IN THE SUPREME COURT OF FLORIDA

CASE NO. 93, 988

NOEL DOORBAL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY.

AMENDED INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the Appellant, Noel Doorbal, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R," "SR" and "T" will be used to refer to portions of the record on appeal, supplemental record and trial transcript, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On October 2, 1996, an indictment was filed charging the defendant with conspiracy to commit racketeering, racketeering, two counts of first degree murder involving Frank Griga and Krisztina Furton, three counts of kidnapping, attempted extortion, two counts of grand theft, attempted extortion, attempted first degree murder of Marcelo Schiller, armed robbery, burglary of a dwelling, arson, extortion and conspiracy to commit a first degree felony. (R. 61-112). A jury trial was conducted before the Honorable Alex Ferrer, Circuit Judge, from February 2, 1998 to May 5, 1998. At the conclusion of trial, the jury found the defendant guilty of all counts, as charged. (R. 2704-2708). Following the penalty phase, the jury returned an

advisory verdict of 8-4 in favor of imposing the death penalty on the two, first degree murder counts. (R. 2940-41).

The trial court subsequently entered a sentencing order imposing the sentence of death on the two murder counts. (R. 3462-85). Regarding the Furton murder count, the court found that the State had established six aggravating circumstances: the defendant was previously convicted of a capital felony or a felony involving violence, the capital felony was committed while the defendant was engaged in a kidnapping, the capital felony was committed for the purpose of avoiding a lawful arrest, the capital felony was committed for pecuniary gain, the capital felony was heinous, atrocious or cruel and the capital felony was cold, calculated and premeditated. (R. 3462-72). With regard to the Griga murder count, the court found that the State had proven the same aggravating circumstances with the exception of the heinous, atrocious or cruel aggravator. The court assigned great weight to each of the aggravating circumstances found by the court. The court found that no statutory mitigating circumstances had been proven.[1] The court found that several non-statutory mitigators had been proven: the defendant had a difficult and abusive childhood, the defendant had been a hardworking employee

[1] Although the defendant had no prior convictions prior to the instant prosecution, the Court found that the no significant prior criminal history mitigator had been rebutted by the entry of burglary and grand theft convictions against the defendant on the counts relating to Marcelo Schiller. (R. 3472-73).

and a loyal friend, the defendant had found religion, the defendant had properly comported himself in the courtroom and the defendant would spend the rest of his life in prison based upon the convictions entered against him. The court assigned little weight to each of the mitigators found. (R. 3475-81).

Finding that each of the aggravating circumstances, with the exception of the felony murder aggravator, was sufficient to outweigh all of the mitigating circumstances combined, the court sentenced the defendant to death on each of the first degree murder counts. (R. 3483). On the remaining counts the court sentenced the defendant to thirty years on the conspiracy to commit racketeering count, thirty years on the racketeering count, life on each of the kidnapping counts, five years for both the attempted extortion and one grand theft count, life on the attempted first degree murder count, life on the armed robbery count, fifteen years each for the burglary and grand theft counts, thirty years on the arson count, thirty years on the armed extortion count and fifteen years on the conspiracy to commit a first degree felony count. All sentences and minimum mandatories imposed as a condition of the sentences were to run consecutively. (R. 3483-85).

On July 28, 1998, the defendant timely filed a motion for new trial. (R. 3495-99). The trial court denied the motion after convening a hearing on January 13, 1999. (R. 3837-38).

On January 31, 1999, a timely notice of appeal was filed. (R.

3781). This appeal follows.

STATEMENT OF THE FACTS

On January 22, 1998, the court conducted a hearing on the defendant's motion to suppress evidence. (R. 1121-24, T. 2260). The motion attacked police searches of the defendant's apartment and car that were done pursuant to search warrant.(R. 1195-1287). At the hearing, the defendant contended that the affidavits filed in support of the issuance of the warrants were insufficient, because they failed to establish probable cause to believe that the defendant was connected with any wrongdoing, or that any evidence of criminality would be found in either the defendant's apartment or car. (T. 2260-70, 2274-75). The defendant further argued that each succeeding warrant was based upon evidence seized pursuant to a preceding, improvidently-issued warrant. (T. 2284). The trial court rejected the defendant's argument and found probable cause in the affidavits to support issuance of the warrants. The court therefore found the searches of the defendant's apartment and car to be legal. (T. 2277, 2284-85).

At trial, Jorge Delgado testified that he met Marcelo Schiller through his wife, who had been working for Schiller at Schiller's accounting firm. (T. 11597-98). Delgado subsequently went to work for Schiller and developed a close friendship with him. (T. 11599). As a result of that friendship, Schiller confided in Delgado and provided him with a great deal of personal information. (T. 11601). Delgado

subsequently went into business with Schiller: they both engaged in a medical supply business which was a front for Medicare fraud[2] and they engaged in a mortgage business. (T. 11637, 11642-43). The Medicare business was quite lucrative; Delgado made in excess of $300,000 in 1992. (T. 11891).

In 1992, Delgado joined Sun Gym and met both Daniel Lugo, a co-defendant, and the defendant at the gym. (T. 11638, 11640). Delgado became very friendly with Lugo and entered into a joint business venture with him. (T. 11645, 11648). After Delgado introduced Lugo to Schiller, Schiller expressed disapproval of Lugo and told Delgado that he would not do business with Lugo. In effect, Schiller forced Delgado to choose between him and Lugo. (T. 11644-45).

Subsequently, after Lugo had become involved in the billing of the Medicare business, Lugo informed Delgado that Schiller had cheated him. (T. 11647, 11651). According to Lugo, Schiller owed Delgado $200,000. (T. 11661). After Schiller rejected Delgado's request for the money, Lugo suggested that they kidnap Schiller to force him to get the money back. (T. 11652-53).

In October, 1994, a meeting was conducted in Lugo's office with Delgado, the defendant, Carl Weekes and Stevenson Pierre.[3] At that

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[2] Delgado admitted that he and Schiller had been involved in hundreds of instances of Medicare fraud. (T. 12031-33). Delgado also acknowledged that he was the subject of a federal investigation into those fraudulent activities. (T. 11862).

[3] Stevenson Pierre met Lugo when he was hired by him at Sun Gym in October, 1993. (T. 8834). Pierre claimed that Lugo offered him $100,000 to participate in the

meeting, Lugo announced that they would try to capture Schiller and get their money back.[4] (T. 11657). Each of the participants had a role: Lugo led the meeting, Delgado was to provide information about Schiller and was to watch him once he was captured, Pierre and Weekes were to assist in Schiller's capture and watch him once he was captured and the defendant was to help with Schiller's capture and get him to talk by roughing him up, if necessary. (T. 11657-58, 11662-63). The participants agreed that Schiller would be kept at a warehouse previously rented by Delgado. (T. 6459-69, 11664). In preparation for the kidnapping, Lugo purchased a taser gun, a mask, rope, handcuffs and duct tape. (T. 11666-67). The men then endeavored to abduct Schiller by staging a car accident, by snatching him out of his home and by forcibly taking him at his place of business, Schlotzky's Deli. (T. 8858-8891). Each attempt failed. Finally, on November 15, 1994, Marcelo Schiller was successfully abducted by the defendant, Mario Sanchez[5] and Carl Weekes outside of Schlotzky's Deli. (T. 7327,

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Schiller kidnapping. (T. 8850). Carl Weekes is Pierre's cousin. (T. 8833).

Pierre was charged with attempted first degree murder, kidnapping, armed robbery, burglary, two counts of grand theft and arson for his role in the Schiller incident. (T. 8950). Facing life in prison, Pierre entered into a negotiated plea with the State on all the charges. In return for his cooperation, Pierre was to receive a sentence of ten years in prison. If he failed to cooperate fully, Pierre was to be sentenced to forty years in prison. (T. 8951-53).

[4] Lugo claimed that Schiller owed him $100,000. (T. 11661).

[5] Mario Sanchez met the defendant when they worked together at Sun Gym in 1994. (T. 8456-58). Sanchez alleged that he had a volatile relationship with the defendant. (T. 8458-59). Sanchez claimed that he once heard the defendant heatedly tell another weight

8498).

Schiller testified that he left Schlotzky's Deli after 4:00 PM on November 15, 1994 and walked to his Toyota 4-Runner parked in the lot at the rear of the restaurant. (T. 7325-26). Schiller saw some men approach, although he did not get a good look at them. (T. 7327). As the men grabbed for Schiller, Weekes "got" Schiller with a taser several times. (T. 7327, 8497). Schiller stated that the taser was very painful. While Schiller struggled to resist, Sanchez grabbed Schiller and forced him into a waiting van. (T. 8498). As the defendant drove away from the scene, Weekes struck Schiller several times, handcuffed him and threatened to kill Schiller if Schiller did not remain quiet. (T. 8499). Weekes taped Schiller's eyes and both Weekes and Sanchez struck Schiller several times. (T. 7328, 8500-05). Weekes then removed Schiller's jewelry and gave it to the defendant. (T. 8505). As he drove, the defendant called someone on a cellular

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lifter that, "when I get mad I'll do anything. I'll cut – I'll start up a chain-saw and cut somebody up just to see the blood spurting." He also alleged that he once heard the defendant say, "I'll go into a house and tie everybody up, grandmother, mother, daughter... And I'll shoot – I'll start shooting everybody until they give me what I want." (T. 8548-49). Both remarks were objected to by counsel for co-defendant Mese. The court overruled the objections. (T. 8549). Despite these tirades, Sanchez stated that the defendant was able to entice him to get involved in the Schiller incident by offering him $1000 to help him collect a debt from a "drug dealer." (T. 8474-75). Sanchez claimed that he was not aware that Schiller was a kidnap victim at the time that Schiller was abducted. (T. 8498).

Sanchez was charged with attempted first degree murder, armed kidnapping, armed robbery and burglary for his role in the Schiller incident. (T. 8573). Sanchez entered into a negotiated plea on the kidnapping charge only. Originally facing a prison sentence of 7 to 12 years, Sanchez was sentenced to two years in prison followed by two years of community control. (T. 8577).

phone and announced, “the eagle has landed.” (T. 8525).

Pierre and Lugo met the defendant, Sanchez, Weekes and Schiller at Delgado’s warehouse. (T. 8527). During the next several hours, Delgado and Lugo retrieved Schiller’s car from the restaurant parking lot, while they all administered a beating to Schiller. Schiller was punched, kicked, burned with a cigarette butt and struck with a gun. (T. 7329-33, 8897, 11670). As they beat Schiller, the men demanded a list of Schiller’s assets. Schiller noted that the men had accurate information about some of his holdings. (T. 7333-34). Based upon the information his captors had, Schiller assumed that Delgado was involved. (T. 7340-41). At that time, Schiller also recognized Lugo’s voice. (T. 7336). The men threatened Schiller’s wife and children. Schiller told his captors that they could have what they wanted if they allowed his wife and children to leave the country. (T. 7338-39).

With the information provided by Schiller, the defendant and Lugo went to Schiller’s home and removed his safe and several personal items. (T. 8912, 11675). The money from the safe, approximately $10,000, was split between the defendant, Pierre and Weekes. (T. 8912).

During the next several days, Schiller was required to call his bankers and sign several documents. (T. 7351-53). Included among the documents was a deed to Schiller’s home, which was conveyed to D & J International, a corporation formed by Lugo and John Mese. (T. 8913,

11676-77). The deed and a change of beneficiary form[6] for Schiller's life insurance policies were taken to Mese for notarization. (T. 8916-17, 11680). Schiller was also required to sign a confession admitting to Medicare fraud, although Schiller denied that he was ever involved in any such activity. (T. 7354-55). Additionally, Schiller was required to marshal his assets from several offshore accounts. Checks totaling $1,260,000 were then unwittingly signed by Schiller and deposited in the corporate account of a company named Sun Fitness[7]. (T. 7484-85, 11680-81). According to Delgado, Lugo, the defendant, Pierre, Weekes, Delgado and Mese were to share in the proceeds. (T. 11682). Finally, Schiller was told by his captors that he should call

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[6] Sharon Farugia, an employee of Met Life, testified that in November, 1994, Marcelo Schiller owned two life insurance policies worth $1,000,000 each. The original beneficiary on the policies was Diana Schiller, Schiller's wife. (T. 6856-60). On November 24, 1994, a change of beneficiary form was executed changing the beneficiary on the policies to Lillian Torres, "fiancee." (In fact, Lillian Torres was Lugo's ex-wife). (T. 6861-63, 8204, 8211). There was a mark for a signature and the signature was notarized by John Mese. (T. 6862). On December 22, 1994, Gene Rosen, Schiller's attorney, notified Met Life that the change of beneficiary should be voided and that the beneficiary should again be Diana Schiller. (T. 6863, 6887).

Additionally, Camilo Blanco, a principal in the construction of La Gorce Palace, a 34 story condominium on Miami Beach, testified that Schiller and his wife had purchased a condominium prior to construction. (T. 6904-06). On November 28, 1994, Blanco received a written assignment of Schiller's contract on the condominium, which purported to assign Schiller's interest to Lillian Torres. The assignment had been signed by Schiller and was notarized by Mese. It was accompanied by a check for $2,400 written on Schiller's account. (T. 6909-14). Blanco was unable to contact Torres. (T. 6911). In February, 1995, Gene Rosen contacted Blanco and informed him that the assignment should be voided. (T. 6918).

[7] The Sun Fitness account was owned by Mese. However, Lugo and the defendant were the authorized signatories on the account. (T. 9579).

Gene Rosen and tell him to grant Delgado power of attorney over Schlotzky's Deli. (T. 7367). When he was informed of Delgado's involvement, Schiller assumed that his captors planned to kill him.[8] (T. 7366-67).

Lugo told Delgado that the plan was to get Schiller drunk and have him burn in a staged car accident. (T. 11686). On December 15, 1994, Lugo directed Schiller's 4-Runner into a pole, with an intoxicated Schiller sitting in the front seat of the car. (T. 8919-21). Lugo doused the car with gasoline and ignited it. (T. 8922). However, because they had forgotten to seat belt Schiller in, he was able to escape. (T. 8923). At the direction of Lugo and the defendant, Weekes ran Schiller over twice. (T. 89223, 11688). When the police found Schiller, they believed that he had been involved in a car accident while driving drunk. Schiller was transported to Jackson Memorial Hospital. (T. 8920, 11688).

When Lugo and Delgado realized that Schiller might not be dead, Lugo, Weekes, Pierre and the defendant went to the hospital looking for Schiller. The defendant had decided to attempt to strangle Schiller in his bed. (T. 11689). However, because a guard had been stationed outside Schiller's door, nothing was done. (T. 8926-27, 11690).

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[8] Schiller's suspicions were confirmed by Delgado. Once Schiller learned of Delgado's involvement, according to Delgado, it was decided that Schiller had to die. (T. 11685).

Lugo, Delgado and the defendant later went to Schiller's home and emptied it. Delgado took Schiller's stereo and television. The defendant took Schiller's furniture. Lugo took furniture, cameras and Schiller's BMW. (T. 11694-95). They all used Schiller's credit cards to buy things.[9] (T. 8931-32, 11695-96).

Schiller suffered several major injuries as a result of his abduction. (T. 6968-69, 7375-77). While hospitalized, Schiller informed his doctor of what had happened to him. He also told his attorney, Gene Rosen. (T. 7378, 7594-96). Despite these reports, no police officer responded to the hospital to investigate the abduction. (T. 7596). On his lawyer's advice, Schiller fled from the hospital and went to New York in an effort to assure his safety. (T. 7379, 7769).

In January, 1995, Schiller hired private investigator, Ed Dubois, to try to regain his money and property. (T. 7385-86).

Based upon a memorandum written by Schiller, Dubois contacted John Mese. (T. 7776). Dubois met with Mese in February, 1995, and told Mese that he represented Schiller. Dubois allowed Mese to read the memorandum prepared by Schiller. (T. 7781-84). Mese admitted that he knew Delgado and Lugo, but denied any knowledge of Schiller's abduction. (T. 7783-87). Mese did not deny that he had notarized

[9] In furtherance of his efforts to purchase items with Schiller's credit cards, Lugo rented a post office box in Schiller's name. Elle Ovedia, the owner of the postal center, recalled that Lugo had asked her to pre-date the rental of the box back to March, 1994. (T. 9329-33).

Schiller's documents. He simply claimed that he did not recognize Schiller's name because he frequently notarizes documents. (T. 7783-86). At Dubois' request, Mese agreed to set up a meeting between Dubois and Lugo. (T. 7788).

At the appointed meeting time, Dubois met Delgado rather than Lugo. (T. 7800-04). After informing Delgado of Schiller's claims, Delgado denied Schiller's story and told Dubois that the entire matter concerned a business deal. (T. 7805, 11700). After Dubois asked Delgado if a business deal included torture and kidnapping, Delgado told Dubois that another meeting would be required. (T. 7805-07). They agreed to meet with Lugo on the following day in Mese's Miami Lakes office. (T. 7808).

The next day, Dubois arrived at the appointed time, but found neither Mese nor Delgado at Mese's office. Instead, he was shown into an office where he waited for 2-3 hours. In the trash in the office, Dubois found Merrill Lynch account statements for an account bearing the defendant's name, several cancelled checks written by Lugo and other documents relating to Lugo and Sun Fitness. (T. 7827-57). Finally, Mese and Delgado arrived. Lugo did not attend the meeting. (T. 7859-60). Delgado told Dubois that "we" will give back the $1.26 million taken from Schiller. The return of the money was conditioned on Schiller signing an agreement in which he was to state that the money was being returned for a business deal gone sour. (T. 7861, 7867). Schiller must also agree that he would not go to the police.

