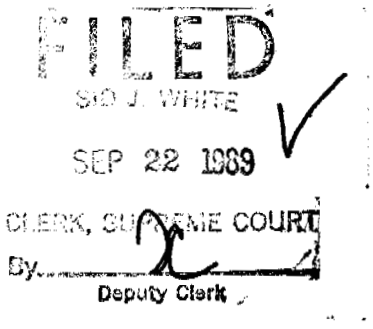
IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,436




HENRY JOSE ESPINOSA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

**********

# INITIAL BRIEF OF APPELLANT

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## INTRODUCTION

Appellant HENRY JOSE ESPINOSA takes this appeal from a sentence of death imposed following his conviction of first degree murder, second degree murder, attempted first degree murder; burglary and grand theft.

In this brief, Henry Espinosa, will be referred to by name. Co-defendant Mauricio Beltran-Lopez will be referred to as Beltran. Appellee will be referred to as the state.

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## STATEMENT OF THE CASE

### Procedural History

On July 30, 1986 a five count indictment was returned in Dade County charging Espinosa and Beltran with (1) the first degree murder of Bernardo Rodriguez by shooting and/or stabbing him; (2) the first degree murder of Teresa Rodriguez by stabbing and/or strangling and/or suffocating her; (3) the attempted first degree murder of Odanis Rodriguez by stabbing her; (4) the robbery of over three hundred dollars from the Rodriguez home using a gun and/or a knife; and (5) the armed burglary of the Rodriguez home located at 9357 S.W. 36th Street in Miami (R 1 to 4a).

Following significant pretrial procedural skirmishing, detailed below, this cause was tried by a jury from August 29 until September 7, 1988. The jury found Espinosa guilty of (1) the lesser included offense of second degree murder of Bernardo Rodriguez; (2) first degree murder of Teresa Rodriguez; (3) attempted first degree murder of Odanis Rodriguez; (4) the lesser included offense of grand theft; and (5) armed burglary of the Rodriguez's home (R 25; R 339 to 343; R 2469 to 2470). Beltran was found guilty of the same offenses. The court adjudged them guilty (R 344).

The sentencing phase of the trial took place on September 9, 1988. The jury recommended the death penalty for Espinosa by a vote of 11 to 1, and for Beltran by a vote of 8 to 4 (R 29; R 382; R 2733).

On November 4, 1988 the trial judge imposed the sentence of death for the first degree murder of Teresa Rodriguez; and concurrent terms of life imprisonment for second degree murder, armed robbery and attempted first degree murder and five years for grand theft (R 410; R 2742). The court entered a written order of its findings at R 416.

Notice of appeal was timely filed and these proceedings ensue (R 430, 433). This Court's jurisdiction is invoked pursuant to Article V, Section 3(b)(1) of the Constitution of the State of Florida, Section 921.141(4) of the Florida Statutes and Rules 9.140(b)(4) and 9.030(a)(i) of the Florida Rules of Appellate Procedure. This Court's jurisdiction exends to review of the other convictions arising from the same trial as the death penalty conviction on authority of Riley v. State, 366 So.2d 19, 20 n.1 (Fla. 1978), appeal after remand 413 So.2d 1173, cert. denied 459 U.S. 981; and Huckaby v. State, 343 So.2d 29, 30 n.1 (Fla. 1977).

## Rulings Adverse to the Defense

A number of significant rulings made before, during and after the trial were adverse to the defense. Among the motions were Espinosa's motion for expert witness expenses for fingerprint comparison, serology and forensic pathology (R 50); and the state's pretrial motion for an order in limine to prevent Espinosa from making reference to murder victim Bernardo Rodriguez's convictions for trafficking in marijuana, or his probation status for that conviction (R 65) (R 791 to 793; 1128 to 1135).

During trial, counsel wanted to cross examine the lead detective about Bernardo Rodriguez's prior criminal conviction, but the court would not allow it, nor would the court even allow counsel to present a certificate of the conviction from the United States District Court (R 1505 to 1512);

Also denied was Espinosa's motion to sever count III (attempted murder of Odanis Rodriguez), from Counts I and II (murder of Bernardo and Teresa Rodriguez) because (a) his defense to Count III was different from his defense to the murder counts; (b) trying the counts together will allow the state to discredit the defense on Count III and to argue to the jury that the facts of the attempted murder invalidate the defense to those counts; (3) Espinosa wanted to testify

about the murder counts, but not the attempted murder so a joint trial would force him to choose between the right to remain silent and the right to present a defense and thus to have a fair trial; and (4) should the cause proceed to a penalty phase, joinder of these counts would create jury confusion (R 68) (denied at R 519);

Espinosa's motion to suppress his post-arrest statements to the police obtained in violation of the fifth, sixth and fourteenth amendments (R 74) (R 697 to 735, 794 TO 797);

Espinosa's motion to sever defendants on grounds that their defenses were mutually exclusive (R 76);

Espinosa's extensive motion for costs for expert witness Elizabeth Loftus, Ph.D., an eyewitness identification expert concerning the identification of Espinosa by Odanis Rodriguez, a child who was ten years old at the time of the incident, who was repeatedly stabbed shortly after her mother and father were killed. She was the sole eyewitness (R 99 to 133) (denied at R 538).

On February 18, 1988, as an alternative to granting the defendants separate trials, the trial judge entered an order disqualifying the office of the Public Defender from represention Mr. Espinosa because that office had represented both Espinosa and Beltran for six months before filing a conflict

of interest, and the court having denied both defendants' motions for severance, involvement of the Public Defender at a joint trial would interfere with Beltran's fifth, sixth and fourteenth amendment rights to testify or not, to cross examination and to due process (R 134).

Espinosa's newly appointed lawyer filed another motion for a severance alleging that the defenses of Espinosa and Beltran are mutually exclusive and irreconcilable; and that on June 10, 1987 and on February 12, 1988, Beltran's lawyer represented to the court that Beltran was going to testify and that the defense of each was to blame the other entirely (R 138) (R 678 to 691, 798).

Espinosa filed a motion in limine, should the cause proceed to a penalty phase, to exclude the statutory aggravating circumstance "heinous, atrocious and cruel" and "cold, calculated and premeditated" based upon Maynard v. Cartwright, 108 S.Ct. 1853 (1988), in which the Supreme Court held those aggravating circumstances under the Oklahoma law to be unconstitutional (R 143) (R 693 to 694, 696, 2172 to 2183, 2586 to 2509).

Espinosa requested a special instruction concerning the jury's role in the penalty phase of a capital case, which was denied (R 145).

After trial but prior to sentencing, Espinosa filed a motion for substitution of counsel for the penalty phase, to appoint a death penalty expert from the University of Texas Law School and or the Texas Capital Punishment Clinic and Resource Center; with incorporated motion to continue the penalty phase hearing; and to provide expenses and sufficient time to permit Espinosa's family members to travel from Guatemala to present important testimony at the hearing (R 405) (R 2480 to 2497).

Espinosa filed a motion for new trial on the following grounds: the court abused its discretion in trying the defendants together; in preventing Espinosa from presenting critical proof about Bernardo Rodriguez's conviction for marijuana trafficking; in preventing Espinosa from preventing testimony concerning Beltran's activities in the Nicaraguan military; and in not allowing Espinosa a continuance and expenses to allow his mother, sisters and brothers to obtain visas and travel to Miami from Guatemala to testify about the alleged systematic pattern of physical and mental abuse Espinosa suffered at the hands of his mother. This motion was argued at length in the trial court (R 2745 to 2788). The written copy is not in the record on appeal, but will be included in a supplemental record. A copy is included in the Appendix at the end of this brief, as App. 1 to 9.

The record further reflects that during opening statement, the court granted the state's objection to counsel's mention of Beltran's background as a member of a Nicaraguan death squad; the details of how Espinosa and Beltran met before coming to the United States and Beltran's propensity for killing. When the court barred that entire subject matter, defense counsel argued that a critical part of his defense was precluded. He moved for a mistrial and for a severance, which were denied (R 1166 to 1174).

During trial, counsel requested a special jury instruction on specific intent (R 1505, 2199, 2201, 2203 to 2204).

Counsel renewed all motions at the close of the state's case and moved for a judgment of acquittal (R 2156-64; 2170).

At the charge conference for the penalty phase, defense counsel argued against giving instructions on aggravating circumstances for prior conviction (R 2499 to 2501); crime to avoid lawful arrest (R 2502 to 2505, 2514 to 2516); heinous, atrocious and cruel (R 2586 to 2510); and another capital offense (R 2512 to 2513)

During the penalty phase, the trial court refused to allow Espinosa to present as a witness Assistant Public Defender Diane Ward, one of Espinosa's original lawyers who had been ordered discharged by the court due to Beltran's claims of conflict (R 2567 to 2574).

## STATEMENT OF THE FACTS

The record reflects that in the early morning hours of July 10, 1986, Bernardo Rodriguez was found dead on the kitchen floor of his home in southwest Dade County, having been shot and stabbed (R 1605, 1294). His wife, Teresa Rodriguez was found dead on her bed, stabbed, strangled and asphyxiated with a pillow (R 1605, 1295). Their eleven year old daughter Odanis had been stabbed sixteen times (R 146) (R 1898).

### The Rodriguez Children's Testimony

In July of 1986, Odanis Rodriguez had just turned eleven. She was living at 9357 S.W.36th Street in Miami with her parents Bernardo and Teresa,and her older sister Odenia (R 1224, 1225). On the night of July 9th, Odanis went to sleep at around 10:30 or 11:00 after playing dolls with her sister. She was awakened by a "big noise." She heard her mother's voice and Henry Espinosa's voice. Another man (later identified as Beltran) came into her bedroom, pulled the phone cord and took it with him (apparently because the phone was ringing (R 1266)). Odanis said she heard talking. She opened her door and saw Espinosa standing in front of her mother holding a knife, as Beltran held her mother's elbow. The mother motioned for Odanis to go back into her room. Odanis locked her door (R 1226 to 1232).

Odanis said she knew Henry Espinosa because they were neighbors for about a year and a half before the Rodriguez family moved into their house (R 1233).

Odanis said she heard her mother say "Don't Henry, don't." Then she heard footsteps coming to her door, and she heard Henry say "Your mother wants to see you." (R 1234). When she opened her door, Beltran grabbed her from behind and held her nose and mouth as Espinosa stabbed her with a knife. After that, she remembered being dragged out of the house by her sister Odenia and Maria Blanco (a neighbor Odenia called for help); and being in the hospital (R 1235, 1236).

Later that same day, in the hospital, Odanis was shown photographs by the police. She pointed out Espinosa's picture (R 1238). She subsequently was shown additional photographs from which she selected Beltran's (R 1239).

On cross examination defense counsel elicited that Odanis was in fourth grade, had just turned eleven and was still playing with dolls when this incident occurred (R 1241 to 1242). Their families lived in the same apartment building (R 1244). They were all friendly (R 1245). Henry, she said, was nice and helped her with her Spanish lessons (R 1242). Odanis said that she was never threatened or scared by Henry or his wife and children (R 1247).

Odanis testified that she is Cuban and that Henry Espinosa is the only Nicaraguan man she ever met. She had never met Beltran before (R 1263). She also testified that she met with the prosecutors and discussed the case with them about seven times in the two years since July of 1986 (R 1274).

Odanis's older sister Odenia Rodriguez testified that she was 12 years old in July of 1986. On July 10th, Odenia said she was awakened by her mother screaming. She opened her door and saw her father on the kitchen floor in a pool of blood. She heard, but did not see her mother (R 1399-1402).

