IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 93,994

DANIEL LUGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

CRIMINAL DIVISION

****

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, and "T" will designate the trial transcript.

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ARGUMENT

(I)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE IMPROPER JOINDER OF COUNTS

Defendant was denied a fair trial by the improper joinder of counts. The State argues that Defendant was not entitled to severance of the homicide counts related to Griga/Furton from the Schiller counts because these offenses were connected acts within an ongoing criminal scheme. The State points out that where the RICO count is properly pled, the trial court does not err in denying severance of the predicate acts.

Defendant submits that neither Shimek v. State, 610 So.2d 632 (Fla. 1st DCA 1992), nor Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), cited by the State support this argument. In Shimek, the district court considered whether one count out of four counts of grand theft, which formed the predicate acts for a RICO allegation, were properly tried together. The appellate court pointed out that the evidence showed the requisite similarity of

method and purpose between the counts. The defendant and his accomplices engaged in several schemes to convince individuals either to advance fees for loans with their business or to invest in the business with promises of extraordinary returns that were never realized. In Fotopoulos, this Court relied on the standard "episodic sense" analysis under Rule 3.152(a)(1), Florida Rules of Criminal Procedure, to affirm the trial court's denial of the defendant's motion for severance. The trial court in Fotopoulos found that two days after one murder the defendant was involved in plots to kill his wife and that both incidents were well-connected both in an episodic sense and in a temporal sense. Neither Shimek nor Fotopoulos do away with the traditional severance test under Rule 3.152(a)(1), Florida Rules of Criminal Procedure. This Rule provides as follows:

> (1) In case 2 or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges on timely motion.

The courts must still make a determination whether the joined counts are connected in an "episodic sense." The fact that the State includes the RICO counts in the indictment does not justify trying the two episodes together. In the absence of proof of racketeering, joinder of the offenses is error. The fact that a defendant may be involved in a series of crimes involving similar circumstances does not warrant joinder. Contrary to the State's claim, Defendant does not assert that there is a requirement that the predicate acts be identical. Rather, offenses joined in one charging document must be connected in an "episodic sense."

The State argues that a RICO violation generally requires separate offenses, which involve the same or similar intents, results, accomplices, victims or methods of commission. In this case, the State points out that Defendant plotted an ongoing scheme and organized a crew of criminals to attempt to abduct wealthy victims, extort their assets, and then murder the victims to avoid detection. Defendant would submit a RICO allegation does

not vitiate the applicability of Rule 3.152(a)(1), Florida Rules of Criminal Procedure. The State dismisses out of hand the various severance cases cited by Defendant in his initial brief because they do not involve a RICO prosecution. The State attempts to distinguish Fudge v. State, 645 So.2d 23 (Fla. 2d DCA 1994), a RICO case, by arguing that in Fudge the defendant's jury deadlocked on numerous counts and found the defendant not guilty on various other counts. While in the present case, Defendant was found guilty on all counts. The State also alluded to the fact that in Fudge the court granted a motion for severance where the counts were unrelated. The State's argument, however, does not address the core issue concerning the relatedness of the incidents at trial. The issue remains whether the predicate offenses were related in an episodic sense.

The State attempts to explain how the Griga/Furton and Schiller incidents were similar and related. However, the State does not address the many points of dissimilarity between the two incidents. Moreover, the State wholly

disregards the temporal disconnect between both incidents. The evidence clearly showed that the two separate criminal actions charged against Defendant were not connected in time and place. These separate acts did not constitute one criminal episode. The incidents involved different victims. The incidents developed in completely different ways. Unlike the Schiller incident, the Griga/Furton victims were not taken to a warehouse. In fact, Griga died almost immediately. Unlike the Schiller incident, in the Griga/Furton incident, there was no legal transfer of real property or insurance proceeds. Unlike the Schiller incident, in the Griga/Furton incident, there was use of animal tranquilizers and dismemberment. The State's argument that the organization was set up to prey on very wealthy victims is belied by the supposed abduction of Winston. (T. 11053-11054). The fact that the defendants may have utilized items or articles taken during the Schiller episode in the Griga/Furton episode does not justify joinder. Whether the separate offenses were "relevant" to Defendant's RICO charge does not address the

fundamental severance analysis under the rules of criminal procedure.

Lastly, the State maintains that evidence of the separate incidents could have been used even in separate trials to show common scheme, motive, as well as the entire context out of which the criminal action occurred. A similar "fall-back" argument was made by the prosecution and rejected by the appellate court in Fudge, supra. The appellate court in Fudge noted that multiple offenses involving vehicle ramming, carjacking, robbery and burglary did not qualify as similar offenses under Section 90.404(2), Florida Statutes. This Court must still make a determination whether these supposed "similar" incidents could be properly admitted in the context of a single trial. As noted previously, Defendant submits that the Schiller and Griga/Furton incidents were not similar for purposes of admissibility under Section 90.404(2), Florida Statutes.

