IN THE FLORIDA SUPREME COURT

HECTOR MANUEL IRIZARRY, :

Appellant, :

vs. : Case No. 66,947

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
ASSISTANT PUBLIC DEFENDER

P.O. Box 1640
Bartow, Florida 33830
(813)533-1184 or 533-0931

COUNSEL FOR APPELLANT

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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 "Hecter Irrzarry," but this brief will employ the correct spelling, "Hector Irizarry."

STATEMENT OF THE CASE

On August 15, 1984 a Hillsborough County grand jury returned an indictment charging Hector Manuel Irizarry with the first degree murder of Carman L. Irizarry[2/] and the attempted first degree murder of Orlando Hernandez. (R889-890) This cause proceeded to a jury trial beginning on January 14, 1985, which ended in a mistrial because the jury could not reach a verdict. (R79,134,885,937) The retrial began on March 25, 1985. (R1) On March 27, 1985 the jury found Irizarry guilty as charged in both counts of the indictment. (R690-691,952,953) After hearing additional defense evidence on the following day, the jury recommended a life sentence by a vote of nine to three. (R837,969)

Circuit Judge M. William Graybill, the presiding judge, adjudged Irizarry guilty on March 28, 1985. (R841) On April 4, 1985 Judge Graybill sentenced Irizarry to death for the murder and, departing from the recommended guidelines sentence of seven to 12 years, to 30 years for the attempted murder. (R879-880,972-973,977,979,980-985,A1-6) The court found four aggravating circumstances: (1) that Irizarry had previously been convicted of a felony involving the use of violence to the person, to-wit: the contemporaneous attempted murder of Orlando Hernandez; (2) that the capital felony was

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[2/] In the trial transcripts, the homicide victim's name is spelled "Carmen Irrzarry," but this brief will employ the spelling found in the indictment, "Carman Irizarry."

committed while Irizarry was engaged in a burglary of a dwelling; (3) that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and (4) the capital felony was especially heinous, atrocious or cruel. (R874-877,980-983,A1-4) As mitigating circumstances, the court found: (1) that Irizarry had no significant history of prior criminal activity; and (2) Irizarry had lived 40 years with no significant prior criminal history. (R877-878,983,A4)

Irizarry timely filed his notice of appeal to this Court. (R993)

STATEMENT OF THE FACTS

Hector and Carman Irizarry, who were from Puerto Rico, were married in New York in 1971. (R494,495,501) Carman had a daughter, Margaret Lore, from a previous marriage. (R494)

In 1978 the Irizarrys moved from Brooklyn to Florida. (R496) They were divorced in 1980, but continued to live together in the same house until July, 1983, when Hector moved out. (R496) That month, Carman bought a house in Plant City. (R497) Hector moved into that house with Carman in October, 1983, but the two stayed in separate bedrooms. (R498-499)

Hector left Carman's house in June, 1984, at her request. (R499) He told Margaret Lore he did not really want to leave because he loved Carman. (R499) In fact, Hector asked Carman to remarry him, but she responded, "No way, Jose." (R345)

Hector returned his house key to Carman in July, 1984. (R341-342,500)

Orlando Hernandez moved in with Carman in July. (R256,510) The two met at the Lykes Brothers plant where they worked. (R254-255,510)

Hector Irizarry told his stepdaughter, Margaret Lore, that he did not like the idea of Hernandez moving in. (R500-501) He could not understand why Carman would be involved with a Cuban. (R500-501) However, Hector wished Carman happiness with her new boyfriend. (R343,513)

Irizarry worked as a handy man for Jim Hardee Equipment Company. (R389-390) He was a good employee who never showed any tendency for violence on the job, and who did not

have any problems with other workers or the law. (R487-488)

On occasion Irizarry used a machete to cut down brush and weeds in a field in back of the company buildings. (R391-392,474) At least four of the other employees also used machetes, but Irizarry was the person his supervisor most often saw using them. (R394,396) The two machetes owned by the company eventually turned up missing. (R390,393)

On July 25, 1984 Jim Hardee told Irizarry to drive to a lake house owned by Hardee's mother, which was about an hour away from Plant City, and clean the house so it could be painted the following day. (R332,476-477) Irizarry was to spend the night at the house, and Hardee was to join him the next morning. (R477)

At about 7:00 on the morning of July 25 Irizarry went to Hardee's house. (R478) The two men picked up a Ranchero owned by Hardee's mother, purchased paint, and rented a ladder and a steam cleaner. (R478) They also had a gasoline can. (R478) They filled the Ranchero with gasoline at a Union 76 station in Plant City, and Irizarry left for the lake house at about 9:30. (R479-480)

Hardee received a call from Irizarry at around 10:30. (R480-481) Irizarry told him the water pump was not working at the lake house. (R480) Hardee told him to check the fuse box. (R480) Irizarry called back and said a couple of fuses were blown. (R480) Hardee directed him to go into Claremont, the nearest town, and buy replacement fuses. (R481) Irizarry did not call back after that. (R481)

On the evening of July 25 Irizarry called Margaret Lore's residence. She was not home, but Irizarry left a message with her son for her to call him at the lake house before 10:00. (R338,504) She did not return his call that evening. (R504)

Orlando Hernandez went to bed around 10:00 on July 25, 1984. (R256) Carman was still up, cooking. (R256) Hernandez was awakened by a great blow in his face. (R257) He jumped out of bed and turned on the light, whereupon he was struck in the back. (R260) He fell to the floor and touched the shoe of his assailant. (R258) Hernandez did not see the man's face, but saw that he was a white man with no hair on top of his head and very little in the back. (R259-260)[3/] The man was running out the bedroom door, carrying a machete in his right hand. (R258-260)

Hernandez saw Carman lying on the floor beside the bed. (R260) He touched her, but she did not move. (R276) Hernandez then went to his neighbor's house, who summoned aid. (R260,279-280,282) Hernandez was taken to the hospital, where he underwent surgery. (R271)

Otis Stephens entered Carman Irizarry's house with a deputy sheriff and a paramedic. (R283) They found her lying face down beside her bed. (R283-284) There was a thick trail of blood down the side of the bed. (R284)

[3/] Hernandez had never met or seen Hector Irizarry. (R255-256)

The associate medical examiner for Hillsborough County, Lee Miller, found five slash wounds, representing five separate blows of some type of sharp instrument, on Carman Irizarry's body. (R305-310) The five wounds were consistent with having been inflicted by a machete, if it was a very sharp one. (R311) Four of the wounds probably would not have been fatal. (R307-309) The fatal injury was a four-inch wound across the front of the neck which extended through to the spinal column and produced a near decapitation. (R309-310) Miller could not tell with certainty in which sequence the blows were inflicted, but a nine-inch slash across the upper back was probably inflicted last because it produced very little bleeding. (R306,311) And if no one heard Carman cry out, this provided an inference that the blow to her neck was struck first. (R314) She could have remained conscious for from a few seconds up to a minute or so, and death would have occurred in a matter of minutes. (R312,315)

Margaret Lore learned of her mother's death early on the morning of July 26, 1984 when she was notified by law enforcement authorities. (R502-503) At their request, she telephoned Hector Irizarry at 5:30 that morning, using the number he had left the previous evening. (R503-504) Hector answered after one ring, and Margaret hung up because she was surprised, but she then called him back. (R504-505) Margaret asked Hector to come to her house because her mother had been involved in an accident. (R505) However, Hector went to Carman's house instead, which was closer to the highway than was Margaret's house on the route Hector would have taken. (R505-

506,514-515) When Margaret saw Hector at Carman's house later that morning, he was calm. (R507-508) Three days later at the funeral parlor, however, he was crying and screaming. (R508)

Irizarry returned the Ranchero to Jim Hardee that same morning, July 26. (R482) Hardee noticed that the gas gauge indicated a little less than one-quarter of a tank left, which showed use of more gas than it should have taken to go to the lake house and return. (R483)

Sergeant Andrew DeLuna of the Hillsborough County Sheriff's Office questioned Hector Irizarry on July 26 and August 3, 1984. (R318-350) Two interviews were conducted on July 26, which continued into the afternoon hours after Irizarry agreed to take a polygraph. (R328,349)