Odenia said she heard her mother tell both girls to keep their doors closed. At first, Odenia thought it was a nightmare, but when she realized she was awake, she locked her door and called Maria Blanco, a neighbor (R 1403).

Odenia said she heard her mother say, "Henry, leave; if you leave, I won't call the police, just leave." She then heard Henry go to her sister's door and say, "Little girl, open your door, your mother wants to see you." (R 1404).

The next thing Odenia heard that night was moaning. Then, when Maria Blanco arrived, Odenia came out of her room. They found Odanis on the floor full of blood; they dragged her to the car and took her to the hospital. Odenia gave a statement to the police that night, but did not tell them

that she recognized one of the voices because she "was scared and confused." Later that day, she told Maria Blanco that she knew she had heard Henry Espinosa's voice. Maria Blanco told her to tell the police. Odenia gave another statement, and identified Espinosa's picture (R 1407-4712).

Odenia confirmed that Henry Espinosa was friendly when he was their neighbor, and that he helped Odanis with her homework (R 1414 to 1415). Odenia also testified that a Nicaraguan accent is different from a Cuban accent, and that Henry Espinosa was the only Nicaraguan she knew (R 1419).

The Scientific Evidence

Technician Lowe testified that one fingerprint found on the door of the freezer in the Rodriguez kitchen, was Henry Espinosa's (R 1725), and that an entire palmprint and thumb-print from Mauricio Beltran's right hand was found in blood on the large part of the refrigerator door (R 1726, 1733).

Serologist Nelson testified that blood was found all over the Rodriguez house, including on a rag found on top of the television set, on Teresa's pillow case, outside Odanis's room, on Odanis's door jamb, on the coffee table and that most of it was consistent with Beltran and also either Bernardo, Teresa or Odanis Rodriguez (R 1751 to 1804).

No blood of Henry Espinosa was found on the crime scene (R 1766, 1805). However, a pair of red shorts found in Henry Espinosa's car was found to have little blood specks; and statistics showed the specks to be consistent with three and a half of every 100 people, including possibly Teresa and Odanis (R 1822).

Relevant Evidence The State Did Not Present

There was significant relevant information known to the state, which was not presented in its case in chief, and which had to be presented by Espinosa in his defense.

Espinosa called Detective Vas, a member of the Rodriguez homicide team, who testified that there was a large empty dump truck in the driveway of the Rodriguez home that night, along with a 1981 Grand Prix registered to Maria Castellanos at an address in the same neighborhood (R 1899 to 1903).

On the morning of July 10th, the detectives went to the Castellanos address. A man with a loaded .357 Magnum came running out of the house. He was later apprehended by a SWAT team. He said he had broken into the house (R 1904 to 1910).

Inside the Castellanos house, the detectives noticed the odor of marijuana. They found a 200 pound scale (the kind used for measuring narcotics), a hydraulic press used to compress bales into bricks and bags of what appeared to be

marijuana and hemp seed and 700 pounds of marijuana; in other words, "a professional operation" (R 1911 to 1914).

The police impounded 1,030 pounds of suspected marijuana and 430 pounds of suspected seed found throughout the house. They also found a digital beeper with the number 266-8955-11 on it. The telephone number 266-8955 was the number which the man with the .357 Magnum had given the police as his home number (R 1915 to 1918). The 11 was a coded message.

This same telephone number was found on a digital beeper located at the Rodriguez home crime scene (R 1920 to 1922).

The suspected marijuana turned out to be phony. It smelled like the real thing, but it was sterile, which was unusual in the Miami drug business (R 1923 to 1025).

Parked in front of Maria Castellano's house was another big dump truck. The detective testified that shipping narcotics by dump truck was "a good scam" because nobody would think to look in a dump truck for drugs (R 1926, 1927, 1936).

Espinosa's second defense witness was fingerprint technician Lowe who testified that a Marlboro cigarette package found inside Maria Castellano's Grand Prix (parked in front of the Rodriguez house) had Bernardo Rodriguez's fingerprints on it; and that Bernardo Rodriguez's fingerprint was found on an object in the living room of Maria Castellano's house (R 1951 to 1954).

## Henry Espinosa Testified in His Own Defense

Henry Espinosa testified that he is 32 years old and came to the United States from Nicaragua where he was divorced with 13-year old twin daughters. He was a librarian but also had worked undercover for Somoza's central intelligence. He fled Nicaragua when Somoza was overthrown.

In 1979, Espinosa met Beltran in Guatemala City where they both sought political asylum. Espinosa started to say that Beltran was engaged in a ten-pound marijuana deal at that time, but the court would not allow that testimony (R 1958 to 1967). At R 1974 the court stated:

> . . . if you ever say anything on the stand again about anything that happened, about some drug deal or something else in Nicaragua, Honduras or any place else, I am going to totally restrict the questions which may be asked of you.

Espinosa currently has legal refugee status in the U.S. He married Rosa and they had had two sons (R 1983-84).

In the early 1980's Espinosa and Beltran were friendly. In 1982 Espinosa and his family and Beltran moved to Baton Rouge, Louisiana. The Espinosas returned to Miami a year later. Beltran stayed in Baton Rouge. They kept in touch by telephone (R 1985 to 1987).

In 1984 the Espinosas moved to an apartment complex on South River Drive, where the were neighbors of the Rodriguez

family for about a year (R 1988 to 1989). Espinosa and Bernardo Rodriguez went fishing; they repaired their cars together; they drank a beer on the patio together. The wives were friendly. Espinosa especially liked Odanis because she was the same age as his daughters. She would come every day at 5:00 with her notebook and Espinosa would help with her Spanish homework, while Odenia would play with Espinosa's two little boys (R 1990 to 1991).

Bernardo Rodriguez had told Espinosa that he needed money. A friend offered him a drug deal and he was considering it. Espinosa was never in the drug business, but he and Bernardo remained friends. Espinosa worked for an oil company service station; he worked overtime to send money to his daughters in Nicaragua (R 1992 to 1994).

Espinosa moved out the South River Drive apartment in 1985 and did not see Bernardo Rodriguez for almost a year. One day, Bernardo drove into the gas station where Espinosa worked. They talked about their families. Espinosa noticed that Bernardo was driving a Lincoln Continental. Bernardo explained that it was his wife Teresa's car, and that the drug business "has been good to me." (R 1994 to 1997).

Bernardo Rodriguez then said he could help Espinosa get a better paying, perfectly legal job as a truck driver. His

boss, he said, needed drivers for three trucks. He told Espinosa to call him. Espinosa noticed a beeper in Bernardo's car (R 1997 to 1999). Espinosa was adamant that he would not get involved in the drug business or any illegal activity because as a political refugee, he would be deported back to Nicaragua where he would be killed (R 1999).

Bernardo Rodriguez told Espinosa that his family had moved to a nice house; and he confided that Teresa had "earned" the Lincoln Continental by working together with him in the drug business (R 2003).

Espinosa called Bernardo three days later. Odenia answered, asked Henry how he was, and Teresa took the phone. She said that Bernardo sleeps days and works nights, so Espinosa should call back at night (R 2006), which he did. Bernardo said he told his boss that he had a good Nicaraguan friend that he trusted to drive the three trucks. Espinosa would be the "manager of the three trucks and that I should look for [two other] drivers." The work would be hard, starting early in the morning, but the pay would be good. Bernardo said he wanted to help Espinosa with a good-paying legal job "because of your children." (R 2007 to 2009).

Espinosa spent a day in training driving around the Hallandale area. Bernardo told him to get a garage or a

covered place to park the trucks at night and to fuel them up so he would not waste time in the morning (R 2010 to 2011).

By coincidence, Beltran had just returned to Miami to help the Lanza family move from Louisiana. Beltran was staying with Espinosa, so Espinosa asked if he wanted to drive a truck, and told Bernardo Rodriguez about Beltran. Espinosa introduced them a couple of times. Beltran did not meet Teresa or the children until the the incident (R 2013-2016). Espinosa knew there were two girls. Beltran did not(R 2017).

On July 9th, Bernardo told Espinosa to pick up the trucks that night. When Espinosa called at 10:00, Bernardo said he had one truck, and Espinosa should call his beeper later because he was going out on business (R 2017 to 2018).

In the late night, early morning hours of July 9th and 10th, Espinosa and Beltran went out for dinner. At 12:30, Espinosa called Bernardo Rodriguez's beeper. Bernardo said he was busy. Espinosa called back in a half hour, and Bernardo told him to come over to pick up the first truck, and to bring Beltran to drive Espinosa's car back (R 2020-22).

Espinosa and Beltran drove to the Rodriguez home at around 1:00 a.m. Among the vehicles parked there were a red dump truck, a Grand Prix and Teresa's Lincoln (R 2024-25).

Bernardo answered the door, showed Espinosa around the

house and said he needed a favor. He explained that at his friend Maria Castellanos's house, there is marijuana ready to ship to New York. His drivers changed their minds and left him without drivers. "It has to go out, has to leave tonight to New York because that was an agreement that I had with the people that live in New York," and if the marijuana did not leave that night, they would kill him (R 2026 to 2028).

Espinosa protested that he would not get involved with drugs because of his immigration status. Bernardo got upset. Espinosa said that it was Bernardo's problem. Beltran, however, wanted to do it (R 2028 to 2029).

Now, Bernardo was upset. He walked into the kitchen and showed Espinosa and Beltran cash inside a whiskey box on the dining room table. He said the money was for expenses and fun in New York; there would be more money when they returned and Espinosa still had his truck-driving job (R 2029-2030).

Espinosa still saod no. Bernardo made a telephone call. He said "Listen, the people whom I thought were going to do the favor for me do not want to do it and no one is going to get rid of me. Bring the machine gun and bring the people down because these people are going to take these things up tonight." Then, Teresa appeared, pointing a .38 revolver at Espinosa. He recognized the gun as a birthday

present Bernardo had given Teresa when they were neighbors, for protection when he was out at night on business (R 2031 to 2034). Teresa said, "Henry, I'm sorry, but we have problems." (R 2036).

Beltran snatched the gun from Teresa. Bernardo pulled a knife from the block on the kitchen counter and lunged at Beltran. A shot rang out. Bernardo and Beltran were fighting (they were both big men, Espinosa is much smaller by comparison). A door opened and Odanis appeared. Espinosa told her to close the door and Teresa told her to lock her door. Teresa then told Espinosa to tell Beltran not to kill Bernardo. She went back into her room. She said "I don't want the police to come. I don't want . . . problems." (R 2037-40).

Teresa was hysterical. Bernardo was on the floor and Beltran was hitting Bernardo with the knife, and then kicked him in the face and body. Beltran was all bloody. The knife was in his hand. The gun was in his belt. He turned around "like a mad man. He would wipe his blood off. And he saw Teresita in the room. He came over and stabbed her." Beltran stabbed Teresa, pushed her, she fell on the bed and he stabbed her with the knife. Espinosa tried to pull Beltran off Teresa, but Beltran was too heavy (R 2041-45).

When Espinosa finally pushed Beltran away, Teresa was

still moving; there was blood everywhere; Beltran grabbed Espinosa, who feared that he, too would be stabbed (R 2047).

Espinosa said Beltran grabbed him and said that the little girl had seen him, and he was not going to risk rotting in jail because of her. Espinosa protested that she did not see anything, but Beltran did not want any risk. He dragged Espinosa to Odanis's door with the knife in his hand. Espinosa testified "I really thought I was going to die." Beltran said, "Young girl, your mom says for you to open the door." Odanis opened her door. Beltran handed Espinosa the knife, pointed the gun at him and ordered Espinosa to kill Odanis. Beltran grabbed Odanis and covered her mouth, all the while pointing the gun at Espinosa. Beltran pushed Odanis to the floor and cocked the gun. "I knew that he was going to shoot me, so I had to do something and I stabbed - - I wounded her in her arm to make him believe that I was killing the girl." (R 2049 to 2054).

