused its discretion by admitting the former testimony.

Alternatively, the trial court found that Klimeczko's former testimony was admissible pursuant to Fla. Stat. Sec. 90.803(22). Florida Statute section 90.803(22) states as follows:

(22) Former testimony.--Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

Moreover, should this court find that the testimony was inadmissible under Fla. Stat. Section 90.803 (22) such error is harmless because the testimony properly came in under Fla. State section 90.804 because Klimeczko was unavailable due to lack of memory. Lastly, should this court find that the trial court committed error by admitting the testimony, such error is harmless as argued in point I. Therefore, the conviction and sentence must be affirmed

## POINT XI

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT MELISSA MUNROE AND JEAN KLIMECZKO IDENTIFIED PENALVER IN THE PHOTO TAKEN FROM THE VIDEOTAPE. (RESTATED).

Penalver claims that the prosecutor improperly used the out-of-court statements of Munroe and Klimeczko as proof that Penalver was the person in the photos which were presented into evidence. Penalver argues that such evidence is improper opinion testimony, inadmissible and not governed by Fla. Stat. Sec. 90.801<sup>2</sup>. These claims are meritless as the testimony was admissible as non-hearsay pursuant to Florida Statutes section 90.801 (2)(a).

Primarily, Penalver's claims are not properly before this court. Below, Penalver never objected when the testimony regarding the photo identifications was presented (T. Vol. 63 pp. 8455, Vol. 67 pp. 9004-9005). It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993) (quoting

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<sup>2</sup> Although Penalver seems to claim that this testimony was admitted pursuant to Fla. Stat. Sec. 90.801 92)(c), the record reflects that the State pointed out to the trial court that the prior testimony was admissible under Fla. Stat. Sec. 90.801 (2)(a) as substantive evidence (T. Vol. 70 p. 9250).

Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). See also, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Therefore, these claims are not properly before this court as they have not been preserved.

Moreover, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981).

Moreover, Florida Statutes Section 90.801(2) states:

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

A) Testimony of Melissa Munroe.

The trial court properly allowed the Grand Jury testimony of Munroe to be read into the record as it is not hearsay because it is inconsistent with the testimony she

gave at trial. Fla. Stat. Sec. 90.801(2)(a). Furthermore, in Ellis v. State, 622 So.2d 991, 997 (Fla. 1993) citing United States v. Distler, 671 F.2d 954 (6th Cir. 1981), this Court found that within the hearsay exception for prior inconsistent statements made by a declarant subject to the penalty of perjury at trial, hearing or other proceeding, or in a deposition, the term "other proceeding" encompasses grand jury hearings.

In the instant case, at trial Melissa Munroe testified that she did not recognize the person in the photo that was shown to her, and stated that she was never able to identify the photo (T. Vol. 66 pp. 8444-8446, 8454). Munroe also testified that the photo does not look like Seth Penalver (T. Vol. 66 p. 8468). Hence, the State was properly permitted to read the grand jury testimony from August 25, 1994, wherein Munroe was subject to cross-examination and under oath subject to the penalty of perjury. At the Grand Jury Munroe testified that the pictures looked like Seth Penalver and Pablo Ibar, which is inconsistent with her trial testimony (T. Vol. 66 pp. 8456-8458, 8462). The State also read the portion of the testimony where Munroe explained that she only identified the photos because the police told her to and that she was not identifying Penalver and the picture could be anybody (T. Vol. 66 pp. 8461-8462). In this case, Penalver has failed to demonstrate that the trial court abused its discretion. Rather, it is apparent from the record that the Grand Jury testimony was properly read into the record pursuant to Fla. Stat. Sec. 90.801(2)(a).

Alternatively, should this court find error as argued in point I any error is harmless. Hence the conviction and sentence must be affirmed.

B. Testimony of Jean Klimeczko.

Primarily, the State relies upon the argument made in point X as Klimeczko's testimony from the Adversary Preliminary hearing was properly introduced pursuant to Fla. Stat. Sec. 90.804, because the trial court found that he was unavailable, and alternatively under Fla. Stat. Sec. 90.803 (22). Additionally, the testimony was admissible as it is not hearsay pursuant to Fla. Stat. Sec. 90.801(2)(a), because it is inconsistent with the testimony he gave at trial.

At trial in the instant case Klimeczko testified that he could not recall any of his prior statements to police, nor could he recall any prior sworn testimony he had given in this case (T. Vol. 67 pp. 8948-8955). Moreover, at the Adversary Preliminary Hearing that was read into the record, Klimeczko was subject to cross-examination, and under oath subject to the penalty of perjury (T. Vol. 67 pp. 8982-9009, Vol. 68 pp. 9096-9149, Vol. 69 pp. 9152-9180, Vol. 70 pp. 9260-9330, Vol. 71 pp. 9338-9454). At that hearing, Klimeczko identified Pablo Ibar and Seth Penalver in photographs he was shown (T. Vol. 67 p. 9005). Therefore, it is apparent from the record that Klimeczko's trial testimony was inconsistent with the prior testimony he gave at the Adversary Preliminary Hearing. Hence, Penalver has failed to prove that

the trial court abused it's discretion and the conviction and sentence must be affirmed.

