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.

APPELLANT'S REPLY BRIEF

SCOTT W. SAKIN, P.A.
Special Assistant Public Defender
Counsel for Noel Doorbal
1411 N.W. North River Drive
Miami, Florida 33125
(305) 545-0007

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br." The parties will be referred to as they stood in the trial court. All other citations are as in the initial brief. Specific points raised in the initial brief, but not addressed in the reply brief, are not waived.

ARGUMENT

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 his initial brief, the defendant claimed that the trial court erred in permitting Mario Sanchez, Elena Petrescu and Frank Fawcett to provide irrelevant testimony that depicted the defendant as being extremely violent, thereby impugning the defendant's character at a time when the defendant had not placed his character in issue. (Initial Br. p. 45-53). In relying upon this Court's opinion in *Bryan v. State*, 533 So. 2d 744 (Fla. 1988), the State, in response, does not contest that the defendant's character was assassinated by introduction of the harmful testimony cited in the defendant's initial brief. Instead, the State contends that the testimony of Sanchez and Petrescu[1] was elicited for other purposes and therefore was properly admitted.

During his testimony, Sanchez claimed that he once heard the defendant

[1] Interestingly, the State failed to provide any answer to the defendant's claim regarding the irrelevant and harmful testimony provided by Frank Fawcett. (Initial Br. p. 48). Presumably, the State could find no justification for Fawcett's totally gratuitous references to the defendant's alleged threat to kill his girlfriend or to construct a bomb. (T. 10742, 10752).

heatedly tell another weight 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). The State claims that the foregoing was relevant to explain why Sanchez did not report the Schiller kidnapping and continued to associate with the defendant. (Answer Br. p. 69). In support of its argument, the State relies upon *Williamson v. State*, 681 So. 2d 688 (Fla. 1996).

In *Williamson*, the defendant was convicted of committing a home invasion robbery which had resulted in the death of one of the victims. Initially, Panoyan, a State witness, was charged as an accomplice to the defendant; Panoyan had allegedly given the defendant access to the victim's home. Subsequently, the charges against Panoyan were dismissed. At trial, Panoyan was permitted to explain that he had not reported the defendant's involvement in the offense for three years because the defendant had threatened him and he was aware that the defendant was capable of violence since the defendant had previously killed a child. Panoyan's testimony was corroborated by a cell mate of the defendant's, who testified that the defendant had admitted to threatening Panoyan with a weapon if he talked. This Court found that the evidence of the prior threats and the defendant's previous acts of violence were relevant to explain why Panoyan had failed to identify the defendant as the perpetrator

of the murder. In addition, the evidence gave the jury the full context of the criminal episode; it helped explain why Panoyan, with full knowledge of the defendant's previous actions, had cooperated in the crime.

Unlike the situation in *Williamson*, Sanchez claimed that the defendant's alleged statements were made after Sanchez had already joined in the commission of the Schiller kidnapping. As such, it is clear that Sanchez did not participate in the Schiller kidnapping because he feared the defendant. He participated because he agreed to accept $1,000 in payment for his services as an intimidator of Schiller. (T. 8475-78, 8542). Subsequently, he did not report the Schiller kidnapping because he knew he was facing life in prison. As Sanchez explained, it was that fear, and not his fear of the defendant, that caused him to lie to the police when he was initially arrested. (T. 8664-66).

Even if Sanchez' testimony was arguably relevant to establish his fear of the defendant[2], and that his fear was the cause of his failure to implicate both himself and the defendant, the probative value of establishing that hardly material fact was clearly

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[2] Additionally, it is important to note that in *Williamson*, Panoyan was motivated by the defendant's personal threats, which were made to keep Panoyan from implicating the defendant. In this case, Sanchez never claimed that the defendant had threatened him. Instead, Sanchez' reference was to a conversation had between the defendant and an anonymous weight lifter, in which the defendant apparently attempted to describe the depth of his ability to be angry. Notwithstanding Sanchez' alleged fear of the defendant, he freely refused the defendant's purported offer to participate in another criminal episode without suffering any consequences. (T. 8560-63).

outweighed by the prejudice created by the Sanchez testimony. See Section 90.403, Florida Statutes.