(II)

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTION FOR RACKETEERING

There was insufficient evidence to support Defendant's conviction for racketeering. The State argues there was overwhelming evidence adduced at trial that Defendant directed an ongoing organization aimed at the serial abduction and murder of wealthy victims for financial gain. In Gross v. State, 765 So.2d 39 (Fla. 2000), this Court recently adopted a "broad" approach to the definition of "enterprise," in interpreting Florida's RICO statute. This Court ruled that the State may prove the enterprise element without having to prove an ascertainable structure, that is, a structure independent of the predicate acts. Id. at 45-46. Consequently, in order to prove an enterprise, the prosecution must prove (1) an ongoing organization, formal or informal, with a common purpose of engaging in a course of conduct, which (2) functions as a continuing unit. Id. at 45.

The State contends that the testimony at trial showed that Defendant directed others to carry out criminal schemes. The State alludes to testimony by others that the defendants had certain specified roles in the commission of the certain crimes against Schiller, Lee and Griga/Furton. The evidence, as outlined by the State, seems to support an argument for a conspiracy, rather than a RICO enterprise. Clearly, evidence to support a conspiracy is not synonymous with evidence sufficient to support a RICO conviction. This Court in Gross made clear that its adoption of the "broad" view as to the definition of "enterprise," **should not be taken to signify that the RICO statute can be used to supplant or expand the breadth of the conspiracy statute or prosecutions thereunder**. RICO requires a continuity of criminal activity as well as similarity and interrelatedness between the activities. Id at 46 n.5. The evidence adduced at trial, in the light most favorable to the prosecution, showed no more than opportunistic endeavors by various defendants to appropriate money or property from two particular

individuals at different times, using different means, and employing different tactics. There was a changing pattern of roles, as illustrated by the instances when Doorbal, not Lugo, targeted Griga and when Doorbal actually killed Griga and Furton. The prosecution was unable to establish an actual organization, formal or informal, with a common purpose of engaging in a course of conduct which functioned as a continuing unit.

(III)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER OPENING STATEMENT

Defendant was denied a fair trial by the prosecutor's improper opening statement. The State argues that comments by the prosecutor during opening statement were not objected to and therefore unpreserved. Moreover, the State maintains that the statement was a fair and accurate protrayal of the evidence eventually presented.

There is a line of cases which recognize that fundamental error may arise even where no objection is lodged at the trial level. Where defense counsel fails to

object at trial to improper prosecutorial comments, fundamental error may arise where the comments go to the foundation or merits of the cause of action. See Gonzalez v. State, 588 So.2d 314, 315 (Fla. 3d DCA 1991). An appellate court may review the prosecutor's statements under the concept of fundamental error. Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996). This Court may review the record and take into consideration the context of the closing argument. See Crump v. State, 622 So.2d 963, 972 (Fla. 1993). The appellate courts in this state have reversed numerous cases based upon a fundamental error arising from improper prosecutorial arguments. See Porterfield v. State, 522 So.2d 483, 487 (Fla. 1st DCA 1988)(prosecutor's allusions to defendant's failure to testify subject to review even without contemporaneous objection); Rosso v. State, 505 So.2d 611, 612-613 (Fla. 3d DCA 1987)(prosecutor's statements regarding defendant's failure to testify and derogatory comments concerning defendant's insanity defense subject to review even without contemporaneous objection); Aja v. State, 658

So.2d 1168 (Fla. 5th DCA 1995)(prosecutor's comments on matters not introduced as evidence at trial subject to review even without contemporaneous objection); Fuller v. State, 540 So.2d 182, 184-185 (Fla. 5th DCA 1989)(prosecutor's comments derogatory of defendant as "shrewd" and "diabolical" and attacking defense counsel subject to review even without contemporaneous objection); Pacifico v. State, 642 So.2d 1178, 1182-1184 (Fla. 1st DCA 1994)(prosecutor's comments regarding jury's duty to convict, pejorative terms characterizing defendant, expressing personal beliefs as to credibility or veracity of witnesses, and referring to matters not in evidence, subject to review even without contemporaneous objection).

The State suggests that the "gravaman" of Defendant's complaints is that the prosecution characterized the brutal nature of the crimes against Schiller, Griga and Furton, the organization with which these crimes were committed and the purpose behind the crimes. However, the comments were far more than that. The prosecutor below improperly argued the "awful," "evil," "horrible," and

"gruesome, the most gruesome...of murders" and nature of the crimes (T. 4842; T. 4843; T. 4871; T. 4882-4883); the fact that the defendants were "preying" on their victims (T. 4844); the fact that offense was worse than "any war crime" (T. 4851); that the offense amounted to an "Iranian hostage" situation (T. 4852); and that the defendants prepared for a "human barbecue" (T. 4878). These comments clearly amounted to argument discrediting the defense, attacking the character of the defendants and expressing personal views and opinions. It is one thing to present evidence **which the jury** can conclude is "awful," "evil," "horrible," and "gruesome," and quite another for the prosecutor to engage in characterizations of the evidence from her own personal viewpoint. It is one thing for the jury to conclude that the defendants were involved in crimes akin to "war crimes" or similar to an "Iranian hostage" situation, and quite another for the representative of the State to make these conclusions before any evidence is presented whatsoever. It is one thing for jurors to conclude that the defendants prepared

for a "human barbecue," and quite another for an assistant state attorney to make this point during opening statement.