(T. 7867). Dubois agreed to the conditions on Schiller's behalf even though he believed that the agreement was not enforceable. (T. 7867-68). Delgado then dictated an agreement and promised to produce the money by the next day. (T. 7868-69).

During the days that followed, several faxes were exchanged between Dubois, Mese and Joel Greenburg, a lawyer retained by Delgado to draft an agreement. (T. 7871-79, 7889-93). Although Schiller signed the agreement drafted by Greenburg, the agreement was never signed by the other parties named in the agreement: Delgado, Lugo or Mese. (T. 7909-10). After several failed attempts to reclaim Schiller's assets, Dubois contacted the police[10] and provided the police with the documents that he found at Mese's office. (T. 7946-59).

In the months following Schiller's abduction, Delgado purchased a Mercedes and gave his leased 300 ZX to the defendant. Lugo leased a Mercedes. (T. 11709, 11721). Delgado claimed that the defendant had Schiller's furniture in his apartment and that the defendant lived off the money taken from Schiller.[11] (T. 11724, 11727). Lugo lived in an

[10] Dubois contacted the police 3 ½ months after he was initially contacted by Schiller. (T. 8015).

[11] Frank Murphy, a Merrill Lynch account executive, testified that Lugo opened an account with him in April, 1993. A second account was opened for the defendant in early 1994. The initial deposit in the defendant's account was $745,000. (T. 9392, 9401-18). Lugo was given authority to and did make all of the trades on the defendant's account. In fact, Murphy expressed surprise that the defendant did not take a greater interest in the account given the account's size. (T. 9404-05, 9420, 9437).

apartment with his mistress, Elena Petrescu.[12] (T. 11725). Lugo also sought to make improvements to Schiller's home by obtaining service for the pool and an estimate for a new security system.[13] (T. 7269-72, 9360-66).

On December 20, 1994, a check signed by Lugo written on Sun Fitness in the amount of $1,000,000 was deposited into the defendant's account. (T. 9423-25). The defendant subsequently wrote a check to Sun Fitness on his Merrill Lynch account for $240,364. He also took a series of cash advances against the account in denominations less than $10,000. The cash advances were taken in February, 1995. (T. 9431-32, 9440-42). When Merrill Lynch learned that Lugo had a criminal history involving fraud, they ordered that both accounts be closed. The securities in the defendant's account were transferred to Smith Barney. (T. 9440).

[12] During their time together, Lugo told Petrescu that Schiller stole money from Delgado and that Schiller was using Lugo's money. (T. 10333, 10355). Lugo told Petrescu that he had fixed it so that Schiller would not steal from Delgado anymore. (T. 10334). Lugo gave Schiller's BMW to Petrescu for her use. (T. 10357-61). As a result, Petrescu was initially charged with grand theft. The State subsequently dropped the charge. (T. 10362, 19489).

[13] In March, 1995, Lugo met with Frank Fawcett, an investment banker referred to Lugo by Smith Barney. (T. 10716-17). Lugo told Fawcett that he had between two and ten million dollars to invest with him. (T. 10719). In a subsequent meeting, Lugo paid Fawcett a $25,000 retainer. At the meeting, which was also attended by the defendant, the defendant and Lugo told Fawcett about a problem they were having with Marcelo Schiller. Lugo told Fawcett that they had entered into a bad business deal with Schiller and that Schiller wanted his money back from them. The defendant also mentioned that he was having an immigration visa problem. (T. 10735-38). Lugo sought Fawcett's help with both of those problems. (T. 10765-66).

In a subsequent meeting with the defendant, Fawcett said that the defendant told him that he was merely a figurehead and that Fawcett should ask Lugo about any necessary details. Fawcett added that he heard the defendant threaten to kill his girlfriend while the defendant spoke on the telephone. (T. 10742). A month later, when Fawcett again sought to speak to the defendant, Fawcett claimed that the defendant told him, "leave me alone, I'm making a bomb." (T. 10753).

Fawcett noted that he never received a signed contract from Lugo and that he ultimately lost contact with him. (T. 10752).

Delgado testified that Lugo later reported to him that he was having a problem with Winston Lee, a man who worked out at Sun Gym. (T. 11728). Lugo wanted to beat Lee up and take his money. (T. 11728). Although Lugo mentioned that he wanted to kidnap Lee and kill him, Delgado and Lugo never went further then going to Lee's home and taking some pictures.[14] (T. 10363-76,11729).

In March, 1995, Beatrice Weiland was working as an exotic dancer. (T. 5756-57). She had previously been married to Attila Weiland and had also dated Frank Griga. (T. 5754, 5758-59). She began dating the defendant after he met her at "Solid Gold," a strip club. The defendant took her to Lugo's apartment, where she found that Lugo was living with a fellow dancer, Elena Petrescu. (T. 5761-66). Lugo lived across the street from the defendant and had a key to the defendant's apartment. (T. 5773).

The defendant told Beatrice that he and Lugo invested money in the computer business. The defendant also told her that Lugo worked for the CIA. (T. 5767-68). In her view, the defendant looked up to and respected Lugo. (T. 5769).

Beatrice stated that the defendant worked out daily and took steroids. (T. 5780). She added that the defendant was very mysterious; she did not know how the defendant made money. (T. 5786).

[14] Mario Gray, a friend of Lugo's, testified that Lugo asked him if he wanted to help him kidnap Winston Lee. Although Gray indicated that he was willing to assist, Gray said that nothing ever came of it. (T. 11110-13).

One day, Beatrice showed the defendant her photo album. Beatrice noted that the defendant took particular interest in a photo of Frank Griga's Lamborghini. (T. 5787-90). Beatrice told the defendant that the car belonged to her ex-boyfriend, Frank Griga. (T. 5790).

The defendant met Attila Weiland through Beatrice. (T. 5711-12). The defendant told Attila Weiland that he and Lugo were thinking of entering the phone business and were looking for partners. (T. 5719-20). The defendant asked Weiland if he could provide an introduction to Griga. (T. 5720). Weiland relayed the message and subsequently informed the defendant that Griga had indicated that the defendant could stop by his home. (T. 5722). Lugo, the defendant and Weiland then went to Griga's home in Lugo's Mercedes. (T. 5722).

At Griga's house, Lugo discussed a business plan involving phone lines in India. Lugo claimed that he had already invested $5,000,000 in the venture. (T. 5728-29). The defendant did not speak during the thirty minute meeting. (T. 5730). The defendant and Lugo were pleased with the meeting even though Griga had said that he would only be interested in the cellular phone business.[15] After Griga declined their dinner invitation, the defendant and Lugo left Griga a laptop computer as a gift. (T. 5732).

[15] Griga made his fortune in the "976" sex line business, where patrons would pay $3-$5 per minute of phone time. In 1994, Griga earned $1,900,000. (T. 5582-83, 11040-42).

Lugo told Petrescu about the Hungarian man with a lot of money and a yellow Lamborghini. (T. 10393). Lugo told her that the man made a lot of money from phone sex and that the FBI wanted him because he did not pay enough money to the government. (T. 10395). Lugo said that he would capture the man, take his money and turn him over to the FBI.[16] Lugo also stated that the man had a girlfriend. He indicated that they would both be taken and brought to a warehouse. (T. 10397).

Petrescu said that the defendant came over one night with a bag containing a syringe and handcuffs. (T. 10397-98). Lugo had tape. Lugo and the defendant then constructed a plan, which included Petrescu. (T. 10398-400). Petrescu would drive Lugo's Mercedes to Griga's home on Golden Beach. Lugo would pretend to show Griga computer equipment. Lugo would take Griga while the defendant would take the girl. They would both be put in the trunk of Lugo's car, which would be parked in the garage. (T. 10401-406).

One Sunday, Petrescu went to the defendant's apartment. (T. 10409). Lugo had loaded a bag with items but had forgotten to bring the tape. When they went to the store to purchase tape, Petrescu was told that the defendant was carrying a gun. (T. 10409-13). Lugo then called Griga and arranged to meet him at Griga's home to show him some computer equipment. (T. 10418-19). When they arrived at Griga's home,

[16] Petrescu testified that Lugo had told her that he was with the CIA. (T. 10335). In fact, Petrescu said that Lugo called it the bad CIA; the one that kills people. (T. 10346). According to Petrescu, Lugo also told her that the defendant had been a "killer" in his country. (T. 10348).

both Lugo and the defendant got out of the car carrying guns. (T. 10421). Petrescu waited outside. Fifteen minutes later, Lugo and the defendant came back out. After they got in the car and drove off, the defendant yelled angrily that "they should have done it." (T. 10423-24). Lugo then called Griga to arrange to have dinner with him. (T. 10425). After the defendant was dropped off at his apartment, Lugo related the new plan to Petrescu. (T. 10431-32). Petrescu was to play Lugo's Russian wife. Lugo would show the man computer equipment in the defendant's apartment. Lugo would then "take" Griga and the defendant would "take" the girl. Petrescu told Lugo that she did not want to do it. After Lugo told her that she needed to be part of the team and that she had to assist if she were to stay with him, she agreed. (T. 10432-33).

At about 10:00 PM on May 24, 1995, Judi Bartusz, Griga's neighbor and a close friend, was walking her dog when she saw Griga and his girlfriend, Furton, standing in their driveway. (T. 5597-98). Both Griga and Furton were dressed to go out.[17] Also in the driveway was a gold, 4 door Mercedes. Bartusz saw both Lugo and the defendant and was told that they were all going to Shula's restaurant for dinner. (T. 5599-5600). That was the last time that Bartusz saw Griga and Furton alive. (T. 5608).

[17] Furton was wearing a red dress with matching purse and shoes. Griga was wearing jeans and boots. (T. 5600-05). Their clothing was subsequently found in a storage closet in the apartment shared by Petrescu and Lugo. (T. 7155-59).

Eszter Lapolla, Griga's cleaning lady, was also at the Griga home on May 24. At 5:00 PM, she left with Furton to pick up her daughter. When they returned, the defendant and Lugo were present at Griga's home. (T. 5670-71). They all left in two cars. One was a Mercedes 600 SL. (T. 5672). Lapolla said that she did not clean up after they left. She noted that a couple of glasses[18] were left on an office table. (T. 5674). Lapolla said that Griga and Furton did not come home that night. (T. 5675).

At 7:00 AM the next day, Lapolla left the Griga home. She called later that day and the next day, the 26th, but was not successful in contacting Griga. (T. 5676). Lapolla then called Bartusz and was told by Bartusz that Griga and Furton had plans to go to the Bahamas on the 25th. (T. 5607, 5676). Lapolla went to the house and noted that Griga's dog was still in the home and that the house looked the same as she had left it. (T. 5676). Lapolla picked up Bartusz and they both entered the house. (T. 5677). Bartusz felt that it was unusual that the dog was still in the house. It had been Griga's practice to kennel the dog if he was to be out of town. (T. 5607-09). Bartusz then found Griga's passport and two plane tickets. (T. 5612). At that point, Bartusz sensed that something was wrong and she decided to call the police. (T. 5614-18). Bartusz gave the police the information about the Mercedes she had seen. (T. 5619).

[18] Fingerprints left by the defendant and Lugo on the glasses were subsequently identified by the police. (T. 10970-71).

The following day, Bartusz drove to Shula's restaurant in Miami Lakes. Bartusz saw a gold Mercedes on the street that resembled the Mercedes she had seen at Griga's home. She recorded the tag number of the car and provided it to the police. (T. 5620).

Attila Weiland testified that he got a call about Griga from Griga's sister on May 27. (T. 5736). Weiland said that he called the defendant and told him that Griga and Furton were missing. (T. 5737). The defendant told Weiland that he had gone to dinner with Griga and Furton on the preceding Wednesday. However, since the restaurant was closed, they elected to go to a dance club. (T. 5737). The defendant said that he then returned to his apartment and Griga left. (T. 5737). The defendant speculated that Griga and Furton had gone to the Bahamas. (T. 5738).

Weiland spoke with the defendant again on May 31. At that point, Weiland felt that the defendant had been involved in Griga's disappearance. (T. 5739). Weiland continuously asked the defendant about Griga. At one point, the defendant said to Weiland, "you're supposed to be my friend." (T. 5740). Weiland felt from the defendant's tone that he should back off. (T. 5740). In the following days, the defendant told Weiland that he liked Griga, that he had no idea what had happened to him and that his heart went out to Griga. (T. 5741-42).

The defendant had the same reaction with Beatrice Weiland. Although he denied any knowledge about Griga's disappearance, Beatrice

felt that the defendant became upset when talking about it. (T. 5794-95).

Jorge Delgado recalled receiving a phone call from Lugo in which Lugo asked him if he could drive a Lamborghini. (T. 11734). The next day, Delgado went to the defendant's apartment. (T. 11735). At the apartment, Lugo told Delgado that the plan had been to lure Griga to the defendant's apartment. Once there, they would hold Griga in an effort to extort money from him. However, Lugo said that while he was watching television with Furton, he heard a loud noise. (T. 11736). When Lugo looked up, he saw that the defendant had Griga in a headlock. Furton began to scream. To calm her, Lugo grabbed Furton and injected her with a horse tranquilizer. The defendant apparently strangled Griga and left him in the bathroom. (T. 11736-41). To Delgado, Lugo appeared to be mad that Griga had died before they were able to take his money. (T. 11741).

At that point, the defendant brought Furton downstairs. She was wearing a hood, her ankles were taped and she was handcuffed. (T. 11742-43). Furton woke up and asked for Griga. (T. 11743). Lugo told Furton not to worry. Lugo then directed the defendant to inject Furton again. The defendant gave Furton a shot. She screamed and then became calm. (T. 11744).

Lugo and the defendant subsequently tried to question her. She was asked for the alarm code to Griga's house and for the location of Griga's safe. (T. 11746, 11748). When the tape was taken off of her

mouth, she was given water. (T. 11747). Furton was confused and had problems answering. She did give Lugo some numbers, but she kept asking Lugo and the defendant for Griga. Although Lugo assured her that she would be taken to see Griga, Furton got increasingly upset and she began to scream. At that point, the defendant gave her another injection in the thigh. (T. 11748-51). Furton calmed and fell asleep. Less than an hour had elapsed between shots. (T. 11751).

John Raimondo, a corrections officer, appeared at the defendant's apartment. According to Lugo, Raimondo was to help with Griga's body. Raimondo re-taped Furton and held her down when Furton became hysterical. The defendant then gave Furton another shot of the tranquilizer at Lugo's suggestion. An hour transpired between the second and third shots. (T. 11752-58).

Delgado went into the bedroom where the struggle between the defendant and Griga had occurred. Delgado noticed broken computers on the floor and blood on the computers, carpet and wall. Delgado also saw blood on a glass door. Lugo said that Griga had run into the door when trying to get away. (T. 11759-60).

Petrescu testified that Lugo asked her to come over to the defendant's apartment to help clean the blood on the computer. (T. 10445). Petrescu declined. Instead, she went with Lugo to Griga's home in an attempt to enter the home with the numbers provided by Furton. (T. 10445-47). Petrescu punched the numbers into the alarm keypad but was unable to enter. (T. 10447). When Lugo called the

defendant to tell him that they had been unable to enter the house, Petrescu heard the defendant say that "the bitch is cold." (T. 10447, 10551). Lugo then took Griga's mail and had Petrescu open it. (T. 10451).

Later, Lugo and the defendant brought several items to Lugo's apartment for storage in a storage area. Included were a carpet roll and a blood-stained computer.[19] (T. 10455-57). Petrescu said that on another occasion, Lugo and Delgado brought several bags of items to her apartment for storage. (T. 10458-59).

Lugo called his friend, Mario Gray, and asked him to help find someone who could dispose of a car. Lugo said that the car, a Lamborghini, was stolen. (T. 11112-13). Gray got a tow truck driver to meet him, the defendant and Lugo. However, because the truck driver was not willing to allow them to use his truck without him, they all separated without towing the car. (T. 11116-18).

Delgado obtained a U-Haul truck and went to the defendant's apartment at 7:00 AM on the day after he had seen Furton and Griga. (T. 11765-67). Griga was placed under the cushions of Schiller's couch and Furton was placed in a wardrobe box supplied by Delgado. (T. 11768, 11771, 11775). Delgado noticed that Griga was dressed only in his underwear and that his head was bloody. (T. 11774). After Delgado

[19] Alexandra Font, a leasing agent at the defendant's apartment house, confirmed that the defendant had asked that the carpet in his apartment be changed. She recalled that the defendant had said that his cat had defecated in his apartment. The defendant also asked that his apartment be re-painted. (T. 6098-99).

went out to make sure that no one was around, Lugo and the defendant carried the two bodies out of the defendant's apartment and into the waiting truck. (T. 11776-77). Lugo drove to a warehouse where Delgado saw the yellow Lamborghini. (T. 11778, 11781). The bodies were then placed inside the warehouse. Lugo informed the others that they needed to go to Home Depot.