DeLuna met Irizarry outside Carman's residence on the morning of July 26 and drove him to the Sheriff's Operations Center after Irizarry returned the Ranchero to Jim Hardee. (R318-320) As they were driving DeLuna noticed specks that appeared to be blood on Irizarry's head and forehead. (R323-324) After DeLuna mentioned this to Irizarry, he began to scratch and sort of scrub the areas where the substance was located. (R326) Irizarry told DeLuna the substance was fish blood. (R327) He had gone fishing the previous day at the lake house, and probably got the blood on him when he removed the fishhook from a catfish and threw it back into the water. (R327) Irizarry agreed to let law enforcement personnel remove the substance. (R324) The substance removed from his forehead was tested and found to be human blood, blood type unknown. (R379-

382,386) A sample removed from around Irizarry's nose was blood, but it could not be determined from what species it came. (R383)

In his interviews with the sheriff's deputies, Irizarry denied killing his wife. (R328) Although Sergeant DeLuna did not tell him what type of wounds Carman had received, Irizarry said 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. (R328,350,353) Irizarry described his trip to the lake house and maintained that he spent the night there. (R329-341) When questioned concerning the discrepancy in the gas gauge, Irizarry said he had siphoned two gallons out of the Ranchero. (R344) (When Jim Hardee went to the lake house some time after Carman's death, he did find a hose which smelled of gasoline. (R491-492))

Detective D.W. Novak of the Hillsborough County Sheriff's Office performed two experiments with the Ranchero. On August 9, 1984 he filled it with gas in Plant City, drove to the lake house, then to Claremont, then back to the lake house, then to Carman Irizarry's house, then back to the lake house, then back to Carman's again, and finally to Jim Hardee's house. (R424-435) At the end of the trip the gas gauge showed slightly below one-quarter full. (R435) On October 4, 1984 Novak filled the tank with gas and drove the exact route Irizarry said he had taken (which was the same route Novak had driven on August 9, but without the round trip from the lake house to Carman's residence and back to the lake house.)(R439-444) At the end

of this trip the gas gauge showed almost three-quarters of a tank remaining. (R443-444)

Detective Novak obtained two machetes during the course of investigating this case. One came from the closet in Carman Irizarry's bedroom. (R401) This machete was similar to the machetes that were purchased for Jim Hardee's company. (R394) A couple of weeks before Carman's death, Hector Irizarry told Margaret Lore that he had sharpened a machete and left it in Carman's bedroom closet for her protection. (R501)

Novak obtained the second machete from Margaret Lore's residence. (R409) Hector Irizarry had left the machete about three weeks before Carman's death when he came to Margaret's house to cut down overgrown weeds in a garden. (R502) This machete was not similar to the ones used at Jim Hardee Equipment Company. (R394)

Three divers searched the lake beside the lake house, but the machete used to kill Carman Irizarry was never found. (R459)

The interior of the Ranchero was tested for the presence of blood using a sensitive chemical called luminal, but none was found. (R542-545) The Ranchero did not appear to have been cleaned up before it was returned to Jim Hardee. (R490)

With Irizarry's permission law enforcement authorities searched his trailer and car, but found nothing. (R458-459)

At the penalty phase of the trial Hector Irizarry called witnesses to establish that he was a good and dependable

worker who had no problems with the law or getting along with other people, and who did not exhibit a quick temper or violent tendencies. (R708-709,714,716,758-759) Jim Hardee's son and daughter testified to the friendship Irizarry displayed toward the Hardee family. (R712-713,757-759)

Additionally, Dr. Gerald Mussenden, a psychologist who interviewed and examined Hector Irizarry, testified that the offenses involved herein were crimes of passion. (R755) Hector Irizarry became obsessed with the fact his ex-wife jilted him for a Cuban, thus causing him to be under the influence of extreme mental or emotional disturbance at the time of the crimes, and substantially impairing his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (R733-735)

SUMMARY OF ARGUMENT

1. The trial court should have granted a mistrial when a state witness testified that Hector Irizarry had agreed to take a polygraph, and the context in which the testimony was given raised the inference that Irizarry had failed the lie detector test. The court's "curative" instruction to the jury could not undo the damage which had been done. Although the polygraph reference occurred during cross examination, it was not elicited by defense counsel; the witness' answer was not responsive to the question asked.

2. The trial court erred in admitting into evidence two machetes, neither of which was the murder weapon, which were irrelevant and served only to prejudice the jury against Hector Irizarry.

3. Hector Irizarry was entitled to a mistrial due to the prosecutor's prejudicial remarks during final argument which constituted expressions of his personal opinion concerning this case and implied that the State had additional evidence that was not before the jury. Irizarry's motions for mistrial were timely, despite the court's ruling that one of them came too late. A "curative" instruction the court gave after one of the prosecutor's comments could not "unring the bell" so as to eliminate the harm that had been done.

4. Hector Irizarry was denied a fair trial because the bailiff responded to a jury question outside the presence of Irizarry and his counsel. This improper communication constitutes per se reversible error.

5. Prospective juror Ramona Whitman was excused from serving on Hector Irizarry's jury because of her opposition to capital punishment. As a result, his jury was not representative of a cross-section of the community and was unconstitutionally prone to convict.

6. The court below should not have found the aggravating circumstances of "cold, calculated and premeditated" and "especially heinous, atrocious or cruel." The homicide of Carman Irizarry was far from "cold;" it was a crime of passion. If she suffered at all, either mentally or physically, the suffering was of extremely short duration. Hector Irizarry did not torture his ex-wife or prolong her misery in any way. Also, his mental condition at the time of the homicide must be considered in assessing whether the killing was especially heinous, atrocious or cruel.

With regard to mitigating circumstances, the sentencing court failed to give due consideration to Hector Irizarry's mental state at the time of the homicide as either statutory or non-statutory mitigation, and failed even to consider certain non-statutory mitigating circumstances for which there was evidence, such as Irizarry's record as a good and dependable worker, his ability to get along with other people, and his lack of any history of violent or angry behavior.

7. The trial court should not have overridden the life recommendation of the jury, which rationally could have been based upon the two mitigating circumstances found by the trial court, or upon other mitigating evidence present in the record, including Irizarry's mental and emotional state at the

time of the homicide, his value as an employee, his ability to deal with other people, and his lack of prior violent outbursts. This Court has vacated death sentences in a number of previous cases of life overrides involving crimes at least as heinous as the one involved herein.

8. The homicide for which Hector Irizarry was convicted is a very common type, which may be called a "sex-role threat homicide." A comparison of Irizarry's case with others shows that the death penalty is not proportionate to the offense, as there is nothing that would set his case apart from the norm of domestic homicides.

9. The provision for a 25 year minimum mandatory sentence found in Hector Irizarry's written sentence for attempted murder in the first degree is not authorized by law and did not conform with the court's oral imposition of sentence. The 30 year sentence for attempted murder, a departure from the guidelines range of nine to twelve years, is based in part on the improper inclusion in the scoresheet of points for victim injury. Also, the three reasons the court gave for departing from the guidelines are wrong, as they either aggravate for elements already factored into the scoresheet or for factors relating to the instant offense for which convictions had not been obtained.

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.

Sergeant Andrew DeLuna of the Hillsborough County Sheriff's Office conducted two interviews with Hector Irizarry on July 26, 1984 (the day Carman Irizarry's body was found), and another interview on August 3, 1984. (R316,328,346)

On cross-examination during Irizarry's trial, defense counsel was questioning Sergeant DeLuna regarding the fact that there were only two police reports to reflect the three interviews with Irizarry. He asked the following question and received the following answer. (R349):

> Q. I guess part of my problem, Detective, I am not finding any memorializing of a second interview on July the 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.

Thereafter, counsel for Irizarry moved for a mistrial because of the polygraph reference. (R357-358) The court denied the motion (R371), but did instruct the jury as follows (R372):

> Members of the jury, you are hereby instructed to disregard Sergeant DeLuna's reference to the defendant having agreed to take a polygraph examination.

Although defense counsel requested that the above instruction be given, he took the position that nothing short of a mistrial could cure the harm done by Sergeant DeLuna's testimony. (R371-372)

In the absence of consent by both the State and the defendant, polygraph evidence is inadmissible at trial in Florida courts. Delap v. State, 440 So.2d 1242 (Fla.1983); Walsh v. State, 418 So.2d 1000 (Fla.1982); Anderson v. State, 241 So.2d 390 (Fla.1970), modified, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 758 (1972); Carter v. State, 10 FLW 1993 (Fla.3d DCA Aug. 20, 1985).

