IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1434

LOWER COURT NO. CF01-03262A-XX

NELSON SERRANO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

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

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal comes to this Court from a sentence of death imposed by the trial court. The Appellant, Nelson Serrano, will be referred to by his proper name. The Appellee, the State of Florida, will be referred to as the "State."

STATEMENT OF THE CASE

Nelson Serrano, was indicted by the Grand Jury, in and for the Tenth Judicial Circuit, Polk County, Florida, on May 17, 2001, with four counts of First-Degree Murder, contrary to § 782.04 and § 775.087 Florida Statutes, in the deaths of George Gonsalves, Frank Dosso, George Patisso and Diane Patisso on December 3, 1997. The State filed a Notice of Intent to Seek the Death Penalty. (R163)

A jury trial was held on September 5 through October 11, 2006, before the Honorable Susan W. Roberts, Circuit Judge. The jury returned a verdict of guilty of First-Degree Murder on all counts. (R1406-09)

The penalty phase was conducted on October 23-24, 2006. The jury returned a recommendation of death by a vote of 9-3 on each count. (R1500-03)

Following the penalty phase, both the defense and State submitted sentencing memoranda for the court's consideration. (R2455-58) (State); (R2452-54) (Defense). The trial court conducted a *Spencer* hearing on January 2-3, 2007.

The trial court imposed sentence on June 26, 2007. (R2506). On each of the counts, the trial court found the aggravating circumstance of murder committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight), prior violent or capital felony conviction for the contemporaneous crime in this case (great weight) and murder committed for the purpose of avoiding or preventing a lawful arrest (as to Diane Patisso only) (great weight). The trial court found the following mitigation: no prior criminal history (great weight), age at the time of the crime (age 59) (moderate weight), significant history of good works (moderate weight), successful Hispanic immigrant (moderate weight), positive religious involvement (some weight), no history of alcohol or drug abuse (some weight), good social history (moderate weight), good employment history (some weight), good school performance (moderate weight), good father (some weight), good husband (some weight), positive behavior during pretrial incarceration (some weight), positive behavior during court appearances (some weight), significant stressors at the time of the incident (moderate weight), remorse (slight weight). (R2509-15)

The trial court imposed a sentence of death on all counts. (R2506). The written sentencing order was filed on June 26, 2007. (R2509-15).

STATEMENT OF THE FACTS

Introduction

This case stems from four murders that occurred on December 3, 1997 between 5:20 and 5:45 p.m. at a business called Erie Manufacturing and Garment Conveyor Systems (hereinafter "Erie") located in an industrial park in Bartow, Florida. (T2886-89) Mr. Serrano was over 500 miles away that day in an Atlanta hotel. Indeed, it is undisputed that an Atlanta businessman met with Mr. Serrano that day until 11 a.m. Also, hotel videotape footage shows Mr. Serrano in the Atlanta hotel lobby that day at 12:19 p.m. and at 10:17 p.m. In addition, airline and hotel records show that Mr. Serrano traveled to Atlanta the day before the murders and left there the morning after the murders.

The prosecution's theory was that, from 12:19 p.m. until 10:17 p.m., Mr. Serrano could have traveled on a commercial airline from Atlanta to Orlando under a false name, driven 80 miles to Bartow in a rental car in rush hour traffic, shot four people at close range, driven 50 miles in a rental car in rush hour traffic to Tampa, flown back to Atlanta under a different false name via a commercial airline and driven back to his Atlanta hotel.

The defense maintained that the prosecution's theory was preposterous for a number of reasons. First, there was not enough time for Mr. Serrano to have done all of these things and to have arrived at his hotel at 10:17 p.m. Furthermore, not a single witness was found who saw Mr. Serrano leave the hotel, drive to the airport,

park there or get on the planes. No airport videotapes showed Mr. Serrano anywhere near the Atlanta, Orlando or Tampa airports that day.

Moreover, there was not a scintilla of forensic evidence that linked Mr. Serrano to the crime scene. Although law enforcement officers conducted forensic searches of the crime scene, the rented automobile allegedly driven by Mr. Serrano on the day of the crimes and Mr. Serrano's house, they found no incriminating evidence linking Mr. Serrano to the crime scene and no evidence linking the rental car to that scene. In addition, two handguns were used in the murders suggesting that there were two shooters - not one - as the prosecution contended. Neither of the guns was ever found.

Trial Evidence

In 1962, Felice "Phil" Dosso and George Gonsalves formed a business in New York, Erie Manufacturing Corporation, that made parts for various industries. Erie Manufacturing Corporation gradually evolved into a company that specialized in making parts for the garment industry in New York. (T3483-86)

In the mid-1980s, Mr. Serrano was in the business of designing, selling and installing garment conveyor systems called slick rail systems. During that time, Mr Serrano, Phil Dosso and George Gonsalves met and together they created a new and separate company, Garment Conveyor Systems, (hereinafter "Garment") that designed, installed and sold slick rail systems for the garment industry. They

were equal partners in that company with differing responsibilities. Mr. Serrano was responsible for designing, installing and selling the slick rail systems and Dosso and Gonsalves were responsible for manufacturing those systems. (T3182-88, 3362, 3486-93, 3598)

In about the late 1980s, the three men moved their business to an industrial park in Bartow, Florida. They closed Erie Manufacturing Corporation and transferred all of the assets to Erie Manufacturing, Inc. (hereinafter "Erie"). At that time, Mr. Serrano became an equal partner in Erie with Dosso and Gonsalves with each of them earning equal salaries. In return, according to Phil Dosso, Mr. Serrano orally agreed to pay Dosso and Gonsalves $75,000 each. The three men remained equal partners in Garment of which Mr. Serrano was the President and CEO. Together the three men purchased the land in Bartow on which the Erie/Garment building was built. This land was owned equally by the three men and their wives. (T3495-3503)

In 1990, Mr. Serrano's son, Francisco Serrano, became Director of Operations of Erie and Garment. (T4141-43) In about 1996, Phil Dosso's son, Frank Dosso, became Director of Operations of Erie and Francisco Serrano remained on as Director of Operations of Garment. (T4144-45)

Phil Dosso claimed that Mr. Serrano never paid him or Gonsalves the $75,000 he orally agreed to pay them in the mid-80's and this caused friction

between the partners. (T3504-05) However, in reality, this amount of money was incidental compared to the large revenues that Mr. Serrano brought into Erie/Garment. Indeed, in 1994, Mr. Serrano was responsible for bringing in J .C. Penney as a client which significantly increased the companies' revenue. In 1996, the companies had nine million dollars in sales. That year, each of the three partners received a salary of $350,000 plus close to a million dollars each in bonuses. (T3601-02, 4152-56)

Francisco Serrano testified that, although the three partners had their differences, in 1996, most of them seemed to have been resolved with the help of an attorney and an accountant and things seemed to be fairly amicable between the partners in 1996 until the Spring of 1997, when Francisco Serrano discovered that there were two sets of accounting books for Erie/Garment. Francisco Serrano told Phil and Frank Dosso and George Gonsalves about the improper double books. They claimed that the extra set of books was "for practicing." Subsequently, in late Spring 1997, Francisco Serrano discovered that about one million dollars was missing from the Erie/Garment accounts. Francisco and Nelson Serrano met with Phil Dosso and George Gonsalves about the missing money. Francisco Serrano testified that Dosso and Gonsalves acknowledged that they had something to do with the missing money but they would not disclose what they had done with it. An attorney for Erie/Garment, Mr. Atkins, advised the Serranos to report the

missing money to the Internal Revenue Service and they did so. (T4103-04, 4148-4159)

Shortly thereafter, on May 28, 1997, when Mr. Serrano was out-of-town on business, Phil Dosso and George Gonsalves attempted to fire Francisco Serrano but could not do so because Nelson Serrano was the President of Garment at the time. Francisco Serrano testified that he asked Dosso and Gonsalves why they wanted to fire him but they would not answer him. (T4161-62, EV967)

Phil Dosso claimed that he and Gonsalves fired Francisco Serrano because Francisco Serrano started his own import/export company and was doing work for that company while on Erie's time. (T3505-09) However, Francisco Serrano testified that it was 1991 - many years before Phil Dosso and Gonsalves fired him - that Phil Dosso and Gonsalves talked to him about his import/export company and, at the time he was fired, his import/export company had long ceased to exist. (T 4168-69)

On June 16, 1997, after Mr. Serrano learned about the missing money, Mr. Serrano , through an attorney, filed a lawsuit against Dosso and Gonsalves. (T4173-74, 4691-92, 4700-01, 4707-20) That same day, in an effort to protect the company money from possible theft by Dosso and Gonsalves, Mr. Serrano opened a new business checking account under Garment's name at a different bank and deposited a check to Garment from J.C. Penney in the amount of $132,655.30. Mr.

Serrano told the bank officer that there was a dispute with his Garment business partners regarding their fraudulent activity. On June 17, 1997, Mr. Serrano deposited another check to Garment for $140,000 into the new account. Mr. Garment never spent a dime of this money. (T4433-71) Phil Dosso testified that the opening of this new account caused added tension between the three partners. (T3547-49)

On June 23, 1997, at a Garment board of director's meeting attended by the three partners, Phil Dosso and Gonsalves voted to remove Mr. Serrano as the President of Garment, make Phil Dosso the new President of Garment and have only themselves as authorized signatories on Garment's bank accounts. (T3594-95, 3606, EV762-63) After becoming the President of Garment, Dosso immediately fired Francisco Serrano. (T 4172-73)

Soon thereafter, Dosso and Gonsalves had all of the locks changed at Erie/Garment. (T 3606) Since Mr. Serrano still owned one-third of Erie/Garment and he and his wife still owned one-third of the Erie/Garment property, he called the police upon learning that the locks had been changed. However, he ultimately decided to leave, create a new slick rail company and and pursue a resolution of the Erie/Garment issues via the civil lawsuit he filed. (T 3367-69, 3606, 4075-76, 4172-75, 4343)

Various employees of Erie/Garment testified that, while Mr. Serrano was at Erie/Garment, Mr. Serrano got along with Phil Dosso but that he had arguments with Gonsalves. (T3194, 4210-11) However, as one Erie/Garment employee testified, Gonsalves frequently got into arguments with lots of Erie/Garment employees because Gonsalves was obnoxious and often spoke to people in a mean manner. (T4228-30) According to Phil Dosso, sometime around 1995 or 1996, Mr. Serrano, in the presence of Phil Dosso and Francisco Serrano, told Gonsalves that he gets so mad at him that he feels like killing him. However, Dosso and Gonsalves obviously did not view this statement as a serious threat because they continued to work with Mr. Serrano as their partner and the President of Garment ***for at least one year afterwards***. (T3530)

On December 3, 1997, there were about 50 employees at Erie/Garment. At about 5:00 p.m. that day, Frank Dosso's wife spoke to Frank Dosso on the phone and he was at work at Erie/Garment. Based upon that telephone conversation, she expected him to be home by 5:30 p.m. (T3452)

Many Erie/Garment employees clocked out from work that day shortly after 5:00 p.m. while Gonsalves, Frank Dosso and George Patisso (Phil Dosso's son-in-law who was an Erie employee), remained behind. (T 3211-14, 3264, 3307-12). David Catalan, a bookkeeper there, clocked out at 5:05 p.m. that day. (T 3210-13) He and another employee, Mrs. Stephens, were the last employees to leave the

building. Catalan testified that, when he left, he checked the doors to ensure that they were locked and that he told the police that he had done so. (T3227, 3231, 3240-41)

Diane Patisso, who was Phil Dosso's daughter and George Patisso's wife, had plans to pick up Frank Dosso and George Patisso at Erie/Garment that day and take them to Frank Dosso's house for a family party. (T3427-33, 3450-53) Diane Patisso left work between 5:15 and 5:20 p.m. that day and drove a short distance to Erie/Garment to pick them up. At 5:45 p.m., Frank Dosso's wife called Erie/Garment but there was no answer. She also called Frank Dosso's cell phone but there was also no answer. (T 3452-53) Phil Dosso and his wife, Nicoletta Dosso, also tried calling Erie/ Garment without success and then drove to Erie/Garment to find out what had happened. (T 3434-35)

Phil and Nicoletta Dosso testified that, when they arrived at Erie/Garment, the front door was unlocked, and as they entered, they discovered the deceased body of their daughter, Diane Patisso, in a doorway in a pool of blood. Her body could be seen from the front door as soon as they entered. Phil Dosso called 911 at 7:34 p.m. He then discovered the deceased bodies of Gonsalves, George Patisso, his son-in-law and Frank Dosso, his son, in Frank Dosso's office (formerly Mr. Serrano's office when he worked there). (T2884, 3218, 3434, 3437-38, 3559-81, 3585-86)

The Dossos were inside the building when the first police officer, Officer James Christian, arrived. The Dossos went into many rooms at the crime scene, including Frank Dosso's office. Nicoletta Dosso was covered in blood and Officer Christian saw her touching Diane Patisso. (T2862-69, 2913, 3575) Several police officers testified that there was so much blood in Frank Dosso's office and in the area where Diane Patisso was shot, including blood smears on the wall and splattered blood, that it was difficult to avoid coming into contact with it. (T2903, 3017-18)

All of the victims were shot multiple times in the head and some were also shot elsewhere. (T3955-68, 3975-4042) Two different guns were used - a.22 caliber semi-automatic gun and a .32 caliber semi-automatic handgun - suggesting that there were two shooters. (T3616-46) Neither of the guns was ever found. (T3646) The men were shot with the .22 caliber semi-automatic gun. (T3631-33, 3976-81, 4009-13, 4014-25) Diane Patisso was shot once with the same .22 caliber semi-automatic gun used to shoot the men and once with the .32 caliber gun. (T4026-31)

According to the testimony of Leroy Parker, the State's bloodstain pattern analysis expert, the three men were shot in a manner that is consistent with execution-style killings. More specifically, Parker testified that Gonsalves was on his knees when he was shot. George Patisso was shot at close range with his head

only two inches from the floor. (T3889, 3896, 3904-05, 3976-81) The blood in the office where the three men were shot was all near the floor indicating that they were all told to kneel on the floor. There was no blood anywhere that was as high as a desk top. (T3126-27) Parker concluded that George Patisso was definitely shot before Gonsalves but he could not make any other conclusions as to the sequence in which the four individuals were shot. Frank Dosso had bullet wounds to his hand and arm indicating a "defensive mechanism." (T3901, 3905, 3919) Parker also concluded that Diane Patisso was standing up when she was shot. (T3922) In Parker's expert opinion, the shooter or shooters would have had blood on them from the back splatter. (T3917-18)

There was no forensic evidence linking Mr.Serrano to the crime scene. (T 3779) Inside Erie/Garment, law enforcement officers found eleven .22 caliber shell casings and one .32 caliber shell casing. (T2962-64) The .32 caliber casing was found in an office near Diane Patisso's body. (T2965-72, 2978, 3016, 3136-37) None of these casings were linked to Mr. Serrano in any way. (T3028-29, 3041) There were no fingerprints belonging to Mr. Serrano inside Erie/Garment. At the crime scene, law enforcement officials found 13 fingerprints that could not be matched to anyone. Law enforcement officials compared these unidentified fingerprints to every Erie/Garment employee, Mr. Serrano and the deceased. However, no one testified that these unidentified fingerprints were ever compared

to any official fingerprint database (T3035-37, 3045-51, 3070-71, 3156-59, 3302-03)

Law enforcement officers found no sign of a forced entry on any of the doors that were a point of entry into the Erie/Garment building. (T2993-97) As previously explained, the locks to these doors were changed after Mr. Serrano left.