Lugo and the defendant went to Home Depot and purchased a saw, knives, hatchet, buckets, drums, fans, garbage bags, tar, plastic sheeting, a lighter, propane, tape, hose, a fire extinguisher, a gas mask, boots, towels and rags.[20] (T. 11785-89). After Lugo wiped the bodies with Windex, the defendant began to use a chain saw to cut up the bodies. After the chain saw jammed on Furton's hair, the defendant used a hatchet to finish the job. (T. 11795-802). The defendant and Lugo placed the body parts in drums and poured tar into the drums. The drums were then sealed. (T. 11804). Delgado stated that hands, feet and heads were placed in different buckets. (T. 11806). Lugo then set the contents of those buckets on fire. (T. 11808). Lugo allowed the fire to burn for 15 minutes before extinguishing it. (T. 11808-10). At the defendant's request, Delgado then went to the defendant's apartment, cleaned it up and removed items, including the carpet and padding, to Petrescu's apartment. (T. 11810-15). Delgado stated that the defendant's apartment was clean

[20] Representatives of Home Depot and American Express confirmed that the items were purchased by the defendant and Lugo using Lugo's credit card. (T. 10803-929).

of any evidence by the time they[21] were finished. (T. 11815).

On May 28, 1995, Mario Gray was asked by Lugo to rent a truck and come to a warehouse at 7:00 PM. (T. 11121-22). When Gray appeared at the appointed time, he saw several large garbage bags in the warehouse, as well as several large drums. (T. 11123-25). Gray saw Lugo cleaning a wallet, credit cards and jewelry with Windex. (T. 11126-27). In response to the defendant's question about possible dumping areas, Gray told him that he knew of a good spot in Homestead. (T. 11128-29). Sensing that something illegal was occurring, Gray asked Lugo about the contents of the drums. Lugo just told him that the drums contained liquid. Gray noted that the drums smelled bad and that smoke was still coming out of one of the drums. (T. 11129-30).

Gray said that they all drove in Lugo's car to scout the possible dumping area. After they saw the field, they stopped at a gas station. At the station, Lugo told Gray to dump the plastic bag containing the wallet, jewelry and credit cards belonging to Griga. (T. 11130-39, 11144-45). Lugo wanted anyone who found the cards to use them so that they would take the blame. (T. 11210-11). Gray dumped the items in the street.[22] (T. 11139). The men then returned to the warehouse.

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[21] Delgado claimed that he had been assisted by the defendant's wife. (T. 11852-54).

[22] The items were recovered by Greg Lewis and turned over to Metro-Dade Sergeant Archie Moore. The items included credit cards belonging to Griga, Furton's driver's license and other Griga identification materials. (T. 6706-10).

At the warehouse, four barrels were loaded by the defendant and Lugo into the truck. (T. 11143-44). Gray then drove the truck to the dump site. As they approached the dump area, Lugo told Gray to turn off the truck lights. Two barrels were then dropped into a canal. One hundred meters further down the canal, the second two barrels were dumped. (T. 11146-48). Lugo then had Gray drive to Miami Lakes. Once they arrived, Lugo got out, went into an apartment and returned with a green carpet that had been bleached. After the carpet was placed in the truck, they returned to the warehouse where Lugo instructed Gray to throw away all the bags in different places. (T. 11150-52). Gray threw the bags away in Hialeah and in Miami. When Gray finished at 12:30 AM, he was told by Lugo to meet them back at the warehouse at 7:30 AM. (T. 11152-53).

The following day, the defendant met Gray at the warehouse. The defendant gave Gray a couch, a television and $800 for his work.[23] (T. 11154-59).

On May 30, 1995, Metro-Dade Police Homicide Detective Salvador Garafalo was assigned as the lead detective to investigate the disappearance of Griga and Furton. (T. 6014-15). After interviewing

[23] Gray stated that the police initially talked to him about his involvement on September 6, 1995. He told the police that he knew nothing about the case. (T. 11160-61). On March 26, 1996, he was arrested and charged with accessory after the fact to first degree murder. (T. 11163). On October 3, 1996, Gray entered a guilty plea to the charge and was given six months community control to be followed by three years probation. (T. 11164). As a footnote, Gray added that the police took away the couch and television that he had received. (T. 11167).

Bartusz, Lapolla, Attila and Beatrice Weiland, Garafalo concluded that the defendant and Lugo were suspects. (T. 6017). By the time he began his investigation, the Lamborghini[24] had already been found, but Griga and Furton had not. (T. 6017). Garafalo also received information about the Schiller incident. Garafalo spoke with Schiller, who identified both Lugo and Delgado. (T. 6018-19). Garafalo put together a photo display with photos of Lugo, Delgado and the defendant. (T. 6019). Bartusz and Lapolla identified the defendant's photograph on June 1, 1995. (T. 6020-22). With Bartusz' information about the Mercedes, Garafalo obtained information about the home addresses of Lugo and the defendant. (T. 6023-27). Garafalo obtained search warrants for the defendant's apartment and car, Lugo's apartment and car and Delgado's home and car. (T. 6031-34).

On June 3, Garafalo convened a large group of detectives for the purpose of executing the various warrants that day. Detectives Alvarez and Coleman were assigned to search the defendant's apartment. (T. 6037-38). Detective Luis Alvarez said that he arrived at the defendant's apartment to serve the warrant at 7:20 AM. (T. 6142-43). After knocking at the door, Cindy Eldridge, the defendant's wife, answered. Alvarez asked for the defendant and told her that they had a search warrant for the apartment. (T. 6145-46). Eldridge called for

[24] The car was found in a wooded area of Miami on May 29. The car was processed for fingerprints, but no prints belonging to the defendant were found. (T. 5832-33, 5855-58, 5870-71).

the defendant. When the defendant appeared, Alvarez read the warrant to him, had the defendant get dressed and took the defendant outside. (T. 6147-49). Detectives Coleman and Gonzalez then began their search of the defendant's apartment. (T. 6151).

Detective James Coleman found that the downstairs bedroom in the defendant's apartment was empty, save for some boxes in a closet. (T. 6160-63). The boxes contained computer equipment belonging to Schiller. (T. 6218-24).

In the living room, Coleman found credit card receipts for purchases at Mayor's Jewelers, a letter from Schiller demanding repayment of all money taken from him and a fax from Dubois to Greenburg detailing the property taken from Schiller and demanding return of the property. (T. 6164-95). Coleman also found a cell phone, pager and knife belonging to Lugo, a cell phone bill for Delgado's phone, a Jewish New Year card and a hotel receipt that belonged to Schiller, a copy of a warehouse lease signed by Lugo and leased by D & J International, the defendant's car registration for his 300 ZX, a receipt from a locksmith for a change of locks at Schiller's residence, account information for the defendant's account at Smith Barney, a copy of Lugo's federal probation order, a check signed by Lugo on D & J International which had been written to Sun Gym for $67,845, checks signed by Lugo to Penguin Pools for pool care at Schiller's home, photos of Winston Lee's residence, two false passports with Lugo's photo and a brass statue of an eagle that

Coleman believed had belonged to Schiller. (T. 6227-96).

In the master bedroom, Coleman found a pair of handcuffs and several receipts for jewelry purchased at Mayor's. (T. 6307-10). No guns were found in the defendant's apartment. (T. 6378).

Detective Ray Hoadley executed a second search warrant at the defendant's home on June 7. (T. 6393). Hoadley found no blood stains on the carpet or on the pad below. Hoadley did find an orange dart embedded in the wall of the defendant's apartment. The dart had been patched over. (T. 6420-22). Hoadley seized the dart and a section of the wall. (T. 6424-25). Hoadley also seized numerous financial documents and checks. (T. 6397-6419).

Sergeant Mike Santos executed the warrant at Lugo and Petrescu's apartment. Since no one was at home at 8:00 AM, the police pried the front door and gained entry. (T. 7078-84). Inside the apartment, Santos found BMW keys, computer equipment, paperwork for the defendant's account at Smith Barney, checks signed by Lugo on the Sun Fitness account, Sun Fitness bank statements, a letter and fax from Schiller to Mese demanding return of Schiller's money, a letter from LaGorce Palace to Schiller regarding his condominium, a letter from Fawcett to Lugo accepting employment, a warranty deed for Schiller's home, a judgment against D & J International restoring good title to Schiller's home to Schiller, and letters between Dubois, Greenburg and attorney Ed O'Donnell regarding an agreement fostering the return of $1,260,000 to Schiller. (T. 7084-7124).

Santos also found a briefcase hidden behind a couch in the living room. Santos found a medication bottle containing "Rompun," a number of syringes, a stun gun, two rolls of duct tape, a dart gun, Griga's driver's license and surveillance equipment in the briefcase. (T. 7144-49, 7152). Also in the living room was a television with a blood droplet on it. (T. 7142).

Santos conducted a search of a storage closet in Lugo's apartment. Santos found a gym bag containing a retractable baton and blood-stained towels and gloves. (T. 7141, 7150, 7154-55). Santos also found a pair of bloody sweat pants, used duct tape, and blood-soaked paper in the closet. (T. 7156, 7159). Outside the storage closet, Santos found Griga's boots, Furton's red shoes, bag and jacket, carpet padding with bloodstains and a blue shirt[25] and socks with bloodstains. (T. 7156-58).

In the master bedroom, Santos found a napkin with Griga's name on it. (T. 7208). He also found a Rolex watch, a diamond bracelet and two rings.[26] Finally, Santos found a number of firearms in Lugo's apartment and ammunition. (T. 7164-86).

Garafalo also had officers search the two warehouses that had

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[25] The blood-stained blue shirt bore a Dry Clean USA tag. (T. 7192-93). The shirt had been brought in for a cleaning on April 25,1995 by someone named Taylor. (T. 11091-92). Attila Weiland testified that the defendant used the name Adrian Taylor when corresponding with Hungarian women. (T. 9320-21).

[26] The jewelry was identified by Bartusz as belonging to Griga and Furton. (T. 5628-29).

been involved. (T. 6042-43). Detective Bret Nichols searched one warehouse and found plastic lining, a gas can, a broom, Windex, tools, handcuffs, a black leather bag with duct tape, solder, drums, a fire extinguisher,[27] rope, goggles and directions to operate a chain saw. (T. 6535-44). Nichols also found a Home Depot receipt reflecting purchase of many of the items. (T. 6548). Nichols processed the area for fingerprints. (T. 6547).

On June 16, Nichols returned and tested the warehouse for the presence of blood by using Luminol. (T. 6549). The test yielded a positive result for the presence of blood. A further search revealed a AAA card and an American Express receipt belonging to Griga. (T. 6549-52).

Searches were done of Sun Gym, John Mese's two offices, and Lucretia Goodridge's home. Those searches yielded many financial documents and checks that were introduced in evidence by the State at trial. (T. 6568-6824). The documents and checks involved numerous exchanges of funds between the defendant, Lugo, D & J International, Sun Fitness, Mese and the other defendants charged in the case.[28]

Based upon the information received, Garafalo obtained an arrest warrant for Lugo and Delgado. (T. 6076-77). The defendant and Delgado

[27] The defendant's fingerprints were found on the fire extinguisher box. (T. 10984).

[28] Those items served as the basis of the money laundering counts lodged against Mese and Lugo.

were arrested on June 3.[29] (T. 11858). Lugo and Petrescu had gone to the Bahamas. When Lugo learned that the defendant and Delgado had been arrested, he sent Petrescu back to Miami with directions to destroy the bloody clothes and the computer equipment left in their apartment. (T. 10466-75). When Petrescu arrived at the apartment, she was arrested by the police. (T. 10477-78).

Delgado initially lied to the police about his involvement when he was arrested. (T. 11858-59). However, on March 8, 1996, Delgado entered into a written agreement with the State. (T. 11899-900). Delgado pled guilty to attempted first degree murder, kidnapping, extortion and accessory after the fact. Although he was facing life in prison, Delgado was sentenced to fifteen years. Delgado claimed that he would get forty years if he lied or failed to cooperate.[30] (T. 11860-61, 11902-05). Finally, Delgado conceded that what he knew about the Griga abduction came entirely from Lugo. (T. 11927, 12021). Delgado also admitted that he could not disprove the notion that he

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[29] Franklin Higgs, a 12-time convicted felon, testified that he overheard the defendant say in the jail exercise yard that the crime he was accused of was supposed to be the perfect crime. Higgs also claimed that he heard the defendant talk about cutting up bodies with a chain saw and that he [the defendant] knew the most effective choke hold. (T. 11453, 11459, 11461). Finally, Higgs claimed that he overheard the defendant on the phone saying that if "Lugo would keep his mouth shut, we'd be in the clear." (T. 11477). Higgs tried to sell the information he had to the State and the police for a reduction in his sentence. Higgs said that the prosecutor had offered him a possible two-year reduction in his sentence. As of the time of his testimony, Higgs' sentence had not been reduced. (T. 11457-58, 11463-66, 11469-71).

[30] Although he successfully stole $200,000 from Schiller, Delgado was not required to return any of the money to Schiller. (T. 11906-07).

had killed Griga and Furton. (T. 12055).

Detective Robert Fernandez was dispatched to the Bahamas on June 7, 1995 to find Lugo. (T. 11263-64). On June 8, Lugo was apprehended and voluntarily chose to return to the United States. (T. 11267).

On June 9, Sgt. Felix Jimenez was contacted by Jeff Geller, a private investigator working for attorney Jay White. At a meeting convened as a result of that contact, Lugo agreed to show the police where the bodies of Griga and Furton were if an officer would come in to court to say that Lugo had cooperated. (T. 11311). At 1:00 AM, Lugo was taken out of jail. Lugo directed the police to a canal in South Dade. (T. 11311-15). Lugo informed the police that three barrels could be found in the canal. The police waited until daylight to retrieve the barrels. (T. 11315-19).

Detective Thomas Romagni was on the team that retrieved the barrels. Romagni stated that three barrels were found in the canal. Two contained the body parts of a male and a female. The bodies were missing hands, feet and heads. (T. 11360-75). A third barrel was found to contain only masking tape. (T. 11360).

On July 7, 1995, Jimenez received an anonymous call about the case. As a result of the call, a search was conducted along Interstate 75 in Broward County on the following day. (T. 11330-31). The search yielded a few buckets that contained two human skulls, hands and feet. (T. 11413, 11425-26). A knife and a hatchet was found in another bucket at the same site. (T. 11411).

The remains of Griga and Furton were positively identified through a DNA comparison with samples taken from Griga's and Furton's relatives. (T. 12212-20). The State's DNA expert was also able to identify Griga's DNA on several of the bloody items retrieved from the storage area in Lugo's apartment. (T. 12223-27).

Dr. Tony Falsetti, a physical anthropologist, examined the remains and confirmed that the bones had been cut through the use of a chain saw and a single blade object. (T. 12231, 12256-66). Falsetti claimed that the male skull had four separate areas of trauma. (T. 12259-60, 12268).

Dr. Alan Herron, a veterinarian pathologist, testified that Rompun is a tranquilizer and analgesic used to calm and lessen pain in animals. (T. 11545-48). Rompun is given in varying doses and strengths, depending on the size of the animal involved. (T. 11551). The drug may be administered by injection in either the vein or the muscle. If injected in the vein, the drug works faster. If injected in the muscle, the drug works slower and the injection is more painful. (T. 11554-55). At toxic levels, Rompun depresses the heart and respiratory rate. (T. 11557).

Based upon toxicology reports received from the Medical Examiner's Office, Dr. Herron determined that Griga had very little of the drug in his system. (T. 11557-58). Because the drug had passed through several of the organs in his body, Dr. Herron determined that Griga was alive when he received the drug. (T. 11557-58). Furton had

large concentrations of the drug in her body. Furton was found to have the drug present in her liver, kidney and brain. Based upon the amount found, Dr. Herron opined that the drug given, if administered at once, would have been enough to kill several horses. (T. 11559-65). Dr. Herron conceded that the drug would have a less toxic effect if the doses were staggered over time. (T. 11561). Based upon the Medical Examiner's toxicology report, Dr. Herron was unable to determine how much of the drug was given to Furton or the period of time in which it was given. (T. 11571, 11582).

Dr. Roger Mittleman, the Chief Medical Examiner for Metro-Dade County, performed the autopsies on Griga and Furton. (T. 12314-17). Dr. Mittleman noted that he was able to identify Griga from a comparison of X-rays he performed. He was able to identify Furton from a comparison of breast implants found in the body with the medical records of her plastic surgeon. (T. 12320-24, 12328-29).

Dr. Mittleman found no trauma to the torso of either Furton or Griga. (T. 12324, 12333). In fact, Dr. Mittleman found no reason for death based upon his internal examination of Griga. (T. 12333). Dr. Mittleman did find evidence of trauma to Griga's skull. (T. 12340). If the injury had occurred while Griga was alive, it might have caused extensive bleeding and possibly death. (T. 12340-41). However, since Griga's brain had decomposed, Dr. Mittleman was not able to determine the extent or involvement of Griga's head injury. (T. 12341). Since Dr. Mittleman could not exclude that the trauma to Griga's head had

occurred post-mortem, Dr. Mittleman surmised that Griga may have died from asphyxiation. (T. 12351, 12359-60). Dr. Mittleman stated that a medical examiner looks to asphyxia as a cause of death when no other cause can be specifically found. (T. 12357).

Dr. Mittleman found that Furton's death was consistent with an overdose of Rompun. (T. 12346-48). Dr. Mittleman noted that Rompun has no human use. It causes central nervous system depression, respiratory suppression and a slow heart beat. (T. 12344-45). Dr. Mittleman noted that Furton's body was found to have sufficient concentrations of Rompun to cause severe symptoms. (T. 12345-46, 12369). Since the drug had passed to several of the organs in her body, Dr. Mittleman opined that Furton was undoubtedly alive when the drug was administered. (T. 12347). In his view, Furton must have experienced psychic horror as she was administered a drug she knew would kill her. (T. 12347).

