IN THE SUPREME COURT OF FLORIDA

CRUZ MARTA-RODRIGUEZ,	:	
Appellant,	:	
vs.	:	Case No. 85,326
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

References in this brief to the first three volumes of the record on appeal herein, which consist of copies of documents from the circuit court file, will be designated by "R," followed by the page number. References in this brief to the remaining seven volumes of the record on appeal herein, which consist of transcripts and copies of exhibits, will be designated by "T," followed by the page number.

STATEMENT OF THE CASE

On May 18, 1994, a six-count indictment was filed against Appellant, Cruz Marta-Rodriguez, and five other people in Hillsborough County Circuit Court. (R 58-64)[1] Count One charged Appellant and Luis Manuel Pecina, Alice Ann Knestaut, Serafin Licor, Jr., Christopher Nicholson, and Carl Emerson King with the first degree murder of Rodrigo Miguel. (R 58) Count Two charged the same people with the first degree murder of Alfredo Garcia. (R 59) Count Three charged them with armed kidnapping of Rodrigo Miguel. (R 59) Count Four charged armed kidnapping of Alfredo Garcia. (R 60) Count Five charged attempted armed robbery of Rodrigo Miguel. (R 61) The final count charged attempted armed robbery of Alfredo Garcia. (R 61-62)

Appellant's cause proceeded to a jury trial on January 9-12, 1995, with the Honorable Diana M. Allen presiding. (T 1-901)[2] On January 11, 1995, Appellant's jury found him guilty as charged in all six counts of the indictment. (R 386-390, 702-703)[3] Penalty phase, at which the jury received evidence from both the State and the defense, was held on January 12, 1995. (T 712-901) During penalty deliberations, the jury propounded the following question to the court: "May we recommend that the life sentences run

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[1] This indictment superceded an earlier indictment that was filed on May 4, 1994. (R 47-55, 58-64)

[2] Appellant's codefendants had not yet been tried at the time of his trial. (T 572)

[3] With regard to the first degree murder charges, the jury found Appellant guilty of both premeditated and felony murder as to both counts. (R 386-387, T 702-703)

consecutively to the Judge in writing?" (R 397, T 893) The court answered this question in open court as follows (T 893):

> The answer to your question is, "Yes." As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, your advisory sentence must be given great weight by the Court in determining what sentence to impose upon the defendant. And it is only under rare circumstances that the Court could impose a different sentence.

The jury thereafter returned life recommendations as to both murder counts, with the added recommendation that the sentences run consecutively. (R 434, 435, T 894-895)

A sentencing hearing was held before Judge Allen on February 17, 1995, at which the court heard from Alfredo Garcia's brother, Jose Garcia. (T 981-999) The court sentenced Appellant to death for both murders. (R 471, 473, T 997-998) In aggravation, she found that (1) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Appellant was egaged in the commission of, or attempt to commit, robbery and kidnapping; (3) (as to the murder of Alfredo Garcia) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R T 988-992) The court found no mitigating circumstances. (R T 992-997) With regard to the non-capital felonies of which Appellant was convicted, the sentencing guidelines called for a sentence of

no less than 182.55 months in prison and no more than 304.25 months in prison (R 485), but the court departed upward due to the contemporaneous convictions of the capital felonies. (R 496, T 997) On counts three and four (armed kidnapping) the court sentenced Appellant to life in prison with a three year minimum mandatory on each count. (R 475, 477, T 998) On counts five and six (attempted robbery with a firearm) the court sentenced Appellant to fifteen years in prison with a three year minimum mandatory on each count. (R 479-482, T 998) The sentences were to run consecutively. (R 476, 478, 480, 482, T 998)

Appellant filed a timely notice of appeal to this Court on February 27, 1995. (R 499-500)

STATEMENT OF THE FACTS

Trial--Guilt Phase

On the morning of January 13, 1994, Jason Green, who worked for Charlie Pierce Tree Planting, was going to plant trees at a phosphate mine in Hillsborough County. (T 234-235) When he approached a bridge that led onto the mining property off State Road 39 on Thatcher Road at a little before 7:00, he saw a blue Thunderbird with the driver's door open. (T 235-237) Beside the car were two bodies, face up. (T 237, 245) Green remained in his truck until his tree planting crew arrived, then walked up to the bodies to make sure the people were dead. (T 238-239) The wrists of the two people had been tied with gray duct tape, but had apparently been pulled apart. (T 240, 244) Their feet were also taped together. (T 240-241, 245) There was a puddle of blood on the north side of the bridge, and a trail going to where the bodies were. (T 241) Law enforcement arrived in about 15-20 minutes and interviewed Green. (T 241)

Assistant Medical Examiner Dr. Rebecca Ann Hamilton, went with another doctor, Marie Herman, to the scene in rural Hillsborough County where the bodies were found, arriving at approximately 9:45 a.m. on January 13, 1994. (T 289-290) Hamilton observed the bodies side by side, on their backs next to the pale blue Thunderbird. (T 290, 292, 317-318) She saw the duct tape around the hands and ankles. (T 290, 317) The hands of both decedents were separated; they appeared to have pulled their wrists free. (T 290, 317, 323-324) The right sleeve of Rodrigo Miguel's

long-sleeved shirt was ripped and lying across his chest and abdomen. (T 328) There was a trail of blood and brain matter that led across from one side of the bridge to the other to Miguel. (T 290-291) Miguel had a large contact gunshot wound to the back of the head, while Alfredo Garcia had a large gunshot wound to the face and a hard contact gunshot wound to the chest. (T 292, 300-308, 318, 325) There was some blood spatter on the interior and exterior of the open passenger door of the Thunderbird, which Hamilton believed was most likely Garcia's blood. (T 296-297)

A gold-colored necklace with a Christ charm and a gold-colored necklace with a crucifix charm were removed from Alfredo Garcia. (T 265) He had $204.51 in his pockets. (T 265) Rodrigo Miguel had $11.97 in his pockets. (T 265-266)

Autopsies were conducted at the medical examiner's office in Tampa on January 13. (T 298-299, 306, 313)

Alfredo Garcia was five feet, six inches tall, and weighed 180 pounds. (T 299) He appeared to be consistent with a 29 year old man. (T 299) Either the shot to his face or the shot to his chest would have caused Garcia's death. (T 301, 304-306, 320) Hamilton was of the opinion that Garcia was shot in the face first, then collapsed and was shot in the chest as he lay on a hard surface, such as the concrete on which his body was found. (T 303-305) He would have been rendered unconscious immediately, and would have died fairly quickly, whichever shot actually occurred first. (T 302, 305, 320-321) Hamilton observed no other injuries to Garcia, except for a few abrasions and lacerations on his right arm; she

could provide no time frame as to when these might have occurred. (T 305, 322)

Rodrigo Miguel was five feet, four inches tall, and weighed 149 pounds. (T 306) He looked consistent with a person who was 22 years of age. (T 306) The gunshot to the back of his head would have rendered Miguel unconscious immediately, and dead very quickly. (T 309, 324) Miguel also had some injuries inside his upper lip, as well as two cuts of his lower lip and three small contusions in the area of his nasal bridge; these were minor injuries which were consistent with a blow to the face by either a hand or a foot. (T 310-311, 324) Hamilton could not estimate when they occurred. (T 324)

Hamilton could not determine which of the two men was shot first, nor did she know where they were when they were shot. (T 316-317, 330) However, she believed that Miguel and Garcia had been placed side by side on their backs, and had not merely fallen in that position after being shot. (T 329-330)

Evidence the Hillsborough County Sheriff's Department collected at the scene included plaster casts of tire and tennis shoe impressions and latent fingerprints from the exterior and interior of the Thunderbird. (T 267-270, 278, 334-335) After suspects were arrested in this case, the fingerprints were compared with the known prints of these suspects, including Appellant, with negative results. (T 350) Other items were checked for prints, but none could be found. (T 370-371) Shell casings of different calibers and makes were also collected at the scene; the sheriff's

deputies assumed that the area was used by people to shoot at bottles, etc. (T 282-284)

State witness Steven Stamper, who was 23 years old at the time of Appellant's trial, had known Appellant for approximately six years prior to the incident for which Appellant was being tried. (T 426-427) He and Appellant "grew up in the same neighborhood and hung around with some of the same people." (T 427)

Stamper was a friend of Serafin Licor, and he also knew Luis Pecina. (T 428-429) Stamper met Carl King and Chris Nicholson in the days before January 13, 1994. (T 428-429) Stamper did not know Rodrigo Miguel or Alfredo Garcia. (T 429)

Stamper had been selling marijuana to support himself; he was dealing in fairly large quantities, 40 pounds or so. (T 431-432, 470) In late December [1993] or early January [1994], approximately two weeks prior to the homicides of Rodrigo Miguel Alfredo Garcia, he and Appellant were supposed to sell 88 pounds of the drug to a buyer who Stamper had contacted. (T 432-433, 436) Stamper obtained 40 pounds of marijuana from his supplier, Palone Reina. (T 432-433) Stamper was to pay Reina after the transaction was completed. (T 433-434) Appellant had the same type of arrangement with his suppliers, who were from Texas, and from whom Appellant obtained the remaining 48 pounds of marijuana needed for the sale. (T 434-435) The price was to be $850 per pound. (T 435) Of this, Appellant and Stamper would split $25 per pound as their profit, and the rest of the money would go to pay their suppliers. (T 435) When Appellant and Stamper arrived at the motel, the

marijuana was in the trunk of Stamper's car. (T 436) Appellant remained in his own car while Stamper entered the motel room. (T 436) There the buyer opened a briefcase and pulled out a stack of money. (T 436) It had hundred dollar bills on top, but when Stamper flipped through it, he could see one-dollar bills in between the hundreds; "it was a fake stack of money." (T 436) When Stamper looked up, the buyer had pulled a gun. (T 437) He told Stamper to get on the floor, and took his wallet and car keys. (T 437) There was someone else outside the motel room to whom the buyer gave the keys, and they took Stamper's car. (T 437) Appellant remained in his own car the whole time and did not try to intervene, because "[h]e thought they were police officers." (T 437)

Stamper recovered his car that same night, but the marijuana was gone from the trunk. (T 438)

Appellant and Stamper advised their suppliers what had happened; they were not excused from having to pay for the marijuana. (T 438-439)

Some time after the theft of the marijuana, before the homicides took place, Stamper met Alice Knestaut through Appellant. (T 427-428, 439-440)[4] Appellant and Knestaut had a relationship; they were "seeing each other." (T 428) Knestaut's residence in Tropical Acres, which is where Stamper met her, was about two to

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[4] Stamper initially testified that he met Knestaut "[a]pproximately maybe a month, four weeks, three to four weeks" prior to the homicides (T 428), but subsequently testified that he met her"[a]pproximately seven days" before the homicides. (T 440)

three miles from Stamper's house. (T 426, 440) Knestaut knew about the marijuana theft, and she engaged in conversations with Appellant and Stamper regarding how they could recoup the money they lost. (T 440, 473) Knestaut formulated two plans that involved obtaining marijuana from her connection in Texas. (T 441-442, 473) Another plan was to "rob these guys for a hundred pounds of marijuana." (T 443-444)[5] In addition to Stamper, Appellant, and Knestaut, Carl King, Chris Nicholson, and Serafin Licor were involved in formulating the latter plan. (T 443-444) On direct examination Stamper testified that the plan was Appellant's and Alice Knestaut's idea, but on deposition he said it was Knestaut's plan, and he testified on cross-examination that Knestaut was the only one who knew the men that were going to be "ripped off," and she sort of orchestrated the plan. (T 443-444, 478-480) Chris Nicholson was to disguise himself by dyeing his hair black and pretend to be a buyer from New York. (T 444-445, 473-475) Appellant and Knestaut were merely to be present at Knestaut's trailer when the men showed up; their part was "[a]s the middle people." (T 445-446) Carl King, Serafin Licor, and, possibly, Luis Pecina would wait outside, then "bust in the back door and rob" the men with the marijuana and tie up everyone. (T 444, 475) The robbers would then beep Stamper on his beeper, and he would come in and untie everyone. (T 444, 475) It was never said in Stamper's

[5] Although on direct examination Stamper indicated that there was to be more than one victim of the robbery scheme, on cross-examination he said that, from the way he "understood it, there was only supposed to be one person" who would be robbed. (T 474)

presence that part of the plan involved killing anybody. (T 476)