Near Diane Patisso's body, law enforcement officers found a plastic glove that did not belong there. (T3008, 313) In 1997, Theodore Yeshion, a DNA expert with the Florida Department of Law Enforcement subjected the glove to the type of DNA testing that was then in existence, PCR testing, and found no DNA to test on it. Yeshion testified that, at the time of the trial in this case which was held over eight years later, DNA science had developed to such a degree that it was possible that new types of DNA testing known as STR and mitochondrial DNA testing could extract a DNA profile from the glove. However, although the glove was obviously left at the crime scene by the perpetrator, the State ***never*** sought to re-test the glove for DNA utilizing this new STR or mitochondrial DNA testing. (T4792-4807)

On the evening of the incident, law enforcement officers also found two fresh cigarette butts located close together in the Erie/Garment parking lot. (T2999-3001) These two cigarette butts were subjected to DNA testing and a DNA profile was extracted from one of them. No people in the world except identical twins

share the same DNA profile. Nevertheless, the State only asked Yeshion to compare this DNA profile to Phil and Nicoletta Dosso and the four victims. The State never sought to compare this DNA profile to Mr. Serrano or to any DNA databases, although that would have been the logical thing to do unless the State feared that the results would show that its theory of prosecution was wrong. (T4807-13)

There was evidence that the motive for the shootings was robbery. There were no wristwatches found on any of the three men who were killed. Blood on Frank Dosso's arm showed an outline of his Rolex wristwatch which had been stolen from him after he was shot.[1] George Patisso had been wearing a gold neck chain that was also stolen by the perpetrator. Frank Dosso's pants pocket was partially pulled out. Frank Dosso's office and several offices near it were in complete disarray with drawers and file cabinets left open and papers and other items strewn all over the floors. (T3010-11, 3013-15, 3018-19, 3035-37, 3043-45, 3152, 3219-20, 3246, 3680, 3831, 3920, 4297-98, 5882) A detective in this case testified that someone targeting the business for a robbery would not know that the business did not have a lot of cash on hand. (T3832-34)

[1] Leroy Parker, the State's expert in bloodstain analysis, testified that whoever removed Frank Dosso's watch would have had blood transferred to his hands and possibly elsewhere. (T3919-21)

Notably, a detective in this case testified that he interviewed an Erie/Garment employee about possible suspects in this case and she told him about two Hispanic men. Defense counsel questioned the detective about the fact that this employee told him that these men came to Erie/Garment on the day of the murders seeking employment and their behavior was weird. (T3815-16, 6229-30) The detective further testified that a man who worked near Erie/Garment reported that he saw an African-American male and a blue vehicle at Erie/Garment at the time of the murders and heard a gunshot. (T3811-13) The detective additionally testified that, several times on the day of the murders, a Ford Thunderbird driven by a man who was 30 to 35 years old drove slowly past Erie and a police officer tried to stop the vehicle but it got away. (T3814)

In Frank Dosso's office, there was a ceiling tile that was "***slightly*** displaced." (T3154) Under it, there was a blue vinyl chair with some dusty shoe prints on the seat. (T2980, 3038, 3118-24, 4385) David Catalan, an Erie/Garment employee testified that, in early 1996, he saw Mr. Serrano in his office standing on a chair taking papers out of the ceiling by removing a ceiling tile. On that occasion, Mr. Serrano showed him a large handgun that he owned. Catalan testified that he only saw Mr. Serrano taking papers out of the ceiling - not the handgun. (T3221-25) Catalan further testified that the handgun was in a box. (T3245) An Erie/Garment employee, Velma Ellis, who had been a close friend of Frank Dosso, testified that,

years after the murders, she was interviewed by a law enforcement officer and recalled, years later, that, when she left work on the day of the murders, she had seen the blue chair under a desk. (T4579-80, 4582-87)

The prosecution relied upon this testimony of Catalan and Ellis to theorize that Mr. Serrano kept a .32 caliber gun hidden in the ceiling of his office and, on the evening of the murders, he retrieved it and used it to shoot Diane Patisso as she entered the building. As previously explained, an ejected .32 caliber casing from the .32 caliber bullet that shot Diane Patisso was found near her body. Catalan told a detective assigned to this case that the gun shown to him by Mr. Serrano was a ***revolver with a wheel in the center***. (T5937-38) In addition, a computer technician for Erie/Garment's computers testified that the gun that Mr. Serrano kept in his office was a ***revolver***. (T4074-75) The .32 caliber gun used to shoot Diane Patisso was a semi-automatic gun - ***not a revolver*** - because, as an FBI agent testified, a revolver does not automatically eject the cartridge casing. A shooter of a revolver has to manually remove a casing from a revolver and it would be nonsensical for the perpetrator to take the time to manually remove the .32 casing from the chamber of the revolver and throw it on the floor. (T5133-34)

In support of its theory that Mr. Serrano stood on the blue chair to get the .32 caliber firearm used to shoot Diane Patisso, the prosecution also called an FDLE crime analyst who testified that he tested the shoe impressions on the chair and

found that the class characteristics were consistent with a pair of shoes owned by Mr. Serrano which Mr. Serrano loaned to his nephew to wear when he appeared before the grand jury investigating this case on June 15, 2000. (T5287-99, 5764, 5862) However, this FDLE crime analyst could not positively identify that shoe as having made those impressions and he did not dispute that the class characteristics of that shoe could be consistent with as many as 100 million or more shoes. (T5295-99, 5303-04) Furthermore, defense counsel pointed out that it would be ludicrous for Mr. Serrano to give shoes used to commit murders to his nephew to wear to the grand jury that was investigating those murders. (T5304, 6232-33)

John Purvis, who worked in a managerial position at a business near Erie/Garment, testified that, when he left work on December 3, 1997 between 5:50 and 6:15 p.m. he saw a young, medium-built man ***between the ages of 25 and 30*** with an olive complexion, possibly Mediterranean descent, dark black hair and a wispy black mustache standing off the side of a road near the Erie/Garment building. (T3377-82, 3399-3400, 3422-23) The man was wearing a suit with a white shirt, a v-neck white sweater and a tie under it. (T3395-96) The man was holding his coat up in front of his face in a manner which led Purvis to assume that he was lighting a cigarette. (T3403) A few weeks after the incident, Purvis described the man to a police forensic artist who then drew a composite sketch. (T3382-84, 3407-23, EV744)

The State mistakenly states in its brief at 16 that Purvis testified that he saw "a person matching Appellant's description." However, Purvis never identified Mr. Serrano as the person he saw or testified that Mr. Serrano matched the description of the person he saw. Furthermore, Purvis's description of the man he saw does not match Mr. Serrano who was 59-years-old at the time - definitely not a "young person" between the ages of 25 and 30. (T 3400, 3422-23) Moreover, Purvis saw this man between 5:50 and 6:15 p.m. which was after the murders occurred and it would be nonsensical for the perpetrator to stand around near the Erie/Garment building rather than fleeing immediately. In addition, Maureen Serrano, formerly Francisco Serrano's wife, and FDLE Agent Tommy Ray, the lead investigator in this case, both testified that Mr. Serrano did not smoke cigarettes. (T4122, 4299)[2]

On the evening of the murders, the first suspects who law enforcement officers focused on were Francisco and Nelson Serrano, because of the previous business disputes that had occurred at Erie/Garment. (T3678, 5924) However, Francisco Serrano had an alibi in that he was attending a business meeting in Tampa when the crimes occurred. (T4053-65, 4078-82) Francisco Serrano voluntarily met with law enforcement officers on the evening of the incident and

[2] The State mistakenly states in its brief at 16 that Maureen Serrano testified that Mr. Serrano smoked cigarettes when, in fact, she testified that he did not do so.

agreed to have his hands tested for carbon residue, a substance which would ordinarily be found on someone who had recently fired a firearm (T4194-96)

Nelson Serrano also had an alibi because law enforcement officers verified that he was in Atlanta that evening. Law enforcement officers confirmed that Mr. Serrano checked into an Atlanta hotel, La Quinta Inn, on December 2, 1997 and checked out on December 4, 1997 at 11:47 a.m. (T4618) Through airline, rental car and airport parking records, they also confirmed that Mr. Serrano, who resided in Lakeland, flew from Washington D.C. where he had been on a business matter to Atlanta on December 2, 1997, rented a car there and then flew back to Orlando on December 4, 1997. (T4992-94, 5048, 5073-76, EV1124-29)

Law enforcement officers additionally confirmed that, on December 3, 1997 from about 10 to 11 a.m., Mr. Serrano attended a business meeting with Larry Heflin of Astechnologies in Roswell, Georgia, a suburb of Atlanta. Heflin testified at the trial that there was a real need for this meeting. (T4343-67)

Law enforcement officers obtained surveillance videotapes from the La Quinta Inn that showed Mr. Serrano in the Atlanta hotel lobby on December 3, 1997 at 12:19 p.m. and at 10:17 p.m. (T4390-96, 6133, EV772, 828, 856)

On December 4, 1997, when Mr. Serrano returned from Atlanta, he voluntarily went to the Bartow Police Department to be interviewed at the request of law enforcement officers. (T3682-83) Part of the interview was recorded and

part was not. He had no injuries on him at that time. (T3065) Prior to being tape-recorded, Mr. Serrano volunteered to Detective Steve Parker that he and his son had experienced business disputes with George Gonsalves and Phil Dosso and that he had filed a lawsuit against them. Mr. Serrano stated that he had been removed as President of Garment and had not returned there since that time. (T3685-87)

Mr. Serrano told Detective Parker that he learned about the murders the previous evening when he called his wife from his Atlanta hotel and she told him that four people had been killed at Erie/Garment. (T3687-88) Mr. Serrano said that he then telephoned an Erie employee named Louis Velandia who told him that, when he left work at Erie on December 3, 1997, Gonsalves, Frank Dosso and George Patisso were there and the only car there was Gonsalves' car. (T3690) Subsequently, Mr. Serrano telephoned his wife again and she told him that three men and one woman had been shot. (T3700-01)

Mr. Serrano told Detective Parker that he had flown to Atlanta on December 2, 1997 for a business meeting with Larry Heflin of Aztechnologies. He further stated that he got a severe migraine headache on December 3, 1997 and, therefore, he had to change a business meeting to December 4, 1997. (T3690) It was undisputed that Mr. Serrano suffers from migraines. He was on migraine medication throughout the trial. (T5130) Mr. Serrano said that he remained in Atlanta until he returned on December 4, 1997. (T3688)

Detective Parker asked Mr. Serrano what he thought might have happened at Erie. Mr. Serrano said that he did not think that robbery was a motive because no cash was kept there. Unbeknownst to Mr. Serrano, two of the men who were killed had been robbed of their jewelry. Mr. Serrano said he guessed that "somebody is getting even; somebody they cheated, and George [Gonsalves] is capable of that." (T3690-92)

In his taped statement, which was played in court, Mr. Serrano speculated that it was possible that the female victim "walked in the middle of something." (T 3704) The prosecution argued at the trial that this statement showed that Mr. Serrano was the killer because, at the time of Mr. Serrano's police interview, no information had been released about the fact that Diane Patisso's body was found in a different location from the others near the entryway. (T3727, 6122-23, 6139) However, Detective Parker conceded on cross-examination that his investigation revealed that, before Mr. Serrano was interviewed by him, Mr. Serrano had been told by others that three employees and one non-employee had been killed. He further conceded that it is a logical conclusion that, if a non-employee gets killed at a business where three employees are killed, the non-employee probably walked in on something rather than already being there. (T3829-31) Notably, Maureen Serrano, who is divorced from Francisco Serrano, testified that, on the evening before Mr. Serrano's police interview, she spoke to Mr. Serrano by telephone and

told him the names of the four victims. (T 4111-12, 4124-25) As previously explained, Velandia had told Mr. Serrano that only Gonsalves, Frank Dosso and George Patisso were at Erie/Garment when he left there and that only Gonsalves' car was in the parking lot so it would be logical for Mr. Serrano to think that Diane Patisso, who worked elsewhere, came to Erie/Garment to pick up her husband and brother and "walked in on something."

Alvaro Penaherrera Mr. Serrano's nephew, testified for the prosecution. He conceded that law enforcement officers had accused him of being involved in the Erie/Garment murders and this had scared him. (T5814-15) Penaherrera knew Mr. Serrano while growing up in Ecuador, Mr. Serrano's native country. At age 19, Penaherrera moved to Orlando and lived with Mr. Serrano and his family. Mr. Serrano employed him at Erie/Garment during this time period. In 1993, he quit working at Erie/Garment to attend college and joined the Army Reserve. (T4861-80, 5817)

Penaherrera claimed that, in 1997, Mr. Serrano asked him to rent a car for him on two occasions because his girlfriend was coming to Orlando to visit him from Brazil and his credit card statements came to his house and he did not want his wife to question him about it. (T4884-89, 5714-17) Penaherrera testified that he had heard from his family that Mr. Serrano was a "womanizer" who was "always cheating" on his wife. (T5800-01)

On October 31, 1997 and on December 3, 1997, Penaherrera rented cars in Orlando which he claimed were actually rented for Mr. Serrano and his girlfriend. (T 4884-93, 5708-37) Penaherrera further claimed that, on December 4, 1997, Mr. Serrano telephoned him from Atlanta and asked him to pick up the rental car in the Tampa International Airport parking lot and return it to the Tampa rental car agency because he had to drop off the car at that airport abruptly and leave since things did not work out with his girlfriend. Penaherrera testified that he then drove to Tampa and did as Mr. Serrano requested. (T5743) This testimony differed from Penaherrera's deposition testimony in which he stated that Mr. Serrano's lover picked up the rental car in Orlando on December 3, 1997 and then dropped it off at the Tampa International Airport. (T5806)

According to Penaherrera, he saw Mr. Serrano in Ecuador at Christmas time in 1997 and, at that time, Mr. Serrano told him that he could not say anything about the rental cars because it would cause a divorce and the police investigating the murders at Erie/Garment would not believe that he was in Orlando with his lover. (T5752-59) Penaherrera testified that he did not know if Mr. Serrano or his lover actually used the cars that he claimed he rented for them. (T5810) Law enforcement officers conducted a thorough forensic search of both of those rental cars and did not find a scintilla of evidence linking Mr. Serrano to the murders. (T5863, 5925, 5928-29)

In June 2000, Penaherrera, his girlfriend and his brother, Ricardo, were all subpoenaed to testify before the grand jury in Bartow. They stayed at Mr. Serrano's house the night before they testified. Mr. Serrano gave Penaherrera and his brother suits and dress shoes to wear to the grand jury. (T5762-65) Ricardo Penaherrera testified that Mr. Serrano told him, his brother and his brother's girlfriend to tell the truth before the grand jury. (T4860-61) Alvaro Penaherrera likewise testified in his deposition that Mr. Serrano told him to tell the truth to the grand jury. (T5772-75) However, at the trial, Penaherrera changed his testimony and claimed that Mr. Serrano told him to lie to the grand jury about the car rentals. (T5766-71) At the trial, Penaherrera admitted that he had lied under oath and to law enforcement officers at least eight to ten times when questioned about this case. (T5775-78, 5783-89, 5817-23) Penaherrera admitted that he had "assumed" that there was a "big reward' in this case for information leading to the arrest and convictions of the perpetrators of the murders that were committed in this case. (T5841-41) Indeed, there was a highly publicized reward of over one hundred thousand dollars. (T5945)

From the time of the murders in 1997 until August 2000, Mr. Serrano and his family members were repeatedly interviewed by law enforcement authorities but Mr. Serrano never fled. Mr. Serrano traveled to Ecuador, where he has family, six times after the murders and always returned to his home in Lakeland. In August 2000,

almost three years after the murders, Mr. Serrano retired to Ecuador. (T4114, 4180, 4300-01, 5930, 5936) The lead investigator, FDLE Agent Tommy Ray conceded that Mr. Serrano retired to Ecuador and did not flee. Indeed, he even wrote that in a report. (T 5930, 5936)

As previously explained, the State's theory was that, on December 3, 1997, Mr. Serrano traveled from Atlanta to Orlando and from Tampa back to Atlanta under the names "Juan Agacio" and "John White." The State introduced airline passenger manifests indicating that, on December 3, 1997 at 1:36 p.m., a passenger named Juan Agacio boarded a Delta flight in Atlanta, scheduled to depart at 1:41 p.m. and scheduled to land in Orlando at 3:05 p.m. (The passenger manifests do not show what time the plane actually took off or landed). (T5021-27, 5042-43, 5051-52,EV741, 901-05)

Mr. Serrano has a son, John Greevan, from a former wife, Gladys Agacio Serrano. When John Greevan was born in 1960, he was named Juan Carlos Serrano. Mr. Serrano and Gladys Serrano divorced when John Greevan was a young child. Gladys Agacio subsequently remarried and legally changed her son's name to John Greevan to reflect the last name of his stepfather. John Greevan testified that he has never gone by the name of Juan Agacios because that has never been his name. (T3164-81) The defense argued that it would be ridiculous for Mr. Serrano to concoct an elaborate scheme to return to Orlando to commit a murder and use this

combination of his son's unusual names if he truly wanted to conceal that he was on the flight. (T6064-65)

A passenger manifest indicated that, at 7:28 p.m. on December 3, 1997, a passenger named John White arrived at Tampa International Airport and checked into a Delta Airlines flight to Atlanta. That flight was scheduled to arrive in Atlanta at 9:41 p.m. (T5021-27, 5040-41, EV743)

Thus, the wide-bodied jet from Tampa to Atlanta that the prosecution speculated Mr. Serrano flew on as "John White" touched down in the Atlanta International Airport just 28 minutes before 10:17 p.m. when Mr. Serrano was seen on the video surveillance in the Atlanta hotel lobby. Defense counsel argued at the trial that the prosecution's theory could not be true because, ***in only 28 minutes,*** the jet would have had to have touched down, the jet would have had to taxi down the runway to a gate, the airport personnel would have had to have connected the jet to the gate and Mr. Serrano would have had to have disembarked from the wide-bodied jet with the many other passengers, make his way through the Atlanta airport, one of the busiest in the world, exit the airport, get a taxi or some other vehicular transport and travel to his hotel five miles away. Defense counsel further argued that it would be ridiculous for Mr. Serrano, a Hispanic with a thick Spanish accent, to use the alias, John White.

