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IN THE FLORIDA SUPREME COURT

HECTOR MANUEL IRIZARRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 66,947

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant, Hector Manuel Irizarry,1/ will be referred to by name in this brief. Page references to the record on appeal and the appendix to this brief will be designated by "R" and "A", respectively.

1/ In the trial transcripts, Appellant's name is spelled "Hector Irrzarry," but this brief will employ the correct spelling, "Hector Irizarry."

STATEMENT OF THE CASE

The "State" would agree with the statement of the case presented by Appellee; and, would add the following. On October 11, 1985, Appellant filed a motion to strike the appendix attached to Appellee's brief. On October 30, 1985, this Court rendered an Order denying the motion.

STATEMENT OF THE FACTS

The facts of this case are simple. Hector and Carmen Irizarry were married; divorced; lived together; separated; and, rendition of the separation is Carmen's death.

Hector and Carmen Irizarry are Puerto Ricans who in 1971 married in New York. (R.494,495,501) The couple moved to Florida in 1978. (R.496) The marriage was dissolved by divorce in 1980 (R.496); however, co-habitation continued until Carmen became enamoured with a fellow Lykes Brothers co-workers named Orlando Hernandez, a Cuban. (R.501) When Carmen decided that she would rather co-habitate with Mr. Hernandez, she requested that her former husband leave her house. (R.499-501) Appellant complied with this request; and, approximately two weeks later (in the early morning hours of July 26, 1984, Appellant returned to Carmen's residence; broke into the house; took a machete and began beheading Carmen and attempted to behead Mr. Hernandez. Carmen expired at the scene; and, Mr. Hernandez was able to recall a vague identification of the perpetrator (a man whose identification was compatible with that of Appellant). (R.258-260)

The prosecution's case in chief was built entirely on circumstantial evidence. That evidence established Appellant's guilt.

Hector Irizarry informed his step-daughter that he did not like the idea of Orlando Hernandez moving in with his ex-wife, the victim, Carmen Irizarry. (R.500-501) In fact, when Hector sought a reconciliation with his former spouse, she stated: "No way, Jose." (R.345)

Circumstantial evidence points to Hector Irizarry as the perpetrator of this savage murder. (R.310) There were no eyewitnesses to the near decapitation murder of Carmen Irizarry and mutilation of Orlando Hernandez. The prosecutor's case portrayed Hector as a man who, while engaged in a several-day, home repair project for his employer's mother (R.477), drove some 50 miles in the early morning hours to kill Carmen Irizarry and Orlando Hernandez. (R.331-336; 425-448; 483, 487) The lone survivor of this mayhem gave a description of the assailant that was not incompatible with the description of Hector Irizarry. (R.258-260) Once Orlando Hernandez was able to turn a light on in the bedroom during the attack, the assailant fled. (R.258) Hector Irizarry was a machete connossieur and used them with his employer, Jim Hardee. (R.392) Margaret Lore, Hector Irizarry's former step-daughter, informed the jury that Hector had given his late-wife a machete for her protection (R.501, which suggests Hector favors the use of a machete as a weapon. In fact, it was suggested that the machete Hector Irizarry gave Carmen came from one of the two

Hector secured for his employer. (R.394) Hector was quoted by Sgt. DeLuna during interview: "He told me during the thirteen years he was married to Carmen he worked for her like a mad dog, he treated her like a queen, and also gave her everything in the world. He did not know of anyone else who could give her anything else." (R.342,343) His step-daughter, Margaret Lore, testified that Hector continued to proclaim his love for Carmen after moving out. (R.499) Hector, a Puerto Rican, held a nationalistic prejudice against Orlando Hernandez because he was Cuban. (R.501)

Four hours after the attack, Hector Irizarry informs police (upon inquiry) that the specks of blood on his forehead are fish blood. (R.326-327) Laboratory analysis reveals the blood to be human. (R.339; 381-382) Hector Irizarry also misinforms Margaret Lore that fish blood was found by police on his forehead. (R.509)

Hector Irizarry attempted to establish an alibi. On the murder date, Hector requested Margaret Lore to telephone him at Jim Hardee's mother's residence (where he was working) not after 10:00 p.m. (R.504) The testimony of Orlando Hernandez left no doubt that the individual who broke and entered the dwelling was familiar with the house as nothing was out of place. (R.1017; 1019) In fact, no item (including the victim's purse) was stolen. (R.268-270) Carmen's purse had not been tampered with. (R.424)

Moreover, whoever broke into the house could not help but observe three (3) cars in the victim's driveway (R.264) which should have deterred someone not familiar with the domicile. After Hector Irizarry moved out, he kept Carmen's housekey for an extended period of time (R.342, 5001) which would have given him an opportunity to secure a duplicate. The entry through the back door of the residence did not reflect "pry marks": there existed a latch; deadbolt; and, doorknob for the perpetrator's manipulation. (R.415-422) As a subterfuge, gloves were left on a window ledge. (R.421; 465) Upon exiting, the deadbolt was not locked. (R.465)

When Margaret Lore telephoned Hector Irizarry, under police direction, to inform him of her mother's "accident", Hector Irizarry answered the telephone on the first ring. (R.504,505) The time the call was placed was 5:30 a.m. (R.504) Ms. Lore was so shocked that Hector answered, that she hung up and replaced the call. (R.505) Ms. Lore twice directed Hector Irizarry to come immediately to her own home. (R.505,506) Hector Irizarry disregarded that directive and went to Carmen Irizarry's death scene. (R.505; 506) When Carmen Irizarry's remains were removed from the death scene (in Hector's presence), he showed calm curiosity. (R.507,508) Three days later, at Carmen's funeral, Hector cries hysterically. (R.508) During police

interviews, Hector makes an admission that if he had wanted Carmen Irizarry dead he would have cut her head off. (R.328; 350; 353) At the time of the admission, neither the police nor Margaret Lore had disclosed facts of the homicide which would indicate decapitation. (R.507; 328)

On direct examination, Orlando Hernandez testified that he threw himself on the floor in his confrontation with his assailant. (R.258) Later, Hector Irizarry is informed by Margaret Lore thta Orlando Hernandez was making a claim against the estate. Hector angrily replied: "Maybe that is why he threw himself on the floor that way." (R.510-511) Orlando had testified that he threw himself on the floor and touched his assailant's shoe. (R.258)

The police also ran an experiment with James Hardee's automobile (which was under the control of Hector Irizarry at the time of the homicide). The gas gauge was consistent with Hector Irizarry driving from Mr. Hardee's mother's lake house to the death scene and back again. (R.425-450) The depletion of the gasoline suggests a discrepancy which, including gasoline for a pressure washer, is not reconciled.