Lastly, should this court find error, such error is harmless as argued in Point I.

## POINT XII

THE TRIAL COURT PROPERLY EXCLUDED THE  
AUDIOTAPE OF THE CONVERSATION BETWEEN  
CASEY SUCHARSKI AND KRISTAL FISHER.  
(RESTATED).

Penalver claims that the trial court improperly excluded the tape recording of the conversation between Casimir Sucharski and Kristal Fisher. This claim is meritless because Kristal Fisher did not consent to the conversation being recorded. Moreover, any error is harmless as Penalver was permitted to impeach Fisher with the tape.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981).

Moreover, Fla. Stat. Sec. 934.03(2)(c), permits a warrantless interception of oral communications where one of the parties to the communication has given prior consent to the interception and the purpose of the interception is to obtain evidence of a criminal act. See Tollett v. State, 272 So.2d 490 (Fla.1973), *receded from on*

*other grounds* State v. Welker, 536 So.2d 1017, 1020 (Fla.1988); Waters v. State, 444 So.2d 1135 (Fla. 2d DCA 1984).

In this case, Detective Manzella testified that through his investigation he determined that Kristal Fisher was unaware that the recording had been made (T. Vol. 53 p. 7021). Hence, the tape was inadmissible because Fisher did not consent to the recording.

Additionally, any error in not playing the tape for the jury was harmless because Defense counsel was permitted to impeach Fisher with the contents of the recording (T. Vol. 58 pp. 7700), Defense counsel was able to establish from the recording that Fisher had not picked up all of her belongings and that she and Casimir Sucharski were arguing about when she would be able to get the rest of her belongings, which included clothing and jewelry (T. Vol. 58 pp. 7700-7720). Hence, the conviction and sentence must be affirmed.

### POINT XIII

#### THE TRIAL COURT PROPERLY ADMITTED JEAN KLIMECZKO'S PRIOR TESTIMONY. (RESTATED).

Penalver argues that the cross examination from the adversary preliminary hearing should not have been admitted as evidence. Penalver has repeated the arguments made in point XI. For purposes of clarity the State relies on the argument

as set forth in point XI. Additionally, Penalver claims that an Adversarial Preliminary Hearing is different from the final trial and the cross examination should not have been introduced. Such a claim is meritless as the Adversary Preliminary Hearing was properly admitted as former testimony. The Supreme Court, in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), explained that when witness was unavailable for the trial yet witness appeared at a preliminary hearing and was cross-examined confrontation clause is not violated. Additionally, the court in United States v. Owens, 484 U.S. 554 (1988), held that the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination in whatever way the defendant might wish. Hence, the former testimony was properly admitted. Moreover, any error was harmless because the testimony was cumulative to Klimeczko's identification on direct examination during the Adversary Preliminary Hearing. Hence, the conviction and sentence must be affirmed.

#### POINT XIV

#### THE EVIDENCE PRESENTED WAS SUFFICIENT FOR CONVICTION. (RESTATED)

Penalver claims that the only evidence that he was involved in the crimes were the out of court statements of Melissa Munroe and Jean Klimeczko. This claim is meritless as there was an abundance of evidence in this case to prove that Penalver

was guilty on all counts.

"Sufficiency of evidence" is a test as to whether the evidence presented is legally adequate to justify the verdict. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982); Evans v. State, 692 So. 2d 966, 968 (Fla. 5th DCA 1997).

Where the only issue presented is the sufficiency of the evidence to sustain the verdict, and adequate evidence is presented to support the verdict, it is improper for the trial court to grant a new trial, even if there is conflicting evidence. In such a situation, it is the jury's function to evaluate the evidence.

State v. Hart, 632 So. 2d 134, 135, n. 2 (Fla. 4th DCA 1994). See Thomas v. State, 512 So. 2d 1099, 1101 (Fla. 5th DCA 1987)(circumstantial evidence contradicting defendant's theory of innocence should go the jury). The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction. I.R. v. State, 385 So. 2d 686, 688 (Fla. 3d DCA 1980).

An appellate court may not retry a case or reweigh the evidence. Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995); State v. Law, 559 So. 2d 187, 188 (Fla. 1989); Clark v. State, 379 So. 2d 97, 101 (Fla. 1979). A judgment of conviction comes to an appellate court clothed with the presumption of correctness, and an appellant's claim of insufficiency of the evidence cannot prevail where there is competent

substantial evidence to support the verdict and judgment. Terry v. State, 668 So. 2d 954 (Fla. 1996). Competent evidence is evidence which is probative of the fact or facts to be proven. Brumley v. State, 500 So. 2d 233 (Fla. 4th DCA 1986). Evidence is substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. Id. Competent substantial evidence, therefore, is such evidence, in character, weight or amount as will legally justify the judicial or official action demanded. Terry v. State, 668 So. 2d 954 (Fla. 1996).