Notably, not a single witness was found who saw Mr. Serrano leave his Atlanta hotel, drive to the airport, park there or get on the airplanes on December 3, 1997. No airport security videos showed Mr. Serrano anywhere near the Atlanta, Orlando or Tampa airports that day. (T3837-40) According to an airport parking ticket, the rental car rented by Penaherrera exited the Orlando International Airport parking garage at 3:59 p.m. on December 3, 1997. According to another airport parking ticket, Mr. Serrano's car entered the Orlando International Airport parking garage on November 23, 1997 at 4:51 p.m. and exited the airport parking garage at 5:33 p.m. (T4998-91, 5029-34)

A round trip ticket for Juan Agacio's December 3, 1997 Atlanta-to-Orlando flight was purchased by Juan Agacio at the Orlando International Airport on November 23, 1997 at 5:16 p.m. (T5029-34, EV748-52) A round trip ticket for John White's December 3, 1997 Tampa-to-Atlanta flight was purchased on November 23, 1997 at 3:18 p.m. at Tampa International Airport. (T5034-42, 5057-58, EV773-77) It was the State's theory that Mr. Serrano purchased both of these tickets using cash, although it would be nonsensical to drive to the Tampa International Airport to purchase John White's Delta Airlines ticket on November 23, 1997 at 3:18 p.m. and then drive all the way to the Orlando International Airport to purchase Juan Agacio's Delta Airlines ticket at 5:13 p.m. that same day when both tickets could have been purchased at the same airport.

The State's well-credentialed fingerprint expert, Jim Hamilton, testified that a fingerprint on the November 23, 1997 Orlando Airport parking garage ticket matched Mr. Serrano's right index finger. He further testified that a fingerprint on the December 3, 1997 Orlando Airport parking garage ticket "coincidentally" matched Mr. Serrano's same finger - the right index finger. Although Hamilton was the State's expert witness, he testified that he had serious reservations about these two fingerprints for several reasons. First, he was concerned about the likelihood that a print from the same finger of the same hand of Mr. Serrano would be on both of the tickets. Second, it makes no sense for someone to reach across his body with his right hand between his body and the steering wheel to hand a ticket to a parking attendant who is located at least two to three feet away from the left side of the car. Third, even if someone did use their right hand to reach across in that manner, there should have a fingerprint of Mr. Serrano on each side of the tickets but there is only one fingerprint on one side of the tickets. Notably, the prints that appear on the parking tickets consist of opposite halves of the same right index fingerprint. Mr. Hamilton further testified that fingerprints can be planted and yet not detected by experts. He gave examples of how this could have happened in this case. He testified that, at the time he was retained to give his opinion about the two subject fingerprints, the actual fingerprints on the parking tickets had become invisible and

only photographs of them taken by an FDLE laboratory analyst were available. (T5271-84)

Notably, the FDLE laboratory analyst who developed the two subject fingerprints acknowledged that, on the two parking tickets that contained Mr. Serrano's fingerprint, half of his right index finger is on one ticket, the other half of this same right index finger is on the other ticket and there are no other fingerprints on either of those tickets, which is plainly unusual. (T5340-42) This laboratory analyst further testified that these two parking tickets were submitted to her by the lead investigator, Tommy Ray. Notably, two law enforcement officers looked for these parking tickets at the Orlando parking garage in late 1998/early 1999 but they did not find them. Then, according to Agent Ray, years later, in March 2001, after a great deal of frustration in trying to solve the crimes in this high profile case, he went back to that parking garage and "discovered" the two parking tickets containing the fingerprints that he claimed miraculously survived all those years. (T5333-34, 5880, 5891-93)

It was undisputed that Mr. Serrano was a gun collector. He made no secret of this hobby and sometimes did some target shooting at the Erie/Garment property, along with Phil Dosso and other Erie/Garment employees. (T4205-06, 4214, 4645-49) During the investigation of the murders, law enforcement officers searched Mr. Serrano's house twice. These law enforcement officers seized firearms from Mr.

Serrano's gun collection and firearms permits from Mr. Serrano's house but ultimately determined through testing and research that none of them were linked in any way to the murders. Indeed, there was nothing incriminating found in Mr. Serrano's house. (T5113-38, 5148, 5926)

On May 17, 2001, the grand jury returned a sealed indictment charging Mr. Serrano in this case. At that time, he lived in Quito, Ecuador where he had retired. On August 31, 2002, Mr. Serrano was forcibly taken from the streets of Quito by men hired by Agent Tommy Ray, kept in an animal cage overnight and then delivered the next morning to Agent Ray and another law enforcement officer who were waiting for him on an American Airlines commercial airplane. (T 4300, 4738-52)

On the airplane flight to the United States, Mr. Serrano sat by Agent Tommy Ray and the other law enforcement officer. Ray testified that Mr. Serrano was in his custody at the time and that Mr. Serrano spoke to him on the plane. These statements were the subject of a motion to suppress which was denied by the trial court and is an issue in this appeal. (T5898-5900)

Agent Ray claimed that, on the plane, he asked Mr. Serrano if he had planned to come back to the United States on September 18, 1997 for a hearing on the civil lawsuit and that Mr. Serrano said, "No, why should I come back and you could trick me?" Ray also testified that he asked Mr. Serrano why he had deposited the two

Garment checks totaling about $247,000 into a new bank account and Mr. Serrano said he did that to keep Phil Dosso and Gonsalves from stealing it because Gonsalves was a thief who Francisco Serrano had reported to the IRS. Mr. Serrano stated that he and Francisco Serrano built up the company from nothing and the partners stole it from him. Ray testified that Mr. Serrano told him he was in Atlanta - not Orlando - on the day of the murders and that Mr. Penaherrera rented a car for Mr. Serrano's girlfriend, Anna Gillian, that day. According to Ray, he asked if Mr. Serrano had a way to reach her and if she was Brazilian. He replied that the Brazilian was a different girlfriend. Ray testified that Mr. Serrano told him he had a theory that Frank Dosso, who was unintelligent, was connected to the Mafia and had hired a hit man without meeting him in person to kill Gonsalves. According to Ray, Mr. Serrano said that, when he was working at Erie/Garment and would go out-of-town, he would keep a .357 caliber revolver in the ceiling tile area of his office but otherwise would hide it behind his office computer. As previously explained, the guns used in this case were semi-automatics - not revolvers - and they were .22 and .32 caliber guns. (T5899-5900)

Leslie Jones, an admitted cocaine user who had been convicted of five felonies involving crimes of dishonesty or false statements and another felony involving violence, testified that he was incarcerated with Mr. Serrano in late 2005 and early 2006 and that, during that time, Mr. Serrano spoke to him about this case.

(T5491-92, 5510-11, 5537-38) Jones received a lighter sentence on a criminal case pending against him because he agreed to testify against Mr. Serrano at the trial. (T5502-67) Jones stole notes made by Mr. Serrano for his defense attorneys and kept them. (T5448-49) Jones testified that Mr. Serrano told him that he did not commit the murders in this case and that his fingerprint was planted on airport parking tickets by Agent Tommy Ray. (T5473-74, 5478, 5567) Jones acknowledged that Mr. Serrano told him that he was in his room in a Georgia hotel with a severe migraine headache when the murders occurred. (T5577) In addition, Jones testified that Mr. Serrano told him that he wanted DNA testing to be performed on the plastic glove that was found on the scene because it had not been worn by him. (T5573)

According to Jones, Mr. Serrano told him that he suspected that a Mafia hit man may have committed the murders because Frank Dosso had been involved in drugs and owed over one million dollars as a result or that somehow the murders were connected to Frank Dosso wanting to get a larger share of the business from Gonsalves. (T5472-78, 5570-71) According to Jones, Mr. Serrano told him that he suspected that a man named John who was owed a substantial amount of money by the Dosso and Gonsalves families committed the murders. (T5590-94) Jones claimed that Mr. Serrano told him that he and John drove to the Tampa and Orlando airports together and that, although he went to the airport with John, he did not know

why John was going, but he subsequently learned that John had purchased airline tickets under the aliases of Todd - not John - White and Juan Agacio. (T5475-76, 5572) Jones also claimed that Mr. Serrano told Jones that John had planned to approach the business partners on Halloween night but it was raining and the business was closed. (T5477)[3]

The defense rested without presenting any evidence. (T6016) Subsequently, the jury returned a verdict finding Mr. Serrano guilty on all counts. (T 6287-88)

SUMMARY OF THE ISSUES

I. The prosecution's case was circumstantial. There was no objective evidence, physical or testimonial, to place Mr. Serrano at the crime scene at the time of the shooting. The circumstantial evidence is insufficient for conviction.

II. The prosecution introduced a statement of Mr. Serrano made to a law enforcement agent while he was being forcibly removed from Ecuador to the United States on an airplane. The admission of this statement violated the Fifth and Fourteenth Amendments' prohibition against self-incrimination. Furthermore, the trial court applied the wrong law in ruling on Mr. Serrano's motion to suppress this statement.

[3] On Halloween 1997, Juan Agacio traveled from Charlotte to Orlando arriving in Orlando at 3:07 p.m. John White was scheduled to depart on a flight from Tampa to Charlotte that evening. (T 5219-38, 5228-31)

III. Florida law enforcement officials kidnaped Mr. Serrano in Ecuador and forcibly brought him to the United States. In doing so, they committed outrageous acts and violated the United States/Ecuador Extradition Treaty in violation of Mr. Serrano's right to due process.

IV. The prosecutor used improper methods to produce the convictions and death sentence in this case. The cumulative impact of the prosecutor's repeated acts of misconduct requires reversal of Mr. Serrano's conviction and sentence.

V. There was an extraordinary amount of prejudicial publicity about this case both before and during the trial. A change of venue was mandated in order for Mr. Serrano to obtain a fair trial.

VI. The trial court violated the Confrontation Clause by allowing the State's bloodstain pattern expert to testify about FDLE reports that he had not authored.

VII. During the penalty phase, the prosecution repeatedly assaulted Mr. Serrano's character by cross-examining defense witnesses regarding unsubstantiated sexual abuse by Mr. Serrano. This had the effect of allowing the prosecutor to present inadmissible non-statutory aggravation and violated Section 90.403 of the Florida Statutes as well as Mr. Serrano's rights under the state and federal Constitutions to a fair sentencing proceeding.

VIII. The trial court erred by improperly imposing the "avoid arrest" aggravator.

IX. Various constitutional deficiencies invalidate the death sentence in this case.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND FAILED TO PROVE IDENTITY.

After the State rested its case-in-chief, Mr. Serrano moved for a judgment of acquittal on the ground that the State had failed to prove that Mr. Serrano killed the individuals who were the subject of the charges. (T5952-74)

The Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. *Cox v. State*, 555 So.2d 352 (Fla. 1989).

This case is based completely on circumstantial evidence. "[W]here a conviction is based wholly upon circumstantial evidence, a special standard of review applies." *Lindsey v. State*, ___ So.3d ___, WL 1955053 *3 (Fla. 2009)(quoting *Darling v. State*, 808 So.2d 145, 155 (Fla. 2002)). The special standard requires that circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not

sufficient that the facts create a strong probability of and be consistent with guilt. They must be inconsistent with innocence." *Lindsey, supra* (quoting *Frank v. State*, 121 Fla. 53, 163 So. 223, 223 (Fla. 1935)). In *Lindsey*, 2009 WL 1955053 *3 (quoting *Davis v. State*, 90 So.2d 629, 631-32 (Fla. 1956)), this Court explained:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction.

In *Ballard v. State*, 923 So.2d 475, 485 (Fla. 2006)(quoting *Crain v. State*, 894 So.2d 59, 71 (Fla. 2004)), this Court held that it is the duty of "the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk.... [When a] case is purely circumstantial, we must determine whether competent evidence is present to support an inference of guilt 'to the exclusion of all other inferences.'" In *Ballard*, a capital case, investigators determined that a fingerprint found on a bedframe near the victim's upper torso belonged to the defendant. In addition, a forensic scientist determined that one of the hairs found in the victim's hand was consistent with Ballard's arm hairs although the scientist could not determine whether that hair had fallen out naturally or had been forcibly removed. This Court held that the State's evidence, while perhaps sufficient to create some suspicion, was not sufficient to support a conviction and stated:

> In capital cases, this Court had recognized that it has a fundamental obligation to ascertain whether the State has presented sufficient evidence to support a conviction. Ballard contends that although the State proved that [the victims] were robbed and killed, and one of his hairs and fingerprint was in the apartment, the State failed to prove that Ballard was the perpetrator of those crimes.

Id. at 482.

Recently, in *Lindsey*, *supra*, a capital case, this Court also held that the evidence was insufficient and reasoned that "[w]hile we agree that the evidence here does seem suspicious, even a 'deep suspicion the appellant committed the crime charged is not sufficient to sustain conviction.'" (citations omitted).

In this case, the State failed to prove that Mr. Serrano was the killer. There was no objective evidence such as fingerprints or DNA to place Mr. Serrano at the crime scene. Although law enforcement officers conducted forensic searches of the crime scene, the automobile allegedly driven by Mr. Serrano that day and, Mr. Serrano's house, they found no incriminating evidence linked to Mr. Serrano. In addition, two handguns were used in the murders suggesting that there were two shooters - not one - as the prosecution contended. Neither of the guns was ever found. There was no eyewitness testimony. An Atlanta businessman met with Mr. Serrano in Atlanta the day of the incident until 11 a.m. Also, hotel videotape footage showed Mr. Serrano in the Atlanta hotel lobby that day at 12:19 p.m. and at

10:17 p.m. In addition, airline and hotel records showed that Mr. Serrano traveled to Atlanta the day before the murders and left there the morning after the murders.

The prosecution's theory was that, from 12:19 p.m. until 10:17 p.m., Mr. Serrano could have traveled on a commercial airline from Atlanta to Orlando under a false name, driven 80 miles to Bartow in a rental car in rush hour traffic, shot four people at close range, driven 50 miles in a rental car in rush hour traffic to Tampa, flown back to Atlanta under a false name via a commercial airline and driven back to his Atlanta hotel lobby. However, there was not enough time for Mr. Serrano to have done all of these things and to have arrived at his hotel at 10:17 p.m. Notably, the wide-bodied jet from Tampa to Atlanta that the prosecution theorized Mr. Serrano flew on as "John White" touched down in the Atlanta International Airport just 28 minutes before 10:17 p.m. when Mr. Serrano was seen on the video surveillance in the Atlanta hotel lobby. Therefore, ***in only 28 minutes,*** the jet would have had to have touched down and taxied down the runway to a gate, the airport personnel would have had to have connected the jet to the gate and Mr. Serrano would have had to have disembarked from the wide-bodied jet with the many other passengers, made his way through the huge Atlanta airport, one of the busiest in the world, exited the airport, obtained a taxi or some other vehicular transport and traveled to his hotel five miles away.

