**IN THE SUPREME COURT OF FLORIDA**

CASE NO. **73,648**

ROLANDO GARCIA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

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

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# REPLY BRIEF OF APPELLANT ROLANDO GARCIA

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## STATEMENT OF THE CASE AND FACTS

The appellant, Rolando Garcia, respectfully re ies upon the Statement of the Case and Statement of the Facts as described in his initial brief of appellant.

## ARGUMENT

### I.

**THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS TO SEVER THE UNRELATED PAIRS OF HOMICIDES IMPROPERLY JOINED IN THIS INDICTMENT THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

There exists no legitimate justification for the consolidation, and the defendant's compelled coincidental defense, of the three separate and distinct double homicides with which he was charged. No jury, no matter how reasonable or fair-minded, could have been expected to overlook the number of the defendant's alleged homicidal misdeeds or avoid the irresistible temptation to find him guilty of something due to the sheer magnitude of the accusations.

A joinder of offenses involves a presumptive possibility of prejudice to the defendant. King v. United States, 355 F.2d 700 (1st Cir. 1966). To offset this prejudice, there must be at least some benefit to the government and ultimately to the public to justify the joint trial. In this case, the "benefit-to-the-public" side of the balance is empty. Indeed, it appears that "the only real convenience served by permitting a joint trial. . .[was] the convenience of the prosecution in securing a conviction." united States v. Fountz, 540 F.2d 733, 738 (4th Cir. 1976). Because neither convenience nor the hope of judicial economy comported with the guarantee of fairness to the defendant in this case, new separate trials should be granted by

this Court on appeal.

unless a serial offender is irrational or psychotic, his crimes and his victims virtually always share certain common characteristics as well as a degree of relationship. A serial murderer may commit a series of very repetitive crimes in order to satisfy a single unquenchable pathological need. Such circumstances alone do not make multiple offenses triable together, absent shared unique characteristics.

The State suggests that the murders of both Amador/Alfonso and Robledo/Ledo were drug rip-offs which occurred while the defendant and co-defendant Pardo were employed by their drug boss, El Negro. Nowhere does the State suggest any further relationship or reason for the defendant to have been prosecuted for both "drug rip-off" murders at the same time. The two alleged drug rip-offs here are no different from the five child sexual batteries consolidated for trial in Wallis v. State, 14 F.L.W. 2066 (Fla. 5th DCA Opinion filed September 7, 1989). The Wallis court reversed the defendant's convictions for the same reason this Court should:

> The acts alleged and offenses charged in these three Informations, were not "connected acts" or "related offenses" within the meaning of those terms in the rules permitting consolidation (Florida Rules of Criminal Procedure 3.151(a) & (b)) and it was error to consolidate these cases for trial. The acts charged in each Information related to a different victim and an entirely separate and different factual event than that charged in each other Information. The only relationship between the acts and offenses charged is that each relates to the same defendant and the same type of crime. Every defendant has a constitutional right to a fair trial on each criminal accusation without the prejudice that necessarily results from the consolidation for

> trial of criminal charges relating to separate factual events. [citations omitted] Id at 2066.

The "two drug rip-offs" involved here are similarly no different from the defendant's six criminal episodes over a seventy-day period which the State theorized constituted a "one-man crime wave" in violation of Florida's criminal RICO statute in Cannady v. State, 15 F.L.W. D551 (Fla. 3d DCA Opinion filed February 27, 1990). The Cannady court reversed and remanded for separate trials citing the controlling precedent of this Court:

> In State v. Williams, 453 So.2d 824 (Fla. 1984), the controlling authority, the Supreme Court, noting that its ruling is settled law in this state, held that where convictions were obtained on nine consolidated Informations involving acts or transactions occurring over eight different days, and where the offenses were connected only by the fact that they were allegedly committed by the same defendant and were similar in nature, reversal was mandated. This case is indistinguishable. Id at D551.

So is the case sub judice indistinguishable. The Amador/Alfonso and Robledo/Ledo homicides occurred on January 22, 1986, and February 27, 1986, respectively, more than a month apart and at different locations. No relationship existed between the pairs of victims and no "tangible relationship" existed between the offenses. Both crimes were charged together and tried together solely because they were similar in nature and allegedly committed by the same defendants. Neither offense provided any kind of "motive" for the other. None of the

authorities cited by the State in its Brief of Appellee suggest any support for the joint trial of these two unrelated crimes. For the misjoinder of the Amador/Alfonso and Robledo/Ledo homicides alone, the defendant's convictions and sentences should be reversed.