Defendant was indeed entitled to a dispassionate and sanitized rendition of the evidence the prosecution was about to present, without editorializing and without emotional buzz words clearly aimed at inflamming the passions and prejudices of the jury. Indeed, the State appears to totally miss the point that the prosecutor was delivering an opening statement, not a closing argument. The prosecutor's comments were delivered over 40 pages of transcripts at the very moment the jury was asked to focus on the particulars of the case. These were not mere isolated remarks. This "argument" was not just the State's version of the facts. See Rhodes v. State, 638 So.2d 920, 925 (Fla. 1994)(prosecutor allowed to explain how defendant strangled victim).

(IV)

DEFENDANT WAS DENIED A FAIR TRIAL WHERE COUNSEL FOR CO-DEFENDANT DOORBAL WAS ABLE TO QUESTION WITNESSES ADVERSELY TO DEFENDANT

Defendant was denied a fair trial where counsel for co-defendant Doorbal was able to question witnesses adversely to Defendant. The State argues that the trial court did not abuse its discretion to have Defendant's case heard separately but concurrently to Doorbal's case and that no prejudice accrued to Defendant. The State contends that although Defendant joined a motion against dual juries defense counsel below did not object to the majority of the questions asked by Doorbal's counsel. The State points out that Doorbal's cross-examination of various police witnesses about evidence incriminating Defendant and Doorbal's cross-examination of civilian witnesses concerning Lugo's leadership role was largely brought out during direct examination.

Defendant submits that he properly preserved the issue of severance for appeal. Defendant also contends the State has wholly disregarded the prejudicial impact on Defendant's case arising from the adversarial questioning by Doorbal's counsel. Initially, the State asserts that although Defendant joined a motion for separate juries he

did not object to the majority of the improper questions propounded by Doorbal's counsel. The State does not mention, however, that Defendant filed a **motion for severance** in this case. (R. 2514-2528). In said motion, Defendant detailed the very reasons why a complete severance of the defendants' trials should have been granted, **including the issue of antagonistic or "conflicting" defenses**. (R. 2515-2516; R. 2520-2521; R. 2522-2525).

Contrary to the State's argument that Doorbal's questioning of witnesses was merely "cumulative," and, therefore, non-prejudicial, Defendant submits that the lines of questioning by Doorbal's attorney resulted in severe prejudice to Defendant by re-emphasizing areas of inquiry developed by the prosecutor and channeling the impact of the evidence against Defendant.

During the course of the trial, counsel for Doorbal continually questioned witnesses adversely to Defendant's interests in no less than ten (10) major areas as follows:

1) Doorbal's attorney portrayed Defendant Lugo as the **leader and mastermind** of the criminal operation. (T. 5068-5069; T. 5121-5124; T. 5125; T. 5129-5130; T. 5236; T. 7053-7054; T. 7561-7562; T. 7987-7988; T. 8789; T. 8791; T. 10511-10512l; T. 10522; T. 11233; T. 11234; T. 11235; T. 11235-11236);

2) Counsel for Doorbal questioned witnesses about Defendant Lugo's **criminal past and activities**, including his federal probation (T. 5674; T. 11338-11339); Defendant's alleged involvement in medicaid fraud (T. 8340-8341; T. 10513); and the similarity of the signatures by Defendant and Doorbal, intimating possible forgery (T. 8369-8370);

3) He questioned witnesses about **incriminating evidence** linked directly to Defendant, such as real estate documents, passports, the dart and dart guns; Griga's driver's license, a $30,000 check to Delgado, a napkin belonging to Griga, account information on Griga and various firearms, syringes, the substance Rompun and bloody clothes found in Defendant's apartment. (T. 5669-

5670; T. 5673-5674; T. 5764-5765; T. 6520-6525; T. 6529-6537; T. 6543-6546; T. 6548). Counsel for Doorbal also had the judge read documents implicating Defendant in Schiller's captivity. (T. 6895-6897). He asked questions concerning papers found in Defendant's office at Mese's business. (T. 7298-7302; T. 7306-7310). Counsel also asked a witness about the possibility that Defendant wore the blue denim shirt in evidence. (T. 8301);

4) Doorbal's attorney brought out the **identification** of Defendant by others. (T. 6271-6272; T. 6300-6301; T. 6884-6885; T. 6889; T. 10209-10210);

5) He elicited testimony emphasizing the fact that the **demand letters** in the Schiller matter referenced Defendant; that Mese represented Defendant but not Doorbal. (T. 7314; T. 7315); and directing the negotiations with Rosen on the sale of the deli (T. 11237-11238);

6) Doorbal's attorney brought out that Defendant was **knowledgeable about the stock market** and that he used,

deceived and betrayed Lillian Torres. (T. 7559-7560; T. 8799);

7) Counsel for Doorbal questioned witnesses concerning **checks written by Defendant**. (T. 7726-7730); Defendant's million dollar investment (T. 8801); Defendant's payments to Delgado and others through an account he alone controlled (T. 9007-9008; T. 11325-11329);

8) He questioned a witness about Defendant's **post-arrest phone calls** (T. 8326-8329); and Defendant's post-arrest attempts to manipulate a defense (T. 11345);

9) Doorbal's attorney questioned a witness about Defendant's act in **opening a mail box for Schiller** (T. 8573-8574);

10) He questioned a witness about Defendant's **possession of a gun and items** used for the kidnapping (T. 9835-9925).