All facts elicited in this circumstantial evidence prosecution points squarely to the guilt of Hector Irizarry.

SUMMARY OF THE ARGUMENTS

As to Issue I: There is no reversible error as the reference to this polygraph was made during the cross-examination of a state's witness. The answer was not solicited by the prosecution. The trial court gave a curative instruction; and, neither a priori nor a posteriori could the jury have concluded the results of the test.

As to Issue II: The two machetes introduced into evidence had probative value which outweighed any prejudice appellant might argue below or here. They are admissible as they are so connected with the crime at bar and which with appellant as to throw light on who killed Carmen Irizarry and who attempted to kill Orlando Hernandez. That Hector Irizarry had favored machetes as both working tools and weapons goes to establish ability to perpetrate the crime.

As to Issue III: There exists a procedural default to the claims raised as defense counsel did not immediately object to the purportedly improper argument. The trial court offered to give a curative instruction to the jury. Defense counsel declined the curative instruction. On the merits the prosecutorial comments are not so egregious that they prejudically affected Irizarry's substantial rights.

As to Issue IV: The communication between the bailiff and juror was heard by defense counsel with Irizarry present. The bailiff was never used by the lower court as its agent to answer jury questions. At bar the communication did not constitute an instruction on the law or a prohibited communciation with the jurors on a subject connected with the trial. There is absolutely no showing of prejudice under this claim which would support a mistrial.

As to Issue V: Appellant's Lockhart v. McCree, (U.S. 84-1865, pending) claim at present is not binding on this Court. This Court has rejected the death-qualified jury claim and under Witt v. State, 465 So.2d 510 (Fla. 1985) and has refused to revisit it in Porter v. State, ___ So.2d ___, 10 F.L.W. 573, 574 (Case No. 67,805, Opinion filed October 25, 1985).

As to Issue VI: The sentencing weighing process did not include improper aggravating circumstances nor exclude improper mitigating circumstances.

As to Sub-Point A: The homicide at bar was committed in a cold, calculated and premeditated manner. The murder photographs, plus Orlando Hernandez's testimony, set this case out as an execution; plus, the homicide was proven by circumstantial evidence to be one of premeditation.

As to Sub-Point B: This homicide is especially heinous, atrocious or cruel. There is evidence of excessive physical or mental suffering. The evidence strongly indicates Carmen Irizarry was able to roll off the bed after having suffered four (4) machete blows to her upper front body but prior to having suffered the final machete blow to her back reasonably suggesting she was awakened and remained conscious during the hacking and hewing.

As to Sub-Point C: The trial court gave adequate consideration to the psychological testimony received in reference to Hector Irizarry's mental and emotional state at the time of the homicide. The trial court has the discretion to accept or reject the opinion of an expert even though it is uncontroverted. The trial court gave Dr. Mussenden's testimony the weight to which it was entitled. Dr. Mussenden was not entirely familiar with the circumstantial evidence presented by the prosecution. It is not an appellate function to re-weigh findings of fact. That the trial court found Dr. Mussenden's testimony to be of no probative value has a basis in the record proper.

As to Sub-Point D: The trial court never failed to consider any evidence in mitigation; but, that the trial court did not find proferred evidence in mitigation does not mean that it did not consider the evidence. All relevant evidence in mitigation was considered and weighed in the balance prior to passing sentence. Hector Irizarry's social

history of menial jobs and eighth grade education were considered and rejected. That evidence of positive work habits; compatible relationship with co-workers and employer's family; and, no evidence of angry or violent outbursts was considered by the trial court. To not find these factors to be non-statutory mitigating factors means that they were rejected rather than being accepted. There is no ambiguity on this record.

As to Issue VII: The trial court followed the teachings of Tedder in overriding the jury recommendation of life imprisonment. In this case the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. Hector Irizarry is a previously convicted felon involving the use of violence; the felony was committed while appellant was engaged in the commission of a burglary of a dwelling; the felony was committed in a cold, calculated, premeditated manner; and, the felony was especially heinous, atrocious or cruel.

As to Issue VIII: This is not a case of uxoricide; nor, must this court look to uxoricide in its proportionality review. The parties had been divorced for several years; and, had co-habitated as roommates in separate bedrooms prior to the homicide. This is not the domestic killing where this Court has set aside the death penalty.

As to Issue IX: There is no sentencing guidelines error in assessing a 25 year minimum mandatory penalty as it is but a nunc pro tunc rendition of the oral pronouncement; however, if there must be strict compliance with the oral pronouncement of sentence, the 30 year sentence is not excessive as victim injury may be used as a reason to depart from the guidelines. The stated reasons provide an adequate basis for sentencing appellant above the recommended range.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN DENYING HECTOR IRIZARRY'S MOTION FOR MISTRIAL AFTER STATE WITNESS SERGEANT ANDREW DELUNA TESTIFIED CONCERNING A POLYGRAPH TEST THAT IRIZARRY AGREED TO TAKE.
(As stated by Appellant)

Appellant overlooks the context in which the answer, solicited by defense counsel occurred. The cross-examination of Sgt. DeLuna was critical. Why was it critical? Because the trial was focusing on penal admissions against interest appellant had made. Specifically, Sgt. DeLuna had not informed appellant of the type of wounds which caused the death of Carmen. During the interview, appellant stated he would have cut his own head off before he would have cut her head off, and that if he wanted to kill her he would have cut her head off two weeks earlier. (R.328,350,353). Sgt. DeLuna of the Hillsborough County Sheriff's office interrogated appellant on July 26th and August 3, 1984 (R.318-350). The thrust of the defense questioning was to establish whether the penal admissions were made on the former or latter date. If the penal admissions were made on the latter date, then perhaps appellant had knowledge of the decapitation from a source other than his actual wielding of a machete. Specifically, two interviews were conducted on July 26, which continued into the afternoon hours <u>after</u> appellant agreed to take a

polygraph (R.328,349). Defense counsel opened the door for the witness to "nail-down" the date of the particular interview with his cross-examination:

> Q. I guess part of my problem, Detective, I am not finding any memorializing of a second interview on July 26th. I am seeing two interviews, a July 26th interview in the morning and an August 3rd interview which is memorialized there.
>
> A. Okay. During the initial interview with the defendant it was an interview that kept going through the afternoon hours after he agreed to take a polygraph and from there it just continued. It was one interview, if you want to look at it that way, one interview together. (R.349)

Was appellant deprived of a fair trial because this answer was elicited (not by the prosecution) but by appellant's counsel? There is no deprivation. First, it cannot be ignored that defense counsel ignored the contemporaneous objection rule by waiting until the witness was excused to call a bench conference to lodge objection (R.355). Thus, the "State" would assert a procedural default under Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) as a bar to consideration of the claim. If this Court is inclined to address the merits, then Davis v. State, 461 So.2d 70 (Fla. 1984) controls. This Court held:

