IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-383

NOEL DOORBAL
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial a Motion for post-conviction relief. The motion was brought pursuant to Fla.R.Crim.P. 3.850. *et seq*. Petitioner, NOEL DOORBAL ("Doorbal") was the defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. Respondent, STATE OF FLORIDA, "the State" was the plaintiff. The following symbols and citations will be used to designate references to the transcript and record in this instant cause:

Trial Transcripts - (T. page) [1]

Record on Direct Appeal to this Court - (R. page)[2]

Post Conviction Record on Appeal - (PC-R. page)[3]

Supplemental Post Conviction Record on Appeal - (PC-SR. page)[4]

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[1] The Trial Transcript consists of 14,523 pages in 177 Volumes. Appellant requested that the Clerk provide this Court with 3 CD's filed in the Circuit Court that contain these Volumes as well as the Supplemental ROA and the Exhibits in this cause (PC-R. 586). The Supplemental ROA consists of 1,174 pages in 7 Volumes. The Exhibits consist of 10,690 pages in 53 Volumes.

[2] The ROA consists of 3,956 pages in 20 Volumes.

[3] The Post Conviction ROA consists of 1,206 pages in 7 Volumes.

[4] The Post Conviction Supplemental ROA consists of 443 pages in 3 Volumes.

REQUEST FOR ORAL ARGUMENT

Mr. Doorbal has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. Given the seriousness of the claims at issue and the stakes involved, Noel Doorbal, a death-sentenced inmate on Death Row at Union Correctional Institution, through counsel, respectfully requests that this Court permits oral argument on the issues raised in his appeal.

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural History

The Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered the judgments of conviction and sentences under review. (R. 2856-58, 3662-68). Doorbal was indicted on October 2, 1996, for conspiracy to commit racketeering, racketeering, two counts of first degree murder involving Frank Griga and Krisztina Furton, three counts of kidnapping, two counts of attempted extortion, two counts of grand theft, 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).

Doorbal was tried by jury from February 2, 1998 to May 5, 1998, before the Honorable Alex Ferrer. (T. 2411-16397). The State called more than ninety (90) witnesses before resting their case.

Doorbal moved for a judgment of acquittal claiming that insufficient evidence had been produced on all counts. As for the RICO count, Doorbal 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 Doorbal's motion. (T. 12437). Doorbal then sought a court ruling on the admissibility of letters written by Lugo to Doorbal after their arrest. (T. 11517-72). In the letters, Lugo detailed a plan in which Doorbal was supposed to take responsibility for all of the crimes. Once Lugo was cleared, he promised Doorbal that he would then work to exonerate Doorbal. (R. 2381-82, T. 12517-21). The trial court found that the letters were hearsay. (T. 11521-22, 11555). Doorbal maintained that the letters should be admitted to demonstrate Lugo's bias against Doorbal and Lugo's effort to place blame for the crimes on Doorbal. (T. 12556-59). The court rejected Doorbal's argument and ruled the letters were inadmissible. (T. 12562, 12567-68, 12572). The trial court added that the letters would be relevant to penalty phase issues and the State agreed. (T. 12568). After entering records from Doorbal's account at Smith Barney, Doorbal renewed his motion for judgment of acquittal. (T. 12516, 12968). The court entered no ruling on Doorbal's motion.

The jury found Doorbal guilty on all counts, (T. 13680-13685), and the Court adjudicated Doorbal guilty on May 5, 1998. (T. 13695). Mr. Doorbal's penalty phase was conducted from June 1, 1998, to June 2, 1998, (T. 14380-14423), and on June 11, the jury's verdict was announced. (T. 14311-14314). The jury recommended two sentences of death with each advisory recommendation vote as 8-4. (T. 14311-14314). Following a Spencer hearing held on July 8, 1998, (T. 14320-14376), Doorbal filed a Motion to Continue Sentencing when Schiller's pre-arranged arrest on the courthouse steps by the Federal government in concert with the State's actions. (R. 3500-3501, 3505-13). The trial court denied Doorbal's Motion and sentenced Doorbal on July 17, 1998. (T. 14380-14423).

Doorbal was sentenced to death for his conviction in the first degree murder of Frank Griga, was consecutively sentenced to death for the conviction in the first degree murder of Krisztina Furton, was consecutively sentenced to: thirty years in prison for conspiracy to commit racketeering, to thirty years in prison for racketeering, to life in prison for the kidnapping of Ms. Furton, to life in prison for the kidnapping of Mr. Griga, to five years in prison for one count of attempted extortion, to five years in prison for grand theft auto, to life in prison for attempted first degree murder of Schiller, to life in prison with a three year mandatory for kidnapping with use of a firearm, to life in prison with a three year mandatory for

robbery with use of a firearm, to fifteen years in prison for burglary of a dwelling, to fifteen years in prison for grand theft in an amount of $20,000 or more but under $100,000, to thirty years in prison for first degree arson, to thirty years in prison for extortion with a firearm and to fifteen years in prison for conspiracy to commit first degree murder. (T. 14420).

Doorbal's Motion for New Trial was filed on July 27, 1998. (R. 3495-3499). A Notice of Appeal was filed on August 12, 1998. (R. 3659). On November 2, 1998, a Motion to Remand for an Evidentiary Hearing pending a Motion for New Trial based on Newly Discovered Evidence was filed in the Florida Supreme Court and the State filed its Response on December 17, 1998. (PC-R. 399-402, 404-411). Upon remand to the trial court, Mr. Doorbal's Motion for a Richardson hearing and for a New Trial was denied following a hearing held on January 13, 1999. (T. 3912-3954).[5] A Notice of Appeal was filed on January 13, 1999. (R. 3781).

[5] Doorbal's trial Judge, the Honorable Alexander Ferrer, just three weeks after the trial Court denied Doorbal's Motion for a New Trial, testified at Marcello Schiller's Federal sentencing hearing conducted on February 5, 1999, (PC-R. 269-283). Judge Ferrer testified on Schiller's behalf to support Schiller's request for minimum sentencing after he pled guilty to Medicare fraud. (PC-R. 275-283).

On Direct Appeal, Doorbal's Appellant counsel raised the following claims before this Court:

I. Doorbal was denied a fair trial when the State improperly elicited irrelevant testimony relating to "bad character" evidence at a time when Doorbal had not placed his character as an issue. The Florida Supreme Court, forced to analyze the testimony under the "fundamental error doctrine" because trial counsel failed to contemporaneously object to any of the highly prejudicial statements, determined that relief was not warranted based on fundamental error.

II. Doorbal was denied a fair trial when the State commented in its closing argument upon Doorbal's decision to exercise his right to remain silent. The Florida Supreme Court, forced to review this reversible error under the "fundamental error doctrine" because trial counsel failed to contemporaneously object or motion for a mistrial, determined that relief was not warranted based on fundamental error but noted its position regarding this form of prosecutorial misconduct.

III. Doorbal was denied a fair trial when the State improperly used the "Golden Rule" argument to the jury during the guilt phase of the trial. The Florida Supreme Court, forced to review the reversible error under the "fundamental error doctrine" because trial counsel failed to

contemporaneously object, determined that the State committed error, "walking the edge of reversible error," that needlessly violated the prohibition against "Golden Rule" arguments, but did not warrant relief based on fundamental error.

IV. Doorbal was denied a fair trial when the Court denied a motion to suppress illegally seized evidence used at trial. The Florida Supreme Court concluded that a "common sense" determination that there was a probability of evidence related to crimes and the denial of the motion did not entitle Doorbal to relief.

V. Doorbal was denied a fair trial when the Court limited the presentation of mitigating evidence. The Florida Supreme Court concluded that if there was any error committed by the Court in not admitting letters from co-defendant Dan Lugo as mitigating evidence showing that Lugo had a dominating influence over Doorbal "in the context in which it was proffered," such error was harmless and Doorbal was not entitled to relief.

VI. Doorbal was denied a fair trial when the State improperly used the "Golden Rule" argument to the jury during the penalty phase of the trial and when the State implored the jury to show Doorbal no mercy. The Florida Supreme Court, forced to review the reversible error

under the "fundamental error doctrine" because trial counsel failed to contemporaneously object, determined that the State committed error while treading dangerous ground, but did not warrant relief based on fundamental error.

VII. Doorbal was denied a fair trial when the Court improperly considered and weighed the use of felony murder and pecuniary gain aggravating circumstances. The Florida Supreme Court ruled that improper doubling did not occur and Doorbal was not entitled to relief on this issue.

VIII. Doorbal was denied a fair trial when the Court improperly considered and weighed the use of cold, calculated and premeditated and avoiding arrest aggravating circumstances. The Florida Supreme Court ruled that improper doubling did not occur, denying relief on this issue.

IX. Doorbal was denied a fair trial when the Court found that the cold, calculating and premeditated aggravating circumstance exists due to insufficient evidence. The Florida Supreme Court denied relief for Doorbal.

X. Doorbal was denied a fair trial when the Court found that the avoiding arrest aggravating circumstance exists due to insufficient evidence.

The Florida Supreme Court concluded that Doorbal's claim does not warrant relief.

XI. Doorbal, on rehearing, challenged Florida's capital sentencing scheme as unconstitutional in lieu of Ring v. Arizona, 122 S. Ct. 2428 (2002). The Florida Supreme Court rejected the argument and denied Doorbal relief.

In addition, although not specifically challenged, the Florida Supreme Court reviewed the proportionality of Doorbal's sentences to death and concluded Doorbal was not entitled to relief on this issue.

The Florida Supreme Court affirmed Doorbal's convictions and sentences, including his sentences of death, but withdrew its opinion. Doorbal v. State, 2002 WL 31259825, 27 Fl. Law Weekly S839 (Fla. Oct. 10, 2002). Upon Rehearing, the Florida Supreme Court superceded its opinion and denied Doorbal relief. Doorbal v. State, 837 So.2nd 940, 28 Fla. Law Weekly S108 (Fla. Jan 30, 2003) (NO. SC93988).

The U.S. Supreme Court denied Certiorari on June 27, 2003. Doorbal v. Florida, 123 S.Ct. 2647, 156 L.Ed.2d 663, 71 USLW 3799 (U.S. Fla. June 27, 2003) (NO. 02-10379).

B. Statement of the Facts at Trial

Mr. Doorbal's trial proceeding was conducted with co-defendants John Mese and Daniel Lugo in a consolidated case where two juries heard testimony from more than ninety (90) witnesses involving three of the twelve co-defendants charged. At trial, co-defendant Jorge Delgado testified that he met Marcelo Schiller through his wife, who had been working for co-defendant Schiller at Schiller's accounting firm. (T. 11597-98). Delgado later 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 admitted that he and Schiller had been involved in hundreds of instances of Medicare fraud. (T. 12031-33). Delgado also acknowledged he was the subject of a federal investigation into those fraudulent activities. (T. 11862). Schiller and Delgado ran Schiller's medical supply business as a front for Medicare fraud. (T. 11637, 11642-43). The unlawful Medicare business was quite lucrative, and Delgado alone, made in excess of $300,000 in 1992. (T. 11891).

In 1992, Delgado joined Sun Gym and met both co-defendant Daniel Lugo and Doorbal. (T. 11638, 11640). Delgado became very friendly with Lugo and entered into a joint business venture with him. (T. 11645, 11648). When Delgado introduced Lugo to Schiller, Schiller expressed disapproval of Lugo. Delgado

testified that Schiller would not do business with Lugo, and Delgado would have to choose between them. (T. 11644-45). Nevertheless, Lugo became involved in the unlawful billing of the Medicare business, and, according to Delgado, subsequently informed Delgado that Schiller was a cheating Delgado out of significant unlawful gains. (T. 11647, 11651). Delgado testified that Lugo learned that Schiller owed Delgado $200,000. (T. 11661). When Schiller rejected Delgado's request for the money, Delgado testified that it was Lugo who suggested that they kidnap Schiller to force him to get the money back. (T. 11652-53).

In October 1994, according to Delgado, a meeting was conducted in Lugo's office with Delgado, Doorbal, cod-defendant Carl Weekes and co-defendant Stevenson Pierre where Lugo announced that they would try to capture Schiller and get their money back. (T. 11657). Lugo led the meeting, according to Delgado, and Delgado testified that it was his job to provide information about Schiller and then watch him once he was captured. Weekes and Pierre were asked to help. Delgado testified that Doorbal's job was to help with Schiller's capture and get him to talk by roughing him up, if necessary. (T. 11657-58, 11662-63). Delgado testified that the participants agreed that Schiller would be kept at a warehouse that had been previously rented by Delgado. (T. 6459-69, 11664).

According to Delgado, 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). Delgado testified that while earlier attempts failed, Schiller was abducted outside Schlotzky's Deli. (T. 7327, 8498).