Defendant's trial did not just involve dual juries. Defendant was, in effect, confronted by "dual"

prosecutions. Defendant was forced to navigate between the Scylla and Charybdis of the State's formal prosecution on the one side and Doorbal's unoffical, but unrelenting, "prosecution" on the other. He ultimately foundered against the rocks and sank in the whirlpool of the dual attacks. The State dismissively asserts that much of the foregoing testimony was brought out during the State's direct examination. However, the detrimental impact of examination by the attorney for a charged co-defendant, in a joint trial, into these areas, coupled with the inimical "spin" of said questioning cannot be so easily dismissed. This Court in Crum v. State, 398 So.2d 810, 811-12 (Fla. 1981), made clear that a defendant should not be forced to "stand trial before two accusers: the State and his co-defendant."[1]

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[1] The State cites to Velez v. State, 596 So.2d 1197 (Fla. 3d DCA 1992), where the Third District approved the procedure of dual juries in a manslaughter case. The appellate court in Velez made clear, however, that dual juries requires great diligence by the trial court (Id at 1199) and is rife with the potential for error or prejudice. ((Id at 1200). Here, the trial court did not maintain the necessary diligence. The trial, with the

In the present case, even the trial court acknowledged the inimical nature of co-defendant Doorbal's position in the case vis-a-vis Defendant. During a discussion concerning the introduction of letters supposedly written by Lugo and to be introduced by Doorbal, the court noted:

> "...**[F]rom day one** he's been standing up there, basically, **my guy's been mislead [sic] by Lugo**, my guy wouldn't do anything, **it's Lugo that's the one** that manipulated him. It's not like he's been acting like he's your client's buddy and all of a sudden dropping the hammer on him..." (T. 11714)(emphasis supplied)

Still later, the court acknowledged that the defendants Lugo and Doorbal were presenting "conflicting" defenses. (T. 11857). There is no question from the record that Defendant was unfairly subjected to a two-front attack. Defendant is entitled to a new trial.

(V)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE INTRODUCTION OF DOCUMENTS SHOWING DEFENDANT'S PROBATION IN A FEDERAL CASE

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resuling overlapping and repetitive questioning by co-defendant's attorney, went clearly beyond the mere "potential" for error or prejudice.

During the course of Detective McColman's direct examination, the State sought to introduce evidence of Defendant Lugo's probation termination in federal court. The defense objected. (T. 5539-5540). The State argues that the evidence of Defendant's probationary status was admissible because he used misappropriated money to pay off his probationary restitution, thus supporting the charges of money laundering and RICO. The State maintains the evidence was not presented to establish Defendant's propensity to commit fraud; but rather, the evidence was an interrelated function of Mese's financial accounts with Defendant's RICO operations.

The State totally disregards Defendant's contention that there was **no need** to show Defendant had been convicted in federal court and had been placed on probation in order to prove he had utilized certain misappropriated funds. Moreover, the State does not address whatsoever the argument that the particulars of the prior conviction and probation added nothing to the State's need for the evidence. Lastly, the State does not

mention the **numerous places** in the record where Defendant's federal conviction and probation is brought out.

It is axiomatic that inquiry into a defendant's prior conviction is permitted only when a defendant testifies.

> "The rule in Florida has long been established that a defendant who testifies on his own behalf may be asked on cross-examination whether he has been convicted of a crime and, if so, how many times. Unless the defendant answers untruthfully, the prosecution's inquiry along this line must stop." Leonard v. State, 386 So.2d 51 (Fla. 2d DCA 1980) (citations omitted). See also Mead v. State, 86 So.2d 773, 774 (Fla. 1956); Lockwood v. State, 107 So.2d 770, 772 (Fla. 2d DCA 1959); Gavins v. State, 587 So.2d 487, 489 (Fla. 1st DCA 1991). See also Section 90.610(1), Florida Statutes.

Clearly, questions concerning the specifics of the prior conviction are not allowed. See Anderson v. State, 546 So.2d 65, 67 (Fla. 5th DCA 1989)(cases cited).