Due to the State's filing of a RICO charge, the Schiller incident and the crimes involving Griga and Furton were joined together. Although Sanchez had nothing to do with or say about the offenses involving Griga and Furton, his allegations regarding the defendant's comments clearly damaged the defendant's ability to fairly defend himself against those charges. In a case involving post-mortem dismemberment, Sanchez' reference to the defendant's alleged comment about "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," had to have had a substantial prejudicial impact which far outweighed any probative value provided by Sanchez' reference.

The State's justification for the admission of Petrescu's prejudicial testimony is plainly specious. The State claims that Petrescu's reference to the defendant as a "killer in his country" was probative to explain why Petrescu had accompanied the defendant and Lugo in their efforts to abduct Griga. (Answer Br. p. 69). Clearly, a naive Petrescu had been duped by her boyfriend, Lugo, into thinking that Lugo was a CIA agent and that his operation with Griga involved the capture of a terrorist who owed money to the government. (T. 10335, 10367, 10395). Petrescu admitted, however, that she had just assumed that the defendant was also in the CIA. (T. 10339-40). Even if the State is correct in insisting that Petrescu may have been motivated to

assist Lugo and the defendant out of patriotic motives on behalf of her adopted country,[3] the reference to the defendant as a "killer in his country" had absolutely nothing to do with that. The reference was nothing more than a gratuitous remark that was designed to prejudice the defendant in front of a jury that was to determine his guilt or innocence on the charge of murder.

In its brief, the State made no effort to distinguish the numerous authorities relied upon by the defendant that clearly establish that the State may not destroy a defendant's character with evidence that is solely probative of a defendant's propensity toward violence, particularly when the defendant has not first placed his good character in issue. (Initial Br. p.49-52). Plainly, at the time that Sanchez, Petrescu and Fawcett testified, the defendant had nothing to place his character in issue. The repeated references to the defendant's bad character advanced by Sanchez, Petrescu and Fawcett did not tend to prove any fact material to resolution of any appropriate issue before the jury. Instead, the State's witnesses were permitted to successfully paint a picture for the jury of a defendant who had an extreme propensity toward violent acts and thoughts. The overwhelming prejudice suffered by the defendant as a consequence of the State's reliance upon such irrelevant testimony

[3] The more likely explanation for Petrescu's assistance could be found in her testimony in which she stated that Lugo had told her that she was part of a team with him. Lugo told her if she couldn't help, Lugo and Petrescu could not stay together. (T. 10433). Petrescu then decided to participate. (T. 10433).

served to deprive the defendant of a fair trial.

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.

In response to the defendant's claim that the prosecutor had impermissibly commented upon the defendant's right not to testify, the State essentially raises two points: 1) the State claims that the comment was a reference to the failure of the defense to impeach the testimony of Jorge Delgado, not a comment on silence, and 2) the comment fell outside the ambit of this Court's decision in *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), because there were people, other than the defendant, who were in a position to contradict the version supplied by Delgado. (Answer Br. p. 72-73). Neither contention is supported by the record or the law.

An examination of the prosecutor's statement plainly reveals that the prosecutor went well beyond simply commenting upon whether Delgado's testimony stood up under cross examination. After telling the jury that Delgado's story was credible and

that he had supplied details necessary to establish the charge of first degree murder, the prosecutor then said:

> 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).

Although the prosecutor clearly referred to the cross examination of Delgado in the initial part of her statement, her reference in the last sentence could only have been interpreted as a comment upon the failure of a witness to take the stand to contest Delgado's story.