Espinosa was adamant that he stabbed Odanis in the arm to avoid harming her, "So, to make him believe that I'm killing the girl, I hit her once on the arm." The telephone rang and Beltran went to pull it from the wall. Espinosa wanted to escape with Odanis, but she was unconscious, and he could not carry her away before Beltran returned (R 2055-57).

In the meantime, Espinosa saw that Beltran went back into Teresa's room carrying the telephone cord. Beltran "said he had to finish something." Espinosa saw Beltran on top of Teresa's body, after which Beltran returned to Odanis's room. Espinosa dropped the knife, told Beltran that Odanis was dead and they should leave. Henry walked fast toward the door, but Beltran was not behind him (R 2058-62).

Espinosa ran to his car to go for help, but just as he found his keys, Beltran appeared with the gun, angry that Espinosa had tried to trick him about Odanis. Beltran brought the whiskey box with the money and the knife into the car. Beltran was soaked in blood. The red shorts on which the specks of blood had been found, were on the floor of the car where Beltran placed the box and the knife (R 2064-68).

In the car, Beltran pointed the gun at Espinosa and asked how many children were in the house. Espinosa lied to protect Odenia and said there was just the one girl. Beltran threatened Espinosa that if he lied, or if he told anyone, he (Beltran) would harm Espinosa's daughters in Nicaragua, or his two sons in Miami (R 2069 to 2070).

They drove to Espinosa's house. Beltran had the money, the knife and the revolver. Beltran had a deep knife wound in his hand. He washed his hand and told Espinosa to take

off his clothes to throw them away, even though Espinosa's clothes were clean. They placed the clothes in bags, changed and threw the bags into a garbage dumpster. Then, Beltran told Espinosa to drive to Key Biscayne where Beltran threw the knife and the gun into the water (R 2072 to 2077).

After that, they drove to the Lanzas' house, the people Beltran had helped to move from Louisiana. The money was in a brown paper bag. Beltran had thrown the whiskey box away with the clothes. Beltran told Mrs. Lanza that he cut his hand repairing his car, and that the money was a loan to open a business. Beltran took some of the money to get medical attention for his hand. He asked Mrs. Lanza to keep the money for him. She put it in her closet (R 2077 to 2080).

Espinosa drove Beltran to a clinic for treatment. He did not go to the police because of the threat against his children. Espinosa told Beltran that he did not want him in his home any more (R 2080-82).

Espinosa was confused. He thought about going to a priest or calling the police. The next morning, he saw his picture on television and learned that Odanis survived. He was concerned for her, and glad that she had survived to "help me tell really everything that had occurred." That night Espinosa was arrested while leaving his fiance's apartment (R 2083 to 2086).

Espinosa was questioned by Detective Santos. He was handcuffed to the leg of a chair in a small room. He denied killing anyone. The detective left for a long time, and when he returned, kicked the door open, grabbed Espinosa by the hair and continued the interrogation in that manner. Espinosa had wanted to confide in someone, but the detective was much too hostile (R 2088 to 2091).

Espinosa denied stabbing Odanis more than one time in the arm. He denied any involvement in the stabbing, shooting or strangling of Bernardo or Teresa Rodriguez (R 2064).

## SUMMARY OF THE ARGUMENT

The overall theme that pervaded these proceedings was one of judicial economy and concern for victims rather than for the defendant on trial for his life. That theme is the basis for the rulings which create the issues on appeal.

The judge said during trial, that if there is a first degree murder conviction, the sentencing phase would begin within hours of the verdict. The verdict was returned on September 7th. The sentencing phase commenced on September 9th (R 1295, 2482).

After imposing the death sentence on Henry Espinosa, and after hearing argument on Espinosa's motion for new trial, the judge said (R 2787 to 2788) (emphasis added):

> I am going to say something on the record now because I want the appellate court to think about it when they decide this case.
>
> My whole theory of justice is based upon the thing that is on the wall behind me . . . "We who seek the truth labor here for justice." I'd only like the appellate courts . . . when they decide this case . . . I would like to add one thing, that I do not believe that the word "justice" in that phrase applies only to the defendants. I think the word "justice" applies just as much to the victims and the victim and I think when they decide this case, I think they should give that some consideration.

Point I contends that the joint trial with Beltran deprived Espinosa of due process and a fair trial because of

the irreconcilable and mutually antagonistic defenses presented by the defendants, the barrage of incriminatory argument from and vicious cross-examination by Beltran's counsel; and by the trial court's refusal to allow Espinosa to present an important aspect of his defense due to its claimed prejudice to the co-defendant Beltran.

Point II contends that the trial court erred in refusing to allow Espinosa present two critical aspects of his defense, first that he was tricked into a drug deal by the victim Bernardo Rodriguez who had been convicted of felony trafficking in narcotics and was on federal probation at the time of his death; and second, that it was co-defendant Beltran, nicknamed The Beast, formerly the head of a Nicaraguan death squad, no novice at brutal and violent acts, who snapped totally out of control and murdered Bernardo and Teresa Rodriguez and stabbed Odanis.

Point III contends that the trial court erred in refusing to sever Count III, attempted first degree murder of Odanis Rodriguez from the other counts, because Espinosa's defense was different on that count; he wanted to testify on the murder counts and not the attempted murder count; and most importantly, when it came time for the jury to deliberate and recommend a sentence for the first degree

murder conviction of Teresa Rodriguez, the jury had been tainted and prejudiced by the evidence about the stabbing of young Odanis.

Point IV raises nine separate, meritorious reasons why the death sentence must be vacated for a new sentencing hearing before a new jury: the trial judge refused to allow a reasonable delay in the proceedings, and refused to approve monies for counsel to bring Espinosa's family from Guatemala to testify about his history of mental and physical abuse as a child, in violation of the principle that a capital defendant may present evidence in mitigation to spare his life; the court erred in finding certain aggravating circumstance instructions applicable; the court failed to give defendant's requested instruction on the role of the jury; the court erred in refusing to allow Espinosa to present as a defense witness in mitigation, his former assistant public defender and through her, introducing examples of his artistic talent which would have persuaded the jury against the death penalty for this gentle, artistic man; the court erred in cutting short Espinosa's narrative presentation to the jury in his own defense; the court erred in failing to empanel a new jury to make a sentencing recommendation since the trial jury was prejudiced and tainted by the evidence that young Odanis

Rodriguez had been stabbed repeatedly and left for dead; the application of the death penalty violated the eighth and fourteenth amendments; imposition of the death penalty in this case is disproportional and impermissibly applied.

Point V contends that the cumulative effect of a number of the trial court's rulings cannot be considered harmless and require a new trial where the trial judge refused to allow Espinosa monies to bring a leading national expert in the area of eyewitness identification; where the court refused to give a jury instruction on specific intent; where the trial court refused to suppress the statements made by Espinosa given in a torturous interrogation during which he was handcuffed to the leg of a chair, and had his hair yanked by the detective; and where the trial judge allowed the serologist to testify about statistics and percentages of blood types in the population where her statistics were not recent, and were not necessarily accurate for the demographics in Dade County following the influx of refugees in the early 1980's.

Point VI contends that the Harmless Error Rule cannot salvage the conviction and sentence on appeal, and Point VI adopts all issues and arguments of the co-defendant in the companion appeal, which may be applicable to Henry Espinosa.

## POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ESPINOSA'S REPEATED MOTIONS FOR SEVERANCE DUE TO THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY HIS CO-DEFENDANT'S IRRECONCILABLE AND ANTAGONISTIC DEFENSES, AND BY THE COURT'S REFUSAL TO ALLOW ESPINOSA TO PRESENT HIS FULL DEFENSE, IN VIOLATION OF THE RIGHTS GUARANTEED BY ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

When the state of Florida decides to seek the ultimate penalty in a criminal case, then it owes the defendant the full benefit of all fundamental rights guaranteed by the state and federal constitutions.

Throughout this case, both the trial judge and the prosecutor expressed great concern for judicial economy and for the costs of this prosecution to the taxpayers of Florida. They also expressed their great concern for the victims, which is admirable, but not when it supersedes or violates the fundamental rights of the accused.

We recognize that a young child was stabbed and almost died. We recognize that her parents were killed by shooting, stabbing and/or strangulation. We do not in any way mean to diminish the serious nature of these offenses or the lasting effect this has had on the two Rodriguez children.

But when the state decides to take a life in the name of justice, then emotion, publicity and monetary considerations

must be balanced as a second priority, so that everything possible will be done to ensure that the trial is a fair one.

We believe that every defendant subject to the death penalty ought to be tried separately from any other defendant unless all defendants, the state and the court stipulate and agree to a joint trial. This may be more expensive to the taxpayers in the first instance, and it may require victims to testify more than once, but it is the only way that we who labor in the Florida system of criminal justice can be sure that each defendant has a fair trial before being found guilty and sentenced to death.

And if this Court is not prepared to make it the law of Florida that every defendant facing the death penalty is entitled to a separate trial, then we present the following clear demonstration that in this one case, this particular defendant Henry Jose Espinosa did not receive a fair trial.

Antagonistic Defenses

Nothing is more remarkable than the degree to which the defense of Henry Espinosa was antagonistic to that of co-defendant Mauricio Beltran. Long before the trial commenced it was apparent that Beltran would blame the homicides and the stabbing of the child solely on Espinosa, and Espinosa on Beltran. From opening statement to the conclusion of the

penalty phase, Espinosa had to defend himself against not only the accusations of the State of Florida, but also those of a second, vociferous and aggressive accusor as well.

The trial of Henry Espinosa was thereby pervaded with a character of unfairness which renders the trial court's failure to grant a severance a serious, prejudicial abuse of discretion. Espinosa's convictions and sentence of death must be reversed.

In deciding that a motion for severance is a discretionary matter for a judge, the courts of Florida have nevertheless recognized that severance would be liberally granted whenever a potential prejudice is likely to arise in the course of a trial. Menendez v. State, 368 So.2d 1278 (Fla. 1979). As this Court held in Crum v. State, 398 So.2d 810, 811 to 812 (Fla. 1981):

> The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, efficiency and convenience.

Rule 3.152(b)(1)(i) of the Florida Rules of Criminal Procedure, provides for severance before trial:

> . . . upon a showing that such order is necessary to protect the defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of one or more of the defendants.

This rule is consistent with the minimum standards promulgated by the American Bar Association. ABA Standard for Criminal Justice 13-2.1(b) (2d Ed. 1980).

The federal standard, that a severance is compelled if the defenses are antagonistic and mutually exclusive, is best stated in United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir., Unit B, 1981) (citations omitted):

> . . . we hold that the defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant. In such a situation, the co-defendants do indeed become the government's best witnesses against each other. Where two defendants present defenses that are antagonistic at their core, a substantial possiblity exists that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty . . .

While federal caselaw is certainly applicable, this court's decision in Crum should control the issue here. In that case, Preston Crum and his brother Marvin were indicted and tried together for first degree murder. Preston moved for a severance, alleging that his defense and that of brother/co-defendant Marvin were antagonistic and warranted a severance. Preston alleged that "Marvin would accuse him of

singularly committing the murder for which the two of them were charged." 398 So.2d at 811.

The trial court denied the motion for severance, and this Court reversed stating that: "[b]y denying the motion, the trial court forced Preston to stand trial before two accusors: the state and his co-defendant." 398 So.2d at 811-12. Espinosa, too, was forced "to stand trial before two accusers." Ibid.