Schiller testified that he left Schlotzky's Deli 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 shot Schiller with a taser several times. (T. 7327, 8497). While Schiller struggled to resist, co-defendant Sanchez grabbed Schiller and forced him into a waiting van. (T. 8498). As they 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 removed Schiller's jewelry and gave it to Doorbal. (T. 8505). Pierre and Lugo met Doorbal, Sanchez, Weekes and Schiller at Delgado's warehouse. (T. 8527). Schiller was punched, kicked, burned with a cigarette butt and struck with a gun. (T. 7329-33, 8897, 11670). As Schiller was beaten, the men demanded a list of Schiller's assets, surprising Schiller that noted that the men had accurate information about some of his holdings. (T. 7333-34).

Based on the information his captors had, Schiller assumed that Delgado was involved. (T. 7340-41). Schiller also recognized Lugo's voice. (T. 7336). The men threatened harm to Schiller's wife and children, but 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, Delgado testified that Lugo and Doorbal 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 Doorbal, Pierre and Weekes, according to Pierre. (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 co-defendant John Mese. (T. 8913, 11676-77). The deed and a change of beneficiary form for Schiller's life insurance policies were taken to Mese for notarization. (T. 8916- 17, 11680).[6]

[6] Sharon Farugia, an employee of Met Life, testified that in November 1994, Schiller had 2 life insurance policies worth $1,000,000 each. The original beneficiary on the policies was his Schiller's wife, Diana Schiller. (R.6856-60). A change of beneficiary form was executed changing the beneficiary on the policies to Lillian Torres, "fiancée." In fact, Lillian Torres was Lugo's ex-wife. (R.6861-63, 8204, 8211). There was a mark for a signature and John Mese notarized the

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 signed by Schiller and deposited in the corporate account of a company named Sun Fitness. (T. 7484-85, 11680-81). According to Delgado, the proceeds would be shared among Lugo, Doorbal, Pierre, Weekes, Delgado and Mese. (T. 11682). Finally, his captors told Schiller that he should call Gene Rosen and tell him to grant Delgado power of attorney over Schlotzky's Deli. (T. 7367). Delgado testified that Lugo told

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signature. (R.6862). Gene Rosen, Schiller's attorney, later notified Met Life that the change of beneficiary should be voided and the beneficiary should be Diana Schiller. (R.6863, 6887). Also, Camilo Blanco, a principal in the construction of La Gorce Palace, a 34-story condominium on Miami Beach, testified Schiller and his wife purchased a condominium before construction. (R.6904-06). Blanco received a written assignment of Schiller's contract on the condo which purported to assign Schiller's interest to Lillian Torres. The assignment had been signed by Schiller and notarized by Mese. It was accompanied by a check for $2,400 written on Schiller's account. (R.6909-14). Blanco was unable to contact Torres. (R.6911). Gene Rosen, however, later contacted Blanco and informed him that the assignment should be voided. (R.6918).

Delgado that the plan was to get Schiller drunk and have him burn in a staged car accident. (T. 11686). Lugo aimed Schiller's vehicle at a metal 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). Because they had forgotten to place a seat belt on Schiller, however, he was able to escape. (T. 8923). Weekes hit and ran Schiller over twice. (T. 89223, 11688).

When police found Schiller, they believed that he had been involved in a car accident while driving drunk, and he was transported to Jackson Memorial Hospital. (T. 8920, 11688). Pierre testified that when Lugo and Delgado realized that Schiller might not be dead, he went with Lugo, Weekes and Doorbal to the hospital looking for Schiller, but a guard was stationed outside Schiller's door. (T. 8926-27, 11689-11690). Schiller suffered major injuries from his abduction. (T. 6968-69, 7375-77). While hospitalized, he informed his doctor what had happened and told his attorney, Gene Rosen. (T. 7378, 7594-96). Schiller testified that despite the reports, no police officer responded to the hospital to investigate the abduction. (T. 7596). On his lawyer's advice, Schiller fled the hospital and went to New York 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 on a memorandum written by Schiller, Dubois contacted John Mese (T. 7776) and met with Mese in February

1995, telling Mese that he represented 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 Schiller's documents, but 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 with 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 then agreed to arrange a meeting with Lugo on the following day at 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 Doorbal's name, several cancelled

checks written by Lugo and other documents relating to Lugo and Sun Fitness. (T. 7827-57).[7]

Mese and Delgado subsequently arrived, but Lugo did not attend the meeting. (T. 7859-60). Delgado told Dubois that they would give back the $1.26 million taken from Schiller, but that 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 and that he would not go to the police. (T. 7861, 7867).

Dubois contacted the police three and three and one-half (3 ½) months after Schiller initially contacted him. (T. 8015).

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, not mentioning Doorbal's name, and promised to produce the money

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

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 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 provided his leased 300 ZX to Doorbal. Lugo leased a Mercedes. (T. 11709, 11721). Delgado testified that Doorbal was using Schiller's furniture in his apartment and that Doorbal lived off the money taken from Schiller. (T. 11724, 11727). During their time together, Lugo told his girlfriend, Elena Petrescu, that Schiller had stolen 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, though the State later dropped the charge. (T. 10362, 19489).

On December 20, 1994, a check signed by Lugo written on Sun Fitness in the amount of $1,000,000 was deposited into Doorbal's account. (T. 9423- 25).

Subsequently, a check with Doorbal's purported signature was written payable to Sun Fitness on his Merrill Lynch account for $240,364. In February 1995, cash advances against the account were drawn in denominations less than $10,000. (T. 9431-32, 9440-42).

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). When Merrill Lynch learned that Lugo had a criminal history involving fraud, they ordered that both accounts be closed. The securities in Doorbal's account were transferred to Smith Barney. (T. 9440). Lugo also sought to make improvements to Schiller's home by obtaining service for the pool and an estimate for a new security system. (T. 7269-72, 9360-66).

Also in March 1995, Beatrice Weiland was working as an exotic dancer. (T. 5756-57). Beatrice had previously been married to Attila Weiland and had also dated Frank Griga. (T. 5754, 5758-59). After she began dating Doorbal when he met her at "Solid Gold," a strip club, Doorbal took her to Lugo's apartment, where she found that Lugo was living with fellow dancer, Elena Petrescu. (T. 5761-66). Lugo lived across the street from Doorbal and had a key to Doorbal's apartment. (T. 5773). Doorbal told Beatrice that he and Lugo invested money in the computer business and that Lugo worked for the CIA. (T. 5767-68). In her view, Doorbal

looked up to and respected Lugo. (T. 5769). Beatrice stated that Doorbal worked out daily and took steroids. (T. 5780). She added that Doorbal was very mysterious; she did not know how he made money. (T. 5786).

After Beatrice showed Doorbal her photo album, Beatrice testified that she noted that Doorbal took particular interest in a photo of Frank Griga's Lamborghini. (T. 5787-90). Beatrice told Doorbal the car belonged to her ex-boyfriend, Frank Griga. (T. 5790). Frank Griga, made his fortune in the "976" sex line business, where patrons would pay $3 to $5 per minute of phone time. In 1994, Griga earned $1,900,000. (T. 5582-83, 11040-42).

Beatrice introduced Doorbal to Attila Weiland. (T. 5711-12). Doorbal told Attila Weiland that he and Lugo were thinking of entering the phone business and were looking for partners. (T. 5719- 20). Doorbal asked Weiland if he could provide an introduction to Griga. (T. 5720). Weiland relayed the message and subsequently informed Doorbal that Griga had indicated that Doorbal could stop by his home. (T. 5722).

Lugo, Doorbal 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). Doorbal did not speak during the thirty-minute meeting. (T. 5730).

When Griga declined a dinner invitation, Lugo and Doorbal left Griga a laptop computer as a gift. (T. 5732).

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 Doorbal had been a "killer" in his country. (T. 10348). Lugo told Petrescu about a Hungarian man with a lot of money and a yellow Lamborghini. (T. 10393). Lugo also 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, taking the man and his girlfriend to a warehouse. (T. 10397).

Petrescu testified that Lugo and Doorbal then constructed a plan, which included Petrescu. (T. 10398-400). Petrescu testified that Doorbal came over one night with a bag containing a syringe and handcuffs. (T. 10397-98). Petrescu would drive Lugo's Mercedes to Griga's home on Golden Beach. Lugo would pretend to show Griga computer equipment and then capture Griga while Doorbal took care of Furton, Griga's girlfriend, who would both be put in the trunk of Lugo's ca (T. 10401-406). Petrescu testified that Lugo loaded a bag with items but had forgot to bring tape, so they went to the store and Lugo told Petrescu Doorbal

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).

After an abortive attempt, a new plan was hatched: Petrescu was to play Lugo's Russian wife. Lugo would show the man computer equipment in Doorbal's apartment. Lugo would then "take" Griga and Doorbal would "take" the girl. Petrescu testified she 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).

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. Also in the driveway was a gold, 4-door Mercedes. Bartusz saw both Lugo and Doorbal and was told that they were all going to Shula's Restaurant for dinner. (T. 5599-5600). That was the last time Bartusz saw Griga and Furton alive. (T. 5608).

Estzer Lapolla, Griga's cleaning lady, was also at the Griga home that day. She left with Furton to pick up her daughter. When they returned, Doorbal and Lugo were 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 were left on an office table. (T. 5674). Lapolla said that Griga and Furton did not come home that night. (T. 5675). The police

later identified fingerprints left on the glasses by Doorbal and Lugo. (T. 10970-71). The next morning, Lapolla left the Griga home, called later that day and the next, but was not successful in contacting Griga. (T. 5676). Lapolla then called Bartusz and learned that Griga and Furton had plans to go to the Bahamas. (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). 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. (T. 5736). Weiland said that he called Doorbal and told him that Griga and Furton were missing. (T. 5737). Doorbal told Weiland that he had gone to dinner with Griga and Furton on the preceding Wednesday, but the restaurant was closed so

they decided to go to a dance club instead. (T. 5737). Weiland testified that Doorbal said he then returned to his apartment and Griga left. (T. 5737). Doorbal speculated that Griga and Furton had gone to the Bahamas. (T. 5738). Weiland spoke with Doorbal again and felt Doorbal had been involved in Griga's disappearance. (T. 5739). Weiland continuously asked Doorbal about Griga. At one point, Doorbal told Weiland, "You're supposed to be my friend." (T. 5740). Weiland felt from Doorbal's tone that he should back off. (T. 5740).

In the following days, Doorbal 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). Doorbal had the same interaction with Beatrice Weiland. Although Doorbal denied any knowledge about Griga's disappearance, Beatrice felt that Doorbal became upset when talking about it. (T. 5794- 95).

Delgado testified that he received a phone call from Lugo in which Lugo asked him if he could drive a Lamborghini. (T. 11734). Delgado alleged that the next day, Delgado went to Doorbal's apartment (T. 11735) where Lugo told Delgado that the plan had been to lure Griga to Doorbal's apartment to extort money from him. Delgado claimed that Lugo told him, however, that while he was watching television with Furton, he heard a loud noise. (T. 11736). According to Delgado, Lugo told him that he saw Doorbal embrace Griga in a headlock. When Furton began to scream, according to Delgado, to calm her, Lugo grabbed Furton

and injected her with a horse tranquilize Delgado testified that Doorbal strangled Griga and left him in the bathroom. (T. 11736-41). According to Delgado's version of events prior to the Griga/Furton murders that did not include his presence or participation or the presence or participation of co-defendant John Raimondo, Lugo appeared to be mad that Griga had died before they were able to take his money. (T. 11741). Delgado testified in detail that Doorbal brought Furton, wearing a hood, her ankles taped and handcuffed, down the stairs. (T. 11742-43). Furton woke up and asked for Griga. (T. 11743). Lugo told Furton not to worry and directed Doorbal to inject Furton again. Doorbal gave Furton a shot. At first Furton screamed, but soon became calm. (T. 11744).

According to Delgado, Lugo and Doorbal tried to question Furton. Furton 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, according to Delgado who claimed he was not there, she was given water. (T. 11747). Delgado testified that Furton was confused and had problems answering. Delgado further testified that Furton gave Lugo some numbers, but she kept asking for Griga. Though Lugo assured her that she would be taken to see Griga, Furton got increasingly upset and began to scream. At that point, Delgado testified that Doorbal gave her another shot in the thigh. (T. 11748-51). Furton calmed, fell

asleep with the injection given less than an hour that had elapsed between shots. (T. 11751).

Delgado testified that Raimondo, a corrections officer, appeared at Doorbal's apartment. Delgado stated that according to Lugo, Raimondo was to help with Griga's body. Raimondo, according to Delgado's testimony, re-taped Furton and held her down when Furton became hysterical. Doorbal then gave Furton another shot of the tranquilizer at Lugo's direction. An hour transpired between the second and third shots. (T. 11752-58). Delgado, who never admitted that he and Raimondo were present when Griga and Furton were killed, testified that he went into the bedroom where the purported struggle between Doorbal and Griga had occurred and noticed broken computers on the floor with blood on the computers, carpet and wall. Petrescu testified that Lugo asked her to come over to Doorbal's apartment to help clean the blood on the compute (T. 10445). Petrescu declined, but instead, 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 Doorbal to tell him that they had been unable to enter the house, Petrescu testified that she heard Doorbal say that "the bitch is cold." (T. 10447, 10551). Lugo then took Griga's mail and directed Petrescu to open it. (T. 10451). Later, according to Petrescu, Lugo and Doorbal brought several items to

Lugo's apartment for storage in a storage area. Included were a carpet roll and a bloodstained computer. (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 ca Lugo said that the car, a Lamborghini, was stolen. (T. 11112-13). Gray got a tow truck driver to meet him, Doorbal 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 ca (T. 11116-18).