Not a single witness was found who saw Mr. Serrano leave the hotel, drive to the airport, park there or get on the planes. No airport videotapes showed Mr. Serrano anywhere near the Atlanta, Orlando or Tampa airports that day.

The State's bloodstain pattern analysis expert could not discern the order in which the victims were shot. However, that expert concluded that George Patisso was shot execution style before George Gonsalves which detracts from the prosecution's theory that George Gonsalves was the target of Mr. Serrano's alleged murder plan.

At the crime scene, law enforcement officials found 13 fingerprints that could not be matched to anyone, although they obtained fingerprints from every Erie/Garment employee, Mr. Serrano and the deceased. (T3035-37, 3045-51, 3070-71, 3156-59, 3302-03) Law enforcement officers found no sign of a forced entry on any of the doors that were a point of entry into the Erie/Garment building. The locks to these doors were changed after Mr. Serrano left.

The shoe impression on the blue chair in Frank Dosso's office had some very general class characteristics similar to a shoe that was part of a pair of shoes owned by Mr. Serrano which Mr. Serrano loaned to Alvaro Penaherrera to wear when he appeared before the grand jury investigating this case over two years after the crimes occurred. However, the FDLE crimes analyst who analyzed the shoe could not positively identify that shoe as having made the impression on that chair.

Furthermore, the analyst did not dispute that the class characteristics of that shoe could be consistent with as many as 100 million or more shoes. Moreover, defense counsel pointed out at the trial that it would have been crazy for Mr. Serrano to give shoes worn during the commission of murders to Penaherrera to wear to the grand jury that was investigating those same murders.

There was substantial evidence that the motive for the shootings was robbery. There were no wristwatches found on any of the three men who were killed. Blood on Frank Dosso's arm showed an outline of his Rolex wristwatch which had been stolen from him after he was shot. George Patisso had been wearing a gold neck chain that was also stolen by the perpetrator. Frank Dosso's pants pocket was partially pulled out. Frank Dosso's office and several other offices were in complete disarray with drawers and file cabinets left open and papers and other items strewn all over the floors. Someone targeting the business for a robbery would most likely not know that the business did not have a lot of cash on hand. (T3832-34) Detective Parker testified that, in the event that robbery was not the motive, the shooter or shooters went to the trouble of trying to make it look like robbery was the motive. (T3835) Yet, when Detective Parker asked Mr. Serrano to opine on what he thought the motive was for the murders, Mr. Serrano told Detective Parker that he did not think that robbery was the motive. (T3834-35)

The State's own fingerprint expert testified that he had serious reservations about the fingerprints on the November 23, 1997and the December 3, 1997 Orlando Airport parking garage tickets, both of which "coincidentally" matched Mr. Serrano's same finger - the right index finger - and each of which was a print of the opposite half of that ***same*** finger. The State's fingerprint expert explained that fingerprints can be planted and yet not detected by experts. Notably, two law enforcement officers looked for these parking tickets at the Orlando Airport parking garage in late 1998/early 1999 but they did not find them. Then, according to Agent Ray, years later, in March 2001, after a great deal of frustration in trying to solve the crimes in this high profile case, he went back to that parking garage and "discovered" the two parking tickets containing the fingerprints that he claimed miraculously survived all those years.

It is pure speculation that Mr. Serrano killed George Gonsalves, Frank Dosso, and George and Diane Patisso. A conviction may not be based on guesswork, no matter how educatd the guess or how strong the suspicion may be. *See e.g., Frank v. State*, 163 So.233, 121 Fla. 53, 55-56 (Fla. 1935). Mr. Serrano's conviction and sentence must be reversed.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS MR. SERRANO'S STATEMENT. THE ADMISSION OF THIS STATEMENT VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS' PROHIBITION

AGAINST SELF-INCRIMINATION.

As previously explained, after Mr. Serrano was arrested in Ecuador, he was forcibly removed to the United States on an airplane in which he was seated with Agent Ray and a DEA agent for many hours. (T4751, 5897) Mr. Serrano made statements to Agent Ray on the plane. During the trial, Mr. Serrano, through his counsel, orally moved to suppress those statements. (T1350-53, 1363, 4677-78, 5595-96) A hearing on the motion was held on October 4, 2006. (T1334-64) The trial court denied the motion by written order that same day. (T1401-02) During the trial, prior to the admission of these statements, Mr. Serrano renewed his motion to suppress. (T5886-88) After the trial, he filed a motion for a new trial based upon the denial of his motion to suppress. (T1504) This motion was denied. (T2461-62)

The testimony at the October 4, 2006 suppression hearing is summarized as follows:

Agent Ray and a DEA agent testified that Mr. Serrano was placed in their custody on an airplane at about 7:30 a.m. on September 1, 2002. Agent Ray and the DEA agent then read Mr. Serrano his *Miranda* rights. (T1339-40, 4739)

Agent Ray further testified that, at about 8:30 a.m., he asked Mr. Serrano if he wanted to make a statement. (T1341) Mr. Serrano responded, "I don't want to say anything at this time." (T1347-48) According to Agent Ray, about one and a half hours later, Mr. Serrano asked "how much we paid the Ecuadorian police to do this

to him." (T1341) Ray then said that they did not pay the Ecuadorian police anything to arrest and quickly remove him from Ecuador. He was just enforcing the law. Ray then immediately interrogated Mr. Serrano extensively but did not re-advise him of his *Miranda* rights or make any attempt to ensure that Mr. Serrano wanted to waive those rights even though Mr. Serrano plainly had invoked those rights. (T1348-49)

More specifically, without renewing any *Miranda* warnings, Ray asked Mr. Serrano if he had been planning on attending the civil hearing on the lawsuit between Mr. Serrano and the other Erie/Garment partners that was set in the United States for September 18, 2002. According to Ray, Mr. Serrano responded that he knew that the setting of the hearing was a trick, implying that the hearing was merely set in order to get Mr. Serrano to enter the United States. (T1342) Ray conceded that, after he asked Mr. Serrano the question about him attending the hearing in the civil lawsuit, Mr. Serrano "was not readvised and he was not reminded of his rights" and they "engaged in a conversation of [Ray] asking him questions for quite some period of time." (T1349) Ray also conceded that this interrogation lasted about 30 minutes. (T1342) The subject matter of this interrogation is more specifically described herein at 29-30, *infra*. (R1404, T5903-08)

At the conclusion of this interrogation, according to Ray, he asked Mr. Serrano where he had kept his firearm at Erie/Garment and Mr. Serrano responded that, when he would go out-of-town for several weeks, he would hide his .357 caliber revolver in the ceiling or behind his computer in his office. (T1343) Ray testified that Mr. Serrano then said, "You are starting to talk business now, I don't want to talk business" and Ray discontinued his interrogation. (T1343)

It is Mr. Serrano's position in this appeal that the trial court erred in denying his motion to suppress. The trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts are accorded a presumption of correctness unless clearly erroneous. Review is plenary - the review of the law as applied to the facts is reviewed by this Court under a *de novo* standard and the factual findings of the trial court are affirmed only if supported by competent substantial evidence. *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001).

The United States Supreme Court has held that, when an accused has invoked his right to counsel, all interrogation by the police must cease immediately "until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). *Accord Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (After being advised of his rights, if an accused indicates that he wishes to remain silent, "the interrogation must cease.").

The *Edwards* decision was clarified in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In a plurality opinion, the *Bradshaw* Court set forth a two-step process which must be utilized where the accused initiates a conversation that takes place after he has invoked his *Miranda* rights. First, the trial court must determine whether the accused initiated the conversation in a way evincing a "willingness and a desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46. *Accord Welch v. State*, 992 So.2d 206, 214 (2008). If the trial court determines that the accused initiated the conversation in a way evincing a willingness and a desire for a generalized discussion concerning the investigation, the trial court must make one other inquiry in determining whether the accused waived his *Miranda* rights: whether the accused, by his or her initiation of such a conversation, coupled with the totality of the other circumstances, voluntarily, knowingly and intelligently waived those rights. *Bradshaw*, 462 U.S. at 1046. *Accord Welch*, 992 So.2d at 215. With respect to this second inquiry, the prosecution has the heavy burden of proving such a waiver. *Bradshaw*, 462 U.S. at 1044-45; *United States v. Montgomery*, 714 F.2d 201, 203 (1st Cir. 1983)(same).

A. Mr. Serrano's Question Posed to Agent Ray After Having Invoked His *Miranda* Rights Did Not Evince A Willingness And A Desire For A Generalized Discussion About The Investigation.

At the time that Mr. Serrano was arrested by Ecuadorian police and placed on the airplane with Agent Ray, he was being deported - not extradited - after having just been arrested by the Ecuadorian police the previous day. (T4370, 4384, 4738-39) Mr. Serrano's off-hand question, "How much did you pay the Ecuadorian police to do this to me?" posed on the plane just after the Ecuadorian police had arrested and forcibly removed him without following the usual extradition procedures was a natural, if not inevitable, query which would occur to one in his situation. The question did not refer to the crimes and did not evince a willingness and a desire to discuss his case in depth after having previously invoked his *Miranda* rights.

The Supreme Court in *Bradshaw*, 462 U.S. at 1045, recognized that "there are undoubtedly situations where a bare inquiry by either a defendant or a police officer should not be held to 'initiate' any conversation or dialogue...." Subsequently, courts have not hesitated to apply this legal principle and hold that suppression of a defendant's statement was required even though the defendant had asked the police a question after being Mirandized. For example, in *United States v. Montgomery*, *supra*, the defendant was found in possession of several firearms in violation of federal law. Following his arrest several months later, the defendant was given *Miranda* warnings and invoked his rights. After being fingerprinted, he asked a federal agent, "Am I being charged with each gun?" The Court ruled that, although the defendant had initiated the conversation, the question asked by the defendant,

"Am I being charged with each gun" "was a natural, if not inevitable, query which would occur to one in his situation who had been present seven months earlier when several guns had been seized." 714 F.2d at 203-204. Accordingly, the Court held that the defendant's question did not evince a willingness and a desire for a generalized discussion concerning the investigation and ordered the suppression of the defendant's statements.

For further example, in *People v. Olivera*, 647 N.E.2d 926 (1995), the defendant surrendered to police in relation to a shooting investigation. The arresting officer advised the defendant of his *Miranda* rights and the defendant invoked those rights. Subsequently, another officer placed Olivera in a lineup after which Olivera asked the officer, "What happened?". The Supreme Court of Illinois held as follows:

> In the instant case the defendant's question "What happened?" posed to Detective Kate immediately following the conclusion of the lineup cannot be said to evince on the defendant's part a willingness and a desire for a generalized discussion concerning the investigation. To ascribe such significance to this limited question would render virtually any remark by a defendant, no matter how offhand or superficial, susceptible of interpretation as an invitation to discuss his case in depth. To do so would amount to a perversion of the rule fashioned in *Edwards* and articulated more fully in *Bradshaw*.

And, in *People v. Sims*, 5 Cal.4th 405, 441-44 (Cal. 1993), the defendant was arrested in Nevada after committing murders in two other States. The police advised

the defendant of his *Miranda* rights and the defendant invoked those rights while he was with the police in a jailhouse interview room. As the police officers stood up to leave the room, the defendant asked "what was going to happen from this point on" and referred to the matter of extradition. The Court held that the defendant's question relating to extradition was "'natural, if not inevitable' in light of his having been arrested in Nevada after committing murders in two other States" and, could not be construed to have opened the door to interrogation after previously having invoked his *Miranda* rights. *Id*. at 443.

Like the defendants' questions in *Montgomery*, *Olivera* and *Sims*, Mr. Serrano's question relating to his having just been arrested by the Ecuadorian police and rapidly removed from Ecuador by them without them following the usual extradition procedures was "natural, if not inevitable" under the circumstances. It did not evince a willingness and a desire for a generalized discussion about the investigation after he had previously invoked his *Miranda* rights.

B. The Prosecution Failed to Meet its Heavy Burden of Proving That Mr. Serrano Knowingly, Voluntarily and Intelligently Waived His *Miranda* Rights.

As previously explained, even if the accused initiates a conversation that takes place after he has invoked his *Miranda* rights, where re-interrogation follows, the burden is on the prosecution to show that subsequent events established a waiver of

those rights. *E.g. Bradshaw*, 462 U.S. at 1044; *Welch*, 992 So.2d at 214-215. In this case, Mr. Serrano invoked his *Miranda* rights and, about an hour and a half later, asked Agent Ray how much he had paid the Ecuadorian police to arrest and deport him without the usual extradition procedures. Agent Ray answered the question and then, ***without renewing any warnings or making any effort to ensure that Mr. Serrano wanted to answer questions about the crime***, Agent Ray interrogated Mr. Serrano for 30 minutes about the crime.

In *Bradshaw*, when the defendant asked, "Well what is going to happen to me now?" after having invoked his *Miranda* rights, the police officer answered by saying, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say - because - since you have requested an attorney, you know, it has to be at your own free will." 462 U.S. at 1042. Based upon this warning and the defendant subsequently signing a *Miranda* waiver, the Supreme Court held that there was a valid waiver of the defendant's *Miranda* rights before the second interview occurred.

Similarly, in a host of Florida cases where this issue has been considered and Courts have held that a valid waiver of invoked *Miranda* rights occurred, Courts have relied upon the fact that there was either a re-advisement of *Miranda* rights or something said by law enforcement to clarify that the defendant understood and sought to waive his rights before law enforcement began the second interview.

Francis v. State, 808 So.2d 110, 127 (Fla. 2001)("as in *Bradshaw*, the police in this case applied the additional precaution of informing the defendant that because he had invoked his right to counsel they could not speak with him unless [the defendant] indicated that he wished to reinitiate contact"); *Welch*, 992 So.2d at 214-15 (defendant was re-Mirandized before law enforcement began the second interview); *Stein v. State*, 632 So.2d 1361, 1364 (Fla. 1994)(before law enforcement officer began the second interview, they re-advised the defendant of his right to an attorney); *Bryan v. State*, 947 So.2d 1270, 1272 (Fla. 5th DCA 2007)(defendant was re-Mirandized before law enforcement began the second interview); *State v. Blackburn*, 840 So.2d 1092-93 (Fla. 5th DCA 2003)(defendant was re-Mirandized before law enforcement began the second interview); *Ahedo v. State*, 842 So.2d 868, 870 (Fla. 2d DCA 2003)(before law enforcement began the second interview, the officer reminded the defendant that he had invoked his Miranda rights and stated that he wanted to be clear that the defendant wanted to speak to him about the crime).

Here, in contrast, Agent Ray did not respond with any re-advisement of *Miranda* rights or statements to clarify that Mr. Serrano understood and sought to waive those rights. Instead, Agent Ray answered Mr. Serrano's question and then proceeded to interrogate him for 30 minutes with questions that focused on the

investigation and evidence in this case and which served no legitimate purpose incident to Mr. Serrano's arrest or custody.

This interrogation by Agent Ray should be viewed "as a not untypical case history of what is likely to happen if law enforcement officials are permitted without reiterating that further talk is not compelled, to use a suspect's simple, not-guilt-suggestive question as a license to launch a fishing expedition." *See Montgomery*, 714 F.2d at 204-205. *Cf. Welch*, 992 So.2d at 215 (incriminating confession made after the defendant invoked his *Miranda* rights but then initiated a conversation with law enforcement was admissible in part because the confession was not in response to interrogation by law enforcement officers who "did not pressure [defendant] but waited several minutes in silence for [defendant] to talk"). Accordingly, the prosecution plainly failed to satisfy its heavy burden of proving that Mr. Serrano knowingly, voluntarily and intelligently waived his *Miranda* rights.

