

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.: SC07-1434**

**NELSON SERRANO,**

**Appellant,**

**vs.**

**STATE OF FLORIDA,**

**Appellee.**

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**APPELLANT'S INITIAL BRIEF**

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**On direct review from a decision of the Circuit Court of the  
Tenth Judicial Circuit imposing a sentence of death**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS. . . . . i

TABLE OF CITATIONS. . . . .v

PREFACE. . . . . xii

STATEMENT OF THE CASE AND FACTS. . . . .1

Change of Venue

The Guilt Phase of the Trial. . . . .

Alleged “Consciousness of Guilt” Evidence

The Penalty Phase of the Trial. . . . .

SUMMARY OF ARGUMENTS. . . . .

ARGUMENT 1:

THE TRIAL COURT ERRED IN DENYING THE  
DEFENDANT’S MOTION FOR JUDGMENT OF  
ACQUITTAL BECAUSE THE STATE FAILED TO  
PROVE ITS CASE BEYOND A REASONABLE DOUBT

ARGUMENT 2:

THE DUE PROCESS CLAUSE OF THE FLORIDA  
CONSTITUTION PROVIDES MORE PROTECTION TO  
CRIMINAL DEFENDANTS THAN THE UNITED STATES  
CONSTITUTION AND THIS COURT SHOULD APPLY

THE DOCTRINE OF PRIMACY TO THIS CASE. ....

ARGUMENT 3:

THE TRIAL COURT ERRED IN REFUSING TO DISMISS  
THE INDICTMENT BECAUSE LAW ENFORCEMENT  
VIOLATED INTERNATIONAL LAW, NUMEROUS TREATIES  
AND THE DEFENDANT’S CONSTITUTIONAL RIGHTS  
WHEN HE WAS KIDNAPPED IN ECUADOR AND  
FORCIBLY BROUGHT TO THE UNITED STATES

ARGUMENT 4:

THE CUMULATIVE EFFECT OF THE PROSECUTORIAL  
MISCONDUCT DEPRIVED THE DEFENDANT OF A FAIR  
TRIAL

ARGUMENT 5:

THE TRIAL COURT REVERSIBLY ERRED IN REFUSING TO  
ADMIT POLYGRAPH TEST RESULTS THAT IMPEACHED  
KEY STATE WITNESSES

ARGUMENT 6:

THE DEFENDANT’S MOTION FOR CHANGE OF VENUE  
SHOULD HAVE BEEN GRANTED BECAUSE IT WAS

IMPOSSIBLE FOR HIM TO GET A FAIR TRIAL IN THE COUNTY WHERE THE ALLEGED CRIMES TOOK PLACE DUE TO THE OVERWHELMING MEDIA COVERAGE FINDING HIM GUILTY BEFORE THE TRIAL EVEN BEGAN

ARGUMENT 7:

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE DEFENDANT’S STATEMENTS TO SPECIAL AGENT RAY

ARGUMENT 8:

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

ARGUMENT 9:

THIS COURT’S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL.....

ARGUMENT 10:

THE DEFENDANT’S SENTENCE OF DEATH IS DISPROPORTIONATE.....

ARGUMENT 11:

GIVEN THE LACK OF CONCRETE EVIDENCE, A SENTENCE OF DEATH SHOULD NOT BE IMPOSED BECAUSE THERE IS AN UNACCEPTABLE RISK THAT THE WRONG PERSON WAS CONVICTED

ARGUMENT 12:

FLORIDA’S DEATH PENALTY SCHEME VIOLATES DUE PROCESS, THE SIXTH AMENDMENT AND *RING v. ARIZONA* AND ITS PROGENY.....

ARGUMENT 13:

LETHAL INJECTION AND FLORIDA’S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL.....

CONCLUSION.....

CERTIFICATE OF SERVICE.....

CERTIFICATE OF FONT COMPLIANCE.....

## TABLE OF CITATIONS

### CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000).....	
<u>Anderson v. State</u> , 841 So.2d 390 (Fla. 2003).....	
<u>B.H. v. State</u> , 645 So.2d 987 (Fla. 1994).....	
<u>Baze v. Rees</u> , 217 S.W.3d 207 (KY. 2007).....	
<u>Bertolotti v. State</u> , 476 So.2d 130 (Fla. 1985).....	
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004).....	
<u>Bolin v. State</u> , 793 So.2d 894 (Fla. 2001).....	
<u>Brooks v. State</u> , 762 So.2d 879 (Fla. 2000).....	
<u>Brown v. State</u> , 484 So.2d 1324 (Fla. 3d DCA 1986).....	
<u>Bryan v. State</u> , 533 So.2d 744 (Fla. 1988).....	
<u>Butler v. State</u> , 842 So.2d 813 (Fla. 2003).....	
<u>Carpenter v. State</u> , 785 So.2d 1182 (Fla. 2001).....	
<u>Chandler v. State</u> , 744 So.2d 1058 (Fla. 4 <sup>th</sup> DCA 1999).....	
<u>Charton v. State</u> , 716 So.2d 803 (Fla. 4 <sup>th</sup> DCA 1998).....	
<u>Coday v. Sate</u> , 946 So.2d 988 (Fla. 2006).....	
<u>Cohen v. Pollack</u> , 674 So.2d 805 (Fla 3d DCA 1996).....	
<u>Conde v. State</u> , 860 So.2d 930 (Fla. 2003).....	

Crump v State, 622 So.2d 963 (Fla. 1993). . . . .

Cunningham v. California, 127 S.Ct. 856 (2007). . . . .

Dufour v. State, 622 So.2d 963 (Fla. 1993). . . . .

Evitts v. Lucey, 469 U.S. 387 (1985). . . . .

Fowler v. State, 921 So.2d 708 (Fla. 2d DCA 2006). . . . .

Geralds v. State, 674 So.2d 96 (Fla. 1996). . . . .

Goutis v. Express Transport, 699 So.2d 757 (Fla. 4<sup>th</sup> DCA 1997). . . . .

Harbison v. Little, 3:06-1206 (M.D. Tenn, September 19, 2007). . . . .

Hall v. United States, 419 F.2d 582 (5<sup>th</sup> Cir. 1969). . . . .

Henrion v. State, 895 So.2d 1213 (Fla. 2d DCA 2005). . . . .

Hill v. State, 921 So.2d 579 (Fla. 2006). . . . .

Hlad v. State, 585 So.2d 928 (Fla. 1991). . . . .

Hoggins v. State, 689 So.2d 383 (Fla. 4<sup>th</sup> DCA 1997). . . . .

In re Elkins, 144 Cal.App.4th (Cal. App. 1 2006). . . . .

In re Forfeiture of \$ 8,489.00, 603 So.2d 96 (Fla. 2d DCA 1992). . . . .

Jackson v. State, 603 So.2d 670 (Fla. 4<sup>th</sup> DCA 1992). . . . .

Johnson v. State, 720 So.2d 232 (Fla. 1998). . . . .

Johnson v. State, 451 So.2d 1024 (Fla. 1<sup>st</sup> DCA 1984). . . . .

Kilgore v. State, 933 So.2d 1192 (Fla. 2d DCA 2006). . . . .

King v. State, 623 So.2d 486 (Fla. 1993). . . . .

King v. State, 390 So.2d 315 (Fla. 1980). . . . .

Koon v. State, 463 So.2d 201 (Fla. 1985). . . . .

Knight v. State, 746 So.2d 423 (Fla. 1998). . . . .

Lanzafame v. State, 751 So.2d 628 (Fla. 4<sup>th</sup> DCA 1999). . . . .

Lee v. State, 422 So.2d 928 (Fla. 3d DCA 1982). . . . .

Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007). . . . .

M.E.K. v. R.L.K., 921 So.2d 787 (Fla. 5<sup>th</sup> DCA 2006). . . . .

Maxwell v. State, 490 So.2d 927 (Fla. 1986). . . . .

Metropolitan Dade Cty. v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992). . . . .

Norman v. Gloria Farms, Inc., 668 So.2d 1016 (Fla. 4<sup>th</sup> DCA 1996). . . . .

Pagan v. State, 830 So.2d 792 (Fla. 2002). . . . .

Pait v. State, 112 So.2d 380 (Fla. 1959). . . . .

Pardo v. State, 563 So.2d 77 (1990). . . . .

Pell v. Proconier, 417 U.S. 817 (1974). . . . .

Proffitt v. Florida, 428 U.S. 242 (1976). . . . .

Pub. Health Tr. of Dade Cty. v. Gerber, 613 So.2d 126 (Fla. 3d DCA 1993). . . . .

Pulley v. Harris, 465 U.S. 37, 44-54 (1984). . . . .

Rhodes v. State, 547 So.2d 1201 (Fla. 1989). . . . .

Ring v. Arizona, 536 U.S. 584 (2002). . . . .

Robinson v. State, 462 So.2d 471 (Fla. 1<sup>st</sup> DCA 1984). . . . .

Robinson v. State, 561 So.2d 419 (Fla. 1990). . . . .

Rolling v. State, 944 So.2d 176 (Fla. 2006). . . . .

Roper v. Simmons, 543 U.S. 551 (2005). . . . .

Rutherford v. State, 926 So.2d 1100 (Fla. 2006). . . . .

Ruiz v. State, 743 So.2d 1 (Fla. 1999). . . . .

Schwab v. State, 969 So.2d 318 (Fla. 2007). . . . .

Simmons v. State, 934 So.2d 1100 (Fla. 2006). . . . .

Sims v. State, 754 So.2d 657 (Fla. 2000). . . . .

Smith v. State, 344 So.2d 915 (Fla. 1<sup>st</sup> DCA 1977). . . . .

Spencer v. State, 615 So.2d 688 (Fla. 1993). . . . .

State v. Barquet, 262 So.2d 431 (Fla. 1972). . . . .

State v. Burris, 875 So.2d 408 (Fla. 2004). . . . .

State ex. rel. Davis v. City of Stuart, 97 Fla. 69 (1929). . . . .

State v. Griffin, 347 So.2d 692 (Fla. 1<sup>st</sup> DCA 1977). . . . .

State v. McFadden, 772 So.2d 1209 (Fla. 2000). . . . .

State v. Sireci, 399 So.2d 964 (Fla. 1981). . . . .

State v. Slappy, 522 So.2d 18 (Fla. 1988). . . . .

State v. Steele, 921 So.2d 538 (Fla. 2005). . . . .

Stephens v. State, 787 So.2d 747 (Fla. 2001). . . . .

Sufour v. State, 905 So.2d 42 (Fla. 2005). . . . .

Taylor v. State, 583 So.2d 323 (Fla. 1991). . . . .

Thomas v. State, 574 So.2d 160 (Fla. 4<sup>th</sup> DCA 1990). . . . .

Tibbs v. State, 397 So.2d 1120 (Fla. 1981). . . . .

Traylor v. State, 596 So.2d 957 (Fla. 1992). . . . .

Tuilaepa v. California, 512 U.S. 967 (1994). . . . .

Turner v. California, 498 U.S. 1053 (1991). . . . .

United States v. Booker, 543 U.S. 220 (2005). . . . .

United States v. Dawson, 563 F.2d 149 (5<sup>th</sup> Cir. 1977). . . . .

United States v. Gainey, 111 F.3d 834 (3<sup>rd</sup> Cir. 1997). . . . .

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Urbin v. State, 714 So.2d 411 (Fla. 1998). . . . .

Valle v. State, 394 So.2d 1004 (Fla. 1981). . . . .

Wasko v. State, 505 So.2d 1314 (1987). . . . .

Whitby v. State, 2008 WL 321509 (Fla. 2008). . . . .

Woodel v. State, 804 So.2d 316 (Fla. 2001). . . . .

Woods v. State, 733 So.2d 980 (Fla. 1999). . . . .

Yokie v. State, 773 So.2d 115 (Fla. 4<sup>th</sup> DCA 2000). . . . .

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## **PREFACE**

This is an appeal from a judgment and sentence imposing the death penalty from the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, the Honorable Susan W. Roberts presiding. Nelson Serrano was the defendant in the trial court and will be referred to as “defendant” in this brief. The State of Florida was the plaintiff in the trial court and will be referred to as “State” in this brief.