The State then rested its case. The defendant moved for a judgment of acquittal claiming that insufficient evidence had been produced on all counts. As for the RICO count, the defendant claimed that the State had failed to prove that a criminal enterprise had existed to commit each of the predicate acts listed in the indictment. (T. 12416-18). The trial court denied the defendant's motion. (T. 12437).

The defendant then sought a court ruling on the admissibility of letters written by Lugo to the defendant after their arrest. (T.

11517-72). In the letters, Lugo detailed a plan in which the defendant was supposed to take responsibility for all crimes. After Lugo would be cleared, Lugo promised the defendant that he would then work to exonerate the defendant. (T. 2381-82, 12517-21). The Court found that the letters were hearsay. (T. 11521-22, 11555). The defendant maintained that the letters should be admitted to demonstrate Lugo's bias against the defendant and Lugo's effort to place blame for the crimes on the defendant. (T. 12556-59). The court rejected the defendant's argument and ruled that the letters were inadmissible. (T. 12562, 12567-68, 12572). The court added that the letters would be relevant to penalty phase issues. (T. 12568).

After entering records from the defendant's account with Smith Barney, the defendant renewed his motion for judgment of acquittal. (T. 12516, 12968). The court entered no ruling on the defendant's motion.

During closing argument, the prosecutor made the following remark:

> Remember Detective Hoadley came in and showed you how that Omega taser works. Many of you jumped. Can you imagine how that would feel on your skin right up close? How it felt on Marc Schiller's sweating legs and ankles. But, again and again until he signed over everything. Signed over his entire life. (T. 13068)

Later the prosecutor added:

> Another thing is that - - listen to the cross examination of Jorge Delgado? Try and recall it. Never once was it at anybody else but defendant

> Doorbal that was the hands-on killer. Lugo, along with hands-on killer Doorbal. Never once did anybody else get up once to say anything different. (T. 13180-81).

Thereafter, the jury returned guilty verdicts on all counts. (T. 13681-83).

At a hearing convened prior to taking testimony during the penalty phase, the State moved in limine to preclude admission of the letters written by Lugo to the defendant after their arrest. The defendant argued that the letters were admissible because they demonstrated a hierarchal relationship between Lugo and the defendant in which Lugo dominated the defendant. (T. 13781, 13784). The court noted that the letters were hearsay and that the State would not be able to rebut the letters. (T. 13784-85). The defense responded by arguing that the State could rebut the content of the letters by relying on some of the evidence admitted at trial; specifically, the evidence that demonstrated that the defendant had not been a follower during the offense. (T. 13785). The court initially deferred ruling. (T. 13800). Later, the court noted that the letters might be admissible because they were relevant to show that the defendant was subject to being manipulated by Lugo in their relationship. (T. 13848-49). However, before the letters could be admitted, the court required that the defendant prove that the letters accurately depicted the state of the relationship during the offense, rather than just the state of their relationship after they had been arrested. (T. 13848-49).

During the penalty phase, Istvan Furton, Krisztina Furton's

father, testified that Krisztina was close to her family. (T. 13880, 13885). After Krisztina's death, Krisztina's mother suffered a nervous breakdown and was hospitalized. She has been unable to work since her daughter's death. (T. 13883-84).

Zsuzsanna Griga, Frank Griga's sister, attested to her close relationship to Frank. (T. 13889). Zsuzsanna noted that Frank was the godfather to her children and like a son to her husband. (T. 13890, 13899). After Frank became wealthy, he refurbished the family home and lent money to others. (T. 13894-96). Frank's death shattered the lives of family members. Zsuzsanna was required to leave her job in an effort to continue Frank's business. (T. 13899-900).

The defense called Sachi Lievano, a legal secretary for co-defense counsel, Penny Burke. (T. 13910). Lievano met the defendant through her work at Burke's office. (T. 13911). Over time, Lievano found the defendant to be a caring and gentle man. Ultimately, Lievano and the defendant agreed to marry. (T. 13911, 13914).

Lievano claimed that the defendant has taught her to be patient and to be a better parent. (T. 13921). Lievano noted that the defendant has formed a special relationship with one of her daughters. He has also helped Lievano in her relationships with her children and with her mother. (T. 13917, 13919, 13924-27).

Finally, Lievano stated that although she was aware that the defendant's crimes were serious, she had never discussed the facts of the case with the defendant. (T. 13918, 13933).

Olga Gonzalez, Lievano's mother, testified that the defendant had become like a son to her. (T. 13938-39). Gonzalez noted that her daughter had become a better person since the onset of her relationship with the defendant. (T. 13939-41).

Kathleen Pelish worked with the defendant at Fiesta Taco. Pelish noted that the defendant had been a reliable employee who had been promoted from an assistant cook to manager of the restaurant. (T. 13946-48). Prior to 1992, the time that Pelish moved to Texas, she never knew the defendant to get angry or to raise his voice. (T. 13952).

Pelish invited the defendant to spend several holidays with her family. She always found the defendant to be grateful for the gesture. (T. 13949). Pelish noted that although the defendant had mentioned that his parents had died, he seemed uncomfortable in talking about his family. (T. 13951).

Pelish had extremely limited contact with the defendant after 1992. In one letter written after 1992, the defendant wrote that life had been good to him. (T. 13952-57, 13961).

Andrea Franklin met the defendant in 1991 and began to date the defendant shortly thereafter. (T. 13970-72). At that time, the defendant had no car and very little money. Franklin stated that the defendant frequently did thoughtful things for her. (T. 13972).

Franklin was aware of the defendant's desire to become a professional body builder. Franklin stated that to become a body

builder, you must be willing to take steroids. Franklin knew that the defendant took steroids. She claimed to notice no difference in the defendant's personality while he was taking the drugs. (T. 13973-74).

Franklin testified that she met Lugo and found him to be outgoing, a leader and very smart. (T. 13978).

Franklin stated that she initiated contact with the defendant after his arrest. (T. 13981). Franklin noted that the defendant had found a spirituality that she believed was genuine. (T. 13981, 13991). Franklin conceded that she had not discussed the case with the defendant and was against the death penalty for any case. (T. 13991, 13993).

Stephen Bernstein, a physical therapist, testified that he had been the defendant's best friend. (T. 13995-96). Bernstein first met the defendant while he was working at Fiesta Taco. (T. 13996). The defendant and Bernstein shared an interest in body building. (T. 13996). Bernstein helped the defendant with nutrition information and also introduced him to steroid use. (T. 13998-14000). Bernstein stated that the defendant's personality was not affected by the use of steroids. (T. 14000).

Bernstein testified that the defendant changed after he met Lugo. (T. 14001). At that time, the defendant was attempting to purchase his first car, but found himself $1000 short. (T. 14005). Lugo offered the defendant a place to stay in Miami Lakes, a chance at legal residency

and a business opportunity. Lugo also gave the defendant the money for the car. (T. 14006-08). Bernstein noticed that prior to meeting Lugo, the defendant had not been motivated by money. (T. 14001). After the defendant met Lugo, he quit his job and had a different attitude about money. The defendant was no longer interested in body building; he wanted to own the gym. (T. 14008-11). When Bernstein visited the defendant in his apartment in Miami Lakes, he noticed that the defendant had several big ticket items in his apartment. Bernstein felt that the defendant was spending money foolishly. (T. 14024, 14031).

Bernstein added that he always found the defendant to be kind and helpful. Bernstein found the defendant to be happy and confident with Lugo and did not appear to be fearful of Lugo. (T. 14013, 14024).

Patsy Hernandez stated that she is the defendant's half-sister; they share the same father, but have different mothers. (T. 14037). Hernandez testified that the family lived poor in Trinidad. When her mother was sent to a sanitarium, the children's grandmother, Petra Lauric, helped raise them. (T. 14038-41). Later, Hernandez and another sibling emigrated to the United States, leaving her father behind in Trinidad. (T. 14042-43). By that time, the defendant's father had had his leg amputated and was unable to work. (T. 14042).

Hernandez subsequently learned that her father had impregnated a 13-year old child, Winifred. (T. 14044). The defendant was the child born of that union. (T. 14045). Hernandez stated that Winifred was a

loud, aggressive child, who was mean and abusive to the defendant. (T. 14049-51). As a result of the mistreatment, Lauric acted as a mother figure to the defendant. (T. 14050). When the defendant was three, the defendant's father emigrated to the United States without him. (T. 14052). To avoid further abuse from his mother, Lauric sent the defendant to the United States when he was eight. (T. 14050). During the six months that the defendant stayed with her family, Hernandez stated that the defendant grew close to her daughter and to her husband. (T. 14055-56). Hernandez unsuccessfully tried to have the defendant remain in the United States. Hernandez stated that the defendant was very upset about having to return to Trinidad. (T. 14058).

Hernandez said that Lauric and her father loved the defendant. (T. 14068-70). The same could not be said for the defendant's mother. The defendant claimed that his mother hated him and had once broken his nose. (T. 14071). In Hernandez' view, the defendant's mother, Winifred, suffered from a mental illness. (T. 14067).

Jeffrey Hernandez, Patsy's husband, stated that he had grown close to the defendant when he came to the U. S. at age eight. Hernandez said that the defendant had been like a son to him. He did chores in the house and spent a lot of time with Hernandez' daughter. (T. 14084-86). When Hernandez' family was unable to make the defendant's stay in the U. S. permanent, the defendant was extremely upset about having to return to Trinidad. (T. 14087-88). Hernandez opined that the defendant

felt like he had been disowned. (T. 14088).

At the close of Hernandez' testimony, the defendant renewed his request to have the "Lugo letters" introduced in evidence. (T. 14143). The defendant maintained that the defense had established that Lugo had been a substantial influence on the defendant and that the letters were relevant to show the dominant position held by Lugo in their relationship. (T. 14143-44, 14149, 14151-52). The defendant stressed that the jury should be permitted to weigh the value of the non-statutory mitigating evidence formed by the letters. (T. 14151, 14158). The court ruled that while the letters were "fascinating," they would not be admitted. (T. 14158-60).

Petra Lauric, the defendant's grandmother, testified that her daughter, Winifred, became pregnant by the defendant's father at age 13. (T. 14163-65). At the time, Winifred had experienced mental and learning problems and had already received out-patient care at a mental hospital. (T. 14168-69). After the defendant was born, Winifred demonstrated that she did not want the defendant as her child. She physically abused the defendant and did nothing to care for him. (T. 14170, 14176). Lauric claimed that Winifred hit the defendant's head against a wall and once broke his hand. (T. 14176). Due to Winifred's mistreatment of the defendant, it was necessary for Lauric to care for the defendant. (T. 14171).

As the defendant grew older, Lauric tried to send the defendant to the U. S. to escape Winifred's cruelty. (T. 14180). When the

defendant was unable to stay in the U.S., he returned unhappily. (T. 14180). Lauric noted that Winifred never showed affection to the defendant and that the defendant did not refer to Winifred as his mother. (T. 14196).

At the conclusion of the penalty phase, the jury returned a death recommendation for each murder count by a vote of 8 to 4. (T. 14311-12).

On July 17, 1998, the court announced its sentence in open court. (T. 14381-422). This appeal follows.

SUMMARY OF ARGUMENT

Guilt/Innocence Phase

The defendant was denied a fair trial by the introduction of State testimony demonstrating the defendant's bad character. At the time the prejudicial and damaging testimony was admitted, the defendant had not placed his character in issue. The highly inflammatory references included: testimony that the defendant was a "killer" in his country; testimony that, when angered, the defendant had spoken of cutting people up with chain saws to see their blood spurting and tying people up and shooting them; testimony that the defendant had threatened to kill his girlfriend; and testimony that the defendant was making a bomb. Each of the references were irrelevant to any material fact in issue and only served to highlight the defendant's propensity toward violence and crime.

The defendant was denied a fair trial by the prosecutor's

reference during closing argument to the defendant's failure to testify. During closing argument, the prosecutor discussed Jorge Delgado's testimony and his insistence that the defendant was the hands-on killer. In attempting to convince the jury that they should place stock in Delgado's testimony, the prosecutor argued, "never once did anybody else get up once to say anything different." Since the defendant was the only one in a position to say anything different, the prosecutor clearly and improperly focused the jury's attention on the defendant's invocation of his right to silence.

The defendant was denied a fair trial by the prosecutor's use of a "Golden Rule" argument in closing argument. The prosecutor improperly and prejudicially appealed to the fears and emotions of the jury by discussing the use of a taser on Marcelo Schiller in this way: "*Can you imagine how that would feel on your skin right up close? How it felt on Marc Schiller's sweating legs and ankles. But, again and again until he signed over everything. Signed over his entire life*."

The trial court erred in denying the defendant's motion to suppress, which had been directed at searches of the defendant's apartment and car. The searches were done pursuant to warrants, which had been issued based upon affidavits that lacked probable cause. The affidavits failed to allege sufficient facts from which a magistrate could reasonably conclude that the defendant had been involved in crime or that the fruits or instrumentalities of crime would be located in the defendant's car or apartment.

Penalty Phase

The trial court erred when it limited the defendant's presentation of mitigation evidence. The court refused to permit the defendant to introduce in evidence letters written by co-defendant Lugo to the defendant following their arrest. In the letters, Lugo proposed an elaborate plan in which the defendant was to confess to his own complicity in the crimes charged, while exonerating Lugo. Apart from demonstrating Lugo's consciousness of guilt, the language and the spirit of the letters demonstrated that Lugo had a substantial influence over the defendant and that Lugo held a dominant position in their relationship and within the alleged conspiracy they had formed. It was therefore error for the court to have deprived the jury of the opportunity to consider this important mitigating evidence.

The defendant was denied a fair trial by the prosecutor's use of a "Golden Rule" argument in closing argument. During her argument, the prosecutor improperly personalized the jury's task and de-humanized the defendant by pointing out that if either the prosecutor or the jury had a similar background as the defendant, they would not have acted the way the defendant had: "*And, I don't know, but to say that where I live, if I lived in Trinidad or if you lived in Trinidad or you live in the United States, you don't do the things that this defendant did.*" The prosecutor then improperly appealed to the jury's emotions and sympathy by arguing that based upon the way the defendant had treated the victims, he deserved no mercy or respect.

The trial court improperly considered and weighed as two separate aggravating circumstances, the "felony murder" and "pecuniary gain" aggravators. Florida law plainly precludes the "doubling" of aggravating circumstances when the aggravators are based on the same aspect of the offense. In this case, the record clearly establishes that pecuniary gain was the sole motivating factor behind the defendant's commission of kidnapping and extortion of Griga and Furton. Under those circumstances, the trial court's separate consideration and weighing of both the "felony murder" aggravator and the "pecuniary gain" aggravator, was error.

The trial court improperly considered and weighed as two separate aggravating circumstances, the "CCP" and "avoid lawful arrest" aggravators, since both circumstances rested on the same aspect of the defendant's offense. In support of its findings on both the "CCP" aggravator and the "avoid lawful arrest" aggravator, the trial court relied on the existence of an alleged "plan" to kill both Griga and Furton. The plan had allegedly been formulated to ensure that the victims would not be able to identify the defendants when the underlying felonies had been completed. In that the trial judge's findings were based upon the same facts and the same aspect of the defendant's offense, it was error for the trial judge to separately weigh and consider the two aggravating circumstances.

The trial court erred in finding that the cold, calculated and premeditated (CCP) aggravating circumstance had been established beyond

a reasonable doubt. The law in Florida is clear that for application of the "CCP" aggravator, there must be substantial evidence of a calculated, carefully planned, pre-arranged design to kill. The evidence introduced at trial demonstrated that the defendant had planned only the underlying felonies, a kidnapping and extortion. There was no preconceived plan to kill the kidnapping victims. The State produced evidence demonstrating that the defendant killed Griga, when Griga resisted the kidnapping and attempted to escape from his confinement. Furton died inadvertently, as the result of an overdose from tranquilizers administered by the defendant. Under these circumstances, the evidence clearly failed to establish the calculation and heightened premeditation necessary for the application of the "CCP" aggravator.

Finally, the trial court erred in finding that the "avoid arrest" aggravating circumstance had been established beyond a reasonable doubt. In Florida, to establish the "avoid arrest" aggravator when a law enforcement officer is not involved, the State must elicit strong proof that the defendant's sole or dominant purpose for the capital felony was the elimination of a witness. The fact that the defendant was known to the victims is not enough to demonstrate this aggravator. In this case, the record establishes that Griga was killed while resisting his kidnapping and attempting to escape from his confinement. Furton died inadvertently as the result of a drug overdose. In neither instance, does the record indicate that the victims were killed for the

purpose of eliminating them as witnesses.

ARGUMENT

Preliminary Statement

The defendant is mindful of the general rule precluding appellate review of errors that have not been preserved by contemporaneous objection. See *Kilgore v. State*, 688 So. 2d 895 (Fla. 1996). The only exception to this procedural bar is where the error constitutes fundamental error, defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore, supra* at 898; *Urbin v. State*, 714 So. 2d 411, 418. While the unpreserved errors highlighted below may not individually rise to the level of fundamental error, the defendant contends that collectively, his right to a fair trial was fundamentally impaired by the numerous errors that infected his trial. See *Urbin v. State, supra*; *Brooks v. State*, 762 So. 2d 879 (Fla. 2000); *Gomez v. State*, 751 So. 2d 630 (Fla. 3rd DCA 1999) and *Peterson v. State*, 376 So. 2d 1230 (Fla. 4th DCA 1979).