The First District Court of Appeal in Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981), reached the same conclusion under similar circumstances, and in Roundtree v. State, 546 So.2d 1042 (Fla. 1989), this Court reversed a conviction and death sentence, and remanded the cause "for a new trial in which Roundtree is to be tried separately from his codefendant Brown." The facts showed that at trial both Roundtree and Brown accused each other of being solely responsible for the murder for which they were charged.

While it is axiomatic that no defendant is entitled to a perfect trial, it is equally clear that each defendant on trial is entitled to fair trial which means an independent determination by the jury of that defendant's guilt or innocence.

The record reflects that early on, Espinosa filed a

motion for a separate trial from Beltran, alleging that their defenses were mutually exclusive (R 76). Beltran's counsel told the court that Beltran was going to testify, and that his testimony would be that Espinosa was totally responsible for the crimes charged, thus warning the trial court that Espinosa would be prosecuted not only by the state of Florida, but also by the co-defendant. A second pretrial motion for severance of defendants was filed (R 138).

The record reflects that at a pretrial hearing on June 10, 1987, Beltran moved for a severance because both defendants had been represented by the public defender for a period of about six months after their arrest. At that time, the state argued that the remedy was not a severance, but rather to inquire of Espinosa whether he waived the conflict. The conflict, they alleged, was Espinosa's, not Beltran's (R 442 to 446).

Beltran's counsel also argued antagonistic defenses. The judge stated, "I don't like to try cases separately, okay. I think it is a waste of everybody's time." (R 457) (emphasis added).

The next day, June 11, 1987, Beltran's counsel again argued antagonistic defenses (R 468), and the court ruled

> Well, I think everyone knows that antagonistic defenses in and of themselves are not a basis for

> a severance. In fact, most judges like to sit back and let the defense attorneys do whatever they want . . . and accuse anybody of anything they want. I don't think that the law has ever said that that is unfair to either (R 469).

Espinosa's public defender argued the federal law, that when antagonism reaches the situation where defenses are irreconcilable so that the jury has to believe one and thus reject the other, that requires a severance. The court said,

> . . . I don't think this Court is bound by - - I think this Court is bound by the Florida law on that particular subject and not federal law, okay? And that's the position I am going to take anyhow, okay? (R 471).

The prosecutor's argument was, essentially, that avoiding inconvenience to the system was paramount to defendants' constitutional rights; that Odenia and Odanis Rodriguez would suffer trauma by having to testify at more than one trial; and that the last-tried defendant would be "randomly favor-[ed]" as a result of the advantage of knowing the state's case (R 488 to 489). Of course the state would not want a defendant to be "favored" in any way. The severance was denied (R 494).

After the trial judge determined that Espinosa specifically wanted Assistant Public Defenders Ward and Smith to continue to represent him, and that he specifically waived

any conflict in their representation (R 553, 554), Espinosa again sought a severance on grounds that he would be prosecuted by both the state and by Beltran (R 553, 554).

Again, the court pointed out "that the State of Florida has rights also as well as the defendants" (R 561); "[A]ll the case law indicates that all I have to do is assure you of a fair trial" (R 564); and "There is really no basis for a motion to sever. You are talking about rights here. Nobody is talking about the rights of the witnesses and everything else, as talked about in all of the Florida cases . . . But they're also young victims" (R 571) (emphasis added).

At that posture of the proceedings, the trial judge again denied the motion to sever, but entered an order, over Espinosa's objections, removing Espinosa's lawyers from the case (R 573). The Public Defender's Office was disqualified from representing Henry Espinosa (R 575) (R 134). That decision was litigated and ultimately was upheld by the Third District Court of Appeal. As a result of denying the motion to sever, Espinosa was deprived of the attorneys he wanted to represent him. In April of 1988 a new attorney was appointed represent Henry Espinosa (R 608).

Just prior to trial on August 29, 1988, there was another hearing on the motion for severance. Espinosa's

counsel argued that Espinosa would testify and blame Beltran totally; and Beltran's counsel represented to the court that Beltran was going to testify consistent with his statement which blamed Espinosa totally. The defendants would become the best witnesses, and the most agressive prosecutors against each other in the purest sense of mutually exclusive and irreconcilable defenses (R 677 to 692). Nonetheless, the motion for severance was denied (R 798).

Indeed, counsels' arguments were prophetic. The very potential for prejudice argued by counsel, became reality at the trial.

Defense counsel for Beltran repeatedly argued Espinosa's guilt to the jury. For example, during opening statement, counsel argued that when Beltran and Espinosa arrived at the Rodriguez house that night, Beltran stayed outside sitting on the doorstep and Espinosa went in. Beltran, he said, heard a commotion and went inside, where he found Bernardo Rodriguez and Espinosa fighting. While trying to separate them, Beltran was cut in the hand. Then, Teresa Rodriguez appeared and pointed a gun at Espinosa. "Henry has taken the gun away from Mrs. Rodriguez and has shot Mr. Rodriguez, okay?" (R 1215 to 1216), after which "Henry Espinosa goes into the bedroom of the house." Beltran was physically unable to have

strangled Teresa Rodriguez with the telephone cord, counsel argued, because of the deep cut in his hand (R 1217).

Counsel continued to pummel Espinosa (R 1218 to 1221):

> Mr. Espinosa goes in, takes this woman, gets on top of her and stabs her, stabs her . . .
>
> . . . she had a gash right here on her belly that [the lead investigator] could actually see her spine from there.
>
> This was Mr. Espinosa. Mr. Beltran was not even in the bedroom.
>
> What happens? Now, remember, Beltran doesn't know the girls. He has no beef with these people. He has no problems with these people. He has no personal probelms with them, no business problems with them, nothing at all.
>
> * * *
>
> And as horrible as this case may be, after this little girl has been stabbed all these times,
>
> Espinosa says: There is another one. There is another one in the bedroom.
>
> And Maruicio told Henry: Let's get out of here, get out of here, go.
>
> Espinosa says there was some money on top of the table. . .
>
> * * *
>
> He says: Take the money. He owes me that money. That's my money. That's my money. That's what Espinosa says to Beltran. Take it. He owes me that money.

* * *

> . . . Mr. Beltran's mistake was not wanting to turn in Henry Espinosa because they were friends.
>
> And what does Beltran do? He helped Espinosa throw the knife and the gun in Key Biscayne in the water.

* * *

> He had nothing, nothing to do with killing these people, nothing at all.

The record reflects that Henry Espinosa was subjected to a vigorous cross examination by the state (R 2091 to 2119), after which he was every bit as vigorously and viciously cross examined by counsel for Beltran (R 2119 to 2142). At that point, the prosecutors could just sit back, relax and let the co-defendant do their job for them:

Beltran's counsel accused Espinosa of involvement in cocaine and marijuana deals with Bernardo Rodriguez (R 2127);

Beltran's counsel asked, "You mean to tell the jury that Mauricio Beltran who really doesn't know this Bernardo Rodriguez, he gets into a fight with Bernardo Rodriguez because the machine gun people are coming?" (R 2134 to 2135);

"What I want to know is are you telling this jury that Mauricio Beltran gets into a violent fight with this man that he doesn't know over this marijuana that you are supposed to drive or the machine gun people . . . are coming?" (R 2135);

"What you are telling us here - - this is the first time you've told anyone this story, haven't you? * * * I mean other than your lawyer." (R 2136);

"Now, you are telling us also that when Mauricio Beltran was in the car, he asked you specifically if there were any other children in the house? * * * He didn't know that family, did he? * * * Well, isn't it true, Mr. Espinosa, that it was you who went to Odenia's bedroom and tried the door? *** You never tried the door? * * * He didn't know there were other children in the house, did he? But you did, didn't you? You knew there was another girl in there, didn't you? * * * Didn't you tell him: Get the money from the table, he owes me that money? * * * You never told him that? * * * And you never tried Odenia's door? * * *" (R 2138 to 2139).

Beltran's counsel then grilled Espinosa about whether he killed Bernardo Rodriguez and Teresa Rodriguez; whether he had had marital problems; and whether he had had a business disagreement with Bernardo (R 2140); and then, about his failure to tell the police what had happened; why he did not visit Odanis in the hospital; and asked why Espinosa felt threatened by Beltran not to go to the police, but not sufficiently threatened to tell him to leave his house (R 2143).

The prosecutors must have been delighted with this excellent assistance from the defense camp, but the best was yet to come. In closig argument, Beltran's counsel argued that Espinosa was involved with Bernardo Rodriguez in the dope business (R 2214); he told the jury that Espinosa killed Teresa because she knew and could identify him (R 2215); told the jury not to believe Espinosa (R 2216); referred to Espinosa's testimony as "Amazing Stories;" (R 2217); said that all of the evidence points to Esinosa, and that Espinosa had a motive (R 2218); he argued again that Espinosa committed the "senseless murder" of Teresa Rodriguez so she would not identify him (R 2220); he aruged that Beltran had no motive, that this was a problem between drug dealers (R 2224); he argued that Espinosa stopped to "take care" of the witesses, Teresa and Odanis (R 2225); and that when Espinosa stabbed Odanis, his motive was to eliminate a witness who could identify him (R 2226).

After trial, defense counsel filed a motion for new trial alleging as one of the grounds, the denial of a severance (R 2745 to 2758).

If ever an appellate court had before it a case in which one co-defendant was the prosecution's best witness against the other, this is the case.

State and federal constitutional due process principles soundly reject this method of prosecution. It creates an intolerable atmosphere of hostility which is inconsistent with the constitutional guarantees of a fair trial.

The most telling, supporting evidence of this fact is that after Espinosa spent several hours on direct and cross examination, co-defendant Beltran changed his mind and refused to testify in his own behalf, much to everyone's surprise. Obviously, the impact of Espinosa's testimony, was devastating to Beltran to the extent that he suddenly abandoned his previously stated intention to testify (R 1858). "After seeing what goes on, it's his desire not to testify." (R 2143 to 2145).

Espinosa was subject to constant incrimination from Beltran's counsel, including the vigorous argument and vicious cross examination outlined above.

Espinosa was denied his fundamental right to a fair trial, solely for judicial economy. As this case developed through trial, there was more than mere general antagonism among co-defendants; this was a classic case of totally mutually exclusive and irreconcilable defenses justifying a severance of defendants to ensure a fair trial.

The extent of conflict and the degree to which Espinosa was attacked by his co-defendant's counsel was extraordinary. Nothing Espinosa was able to do, or could have done, could have mustered the Herculean efforts required to avoid the inherent prejudice he suffered by virtue of this joint trial. Unless this Court is prepared to abolish altogether antagonistic defenses as a basis for severance, it must grant relief to Espinosa for the remarkable unfairness visited upon him at his joint trial. Espinosa should be granted a new trial at which he is tried alone and fairly, by a single accusor on behalf of the state alone.

Espinosa Could Not Defend Himself in a Joint Trial

If it is possible that any aspect of this case may be even more remarkable than the degree of antagonism between these defendants, then it is the trial court's ruling precluding Espinosa from presenting a critical aspect of his theory of defense. The court ruled that Espinosa could not present evidence that Beltran, also known as The Beast, had a history of violent behavior in Nicaragua, because of the prejudice which would be visted on Beltran as a result.

A key prong of Espinosa's defense at trial, was that co-defendant Mauricio Beltran, when confronted by Teresa Rodriguez holding a pointed pistol and threats by both Teresa and

Bernardo Rodriguez, simply "snapped," meaning that he flew into an uncontrollable rage and proceeded by himself, to systematically and brutally murder Bernardo and Teresa, and to then savagely attempt to murder Odanis Rodriguez, their 11-year old daughter by stabbing her 16 times with a butcher knife. Evidence showed that Teresa Rodriguez was stabbed five or six times and also suffocated and strangled; Bernardo was shot with a death wound to the chest, and then stabbed repeatedly in the throat, kicked and punched.