In Kaminski v. State, 63 So.2d 339 (Fla.1953), cert. den., 348 U.S. 832, this Court recognized that a reference to taking a polygraph may be prejudicial in and of itself, even if there is no testimony concerning the results of the test. Sergeant DeLuna's testimony suggested that Hector Irizarry had failed the polygraph, because DeLuna stated that the interview continued after Irizarry agreed to take a polygraph. (R349) Why else would this second interview have been needed unless the polygraph yielded results unfavorable to Irizarry?

This case is to be distinguished from Davis v. State, 461 So.2d 67 (Fla.1984), where the Court noted that the mere mention of a polygraph examination does not necessarily compel the granting of a new trial, because in Davis the testimony did not suggest that the defendant had already taken and failed a lie detector test. More to the point is Frazier v. State, 425 So.2d 192,193 (Fla.3d DCA 1983), in which the court stated:

> To place before the jury, as here, that the defendant in a criminal case failed a polygraph examination taken in connection with the case constitutes, in our view, classic grounds for a mistrial because the prejudicial impact of this damning evidence could not be cured by a cautionary instruction. [Citation omitted.]

Although the court below gave a purportedly curative instruction to the jury, it was not enough to "unring the bell" and allay the mischief occasioned by the improper testimony. In Dean v. State, 325 So.2d 14 (Fla.1st DCA 1975), cert.den., 333 So.2d 465 (Fla.1976) the court found that even the "thorough" cautionary instruction given by the trial court could not offset the prejudice caused by a witness' testimony concerning the lie detector tests he had taken. And in Walsh, supra, this Court noted that the defendant's comment during his first trial that he had taken and passed a lie detector test is the type of testimony which is difficult for jurors to disregard and which is likely to influence their decision, even where they are given a precautionary instruction.

It is of no significance that the polygraph reference occurred during cross-examination by defense counsel rather than on direct examination by the prosecutor because, as in Frazier,

> [c]ounsel's question in no way related to a polygraph examination or the results thereof; the witness' answer was non-responsive and entirely volunteered.

425 So.2d at 193.

The inference that Hector Irizarry had failed a lie detector test deprived him of a fair trial, and he is entitled to a new one as a result.

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.

During the testimony of Detective D.W. Novak of the Hillsborough County Sheriff's Office, the prosecution introduced into evidence two machetes, over defense objections that they were irrelevant. (R409-410) Novak obtained one of the machetes from the closet of the main bedroom in Carman Irizarry's home (R401), and obtained the other from the home of Margaret Lore, Carman Irizarry's daughter. (R409)

There was testimony from Margaret Lore that Hector Irizarry told her a couple of weeks before the homicide that he had sharpened a machete and left it in Carman's bedroom closet for her protection, but there was no evidence to show positively that the machete Novak recovered from Carman's house was the one to which Irizarry had referred. (R501) However, this machete was similar to ones that were used at Jim Hardee Equipment Company, where Irizarry was employed. (R394)

The machete given to Novak by Margaret Lore at her residence had been left there by Irizarry when he came there to cut down overgrown weeds in a garden about three weeks before Carman's death. (R502) This machete was not similar to the ones used where Irizarry worked. (R394)

Neither of the machetes was the murder weapon, which was carried out of the house by the perpetrator and never recovered. (R259-260,459,640)

In Harris v. State, 129 Fla. 733, 177 So. 187 (Fla. 1937), this Court stated the general rule that

> ...weapons not actually used in the commission of the crime may be admitted into evidence when they tend to prove the guilt or innocence of the accused and have some probative value.

177 So. at 190. The machetes admitted into evidence at Irizarry's trial did not meet this test; they had no probative value and did not tend to prove Irizarry's guilt or innocence.

Three cases from other jurisdictions, which were discussed in Harris, are particularly instructive. People v. McGeoghegan, 325 Ill. 337, 156 N.E. 378 (Ill.1927) was a murder case. The appellate court held that two .45 caliber pistols found on the defendant when he was arrested furnished no proof of his guilt where the deceased was killed with a .38 caliber bullet. In Hardaman v. State, 16 Ala.App. 408, 78 So. 324 (Ala.Ct.App. 1918), a manslaughter case in which the victim was shot, the court held that the trial court committed reversible error in allowing the state to prove that the defendant carried a rifle after the offense was committed, as this tended to prejudice the minds of the jury against him. People v. Riggins, 159 Cal. 113, 112 P. 862 (Cal.1910), involved an assault with intent to murder. The court stated:

> The testimony that defendant was carrying a pistol in his overcoat pocket while attending a performance at a theater in the evening of the day of the alleged assault, and several hours afterward, was irrelevant and should have been excluded. The prosecution had proved that this was not the pistol with which the alleged assault was committed, and his possession of another pistol afterward

> was not shown to have any connection with or relation to the offense charged, and it may have prejudiced defendant in the minds of the jurors.

112 P. at 865.

The machetes in question had even less probative value than did the weapons in the cases discussed above. The one found in Carman's house was never positively linked to Hector Irizarry. The one left in Margaret Lore's house had merely been used to cut weeds several weeks before the homicide. Neither machete was even shown to be similar to the murder weapon.

The prosecutor exacerbated the prejudicial impact of the irrelevant machetes when he (apparently) brandished at least one of them during his final argument to the jury (R576-577), prompting defense counsel to refer in his final argument to "Benito's [the prosecutor's] machete (R610)," and to call the assistant state attorney a "samurai prosecutor." (R645)

Here, as in Riggins, the machetes were "not shown to have any connection with or relation to the offense charged, and...may have prejudiced [Irizarry] in the minds of the jurors." Therefore, he should be granted a new trial.

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.

Twice during the prosecutor's final arguments to the jury, defense counsel moved for a mistrial. The first such motion came as soon as the assistant state attorney finished the initial part of his bifurcated final argument. It was predicated upon three statements made by the prosecutor which constituted expressions of his personal opinion and implied that he had knowledge of other evidence which was not presented to the jury. (R603) The three offending remarks were as follows (emphasis supplied):

> He [Irizarry] fills it up at the gas station and he drives to the lake house in Lake County and he goes into Claremont and buys the fuses and then he goes back to the lake house, then he does what we know he did. At 1:30 in the morning, 1:30 in the morning he comes into Plant City and drives up behind the Irrzarry house and he goes in there and he kills that woman and he tries to kill her lover and then he drives back to the lake house and then anxiously awaiting word, pacing and gets a phone call and drives back, not to Margaret's where he's supposed to go, but drives back to Carmen's and then he drives to Mr. Hardee's to drop it off. (R599)
>
> That is the exact route that Detective Novak took and after he took that exact route which we know the defendant took, we photographed the gas gauge and where is the needle? It's on Number 7, and where did Mr. Hardee say he saw the needle when the defendant dropped the car off? He said Number 7. (R599)
>
> * * *
>
> You look, you look at the difference in Number 7 on State's Exhibit Number 23 which is the route we know he took and look at the

> difference in the gas in State's Exhibit Number 37 where the needle was on the route he took, and don't get confused about, well, was the gas tank filled up all the way, how do you know it was filled up? (R600)

The court ruled that the defense motion for a mistrial came too late. (R604) The court further said he probably would have sustained a timely objection, but that the comments did not warrant a mistrial. (R604) Defense counsel explained, to no avail, that he had not made his motion sooner because he felt it was bad form to interrupt opposing counsel's closing argument, and the objectionable remarks came very near the end. (R603)

As to the timeliness of Hector Irizarry's motion for mistrial, Meade v. State, 431 So.2d 1031 (Fla.4th DCA 1983) (along with the cases cited therein) is particularly instructive. There defense counsel did not object to the prosecutor's closing argument until a recess following the argument. The appellate court found the delay in bringing the matter to the trial court's attention not to be fatal, and reversed and remanded for a new trial because of the prosecutor's prejudicial remarks.