Delgado testified that he obtained a U-Haul truck and went to Doorbal's apartment at 7:00 a.m. on the day after he had seen the deceased, Griga and Furton. (T. 11765-67). Griga's body 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).

Delgado testified that after Delgado had gone out to make sure that no one was around, Lugo and Doorbal carried the two bodies out of Doorbal'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 taken inside the warehouse. Lugo and Doorbal 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. (T. 11785-89). After Lugo wiped the bodies with Windex, Doorbal began using a chain saw to cut up the bodies. When the chain saw jammed on Furton's hair, Delgado testified that Doorbal used a hatchet to finish the job. (T. 11795-802).

Delgado testified that Doorbal and Lugo placed the body parts in drums and then 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). Delgado said 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 Doorbal's request, Delgado testified that he then went to Doorbal's apartment, cleaned it up and removed items, including the carpet and padding. (T. 11810-15). Delgado stated that Doorbal's apartment was clean of any evidence by the time they were finished. (T. 11815).

Lugo asked co-defendant Mario Gray to rent a truck and come to a warehouse. (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 Doorbal'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. (T. 11139). The men then returned to the warehouse. Gray stated that when police initially talked to him about his involvement, he told the police that he knew nothing about the case. (T. 11160-61).

At the warehouse, Gray, Lugo and Doorbal loaded four barrels onto the truck. (T.11143-44). Gray then drove the truck to the dumpsite. 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. When they arrived, Lugo got out, went into an apartment and returned with a green carpet that had been bleached. When 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 a.m., Lugo told him to meet them back at the warehouse at 7:30 a.m. (T. 11152-53). The next day, Doorbal met Gray at the warehouse, and gave Gray a couch, a television and $800 for his work. (T. 11154-59).

Metro-Dade Police Detective Salvador Garafalo was assigned as the lead detective to investigate the disappearance of Griga and Furton. (T. 6014-15). A police investigation ensued. After interviewing Bartusz, Lapolla, Attila and Beatrice Weiland, Detective Garafalo concluded that Lugo and Doorbal were suspects. (T. 6017). By the time he began his investigation, the Lamborghini had already been found, but Griga and Furton had not located. (T. 6017). Garafalo had also received information about the Schiller incident and spoke with Schiller, who identified both Lugo and Delgado. (T. 6018-19). Garafalo put together a photo display with photos of Lugo, Delgado and Doorbal. (T. 6019). Bartusz and Lapolla identified Doorbal's photograph. (T. 6020-22). With Bartusz' information about the Mercedes, Garafalo obtained information about the home addresses of Lugo and Doorbal. (T. 6023-27). Garafalo obtained search warrants for Doorbal's apartment and car, Lugo's apartment and car and Delgado's home and ca (T. 6031-34).

Detective Garafalo convened a large group of detectives to execute the various warrants. Detectives Alvarez and Coleman were assigned to search Doorbal's apartment. (T.6037-38). Detective Luis Alvarez said that he arrived at Doorbal's apartment to serve the warrant at 7:20 a.m. (T. 6142-43). When Cindy Eldridge, Doorbal's wife, answered the door, Alvarez asked for Doorbal and told her that they had a search warrant for the apartment. (T. 6145-46). Eldridge called for Doorbal, who had been sleeping. When Doorbal appeared, Alvarez read the warrant to him, had Doorbal get dressed and took him outside. (T. 6147-49). Detectives Coleman and Gonzalez then began their search of Doorbal's apartment. (T. 6151). Detective Coleman found the downstairs bedroom in Doorbal's apartment was empty, except for some boxes in a closet (T. 6160-63) that 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 its return. (T. 6164-95). Coleman also found a cell phone, pager and knife belonging to Lugo, a cell phone bill for Delgado's phone, a greeting card and hotel receipt belonging to Schiller, a copy of a warehouse lease signed by Lugo and leased by D & J International, the registration for Doorbal's 300 ZX, a receipt from a locksmith for a change of locks at Schiller's residence, account information

for Doorbal'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. 6227-6296). In the master bedroom, Coleman found a pair of handcuffs and several receipts for jewelry purchased at Mayor's. (T. 6307-10).

Detective Ray Hoadley executed a second search warrant at Doorbal's home (T. 6393) which yielded no blood stains on the carpet or pad. He did find an orange dart embedded in the wall (T. 6420-22), which he seized with a section of the wall. (T. 6424-25). Hoadley also took numerous documents and checks. (T. 6397-6419).

Sergeant Mike Santos executed the warrant at Lugo and Petrescu's apartment. Police pried the front door to gain entry since no one was at home at 8:00 a.m. (T. 7078-84). Inside the apartment, Santos found keys to a BMW, computer equipment, paperwork for Doorbal'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 the return of Schiller's money, a letter from LaGorce Palace to Schiller regarding his condo unit, 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). The bloodstained 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 Doorbal used the name Adrian Taylor when corresponding with Hungarian women. (T. 9320-21). The jewelry was identified by Bartusz as belonging to Griga and Furton. (T. 5628- 29). Santos also found a briefcase behind a couch in the living room containing 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. (T. 7144-49, 7152). Also in the living room was a television bearing a blood droplet. (T. 7142). Santos conducted a search of a storage closet in Lugo's apartment, finding a gym bag containing a retractable baton and bloodstained towels and gloves. (T. 7141, 7150, 7154-55). He 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 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. Finally, Santos found a number of firearms in Lugo's apartment and ammunition. (T. 7164-86).

Detective Garafalo also had officers search the two warehouses. (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, rope, goggles and directions to operate a chain saw. (T. 6535-44). Nichols also found a Home Depot receipt reflecting many of the items' purchase. (T. 6548). Nichols processed the area for fingerprints (T. 6547) and returned later to test the warehouse using Luminal, yielding a positive result for the presence of blood. A further search revealed an AAA card and an American Express receipt belonging to Griga. (T. 6549-52). Searches were conducted at Sun Gym, John Mese's offices, and Lucretia Goodridge's home. Those searches yielded many financial documents and checks that were introduced into evidence by the State at trial. (T. 6568-6824).

Based on the evidence obtained from the searches, Garafalo secured an arrest warrant for Lugo, but Lugo and Petrescu had gone to the Bahamas. (T. 6076-77). When Lugo learned of the Doorbal's arrest, he sent Petrescu back to Miami to destroy the bloody clothes and computer equipment left in their apartment. (T. 10466-75). When Petrescu arrived at the apartment, however, police arrested her. (T. 10477-78).

Delgado, also arrested but initially denying any involvement, (T. 11858-59), later entered into a plea agreement with the State (T. 11899-900), pleading guilty to attempted first degree murder, kidnapping, extortion and accessory after the fact. Facing life in prison, Delgado was sentenced to 15 years, though he would get 40 if he failed to cooperate. (T. 11860-61, 11902-05). Delgado testified that what he knew about Griga's abduction came entirely from Lugo. (T. 11927, 12021). Delgado also admitted he could not disprove the notion that he killed Griga and Furton. (T. 12055).

After Lugo was apprehended in the Bahamas, (T. 11267), he agreed to show 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). Lugo was taken out of jail and directed police to a canal in South Miami-Dade County. (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). Three barrels were found in the canal. Two contained the body parts of a male and a female. The hands, feet and heads were missing. (T. 11360-75). A third barrel contained only masking tape. (T. 11360). An anonymous call sparked a search along I-75 in Broward County the following day. (T. 11330-31). The search yielded buckets containing two human skulls, hands and feet. (T. 11413, 11425-26). A knife and a hatchet were 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). At toxic levels, Rompun depresses the heart and respiratory rate. (T. 11557). Based on 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 and 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 on 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 Miami-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, and 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). Dr. Mittleman found no reason for death based upon his internal examination of Griga. (T. 12333). Dr. Mittleman did, however, 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). 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 Mittleman could not exclude that the trauma to Griga's head had occurred post-mortem, he surmised that Griga may have died of asphyxiation. (T. 12351, 12359-60). Dr. Mittleman stated that a medical examiner looks to asphyxia as the cause of death when no other cause can be found. (T. 12357). Dr. Mittleman found Furton's death was consistent with an overdose of Rompun. (T. 12346-48). He noted that while

Rompun has no human use, it causes central nervous system depression, respiratory suppression and a slow heartbeat. (T. 12344-45). He said Furton's body had sufficient concentrations of Rompun to cause severe symptoms. (T. 12345-46, 12369). As the drug passed to several organs in her body, Mittleman opined Furton was alive when the drug was injected. (T. 12347). In his view, Furton must have experienced psychic horror as she was administered a drug she knew would kill her. (T. 12347).

C. Post-conviction Proceedings

On post-conviction, Doorbal also filed a Motion to Disqualify Judge Ferrer, (PC-SR. 7-19) after learning that Judge Ferrer had testified on behalf of Marcello Schiller at Schiller's Federal Sentencing hearing less than 30 days following the trial Court's ruling that denied Doorbal a New Trial. (PC-R. 275-283).

Pursuant to Fla.R.Crim.P. 3.850 *et seq*., Doorbal subsequently filed Motions To Vacate Judgments Of Convictions And Sentences Of Death, Motions To Compel Discovery, a Special Request Motion For Leave To Amend, and Motions For an Evidentiary Hearing along with attachments in Miami-Dade Circuit Court on June 15, 2004 and on January 15, 2005. (PC-R. 177-479, PC-SR. 95-200). Doorbal raised the following post-conviction claims:

Claim I

Fla. R. Crim. P. 3.851 (1998) Is Unconstitutional On Its Face And As Applied And It Violates Art. I, Section 24 Of The Florida Constitution And Corresponding Florida Case Law As Well As Mr. Doorbal's Fifth, Sixth, Eighth And Fourteenth Amendment Rights And His Right To Due Process And Access To The Courts.

Claim II

Fla. Statute?119.19 And Fla. R. Crim. P. 3.852 (1998) Are Unconstitutional On Their Face And As Applied And They Violate Art. I, Section 24 Of The Florida Constitution And Corresponding Florida Case Law As Well As Mr. Doorbal's Fifth, Sixth, Eighth And Fourteenth Amendment Rights And His Right To Due Process And Access To The Courts.

Claim III

Mr. Doorbal Is Being Denied His Rights To Due Process And Equal Protection As Guaranteed By The Eighth And Fourteenth Amendments To The United States Constitution And The Corresponding Provision Of The Florida Constitution Where Access To The Files And Records Pertaining To Mr. Doorbal’s Case In The Possession Of Certain State Agencies Have Been

Withheld In Violation Of Chapter 119, Fla. Stat. Mr. Doorbal Cannot Prepare An Adequate 3.851 Motion Until He Has Received Public Records Materials And Has Been Afforded Sufficient Time In Proportion To The Number Of Records Review Those Materials And Amend His Petition.

Claim IV

The State Withheld Evidence Material And Exculpatory And/Or Presented False And/Or Misleading Evidence At Both Phases Of Mr. Doorbal's Capital Trial In Violation Of Mr. Doorbal's Rights Under The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitutions. Such Omissions Rendered Defense Counsel's Representation Ineffective And Prevented Full Adversarial Testing Of The State's Case In Violation Of *Giglio* And *Brady* And The Eighth And Fourteenth Amendments Of The U.S. Constitution. Mr. Doorbal Was Denied His Right To Fair Trial When The State, To Secure A Conviction In This Case, Intentionally, Knowingly And Willingly Used A Witness Who Lied To The Court, To The Jury And To Mr. Doorbal's Trial Counsel During Depositions. The State Deprived Mr. Doorbal Of Brady Material, Including Names Of Persons And Evidence

That Mr. Doorbal Can Use To Impeach The State's Witness And Challenge His Convictions And Sentences. Mr. Doorbal Is Entitled To A New Trial.

Claim V

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Counsel Was Ineffective During The Guilt Phase In Violation Of The Sixth, Eighth And Fourteenth Amendments When Trial Counsel Failed To Move To Withdraw Prior To Trial Due To Conflicts Of Interest Which Rendered Counsel Incapable Of Focusing On His Duties Of Representing Mr. Doorbal And Failed To Request Further Continuances In Order To Attend To Counsel's Emotional Needs Where Counsel's Father Had Died Immediately Prior To Trial, Counsel's Mother Was Seriously Ill Prior To And Throughout Mr. Doorbal's Trial And Counsel Was Continuing To Experience Severe Financial Hardship And Personal Crises As A Direct Result Of His Representation Of Mr. Doorbal. Mr. Doorbal Is Entitled To A New Trial.