In his initial brief, the defendant contended that the absent witness referred to by the prosecutor had to have been the defendant. (Initial Brief p. 56). As such, the comment came within this Court's proscription defined in *Rodriguez*. In *Rodriguez*, this Court held that where the State makes reference to 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. The State contends that since both Lugo and Raimondo were present during the events described by Delgado, the comment by the prosecutor may well have been a reference to their failure to come forward to contest Delgado's story. On these facts, this Court should consider that a distinction that makes no difference. Both Lugo and Raimondo were

in the same position as the defendant. Lugo was tried jointly with the defendant and would have also had to surrender his right to remain silent to contest Delgado's story. Raimondo was a co-defendant whose case was severed from the defendant's and was still awaiting trial at the time of the defendant's trial. He, too, would have had to surrender his Fifth Amendment rights in order to contest Delgado's story. In any instance, the prosecutor's reference was nothing more than an effort to capitalize on the uncontroverted nature of Delgado's story - a story that remained uncontroverted because of the exercise of constitutional rights held by the defendant and his co-defendants. It was that precise situation that this Court found to be untenable in *Rodriguez*.

The cases relied upon by the State in its brief, *Rich v. State*, 756 so. 2d 1095 (Fla. 4th DCA 2000) and *Wolcott v. State*, 774 So. 2d 954 (Fla. 5th DCA 2001), both deal with the limited exception to the general rule created by the *Rodriguez* opinion. Both cases held that otherwise impermissible comments upon the defendant's failure to testify may be allowed when deemed to be a response invited by an argument made by the defense. In this case, no such argument was made by defense counsel. Under no circumstances was the prosecutor's comment invited. It simply was a direct, unsolicited comment upon the defendant's failure to take the stand. Based upon the clear controlling authority, this Court's decision in *Rodriguez*, *supra*, the defendant's convictions and sentences should be reversed.

V

THE TRIAL COURT ERRED WHEN IT LIMITED THE DEFENDANT'S PRESENTATION OF MITIGATION EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

In his Initial Brief, the defendant claimed that the trial court improperly excluded mitigating evidence from the jury's consideration during the penalty phase, when the trial court precluded the defendant from admitting into evidence letters written by co-defendant Lugo to the defendant after their arrest. (Initial Brief, p. 69-74). The defendant maintained that the letters were probative of the dominant position that Lugo held in his relationship with the defendant and were therefore admissible as non-statutory mitigating evidence.

In response, the State contends that the trial court did not abuse its discretion in failing to admit the letters because the letters were written after the commission of the offenses charged and because the defendant did not actually do what Lugo asked in the letters. The State chiefly relies upon this Court's decision in *Hill v. State*, 515 So. 2d 176 (Fla. 1987) for its position.

In *Hill*, the defendant contested the trial court's decision to exclude portions of the background testimony provided by the defendant's mother and father.

Specifically, the trial court would not permit the defendant's mother to testify that she had cared for the defendant's cousins and declined to allow the defendant's father to speak about his own ill health and job responsibilities. In both instances, this Court ruled that the trial court's rulings were correct because the proffered testimony related more to the character of the witnesses than to the character of the defendant.

Unlike the excluded testimony in *Hill*, which was solely probative of the character of the defendant's family members, the excluded letters in this case were relevant to explain the type of relationship shared by the defendant and his alleged co-perpetrator of the offenses charged. While the defendant was permitted to elicit testimony from Stephen Bernstein, who plainly testified that he had noted a marked change in the defendant after the defendant had begun to associate with Lugo, the letters were more useful and probative because they helped explain the cause of that change. Although the letters were written after the arrest of Lugo and the defendant, they do make several references to the manner in which the two men related and to the position Lugo held in the defendant's life prior to the arrest. As such, the mere fact that the defendant did not do as Lugo asked after their arrest, did not make the letters relevant to the type of relationship the two men shared prior to their arrest.

As a result, the State's effort to distinguish the clearly controlling precedent of *Gore v. Dugger*, 532 So. 2d 1048 (Fla. 1988) is unavailing. In *Gore*, the defendant was precluded from eliciting testimony about the influence and dominance his

cousin/co-defendant held over him at the time of the offenses. This Court held that although the evidence did not rise to the level of satisfying the statutory mitigator relating to operating under duress or substantial dominance of another, it did qualify as non-statutory mitigation because of its relevance to the defendant's character. In other words, the jury should have been permitted to consider the mitigating evidence, give it any weight they wished to and rely upon it in making its sentencing recommendation.