Turning to the merits, it is highly improper for an attorney to express his personal beliefs concerning the case he is trying. Cummings v. State, 412 So.2d 436 (Fla.4th DCA 1982); Buckhann v. State, 356 So.2d 1327 (Fla.4th DCA 1978); Jones v. State, 449 So.2d 313 (Fla.5th DCA 1984); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966); Dunn v. United States, 307 F.2d 883 (5th Cir. 1962); Fla.Bar Code Prof.Resp. D.R. 7-106(C)(4). It is similarly highly improper for him to imply that he has other evidence which he has not presented to the

jury. Williamson v. State, 459 So.2d 1125 (Fla.3d DCA 1984); Thompson v. State, 318 So.2d 549 (Fla.4th DCA 1975); Cummings, supra; see also United States v. Martinez, 466 F.2d 679 (5th Cir. 1972), cert.denied, 414 U.S. 1065, __S.Ct.__, __L.Ed.2d __ (1974); United States v. Morris, 568 F.2d 396 (5th Cir. 1978); Richardson v. State, 335 So.2d 835 (Fla.4th DCA 1976). Through his multiple use of the words "we know," the assistant state attorney indulged in both species of proscribed comment; he expressed personal belief in the correctness of the State's evidence, and implied that the State possessed additional evidence which confirmed the evidence actually presented to the jury.

Irizarry made his other motion for mistrial soon after the prosecutor began the second segment of his final argument, immediately after the prosecutor said, "This man [defense counsel] called me a samurai prosecutor; his client is a murderer." (R645-646) This remark was, again, an improper expression of counsel's personal belief, and could only have served to inflame the jury. (It was similar to the characterization by the prosecutor in Getchell v. United States, 282 F.2d 681 (5th Cir. 1960), a fraud case, of the defendant as a "master con man," and was, especially, similar to the characterization by the prosecutor in Meade of the defendant as a "real live murderer.")

The trial court did give the following "curative" instruction to the jury (R650):

> The jury is hereby instructed to disregard the statement made by the prosecutor to the effect that Mr. Donerly's client is a murderer.

However, the damage had already been done; the words could not be recalled by the simple expedient of a "curative" instruction. See Ruiz v. State, 395 So.2d 566 (Fla.3d DCA 1981) and Harper v. State, 411 So.2d 235 (Fla.3d DCA 1982). As the court stated in Meade:

> In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it".

307 F.2d at 886.

In a case such as this, resting as it does entirely on circumstantial evidence,[4/] particularly careful attention must be given to improper prosecutorial remarks. Ryan v. State, 457 So.2d 1084 (Fla.4th DCA 1984). It is impossible to determine from the record before this Court that the remarks of the assistant state attorney did not prejudice Hector Irizarry, and so his convictions should be reversed. Pait v. State, 112 So.2d 380 (Fla.1959). See also Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert.denied, __U.S.__, 104 S.Ct. 1430, 79 L.Ed. 2d 754 (1984).

[4/] The prosecutor conceded during final argument below that his case rested entirely on circumstantial evidence. (R569)

ISSUE IV.

HECTOR IRIZARRY'S CONVICTIONS MUST BE REVERSED BECAUSE OF IMPROPER COMMUNICATION BETWEEN THE BAILIFF AND THE JURY DURING DELIBERATIONS.

The record contains a discussion among the court and counsel concerning a request from the jury during deliberations that they be allowed to review a videotape of the crime scene that was admitted into evidence. (R685-690) What is not clear, however, is what transpired before the court went on the record. The court stated that the jury had buzzed and the bailiff had inquired. (R685) The court said the "initial inquiry" was the jury request to see the videotape. (R685) Defense counsel expressed concern over exactly what the bailiff had told the jury in response to another question they had. (R686) Counsel noted that he was present in the courtroom but could not overhear exactly what was said. (R688) Hector Irizarry was not present. (R688)

When the bailiff was questioned as to exactly what took place, he gave the following version (R687-688):

> 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.

Defense counsel then said he thought the bailiff had told him the question from the jury related to the mechanism of taking a vote. (R688) The bailiff denied this, stating that he interceded when he heard the words "verbal" and "verdict." (R688)

Defense counsel did not make a formal motion at that time, but did call to the court's attention that such communication between the bailiff and jury out of the presence of the court and the defendant and defense counsel was error (R688), and he cited the "unsupervised, unauthorized communication between the bailiff and the Jury" in a motion for new trial. (R970-971)

Even if the bailiff's rendition of what took place was accurate, it was error for him to instruct the jury without defense counsel and Hector Irizarry being present. Section 918.07 of the Florida Statutes prohibits the officer in charge of the jurors (the bailiff) from communicating with the jurors on any subject connected with the trial. And Florida Rule of Criminal Procedure 3.140 requires that any additional instructions to the jury be given only in the courtroom after notice to the prosecuting attorney and to counsel for the defendant.

The statute and criminal rule referred to above are to be strictly construed. In Holzapfel v. State, 120 So.2d 195 (Fla.3d DCA 1960) the court had before it a situation similar to the one presently before this Court, where it was uncertain exactly what happened when the bailiff communicated with the jury. In reversing and remanding for a new trial, the court noted:

> In the criminal law the procedural aspects affecting the substantial rights of the defendant must be strictly observed for it is essential that an accused receive a fair and impartial trial as guaranteed by §11 of the Declaration of Rights of the Constitution of Florida, F.S.A. To this end the statutes of the State of Florida prescribe

> certain safeguards pertaining to the conduct of a trial which must be followed exactly.

120 So.2d at 196.

In Randolph v. State, 336 So.2d 673 (Fla.2d DCA 1976) the court condemned the trial court's answering of a jury question through his bailiff. The court observed that the court's response should have been given in open court in the presence of the defendant, his counsel, and the prosecutor. (The situation in Irizarry's case was even more egregious, as there was no input from the court before the bailiff talked to the jurors.) Similarly, in Caldwell v. State, 340 So.2d 490 (Fla.2d DCA 1976) the court stated:

> Inquiries from the jury must be answered in open court after notice to both the defendant's counsel and the prosecution. Fla.R.Crim.P. 3.410. No one is permitted to communicate with the jurors without permission from the court given in open court in the presence of the defendant or his counsel. Section 918.07, Florida Statutes.

340 So.2d at 491.

Whether or not what the bailiff told the jury was correct is not controlling; it is the sole province of the court to instruct the jurors, and this must be done in the presence of the defendant. Thomas v. State, 348 So.2d 634 (Fla.3d DCA 1977) and Holzapfel.

Thus, upon receiving any question from the jury the bailiff should have conducted them into the courtroom, as required by Florida Rule of Criminal Procedure 3.140, for the court to answer the question in the presence of Hector Irizarry and his attorney.

The larger problem presented here is that we cannot know exactly what took place between the bailiff and the jurors (which was also true in Holzapfel). The bailiff's story was somewhat vague, and defense counsel questioned its accuracy.

In Slinsky v. State, 232 So.2d 451 (Fla.4th DCA 1970) the trial judge summarily denied a jury request that certain testimony be read back to them. This was accomplished without opening court and without advising counsel for the State or for the defense. (Apparently, the court communicated his answer to the jury through his bailiff.) The Slinsky court, in reversing and remanding for a new trial, pointed out some of the reasons why any response to an inquiry from the jury should be made in open court, with all parties present:

> From our reading of the statutes and the authorities, we feel that the practice here employed, innocently intended as undoubtedly it was, violated the defendant's rights in a harmful way and entitles him to a new trial. Using hindsight, we offer that the trial court, faced with such request, should have advised counsel of it and re-convened court with defendant in attendance. Depending upon the nature and scope of the jury's question, the court could then recall or offer to recall the jury into the courtroom for inquiry and the rendition of a response to their request. This would afford counsel an opportunity to perform their respective functions. They could advise the court, object, request the giving of additional instructions or the reading of additional testimony, and otherwise fully participate in this facet of the proceeding. Finally, this method would do much to eliminate any procedural grievance of a defendant. However, if the transaction should be assigned as error then this court would have a full record whereby it could assay the substantive merits of the trial judge's rulings.

232 So.2d at 453-454. Without a "full record" of what occurred

between the court's officer and the jury, this Court is left to speculate as to whether or not Irizarry was thereby prejudiced.

Finally, in Ivory v. State, 351 So.2d 26 (Fla.1977) this Court observed:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel, is so fraught with potential prejudice that it cannot be considered harmless.