> Unless both sides consent, the results of polygraph examinations are inadmissible in adversarial proceedings. Walsh v. State, 418 So.2d 1000 (Fla. 1982). Here, however, neither party sought to have any such results introduced. The mere mention of the possibility of a polygraph examination does not compel the granting of a new trial. See Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). The trial court's cautionary instruction to the jury cured any problem with this witness' inadvertent reference to a polygraph examination, and we find no error on this point.
>
> (Text of 461 So.2d at 70)

Here, the trial court, after hearing argument, considered appellant's request to give a currative instruction (R.366). The jury was given the instruction (R.372). The court based its ruling on the logic of Sullivan and Frazier v. State, 425 So.2d 192 (Fla. 3d DCA 1983). In the latter, the witness stated: "...and Henry flunked the polygraph." As the court observed that a mistrial was mandated because the prejudicial impact of this damning evidence would not be cured by a cautionary instruction. In no way are the results of the polygraph at bar communicated to the jury in this witness' testimony.

ISSUE II

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE AT HECTOR IRIZARRY'S TRIAL TWO MACHETES WHICH WERE IRRELEVANT AND PREJUDICIAL.
(As stated by Appellant)

At trial, the following transpired in reference to the machetes in question:

> Q. Did you also, subsequent to that day, obtain a machete from Margaret Lore?
>
> A. On the 31st of July, yes, sir.
>
> Q. And where did you obtain that machete from?
>
> A. It was given to me by her at her residence.
>
> Q. I show you what has been marked as State's Exhibit Number 24 for identification. Is that the machete given to you by Ms. Lore?
>
> A. Yes, it is.
>
> Q. Does it appear to be in substantially the same condition as when you received it from Ms. Lore?
>
> A. Yes, it does.
>
> Q. Did you place it in evidence, sir?
>
> A. Yes, I did.
>
> Q. Now, State's Exhibit Number 25 marked for identification, it was also placed in evidence by you, sir?
>
> A. Yes, it was.

MR. BENITO: At this time the State would move into evidence State's Exhibits 24 and 25.

MR. DONERLY: Objection, relevancy.

THE COURT: Overruled. Received into evidence as State's Exhibits Numbers 24 and 25.

(State's Exhibits Numbers 24 and 25 were received.)

As supplied by appellant, the rule of evidence announced in Harris v. State, 177 So. 187, 190 (Fla. 1937) states:

> . . .where the introduction of weapons would have some probative value and help determine the guilt of the accused, they might be admitted even though they were not proven to be the weapons used in the commission of the alleged crime.
>
> (Text of 177 So. at 190)

The "State" would urge that the machetes in question are admissible in evidence as they are so connected with the crime at bar and with Hector Manuel Irizarry as to throw light on the material inquiry in the case -- who killed Carmen Irizarry and who attempted to kill Orlando Hernandez? The prosecutor made a prima facie showing of identity and connection with the crime. A connection with the machetes was made with Hector Irizarry as he used machetes in his work (R.392) and he gave a machete to Carmen Irizarry for

her protection (R.501). Clearly, the two machetes admitted into evidence are connected with Hector Irizarry. What then is the probative value? The machetes establish Hector Irizarry is familiar with machetes; knows how to use them; gave a machete (as a weapon of choice) to Carmen Irizarry for her self-protection. Machetes are not commonly used in Florida as weapons for the perpetration of crime. That Hector Irizarry possesses such an expertise is relevant and probative of the fact that he is capable of being equipped with machetes (criminal tools). The prosecution connected Hector Irizarry with the machete he gave his late ex-wife for her self-protection; and, he was connected with the machete he used working for Jim Hardee.

In United States v. Sarmiento-Perez, 724 F.2d 898 (11th Cir. 1984), appellant, in an appeal from a cocaine conviction, argued the trial court committed reversible error when it admitted into evidence cocaine seized from his accomplices. Appellant was not present when his accomplices were arrested in a Miami hotel room and cocaine seized. In reliance on United States v. White, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1978), the Eleventh Circuit restated: "Proof of the connection of physical evidence with a defendant goes to the weight of the evidence rather than its admissibility." See, also, United States v. Soto, 591 F.2d

1091, 1099-1100 (5th Cir. 1979). At bar, there is direct evidence connecting Hector Irizarry with the machetes admitted into evidence. The trial court did not abuse its discretion in admitting the machetes into evidence.

ISSUE III

THE COURT BELOW ERRED IN DENYING HECTOR IRIZARRY'S MOTIONS FOR MISTRIAL DUE TO IMPROPER REMARKS OF THE PROSECUTOR DURING HIS FINAL ARGUMENTS TO THE JURY.
(As stated by Appellant)

Appellant complains of comments made by the prosecutor during closing argument. The comments are:

". . .he does what we know he did."
(R.599)

". . .which we know the defendant took."
(R.599)

". . .the route we know he took."
(R.600)

Defense counsel failed to object during argument. The trial court noted this and ruled that appellant was procedurally defaulted from pursuing this objection (R.603-604). On alternate grounds, the trial court held that appellant's claim did not warrant a mistrial; but, offered the following to defense counsel ". . .if you want me to give a curative instruction I will do it." (R.604). After the bench conference, defense counsel began his final argument (R.605). At the conclusion of the defense closing argument, a curative instruction was given as to a separate claim (R.650); but, not the ones previously assailed. No curative instruction was given on the solicitation from the bench. However, the jury was clearly instructed prior to the prosecution's closing:

> Please remember that what the attorneys say is not evidence. . . (R.567)

Learned Hand observed, "It is impossible to expect that a criminal trial shall be conducted without some showing of feeling; the stakes are high, and the participants are inevitaly charged with emotion." United States v. Wexler, 79 F.2d 526, 529-530 (2nd Cir. 1935), cert. denied, 297 U.S. 703 (1936). In fifty years, times have not changed.