When the trial court limited the presentation of Espinosa's "Beast" defense in opening statement, counsel moved for a mistrial and a severance which were denied (R 1163 to 1176). That ruling forced Espinosa to face trial for his life, without his complete defense. Counsel vigorouly argued this again on motion for new trial (R 2766 to 2774):

The court refused to allow Espinosa to testify in support of his defense that Beltran went berserk and committed the killings himself, that Beltran had previously told him that while in Nicaragua, he was chief of a group called the "Vengadores," translated " Avengers;" and that as chief of this group, he was known as "La Bestia," or The Beast.

As a former member of General Somoza's internal security forces, Espinosa was well aware of the activities of the

"Vengadores." Counsel proffered that in desperation, in the last days of the Nicaraguan war before the Communist Sandinistas took power, General Anastasio Somoza pardoned all convicted murderers and violent criminals, naming them the "Vengadores." This group took to the mountains and under the direction of Beltran, "La Bestia," the Beast, systematically proceeded to torture, maim and murder thousands of people.

Although they did not know each other in Nicaragua, in Miami, Beltran confided his "Vengadores" activities to Espinosa, including an incident in which after killing some suspected Sandinistas, Beltran personally ripped out and ate the heart of one of the dead Communists.

One of the state's witnesses, Alba Lanza, was a close friend of Mauricio Beltran. On pretrial deposition, she testified that once Beltran learned that Espinosa had been arrested, Beltran blurted out to Mrs. Lanza and her son, "The Beast is in trouble." This reference is made in Espinosa's motion for new trial at page 5. App. 5. The deposition of Alba Lanza is not in the record on appeal, however, it is the subject of a motion to supplement the record filed with this brief, and copies of the relevant pages are included in the Appendix as App. 10 to 12.

Due to the trial court's prior rulings, counsel was precluded from asking Mrs. Lanza about this, and was precluded from calling other available witnesses who were prepared to testify about "the Beast" and his activities with the "Vengadores."

Considering the brutality of the crimes; the lack of evidence that Espinosa had problems with the Rodriguezes; the positive testimony from Odanis about what a good friend Espinosa had been to her, her sister and their parents; and by contrast, considering that Beltran had no prior relationship or friendship with them as Espinosa did, the court's refusal to allow Espinosa to develop "La Bestia" and "Vengadores" evidence, totally deprived him of the corroboration he needed the jury to hear.

It was Espinosa's contention that he had no motive whatever to commit unspeakable brutal acts on his friends; and that with no criminal record and no prior history of drug involvement, in fact he did not do these acts.

Espinosa testified that he witnessed Beltran commit the acts as if in a wild, animal-like rage (R 2043, 2050). Yes, "The Beast [was] in trouble."

Any potential prejudice to Beltran would have been avoided by separate trials, and the serious prejudice to

Espinosa would not have occurred because he would have been able to present this evidence of great probative value at trial. In considering the reasonableness of Espinosa's defense, the jury should have been allowed to consider the uncontested facts about "La Bestia," Beltran The Beast, as head of the maniacal "Vengadores" in deciding whether Beltran in fact, acted alone to commit these crimes.

The court improperly weighed the right of Espinosa to present his defense with credible tesimony, against Beltran's right to be tried free of prejudice, and sided with Beltran. That decision should never have had to be made.

If the court felt that Beltran would be unduly prejudiced by admission of this evidence, rather than effectively gutting Espinosa's right to present his defense, the court should have severed the defendants and tried them separately. That way, they both would have received a fair trial. This way, no one received a fair trial.

For all of the foregoing reasons, we implore the Court to reverse the convictions and remand this cause to the trial court for a new, separate and fair trial.

## POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PRECLUDING TWO CRITICAL ASPECTS OF ESPINOSA'S DEFENSE, THE CRIMINAL BACKGROUND OF BERNARDO RODRIGUEZ, AND THE MILITARY KILLER BACKGROUND OF MAURICIO BELTRAN, IN VIOLATION OF ESPINOSA'S RIGHTS HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The sixth amendment is a compact statement of the rights necessary to a full defense. Because those rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the fourteenth amendment, to defendants in the courts of the states. The sixth amendment guarantees that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses and the orderly introduction of evidence. The sixth amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. Faretta v. California, 422 U.S. 812, 818 (1975).

### Precluded Evidence Re: Bernardo Rodriguez

The record reflects that the state filed a pretrial motion in limine to preclude Espinosa from mentioning Bernardo Rodriguez's federal conviction for trafficking in marijuana or his probation status for that conviction (R 65).

Espinosa's counsel argued that his theory of defense was that Bernardo Rodriguez was a drug trafficker and was on federal probation when he was killed; Bernardo had brought Espinosa to his house on false pretenses on July 10th, telling him that he had trucks for Espinosa to drive, when he really wanted Espinosa to drive marijuana to New York because his driver had backed out. When Espinosa refused, they began to argue, and Beltran ended up killing Bernardo and Teresa Rodriguez (R 792 to 793).

In addition to the dump truck in the Rodriguez driveway, there was also a Grand Prix belonging to Maria Castellanos. At her house, the police found suspected marijuana, a beeper and drug paraphernalia (R 1901 to 1925).

It was critical to Espinosa's defense to show that Bernardo set Espinosa up for a drug deal, and when Espinosa refused, Bernardo and his wife went crazy and tried to force Espinosa by threat, at gunpoint to do it. When Beltran interfered and grabbed the gun, the situation escalated (R 792 to 793). The trial judge reserved ruling on the state's motion in limine (R 793).

During trial, counsel again argued that to disallow relevant evidence about Bernardo's conviction would "cut the heart out of [Espinosa's] defense" (R 1128).

When counsel informed the trial judge that he wanted to question Detective Santos about whether Bernardo Rodriguez had been convicted of a crime, the judge said there was no rule of law to allow that. Counsel argued that the rule was for impeachment, not to protect dead people and that Espinosa had a right to present his defense. The trial court said he did not (R 1509). The court reserved ruling on whether counsel could bring in the arresting officer or a certificate from federal court (R 1505 to 1512).

The court had ruled that Espinosa could not "under any conditions - and I will admonish him and I will hold him in contempt if he brings out anything regarding the conviction or record of this gentleman. That is not allowed (R 1131-32). Espinosa moved for a mistrial. It was denied (R 1135).

The court refused to permit Espinosa, in any fashion, to testify or to develop evidence through cross examation of other witnesses, or by calling his own witnesses or by introduction of certified copies of court documents, that Bernardo Rodriguez was on federal probation for felony drug trafficking in the Southern District of Florida. It was an abuse of discretion for the trial court to refuse to allow Espinosa to present this critical proof at trial.

In his defense, Espinosa called one of the state's lead homicide detectives (R 1899) and one of its fingerprint experts (R 1991) to establish that there was a secondary crime scene, namely the stash or dope house which belonged to Bernardo Rodriguez's friend, Maria Castellanos; that Bernardo's fingerprints were positively matched inside the dope house (R 1954); a beeper in the Rodriguez kitchen displayed the exact telephone number and code as a beeper found in the dope house (R 1917 to 1920); and the Grand Prix in the Rodriguez driveway belonged to Maria Castellanos (R 1903). Bernardo Rodriguez's fingerprints were found in Castellanos's car (R 1952); and inside her house, the police found in excess of 1000 pounds of suspected marijuana, firearms and assorted drug paraphernalia indicative of a fully-functioning dope sales operation (R 1911 to 1936).

Whatever prejudice the state or the deceased Bernardo Rodriguez might have suffered by introduction of the uncontradicted evidence that he was a convicted felon marijuana trafficker on probation, was substantitally and totally outweighed by Espinosa's need for this critical corroboration evidence to support his theory of why he was in the Rodriguez house that night, and what actually was going on there.

Counsel argued extensively on motion for new trial that the court abused its discretion in preventing Espinosa from presenting hard evidence that Bernardo Rodriguez was a dope dealer; and that a major portion of Espinosa's defense was thus kept from thee jury by the trial judge (R 2760 to 2766).

Precluded Evidence Re: Mauricio Beltran

The trial court abused its discretion in not allowing Espinosa to present through his own testimony, or that of other witnesses, evidence about Beltran and his work and activities in the Nicaraguan military under then-President General Anastasio Somoza.

Because this brief is well over the over the page limit provided by the Rules of Appellate Procedure, we adopt and incorporate by reference as though set forth in its entirety herein, the facts and the argument on the court's refusal to allow Espinosa to present the other critical aspect of his defense, evidence about Beltran, The Beast, which is included in POINT I of this brief, supra.

## POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER COUNT III FROM THE REMAINING COUNTS IN VIOLATION OF ESPINOSA'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Espinosa filed a motion to sever Count III, the charge of attempted murder of Odanis Rodriguez, from the other counts in the indictment (R 68). As grounds, the motion alleged that the charge of attempted murder of the child must be severed from the charges of murder of the parents, in order to allow a fair determination of guilt and innocence on each offense.

Rule 3.152(a)(2)(i) of the Florida Rules of Criminal Procedure provides that where two or more charges of related offenses are joined in a single indictment, the court shall grant a severance of charges on motion of a defendant, upon a showing that such severance is appropriate to promote a fair determination of the defendant's guilt of innocence of each offense. This is precisely why the trial court abused its discretion in denying the motion in this case (R 517 to 519).

Espinosa's defense to the murder counts was different from his defense to the attempted murder charge. But by trying the counts together, the state was able to use the facts surrounding the attempted murder to discredit Espinosa's defense to the murder counts.

Espinosa wanted to testify about the murder charges, but not about the attempted murder charge. He thus, was forced to choose between his right to present a defense and his right to remain silent. The did, of course, give up his fifth amendment right to silence on the attempted murder charge in order to present his defense to the murder charges.

But the most egregious result of trying these charges together was that in the penalty phase, the jury, having heard the details of the stabbing of young Odanis Rodriguez, could not have completely removed that from their minds when deciding the appropriateness of the death penalty for the murder of Odanis's mother, Teresa Rodriguez.

Based upon the court's refusal to sever the counts for the guilt/innocence phase of the trial, then the only way to ensure a fair jury for the penalty phase would have been to empanel a new jury. See Lucas v. State, 490 So.2d 943 (Fla. 1986).

The state's evidence of aggravating factors was not so compelling at the sentencing phase to warrant imposition of the death penalty. We can only surmise that the real reason that the jury voted for death could not have been that the murder of Teresa Rodriguez was especially heinous, atrocious and cruel, but rather because the jury was unable to erase

from their minds the testimony of Odanis Rodriguez, a sweet, appealing 13-year old child who had just been 11 years old for about a month when she was stabbed multiple times and almost died. The jury must have been outraged. And human nature being what it is, they must have kept it in mind as an aggravating factor in spite of the instructions the court gave them about what information they should and should not consider in recommending a sentence.

The medical examiner testified that Teresa Rodriguez was technically alive during the attack, but he could not estimate the length of time that she was conscious and aware of her plight or suffering. The record was insufficient to show that Teresa was mentally aware and suffering. So the only basis that the jury could have applied to vote for the death penalty had to be the testimony of young Odanis, who had been so violently attacked.

Had the offenses been tried separately, then this prejudice would have been avoided. The only other way to eliminate the prejudice would have been to empanel a new jury to hear the sentencing phase. The failure to sever Count III deprived Espinosa of due process and a fair trial.