When evidence supports two conflicting theories, the appellate court's duty is to review the record in the light most favorable to the prevailing party. Johnson v. State, 660 So. 2d 637 (Fla. 1995). The relevant question on appeal is, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict, whether there is competent, substantial evidence to support the jury's verdict and judgment. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982).

Under Florida law, premeditation can be formed in a moment and need only exist "for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, ---U.S.---, 112 S.Ct. 265, 116L.Ed. 218 (1991). The jury must determine whether a premeditated design to kill was formed before the killing.

Id.

“The charge of armed burglary is pursuant to chapter 810, Florida Statutes, entitled "Burglary and Trespass," which provides that " '[b]urglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein." Fla. Stat. Sec. 810.02(1). Burglary becomes armed burglary if, in the course of committing the offense, the offender "[i]s armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon." Fla. Stat. Sec. 810.02(2)(b). Armed burglary requires proof that an offender already was armed or that he armed himself once he entered a structure with the intent to commit an offense therein.” Gaber v. State, 684 So.2d 189 (Fla. 1996).

Elements of the crime of armed robbery with a firearm require proof that the defendant: (1) took property from the victim and the property was of some value; (2) used force, violence, assault, or put the victim in fear in the course of the taking; (3) intended to permanently or temporarily deprive the victim of the right to the property; and (4) carried a firearm in the course of committing the robbery. Fla. Stat. Sec. 812.13. The elements of attempted armed robbery are: (1) formation of an intent to commit the crime of robbery, (2) commission of some physical act in furtherance of the robbery, and (3) use of a firearm. Fla. Stat. Sec. 777.04(1), 812.13(2)(a).

In this case, there is competent, substantial evidence to support the jury finding

that Penalver was guilty of three counts of premeditated murder, one count of armed burglary, one count of armed robbery, and one count of armed robbery. The State presented a video tape of the crimes. That video depicts that each victim was shot twice, each one receiving a fatal gunshot wound at the base of the skull. The medical examiner testified that each victim had contact wound to the head because they were shot at such a close range (T. Vol. 43 pp. 5313-5345).

Moreover, Penalvers claim that there is no evidence other than Munroe and Klimeczko's identifications linking him to the crime is meritless. In this case, Gary Foy, Casimir Sucharski's neighbor, testified that the morning of the murders he was leaving his home early to go bowling and he drove past Mr. Sucharski's home (T. Vol. 47 p. 6025-6031). Mr. Foy saw two men get into Mr. Sucharski's black Mercedes, back out and pull behind him (T. Vol. 47 p. 6031-6035). Mr. Foy said that the two men were white/latin, and he thought it was unusual because Mr. Sucharski never let people drive his car (T. Vol. 47 p. 6041). Mr. Foy was able to positively identify Pablo Ibar as the passenger but did not get a good look at the driver (T. Vol. 47 6042). Ian Milman testified that the photo looked like Seth but he could not be sure (T. Vol. 72 p. 9547). Milman also testified that there was a tec .9 gun at the Lee Street house (T. Vol. 72 p. 9553-9569, 9657).

Chris Bass testified that on September 2, 1994 he met Seth Penalver and Pablo

Ibar in court (T. Vol. 74 p. 9793). Bass overheard Penalver tell Ibar “that his Lawyer said he had a shot because he didn’t take his mask off” (T. Vol. 74 p. 9798). David Phillips testified that he knew Seth Penalver through Kim San (T. Vol. 79 p. 10490). Phillips said that he was helping Kim move one weekend and he saw Seth Penalver and another guy at her house in a black Mercedes (T. Vol. 79 p. 10499).

Kim San testified that Seth moved in with her in January of 1994 and they were just friends (T. Vol. 83 10899). On June 26, 1994 she was moving out of the four bedroom home they were sharing (T. Vol. 83 p. 10904). On June 25, Penalver was mad because she was moving out and he called her from the car she knew Pablo Ibar was with him because she heard Penalver tell him to hang up the phone (t. Vol. 83 p. 10914). On Sunday morning while she was moving out Penalver and Ibar were at the house and they had a black Mercedes (T. Vol. 83 p. 10918-10919). Kim San identified Penalver as the man in the surveillance video of the murders (T. Vol. 83 p. 10955). Brenda Kinnaman testified that Kim San is her daughter and she was at the home in Sunrise helping Kim move (T. Vol. 86 p. 11396). Brenda Kinnaman saw Penalver and another man at home that morning (T. Vol. 86 p. 11400).

Therefore, it is apparent that the conviction is supported by competent substantial evidence. The conviction and sentence must be affirmed.

#### POINT XV

TRIAL COURT PROPERLY ALLOWED TESTIMONY  
BY JASMINE MCMURTRY THAT KIM SAN TOLD  
HER THAT PENALVER WAS INVOLVED IN  
MURDERS. (RESTATED).

Penalver claims that the trial court improperly allowed Jasmine McMurtry to testify that Kin San had told others that Penalver was involved in the murders. However, such testimony was admissible as it was admitted to rebut McMurtry's prior testimony that Kim San had said that Penalver was not involved in the murders.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981).