The defendant is appealing his convictions and sentence of death. The defendant was convicted of four first degree murders, with a jury vote of 9 to 3 recommending death on each count. The record will be cited as [R. (page number)]. The trial transcripts will be cited as [Tr. (page number)].

## STATEMENT OF THE CASE AND FACTS

The defendant was indicted on four counts of first degree murder in violation of Fla. Stat. § 782.04. It was alleged that on December 3, 1997, the defendant shot and killed George Gonsalves, Frank Dosso, George Patiso, and Diane Patisso [R. 151; Tr. 2607].

The four victims were found dead at the Erie Manufacturing warehouse in Bartow, Florida. The defendant was arrested for the crimes on September 1, 2002 [R. 813]. The defendant was sentenced to death on June 26, 2007 [R. 2509].

The defendant is Ecuadorian and he is hearing impaired. He had the assistance of a hearing device throughout the trial [R. 612]. The defendant has Meniere's disease [R. 796].

The State alleged that the day of the murders was the culmination of an acrimonious business relationship among the partners at Erie manufacturing. Tr. 2608. At the time of the murders, the defendant no longer worked at the plant. The State alleged that the defendant went there to murder George Gonsalves, but ended-up killing Gonsalves and three other people. Tr. 2609.

Purportedly, the defendant agreed to pay George Gonsalves and Phil Dosso to become a third partner in the business, but the promise was never fulfilled and it caused a tremendous amount of discord. Tr. 2629. The defendant never paid the

money even though he was treated as an equal partner. The defendant always had some kind of excuse as to why he could not pay, but the defendant still expected equal partnership and eventually wanted the whole company. Tr. 2631.

On July 22, 2007, the defendant was removed from the company. He did not return until December 3, 1997, the day of the murders. Tr. 2697-98. These were the allegations.

### CHANGE OF VENUE

This case was the worst mass murder in Polk County history. The defense filed multiple motions for a change of venue with supporting affidavits [R. 183; 193; 213]. The defense argued that adverse media coverage has saturated the entire county and the extensive nature of the publicity has pervasively biased, prejudiced and caused preconceived opinions of local residents.

Further, victim Diane Patisso was an Assistant State Attorney employed by the Office of the State Attorney in Bartow, Florida [R. 193]. In sum, the defendant cannot get a fair trial in Polk County [R. 184, 194].

At the first hearing on this issue on July 30, 2004, various media articles were entered into evidence [R. 384-385]. The defense pointed out that the jury

room is on the second floor of the courthouse, where the state attorney's office is, and they have a plaque hanging in their lobby that is visible from the outside as a testament to victim Diane Patisso [R. 387]. The plaque was removed a week before the trial began [R. 609].

The second hearing took place on September 24, 2004. The defense noted that it would be a waste of two or three weeks trying to pick a jury [R. 404]. Further, there is a unique circumstance present in this case due to the death of the Assistant State Attorney [R. 406, 408]. This fact falls into the exception to the rule that attempts be made to seat a jury before changing venue [R. 406, 408].

The trial court ruled that it will presume that a jury can be seated, and denied the motion for the time being [R. 407, 409-410].

The first attempt at jury selection began on January 10, 2005 [R. 576]. The prosecutor noted that a lot about the trial was being reported on the radio, the television, and in the newspaper [R. 611]. The parties went off the record to do a preliminary analysis of the jury pool [R. 610-612].

When the parties came back on record the defense 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 [R. 613-614].

The prosecutor agreed with the defense's motion, but the trial court still denied it [R. 614; 697-698]. Television cameras were in the courtroom [R. 619].

The State and the defense filed a joint motion to disqualify the trial court, which was granted [R. 695]. The case was reassigned to another judge [R. 618]. The prosecutor summarized the case to the new judge and stated that the defense has moved to dismiss the entire jury panel three times due to contamination, and the State has joined the defense twice [R. 621].

The new trial judge struck the jury panel [R. 627-629]. The judge also noted that there was recent publicity in the case [R. 638], and stated that it was concerned about all of the pre-trial publicity [R. 666-667]. The parties and the court discussed possible change of venue locations [R. 668-671]. At a subsequent hearing on April 7, 2005, the trial court again noted that there has been a lot of publicity in this case [R. 729].

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 pre-trial publicity [R. 806, 811-812]. The defense conceded that this particular pool was not permeated with publicity, but that they were not

withdrawing their motion at this time because things could change at the actual jury selection [R. 908-909].<sup>1</sup>

At the hearing on November 1, 2005, the prosecutor remarked that "there was a ton of publicity" on this case [R. 1113].

Jury selection began on August 14, 2006 [Tr. 3]. It did not end until August 31, 2006 [Tr. 2540]. Potential jurors were excused because of their exposure to the media. On August 17, 2006, the defense filed a notice of filing with a slew of media articles about the case [R. 1242-1280]. On one day the trial court was notified that a Bay News 9 television crew was actually in the jury assembly room trying to interview prospective jurors, in violation of the court's decorum order [Tr. 2467; R. 1236].

After the jury was selected the defense renewed its motion for a change of venue, in light of how this case has evolved. The trial court denied the motion [R. 1313; 2582].

During one lunch recess the jury and the victims family were co-mingling at a restaurant. Tr. 2677-2680. The media was in the courtroom throughout this case.

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<sup>1</sup> For example, the media coverage just prior to the actual trial would be much more saturating than a mere pre-trial motion hearing and therefore there will likely be many more problems seating a jury just prior to trial.

R. 1240; Tr. 3004. Court TV broadcast the actual trial on television. R. 1642.

There were also continual problems with aggressive media throughout the case.

Tr. 4989-90.

### THE GUILT PHASE OF THE TRIAL

This was an extraordinarily large and complicated circumstantial evidence case. The State's case was so lacking in evidence that it is barely comprehensible as one tenuous inference is stacked upon another.

Law enforcement responded to the crime scene at 7:36 p.m. on December 3, 1997. Tr. 2855. There were four dead bodies. Tr. 2863-66. There were eleven .22 caliber casings and one .32 caliber casing found at the scene. Tr. 2963. No cartridges or casings were linked to the defendant. Tr. 3028, 3041. Fingerprints samples were also taken from the scene, but none matched the defendant. Tr. 3047.

David Catalan testified that the defendant and his son used to work at Erie Manufacturing, but that ended in the summer of 1997. The defendant did not get along with the two other partners, George Gonsalves and Phil Dosso. Tr. 3192-93.

The defendant promised to pay each of them \$ 75,000.00 to become a third partner, but he never did. Tr. 3500, 3505.

A ceiling tile in the office was slightly moved, but no one knew when this was done. Tr. 3038. The defendant had been seen stepping on a chair to get at a ceiling tile in that room in the past. The defendant kept papers in the ceiling. Tr. 3223-24, 4378.

Law enforcement did not bother to take fingernail scrapings from any of the victims. There was an unknown glove found at the scene, which did not fit the defendant. There were 13 sets of fingerprints found at the scene that could not be matched to anyone. Tr. 3299-3303. Nothing found at the scene was linked to the defendant. Search warrants were also executed upon the defendant and nothing was found that linked him to the homicides in any way. Tr. 3779.

John Purvis saw a man in the area around the time of the crimes, but he could not say that it was the defendant. The person was holding his hand as if he was smoking a cigarette. Tr. 3380-81. The defendant does not smoke. Tr. 4299-4300. Purvis did not give this information to police until he was interviewed by law enforcement 19 days after the crimes. Tr. 3784.

The day after the murders the defendant voluntarily went to the Bartow Police Department to be interviewed. The defendant said the two partners were

doing things that he did not agree with, so he filed a lawsuit against them. Tr. 3682-87.

The defendant discovered that a million dollars was missing and George and Phil acknowledged that they had something to do with it. Tr. 4151. The defendant had been removed as president of the company on July 25, 1997, and had not returned to the place of business since then. Tr. 3682-87.

The defendant said he was at the LaQuinta Inn in Atlanta at the time of the murders. Tr. 3688. The defendant had a meeting with Larry Heflin scheduled for December 3<sup>rd</sup>, but the defendant had a severe migraine headache so he had to re-schedule the meeting for December 4<sup>th</sup>. Tr. 3690, 3835. The defendant was on migraine medication throughout the trial.

The defendant was in his hotel room dealing with his migraine headache when the murders took place. There was not a single hotel employee or a video camera that observed the defendant outside of his room during this key time. There was not a single witness or airport video camera that observed the defendant traveling to or from the airports in order to fly to Florida to commit the crimes, and travel back. Tr. 3837, 3839, 4625.

Law enforcement was not able to determine if there was one gunman or two, and law enforcement was not able to determine where the shooter was standing in

relation to the victims. Tr. 3925. The sequence of the killings was also not able to be determined. Tr. 4044.

A Rolex watch and a gold chain were taken from two of the victims, which indicates that the motive for this crime could have been a robbery, not a personal grudge. Someone targeting the business for a robbery would not know that the business did not have a lot of cash on hand. Tr. 3832-34.

Law enforcement confirmed that the defendant checked into the Atlanta hotel on December 2, 1997 and checked out on December 4, 1997, at 11:47 a.m. Tr. 4618. During the time the defendant was in his room suffering from a migraine the hotel did not have the ability to record outgoing calls made by any guests in their rooms. Tr. 4622-23. The defendant had no way of knowing this.

The defendant's fingerprints were found on an Orlando International Airport parking ticket, dated the day of the murders. Tr. 5247-5252. A shoe impression was taken of the chair, years after the crime, and it was consistent with the defendant's shoe, but there were no individual characteristics that matched the defendant's shoe. Tr. 5291-5304.

Fellow inmate Leslie Todd Jones testified that the defendant discussed the case with him. Jones was a jailhouse lawyer who was helping the defendant with his case. Tr. 5473. The prosecutor admitted that Jones received a lighter sentence

on a criminal case pending against him because of his testimony in this case. Tr. 6146.

The defendant said that he did not commit the murders, but that he had a theory that it was a hit man named John, whom the two Erie partners owed money to. Tr. 5474, 5480. John was going to kill the partners on Halloween, but it was raining and the business was closed, so he did not do it. Tr. 5477.

There was no statement by the defendant that he hired John to kill the partners. The defendant just wanted Jones to help him get his money back as well. Tr. 5475-76.

The defendant said he needed to come up with a story that would fit the evidence against him. Tr. 5480. The defendant said that someone fabricated the fingerprint on the parking ticket because he was not in Orlando that day. Tr. 5577. There was never any confession from the defendant. In fact, the defendant told Jones that he was in his room in a Georgia hotel with a severe migraine headache when the murders occurred. Tr. 5577.

Alvaro Penaherrera testified that the defendant asked him to rent a car for him. Subsequently, the defendant told him where the rental car was parked in Tampa, and had Penaherrera go and return it. Tr. 5746. The defendant asked him

to do this on the day of the crimes and the defendant was in Atlanta at the time. Tr. 5809.

The defendant said not to mention it to anyone because he had gone to visit one of his mistresses and he did not want his wife to find out because it would cause a divorce. Tr. 5759. The defendant could have been in Atlanta the whole time and it could have been the mistress that used the car. Penaherrera did not know if the defendant actually used the car. Tr. 5810. Nothing was discovered in the rental car that linked the defendant to the murders. Tr. 5810.

After the crimes wiretaps were done on the defendant's phones, but no incriminating statements were ever made. Tr. 5924-25. The State rested. Tr. 5952. The defendant did not testify. The jury found the defendant guilty on all four counts. Tr. 6288, R. 1500.

#### ALLEGED "CONSCIOUSNESS OF GUILT" EVIDENCE

The defendant traveled back to Ecuador in August of 2000, four years after the killings. Tr. 4117, 4300. He did not flee prosecution. He retired, as reflected in Agent Tommy Ray's reports. Tr. 4495; R. 1286-87; 2264. Agent Ray admitted that the defendant retired to Ecuador (not fled to Ecuador). Tr. 5936.

The defendant did not hide under a bed when law enforcement came to arrest him. He moved four years after the crime, well after he and every member of his family was interviewed and re-interviewed. Tr. 4515.