C. The Admission Of Mr. Serrano's Statements Constituted Harmful Error.

"To affirm a conviction despite error at trial, the State must prove beyond a reasonable doubt that the error 'did not contribute to the verdict or, alternatively stated, that there was no reasonable possibility that the error contributed to the conviction.'" *Rigterink v. State*, 2 So.3d 221, 255 (Fla. 2009)(quoting *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla. 1986)). Recognizing this test, this Court in

Rigterink, 2 So.3d at 255, reversed a defendant's conviction because the trial court erroneously admitted his confession during his capital trial. This Court reasoned that, "[a]lthough each of the three prior inconsistent stories that Rigterink provided would remain admissible to demonstrate his complete dishonesty, and despite the fact that there is circumstantial evidence demonstrating that he committed these murders, we cannot say that the erroneously admitted videotape did not 'contribute to' his convictions."

Similarly, in this case, it cannot be said that Mr. Serrano's statements to Agent Ray on the plane did not contribute to his convictions. These statements were admitted during the State's case-in-chief. (T5897-5908) Furthermore, during the State's closing argument, the State repeatedly argued to the jury that Mr. Serrano's statements to Agent Ray on the plane proved his guilt and emphasized that Mr. Serrano told Ray on the plane that, when he worked at Erie/Garment, he used to hide a gun in the ceiling. (T6150-52, 6154, 6165-66, 6169) In short, the State clearly benefitted from the admission of Mr. Serrano's statements to Agent Ray and it cannot be said beyond a reasonable doubt that the admission of those statements did not contribute to the verdict. Accordingly, the order denying suppression should be reversed and this case remanded for a new trial.

D. The Trial Court Applied The Wrong Law In Denying The Motion to Suppress.

As previously explained, where, as here, an accused has invoked his *Miranda* rights but the ***accused*** then asks a law enforcement agent a question, the trial court must follow the two-step test set forth in *Bradshaw*: (1) did the defendant's question evince a willingness and a desire to talk about the crime, and (2) even if the answer to step one is yes, did the prosecution meet its heavy burden of showing that the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights after asking that question. *E.g., Bradshaw*, 462 U.S. at 1045-46; *Welch*, 992 So.2d at 214-15.

On the other hand, where the ***police*** - not the accused - reinitiate the dialogue, this Court in *Globe v. State*, 877 So.2d 663 (Fla. 2004) and the Court in *State v. Pitts*, 936 So.2d 1111 (Fla. 2d DCA 2006) relying on *Michigan v. Mosley*, 423 U.S. 96 (1975), have merely required the trial court to examine the totality of the circumstances and determine if the police scrupulously honored the defendant's right to cut off questioning. This distinction has been expressly recognized by the Second District in *State v. Hunt*, ___ So.3d ___ , 2009 WL 1424014 (Fla. 2d DCA 2009).

In this case, the trial court applied an incorrect standard in denying Mr. Serrano's motion to suppress. The trial court erroneously relied upon the totality-of-the- circumstances test of *Globe, supra* and *Pitts, supra* rather than applying the two-step *Bradshaw* test. (T1401-02) Accordingly, reversal is mandated.

III. THE CONVICTIONS AND DEATH SENTENCE OF MR.

SERRANO VIOLATE HIS RIGHTS TO DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS BECAUSE FLORIDA LAW ENFORCEMENT OFFICIALS COMMITTED OUTRAGEOUS ACTS AND VIOLATED AN EXTRADITION TREATY WHEN THEY KIDNAPED HIM IN ECUADOR AND FORCIBLY BROUGHT HIM TO THE UNITED STATES.

Prior to the trial, Mr. Serrano filed a motion for the trial court to divest itself of jurisdiction and to dismiss the indictment. The motion provided, *inter alia*,

> 1. The Defendant, NELSON IVAN SERRANO, holds dual citizenship as a lawful citizen of the United States of America (through naturalization processes in 1971) and maintains and is entitled to the benefits of citizenship of the country of Ecuador.
>
> 2. On or about August 21st of the year 2000, the Defendant did lawfully enter his home country of Ecuador where he remained until he was wrongfully arrested by representatives of the State of Florida.
>
> 3. Nearly a year later, and on or about May 17th of the year 2001, the Defendant was indicted by a Grand Jury in and for Polk County, State of Florida and charged with four (4) counts of First Degree Murder, the subject matter of the above-styled cause.
>
> 4. More than a year later, on or about August 31st of 2002, Agents for the Florida Department of Law Enforcement and others collaborated with Ecuadorian Police to seek the deportation of Mr. Serrano from Ecuador. Such action was illegal because the Defendant was also an Ecuadorian Citizen and not subject to lawful deportation.
>
> 5. Immediately, without other notice the Defendant was arrested with no other process, in Ecuador. He was physically restrained, thrown into an animal cage, held incommunicado and the next day surreptitiously flown to the State of Florida.

> 6. The Defendant was not afforded any semblance of due process; he had no hearing; he had no lawyer; he had no notice; and was treated in a despicable and inhumane manner.
>
> 7. The Defendant was not afforded any hearing before a judicial authority. The Defendant was not afforded any process to allow any question or analysis of the legality of his detention and deportation in that apparently, the process before being caged lasted only one (1) hour and twenty (20) minutes.
>
> 8. The Defendant was not afforded any opportunity to answer the accusations before any impartial judge but was rather summarily caged and "deported" by the police.
>
> 9. The Defendant brought action before the Interamerican Commission of Human Rights, the Organization of American States. The report of said commission was approved on October 12, 2005, which report condemns the unlawful deportation of an Ecuadorian Citizen and the violation of human rights contrary to the terms and provisions of the American Convention of Human Rights to which the United States of America is a signatory member.
>
> 10. The conclusion of the Interamerican Commission of Human Rights essentially confirms the allegations of fact brought by Mr. Serrano and the illegality of his sentence, treatment and deportation.

(R1284-85)

Attached to that motion was the Report of the Interamerican Commission of Human Rights which provided, *inter alia*, that the following facts were not disputed by the State:

> Mr. Serrano had been kept in a cage for animals during an entire night previously to his transfer to the United States; the circumstance that he had been kept incommunicado

> during the entire deportation process; the decision that might have been adopted by the Ecuadorian authorities regarding the fact that they proceeded to deport him because they consider him a foreign citizen; without previously permitting him to question said condition and in spite that he had invoked his condition of Ecuadorian national.

(R1311)

On September 5, 2006, the trial court heard argument on Mr. Serrano's motion. At that hearing, defense counsel argued as follows:

> In the *Toscinino* case the Defendant was held incommunicado for eleven hours. Well, guess what? Nelson Serrano was kept incommunicado for that period of time or longer. He was unlawfully kidnaped without warrant or due process, although there was a warrant issued here pursuant to a Grand Jury Indictment, there was no process through an extradition treaty in Ecuador.... He was denied counsel. He was denied the right to consult the consulate. And, he was put in an animal cage and kept that way until wrongfully brought into the United States. He somehow suffered bruises and abrasions upon his body and face at the time. His testimony is, of course, is those were caused by the treatment he received at the hands of the agents involved.

(T2562) At that oral argument, the prosecutor did not dispute these facts. The trial court denied the motion. (T2558-82; R2296-97)

On March 8, 2007, Mr. Serrano filed a supplemental motion to dismiss the indictment and divest the court of jurisdiction. (R2260-66) In his amended motion, he stated, in pertinent part:

In January of ... 2007 the Congress of the Country of Ecuador did pass a resolution regarding this case and the treatment of Nelson Serrano requiring the immediate direct intervention of the Ecuadorian National Ombudsman and his agents to intervene and further demand investigation of the General Police Superintendent of Pichincha Provence and other officials in the deportation process. (A certified copy of the Resolution was attached.)

* * *

Pursuant to the Resolution of the Ecuadorian Congress and instructions, the Ecuadorian National Ombudsman did undertake a complete and thorough investigation of all matters related to the "Deportation" of Nelson Serrano ultimately determining that IN FACT Nelson Serrano was illegally taken prisoner in Ecuador and deported to the United States in violation of the Constitutional Rights of Ecuadorian citizens and various Articles of Rights set forth in the American Human Rights Convention. Further, said Ombudsman found that the law enforcement parties involved acted in open contradiction of the National Constitution of Ecuador, the Migration Laws and the Code of Criminal Procedure. (A certified copy of the Ombudsman's findings and conclusion was attached.)

* * *

The official investigation by the Ecuadorian Government through it's[sic] Ombudsman and pursuant to the charge and resolution of the Ecuadorian Congress confirms numerous factual matters that should be considered by this Court in light of it's[sic] original Order and expressed concerns. Amongst those are the following:

A. Nelson Ivan Serrano was born in Ecuador and is an Ecuadorian citizen, having been born on September 15, 1938, Citizen Identification Card Number 170667438-7.

B. Mr. Serrano was granted a regular Ecuadorian Passport Number DL71.513 on May 8, 2000, with an expiration date of May 8, 2006.

C. That false representations were made to the General Superintendent of Police of Pichincha that Nelson Ivan Serrano was illegally in the country on an expired Visa when in fact he was lawfully there pursuant to the aforesaid properly and legally issued Passport.

D. An alleged "hearing" was held (as claimed by the prosecution for the State of Florida in this cause),

however,, the findings reveal that Nelson Serrano was presented to the police after having been arrested with the Defendant having no lawyer; that Ecuadorian process was denied by concealing or intentionally misrepresenting the existence of the lawfully issued Passport, (thus having him "judged as a foreigner") and that apparent efforts were made to conceal this illegal process by creating documents for certain processes which occurred AFTER Mr. Serrano had in fact already been "deported".

E. That citizen Nelson Serrano was arrested by numerous members of the Police Department in riot gear outside the "Embassy Hotel" in the City of Quito, Ecuador where he was seized and forcibly thrown into a green truck.

F. That Mr. Serrano was allegedly "tried" just ten (10) minutes after having been grabbed off the streets of Quito and in further outrageous conduct in an effort to cover this series of violations of rights, the Police Superintendent attempted to appoint a lawyer for Serrano **after the fact**.

G. The National Constitution of Ecuador, Article 24(6) prohibits anyone from being deprived of his liberty unless pursuant to an Order of a Judge or except in the case of "flagrant crimes"

H. An Order to Arrest issued by the Superintendent of Police was in violation of Ecuadorian law and even itself internally included false allegations as presented by the seeking authorities (FDLE Agent Tommy Ray and Assistant State Attorney Paul Wallace) that Serrano was **only** a "U.S. Citizen". Moreover, as found by the Ombudsman, even this unlawful Order was defective for failing to allege the essential requirements in accordance with Ecuadorian Law.

I. The Ombudsman determined that the Order for Arrest was unlawful and thus, null and void. They further concluded that the National Constitution of the Republic of Ecuador Articles 23 (2, 4, 8, 14, 25 & 27) which are in accordance with the American

Human Rights Convention Articles 1, 5, 7, 8, 22 and 25 were all violated.

J. Not only was the process itself significantly in numerous respects fatally flawed, the order of apprehension of the Defendant was also illegal. The Ombudsman concluded that such Order was improper, illegal and violated the Constitution of Law and also contains numerous falsehoods. Thus, in conclusion, regarding August 30, 2002 actions of the Ecuadorian authorities, the Ombudsman determined that the Order for Arrest and the Order for Preventive Custody were both illegal.

K. As found by the Ombudsman even if the knowing and intentional misrepresentations by the Florida authorities were true (i.e. that the Defendant was only a U.S. Citizen), he could not have lawfully been subject to an Order for Arrest because there had been no compliance with the Migration Law of the Country of Ecuador. The Ombudsman further concluded that Serrano was improperly considered as being of U.S. citizenship. The records clearly establish that Serrano had been issued an Ecuadorian Citizen's Passport as set above, by the Ecuadorian Consulate of the United States on May 8, 2000 and thereafter had unlawfully entered Ecuador on August 21, 2000 as an Ecuadorian citizen.

L. The Ombudsman stated, "as may clearly be concluded, such a distortion in the analysis of the facts lead the Superintendent (of Police) to carry out his illegal, out-of-order and unjust purpose because as an Ecuadorian there was no reason whatsoever to deport him, nor to extradite him because pursuant to Article 25 of the National Constitution of the Republic of Ecuador, "in no event shall an Ecuadorian citizen be extradited. They shall be tried subject to the laws of Ecuador".

M. The Ombudsman further and materially found that "it should be noted that the Superintendent (of Police) in order to carry out the unconstitutional,

> illegal deportation action, took only one (1) hour and twenty (20) minutes from street arrest. Further, pursuant to the Ombudsman's findings, "this all reflects a degree of total defenselessness to which citizen Serrano-Saenz was subjected precisely to prevent him from exercising his legitimate right to defense under the constitution and the law. All these actions are null and void under the law of Ecuador because they are substantial violations of the formal procedures of civil and human rights".
>
> N. The Ombudsman further found specifically that Defendant Serrano's right to counsel guaranteed by the Ecuadorian National Constitution, Article 24(7)(17) and Article 8 of the American Rights Convention were violated. Further, that the Defendants[sic] guarantee of due process pursuant to the Ecuadorian Constitution were violated.
>
> O. As a result of the numerous violations of law, the Ombudsman's conclusion is that the numerous violations also violated the norms contained in the Inter-American Convention of Human Rights.

(R2261-64 ¶¶ 4-6)(emphasis in text)

Notably, at Mr. Serrano's trial, FDLE Agent Tommy Ray admitted that he believed that Mr. Serrano held dual citizenship in Ecuador and the United States and knew that Mr. Serrano had an Ecuadorian passport before he sought to deport Mr. Serrano on the basis that he was solely a United States citizen. (T5894-95, 5929) Mr. Serrano's supplemental motion to dismiss also pointed out that:

> The recent television documentary shown on Saturday evening, March 3, 2007 on the CBS Television Network Program "48 Hours: Mystery", revealed that Mr. Ray acknowledged that he could not lawfully deport or extradite Mr. Serrano and that moreover the United States

> State Department had told him to quit and to go home. Instead, Mr. Ray is seen on said documentary to acknowledge that he hired people in Ecuador "for $1.00 an hour" which he contacted through an ex-patriot bar to assist him in the kidnaping of the Defendant.
>
> Mr. Ray also acknowledged that the Defendant wa taken off the streets at gunpoint, held incommunicado and housed overnight in an **animal kennel** which was photographically displayed in the 48 Hours documentary.

(R2265 ¶¶ 9, 10)(emphasis in text)

On March 15, 2007, an evidentiary hearing was held on Mr. Serrano's amended motion. (R2370-2444) At the hearing, FDLE Agent Ray testified that, prior to going to Ecuador to attempt to remove Mr. Serrano, he had been told by a federal law enforcement agent that such an attempt would be futile due to the applicable extradition laws. (R2393-94) Ray conceded that he, nevertheless, traveled to Ecuador where he met some off-duty Ecuadorian National police officers in a bar to whom he paid $1.00 per hour to capture Mr. Serrano for a total of approximately $300.00. (R2394, 2398-99) According to Ray, he did not personally see where Mr. Serrano was taken when he was arrested but he heard it was an office at the "Canine Unit." (R2396)

Ecuadorian National Ombudsman Claudio Mueckay testified as follows:

The Ombudsman of Ecuador is appointed to the Ecuadorian Congress to protect the human and civil rights of its citizens. In his position as Ombudsman, he conducted an official investigation into the manner in which Mr. Serrano was

removed from Ecuador. He was directed by a Congressional Resolution to conduct this investigation. (R2404-12, 2435; EV1258-99) Mr. Serrano was a dual citizen of Ecuador and the United States when he was arrested in Ecuador. (R2412-13) Pursuant to Ecuador's Constitution, a citizen of Ecuador can never be extradited or deported. Accordingly, Mr. Serrano's removal from Ecuador was illegal. (R2412-14) According to Ecuador's Constitution, Mr. Serrano, however, may have had to stand trial in Ecuador for the charges in this case instead of being extradited or deported. (R2414-15)

There is an Extradition Treaty between the United States and Ecuador. (R2415-17; EV1300-05) That Treaty and Ecuador's Constitution prohibit the extradition of an Ecuadorian citizen to face the death penalty. (R2438) Mr. Serrano, who was lawfully in Ecuador (R2422-23), was not extradited pursuant to this Treaty. Rather, he was removed through illegal procedures in violation of his human rights. (R2418-19, 2421)

The hearing officer before whom Mr. Serrano appeared when he was arrested in Ecuador was a police chief who was falsely told that Mr. Serrano was a United States citizen and was without authority to order Mr. Serrano's removal. (R2418-20) It was only 90 minutes from the time that Mr. Serrano was arrested until he was ordered to be removed by the police chief which is unheard of and is a violation of Mr. Serrano's constitutional right to due process. (R2434) After Mr. Serrano was

arrested, he was kept overnight in an animal cage at police headquarters until the next morning when he was flown out on a plane with Agent Ray. (R2420-21) Agent Ray's payment of $300 to Ecuadorian off-duty police officers to arrest Mr. Serrano was illegal. (R2421)

The trial court denied Mr. Serrano's supplemental motion. (R2459-60)

This issue involves a legal dispute as to a conclusion of law. Legal rulings are reviewed *de novo*. *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla. 2001).