After the plan was devised, Stamper met with his supplier, Palone, two nights before the murders. (T 446-447) Palone agreed to accept Stamper's trailer and some gold and cash to satisfy the debt Stamper owed for the marijuana that was stolen. (T 447-449) Stamper told Appellant and Knestaut about this arrangement, and indicated that he did not want to be involved in the robbery any further, but Appellant said they were all in it together. (T 448-449)

The day before the murders, Stamper went to Alice Knestaut's residence at approximately 1:00 or 2:00, but neither she nor Appellant was there. (T 449-451) Stamper returned between 4:00 and 5:00. (T 449, 451) Knestaut assured him that there was not going to be a robbery, the plan had been called off. (T 449-451) She offered to loan Stamper $2,000 if he came by later that night, because Stamper had no money. (T 451-452)

Stamper called Knestaut that night around 11:00. (T 453-455) She said, speaking kind of quickly, "'I can't talk right now. I'm hung up,'" and hung up on Stamper very quickly. (T 454) Stamper called again about an hour later. (T 454) This time a man answered, whose voice Stamper did not recognize, and said that Knestaut was not there, she and Appellant had gone to Kash 'N Karry in Riverview. (T 454) Stamper called a third time approximately 45 minutes to an hour later. (T 455) A man answered, and said they were still in Riverview. (T 455) After waiting another 45 minutes to an hour, Stamper called once again, but Knestaut was not home

yet. (T 455) At that point, Stamper thought that Knestaut was just putting him off, and did not want to loan him the money. (T 455) He called right back, and told the man he was coming over. (T 455-456) It took approximately 30 minutes to drive to Knestaut's trailer from the Bahia Beach Motel where Stamper was staying, and it was probably around 2:00 in the morning when he arrived to find Chris Nicholson and Carl King "[j]ust sitting there." (T 456) Stamper waited in the living room some 15 to 20 minutes before Knestaut and Appellant arrived. (T 457-458) Stamper noticed that a rug, about five by five in size, was missing from the living room floor. (T 457-458) When Stamper heard a car drive up, he looked out the front door and saw Knestaut on one side of Appellant, and Serafin Licor on the other as they walked toward the trailer. (T 458) Appellant had a beer in one hand and a "joint" in the other, and his arms were around Knestaut and Licor. (T 458, 483) He looked "[d]istranged [sic] or not normal," and appeared to be sort of "out of it." (T 458, 483-484) When he got up to the house, Appellant walked on his own, and they all went inside. (T 458) Stamper, Appellant, and Knestaut went into the back bedroom to discuss the money Knestaut said she would loan Stamper. (T 459) There Stamper saw several pounds of marijuana in boxes stacked up in the corner. (T 461, 484) He also noticed the missing rug, with a big stain on it, rolled up on a couch. (T 459) He asked Appellant what happened, and Appellant replied that "he kicked the shit out of a dude." (T 459) Stamper did not think anything of it; he thought there must have just been a fight in the trailer. (T

460) Stamper did not see whether or not Appellant had any blood on him. (T 460)

Knestaut told Stamper to come by in the morning and she would loan him the money. (T 461) Knestaut and Appellant said they needed a twelve-pack from the store, and Stamper offered to give them a ride; he was "kissing up to Alice, because [he] wanted her to loan [him] the money..." (T 461) They proceeded toward the Presto, which was about a half-mile from Knestaut's residence, in Stamper's car. (T 461-462) Appellant was sitting next to Stamper in the front seat, and Knestaut was in the right rear seat. (T 462) However, instead of stopping at the Presto, Appellant gave Stamper directions on where to drive. (T 462) Appellant said they were going to see some friends, and Stamper assumed they were going to Carlton Lake Road where they had been a couple of nights earlier. (T 462) But Appellant told Stamper not to turn where Stamper was expected to turn, but to go straight instead. (T 463) Finally, Stamper "kind of got scared and mad all at once," and asked, "Where the hell are we going?" (T 463) Appellant said, "'You know them guys we was gonna rob?'" (T 463) Stamper said, "Yeah." Appellant said, "'We killed 'em.'" (T 463) Stamper uttered an expletive and hit the brakes; he was going to turn around, but Appellant told him to keep going. (T 463) Appellant asked Stamper if he had his gun. (T 463) Stamper said that he did, and reached under the seat and put the gun between his legs. (T 463) Appellant said, "'Give me your gun." (T 463) Stamper asked, "What do you want my gun for?" (T 463) Appellant responded, "'If they ain't dead, I'm gonna shoot

'em with your gun." (T 463) Stamper said, "No, you're not shooting nobody with my gun." (T 463)

Knestaut was digging in her purse; Stamper did not know if she had a gun or not. (T 463) He kept driving towards the mines property. (T 463-464) Appellant and Knestaut were putting on rubber gloves. (T 464)

With regard to why Appellant and Knestaut were going back to the scene, Stamper thought they said something about a beeper, but he was not positive. (T 465)

When they got to the end of the bridge, they told Stamper to turn the car around. (T 464) Appellant and Knestaut jumped out and ran up to a car sitting on the bridge that had what looked like two bodies lying beside it. (T 464) Stamper turned the card around. (T 464) He was really scared, and was going to leave them, but thought they would kill him if the police did not catch them. (T 464) He yelled out the window, "Come on, I'm leaving." (T 464) He saw Knestaut bent over in the car, and Appellant "was hovered over the bodies, standing over the bodies." (T 465) When they came back to the car, Appellant had blood all over him and "had some kind of bloody material..." (T 464) Knestaut had blood on her rubber gloves. (T 464) They had some bloody objects with them that they put on the floor mats in Stamper's car. (T 465-466, 486-487)

Stamper drove really fast back to Knestaut's residence. (T 464) During the drive, Appellant said that if anybody said anything, "that they he [sic] would kill them." (T 464-465)

Upon arriving back at Knestaut's trailer, she and Appellant removed the floor mats and the items on them from Stamper's car and took them inside. (T 466)

Stamper later had the carpet in his car shampooed, because it had blood on it. (T 466-467, 487-488)

Stamper never received the $2,000 loan from Alice Knestaut. (T 469)

Stamper did not talk to the police until approximately four months later, because he feared for his life and his family's life. (T 467, 488)

It was Stamper's understanding that, as long as he told "the truth and the whole truth," no charges would be brought against him. (T 431) The assistant state attorney had told Stamper that he would not be charged as long as he cooperated, but that decision was still pending at the time of Appellant's trial. (T 476-477, 490-491)

Appellant's codefendant, Luis Pecina, whose nickname was "MeMe," and who had six prior felony convictions, had entered into plea negotiations with the State which called for him to receive concurrent sentences of five and a half years for two counts of attempted robbery, as well as a concurrent four and a half year sentence for violating his house arrest, with some amount of probation to follow the prison time. (T 492-494, 495, 534) In exchange, Pecina was required to give truthful testimony regarding the murders of Alfredo Garcia and Rodrigo Miguel. (T 493-494)

Pecina had not yet been sentenced when he testified at Appellant's trial. (T 494, 534)

Pecina grew up in Wimauma in Hillsborough County, and had known Appellant for a number of years. (T 494-495) They were very good friends. (T 496, 553)

In January, 1994, Pecina was living on and off with Alice Knestaut, whom he had known for a couple of months, because he "got chased from where [his] wife live[d] by the cops for violation of house arrest." (T 499-500) Appellant, who was Knestaut's boy-friend, was also living at the trailer, as were Knestaut's son and daughter, and, on and off, Serafin Licor. (T 500-501)

Pecina was not working, and supported himself by selling drugs [marijuana], usually in small quantities. (T 501) The largest amount he obtained from his suppliers was 10 or 15 pounds. (T 501-502) Pecina also smoked marijuana every day, used cocaine on and off, and drank alcohol. (T 502, 540)

During January, 1994, Pecina became aware that Steve Stamper had been ripped off in a drug deal. (T 502) Appellant told Pecina he had been ripped off at a hotel room the night before by people posing as D.E.A. (T 502) Alice Knestaut developed a plan for a fake drug bust, in which she, Pecina, Serafin Licor, Carl King, Chris Nicholson, and Appellant would take part. (T 503-504, 543-544) The plan did not involve killing anyone. (T 555) Knestaut dyed Nicholson's blond hair and mustache black, as a disguise. (T 509, 544-545) He was to pose as a buyer from New York named Mike. (T 511) On January 12, 1994, Rodrigo Miguel, whom Knestaut knew,

came to her trailer around 3:00 or 3:30 in the afternoon and left 13 pounds of marijuana with Knestaut as a sample of the 100 to 150 pounds he was to bring later, which would cost more than $100,000. (T 503-506, 544-545) Miguel had been expected to return alone that evening with the marijuana, but when he came back to Knestaut's trailer at dusk, Alfredo Garcia was with him. (T 509-510) Prior to the victims' arrival, Pecina and Licor went into a bedroom beside the kitchen when Knestaut told them to get ready, Miguel was on his way. (T 510-511, 513) Nicholson was in the living room. (T 513) King was either in the living room, bathroom, or bedroom. (T 513) Appellant, who was drinking and was "a little bit" drunk, was in the living room. (T 513, 552) Pecina did not see the two men enter the trailer through the front door, but he heard greetings exchanged in the living room. (T 510, 514) Later he heard a sound "[l]ike somebody got thrown either down or into a wall, slammed real hard." (T 514) Either Garcia or Miguel asked, "What's going on? What's going on?" (T 514) Carl King went by Pecina. (T 514) Pecina did not leave the room where he was hiding because he was scared. (T 514-515) He remained there for five minutes, during which time he heard Appellant ask, in Spanish, where the rest of the marijuana was. (T 515) Appellant said he was going to kill him if he did not "get the rest of the stuff." (T 516) Pecina turned the corner and looked into the living room when King or Nicholson called him. (T 516, 547-548) A wallet that had been taken from one of the men was sitting on top of the TV. (T 521-522) Nicholson, Licor, and King were tying up Garcia with duct tape. (T 516)

Miguel had already been bound with gray duct tape, hog-tied with his hands and feet behind his back. (T 517) Both men had pillow-cases over their heads. (T 516-517, 548, 551-552) Appellant had a "big gun," which he was pointing at Miguel's head off and on. (T 518-519) There were two or three other guns involved, but they were not out. (T 550) Alice Knestaut did not have a gun at that point. (T 561-562) Appellant also had a potato in his hand, which he put in front of the gun to act as a silencer. (T 519-520) Appellant kicked Miguel in the face. (T 518) This caused Miguel's mouth or nose to bleed, and some of the blood got on a carpet in front of the TV. (T 523-524) It was possible that Nicholson also may have kicked Miguel. (T 549-550) Miguel said that if he would let him go "he'd let her have all that. He'd give him more money." (T 518) Appellant was telling Miguel that "he wanted the stuff; he needed the stuff." (T 519) Chris Nicholson also was yelling at the men. (T 551) After Pecina "saw the gun and the potato put against his head," he told Appellant "to let him go, not to do it." (T 520) Appellant winked his eye at Pecina, who "thought he was playing, he was bluffing." (T 521) Carl King and Serafin Licor were just sitting on the couch while this was going on, but Chris Nicholson was "like mad and telling them, 'Yeah, we gotta get it, we gotta get it, we're gonna get it.'" (T 521) Pecina asked Appellant "several times not to do it," and told him that if he got caught he would "go to the electric chair, or if he didn't get caught, one of the families would put a bullet in his head." (T 522) At that point, Knestaut (who considered herself a "fighting bitch") told

Appellant that Rodrigo Miguel "had touched her pussy and her ass and that he deserved to die." (T 521, 554-555, 556-557, 561-562)

Appellant, Licor, King, and Nicholson carried Miguel and Garcia out of the trailer through a double door on the back of the living room. (T 522-523) Licor, Nicholson, Knestaut, and Appellant left around 11:30 or midnight and were gone about 45 minutes to an hour. (T 523-524) When they returned, Appellant was shirtless, and had blood all over his legs, belly, white tennis shoes, and shorts. (T 524) Pecina advised Appellant to take his clothes off and wash up, but Appellant "said he was gonna show his people that he had taken care of business." (T 525) He left with Knestaut, and was gone about a half an hour or 45 minutes. (T 525) After their return, Knestaut and Appellant remained in the trailer for a short while, then left again for an unknown destination. (T 526)