The defendant was indicted on May 17, 2001. He was in Quito, Ecuador at the time. Tr. 4300. The defendant has no way of knowing that he had been indicted. Tr. 4762. The defendant was arrested on August 31, 2001 and was returned to the United States. Tr. 4370. There was no consciousness of guilt on this issue, or on any issue in this case.

#### THE PENALTY PHASE OF THE TRIAL

The defendant is hearing impaired was 59 years-old at the time of the crimes and 6 years-old at the time of trial. R. 1496.

The penalty phase in front of the jury took place on October 23 and October 24, 2006. The jury returned an advisory sentence of death with a vote of 9 to 3 [Supp. R. 283-284].

The *Spencer* hearing took place on January 2 and January 3, 2007 [R. 1506-1815]. Numerous videotaped depositions were also introduced into evidence [R. 1827-2256]. Oral argument took place on April 9, 2007. R. 2470-2497. The trial

court pronounced its sentence of death for each of the four counts on June 26, 2007. R. 2506.

The defendant is hearing impaired was 59 years-old at the time of the crimes and 68 years-old at the time of trial. R. 1496. The defendant was tortured while awaiting sentencing in this case. He was not fed and was awoken every 15 minutes. He has lost over 20 pounds. He was kept naked, cold, was not allowed to sleep, shower, and had no toothbrush or toothpaste for 27 days [R. 1513-19; 1701-09].

The defendant is married and he has one son and two daughters. R. 1543, 1611. Francisco Serrano, the defendant's son, testified that the defendant is a practicing Roman Catholic, and integrated the religion into the life of his children and family. The family always contributed clothes and money to the church R. 1538-42. The defendant taught the children ethics and honesty. R. 1543.

The defendant is hardworking, has always provided for the family and he is a good father. R. 1544-1550. The defendant came to the United States from Ecuador with next to nothing. He then built his own multi-million dollar business. R. 1555-56, 1562-63. The defendant was an example of a good human being to his family and to other people as well. R. 1573-74, 1627. He has always been driven, honest and ethical. R. 1576-77.

Juan Polit is the defendant's brother-in-law, and he worked with the defendant at Slick Rail. R. 1611. Polit said that the defendant is Catholic and that religion is very strong in Ecuador. R. 1618. The defendant is generous and he routinely and repeatedly helps people out when they are in trouble, even though he gets nothing in return. A multitude of examples were provided. R. 1615-16, 1627-28, 1661, 1676-78, 1730-31, 1757. 1789-90.

The defendant is a caring person with a great heart. R. 1777. The defense witnesses were of the uniform opinion, without hesitation, that the defendant did not commit these crimes. Perhaps Diego Tamaiz, a life-long friend of the defendant, said it best:

I'm totally convinced of his innocence. Nelson was part of my life and I love him. And I certainly am confident that justice will prevail and justice will be done. And he'll be again a free man.

[R. 1771].

The defendant timely filed his notice of appeal and his initial brief follows.

### **SUMMARY OF ARGUMENTS**

Death is different. The defendant's due process rights to a fair trial and a fair

penalty phase were violated by numerous errors in this case.

It is also only a matter of time before the United States Supreme Court strikes down Florida's death penalty scheme. In this regard, the defendant has raised several arguments that have already been rejected by this Court in order to preserve them for future review. However, the defendant has also raised new issues that this Court has not addressed.

Significantly, the defendant is arguing that the Florida due process clause provides more protection than the federal due process clause. This Court has not addressed the constitutionality of Florida's death penalty scheme with this fundamental concept in mind.

**ARGUMENT 1: THE TRIAL COURT ERRED IN DENYING THE  
DEFENDANT'S MOTION FOR JUDGMENT OF  
ACQUITTAL BECAUSE THE STATE FAILED TO  
PROVE ITS CASE BEYOND A REASONABLE DOUBT**

The defense moved for a judgment of acquittal. Tr. 5952-5973. The trial court denied the motion. Tr. 5974. This is a circumstantial evidence case, a fact to which the State has already conceded. Tr. 6117, 6171.

A special standard of review applies in circumstantial evidence cases. “[N]o matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with *any* reasonable hypothesis of innocence.” Myles v. State, 826 So.2d 1102, 1103 (Fla. 5<sup>th</sup> DCA 2002), *citing* State v. Law, 559 So.2d 187, 188 (Fla. 1989) (emphasis added). *See also* Beasley v. State, 774 So.2d 649 (Fla. 2000).

This necessarily means that if there is even a single reasonable hypothesis of innocence the jury must necessarily have had a reasonable doubt of guilt. The State failed to prove that the defendant was the person who committed these crimes. In this regard, this Court has held that:

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 the conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict.

Orme v. State, 677 So.2d 258, 261 fn1 (Fla. 1996), *citing* Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956).

The standard of review of a trial court’s denial of a motion for judgment of acquittal is de novo. Fowler v. State, 921 So.2d 708, 711 (Fla. 2d DCA 2006),

*citing Pagan v. State*, 830 So.2d 792, 803 (Fla. 2002). While the State gets the inferences from the evidence resolved in its favor, the inferences the State wants this Court to draw to infer guilt are not reasonable and not sufficient.

There is no proof that the defendant killed any one. It is that simple. The State failed to disprove the defendant's hypothesis of innocence that he did not commit the murders and that one or two other gunmen did.

The State failed to prove that the defendant was in Polk County at the time of the crimes. In fact, the State could not place the defendant at the scene within six months of the murders. Therefore, there is a reasonable doubt in this case. Someone else committed these horrible crimes. The inferences the State wants this Court to draw to prove otherwise are too tenuous to sustain the convictions in this case.

Many courts have reversed convictions under more compelling circumstances, including those cases where there was evidence that the defendant was actually at the scene of the crime. See Ballard v. State, 923 So.2d 475 (Fla. 2006); Burkell v. State, 2007 WL 3006535 (Fla. 4<sup>th</sup> DCA, October 17, 2007) (check to see if withdrawn); Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988).

There was no DNA, fingerprint or other forensic evidence tying the defendant to the crime scene or the murders in any way. Neither the .22 caliber

firearm, the .32 caliber firearm, or ammunition from either, was tied to the defendant in any way. A strange glove was found at the scene, but it did not fit the defendant and was not linked to him in any way. No gun shot residue was found on the defendant.

There was no evidence presented that the defendant even returned to Erie Manufacturing since he was removed from his position six months earlier. There was no confession. The defendant's statements to agent Tommy Ray and jailhouse snitch Leslie Todd Jones do not relay any type of confession or incriminating evidence. The defendant offered his opinion to Ray and Jones about his theories as to who could have committed the murders. The defendant did not admit culpability in any way.

The search warrants executed on the defendant revealed nothing. The wiretaps done on the defendant's phones revealed nothing. No eyewitness placed the defendant in the same county around the time of the crimes, let alone at the actual murder scene.

Two guns were used in the killings and this implies that there were two shooters. The State could not discern the order in which the victims were shot. The target of the shootings could have been Assistant State Attorney Diane Patisso, due to her job as prosecutor. The State failed to prove otherwise.

The police did not even bother to take fingernail scrapings from the victims. Law enforcement has 13 unidentified fingerprints that they did not match to anyone. There were other unidentified shoe impressions. The defendant had no access to the locked building.

The shoe impression taken of the crime scene was merely similar to the shoes actually tested. The shoes matched millions upon millions and had no individual characteristics whatsoever.

As for the alleged fabricated alibis, there is no proof that the defendant himself actually used the rental car that Penaherrera allegedly rented for him. There were no matching tire impressions or any other evidence even placing the rental car at the scene of the crime.

There is no proof that the defendant bought plane tickets under the names Juan Agacio and John White. There is also no proof that the defendant actually used the plane tickets and traveled on these planes. There was no evidence that the defendant had fake identification purporting to be these men and no evidence as to how the defendant could have boarded a plane as these men.

There is no security camera footage of the defendant purchasing a ticket in someone else's name at an airline counter. The defendant was not on any security cameras at any airport. The State cannot prove that he bought the tickets or actually

flew using the tickets.

The defendant was not placed outside of his hotel room by anyone, or any camera, when he said he was in his room suffering from a severe migraine headache. He was also not seen by anyone or any camera in one of the airports when he was purportedly in his hotel room.

The defendant's alleged fingerprint on the Orlando Airport Parking ticket is simply not enough. Lying to police about your whereabouts at the time of a crime is not proof of murder. Nothing tied the defendant to the actual deaths in any way.

Even giving the State some unreasonable inferences in its favor, at best, the State proved that the defendant could have done it, not that he actually did it. The defendant's reasonable hypothesis of innocence was not overcome. There is a reasonable doubt in this case. The defendant is going to be executed for something he did not do. The defendant's convictions on all four counts must be reversed.

**ARGUMENT 2: THE DUE PROCESS CLAUSE OF THE FLORIDA  
CONSTITUTION PROVIDES MORE PROTECTION TO  
CRIMINAL DEFENDANTS THAN THE UNITED  
STATES CONSTITUTION AND THIS COURT SHOULD  
APPLY THE DOCTRINE OF PRIMACY TO THIS CASE**

Article I, Section 9 of the Florida Constitution provides higher standards of protection than the United States Constitution. See Traylor v. State, 596 So.2d 957, 961-966 (Fla. 1992); Hlad v. State, 585 So.2d 928, 932 (Fla. 1991) (Kogan, J., dissenting); In re Forfeiture of Eight Thousand Four Hundred Eighty-Nine Dollars in U.S. Currency, 603 So.2d 96, 98 (Fla. 2d DCA 1992); Brown v. State, 484 So.2d 1324, 1328 (Fla. 3d DCA 1986).

The doctrine of primacy states that this Court should review claims of constitutional violations under the Florida Constitution before it reaches the United States Constitution. Traylor at 962-63; B.H. v. State, 645 So.2d 987, 991 (Fla. 1994).

As a point of comparison, Article I, Section 17 of the Florida Constitution, the prohibition against cruel and unusual punishment, explicitly states in its text that this provision must be construed exactly the same as the Eighth Amendment of the United States Constitution, as defined by the U.S. Supreme Court. Florida's due process clause does not have this limiting language. This is a dispositive difference.

The due process clause of the Florida Constitution can be read more stringently than the federal due process clause. State v. Barquet, 262 So.2d 431,

435-36 (Fla. 1972). See also State ex rel. Davis v. City of Stuart, 97 Fla. 69, 102-03, 120 So. 335, 347 (1929).

In fact, Florida’s due process clause provides higher standards of protection than its federal counterpart. See State v. Griffin, 347 So.2d 692, 696 (Fla. 1<sup>st</sup> DCA 1977) (“Florida due process standards in many instances exceed federal standards as defined by the United States Supreme Court.”).

This Court has never made a ruling on the protections of Florida’s due process clause as compared to the federal due process clause. It is still an open question.

The people of Florida have chosen to give its citizens more rights and protections in the area of governmental encroachment on individual rights. This necessarily includes the fairness of trials and executions.

If this Court were to disagree with the defendant on this issue, then Florida’s due process clause would be redundant and therefore meaningless. The citizens of Florida did not intend for this to be the case. The people seek more protection from the government than that offered by the federal constitution.

The court in M.E.K. v. R.L.K., 921 So.2d 787, 790 (Fla. 5<sup>th</sup> DCA 2006), held that the Florida Constitution provides higher standards of protection for parents in termination of parental rights proceedings than its federal counterpart due to the

fundamental liberty interests at issue.

The M.E.K. mandate applies with equal or more force when applied to the criminal defendant, who is protected by a fundamental liberty interest against confinement, and in this case, death. Therefore, the Florida Constitution provides more protection than the federal constitution when this interest is infringed upon.

For example, the Florida due process clause provides greater protection against self-incrimination than the federal constitution. Charton v. State, 716 So.2d 803, 807 fn3 (Fla. 4<sup>th</sup> DCA 1998), *citing* Hoggins v. State, 689 So.2d 383, 386 (Fla. 4<sup>th</sup> DCA 1997), *approved* 718 So.2d 761 (Fla. 1998). See also Lee v. State, 422 So.2d 928, 930 (Fla. 3d DCA 1982).