The general rule under the *Ker/Frisbie* line of cases is that the means used to bring a criminal defendant before a court do not deprive that court of jurisdiction over the defendant. *United States v. Alvarez-Machain*, 504 U.S. 655, 661-62 (1992) (citing and quoting *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952)). Nevertheless, the *Ker/Frisbie* doctrine does not apply, and a court is deprived of jurisdiction over a defendant if: (1) the removal of the defendant violated the applicable extradition treaty, that treaty provides that it is the sole means by which a fugitive may be removed to another country and the offended nation objects to the removal of its citizen, or (2) the actions of American law enforcement officials in removing a defendant from a foreign country were outrageous. *See e.g., Alvarez-Machain*, 504 U.S. at 662-64, 667; *United States v. Anderson*, 472 F.3d 662, 666 (9th Cir. 2006).

The removal of Mr. Serrano to the United States without complying with the United States-Ecuador Extradition Treaty deprived the trial court of jurisdiction over Mr. Serrano. That Treaty provides, *inter alia*, as follows:

> [W]hen the fugitive is merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime has been committed, and of any evidence in writing upon which such warrant may have been issued, must accompany the aforesaid requisition. The President of the United States, or the proper executive authority of Ecuador, may then order the arrest of the fugitive, in order that he may be brought before the judicial authority which is competent to examine the question of extradition. ***If, then, according to the evidence and the law, it be decided that the extradition is due in conformity with this treaty, the fugitive shall be delivered up, according to the forms prescribed in such cases***.

18 Stat. 756, 1873 WL 15435 (U.S./Ecuador Treaty, Article V)(emphasis added). Thus, the Treaty states explicitly that it is the ***sole*** means by which the United States is able to secure the presence of a fugitive. Yet, the Treaty was not complied with in this case and it prohibits the extradition of an Ecuadorian citizen such as Mr. Serrano to face the death penalty. (R2414, 2418-19, 2421-23, 2438).

In *United States v. Rauscheri*, 119 U.S. 407 (1886), the Supreme Court recognized that a violation of the contract between parties to a treaty is also a violation of the Supreme Law of the this land and directly involves personal rights. A right of a person or property, secured or recognized by treaty, may be set up as a

defense to a prosecution with the same effect as if such right was secured by an act of Congress.

In *The Paguette Habana*, 175 U.S. 677, 700 (1900), the Supreme Court held that a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself, without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."

In *Asakura v. Seattle*, 265 U.S. 332, 341 (1924), the Supreme Court reinforced this fact when it held that "the construction of treaties is judicial in nature, and courts when called upon to act shall be careful to see that international agreements are faithfully kept and observed. .." *See also Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); *Cook v. United States*, 288 U.S. 102 (1933).

In *Alvarez-Machain*, 504 U.S. at 661 n. 7, the Supreme Court noted that there had been occasions where the United States had entered into treaties which circumscribed the exercise of a court's jurisdiction. In *Cook v. United States*, 288 U.S. 102, 111-118 (1933), for instance the Court held that a seizure in violation of a treaty with Great Britain could not be saved under the doctrine of *Ker v. Illinois*, 119 U.S. 436 (1886) precisely because the United States had agreed to limit its authority by treaty. Significantly, the Ecuadorian Congress passed an official resolution condemning the actions of American law enforcement in this case. (R2300-01,

2406-10) The Ombudsman of the Ecuadorian Congress traveled to the trial court for the express purpose of protesting the outrageous kidnaping of Mr. Serrano in violation of the Extradition Treaty. Furthermore, the Attorney General of Ecuador officially condemned the illegal kidnaping of Mr. Serrano. (R1724-26)

Moreover, the actions of American law enforcement officials in illegally kidnaping Mr. Serrano were so outrageous that the due process clause of the federal and Florida Constitutions required the trial court to divest itself of jurisdiction over Mr. Serrano. In *United States v. Russell*, 411 U.S. 423, 431 (1973), Justice William Rehnquist acknowledged that:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process would absolutely bar the government from invoking judicial processes to obtain a conviction.

The Second Circuit in *United States v. Toscanino*, 500 F.2d 267, 275 (2nd Cir. 1974), citing due process concerns, carved out an exception to the *Ker/Frisbie* doctrine and held that due process requires a court to "divest itself of jurisdiction over the person of the defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." The Second Circuit reasoned that "when an accused is kidnaped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct."

Id. *See also United States v. Lambros*, 65 F.3d 698, 700-01 (8th Cir. 1995)(holding that "we do not foreclose the possibility that vicious conduct by American officials could amount to a violation of a criminal's due process rights").

In this case, American law enforcement officers deliberately and outrageously violated Mr. Serrano's constitutional rights. Agent Ray personally bribed off-duty Ecuadorian national police officers to take Mr. Serrano off the streets without notice and at gunpoint, hold him completely incommunicado without even the ability to speak to his attorney and keep him locked in an animal cage until he was flown to the United States the next day. (R1285) As a result of the actions of American law enforcement officials, the Ecuadorian police chief who ordered Mr. Serrano's removal was falsely told that Mr. Serrano was solely a United States citizen although he was also a citizen of Ecuador, a fact which would have precluded his forcible removal from Ecuador. Mr. Serrano had no hearing before a judicial authority, he had no lawyer, he had no notice, and was treated in a despicable and inhumane manner. Mr. Serrano was physically abused and suffered bruises and abrasions. (T2562, 2566) As previously explained, the Interamerican Commission of Human Rights, the Organization of American States, found that Mr. Serrano was unlawfully deported, illegally seized, and his human rights were violated. (R1285, 1301) As a result of these illegal and unconstitutional actions by American law enforcement officials, Mr. Serrano was sentenced to death in this case, an act which would never

have occurred if he had been tried in Ecuador where the death penalty is illegal. Accordingly, for all the foregoing reasons, Mr. Serrano's convictions and sentence must be reversed and this case must be remanded with directions to dismiss the indictment and return Mr. Serrano to Ecuador.

IV. THE CUMULATIVE IMPACT OF THE PROSECUTOR'S REPEATED ACTS OF MISCONDUCT REQUIRES REVERSAL OF MR. SERRANO'S CONVICTIONS AND SENTENCE.

A. PROSECUTORS HAVE A GREATER RESPONSIBILITY THAN NORMAL TO REFRAIN FROM MISCONDUCT IN DEATH CASES.

Prosecutors should "prosecute with eagerness and vigor" but may not use "improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). They should not be at liberty to strike "foul blows." *Id*. Prosecutorial misconduct "is especially egregious in…a death case, where both the prosecutors and the courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects," and the effects of the impropriety extend well beyond the trial itself, threatening a guilty verdict and risking the delay inherent in a reversal and retrial. *Salazar v. State*, 991 So.2d 364, 383 (Fla. 2008)(citing to *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629 (1935)).

This Court has responded swiftly to prosecutorial misconduct in death cases by reversing convictions and death sentences. In *Gore v. State*, 719 So.2d 1197, 1202 (Fla. 1998), this Court noted that a prosecutor has a great responsibility as an officer of the court in a death case. This Court went on to note, "[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases.... It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." *Id.* (citing to *Bertolotti v. State*, 476 So.2d 130, 133 (Fla.1985)).

In *Gore*, *supra*, this Court looked at the totality of the improper questions and comments by the prosecutor. The prosecutor's impermissible conduct included cross examinations which raised presumptively prejudicial collateral crime evidence without an appropriate predicate for its admissibility. In addition, the prosecutor expressed his personal belief about the defendant's guilt. This Court held that it could not conclude that collectively these errors were harmless and did not affect the verdict, especially since there was no physical evidence directly linking Gore to the murder, Gore did not confess, and the State's case was circumstantial. 719 So.2d at 1202-23.

In *Garron v. State*, 528 So.2d 353 (Fla. 1988), this Court reviewed several improper statements made by the prosecutor during closing arguments in a capital case. This Court held that, taken as a whole, the prosecutor's comments warranted reversal and stated:

> These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless. ***While it is true that instructions to disregard the comments were given, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct.***

Id. at 359 (emphasis added).

And, in the capital cases of *Ruiz v. State*, 743 So.2d 1, 9-10 (Fla. 1999), *Nowitzke v. State*, 572 So.2d 1346 (Fla. 1990), and *Urbin v. State*, 714 So.2d 411 (Fla. 1998), this Court also reversed based upon prosecutorial misconduct.

B. THE INSTANCES OF PROSECUTORIAL MISCONDUCT.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to a conclusion of law. Legal rulings are reviewed *de novo*. *Glatzmayer*, 789 So.2d at 301 n. 7. Although some evidentiary rulings are reviewed

for abuse of discretion, any discretion is controlled and limited by rules of evidence. *Johnston v. State*, 863 So.2d 271, 278 (Fla. 2003).

1. The Prosecutor Improperly Commented On Mr. Serrano's Federal and State Right To Remain Silent.

A defendant has a constitutional right to decline to testify in a criminal proceeding. *See* U.S. Const. Amend. V; Art. I, § 9, Fla. Const. Therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So.2d 29, 37 (Fla. 2000)(quoting from *State v. Marshall*, 476 So.2d 150, 153 (Fla. 1985)). *See also, e.g.*, *Heath v. State*, 648 So.2d 660, 663 (Fla. 1994); *State v. DiGuilio*, 491 So.2d 1129, 1131 (Fla. 1986). The "fairly susceptible" test is a "very liberal rule." *DiGuilio*, 491 So.2d at 1135.

This constitutional principle is also incorporated in Florida Rule of Criminal Procedure 3.250, which prohibits a prosecuting attorney from commenting on the defendant's failure to testify on his or her behalf. Comments on a defendant's failure to testify can be of an "almost unlimited variety" and any remark which is "fairly susceptible" of being interpreted as a comment on silence creates a "high risk" of error. *DiGuilio*, 491 So.2d at 1135-36. Three such remarks were made by the prosecutor in this case.

First, during the trial, the prosecutor asked FDLE Agent Ray if Francisco Serrano and Alvaro Penaherrera testified before the grand jury on multiple occasions to which Ray answered affirmatively. Immediately thereafter, knowing Mr. Serrano did not testify before the grand jury, the prosecutor asked Agent Ray, "Did Mr. Serrano appear before the Polk County grand jury?" (T4302)

Defense counsel immediately objected and moved for a mistrial on the ground that this was a violation of Mr. Serrano's right to remain silent and that this suggested that Mr. Serrano had a burden to testify before the grand jury to prove his innocence. The trial court agreed with defense counsel and initially directed the prosecutor to "[f]ix it." (T4302)

The prosecutor conceded to the trial court that Mr. Serrano had been subpoenaed to testify before the gand jury and had elected not to testify pursuant to his constitutional right to remain silent. (T4311) Thus, there was no proper reason for the prosecutor to ask the question of Ray unless he wanted to improperly elicit evidence of Mr. Serrano's silence.

Defense counsel pointed out that, when the prosecutor elicited from Ray that others who were suspects in this case (Francisco Serrano and Alvaro Penaherrera) repeatedly testified before the grand jury and the prosecutor then immediately asked Ray if Mr. Serrano appeared before the grand jury which the prosecutor knew would draw a defense objection, the prosecutor cleverly created a supposition that Mr.

Serrano - unlike the other suspects in this case - refused to testify before the Grand jury so he must be guilty. (T4301-34) The trial court denied the motion. (T4334) The trial court told the jury to disregard the prosecutor's question but defense counsel noted this did not cure the error. (T4334-35, 4340-42)

In addition, in the prosecutor's opening statement, the prosecutor stated that Mr. Serrano "had to come up with a story about how the fingerprint got on that ticket." (T2733) The defense objected and moved for a mistrial because the prosecutor improperly commented that Mr. Serrano had a duty to testify or present evidence about the fingerprint in the form of a "made-up story." (T2733-41) The trial court overruled the objection and denied the mistrial motion.

In the same opening statement, the prosecutor also stated, "[T]he very next day [after the murders], is Mr. Serrano's opportunity to tell the police what happened at Erie Manufacturing." (T2707) The defense objected to this comment that Mr. Serrano had a duty to talk to the police when, in fact, he had a right to remain silent. The defense also noted that, by referring to "Mr. Serrano's opportunity," the prosecutor had suggested that Mr. Serrano knew what happened when the murders occurred at Erie Manufacturing which violated his presumption of innocence. The defense moved for a mistrial on these bases. However, the trial court denied that motion. (T2707-10, 2841-49)

All of the previously explained instances of prosecutorial misconduct involved comments or questions which were plainly improper since they, at the very least, are "fairly susceptible" of being interpreted as referring to a defendant's failure to testify. *See Rodriguez*, 753 So.2d at 37. In addition, as previously explained, some of these comments improperly shifted the burden of proof and violated Mr. Serrano's presumption of innocence under the federal and State constitutions.

2. The Prosecutor Improperly Vouched For The Credibility Of Witnesses.

Improper bolstering of the credibility of a witness occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony. *Spann v. State*, 985 So.2d 1059, 1067 (Fla. 2008)(citing to *Hutchinson v. State*, 882 So.2d 943, 953 (Fla. 2004)); *Gorby v. State*, 630 So.2d 544 (Fla. 1993).

During the prosecutor's examination of key prosecution witness David Catalan, the following colloquy occurred between the prosecutor and Catalan:

> Q When's the first time you ever saw a picture of the room with a ceiling tile disturbed?
> A Today.
> Q And who showed that to you?
> A You.
> Q And was that when you were talking to me this morning before Court about being a witness in this case?
> A Yes.
> Q ***And did I tell you the most important thing to do was tell the truth***?
> A ***Yes, sir***.

Clearly, the prosecutor was placing his prestige behind the witness by eliciting that he [the prosecutor] told Catalan that the most important thing to do was to tell the truth. Consequently, this plainly constituted improper bolstering. *Id*. Notably, Mr. Catalan was a key State witness who the prosecution relied upon to argue that Mr.

Serrano kept a firearm in his office (possibly in the ceiling) and had been seen moving around a ceiling tile in the past.

The prosecutor additionally improperly bolstered the testimony of jailhouse snitch Leslie Todd Jones by eliciting from him that, if he was untruthful, his probation would be violated. (T5587) The defense objected and the trial court sustained the objection. The trial court then told the jury that they had to decide whether Jones was telling the truth. (T5587-90) However, this instruction failed to cure the error.

3. The Prosecutor Improperly Elicited Testimony To Show Mr. Serrano's Lack of Remorse.

During the guilt phase of the trial, the prosecutor asked Detective Parker if Mr. Serrano ever cried when he was interviewed by Parker the day after the murders. Parker responded, "No." (T3728) Defense counsel objected and moved for a mistrial. The trial court sustained the objection but denied the motion for mistrial. Defense counsel stated that it would be impossible for the jury to put out of their minds that, when Mr. Serrano talked to the police the day after the murders of these four people he knew, he did not cry. The trial court instructed the jury to disregard this testimony. (T3728-31, 3740-57, 3762)

This Court has repeatedly held that a defendant's lack of remorse is inadmissible in a guilt or penalty phase of a capital case. *Randolph v. State*, 562

So.2d 331, 337-38 (Fla. 1990)(holding that, in a capital case, the prosecutor acted improperly in asking a witness during the guilt phase, "Did the defendant act remorseful or ashamed, or anything, sad for what he had done?"); *Colina v. State*, 570 So.2d 929, 932 (Fla. 1990) (vacating the defendant's death sentence because the prosecutor erroneously elicited testimony regarding the defendant's lack of remorse); *Robinson v. State*, 520 So.2d 1, 5-6 (Fla. 1988)(holding that it was error to admit evidence of the defendant's lack of remorse during the penalty phase of a death case); *Pope v. State*, 441 So.2d 1073, 1077-78 (Fla. 1983)(same).