The interesting aspect of this claim is the procedural default. See, Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). In federal prosecutions where there is no objection, review is limited to the "plain error" standard. In United States v. Lacayo, 758 F.2d 1559, 1564-1565 (11th Cir. 1985), Judge Fay in application of Fed.R.Crim.P. 52(b), points out:

> [4-6] These remarks were not objected to by trial counsel, and review is therefore limited to the "plain error" standard. Fed.R.Crim.P. 52(b). The Supreme Court has recently reiterated that "Rule [52(b)] authorizes the Courts of Appeals to correct only 'particularly egregious errors,' United States v. Frady, 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' United States v. Atkinson [297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)]. United States v. Young, ___ U.S. ___, 105 S.Ct. 10-38, 1046-47, 84 L.Ed.2d 1 (1985). Therefore, the plain error rule must be used sparingly, and such an assertion must be evaluated in the context of the

> entire record. Id. 105 S.Ct. at 1047. Apart from the plain error rule, the two-part test for determining the existence of prosecutorial misconduct is whether the remarks were improper and whether they prejudicially affected the defendant's substantial rights. United States v. Zielie, 734 F.2d 1447, 1460 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 957, 83 L.Ed.2d 964 and ___ U.S. ___, 105 S.Ct. 1192, 84 L.Ed.2d 338 (1985).

The United States Supreme Court in United States v. Young, ___ U.S. ___, 105 S.Ct. 1038, 1044, 84 L.Ed.2d 1 (1985) [quoting Dunlop v. United States, 165 U.S. 486, 498, 17 S.Ct. 375, 379, 41 L.Ed. 799 (1897)] observed "that 'in the heat of argument, counsel do occassionally make remarks that are not prejudicial to the accused.'" The argument appellant asserts has no basis. The "State" concedes that a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1985); United States v. Young, ___ U.S. ___, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Here, no foul blows were struck. Even assuming the argument was somewhat improper [and it was not], it was not so egregious that it prejudicially affected Irizarry's substantial rights.

The practice this Court mandates is best couched as discretionary. The control of comments in closing arguments is within a trial court's discretion, and a court's ruling will not be overturned unless a clear abuse is shown.

Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); and, Breedlove v. State, 413 So.2d 1 (Fla. 1982), cert. denied, 459 U.S. 882. What more could the trial court have done. A curative instruction was offered; and, for perhaps strategy reasons, defense counsel declined the offer. In the absence of fundamental error the failure to object precludes consideration of this point on appeal. Bassett v. State, 449 So.2d 803 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

ISSUE IV

HECTOR IRIZARRY'S CONVICTIONS MUST BE REVERSED BECAUSE OF IMPROPER COMMUNICATION BETWEEN THE BAILIFF AND THE JURY DURING DELIBERATIONS.
(As stated by Appellant)

Whatever communication which transpired between the jury and the bailiff was certainly noticed by defense counsel (R.685-688). See, Curtis v. State, ___ So.2d ___, 10 F.L.W. 533, fn2 (Case No. 65,891, Opinion filed September 26, 1985). In Ivory v. State, 351 So.2d 26, 27 (Fla. 1977), the trial judge without notifying the defendant, his counsel, or counsel for the state, and outside of their presence, ordered the baliff to deliver a medical examiner's report to the jury. It was subsequently discovered that the medical examiner's report had not been admitted into evidence. This Court found the lower court's curative instruction to disregard the medical examiner's report insufficient to unring the bell that was ringing.

The facts at bar can be distinguished from Ivory. Here, the court reconvened, pending verdict, so that a request for a video tape might be received (R.685). Both Irizarry and his counsel were present (R.685); but, the prosecutor was not (R.685). The bailiff was instructed to direct the jury to reduce their request to writing (R.685). When this directive was given, one of the jurors verbally inquired (which defense counsel heard and noted) about a

collateral matter. The entire scenario was reconstructed:

> THE COURT: All right. Mr. Baliff open the jury door and receive the question.
>
> (The bailiff complied.)
>
> THE COURT: "March 27th, 1985, 5:20 p.m. We, the jury, request to see the video tape. Robert A. Deamer, Foreman."
>
> Now, do you wish to further pursue what also happened?
>
> MR. DONERLY: Yes, Your Honor. I would like the bailiff to state, as an officer of the court and I don't need him sworn, but I would like to have him state what the jury said and what he said.
>
> THE COURT: All right. Mr. Lazzara, after the jury informed you they wanted to see the video tape orally, then did the jury make any furhter request of you?
>
> THE BAILIFF: There was a knock on the door. When I answered one of the jurors wanted to ask me a point of procedure. I tried to cut in his conversation and when I heard the word "verdict," I advised them that the verdict must be written on the slips that was issued by the Judge and any questions on paper and I closed the door.
>
> MR. DONERLY: Sir, I thought you had told me the question had something about the mechanism of taking a vote?
>
> THE BAILIFF: No. All I heard is the words "verbal" and "verdict," and I interceded.

Defense counsel objected on the basis of Ivory; and, he renewed this claim in his motion for new trial (R.970-971). Although the communication on the collateral point was not authorized, it cannot be argued that it was unsupervised. There was no danger of staleness; and, the bailiff testified as an officer of the court. The communication between the bailiff and jury is regretable; but, surely it is not of such a fundamental nature as to require a new trial. Here, the trial court did not use the bailiff as a court agent to answer questions. In no way was this bailiff dispatched to field and answer jury questions. He was dispatched to communicate a bench directive: Reduce juror questions to writing. Whatever juror question was asked was heard by defense counsel. The entire episode was immediately reconstructed for evaluation as to harm and prejudice. Here, nothing was asked or answered which would by any stretch of the imagination undermine the confidence in the verdict. That the bailiff advised the jury that the verdict was to be written on the slips issued by the judge and questions were to be reduced to writing (R.688) is not substantive. In Degeer v. State, 349 So.2d 713 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 129 (Fla. 1978) [which was decided subsequent to Ivory], Judge Grimes found neither a violation of Fla.R.Crim.P. 3.410 nor of §918.07, Florida Statutes (1975). In Degeer, the bailiff told the jury that a certain photograph was not in evidence. This

communication was held to be part of the bailiff's obligation. The communication did not constitute an instruction on the law or a prohibited communication with the jurors on a subject connected with the trial. At bar, the communication between the bailiff and juror was not an instruction on the law or a prohibited communication on a subject connected with the trial.

Here, the communication was proper; however, if it were improper [and it is not], then it is not clear that an improper communication with jurors automatically mandates a new trial. In Crews v. State, 442 So.2d 432 (Fla. 5th DCA 1983), Judge Sharp in reliance on Walt Disney World Co. v. Althouse, 427 So.2d 1135 (Fla. 5th DCA 1983); Ennis v. State, 300 So.2d 325 (Fla. 1st DCA 1974); and, Degeer v. State, supra, points out authority exists that a showing of prejudice must be made prior to granting of relief. Also, Judge Sharp points to the authority of Caldwell v. State, 340 So.2d 490 (Fla. 2d DCA 1976); Randolph v. State, 36 So.2d 673 (Fla. 2d DCA 1976); and, Holzapfel v. State, 120 So.2d 195 (Fla. 3d DCA 1960) for the proposition that reversible error occurred whether or not the communication was legally correct and not harmful, or unknown.