Like *Gore*, the defendant sought to have his sentencing jury consider non-statutory mitigating evidence in the form of the "Lugo letters," which were relevant to demonstrate the influence and dominance Lugo held over the defendant during the time that the offenses were committed. The letters were relevant to the defendant's character, and as such, should have been considered by the jury in formulating its recommendation. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869 (1982). Given that the defendant was denied the opportunity to have his sentencing jury consider all aspects of his character or record, the defendant is entitled to vacatur of his death sentence with directions to remand this cause for a new, complete sentencing hearing. See, *Skipper v. South Carolina*, 476 U.S. 1 , 106 S. Ct. 1669 (1986).

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 response to the defendant's claim that the trial court had erred in separately considering and weighing the felony murder and pecuniary gain aggravating circumstances, the State makes two arguments: 1) that the error was not properly preserved, and 2) that the facts do not support the defendant's claim. Both of the State's contentions are incorrect.

In support of its lack of preservation claim, the State relies upon *Knight v. State*, 746 So. 2d 423 (Fla. 1998); *Gore v. State*, 706 So. 2d 1328 (Fla. 1997) and *Wike v. State*, 698 So. 2d 817 (Fla. 1997). All three cases are distinguishable, however, from the instant case. In *Knight*, *Gore* and *Wike*, the defendant claimed that the trial court had erred in failing to give an instruction on the improper doubling of aggravated circumstances. In each case, this Court ruled that the error had not been properly preserved because the defendant had not requested that the particular instruction be given by the trial judge.

In the case at bar, the issue raised by the defendant does not involve the trial

court's failure to give a requested instruction. The issue concerns the propriety of findings entered by the sentencing judge in support of his conclusion that the death penalty was appropriate. The cases relied upon by the State are therefore inapplicable.

In support of its argument that the trial court did not err in separately considering the two aggravators on these facts, the State chiefly relies upon *Hartley v. State*, 686 So. 2d 1316 (Fla. 1994); *Bryan v. State*, 533 So. 2d 744 (Fla. 1988) and *Routly v. State*, 440 So. 2d 1257 (Fla. 1983). In each of those cases, the defendant robbed the victim, then drove or took the victim to a secluded area where the murder took place. It was apparent in *Hartley*, *Bryan* and *Routly*, that the kidnapping in each case had an independent significance - it was done to facilitate the murder at a different time and place from the endeavor to take property. As such, the kidnapping held a significance in each of the State's cases separate and apart from the defendant's pecuniary motive, and did not, in fact, refer to the same aspect of the defendant's crime as the defendant's desire to obtain pecuniary gain.

In the present case, it is clear from the record that the defendant's sole purpose in participating in the kidnapping of Griga and Furton was to realize pecuniary gain. The defendant's girlfriend, Beatrice Weiland, testified that the defendant had been impressed by Griga's wealth when he saw a photograph depicting Griga's Lamborghini. (T. 5787-90). The defendant sought an introduction to Griga under the guise that he was looking for business partners, as part of a plan to abduct Griga and

Furton and to take their assets. (T. 5720, 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.

Clearly, under the facts in this record and unlike *Hartley*, *Bryan* and *Routly*, it is plain that the motivating purpose for the kidnapping of Griga and Furton was pecuniary gain. Thus, since both the felony murder and pecuniary aggravators referred to the same aspect of the crime, it was error for the trial court to separately consider and assign great weight to both of those aggravators. See, *Green v. State*, 641 So. 2d 391 (Fla. 1989) and *Clark v. State*, 379 So. 2d 97 (Fla. 1979). 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.

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.

With regard to the defendant's claim concerning an improper doubling of the CCP and avoid arrest aggravators, the State raises the identical lack of preservation argument made in Issue VII. Since the claim raised in Issue VIII is not based upon the trial court's failure to provide an "improper doubling" instruction, the defendant's response in Issue VII, supra, is equally applicable here.