In addition, Florida provides greater protection than the federal courts in preventing discriminatory jury selection practices. Whitby v. State, 974 So.2d 1124, 1125 (Fla. 1998) (J. Pariente concurring), *citing* State v. Slappy, 522 So.2d 18, 20-21 (Fla. 1988) (which holds that Article I, Section 16 of the Florida Constitution, impartial trial, provides more protection than federal guarantees).

Significantly, however, it is essential that this Court be reminded of this fundamental point of American jurisprudence: The constitution dictates the case law. It is not the other way around.

In sum, the Florida due process clause provides heightened protections to

citizens accused of committing a crime. This Court should apply this standard to all claims of constitutional violations in this brief. In so doing, this Court should not be bound by prior decisions of this Court, or other courts, that simply apply a federal constitutional analysis to the case before them.

This Court has never actually defined the Florida Due Process Clause, vis-avis, its federal counterpart. If this Court holds that the Florida due process clause provides more protection, then all of this Court's prior precedent would not automatically apply to the due process issues in this brief. Federal case law is also no longer dispositive.

Such a holding would require a re-examination of all precedent with the new mandate that Florida's due process clause provides more protection. Since there has never been such a holding, there has never been an analysis of an appellate issue with this fundamental concept in mind. There is no indication that any other past Florida Supreme Court decision applied any additional protections to the Florida Due Process Clause.

It must be presumed that past decisions of this Court were deeming the two due process clauses to be on an equal plane, when they are not. We have no idea what comparative force courts have been applying to Florida's due process clause.

This argument section is being written to define the scope of the right. The

term has never been defined before. The rest of this brief includes references as to how the defendant's due process rights were violated in this particular case.

Every argument in this appeal is hereby incorporated by reference for a new examination under the more powerful due process protections of the Florida Constitution, including but not limited to:

- + admissibility of the polygraph test results and the threshold needed to establish prejudice;
- + the effect of the prosecutorial misconduct on the fairness of the trial;
- + the effect of FDLE kidnapping a Florida citizen;
- + the fairness of the venue for trial;
- + the suppression of statements to Agent Ray;
- + using an improper aggravator in imposing a sentence of death;
- + the extent of this Court's comparative proportionality review of death sentences;
- + whether the defendant's death sentence is proportionate;
- + the validity of imposing death based on circumstantial evidence with no forensic links;
- + the implementation of Florida's entire capital scheme, including the trial and the manner in which executions are performed.

**ARGUMENT 3: THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT BECAUSE LAW ENFORCEMENT VIOLATED INTERNATIONAL LAW, NUMEROUS TREATIES, AND THE DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN HE WAS KIDNAPPED IN ECUADOR AND FORCIBLY BROUGHT TO THE UNITED STATES**

The defense filed a motion to dismiss the indictment and for the trial court to divest itself of jurisdiction [R. 1284-1312]. The hearing on this issue was held on September 5, 2006 [Tr. 2557-2582]. The motion was denied [R. 1313, 2582, 2296-2297]. Subsequently, the defense filed an amended and supplemental motion to dismiss [R. 2260]. The hearing on the amended motion was held on March 15, 2007 [R. 2370-2444]. This motion was also denied [R. 2459].

The defendant holds dual citizenship of both the United States and Ecuador. Tr. 5895, 5927. He is a lawful citizen of the United States (through naturalization processes in 1971) and maintains and is entitled to the benefits of the citizenship of the county of Ecuador [R. 1284]. Ecuador does not have the death penalty and will not extradite an Ecuadorian citizen to a country with the death penalty Tr. 2748.

On or about August 21, 2000, the defendant lawfully entered his home country of Ecuador where he remained until he was illegally arrested by Florida law enforcement. Nearly a year later, on or about May 17, 2001, the defendant was indicted by the Grand Jury [R. 1284].

On or about August 31, 2002, agents for the Florida Department of Law Enforcement and others collaborated with the Ecuadorian Police to seek the deportation of Mr. Serrano from Ecuador. Such action was illegal because the defendant was also an Ecuadorian citizen and therefore not subject to deportation [R. 1285].

Without any notice and without going through any process in Ecuador, the defendant was seized, physically restrained, thrown into an animal cage, and held incommunicado until he was flown to Florida the next day [R. 1285]. The defendant was physically abused and suffered bruises and abrasions [Tr. 2562, 2566].

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. The defendant was never afforded a hearing before a judicial authority. He was summarily caged and deported by the police [R. 1285].

The defendant brought action before the Interamerican Commission of

Human Rights, the Organization of American States. The United States is a signatory member. The report of said commission was approved on October 12, 2005. The report held that the defendant was unlawfully deported, illegally seized, and his human rights were violated [R. 1285]. The English translation of the report is at [R. 1301].

The trial court entered its order denying the motion to dismiss the indictment [R. 2296-2297]. The trial court ruled that its jurisdiction is not defeated by an assertion that there may have been an illegal procurement of the defendant's presence in the jurisdiction. See United States v. Alvarez-Machain, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992); United States v. Arbane, 446 F.3d 1223 (11<sup>th</sup> Cir. 2006); Grimes v. State, 244 So.2d 130 (Fla. 1971). [R. 2297]. See also Medellin v. Texas, 128 S.Ct. 1346 (2008).

In its order, the trial court expressed concern about the weight to be given to the findings and the report of the Inter-American Commission on Human Rights. Subsequently, the defense filed an amended and supplemental motion to dismiss [R. 2261-2328].

The defense noted that the country of Ecuador had continued to investigate this case while the trial herein progressed. In January of 2007 Ecuador passed a resolution which ordered the Ecuadorian National Ombudsman and his agents to

investigate this case [R. 2261].

The Ecuadorian National Ombudsman conducted an investigation and concluded that the defendant was in fact 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 [R. 2261-2262].

A hearing on this amended motion to dismiss was held on March 15, 2007 [R. 2329-2444]. The trial court denied the amended motion, referring to the case law cited in its first order of denial [R. 2459].

The essential facts on this issue are undisputed. The trial court simply applied the law to the undisputed facts at hand. Accordingly, this is an issue of law subject to de novo review by this Court. The trial court's legal interpretation is erroneous.

The illegal kidnapping and arrest of the defendant violated the defendant's due process rights under the Florida and United States Constitutions and constituted an unlawful seizure in violation of the Fourth Amendment of the United States Constitution.

The facts of this case invoke and fall within the rationale of United States v. Toscanino, 500 F.2d 267 (2<sup>nd</sup> Cir. 1974). The court held that the Bill of Rights has

extraterritorial application to the conduct abroad of law enforcement; due process requires a court to divest itself of jurisdiction where its jurisdiction over a defendant has been acquired as a result of the government's deliberate, unnecessary, and unreasonable invasion of the defendant's constitutional rights. The court noted that the government should be denied the right to exploit its own illegal conduct.

Even within the United States, unlawful allegations and false arrests of fugitives have been found to be in violation of law and protections guaranteed under the Uniform Inter-State Extradition Act. See France v. Judd, 932 So.2d 1263 (Fla. 2d DCA 2006). This Court should follow the rationale and spirit of this decision as it is clear that Florida demands law enforcement to respect the due process rights of citizens and non-citizens (in the United States and outside the United States).

The United States Supreme Court held in United States v. Alvarez-Machain, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), that unless an extradition treaty expressly prohibits abductions, the United States' abduction of a defendant in another country does not deprive a federal district court of jurisdiction.

However, in a decision issued well after Alvarez-Machain, the court in United States v. Lambros, 65 F.3d 698, 700-01 (8<sup>th</sup> Cir. 1995), held that "[w]e do

not foreclose the possibility that vicious conduct by American officials could amount to a violation of a criminal's due process rights.”

The defendant in Lambros had alleged that American officials were complicit in his torture in Brazil while he was awaiting extradition. See also United States v. Anderson, 472 F.3d 662, 667 (9<sup>th</sup> Cir. 2006) (allowing for the possibility that outrageous governmental conduct can void personal jurisdiction).

The state sanctioned kidnapping in this case constitutes outrageous conduct. The defendant was physically restrained and physically abused when he was forcibly abducted without any notice whatsoever. He suffered physical injuries as a result. The defendant was then held incommunicado before his kidnappers forced him onto a plane to go back to the United States. These facts alone warrant reversal, irrespective of any treaty violations.

Significantly, however, extradition treaties are meant to maintain the rule of law and prevent international anarchy. “Each of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct.” United States v. Verdugo Urquidez, 939 F.2d 1341, 1349 (9<sup>th</sup> Cir. 1991).

Extradition treaties promote harmonious relations between countries and respect for individual rights at the same time. The United States purports to be a bastion of these principles. Agents of the State of Florida have taken it upon

themselves to obliterate these important national objectives.

Pursuant to Article V of the Extradition Treaty between the United States of America and the Republic of Ecuador, signed June 28, 1872:

[W]hen the fugitive is merely charged with a 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.

None of these prerequisites were satisfied. The Treaty was completely ignored. An individual does not have standing to challenge the violation of an international treaty unless the sovereign involved protests the action. See United States v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975). Ecuador has in fact officially protested the actions of the United States.

Contrary to the case law cited by the trial court, the facts of this case are

distinguishable because the United States' treaty with Ecuador states explicitly in its text that the treaty is the sole means by which the United States is able to secure the presence of a fugitive. This is the dispositive difference.

Assuming arguendo that this Court is inclined to affirm the trial court based on the federal case law cited by the trial court, this Court is most certainly not bound by this case law when interpreting the Florida Constitution. The defendant submits that his rights were violated under the Florida due process clause. This case involves state-sponsored action by Florida law enforcement. The Florida Constitution is implicated.

As argued in Argument 1 above, the Florida due process clause provides more protection to criminal defendants than the federal due process clause. This Court can independently determine whether Florida is going to allow this type of conduct, without regard to any contrary federal decisions.

This Court should not countenance the blatantly illegal actions of law enforcement in this case. To do so would open a Pandora's box of unlimited secret police power in derogation of principles of international comity.

For example, the Tennessee Supreme Court has held that despite federal case law on the issue, the due process clause of the Tennessee Constitution allows a conviction to be voided if a fugitive is returned to the state in a manner in which

was so illegal and outrageous so as to shock the conscience. State v. Hall, 976 S.W.2d 121, 160 (Tenn. 1998); Sneed v. State, 872 S.w.2d 930, 937 (Tenn.Crim.App. 1993).

An FDLE sponsored kidnapping on foreign soil where the defendant is physically abused in the process qualifies as shocking the conscience. This is not what the people of Florida had in mind when they added article I, Section 9 to the Florida Constitution. This is an unacceptable use of police power that cannot go unchecked.

After the defendant was convicted, the entire country of Ecuador has been marching and demonstrating in the streets of Quito due to the illegality of the kidnapping [R. 1575-76; 1715-22]. The whole country of Ecuador is surprised at the way the defendant was treated and the whole country is behind him [R. 1762].

The defendant hereby argues that the Vienna Convention was violated. See Vienna Convention, 21 U.S.T. 77, T.I.A.S. No. 6820. Further, the Attorney General of Ecuador has officially condemned the illegal kidnapping [R. 1724-26]. The official ombudsman of the country of Ecuador testified that the Ecuadorian Congress has passed an official resolution condemning the actions of American law enforcement in this case. R. 2406.

The ombudsman also testified that the defendant is an Ecuadorian citizen R.

2411-13. The defendant was not eligible to be deported or extradited. R. 2413. So, any complicit Ecuadorians were also acting illegally.

The result of the official Ecuadorian investigation concluded that there was no paperwork regarding the defendant's extradition and therefore it was contrary to law. R. 2414. The defendant also should have been afforded an attorney in Ecuador. R. 2417. The purported judicial hearing given to the defendant in this case was an abuse of the law. R. 2418.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

In the motions to dismiss filed by trial counsel, it was argued that the defendant's due process rights were violated. The defendant hereby argues that this argument encompassed the due process clause of the U.S. Constitution and the Florida Constitution.

If this Court disagrees, and holds that the Florida due process clause argument was not sufficiently preserved for appellate review, then the defendant received ineffective assistance of counsel and his Sixth Amendment rights were violated. See Strickland v. Washington, 466 U.S. 668 (1984).