At bar, the "State" would maintain that there has been no violation of Fla.R.Crim.P. 3.410 nor of §918.07, Florida Statutes (1983). The contact bailiff had with the juror fell within the scope of his obligations and duties.

ISSUE V

THE TRIAL COURT ERRED IN EXCLUDING A PROSPECTIVE JUROR FROM HECTOR IRIZARRY'S TRIAL BECAUSE OF HER RESERVATIONS CONCERNING CAPITAL PUNISHMENT, AS A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY, AND IS ALSO MORE PRONE TO CONVICT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.
(As stated by Appellant)

At bar, the following transpired with Juror No. 19: Ramona Whitman after she answered that under the proper circumstances she could not recommend to the court that the defendant be sentenced to death (R.130-131):

> Q. Would it be fair to say under no circumstances, Ms. Whitman, could you recommend to the Court that the defendant be sentenced to death?
>
> A. I just don't believe in killing like that.
>
> Q. Let me ask you this: Would you automatically vote -- would you automatically vote against the imposition of the death penalty?
>
> A. Not automatically, no.
>
> Q. Excuse me?
>
> A. Not automatically, I will have to hear it first.
>
> Q. Okay.
> Then you will be willing to listen to the evidence to determine whether or not

you, if you are a member of the jury, that you should recommend taht the man be sentenced to death?

A. Yes.

Q. After hearing that, if the circumstances were proper, could you, in fact, vote to recommend the death penalty?

A. I would have to be really convinced.

Q. But you could, let's put it that way?

A. If I had to, yes.

Q. Not if you had to but if you were convinced that the circumstances were proper, could you vote and recommend the death penalty?

A. I don't think so.

A. Well, because you have reservations about capital punishment, do you think they would prevent you from making an impartial decision as to the defendant's guilt or innocence in the first phase, you would be worried about the death penalty when you are considering whether he is guilty or innocent? Do you think that will have an effect on your deliberations?

A. Yes.

Ramona Whitman's opinions remained unchanged when questioned by defense counseld (R.151-155).

A close reading of this record reveals that Ramona Whitman's reservations concerning capital punishment focused not on the guilt phase of the trial but rather on the penalty phase of the trial. Ms. Whitman was of the opinion

she could not recommend a sentence of death. The jury in this case shared Ms. Whitman's view and did not recommend death (R.969). The record reflects the following in reference to defense counsel's questioning:

> Q. No, let's say you found him to be guilty after you have heard all of the evidence, after you have heard all of the evidence, and you go back in the jury room and you talk it over with the other jurors, you are convinced --
>
> A. That he's guilty?
>
> Q. -- that he committed the first-degree murder, but would you convict him, would you join the other jurors in convicting him by saying he's guilty of first-degree murder?
>
> A. Yes.
>
> Q. And you can do that, that is, convict him of first-degree murder even though capital punishment might then go over your head?
>
> A. Yeah, I can say he's guilty but I couldn't say, you know, put him in the electric chair. (R.153-154)

The prosecutorial challenge and defense objection reads as follows:

> MR. BENITO: At this time the State would strike Ms. Whitman for cause based on her views of the capital punishment and I will cite to the Court the recent case of Witt versus Wainwright, which is the new standard adopted by the United States Supreme Court, cited in that case the proper standard for determining whether a person may be excluded for

> cause on his views on capital punishment if it impairs the performance of his duties as a juror in accordance with the instructions.
>
> And I believe she said so on numerous occasions that she cannot vote or recommend to the Court death whether the defendant, under any circumstances and that I would concede substantially impedes her ability to perform a duty as a juror in this case.
>
> MR. DONERLY: Judge, the defendant's position is under the recent Eighth Circuit case, that name of which I do not know off the top of my head, is if jurors like Ramona Whitman are being excused for cause he's being deprived of a jury from a fair cross-section of the community or one challenge of that cross-examination are those people who do not believe in the death penalty and it will be our position that one could reconcile with Wainwright and the Eighth Circuit case by having her removed and be placed by an alternate should there be a need for a second phase. She said she could convict if the evidence proved Mr. Irizarry guilty beyond a reasonable doubt.
>
> THE COURT: The Court will excuse Ms. Whitman for cause. She even meets the Witherspoon test plus the latest United States Supreme Court test.

Irizarry's reliance on Grigsby v. Mabry, 758 F.2d 266 (8th Cir. 1985), cert. granted, October 7, 1985, sub. nom. Lockhart v. McCree, ___ U.S. ___, 38 CrL 4030 (U.S. 84-1865, pending) is misplaced. Lockhart has been rejected. See, Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841 (1985); Witt v. Wainwright, ___ U.S. ___, 84 L.Ed.2d 801 (1985);

Caruthers v. State, 465 So.2d 496 (Fla. 1985); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Gafford v. State, 387 So.2d 333 (Fla. 1980); Witt v. State, 465 So.2d 510 (Fla. 1985). See also, McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1980); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985).

Irizarry concedes in his brief that Grigsby conflicts with Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert. denied, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) and Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984). The language in Witt v. Wainwright, ___ U.S. ___, 84 L.Ed.2d 801 (1985) lends little encouragement that the Eighth Circuit's views expressed in Grigsby will be adopted as the law of the United States.

The Eighth Circuit Court of Appeal's decision in Grigsby is not binding authority on this Court. See, Witt v. State, 465 So.2d 510 (Fla. 1985). Irizarry presents no binding authority to this Court in support of his claim. This Court in Porter v. State, ___ So.2d ___, 10 F.L.W. 573, 574 (Case No. 67,805, Opinion filed October 25, 1985) held: "We have rejected the death-qualified jury claim before, Dougan v. State, 470 So.2d 697 (Fla. 1985); Witt v. State, 465 So.2d 510 (Fla. 1985), and refuse to revisit it."

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.
(As stated by Appellant)

For the purposes of brevity and clarity, the "State" will use the format adopted by Irizarry and address each of the sub-points seriatim.

A.

(As stated by Irizarry)

Appellant suggests that because a homicide has motivational factors of "jealousy and anger" this would negate tht the homicide was committed in a "cold, calculated and premeditated manner." These are separate concepts but blend into one another. Rather than being differentiated concepts, they are subject to legal integration. If ever a "cold" killing is before this Court for review, this case qualifies. Hector Irizarry argues that he felt he had moral justification for the homicide as he had been evicted from his former spouse's home so that she could co-habitate with Orlando Hernandez. In light of §798.02, Florida Statutes (1983), the "State" questions Irizarry's standing to urge his perception of moral justification for the homicide.