On the merits, the State failed to adequately address the defendant's main contention; that the trial court's findings in support of both aggravators focused on the same aspect of the charged offenses and were supported by the same facts - that the defendants had formulated a plan to kill Griga and Furton as evidenced by the fact that the defendants had done nothing to shield their identities. (Initial Br. p. 82-84). Under those circumstances, based upon the authorities cited in Points VII and VIII of the Initial Brief, it was error for the trial court to separately consider and weigh the

CCP and avoid arrest aggravators. The defendant's death sentence should be vacated and this cause remanded 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 response to the defendant's contention that the evidence introduced at trial was legally insufficient to sustain the trial court's finding of the cold, calculated and premeditated (CCP) aggravating circumstance, the State relies upon several cases that it claims supports the trial court's finding. A review of each of the State's cases, *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), *Wuornos v. State*, 644 So. 2d 1000 (Fla. 1994), *Gore v. State*, 706 So. 2d 1328 (Fla. 1997) and *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993), reveals strong evidence of each defendant's calculated intention to kill, justifying the application of the CCP aggravator, in stark contrast to the dearth of evidence on that significant factor in this case.

For example, in *Gore v. State, supra*, there was substantial evidence

demonstrating the defendant's calculated plan to kidnap and kill the victims, including evidence of several instances where the defendant threatened to kill the victims during their ordeal and the defendant's statement, prior to the murder, that "he was going to do it anyway."

In *Rodriguez v. State, supra*, the defendant entered the home of his victims armed with a gun and gloves to obscure fingerprints. Although the victims were compliant with his demands, the defendant nevertheless shot them in the head and then fired an additional shot into each victim to make sure that they were dead. Later, the defendant told his girlfriend that he had made certain that the victims were dead.

In *Wuornos v. State, supra*, the defendant lured each victim to an isolated location for the express purpose of killing the victim to steal the victim's belongings.

Finally, in *Sweet v. State, supra*, the defendant observed a woman talking to the police that he had recently robbed. Fearing that she had implicated him, the defendant armed himself, entered the victim's home and immediately opened fire, killing her.

In each of the foregoing cases, this Court was able to find evidence of a careful plan or prearranged design to commit murder - a plan that was frequently separate and apart from the plan necessary to commit the underlying felony in a felony murder scenario. In several of the cases, the plan to kill was confirmed by the defendant's own threats or statements.

By contrast, there was no evidence of any pre-existing intention in the defendant

to kill the victims. Instead, the record plainly reflects that the defendant's intention was to abduct both Griga and Furton and to extort their money. In fact, Jorge Delgado, the State's cooperating witness and the only witness able to describe the events in the defendant's apartment, testified that he was familiar with the "plan" for abducting Griga and that he did not know why Griga had been killed. (T. 12064). With regard to Griga's death, only Delgado was able to provide any insight into the manner of Griga's death. Delgado stated that Griga died when he fought the defendant in an effort to resist his abduction and attempted to escape. (T. 11736-41, 11759-60). According to Delgado, Furton was administered animal tranquilizers to calm her during the incident. (T. 11736-44). She subsequently died from an apparent overdose of the tranquilizer administered. On these facts, it is apparent that the defendant did not possess the heightened premeditation and carefully calculated design necessary for application of the CCP aggravator.

The trial court in its findings and the State in its brief, point to the preparations made by the defendant in advance of the abduction of Griga and Furton as evidence in support of the CCP aggravator. (Answer Br. p. 89). However, that evidence is equally consistent with the notion that the defendant had taken pains in planning the underlying felonies involved: kidnapping and extortion. In that regard, this case should be controlled by this Court's decision in *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992).

In *Geralds*, the defendant had worked as a carpenter during the remodeling of the victim's home. Subsequently, despite extensive pre-planning, which included the defendant bringing gloves, a change of clothes and plastic ties with him to the victim's house, the burglary went awry and resulted in the stabbing murder of the victim. This Court concluded that while the evidence supported a hypothesis encompassing premeditated murder, the evidence also sustained the possibility that the defendant had bound the victim, in an effort to compel the victim to reveal the location of money in the home, and had killed her in an anger, after he had become enraged by the victim's refusal to reveal the location. As such, this Court concluded that the CCP aggravator had not been established.