## POINT IV

THE TRIAL COURT ERRED IN SENTENCING ESPINOSA TO DEATH; THEREBY DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; THE SENTENCE MUST BE VACATED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

### 1. Espinosa Was Denied Time and Money to Present Important Evidence in Mitigation

In the landmark decision of Williams v. New York, 337 U.S. 241 (1949), the Supreme Court held that a sentencing court ought to have before it all relevant information about the defendant in order to impose an appropriate sentence. In a death penalty case that principle ought to doubly apply.

This Court held in Peek v. State, 395 So.2d 492, 497 (Fla. 1981), cert. denied 451 U.S. 964, that under Florida law, the jury may consider other mitigating factors, in addition to those listed in Section 921.141(6), which the defendant proffers as a basis for a sentence less than death. Our "death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated;" and the statutory mitigating factors, "when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his . . . entitlement to a sentence less than death." Peek, supra at 497.

In McCrae v. State, 510 So.2d 874, 880 (Fla. 1987), this Court ordered a new sentencing hearing because the sentencing judge did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors. And in Cooper v. Dugger, 526 So.2d 900, 902 to 903 (Fla. 1988) Justice Barkett held that where the trial judge refused to consider evidence of nonstatutory mitigating circumstances, the defendant was entitled to a new sentencing. That same result is compelled here because the court refused Espinosa an opportunity to gather, and then present such evidence.

On September 9th, a motion was filed on behalf of Espinosa for substitution of penalty phase counsel; continuance of the "death phase" for substitute counsel to prepare; and for authorization of expenses for Espinosa's family to travel from Guatemala to testify at the penalty phase (R 405-409).

The motion alleged that one day before, September 8th, Espinosa informed counsel that he wished to change attorneys for the penalty phase, and that Espinosa had telephoned Robert McGlassen, law professor at University of Texas Law School and director of the Texas Capital Punishment Clinic and Resource Center in Austin. Mr. McGlassen directs an office equivalent to Florida's Capital Collateral Representative.

At Espinosa's request, counsel spoke with Mr. McGlassen who said that he would personally not be able to represent Espinosa, but that on Tuesday, September 13th, he would provide the name of a skilled, experienced death phase attorney who would accept the case. The motion requested that the penalty phase be postponed.

Counsel had already agreed that released alternate jurors, or new substitute jurors could be called if necessary. The state would not be prejudiced. The motion asked the court to schedule a "report re: counsel" for September 14th when the name of substitute counsel would be available.

The motion noted that Espinosa continued to assert his total innocence, and that "in an abundance of caution and fairness, the undersigned urges the Court to grant this delay, as justifiable, to provide the defendant with effective assistance of counsel in the penalty phase." (R 406).

Were Espinosa not indigent, he would be able to hire any new counsel he wanted. He should be treated no differently because he is indigent (R 407):

> He faces a decision by the advisory jury and this Court that could take his life. No consideration of judicial economy or expediency, absent some extremely compelling claim of prejudice, should take precedence over giving the defendant every chance to save his life.

The motion also recited a second highly meritorious

reason for a delay in the penalty phase, which had just been discovered by counsel, that Espinosa had just admitted to counsel for the first time, that he had a history of serious physical and mental child abuse. Due to embarassment, he did not tell counsel previously. But counsel stated in the motion that he believed strongly that this information could form the basis for substantial mitigating evidence at the penalty phase both for the jury and the court.

According to the motion, Espinosa's mother was the source of the abuse. Counsel asked for expense monies to make arrangements for the mother, two brothers and two sisters to obtain visas to travel from Guatemala City to Miami to testify as penalty phase witnesses about the alleged history of mental and physical child abuse of Henry Espinosa.

There is precedent in Dade County for just such a delay, in the penalty phase, based upon an indigent defendant's allegations of substantial mitigating evidence of a history of serious physical and mental abuse as a child. In State v. Jesse Ramirez, 85-16798A, Dade Circuit Judge Steven Robinson delayed the penalty phase of the "Duct Tape I" murder case based upon the representation of defense counsel that they had recently discovered the possibility that Ramirez had been the victim of serious abuse as a child.

Recognizing that if true, the evidence could provide substantial mitigating evidence in the death phase, Judge Robinson delayed the death phase and authorized travel expenses for indigent defendant Ramirez's counsel to fly to Colombia to interview relatives and neighbors in an attempt to develop the mitigation.

In Colombia, not only did counsel confirm what Ramirez had told them, they learned that Ramirez had been the object of torture by family members. This information was eventually admitted by Ramirez who was reluctant even facing the prospect of the death penalty, to reveal his torture as a child.

Based upon the startling new evidence, counsel requested and the court appointed child abuse psychologist experts to evaulate Ramirez and the new information and to analyze its importance as death penalty mitigation. Not all of the information eventually developed by the Ramirez defense team was available for presentation to the jury, which voted 10 to 2 for death. Subsequently, however, when all of the information was presented to Judge Robinson, he overrode the jury recommendation and imposed a sentence of life imprisonment.

The motion next alleged that the mother and siblings were willing to come to Miami to testify about the child abuse and Espinosa's troubled family background (R 408-409).

The trial court was less than receptive to Espinosa's motion. Counsel asked to be heard on the motion (R 2482), and the court said (R 2484, 2485):

> Let me cut it, really. Your motion is of record and everybody has read it.
>
> And frankly, I am not really concerned with anything that's in that motion other than the fact that you have not asked to be relieved. You are ready to proceed.
>
> --
>
> You are well aware of my feelings in all murder cases that we go to the jury as quickly as possible on the second phase of it.

The trial judge was not amenable to appointing a death penalty expert attorney, or allowing expenses to bring the family from Guatemala, and found the very request to be a "subervision of the system" (R 2485-86):

> bringing his family from Guatemala and expending large sums of the State's money to do this and notwithstanding your reference to a case that was heard here in Dade County, which I disagree with the rulings of the Judge 100 percent . . .
>
> . . . I do not agree with it.
>
> . . . I don't believe it's the law. I think it's ludicrous. I think I said ridiculous.
>
> It's hitting at the foundations of the American justice system. There never is any finality anymore that deals with death except death itself.
>
> Now, we have a great system in this country and I think it's being subverted and this motion is a typical example of that subversion of the system.

The court went on to state that if it granted the motion (R 2486 to 2487):

> somebody might think this is legal . . . [and] this is the way we should do things. There will never be anybody except these hard-rock specialists that's ever going to be able to try a death phase anymore.
>
> [While the post-conviction specialists do a good job], that affects very capably a defendant going to the electric chair at the present time,"
>
> And even though that is undermining respect of the entire criminal justice system - and I believe that in the very depths of my heart that that's exactly what it is doing, it's undermining totally our American system of justice.
>
> And I, for one, will have nothing to do with that and rather than let you continue, because there is no question in my mind, your motion is totally denied.

Counsel implored the court for just five or ten minutes of argument, at least to make his record because the motion was filed in good faith (R 2487). Counsel argued what the lawyers found out in the Ramirez case, and the trial judge said (R 2491 to 2492):

> . . . you fail to convince me at all because I wouldn't even allow that testimony . . . and I'm not spending the money to bring witnesses from Guatemala.
>
> I am not depriving the people of the State of Florida of their hard-earned funds to do this, okay?

When counsel argued constitutional issues such as equal protection, the court said that the constitution does not provide these things; that Judge Robinson's ruling is not binding on it; and "I'm older than he is. I've got more trial experience than he has. I've been on the bench longer than he has and I don't have to go by what Judge Robinson did, okay?" (R 2492).

Counsel continued to argue that a solvent defendant could bring witnesses from Guatemala; if the state prosecutes an indigent, then it has to provide him all reasonable expenses and costs to help him prepare a defense. In spite of counsel's protests that he had just learned this information from Espinosa, the court said, "I scheduled this [penalty phase] hearing. I'm not going to unschedule it." (R 2493).

Counsel argued that it was not until the verdict was returned two days before, that he and Espinosa began seriously discussing the death penalty phase, and that is when the history of child abuse first came out. The court said it was Espinosa's decision to wait so long to tell counsel, and that

> I'm sure Mr. and Mrs. Rodriguez and Odanis Rodriguez [the victims] are very interested in his past, okay? (R 2494).

Counsel argued that the jury should hear the evidence and could reject it if they want, but at least hear it fully. But the court said (R 2495 to 2496):

> I consider this totally inappropriate.
>
> I am not going to subvert justice by these seemingly [sic] arguments for justice, okay?
>
> I think it's time we started to think about the victims. The newspapers say it. Everybody says it.
>
> And I think it's about time that Criminal Court Judges in this country get up and said it themselves, including the Supreme Court of Florida and the Supreme Court of the United States.
>
> You can go just so far with technical points and then it becomes ludicrous.
>
> And then the people have no faith in the system, and when the people have no faith that's the important thing.
>
> Mr. Rodriguez, Mrs. Rodriguez, they become unimportant when the whole system is going down the drain by subversion and I consider this so.

The court stated that it wanted the same jury to hear the penalty phase, and that with delay, the hearing would have to be much longer to present witnesses to restate the details of the crime (R 2496). The court then said that counsel did the best job for Espinosa that any lawyer could (R 2497):

> And if I get reversed, that's fine. I mean, that's the way the system works. I got bosses like everybody else, but I also am entitled to my opinion and I've given it to you.

Even the prosecutor keyed in on the real issue here, and told the court that it did not have to decide whether the evidence would be appropriate, just whether a continuance should be granted when the defendant only made counsel aware of the information the day before (R 2497).

Counsel raised and argued this again on motion for new trial. All motions were denied (R 2775 to 2780; 2786; 2788).

Henry Espinosa was entitled to a resonable delay, and a reasonable amount of expense monies from the state for counsel to explore the information, and if confirmed, to bring his family from Guatemala to testify. The jury did not have benefit of this substantial body of information in mitigation when it voted 11 to 1 for death. The trial judge deprived Espinosa of due process and a fair trial in refusing to allow him to present important evidence at the death penalty phase.

2. Penalty Phase Instructions

a. Error To Instruct On Prior Felony Conviction

The trial judge gave the instruction on aggravation for prior felony conviction for the contemporaneous conviction on the second degree murder of Bernardo Rodriguez (R 2714). The state cited Correll v. State, 523 So.2d 562 (Fla. 1988). Defense counsel objected (R 2498 to 2501; 2511 to 2513).

We suggest that under Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987) and Wasko v. State, 505 So.2d 1314 (Fla. 1987), it is improper to aggravate for a contemporaneous. And Espinosa insists that the court's finding of this aggravating factor is in direct conflict with the mitigating factor of no prior criminal record.

b. Error To Instruct On Avoiding Or Preventing Lawful Arrest

The trial judge gave the instruction on aggravation for committing the crime for the purpose of avoiding or preventing lawful arrest (R 2714). Counsel objected on authority of Scull v. State, 533 So. 2d 1137 (Fla. 1988) and Correll, supra (R 2502 to 2505; 2514 to 2516), which provide that in order to order to support this finding, when the victim is not a police officer, the state must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of the witness. Accord, Garron v. State, 528 F.2d 353. 360 (Fla. 1988).

c. Error To Instruct On Heinous, Atrocious And Cruel

The trial judge also gave the heinous, atrocious and cruel aggravation instruction (R 2714) over defense objection that it was unconstitutional pursuant to Maynard v. Cartwright, 108 S.Ct. 1853 (1988) (R 2506 to 2507). In fact, even before trial, Espinosa filed a motion in limine to

exclude heinous, atrocious and cruel, and cold, calculated and premeditated should the proceedings reach that stage, because both were unconstitutionally vague (R 143; 693-96).