In application of §921.141(5)(i), Florida Statutes, this Court in McCray v. State, 416 So.2d 804, 807 (Fla. 1982), in review of this aggravating circumstance points out: "That aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive, Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981), given the decapitation of Carmen Irizarry (R.1037). Whether an execution is dispassionate or passionate begs the quesion. An execution is an execution. In Card v. State, 453 So.2d 17 (Fla. 1984) cert. denied, 105 S.Ct. 396 (1984), Justice Adkins noted that the level of premeditation needed to convict in a first-degree murder trial does not necessarily rise to the level of premeditation in §921.141(5)(i), Florida Statutes. This aggravating factor requires a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. Hardwick v. State, 461 So.2d 79 (Fla. 1984). This Court has previously applied this aggravating circumstance to those murders which are characterized as execution by contract murders or witness elimination murders. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984). This Court upheld a finding of premeditation as an aggravating factor in Squires v. State, 450 So.2d 208, 212 (Fla. 1984). Squires shot the victim

four times in the head with a revolver after having initially wounded the man with a shotgun. Here, Hector Irizarry dealt repeated blows with his machete to Carmen Irizarry. In fact, the autopsy protocol disclosed five (5) incised and/or slash wounds (R.305-313).

The written findings of the trial court reflect:

> 3). . . said crime was committed during the course of a burglary wherein Defendant entered a dwelling without permission with a cold, calculated, premeditated intent to commit two (2) machete murders. (R.984)

Clearly, Hector Irizarry had the intent to kill both Carmen Irizarry and Orlando Hernandez. Carmen Irizarry was executed so that she would not be a witness to the attempted homicide of Orlando Hernandez; and, Hector Irizarry attempted to eliminate Orlando Hernandez so that he would not be a witness to the homicide of Carmen Irizarry. The statutory elements of this premeditated aggravating circumstance were fulfilled in light of the court's reasoning:

> The capital felony for which Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, to wit: deliberate planning on the part of Defendant to commit First Degree Murder of his ex-wife victim Carmen Irizarry and victim Orlando Hernandez after becoming jealous and angry following victim Carmen Irizarry's request of Defendant to move our of her solely owned

> residence in order that victim Orlando Hernandez could move in with her by arming himself with a machete, driving approximately fifty (50) miles from Lake County, Florida to said victim's residence in Hillsborough County, entering under cover of darkness and without permission said residence with which he was totally familiar, savagely using said machete to murder his ex-wife and attempt to murder her new-found boyfriend, and then returning to Lake County, Florida in an effort to establish a previously planned alibi that he had been in Lake County, Florida all night. (R.981)

B.

(As stated by Irizarry)

Appellant's reliance on Mills v. State, ___ So.2d ___, 10 F.L.W. 498 (Case No. 59,140, Opinion filed August 30, 1985), sheds light on the claim:

> Mills also argues that the court erred in finding that the capital felony was especially heinous, atrocious, or cruel. He asserts there was no infliction of excessive physical or mental suffering. In making an analysis whether the homicide was especially heinous, atrocious and cruel, we must of necessity look to the act itself that brought about the death. It is part of the analysis mandated by section 921.141(1), Florida Statutes which provides for a separate proceeding on the issue of the penalty to be enforced and "evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." . . . . . Whether death is immediate or whether the victim lingers and suffers

> is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined.
>
> (Text of 10 F.L.W. at 500)

What was the mental anguish of Carmen Irizarry? Does the record reflect to what degree Carmen Irizarry agonized over her ultimate fate? See, Phillips v. State, ___ So.2d ___, 10 F.L.W. 501, 502 (Case No. 64,883, Opinion filed August 30, 1985). In addition to describing the wounds inflicted, Judge Graybill focused on these circumstances:

> Furthermore, the photographs admitted at trial clearly indicate the vicious and brutal nature of the attack on sid victim and the evidence strongly indicates she was able to roll off the bed after having suffered four (4) machete blows to her upper front body but prior to having suffered the final machete blow to her back reasonably suggesting she was awakened and remained conscious during Defendant's savage attack upon her.
>
> (R.982-983)

There has been no misapplication of law to fact. Hector Irizarry planned and committed a conscienceless, pitiless and unnecessarily tortuous crime that sets it apart from the norm of capital felonies. See, Profitt v. State, 315 So.2d 461 (Fla. 1975) and Jennings v. State, 453 So.2d 1109 (Fla. 1984).

As to the mental condition of Hector Irizarry, as painted by Dr. Mussenden, in evaluating the heinous, atrocious or cruel aggravating circumstance, it cannot be said it was ignored. For whatever reason, it had no impact. It is the province of the court to determine the weight to be given to the testimony in the sentencing phase. Smith v. State, 407 So.2d 894 (Fla. 1981) cert. denied 456 U.S. 984 and Card v. State, 453 So.2d 17, 23 (Fla. 1984).

C.

(As stated by Irizarry)

The general rule addressing expert testimony is codified in the Florida Evidence Code. In Nettles v. State, 409 So.2d 85, 88 (Fla. 1st DCA 1982), restated that expert tetimony is not binding on the trier of facts; and, the court has discretion to accept or reject the opinion of an expert even though it is uncontroverted. Prior to Nettles, Judge Baskin in writing for the Third District noted, on federal authority, that expert opinion on competence is not conclusive. See, Williams v. State, 396 So.2d 267, 269 (Fla. 3d DCA 1981).

Under the argument at bar, Hector Irizarry overlooks and fails to consider the competent cross-examination of the prosecutor. Thre was little question but that Dr. Mussenden shared Hector Irizarry was capable of planning a cold,

calculated murder (R.749). Also, Dr. Mussenden was of the opinion that this homicide did not take a lot of planning (R.751). The testimony reads:

> Q. Doctor, you are not aware at all of the amount of evidence in this case, are you?
>
> A. I guess not.
>
> Q. Certainly the defendant didn't tell you what he did, did he?
>
> A. He has denied the charge from the very beginning. (R.751)

The testimony left no doubt that Dr. Mussenden had relied on police reports to gain the factual basis of the crime; but, for whatever reason, Dr. Mussenden had not communicated with the prosecutor for the facts of the crime (R.751-753). The trial gave the opinion testimony the weight it was entitled to reflect. In his sentencing Order, the court found Dr. Musenden's testimony to be "of no probative value" because the testimony was "wholly inconsistent with the nature and circumstances of this particular premeditated murder." (R.983). It was Judge Graybill who saw and heard Dr. Mussenden testify; and, this record establishes (through the prosecutor's cross-examination), the faulty basis on which the opinion was rendered.