A prosecutor can use cross-examination to delve further into issues raised during the direct examination and to impeach a witness's credibility. See Steinhorst v. State, 412 So.2d 332, 337 (Fla.1982); Diaz v. State, 747 So.2d 1021, 1023 (Fla. 3d DCA 1999). Additionally, cross-examination is not limited to the exact details testified to on direct examination but extends to the whole subject and all matters that modify, supplement, contradict, rebut or make clearer the direct testimony. See Butler v. State, 27 Fla. L. Weekly S461(May 9, 2002); Francis v. State, 808 So.2d 110 (Fla. 2001);

Chandler v. State, 702 So.2d 186 (Fla.1997); Geralds v. State, 674 So.2d 96 (Fla.1996). Moreover, a defendant cannot take advantage on appeal of a situation which he has created at trial. McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980); Czubak v. State, 570 So.2d 925,928 (Fla. 1990)

In the instant case, during the direct examination of Jasmine McMurtry ("McMurtry"), over the State's objection, defense counsel was permitted to elicit from the witness testimony that Kim San had once said that Penalver was not guilty of the crime (T. Vol. 92 pp. 12244). Counsel established that the witness had gone with Kim San to meet with the defense investigator (Randy) at a Miami Subs (T. Vol. 92 pp. 12248-12249). McMurtry also testified that Kim San told Randy that Seth could not have committed the crime because she was at home at 7:30 and Seth was there (T. Vol. 92 p. 12250). During cross-examination by the State, over Penalver's hearsay objection, McMurtry testified that Kim San had also said at one time that she believed that Seth was involved in the murders (T. Vol. 92 p. 12261).

Here, Penalver relies upon Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001, however that case is inapplicable. In that case, Fourth District found it improper for a police officer to vouch for the credibility of witness and that such testimony invaded the province of the jury. Id. This is not what occurred here, McMurtry did not vouch for Kin San's credibility, she only testified to what she heard Kim San say to people.

Hence, it is apparent from a review of the record that McMurtry's testimony that Kim San told others that she believed Penalver was involved in the murders was properly admitted to rebut McMurtry's testimony on direct examination that Kim San had also said that Penalver was not involved in the murders. Additionally, even if this Court finds error, such error was invited by defense counsel's direct examination. Lastly as argued in point I any error is harmless. The conviction and death sentence must be affirmed

#### POINT XVI

#### THE TRIAL COURT PROPERLY ADMITTED MARIA CASAS FORMER TESTIMONY. (RESTATED).

Penalver claims that Maria Casas' prior testimony was improperly introduced into evidence. Penalver claims that the testimony was introduced as a subterfuge to introduce testimony of police as to Casas' out of court statements in which she allegedly identified Ibar as being one of the perpetrators.<sup>3</sup> This claim is meritless.

Initially, the State would submit that any claim that the testimony was improper has been waived. Here, defense counsel agreed that the prior testimony would be admissible (T. Vol. 49 p. 6352). See Cox. v. State, 819 So.2d 705, 715(Fla.

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<sup>3</sup> Penalver has failed to cite to any location in the record where such testimony exists, nor has he stated which officers testified as such, hence, the State is unable to respond as Penalver has failed to specifically identify any error.

2002)(finding that where the error asserted by Cox was not only invited, it was fully discussed, and agreed to by defense counsel). Under Florida law, "[a] party may not invite error and then be heard to complain of that error on appeal." Pope v. State, 441 So.2d 1073, 1076 (Fla.1983). Therefore, any claim that the testimony is improperly before the jury has Penalver agreed to the introduction of the testimony.

Moreover, the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981).

Moreover, pursuant to Florida Statute, Section 90.804, Casas' testimony is not hearsay and admissible as she is dead. The relevant portion of Fla. Stat. Sec. 90.804 states:

(1) Definition of unavailability.--"Unavailability as a witness" means that the declarant:

(d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity;

(2) Hearsay exceptions.--The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(a) Former testimony.--Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

In the instant case, the State established that Maria Casas was dead (T. Vol. 50 p. 6428, 6463). Moreover, the record reflects that the witness was under oath and subject to cross examination at a prior proceeding (T. Vol. 51 p. 6576). Hence, pursuant to Fla. Stat. Sec. 90.804, the testimony was properly introduced into evidence. The conviction and death sentence must be affirmed.

## POINT XVII

THE TRIAL COURT PROPERLY ADMITTED THE PRIOR TESTIMONY OF MELISSA MUNROE, JEAN KLIMECZKO, AND MARIA CASAS. (RESTATED).

Penalver has merely summarized the points he has made in points X, XI, and XVI and for purposes of clarity the State relies upon the arguments made in those

claims. Additionally, the State submits that such a claim is not properly before this court as no objection was made below on such a basis. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and “the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.” Archer v. State, 613 So. 2d 446 (Fla. 1993) (quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985)). See also, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Therefore, these claims are not properly before this Court.

Lastly, the State submits that Morton v. State, 689 So. 2d 259 (Fla. 1997) is inapplicable to the instant case. In Morton, the court found 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. In this case, the former testimony of these was properly admissible pursuant to the rules of evidence and was not solely introduced for purposes of impeachment.