At the penalty phase charge conference, counsel also argued that the HAC instruction did not apply because although Teresa Rodriguez had been stabbed, suffocated and strangled, there was no evidence of the extent or length of her suffering. The murder was serious, but not a torture murder (R 2508 to 2508). The facts do not establish that the murder of Teresa Rodriguez was an atrocity. See Garron, 528 So.2d at 360; and subsection 7, infra at 74.

And the jury had heard the testimony about young Odanis's 16 stab wounds, which should be irrelevant to whether the murder of Teresa Rodriguez was heinous, atrocious and cruel but which the jury probably would consider (R 2508).

The state argued Phillips v. State, 476 So.2d 194, 196 (Fla. 1985), in which the victim was stalked by appellant, shot twice in the chest and fled a short distance before being killed. "Mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies." In Phillips, the trial court correctly surmised that between the two series of gunfire the victim must have agonized over his ultimate fate (R 2509).

Mitigating Circumstances

The court agreed to give crime committed under the influence of extreme mental or emotional disturbance and whether defendant appreciated the criminality of his conduct (R 2716). But due to the denial of the request for a fair opportunity develop evidence about Espinosa's childhood abuse, without knowing what an expert ultimately would say about these factors, the defense really had little to argue in support of these factors. The court noted that Espinosa could testify about his abuse as a child, but counsel responded that without corroboration, the evidence would be limited Espinosa's self-serving statements (R 2517 to 2519).

Defense counsel was concerned that the prosecutor would argue the 16 stab wounds to Odanis Rodriguez to aggravate the Teresa Rodriguez murder (R 2522 to 2523). The court directed the state not to mention the stab wounds, and only to argue that Teresa was murdered in order to prevent her from identifying them, "I'm going to allow him to say that that was also the reason for attempting to eliminate Odanis." (R 2526-27). A new jury should have been empaneled. Section 6, infra.

3. Espinosa's Requested Instruction on Jury's Role Was Denied

Espinosa requested an instruction on the jury's role in sentencing citing Mann v. Dugger, 817 F.2d 1471 (11th Cir.

en banc); Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1988), reh.gr.vac. 828 F.2d 1497, reh. 844 F.2d 1464 (R 145).

> . . . although its recomendation on punishment to the Court is advisory, the Court must give any such recommendation great weight and, in fact, the Court must presume a jury's recommendation correct, unless there is absolutely no reasonable basis for it. Only in a situation where the jury's sentence recommendation is clearly erroneous can this Court override it, and impose the alternative possible punishment.

Counsel argued that although this is not yet the law in Florida, it is the only constitutional interpretation of the jury's function in the death penalty process and therefore, it should be the law (R 2528 to 2530).

Evidence Presented to The Jury

The state's only witness at the penalty phase was the associate medical examiner who testified that Teresa Rodriguez's death by stabbing was painful; she was alive when she was suffocated; the death was agonizing; she experienced mental and physical pain and anguish; she could not breathe; she had defensive wounds meaning she knew she was going to die; and that she died a torturous death (R 2540 to 2546).

On cross examination, it was elicited that although her heart was pumping, meaning she was alive, it does not mean that she was mentally alert. The key to suffering is mental awareness (R 2554).

On rebuttal, the state elicited that she was alert long enough to know what was happening and to put up a fight (R 2557).

Henry Espinosa presented a number of character witnesses who testified that he was a pleasant and respectful person who worked, supported his family and treated his children well (R 2559 to 2563); that he was a humble, sincere, good person (R 2577 to 2578); that he was decent, respectful and lived by good principles (R 2582 to 2583); that he was humble, tender and great with children (R 2589); that he is a good, hard-working man and he is innocent (R 2592 to 2596).

4. The Court Erred In Disallowing a Mitigation Witness

The record reflects that Espinosa was going to call as another witness in mitigation, Assistant Public Defender Diane Ward, former counsel for Espinosa, who was removed as counsel due to Beltran's complaints of conflict and prejudice. Counsel planned to admit as exhibits two pieces of handiwork which Henry Espinosa made for Diane Ward while he was in the jail (R 2567). The record does not reflect exactly what these items were, but the undersigned can attest that Espinosa is talented and artistic because she herself received a lovely hand-painted handkerchief from him, a copy a copy of which is in the Appendix as App. 14.

Counsel proffered that Ms. Ward would testify that she came to know Espinosa as a kind, artistic person, and then introduce the items for the jury. Beltran's counsel complained. Because Ms. Ward had previously represented both defendants, she could not testify. Her testimony would not have related to Beltran in any way. The state took no position (R 2567 to 2569).

The court ruled that conflict was not a problem, but that it was "bad precedent for attorneys to . . . and to become witnesses and saying how nice their client is or was." Her testimony would have been her observations as a person, not related to the case, but the court excluded her as a witness in mitigation (R 2570 to 2571):

> . . . on the basis that [she] was part of the defense team and I know of no situation where lawyers are allowed to come in and testify how nice their former clients were, okay?

Counsel reminded the court that this is possible mitigation in a death proceeding, and that if the jury saw Espinosa's handiwork, they might think twice about recommending the death penalty, but court ruled (R 2572 to 2573):

> . . . I don't propose to expand the penalty phases for now or the future every time lawyers get involved with somebody.

* * *

> Lawyers are not in that capacity - we are not witnesses. We are advocates and I am not going to put lawyers in the position where they become anything less or more than advocates.

Counsel had the exhibits marked A-1 for identification, and the undersigned has filed a motion to supplement the record with this composite exhibit that would have been admitted through Diane Ward, had she been allowed to testify (R 2574).

5. The Court Erred in Cutting Short Espinosa's Testimony

Espinosa testified in his own behalf, giving a narrative about his non-involvement in the offenses of which he had been found guilty (R 2601 to 2608). But when the court decided that he had gone on long enough, it said, "I am going to stop this." (R 2608). And when counsel asked if there was one final comment Espinosa wanted to make to the jury, the court said, "Denied." (R 2609). Espinosa rested.

Beltran Blamed Espinosa Totally

Although he did not testify at the guilt-innocence phase of the trial, Beltran did testify at the sentencing phase, and admitted into evidence his 35-page statement to the police, is in the record at R 347 to 381. Beltran blamed Espinosa totally for the crimes: Bernardo Rodriguez and Espinosa were fighting. Beltran tried to separate them; Espinosa grabbed the gun from Teresa; Espinosa shot Bernardo; Beltran never went into the bedroom; Espinosa stabbed Teresa

and Odanis; Espinosa told Beltran to grab the money and said that he had to kill the other child; Beltran told Espinosa he was crazy, and that Beltran was leaving, whereupon Espinosa followed him; they took the money to the Lanza's because Espinosa had no place to keep it and he told Beltran to tell the Lanza's that the money was a loan (R 2619 to 2629).

The Verdict

Less than two hours after retiring to deliberate, the jury returned its advisory sentence of 11 to 1 for the death penalty for Espinosa, and 8 to 4 for the death penalty for Beltran (R 2721, 2732, 2733).

Sentencing was scheduled for October 20th, however for reasons not explained in the record, sentencing was imposed on November 4, 1988 (R 2742).

The Sentencing Order

By written order dated November 4, the court found the following aggravating circumstances as set forth in Section 921.141(5), to apply (R 418 to 421):

(b) defendant was previously convicted of another capital felony or felony involving the use of or threat of, violence. Under Correll, supra, the second degree murder of Bernardo Rodriguez, a contemporaneous conviction for a crime against a different victim, proves this aggravating factor beyond a reasonable doubt;

(d) defendant was engaged in, or an accomplice to, the commission of a burglary. The killing of Teresa Rodriguez during the commission of an armed burglary proves this

aggravating factor beyond a reasonable doubt;

(e) defendant committed the crime for the purpose of avoiding or preventing a lawful arrest. After killing Bernardo, Teresa begged for her life, promising Espinosa, a former neighbor, that she would not call the police. The court found that she was killed because she witnessed the attack on her husband, and could identify the defendants. Convincing evidence of this intention was the subsequent attack on Odanis Rodriguez, who was tricked out of her room so she too could be eliminated as a witness; and

(g) capital felony committed to disrupt or hinder lawful exercise of governmental function. The court recognized that this aggravating circumstance "doubled up" of (e), supra, so it was "not given any additional weight." (R 420 to 421).

The Court found only one statutory and one non-statutory mitigating circumstance applicable: no significant history of prior criminal activity; and the testimony of witnesses who testified that Espinosa was a kind man (which was given "some weight" (R 423, 424).

The court found, balancing the 4 against the 2, that the magnitude of the crime and the surrounding circumstances, the sentence of death was justified (R 425).

6. A New Jury Should Have Been Empaneled

A defendant's right to an impartial jury is fundamental, and is guaranteed by the sixth and fourteenth amendments of the United States Constitution. Livingston v. State, 458 So.2d 235 (Fla. 1984). The right to an impartial sentencing jury is further guaranteed by the eighth amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). The jury plays a critical role in the capital sentencing scheme of Florida. Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1986).

Under these facts, the jury was tainted for purposes of a fair sentencing hearing on one first degree murder charge, where it had already heard evidence about the stabbing of Odanis Rodriguez. The trial court's failure to discharge the entire panel for sentencing deprived Espinosa of his right to a fundamentally fair capital sentencing hearing.

7. Application of the Capital Sentencing Statute to Espinosa Violates The Eighth And Fourteenth Amendments

Under Florida law, no defendant can be sentenced to death unless the aggravating factors outweigh the mitigating factors. Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). Since the aggravating circumstances set forth in Section 921.141(5) actually define those capital crimes to which the death penalty is applicable, they must be proven beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So.2d 1, 8 to 9 (Fla. 1973). The statutory aggravating circumstances are exclusive and no other circumstances may be used to tip the balance in favor of death. Miller v. State, 373 So.2d 882, 885 (Fla. 1979).

In imposing the death penalty on Henry Espinosa, the trial court violated these principles by relying on aggravating circumstances not established by the evidence, and by using nonstatutory aggravating factors in its weighing process. Because the trial court also found two mitigating fac-

tors, the death sentence must be vacated for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

8. Espinosa Adopts Motions Filed by Beltran on Constitutionality of Death Penalty Generally, And as Applied

A number of motions were filed before trial on behalf of co-defendant Mauricio Beltran, challenging the constitutionality of the death penalty under Florida law generally, and as applied in this case. Those motions are in Beltran's record on appeal in the companion case, but not in Espinosa's record. They are adopted and incorporated by reference as though set forth in their entirety herein, and copies are included in the Appendix to this brief as App. 15 to 33.

Those motions include a motion to declare Section 921.141 unconstitutional as a violation of the eighth and fourteenth amendments (App. 15 to 19);

motion to dismiss based upon the arbitrary and capricious application of the death penalty based upon the whim, prejudice or personal judgment of each judge, setting forth a detailed accounting of at least 17 equally dreadful murder cases in which the death penalty was sought by the state, some of which resulted in imposition of a death sentence, and others which did not (App. 20 to 27);

motion to dismiss or preclude and prevent sentencing pursuant to Section 921.141 and 775.082(1) on grounds that

offenses in the same category do not call for identical punishment (App. 28 to 29);

motion to declare Section 922.10, providing for death sentence by electrocution, unconstitutional as cruel and unusual punishment (App. 30);

motion to dismiss because Section 921.141 establishing a procedure for imposition of the death penalty has never been promulgated by adopted by this Court as a rule of procedure, and therefore is unconstitutional (App. 31); and

motion to dismiss indictment or declare death not a possible penalty because aggravating circumstances were not alleged in the indictment in order to confer jurisdiction to impose a sentence of death (App. 32 to 33).