As Dr. Mussenden opined that Hector Irizarry was capable of planning a cold, calculated murder (R.749) and further that Hector Irizarry was able to appreciate the

criminality of his conduct (R.747), the court correctly determined (R.983) that the evidence did not establish the statutory mitigating circumstances as codified in §921.141(6)(b) & §921.141(6)(f), Florida Statutues (1983). That no finding was made that the psychological testimony fit nonstatutory mitigation is not error as there simply is a lack of basis for same with Dr. Mussenden's lack of knowledge on the criminal episode itself. This case is easily distinguished from Ross v. State, 474 So.2d 1170 (Fla. 1985). There Wilton and Gladys Ross had indulged in a classic domestic dispute (argument ending in death). At bar, Hector Irizarry moved from his ex-wife's domicile and had been absent for weeks when he returns to perform his machete murder. Borrowing from domestic relations, it is not unreasonable to presume that a reasonable "cooling off" period had elapsed prior to the homicide. Because this recognized "cooling off" period had elapsed, this testimony simply does not fit nonstatutory mitigation.

D.

(As stated by Irizarry)

Appellant argues error as the trial court failed to make specific non-statutory mitigating findings that Hector Irizarry was a good, dependable worker (R.487, 708-709, 758-759); got along well with co-workers and his employer's family (R.709, 713, 716, 758); and, that he had no history

of angry or violent outbursts (R.512, 714, 716). These are circumstances of Appellant's social history which Judge Graybill noted in not finding nonstatutory mitigating circumstances; to wit, Appellant's eighth grade education and menial job history (R.984). This record does not disclose any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court. See, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 14 (1982). At bar there is no error on this sub-point.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.
(As stated by Appellant)

There is no disagreement that an appellate court, in reviewing a death sentence, must weigh heavily the advisory opinion of the sentencing jury. McCaskill v. State, 344 So.2d 1276 (Fla. 1977). Whether this death sentence stands or falls depends entirely on the record proper before this Court.

In evaluating the propriety of death sentence after a jury recommendation of life, this Court must decide whether facts suggesting sentence of death are so clear and convincing that virtually no reasonable person could differ. See, Gilvin v. State, 418 So.2d 996 (Fla. 1982). In overruling an advisory verdict of jury for a life sentence and imposing the death penalty, the trial court correctly determined that the crime was especially henious, atrocious or cruel as an aggravating circumstance. See, McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied 454 U.S. 1041.

There are several recent decisions from this Court in support of judicial overrides of jury recommendations of

life imprisonment. See, Barclay v. State, 470 So.2d 691 (Fla. 1985); Francis v. State, 473 So.2d 672 (Fla. 1985); Brown v. State, 473 So.2d 1260 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Mills v. State, 10 F.L.W. 498, ___ So.2d ___ (Fla. Case No. 59,140, Opinion filed August 30, 1 85); Echols v. State, 10 F.L.W. 526, ___ So.2d __ (Fla. Case No. 64,246, Opinion filed September 19, 1985).

In Echols, Justice Shaw restates the standard for review announced in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This Court affirmed the three aggravating factors found by the trial court; and, further this Court found a fourth factor which may have been overlooked by the trial court. Justice Shaw points out: ". . .we note its presence in accordance with our responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." In Mills, this Court affirmed the trial court's finding of three (3) aggravating factors with no mitigating ones. The facts suggesting death were so clear and convincing that no reasonable person could differ.

In Huddleston, Justice Adkins when addressing the age of Harry Huddleston also noted the trial court's failure to take into consideration Huddleston's troubled personal life

[(1) history of drug abuse; (2) unemployed; (3) pregnant girlfriend who, contra to his intentions, wished to place the infant through adoption; (4) his parents were on the verge of divorce]. When these factors were considered, this Court found that it could not hold there had been compliance with the Tedder standard. In Brown, the majority sets forth all authority in support of the proposition that where there are aggravating circumstances making death the appropriate penalty, the jury's recommendation is not based on some valid mititgating factor (statutory or nonstatutory) discernible from the record, it is proper for the trial court to overrule the jury's recommendation and impose the death penalty. The majority review of the record brought forth a finding that there was nothing in mitigation to provide reasonable support for the jury's recommendation of a life sentence.

In Francis, this Court found no reasonable basis discernible from the record to support the jury's life recommendation. It was projected that the non-legal closing argument of defense counsel referencing several times to Easter may well have had an impact on the jury. Of course, argument of counsel has no evidentiary weight which this Court and the trial court inherently recognized. In Barclay, the facts of his case were found by the majority to not meet the Tedder test for overriding the jury's

recommendation. The lower court's speculation as to future criminal conduct on the part of Barclay was condemned. See, White v. State, 403 So.2d 331, 337 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983). After analysis, this Court found two valid aggravating factors, numerous invalid ones, and a jury recommendation of life imprisonment.

At bar, the lower court found as follows in reference to statutory aggravating factors: (1) that appellant was a previously convicted felon involving the use of violence; (2) that the capital felony was committed while appellant was engaged in the commission of a burglary of a dwelling; (3) that the capital felony was committed in a cold, calculated and premeditated manner; (4) that the capital felony was especially heinous, atrocious or cruel (R.980-981). The validity of these factors has already been argued; however, as to the "cold, calculated, and premeditated" component of this aggravating circumstance much support for Judge Graybill's finding is set out in Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985). The aggravating factors were properly found and supported by the evidence. There is nothing in mitigation, either statutory or non-statutory, to provide reasonable support for the jury's recommendation of a life sentence. The Tedder test was satisfied and the sentence imposed was appropriate under the law.

ISSUE VIII

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONATE TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
(As stated by Appellant)

The "State" would request that this Court compare all the facts and circumstances of this case with those presented in many other capital appeals that have come before this Court; and, after such comparison, the "State" would ask this Court to find that death is the appropriate sentence and is not out of proportion to the sentences approved by this Court in similar cases.

Appellant's reliance on Till Death Do Us Part: A Study of Spouse Murder is misplaced. By internal definition, this is not uxoricide. Why? Because Hector and Carmen Irizarry ended their marital relationship in a civilized manner: they divorced in 1980 (R. 496). That eight months prior to the homicide he began to reside again with his ex-wife can best be cast as a platonic relationship as testimony establishes that they lived in separate bedrooms subsequent to the dissolution (R.498). Dr. Mussenden merely states an unsupported conclusion on his part that Hector and Carmen Irizarry co-habited after divorce as "common law husband and wife" until appellant

was asked to vacate (R.728). Thus, in this Court's proportionality review, this case is not uxoricide.