#### POINT XVIII

THE TRIAL COURT PROPERLY ALLOWED TESTIMONY ABOUT WHY KIM SAN CAME FORWARD WITH INFORMATION AFTER THE MURDERS. (RESTATED).

Penalver claims that Kim San only came forward with information regarding the

crimes three years after they occurred in an effort to seek a deal for her fiancée, Bill Grace, who was in trouble with the law. Penalver improperly argues that the trial court allowed Jasmine McMurtry to testify that Kim San came forward because she felt badly, and never mentioned Bill Grace. However, upon a review of the record, Penalver is actually citing to the cross examination by the State of Detective Lillie. Moreover, such a claim is meritless because defense counsel opened the door for the State to cross examine the witness about Kim San's motives for coming forward.

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981).

It is well established that cross-examination extends to the "entire subject matter" of the direct examination including "all matter[s] that may modify, supplement, contradict, rebut or make clearer the facts testified to" on direct. Francis v. State, 808 So.2d 110, 140 (Fla. 2001). Furthermore, in Rodriguez v. State, 753 So.2d 29 (Fla.2000), this Court explained the concept of "opening the door", finding that as an evidentiary principle, the concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence

previously admitted. Moreover, a defendant cannot take advantage on appeal of a situation which he has created at trial. McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980); Czubak v. State, 570 So.2d 925,928 (Fla. 1990).

In this case, on direct examination of Detective Lillie, defense counsel asked him if Kim San had been asking for leniency for her fiancée Bill Grace. Detective Lillie testified that Kim San had come looking for help for Bill Grace, however, she was offering information on a crime unrelated to this case (T. Vol. 95 p. 12621). During cross examination, the State established that when Kim San was talking to Detective Lillie about the instant case she never mentioned Bill Grace (T. Vol. 95 p. 12623). It is apparent from the record that Penalver was inferring that Kim San had come forward about the homicide for disingenuous reasons and the State properly questioned Detective Lillie about her motives. Hence, the conviction and sentence must be affirmed. Additionally, should this court find error, such error is harmless as argued in point I.

#### POINT XIX

THE TRIAL COURT PROPERLY EXCLUDED THE  
DEPOSITION OF HERSCHEL KINNAMAN.  
(RESTATED).

Penalver claims that the trial court improperly infringed upon his due process rights when it prohibited him from presenting Herschel Kinnaman's deposition. The

trial court did not abuse its discretion when it found that the deposition was not admissible pursuant to 90.801(2)(c) because Mr. Kinnaman never testified at a trial or hearing. Additionally, the trial court properly found that the deposition was not admissible pursuant to 90.803 (22).

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997); Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). The relevant portion of 90.801 states as follows:

(2)A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is;

(c) One of identification of a person made after perceiving the person.

Florida Statutes Section 90.801(2)(c) excludes from the definition of hearsay out-of-court statements of identification only when the declarant also testifies at trial. State v. Freber, 366 So.2d 426 (Fla.1978); Hayes v. State, 581 So.2d 121, 124 (Fla. 1991). In this case, it is clear from the record that the trial court properly found that since Herschel Kinnaman never testified at the trial or at a hearing, his deposition was not admissible pursuant to Fla. Stat. Sec. 90.801 (2)(c).

Additionally, the trial court properly found that the deposition was inadmissible pursuant Fla. Stat. Sec. 90.803(22). Discovery depositions may not be used as substantive evidence in a criminal trial. State v. James, 402 So. 2d 1169, 1171 (Fla. 1981); State v. Green, 667 So. 2d 756 (Fla. 1995). Hence, Penalver can not show that the trial court abused it's discretion as he properly followed the rules of evidence and excluded the deposition. The conviction and sentence must be affirmed.

### **POINT XX**

#### **FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL (RESTATED).**

Penalver claims that he is entitled to relief based on the United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2445 (2002). This Court's decision in Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001) which was premised in part on Walton v. Arizona, 497 U.S. 639 (1990), is no longer viable because Ring explicitly overruled Walton. Based on the assumption that Ring applies to Florida's sentencing scheme, Penalver alleges that the (1) the jury's role in Florida's sentencing scheme is insignificant, and (2) aggravating factors must now be pled in the indictment as they are to be considered elements of the offense of capital murder.

In this case, Penalver failed to object below on these grounds. It is well established that for an issue to be preserved for appeal, it must be presented to the

lower court and “the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.” Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, Penalver never challenged the constitutionality of the death penalty statute based on the arguments presented here. At no time did Penalver argue that the jury’s “advisory role” was constitutionally deficient or that the State was required to place the aggravating factors in the indictment. Hence, the claim is not properly before this court.

Notwithstanding the procedural default, this Court has clearly rejected the argument that Ring has implicitly overruled its earlier opinions upholding Florida’s sentencing scheme. In Bottoson v. Moore, 27 Fla. L. Weekly S891 (Fla. October 24, 2002) this Court stated:

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

Consequently Penalver is not entitled to relief based on Ring.