The State argues that admission of evidence pertaining to Defendant's federal conviction and probation was harmless in view of the "brief" testimony on this issue. In addition, the State avers that there was a "wealth" of evidence against Defendant. First, Defendant submits that

testimony and evidence on his prior federal conviction and probation was not "brief." The record shows repeated references to it. (T. 5566-5571; T. 5953; T. 7225; T. 7226; T. 7417; T. 7421; T. 7537; T. 7699-7700; T. 8934; T. 8988-8989; T. 8718; T. 9102-9104; T. 9127-9140; T. 9149-9160; T. 9164-9167; T. 9171-9189; T. 9674-9675; T. 9865-9866; T. 11055). Some of the main witnesses address Defendant's conviction and probation, including Edward DuBois, Jorge Delgado, and Elena Petrescu. The State even called **Defendant's probation officer** to the stand. Indeed, the **prosecutor below made argument** on this issue. (T. 12472-12473; T. 12480-12481). Second, Defendant notes that this Court has recognized that other crimes evidence is presumptively harmful. Holland v. State, 636 So.2d 1289, 1293 (Fla. 1994). The State does not address this principle of law. Defendant points outs, moreover, that the jury's knowledge of Defendant's prior federal criminal conviction, which involved fraud, indisputably made their acceptance of the charges in the indictment, and the testimony of the cooperating witnesses, easier to accept.

(VI)

THE TRIAL COURT ERRED WHEN IT PROHIBITED DEFENSE COUNSEL FROM QUESTIONING DEFENDANT'S EX-WIFE ABOUT THE FACT THAT SHE APPEARED AT THE STATE ATTORNEY'S OFFICE WITH A LAWYER

During Lillian Torres' cross-examination, defense counsel tried to ask Ms. Torres about the fact that she appeared at the State Attorney's Office under subpoena with her lawyer. The State argues that Defendant's Sixth Amendment rights were not violated because the only area of inquiry he was prohibited from exploring was the fact that Torres' attorney accompanied her to the State Attorney's Office. The State asserts that, other than perjury, Torres never faced the possibility of being charged with any crime. Moreover, the State points out that no agreement was reached between Torres and the State and no charges were ever filed against her.

Defendant submits that his counsel's line of inquiry was not just one of implying culpability from the fact that a lawyer accompanied Torres to her interview with the State Attorney's Office. His counsel was denied the

opportunity to question Torres about the fact that she was at the State Attorney's Office with her attorney, who told her she could face charges. (T. 7565; T. 7580-7581). At one point, the prosecutor actually represented to the trial court that the State Attorney's Office "had contemplated charging her (Torres) with a crime..." (T. 7564). The prosecutor later stated that she had decided Torres had done nothing wrong. (T. 7564). What the State totally disregards is Torres' frame of mind at the time of giving her statement to the State Attorney's Office. Defense counsel should have been allowed to fully explore Torres' fears of being charged, **whether or not** the State contemplated charges or ultimately failed to charge her. In Jean-Mary v. State, 678 So.2d 928 (Fla. 3d DCA 1996), the Third District recognized a defendant's right to question witnesses concerning threatened criminal prosecution. This right to cross-examine a witness applies even where there is no agreement between the witness and the state. Id at 929. It should be remembered

that Torres was Defendant's ex-wife and was the recipient of misappropriated property and assets of victim Schiller.

(VII)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND REQUEST FOR DISCOVERY CONCERNING THE PROSECUTION'S FAILURE TO DISCLOSE VICTIM SCHILLER'S FEDERAL CRIMINAL INVESTIGATION AND CASE AND THE PROSECUTION'S FAILURE TO DISCLOSE AN INVESTIGATION INVOLVING THE MEDICAL EXAMINER

The trial court erred in denying Defendant's motion for new trial and request for discovery concerning the prosecution's failure to disclose Marcelo Schiller's federal criminal investigation and case and the prosecution's failure to disclose an investigation involving the medical examiner who testified at trial. The State argues that Defendant's supplemental motion for new trial was untimely because it was filed on July 29, 1998, well beyond the 10-day period mandated by Rule 3.590, Florida Rules of Criminal Procedure. In addition, the State avers that the allegations in motion for new trial were insufficient in light of the record.

Defendant first notes that trial counsel submitted the supplemental motion for new trial on July 27, 1998. Defendant's first motion for new trial had been submitted in May, 1998. Defendant's counsel filed a motion to continue/stay sentencing on July 13, 1998, in order to gain sufficient time to research and file his motion and brief for new trial based on newly discovered evidence pertaining to Schiller's federal medicare fraud and money laundering matter. (R. 5399-5401). On July 15, 1998, the trial court refused to delay the sentencing but ruled that the defendants could "come back" to court if they found any merit to possible Brady violations. (T. 13233-13234). The court directed the parties to "file a motion," and to put whatever the defense finds "in a form of a motion and I will be glad to hear it." (T. 13235; T. 13236). Consequently, the defense acted within ten days of learning of potential newly discovered evidence and the court **permitted** the defense to bring the matter up at a subsequent time. Moreover, in the present case, Defendant alleged perjury and false testimony by Marcelo Schiller,

when he denied involvement in Medicare fraud and money laundering. As such, due process warranted consideration of Defendant's motion. The strict 10-day limit set in Rule 3.590, Florida Rules of Criminal Procedure, does not apply under these circumstances. See, e.g., State v. Glover, 564 So.2d 191 (Fla. 5th DCA 1990)(defendant entitled to consideration of motion for new trial as a result of false testimony of witness even though motion was untimely).