351 So.2d at 28. Recently, in Curtis v. State, 10 FLW 533 (Fla. Sept 26, 1985) this Court reaffirmed the viability of Ivory, and characterized the jury deliberation process as "one of the most sensitive stages of the trial." 10 FLW at 533.

The jury-room communication between the bailiff and the jury in Irizarry's case certainly was rife with the potential prejudice spoken of in Ivory. Hector Irizarry therefore should be granted a new trial.

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.

During jury selection below, the prosecutor challenged prospective juror Ramona Whitman for cause because of her opposition to the death penalty. (R164-165) The challenge was granted over defense objections. (R165)

The method of selecting a jury used by the lower court, in which prospective jurors with scruples against the death penalty were excused for cause, deprived Hector Irizarry of his right to a jury representative of a cross-section of the community and also resulted in a jury unconstitutionally prone to convict him.

In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) the Supreme Court of the United States failed to resolve the question of whether a jury which excludes persons opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. The Court rejected Witherspoon's arguments that such a jury was unconstitutional because the data adduced was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." 391 U.S. at 517 (footnote omitted). The Court held open the possibility

that, if presented with persuasive data, it would find a jury which excluded death-scrupled jurors to be violative of a defendant's rights.

Since Witherspoon was decided, studies have been conducted which show beyond peradventure that death-qualified juries are not as representative of the community as they should be and cannot be considered fair and impartial with respect to the issue of guilt or innocence. This was the conclusion reached by the United States District Court for the Eastern District of Arkansas in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), and then affirmed by the United States Court of Appeals for the Eighth Circuit in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).[5/]

Grigsby arose from petitions for writs of habeas corpus filed in federal district court by three state prisoners convicted of capital murder. Petitioner Grigsby was sentenced to life in prison without parole for his crime. In Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980), the federal district court agreed with Grigsby's contention that the trial court abused its discretion in denying him a continuance so that he could present evidence that exclusion of prospective jurors unalterably opposed to the death penalty might affect the jury's determination on the question of his guilt. The court ordered the case sent back to state circuit court for an evidentiary hearing wherein Grigsby could supply proof of his legal premise. The court noted that the data concerning the conviction-

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[5/] Defense counsel below referred to the Eighth Circuit's Grigsby opinion, although not by name, in opposing Ramona Whitman's excusal. (R165)

proneness issue was "considerably less fragmentary and tentative" than it was when Witherspoon was decided. 483 F.Supp. at 1388. Both Grigsby and the state appealed, and in Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980) the federal appeals court modified the order of the district court to provide for the evidentiary hearing to be held in federal district court rather than the State court.

After the evidentiary hearing, the federal district court issued its opinion in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983). The court reviewed at some length the studies and scholarly works with which it had been presented and concluded from the evidence that death-qualified juries are not sufficiently representative of the community and "are not only 'uncommonly', but also unconstitutionally, prone to convict." 569 F.Supp. at 1323. A majority of the en banc United States Court of Appeals for the Eighth Circuit affirmed the holding of the district court. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985)(The appellate court modified the lower court's requirement that a bifurcated trial with two juries was needed to remedy the constitutional problems identified in the opinion by permitting the state to formulate other alternatives that would safeguard defendants' Sixth Amendment rights.) The court of appeals recognized that its holding was in conflict with decisions of other circuits, referring to Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858, cert.denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982), Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d

796 (1979), and Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), and expressed the hope that the United States Supreme Court would grant a writ of certiorari to resolve this "important issue." (The Eighth Circuit's opinion also conflicts with McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), in which the en banc court summarily rejected petitioner's claim, which was based in part on Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), that exclusion of jurors adamantly opposed to capital punishment violated his right to be tried by an impartial and unbiased community-representative jury.) The day after it decided Grigsby, the Eighth Circuit declared its holding therein to be retroactive. Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985).

Irizarry realizes that the Eighth Circuit Court of Appeals' decision in Grigsby is not binding authority on this Court. Witt v. State, 465 So.2d 510 (Fla.1985). However, this question is likely to soon be resolved by the United States Supreme Court as the Grigsby court urged. See also, Witt v. Wainwright, __U.S.__, __S.Ct. __, 84 L.Ed.2d 801 (1985), Justice Marshall, dissenting from denial of certiorari. Irizarry urges this Court to follow Grigsby and reverse his conviction. Alternatively, he asks this Court to reserve ruling on this question until the matter is resolved in the United States Supreme Court.

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.

The trial court improperly applied Section 921.141, Florida Statutes in sentencing Hector Irizarry to die in the electric chair. He found some improper aggravating circumstances and overlooked existing mitigating circumstances, thereby skewing the sentencing determination. This misapplication of Florida's sentencing law renders Irizarry's death sentence unconstitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973). Specific misapplications will be addressed separately in the remainder of this argument.

A.

The Trial Court Erred In Finding That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

Florida's legislature did not intend this aggravating circumstance to apply to all premeditated killings. Harris v. State, 438 So.2d 787 (Fla.1983). It must be limited to those cases having some quality to set them apart from the ordinary premeditated murder. Brown v. State, 10 FLW 343 (Fla. June 27, 1985).

This case does not involve a "cold" killing that would qualify for the "cold, calculated and premeditated" aggravating

circumstance. Dr. Mussenden found the homicide to be a "crime of passion." (R755) He described how Hector Irizarry became obsessed with the fact that his wife jilted him (R733-735), and how this obsession was exacerbated by the natural enmity between Puerto Ricans (such as Hector Irizarry) and Cubans (such as Carman Irizarry's new boyfriend, Orlando Hernandez). (R729-731)

The trial court even noted in his sentencing order that the attack on Carman Irizarry was motivated by jealousy and anger, but failed to recognize that this would negate the cold, calculated and premeditated aggravating circumstance. (R981,A2) He focused instead on the planning aspect of the crime. (R981,A2)

Furthermore, Hector Irizarry must have felt that he had at least a pretense of moral justification for his actions in light of being forced out of Carman's house to make room for another man. This fact also would negate the aggravating circumstance in question. See Cannady v. State, 427 So.2d 723 (Fla.1983).

The cold, calculated and premeditated aggravating circumstance is reserved primarily for executions or contract murders or witness-elimination murders. Bates v. State, 465 So.2d 490 (Fla.1985); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Clearly, the homicide of Carman Irizarry does not fall into either of the last two categories. It might be termed an "execution" in the very broadest sense of the term, but the legislature surely intended that this aggravating circumstance apply only to the dispassionate form of execution one generally

thinks of rather than to a domestic killing of the type involved here.

The cold, calculated and premeditated aggravating circumstance should not have been found, and Irizarry asks the Court to reverse his death sentence that was based in part on this improper element.

B.

The Trial Court Erred In Finding That The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

This Court defined the aggravating circumstance of especially heinous, atrocious or cruel in State v. Dixon, 283 So.2d 1 (Fla.1973) as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d 9. In finding that the homicide in this case fit this description, the trial judge relied primarily upon the manner in which the wounds were inflicted upon Carman Irizarry, the nature of the wounds, and the fact that Carman may have remained conscious for a short while after she was wounded. (R982-983,A3-4)

In examining this aggravating circumstance it is important to bear in mind that Carman Irizarry did not suffer for

long, either mentally, emotionally or physically.

This Court spoke in Phillips v. State, 10 FLW 501 (Fla. Aug. 30, 1985) of the importance of the "mindset or mental anguish of the victim" in determining the applicability of this aggravating circumstance. Carman Irizarry was apparently asleep when the incident began, and thus not cognizant of what was about to happen. The fatal blow was likely the first one struck, as there is no evidence she cried out. (R314) She would have remained conscious only for a matter of seconds up to one minute. (R312,314) Death would have occurred within minutes. (R315) When Orlando Hernandez touched Carman immediately after the attack, she did not move (R276), thus indicating that she was already dead, or at least unconscious. Therefore, any period of mental (or physical) anguish was of very short duration. When the death or unconsciousness of the victim is immediate, the homicide is not especially heinous, atrocious or cruel, since pain or suffering cannot be experienced. E.g., Herzog v. State, 439 So.2d 1372 (Fla.1983); Simmons v. State, 419 So.2d 316 (Fla.1982); Riley v. State, 366 So.2d 19 (Fla.1978), cert.denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982); Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert.denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). Even a case where the victim survives an attack for a period of time in pain and suffering does not necessarily qualify for this aggravating circumstance. Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert.denied, __U.S.__, __S.Ct. __, 79 L.Ed.2d 754 (1984); Mills v. State, 10 FLW 498 (Fla. Aug.