This issue may be addressed on direct appeal because it is an error on the

face of the record. This is not an issue of trial strategy in front of the jury – where the trial attorney gets deference. This is strictly a legal argument in front of the judge. The failure to specifically argue that the Florida due process clause was violated is an objectively verifiable legal error. The defense had nothing to lose and all to gain by making the argument.

The defendant was prejudiced because he would have prevailed in the trial court or on appeal, had the correct legal argument been made. The failure to make a dispositive motion cannot be considered a matter to trial tactics, and therefore the issue can be addressed on direct appeal. See Barber v. State, 901 So.2d 364 (Fla. 5<sup>th</sup> DCA 2005); Lambert v. State, 811 So.2d 805, 807 (Fla. 2d DCA 2002).

The defendant should not be held responsible for his trial attorney’s mistake and therefore this Court should apply a de novo standard of review to this issue.

**ARGUMENT 4: THE CUMULATIVE EFFECT OF THE  
PROSECUTORIAL MISCONDUCT DEPRIVED  
THE DEFENDANT OF A FAIR TRIAL**

The defendant’s guilt and his sentence are not reliable in this case. In analyzing the prejudicial effect of improper, inflammatory, prosecutorial remarks,

the inquiry of the appellate Courts is whether the prosecutor's comments were so outrageous as to taint the jury's finding of guilt or recommendation of death.

Crump v. State, 622 So.2d 963, 971 (Fla. 1993).

Alternatively, the reviewing Courts determine whether the improper comments so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *See* Dufour v. State, 905 So.2d 42, 64 (Fla. 2005), quoting Maxwell v. State, 490 So.2d 927, 932 (Fla. 1986).

The problematic prosecutorial remarks at issue fall into the following four categories. Where defense counsel objected, the objection is noted. However, this Court will consider the effect of improper prosecutorial comments even without objection where prejudice is demonstrated. Sufour v. State, 905 So. 2d 42 (Fla. 2005).

In Ruiz v. State, 743 So.2d 1 (Fla. 1999), this reviewing Court commented, “[t]he State argues that because defense counsel failed to object to several of the prosecutor’s guilt and penalty phase statements, he is barred from raising the issue on appeal. We disagree. When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.”

The improper conduct denied the defendant's due process and fair jury trial rights secured by the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and by Article 1, Sections 9 and 16 of the Florida Constitution. The defendant's due process rights under the United States and Florida Constitutions were violated as the prosecutor chipped away at the fairness of this trial.

The cumulative effect of the misconduct and errors in this case require a new trial. See McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007) (reversing on much less impropriety and prejudice).

The defense moved for a mistrial based upon these errors. R. 1504. The hearing was held on March 15, 2007. R. 2343-2368. The trial court denied the motion. R. 2461.

In opening statement the prosecutor stated that: "[T]he very next day is Mr. Serrano's opportunity to tell the police what happened . . ." Tr. 2707. The defense objected and the trial court sustained the objection. Tr. 2707, 2715, 2768, 2842-48. The prosecutor then stated that the defendant "had to come up with a story about how the fingerprint got on that ticket." Tr. 2733. The defense objected. Tr. 2733.

The prosecutor implied that the defendant was committing a crime or a bad act when he attempted to open-up a new business bank account. Tr. 2635, 2664. The trial court agreed that it was improper. Tr. 2685. The prosecutor then did it

again, which was objected to. Tr. 3195, 3198.

During closing argument the State called the defendant a liar. Tr 6162; said it was a “bloody lie” that he was in Atlanta. Tr. 6165; and said three different times that the defendant was “diabolical” (defined as being “of or like the Devil, especially in being evil or cruel”). Tr. 6102, 6122, 6171. These comments were not objected to.

The failure to object to these comments constitutes ineffective assistance of counsel and therefore this Court should review these comments as if they were objected to. No trial strategy can justify failing to object. The defense team had already objected to these type of comments throughout the case, and the trial court would have sustained the objection.

The only possible reason not to object was because counsel did not want to draw the jury’s attention to the comments. However, juries are instructed not to consider objections by counsel as part of their deliberations and juries are presumed to follow as instructions. Also, a limiting instruction should have been asked for and would have been given. All of this constitutes ineffective assistance and the defendant should not be penalized with an unfavorable standard of review.

During closing argument the prosecutor improperly shifted the burden of proof when he said that the defendant did it because you cannot come up with any

other theory that fits. Tr 6101. Also, that there was no evidence presented that this was a professional hit. Tr. 6104. These comments were not objected to. This was ineffective assistance as well. “Arguments that shift or lessen the burden of proof are error.” Stires v. State, 824 So.2d 943, 946 (Fla. 5<sup>th</sup> DCA 2002)

The prosecutor improperly vouched for the credibility of key State witness David Catalan. The defense objected and moved for a mistrial. The trial court sustained the objection and told the prosecutor not to do it again, but denied the motion for a mistrial. Tr. 3248-51. Vouching for the credibility of a witness is clearly improper. See Brown v. State, 787 So.2d 229 (Fla. 2d DCA 2001).

David Catalan was a key State witness whose purpose was to show the jury that the defendant kept a gun in his office (possibly in the ceiling) and was seen moving around a ceiling tile in the past. This was a key circumstantial link in the State’s case. The credibility of this witness was essential, and it was unfairly buttressed. The prosecutor’s misconduct was additionally prejudicial because Catalan was a suspect in the crime and failed a lie detector test given by law enforcement.

The prosecutor then improperly bolstered the testimony of jailhouse snitch Leslie Todd Jones, by asking him that if he was untruthful, he could violate his probation. Tr. 5587. The defense objected and the trial court sustained the

objection. The trial court told the jury that they had to decide whether Jones was telling the truth. Tr. 5587-90.

Jailhouse snitch Leslie Todd Jones testified that the defendant was held in protective custody pending trial, where those accused of murder and sex crimes were held. Tr. 5468. The defense objected because it was not relevant, and would only cause prejudicial implications for the jury. The trial court sustained the objection. Tr. 5469-70.

The prosecutor improperly commented on the defendant's purported lack of remorse when he elicited testimony that the defendant did not cry when he was interviewed. The defense objected and moved for a mistrial. The trial court sustained the objection. Tr. 3728, 3731, 3740-57. See Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

The prosecutor improperly commented on the defendant's right to remain silent when he asked whether the defendant appeared before the Polk County grand jury. The defense objected and moved for a mistrial. The trial court told the prosecutor to fix it. Tr. 4301-4334. The trial court expressed that an appellate court might reverse on this issue, but still denied the motion for a mistrial. Tr. 4334. See Connelly v. State, 744 So.2d 531 (Fla. 2d DCA 1999).

Special Agent Tommy Ray improperly speculated that the defendant was

the person who was in the December 3<sup>rd</sup>, 12:20 pm, LaQuinta Inn video. Tr. 4413-14. The picture was indecipherable. Ray was just guessing. Tr. 4415. The defense objected and the trial court sustained the objection. Tr. 4417.

The prosecutor improperly argued and elicited testimony that since the defendant owned a lot of guns, and some were missing from his collection, he must have been the shooter in this case. This was improper bad character evidence. None of the defendant's guns were linked to the crime in any way. The defense objected and the trial court overruled the objection. Tr. 5115-5129. This was irrelevant evidence, had no probative value, and was unduly prejudicial under 90.403.

In closing, the prosecutor argued: Was it a coincidence that the defendant owns a .22 and they were shot with a .22? Tr. 6155-56. This heightened the prejudice on the gun ownership issue.

The improper conduct and character attacks in the guilt phase necessarily carried over and fatally infected the penalty phase as well. In addition, in the penalty phase, the State repeatedly implied that the defendant was a child molester. There were no facts in evidence establishing this.

The defense objected, to no avail. R. 2473-74; 2493-94. This was a highly improper attack on the defendant's character and the inflammatory nature of this

groundless accusation prejudiced him in the eyes of the jury as to what his sentence should be. The defendant's character was repeatedly impugned in an inappropriate manner.

Given the close question of guilt, and the lack of direct evidence, the State cannot prove that all of these errors, taken individually and/or collectively, were harmless. See Lawrence v. State, 829 So.2d 955, 958 (Fla. 3d DCA 2002) (State must prove beyond a reasonable doubt that the prosecutorial misconduct did not contribute to the verdict).

As a result of this, the errors in the guilt phase which necessarily carried over to the penalty phase, deprived the defendant of a fair trial during both phases of this trial.

**ARGUMENT 5: THE TRIAL COURT ERRED IN REFUSING TO ADMIT  
POLYGRAPH EXAMINATION TEST RESULTS THAT  
IMPEACHED KEY STATE WITNESSES**

The defense filed a motion to allow polygraph test evidence of Mr. Alviro Penaherrera, who was a "star witness" for the State (who failed two examinations) and Mr. Gustavo Concha and Mr. David Catalan, who were both suspects in the crimes (who each failed a test). Significantly, the polygraphs were administered by

law enforcement during the course of their investigation [R. 570].

The defense had argued that the witnesses failed questions about whether they were responsible for the deaths, whether they knew who committed the crimes, and whether they were withholding information. This directly went to their credibility. During the trial the defense re-moved to admit the test as to Alviro Penaherrera. Tr. 4495, 4952-53.

A Frye hearing on the issue was held on August 29, 2005 [R. 918-1093PP] and July 17, 2006 [R. 1161-1185]. The defense put forth the testimony of Leonard G. Bierman, an expert in polygraph examinations. He testified that polygraphs are scientifically reliable and are admissible in federal court and in some state courts [R. 926-1013; 1093C-1093X].

The trial court noted that the testimony of this witness alone was insufficient under State v. Thompkins, 891 So.2d 1151 (Fla. 4<sup>th</sup> DCA 2005). The trial court continued the hearing so that the defense could put forth additional evidence.

The defense then introduced transcripts of testimony from experts that were taken in a New Mexico case, along with legal memoranda from that case that argued the issue [R. 1164, 1171-1172; Supp. R. 1; 296]. The State put forth the testimony of William Iacono, a professor of psychophysiology at the University of Minnesota, who testified that polygraphs are not scientifically reliable [R. 1022-

1093].

The trial court remarked that it can find no Florida case which analyzes the criteria for polygraph admissibility. The trial court noted that all of the case law refers back to the 1952 Florida Supreme Court decision which states the results are *per se* inadmissible. “[B]ecause they said no, that’s the way it is.” [R. 1166].

The trial court entered its order which found that the defense did not meet its burden to prove that polygraph evidence meets the standard of reliability dictated by Frye, “and a review of the case law supports a conclusion that polygraph evidence does not meet the Frye standard of admissibility” [R. 1233-1234].

The trial court’s order is erroneous in two regards. First, the defense did prove that the polygraph now meets scientific standards of reliability and passes the Frye test.

Second, the trial court essentially held that there was no possible way the defense could have proven its case given the settled case law in Florida. The trial court was mistaken that it did not have the authority to allow the polygraph based upon new scientific data. The trial court misapprehended the extent of its authority in this matter. This was reversible error.

The tests for admissibility of evidence such as polygraph examinations is controlled by the Frye standard. Frye v. United States, 293 F. 1013 (D.C. Cir.

1923). Florida adheres to the Frye test for the admissibility of scientific opinions. Flanagan v. State, 625 So.2d 827 (Fla. 1993).

This means that scientific principles must be found by the trial court to be generally accepted by the relevant members of the particular field. Brim v. State, 695 So.2d 268 (Fla. 1997).

Polygraph evidence has been admitted in numerous foreign countries and is accepted in the Federal Court and many states. The leading case is United States v. Piccinonna, 885 F.3d 1529 (11<sup>th</sup> Cir. 1989) (*en banc*), where the court receded from its rule of *per se* inadmissibility and held that the science of the polygraph had reached a point of acceptance so that it was no longer even subject to the Frye test. The court also explicitly held that polygraph results were admissible to impeach a witness.

There is no cogent reason to exempt Florida from what is now considered sound science. Scientific principles are not altered once Florida's state line has been crossed.