The prosecutor plainly improperly elicited evidence regarding Mr. Serrano's lack of remorse which was irrelevant, highly prejudicial and, accordingly, inadmissible under Sections 90.401 and 90.403 of the Florida Statutes.

4. The Prosecutor Improperly Made Comments And Elicited Evidence The Sole Relevance Of Which Was To Demonstrate Mr. Serrano's Alleged Bad Character.

During opening statements, the prosecutor stated that, while Mr. Serrano was at Erie/Garment, he decided to "***take some money*** owed to the two corporations and open up ***his own*** bank account," suggesting that Mr. Serrano stole money from Erie/Garment. (T2634-35) The prosecutor then told the jury that it would hear the testimony of the banker who helped Mr. Serrano open up this bank account "[a]nd

she knows something ain't right. You can't open corporate accounts by yourself." (T2635)

Defense counsel objected to the prosecutor characterizing this banking transaction as illegal or, at the very least, improper and telling the jurors that the banker's opinion was that this transaction was illegal or, at the very least, improper. Defense counsel explained and the prosecutor did not deny that the opening of the new bank account with these checks by Mr. Serrano was investigated by law enforcement and deemed to be a legal and proper transaction. Defense counsel moved for a mistrial. The trial court sustained the objection, denied the mistrial motion and instructed the jury to disregard the comments. (T2635-44, 2658-74, 2695)

These comments of the prosecutor were both improper and prejudicial. *See Murphy v. State*, 642 So.2d 646 (Fla. 4th DCA 1994)(error for prosecutor to elicit testimony from State lay witness that she thought "something illegal was going on"); *Somerville v. State*, 584 So.2d 200 (Fla. 1st DCA 1991)(prosecutor improperly elicited testimony of lay witness's opinion to prove the state of mind of the accused).

In addition, over the defense's objection, the prosecutor improperly argued and elicited testimony and evidence that, since Mr. Serrano owned a lot of guns in his gun collection, he must have been the killer in this case. The trial court overruled the objection. (T5115-5129)

This was improper bad character evidence. None of Mr. Serrano's guns were linked to the crime in any way. This evidence was irrelevant under Section 90.401 of the Florida Statutes, had no probative value, and was unduly prejudicial under Section 90.403 of the Florida Statutes. Notably, in closing argument, although none of Mr. Serrano's guns were linked to the crime in any way, the prosecutor argued: Was it a coincidence that the defendant owns a .22 firearm and they were shot with a .22 firearm? (T6155-56) This argument exacerbated the prejudice to Mr. Serrano.

On direct examination of jailhouse snitch Leslie Jones, the prosecutor elicited from him that Jones came into contact with Mr. Serrano at the South County Jail in the Q Dorm where they were housed "which is protective custody." The prosecutor then directly asked, "What is that section called?" Jones responded, "PC Unit, protective unit, for people accused of murder charges or sex crimes mostly." (T5468) Defense counsel objected and moved for a mistrial because the testimony was irrelevant and any probative value was outweighed by its prejudicial impact. (T5469) Indeed, the natural impact of this testimony would have been to imply that Mr. Serrano was so dangerous that the other prisoners needed to be protected from him and that he probably acted consistently with that propensity with regard to the charged crimes. The trial court sustained the objection but denied the mistrial motion and simply told the jury to ignore the testimony. (T5470-72)

The fact that Jones communicated with Mr. Serrano while they were housed in the "protective unit" of the jail reserved mostly for accused murderers and sex offenders was irrelevant, did not prove any fact in issue in this case, was highly prejudicial improper evidence of bad character which Sections 90.403 and 90.404(1) of the Florida Statutes seek to exclude and eroded the presumption of innocence. *See Thomas v. State*, 701 So.2d 891 (Fla. 1st DCA 1997)(testimony that the defendant charged with murder was housed in a section of the prison reserved for the more violent inmates was reversible error); *Estelle v. Williams*, 425 U.S. 501 (1976) (compelling an accused to go to trial in prison clothing poses an unacceptable risk of impermissible factors coming into play).

The trial court's instruction to ignore the testimony was insufficient to dissipate the prejudicial effect of it. "The die was cast, the damage was done." *Post v. State*, 315 So.2d 230, 232 (Fla. 2d DCA 1975).

5. The Prosecutor Improperly Argued At Closing Argument That Mr. Serrano Was Diabolical And Called Him A "Liar."

During closing argument, the prosecutor called Mr. Serrano a liar (T6162), said it was a "bloody lie" that he was in Atlanta (T6165), and said three different times that Mr. Serrano was "diabolical" (defined as being "of or like the Devil, especially in being evil or cruel"). (T6102, 6122, 6171)

In *Gore v. State*, 719 So.2d 1197, 1201 (Fla. 1998), the prosecutor argued at closing, "'You know, Ladies and Gentlemen, there's a lot of rules and procedures that I have to follow in court, and there's a lot of things I can say or can't say, but there's one thing the Judge can't ever make me say and that is he can never make me say that's a human being.'" This Court reversed and held that "[i]t is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." *Id. See also e.g., Goddard v. State,* 196 So. 596, 598 (1940) (prosecution referred to the defendant as a "low down scoundrel" and a "skunk").

In *Ruiz v. State*, 743 So.2d 1, 5-6 (Fla. 1999), the prosecutor compared the defendant to Pinocchio. The prosecutor then proceeded to tell the jury that "truth equals justice" and "justice is that you convict him." The Court held that these comments were improper because the prosecutor was inviting the jury to convict the defendant of first-degree murder because he was a liar.

Closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *King v. State,* 623 So.2d 486, 488 (Fla. 1993)(citations omitted). Furthermore, if "comments in closing argument are intended to and do inject elements of emotion . . . into the jury's deliberations, a prosecutor has ventured far

outside the scope of proper argument." *Garron v. State*, 528 So.2d 353, 359 (Fla.1988).

6. The Prosecutor Improperly Shifted The Burden Of Proof.

During closing arguments, the prosecutor improperly shifted the burden of proof when he said that Mr. Serrano committed the murders because "you can't come up with any other theory that fits that anybody else would have done it." (T6101) In addition, the prosecutor, in response to defense counsel's closing statements noting that the evidence suggested that the murders could have been the result of a professional hit, stated, "[H]e talks about this being a professional hit. There is no evidence. There is no evidence that these crimes are any kind of professional hit." (T6104)

It is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict for some reason other than that the State did not prove its case beyond a reasonable doubt. *Gore*, 719 So.2d at 1200; *Atkins v. State*, 878 So.2d 460 (Fla. 3d DCA 2004). Accordingly, these arguments were plainly improper.

Conclusion

These numerous acts of misconduct by the prosecutor as well as that set forth in Argument VII, herein, violated Mr. Serrano's State and federal constitutional

rights to due process, a fair trial and sentencing, to remain silent and to be presumed innocent. *See* U.S. Const., Amend. V, VI, XIV; Art. I, §§ 3, 7, 16, 17, Fla. Const. The cumulative effect of these errors and misconduct mandate a new trial and sentencing. *See e.g.*, *McDuffie v. State*, 970 So.2d 312, 328 (Fla. 2007)(reversing on much less impropriety and prejudice).

V. THE TRIAL COURT ERRED IN DENYING MR. SERRANO'S MOTION FOR A CHANGE OF VENUE. THIS ERROR VIOLATED HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

This case was the worst mass murder in Polk County history. Prior to trial, Mr. Serrano filed several motions for a change of venue with supporting affidavits on the grounds that (1) there was such an extraordinary amount of prejudicial publicity about this case that it would be impossible to select an impartial jury in Polk County and (2) exacerbating this issue was the fact that one of the victims, Diane Patisso, was an Assistant State Attorney employed by the Office of the State Attorney in Bartow where the trial was to be held. (R183-88, 193-96, 213-17)

At a pretrial hearing held on July 30, 2004, newspaper articles from the Lakeland Ledger in 2002 and 2003 were made court exhibits. (R384-85, EV2-53) At that hearing, defense counsel pointed out that the jury room for Mr. Serrano's trial would be on the second floor of the courthouse where the State Attorney's Office is located and that the State Attorney's Office has a plaque hanging in their

lobby on that floor that is visible from the outside as a testament to Ms. Patisso. (R387) The plaque was removed a week before the trial began. (R609)

On September 24, 2004, the trial court held another hearing on the motion for change of venue. At that hearing, the trial court deferred ruling on the motion until there was an attempt to select a jury but noted that, if a lot of press showed up in media trucks, the court would have to have a change of plan. (R408)

Before Mr. Serrano was indicted, billboards were put up throughout Polk County to solicit information from citizens and a crime task force ran crime stopper ads offering a substantial reward for information. (T3772-74, 5841-42) This case was also featured on "America's Most Wanted" national television show. (T1349-51, 4297-98)

On January 10, 2005, the first attempt at jury selection began. (R576) The prosecutor conceded that a lot about the trial was being reported on the radio, the television, and in the newspaper. (R611) The parties went off the record to do a preliminary analysis of the jury pool. (R610-612) When the parties came back on the record, defense counsel moved to strike the entire panel. Jurors had been talking about the specifics of the case in violation of the court's order and the courthouse jury administrator overheard people using racial epithets and saying things to the effect of "fry that Hispanic guy," and other contaminating comments. (R613-614)

The prosecutor agreed with the defense's motion, but the trial court still denied it. (R614, 697-698) Television cameras were in the courtroom. (R619)

The prosecutor and defense counsel then filed a joint motion to disqualify the trial judge, which was granted. (R695) The case was reassigned to another judge. (R618) The prosecutor summarized the case to the new judge and pointed out that defense counsel had moved to dismiss the entire jury panel three times due to contamination, and that the State had joined in these motions twice. (R621)

The new trial judge struck the jury panel. (R627-629) The new judge stated that he was concerned about the massive amount of pre-trial publicity. (R638, 666-667) The parties and the court discussed possible change of venue locations. (R668-671) At a subsequent hearing on April 7, 2005, the trial court again noted that there had been a lot of publicity about this case. (R729)

On May 9, 2005, a mock jury selection was held as part of the defense's motion for a change of venue. The purpose was to gauge the extent of the public's exposure to the pre-trial publicity. (R806, 811-812) Defense counsel stated that this particular pool was not permeated with publicity, but that Mr. Serrano was not withdrawing his motion for a change of venue because there likely would be a lot more publicity at the time of the actual jury selection than there was then. (R908-909) At a hearing on November 1, 2005, the prosecutor remarked that "there was a ton publicity" about this case. (R1113)

On August 14, 2006, over a year after the mock jury selection, the real jury selection began. Television and newspaper reporters were present. Newspaper articles about the case had appeared that day and the preceding weekend. (T4-10) The trial was broadcast live on the national "Court TV" television station. The national news shows, "Dateline NBC" and "48 Hours" covered this case throughout the trial. (T7-10) Jury selection did not end until August 31, 2006. (T2540)

Eighty of the first group of 150 prospective jurors had heard about this case in the media. (T59-67) Sixteen of the second group of 36 prospective jurors had heard about the case in the media. (T732-34) There was a third group of 150 prospective jurors. When questioning that group, the trial court first asked which of those jurors had a problem with the length of the trial and 125 jurors raised their hand. The trial court then asked that ***only*** those jurors who had not already raised their hand on the first question raise their hand if they had heard about the case from any source. This had the effect of preventing prospective jurors who raised their hand as to the length of trial from raising their hand on the issue of prior knowledge and the media, thereby making it impossible to know how many of these 150 jurors had heard about the case in the media. (T937-46) The prosecutor subsequently stated that "89 people were publicity only" which may have been based upon the jury questionnaire. (T1014) Seventy jurors in the fourth group of prospective jurors had

heard about this case or recognized names of witnesses, lawyers or parties. (T1562-1566)

During jury selection, the trial judge stated that "there is an exorbitant amount of [media] coverage about this case," that the publicity was "a nightmare and everywhere" and that some of these media reports contained incorrect facts. (T101, 217-18, 329, 632-35) Potential jurors were excused because of their exposure to the media. On one day during jury selection, the trial court was notified that a television crew was actually in the jury assembly room trying to interview prospective jurors, in violation of the court's decorum order. (T2467; R1236) On August 17, 2006, the defense filed a notice of filing a slew of media articles about the case. (R1242-1280)

After the jury was selected, the defense renewed its motion for a change of venue. The trial court denied the motion. (R1313, T2582)

As previously explained, the media was in the courtroom throughout the trial. (R1240; T3004) Court TV broadcast the trial live everyday on television. (R1642; T2770-72) There were four cameras in the courtroom at all times. (T4910-16) In the parking lot outside the courthouse, Court TV set up a tent which was like an "outside studio." In addition, there were many other news station trucks parked outside the courthouse televising reports from the courthouse. (T2770) All of the jurors noticed this intense media presence. (T2773-74, 2818-19) During the trial, some jurors became aware and concerned that some of them had been seen on Court

TV when the tops of the heads of some of the jurors were inadvertently broadcast on Court TV. (T4899-4945)

The standard of review of an order denying a motion for a change of venue is whether the denial was an abuse of discretion. *Cole v. State*, 701 So.2d 845, 854 (Fla. 1997). However, the reviewing court has a duty to undertake an independent evaluation of the facts regarding media coverage. *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975). *See also Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("[A]ppellate tribunals have the duty to make an independent review of the circumstances.").

An accused in a criminal case has a Sixth Amendment right to a fair and impartial trial. *Singer v. United States*, 380 U.S. 24, 85 (1965). The defendant must be "fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power," in order to guarantee this right. *Sheppard v. Maxell*, *supra*, 384 U.S. 333 (1966). In *Sheppard*, the Supreme Court reversed a conviction for first degree murder because extensive pre-trial and trial publicity deprived the defendant of a fair trial. In that case, the Supreme Court noted:

> Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interests of the American public in the bizarre.

> In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life.

333 U.S. at 356 (citations and quotations omitted).

This Court has stated that, while the defendant bears the burden on a change of venue motion, the trial court is "bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning v. State*, 378 So.2d 274 (Fla. 1979). Thus, community hostility may be established by inflammatory publicity or great difficulty in selecting a jury. *Noe v. State*, 586 So.2d 371, 379 (Fla. 1st DCA 1991)(citing *Holsworth v. State*, 522 So.2d 348, 350 (Fla. 1988). However, prejudice from publicity is presumed when the publicity is sufficiently prejudicial and inflammatory that it pervades the community where the trial is to be held. *Noe*, 586 So.2d at 379; *Murphy v. Florida*, 421 U.S. 794 (1975). So dangerous is the subconscious and conscious effect of pervasive publicity on a potential juror's mind that the United States Supreme Court has held that, when the publicity in a case is so great, the trial court may disregard prospective jurors' assurances of impartiality. *See Irvin v. Dowd*, 366 U.S. 717 (1961).

Notably, this Court has made clear how trial courts must respond when confronted with a motion for change of venue.

> We take care to make clear . . . that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the state to furnish a defendant a trial by a fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue, a motion therefore properly made should be granted.
>
> A change of venue may sometimes inconvenience the state, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly re-trial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue.

Singer v. State, 109 So.2d 7 (Fla. 1959).

By the previously explained record in this case, Mr. Serrano has shown a pervasive, inflammatory and prejudicial coverage of his case by the media. In fact, few would disagree that Mr. Serrano's case is the most publicized coverage of a criminal case in the history of Polk County. Accordingly, for all of the foregoing reasons, the trial court's denial of a change of venue violated Mr. Serrano's Sixth and Fourteenth Amendment rights to a trial and sentencing by a fair and impartial jury and those same rights under Florida's Constitution.