Moreover, even if Ring was applicable in Florida and the issue had been preserved for review, Ring, is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of Anderson's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Ring, which did not directly or indirectly address Florida law, provides no basis for consideration of Ring in this case. The United States Supreme Court recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151

(4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that Apprendi is not retroactive). Every federal circuit that has addressed the issue had found that Apprendi is not retroactive. See, e.g., McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of Apprendi has, likewise, determine that the decision is not retroactive. Whisler v. State, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. DeStefano v. Woods, 392 U.S. 631 (1968) (refusing to apply the right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the fact-finding process being done by the judge rather than the jury).

As for the merits, the state further asserts that Ring does not apply to Florida's death penalty scheme. The Arizona statute at issue in Ring is different from Florida's death sentencing statute:

Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum penalty he could have received was life imprisonment.

Ring v. Arizona, 122 S.Ct. at 2437. Under Arizona law, the determination of death eligibility takes place during the penalty phase proceedings, and requires that an aggravating factor exists. This Court has previously recognized that the statutory

maximum for first degree murder in Florida is death, and has repeatedly rejected claims similar to those raised herein. Cox v. State, 819 So. 2d 705 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), cert. denied, Case No. 01-9932 (U.S. June 28, 2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, Case No. 01-7092 (U.S. June 28, 2002); Mills, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. Ring, at \*13; Mullaney v. Wilbur, 421 U.S. 684 (1975).

Moreover, contrary to petitioner's claim, Ring does not require jury sentencing in capital cases, rather it involves only the requirement that the jury find the defendant death-eligible. Id. at n.4. A clear understanding of what Ring does and does not say is essential to analyze any possible Ring implications to Florida's capital sentencing procedures. As already recognized by this Court, the Ring decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989). Indeed the opinion quotes Proffitt v. Florida, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is

constitutionally required."). Ring, at \*9, n.4. In Florida, any death sentence which was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in Ring, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

And finally, to the extent Ring would be applicable to petitioner the requirements of same have been met. In this case, the jury recommendation was 12-0 (R. Vol. X pp. 1883-1885). Hence, one could infer that at least one aggravating factor had been found by the unanimous jury. Moreover, the trial court found the existence of the aggravating factor that the murder was committed during the course of a felony (R. Vol. X p. 1989).

Additionally, the trial court found the existence of the aggravator factor that petitioner had been convicted of another prior violent felony (R. Vol. X p. 1988-1989). The prior violent felony aggravator is exempted from the holding in Apprendi. Apprendi explicitly exempted recidivist factual findings from its holding. Apprendi, 530 U.S. at 490 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt). Thus, a trial court may make factual findings regarding recidivism. Walker v. State, 790 So.2d 1200, 1201 (Fla. 5<sup>th</sup> DCA 2001)(noting that Florida courts, consistent with Apprendi's language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an Apprendi). Because this is a recidivist aggravator, the prior violent felony aggravator may be found by the judge even in the wake of Ring. Ring, 122 S.Ct. 2445 at n.4 (noting that none of the aggravators at issue related to past convictions and that therefore the holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged).

In summary, this claim is procedurally barred, Ring is not subject to retroactive application, Ring does not apply to Florida's sentencing scheme; and Florida's sentencing scheme is constitutional even in light of Ring. Consequently, for the reasons stated above, Penalver is not entitled to relief based on Ring.

#### POINT XXI

THE DEATH PENALTY IN THIS CASE IS RELIABLE.  
(RESTATED).

In this case, Penalver claims that the trial court improperly denied defense

counsel's motion to appoint public counsel to investigate and present mitigation. Penalver also claims that the trial court erroneously gave great weight to the jury recommendation of death. Lastly, Penalver argues that a PSI should be required regardless of the fact that he was convicted and sentenced prior to the Muhammad decision. These claims are meritless and each will be addressed in turned.

First Penalver claims that the trial court improperly denied his motion to appoint public counsel to present mitigation. Initially, the State submits that such a claim was waived. Below, at a the hearing, the following colloquy occurred:

The Court: You are asking me not to appoint another attorney, correct?

Mr. Penalver: Yes Sir

(T. Vol. 110 p. 14715).

The Court: So you are saying no, you don't want counsel appointed?

Mr. Rastatter: It would be an exercise in futility on your behalf.

(T. Vol. 110 p. 14716).

Under Florida law, "[a] party may not invite error and then be heard to complain of that error on appeal." Pope v. State, 441 So.2d 1073, 1076 (Fla.1983). Here, the "error" asserted by the appellant was not only invited, it was fully discussed and

agreed to by trial counsel and Penalver. Hence, any claim has been waived.