Claim VI

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Counsel Was Ineffective During The Guilt Phase In Violation Of The

Sixth, Eighth And Fourteenth Amendments When Trial Counsel Failed To Object To "Bad Character" Evidence That The State Improperly Elicited, To Prosecutorial Conduct During The State's Closing Argument Where The State Improperly Commented On Mr. Doorbal's Decision To Exercise His Right To Remain Silence And To Egregious Prosecutorial Misconduct "Walking The Edge Of Reversible Error" When The State Improperly Used The "Golden Rule" Argument To The Jury During The Guilt Phase. Mr. Doorbal Was Deprived Of His Right To Be Assisted By An Attorney, And He Is Entitled To A New Trial.

Claim VII

Mr. Doorbal's Trial Was Fraught With Procedural And Substantive Errors Which Cannot Be Harmless When Viewed As A Whole, Since The Combination Of Errors Deprived Him Of The Fundamentally Fair Trial Guaranteed Under The Sixth, Eighth, And Fourteenth Amendments.

Claim VIII

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Counsel Was Ineffective During The Guilt Phase In Violation Of The Sixth, Eighth And Fourteenth Amendments When Trial Counsel Failed To

Investigate And Challenge The State's Case Or To Retain Experts And Develop Evidence To Assist Mr. Doorbal At Trial. As A Result Of Personal Conflicts And Crises, Trial Counsel Failed To Investigate Claims Of Innocence Pertaining To The Schiller Counts, Develop Defenses To Attempted First Degree Murder And Kidnapping, And To Engage Experts To Examine Evidence And Testify About Evidence That Supports Claims Of Innocence. Trial Counsel Was Rendered Ineffective By The Trial Court's And State's Actions. Mr. Doorbal Is Entitled To Conflict Free Counsel And A New Trial.

Claim IX

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Counsel Was Ineffective During The Guilt Phase In Violation Of The Sixth, Eighth And Fourteenth Amendments When Trial Counsel Failed To Investigate And Challenge The State's Case Or To Retain Experts And Develop Evidence To Assist Mr. Doorbal At Trial. As A Result Of Personal Conflicts And Crises, Trial Counsel Failed To Investigate Claims Of Innocence Pertaining To The Griga/Furton Counts, Develop Defenses To First Degree Murder And Engage Experts To Examine And Testify About Evidence That Supports Claims Of Innocence. Trial Counsel Was Rendered

Ineffective By The Trial Court's And State's Actions. Mr. Doorbal Is Entitled To Conflict Free Counsel And A New Trial.

Claim X

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Attorneys Were Ineffective During The Guilt And Penalty Phases In Violation Of The Sixth, Eighth And Fourteenth Amendments When Neither Of Mr. Doorbal's Court Appointed Counselors At Law Properly Proffered Letters Written To Mr. Doorbal By Co-Defendant Daniel Lugo. Trial Counsel Were Rendered Ineffective By The Trial Court's And State's Actions. Mr. Doorbal Is Entitled To A New Trial, Or In The Alternative, A New Sentencing Phase.

Claim XI

Mr. Doorbal Was Denied His Rights Under Ake V. Oklahoma At The Guilt And Penalty Phases Of His Capital Trial, When Counsel Failed To Obtain An Adequate Mental Health Evaluation And Failed To Provide The Necessary Background Information To The Mental Health Consultant In Violation Of Mr. Doorbal's Rights To Due Process And Equal Protection

Under The Fourteenth Amendment To The United States Constitution, As Well As His Rights Under The Fifth, Sixth, And Eighth Amendments.

Claim XII

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Counsel Was Ineffective During The Penalty Phase In Violation Of The Sixth, Eighth And Fourteenth Amendments. Trial Counsel Was Rendered Ineffective By The Trial Court's And State's Actions. Trial Counsel Failed To Adequately Investigate And Prepare Mitigating Evidence, Failed To Provide The Mental Health Experts With This Mitigation, And Failed To Adequately Challenge The State's Case. Counsel Failed To Adequately Object To Eighth Amendment Error. Counsel Failed To Object To Egregious Prosecutorial Conduct During The State's Closing Argument Where The State Improperly Invoked The "Golden Rule." Counsel's Performance Was Deficient, And As A Result, Mr. Doorbal's Death Sentence Is Unreliable.

Claim XIII

Mr. Doorbal Was Denied His Right To Consular Access As A Citizen Of Trinidad And Tobago In Violation Of International Treaties. Mr. Doorbal's

Counsel Was Ineffective When Counsel Failed To Secure Consular Access And When It Failed To Object To The State's Denial Of Consular Access To Mr. Doorbal.

Claim XIV

Florida's Capital Sentencing Statute Is Unconstitutional On Its Face And As Applied In This Case Because It Fails To Prevent The Arbitrary And Capricious Imposition Of The Death Penalty.

Claim XV

Mr. Doorbal's Convictions And Sentences To Death Are Unconstitutional Under Ring v. Arizona.

Claim XVI

Mr. Doorbal's Sentences To Death Violate The Fifth, Sixth, Eighth, And Fourteenth Amendments Because The Penalty Phase Jury Instructions Were Incorrect Under Florida Law Shifting The Burden To Mr. Doorbal To Prove That Death Was Inappropriate. The Trial Court Employed A Presumption Of Death In Sentencing Mr. Doorbal. Trial Counsel Was Ineffective For Not Objecting To These Errors.

Claim XVII

Mr. Doorbal Is Denied His Rights Under The Eighth And Fourteenth Amendments Of The United States Constitution, The Corresponding Provisions Of The Florida Constitution And Under International Law Because Execution By Electrocution And/Or Lethal Injection Is Cruel And Unusual Punishment.

Claim XVIII

Mr. Doorbal Was Denied His Sixth Amendment Right To Counsel And His Trial Counsel Was Ineffective During The Guilt Phase In Violation Of The Sixth, Eighth And Fourteenth Amendments When Trial Counsel Failed To Successfully Move For Severance Of Claims, Severance Of Defendants And Bifurcation Of Juries. The Trial Court Erred In Denying Mr. Doorbal's Motion for Severance of Defendants. Mr. Doorbal is Entitled a to New Trial.

Claim XIX

In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments To The U.S. Constitution, Mr. Doorbal Was Denied His Right To A Fair Trial When The Trial Court Denied Mr. Doorbal's Motion For A 30 Day Continuance When Trial Counsel's Father Died Immediately Before Trial,

When It Denied Trial Counsel's Motions To Withdraw Due To Financial Hardship And Conflicts Of Interest, When It Denied Motions To Suppress Illegally Seized Evidence, When It Denied Mr. Doorbal's Motion To Admit Into Evidence Letters Written By Co-Defendant Lugo To Mr. Doorbal, When It Denied Mr. Doorbal's Motions For A New Trial And When It Denied Mr. Doorbal's Motions To Rule That The Florida Death Penalty Statute, On Its Face And As Applied, Is Unconstitutional. Mr. Doorbal Is Entitled To A New Trial.

Claim XX

Mr. Doorbal Is Denied His First, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution And Is Denied Effective Assistance Of Counsel In Pursuing His Post-Conviction Remedies Because Of The Rules Prohibiting Mr. Doorbal's Lawyer From Interviewing Jurors To Determine If Constitutional Error Was Present.

Claim XXI

Prosecutorial Argument And Inadequate Jury Instructions Misled The Jury Regarding Its Ability To Exercise Mercy And Sympathy, Thereby Depriving

Mr. Doorbal Of A Reliable And Individualized Capital Sentencing Determination In Violation Of The Eighth And Fourteenth Amendments To The United States Constitution. To The Extent Counsel Failed To Request That The Jury Be Instructed That Mercy And Sympathy Are Proper Considerations In The Penalty Phase Of A Capital Murder Trial And When Counsel Failed To Object To The State's Improper Closing Argument Calling For No Mercy. Mr. Doorbal Received Prejudicially Ineffective Assistance of Counsel.

The trial Court summarily denied twenty (20) of twenty-one (21) claims Doorbal alleged in his Initial Rule 3 Motion, granting an evidentiary hearing for only Claim XII.

Doorbal, upon discovering an email evidencing a *Giglio* violation and in a diligent attempt to prepare for an evidentiary hearing on Doorbal's Rule 3 Motion, filed a Motion to Depose the Assistant State Attorneys, (PC-R. 480-482), Motions for a Continuance (PC-R. 673-674), and Demands for Additional Public Records, (PC-R. 156-159, 163-167, 508-511) - all of which were denied by the trial Court. (PC-R. 92, 94, 902, 1156). Without holding an evidentiary hearing, Circuit Court Judge Alex Ferrer denied Doorbal's Rule 3 Motion on February 24, 2005. (PC-R. 782-784). Doorbal filed a Notice of Appeal on the Motion to Vacate Judgments and Sentences of Death on February 25, 2005. (PC-R. 786).

SUMMARY OF ARGUMENT

It is undisputable that Doorbal is entitled to an impartial and neutral decision-maker during the post-conviction appeal process. Where Doorbal's fear is grounded in Judge Ferrer's undetached conduct and in light of Judge Ferrer's testimony at Schiller's federal sentencing hearing that evidences blatant impartiality, Doorbal was denied due process and is entitled to relief.

To the extent to which prosecutorial misconduct, concealment and deception permeated the proceedings that resulted in Doorbal's convictions and sentences of death, relief is warranted. Doorbal asserts the Circuit Court's Order denying discovery through depositions in the present case departs from the essential requirements of the law as the discovery requested is calculated to lead to admissible evidence probative of the ultimate facts underlying Ground IV of Mr. Doorbal's Rule 3.851 motion which raises *Giglio* and *Brady* violations.

The State is prohibited from presenting evidence known to be false and that evidence later learned to be false must be stricken from the record and excluded from evidence at trial. Giglio v. U.S., 405 U.S. 150 (1972). There is substantial evidence the State withheld exculpatory impeachment evidence and knowingly called a crucial witness (Schiller) who testified falsely during Doorbal's trial. Doorbal is entitled to a new trial.

The trial court abused its discretion in striking a substantial portion of Doorbal's Amended Motion. Significant mitigation evidence referenced in Doorbal's Amended Motion, including school and medical records not obtained by trial counsel, could not have been previously discovered through and exercise of due diligence during the post-conviction investigation.

Further, the trial court, abusing its discretion, improperly denied Doorbal's Motion for a Continuance and precluded Doorbal with the necessary time to adequately prepare for an evidentiary hearing.

Subsequently, the trial Court summarily denied Doorbal's Motion and Amended Motion to Vacate Judgments of Convictions and Sentences without an evidentiary hearing. The trial Court's Amended Order summarizes the State's positions on Doorbal's twenty of twenty-one claims and concludes that Doorbal is not entitled to relief without referencing any hearings, transcripts or any part of the record.

STANDARD OF REVIEW

The standard of review of a trial judge's determination on a motion to disqualify is de novo. Mansfield v. State, 911 So. 2d 1160, 1170 (Fla. 2005) (Citations omitted).

On review of an order denying or limiting discovery it is the moving parties burden to show that the trial court abused its discretion. State v. Lewis, 656 So. 2d 1248, 1994 Fla. LEXIS 1566, 19 Fla. L. Weekly S 545, 20 Fla. L. Weekly S 163 (Fla. 1994).

The appellate court applies a mixed standard of review to *Giglio* claims, deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing de novo the application of the law to the facts. Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006).

For *Brady* claims, the reviewing Court considers whether the record does not clearly refute Doorbal's factual allegations concerning withheld statements when determining whether an evidentiary hearing is required. Peede v. State, 748 So. 2d 253, 1999 Fla. LEXIS 1368, 24 Fla. L. Weekly S 391 (Fla. 1999).

Fla.R.Crim.P. 3.850(d) provides that a claim may be denied without a hearing where the motion, files, and records in the case conclusively show that the movant is entitled to no relief. Thus, to support summary denial without a hearing, a trial court must either state its rationale or attach to its order those specific parts of the record that refute each claim presented in the motion. Further, when the trial court denies post-conviction relief without conducting an evidentiary hearing, the Supreme Court of Florida must accept defendant's factual allegations as true to the

extent they are not refuted by the record. However, defendant has the burden of establishing a legally sufficient claim. If the claim is legally sufficient, the Supreme Court must then determine whether the claim is refuted by the record.

This Court applies an abuse of discretion standard to review a trial Court Order denying a Motion for Continuance.

ARGUMENT

ISSUE I

THE APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT JUDGE FAILED TO DISQUALIFY HIMSELF AFTER TESTIFYING IN FEDERAL COURT ON BEHALF OF A MATERIAL WITNESS CONVICTED OF CRIMES HE LIED ABOUT COMMITTING DURING DOORBAL'S TRIAL.

A. Facts

Doorbal's trial Judge, the Honorable Alexander Ferrer, just three weeks after the trial Court denied Doorbal's Motion for a New Trial, testified at Marcello Schiller's Federal sentencing hearing conducted on February 5, 1999, (PC-R. 269-283). Judge Ferrer testified on Schiller's behalf to support Schiller's request for minimum sentencing after he pled guilty to Medicare fraud. (PC-R. 275-283).