Appellant urges a rather novel concept. A priori, he urges that Hector Irizarry does not deserve to be executed for the homicide of his ex-wife as it is not the "unusual one" requiring the supreme punishment. He goes on to suggest that appellant's crime is no different from the norm of domestic killings where a husband kills his wife. One wonders what the position of the National Organization of Women might be if they apeared as amicus in this case? The "State" does not accept this position of appellant.

The factor that distinguishes this case from Blair v. State, 406 So.2d 1103 (Fla. 1981); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Ross v. State, 474 So.2d 1170 (Fla. 1985), is that appellant never established in this record that he and his ex-wife had any type of relationship other than that of a landlady and boarder. Appellant on this record never established that he was romantically involved with his ex-wife. Clearly, there was passion in this homicide; but, whatever the motivational focus of that passion might be it was not established that it was the purported domestic reltionship that existed prior to the murder. The only witness with actual, direct

knowledge as to how the couple lived testified that they lived in separate bedrooms (R.498). Although it is improper to comment on an accused's failure to testify at trial it is not improper to comment on appeal. Hector Irizarry did not testify and to a great extent abandons this theory of mitigation. The only surviving witness who knew the intimate truth of the post-dissolution relationship is Hector Irizarry. Judge Pierce's opinion in Russell v. State, 269 So.2d 437, 439 (Fla. 2d DCA 1972) sheds light on this claim:

> . . . and finally, he did not even take the stand to deny it. Such voluntary decision could not, of course, be commented upon at trial, but it can be now -- and we do it.
> (Text of 269 So.2d at 439)

The death penalty must not be set aside.

ISSUE IX

THE COURT BELOW ERRED IN INCLUDING A 25-YEAR MINIMUM MANDATORY SENTENCE IN HIS WRITTEN SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER, IN USING A SENTENCING GUIDELINES SCORESHEET WHICH ERRONEOUSLY INCLUDED POINTS FOR VICTIM INJURY, AND IN IMPOSING A SENTENCE FOR ATTEMPTED FIRST DEGREE MURDER THAT WAS WELL OUTSIDE THE RANGE CALLED FOR BY THE GUIDELINES.

(As stated by Appellant)

The sentencing guidlines claim is one of legion reaching this Court and all the district courts of appeal in Florida. This Court has filed two recent opinions which have a bearing on the correctness of the lower court's sentencing order for the attempted murder of Orlando Hernandez. See, Hendrix v. State, 10 F.L.W. 425, 475 So.2d 1218 (Fla. 1985) [West reserved citation] and Albritton v. State, 10 F.L.W. 426, 476 So.2d 158 (Fla. 1985) [West reserved citation]. Both of these cases address the discretion a trial court can utilize in departure for clear and convincing reasons. There is nothing in the guidelines which specifically prevent prior convictions from being considered a reason for departure. See, Hendrix (Justice Adkins dissenting).

There is a discrepancy between the oral pronouncement of sentence (R.880) and the written judgment and sentence (R.797). There is no question but that the formal sentence

order (setting forth reasons) comports with the oral pronouncement (R.985). To the extent the sentence used for committment is not a clerical and/or scribner's error, the "State" would urge that the order at bar is merely a "nunc pro tunc" clarification of the oral pronouncement. In Briseno v. Perry, 417 So.2d 813, 814 (Fla. 5th DCA 1982), Judge Cowart instructs: ". . .a judgment or order is rendered and is valid and binding when it is orally given, pronounced or announced, although the only competent evidence of that judicial act is a memorial or record in the form of a latter written and signed order or judgment. Nunc pro tunc means 'now for then' and when applied to the entry of a legal order or judgment it normally refers, not to a new or de novo decision, but to the judicial act previously taken, concerning which the record is absent or defective. The latter record-making act constitutes but latter evidence of the earlier effectual act. See Luhrs v. State, 392 So.2d 137 (Fla. 5th DCA 1981), citing Becker v. King, 307 So.2d 855 (Fla. 4th DCA 1975), cert. dismissed, 317 So.2d 76 (Fla. 1975), which was recently again cited with approval by this Court in Blais v. State, 410 So.2d 1365 (Fla. 5th DCA 1982)." See also, Whack v. Seminole Memorial Hospital, Inc., 456 So.2d 561, 563-564 (Fla. 5th DCA 1984). The "State" would suggest that the sentence order relates back to the pronounced ore tenus one. If, under the authority of

Shaw v. State, 467 So.2d 1087 (Fla. 2d DCA 1985), reversible error is preserved, then remand for imposition of sentence in accordance with the oral pronouncement is the appropriate relief.

Appellant then urges, in essence, that if remanded the 30-year sentence would be excessive as the scoresheet erroneously included 21 points for victim injury. On November 20, 1985, the Second District filed an an banc opinion on rehearing in Parker v. State, 2d DCA Case No. 84-2268 [opinion attached as Appendix], Judge Ott notes that physical contact or victim injury may accompany or be incidental to force or violence, but neither is necessarily a part of the proof of force or violence. The en banc panel adhered to its prior holding that victim injury points should not be scored under the guidelines for the crime of robbery. In reliance on Hendrix, the panel noted when victim injury is not an element of a crime at conviction, it may be used as a reason to depart from the guidelines. "Hence, victim injury may be used as a reason to depart from the guidelines in a robbery conviction." The same ratio decendi applies to the case at bar.

Appellant also argues that the three reasons the trial court relied on for departing were improper (R.984, A5). The first two reasons are proper (severe injury) under Parker is appropriate. Excessive methods of committing a

crime (such as gratituous infliction of an injury) would be permissible reasons for departing from the guidelines. See, Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984). Fla.R.Crim.P. 3.701(d)(11), provides that, "Reasons for deviating from the guidelines shall not include factors relating to either instant offenses or prior arrests for which convictions have not been obtained." Thus, Rule 3.701(d)(11) implies that crimes for which convictions have been obtained, but can't be scored, can be considered as a factor for going outside the presumptive sentence provided in the sentencing guidelines. In Weems v. State, 451 So.2d 1027, 1028 (Fla. 2d DCA 1984), Judge Grimes pionts out on comparable facts that even though Isaac Weems' juvenile record would not be considered in calculating the applicable sentencing range did not mean that it could not be considered by the court as a reason for departing from the guidelines. The Weems opinion notes that there is nothing in Rule 3.701 to suggest that matters excluded for purposes of guideline computation cannot be considered as reasons for departure from the guidelines.

At bar, the stated reasons provided an adequate basis for sentencing appellant above the recommended range.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and citation of authority, Apppellee would pray that this Honorable Court render an Opinion affirming the judgment of guilt and sentence of death by electricution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, P. O. Box 1640, Bartow, Florida 33830-1640, this 27th day of November, 1985.

OF COUNSEL FOR APPELLEE