Similarly, in this case, there is sufficient evidence in the record to demonstrate that the defendant had planned the commission of a kidnapping and extortion of victims who were familiar with him. Despite his planning, the kidnapping and extortion took an even worse turn when Griga resisted and physically attempted to escape. Griga's death was a direct result of the defendant's response to that effort. The record likewise supports the notion that Furton's death was the result of a tragic and unintended overdose. The State's failure to exclude these hypotheses, which are so clearly inconsistent with the intention and design necessary for application of the CCP aggravator, should compel this Court to conclude that the trial court had erred in finding the CCP aggravator to be applicable.

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 response to the defendant's claim that the trial court had erred in finding the "avoid arrest" aggravator because witness elimination was not the sole or dominant motive for the murders charged herein, the State claims that the evidence does not support any other rationale for the murders other than witness elimination. (Answer Br. p. 95-96). In support of its argument, the state cites a series of cases which are readily distinguishable from the instant case.

For example, in *Wike v. State*, *supra*, the defendant abducted two sisters and after raping one in front of the other, the defendant murdered the second sister. Under the circumstances, this Court found that the defendant's gratuitous slaying of the sister who was required to watch her sibling get raped was done for the sole purpose of eliminating a witness.

In addition, in *Sweet v. State*, *supra*, as described above, after witnessing the victim converse with a police officer, the defendant, thinking that the victim had implicated him, entered the victim's home shooting. This Court concluded that the

victim's murder in that hail of gunfire was the result of a purposeful effort to eliminate her as a witness.

Similarly, in *Howell v. State*, 707 So. 2d 674 (Fla. 1998), the defendant, thinking that Bailey had implicated his brother to the police, sent Bailey a bomb. The bomb was unwittingly intercepted by a highway patrolman, who was subsequently killed by the bomb blast. This Court held that the defendant's intent to eliminate Bailey as a witness was transferred to the highway patrolman and justified the application of the "avoid arrest" aggravator.

Finally, in *Jennings v. State*, 718 So. 2d 144 (Fla. 1998), the defendant robbed a restaurant in which he had formerly worked. After donning gloves and taking property, the defendant first confined the victims to the freezer and then killed them. This Court found that the "avoid arrest" aggravator was applicable. Instrumental in this Court's decision was the fact that the murders appeared to be completely gratuitous in that any threat to Jennings could have been eliminated by simply locking the victims in the freezer. This Court also stressed that there was no evidence to indicate that the killings were in any way reactionary or instinctive.

By contrast, the only evidence in this case that was descriptive of the manner in which Frank Griga died demonstrated that Griga died in an effort to resist his abduction and escape. Jorge Delgado plainly testified that he was told by Lugo that Griga died in a struggle with the defendant when he attempted to escape at a time when

the extortion effort had not been completed. The defendant's physical reaction to Griga's attempt belies the notion that the sole motive for Griga's murder was his elimination as a witness.

As for Furton, no witness provided any evidence that clearly demonstrated the circumstances under which she died. What is apparent is that she was administered a massive quantity of an animal tranquilizer. The State's witnesses testified that the drug was administered to calm Furton during the time that she was held captive. (T. 11744, 11748-51). Given the fact that the defendants were still endeavoring to obtain the victims' property at the time of Furton's death and the medical examiner's opinion that Furton had likely died from an overdose, it is clear that the State failed to exclude the reasonable hypothesis that Furton had simply died from an inadvertent overdose rather than as the product of a purposeful effort to eliminate a witness.

As such, unlike the cases relied upon by the State, the record in this case clearly fails to demonstrate by strong and clear proof that the defendant's sole or dominant motive for the murders was the elimination of witnesses. See, *Urbin v. State*, 714 So. 2d 411 (Fla. 1998); *Perry v. State*, 522 So. 2d 817 (Fla. 1988) and *Scull v. State*, 533 So. 2d 1137 (Fla. 1988).

Based upon the foregoing, 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.

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 a new sentencing hearing before a jury.

Respectfully Submitted,

SCOTT W. SAKIN
Counsel for Appellant
Special Assistant Public Defender
1411 N. W. North River Drive
Miami, FL 33125

(305) 545-0007

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 Sandra S. Jaggard, Assistant Attorney General, Rivergate Plaza, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this ____ day of April, 2001.

BY: _____
SCOTT W. SAKIN