Judge Ferrer testified in Federal Court that the Schiller was an "indispensable" witness for the State of Florida in the Doorbal trial. (PC-R. 276). Judge Ferrer provided the following testimony to the Federal Court:

"Mr. Schiller was crucial, of course, to the portion of the case that involved the crimes committed against him. And also those crimes of course laid a predicate for the death penalty which the state was seeking as a result of the Hungarian couple. So he was a crucial witness at both the initial part of the case as

to the crimes he was a victim of, and also to the latter part of the case on the victims." (PC-R. 277).

Judge Ferrer explained to Federal Judge Alan Gold that the State indicated at one of the trial court hearings that Mr. Schiller knew that he was under investigation when he came back from South America to provide testimony at Mr. Doorbal's trial, but that he came back anyway. (PC-R. 281). Judge Ferrer further testified that he believed it was the prosecutors who provided him with information that Mr. Schiller was told he was under investigation. (PC-R. 281). Judge Ferrer, responding to a question posed by Schiller's attorney, Jeffrey Tew, confessed his personal feelings and thoughts about Mr. Schiller and the death penalty case Schiller was involved in to the Federal judge:

"Well, Your Honor, the only thing I can tell you is the same thing I told Mr. Tew. I'm a firm believer that punishment is only punishment if it's imposed by the government or by the state as a result of the crime committed. Generally, I know that your honor was faced with these situations the same way as I am. And an armed robber commits an armed robbery and complains to me that he got shot as a result of the armed robbery by the victim, I generally view it as an occupational hazard. It's not a form of punishment, I don't give any credit for it towards his sentence. For some reason I feel this case is different. I can't tell you why. I don't know a legal reason why. I know that we can consider anything at

sentencing. This case was a very emotional case to sit through. It still bothers me to some extent. And I know that if things were just black and white, they could have computers do our jobs. But there's something intangible about this case that makes me feel like what he went through should be given some credit, because I don't think it could have been any worse if he was a prisoner of war." (PC-R. 282-283).

Judge Ferrer, while clearly still moved by the experiences Schiller testified about at Doorbal's trial, nevertheless failed to report to the Federal Court that Schiller denied having any involvement in Medicare fraud when he testified during sworn depositions prior to trial. (PC-R. 336-341). Judge Ferrer also withheld critical information from the Federal Court when he neglected to testify that Schiller committed perjury when Schiller lied under oath at Doorbal's death penalty trial. (PC-R. Trial). Even though Judge Ferrer was not asked by Attorney Tew if Schiller lied about his involvement in Medicare fraud during Doorbal's trial, Judges have a duty of candor that should have compelled Judge Ferrer to tell the whole truth about Schiller's role as a crucial and indispensable material witness. Judge Ferrer made it clear to the Federal Court that although Schiller plead guilty to one count of Medicare fraud, (one of the 23 counts charging Schiller in a Medicare fraud scheme where $14 million dollars was stolen,) (PC-R. 367-397), armed robbery and white-collar crime require different standards of

punishment when those involved in the crime turn on each other. Judge Ferrer's plea for leniency and his concern for a person he perceived to be a prisoner of war demonstrates an impassioned relationship with an adversarial material witness in Doorbal's cause. Judge Ferrer's testimony at Schiller's Federal Sentencing hearing crosses the line of judicial ethics required for neutrality.

There is no record that any notice of Judge Ferrer's testimony, presumably arranged and prepared ***prior*** to Judge Ferrer's ruling on Doorbal's Motion for a New Trial,[8] was provided to Doorbal's counsel. In the State's Response to Doorbal's Motion for a New Trial, however, there is some evidence that the State had prior notice because of a peculiar and remarkable unsolicited footnote it provided in a brief disclaimer stating that no **prosecutor** had ever agreed to testify on Mr. Schiller's behalf, nor had any prosecutor been contacted by the U.S.

[8] During an informal interview conducted by undersigned counsel with Mr. Schiller's attorney, Mr. Tew revealed that while no records are available that document when Judge Ferrer was first contacted, federal prosecutors are entitled to a witness list at least thirty (30) days prior to a sentencing hearing. This time frame places communications between Schiller and Judge Ferrer prior to Judge Ferrer's ruling on Doorbal's Motion for a New Trial.

Attorney or Schiller.[9] (R. 3770).

Doorbal's initial post conviction counsel filed a Motion to Disqualify Judge on March 28, 2003, requesting that Judge Ferrer recuse himself and refrain from participating in further proceedings. (PC-SR. 7-19). Judge Ferrer denied Mr. Doorbal's Motion without a hearing on May 2, 2003, (PC-R. 82), after the State filed a Response on April 29, 2003. (PC-SR. 20-31).

B. Standard of Review

The standard of review of a trial judge's determination on a motion to disqualify is de novo. Mansfield v. State, 911 So. 2d 1160, 1170 (Fla. 2005).

C. Argument

[9] It is peculiar because, even when a State witness provides testimony as part of plea bargain, which was not the case with Schiller as far as it known, prosecutors do not testify at their sentencing hearings and there is no is generally no need for a disclaimer denying such factors.

In Mr. Doorbal's timely filed Motion,[10] Doorbal asserts that Judge Ferrer's conduct in Federal court on behalf of Schiller justifies Doorbal's fear that the Judge cannot be neutral during this post-conviction appeal process. (PC-SR. 19). Mr. Doorbal alleges that Judge Ferrer has demonstrated bias when he testified on behalf of Mr. Schiller, not merely reporting Schiller's demeanor as asserted, but also providing personal opinions about the impact of the trial process on himself and drawing a analogy of Schiller as a prisoner of war.

The State's advice to the Judge that he need not disqualify himself is seriously flawed. While the State attempts to divert attention away from the issue at hand by citing law that allows a Judge to comment on the performance of an attorney, which has nothing to do with Mr. Doorbal's concerns and is not

[10] CCRC filed the Motion to Disqualify Judge Ferrer within 10 days after first reading an archived article in Miami News Times, as part of its orientation and initial research in the case, a news article that had been published three years earlier. The State's argument that the Motion is untimely is mistaken since it wrongly assumed that the article was found or read on the day that CCRC was appointed or that other attorneys who had previously represented Mr. Doorbal even knew about the article. The State, referencing the transcript of the Federal court sentencing hearing, alternatively and presumably, may have known about the Judge's testimony.

analogous to a judge testifying on behalf of a material witness in a case before him, the State is unable to alleviate Mr. Doorbal's justifiable fear. Judge Ferrer, an experienced Judge, was fully aware prior to testifying on Schiller's behalf that Mr. Doorbal's case would return to him for post-conviction proceedings if the Florida Supreme Court affirmed Mr. Doorbal's Judgments of Convictions and Sentences.

Doorbal, after reading Schiller's Federal sentencing transcripts, feared that Judge Ferrer could not and would not be fair and impartial. Judge Ferrer identified Mr. Schiller's experience as being so horrific that it seemed similar to that of a prisoner of war.

Given Schiller's criminal proclivities and activities, however, it is unreasonable and essentially insulting to compare the violence he experienced at the hands of other criminals that he had a relationship with to that experienced by heroic prisoners of war. Nevertheless, the extent to which the Doorbal case still bothered Judge Ferrer when it came back to him on post-conviction proceedings was never discerned because Ferrer denied Doorbal's Motion to Disqualify himself without a hearing.

Doorbal's Motion to Disqualify Judge cites Marshall v. Jericho, Inc., 446 U.S. 238, 242 (1980) to emphasize Doorbal's right to due process and it recognizes the basic constitutional precept of a neutral and detached judiciary. (PC-SR. 14-15).

It is undisputable that Doorbal is entitled to an impartial and neutral decision-maker during the post-conviction appeal process. Where Doorbal's fear is grounded in Judge Ferrer's undetached conduct and in light of Judge Ferrer's testimony at Schiller's federal sentencing hearing that evidences blatant impartiality, Doorbal was denied due process and is entitled to relief.

D. Relief is Warranted

Doorbal should be granted a new trial by this Court. The Judge's unethical and unprofessional conduct while the Doorbal case, and particularly the Motion for New Trial was before him, casts more than a looming doubt that Doorbal received a fair trial with a neutral judge. Even if this Court rejects the argument that Doorbal did not receive a fair trial on this issue alone, it is inconceivable that Judge Ferrer's decision to deny Doorbal's post-conviction Motion to Disqualify Judge can stand. Although Judge Ferrer is no longer a Judge in the Circuit Court, it is not a moot point given that all of Judge Ferrer's rulings in post-conviction proceedings were clearly tainted with bias and impartiality. Doorbal, if denied a new trial by this Court, in the alternative requests that this cause be remanded to Circuit Court where he can file a new Rule 3 Motion and litigate it in its entirety before a neutral judge.

ISSUE II

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO DEPOSE ASSISTANT STATE ATTORNEYS IN LIGHT OF EVIDENCE DISCOVERED IN PUBLIC RECORDS THAT REVEALS PROSECUTORIAL MISCONDUCT. FURTHER, THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT AN EVIDENTIARY HEARING TO ADDRESS APPELLANT'S CLAIM THAT A *GIGLIO* VIOLATION DEPRIVED HIM OF DUE PROCESS AND A FAIR TRIAL.

A. Introduction

When Doorbal filed his Rule 3.851 Motion in Circuit Court on June 15, 2004, he also filed a Motion to Depose Assistant State Attorneys due to an email discovered in the ASA's public records forwarded to post-conviction defense counsel from the Repository for post-conviction review. (PC-R. 480-82, 334).[11] The above-referenced email, dated October 31, 1996, was a communication between Assistant State Attorney (ASA) Gail Levine and her supervisor, ASA Michael Band. (PC-R. 334). The email clearly states that Levine was concerned about the Federal Government's decision to offer co-defendant Jorge Delgado a plea offer that might undermine her case against Doorbal at trial. (PC-R. 334). An

[11] Doorbal, through undersigned counsel, found only three (3) emails in more than 140,000 pages of documents placed on thirteen (13) CD's by the Repository.

excerpt of the email contains the following confession and Levine's plea for guidance:

"Alicia Valle AUSA called and told me the[y] got the ***flip in N.J.*** (Emphasis added.) They do **NOT** need Delgado to make the case. BUT, Jack Denaro came to her office and asked her for a plea and she is thinking about making it CONCURRENT. Just what I don't want. Last week when I spoke with Ms. Rundle about the Natale matter, she told me to make sure that the Feds did not mess me up. That they can just wait because our case is so much more important. She told me whatever help I needed she would do. I thought that if *we gave the Feds more info* so they didn't need Delgado that they would give him consecutive time. (Emphasis added.) I really think that we need to stand firm on this even if you or Ms. Rundle have to call the powers to be over there. They just seem they will plead anyone out---But Schiller. That's the only person they care about even though Delgado is in this for over a million. By the way the deal will also save his entire family. He is looking worse and worse for me. Do the words Sal and Willie mean anything to them?? I rather he be pending charges when I try the case than this cush deal. I, of course, appreciate your guidance in these matters." (PC-R. 334).

Although the State ASA's repeatedly claimed that they had no communication with Assistant U.S. Attorney's and had no knowledge regarding

Schiller, (), the trial court denied Doorbal's Motion to Depose the ASA's concerning their investigation of Schiller and his accomplices, the evidence that the State ASA's provided to the Federal Government so that the AUSA would not need Delgado to convict Schiller, and their communications with Schiller and the Office of the United States Attorney. (PC-R. 883-914). In Doorbal's Motion, he alleged that the State was not simply withholding *Brady* evidence but had actually committed a *Giglio* violation by knowingly presenting false testimony to Doorbal's jury when calling Schiller to testify. Doorbal filed an Interlocutory Appeal on this issue in this Court and the Appeal was dismissed without prejudice on November 3, 2004. Doorbal subsequently filed a Motion for Rehearing in the Circuit Court, and was again denied the opportunity to depose ASA's. During a Huff hearing on November 16, 2004, the trial court summarily denied Doorbal's Claim IV in his Rule 3 Motion that squarely laid out the *Giglio* issue. (PC-R. 931-1058). In the trial Court's Amended Order denying Doorbal relief, Judge Ferrer stated: "Claim IV is procedurally barred as the matter could have been raised on direct appeal because it was the subject of a Motion for New Trial. Moreover, the allegation of Schiller's involvement in Medicare fraud, and possible upcoming federal prosecution, was addressed throughout the trial and by all defense counsel as a virtual certainty. It is untenable for counsel to now suggest that his ultimate Federal prosecution was a Brady violation." (PC-R. 783).