30, 1985). See also Demps v. State, 395 So.2d 501 (Fla.1981), cert.denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981), in which the victim lived for some time after suffering multiple stab wounds.

In Mills this Court took an entirely different approach from that in Phillips, instead focusing upon the actions and intent of the perpetrator. The Court opined in Mills:

> 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.

10 FLW at 500. Analyzing the instant case from the perspective employed in Mills, there is no indication that Hector Irizarry intended to inflict undue suffering upon his ex-wife. He chose a machete as his weapon of choice only because he was familiar with its use. There is no evidence to suggest that he wished to torture Carman in any way or to subject her to a prolonged ordeal; the dispatch with which the attack was carried out shows just the opposite.

In conjunction with the focus upon Irizarry's intent, it is important to note that the court below completely ignored Irizarry's mental condition in evaluating the heinous, atrocious or cruel aggravating circumstance, despite testimony from Dr. Mussenden of Irizarry's highly agitated mental state at the time of the homicide. (Irizarry's mental condition is discussed in more detail in Issue VI. C. below.) This Court has frequently recognized the interrelationship of a defendant's mental condition and the infliction of grievous wounds. E.g., Mann v. State, 420 So.2d 578 (Fla.1982); Miller v. State, 373

So.2d 882 (Fla.1979); Huckaby v. State, 343 So.2d 29 (Fla.1977), cert.denied, 434 U.S. 920, __S.Ct.__, __L.Ed.2d__ (1978).[6/] Thus, the trial court should have included an evaluation of Irizarry's psychological state as it impacted upon the aggravating circumstance under discussion.

Hector Irizarry asks this Court to reverse his sentence because of the erroneous inclusion of the heinous, atrocious or cruel aggravating circumstance in the sentencing process.

C.

The Trial Court Erred In Failing To Give Adequate Consideration To The Evidence Presented Concerning Hector Irizarry's Mental And Emotional State At The Time Of The Homicide.

Psychologist Dr. Gerald Mussenden testified at the penalty phase of the trial. He had interviewed and examined Hector Irizarry. (R723-725) He described how Irizarry developed an obsession with the fact that Carman Irizarry rejected him for a man from Cuba. (R733-735) This obsession deprived Irizarry of rational thought processes; he had to resolve the conflict within himself. (R734-735) Irizarry "was like an Atom bomb about to go off" prior to the homicide. (R735) Dr. Mussenden concluded that Hector Irizarry was under the in-

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6/ But see Michael v. State, 437 So.2d 138 (Fla.1983), cert. denied, __U.S.__, __S.Ct.__, 79 L.Ed.2d 246 (1984), which seems to conflict with these earlier precedents.

fluence of extreme mental or emotional disturbance when Carman Irizarry was killed, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R733-735)

In his sentencing order the court found Dr. Mussenden's testimony to be "of no probative value" because (from the court's point of view as a layman) the testimony was "wholly inconsistent with the nature and circumstances of this particular premeditated murder." (R983,A4) The court did not elaborate to explain how or in what way the "nature and circumstances" of the offense served to negate the uncontradicted testimony of the mental health professional, who was familiar with the details of the case before he rendered his expert opinion concerning Irizarry's mental state. (R724-725)

Despite seeming to reject Dr. Mussenden's testimony, the court apparently did concede that Hector Irizarry was impaired to some degree when the homicide occurred. The court emphasized that he did not believe Irizarry

> was under the influence of extreme mental or emotional disturbance nor was the capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired, notwithstanding expert Defense testimony to the contrary,....

(R983,A4--emphasis by the trial court). The court thus determined that the evidence did not establish the statutory mitigating circumstances found in sections 921.141(6)(b) and 921.141(6)(f) of the Florida Statutes, without considering the evidence as nonstatutory mitigation.

The sentencing court adopted a much too narrow approach in considering the mitigating evidence of Irizarry's mental and emotional condition. Under the principles expressed in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the mitigating circumstances which are available to a capital defendant, if established by the evidence, cannot constitutionally be limited to those in the statute. See Songer v. State, 365 So.2d 696 (Fla.1978), cert. den., 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Thus, where the evidence shows any impairment of the defendant's faculties, whether or not rising to the level of "substantial" or "extreme," that evidence must be considered in mitigation. In the instant case, moreover, the uncontradicted evidence proved that Irizarry did qualify for the statutory mitigating circumstances found in sections 921.141(6)(b) and (f). See Mines v. State, 390 So.2d 332 (Fla.1980), cert.den., 451 U.S. 916, __S.Ct.__, __L.Ed.2d__ (1981) and Huckaby v. State, 343 So.2d 29 (Fla.1977), cert.den., 434 U.S. 920, __S.Ct.__, __L.Ed.2d__ (1978).

In Ross v. State, 10 FLW 405 (Fla. Aug. 15, 1985) this Court reversed a death sentence imposed after a death recommendation from the jury, in large part because the sentencing court failed to consider as a significant mitigating factor testimony that the defendant had a drinking problem and had been drinking when he attacked the victim (even though this testimony was contradicted by the defendant's own testimony at the sentencing phase that he was "cold sober" on the night of

the murder), and that "the killing was the result of an angry domestic dispute in which the victim realized the appellant was having difficulty controlling his emotions." 10 FLW at 406. If Ross was entitled to the benefit of a significant mitigating factor under the circumstances of his case, then certainly Hector Irizarry is even more deserving. As in Ross, the homicide resulted from a domestic situation. Furthermore, unlike in Ross, Dr. Mussenden's testimony concerning Irizarry's mental condition on the night of the homicide was not counteracted by other evidence. The sentencing court therefore should have found significant mitigation in the circumstances under which Carman Irizarry was killed.

D.

The Trial Court Erred In Failing To Consider All Evidence In Mitigation That Was Presented At Trial.

The sentencing court considered and rejected only two non-statutory mitigating circumstances: that Hector Irizarry had only an eighth grade education and had worked menial jobs all his life. Yet Irizarry presented evidence of several other non-statutory mitigating circumstances (in addition to the evidence of mental impairment at the time of the homicide, discussed in Issue VI. C. above) which the court should have at least considered. For example, there was testimony that Irizarry was a good, dependable worker. (R487,708-709,758-759) He got along well with others, including his fellow employees and the family of his boss. (R709,713,716,758) He had no history of angry or violent outbursts. (R512,714,716)

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) emphasizes the need for the sentencer to consider all relevant mitigating evidence. See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In her separate concurring opinion in Eddings, Justice O'Connor noted that the Supreme Court could not speculate as to whether the judge and the state appellate court had actually considered all mitigating factors and found them to be insufficient to offset the aggravating circumstances. It was necessary for the Court "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." (71 L.Ed.2d at 14) See also Mann v. State, 420 So.2d 578 (Fla. 1982).

The record here does not clearly reflect that the court considered all the legitimate evidence Irizarry presented in mitigation. Therefore, there is a question as to whether or not all mitigating evidence was weighed in the balance prior to passing sentence, and Irizarry's death sentence must be reversed.

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.

The jury recommended by a vote of nine to three that Hector Irizarry's life be spared. (R837,969)

The life recommendation of a jury must be followed if there is a reasonable basis therefor. Malloy v. State, 382 So.2d 1190 (Fla.1979). The jury's recommendation of life must be given great weight, and

> [i]n order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908,910 (Fla.1975); see also Herzog v. State, 439 So.2d 1372 (Fla.1983).

The recommendation of the jury represents the judgment of the community as to whether death is the appropriate penalty under the facts of the case being considered. Odom v. State, 403 So.2d 936 (Fla.1981).