With regard to the Alvaro/Ricard murders, the State offers motive as the justification for its joinder of these counts with the Amador/Alfonso and Robledo/Ledo homicides which ocurred fully three and two months before, respectively. First, the State reads too much into this record. The fairest reading of the evidence in a light most favorable to the State, supports the State's theory that Alvaro, the defendant's drug "boss", had a falling out with the defendant and, in particular, co-defendant Pardo, but fails to provide any direct link between the Amador/Alfonso and Robledo/Ledo cases and the killings of Alvaro and Ricard:

> A. Manuel Pardo told me when we were on the way there that they were going to meet with his boss and they were going to talk about the drug deal and him going to Ohio.
>
> Q. Is that the first time you heard about a boss connection with this defendant and Pardo?
>
> A. Yes.
>
> Q. On the way to that location while you were driving, did you hear anything else as far as any explanation about the boss?
>
> A. No. [TR. 2247-2248]

After a meeting between the defendant, Pardo, and Alvaro, Ribera described Pardo's reaction:

> They just said that -- Manuel Pardo said that he didn't think the deal was going to go on, that he didn't believe, after all he did for El Negro, that this guy was going to screw him, after all he had done for him.
>
> And then Rolando Garcia told Manuel Pardo to take it easy, to calm down, that things were going to work out.
>
> And that's when we got on the Palmetto and started driving toward Pardo's house.
>
> Q. Was there any more discussion about El Negro?
>
> A. As we were getting off, Pardo is still real upset. He drank two valiums in the car and just, if he didn't deliver he was going to kill El Negro because he wasn't goint (sic) to let this guy get away with what he was doing after all he had done for him. [TR. 22501

Later, Ribera explained the reason why Alvaro was upset with the defendants but not the reason for Alvaro's death:

> Q. . . .Was there another time, any time, when the defendant explained to you why he and Pardo were so mad about El Negro?
>
> A. When I dropped Pardo off that -- Rolando got in my car, I asked why is he upset and he goes, "The reason why El Negro is upset is because we ripped off two of his customers and that was Mario and Luis Robledo and El Negro didn't want any more dealings with him." [TR. 22511

Ribera's only reference to the motive for Alvaro's murder was:

> A. That it was time to take care of their -- of their business because they were the laughing stock of the drug -- drug world.
>
> That they were going to kill El Negro because he wasn't delivering after all they did for him, after all the drug deals they had done for him. . . [TR. 22641

Such testimony as the State therefore adduced at trial thus fell short of linking the motive for Alvaro's murder and establishing the "tangible relationship" between that crime and the other homicides charged required to justify joinder. In fact, each of the "motive" cases cited by the State in its Brief of Appellee is materially distinguishable from the circumstances in the case at bar. King v. State, 390 So.2d 315 (Fla. 1980), involved the attempted murder of a counselor immediately following the rape and murder of a woman in a nearby residence following his escape from a work release center. Reasoning, among other things, that the evidence for any of the offenses would have been admissible in which ever one was tried separately, the Court properly held consolidation to be proper.

In Zeigler v. State, 402 So.2d 365 (Fla. 1981), the defendant murdered four people in a single episodic event, thereafter shooting himself in order to make it appear that his fourth victim had actually committed the killings. The events were thereby inseparable.

In Davis v. State, 431 So.2d 325 (Fla. 3d DCA 19831, the Court was reasonable to deny the defendant's motion to sever his charge of murdering a witness to a pending aggravated assault from that aggravated assault charge. Clearly, the best evidence of the defendant's guilt of the first offense in the episode was his homicide of his accuser.

Brown v. State, 502 So.2d 979 (Fla. 1st DCA 19871, which the State characterizes as "directly on target", actually provides the State little or no support for its position. There, the

defendant committed a burglary on Monday. Within two days, the defendant's homicide victim telephoned him and discussed his presence at the victim's house on the day of the burglary. Thus, the Court reasoned, the burglary led directly to the commission of the murder and was the motive. The facts proved by the State were determined by the Court to have established a single criminal episode. Here, the facts show nothing of the kind.

Brown is probably most important for its recognition of the opposite result reached by the Third District in Jones v. State, **497** So.2d **1268** (Fla. 3d DCA 1986), where the Court found that charges of armed robbery and kidnapping of one victim and charges of first degree murder of another victim were based on similar but separate episodes and were thus improperly joined. The facts were that on January **26, 1985,** defendant Jones kidnapped Morrison, robbed him, and fled in Morrison's car. Three hours later Daugherty was killed, and two days later, while occupying Morrison's car, Jones was arrested on a charge of car theft. He was subsequently charged with the murder of Morrison. The Court held it was error to deny Jones' motion for severance of the charges growing out of the criminal episode involving Morrison and that involving Daugherty, relying, in particular, on this Court's decision in State v. Williams, supra.

The Amador/Alfonso and Robledo/Ledo offenses were no more related than any other similar crimes allegedly committed by the same perpetrators. They should never have been tried together before the same jury for the obvious prejudice which results from such improper joinder. Likewise, the Alvaro/Ricard offenses were

even more remote in time and transactional identity than the other offenses. The jury's exposure to all six homicides and their multiple related offenses at the same trial eliminated any possibility that the defendant would receive its open-minded consideration of the relevant facts untainted by the State's overkill. These enormously serious charges, inflammatory enough in and of themselves, should have been tried individually. Because they were not, the defendant's convictions must be reversed.