VI. THE HEARSAY TESTIMONY OF THE STATE'S BLOOD STAIN PATTERN EXPERT VIOLATED THE CONFRONTATION CLAUSE.

FDLE Agent Parker never went to the crime scene. He was permitted to testify at the trial, over defense objection, as to his opinions regarding bloodstain pattern analysis based on measurements measured by FDLE Agent Lynn Ernst at the crime scene. Those measurements were described in an FDLE Bloodstain Pattern Analysis Report authored by Agent John Wierzbowski, not Agent Parker. (T3878-3888) The trial court agreed with the defense that the fact that Agent Parker was testifying about the measurements taken by Agent Ernst set forth in the FDLE report was a violation of the Confrontation Clause pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). (T3884-3885) The prosecutor agreed that he would subsequently call Agent Ernst to testify as to the measurements described in the FDLE report to satisfy the court's concern. (T3886-3887) Nevertheless, the prosecutor failed to do so.

As a result, Agent Parker was erroneously permitted to testify as to his opinions that were based on inadmissible hearsay contained in the FDLE Bloodstain Pattern Analysis Report, including his opinions based on spatial relationships and distances between the decedents and blood spatter left on the walls and floor of the crime scene, points of convergence, points of origin, targets and movement after the bloodshed. (T3895-3900) While testifying, Agent Parker specifically mentioned the measurements taken by Lynn Ernst and the trial court *sua sponte* called a sidebar and noted that Agent Parker was "talking about something he wasn't supposed to talk

about..." and the court warned that "I don't want the 3.850" obviously referring to the fact that Parker's testimony, alone, about the report he did not author, was improper.

The defense clearly noted its objections to Agent Parker testifying regarding hearsay measurements contained in the FDLE report and cited to *Crawford v. Washington*, 541 U.S. 36 (2004) and *Martin v. State*, 936 So.2d 1190 (Fla. 1st DCA 2006) (T3878-3879) In *Martin*, the Court held that the contents of an FDLE report describing substances seized from a defendant as contraband was testimonial hearsay and inadmissible under the Confrontation Clause in the absence of an opportunity for the defendant to cross examine the author of the FDLE report. Recently, in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527 (2009), the Supreme Court extended the Confrontation Clause to forensic reports.

Notably, in *State v. Johnson*, 982 So.2d 672 (Fla. 2008), this Court held that a lab report purporting to reveal the illegal nature of substances seized from the defendant was testimonial hearsay, and, because the preparer of the report was not unavailable, admission of the report via testimony from the preparer's supervisor violated the defendant's Sixth Amendment right to confrontation. Thus, Agent Parker's testimony plainly violated the Confrontation Clause. *See* U.S. Const. Amend. VI and Art. I § 16, Fla. Const.

VII. THE IMPROPER CROSS-EXAMINATION OF DEFENSE WITNESSES REGARDING UNSUBSTANTIATED SEXUAL ABUSE BY

MR. SERRANO IN THE PENALTY PHASE DENIED MR. SERRANO HIS RIGHT TO A FAIR SENTENCING WHICH IS REQUIRED BY THE FEDERAL AND STATE CONSTITUTIONS.

During the penalty phase, the prosecution repeatedly assaulted Mr. Serrano's character by attempting to impeach his son, as well as other defense character witnesses, by graphically alleging that Mr. Serrano had molested his daughter by inserting his finger into her vagina at some unidentified point in the past. This unscrupulous cross-examination of defense witnesses by the prosecution was, in reality, a guise for the introduction of testimony about a highly prejudicial unverified collateral crime and it undoubtedly had an unduly prejudicial effect on the jury weighing whether or not to sentence Mr. Serrano to death.

Indeed, despite the fact that the prosecution had stipulated that Mr. Serrano had no criminal history (R1496), the prosecutor disregarded this stipulation by repeatedly attempting to impeach several defense character witnesses with the unsubstantiated allegation that Mr. Serrano had molested his daughter, to which the defense repeatedly objected throughout the sentencing. (R1578-79, 1582-84, 1686, 1741-42, 1744-50) More specifically, the prosecutor inquired into Mr. Serrano's son's knowledge of his father being an incestuous child molester:

> (By ASA Aguero)
> Q. How about responsibility for molesting your sister, did he ever take responsibility for that?

A. I know you have great satisfaction in bringing up that alleged incident. Are you trying to get more satisfaction right now...

(T1578)

Q. Are you aware that your sister told the authorities in Ohio that your father molested her?

A. I'm not aware of that.

(T1580)

Q. Ok. Do you think that he [Mr. Serrano] is intelligent enough to know that you don't check a 15 year old for pregnancy by putting your finger in her vagina?

A. I don't really understand your line of questions. I mean, what are you trying to prove here?

Q. I'm asking you if you think your father is intelligent enough to know that that is not the way you find out if a 15 year old girl is pregnant, yes or no?

A. I don't know how you find out if a 15 year old is pregnant other than taking her to a doctor.

(T1580-1581)

Shortly thereafter, during the testimony of Maria Soledad Serrano, another defense character witness, the prosecutor again inquired about Mr. Serrano's alleged molestation of his daughter over defense objection:

(By ASA Aguero)

Q. Did you know Christina reported to the police in Ohio that her father molested her when she was 15?

A. No.

Q. Would it surprise you if that was true?

(T1686)

Q. Would it change your view of the character of

Nelson Serrano if he molested his daughter when she was 15?

... (*objection by the defense)*

A. It is just that I don't believe that is true.

(T1687)

Subsequently, during the testimony of Alfredo Luna, Sr., another defense character witness, the prosecutor continued the unsubstantiated assault on Mr. Serrano's character by attempting to inquire about Mr. Serrano's alleged molestation of his daughter over defense objection:

(By ASA Aguero)

Q. Were you aware that when his daughter was 15 years old --

... (*objection by the defense)*

(T1741)

Q. First, Mr. Luna have you ever before today heard an accusation that Mr. Serrano molested his daughter, Christina, when she was 15?

A. No.

Q. If that were true, would that change your opinion of the character of Mr. Serrano?

A. Because we don't know if that's true then I -- then I don't believe it, therefore my opinion doesn't change.

Q. Do you know Christina?

A. Of course.

Q. Have you ever asked her?

A. I cannot ask her something that I just found out about today through you.

Q. Let's suppose that you asked her and she tells you it is true, would that change your opinion.

... (*objection by the defense)*

(T 1743)

At this point, the trial court acknowledged that the prosecutor was "kind of going at it with a heavy hand" although the court permitted this line of questioning. (T1744)

The prosecution argued that the source of this allegation, a police report, was provided to the defense and that Mr. Serrano had admitted the truth of the allegation in a letter to a jailhouse snitch. (R1744-1750) The trial court noted that Mr. Serrano was neither tried nor convicted of the alleged molestation. (T1748) However, the trial court ultimately allowed the prosecution to continue this barrage on the Mr. Serrano's character:

> (By ASA Aguero)
> Q. Mr. Luna, we were talking about your opinion regarding the character of Mr. Serrano.
> A. Yes, sir.
> Q. If you were to believe it to be true that Mr. Serrano in order to check if his daughter was still a virgin put his own finger into her would that change your opinion of the character of Mr. Serrano?
> A. When I went to law school in Ecuador I was taught to base my opinions on proven facts, not on supposition; therefore, I cannot answer your question based
> (T1751-1752)

Notably, the prosecution continued to raise this unduly prejudicial allegation in its sentencing memorandum to the trial court. (R2470-77)

In *Hitchcock v. State*, 673 So.2d 859 (Fla. 1996), this Court held that, during the penalty phase of a capital murder case, a prosecutor cannot ask questions of

witnesses that are "a guise for the introduction of testimony about unverified collateral crimes." This is because "the State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible non-statutory aggravation, under the pretense that it is being admitted for some other purpose." *Id*. (citations omitted). *See also Geralds v. State*, 601 So.2d 1157 (Fla. 1992). Furthermore, the admission of such evidence under such circumstances violates Section 90.403 of the Florida Statutes and a defendant's rights under the State and federal constitutions to a fair sentencing proceeding since the prejudicial effect of this evidence outweighs any probative value it allegedly could have. *See Hitchcock*, 673 So.2d at 863.

In *Hitchcock*, during the penalty phase of a capital murder case, the prosecutor, *inter alia*, cross-examined a defense mitigation witness about the defendant's sexual history, including his tendencies towards pedophilia, although the defense mitigation witness' testimony during direct examination was only about her opinion of the defendant's maturation while incarcerated. This Court, relying upon *Geralds*, *supra*, held that this was error and a resentencing was required, explaining as follows:

> [W]e have held that the State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose. This rule is of particular force and effect during

> the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Id. at 862-63.

Indeed, during the penalty phase of a capital murder trial, "once the prosecutor rings that bell and informs the jury [about a defendant's prior crimes], the bell cannot, for all practical purposes, be 'unrung' by instruction from the court." *Geralds*, 601 So.2d at 1162. In this case, the unverified allegation that Mr. Serrano was a child molester rang a thunderous bell that most certainly could not be unrung. The prosecution's portrayal of Mr. Serrano as a child molester served only to inflame the jury in weighing on whether or not to impose a sentence of death. This error was exacerbated by the fact that, during the trial, over Mr. Serrano's objection, the prosecutor deliberately elicited testimony that, when Mr. Serrano was incarcerated prior to trial, he was kept in the "protective unit, for people of murder or sex crimes mostly." (T5468) Accordingly, for all the foregoing reasons, a re-sentencing of Mr. Serrano is mandated.

VIII. THE TRIAL COURT ERRED IN ALLOWING THE "AVOID ARREST" AGGRAVATOR TO BE SUBMITTED TO THE JURY AND IN FINDING THE EXISTENCE OF THIS AGGRAVATOR IN ITS SENTENCING ORDER.

Over the defense's objection, the trial court found that the State's evidence was sufficient to prove the existence of the avoid arrest aggravator as to the death of Diane Patisso (R1437-38, 2511-12, 2478). The State's theory was that Patisso was not the target of the killings and was merely killed because she was a witness. Every aggravating factor must be proven beyond a reasonable doubt. *Eutzy v. State*, 458 So.2d 755, 757 (Fla. 1984). If there is only circumstantial evidence of the existence of an aggravator, that circumstantial evidence must be inconsistent with any reasonable hypothesis which negates the aggravating factor. *Id*. at 757-58.

A stringent standard and degree of proof is required to establish the avoid arrest aggravator. This stringent standard and degree of proof was explained by this Court in *Jones v. State*, 963 So.2d 180, 186 (Fla. 1997), as follows:

> This standard must be especially honored in cases where the defendant is not fleeing from the police and the victim is not a police officer. The stringent standard and degree of proof required to establish the avoid arrest aggravator in such instrances was explained in *Urbin v. State*, 714 So.2d 411 (Fla. 1988), where this Court held that the intent to avoid arrest is not present unless it is demonstrated beyond a reasonable doubt that the dominant or only motive for the murder was the elimination of witnesses. *Urbin*, 714 So.2d at 415 (citing *Mendez v. State*, 368 So.2d 1278, 1282 (Fla. 1979)). This Court also explained the avoid arrest

> aggravator in *Riley v. State*, 366 So.2d 19 (Fla. 1978), where we cautioned that "the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be ***very strong*** in these cases. *Id*. at 22. Further, in *Hurst v. State*, 819 So.2d 689 (Fla. 2002), this Court held that the mere fact that the victim knew the defendant and could identify the defendant, without more, is insufficient to prove this aggravator. *Id*. at 696 (quoting *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996)(stating that ***mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator***)); *see also Davis v. State*, 604 So.2d 794, 798 (Fla. 1992); *Geralds v. State*, 601 So.2d 1157, 1164 (Fla. 1992).

This Court, in *Jones*, 963 So.2d at 187, applied this strict standard to hold that the evidence "was insufficient to meet the high standards we have set to establish the existence of this aggravator" where, as in the instant case, there was no direct evidence of what occurred immediately preceding the shooting of the victim.

The trial court erred in submitting this aggravator to the jury and in finding its existence because, under the high standards this Court has set to establish the existence of this aggravator, the proof was lacking that the dominant or only motive for Patisso's killing was to avoid arrest. In this case, the State has no idea whether Diane Patisso was the target of the killings or whether she was killed because she was a witness. The testimony at trial was that the State's forensic expert did not know the order in which the victims were killed. The State's theory was just that, a

theory. No evidence actually supported it. And, "mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." *Id*. (citing *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996)). The trial court relied upon Mr. Serrano's statement that he knew Diane Patisso and he assumed that she was shot because she walked into something. (R2512) This statement was something that anyone who had familiarity with the company could have said because Patisso was not an employee and was not usually there. Therefore, anyone might have speculated that she was not the target. However, in actuality, the State failed to disprove all reasonable hypotheses negating the aggravating factor, such as the hypothesis that a disgruntled former criminal defendant may have followed the prosecutor to the business in order to kill her. It was error to find the avoid arrest aggravator. Accordingly, this cause must be reversed for a new penalty phase.

IX. VARIOUS CONSTITUTIONAL DEFICIENCIES INVALIDATE THE DEATH SENTENCE IN THIS CASE.

In *Sireci v. State*, 773 So.2d 34, 41 n. 14 (Fla. 2000), this Court stated, "[W]e take this opportunity to suggest that issues which are being raised solely for the purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by

grouping these claims under an appropriately entitled heading and providing a description of the substance."

Mr. Serrano therefore submits the following claims for presentation under the procedure set forth in *Sireci*: Claim IX A: Because aggravating factors are elements of the offense under Florida law and *Ring v. Arizona*, 536 U.S. 584 (2002), they should have been charged in the indictment based upon a finding of probable cause by a grand jury and found by the jury beyond a reasonable doubt; Claim IX B: *Ring* and its progency mandate that the jury, not the judge, make the necessary findings of fact to determine eligibility for the death penalty, and the ultimate question of whether death shall be imposed; Claim IX C: A special verdict form should have been submitted to the jury so that they could have made specific findings on each of the aggravating factors in this case. *See State v. Steele*, 921 So.2d 538, 552 (Fla. 2005)(J. Pariente dissenting in part). Currently, Florida allows a jury to return a death recommendation without a majority of the jury agreeing on a single aggravating factor – thereby condemning some unknown fraction of criminal defendants to serve an illegal sentence; Claim IX D: The Sixth Amendment requires juries to *unanimously* find the existence of aggravating factors and *unanimously* find that death should be imposed. Here, the jury recommended death by a margin of 9 to 3. With a 9 to 3 vote, there is a substantial probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance;

Claim IX E: The requirement that the defendant must prove that the mitigating factors must outweigh the aggravating factors is unconstitutional burden shifting; Claim IX F: The sentencing statute fails to provide a necessary standard for determining that aggravating circumstances "outweigh" mitigating factors, does not define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravating circumstances. The jury instructions are unconstitutionally vague which results in inconsistent findings of death; Claim IX G: The procedure does not have the independent re-weighing of aggravating and mitigating circumstances required by *Proffitt v. Florida*, 428 U.S. 242 (1976); Claim IX H: Florida's failure to follow *Ring* violates the defendant's equal protection rights because Florida is the only State in the nation that allows the death penalty to be imposed based upon a majority vote by the jury as to whether aggravating factors exist and as to the recommendation of death itself; Claim IX I: Florida's death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment; Claim IX J: This Court's proportionality review should include a review of cases in which a death sentence was imposed, cases in which a death penalty was sought but was not imposed and cases in which the death penalty could have been sought but was not sought. This Court should also make a comparison to death sentences in other states and in federal cases. If this were done, this Court

would reverse the sentence of death in this case; Claim IX K: Lethal injection and Florida's lethal injection procedures do not comply with *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 1520 (2008), violate Article I, Sections 9 and 17 and Article II, Section 3 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution, and present an unnecessary risk of pain and suffering. Pursuant to all of the foregoing, Florida's death penalty scheme violates Mr. Serrano's rights to equal protection, due process, a jury trial and the proscription against cruel and unusual punishment under the federal and Florida Constitutions. These claims were preserved by Mr. Serrano in the trial court. (R218-376, 420-487, 488-517, 611-612, 712-798).

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court must vacate the convictions and sentence, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Attn: Stephen D. Ake, Esq., Concourse Center 4, 3507 E. Frontage Road, Ste. 200, Tampa, FL 33607-7013 on this day ____ of September 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

_____

MARCIA J. SILVERS, ESQUIRE