I

THE STATE IMPROPERLY ELICITED IRRELEVANT TESTIMONY RELATING TO THE DEFENDANT'S BAD CHARACTER AND PROPENSITY TO COMMIT CRIME, AT A TIME WHEN THE DEFENDANT HAD NOT PLACED HIS CHARACTER IN ISSUE, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Michaelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 218 (1948), the United States Supreme Court discussed the basis for the general proscription against introduction of evidence of the character of the accused by the prosecution:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character [citation omitted], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

By its enactment of Section 90.404(1)(a), Florida Statutes, the Florida Legislature adopted the general proscription discussed by the United States Supreme Court. Evidence of a person's character or character trait, that is offered to prove action in conformity with it on a particular occasion, is inadmissible under that provision. In fact, the State may only introduce evidence of a character trait of the accused to rebut a character trait first placed in issue by the

accused. *Jordan v. State*, 107 Fla. 333, 144 So. 669 (1932); *Carter v. State*, 687 So. 2d 327 (Fla. 1st DCA 1997) and *Albright v. State*, 378 So. 2d 1234 (Fla. 2nd DCA 1979). Moreover, evidence of any crime committed by a defendant, other than the crime or crimes for which the defendant is on trial, is inadmissible in a criminal case, where its sole relevance is to attack the character of the defendant or to show the defendant's propensity to commit crime. *Holland v. State*, 636 So. 2d 1289 (Fla. 1994); *Craig v. State*, 510 So. 2d 857 (Fla. 1987) and *Williams v. State*, 110 So. 2d 654 (Fla.) *cert. denied*, 361 U.S. 847 (1959).

In this case, these fundamental principles were violated on several occasions when three State witnesses provided testimony that severely impugned the defendant's character and portrayed the defendant as an extremely violent man, at a time when the defendant had not placed his character in issue. The prejudice resulting from these highly inflammatory references served to deprive the defendant of a fair trial.

The State's inflammatory assassination of the defendant's character through use of evidence demonstrating the defendant's propensity for violence began with the testimony of Mario Sanchez, a co-worker of the defendant at Sun Gym. During his testimony, Sanchez described his relationship with the defendant as volatile. He and the defendant once had a heated argument which resulted in him quitting his job at the gym. (T. 8458-61). Later, the defendant and Sanchez began

working out together again at another gym. (T. 8544). Sanchez claimed that he did so, in part, because he was fearful of the defendant. That fear arose from a dispute that Sanchez had witnessed between the defendant and another weight lifter. (T. 8547). After the dispute, Sanchez claimed that the defendant made a "commentary" in which he said, "*when I get mad, I'll do anything. I'll cut - I'll start up a chain saw and cut somebody up just to see the blood spurting*." (T. 8548). Sanchez testified that he heard the defendant say on another occasion that "*I'll go into a house and tie everybody up, grandmother, mother, daughter... And I'll shoot - I'll start shooting everybody until they give me what I want*." (T. 8549). An objection on relevance grounds, interposed by counsel for Mese, was overruled by the court. (T. 8549).

The effort to impugn the defendant's character continued through the testimony of Elena Petrescu, co-defendant Lugo's girlfriend. Petrescu described conversations she had with Lugo in which Lugo told Petrescu how he made his living. Petrescu testified that Lugo told her that he was with the "bad" CIA; the one that kills people. (T. 10346). Petrescu then gratuitously added that Lugo had also told her that the defendant was a "*killer*" in his country. (T. 10348).

The attack on the defendant's character concluded with the testimony of Frank Fawcett, the investment banker contacted by Lugo to assist Lugo and the defendant with investments, Schiller and the defendant's immigration visa problem. (T. 10716-19, 10765-66). During

his testimony, Fawcett described his brief efforts to talk with the defendant about his work. During one meeting with the defendant, the defendant assured Fawcett that he was merely a figurehead and that Fawcett should speak to Lugo about any necessary details. Fawcett then gratuitously added that *he heard the defendant threaten to kill his girlfriend* while the defendant spoke on the telephone. (T. 10742). A month later, when Fawcett again tried to speak with the defendant, Fawcett claimed that the defendant told him, "*leave me alone, I'm making a bomb*." (T. 10752).

In taking the measure of these gratuitous, highly inflammatory and prejudicial references, it is important to remember that the defendant was charged with several crimes of extreme violence, including murder. The defendant was entitled to anticipate that his jury would be permitted to focus on the relevant evidence admitted to prove the charged offenses. However, nearly from the get go, the State was able to move the jury's focus away from the relevant evidence and over to the defendant's character by successfully labeling the defendant a "killer" who had been heard to harbor and voice thoughts of unspeakable violence towards others. In addition, the jury was told of the defendant's probable commission of uncharged crimes, such as assault and the making of a destructive device. As a result of these highly prejudicial attacks on the defendant's character, the defendant was required to not only defend against the relevant evidence admitted on the charged offenses, he was also unfairly required to overcome the

State's prejudicial assassination of his character, a depiction that clearly featured the defendant's purported extreme propensity toward violent acts and thoughts. The defendant's right to a fair trial was sacrificed as a consequence.

There are numerous cases that illustrate the prejudice suffered by the defendant in the court below.

In *Gore v. State*, 719 So. 2d 1197 (Fla. 1998), the defendant testified during his trial on charges of first degree murder and armed robbery. On cross examination, the State questioned the defendant about his having allegedly left his two-year old son in an abandoned home, naked, in thirty-degree weather. The State also questioned the defendant about allegations that he had sex with a thirteen-year old girl. On review of his convictions, this Court found that the prosecutor's questions relating to Gore's treatment of his child had marginal probative value[31] that was "clearly outweighed by the tremendous prejudice resulting from the jury hearing of these despicable actions." *Gore*, *supra* at 1200. The questions concerning the defendant's alleged sexual activity with a minor were found to have no relevance other than to demonstrate that the defendant was a morally reprehensible individual. This Court found that these attacks on Gore's character should not have been admitted and, as a consequence, reversed Gore's convictions.

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[31] The State contended that the evidence concerning the treatment of the two-year old was impeachment evidence.

In *Carter v. State*, 687 So. 2d 327 (Fla. 1st DCA 1997), the defendant was convicted of lewd assault on a child under sixteen after a thirteen-year old child accused him of touching her genitals. During trial, the victim's aunt was permitted to relate that in a conversation she had with the defendant concerning young girls and sex, the defendant said, "If you're old enough to bleed, you're old enough to breed." The First District reversed the defendant's conviction upon finding that the aunt's testimony constituted an impermissible attack upon the defendant's character made when the defendant had not placed his character in issue.

In *Ivey v. State*, 586 So. 2d 1230 (Fla. 1st DCA 1991), the defendant was charged with aggravated battery for his role in a fight involving a knife. The defendant claimed that she had acted in self defense. On cross examination of the defendant, the State was permitted to elicit testimony that the defendant had previously been convicted of improper exhibition of a deadly weapon and two counts of battery. The First District reversed the defendant's conviction after concluding that the admission of the evidence of the prior violent acts was an improper attack upon the defendant's character. The Court found that the defendant had not placed her character in issue by simply alleging self defense on one occasion. The State should not therefore have been permitted to try to prove that the defendant had committed an aggravated battery by showing the defendant's propensity toward violence.

In *Albright v. State*, 378 So. 2d 1234 (Fla. 2nd DCA 1979), a former co-defendant testified against the defendant during the defendant's trial for robbery. During his testimony, the co-defendant claimed that the defendant had taught him how to "get off" through self infliction of cuts on his arm. A second cooperating State witness testified that the defendant had invited him to remove the proceeds of the charged robbery that the defendant had attached to his penis, by engaging in an aberrant act. That same witness referred to the defendant as a "junkie," a "criminal," a "backstabber" and a "double-crosser." In reversing the defendant's conviction, the First District found:

> The gratuitous comments by witnesses Cogman and Radcliff were irrelevant and highly inflammatory innuendos and implications concerning appellant's character.....These comments focused on appellant's aberrant and vulgar behavior, implied other criminal activity not relevant to the crime charged, and highlighting appellant's character, diverted the jury from the material evidence in issue..... Unless and until the defendant places his good character in issue before the jury either through his own or his witnesses' testimony, the State may not do so. [citations omitted].....The cumulative effect of these comments resulted in fundamental prejudice and denied appellant his constitutional right to be prosecuted only for the crime charged in a fair trial before an impartial jury.

Albright, *supra* at 1235.

In *Wilkins v. State*, 607 So. 2d 500 (Fla. 3rd DCA 1992), during the prosecution of the defendant for attempted first degree murder and aggravated child abuse, the State elicited evidence that the defendant and his wife had considered having an abortion of the baby-victim, that

the defendant had a violent temper and had committed prior acts of violence, that the defendant had neglected one of his children and that the defendant felt no remorse for the injuries inflicted on the victim. The Third District reversed the defendant's convictions because the Court found that the above-described evidence was an impermissible assault upon the defendant's character that was highly inflammatory and irrelevant.

See also the following, in which the courts unanimously condemned the State's use of evidence designed to impugn the defendant's character by establishing a propensity to commit violent or bad acts: *Ellis v. State*, 622 So. 2d 991 (Fla. 1993)(murder prosecution - evidence that the defendant was popular at school because of his hatred of blacks); *Hudson v. State*, 745 So. 2d 1014 (Fla. 5th DCA 1999)(manslaughter of an infant prosecution - evidence of the defendant's two prior abortions); *McClain v. State*, 516 So. 2d 53 (Fla. 2nd DCA 1987)(sexual battery prosecution - victim's accusation that the defendant probably raped his stepdaughter too); *Donaldson v. State*, 369 So. 2d 691 (Fla. 1st DCA 1979)(aggravated battery prosecution - the defendant's wife (not the victim) testified that the defendant threatened and beat her); *Mudd v. State*, 638 So. 2d 124 (Fla. 1st DCA 1994)(manslaughter of a child prosecution - evidence that the defendant had abused his other child); *Thomas v. State*, 701 So. 2d 891 (Fla. 1st DCA 1997)(prosecution for attempted second degree murder of a fellow inmate - evidence that the defendant had been housed in space reserved

for "more violent inmates"); *Gonzalez v. State*, 559 So. 2d 748 (Fla. 3rd DCA 1990)(manslaughter prosecution - evidence that the defendant had been expelled from high school, that the defendant had been placed in a "last chance" school and that the defendant had been suspended from the "last chance" school for carrying a concealed weapon).

In the case at bar, the defendant was charged with several violent felonies, including first degree murder and attempted murder. Rather than simply attempting to prove the defendant's guilt of the offenses charged with evidence related to those crimes, the State chose instead to buttress its case with a broad-based attack on the defendant's character that featured evidence detailing the defendant's propensity toward violence and accusations of the defendant's involvement in other violent offenses. The introduction of the highly inflammatory character evidence was accomplished in violation of Section 90.404(1)(a), given that the defendant had clearly not first placed his character in issue.

The extreme prejudice suffered by the defendant as a consequence of the character attack is apparent. In a first degree murder case involving dismemberment of the victims, the jury had to have been prejudiced by the State witnesses' gratuitous references to the defendant as a "killer" and to the defendant's alleged expression of his desire to *"start up a chain saw and cut somebody up just to see the blood spurting"* and to "*start shooting everybody until they give me what I want*." As in *Albright*, *supra*, those comments, together with

Fawcett's gratuitous references about the defendant's threat to kill his girlfriend and the defendant's efforts to construct a bomb[32], only served to fundamentally prejudice and deny the defendant his constitutional right to be prosecuted only for the crime charged in a fair trial before an impartial jury. See also ***Holland v. State, supra,*** and ***Craig v. State, supra.*** Reversal of the defendant's convictions for a new trial before an untainted jury is required.

II

THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR COMMENTED IN CLOSING ARGUMENT UPON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

This Court has "adopted a very liberal rule for determining whether a comment constitutes a comment on silence: any comment which is 'fairly susceptible' of being interpreted as a comment on silence will be treated as such." ***State v. Diguilio***, 491 So. 2d 1129, 1135 (Fla. 1986); ***State v. Kinchen***, 490 So. 2d 21 (Fla. 1985). This is so because "it is clear that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict and

[32] Evidence of collateral criminal conduct is presumed to be harmful because of the danger that a jury will take the bad character or propensity to commit crime or acts of misconduct thus demonstrated, as evidence of guilt of the crime charged. *Straight v. State*, 397 So. 2d 903 (Fla. 1981); *Holland v. State*, *supra*.

that an appellate court, or even the trial court, is likely to find that the comment is harmful under *Chapman*."[33]

In the case at bar, during closing argument, the prosecutor focused the jury's attention on the defendant's failure to take the stand and rebut the testimony of State witness, Jorge Delgado. In doing so, the prosecutor clearly commented upon the defendant's exercise of his constitutional right to remain silent. As a consequence, the defendant's right to a fair trial was substantially harmed.

During closing argument, the prosecutor argued:

> It doesn't matter how many years Jorge Delgado is going to do, it's not enough. His life. Blood isn't enough. That's not the issue. The issue is, did he tell you the truth and what did he tell you? Was that important? And, of course, it is. He tells you about the enterprise. He tells you about what's going on. He tells you the gross details that you need to know to know it's a first degree murder case. There is a second degree murder case; it's different. It's a first degree murder case, nothing less.
>
> Another thing is that - - listen to the cross examination of Jorge Delgado? Try and recall it. Never once was it anybody else but defendant Doorbal that was the hands-on killer. Lugo, along with hands-on killer Doorbal. ***Never once did anybody else get up once to say anything different***. (T. 13180-81).

The prosecutor's comment was remarkably similar to that analyzed by this Court in its recent opinion in *Rodriguez v. State*, 753 So. 2d

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[33] *Chapman v. California*, 386 U. S. 18 (1967).

29 (Fla. 2000). In *Rodriguez*, during closing argument, the prosecutor addressed the fact that there was an absence of testimony contradicting the testimony of Luis Rodriguez, an accomplice of the defendant, who was present at the time of the charged murders. In closing, the prosecutor remarked, in pertinent part:

> "...somebody obviously was in that apartment with Luis Rodriguez. *And we still haven't heard in any of the argument, in any of the discussions, what the theory is of who that second person could have been*.....Counsel asked you during voir dire...Would you be willing to listen to two sides, to both sides of the story?...This is not a story. This is real life. This is not a fictional tale. *And there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant. There were no two sides."*

In finding that the prosecutor in *Rodriguez* had commented upon the defendant's failure to testify, this Court clarified the distinction between impermissible comments on silence and permissible comments on the evidence in the case. Specifically, this Court found that where the State makes reference to the fact that its evidence is uncontroverted on a point that only the defendant could contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify. *Rodriguez v. State*, *supra*. In *Rodriguez*, since it was only the defendant who could refute the testimony of his accomplice, Luis Rodriguez, this Court ruled that the State had impermissibly commented upon the defendant's failure to testify, when the prosecutor noted that

no one else had come forward to challenge Luis Rodriguez' testimony.

Similarly, in this case, the prosecutor made a point in her argument of noting that Jorge Delgado had provided the details needed to convict the defendant of first degree murder.[34] In concluding the argument, the prosecutor made two points. First, the prosecutor noted that Delgado's testimony had not been shaken by the cross examination of defense counsel. Second, the prosecutor plainly informed the jury that *"not once did anybody else get up [once] and say anything different."* Based upon Delgado's testimony, since only the defendant was in a position to contest Delgado's claims, the jury had to have assumed that the prosecutor's markedly clear reference was to the defendant's failure to step forward to take the stand to defend himself. It was that precise inference that this Court condemned as impermissible in *Rodriguez.*

Two other cases illustrate the improper nature of the prosecutor's remark.

In *Abreu v. State*, 511 So. 2d 1111 (Fla. 2d DCA 1987), a cooperating State witness, Koonce, testified and implicated the defendant in cocaine trafficking. During closing argument, the prosecutor argued:

"Now, Ladies and Gentlemen of the jury, you also

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[34] Jorge Delgado had testified that he arrived at the defendant's apartment while Furton was alive, but after Griga had died. Delgado related what Lugo had told him about the death of Griga. Delgado also testified about the defendants' treatment of Furton as they attempted to obtain information from her about Griga's property. (T. 11735-51).

> heard [Koonce] tell you about the facts of this case. That is the relevant evidence. *And what did you hear to rebut that? Who took the stand and said that what he said wasn't true?*

Based upon the prosecutor's remarks, the Second District reversed the defendant's conviction, holding that the prosecutor's comments were fairly susceptible to interpretation that the defendant had failed to rebut Koonce's story. In doing so, the prosecutor improperly focused the jury's attention on the defendant's failure to testify.

Similarly, in *Rigsby v. State*, 639 So. 2d 132 (Fla. 2d DCA 1994), the Second District concluded that the prosecutor had improperly commented on the defendant's right not to testify when he stated, "we have heard [counsel's] version about what happened that night, but we didn't hear that from the stand" and "you didn't hear from the stand from anyone who could testify as to exactly how it happened."