9. Imposition of The Death Penalty Against Espinosa Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment

It is incumbent upon this Court in all capital cases, to objectively review the circumstances to ascertain whether the imposition of the death penalty constitutes a proportional application of the ultimate sentence. In this case, despite the applicability of certain aggravating circumstances, to uphold the imposition of the sentence of death would be inconsistent with the penalties meted other defendants committing similar crimes under like circumstances. As such, the

defendant's sentence of death cannot be sustained consistent with the promise of equal protection, due process, and freedom from cruel and unusual punishment guaranteed by the fifth, sixth, eighth and fourteenth amendments.

Section 921.141(5) establishes an automatic review procedure in this Court to ensure against the disproportional application of the death penalty:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in the light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia . . . can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather an exercise in judgment at all. Dixon v. State, 283 So.2d 1, 10 (Fla. 1973).

Death is reserved only for the most aggravated of murders, and thus is not proportional in a case such as this. Despite the best efforts of those involved in the process, studies have shown the disproportional application of capital punishment. See App. 24 to 27, listing numerous examples which demonstrate the arbitrary and fortuitous manner in which capital prosecutions are disposed pursuant to Section 921.141.

The death penalty must be applied "fairly and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Here, it was not. The trial court found four aggravating circumstances and two mitigating circumstances. The murder of which Espinosa stands convicted is not so extraordinary as to justify the imposition of the extraordinary sentence of death. More importantly, the execution of Henry Espinosa cannot be reconciled with the prison sentences of Robert F. Carr, Ronnie Lee Pouncy, Scott Tyrell Riles, Gary Knopf, Robert Lee Douglas, Joseph Roth, Stanley Morgan, Preston Shands, Jr., Phillip Courtney, Dale James King and James R. Jacobs and numerous others whose offenses are no less pointless or more justifiable, but whose lives were spared (App. 24 to 27).

For all of the foregoing reasons, the sentence of death imposed upon Henry Espinosa must be reversed.

## POINT V

A NUMBER OF THE TRIAL COURT'S RULINGS STANDING ALONE, MIGHT NOT WARRANT A REVERSAL, HOWEVER, THE CUMULATIVE EFFECT OF THOSE RULINGS CANNOT BE CONSIDERED HARMLESS AND REQUIRE A REVERSAL OF THE CAUSE AND REMAND FOR A NEW, FAIR TRIAL.

The defense of this cause was seriously hampered by the trial court's denial of a number of significant motions which would have allowed Espinosa to more fully prepare to present his defense.

### Motion for Expert Witness Expenses for Fingerprint Comparison, Serology and Forensic Pathology

For example, Espinosa filed a motion for expert witness expenses for fingerprint comparison, serology and forensic pathology (R 50). An expert witness for fingerprint comparison was critical in this case because the state presented evidence of one fingerprint alleged to be that of Henry Espinosa, found on the freezer door of the Rodriguez refrigerator. Espinosa adamantly denies that the fingerprint is his. Had the court granted expenses for a fingerprint expert, the defense could possibly have shown that the fingerprint was not Espinosa's, or alternatively that the fingerprint was placed there by fraudulent means.

Motion for Eyewitness Identification Expert

The defense also filed a motion for costs to retain Elizabeth Loftus, Ph.D., a professor of psychology at the University of Washington in Seattle, and a leading expert in the field of eyewitness identification (R 99 to 133). The motion alleges that the state's case relies on Odanis Rodriguez who was nine (this is incorrect, she had just turned 11) years old when she was stabbed and her parents were killed. Odanis was the only eyewitness on the state's witness list to identify Espinosa as the person who stabbed her. Espinosa had already filed a motion to suppress her identification.

The motion detailed some of the myths associated with eyewitness testimony; alleged that Dr. Loftus is a leading national expert in the area of eyewitness identification and has been accepted as an expert in over 100 cases in courts throughout the United States; and attached some 30 pages containing Dr. Loftus's curriculum vitae, a listing of the cases in which she has testified and her publications (R 103 to 133).

Following a hearing at which there was a spirited argument on this motion, the trial judge denied the motion (R 531 to 538).

Motion to Exclude Statistical Blood Evidence and Chart

We first note that no blood of Henry Espinosa was found at the crime scene (R 1805), but that small specks of blood were found on a pair of red shorts in Espinosa's car, which specks were found to be consistent with the blood of Teresa and Odanis Rodriguez, and three and a half of every 100 people (R 1822).

Before the serologist testified, Espinosa moved to preclude her from testifying to statistics about the blood types of certain percentages of the population; and objected to her use of a chart (R 1513). At first, the court was amendable to disallow her statistics, but then decided to reserve ruling (R 1517-18). Counsel argued that the statistics were obtained prior to 1979; and that since that time, the influx of refugees into Dade County may well have created demographics different from the original research, or even the more recent 1987 source book on which her testimony would rely, which did not cover Dade County (R 1686 to 1703). The court ruled that the serologist could testify to the statistics, and could use the chart (R 1703).

The Court Refused to Give the Specific Intent Instruction

Espinosa requested that the court charge the jury on specific intent and circumstantial evidence. The circumstan-

tial evidence instruction is in the record at R 145. The specific intent instruction is not in the record, but is the subject of a motion to supplement filed together with this brief, and a copy of the requested instruction is included in the Appendix to this brief as App. 13.

Counsel reminded the court of his requested specific intent instruction at R 1505. The trial court refused to give both requested instructions, or even a "mere presence without proof of specific intent" instruction (R 2199-2204).

Considered together, these rulings deprived Espinosa of due process and a fair trial, and warrant a reversal and remand for a new trial.

## POINT VI

### THE HARMLESS ERROR RULE CANNOT SALVAGE ESPINOSA'S CONVICTION AND SENTENCE ON APPEAL.

As this court reviews the issues raised in this brief, it must apply the DiGuilio harmless error test to the facts and issues presented, and only if it can say beyond a reasonable doubt that the errors did not effect the jury's verdict, will the judgment and sentence be upheld. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); Thompson v. State, 507 So.2d 1074 (Fla. 1987).

We do not concede that the evidence was overwhelming for reasons discussed below. But for argument's sake, should the Court conclude that "the overwhelming evidence" might allow an affirmance of the conviction, we must remember that the DiGuilio harmless error test, 491 So. 2d at 1139, emphasis added:

> is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

As the Court knows from the record and from this brief, Espinosa testified at length and, arguably, very credibly at trial. Espinosa called two of the prosecution's main law enforcement witnesses to confirm the Bernardo Rodriguez's dope house connection. By contrast, co-defendant Beltran did not testify or call any defense witnesses.

While the state presented evidence of Beltran's bloody fingerprints, and Beltran's blood mixed with the blood of the victims all over the house, no such blood or fingerprint evidence existed as to Espinosa. There was a lone, clean fingerprint on the refrigerator door which was alleged to be that of Henry Espinosa.

The evidence at trial established a clear absence of motive for Espinosa to commit these acts. The only eyewitness, 11 year old Odanis Rodriguez, herself stabbed 16 times and left for dead, had only limited recollection about the events inside the home that evening. She turned 11 years old only one month before, and had just completed fourth grade.

Espinosa denied any involvement in the murders/attempted murder when he was arrested. By contrast, after Beltran's arrest, after a series of initial deceptions and denials, Beltran denied almost completely his own involvement in the crimes, and blamed everything on Espinosa.

While the evidence against Espinosa may have been sufficient to send the case to the jury (counsel argued insufficiency at the close of the state's case and the close of all of the evidence), the case against Espinosa, by any fair standard, can hardly be considered overwhelming.

> The harmless error test, as set forth in Chapman (v. California) and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction . . . Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. DiGuilio, supra, 491 So.2d 1135, citation omitted.

In State v. Lee, 531 So.2d 133, 137 (Fla. 1988), this Court reiterated its strict construction of the Harmless Error Rule, by citing the language of former Chief Justice Traynor of the California Supreme Court in People v. Ross, 67 Cal.2d 64, 85, 429 P.2d 606, 621, 60 Cal. Rptr. 254, 269 (1967), Traynor, C.J. dissenting, rev'd 391 U.S. 470 (1968):

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached

its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

## POINT VII

ESPINOSA ADOPTS ALL ARGUMENTS AND AUTHORITIES RAISED ON BEHALF OF CO-DEFENDANT BELTRAN WHICH ARE APPLICABLE TO HIM.

As and for his final point on appeal, Henry Espinosa would adopt and incorporate by reference all issues, arguments and authorities raised and cited by co-defendant Mauricio Beltran in the companion appeal, No. 73,437, as though set forth in their entirety herein, to the extent that they are applicable to Espinosa, and not adverse to his position in these proceedings.

## CONCLUSION

Henry Espinosa stands before this Court convicted of the most serious of felonies and has been sentenced to the ultimate irrevocable penalty after a constitutionally defective compelled joint trial with his viciously accusatory, self-interested co-defendant.

During trial, the court prohibited Espinosa from presenting critical evidence in support of his theory of his defense: first, that Bernardo Rodriguez was a convicted drug trafficker who was on federal probation at the time of his

death; and second, that co-defendant Mauricio Beltran, known in his home country of Nicaragua as "The Beast," had been the head of a death squad, and was no stranger to violent behavior and brutal murders. This second aspect of defense was precluded because of claimed prejudice to Beltran resulting from the joint trial.

Espinosa was so egregiously prejudiced that he was denied a fair trial, and thus doomed to conviction.

The motivation for many of the trial court's rulings which are challenged on this appeal, may be acscertained from the court's various comments of record which reflect a greater concern for the rights of the victims, than for those of the accused on trial for his life.

Moreover, the penalty phase was even more unfair than the guilt/innocence trial because the trial judge prevented Espinosa from presenting significant evidence in mitigation, rendering the penalty phase fundamentally defective.

Espinosa's requests for time and money to investigate and bring evidence of history of serious abuse as a child were referred to by the court as "subversion of the system," and a waste of the money of the taxpayers of the State of Florida. The imposition of the death penalty under these circumstances, and as compared to other death penalty cases,

was a disproportional application of the ultimate sentence.

Accordingly, Espinosa's convictions and sentence of death must be reversed by this Court and remanded to the trial court for further proceedings with such instructions as the Court deems appropriate.

Respectfully submitted,

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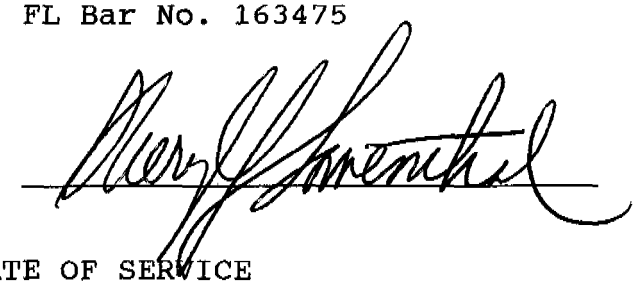

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief of Appellant Henry Espinosa was mailed on September 20, 1989 to the OFFICE OF THE ATTORNEY GENERAL, Suite N-921, 401 N.W. Second Avenue, Miami, FL 33128; to NANCY C. WEAR, Attorney for Mr. Beltran, P.O. Box 144775, Coral Gables, FL 33144-4775; and to Mr. HENRY JOSE ESPINOSA, No. 113994, Florida State Prison, R-3-S-7, P.O. Box 747, Starke, FL 32091.

APPENDIX TO INITIAL BRIEF OF APPELLANT ESPINOSA