Pecina acknowledged that he may have been "high" on marijuana when all this happened, but said he knew what he was doing. (T 540, 572)

Pecina saw Appellant's bloody clothes again, as well as the shoes and carpet, at the house of Oscar Thompson, Alice Knestaut's father, where they were being burned. (T 528, 569)

Alice gave Pecina $1,000.00 for his participation in the events of January 13. (T 560-561)

Pecina lived in the trailer off and on after January 13. (T 526) About two months after the homicides, he left Hillsborough County and went to Dallas, Texas, because he was on "house arrest violation" and "didn't want nothing to do with that." (T 526-527,

562) After a month to a month and a half in Dallas, Pecina went to Michigan for a couple of months, where he was arrested for murder, and brought back to Hillsborough County. (T 527, 566) Bullets for a .25 automatic were found on Pecina when he was caught hiding in a cornfield. (T 563-564, 573) Detective Fernandez told Pecina that Appellant was pointing the finger at him, which ticked Pecina off. (T 564-565) Pecina told Assistant State Attorney Ron Hanes that he hated Appellant for what he did. (T 565) Pecina then gave a statement to the police and pointed the finger at Appellant. (T 565)

Alice Knestaut's trailer was about four or five blocks from the house of her father, Oscar Thompson. (T 583-584) Knestaut did not have trash pickup at her residence, and so Thompson picked up her trash twice a week, and burned what he could. (T 584) On about January 18, 1994, Thompson received a call from his daughter, following which he went to her residence and picked up a rolled-up rug and three or four grocery bags of stuff that Knestaut wanted him to throw on the fire he had going. (T 585-587) While he was loading the items, Appellant and Luis Pecina pulled up. (T 588) Knestaut said, "'It's all right. It's all right. I told him all about it.'" (T 588) Thompson did not know what she was talking about. (T 588) He knew one of the men who had been killed, "Rigo," having met him through and girlfriend, and once or twice at his daughter's house, but had no knowledge of the homicides, other than what he read in the papers and saw on television. (T 586-587)

Pecina and Appellant followed Knestaut and Thompson to Thompson's house. (T 588) When he started to pull the rug out, Thompson told his daughter that it would not burn, it probably had a flame retardant on it, and would have to be cut up. (T 588) During the burning of the bags, a piece of a roll of clear packing tape fell out of one of them, as did a small man's or large woman's white tennis shoe. (T 588-589) Some articles that fell out of the bags had purplish stains on them that looked to Thompson like grape stains. (T 594) When the shoe fell out, Thompson asked Knestaut, "What's this?" (T 589) She said something to the effect of, "'Remember, I told you about that?'" (T 589) They then told Thompson that "they were involved in some way in the murders." (T 589) Appellant told Thompson that day "that they had taken them out." (T 591) After that day, Thompson had other conversations with Appellant about the murders. (T 591) Appellant told him that he and Steve Stamper "owed somebody for around a hundred pounds of drugs that they had got ripped of for at a motel in Brandon, and the people were pushing him for the money. That's why he had to do something about it, try to get his money." (T 591) Appellant believed "that Rodrigo might have been involved in it." (T 591) Appellant told Thompson that "he shot one of them once and one of them twice." (T 591) Appellant also remarked that "Rigo had a lot of balls," and that Appellant did not know the other victim. (T 592)

Thompson felt that there were "so many shootings and killings with Mexicans" in his area, and that Mexicans could "bring in a wet

back up here and he'll blow your butt off for a hundred dollars and head back to the border." (T 601)

When the police questioned Thompson, they offered him immunity for whatever he may have done, and the State had given him immunity for what he testified to at Appellant's trial. (T 582, 595)

Alice Knestaut was arrested on May 4, 1994. (T 351) When her white Cadillac was located, there were no tires on the car. (T 353) On August 11, 1994, Knestaut's attorney, Frank DeLa Grana, gave Detective Michael Conigliaro, Jr., of the Hillsborough County Sheriff's Office a large frame revolver in a leather holster. (T 354-360) Subsequent tests revealed that this Dan Wesson revolver was the murder weapon. (T 339, 361-362, 386-388, 390) DeLa Grana told Conigliaro where he obtained the gun, but not from whom. (T 359, 362-363) The gun and holster were checked for latent fingerprints, but there were none. (T 363, 372-374)

Appellant was arrested on May 4, 1994. (T 398) He was cooperative and offered no resistance. (T 399, 421-423) Appellant was interviewed by detectives in a conference room at the special investigations division of the sheriff's office. (T 399-400) A tape recording of the interview was played at Appellant's trial. (T 406-419) Appellant said that he was at the house of his girl-friend, Alice Knestaut, when Luis Pecina came up and asked for his help in getting even with somebody. (T 408-409) At first, Appellant refused, but he finally agreed to help. (T 409) Pecina asked Appellant if he knew somebody else who could help them, and Appellant called "Chris" and "Carl," whose last names he did not

know; they came to Knestaut's house. (T 409-410) Shortly after that, another man, Serafin Licor, arrived. (T 410, 421) Luis Pecina left and came back and said, "Get ready," and threw the others masks and gloves to put on. (T 411) Appellant put on a ski mask. (T 411) Pecina had a piece of carpet with him, which they put down on the floor. (T 416-417) After about 30 minutes, two men arrived. (T 411) Appellant had met one of the men, Rodrigo, once or twice or three times at the most. (T 411) Chris grabbed Rodrigo and threw him down, while Appellant grabbed the other man and threw him down. (T 411-412) Pecina came from behind with a pistol and said he would kill the men if they moved. (T 412) Appellant thought that Pecina kicked Rodrigo in the face, because there was blood on the carpet. (T 417) They taped the hands and feet of the men with duct tape. (T 412) Pecina, Licor, and Appellant picked one of the men up and put him in Rodrigo's car. (T 412) Carl and Chris picked up the other man and put him in the same car, either in the trunk or the back seat. (T 412-413) Pecina said, "'Follow us, follow us." (T 413) Knestaut and Appellant followed in the white Cadillac, until they "got a U-turn." (T 413) Carl came running up and got in the passenger side of the Cadillac. (T 413) Two or three minutes later, Appellant heard about three or four shots, maybe five. (T 413) Pecina came running and jumped in the driver's side and told Appellant to go. (T 413) They stopped at the Presto store and bought a 12-pack of Lite beer. (T 413) At Knestaut's residence, they drank about two beers apiece, after which Pecina, Chris, and Carl left. (T 413) Pecina had told the

participants he was going to give each of them either $900 or a pound of marijuana for their help. (T 413-414) Later that day he did give Appellant, Knestaut, and Licor each a pound. (T 414) Appellant did not know if he gave Carl and Chris a pound or the money. (T 414)

Following the State's case, Appellant moved for a judgment of acquittal on all counts due to the State's failure to prove a prima facie case, which the court denied. (T 602) The defense rested without presenting any evidence. (T 602, 605)

Penalty Phase

The State introduced into evidence at penalty phase a certified copy of a judgment showing Appellant's 1988 conviction for aggravated assault under the name of "Victor Cruz Marta." (R 70-71, T 730-735) The State also presented the testimony of the alleged victim in that incident, Glenn Holmes. (T 735-742) Holmes was pastor of the Assembly of Free Worship church in Riverview. (T 736) At one time, Victor Cruz Marta attended the church. (T 736) However, about a year and a half prior to March 3, 1998, Holmes had instructed Marta not to attend his church. (T 736) Holmes came into contact with Marta on March 3. (T 736) The pastor was at home ust before 1:00 in the morning when he heard the neighbor's dog barking. (T 737) He went to his front door to see what was happening and saw a black hump in a road that was part of his property. (T 737) Holmes went outside to investigate further. (T 738) When he got to within 10 feet of his gate, the black hump, which Holmes had thought might be a dog, jumped up; it turned out

to be a man. (T 738) The man, who had on a black jacket, began to yell obscenities and threats. (T 738-739) When Holmes approached to within two and a half to three feet of the man, with the gate between them, the man pointed a Derringer at the end of his nose and said, "'You better pray you son of a bitch. You're fixing to die." (T 740-741) Holmes wrestled the gun out of his hand, and the pastor's wife called law enforcement. (T 741) Officers arrived in about five minutes and arrested the assailant, who waited for the police to arrive. (T 741-742) Holmes did not know if the gun was loaded, and it was never fired. (T 741-742)

Appellant called seven witnesses at penalty phase, the first of whom was Reverend Holmes's 21 year old daughter, Andrea Elizabeth Holmes. (T 744-745) She met Appellant at church when she was 13. (T 746) She found him to be a "sweet guy" who "would do anything for you," and she liked him a lot. (T 745-746) Appellant had a good sense of humor and was usually cheerful. (T 747) Andrea had never seen him do anything mean or violent. (T 747-748) She could not believe it when she heard that Appellant had been arrested for two counts of murder, because she didn't think he was the type of person that would kill somebody. (T 748)

Appellant's mother, Carmen Munos,[6] testified that she came to the United States with her husband and seven children in 1977, when Appellant was about seven. (T 749-750) [He was 25 at the time of his penalty trial. (T 751)] Her husband, Santiago, did farm work,

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[6] Carmen Munos, who testified through an interpreter, explained that Appellant began using the name Marta-Rodriguez when he was living with the witness' sister-in-law. (T 749, 751)

picking oranges, tomatoes, strawberries, cucumbers, and all types of vegetables, and Munos also worked outside the home. (T 751-752) Santiago Munos would get extremely drunk weekly and hit his wife. (T 752-753) Appellant was around nine years old when he started to realize that his father was hitting his mother. (T 753) One day, Appellant grabbed his mother and said, "'Mother, let's leave to Mexico. Don't take so much from father, any more from my father." (T 753) But Carmen Munos replied, "'No, son. It's best that you will be raised next to your father.'" (T 753)

The abuse continued as Appellant grew older. (T 753) He would attempt to defend his mother by grabbing his father "on the back and pulling him up," but Santiago Munos would tell Appellant not to interfere. (T 753) He said to the boy, "'Get away, because if not, I will hit you.'" (T 753)

Appellant's father died in 1987 when Appellant was 17. (T 752) That was about the time Appellant dropped out of school, at the start of the eleventh grade. (T 752) Until then, he had attended school regularly. (T 754)

Carmen Munos never had trouble with her son when he was a youngster or a teenager. (T 754) He was always joking and laughing and talking with his mother. (T 754) He helped her with the laundry, and was a very, very good son. (T 754)

After he dropped out of school, Appellant did yard work and farm labor, giving his paycheck to his mother. (T 754-755)

Appellant had a very good relationship with his five brothers and his sister; the family was very close, and remained so after Appellant grew up, getting together on holidays. (T 756-758)

Appellant had two daughters with his common law wife, Virginia Armas. (T 758) Vanessa was a little over a year old, and Veronica, who was born after Appellant was arrested, was three weeks old. (T 758) Appellant was a good husband and father. (T 759) Carmen Munos went to her son's house often, and he would have Vanessa in his arms. (T 759) He called Vanessa "Gorda" ("fat"), because she was skinny. (T 759)

Whatever happened, Appellant's family would continue to love and support him. (T 760) Carmen Munos recognized that her son had to be punished, but asked that he not be killed. (T 760)

Borland Conn lived in Tropical Acres, three blocks from the house where Appellant grew up. (T 761-762) Conn had known Appellant since he was 12 or 13, and knew most of his family as well. (T 762-763) Appellant's family members were "pretty good people,...real nice people." (T 763) Appellant was always at Conn's house, because Appellant and Conn's boys were buddies. (T 763) Appellant was a very good and very helpful neighbor who helped Conn trim trees and "all kind of stuff." (T 763-764) Conn had never seen Appellant mad or upset. (T 764) Conn never had any trouble with Appellant, and the two respected one another. (T 764) Conn didn't believe it when he heard that Appellant had been charged with two murders; such acts would be out of character for

the Cruz Conn knew. (T 765) Appellant was a "very good person" who should be spared the death penalty. (T 765-766)

Appellant's 36 year old brother, Jaime Munos Dominguez, was the oldest child in the family. (T 767-768)[7] Their father had a drinking problem and often abused their mother. (T 769) When that happened, Appellant would get in the middle and try to separate them. (T 769)