Just as in *Rodriguez* and *Abreu*, the prosecutor in this case argued to the jury that they had not heard from anyone who could rebut the story told by a cooperating State witness, in this case, Jorge Delgado. In doing so, the prosecutor focused the jury's attention on the defendant's failure to come forward, testify and rebut the version provided by Delgado. Since there is a substantial risk that the jury might view the defendant's silence in the face of accusation to be evidence of guilt, in situations akin to that present here, the courts of this State have uniformly condemned such comments and have reversed convictions tainted by those remarks in favor of a new trial.

Although the defendant's exercise of the fundamental right to remain silent was impermissibly the subject of prosecutorial comment, this Court is still required to determine whether the error that occurred below was harmless. In doing so, this Court must determine whether there was a reasonable possibility that the prejudicial remarks affected the verdict. *State v. DiGuilio*, *supra* at 1139. The State bears the burden in this Court of proving beyond a reasonable doubt that the error did not affect the verdict. *Id.* On this record, the State cannot meet its burden.

The State's entire case was primarily reliant on the testimony of cooperating State witnesses, primarily former co-defendant, Jorge Delgado. Delgado entered into a formal plea bargain with the State in return for his testimony against the defendant. As compensation, Rodriguez received a conviction on reduced charges and certain avoidance of a lengthy prison term. (T. 11860-61, 11902-05). On cross examination, Delgado conceded that his knowledge of the details of the Griga abduction came solely from Lugo. He also had to admit that while he was quick to blame the Griga and Furton homicides on the defendant and Lugo, he could not prove that he was not the actual perpetrator of the homicides. (T. 11927, 12021, 12055). Although there was testimony and physical evidence tying the defendant to the Schiller incident, the testimony and physical evidence relating to Griga and Furton, with the exception of that provided by Petrescu and Delgado, was equally consistent with the defendant being an accessory after the fact. Based

upon the foregoing, it is clear that there was a very real possibility that the highly prejudicial comment of the prosecutor, calling attention to the defendant's exercise of his constitutional right to remain silent, had affected the jury's verdict below. On that basis, this Court should reverse the defendant's convictions and remand this cause for a new trial. *State v. DiGuilio*, *supra*.

III

THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY APPEALED TO THE FEARS AND EMOTIONS OF THE JURY BY MAKING A "GOLDEN RULE" ARGUMENT DURING CLOSING ARGUMENT IN THE GUILT PHASE OF THE DEFENDANT'S TRIAL.

In *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985), this Court aptly noted:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, *it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.*

As an example of an improper argument described in the quote above, the *Bertolotti* court noted that Florida courts have long prohibited "Golden Rule" arguments precisely because they improperly appeal to the fear and emotions of jurors. Generally, "Golden Rule" arguments are those that ask the jury to place themselves in the shoes of the victim. *Bertolotti v. State*, *supra; McDonald v. State*, 743 So.

2d 501 (Fla. 1999). In the case at bar, the prosecutor blatantly violated the "Golden Rule" argument proscription and thereby deprived the defendant of a fair trial.

In closing argument, the prosecutor was describing the conditions under which Marcelo Schiller was abducted and the treatment he received from his captors, when she remarked:

> Remember Detective Hoadley came in and showed you how that Omega taser works. Many of you jumped. *Can you imagine how that would feel on your skin right up close? How it felt on Marc Schiller's sweating legs and ankles. But, again and again until he signed over everything. Signed over his entire life*. (T. 13068)

Clearly, the highlighted portion of the prosecutor's argument was a blatant violation of the "Golden Rule;" the prosecutor improperly sought to inflame the emotions and fear of the jury by asking them to feel the pain and agony Schiller felt when he was repeatedly shocked with a taser gun. The prosecutor's remark was not unlike several others previously found to be improper by Florida courts.

In *Garron v. State*, 528 So. 2d 353 (Fla. 1988), the prosecutor made several inflammatory and unfairly prejudicial remarks during closing arguments in the penalty phase. Included among them was:

> You can just imagine the pain this young girl was going through as she was laying there on the ground dying...Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired.

Garron, supra at 358-59. This Court determined that the remark was a

clear violation of the "Golden Rule" and served as part of this Court's determination that the defendant had been denied a fair penalty phase proceeding because of the prosecutor's highly inflammatory and prejudicial comments.

Similarly, in *DeFreitas v. State*, 701 So. 2d 593 (Fla. 4th DCA 1997), the court reversed the defendant's conviction for aggravated assault based upon several improper comments made by the prosecutor in closing argument. Included among the remarks that the Court found to be fundamental error, was this attempt by the prosecutor to place the jury in the shoes of the victim:

> It's a gun. It's a real gun. It's a gun with a laser on it. *Just imagine how terrifying this laser would be if it was on your chest?*

DeFreitas, supra at 601. The Court found that the prosecutor's violation of the "Golden Rule" was instrumental in destroying the defendant's "most precious right under our criminal justice system, the constitutional right to a fair criminal trial." Id.

In *Bertolotti v. State*, *supra* at 133, the prosecutor remarked during closing arguments in the penalty phase:

> And if that's not heinous, atrocious and cruel, can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, fighting for her life, no lawyers to beg for her life.

Although this Court felt that the remark was highly improper, this Court did not find that the remark had tainted the jury's recommendation in light of the overwhelming aggravating evidence

presented. See also *Peterson v. State*, 376 So. 2d 1230 (Fla. 4th DCA 1979)(the Court reversed the defendant's convictions based upon numerous improper prosecutorial arguments the Court found to be fundamental error, including a "Golden Rule" argument).

In the case at bar, the defendant was entitled to have his jury resolve his guilt of the charges lodged against him based upon a dispassionate, logical analysis of the evidence introduced and the applicable law. Instead, because of the prosecutor's inflammatory comment, the defendant's jury was invited to abandon logic and to instead focus on the fear and emotion engendered by the prosecutor's graphic, personalized description of the injuries suffered by Marc Schiller. The prejudice suffered by the defendant, as a result of the prosecutor's improper choice of words, denied the defendant of a fair disposition of the guilt phase.

IV

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, WHEN THE EVIDENCE IN ISSUE HAD BEEN SEIZED DURING SEARCHES OF THE DEFENDANT'S APARTMENT AND CAR PURSUANT TO A SEARCH WARRANT, THAT HAD BEEN ISSUED WITHOUT PROBABLE CAUSE, IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION.

In *Illinois v. Gates*, 462 U. S. 213, 103 S. Ct. 2317 (1983), the United States Supreme Court defined the test to be applied, when a magistrate reviews an affidavit for the issuance of a search warrant:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether,

> given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 103 S. Ct. at 2332. Accord, *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991); *State v. Siegel*, 679 So. 2d 1201, 1203 (Fla. 5th DCA 1996). The evidentiary basis for a probable cause finding must come from the four corners of the affidavit. *Schmitt v. State*, *supra* at 409; *State v. Badgett*, 695 So. 2d 468, 470 (Fla. 4th DCA 1997).

Once probable cause has been determined, "the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for ... conclud[ing] that probable cause existed." *Illinois v. Gates*, 103 S. Ct. at 2332; *State v. Schmitt*, 590 So. 2d at 409.

In the case at bar, search warrants were issued for searches of the defendant's apartment and car, based upon identical affidavits prepared and submitted by Detective Salvatore Garafalo. (R. 1184-1193, 1275-84). Search warrants were issued pursuant to the affidavits by the Honorable Alex Ferrer, Circuit Judge. (R. 1195-97, 1285-87). The defendant filed a motion to suppress that attacked the issuance of the warrant and the resultant searches and seizures, on the ground that the affidavit established neither probable cause to connect the defendant with criminal activity, nor probable cause to believe that the fruits or instrumentalities of crime would be found in the defendant's apartment or car. (R. 1121-24, 2260-2276). The trial court found

probable cause to support the issuance of the warrant and denied the defendant's motion. (T. 2277).

A review of the affidavits filed in support of the search warrant clearly indicates that the affidavits are legally insufficient to support the issuance of search warrants. The evidence seized as a result of the plainly illegal searches conducted pursuant to the warrants should have been suppressed.

In the warrant, Detective Garafalo set forth facts supporting the allegations of criminal activity against Marcelo Schiller. Detective Garafalo described the kidnapping of Schiller and indicated that Schiller was able to identify Daniel Lugo as one of the several men who had participated in the offense. (R. 1186, 1190). Schiller also had reason to believe that Jorge Delgado was involved. (R. 1187). Garafalo noted that a neighbor of Schiller's, Manuel Salgar, had been able to identify Lugo as a man he had seen at Schiller's home after Schiller's disappearance. (R. 1187-88). Salgar also said that Lugo had frequently been accompanied by a dark-skinned male who drove a Nissan 300ZX. (R. 1188). There was no indication that Salgar had identified the defendant as the man he had seen with Lugo. The affidavit is silent as to any other information possibly tying the defendant to the Schiller offense.

As for the Griga/Furton investigation, Detective Garafalo alleged that both Griga and Furton had been missing since May 24, 1995. Judy Bartusz and Andreas Bardocz, Griga's friends, and Esther Toth, Griga's

cleaning lady, were able to identify the defendant as being one of two men they had seen at Griga's home on the evening of the 24th. Bartusz and Bardocz identified Lugo as the other man. (R. 1190-91). Bartusz said that Griga had told her that they were going to Don Shula's restaurant in Miami Lakes. (R. 1190). After Griga had disappeared, Bartusz went to Miami Lakes and observed a Mercedes that looked like the car used by Lugo and the defendant on the 24th. Bartusz notified the police. Registration information on the Mercedes revealed that it had been leased to Jorge Delgado. (R. 1191-92). Griga's Lamborghini was found abandoned on May 27, 1995. (R. 1191).

With regard to the defendant, the police learned that the defendant had been employed as a trainer at "Sun Gym," that the defendant had a white Nissan 300ZX registered to him and that the defendant had recently purchased a home for cash. (R. 1191-92).

Based upon the foregoing, Detective Garafalo concluded that "Doorbal's home, apartment and automobile will have evidence corroborating the crimes committed upon Schiller and/or the location and whereabouts of Griga and Furton." (R. 1192).

Applying the test enunciated in *Illinois v. Gates*, *supra*, the question for this Court to be resolved is whether Judge Ferrer had a substantial basis to conclude that probable cause existed to believe that evidence relating to the Schiller offenses or the disappearance of Griga and Furton would be found in the defendant's car or apartment. Based upon Detective Garafalo's averments, a substantial basis did not

exist.

With regard to Schiller, no witness identified the defendant as being involved in any of the offenses alleged. Salgar's reference to a dark-skinned male driving a Nissan 300ZX does not tie the defendant to the offenses. No description of the defendant was provided in the warrant, thereby providing no basis to believe that Salgar's cryptic description even applied to the defendant. No further identifying information concerning the car seen by Salgar was provided. Given the size and population of Miami-Dade County, the defendant is clearly not the only driver of a Nissan 300ZX in the area.[35] The mere coincidence of the defendant driving the same model car as that seen by Salgar is not sufficient to establish probable cause to justify a search of the defendant's apartment or car.

Similarly, the fact that the defendant worked with Lugo and for Mese, the man who had notarized documents effectuating a transfer of Schiller's home, may have aroused suspicion, but should not have risen to the level of probable cause, without more evidence tying the defendant to the Schiller crimes.

As for the Griga/Furton investigation, clearly, the evidence indicating that the defendant had last been seen with Griga and Furton would have given the police a reason to question the defendant about the whereabouts of Griga and Furton. A reasonable suspicion concerning

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[35] No evidence was presented in the affidavit concerning the number of registered Nissan 300 ZX automobiles in Miami-Dade County.

the defendant's involvement in criminal activity is not sufficient to provide probable cause for the issuance of a search warrant.

Despite the absence of any additional facts, Detective Garafalo drew the unsupported conclusion that evidence relevant to both the Schiller and Griga/Furton investigations would be found in the defendant's apartment and car. Conclusions regarding the existence of incriminating evidence in a specified place are not sufficient to support the issuance of a search warrant. The failure to demonstrate the probability that evidence would be found in the specified place with facts should have been fatal to the issuance of the warrant.

In *Getreu v. State*, 578 So. 2d 412 (Fla. 2nd DCA 1991), a search warrant was issued based upon an affidavit alleging that a confidential informant had observed the co-defendant in possession of a large quantity of cocaine. The affidavit further provided information regarding the co-defendant's home address and the fact that the defendant lived with the co-defendant. The warrant was executed and a trafficking amount of cocaine was seized. The Second District found the affidavit to be insufficient to establish probable cause. Apart from the fact that the affidavit was indefinite as to when the co-defendant was observed in possession of the cocaine, the affidavit also failed to provide a nexus between the observation of cocaine and the defendant's residence, i.e., no basis to conclude that the cocaine would be in the defendant's house. Finding that the evidence seized should have been suppressed, the Court reversed the defendant's

convictions.

Similarly, in *Glass v. State*, 604 So. 2d 5 (Fla. 4th DCA 1992), the defendant owned a two-story building that contained a grocery store on the bottom floor and two apartments on the top floor. The defendant stayed in one of the apartments and rented out the other. Although the affidavit provided probable cause to believe that a gambling operation was being run out of the rented apartment, a search warrant was sought for the entire building. The only allegations in the affidavit concerning the defendant's apartment included an observation that the defendant had been seen counting money in his apartment and a statement that the entire building was being used to facilitate the gambling operation. The Court upheld the search of the rented apartment, but found that the search of the defendant's apartment was unsupported by probable cause. The Court found that the mere fact that the defendant had been seen counting money in his home was not enough to support probable cause. The unsupported conclusion that the entire building was being illegally utilized was likewise insufficient to support the issued warrant. See also *Gelis v. State*, 249 So. 2d 509 (Fla. 2nd DCA 1971).

As a result of the illegally issued warrant, a large quantity of evidence[36] was seized that was instrumental in tying the defendant to

[36] Items seized included credit card receipts for purchases at Mayor's Jewelers, a letter from Schiller demanding repayment of all money taken from him, a fax from Dubois to Greenburg detailing the property taken from Schiller and demanding return of the property, a cell phone, pager and knife belonging to Lugo, a cell phone bill for Delgado's phone, a

the crimes charged. (R. 1200-07, T. 6160-95, 6227-96). In addition, the police used the seized items to support their allegations in affidavits filed for the issuance of two additional search warrants for the defendant's apartment. (R. 1208-17, 1225-35). Those searches uncovered additional evidence introduced against the defendant at trial. (R. 1240-48, T. 6393-6419).

Based upon the absence of probable cause to support the issuance of the initial search warrants for the defendant's apartment and car, it was error for the trial court to deny the defendant's motion to suppress, which was directed at the evidence seized as a result of the execution of those search warrants. The trial court likewise erred in failing to suppress from evidence the fruits of the subsequent searches conducted at the defendant's apartment, which were themselves the fruits of the initial illegality. *Wong Sun v. United States*, 371 U. S. 471, 83 S. Ct. 407 (1963). The admission of the illegally seized evidence at the defendant's trial served to deny him a fair trial. A new trial for the defendant is mandated.

V

THE TRIAL COURT ERRED WHEN IT LIMITED THE DEFENDANT'S PRESENTATION OF

Jewish New Year card and a hotel receipt that belonged to Schiller, a copy of a warehouse lease signed by Lugo and leased by D & J International, the defendant's car registration for his 300 ZX, a receipt from a locksmith for a change of locks at Schiller's residence, account information for the defendant's account at Smith Barney, a copy of Lugo's federal probation order, a check signed by Lugo on D & J International which had been written to Sun Gym for $67,845, checks signed by Lugo to Penguin Pools for pool care at Schiller's home, photos of Winston Lee's residence, two false passports with Lugo's photo and a brass statue of an eagle that Detective Coleman believed had belonged to Schiller.

MITIGATION EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

It is now a well-established principle of capital case jurisprudence, that a defendant is constitutionally entitled to present, and have the jury and the court consider, any mitigating factor that the defendant can produce. *Skipper v. South Carolina*, 476 U. S. 1, 106 S. Ct. 1669 (1986); *Eddings v. Oklahoma*, 455 U. S. 104, 102 S. Ct. 869 (1982); *Lockett v. Ohio*, 438 U. S. 586, 98 S. Ct. 2954 (1978); *Maxwell v. State*, 603 So. 2d 490 (Fla. 1992). Pursuant to *Eddings*, "the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings*, 102 S. Ct. at 874; *Mills v. Maryland*, 486 U.S. 375, 108 S. Ct. 1860, 1865 (1988). The Eighth Amendment requirement is not simply satisfied by allowing the defendant to present mitigating evidence to the sentencer. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 320, 109 S. Ct. 2934, 2947 (1989). Thus, the United States Supreme Court has said that "under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, ...by the sentencing court, ...or by an evidentiary

ruling." *Mills*, *supra*, 108 S. Ct. at 1865-66 (citations omitted). A State simply cannot, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty. *Penry*, *supra,* 109 S. Ct. at 1946-47.