Turning to the merits, in this case, Penalver has failed to allege that the trial court abused its discretion. Rather a review of the record reflects that after hearing argument, the trial court properly exercised its discretion and denied the motion. Muhammad v. State, 782 So.2d 343, 364 (Fla. 2001)(finding that the trial court possesses the discretion to appoint counsel to present the mitigation). Moreover, in Farr v. State, 656 So.2d 448, 450 (Fla. 1995) this court reasoned that while it is true that in Klokoc v. State, 589 So.2d 219, 220 (Fla.1991), the trial court exercised its own independent discretion and appointed special counsel to present a case for mitigation after Klokoc forbade his own attorney to do so. However, in Farr, this court found that nothing in Klokoc modified the core holding of Hamblen v. State, 527 So. 2d 800 (Fla. 1988), that there is no constitutional requirement that such a procedure be used. Id. This court went on to find that while trial courts have discretion to appoint special counsel where it may be deemed necessary, there is no error in refusing to do so. Id. Hence, even in the wake of Muhammad, this court has maintained that the appointment of public counsel to present mitigation is discretionary to the trial court and Penalver has presented no reason for this court to revisit the issue.

Penalver's second claim is that the trial court erroneously gave great weight to

the jury recommendation where the jury heard no evidence in mitigation. Here, Penalver relies upon Muhammad to support his claim however, this court's ruling in Muhammad is not retroactive to the instant case. Specifically, this court found that the adoption of a prospective procedure in the Muhammad case would not call into question those cases that are already final on appeal or those cases that already have been tried but not yet decided on appeal at the time this opinion is rendered. Muhammad, 782 So. 2d at 365.

Moreover, in Espinosa v. Florida, 505 U.S. 1079, 1081 (1992), the United States Supreme court found that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation. This court has held that a jury determination, irrespective of whether it is for life or death is entitled to great weight. Grossman v. State, 525 So.2d 833, 846 (Fla.1988), King v. State, 623 So. 2d 486, 489 (Fla. 1993), Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995) (jury's recommendation is given great weight in determining the final sentence imposed on a defendant). "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla.1975).

Moreover, in White v. State, 616 So.2d 21, 25 (Fla. 1993), this court found that it is illogical that "great weight" means one thing when applied to a life recommendation but something else when applied to a death recommendation. Hence, the trial court properly afforded great weight to the jury recommendation.

Penalver's third claim is that the trial court erroneously failed to order a PSI. However, this claim is meritless as previously argued, this Court ruled that it's decision in Muhammad is not retroactive to that those cases that are already final on appeal or those cases that already have been tried but not yet decided on appeal. Muhammad, 782 So. 2d at 365. Moreover, Penalver has failed to give any reason for this court to overturn it's decision. The death sentence must be affirmed.

#### POINT XXII

#### THE TRIAL COURT PROPERLY DISALLOWED THE PRESENTATION OF RESIDUAL DOUBT EVIDENCE (RESTATED).

Penalver argues that the trial court improperly prohibited the jury from considering residual doubt as a mitigating circumstance. This claim is meritless as the trial court properly disallowed the presentation of guilt phase evidence and properly

denied Penalver's request to present residual doubt as a mitigating circumstance.

This Court has followed the holding of the United States Supreme Court that there is no constitutional right to present "lingering doubt" evidence. See Sims v. State, 681 So.2d 1112, 1117 (Fla.1996); Franklin v. Lynaugh, 487 U.S. 164, 173-74, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (rejecting the argument that the Eighth Amendment requires a capital sentencing jury to be instructed that it can consider lingering doubt evidence in mitigation). This Court has repeatedly observed that residual doubt is not an appropriate mitigating circumstance. See Darling v. State, 808 So.2d 145(Fla. 2002); Way v. State, 760 So.2d 903 (Fla. 2000); Preston v. State, 607 So.2d 404, 411 (Fla.1992) (rejecting residual doubt as an appropriate mitigator); King v. State, 514 So.2d 354, 358 (Fla.1987) (same), cert. denied, 487 U.S. 1241 (1988). Therefore, the trial court properly excluded this testimony.

Hence, there is no reason for this court to revisit the issue as this Court has previously rejected the presentation of such evidence as it would serve only to create a lingering doubt of the defendant's guilt. The death sentence should be affirmed.

### **POINT XXIII**

#### **THE DEATH SENTENCE IS PROPORTIONATE.**

Although Penalver has not challenged the proportionality of his sentence, the Court is required to complete such a review. Gore v. State, 784 So. 2d 418, 438 (Fla.

2001) (recognizing even absent challenge, Court “has an independent duty to review the proportionality of [the] death sentence as compared to other cases where the Court has affirmed death sentences.”); Jennings v. State, 718 So. 2d 144 (Fla. 1998). Proportionality review is to consider the totality of the circumstances in a case compared with other capital cases to ensure uniformity. Urbin v. State, 714 So. 2d 411, 416-17; Terry v. State, 668 So. 2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The Court’s function is not to reweigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So. 2d 6 (Fla. 1999).