The current law from this Court is that polygraph results are *per se* inadmissible. Delap v. State, 440 So.2d 1242, 1247 (Fla. 1983), *citing* State v. Curtis, 281 so.2d 514 (Fla. 3d DCA 1973). Significantly, the Curtis court relied on this Court's decision in Kaminski v. State, 63 So.2d 339 (1952), for its holding. As

a result, this Court has not addressed this issue since 1952.

Two District Courts of Appeal have asked this court to re-visit this issue and have certified the question to be one of great public importance. See State v. Narval Hardware, 868 So.2d 574 (Fla. 3d DCA 2004), *review denied*, 885 So.2d 387 (Fla. 2004); State v. Santiago, 679 So.2d 861, 863 (Fla. 4<sup>th</sup> DCA 1996) (review not pursued by the appellant).

The trial court felt bound to deny the defense's motion because of this Court's ruling of *per se* inadmissibility. It is now the year 2008. It is time for this Court to revisit this issue. This Court should recede from its *per se* position and hold that polygraph test results can be admitted if proven in a particular case. This conforms with federal jurisprudence and that from many other states. It has been over 50 years since Kaminski.

The Fourth District Court of Appeal has agreed with this argument. In McKenzie v. State, 653 So.2d 395 (Fla. 4<sup>th</sup> DCA 1995), the court held that the admissibility of polygraphs was within the discretion of the trial court. The trial court in the case at bar erroneously believed that it did not have this discretion based on precedent.

The McKenzie court noted that the Florida Supreme Court, since Kaminski, "has never again addressed the reliability and general acceptance of the test to

determine whether advancements in testing techniques and instrumentation warrant its admission . . . [and that]. . . “[i]t would seem that our courts have not been exposed to the advancements in polygraph reliability,” since the Florida Supreme Court ruled on this issue some forty years ago. Id. at 397.

In State v. Thompkins, 891 So.2d 1151 (Fla. 4<sup>th</sup> DCA 2005), the court held that there is no *per se* rule against the admissibility of polygraph results and that courts should conduct a Frye hearing on the issue as a result. The court noted that just because the Florida Supreme Court ruled so long ago on the issue does not mean that the polygraph is not admissible now.

It is now time for this Court to re-visit the issue. The Frye test was never meant to permanently bar evolving sciences. This Court should also clarify that McKenzie and Thompkins are correct, and the results are not *per se* inadmissible. The defense in the case at bar proved that polygraph examinations are now scientifically reliable and pass the Frye test.

In McKenzie, the trial court held that the results were inadmissible. The Fourth District held that this was a matter of evidentiary discretion by the trial court, and affirmed the ruling even though “[a]ppellant’s proffered evidence and articles have gained increased reliability and acceptance in the scientific community.” Id. at 397.

The 1995 McKenzie decision is distinguishable in many ways. First, the evidence put forth by the defense in the case at bar is more powerful than that put forth in McKenzie, because the underlying science has greatly evolved.

Next, the McKenzie decision necessarily turned on a credibility finding, based upon a battle of the experts in that case. Here, the trial court did not base its decision on credibility, and it would have been improper had it done so.

The defense put forth transcripts and legal memoranda to prove its case. No credibility determinations can be made on these items, therefore this Court need not give blind deference to the trial court on this issue. See also Brim v. State, 779 So.2d 427, 448-49 (Fla. 2d DCA 2000) (the appellate court is not authorized to defer to the trial court on the issue of general acceptance in the community).

In any event, an appellate court is in an equal position to review findings of fact based on transcripts of testimony. Severini v. Pan American School, Inc., 557 So.2d 896, 897 (Fla. 1<sup>st</sup> DCA 1990).

Third, McKenzie is distinguishable because the abuse of discretion standard of review does not apply herein. In fact, McKenzie is wrongfully decided because it applied an abuse of discretion standard of review.

This Court has held that the “de novo” standard, not abuse of discretion, applies to a trial court’s determination under Frye as to whether both the scientific

principle and the testing procedures applying the procedure to the case at hand are generally accepted in the community. Hildren v. State, 951 So.2d 784, 791 (Fla. 2006), *citing* Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995). See also Marsh v. Valyou, 977 So.2d 543, 547 (Fla. 2007) (“We review *Frye* issues de novo, with general acceptance considered at the time of the appeal.”)

The de novo standard is applied to promote uniformity and predictability in the admission of scientific evidence because “the general acceptance issue transcends any particular dispute.” Hildren at 791, *citing* Brim v. State, 695 So.2d 268, 274 (Fla. 1997). This Court should abrogate McKenzie on this point.

This Court is obliged to make an independent determination of the general acceptance of the polygraph, and to apply 2008-2009 science in so doing. See Brim v. State, 779 So.2d 427 (Fla. 2d DCA 2000).

It is requested that this Court apply its de novo review and hold that the defense did in fact prove that polygraph tests pass the Frye test. Alternatively, this Court should reverse the trial court on this issue because it erroneously believed that it did not have the legal authority to admit the evidence. Lastly, at the very least, this Court should approve McKenzie and Thompkins and recede from its position of “per se” inadmissibility.

The defendant was prejudiced on this issue and therefore his convictions are

due to be reversed. Given the close question of guilt in this entirely circumstantial evidence case, the State cannot prove that this error was harmless. Had the polygraph evidence been admitted the credibility of three key state witnesses would have been significantly impugned.

The defendant was deprived of a fair trial and therefore his due process rights under the Florida and United States Constitutions have been violated. Further his right to present a defense under the Sixth Amendment and Article I, Section 16 of the Florida Constitution, was unduly limited.

This was specially prejudicial because the prosecutor improperly vouched for the credibility of David Catalan, a suspect in the crime who failed a lie detector test. Tr. 3248-51. Penaherrera admitted that law enforcement broke him down and forced him into changing his story so as to implicate the defendant. Law enforcement's own test was essential to impugn the alleged credibility of these witnesses.

**ARGUMENT 6: THE DEFENDANT'S MOTION FOR CHANGE OF VENUE SHOULD HAVE BEEN GRANTED BECAUSE IT WAS IMPOSSIBLE FOR HIM TO GET A FAIR TRIAL IN THE COUNTY WHERE THE CRIMES TOOK PLACE DUE TO THE OVERWHELMING MEDIA COVERAGE**

## **FINDING HIM GUILTY BEFORE THE TRIAL EVEN BEGAN**

The standard of review of an order denying a motion for change of venue due to pretrial publicity is an abuse of discretion. Cole v. State, 701 So.2d 845, 854 (Fla. 1997).

The test is whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. Cole at 853. See also Copertino v. State, 726 So.2d 330 (Fla. 4<sup>th</sup> DCA 1999).

The media coverage was so saturating that community prejudice should have been presumed. Furthermore, the nature of the overwhelming amount of coverage was extremely biased. The defendant was convicted in the media before the trial even began. The stories concentrated on the State's version of events and reporters made the State's version more inflammatory.

This was the worse mass murder in Polk County history. The local and national media both had this case on their radar, but the local media was utterly fixated, thus eviscerating the neutrality of any local jury pool. The jury was not

even sequestered and the trial was televised. This only heightened the existing problems.

While the jurors on the panel properly answered the trial court's questions during voir dire about their pre-conceived knowledge about the case, community prejudice should have been presumed from the inception due to the nature and amount of the media coverage. See Pamplin v. Mason, 364 F.2d 1, 7 (5<sup>th</sup> Cir. 1966) (Courts should focus on the feeling in the community rather than the transcript of the voir dire, which may not reveal the shades of prejudice that may influence a verdict).

In such a sensational case as this, the line is crossed and a presumption exists that local citizens would say anything to be part of the media frenzy and become famous and notable.

The court in United States v. Campa, 459 F.3d 1121 (11<sup>th</sup> Cir. 2006) (*en banc*), held that prejudice from refusing to grant a change of venue due to pre-trial publicity must be *presumed* by the trial court where the widespread and inflammatory pre-trial publicity so pervades or saturates the community that a fair trial is virtually impossible. See also Rideau v. Louisiana, 373 U.S. 723, 726-27, 83 S.Ct. 1417, 1419-20, 10 L.Ed.2d 663 (1963).

The test is whether there is a reasonable likelihood that the prejudicial media

coverage will prevent a fair trial. Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966); Pamplin v. Mason, 364 F.2d 1, 5 (5<sup>th</sup> Cir. 1966). The defendant met this burden in this case and therefore reversal is required.

The Campa court held that the trial court did not abuse its discretion in denying the motion for change of venue, but this was because the media coverage related to peripheral matters (i.e., the defendants' connections to Fidel Castro's regime), and not guilt or innocence. Campo, 459 F.3d at 1144. This is not so herein. The defendant's guilt and whether his alibis was credible was the precise issue for the media.

While the standard of review is an abuse of discretion, this Court has an independent duty to evaluate the extent of underlying media coverage. United States v. Williams, 523 F.2d 1203, 1208 (5<sup>th</sup> Cir. 1975). See also Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Appellate tribunals have the duty to make an independent evaluation of the circumstances.").

The citizens of Polk County were saturated with invidious news coverage from the inception of this case. The coverage went on for years and its ferocity always tripled when the case was at any meaningful stage. There is a reasonable probability that the defendant was prejudiced given the volume and nature of this coverage.

Even if this Court agrees with the interpretation of the federal case law on this issue and is inclined to affirm under this federal authority, this Court should reverse under the greater protections offered by the Florida due process clause. If this media case does not offend the Florida Constitution, then no change of venue case ever will. The defendant's trial was not fair because it was held in Polk County.

**ARGUMENT 7: THE TRIAL COURT ERRED IN REFUSING TO  
SUPPRESS THE DEFENDANT'S STATEMENTS TO  
SPECIAL AGENT RAY**

The defense objected to Special Agent Tommy Ray testifying to what the defendant told him when they were flying back on the plane from Ecuador, as the statements were obtained in violation of Miranda. Tr. 4677; 5886-88. The defendant was in custody at the time.

The hearing took place on October 4, 2006. R. 1334-1363. The trial court denied the defense motion R. 1401. The defendant was read Miranda warnings after they got on the plane. R. 1339. About an hour and a half into the flight the defendant asked Ray how much he paid the Ecuadorian police to do this to him. R. 1341.

They spoke for 30 minutes and Ray did not readvise the defendant of his Miranda rights. R. 1448. Ray initiated the conversation in an attempt to cause the defendant to speak about the crimes. Ray attempted to side-step Miranda by asking the defendant about his civil lawsuit. Tr. 5899. The defendant had expressed that he wanted to remain silent. R. 1347-48. The defendant did not waive his rights when he made the opening remark to Ray, which had nothing to do with his guilt or innocence.

Since law enforcement intentionally perpetuated the conversation and failed to re-advise the defendant of his Miranda rights, and did not scrupulously honor the defendant's right to remain silent, the defendant's statements should have been excluded. See Michigan v. Mosley, 423 U.S. 96 (1975); Henderson v. Singletary, 968 F.2d 1070 (11<sup>th</sup> Cir. 1992); Globe v. State, 877 So.2d 663 (Fla. 2004).

**ARGUMENT 8: 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**

Every aggravating factor must be proven beyond a reasonable doubt.

Circumstantial evidence may be used to meet this burden of proof, but only if the circumstantial evidence is inconsistent with any reasonable hypothesis of innocence which negates the aggravating factor. Eutzy v. State, 458 So.2d 755, 757-58 (Fla. 1984).

The trial court found that the State had proven the existence of the avoid arrest aggravator pursuant to Fla. Stat. § 921.141(5)(e), as to the death of Diane Patisso [R. 2511-12]. The purported theory was that Patisso was not the target of the killings and was merely killed because she was a witness.

The trial court erred in submitting this aggravator to the jury because the state failed to prove its existence and the trial court erred in finding in its sentencing order that this aggravator was established and was to be given great weight.

The defense objected on this issue [R. 1437-38; 2478]. The State has no idea whether 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 did not know what the order of victims killed was. The State's theory was just that, a theory. No evidence actually supported it.

This Court held in Jackson v. State, 599 So.2d 103, 109 (Fla. 1992), that there must be strong proof of motive and the mere fact that the victim knew and

could have identified the assailant is insufficient to prove intent to kill to avoid unlawful arrest. See also Urbin v. State, 714 So.2d 411, 415 (Fla. 1998) (the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness).