The State submits that Defendant filed a notice of appeal prior to obtaining a ruling on his supplemental motion for new trial and suggested a "procedural bar" exists for consideration of Defendant's motion on appeal. Defendant points out that the State agreed to a relinquishment of jurisdiction. This Court relinquished jurisdiction to the circuit court for a ruling on the supplemental motion for new trial "for consideration of all issues." (**Appendix A**). This Court had the discretion to permit the lower court to render a final order on the

supplemental motion for new trial. Rule 9.110(m), Florida Rules of Appellate Procedure, provides as follows:

> "If a notice of appeal is filed before rendition of a final order, the appeal shall be subject to dismissal as premature. However, if a final order is rendered before dismissal of the premature appeal, the premature notice of appeal shall be considered effective to vest jurisdiction in the court to review the final order. Before dismissal, **the court in its discretion may permit the lower tribunal to render a final order**."(emphasis supplied)

Moreover, Rule 9.600(b), Florida Rules of Appellate Procedure, provides as follows:

> "If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, **the court by order may permit the lower tribunal to proceed with specifically stated matters** during the pendency of the appeal."(emphasis supplied)

Based on the foregoing, the State's arguments on timeliness issue and the "procedural bar" issue are without merit.

The State further contends that the allegations in the motion for new trial were insufficient in light of the record. In particular, the State points out that the defendants learned of possible Medicare fraud during pre-

trial proceedings and depositions. The prosecutor below recognized that **Delgado** was under federal investigation. (T. 1969-1970). There was no clear revelation that Schiller was under federal investigation. The trial court permitted defense counsel to question Delgado about his alleged involvement in any criminal activity with Schiller concerning Medicare fraud, but the court limited the inquiry. The court made clear that the defense attorneys were prohibited from asking Delgado about the details of the crime or evidence regarding the crime. (T. 2001-2007). Delgado was subsequently deposed and questioned about his Medicare fraud involvement with Schiller.

The State argues that the foregoing establishes that the defense was aware that a Medicare scheme was being investigated by the federal government and that there was a possibility of an indictment. The State, however, does not address Defendant's central point, viz., that the State was aware of a pending federal investigation and indictment of Marcelo Schiller and failed to communicate the matter to the defense. Although the defense attorneys

were aware of Delgado's claims of Medicare fraud implicating Schiller, Schiller himself denied it. The State advances the argument that the prosecution below was not part of the federal government and had no control of any federal investigation or indictment. But this misses the point. If the state prosecutor was aware of the ongoing federal investigation and pending federal indictment and kept such information from the defense, it is irrelevant whether the prosecution was part of the federal government or had control of any federal investigation or indictment. In fact, the defendants below pointed to information provided by Mr. Jeffrey Tew, Schiller's counsel, who had informed the prosecutor as early as 1995 that Schiller's money was dirty. Unfortunately, because the trial court prevented the defense from engaging in discovery on this point Defendant was unable to perfect the record for this Court's review.[2]

[2] The trial court asked for a "guarantee" that defense counsel could find that the prosecutor knew about the investigation and ensuing indictment. (T. 13343). The judge noted he was unaware of any law that would permit

The State also contends that defense counsel were able to cross-examine Delgado and Schiller about Medicare fraud. Delgado did talk about Medicare fraud. Schiller denied it. Defense counsel should have been permitted to establish Schiller's lack of credibility by presenting evidence of his involvement in Medicare fraud. Information that the prosecution was aware of Schiller's federal investigation and impending indictment would have undermined Schiller's credibility. Such evidence would have probably affected the outcome of the trial in view of the fact that Schiller was the main witness of the prosecution.

The State argues that knowledge by the State Attorney's Office concerning Dr. Mittleman's investigation was not grounds for a new trial because said investigation had no bearing on the trial. The State maintains, moreover, that Dr. Mittleman did not give an opinion as to causes of death and that his testimony was cumulative to

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the defense attorneys to conduct discovery on the matter. (T. 13361).

the testimony presented by Dr. Herron. In fact, Dr. Mittleman testified that Griga probably died from blunt trauma, strangulation and/or administration of animal tranquilizer. (T. 11676). Dr. Mittleman testified that Furton probably died from the administration of xylazine or from asphyxiation. (T. 11674-11675). He described the psychological trauma experienced by Furton. (T. 11672). Obviously, these matters were not fully testified to by Dr. Herron, who mainly discussed the uses and effects of xylazine. The fact that no one questioned that Griga and Furton had been killed does not address Defendant's argument concerning the critical nature of Dr. Mittleman's testimony, especially as to Furton's physical and psychological trauma. This matter directly related to the aggravating circumstances found against Defendant.