Under the facts of this case, the court below should not have sentenced Hector Irizarry to die after the jury recommended that he live. There were a number of rational bases to support the jury's recommendation. The trial court itself identified two such bases in his sentencing order by finding in mitigation (1) that Hector Irizarry had no significant history of prior criminal activity (which was stipulated to by the pros-

ecutor and defense counsel), and (2) that Hector Irizarry had lived 40 years with no significant prior criminal history. (R983,A4) In addition, the jury may have considered the uncontradicted testimony of Dr. Mussenden relative to Irizarry's impaired mental state when the homicide occurred, which is discussed in Issue VI. C. above, and the testimony of several other witnesses establishing Irizarry's dependability as a worker, his ability to get along with other people, and the absence of any previous incidents of violent behavior in his background, as discussed in Issue VI. D.

In Thompson v. State, 456 So.2d 444 (Fla.1984), and Gilvin v. State, 418 So.2d 996 (Fla.1982) and Welty v. State, 402 So.2d 1159 (Fla.1981), this Court vacated death sentences imposed over life recommendations, even though the trial courts had found no mitigating circumstances, because there was evidence in the record upon which the juries could have relied in mitigation. In the instant case the trial court specifically found two mitigating circumstances, and there was other evidence the jury could have found to be mitigating.

In Cannady v. State, 427 So.2d 723 (Fla.1983) the trial court found the same two mitigating circumstances found by the judge below, age and no significant history of prior criminal activity, but nevertheless overrode the jury's life recommendation. Also, as in Irizarry's case, there was expert medical testimony, rejected by the trial court, that the defendant suffered from a mental or emotional disturbance and was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. This Court vacated

Cannady's sentence of death because the recommendation of the jury reasonably could have been predicated on the two mitigating circumstances found by the court and upon the doctor's testimony, even though the trial court found said testimony not to establish a mitigating circumstance.

In McCampbell v. State, 421 So.2d 1072 (Fla.1982) this Court cited the defendant's exemplary employment record as one factor the jury properly could have relied upon in recommending a life sentence. Similarly, it was proper for Hector Irizarry's jury to consider his record as a good and dependable worker as one factor in favor of a life sentence.

The defendant's mental condition was the circumstance which persuaded this Court to vacate the death sentence imposed over a life recommendation in Jones v. State, 332 So.2d 615 (Fla.1976), even though the degree of his mental impairment was not fully known, because it was reasonable to assume that his mental illness contributed to his behavior. The testimony of Dr. Mussenden at Hector Irizarry's trial similarly established that his impaired mental and emotional condition contributed to the homicide of Carman Irizarry.

This Court has invalidated death sentences imposed over jury recommendations of life in many cases involving murders which were at least as heinous as the one involved herein. For example, the defendant in Huddleston v. State, 10 FLW 487 (Fla. Aug. 29, 1985) initially struck the victim several times with his elbows, knocking her to the floor. The victim began screaming and struggling, whereupon Huddleston struck her on the head with a chair. He then began to strangle her. When

he noticed that the victim was not only still alive, but conscious, Huddleston took a steak knife and stabbed her repeatedly in the chest, neck and back. He finally had to stop when the knife blade bent. Noticing that there was some movement left in the victim's body, he stabbed her with a butcher knife until she died. The trial court found only one mitigating circumstance (no significant history of prior criminal activity), but this, along with other mitigating evidence appearing in the record, was enough for this Court to vacate the death sentence. In Brown v. State, 367 So.2d 616 (Fla.1979), the victim was beaten about the head, shot, and finally drowned. In McKennon v. State, 403 So.2d 389 (Fla.1981), the defendant murdered his employer by beating her head against the floor and wall, strangling her, slicing her throat, breaking ten of her ribs, and stabbing her. The only mitigating circumstance was the defendant's age of eighteen. This Court found that there was a rational basis for the jury's recommendation and reduced the sentence to life imprisonment. In Welty, supra, the defendant stole the victim's car and stereo, then returned, struck the victim several times in the neck and set fire to his bed. And in Jones, supra, the victim was sexually assaulted, stabbed more than 38 times, and finally bled to death.

Another consideration in assessing whether the jury override was proper should be the weight and validity of the aggravating circumstances. As discussed in Issue VI. A. and B., two of the four aggravating circumstances (cold, calculated and premeditated and especially heinous, atrocious or cruel)

should not have been found by the trial court. The remaining circumstances are that Hector Irizarry had a prior conviction for a violent felony (the attempted first degree murder of Orlando Hernandez) and that the capital felony was committed while Irizarry was engaged in committing a burglary of Carman Irizarry's residence. These two circumstances are entitled to very little weight, as both were part and parcel of the homicide itself. With regard to the burglary, there is no evidence Irizarry intended to commit any additional or separate crimes apart from the assault on Carman Irizarry and Orlando Hernandez.

Finally, it appears that the court below, as did the trial judge in Rivers v. State, 458 So.2d 762 (Fla.1984), merely disagreed with the jury's recommendation. His sentencing order merely concludes that the aggravating circumstances clearly outweigh the mitigating, rendering the recommendation unreasonable, but there is no analysis whatsoever as to why the court felt this to be true. As in Rivers, in Irizarry's case

> there was substantial evidence offered in mitigation which the jury could reasonably have relied upon in reaching its advisory verdict.

458 So.2d at 765.

Based upon the foregoing considerations, it is impossible to say that reasonable persons would necessarily conclude that death is the only possible penalty for Hector Irizarry. Therefore, his death sentence must be vacated.

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.

In Issue VII. above Hector Irizarry undertook a comparison of his case with other life override cases involving homicides at least as heinous as the one involved herein in which this Court invalidated the sentences of death. This issue undertakes a proportionality review in the context of cases involving homicides committed in a domestic situation.

To place the issue in perspective, one should keep in mind that murder of one family member by another, particularly murder of one spouse by the other, is quite common in Florida and elsewhere.[7/]

In a study on spouse murder conducted by the Department of Psychiatry at the University of Florida,[8/] researchers identified a particular scenario to be the most frequent one in instances where a husband kills his wife. They characterized the "sex-role threat homicide" as follows:

> The men who engaged in this type of uxoricide felt they were reacting to a previous offense on the part of the victim. This offense, by

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7/ Barnard, G.; Vera, H.; Vera, M.; Newman , G.: Till Death Do Us Part: A Study of Spouse Murder, Bull. Amer. Acad. Psychiat. and the Law, Vol. 10, No.4 (1982). (A copy of this study appears in the appendix to the brief at pages A7 through A16.)

8/ Barnard, et al., Till Death Do Us Part: A Study of Spouse Murder. (A7-16)

> contrast to the previous type, was not immediately provocative or endangering of the physical integrity of the men. Rather, a walkout, a demand, a threat of separation were taken by the men to represent intolerable desertion, rejection, and abandonment. Thus, our data confirm Simon's [footnote omitted] observation that the threat of separation is usually the trigger for violence in these cases. Furthermore, we also see the key to this type of homicide in the murderers' unspoken sense of dependency on the victim.9/

Hector Irizarry and the homicide for which he was convicted fit this description. Dr. Mussenden described the feelings of hurt and rejection Irizarry felt when the woman he idolized asked him to leave her house so that another man, a Cuban, could move in. (R733-734) The pressures in Irizarry built up so that he "was like an Atom bomb about to go off" (R735)--and that bomb exploded on July 26, 1984.

The study further found with regard to the "sex-role threat homicide":

> Most of the males were separated or divorced at the time they murdered their wives. The theme most often expressed by them as the precipitating event for the homicide was their inability to accept what they perceived to be a rejection of them or of their role of dominance over their eventual victims. The sociocultural nexus [footnote omitted] at the base of these dynamics is, most immediately, the culturally prescribed image of what it is to be a man or what it is to be a woman.10/

These words as well are fully applicable to Irizarry's situation.

9/ Ibid. at (A14).

10/ Ibid. at (A14).

Hector Irizarry does not deserve to die for this homicide. His crime is not the unusual one requiring the supreme punishment. His crime is no different from the norm of domestic killings where a husband kills his wife.

For instance, in Blair v. State, 406 So.2d 1103 (Fla. 1981), the defendant decided to kill his wife after a period of marital difficulties. He dug a hole in the backyard, arranged for the children to be gone for a period of time, telling them that their mother would be gone to Miami when they returned, and shot his wife five times. She was buried in the hole in the back yard. The jury recommended the death penalty. This Court concluded that the trial court had included some improper aggravating factors and that one mitigating circumstance existed. However, instead of remanding for resentencing, this Court compared this case with others and remanded for a life sentence. Irizarry is even more deserving of a life sentence than Blair. He was laboring under an explosive emotional disturbance at the time Carman Irizarry was killed. And, as in Blair, improper aggravating circumstances were included in Irizarry's sentencing process. Furthermore, unlike Blair, Irizarry has more than one mitigating circumstance to his credit. (R983,A4) (See also Issue VI. C. and D., infra.)