The trial court relied on the defendant's statement that he knows Diane and he assumed that he she was shot because she was murdered because she walked into something R. 2512. This statement was not an admission and was something that anyone who had familiarity with the company could have said. Patisso was not usually there and therefore anyone would have assumed that she was not the target.

This argument applies to the defendant's statement alone. In actuality, the State failed to disprove the reasonable hypothesis that a disgruntled former criminal defendant followed the prosecutor to the business in order to kill her.

**ARGUMENT 9: THIS COURT'S COMPARATIVE PROPORTIONALITY  
REVIEW OF SENTENCES OF DEATH IS  
UNCONSTITUTIONAL**

**PRESERVATION**

The defense raised this issue below [R. 333; 371-372]. This is an issue of law subject to de novo review. However, proportionality is not an issue for the trial court therefore it was not necessary to raise this issue in the trial court to preserve this issue for appellate review. Circuit courts have no authority over how this Court reviews its capital cases. There is also nothing to “contemporaneously” object to.

If explicit preservation was required, then the defendant received ineffective assistance of trial counsel for not raising this precise argument below. The defendant should not be penalized for his trial attorney’s oversight and this Court should review this issue de novo.

The defense had nothing to lose and all to gain by making this challenge. The defendant was prejudiced because if this Court had a more expansive proportionality review his death sentence would be overturned.

Alternatively, this is a “facial challenge,” which can be raised for the first time on appeal. It applies to every capital defendant. This Court’s current proportionality review constitutes fundamental error because it reaches into the very heart of meaningful appellate review in every single capital case.

## CONSTITUTIONALITY

In reviewing a sentence of death this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

This Court must consider the totality of the circumstances and compare it with other capital cases. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. Woods at 990. See also Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003).

This Court generally only reviews cases in which a death sentence has been imposed and only expands its review when multiple defendants or participants are involved. This is legally insufficient because it is an insufficient body of evidence to determine whether death sentences are proportionate and pass constitutional muster.

The defendant hereby incorporates by reference Chapter 7 from the September 2006 ABA report, pages 207 to 212, and pages xxii to xxiii. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 17, 2006.

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. This Court should also make a comparison to death sentences in other states and in federal cases. The Constitution does not stop at the state line.

All of this criteria must be utilized to achieve both statewide and national uniformity, to ensure that death is not “unusual,” and to ensure that a death sentence is not arbitrary. The failure to engage in this multi-faceted analysis deprives every capital defendant of a meaningful proportionality review.

The current review violates equal protection, violates the due process clauses of the Florida and United States Constitutions, and results in cruel and unusual punishments in derogation of Article 1, Section 17 of the Florida Constitution and the Eighth Amendment. See Simmons v. State, 934 So.2d 1100, 1122 (Fla. 2006). As discussed in Argument 1 above, the Florida Constitution affords more protection to criminal defendants than the Federal Constitution.

To pass constitutional muster, this Court must determine what level of aggravation is sufficiently low and what level of mitigation that is sufficiently high to raise concerns about arbitrariness and uniformity. This is impossible without objective empirical data about Florida’s capital punishment system as a whole, and data from other jurisdictions as well. A defendant’s chances of death should not vary based upon which jurisdictional border he has crossed. This goes for the

county borders within Florida as well.

This Court should impose mandatory data collecting procedures consistent with the suggestions herein. The defendant hereby incorporates by reference:

Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 St. Thomas Law Review. 299 (2004).

The ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 211.

The ABA Report noted, "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 212.

The shift in the affirmance rate and in the manner in which the proportionality review is conducted is evidence of arbitrariness. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. This Court's current limited scope of review presents

an undue risk that death will be imposed in an arbitrary and discriminatory manner.

If this Court increased the body of evidence in its proportionality review, as suggested above, it would reverse the sentence of death in this case. This case is not consistent within Florida. See Lanzafame v. State, 751 So.2d 628 (Fla. 4<sup>th</sup> DCA 1999) (no death sentence for first degree premeditated murder where the defendant, without provocation, hit the victim in the head with a baseball bat in excess of ten times).

This case is also not consistent with other states. See In re Elkins, 144 Cal.App.4th 475 (Cal. App. 1 2006) (defendant who was 19 years old when he robbed and killed his victim by repeatedly hitting him with a baseball bat did not receive a sentence of death, *and in fact was granted parole*). If this Court reviewed cases like this, it would be clear that the sentence of death in this case is disproportionate.

In sum, this Court should: (1) address whether this Court's current limited proportionality review passes constitutional muster – a subject which seems to be one of first impression for the Court; (2) adopt a more comprehensive review as suggested herein; and (3) apply the new comprehensive review to this case.

The United States Supreme Court has held that comparative proportionality review is not constitutionally required. See Pulley v. Harris, 465 U.S. 37, 44-54

(1984). Over time, this decision has proven itself to be violative of the Eighth and Fourteenth Amendments, and therefore should be overruled. See Tuilaepa v. California, 512 U.S. 967, 995 (1994) (J. Blackmun dissenting); Turner v. California, 498 U.S. 1053 (1991) (J. Marshall dissenting from denial of certiorari).

This Court does provide at least some form of comparative proportionality review. This decision places the extent of its review under the Constitutional microscope. See Evitts v. Lucey, 469 U.S. 387, 401 (1985) (when a State opts to act in a field with discretionary elements it must do so in accord with the dictates of the Constitution, and in particular, the due process clause).

This question is one of first impression for this Court. This is due to the fact that death penalty case law has evolved significantly over the last 8 years (since Ring) and now Florida stands alone on the fringe of what death penalty protections should be applied in a statutory scheme.

In sum, Florida has not followed the death penalty revolution, despite this Court's urging,<sup>2</sup> and therefore this Court must employ a more comprehensive comparative proportionality review to make up for it.

Florida's death penalty scheme does not provide the necessary constitutional

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<sup>2</sup> State v. Steele, 921 So.2d 538, 548-50 (Fla. 2005) (“need for legislative action” because Florida is the “outlier state.”)

safeguards to allow this Court's proportionality review to be so narrow.

Florida is the only state that allows juries to find the existence of aggravating factors and allows the decision to impose death on a mere majority vote. There is also no assurance that the jurors are even agreeing on the same aggravating factors. This Court is constitutionally required to undertake a more comprehensive review as a result.

The United States Supreme Court case law on this issue is pre-Ring and therefore is ripe for abrogation. Regardless, the high court specifically makes the holding that comparative proportionality review is not required when the State system at issue provides sufficient safeguards against arbitrariness. See Pulley v. Harris, U.S. 37 (1984).

Florida's system does not satisfy this criteria. Florida does not provide sufficient safeguards given the recent changes in death penalty jurisprudence and new statutory capital schemes throughout the other states.

## **ARGUMENT 10: THE DEFENDANT'S SENTENCE OF DEATH IS DISPROPORTIONATE**

The defendant does not concede any culpability for the crimes at issue

(because he is innocent) and this issue is only being addressed because this Court is going to address it regardless.

It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first degree murders. Woods v. State, 733 So.2d 980, 990 (Fla. 1999). This court will review this issue in any event.

The defense filed a sentencing memorandum, which is hereby incorporated by reference [R. 2452]. The defendant is an older man which therefore gives this Court a much expansive view of his life history.

Plain and simple, the defendant is a good person and he has led a virtuous life. He has a lifelong history of being a good person who has done continual good deeds without recompense. He has been a good leader of his family. He is the ideal American immigrant. He has absolutely no criminal history of any kind.

The acts at issue were aberrant behavior based upon his wrongful ousting as president of the company. His wrongful ousting was punishment for his discovery that a million dollars was missing and that the other two partners were responsible. This was a significant stressor. The defendant was attempting to right a wrong.

There is no HAC aggravator in this case. The gun shots caused quick unconsciousness (Tr. 3985), and were almost immediately fatal (Tr. 2701). The defendant is religious and has a positive character. He is also an older age of 69

and deaf. These factors also militate toward a sentence of life.

The jury recommendation was not unanimous and was only 9 to 3. The fact that he was tortured by jail officials should have been argued and should have been a strong mitigating factor in this case. Vacating a death sentence for such conduct by jail officials is the only real deterrent to such conduct.

The defendant exhibited good behavior while in court and while in jail and can certainly successfully exist in the prison population. He has never abused drugs or alcohol. He has always live a good, law-abiding life, and has had a positive impact and a multitude of people.

It is abundantly clear that the tragic crimes at issue are an anomaly in the defendant's life and character. He has literally had a lifelong history of being a good family man, a good friend, and a good citizen. Compare Johnson v. State, 720 So.2d 232, 238 (Fla. 1998).

In sum, given the defendant's extremely positive life, and the fact that the impetus for his aberrant behavior was the immoral and illegal behavior of the partners, his sentence of death is disproportionate.

Hearing impaired and older at X.

**ARGUMENT 11: GIVEN THE LACK OF CONCRETE EVIDENCE, A**

**SENTENCE OF DEATH SHOULD NOT BE IMPOSED  
BECAUSE THERE IS AN UNACCEPTABLE RISK  
THAT THE WRONG PERSON WAS CONVICTED**

In the unlikely event this Court upholds the verdict in this case, the fact that this case was entirely circumstantial (and had no concrete forensic links), was such a close call, and the consequences of an irreversible mistake loom so prominently in the background, the sentence of death should be reversed.

Death is different. Due process under the Florida and United States Constitutions, and the right to a jury trial under same, require such a result. The extra protections that the Florida Constitution affords defendants allows for this remedy, even if the United States Constitution does not.

As an analogy, this Court applies a special standard of review to the sufficiency of the evidence in a circumstantial case. The underlying logic for doing so is that there is an increased risk of error in these indirect cases. This rationale applies with at least equal force when there is a sentence of death.

The circumstantial evidence in this case was not buttressed by any forensic or indisputable scientific evidence. Because of this, the evidence is not sufficiently reliable so as to allow a sentence of death, even if the State technically met its burden of proof.

It is well-established that circumstantial evidence can be sufficient to prove guilt. The defendant is not arguing otherwise. This is a penalty-only argument. When the circumstantial evidence does not contain any direct scientific or forensic links to buttress its reliability, the imposition of the death penalty is too great of a risk.

**ARGUMENT 12: FLORIDA’S DEATH PENALTY SCHEME VIOLATES  
DUE PROCESS, THE SIXTH AMENDMENT AND *RING*  
v. *ARIZONA* AND ITS PROGENY**

The defense filed numerous motions to declare Florida’s death penalty scheme unconstitutional. The defense filed motions attacking a wide range of procedures and statutes, including the constitutionality of section 941.141 based upon *Ring* and other grounds [R. 218-376].

The first hearing on these issues was held on December 4, 2004 [R. 420-487]. The bulk of the defense’s motions were denied [R. 488-517]. The defense renewed their motions before the first jury selection began and the requests were denied [R. 611-612]. After the first trial judge recused himself, a new hearing on these issues was held on April 7, 2005. Again, the bulk of the motions were denied [R. 712-798]. These are strictly issues of law subject to de novo review.

The failure to have a special verdict has deprived the defendant of meaningful appellate review. See State v. Steele, 921 So.2d 538, 553 (Fla. 20005) (C.J. Pariente, dissenting in part). The failure to have detailed appellate review is a due process violation in and of itself.

The due process issues in this argument (and in this brief) have not been considered with the mandate that the Florida due process clause provides more protection than the federal constitution. Therefore, all of these issues require re-analysis and precedent should actually change.

It appears, that this Court has relied on the failure of the U.S. Supreme Court to reverse its decisions as dispositive authority. Denials of certiorari are analogous to PCAs and should not have any precedential effect. Regardless, the U.S. Supreme Court's rulings are irrelevant when this Court is interpreting the Florida Constitution.

How can a trial court and an appellate court accurately uphold a jury verdict where no one has any idea what the jury was thinking? If it is not necessary to know what the jury was thinking, then in Florida having a jury in a capital case is an empty formality, and this is not constitutionally acceptable.

Florida's death penalty scheme is unconstitutional on its face and as applied to the facts of this case. This issue was preserved in the lower court and is therefore

an issue of law subject to de novo review.