After Appellant dropped out of school, he worked regularly, at a ranch, or doing farm labor. (T 771) His brother also worked at the ranch, and Appellant did whatever his brother told him to do. (T 770-771)

Appellant and Virginia Armas were a very good couple, and Appellant loved his children very much. (T 771-772) Appellant treated her and the children well. (T 772)

Appellant was a very good person and a good brother. (T 769-770) Munos never saw him "get into any problems." (T 768)

When Munos heard that his brother had been arrested for the murders, he never thought he did it, because Appellant had always been good to his family and his mother, whom he always helped a lot. (T 770) It seemed out of character for Appellant to have committed these offenses. (T 770)

The family was very close, and would love and support Appellant no matter what happened in his case. (T 772) Munos

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[7] Jaime Munos Dominguez testified through an interpreter. (T 766-767

wanted to see the jury recommend life imprisonment rather than death. (T 772)

Appellant's sister, Josephina, was eight years older than Appellant. (T 775-776)[8] When their father became intoxicated and tried to hit their mother, Appellant would get in the middle and cry and not allow his father to strike his mother. (T 776-777)

Even after the children became adults, the family stayed close, seeing each other frequently, on holidays, weekends, etc. (T 777)

Josephina's described her brother as having a "very good heart," and she could not believe the accusations against him. (T 777-778)

Appellant had been a good husband to Virginia Armas; he never hit her. (T 778) Appellant also had been a good father; he would get up in the middle of the night to take care of his daughter. (T 778)

Josephina Munos asked that her brother be given time in prison. (T 778-779)

Virginia Armas was 17 years old at the time of Appellant's penalty trial. (T 781) She met Appellant, who was her common law husband, at a party when she was around 15; they started going together, and eventually moved in together, to which her parents did not object. (T 781-782) Appellant was nice, friendly, and kind to Armas; he never abused her or abused drugs when he was with her. (T 783, 786) Appellant worked in the field and sometimes worked

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[8] Josephina Munos testified through an interpreter. (T 775)

with his brother, Jaime. (T 783) Appellant was paid regularly, and gave Armas his paycheck so that she could pay the bills. (T 783-784)

Appellant was a good and responsible father before he was arrested. (T 784-785) He would play with his daughter and was proud of her and did not abuse her. (T 784-786)

Armas described Appellant's relationship with his mother and brothers and sister as "kind." (T 785)

In the weeks before the homicides, Appellant began spending a lot of time at Alice Knestaut's residence, and not coming home to Armas very much, although she would still see him. (T 785-786) After the men were killed, Appellant came back home to Armas. (T 786-787)

Armas loved and respected Appellant. (T 787) If he were sentenced to life in prison, she would continue to support him and let him see his children, and that is the sentence she would like to see imposed. (T 787)

Appellant's brother, Alberto Munos, was 27 years old, two years older than Appellant. (T 788) Growing up together, Appellant was a good brother, obedient to older people. (T 788-789) He was very kind, always making jokes. (T 789, 791) Appellant worked regularly after he was out of school, doing labor in the fields, and he gave his check to his mother every Friday. (T 789-790) Alberto Munos had never seen Appellant and Virginia Armas fighting, and Appellant treated her well. (T 789) Munos was surprised when he heard that his brother had been arrested for two counts of

murder; he didn't want to believe it. (T 790-791) Munos would love and support his brother regardless of what happened at his trial, and would like the jury to recommend a sentence of life imprisonment rather than death. (T 791)

Hearing of February 13, 1995

The court held a hearing prior to sentencing at which she heard arguments of counsel and testimony from codefendant Chris Nicholson. (T 903-980) Nicholson's testimony was received over defense objections; on February 8, 1995, Appellant filed a written motion to preclude the State from calling Nicholson to give testimony pertaining to Appellant's sentence (R 440-442), which the court heard at the beginning of the February 13 hearing, and denied. (T 906-909)

Nicholson had entered negotiated pleas to two counts of second degree murder, two counts of kidnapping with a firearm, and two counts of attempted robbery with a firearm, and received a 30-year sentence. (T 913) According to Nicholson, he had met Appellant through Alice Knestaut about two weeks before the homicides. (T 913) That came about through his brother, Carl King, "other friends of [his] brother, drug deals with [his] brother. (T 914) He described how the group of six people planned a drug rip-off. (T 915) Nicholson was supposed to be a buyer from New York. (T 915) Alice Knestaut dyed his hair and mustache black, "but it didn't work." (T 915, 928) Others in the group were to pose as DEA agents, come in the back door, put the drug sellers on the ground, take their stuff and leave. (T 915) Steven Stamper was involved,

but "he was butted out because he was too scared, and he backed out at the last minute." (T 916) Nicholson went to Alice Knestaut's trailer with his brother, Carl King, on January 12, 1994. (T 916) Appellant was there. (T 916) The plan was for Knestaut to beep the man with the drugs. (T 917) They were expecting him to come alone, but he showed up with someone else. (T 915, 917-918) The men were "brought down on the ground by gunpoint" in the living room by Appellant. (T 918)[9] Appellant said to tie them up, and he, Knestaut, Serafin Licor, and Luis Pecina did so. (T 918) Pecina brought the pillowcases for the men's heads and put them on. (T 919-920, 929) At one point, Pecina beat the men up. (T 918-919) Appellant was yelling and screaming at them and beating them with his fist and the butt of the gun. (T 919-920) Appellant hit one of the men in the face, and there was blood on the carpet. (T 919) Nicholson took part by yelling at the men, saying it was supposed to be his stuff, to give it up. (T 920) After 30-45 minutes, Appellant made the decision to take the men from the trailer to the bridge. (T 920-921) Pecina drove their car from the front of the trailer to the back and carried the men to the car. (T 918-919) One was put in the trunk, and the other was in the back seat. (T 921) Appellant drove that car, with Alice Knestaut in the passenger seat, and Nicholson and Serafin Licor followed in Knestaut's Cadillac, with Licor driving. (T 921) On the way to the bridge, Nicholson could see Knestaut "on her knees in the seat

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[9] Nicholson testified that he also had a gun, which he put down, and Serafin Licor had a gun. (T 929)

turned around to the back seat, talking to one" of the men. (T 921) When they arrived at the bridge, Appellant took the two men out of the car and put them down on the ground on their backs, side by side, on the passenger side of the car. (T 922, 938) Licor and Nicholson were behind Knestaut's Cadillac. (T 922) Appellant was "yelling at them and talking trash," but Nicholson did not know what he was saying. (T 922) Knestaut was standing next to Appellant and yelling in Spanish. (T 923) The two men were crying and talking back to Appellant. (T 923-924) Nicholson heard a shot, following which Appellant was yelling at the man who had not been shot. (T 922-923) Appellant "flipped the other body on top of the other one," and there were two more gunshots. (T 923-924) Appellant then ran up and said, "'Let's go,'" and they all four got into the car and drove back to the trailer. (T 924-925) On the way back, Appellant pointed the gun at all three of the people in the car and said that if they ever told on him, he would get them "in one way or another." (T 925) Appellant had blood on him when they arrived back at the trailer. (T 925) He later left with Alice Knestaut and Steve Stamper to go get the beeper and pillowcases. (T 925) They were gone about an hour. (T 925) When they returned, Appellant had blood all over him. (T 925) Knestaut had a bag full of stuff; Nicholson did not know what it was. (T 926)

Appellant was drunk the day of the homicides. (T 934)

Nicholson conceded that a statement he gave to the police on May 6 [1994] was mostly fabricated; he felt it would be in his best interest to lie to the police and give a false statement because he

was afraid of Appellant and because he was afraid of getting further into trouble than he already was. (T 927-928) Nicholson gave another statement to the police on May 9, which he initially testified was truthful. (T 928) However, in that statement Nicholson said that he had his head turned facing out away from the bodies when he heard the first gunshot, whereas at the hearing of February 13, he testified that he actually saw Appellant fire all the shots. (T 932-933, 936-937) And in the May 9 statement, Nicholson did not tell the police that he saw Appellant dump one body on top of the other. (T 934)

Appellant renewed his motion to preclude Nicholson's testimony and moved the court to strike it, to no avail. (T 935-936)

The court then heard from Appellant's mother, Carmen Munos, and his sister, Josephina Munos, and his common law wife, Virginia Armas, who asked the court not to sentence Appellant to death. (T 942-945) Armas was present with Appellant's older daughter. (T 944) Appellant then addressed the court himself and said that while he was present when the two men were shot, it was Alice Knestaut who shot them. (T 945-947)

Disposition of codefendants' cases

Of the six people indicted for the murders of Rodrigo Miguel and Alfredo Garcia, only Appellant, Cruz Marta-Rodriguez, was sentenced to death. Chris Nicholson, pursuant to his deal with the State, entered guilty pleas to two counts of second degree murder with a firearm, two counts of armed kidnapping, and two counts of attempted armed robbery, and Judge Allen sentenced him to concur-

rent 30-year sentences on January 26, 1995. Luis Pecina, pursuant to his deal with the State, was allowed to plead to two counts of attempted (strong arm) robbery for sentences totaling five and one-half years, which were imposed by Judge Allen on February 2, 1995; the other charges were nolle prossed. Serafin Licor was found guilty by a jury of the lesser included offenses of third degree murder on counts one and two and false imprisonment with a firearm on counts three and four; he was found guilty as charged on counts five and six. On March 1, 1995, Judge Allen sentenced him as an habitual violent felony offender to concurrent 30-year prison sentences, with 10 years of that a minimum mandatory. Alice Knestaut, whom Appellant said did the actual shooting of the two victims herein, was found guilty by a jury as charged on counts 1-4, and guilty of the lesser included offenses of attempted robbery as to the remaining two counts, after a trial in which the State did not seek the death penalty.[10] On May 23, 1995, she was sentenced by Judge Allen to consecutive life sentences for the murders, to life for each count of armed kidnapping, and to five years for each count of attempted robbery. Carl King also was tried by a jury and found guilty as charged on counts 1-4, and guilty of the lesser included offenses of attempted robbery as to the remaining counts. On May 23, 1995, he received the same sentences from Judge Allen as Alice Knestaut.

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[10] Although the State originally indicated its intention to seek death for both Appellant and Alice Knestaut, the prosecution ultimately only sought the death penalty for Appellant.

SUMMARY OF THE ARGUMENT

Although the trial court told defense counsel that his client could "come up" to the bench when challenges to prospective jurors were exercised, the record does not reflect that Appellant was in fact present at the bench when the strikes were made. Nor does the record show that he knowingly, intelligently, and voluntarily waived his presence, or ratified the strikes his lawyer made. As both peremptory and for-cause challenges were exercised in Appellant's absence, the error cannot be harmless.

The court below erred in finding in aggravation that the dominant or only motive for the killing of Alfredo Garcia, who was not a law enforcement officer, and who did not know Appellant or his codefendants, was to avoid or prevent a lawful arrest. Other reasons for the homicide are equally plausible, such as that this case involved a robbery that got out of hand, and this aggravator should not have been found.

The court also erred in finding that the capital felony was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Although the court's findings are not clear, she may have improperly relied on the extent of planning that went into the drug ripoff scheme to support CCP, even though there was no evidence that any killing was planned in advance. (In fact, the evidence showed instead that the perpetrators did not plan to kill anyone.) Furthermore, it is not clear whether the court meant to apply this aggravating factor to both killings, or only to one; she should have entered separate

findings as to each of the two homicides. And, under the facts and circumstances of this case, there was an inconsistency in finding both avoid arrest and CCP; at most, one of them should have been found.

The court's override of the jury's life recommendations cannot be upheld. It appears that the court below relied heavily upon the testimony of Chris Nicholson, which Appellant's jury never heard, in deciding to sentence Appellant to death. The use of such evidence to override life recommendations raise serious due process concerns and should not be permitted. Furthermore, Nicholson's credibility was highly suspect, to say the least, not only because he was a codefendant who had cut a deal with the prosecutor, but because certain aspects of his testimony were inconsistent with the physical evidence, and he had given false and incomplete statements to the police. To say that Nicholson's testimony would have affected the jury's recommendation would be highly speculative at best.

In addition, two of the aggravating circumstances (avoid arrest and CCP) were not proven, and the others (prior violent felony conviction and committed during another felony) were not entitled to much weight.