Halliwell v. State, 323 So.2d 557 (Fla.1975), which this Court cited in Blair, involved a triangle in which the defendant killed the husband of the woman he loved by beating him to death with a breaker bar and then dismembered his body. The jury recommended the death penalty, which this Court found not to be warranted. Like Irizarry, Halliwell was under emotional

strain at the time of the killing, and had no previous criminal record.

In Kampff v. State, 371 So.2d 1007 (Fla.1979), another case in which the jury recommended death, the defendant shot his wife five times in the retail store and bakery where she worked. They had been divorced for three years, and Kampff had brooded over the divorce during that time. He had constantly harassed and begged his former wife to remarry him. Just before the shooting, Kampff suspected that the victim was becoming romantically involved with someone else. Kampff also had an extreme, chronic problem with alcoholism. This Court reversed Kampff's death sentence and remanded for imposition of a life sentence. Irizarry, like Kampff, suffered from an extreme emotional disturbance and his crime is no more deserving of a death sentence than Kampff's.

In Chambers v. State, 339 So.2d 204 (Fla.1976), this Court again reversed a death sentence imposed upon a defendant for the beating death of his girlfriend. Witnesses saw Chambers beat and drag his girlfriend by the hair in the parking lot of her place of employment. He was arrested but bonded out of jail that evening. Chambers and the victim returned to their apartment where an argument occurred. The victim

> ...was so severely beaten that she died five days later as a result of said beating from cerebral and brain stem contusion. She was bruised all over the head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries.

339 So.2d at 205. Irizarry's crime was not as egregious as Chambers'. While Carman Irizarry was killed, she was not beaten

and brutalized as was the victim in Chambers. Additionally, Irizarry was suffering from emotional pressures brought on by Carman's rejection of him, a factor not present in Chambers. 339 So.2d at 208 (Justice England concurring). Irizarry is more deserving of a life sentence than was Chambers.

The victim in Herzog v. State, 439 So.2d 1372 (Fla. 1983) was the defendant's live-in paramour. She was strangled with a telephone cord following an unsuccessful attempt to smother her with a pillow. The trial court found no mitigating circumstances, but one of the potential non-statutory mitigating circumstances identified by this Court was "the domestic relationship that existed prior to the murder." 439 So.2d at 1381. The Court found the facts of Herzog to justify a life sentence, citing Blair and Chambers.

Finally, Ross v. State, 10 FLW 405 (Fla. Aug. 15, 1985) was another case in which the jury recommended death for the defendant's killing of his wife. Her death resulted from multiple blows to the head with a blunt instrument. Her face was extensively bruised, scratched and lacerated. The bruises occurred while she was still alive, and were probably inflicted with a fist or foot. There was evidence she had tried to fight off her attacker, as she had injuries on her hands and arms. The trial court found the murder to be heinous, atrocious and cruel and found no mitigating circumstances. In vacating the death sentence, this Court noted that the trial court should have considered in mitigation, among other things, "that the killing was the result of an angry domestic dispute." 10 FLW 406. The Court also found significance in the fact that Ross,

like Irizarry, had no prior history of violence. The court concluded that the death penalty was not proportionately warranted under the circumstances of the Ross case, and cited Blair in support.

In Williams v. State, 437 So.2d 133 (Fla.1983), cert. den., __U.S.__, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984), this Court stated that the decisions in Blair, Kampff, and Halliwell were predicated upon "error in the aggravation/mitigation equation and not the fact of the domestic dispute." 437 So.2d at 137. However, there can be little doubt that the domestic situation in each case had at least some influence on the Court's view of the propriety of the death penalty. Furthermore, in at least two cases decided after Williams, Herzog and Ross (which was decided less than two months ago), the Court specifically took cognizance of the domestic nature of the homicides in invalidating the death sentences.

The cases examined above show that Irizarry's death sentence is disproportionate to the crime. He urges this Court to reduce his sentence to life imprisonment.

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.

The written sentence imposed upon Hector Irizarry indicated that he was to receive 30 years in prison for the attempted first degree murder of Orlando Hernandez, with a 25-year minimum mandatory. (R979) The 25-year minimum mandatory provision must be stricken for two reasons. Firstly, it did not conform with the court's oral pronouncement of sentence, where he said nothing about such a provision. (R880) See Shaw v. State, 467 So.2d 1087 (Fla.2d DCA 1985); Timmons v. State, 453 So.2d 143 (Fla.1st DCA 1984); Green v. State, 446 So.2d 253 (Fla.5th DCA 1984). More importantly, the Florida Statutes do not authorize a 25-year minimum mandatory sentence for the crime of attempted first degree murder. §§782.04(1)(a), 777.04 (4)(a), 775.082(3)(b), Fla.Stat. (1983).

The 30-year sentence the court imposed also was excessive under the circumstances of this case, in which the sentencing guidelines scoresheet called for a sentence of seven to 12 years. (R972) The scoresheet erroneously included 21 points for victim injury. Victim injury may only be scored where it is an element of the offense at conviction. Fla.R.Crim.P. 3.701 d. 7.; Whitfield v. State, 471 So.2d 633 (Fla.1st DCA 1985); Benedict v. State, 10 FLW 2167 (Fla.5th DCA Sept. 19,

1985); Parker v. State, 10 FLW 1859 (Fla.2d DCA July 31, 1985). Victim injury is not an element of attempted first degree murder, which obviously can be committed with no harm whatsoever coming to the intended victim. Without these 21 points the total would be 136, which would yield the same recommended sentencing range, but would only be one point up from the next lower range (R973), a fact which might affect the sentence the court would impose.

The court also used improper reasons for departing from the recommended sentence. The reasons he gave were:

> 1) the particularly savage nature of the machete attack upon said victim,
> 2) the clearly visible disfiguring permanent scar to the face of said victim which will serve as a constant reminder to him of the nightmarish night, and
> 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.

(R984,A5) All three reasons were erroneous. With regard to reasons one and two, the severe injury to the victim had already been assessed points on the scoresheet (albeit erroneously). It is improper to aggravate a guideines sentence for reasons which have already been factored into the scoresheet. Hendrix v. State, 10 FLW 425 (Fla.Aug. 29, 1985). Therefore the "savage nature" of the attack and the scar on Orlando Hernandez were not legitimate reasons for departure from the guidelines.

The third reason listed by the court was improper because a guidelines sentence may not be aggravated for factors relating to the instant offense for which convictions had not been obtained. Fla.R.Crim.P. 3.701 d. 11.; Callaghan v. State,

462 So.2d 832 (Fla.4th DCA 1984); Fletcher v. State, 457 So.2d 570 (Fla.5th DCA 1984). The burglary clearly was a "factor related to the instant offense" for which Hector Irizarry was not convicted (or charged).

Even where there are some permissible reasons for departure, where impermissible reasons are also present the sentence must be reversed and the case remanded for resentencing, unless the state can show beyond a reasonable doubt that the departure sentence would have been the same without the impermissible reasons. Albritton v. State, 10 FLW 426 (Fla. Aug. 29, 1985). Here, there were no permissible reasons for departure, and so resentencing clearly is mandated.

CONCLUSION

Appellant, Hector Manuel Irizarry, prays this Honorable Court to grant him a new trial, for the reasons expressed in Issues I. through V. of this brief. If a new trial is not granted, he asks the court to vacate his death sentence and impose a sentence of life in prison with a minimum mandatory sentence of 25 years, for the reasons expressed in Issues VI. through VIII. For the reasons given in Issue IX., Irizarry also asks that his 30 year sentence for attempted first degree murder be reversed and the case be remanded for resentencing under the guidelines, with the provision for a 25-year minimum mandatory sentence stricken.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Robert F. Moeller
ROBERT F. MOELLER
Assistant Public Defender

Hall of Justice Building
P.O. Box 1640
Bartow, Florida 33830-3798
(813)533-0931 or 533-1184

COUNSEL FOR APPELLANT