Preliminarily, then, it must be clearly stated that Doorbal respectfully asserts that no where in the record will this Court find that counsel ever suggested that Schiller's "ultimate Federal prosecution was a Brady violation." On the contrary, counsel was very precise and articulate in alleging that the State committed a *Giglio* violation when it knowingly presented Schiller's false testimony to the jury. Doorbal is neither stating that the State knew Schiller was guilty of medicare fraud, since Schiller had not yet been adjudicated at the time of Doorbal's trial, and, in the law, guilt is a legal term, nor that the defense was wholly unconscious of Schiller's alleged unlawful activity, since it was in part the alleged motive for the crimes against him. **The defense's knowledge of Schiller's unlawful activity does not mitigate the State's misconduct of knowingly presenting false testimony at Doorbal's trial, however.**

While the State was successful in obfuscating Doorbal's claim and two distinct *Brady* and *Giglio* violations before trial court Judge Ferrer, Doorbal requests that this Court carefully review the evidence presented to the Circuit Court that substantiates support for litigating the *Giglio* claim. Further, only when the State forwarded more than sixty (60) boxes to the Repository in 2003 did Doorbal have an opportunity to discover the evidence supporting Doorbal's Motion to Depose Assistant State Attorneys to determine, not **whether they knew that they were presenting false testimony** in violation of *Giglio* at Doorbal's trial, but rather

how and where their information came from.

The trial Court refused, nevertheless, to address the *Giglio* violation asserted in Doorbal's Rule 3 in its Amended Order. Furthermore, the trial Court has misapprehended the feasibility of Doorbal's appellant counsel to raise the *Giglio* claim on direct appeal given the fact that the email communication used as evidence was not provided to the defense until the post-conviction proceedings began. Because Doorbal's appellate counsel did not have the *Giglio* violation evidence, appellate counsel neither could have nor should have raised or discussed the *Giglio* violation on direct appeal. Appellant counsel's failure to raise or discuss the issues presented in Doorbal's Motion for New Trial are appropriately addressed in Doorbal's Petition for Writ of Habeas Corpus.

B. Facts

Due to the length of Doorbal's trial proceedings, the following timeline was created to provide some framework for the more significant and relevant facts:

On March 17, 1995, Schiller and his wife, Diana, signed a document titled, "Agreement," specifically stating, among other concerns, that if their money is returned that they will not "blackmail" Jorge Delgado, Danny Lugo or John Mese. (PC-R. 413-414). On December 7, 1995, when Mr. Schiller was deposed in this

cause, he refused to answer questions related to his involvement in Medicare fraud questions. (PC-R. 286-319).

On July 18,1996, Don Jones, an attorney representing Mr. Jorge Delgado, a co-defendant in Mr. Doorbal's case, made a sworn statement, (PC-R. 321-332), providing the State Attorney with evidence that seemed to conflict with information or evidence provided to the Office of the State Attorney, according to Ms. Levine's email dated October 31, 1996. (PC-R. 334).

In the October 31, 1996, email, Assistant State Attorney Gail Levine sent Assistant State Attorney Michael Band reveals that an Assistant U.S. Attorney, Alicia Valle, called her to tell her about "a flip in NJ" and other significant matters addressed above. (PC-R. 334).

On October 23, 1997, at a pretrial hearing where neither one of Doorbal's attorneys were present due to serious family matters, the trial Court addressed the issue of the Federal investigation being conducted against Marcelo Schiller and Jorge Delgado, **but the State failed to disclose information and evidence contained in her email to ASA Michael Band referenced above and concealed the fact that the State was engaged in coordination of events and communications with the Office of the U.S. Attorney pertaining to the investigation of Schiller.** (T. 2358-2442). Counsel for Co-defendants Delgado and Raimondo were present at the hearing and reported that they were quite aware

of a Federal investigation of Schiller being conducted, even predicting that Schiller would be indicted following the Doorbal trial. (PC-R. 407-409). The State remained moot on the issue.

On January 8, 1998, at a subsequent pretrial hearing where Mr. Natale, Doorbal's trial counsel, was again unable to be present due to serious family matters, the State, on the eve of Mr. Doorbal's trial continued to withhold the information and evidence contained in the above-referenced email. (PC-R. 439-479).

On February 23, 1998, Mr. Schiller was deposed via telephone and was asked four (4) questions, per the trial court's Order, where Schiller denies any involvement in Medicare fraud. (PC-R. 336-341). On March 9, 1998, the State called Schiller to testify against Doorbal and Schiller denied any involvement in Medicare fraud. (T. 7278-7765). Schiller, whose testimony was "crucial" and "indispensable" to the State's case against Doorbal, according to Judge Ferrer,[12] testified falsely with impunity and without reproval. Schiller, testifying to material facts in the case, that is, possible motives for crimes committed against him, presented a false front to Doorbal's jury as the State stood silently by despite their knowledge that Schiller was lying.

[12] Please see **Issue I** referenced above for further clarification.

On April 9, 1998, Mr. Delgado was deposed. (PC-R. 343-365). On April 15, 1998, the State called Jorge Delgado to testify and he told the trial court and jury that the motive for the abduction of Mr. Schiller was that Mr. Schiller had cheated him in a scheme to defraud Medicare, criminal activity that they were both involved in. (T. 11594-12163).

On May 5, 1998, Mr. Doorbal was convicted of all crimes charged in this cause, and the State proceeded to conduct a penalty phase seeking death.

On May 27, 1998, a 23-count Indictment alleging that Mr. Schiller defrauded Medicare was filed. (PC-R. 367-397). On July 8, 1998, Mr. Schiller returned to Miami from South America to testify at a Penalty Phase Spencer hearing before the trial court. Following Schiller's testimony that his "work" had been destroyed and that he wanted the defendants removed from society, even though he could not and did not identify Mr. Doorbal as being involved, he was arrested on the Courthouse steps after exiting the building. (T. 14453-14508).

On July 15, 1998, six days after the indictment was unsealed and made public, Assistant State Attorney Gail Levine claimed, in the alternative, in the telephone conference prior to sentencing "I am prohibited by Federal law to talk about a sealed indictment. That's what this was and they think that they have a *Brady* violation, they are absolutely wrong. This is a stall tactic."

The prosecutor continued to claim that she did not know of the investigation of Schiller *and* that if she did, "The State was precluded by Federal Rule 6E from disclosing a sealed Indictment to anyone, including Schiller." (State's Response attached) The State did *not* admit that they had in fact, had knowledge from the United States Attorneys Office that Schiller was a target.

The authority cited by the State, "Federal Rule 6E", does not exist. The State may have been referring to Rule 6 (e) (2), which states the Grand Jury General Rule of Secrecy. The rule in part states, "an attorney for the Government, or any person to whom disclosure is made under subsection (3)(A)(ii) of the subdivision shall not disclose matters occurring before the grand jury." The rule goes on to state, however, in section (4) that the "indictment be kept secret *until the defendant is in custody or has been released pending trial."*

The Defendant in the Federal case, Schiller, was taken into custody on July 8, 1998, and the Indictment was unsealed on July 9, 1998. Upon the unsealing, the State was released from the obligations in the Rule and was, at that moment, required to respond with candor to the tribunal. The State did not, and has not to this day, come clean to the fact that they were aware of and assisted in the Federal investigation but were unable to reveal it until unsealing.

The State argued against granting Defendant Doorbal's counsel the time to investigate because the State was concerned counsel would uncover evidence that

should have been available for mitigation purposes during the penalty phase. The trial court made it clear in a telephone conference on July 14, 1998, that if Defendant 'find(s) and evidence of this impropriety or any reason to revisit the issue, and I will listen to you at that time." Now that the evidence of prosecutorial impropriety has been uncovered, defense counsel moves to have the sentencing set aside and a new sentencing hearing held.

Doorbal's Motion for New Trial was filed on July 27, 1998. (R. 3495-3499). A Notice of Appeal was filed on August 12, 1998. (R. 3659).

On November 2, 1998, Doorbal's trial counsel filed a Motion in the Florida Supreme Court to Remand for an Evidentiary Hearing pending a Motion for New Trial based on Newly Discovered Evidence. (PC-R. 399-402).

The State filed its Response to Doorbal's Motion to Remand on December 17, 1998, and it continued to deny that it was withholding Brady material from Doorbal stating caustically that Doorbal knew that a federal investigation of Schiller was being conducted and it referenced an October 23, 1997, hearing that neither one of Mr. Doorbal's attorneys attended or participated in. (PC-R. 404-411). The State failed to inform the trial Court about its communication and exchange of information, however, with the Office of the U.S. Attorney.

On January 11, 1999, the State filed a Response to a Motion for New Trial stating that neither "the State nor any of its agents were ever made privy to any

Federal investigation or its evidence against Marcelo Schiller" but that it was provided information by Mr. Delgado's counsel that Mr. Delgado was a target of the same Medicare fraud scheme. In a revealing, but disturbing footnote, the Response states that none of the Assistant State Attorneys have been contacted by the U.S Attorney or by "Defendant" Schiller, and none of the Assistant State Attorneys intend to testify at the sentencing proceeding. (R. 3769-3774).

Upon remand to the trial court on December 23, 1998, by the Florida Supreme Court, Mr. Doorbal's Motion for a Richardson hearing and for a New Trial was scheduled for a hearing on January 13, 1999. (R. 3842-3886).

On January 13, 1999, the trial court conducted a hearing (which the Judge refers to as a Richardson hearing) where Assistant State Attorney Levine states that she "had **absolutely no information about the Federal investigation** except for the fact that they were speaking to Mr. Delgado and Mr. Delgado was telling me he committed the Medicare Fraud with Mr. Schiller and those were the conversations that I had and that I shared with the Federal Government that they knew which made Mr. Schiller in my mind what I knew was the same thing that the defense knew exactly." (R. 3912-3954).

At the hearing conducted on January 13, 1999, ASA Levine also states that she had no idea that Schiller would be found guilty or plead guilty to Medicare fraud, but **she did not reveal to the trial court that she knew Schiller testified**

falsely at the Doorbal's trial. (R. 3948-3949). Levine stated that she essentially left the door open for the jury to disbelieve Mr. Schiller's testimony about his involvement in Medicare fraud. (R. 3948).

The trial court denied Mr. Doorbal's Motions for a New Trial and to conduct discovery on January 13, 1999, stating that even assuming that the State committed a discovery violation, the violation was not intentional and it did not prejudice the defense "in any way shape or form." (R. 3952). During the hearing, Judge Ferrer asked defense counsel if the State was supposed to "tape screws in Mr. Schiller's thumbs" to force him to tell the truth.

The answer to Judge Ferrer is apparently "no" since Schiller plead guilty to one count of Medicare fraud and was sentenced to a lenient prison term courtesy of Judge Ferrer's testimony. Mr. Schiller's Federal sentencing hearing was conducted on February 5, 1999, just three weeks after the trial Court denied Mr. Doorbal's Motion for a New Trial, and Mr. Doorbal's trial Judge, the Honorable Alexander Ferrer, testified on Mr. Schiller's behalf to support minimum sentencing.[13]

While Doorbal's Direct Appeal counsel, Scott Sakin, failed to raise the *Brady* claim in Doorbal's Direct Appeal, neither Mr. Sakin nor Mr. Doorbal's trial attorneys were provided with the information and evidence contained in ASA

[13] Please see **ISSUE I** herein.

Levine's October 31, 1996, email to ASA Band. To the extent that Mr. Doorbal's trial attorneys or failed to investigate the raise or preserve the *Giglio* claim and *Brady* claims for further review, Doorbal received ineffective assistance of counsel.

On July 9, 2004, following a post-conviction investigation, Doorbal learned through a defense investigative report and a review of U.S. District Court files that the "flip" the State referred to in its October 31, 2004, never before disclosed to Doorbal, was John Mathewson, and not Gloria Vasquez as represented to the Court during the July 9, 2004, hearing. (PC-R. 883-914).

Claim IV of Doorbal's Rule 3.851 Motion asserted Doorbal was denied a fair trial when the State concealed material that would have provided him an opportunity to effectively impeach Schiller when Schiller lied in depositions and during trial testimony before court and jury, **and** that Doorbal was denied his constitutional rights under *Giglio* when the State intentionally called a witness to testify that the State knew was committing perjury and then failed to disclose to the jury, to the trial court and to Doorbal, specifically, that Schiller testified falsely to a material fact.

Doorbal's Motion to Depose ASA's (referenced above) was denied and

during a *Huff* hearing on November 16, 2004, (also referenced above), the trial court summarily denied Doorbal's Claim IV in his Rule 3 Motion that squarely laid out the *Giglio* issue. (PC-R. 931-1058).

To the extent to which prosecutorial misconduct, concealment and deception permeated the proceedings that resulted in Doorbal's convictions and sentences of death, relief is warranted. Doorbal asserts the Circuit Court's Order denying discovery in the present case departs from the essential requirements of the law as the discovery requested is calculated to lead to admissible evidence probative of the ultimate facts underlying Ground IV of Mr. Doorbal's Rule 3.851 motion which raises *Giglio* and *Brady* violations.

C. Standard of Review

On review of an order denying or limiting discovery it is the moving parties burden to show that the trial court abused its discretion. State v. Lewis, 656 So. 2d 1248, 1994 Fla. LEXIS 1566, 19 Fla. L. Weekly S 545, 20 Fla. L. Weekly S 163 (Fla. 1994).