The court's treatment of mitigating evidence was wholly inadequate. There were a number of factors which the jury may have found applicable, and which the trial judge should have included in the sentencing weighing process, including the lengthy sentences without parole that Appellant was facing (which the jury obviously

found highly relevant), evidence that he was intoxicated on the day in question and had a history of drug and alcohol abuse, testimony regarding his parenthood and close family ties and his capacity to form loving relationships, his troubled childhood in which he had to step between his parents to keep his alcoholic father from beating his mother, his capacity for gainful employment and ability to do good work, his age of 24 at the time of the crimes, questions about the various roles played by the different people involved in these crimes, and the lesser sentences other major players received or might receive.

The jury may have taken a different view of the evidence from that of the trial court. She was not free to discount their life recommendations merely because she disagreed with them. Appellant's death sentences were not imposed in accordance with the Tedder standard and must be vacated.

Finally, Appellant should not have received consecutive minimum mandatory sentences for using a firearm when his noncapital felonies were committed. All charges arose from a single criminal episode, and the minimum mandatories therefore may only run concurrently.

ARGUMENT

ISSUE I

APPELLANT MUST BE GRANTED A NEW TRIAL, AS THE RECORD DOES NOT REFLECT THAT HE WAS PRESENT WHEN JUROR CHALLENGES WERE EXERCISED, OR KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS PRESENCE, OR RATIFIED THE STRIKES.

The Sixth and Fourteenth Amendments to the United States Constitution give a criminal defendant the right to be present at every stage of his trial. As the Supreme Court of the United States noted in Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353, 356 (1970):

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L. Ed. 1011, 13 S.Ct. 136 (1892).

This Court has acknowledged that a defendant "...has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982); Turner v. State, 530 So. 2d 45, 47-48 (Fla. 1987). One such stage is the exercise of challenges to prospective jurors, where the right to counsel is also implicated, due to the need for the attorney and his client to consult with one another regarding who should be dismissed from the jury, and who should remain.

> Florida Rule of Criminal Procedure 3.180(a)(4) recognizes the challenging of jurors as one of the essential stages of a criminal trial where

> a defendant's presence is mandated. This rule expressly provides:
>
> (a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:
>
> ....
>
> (4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;

Francis, 413 So. 2d at 1177. In Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995), this Court recently had occasion to construe Rule 3.180(a)(4):

> We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised. See Francis. Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made. See State v. Melendez, 244 So.2d 137 (Fla.1971). Again, the court must certify the defendant's approval of the strikes through proper inquiry.[11]

Jury strikes at Appellant's trial were exercised at the bench. (T 202-210) Although the trial judge said, apparently to defense counsel, "your client may come up," the record does not reflect that Appellant actually approached the bench and was present when the challenges were exercised. (T 202) Instead, the record shows

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[11] Although Appellant was tried before Coney was decided, and the ruling in that case was made prospective only, Appellant is entitled to benefit from the Coney decision pursuant to the principles expressed in Smith v. State, 598 So. 2d 1063 (Fla. 1992). See also State v. Brown, 655 So. 2d 82 (Fla. 1995); cf. Jarrett v. State, 654 So. 2d 973 (Fla. 1st DCA 1995).

that the "[c]ourt and counsel conferred at the bench," with no mention of Appellant whatsoever. Nor does the record demonstrate that Appellant knowingly, intelligently, and voluntarily waived his presence at the bench. It is not clear whether he even heard the court's invitation, addressed to his lawyer, for Appellant to "come up," or, if he heard it, that he understood its significance. As in Coney, "the record fails to show that he waived his presence or ratified the strikes." 653 So. 2d at 1013.[12] In Coney this Court found the error harmless because Coney was absent only when the purely "legal issue" of challenges for cause was addressed; no jurors were excused peremptorily. In Appellant's case, however, both for-cause and peremptory challenges were exercised in Appellant's absence, resulting in harmful error.(T 202-210) In Francis this Court found harmful error in the trial court's having proceeded with the jury selection process in Francis' absence:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or

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[12] Appellant's silence after his attorney's exercise of challenges at the bench did not constitute ratification thereof. State v. Melendez, 244 So. 2d 137 (Fla. 1971).

> official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.-2d 759 (1965). In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

413 So. 2d at 1179. This Court must similarly conclude that Appellant is entitled to a new trial, his right to be physically present during the exercise of challenges to prospective jurors having been denied.

Appellant's presence was essential to vindicate his rights to a fair trial and to the effective assistance of counsel, and to assure the fundamental fairness of the proceedings. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9, 16 and 22, Fla. Const. His absence from the exercise of challenges to prospective jurors requires that he receive a new trial.

ISSUE II

THE EVIDENCE FAILED TO SUPPORT THE TRIAL COURT'S FINDINGS IN AGGRAVATION THAT THE HOMICIDE OF ALFREDO GARCIA WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The aggravating circumstances of avoid arrest (section 921.141(5)(e), Florida Statutes) and cold, calculated and premeditated (section 921.141(5)(i), Florida Statutes) were submitted to Appellant's jury for its consideration over defense objections that these factors were not supported by the evidence (T 796-804, 815-821, 882-883), and were found by the trial court in her sentencing order. (R 490-492, T 989-991)

A. Avoiding or preventing a lawful arrest

The trial court found the aggravating circumstance set forth in section 921.141(5)(e) to apply to the killing of Alfredo Garcia, as follows (R 490, T 989):

> 3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> The evidence showed that the victim Alfredo Garcia was previously unknown to the Defendant or any co-defendant and that his arrival with victim Rodrigo Miguel was unexpected. Jewelry and cash remained on victim Garcia's body after his murder. The primary reason for his murder was to avoid subsequent identification of the defendants. This aggravating circumstance was proved beyond a reasonable doubt as to the murder of Alfredo Garcia.

In order to establish the aggravating circumstance in question where, as here, the victim was not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Bates v. State, 465 So. 2d 490 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Foster v. State, 436 So. 2d 56 (Fla. 1983); Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979). In fact, the State must clearly show that the dominant or only motive for the killing was the elimination of a witness. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Jackson v. State, 575 So. 2d 181 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Dufour v. State, 495 So. 2d 154 (Fla. 1986); Doyle v. State, 460 So. 2d 353 (Fla. 1984); Oats v. State, 446 So. 2d 90 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Perry v. State, 522 So. 2d 817 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Davis v. State, 604 So. 2d 794 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992). Even where the victim and the perpetrator knew each, this fact alone is not enough to establish the aggravator in question. Robertson v. State, 611 So. 2d 1228 (Fla. 1993); Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987); Floyd; Caruthers. See also Jackson v. State, 575 So. 2d 181 (Fla. 1981). As the court below pointed out in its finding, as far as the record shows Alfredo Garcia was a stranger to Appellant and his codefendants; therefore, he would have been less likely to have been able to identify them than if he knew them from some prior

relationship. What seems at least equally plausible as the reason Garcia was killed was that the attempted robbery simply got out of hand; it went bad because Miguel and Garcia did not have the marijuana the perpetrators anticipated receiving. Such a scenario would not prove an intended witness-elimination murder. Hansbrough. See also Jackson v. State, 502 So. 2d 409 (Fla. 1986) (where there is more than one possible explanation for the homicide, the aggravator of witness elimination has not been proven beyond a reasonable doubt, and cannot be allowed to stand).

B. Cold, calculated and premeditated

In sentencing Appellant to death, the court found in aggravation that "[t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R 490, T 989) The first problem with this finding is its lack of clarity in that the court did not specify to which of the two homicides it applied, or if it applied to them both. A court sentencing a capital defendant to death should render findings with unmistakable clarity so that this Court can properly review them and not have to speculate as to what the court found. Mann v. State, 420 So. 2d 578 (Fla. 1982). Confusion may be avoided by requiring the trial court to enter a separate sentencing order for each victim for whose killing a defendant is sentenced to death; after all, juries are required to render a separate sentencing recommendation for each count of first-degree murder being considered. Pangburn v. State, 661 So. 2d 1182 (Fla. 1995). Judges should be subject to a like requirement.

The court continued with her finding as follows (R 490-492, T 989-991):

> The Defendant, a drug dealer, had been ripped off for a large amount of marijuana. Owing his supplier, he and the co-defendants concocted a scheme to rip off another drug dealer, one of the ultimate victims in this case, Rodrigo Miguel. The plan was to get Rodrigo Miguel to bring a hundred pounds of marijuana to the residence of the co-defendant Alice Knestaut, for co-defendant Christopher Nicholson to be disguised by dying his hair to pretend to be a drug dealer from New York, to have other co-defendants come in with guns and tie up everyone and take the marijuana. Rodrigo Miguel came to co-defendant Knestaut's house on the afternoon prior to the murders with a thirteen pound sample of marijuana. Co-defendant Knestaut and Defendant Rodriguez talked with Rodrigo Miguel. Later that night Miguel came back to the house as planned, but did not have the hundred pounds of marijuana and was accompanied by Alfredo Garcia. Recognizing that the plan to rob Rodrigo Miguel had gone array [sic], the Defendant Rodriguez armed with a firearm and with the assistance of several co-defendants took both victims to the floor, bound their hands and feet with duct tape, covered their heads with pillow cases, struck them with hands, gun and perhaps feet and threatened to kill them if they did not produce the marijuana. Apparently, they could not produce the marijuana and did not. After announcing that he was going to kill them, Defendant Rodriguez had the victims loaded into their car-Alfredo Garcia in the trunk and Rodrigo Miguel in the back floorboard. Defendant Rodriguez then drove the victims' car to a secluded area some 15 to 20 minutes away. Alice Knestaut rode with Defendant Rodriguez who remained armed with the murder weapon. Co-defendants Nicholson and Licor followed in Knestaut's car. Both victims were shot, close range or contact, in the head resulting in instantaneous death. Victim Alfredo Garcia was shot in the chest with the barrel of the gun pressed to the skin. This wound would have caused death almost instantly. The jury heard no testimony about what happened just prior to the shooting, or who

> actually did the shooting. The Court heard testimony subject to cross examination from co-defendant Nicholson that Defendant Rodriguez pulled both victims from the car, that both victims were crying and speaking in Spanish, that Defendant Rodriguez shot Garcia, that Defendant Rodriguez threw Miguel on top of Garcia so that he could see he was dead and that Defendant Rodriguez shot Miguel in the head. Both victims remained bound with duct tape with pillow cases over their heads while lying on the ground until their deaths. This aggravating circumstance was proved beyond a reasonable doubt.

The court recited several alleged facts that do not find support in the record. For example, no proof was presented that Appellant talked with Rodrigo Miguel when he bought the sample of marijuana to Alice Knestaut's trailer. [Luis Pecina testified that Appellant was present when Miguel brought the sample to Knestaut, but did not say that Appellant spoke with Miguel at that time. (T 506)] Nor was there evidence that Appellant announced that he was going to kill the victims before they were put into a car. The evidence also did not show that Garcia was placed in the trunk of the car and Miguel in the back floorboard. Although Chris Nicholson testified at the hearing of February 13, 1995 that one of the men was placed in the trunk, he did not say it was Garcia. (T 921) Furthermore, Nicholson testified that the second man was placed in the back seat, not in the back floorboard. (T 921)

In addition, as discussed in Issue III. A. below, the court should not have used testimony that Appellant's jury had no opportunity to hear (that of Chris Nicholson) to support her finding of CCP and her decision to override the jury's recommendations.