(VIII)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT

Defendant was denied a fair trial by the prosecutor's improper closing argument. The State maintains that the

first series of comments highlighted in the initial brief (T. 12456; T. 12462; T. 12464) merely involved the State's assessment of Defendant's motive and the serial aspect of Defendant's targets. The State also asserts that the comments properly addressed the fact that Medicare fraud had nothing to do with the crimes at trial. Defendant submits that the prosecutor improperly attacked Defendant's character by noting the "gratuitous violence," the "horrible things... in our world," the "evil" from Lugo who was "hell on wheels." The prosecutor once again alluded to an "Iranian hostage" situation as she had during opening statement (T. 4852), clearly employing inflammatory and prejudicial imagery. The State does not address the inflammatory aspect of the remarks or the personal attack nature of the prosecutor's closing whatsoever. It is perhaps no accident that the State ignores the "Iranian hostage" comment, especially when

such argument undeniably conjures up an indelible memory of a national nightmare.[3]

The State argues that the prosecutor's remark, viz., "[W]e know who did it. It's this man." (T. 12458), merely implied that the jurors knew who committed the crimes by the overwhelming evidence presented at trial. The State wholly disregards the pronoun "We" in the prosecutor's argument. The State does not address at all the prosecutor's comment:

> MS. LEVINE: "Imagine with tape over your mouth and a hood over your head, imagine it on Krisztina. Not on yourselves, on Krisztina and what Krisztina is going through." (T. 12496).

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[3] This Court in Bertolotti v. State, 476 So.2d 130 (Fla. 1985), stated:

> "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**." Id at 134. (emphasis supplied)

The State contends that the numerous comments by the prosecutor labelling Defendant a "liar" (T. 12480; T. 12540; T. 12547; T. 12570) were justified because of the the defense theme that the State's witnesses were liars. However, this Court has specifically condemned this type of prosecutorial argument. See Gore v. State, 719 So.2d 1197, 1200-1201 (Fla. 1998); Ruiz v. State, 743 So.2d 1, 5-6 (Fla. 1999).[4]

While it is true that contemporaneous objections are normally required in order to preserve issues concerning improper closing argument on appeal, the courts in this state have reversed numerous cases based upon fundamental error. All the cases cited by the State on the issue of preservation of error by contemporaneous objection have also recognized the fundamental error exception. See

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[4] In Shellito v. State, 701 So.2d 837, 841-42 (Fla. 1997), cited by the State, this Court considered a prosecutor's comments regarding the credibility of a witness who had testified. This Court noted that the prosecutor's comments were made in the context of allowing the jury to assess the witness' credibility. See also Craig v. State, 510 So.2d 857 (Fla. 1987). In this case, Defendant did not testify.

McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Chandler v. State, 702 So.2d 186, 191 (Fla. 1997); Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996). In addition, it cannot be said the offending closing argument was harmless error. The prosecutor's improper comments were spread out throughout her presentation. The State's evidence against Defendant rested primarily on the cooperating testimony of former co-defendants, such as Delgado, Pierre and Petrescu. Marcelo Schiller implicated Defendant because Schiller recognized a distinctive lisp.

(IX)

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE CUMULATIVE ERRORS

Defendant's convictions should be reversed due to the cumulative effect of the cumulative errors at trial. Defendant relies on his initial brief on this issue.

(X)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments. The State

argues that the prosecutor's argument concerning the jurors' oath (T. 13087-13088) was proper because the comment merely reminded jurors they should return a death recommendation where the aggravating circumstances outweighed the mitigating circumstances. This Court has repeatedly ruled that this "follow your oath" argument is improper. See Urbin v. State, 714 So.2d 411 (Fla. 1998); Garron v. State, 528 So.2d 353 (Fla. 1988); Brooks v. State, 762 So.2d 879 (Fla. 2000).

The State argues that the prosecutor's comments concerning tying up the victims "like animals" (T. 13090) and stating that Furton was "just garbage," were proper remarks distinguishing Defendant's murders from non-capital murders. Moreover, the prosecutor's comments concerning the dismemberment of the bodies (T. 13098) were proper in that the prosecutor explained how the evidence illustrated the CCP aggravator. Defendant submits the prosecutor's argument concerning dismemberment of bodies was obviously presented in order to inject non-statutory aggravating circumstances into the penalty phase.

Moreover, the State does not address whatsoever Defendant's argument that the foregoing comments regarding treating the victims like animals and garbage were dehumanizing and improper.

The State argues that the prosecutor's comments about life imprisonment not being enough for Defendant, and that with life imprisonment Defendant would be able to live a limited life, were proper because the State was merely reviewing the applicable aggravators that distinguished this case from other murders. The State does not address whatsoever the decisions of this Court condemning these types of arguments. See Hodges v. State, 595 So.2d 929 (Fla. 1992); Taylor v. State, 583 So.2d 323 (Fla. 1991). The State, moreover, does not discuss the dehumanizing nature of the remarks.