The appellate court applies a mixed standard of review to *Giglio* claims, deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing de novo the

application of the law to the facts. Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006).

For *Brady* claims, the reviewing Court considers whether the record does not clearly refute Doorbal's factual allegations concerning withheld statements when determining whether an evidentiary hearing is required. Peede v. State, 748 So. 2d 253, 1999 Fla. LEXIS 1368, 24 Fla. L. Weekly S 391 (Fla. 1999).

D. Argument

The trial court's refusal to allow the taking of ASA depositions for a post-conviction evidentiary hearing that was reasonably calculated to lead to admissible evidence that the State obtained Doorbal's convictions and sentences through the knowing use of false testimony before the trial jury and sentencing court (especially in view of the fact that the requested depositions are of the assistant state attorneys alleged to have committed the violations) departs from the essential requirements of the law and denies Mr. Doorbal basic rights under Art. I, §§ 9 and 16(a), Fla. Const., and the Sixth and Fourteenth Amendments to the United States Constitution.

The law is clear that the State is prohibited from presenting evidence known to be false and that evidence later learned to be false must be stricken from the record and excluded from evidence at trial. Giglio v. U.S., 405 U.S. 150 (1972). At

bar, where there is substantial evidence the State withheld exculpatory impeachment evidence and knowingly called a crucial witness who testified falsely, Doorbal had a right to review the records that would disclose the State's misconduct–and to have his case decided without reference to such prejudicial matter. Giglio v. U.S.; Strickler v. Green, 527 U.S. 263 (1999); U.S. v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995).

Both this Court and the United States Supreme Court have consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Giglio; Napue v. Illinois, 360 U.S. 264 (1959). *Accord* Mooney v. Holohan, 294 U.S. 103 (1935); Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003); Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269. In each of these cases, a strict standard of materiality was applied, "not just because they involve prosecutorial misconduct, but because they involve a corruption of the truth-seeking function of the trial process." U.S. v. Agurs, 427 U.S. 97, 104 (1976).

Doorbal's Motion to Depose Assistant State Attorneys should have been granted by the trial court to investigate the context and content of evidence that the

State committed *Giglio* and *Brady* violations before, during and after Doorbal's trial. State attorneys and their assistants may testify as witnesses in postconviction evidentiary hearings raising Brady violations. Scott v. State, 717 So.2d 908 (Fla. 1998). Ground IV of the Rule 3.851 Motion alleges violations of *Brady* and *Giglio*, which go to the heart of the prosecution reveal prosecutorial misconduct.

Thus, to ensure that the Defendant, Noel Doorbal, receives a full and fair opportunity to pursue his Brady and Giglio claims with evidence of covert acts and omissions, it is fundamentally fair that Doorbal be afforded an opportunity to engage in reasonable discovery, deposing the State functionaries alleged to have concealed exculpatory evidence and/or to have knowingly presented perjured testimony.

The defendant in Randolph v. State, 853 So.2d 1051 (Fla. 2003), for example, claimed on appeal of the denial of his capital postconviction motion that he had been denied a full and fair evidentiary hearing as the postconviction court had denied his motion to depose prosecutors whom the motion alleged had engaged in prohibited *ex parte* communications. Recognizing the necessity of creating an adequate evidentiary record upon which to rest its ruling, this Court relinquished jurisdiction with instructions for the post-conviction court to allow the depositions be taken:

> This motion requested permission to depose State Attorney John Tanner, Assistant State Attorney Sean

> Daly, and Circuit Court Judge John Alexander. By this Court's order dated December 22, 2000, we relinquished jurisdiction to the post-conviction court, directing that Randolph be granted leave to depose Tanner, Daly, and Alexander. Therefore, Randolph's claim has been resolved, he has received the discovery he requested, and he has not been denied a full and fair evidentiary hearing on this ground.

Randolph v. State, 853 So.2d at 1061-1062.

In deciding whether to allow discovery, the court must consider: (1) the issues presented, (2) the time elapsed between conviction and post-conviction hearings, (3) any burden placed on the other party or witnesses, (4) alternative means of securing the evidence, and (5) other relevant facts. State v. Lewis, 656 So.2d 1248 (Fla. 1994).

In reviewing the trial court's denial of Doorbal's Motion for Rehearing and/or Reconsider granting Doorbal's Motion to Depose Assistant State Attorneys, Doorbal requests that this Court consider the factors in Lewis, the issues presented and the evidence Doorbal presents demonstrating that State engaged in *Giglio* and *Brady* violations:

1. The issue presented is whether (and why) the present and former Assistant State Attorneys knowingly withheld material evidence, including the existence of a "flip" from New Jersey and Schiller's involvement in Medicare Fraud from Mr. Doorbal, the trial court and the jury prior to Mr. Doorbal convictions and sentences to death, and to what extent that State had knowledge that Mr. Schiller testified

falsely during Mr. Doorbal's trial.

2. While nearly 5 years have elapsed between the motion for new trial based on the post-trial emergence of information about Schiller's Medicare Fraud investigation and the present proceedings, Assistant State Attorney Gail Levine, (one of those sought to be deposed,) demonstrated at the July 9, 2004, hearing total recall of what she then represented to be the facts and matters involved at the time they arose.

3. No burden will be placed on these persons beyond that which is placed on all deponents sworn to tell the truth.

4. There is no alternative means of securing the evidence sought to be obtained at deposition where it is the very facts and circumstances surrounding the ***concealment*** of such matters that the requested depositions seek to develop.[14]

5. It is relevant that the Defendant in this case has an email communication authored by one of the Assistant State Attorneys sought to be deposed, indicating the other persons sought to be deposed had knowledge of matters they have repeatedly previously claimed to have no knowledge and no communications regarding Schiller.

[14] Prior court testimony reveals that Mr. Tew, Schiller's attorney, is unable to provide evidence due to Mr. Schiller's objections citing attorney-client privilege.

The State had numerous opportunities over a period of several years, at least between October 31, 1996, and January 1998, to provide Doorbal and the trial court with information and evidence that would enable Doorbal to impeach Mr. Schiller **with evidence the State had provided the Office of the U.S. Attorney so that it would not need Delgado's testimony to convict Schiller.** Schiller, during depositions and at Doorbal's trial continued to present false testimony about his involvement in Medicare fraud as the State stood, not silently by, but repeatedly denied having any communication with Federal government prosecutors or Schiller.

Further, at Doorbal's trial, the State had numerous opportunities to inform Doorbal's jury and Doorbal's presiding Judge that Schiller was lying about his involvement in Medicare fraud, a material fact that served as the motive for Delgado's plan to exact revenge and compensation when Delgado believed he was being cheated in the medicare fraud scam. Again and again, the State stood moot on the topic to secure Schiller's testimony at any cost and mocked the justice process by telling the jury they could believe or not believe evidence – knowing full well that it, the State, had presented knowingly false evidence.

Doorbal's right to due process and a fair trial, therefore, was denied the State further deprived Doorbal of his constitutional rights under *Giglio* where the State intentionally, knowingly and willingly called a witness to testify that the State

knew was committing perjury, and where the State specifically presented false testimony of a material fact.

Further, Doorbal's right to due process a fair trial was denied when the State deprived him of *Brady* material that would have provided Doorbal with the opportunity to impeach Schiller with evidence the State concealed and continues to disavow knowledge despite what tantamount to be a confession in ASA Levine's October 31, 1996, email.

This Court cannot condone, excuse or minimize the unethical and unprofessional conduct that the State engaged in when it allowed a witness (Schiller) to testify falsely, and knowingly allow false testimony against the defendant to go uncorrected. Giglio v. United States, 405 U.S. 150 (1972). A Giglio violation occurs when: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Ventura v. State, 794 So. 2d 553 (Fla. 2001); Rose v. State , 774 So. 2d 629 (Fla. 2000); Guzman v. State 868 So. 2d 498 (Fla. 2003).

Once Doorbal established the prosecutor knowingly presented false testimony at trial, the State bears the burden of showing the false evidence was not material. Guzman.

The State must disclose evidence favorable to the defense "where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S.

83, 85 (1963). United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 115 S.Ct. 1555 (1995).

In the present case, false testimony was presented to the jury when Mr. Schiller testified that he was not involved in Medicare Fraud. The prosecutor knew Mr. Schiller's testimony was false.

The false testimony with which Mr. Schiller infected the jury characterized Mr. Schiller as a victim who had not violated the law by engaging in Medicare fraud, material to his accusation of being abducted and tortured. Mr. Schiller's testimony was emotional to sit through for the Judge as well as the jury, and his false testimony denying any involvement in Medicare fraud helped create in jurors' minds the false impression that he was a credible witness and that his testimony was impeachable except by testimony offered by codefendants charged in the above referenced cause, and that the State, if it indeed knew that Mr. Schiller was testifying falsely, would have been obligated to inform the jury, or at least Mr. Doorbal and the Court, of the fact that Mr. Schiller lied about a material fact establishing motive.

Mr. Schiller had good reason to testify falsely at Mr. Doorbal's trial, and the State knew that as well. The State knew that Mr. Schiller was under investigation for Medicare fraud, and the State seems to flip flop on whether it knew that Mr. Schiller was aware of this fact. But, according to a Motion filed on by Mr. Tew,

Mr. Schiller's attorney, attempting to argue that Mr. Schiller would not be a flight risk, Mr. Schiller was aware that he was under investigation when he testified at Mr. Doorbal's trial, and he knew that statements he made at Mr. Doorbal's trial could and would be used against him if he confessed to being involved in Medicare fraud. Mr. Schiller is likely to have assumed, in addition, that if he testified at Mr. Doorbal's trial, and particularly if he failed to come clean with the jury about the Medicare fraud showing that perhaps other he was not an innocent person having milked the government and taxpayers out of $14 million dollars, that his lily white testimony, contradicted only by a co-defendant charged in the case, (Delgado), would favorably impact the State's case and their pursuit of the death recommendations - and justify an invitation to the State and or Court to assist and act favorably on Mr. Schiller's behalf when (not if) the investigation resulted in an Indictment.

The federal Indictment **exposing** Schiller's and Delgado's criminal activity, was filed only after Doorbal's jury had rendered a verdict and shows, in conjunction with the October 31, 1996, email, that the State, with knowledge of the evidence used to convict Schiller and Delgado, not only committed a *Giglio* violation but also withheld ***Brady*** material in order to avoid weakening its case against Doorbal, undermining the reliability of his convictions and sentences to death.

As Florida's Supreme Court articulated in Guzman, *supra*: "the proper question under Giglio is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the fact-finder in this case." Guzman. As there is a reasonable likelihood the false testimony at bar could have affected the judgment, a new trial is required.

There can be no doubt the judge and jury found Schiller's testimony credible. Had the State corrected Schiller's false testimony about his criminal activities and the extent to which he had defrauded millions of dollars from Medicare, Schiller's credibility, as well as the State's case (directed against Doorbal, who Schiller had no previous dealings with, and no motive to hurt) would have been significantly weakened.

Furthermore, the Schiller Counts lodged against Mr. Doorbal, as Judge Ferrer told Schiller's Federal sentencing court, laid the predicate for the death penalty.

Doorbal's jury was deceived by the State's actions when it was deprived the jury of the opportunity to know that the State knew that Schiller's testimony was false but that it had assisted Federal prosecutors in providing evidence or information that would lead to Schiller's convictions following Doorbal's trial.

The trial court, in its Amended Order denying Doorbal relief on Claim IV did not address the *Giglio* violation and the Order is, therefore, not supported by competent, substantial evidence.

E. Relief is Warranted

Doorbal is entitled to a new trial and/or a new penalty phase. In the alternative, Doorbal seeks the opportunity to depose Assistant State Attorneys for the reasons stated above to conduct further investigation into *Giglio* and *Brady* violations perpetrated by the State that denied Doorbal due process and a fair trial.

ISSUE III

IN VIOLATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS IN A CRIMINAL PROCEEDING, TWENTY OUT OF TWENTY-ONE FACTUALLY-DISPUTED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, TRIAL ERROR AND PROSECUTORIAL MISCONDUCT WERE SUMMARILY DENIED. DOORBAL IS ENTITLED TO AN EVIDENTIARY HEARING ON ALL TWENTY-ONE CLAIMS.

Doorbal, through undersigned counsel who had been appointed by the trial

Court less than three months earlier,[15] timely filed a Motion to Vacate Judgments of Convictions and Sentences of Death on June 15, 2004. (PC-R. 177-479). After representing Doorbal for nine months since Certiorari was denied by the U.S. Supreme Court, the trial Court, over the State's objection, granted CCRC's Motion to Withdraw due to its inability to staff Doorbal's case with available attorneys. (PC-RS. 32-35, 64-78). Doorbal was advised of CCRC's decision to withdraw and possible implications, but the record is clear that the trial Court did not address this critical matter with Doorbal and ascertain whether Doorbal consented to CCRC's Motion.