The court's finding is merely a recitation of supposed facts, with no analysis as to how the supposed facts tended to establish the aggravating circumstance of CCP. In order for this aggravator to be found, the defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Clark v. State, 609 So. 2d 513 (Fla. 1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). See also Dolinsky v. State, 576 So. 2d 271 (Fla. 1991). The requisite level of forethought was not shown to be present in this case. Although it is not clear from the court's findings exactly what the basis was for her conclusion that CCP was applicable, it may be that she relied upon the degree of planning that went into the scheme to rob Rodrigo Miguel to support her finding. If so, this was clearly improper. In cases such as Barwick v. State, 660 So. 2d 685 (Fla. 1995), Perry v. State, 522 So. 2d 817 (Fla. 1988), Hardwick v. State, 461 So. 2d 79 (Fla. 1984) and Gorham v. State, 454 So. 2d 556 (Fla. 1984), this Court has made it clear that even extensive planning of an offense other than the homicide for which the defendant is being sentenced cannot supply the heightened calculation needed to establish CCP; the prearranged design must

have been to kill, not to commit some other crime or crimes. The testimony presented below showed clearly that there was no intent to kill either Miguel or Garcia when they arrived at Knestaut's trailer; the only intent was to rob them. Indeed, there was direct testimony from State witness Luis Pecina that the plan that was hatched did not involve killing anyone. (T 555) State witness Steve Stamper similarly testified that it was never said in his presence that part of the plan involved killing anybody. (T 476) And the prosecutor below conceded in his penalty phase argument to the jury that "[t]hey didn't plan to commit this murder when those people first came over." (T 846) No matter what degree of premeditation may have gone into the drug ripoff scheme, it cannot supply the calculation necessary to support CCP.

Rather than being planned ahead of time, the killings seem to have been essentially a spontaneous and angry reaction to the failure of the plan to steal from the drug suppliers when it turned out that they did not bring the promised marijuana with them (thus rendering Appellant unable to pay his supplier for the marijuana he had fronted for the transaction in Brandon). The reaction was exacerbated by Alice Knestaut's admonitions to kill Miguel, that he deserved to die because he was guilty of sexual misconduct. The homicides thus should be viewed as killings in a fit of rage or panic, which do not qualify as CCP. Crump v. State, 622 So. 2d 963, 972 (Fla. 1993); Jackson. See also Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987) (CCP not applicable to a robbery that got out of hand).

Furthermore, the court's finding of CCP, under the facts and circumstances of this case, is inconsistent with her finding that Alfredo Garcia was killed primarily "to avoid subsequent identification of the defendants" after Garcia arrived unexpectedly with Rodrigo Miguel (assuming the court found CCP applicable to Garcia's killing). As in Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991), if the perpetrators decided to kill Garcia when he showed up with Miguel because he might be able to identify them, "then it seems unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated."

Finally, as in Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983), the instant homicides occurred during the commission of other offenses, here, attempted robbery and kidnapping, and are "susceptible to other conclusions than finding [that they were] committed in a cold, calculated, and premeditated manner."

Conclusion

The evidence did not support the trial court's determination that the aggravating factors of committed to avoid or prevent lawful arrest and cold, calculated and premeditated had been established. Even if one of these circumstances was properly found, they should not both have been found, under the rationale expressed in Derrick. The court's consideration of unsupported aggravating circumstances skewed the sentencing weighing process, resulting in death sentences violative of the Eighth and Fourteenth Amendments

to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida.[13]

[13] The trial court also committed error in submitted these inapplicable aggravating circumstances to Appellant's penalty phase jury. See, for example, Omelus v. State, 584 So. 2d 563 (Fla. 1991) and Bonifay v. State, 626 So. 2d 1310 (Fla. 1993). However, this error was probably rendered harmless by the jury's return of life recommendations.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING CRUZ MARTA-RODRIGUEZ TO DEATH OVER THE JURY'S RECOMMENDATIONS OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS THE APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.[14]

In Florida, the "capital sentencing jury's recommendation is an integral part of the death sentencing process." Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). The recommendation of the jury represents the judgment of the community as to whether death is the appropriate penalty under the facts of the case being considered. Odom v. State, 403 So. 2d 936 (Fla. 1981).

"If facts are evident from the record on which a jury could rely in recommending life imprisonment, then a trial judge must follow that recommendation." Christmas v. State, 632 So. 2d 1368, 1371 (Fla. 1994). See also Malloy v. State, 382 So. 2d 1190 (Fla. 1979) (life recommendation of jury must be followed if there is a reasonable basis therefor). The jury's recommendation of life must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

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[14] Portions of Appellant's discussion of this issue might technically be termed a proportionality argument, but it is appropriate to include them in an issue dealing with whether death sentences are justified for Appellant in light of the two life recommendations returned by his jury.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). See also Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Riley. Stated another way, this Court "will not sustain an override unless the jury's life recommendation was entirely unreasonable. [Citations omitted.]" Wright v. State, 586 So. 2d 1024, 1031 (Fla. 1991). The lower court's override of the life recommendations in Appellant's case did not comport with these principles, and the death sentences were imposed in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida. They must not be allowed to stand.

A. Testimony of Chris Nicholson

The testimony of Appellant's codefendant, Chris Nicholson, which the trial court heard over defense objections at a presentencing hearing on February 13, 1995 seems to have been the primary reason why the court overrode the jury's life recommendations herein. Although the precise reasons for the override are not clearly stated in the court's sentencing order, she was clearly greatly influenced by Nicholson's testimony that fingered Appellant as the shooter.

In support of its argument that the court should hear from Nicholson, the prosecutor below cited Engle v. State, 438 So. 2d

803 (Fla. 1983), and the court relied upon Engle to justify her decision to admit Nicholson's testimony. (T 908-909)[15]Ingel

Of course, in Engle, this Court vacated Engle's sentence of death, because the sentencing judge had considered the confession of the appellant's codefendant that was admitted at a separate trial, and Engle had no opportunity to confront and cross-examine his codefendant. The court below may have been relying upon the following language found in Engle in deciding to hear Nicholson's testimony:

> Appellant also asserts that his due process rights were violated when the appellee was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that had not been argued before the jury. He contends that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, see, e.g., Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. Swan v. State, 322 So.2d 485 (Fla.1975). Furthermore, the record indicates that the trial judge ordered the presentence investigation report on appellant, after the jury's recommendation had been received, at the request of appellant's trial counsel. Use of said information, with counsel being apprised

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[15] The case is incorrectly transcribed as "Ingel v. State" in the record. (T 908-909)©

> thereof, was not improper and did not violate Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

438 So. 2d at 813.

While decisions of this Court apparently would permit the sentencing judge to rely upon information that was not presented to the jury at penalty phase,[16] this practice raises serious concerns relating to due process and fundamental fairness. Because the jury and judge are equally important components of Florida's capital sentencing scheme, both should be provided with the same information before being called upon to render a sentencing decision. If this does not happen, there is a great risk that the ultimate sentencing decision rendered by the court will not be reliable in that it will not include a jury's advisory verdict that was based upon all the evidence. Obviously, there is the further possibility that, in some cases, the prosecution might deliberately hold back evidence that could and should have been presented to the jury, for use before the court in the event of a life recommendation. Perhaps the greatest difficulty stemming from allowing the judge to use information to which the jury was not privy is that one can never know with any degree of certainty what impact the additional evidence would have had upon the jury's decision; one can only engage in pure speculation. Certainly, this problem is present in the instant case, and was recognized at least implicitly in this

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[16] But see Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983) in which this Court found error in the trial court's overriding of a jury's life recommendation where the override was predicated on the fact that the "jury's recommendation was not based on all available facts and evidence."

Court's decision in Cochran v. State, 547 So. 2d 928 (Fla. 1989). In Cochran a divided court decided that even another first degree murder conviction, which occurred after the jury rendered its life recommendation, was not enough to justify an override. (Three members of the Court dissented.) Cochran is illustrative of the difficulty of ascertaining the import of new or additional evidence or information that is considered by the trial court alone. Of course, in Cochran, the appellant's conviction for another capital offense could not have been presented to the jury, as Cochran's trial for the other murder had not yet taken place when the jury considered his fate. In the instant case, Nicholson's testimony could have been presented to Appellant's penalty phase jury. Although the assistant state attorney argued below that Nicholson was not available to the State to testify before he made his deal, due to his Fifth Amendment privilege not to incriminate himself (T 908-909), as defense counsel pointed out (T 909), the State could have subpoenaed Nicholson and compelled him to testify; he would have had use immunity. § 914.04, Fla. Stat. (1993) Furthermore, the record does not reflect that the State could not have made its deal with Nicholson earlier, while Appellant's trial was still in progress, if there was a Fifth Amendment concern.

As the Supreme Court of the United States recognized in Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 859 (1992),

> Florida has essentially split the [capital sentencing] weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing

> process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

This process becomes skewed where the trial judge discounts the jury's life recommendation on the basis of evidence the jury had no opportunity to consider. This is particularly true where, as here, that evidence was admissible and available for penalty phase, but the State chose not to present it. Under these circumstances, elements of arbitrariness and capriciousness are injected into the capital sentencing process. It loses rationality and objectivity to the point that it no longer passes muster under the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sections 9, 16, 17, and 22 of the Constitution of the State of Florida.

In Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992), this Court decided that where a judge who is to sentence a capital defendant did not hear the evidence presented during the penalty phase, he must conduct a new sentencing proceeding before a jury "to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies." This same rationale should apply to preclude a sentencing judge from using information which the jury had no opportunity to consider to override its life recommendations.

If Chris Nicholson's testimony had been presented to the jury, it is entirely possible that the jury would have found it to lack credibility. After all, Nicholson was indicted for the same crimes as Appellant, and avoided more severe sanctions than the 30-year

sentence he received only by cutting a deal with the State. Florida's Standard Jury Instructions in Criminal Cases admonish jurors to "use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime." Fla. Standard Jury Instr. (Crim.) 2.04(b) The reason for this instruction is obvious: the testimony of accomplices is automatically suspect; they may well be testifying in order to mimimize their own criminal exposure and curry favor with the prosecution.

Furthermore, Nicholson admitted that he had given one statement to the police that was mostly fabricated; that he felt it would be in his best interest to lie to the police and give a false statement, and that his other statement to the police likewise was not the whole truth.

The believability and reliability of Nicholson's testimony was further undercut by his admission that he did not have "that great of vision" and "couldn't see that far[,]" (T 930), as well as by the inconsistencies between his testimony and the physical evidence. For example, Nicholson testified that he saw flame come from the gun when the first shot was fired. (T 936-937) However, the medical examiner testified that Rodrigo Miguel, the victim who was shot only once, had a large <u>contact</u> wound to the back of his head. (T 292, 307-308, 325) It seems unlikely that there would have been any visible flame for Nicholson to see if the pistol was pressed against Miguel's head. Similarly, Nicholson testified that the men were on their backs when they were shot. (T 938) It would have been virtually impossible for Miguel to have been shot in the

back of the head when he was lying in a supine position. In fact, it was the opinion of the assistant medical examiner, the State's own expert witness, that the men were not on their backs when they were shot. With regard specifically to Rodrigo Miguel, she testified that she believed he had been placed on his back after he was shot and fell to the ground. (T 328-329)

These factors tended to seriously undermine the trustiworthiness of Nicholson's testimony. At any rate, although the trial judge apparently found him believable, Appellant's jury would not necessarily have done so. They should have been permitted to make their own decisions regarding his credibility. Even if the jury did hear Nicholson and believe him, it would not necessarily have made a difference in their recommendation. After all, the jury did have before it some evidence from which they could have inferred that Appellant was the shooter, had they been so inclined. This evidence included Appellant's supposed admission to Oscar Thompson that he had shot the two men (T 591), as well as Luis Pecina's testimony that when Appellant returned to Alice Knestaut's trailer on the night in question he had blood all over his legs, belly, white tennis shoes, and shorts. (T 524) In a sense, then, Nicholson's testimony would have been cumulative to what the jury already had heard, and might not have made any difference whatsoever.

Cochran stands for the proposition that evidence that the sentencing judge hears that was not presented to the jury must be very, very strong indeed to justify overriding a life recommenda-

tion. Chris Nicholson's questionable testimony did not rise to this level; it was not so compelling as to justify nullifying the jurors' determination that Appellant's life should be spared.

B. Aggravating Circumstances

As Appellant has discussed above in Issue II, the evidence was insufficient to support two of the aggravating circumstances submitted to Appellant's jury for its consideration and found by the court below: CCP and avoid arrest. The jury may well have agreed with Appellant's assessment of these factors, and rejected them. The Supreme Court of the United States has recognized the ability of a jury to winnow out aggravating circumstances not supported by the evidence. In Sochor v. Florida, 504 U.S. _____, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 340 (1992), the Court observed that "...although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence. [Citation omitted.]" Appellant's jury probably did exactly that.