In this case, there a video tape of the murders of Casimir Sucharski, Sharon, Anderson, and Marie Rogers. The video reflects that the victims were forced to lie on the floor face down while Penalver and his co-defendant Ibar burlarized the home and repeatedly beat Casimir Sucharski for a period of twenty two minutes. All three victims were shot twice and they died from gunshot wounds to the head (T. Vol. 42 p. 5309-5313). The video also reflects that both defendant’s shot each victim once and that after Ibar had shot all three victims, Sharon Anderson was still alive, picks

up her head and Penalver went back to her and shot her execution style. The record reflects that Pablo Ibar knew Casimir Sucharski and the weekend before the murders, Ibar and Penalver were at Casimir Sucharski's night club, Casey's Nickelodeon (T. Vol. 66 pp. 8822-8826). In this case, the trial court found six(6)aggravators; prior violent felony, felony murder (burglary and robbery), avoid arrest, heinous, atrocious or cruel ("HAC"), and cold, calculated and premeditated ("CCP"), one statutory mitigator; Penalver was 21 at the time of the crime (little weight), and five(5) non-statutory mitigators. (T. Vol. 2001)

The State relies upon Rimmer v. State, 27 Fla. L. Weekly S633 (Fla. July 3, 2002), Bush v. State, 682 So.2d 85 (Fla. 1996), Alston v. State, 723 So.2d 148, 153 (Fla. 1998), and Knight v. State, 746 So.2d 423 (Fla. 1998), in support of its argument that Penalver's death sentence is proportionate. Rimmer involved a robbery of a car stereo store, and the execution style murders of the two employees of the store. The victims in Rimmer were forced to lie face down on the floor while Rimmer and his co-defendants loaded merchandise into their car. Id. The Defendant's began to drive away and then Rimmer returned, and said to one of the victims "you know me", put the gun to the back of his head and shot him. Rimmer then approached the other store employee, who was still face down on the floor, and shot him in the back of the head. Id. The criminal episode lasted fifteen or twenty minutes. Id. This court affirmed five

aggravating circumstances; Rimmer was under a sentence of imprisonment, prior violent felony, felony murder, avoid arrest, and CCP, no statutory mitigation and several non-statutory mitigators. Id.

Bush involved the robbery of a convenience store and the abduction of the store clerk, who was driven 13 miles away, stabbed and then shot once in the head, execution style. The trial court found only three (3) aggravators—"prior violent felony," "felony-murder," and CCP-- and no mitigators. See also Cave v. State, 727 So.2d 227 (Fla. 1998)(affirming death sentence for Bush's co-defendant in the robbery and murder); Parker v. State, 476 So.2d 134 (Fla. 1985) (same).

In Alston, the victim's car and money were robbed and he was shot twice in the head, execution-style. All of the aggravators in this case, with the exception of committing the murders while under sentence of imprisonment, were present in Alston. Like here, the trial court found no statutory mitigators and gave little or no weight to three (3) of the five (5) non-statutory mitigators. Finally, in Knight, the victims were robbed of \$50,000 and then shot to death. This Court found Knight's death sentence proportional, relying upon Rolling v. State, 695 So.2d 278 (Fla.) (affirming death sentences for multiple murders despite defendant's significant statutory and nonstatutory mental mitigation, including family's history of mental illness and defendant's physically and mentally abusive childhood), cert. denied, 522 U.S. 984,

118 S.Ct. 448, 139 L.Ed.2d 383 (1997), and Heynard v. State, 689 So.2d 239 (Fla. 1996)(affirming two death sentences despite trial court's finding of both statutory mental mitigators and nonstatutory mitigation involving defendant's stunted emotional level, low intelligence, impoverished upbringing, and dysfunctional family), cert. denied, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (1997). See also Jennings v. State, 718 So.2d 144 (Fla. 1998) (affirming death sentence for murders of three (3) employees of Cracker Barrel Restaurant, who were robbed and then had their throats slit; with "felony murder," "avoid arrest/hinder law enforcement," and CCP aggravators, one statutory mitigator-- that Jennings had no significant history of prior criminal behavior and eight (8) nonstatutory mitigators, most of which were given little weight); Hartley v. State, 686 So.2d 1316 (Fla. 1996)(affirming death sentence where drug dealer was robbed and shot four (4) times in the head and where the trial court found "prior violent felony," "felony murder," "avoid arrest," "pecuniary gain," "HAC" and "CCP" aggravators and minimal mitigation); Fennie v. State, 648 So.2d 95 (Fla. 1994)(affirming death sentence where victim was robbed for her car and ATM cards and where the trial judge found "felony murder," "avoid arrest," "pecuniary gain," "HAC," and "CCP" and found a number of nonstatutory mitigating factors but determined that they were not of sufficient weight to preclude the death penalty); Troedel v. State, 462 So.2d 392 (Fla. 1984)(affirming death sentences where the

victims were robbed and shot to death in their home and where the trial court found the “felony murder,” “avoiding arrest,” “pecuniary gain,” “HAC,” and “CCP” aggravators, no statutory mitigators and give little weight to the nonstatutory mitigators). This Court should affirm Penalver’s death sentence..

**CONCLUSION**

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's conviction and death sentence.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing “Supplemental Answer Brief,” has been furnished by U.S. mail, postage prepaid, to Jeffrey L. Anderson, Esq., Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401.

\_\_\_\_\_  
Melanie A. Dale

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman.

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Melanie Ann Dale