In accordance with these principles, and the dictates of Section 921.142(7)(h), the defendant sought to introduce in the penalty phase letters written to him by co-defendant Lugo, after both had been arrested. (SR. 1-22). In the letters, Lugo proposed an elaborate plan in which the defendant was to confess to his own complicity in the crimes charged while exonerating Lugo. Once Lugo had been cleared, he would then return to assist the defendant with his case. In furtherance of the plan, Lugo provided the defendant with all of the details that he should provide the authorities, which would assure the plan's success. Of significance to the defendant's mitigation case were passages in the letter such as:

> "Remember, you must promise never make another life decision without talking to me because it has been decided that I am your guardian, okay?
>
> Do you remember how many times I made you make decisions when you had little faith in yourself and I had more faith in you than yourself.
>
> When you are being questioned by anyone, take your time and just be relaxed. This is your show and you are the boss. Don't worry about the legal side, like pleading guilty, what about trial, appeal, or anything with court. I have

> <u>everything</u> under my control on that side, my brother. The State, nor you, can screw with that because I have the government on my side. Remember that. The only thing you must remember is not to mention my name in anything illegal."
>
> You better have faith in Allah and me. Don't doubt and do it. I can't control if you don't listen to me, my little brother. If you listen to me and do your part, I will have control and bring you home. (SR. 1, 19).

The defendant argued that the language and the spirit of the letters demonstrated that Lugo had a substantial influence over the defendant and that Lugo held a dominant position in their relationship. (T. 14143-44, 14149, 14151-52). The defendant maintained that the letters were non-statutory mitigation, in that it was probative of the dominance enjoyed by Lugo within their hierarchal relationship and within the conspiracy formed by the defendant and Lugo. (T. 13781, 13784, 13792-94).

The court initially found that the letters were inadmissible as hearsay[37]. Subsequently, the court reversed its ground and determined that the letter were not hearsay because they was not being offered for the truth of the matter asserted. (T. 13785, 13848). Although the court recognized that Lugo's manipulation of the defendant was relevant

[37] The defendant maintains that Lugo's letters were clearly admissible as an exception to the hearsay rule as a statement against interest. Section 90.804(2)(c), Florida Statutes. An after-the-fact statement evincing a desire to avoid prosecution is relevant to demonstrate the declarant's consciousness of guilt. *Straight v. State*, 397 So. 2d 903 (Fla. 1981). Even if the letter was deemed to be hearsay, the letter was still admissible since hearsay is admissible during a penalty phase proceeding. Section 921.142(2), Florida Statutes; *Rodriguez v. State*, *supra*; *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993).

evidence in mitigation, the court ruled that absent evidence relating the defendant's relationship post-arrest with the relationship that existed at the time of the crimes, the letters would not be admitted. (T. 13848-49). The court later ruled that the scheme laid out in the letters did not necessarily prove the nature of the relationship the defendants shared during the conspiracy. The letters were therefore excluded. (T. 14144-45, 14160).

The trial court's error in refusing to permit the letters to be considered by the jury is best illustrated by this Court's decision in *Gore v. Dugger*, 532 So. 2d 1048 (Fla. 1988). In that case, the defendant and his cousin, Waterfield, picked up two girls and brought them against their will to Gore's home. Thereafter, Gore sexually assaulted the girls and shot and killed one of them. The surviving victim testified that Waterfield had no involvement with her once they arrived at Gore's home. In mitigation, the defendant sought to introduce evidence that he and Waterfield were close and that as a result of Waterfield's dominating personality, the defendant had been influenced by Waterfield. The trial judge refused to permit the testimony because there had been no evidence that Waterfield had anything to do with Gore's killing of the victim. This Court disagreed with the trial court's analysis. Although the evidence did not rise to the level of satisfying the statutory mitigating circumstance relating to operating under the duress or substantial domination of another, it did qualify as non-statutory mitigation, because it was relevant to the

defendant's character. This Court concluded that Gore should have been permitted to introduce the evidence for whatever weight the jury would choose to give it.

In this case, during the guilt phase, the jury was given only small pieces of information regarding the nature of the relationship between the defendant and Lugo during the conspiracy. Jorge Delgado testified that Lugo was the leader at the meetings regarding Schiller and was the one who told others what to do. (T. 11657, 11662). Frank Murphy, the Merrill Lynch account executive, testified that Lugo had complete authority over the defendant's account and made all of the trades. (T. 9404-05, 9420, 9437). Frank Fawcett, the investment banker, stated that the defendant told him that he was a mere figurehead and that if he wanted information, he should talk to Lugo. (T. 10742).

During the penalty phase, Stephen Bernstein, the defendant's best friend, testified that he noted a marked change in the defendant after the defendant became acquainted with Lugo. (T. 14001). After Lugo offered the defendant a place to stay, a business opportunity and money, the defendant had abandoned his bodybuilding efforts and was more motivated by obtaining wealth. (T. 14006-11).

Contrary to the trial court's view, the Lugo letters were extremely probative as non-statutory mitigation, because they would have provided the jury with insight on the defendant's character, Lugo's influence over the defendant during the period in which the

offenses were committed and the reason for the defendant's change in personality, as described by Bernstein. In the letters, Lugo reminded the defendant that Lugo had to force him to make decisions in the past and urged him to never make any other life decisions without consulting Lugo first, "because it has been decided that I [Lugo] am your guardian." (SR 1). Lugo's effort to get the defendant to plead guilty so that Lugo could be exonerated is further proof of Lugo's influence over and dominance of the defendant. Clearly, the letter was probative of an important aspect of the defendant's character, and as such, should have been admitted as non-statutory mitigating evidence. *Gore v. Dugger*, *supra*, *Lockett v. Ohio*, *supra*, *Eddings v. Oklahoma*, *supra*.

The failure of the trial court to permit the defendant to introduce the letters during the penalty phase deprived the defendant of the right to have his sentencing jury consider relevant and probative mitigating evidence. The jury's recommendation , which was based upon a record that did not include all of the mitigating evidence that the defendant sought to present, must be considered to be invalid. *Skipper v. South Carolina*, *supra*. The defendant's death sentences must therefore be vacated and this cause be remanded for a new sentencing hearing to be held consistent with the foregoing constitutional principles.

VI

THE DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY APPEALED TO THE FEARS, SYMPATHIES AND EMOTIONS OF THE JURY BY MAKING A

> "GOLDEN RULE" ARGUMENT AND BY IMPLORING THE JURY TO SHOW THE DEFENDANT NO MERCY DURING CLOSING ARGUMENT IN THE PENALTY PHASE OF THE DEFENDANT'S TRIAL.

Unfortunately for the defendant, the prosecutor did not confine her "Golden Rule" argument to the guilt phase[38]. During her penalty phase closing argument, the prosecutor argued to the jury that the defendant's difficult childhood did not relieve him of the moral responsibility of his actions. As part of her argument, the prosecutor commented:

> And he still had a chance to bond with his father. And, again, the mitigation in whatever is Ms. Lauric, because of the fact that she was raped at thirteen, you cannot blame his childhood on that . It doesn't mitigate his moral responsibility. The moral responsibility as a human being, as a person that lives in the society. *And, I don't know, but to say that where I live, if I lived in Trinidad or if you lived in Trinidad or you live in the United States, you don't do the things that this defendant did.*

(T. 14246). Although not an effort to place the jury in the shoes of the victim, the Third District has termed this type of argument, one in which the jury is placed in the shoes of the defendant, to be an improper variation on the "Golden Rule" theme.

In *Gomez v. State*, 751 So. 2d 630 (Fla. 3rd DCA 1999), the defendant was charged with attempted second degree murder. In an

[38] Point III, supra.

effort to denigrate the defendant's defense of self defense, the prosecutor argued in closing that if the jury had placed themselves in the shoes of the defendant, they would not have stabbed the victim in reaction to the circumstances the defendant had faced and, if it really had been a case of self defense, the jurors in the defendant's place would have acted differently. The Third District found the prosecutor's closing argument was a violation of the proscription against "Golden Rule" arguments. Finding the prosecutor's comment to be unprofessional and unfair to the defendant, the Court reversed the defendant's conviction.

In the case at bar, the prosecutor took the same improper tack as the prosecutor in *Gomez*. In attempting to minimize the mitigation put forth by the defense, the prosecutor told all of the jurors that given the same childhood and life the defendant experienced in Trinidad and the United States, none of them would have done what the defendant did.[39] The prosecutor's argument was highly prejudicial in that it had the effect of dehumanizing the defendant and destroying the defendant's mitigation case. Clearly, no reasonable juror, given the prosecutor's invitation to do so, would concede that he/she would do what the defendant did, even given the unfortunate circumstances of the defendant's childhood.

The defendant was entitled to a jury who could assess the evidence

[39] The prosecutor did not exclude herself from the argument. She improperly opined that she would not have done what the defendant did either. (T. 14246).

in aggravation and mitigation as an impartial arbiter of the facts. The prosecutor's comment had the effect of personalizing the jury's task, to the clear detriment of the defendant's case.

The prosecutor also asked the jury to consider what the defendant had done to Griga and Furton and implored them to show the defendant no mercy. The prosecutor remarked:

> "So, what does this defendant do? He holds her [Furton] up while Lugo takes down the numbers from her jumbled brain, from her confusion. And does she try to give these numbers? As best as she can. But another shot to quiet her down. And does she see that injection coming? They lifted the hood that's been put over her head and they moved the tape off it, but were they kind because they gave her some water? Was this a kind, gentle gesture of a kind, gentle man? No.
>
> That's the gesture of a cold-blooded murderer. Then they try again and they go to the house and Mr. Lugo tries to go and do that. He is merely the brains of the operation. He is going to the house, going to try those numbers, but this defendant stays down with [Furton]. Frank's already been moved into the bath tub so his blood could bleed out through the brain and what happens when Lugo calls? This is why you know that he is a cold-blooded killer. The bitch is cold. Those were his words. His words. The bitch is cold.
>
> Not Lugo's words. *Is that a value of human life? Does he deserve to spend the rest of his life in prison?* See sisters and going to the library helping others? *He deserves nothing. He deserved no mercy and he deserves no leniency. He deserves no respect."* (T. 14237-38).

The prosecutor then continued:

> I did not stand up here and tell you that the death penalty is an appropriate penalty because

> Frank Griga was a wealthy man. Don't make your decision on that. You shouldn't dare. Even if he was a bad man. *Anybody that was treated in this matter for whatever* – I don't care if he would have had pennies to give her. It is not about his woman as a passionate person. It is about his goodness and about his well-being as a human.
> *It is about Christina Furton. It is the fact of what's left of them. He deserved no mercy for this*. There is nothing left. Not one single thing that weighs against these items. That's awesome. They are heavy. (T. 14258-59).

Taken in context, the prosecutor essentially argued to the jury that the defendant did not deserve mercy because of the merciless way that he had treated Griga and Furton. Similar arguments have been previously condemned by this Court.

In *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), in closing argument in the penalty phase, the prosecutor argued:

> If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks [the victim] on September 1, 1995, and that was none.

Urbin, *supra* at 421. This Court found the prosecutor's argument to be blatantly impermissible and, in conjunction with other errors found by the Court, reversed the defendant's sentence.

Similarly, in *Rhodes v. State*, 547 So. 2d 1201, 1206 (Fla. 1989), the prosecutor concluded his argument by urging the jury to show the defendant the same mercy shown to the victim on the day of her death. This Court found the prosecutor's argument to be "an unnecessary appeal

to the sympathies of the jurors, calculated to influence their sentence recommendation." This Court reversed the defendant's death sentence. See also *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992).

In *Garron v. State*, *supra*, in dealing with several prosecutorial remarks that were improperly designed to inflame the jury's emotions, this Court aptly described this type of error:

> We believe, however, that the actions of the prosecutor in this case represent an example of what constitutes egregious conduct. When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct.

Garron, supra at 359.

The jury's decision-making process in the penalty phase was prejudicially affected by prosecutorial misconduct. Misconduct of this type injects matters outside the scope of the jury's proper deliberation and violates the prosecutor's duty to seek justice, not merely "win" a death recommendation. *Bertolotti*, *supra*, 476 So. 2d at 133. The defendant urges this Court to reverse and remand this cause for further proceedings in front of a new, impartial jury.

VII

THE TRIAL COURT ERRED WHEN IT SEPARATELY CONSIDERED AND WEIGHED THE FELONY MURDER AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES, SINCE BOTH AGGRAVATING CIRCUMSTANCES REFERRED TO

THE SAME ASPECT OF THE DEFENDANT'S OFFENSE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its sentencing order, the trial court found that both the felony murder aggravating circumstance, Section 921.141 (5)(d), Florida Statutes, and the pecuniary gain aggravating circumstance, Section 921.141 (5)(f), Florida Statutes, applied to this case and assigned both of those aggravators great weight. (R. 3464-65, 3467-68).

It has long been the law in Florida, that a doubling of aggravating circumstances is improper where the aggravating circumstances refer to the "same aspect" of the crime. *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976), *cert denied*, 431 U. S. 969 (1977). As such, if the motivating purpose for the defendant's commission of the kidnapping of Griga and Furton was pecuniary gain, it would have been improper to double the felony murder aggravator with the pecuniary aggravator. *Green v. State*, 641 So. 2d 391 (Fla. 1989). A review of the record clearly establishes that pecuniary gain was precisely the purpose for the defendant's commission of the Griga and Furton kidnapping. As such, it was error for the trial court to have separately found and weighed the felony murder and pecuniary gain aggravators.

At trial, the defendant's girlfriend, Beatrice Weiland, testified that the defendant learned of Griga after he viewed a photo of Griga's Lamborghini. (T. 5787-90). Subsequently, the defendant asked Attila

Weiland for an introduction to Griga under the guise that he was looking for business partners. (T. 5720). According to Jorge Delgado, the defendant had come up with a plan to abduct Griga and Furton. The plan was to do to Griga what they had done to Schiller; abduct and then take Griga's assets. (T. 12064, 12067). Delgado later stated that despite Griga's death, both Lugo and the defendant continued to attempt to obtain Griga's assets by pressing Furton for information about the alarm entry code to Griga's house. (R. 3468, T. 11746, 11748).

Based upon the foregoing, it is clear that the sole purpose for the defendant's kidnapping of Griga and Furton was pecuniary gain. Under such circumstances, this Court has declared that the doubling of the felony murder and pecuniary gain aggravating circumstances is improper.

In *Clark v. State*, 379 So. 2d 97 (Fla. 1979), the defendant, in need of money, formulated a plan to kidnap someone at a bank and to demand money. The defendant abducted the victim and ordered him to drive his car to a secluded area. After the defendant ordered the victim to write a check on his account, the defendant shot and killed the victim. The defendant was charged with and convicted of murder, kidnapping and extortion. On those facts, this Court found that it was error to separately find both the felony murder and pecuniary gain aggravating circumstances.

In *Green v. State*, *supra*, the defendant abducted a couple that had been parking in a secluded area. After taking money from the couple,

the defendant forced them to enter their truck and drive to another location. After they arrived at the second location, the woman was able to escape while the defendant shot and killed the man. The defendant was charged with and convicted of murder, kidnapping and robbery. This Court upheld the finding of separate aggravating circumstances for both felony murder and pecuniary gain because the purpose of the kidnapping clearly was not to rob the couple since they were robbed before they were kidnapped. This Court noted that had the sole purpose of the kidnapping been to rob the victims, the case would have been resolved differently.

The *Green* decision is in accord with several prior decisions of this Court in which the Court upheld separate findings for both the felony murder and pecuniary gain aggravating circumstances, when kidnapping was the felony involved. In *Preston v. State*, 607 So. 2d 404 (Fla. 1992), *Bryan v. State*, 533 So. 2d 744 (Fla. 1988), and *Routly v. State*, 440 So. 2d 1257 (Fla. 1983), the defendants robbed their victims in one location and then transported the victims to a second location, against their will, where the murder occurred. In all of those cases, the kidnapping had a significance independent from the motive for pecuniary gain, because in each case the taking had concluded before the victim was moved to another location to effectuate the homicide.

Those cases are factually inapplicable to this case. The record makes it plain that the motivating purpose for the abduction and

kidnapping of Griga and Furton was to take their assets. No taking was accomplished before the kidnappings had occurred. There was no transport to a second location for the purpose of committing a homicide. Under the circumstances, it is clear that the felony murder and pecuniary gain aggravating circumstances relate to the "same aspect" of the defendant's crimes. As such, it was error for the court to separately consider and assign great weight to *both* the felony murder and pecuniary gain aggravating circumstances. This Court should therefore vacate the defendant's death sentences and remand this cause with directions to re-weigh the remaining aggravating and mitigating circumstances, as modified by this Court. See, ***Davis v. State***, 604 So. 2d 794 (Fla. 1992) (improper doubling of felony murder and pecuniary gain aggravators, where burglary committed for pecuniary gain); ***Campbell v. State***, 571 So. 2d 415 (Fla. 1990), (same) and ***Mills v. State***, 476 So. 2d 172 (Fla. 1985), (same).

VIII

THE TRIAL COURT ERRED WHEN IT SEPARATELY CONSIDERED AND WEIGHED THE AGGRAVATING CIRCUMSTANCES COVERING A HOMICIDE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND A HOMICIDE COMMITTED TO AVOID A LAWFUL ARREST, SINCE BOTH AGGRAVATING CIRCUMSTANCES REFERRED TO THE SAME ASPECT OF THE DEFENDANT'S OFFENSE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its sentencing order, the trial court found that both the cold, calculated and premeditated (CCP) aggravating circumstance, Section

921.141 (5)(I), Florida Statutes, and the avoid lawful arrest aggravating circumstance, Section 921.141 (5)(e), Florida Statutes, applied to this case and assigned both of those aggravators great weight. (R. 3465-67, 3471-72).