The jury also may have recognized the weakness of the two remaining aggravating circumstances submitted to it. Apart from the contemporaneous felonies committed during the same criminal episode for which Appellant was on trial, which really provided no insight into Appellant's propensity to commit violent acts, the only conviction that supported the aggravator of a previous violent felony conviction was the judgment against Appellant for an aggravated assault committed in 1988, some six years before the instant offenses. Even the impact of this conviction and the

testimony of the victim of the assault must have been offset, at least to some degree, in the minds of the jurors by the testimony of the victim's own daughter, who knew Appellant from church, and who described him as a "sweet guy" whom she had never seen do anything mean or violent. (T 745-748)

With regard to the remaining aggravator, that the capital felonies were committed during a kidnapping or attempted robbery, the jury may have understood that this factor is particularly weak, as the section 921.141(5)(d) aggravating circumstance is inherent in every felony-murder prosecution, and so does little to set the crime apart from others that do not merit the ultimate sanction. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-341 (Fla. 1984), wherein the Court reduced a death sentence to life imprisonment where the underlying felony was the only aggravator, even though there were no mitigating circumstances and the jury recommended death. Furthermore, this Court has consistently reduced to life in cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Thompson v. State, 647 So. 2d 824 (Fla. 1994); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

If Appellant's jury analyzed the case in aggravation as Appellant has herein, the jury must have concluded that the State's case was not particularly strong.

C. Mitigating circumstances[17]

This Court has "held that a trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. [Citation omitted.]" Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995). See also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The trial court may only reject a defendant's claim that a mitigating circumstance has been proved if the record contains "competent substantial evidence to support the rejection[.]" Nibert, 574 So. 2d at 1062. "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). Accord, Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The court below gave unduly short shrift to the mitigating evidence presented in this case, in violation of these principles.

Perhaps the most glaring error in the trial court's consideration of mitigating circumstances is her outright rejection of the fact that Appellant would not be eligible for parole for 50 years if consecutive life sentences were imposed. In her sentencing order she dealt with this factor as follows (R 496, T 997):

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[17] Appellant's discussion herein of the deficiencies in the trial court's consideration of mitigating circumstances could have formed a separate issue in this brief. Although Appellant has chosen to discuss the trial court's flawed treatment of mitigation in the context of the jury override question, Appellant nevertheless requests that the Court consider this matter as a separate and independent ground for reversing Appellant's sentences of death, if the Court does not agree with Appellant's position regarding the overrides.

"Defendant if sentenced to life imprisonment would not be eligible for parole. This is not a mitigating circumstance." In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court found reversible error in the trial court's refusal to allow defense counsel to argue to the sentencing jury that Jones could be sentenced to two consecutive mimimum 25-year prison terms on his murder charges if the jury recommended life.

> Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

569 So. 2d at 1239-1240. See also Simmons v. South Carolina, 512 U.S. _____, 114 S. Ct. _____, 129 L. Ed. 2d 133 (1994) (when prosecution relies in part on defendant's future dangerousness in seeking death, due process of law requires that jury be informed that defendant will not be eligible for parole if sentenced to life, either through argument of counsel or an instruction by the court). Appellant's jury unmistakably found great significance in the potential sentence facing Appellant if they recommended life, and the fact that consecutive sentences would insure his incarceration until he was at least 75 years old. This is evident from their question to the court as to whether they could recommend consecutive life sentences, and the fact that they did return such a recommendation on their verdict forms. [The jury also may have been cognizant of the fact that Appellant was facing additional lengthy prison sentences for the four other serious felonies of

which he had been convicted.] Even the prosecutor below recognized what the court did not, when he said at the hearing of February 13, 1995:

> Judge, it's our position he [Appellant] doesn't deserve to ever get out of prison after doing what he did. And while the case law suggests that that can be something to consider in mitigation, it just doesn't deserve the weight, because it doesn't tell you anything about Cruz Rodriguez.

(T 963-emphasis supplied). The court below was obligated to find this factor which has been specifically found to constitute mitigation by this Court. While she was entitled to give it little weight, if that is what she thought it deserved, she was not entitled to reject it out of hand, and give it no weight.

The jury also may have considered Appellant's state of intoxication on the night of the crimes. The court below dealt with this potential mitigator in her sentencing order as follows (R 493-494, T 994):

> Defendant was intoxicated at the time of the incident. While there is evidence that the Defendant was perhaps under the influence of marijuana or alcohol there is no evidence that such marijuana or alcohol use mitigates this offense. To the contrary, the evidence suggests that Defendant Rodriguez was a chronic user of marijuana and alcohol and nothing to show this in any way contributed to his actions on this occasion. This is not a mitigating circumstance in this case.

There was ample testimony from at least three prosecution witnesses concerning Appellant's ingestion of alcohol and marijuana on the day in question. Luis Pecina testified at trial that Appellant was drinking and was "a little bit" drunk. (T 552) Chris Nicholson

testified at the hearing of February 13, 1995 that Appellant was drunk the day of the homicides. (T 934) And Steven Stamper testified at trial that when Appellant and the others came back to the trailer [presumably immediately after having committed the homicides], Appellant had a beer in one hand and a "joint" in the other, and his arms were around Knestaut and Licor [implying that they were holding him up or supporting him]. (T 458, 483) Appellant looked "[d]istranged [sic] or not normal," and appeared to be sort of "out of it." (T 458, 483-484) Even the prosecutor below recognized that this testimony constituted a mitigating factor at the hearing of February 13, 1995, when he said (T 956- emphasis supplied):

> Referring to his [Appellant's] fifth indication about Luis Pecina saying and now Christopher Nicholson saying that Mr. Rodriguez was intoxicated. True, Judge, he had been drinking that day. No doubt about it. He was intoxicated. But, Judge, I would point out to the Court that he wasn't intoxicated to the point where it could have been used as a defense at trial.
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> He wasn't intoxicated to the point where he couldn't assist and actually take part in loading these people in the car, in driving the car to the scene without wiping it out, and unloading these people from the car, and from deliberately and directly firing to kill these people and accomplishing the goal that he was seeking.
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> So, Judge, the intoxication, while I concede that it does exist by the evidence, should not be weighed with a great deal of weight. It just does not mitigate the enormity of this crime.

Thus, the prosecutor conceded that Appellant was drunk at the time of the offenses, and conceded that this constituted a mitigating

circumstance, but merely argued that it was entitled to little weight.

With regard to the court's statement that the evidence suggested that Appellant was a "chronic user of marijuana and alcohol," she apparently gleaned this from the presentence investigation report or some other source not part of the record presently before the Court. At any rate, if true, this would not negate as mitigation that Appellant was intoxicated at the time of the offenses, but would instead constitute an additional mitigating factor; both intoxication on the day of the offense and a history of substance abuse have been held to be legitimate mitigation. For example, in Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986), which, like the instant case, involved two homicides, this Court noted that "[t]here was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse," which were factors the sentencing jury could have properly considered in returning their life recommendations. Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994), involved a particularly brutal killing and a death recommendation, yet this Court vacated the death sentence, finding that among the mitigating factors established in the record were that Morgan had sniffed gasoline for many years, and had sniffed it on the day of the murder. (Contrast Morgan with the court's findings in the instant case, where the court below rejected substance abuse as mitigation because Appellant not only was intoxicated on the day in question, but had a history of substance abuse.) In Knowles v. State, 632

So. 2d 62 (Fla. 1993), the appellant had killed a 10-year old girl and his own father, and the jury recommended death. This Court reversed one of the convictions for first degree murder, and vacated the sentence of death for the killing of Knowles' father. The Court was particularly impressed with testimony regarding Knowles' extended abuse of alcohol and solvents, as well as the fact that he was intoxicated on the day of the murders. 632 So. 2d at 67. The Court vacated Billy Ray Nibert's death sentence in Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990), noting, among other things, that Nibert suffered from chronic and extreme alcohol abuse since his preteen years and had been drinking heavily on the day of the murder. Charles Carter's sentence of death was reduced to life in Carter v. State, 560 So. 2d 1166, 1168-1169 (Fla. 1990), where there was evidence of a history of drug abuse and the possibility of substantial intoxication at the time of the murder. In Scott v. State, 603 So. 2d 1275 (Fla. 1992), this Court reversed a death sentence imposed over a life override, noting that one of the nonstatutory mitigating circumstances present was Scott's long-term drug and alcohol abuse. 603 So. 2d at 1277. In Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987), this Court cited the appellant's extensive history of drug abuse as one circumstance which could have persuaded the jury as to the reasonableness of recommending life imprisonment. Finally, in Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), the Court determined that the sentencing judge should have considered evidence that the appellant was an alcoholic who was intoxicated at the time of the

homicide, even though Ross himself testified at the sentencing proceeding that he was "cold sober" on the night of the murder! Thus, there is ample precedent for finding chronic substance abuse and intoxication at the time of the homicides in mitigation. The lower court found both factors to have been established, and yet afforded them no weight as mitigating circumstances. Even if the court did not feel that Appellant's state of intoxication was sufficient to establish a statutory mitigator such as substantially impaired capacity, she was obligated to find nonstatutory mitigation from the evidence, as Appellant urged.

Appellant's jury also may have been impressed by the testimony regarding his relationships with his mother and siblings and with his common law wife and his two baby daughters. The fact that Appellant was a father, and the testimony regarding his positive character traits and family ties, his capacity to form loving relationships, is the type of evidence this Court has found to constitute legitimate mitigation in cases such as Jacobs v. State, 396 So. 2d 713 (Fla. 1981); Washington v. State, 432 So. 2d 44 (Fla. 1983), Thompson v. State, 456 So. 2d 444 (Fla. 1984), Perry v. State, 522 So. 2d 817 (Fla. 1988), Harmon v. State, 527 So. 2d 182 (Fla. 1988), Hallman v. State, 560 So. 2d 223 (Fla. 1990), Dolinsky v. State, 576 So. 2d 271 (Fla. 1991), Craig v. State, 585 So. 2d 278 (Fla. 1991), Wasko v. State, 505 So. 2d 1314 (Fla. 1987), Holsworth v. State, 522 So. 2d 348 (Fla. 1988), McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), and Scott. The jury also may have properly considered Appellant's troubled childhood, during

which his alcoholic father struck his mother on a regular basis, causing the distraught child to step between his two parents to try to keep his mother from being hurt. In Amazon this Court noted that having been brought up in a "negative family setting" can be mitigating. 487 So. 2d at 13. See also Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Nibert. The lower court did not even mention this factor in her findings as to mitigating circumstances.

In her sentencing order, the court below rejected Appellant's demonstrated care and concern for his family as a mitigating circumstance because at the time leading up to the homicides, Appellant was not living with his common-law wife, but was "apparently cohabitating with co-defendant Knestaut." (R 494-495, T 995) The fact that Appellant may have been staying with Alice Knestaut in the weeks leading up to the instant offenses, while perhaps demonstrating the hold Knestaut had upon Appellant and the degree of influence she wielded, did not negate the positive relationship Appellant enjoyed both with his mother and brothers and sister and with his wife, Virginia Armas. Armas and several family members spoke on Appellant's behalf at his penalty proceedings, and Armas apparently did not hold it against Appellant that he may have had a relationship with Knestaut. She testified at penalty phase that Appellant came back home to her after the instant offenses took place. (T 786-787) Furthermore, even if Appellant was not an ideal husband, this would not totally destroy the value of his evidence regarding the mutual love and respect between his family and himself. See State v. Stevens, 319 Ore.

573, 879 P. 2d 162 (1994) (defendant's estranged wife, who testified for State that defendant abused her and abused their daughter, should have been allowed to testify on cross-examination that it would be better for the daughter if her father served a life sentence without parole rather than being executed; the excluded testimony was relevant mitigating evidence because it suggested something positive about the defendant's character and background). In paragraph 11 of her sentencing order the court again addressed Appellant's evidence from his family members, as follows (R 495, T 996):

> A sentence of death would deprive the Defendant's daughters of a father, mother of a son, and brothers and sisters of a brother; Defendant's family do not want him to receive the death penalty and would maintain a relationship with him if sentenced to life imprisonment; Defendant has a large family; Defendant has the ability to engender feelings of love and respect and is able to develop and maintain meaningful social relationship with others. This family background is not a mitigating circumstance.

The court gave absolutely no reason for her rejection of this mitigating factor; she merely concluded, without explanation, that it was not mitigating. The cases cited above indicate otherwise, and the jury certainly could have reached a result contrary to that reached by the trial court.