The State argues that the prosecutor's comments about everybody having obstacles in life were proper because they rebutted the alleged mitigator that Defendant was abused by his father. The State suggests that the prosecutor was not attempting to have the jurors place

themselves in Defendant's position but was only directed at the lack of mitigating evidence. It is clear, however, that the prosecutor was pointing out to jurors that the jurors took different paths in life although they too may have encountered obstacles.[5]

The State argues that the prosecutor's comment regarding Defendant's cold-blooded acts and the fact that he should not be shown mercy (T. 13113) was not a comment requesting jurors to show Defendant the same mercy he had shown the victims. However, it is clear in reading the prosecutor's comments, in the context in which they were delivered, that the prosecutor was indeed suggesting that Defendant not be given mercy due to the lack of mercy he showed his victims.[6]

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[5] The case of Hooper v. State, 476 So.2d 1253 (Fla. 1985), cited by the State in its brief, involved a prosecutor's comment regarding the activities of the victim's husband upon arriving at the scene of the murders in order to show that his behavior was not inappropriate. The comment involved in this case is wholly different in that the prosecutor was contrasting the jurors' paths in life with that of Defendant's.

[6] The State does not address the prosecutor's comments regarding societal or religious reasons in

(XI)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

The State argues that the sentence of death was proportionate. The State points out that the trial court's determination concerning relative culpability of co-perpetrators is a finding of fact which should be sustained if supported by competent substantial evidence.[7] In the present case, Delgado did not play a relatively minor role in the Furton/Griga episode. By his own testimony it was shown that Delgado was intimately involved in the preceding Schiller incident. Delgado learned about a planned kidnapping of a Hungarian couple. Delgado was present when Furton was injected with

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support of the death penalty (T. 13113) or Defendant's argument thereon.

[7] This Court may review the trial court's decision in light of the record and come to a different conclusion on relative culpability. Indeed, in Puccio v. State, 701 So.2d 858 (Fla. 1997), cited by the State, this Court found that the trial court's determination of relative culpability of the co-perpetrators was not supported by the evidence and vacated the death sentence.

tranquilizers. He actively participated in the disposal of the bodies. He bought the items needed to dismember the bodies. He was present when the bodies were cut up. He assisted in the cleaning of Doorbal's apartment. It is incorrect to say that Delgado was only an accessory after the fact. Delgado was involved while Furton was still alive. Compare Larzelere v. State, 676 So.2d 394 (Fla. 1996)(sentence not disproportionate where cooperating witnesses given immunity and primarily testified to number of incriminating actions and statements of defendant).

Moreover, it was established below that Doorbal, not Defendant Lugo, actually killed both Griga and Furton. In fact, Doorbal apparently killed Griga on his own. The trial court's reference to the jury's Tison instruction related to Defendant's legal guilt on, not comparative culpability for, Griga's murder.

On appeal, this Court reviews the record to determine whether the trial court's decision on aggravating circumstances is supported by law and competent substantial evidence. Cave v. State, 727 So.2d 227, 229

(Fla. 1998)(citing Willacy v. State, 696 So.2d 693 (Fla. 1997)). Review of mitigating circumstances is a mixed question of law and fact. This Court may subject a trial court's decision on the weight given mitigating circumstances to an abuse of discretion standard. Cave v. State, supra, at 230(citing Blanco v. State, 706 So.2d 7 (Fla. 1997) and Campbell v. State, 571 So.2d 415 (Fla. 1990)). It is perfectly appropriate for this Court to review the trial court's sentencing decision under these guidelines.

(XII)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

Defendant relies on his initial brief on this issue.

(XIII)

THE TRIAL COURT ERRED IN ORDERING ALL SENTENCING TERMS AND MINIMUM/MANDATORY TERMS TO RUN CONSECUTIVELY TO EACH OTHER

The State argues that the trial court properly ordered the sentences and the minimum/mandatory terms to run

consecutive. The State points out that Defendant's use of a firearm during the armed kidnapping and armed robbery of Schiller because the gun was used at different times and places. In fact, however, the offenses were part of one continuous criminal episode and were not separated by time and place. The offenses were not subsequent to each other in time and place but were committed together. As such the minimum-mandatory terms should not have been run consecutive.

(XIV)

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING AN UPWARD DEVIATION IN THE SENTENCING GUIDELINES AND ORDERING ALL TERMS OF IMPRISONMENT TO BE RUN CONSECUTIVE TO EACH OTHER

The State argues that the trial court did not err in departing under the guidelines because it used the unscoreable capital convictions as its grounds for upward departure. The State cites to Bunney v. State, 603 So.2d 1270 (Fla. 1992), where this Court upheld a guidelines departure based upon a contemporaneous unscoreable capital conviction. The State, however, does not address the excessiveness of the departure. Bunney does not address this issue. As a result of the lower court's sentencing scheme, Defendant's total sentence consisted of two death sentences, five life terms and 210 years imprisonment, running consecutively.

(XV)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Defendant relies on his initial brief on this issue.

CONCLUSION

For the foregoing reasons, Daniel Lugo respectfully requests that this Honorable Court enter an order reversing his convictions and corresponding sentences and remand for a new trial on all counts of the indictment. In the alternative, this Court should vacate Defendant's death sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Lisa A. Rodríguez, Esq., Office of the Attorney General, 444 Brickell Avenue, Rivergate

Plaza, Suite 950, Miami, Florida, 33131, on this 24th day of May, 2001.

_____
J. RAFAEL RODRIGUEZ