The Sixth Amendment right to a jury trial and the right to due process of law embodied in both the Florida and United States Constitutions is violated by the mandates and implementation of Florida's statutory scheme and case law on attaining a conviction and sentence of death in a capital case.

Florida's death penalty scheme violates the Sixth Amendment and due process. See e.g. Cunningham v. California, 127 S.Ct. 856 (U.S., January 22, 2007); United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Based upon the reasoning and the logical extensions of these cases, permitting a jury to find death on less than a unanimous vote does not pass constitutional muster. Currently, precedent is to the contrary. It is only a matter of time before this changes. Florida is the only state that allows the jury to find both the existence of aggravating circumstances and make a recommendation that the defendant receive the death penalty by majority vote.

The United States Supreme Court's continuing strengthening of the Sixth Amendment, and the principles of due process embodied therein, cast a dark

shadow over Florida's death penalty system.

The concurring opinions of Justices Quince, Bell, Anstead, and Pariente in Coday v. State, 946 So.2d 988, 1009-1026 (Fla. 2006), are hereby incorporated by reference. See also State v. Steele, 921 So.2d 538 (Fla. 2005).

The defendant hereby specifically argues that the following Sixth Amendment, due process and other constitutional deficiencies invalidate the imposition of death in this case:

A. Because aggravating circumstances are elements of the offense under Florida law and Ring, 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.

B. Ring and its progeny 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.

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.

D. The Sixth Amendment requires juries to *unanimously* find the existence of aggravating factors and *unanimously* find that death should be imposed.

E. The requirement that the defendant must prove that the mitigating factors must outweigh the aggravating factors is unconstitutional burden shifting. It results in a presumption of death. The jury instructions in this case shifted the burden of proof to the defendant to prove that the death sentence was inappropriate and the same standard was employed by the sentencing judge. The jury should have been instructed that the aggravating factors must outweigh any mitigating factors.

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.

G. The procedure does not have the independent re-weighing of

aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

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.

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.

Pursuant to all of the foregoing, Florida's death penalty scheme stands in violation of the Eighth Amendment, the Sixth Amendment, and the Fourteenth Amendment of the United States Constitution. As for the Florida Constitution (which provides more protection than its federal counterpart), the scheme violates, equal protection, due process, and the proscription against cruel and unusual punishment.

It is not clear whether this Court has considered all of these arguments within the context of the principle that Florida's Constitution affords more

protection to persons accused of committing a crime as compared to the Federal Constitution.

Florida capital cases require a unanimous verdict by a jury of twelve. *See* Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that, “Because . . . enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense’ . . . the Sixth Amendment requires that they be found by a jury.

The defendant’s death sentence fails in the wake of Ring for a number of reasons. First, the jury recommended death by a margin of 9 to 3. Second, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the Defendant’s case. Third, Ring and Rules 3.270 and 3.440 require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

The jury’s advisory recommendation does not specify what, if any,

aggravating circumstances the defendant's jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

A literal reading of Florida's death penalty sentencing scheme (F.S. Section 921.141) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death penalty.

In view of Apprendi and Ring, *supra*, the Defendant's death sentence cannot stand because his jury did not unanimously recommend death and because it is impossible to know whether the jurors would have unanimously found any specific aggravating circumstances. With a 9 to 3 vote, there is a high probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance.

Given that this Court has already acknowledged in Steele that Florida's death sentencing statute *should* be revisited to require *some unanimity* in the jury's recommendation, and given that this Court has deferred to the legislature as best it

can, and given the continuing lack of legislative action, the Defendant submits that the trial court erred in not ruling that Florida's death sentencing scheme is unconstitutional.

**ARGUMENT 13: LETHAL INJECTION AND FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL**

To the extent that this issue was not preserved for appellate review, the defendant received ineffective assistance of counsel. Had this issue been fully preserved the defendant would have had relief on direct appeal, and was therefore prejudiced, because Florida's death penalty system does not comply with Baze v. Rees, 2008 WL 1733259 (U.S., April 16, 2008).

The error at issue is a question of law that is apparent on the face of the record, therefore this issue can be raised on direct appeal. Florida's protocol for lethal injection is not as reliable as that of Kentucky, therefore Baze is distinguishable. Furthermore, the competency in which said protocol is carried out is different in Florida than Kentucky.

Florida's latest written protocol lists the minimum statutory qualifications for

the medically trained participants, but the defendant still does not know what licensure the technical team members possess; does not know if they have been credentialed in a healthcare institution to provide medical care; does not know if they have ever had their license revoked; and does not know if they have background problems, pending criminal investigations, convictions, and/or arrests or other inappropriate things.

The defendant does not know if the team has experience starting IVs that will be used for inducing anesthesia. Incredibly, the defendant does not even know if the technical team who participated in the botched Diaz execution will participate in future executions.

Furthermore, the decision in Baze turned wholly on Kentucky's written protocol. The Court left open the important question of whether a protocol that may be constitutional on its face may violate the Eighth Amendment when it is not carried out as written. Florida's unique history of deviating from written execution protocols reveals the gravity of this question. The four corners of a written protocol are should not be the end of the question.

Lethal injection itself, the death chemicals, Florida's lethal injection statute (Fla. Stat. § 922.105), and the existing procedure that the State of Florida utilizes for administering lethal injections violate numerous constitutional provisions, to

wit: Article II, Section 3 and Article I, Section 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Death by lethal injection violates the proscription against cruel and unusual punishment because it inflicts undue pain on the prisoner. In addition, Florida's implementation of lethal injections violates due process because of inadequate guidelines which make the prospect of a mishap "objectively intolerable," and readily implemented alternative procedures significantly reduce a substantial risk of severe pain. Baze at \*2.

All courts rendering adverse decisions on this issue are rendered obsolete due to new court rulings, new scientific evidence and other evidence that was not in existence at the time those decisions were made.

Previously, courts have held that the possibility of a prisoner feeling pain and the possibility of mishaps during the execution were speculative. New court holdings and research as well as actual events require this court to re-assess these determinations.

The petitioner's pleadings, arguments and the record-on-appeal in Lightbourne v. McCollum, SC06-2391, are hereby adopted and incorporated by reference as they are relevant to the details of the Diaz execution and the current

problems with lethal injection in Florida.

This additional list of new evidence and research (which is hereby incorporated by reference) renders precedent on this issue obsolete:

- (A) The Governor's Commission on Administration of Lethal Injection, Final Report with Findings and Recommendations, March 1, 2007;
- (B) Lethal Injection for Execution: Chemical Asphyxiation?, Dr. Teresa A. Zimmers, Public Library of Science, April 2007;
- (C) The Florida Department of Corrections revision of its lethal injection protocols, promulgating "Execution by Lethal Injection Procedures", signed by DOC Secretary James R. McDonough on August 16, 2006, and August 1, 2007;
- (D) The April 16, 2005 article published in the medical journal THE LANCET. See Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 THE LANCET 1412 (2005);
- (E) The recent decisions granting relief in lethal injection challenges. See Harbison v. Little, 3:06-1206 (M.D. Tenn., September 19, 2007); Evans v. Maryland, 2006 WL 3716363 (Md. App., December 19, 2006); Morales v. Tilton, 465 F.Supp.2d 972 (N.D. Cal. 2006); Taylor v. Crawford, 2006 WL 1779035, 05-4173-CV-C-FJG (W.D. Mo., June 26, 2006), *reconsideration denied* October 16, 2006.

(F) The Diaz execution debacle.

On March 1, 2007, the Florida governor's own commission concluded that the policies and procedures of the Florida Department of Corrections implementation of lethal injections were lacking in a number of significant areas, which included:

- i. Lack of supervision over personnel;
- ii. Insufficient guidance to select personnel;
- iii. Lack of suitably trained and qualified personnel to perform their assigned duties;
- iv. Lack of a command structure over personnel;
- v. Failure to adhere to DOC Protocol 14(e);
- vi. Inadequacy and insufficiency of DOC Protocol 14(e);
- vii. The current administration of lethal chemicals;
- viii. The inability to conclude that the inmate does not feel pain.

Final Report at p. 8-10.

In *Lethal Injection for Execution: Chemical Asphyxiation?*, Dr. Theresa A. Zimmers, Public Library of Science, April 2007, six scientists spent three years

analyzing more than 50 medical examiner reports of executed prisoners and concluded that the prisoners had probably suffered immense pain before they died. The prisoners slowly suffocated while conscious but were unable to communicate.

Evidence not previously available to this Court when it decided Sims v. State, 754 So.2d 657 (Fla. 2000), and not considered by the Court in the cases, Hill v. State, 921 So. 2d 579 (Fla. 2006), Rutherford v. State, 926 So.2d 1100 (Fla. 2006) and Rolling v. State, 944 So.2d 176 (Fla. 2006), demonstrates that the existing procedure that the State of Florida uses in executions is unconstitutional in that there is an unduly high risk that the execution will inflict pain upon the defendant or otherwise go awry.

The new August 2007 procedures promulgated by the Department of Corrections just after the defendant was sentenced, but will be applied to him, do not cure all of the foregoing problems. The new protocol remains constitutionally inadequate.

In Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), this Court upheld the constitutionality of Florida's lethal injection procedures as currently administered. The defendant asks this court to judicially notice said record as it did in Schwab v. State, 969 So.2d 318 (Fla. 2007).

To be clear, the defendant is challenging the inherent per se

unconstitutionality of lethal injection itself as cruel and inhumane, in violation of *inter alia*, Article I, Section 9 of the Florida Constitution (See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007) – as well as challenging the fact that Florida’s implementation of lethal injection presents an unnecessary risk of pain and suffering.

The May 2007 and August 2007 lethal injection protocols promulgated by the Department of Corrections do not sufficiently minimize the risk of pain and suffering in lethal injection executions. The current process is insufficient.

Florida’s procedures are also unconstitutional because there are readily available alternatives that pose less risk of pain and suffering. Other chemicals and procedures can be implemented, as an alternative to Florida’s current cocktail and procedures, which pose less risk of suffering. Using the least restrictive alternative is constitutionally required.

The continued use of the three drugs – sodium thiopental, pancuronium bromide, and potassium chloride – individually or together, also violate the proscription against cruel and unusual punishment.

DOC’s current procedures are also insufficient because the consciousness assessment needs to meet a clinical standard using medical expertise and equipment and a one-drug protocol utilizing only a lethal dose of sodium pentothal

(sodium thiopental) is a less restrictive, and more humane, alternative.<sup>3</sup> Currently, Florida courts are providing too much deference to DOC on these issues.

### EVOLVING STANDARDS OF DECENCY

Consistent with part of the Baze opinion (Justice Stevens concurring at \*24), the defendant hereby argues that evolving standards of decency prohibit lethal injection and Florida's methods for lethal injection.

Due to evolving standards of decency and continuing problems with lethal injection executions in Florida and throughout the country, death by lethal injection constitutes cruel and unusual punishment and violates due process.

The New Jersey Death Penalty Study Commission Report, dated January 2, 2007, is hereby incorporated by reference. The Committee concluded that New Jersey's death penalty needs to be abolished because, *inter alia*:

There is established evidence that the death penalty is inconsistent with evolving standards of decency; abolition of the death penalty will eliminate the

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<sup>3</sup> See Schwab v. State, 973 So.2d 427, 429 fn 3 (Fla., November 7, 2007) (J. Pariente concurring), noting that the one-drug protocol was recommended by Tennessee's protocol committee but was not adopted. See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn 2007).

risk of disproportionality in capital sentencing; the penalogical interest in executing a small number of guilty persons is not sufficiently compelling to justify the risk of an irreversible mistake.

Accordingly, the United States Supreme Court's "evolving standard of decency" standard for overturning the death penalty precedent is now met.

### **CONCLUSION**

For all the foregoing arguments and authorities set forth herein, the Appellant, NELSON SERRANO, respectfully requests this Honorable Court to reverse his convictions and release him forthwith or remand for a new trial/penalty phase, or reduce his sentence to life imprisonment.

### **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, Suite 200, Tampa, FL 33607-7013 on this xxth day of July 2008.

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**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this xxth day of July 2008.

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