Another factor Appellant's jury may have considered is Appellant's capacity for gainful employment and ability to do good work, about which his brothers testified. See Buckrem v. State, 355 So. 2d 111 (Fla. 1978); Wasko; Proffitt v. State, 510 So. 2d

896 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); McCampbell; Holsworth.

The jury also may have considered Appellant's relatively youthful age of 24 at the time of the crimes, which was not addressed in the trial court's sentencing order. Although this would not necessarily constitute a mitigating factor as a matter of law, as this Court observed recently in Mungin v. State, 21 Fla. Law Weekly S66, 67 (Fla. Feb. 8, 1996), "[h]ow a defendant's age is viewed [as a potential mitigating circumstance] may differ from case to case[,]" and Appellant's jury may have viewed it as mitigating here. See Huddleston v. State, 475 So. 2d 204 (Fla. 1985) (jury could have considered Huddleston's age of 23 as one of the factors to support life recommendation).

Finally, one must consider, as the jury probably did, the various roles played by the six people indicted for the instant offenses, the deals that were made, and the sentences doled out to the participants. In his taped statement to the police, Appellant indicated that Luis Pecina was the moving force behind the homicides, and actually did the shooting. After cutting his deal with the State, Pecina, who testified that he did not even go out to the bridge where the killings occurred, ended up with a lighter sentence than anyone. At the hearing of February 13, 1995, Appellant said that it was Alice Knestaut who was the shooter. Although the jury did not hear this statement, they surely must have concluded that Knestaut was an extremely important player in the events that unfolded. It was she who formulated and orches-

trated the plan to conduct the drug ripoff. The planning and initial stages of the crimes occurred at her trailer. She was present at the bridge when the killings occurred, and went back later to recover potentially incriminating items. Significantly, the murder weapon was recovered from Knestaut's lawyer.

Of course, at the time of Appellant's sentencing, Knestaut had not yet been tried. Nonetheless, the court addressed her involvement in two paragraphs of her sentencing order, as follows (R 494, T 994-995):

> 6. Co-defendant Alice Knestaut exerted a significant and substantial influence on Defendant Rodriguez at the time of these offenses. While there is evidence to suggest that co-defendant Knestaut came up with the plan and fully participated, Defendant Rodriguez was the reason for the plan in the first place and participated fully up to and including pulling the trigger three times, going back to the crime scene to remove evidence and assisting in the destruction of evidence. This mitigating circumstance is not established.
>
> 7. The plan which resulted in the victims' deaths was initiated and instigated by co-defendant Knestaut. Defendant Rodriguez was the reason for the plan. This mitigating circumstance is not established.

The court's rejection of Knestaut's influence and role as a mitigating circumstance because Appellant was "the reason for the plan" makes no logical sense. Furthermore, it is crucial to bear in mind that there might not have been any killing if it were not for Knestaut. Luis Pecina testified that he was trying to dissuade Appellant from killing the men, and seemed to be having an impact, when Knestaut said that Miguel deserved to die because he had touched certain parts of her anatomy. Thus it was Knestaut's

allegation of sexual misconduct at a crucial time in the episode which impelled the others to act and resulted in the deaths of Miguel and Garcia.

Although the jury did not have the benefit of knowing the disposition of Knestaut's case at the time they returned their life recommendations, they might have been concerned that she would not receive sentences of death, and felt that it would be unfair for Appellant to be the only one sentenced to die for what happened. (In Dolinsky this Court suggested that it was appropriate for the jury to consider that one of the perpetrators had not been apprehended at the time of Dolinsky's trial; thus uncertainty over the future fate of a codefendant may be considered in mitigation.) The jury did know what sentence one of the codefendants, Luis Pecina, was likely to receive, a mere five and one-half years in prison, and may have believed his involvement was much more than his self-serving testimony would indicate, especially in light of Appellant's statement to the police regarding the part Pecina played in the killings. It was appropriate for them to take into account the uncertainty they may have felt over the respective roles of the people involved in the crimes. As this Court noted in Parker v. State, 643 So. 2d 1032, 1034 (Fla. 1994), in returning its life recommendation, "the jury was entitled to consider the conflicting testimony [regarding the respective roles of the various participants in the criminal episode] and weigh it in Parker's favor for purposes of imposing punishment while still finding him guilty of first-degree murder." See also Wasko. And

the sentences co-defendants receive are relevant considerations for the judge and jury in determining the appropriate sentence in a capital case. In Craig v. State, 510 So. 2d 857, 870 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S. Ct. 732; 98 L. Ed. 2d 680 (1988), this Court wrote:

> the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision.

See also Bassett v. State, 449 So. 2d 803 (Fla. 1984); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Barfield v. State, 402 So. 2d 377 (Fla. 1981); Messer v. State, 330 So. 2d 137 (Fla. 1976), cert. den., 456 U.S. 984, 102 S. Ct. 2259, 72 L. Ed. 2d 863 (1982); Gafford v. State, 387 So. 2d 333 (Fla. 1980).

Furthermore, while Knestaut was not sentenced until after Appellant, it is appropriate and necessary for this Court to consider on direct appeal, as part of its review function, "the propriety of disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. [Citation omitted.]" Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). In Slater v. State, 316 So. 2d 539, 542 (Fla. 1975), this Court addressed the principle of equal punishment for equal culpability in capital cases as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposi-

> tion of the death sentence in this case is clearly not equal justice under the law.

In Slater, the defendant was the accomplice; the triggerman had entered a plea of nolo contendere to the charge of first degree murder and, in exchange, had received a life sentence. This Court reduced the sentence of death to life imprisonment. 316 So. 2d at 543.

Since Slater, this Court has, on numerous occasions, reversed death sentences where an equally culpable codefendant received lesser punishment. E.g, Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988); Cailler v. State, 523 So. 2d 158 (Fla. 1988); Du Bois v. State, 520 So. 2d 269, 266 (Fla. 1988); Brookings v. State, 495 So. 2d 135, 142-143 (Fla. 1986); Malloy v. State, 382 So. 2d 1190 (Fla. 1979).

The principles expressed in Slater and subsequent opinions of this Court are also consistent with the requirements of the United States Constitution. The Eighth and Fourteenth Amendments require the capital sentencer to focus upon individual culpability; punishment must be based upon what role the defendant played in the crime in comparison with the roles played by his cohorts. See Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). Where, as here, the exact participation of the defendant is not clear, or where an equally or more culpable codefendant was not sentenced to death, the defendant's life must be spared.

Dolinsky is particularly worthy of this Court's consideration. It also involved a drug transaction with multiple victims.

Dolinsky was convicted of two counts of second-degree murder and one count of first-degree murder. Even though he was a shooter, and "participated willingly in these crimes," 576 So. 2d at 274, this Court vacated his death sentence in favor of the jury's life recommendation, in large part because other major players had not been sentenced to death.

Parker likewise involved a drug transaction in which three people were killed. Parker presented a case in mitigation very similar to that presented by Appellant. In addition to the fact that other major participants in the crimes were not sentenced to death for the murder of Nancy Sheppard, and there was conflicting evidence regarding what roles the different people played, there was evidence that: 1.) Parker was under the influence of drugs and alcohol during the murders. Compare this with testimony from the State's witnesses below regarding Appellant's state of intoxication on the day in question, particularly the testimony of Steven Stamper that when Appellant returned to Alice Knestaut's trailer, he had a beer in one hand and a "joint" in the other, and had to be supported by Knestaut and Licor, and that Appellant looked "[d]is-tranged [sic] or not normal," and appeared to be sort of "out of it." (T 458, 483-484) 2.) Parker had "a difficult childhood" during which he and his siblings "were aware that his alcoholic father beat and abused his mother." 643 So. 2d at 1035. Compare this with testimony from Appellant's family establishing that his father had a drinking problem and would beat Appellant's mother regularly, compelling Appellant to attempt to intervene. 3.)

Parker had been regularly abusing drugs since the age of fourteen. See the trial court's finding that Appellant was a "chronic user of marijuana and alcohol." (R 494, T 994) 4.) Parker "had a positive adult relationship with his two children, whom he helped to raise and care for, and ... had a good relationship with his neighbors, whom he assisted when they were in need." 643 So. 2d at 1035. Compare with testimony from Appellant's common-law wife, Virginia Armas and other family members regarding Appellant's relationship with his two baby daughters, and testimony from Borland Conn as to what a good person and helpful neighbor Appellant was.

This Court noted in Parker that "many of these mitigating factors have been found sufficient in other cases to preclude a jury override and sustain a life recommendation. [Citation omitted.]" 643 So. 2d at 1035. The Court vacated Parker's death sentence, and must do the same for Appellant.

In cases such as Thompson v. State, 456 So. 2d 444 (Fla. 1984), Gilvin v. State, 418 So. 2d 996 (Fla. 1982), and Welty v. State, 402 So. 2d 1159 (Fla. 1981), this Court vacated death sentences imposed over life recommendations, even though the trial courts had found no mitigating circumstances, because there was evidence in the record upon which the juries could have relied in mitigation. Whatever the trial court may have felt about the strength of the mitigating evidence, Appellant's jury was free to give this evidence the weight that it felt was appropriate, and this evidence could have formed a rational basis for the life

recommendations. See Scott v. State, 603 So. 2d 1275 (Fla. 1992)

Conclusion

The Tedder standard has not been met here, and Appellant's sentences of death cannot be allowed to stand. Rather than giving the jury's recommendations great weight, as she was required to do, the trial court gave them no weight after hearing from Chris Nicholson. Nicholson's testimony, however, should not have caused the court to disregard the jury's expressions as the conscience of the community. Even if Nicholson's testimony was properly received, it did not compel a result different from what the jury determined to be appropriate. Based upon the weakness of the aggravating circumstances and the strength of the mitigation, as discussed above, reasonable persons could find that Appellant can be adequately punished for his offenses by sentences of life imprisonment.

Mere disagreement with the jury's recommendations is insufficient reason to justify an override. Rivers v. State, 458 So. 2d 762 (Fla. 1984) As in Rivers, in Appellant's case

> there was substantial evidence offered in mitigation which the jury could reasonably have relied upon in reaching its advisory verdict.

458 So. 2d at 765. The test, as Justice McDonald noted in his concurring opinion in Cheshire v. State, 568 So. 2d 908, 914 (Fla. 1990), "is whether the facts are such that the jury's recommendation is reasonable and not whether the judge would reach the same conclusion." In Appellant's case, the recommendations were reasonable, and should have been followed.

> We choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the Tedder standard adopted in 1975 and consistently reaffirmed since then.

Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992). The Tedder standard for overriding the life recommendations of the jury was not met in Appellant's case. His death sentences must be vacated in favor of sentences of life imprisonment.

ISSUE IV

THE COURT BELOW ERRED IN SENTENCING APPELLANT TO CONSECUTIVE MANDATORY MINIMUM TERMS FOR USING A FIREARM IN THE COMMISSION OF THE NONCAPITAL FELONIES OF WHICH HE WAS CONVICTED, WHERE ALL OFFENSES STEMMED FROM A SINGLE EPISODE.

With regard to the non-capital felonies of which Appellant was convicted, the court below departed from the sentence recommended under the guidelines, sentencing Appellant to life in prison on each of the two counts of armed kidnapping, and to 15 years on each of the two counts of attempted robbery with a firearm, with a three year minimum mandatory on each count. (R 475, 477, 479-482, T 998) The sentences were to run consecutively. (R 476, 478, 480, 482, T 998)

As all the charges against Appellant stemmed from a single criminal episode, it was error, pursuant to this Court's opinion in Palmer v. State, 438 So. 2d 1 (Fla. 1983), for Appellant to be subjected to consecutive minimum mandatory sentences for use of a firearm; the minimum mandatories could only run concurrently. Therefore, Appellant's sentences for the noncapital offenses must be reversed, and his cause remanded for resentencing on those counts.

CONCLUSION

Appellant, Cruz Marta-Rodriguez, prays this Honorable Court to reverse his convictions and sentences and remand his cause for a new trial. In the alternative, he asks that his sentences of death be vacated and replaced with sentences of life in prison, and that the minimum mandatory sentences on his noncapital convictions be made to run concurrently. If neither of these forms of relief is forthcoming, Appellant requests that his sentences be vacated and his cause remanded for resentencing by the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31 day of March, 1996.

Respectfully submitted,

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