As stated, supra, it has long been the law in Florida, that a doubling of aggravating circumstances is improper where the aggravating circumstances refer to the "same aspect" of the crime. ***Provence v. State***, 337 So. 2d 783, 786 (Fla. 1976), ***cert denied***, 431 U. S. 969 (1977). Although improper doubling of the CCP and avoid lawful arrest aggravators can occur,[40] this Court has generally upheld separate consideration and weighing of the two aggravators, because the two aggravators frequently refer to different aspects of the defendant's offense. Thus, in ***Stein v. State***, 632 So. 2d 1361 (Fla. 1994), this Court upheld the application of both aggravators, where both aggravators were supported by distinct facts and each aggravator referred to a separate aspect of the crime; CCP focused on the manner in which the crime was committed and the avoid arrest aggravator focused on the motivation for the offense. ***Stein v. State***, 632 So. 2d at 1366.

In the case at bar, a review of the trial judge's sentencing order reveals that both the CCP aggravator and the avoid arrest aggravator were based upon the same aspect of the crime and identical facts.

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[40] *Morton v. State*, 689 So. 2d 259, 265 (Fla. 1997).

As to the avoid arrest aggravator, the trial judge specifically found, "The State proved beyond and to the exclusion of every reasonable doubt that Doorbal's plan was to kill the victims after taking all of their assets in order to eliminate them as witnesses and, thereby, avoid arrest." (R. 3465). The court drew support for its finding from the fact that the defendant was known to the victims and did not wear a disguise during the commission of the underlying felonies. (R. 3466).

As to the CCP aggravator, the trial court found that the defendant had formulated a plan to take Griga's assets as he had done with Schiller. "One notable difference existed. Although the defendants eventually attempted to kill Schiller, at the outset they at least took steps to disguise themselves. As noted above, no such pretense was taken with Griga and Furton, since it was clear that they could not be allowed to live and become witnesses against the defendants." (R. 3471).

In short, it is plain that the trial judge's focus in finding the existence of both the CCP aggravator and the avoid lawful arrest aggravator was the existence of an alleged "plan" to kill both Griga and Furton, to ensure that they would not be able to identify the defendant when the underlying felonies had been completed. Clearly, the trial judge relied on the "same aspect" of the defendant's offense and the same facts to support his finding of two separate aggravating circumstances. Based upon the authorities cited in Point VI, supra, it

was error for the court to separately consider and assign great weight to *both* the CCP and avoid arrest aggravating circumstances. This Court should therefore vacate the defendant's death sentences and remand this cause with directions to re-weigh the remaining aggravating and mitigating circumstances, as modified by this Court.

IX

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD ESTABLISHED THAT THE HOMICIDE HAD BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

In its sentencing order, the trial court found that the evidence had established the statutory aggravating circumstance under Section 921.141(5)(I), Florida Statutes; that 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. 3471-72). A review of the record reveals that in fact, there was insufficient evidence to establish that aggravating circumstance beyond a reasonable doubt.

In *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), this Court sought to provide guidance in the application of the terms employed by the Legislature in Section 921.141(5)(I). To apply the "CCP" aggravating circumstance, the homicide must be "cold", that is, the killing must involve "calm and cool reflection." *Jackson*, *supra* at 88; *Richardson v. State*, 604 So. 2d 1107, 1109. *And*, the killing must be "calculated"; it

must be the product of a careful plan or prearranged design to kill, formulated prior to the fatal incident. *Jackson*, *supra* at 89; *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987). *And*, the killing must be the result of "heightened premeditation", to distinguish homicides that require application of the CCP aggravating circumstance from the premeditation required for conviction of first degree murder. *Jackson*, *supra*, at 88-89; *Rogers*, *supra*, at 533. Finally, the killing must be without pretense of moral or legal justification. *Jackson*, *supra*, at 89; *Banda v. State*, 536 So. 2d 221 (Fla. 1988).

To differentiate a first degree murder from the first degree murder that merits application of the CCP aggravator, the evidence must sustain the presence of each of the elements of CCP; "cold", "calculated" and "premeditated". *Jackson v. State*, *supra*. As such, the CCP statutory aggravator was intended to apply to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first degree murder," *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), such as executions, contract murders or witness elimination killings. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1992); *Green v. State*, 583 So. 2d 647, 652 (Fla. 1991); *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988).

The record in this case demonstrates that the homicides of Frank Griga and Krisztina Furton did not meet the standards reserved for application of the CCP aggravator.

To establish the CCP aggravator, the State relied principally on the testimony of Petrescu and Delgado. According to Delgado, after the defendant learned of Frank Griga's wealth, he originated the idea of abducting Griga in a fashion similar to that employed with Schiller. (T. 12064, 12067). The plan was to abduct Griga and extort his assets from him. Petrescu confirmed this when she stated that Lugo had told her about a plan to abduct a Hungarian man with a lot of money. (T. 10393). Lugo led Petrescu to believe that the abduction was part of an FBI operation. The plan was to capture Griga, take his money and turn him over to the FBI. (T. 10395-97). In neither instance was there a plan discussed which involved the killing of Griga or Furton.

Only Delgado could provide details regarding the manner in which Griga and Furton were killed. According to Delgado, their deaths were clearly not the product of a calculated, premeditated plan. Delgado said that Lugo told him that the defendant had struggled with Griga when he attempted to get away. During the struggle, the defendant held Griga in a headlock and apparently strangled him. (T. 11736-41, 11759-60). In fact, Lugo gave Delgado the impression that Griga had not died according to "plan;" he had expired before they were able to take his property. (T. 11741). Furton had been repeatedly injected with an animal tranquilizer in an effort to calm and quiet her after she became aware of the struggle involving Griga. (T. 11736-44). She died a short time later from an apparent overdose of the tranquilizer administered.

The foregoing clearly establishes that the defendants planned to

kidnap and extort money from Griga and Furton. The defendants took steps to prepare for those offenses by purchasing surveillance equipment and materials for the capture (tape, handcuffs, tranquilizer and syringes), and by renting a warehouse for the victims' imprisonment. Their intention to commit kidnapping and extortion, and the taking of provisions necessary to accomplish that purpose, however, are plainly insufficient to satisfy the standards for the CCP aggravator. This Court has held on numerous occasions that a plan to commit the underlying felony, in a felony murder scenario, is irrelevant to the heightened premeditation and carefully calculated design to kill necessary for application of the CCP aggravator: *Geralds v. State*, 601 So.2d 1157 (Fla. 1992) (defendant planned burglary for a week by ascertaining the whereabouts of the occupants of a home; brought gloves, a change of clothes and plastic ties with him to the house; defendant fatally stabbed victim during burglary - held that CCP factor not proven by evidence of extensive pre-felony planning, that did not necessarily encompass full contemplation of murder); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), (defendant shoots robbery victim/store clerk after becoming angry because the victim had pressed an alarm button - held that CCP factor not proven - defendant's conduct not the product of calculated design to kill, but rather a spontaneous act done during course of robbery); *Hardwick v. State*, 461 So. 2d 81 (Fla. 1984), (defendant raped and strangled victim after victim had refused the defendant's demand for money - held that CCP factor not

proven - for purposes of CCP, defendant's fully formed premeditated intent to rob victim cannot be transferred to a murder which occurs in the course of the robbery); *Vining v. State*, 637 So. 2d 921 (Fla. 1994), (defendant met with victim on several occasions concerning the defendant's interest in buying the victim's diamonds; on the last occasion, the defendant shot the victim and stole the jewelry - held that CCP factor not proven - for purposes of CCP, calculated plan to rob victim does not establish calculation and heightened premeditation to kill victim); *Lawrence v. State*, 614 So. 2d 1092 (Fla. 1993), (defendant entered convenience store after having procured a firearm with the intention of robbing the store; store clerk shot and killed and store proceeds taken - held that CCP factor not proven - intention to commit robbery and procurement of firearm to that end are insufficient to establish the elements of CCP). See also *Castro v. State*, 644 So. 2d 987 (Fla. 1994) and *Power v. State*, 605 So. 2d 856 (Fla. 1992).

In its sentencing order, the court theorized that there had been a plan to murder Griga and Furton because the defendants had not worn disguises during the abduction. (R. 3471). The problem with the court's theory is that it is simply inconsistent with the record. Jorge Delgado, the State's cooperating witness, testified that he was familiar with the "plan" for abducting Griga and he did not know why Griga had been killed. (T. 12064). There was simply no evidence in the record to suggest that there had been any discussion between the

defendants of a plan to kill Griga and Furton, before the incident was set in motion. The defendant's spontaneous killing of Griga and the seemingly inadvertent administration of toxic amounts of animal tranquilizer to Furton, simply does not establish that the murders of Griga and Furton were "calculated", i.e., the product of a careful plan or prearranged design to kill, formulated prior to the fatal incident. *Jackson*, *supra* at 89; *Rogers v. State*, *supra* at 533 (Fla. 1987).

To illustrate, in *Barwick v. State*, 660 So. 2d 685 (Fla. 1995), the defendant observed the victim sunbathing, returned to his home, got a knife from his house, gloves and a mask and returned to the victim's home to rob her. When the victim resisted, the defendant stabbed her to death. Based upon the foregoing, this Court found that the record did not demonstrate that the defendant had a careful plan or prearranged design to kill the victim. Barwick's plan was to rob the victim; the murder was therefore found not to have been committed in a "calculated" manner so as to justify the application of the CCP aggravator.

Similarly, in *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994), the defendant and a co-defendant entered a restaurant and robbed the employees. During the twenty minutes in which they were engaged in the robbery, the defendant pistol whipped one of the victims and then raped a second. The defendant then shot and killed each victim, one at a time. This Court found that on the record presented, there was insufficient evidence to sustain the level of premeditation required

for CCP. Implicit in this Court's opinion was that even though the defendant had the time to formulate a design to kill during the defendant's slow, methodical and calculated killing of each victim, the evidence was still lacking to demonstrate the careful planning that is inherent in the CCP aggravator.

In this case, the record establishes only that the defendant had planned the commission of a kidnapping and extortion. There is a complete absence of evidence demonstrating a careful plan or pre-calculated design to kill that is the hallmark of CCP killings. *Geralds, Barwick, Wyatt.* Instead, the record supports the notion that the defendant spontaneously killed Griga when Griga sought to resist his abduction and had attempted to escape. Furton was killed inadvertently through the administration of a toxic dose of tranquilizer, while the defendants were still endeavoring to obtain information from her that would aid in the commission of the extortion. The absence of compelling evidence to refute this scenario, together with the absence of evidence demonstrating heightened premeditation and a calculated and carefully designed plan to kill, renders the evidence legally insufficient to sustain the trial court's finding that the CCP aggravating circumstance applied to the homicides of Griga and Furton. *Geralds v. State*, *supra*; *Hamblen v. State*, *supra*.

The defendant urges this Court to strike the CCP aggravator and to vacate the defendant's death sentences with directions to remand this cause for re-sentencing.

X

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE HAD BEEN COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE.

In its sentencing order, the trial court found that the evidence had established the statutory aggravating circumstance under Section 921.141(5)(e), Florida Statutes; that the capital felonies were committed for the purpose of avoiding a lawful arrest. (R. 1752-57). A review of the record reveals that there was insufficient evidence to establish that aggravating circumstance beyond a reasonable doubt.

This Court has long held that in order to find the "avoid arrest" aggravating circumstance when the victim is not a law enforcement officer, there must be very strong and clear proof that the sole or dominant motive for the murder was the elimination of the witness. *Urbin v. State*, *supra, Perry v. State*, 522 So. 2d 817 (Fla. 1988); *Scull v. State*, 533 So. 2d 1137 (Fla. 1988). "The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance." *Davis v. State*, 604 So. 2d 794 (Fla. 1992).

In this case, the record does not contain strong and compelling proof that the defendant's sole or dominant purpose for murdering Furton and Griga was to eliminate them as witnesses.

The record demonstrates that the defendant, Lugo and Delgado had planned to do to Griga and Furton, what they had done to Schiller. (T.

12064). In other words, abduct Griga and Furton and extort their assets from them. The trial court hypothesized that since the defendants were facing a threat of prosecution from Schiller at the time of the Griga and Furton offenses, they had determined that one alteration to the plan was necessary; the Court theorized that the defendants had decided to kill Griga and Furton after their assets were taken. The trial court drew support for its conclusion from the fact that, unlike the Schiller kidnapping, the defendants did not disguise themselves with Griga and Furton. (R. 3465-66).

However, the mere fact that the victim knew and could have identified his assailant has been held by this Court to be insufficient to prove intent to kill to avoid a lawful arrest. ***Davis v. State, supra***, (the defendant had done work for the victim at the victim's home); ***Bruno v. State***, 574 So. 2d 76 (Fla. 1991), (the defendant and the victim were friends); ***Perry v. State, supra***, (the defendant was a former neighbor of the victim); ***Caruthers v. State***, 465 So. 2d 496 (Fla. 1985); and ***Rembert v. State***, 445 So. 2d 337 (Fla. 1984). In addition, the facts underlying the actual homicides do not support a finding of a murder to eliminate a witness.

The trial court's finding that "their [sic] was no evidence that [the defendant] acted in a fit of rage or in any manner other than according to plan" is simply belied by the evidence. (R. 3466).

Jorge Delgado was the only witness to provide details concerning the deaths of Griga and Furton. Delgado only knew what Lugo had told

him. (T. 11927, 12021). Delgado said that Lugo told him that the defendant had struggled with Griga when he attempted to get away. During the struggle, the defendant held Griga in a headlock and apparently strangled him. (T. 11736-41, 11759-60). In fact, Lugo gave Delgado the impression that Griga had not died according to "plan;" he had expired before they were able to take his property. (T. 11741).

Delgado stated that Furton had been repeatedly injected with an animal tranquilizer in an effort to calm and quiet her after she became aware of the struggle involving Griga. (T. 11736-44). During this period, the defendant and Lugo obtained information from Furton concerning Griga's house code. It was while Lugo was attempting to enter Griga's home that Furton expired. (T. 10445-47). No other evidence regarding the manner of Furton's death was introduced.

This case is not unlike the situation addressed by this Court in *Urbin v. State, supra*. In Urbin, the State's witnesses testified that the defendant had shot the victim after he resisted a robbery attempt. Facial injuries suffered by the victim indicated that there had been a scuffle sometime before the victim's death. Although there was evidence that the victim recognized the defendant, this Court found that the evidence was insufficient to prove the avoid arrest aggravator, since the shooting appeared to be the product of the victim's resistance, as opposed to a calculated plan to eliminate the victim as a witness. *Accord, Cook v. State*, 542 So. 2d 964, 970 (Fla. 1989).

Additionally, in *Perry v. State*, supra, this Court found that the evidence was lacking to demonstrate that the defendant's purpose in killing his robbery victim was to avoid arrest. In Perry, though the defendant was known to the victim, the existence of evidence to suggest that the defendant had either "panicked" or "blacked out" during the murder, rendered the evidence insufficient to sustain the "avoid arrest" aggravator.

At trial, only Jorge Delgado was able to provide testimony regarding the events that led to Frank Griga's death. Delgado simply parroted the story told him by Lugo: that Griga had died in a struggle with the defendant that had occurred sometime during or after Griga's attempt to "get away." As in the situations in *Urbin* and *Cook,* the evidence therefore readily supports the conclusion that Griga died during his efforts to resist and not as the result of a concerted plan to eliminate him as a witness. To the contrary, Lugo made a point of telling Delgado that he was upset that Griga had died because they had not yet extorted money from Griga.[41]

As for Furton, no witness provided any evidence that clearly demonstrated the circumstances under which she died. Delgado stated that he observed Furton receive several injections that were designed

[41] Specifically, Lugo said, "He wasn't supposed to die at that moment." (T. 11741). In context, the statement plainly demonstrated that the purpose of Griga's confinement, the theft of his money, had not yet been accomplished. The defendant maintains that it is pure conjecture to assume that by adding "at that moment," Lugo meant to imply that Griga was supposed to die at some other time.

to calm and quiet her whenever she became hysterical. (T. 11744, 11748-51). After information concerning her home alarm codes was obtained from Furton, Lugo and Petrescu were in the process of acting on it when they were informed by the defendant that Furton had died. (T. 10447, 10551). The medical examiner opined that Furton had likely died from an overdose of the animal tranquilizer given to her. (T. 12346-48). Based upon the foregoing, the defendant maintains that the evidence does not exclude the reasonable possibility that Furton had died inadvertently; the product of reckless administration of a drug[42]. As such, the State clearly failed to demonstrate, beyond a reasonable doubt, that the sole or dominant motive for Furton's murder was her elimination as a witness.

Based upon the foregoing, it is clear that the State had not established beyond a reasonable doubt that the defendant's sole or dominant purpose for the murders of Griga and Furton was their elimination as witnesses. The insufficiency of evidence should compel this Court to conclude that the trial court had erred in finding that the "avoid arrest" aggravator had been established by the State. The defendant urges this Court to strike the "avoid arrest" aggravator and to vacate the defendant's death sentences with directions to remand this cause for re-sentencing.

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[42] Lugo also told Delgado that he had contacted John Raimondo to help him with the problem - killing Furton and disposing of the bodies. (T. 11753). Raimondo arrived at the defendant's apartment, but did neither.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentences of death must be vacated and the case remanded for new sentencing proceeding before a jury.

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BY: _____
SCOTT W. SAKIN
Florida Bar No. 349089

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Rivergate Plaza, Miami, Florida 33131 this _____ day of November, 2000.

BY: _____
SCOTT W. SAKIN, ESQ.