Given the fact that Doorbal would have unduly and unfairly been prejudiced if his right to Federal review becomes necessary and his Motion to Vacate was not timely filed to stay Federal proceedings, Doorbal filed a one hundred (100) page Motion with Attachments that cannot be said to be a "shell" motion. Doorbal alleged significant error in twenty-one (21) claims that were supported by substantial allegations and law, and an evidentiary hearing was requested. Doorbal, after filing the initial Motion, began to prepare for a Huff hearing and assiduously attempted to investigate and clarify allegations. Doorbal, after being denied the opportunity to depose ASA's concerning a *Giglio* violation, offered oral

[15] Notice of Appearance as Counsel of Record was filed on April 2, 2004. (PC-R. 97).

argument on his claims at a *Huff* hearing held on November, 16, 2004. (PC-R. 931-1058). During the Huff hearing, the Judge Ferrer, who has previously refused to disqualify himself and had allowed CCRC to withdraw, summarily denied twenty (20) of Doorbal's twenty-one (21) claims. (PC-R. 931-1058). The trial Court granted an evidentiary hearing on Claim XI, a claim alleging:

> Mr. Doorbal Was Denied His Rights Under Ake V. Oklahoma At The Guilt And Penalty Phases Of His Capital Trial, When Counsel Failed To Obtain An Adequate Mental Health Evaluation And Failed To Provide The Necessary Background Information To The Mental Health Consultant In Violation Of Mr. Doorbal's Rights To Due Process And Equal Protection Under The Fourteenth Amendment To The United States Constitution, As Well As His Rights Under The Fifth, Sixth, And Eighth Amendments.

The trial Court denied Doorbal's Motion for Continuance to prepare for the hearing and ultimately summarily denied Claim XI as well. (PC-R. 1173-1203). The trial Court's Amended Order does not reference any part of the record and fails to refute Doorbal's factually-disputed claims.

For all death case post-conviction motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851 requires an evidentiary hearing "on claims listed by the defendant as requiring a factual determination." Fla.R.Crim. P. 3.851(f)(5)(A)(i); see also Amendments to Fla. Rules of Criminal Procedure

3.851, 3.852, & 3.993, 802 So. 2d 298, 301 (Fla. 2001).

Fla.R.Crim.P. 3.850(d) provides that a claim may be denied without a hearing where the motion, files, and records in the case conclusively show that the movant is entitled to no relief. Thus, to support summary denial without a hearing, a trial court must either state its rationale or attach to its order those specific parts of the record that refute each claim presented in the motion. Further, when the trial court denies post-conviction relief without conducting an evidentiary hearing, the Supreme Court of Florida must accept defendant's factual allegations as true to the extent they are not refuted by the record. However, defendant has the burden of establishing a legally sufficient claim. If the claim is legally sufficient, the Supreme Court must then determine whether the claim is refuted by the record. Mungin v. State, 2006 Fla. LEXIS 553, 31 Fla. L. Weekly S 215 (Fla. Apr. 6, 2006).

Doorbal's Motion to Vacate Judgments of Convictions and Sentences Trial court error, prosecutorial misconduct and ineffective assistance of counsel claims in Doorbal's Rule 3 were raised in his Motion to address a pattern of deficient conduct demonstrated by counsel and because this Court was forced to apply a fundamental error analysis when reviewing unpreserved claims raised on Doorbal's direct appeal.

In this case, the trial Court summarily denied Doorbal's Claims without an evidentiary hearing and failed to provide this Court with an Order stating its rationale or attaching to its Order those specific parts of the record that refute each claim presented in the motion.

Doorbal requests that this Court remand this cause to the Circuit Court and Order an evidentiary hearing on factually-disputed issues raised in Doorbal's Amended Motion.

ISSUE IV

APPELLANT'S AMENDED MOTION TO VACATE CONVICTIONS AND SENTENCES WAS ERRONEOUSLY STRUCK BY THE TRIAL COURT DEPRIVING APPELLANT OF DUE PROCESS AND A FULL AND FAIR ADVERSARIAL TESTING.

Pursuant to Rule 3.851(f)(4), Doorbal filed a Motion requesting an opportunity to Amend his Motion to Vacate Judgments of Convictions and Sentences along with the Amended Motion to Vacate and Supplemental Attachments. (PC-R. 177-479, PC-SR. 95-401). Doorbal also filed a Motion for Continuance to avoid manifest injustice. (PC-R. 673-674). The foregoing Motions were served via U.S. Mail on January 15, 2005, complying with the Rule after the trial court scheduled, over Doorbal's objection, an evidentiary hearing for February 14, 2005.

Rule 3.851(f)(4) does not specify whether the Amended motion must be **filed** or **served** up to 30 days before the evidentiary hearing; it merely requires that a 3.851 motion may be amended up to 30 days prior to the evidentiary hearing. The trial Court granted Doorbal's Motions as to Claim XI but struck the significant remaining portion of Doorbal's research, investigation and production of evidence that support his Claims.

Upon hearing Doorbal's Motions, the trial court stated that **the date was set** to dispose of the case prior to the end of February because Judge Ferrer was leaving the bench to pursue his new career in television. Doorbal was blindsided by this announcement since no information about Judge Ferrer's departure from the bench had been made and second-hand information led Doorbal to believe that Judge Ferrer would remain on the Circuit Court through the Spring of 2005. The trial Court's decision to leave the bench in February to begin taping his show in Houston at the end of the month, and Judge Ferrer's decision not to allow another Judge to render a ruling on Doorbal's post-conviction Motion place Doorbal is an untenable position and unable to proceed without a Continuance and the opportunity to Amend his Rule 3.

Relief is warranted. The trial court abused its discretion in striking a substantial portion of Doorbal's Amended Motion. See Mungin. Significant mitigation evidence referenced in Doorbal's Amended Motion could not have been

previously discovered through and exercise of due diligence during the post-conviction investigation. Because undersigned counsel, with as much due diligence as one could muster, had barely enough time to read the trial transcripts and prepare the Initial Motion on time, the records, including Doorbal's school and medical records that were found in Trinidad, could not have possibly been discovered and included in the initial petition.[16] Doorbal requests that this Court remand this proceeding to the Circuit Court with an Order directing a new trial judge to conduct an evidentiary hearing on Doorbal's Amended Motion after providing Doorbal an opportunity to adequately prepare.

ISSUE V

THE TRIAL COURT ERRED WHEN IT DENIED A GOOD CAUSE MOTION FOR CONTINUANCE TO PREPARE FOR AN EVIDENTIARY HEARING IN WHAT THE COURT DETERMINED WAS AN EXTRAORDINARY CASE. DOORBAL WAS DENIED DUE PROCESS AND AN EVIDENTIARY

[16] In the one CCRC workbox containing two file folders that were provided to undersigned counsel when CCRC withdrew as counsel of record, there is no evidence that Doorbal's transcript was ever read or any claims were ever developed to investigate. Other than filing Demands for Public Records, the only Motion filed on behalf of Doorbal was the Motion to Disqualify the Trial Judge

HEARING FOR ALL FACTUALLY-DISPUTED CLAIMS IS WARRANTED.

Following a *Huff* hearing on November 16, 2004, (PC-R. 931-1058), where the trial court granted an evidentiary hearing for only one of Doorbal's claims, Claim XI, Doorbal filed a Motion for a Continuance requesting that the trial court allow additional time provided by statute to prepare for and conduct an evidentiary hearing in an extraordinary case. (PC-R. 673-674). Claim XI, raising due process and equal protection violations concerning Doorbal's mental health investigation, by far, is one the most complicated and difficult claims to prepare and present evidence: personal and medical records, past and current test results and expert analysis. Due to ineffective assistance of trial counsel, existing records, including school and medical records needed to be obtained, tests and evaluations needed to be conducted and experts needed to be provided with sufficient background and record information to develop a professional assessment and analysis. Doorbal's post-conviction mental health experts reported to the trial Court that they were unable to complete their review of the relevant records and provide an expert opinion with any certainty on or before the date of Doorbal's scheduled evidentiary hearing. (PC-R. 745-774).

The trial court denied Doorbal's Motion for a Continuance and precluded Doorbal with the necessary time to adequately prepare for the evidentiary hearing. (PC-R. 1173-1203). None of the experts Doorbal engaged to conduct tests, review

records and evaluate him were willing to testify at a hearing to any medical certainty until they were able to complete their work and analyze their findings. (PC-SR. 271-274).

Judge Ferrer, preparing to leave the bench in February 2005, to pursue a career in television that features courtroom drama and comedy, announced that he did not want to pass this case along to another Judge. Although the co-defendant Lugo case was not able to be disposed of by Judge Ferrer, by denying Doorbal the opportunity to admit evidence proving that his trial counsel were ineffective, that the trial court made several errors during his trial and that the prosecutors engaged in prosecutorial misconduct, Doorbal was denied due process because of the personal and skewed professional priorities of a trial judge. While it is not clear when Judge Ferrer made his decision to leave the bench, his rulings on Doorbal's Motions and calendar scheduling evidence a rush to judgment in an extraordinary case that resulted in contradictory, unjustifiable decisions and an abuse of discretion.

For example, Judge Ferrer, in Orders to pay undersigned counsel for preparing the Rule 3 Motion found that the Doorbal case was extraordinary and counsel was entitled to fees and expenses beyond the caps established by statute. While undersigned counsel is not complaining about the trial court's decision regarding a just wage in this cause, it is more than perplexing that the trial court

was not able to grasp the fact that preparing for an evidentiary hearing also required a ruling that the case was extraordinary when it denied Doorbal's Motion for Continuance requesting time that is permitted by statute in extraordinary cases. Rule 3.851. Judge Ferrer apparently knew for quite some time that his contract with the 'Judge Alex' show would require him to set the court's calendar to hear Doorbal within a specific timeframe. Judge Ferrer inappropriately balanced his desire to clear his docket and to dispose of Doorbal's claims with his own personal and professional agenda and timetable. This misplaced judgment by Judge Ferrer is reminiscent of decisions the trial Court made when it denied Doorbal's Motion for New Trial, to testify at Schiller's federal sentencing hearing, to disqualify himself and to ultimately deny Doorbal an opportunity to present evidence on all twenty-one issues raised in his Motion to Vacate Judgment and Sentences to Death.

Relief is warranted. This Court reviews denied Motions for Continuance by discerning whether the trial Court abused its discretion. Doorbal asserts the trial Court should have granted his good cause Motion for Continuance and respectfully requests that this Court remand this cause and Order an evidentiary with adequate time to prepare and present evidence. In the alternative, this Court should grant Doorbal a new trial and/or new sentencing trial.

ISSUE VI

WITHOUT CONDUCTING AN EVIDENTIARY HEARING, THE APPELLANT'S MOTION TO VACATE HIS JUDGMENTS OF CONVICTIONS AND SENTENCES OF DEATH WAS ERRONEOUSLY DENIED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS. FURTHER, THE TRIAL COURT'S AMENDED ORDER FAILS TO PROVIDE GUIDANCE FOR APPELLATE REVIEW.

Just before the Judge Ferrer vacated the bench in February 2005, the State prompted the trial court to clarify its final order denying Doorbal post-conviction relief. (PC-R. 778-779). The trial court amended its initial two-page Order denying Doorbal relief with a three-page Amended Order that still fails to provide this Court with sufficient guidance to determine whether Doorbal's claims have merit. (PC-R. 776-777, 782-784). The Amended Order summarizes the State's positions on Doorbal's twenty of twenty-one claims and concludes that Doorbal is not entitled to relief without referencing any hearings, transcripts or any part of the record. (PC-R. 782-784).

The trial court's Amended Order also addresses Doorbal's mental health claim that was denied without an evidentiary hearing, but does not offer any explanation for denying Doorbal's Motion for Continuance to prepare for an evidentiary hearing. (PC-R. 782-784).

Judge Ferrer has left the bench and is no longer available to substantiate or comment on the trial court Order now under review, even if this were an appropriate remedy, thus this Court should remand Doorbal's case to the circuit court for a full and fair adversarial testing that includes time to prepare an extraordinary case for an evidentiary hearing on all of the factually-disputed issues. In the alternative, to minimize substantially more extraordinary costs and judicial administration, this Court should grant Doorbal a new trial and/or a new sentencing hearing. See Mungin.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons and those set forth in the accompanying Initial Brief, a new trial and/or sentencing hearing is warranted, but at minimum this case should be remanded to the Circuit Court for an evidentiary hearing on Doorbal's twenty-one factually-disputed claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131; (2) Gail Levine, Assistant State Attorney, 1350 NW 12th Ave., Miami, Florida 33136, (3) the Honorable David H. Young, Richard E. Gerstein Justice Building, 1351 NW 12th Ave., Miami, Florida 33136, Miami Florida 33316, and (4) Defendant, Noel Doorbal, #M16320, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4410, by United States Mail, this 24th day of July, 2006.

Melodee A. Smith
Fla. Bar No. 33121

CERTIFICATE OF FONT AND TYPE SIZE

This appeal is word-processed utilizing 14-point Times New Roman type.

Melodee A. Smith
Fla. Bar No. 33121