**11.**

**THE TRIAL COURT'S FAILURE TO PRECLUDE THE STATE'S INTRODUCTION OF THE UNRELATED, COLLATERAL, IRRELEVANT, AND UNCHARGED MUSA-QUINTERO HOMICIDES CONSTITUTED PREJUDICIAL ERROR AND DENIED THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION**

For all the same reasons it was improper to try the Amador/Alfonso, Robledo/Ledo, and Alvaro/Ricard homicides together, it was wrong for the State to offer to this jury evidence of the Musa/Quintero homicides. In addition, the Musa/Quintero episode, as the State conceded, could not properly be joined with the others, given its even greater remoteness in terms of time, characteristics, and relevance. It is telling that the State diminishes the prejudicial impact of such evidence by its argument that, "It must be remembered that the defendant was already charged with six murders which he denied committing. . ." [Appellee Brief at p.57], as if to say, "After hearing testimony concerning three pairs of unrelated double homicides, what difference could another set of unrelated homicides have?" The answer is that whatever hope the defendant might have had to enjoy a fair trial and due process of law was extinguished when the jury heard about the defendant's alleged involvement in the brutal slayings of these two young women.

Assuming, arguendo, that there existed a number of motives established by the State for the Musa/Quintero homicides (a $50.00 debt, the girls' failure to buy VCRs with Robledo's credit

cards, the rumors the girls were spreading which hurt their reputation in the drug community, or the mere fact they were homosexual), their deaths remained distinctly different from the other charges in this case. To the extent the Musa/Quintero facts supported the consistency of Ribera's testimony and the discovery of Robledo's credit card in a cigarette pack at the scene, the evidence merely showed what we know is not enough to justify the jury's exposure to evidence of collateral crimes - that the defendant may have committed the other crimes, as well.

When the State suggests that, "Although evidence of an uncharged double murder sounds impressive, when compared to the severity of the charged crimes in this case, the potential for prejudice is sharply reduced.", it reveals the fallacy of its position. Judge Cowart in Anderson v. State, 14 F.L.W. 1622 (Fla. 5th DCA Opinion filed July 6, 1989) explained:

> As clearly explained by Wigmore, the original and ancient rule of exclusion of similar fact evidence was not based on the fact that such evidence was not relevant but was based on human experience to the effect that such evidence was too relevant, i.e., too convincing. In other words, when the issue in a case is whether or not the defendant did or did not do a particular bad act, when the prosecutor is allowed to show the jury that in other instances the defendant did a similar bad act, then the jury will not only readily believe that the defendant is morally capable of doing the bad act charged but also that the defendant has a general character defect or propensity to do this type of a bad act and, accordingly, it is highly probable that he did the particular bad act charged. Id at 1623.

As the Court correctly concluded:

> This jury inclination is so strong that on the balance between admissibility because of

> relevancy and inadmissibility because of the strong likelihood of prejudice, such evidence should be excluded as a matter of law.

While the first rule of the law of evidence is that all relevant evidence is admissible except as otherwise provided, (see Fla. Stat. §90.402), to this rule there is a rather broad exception to the effect that even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See, Fla. Stat. §90.403. Here, even if the Musa/Quintero homicide evidence is somehow deemed relevant, the unfair prejudice resulting from its admission denied the defendant a fair trial.

No jury could reasonably be expected to forgive the depravity established by the Musa/Quintero facts. Over some perceived slight involving a fifty dollar debt or other minor offense, the perpetrators beat the victims severely before shooting them to death. Whatever relevance such evidence might otherwise have had, its probative value was overwhelmed by its prejudicial effect. The defendant should be given new trials at which the evidence of the uncharged Musa/Quintero homicides is excluded.

**111.**

**THE TRIAL COURT REPEATEDLY ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE COLLATERAL AND IRRELEVANT EVIDENCE OF UNRELATED COLLATERAL OFFENSES FOR NO REASON OTHER THAN TO DENIGRATE THE DEFENDANT'S CHARACTER AND INFLAME THE JURY AGAINST HIM IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

The only response of the State to the defendant's claim of error concerning the trial court's failure to grant the defendant's motion for mistrial upon the prosecutor's elicitation of testimony from its primary witness that the defendant's ". . .name had come up in several investigations of other homicides. . .", essentially involves a claim of waiver. Although the record shows the defendant's immediate objection and request for a mistrial, the State contends that defense counsel's failure to accept the trial court's offer of a curative instruction and his failure to object prior to the witness' testimony constituted a waiver. It did not and should not be deemed by this Court to have done so.

Defense counsel's failure to object before the offending testimony was offered cannot be held against the defendant. No precedent exists for the State's novel theory that prescience is required to preserve error for appellate review. The more interesting question is whether defense counsel's waiver of a curative instruction necessarily waived his motion for mistrial. None of the authorities cited by the State so hold, although each says that "the proper procedure'' to take when objectionable

comments are made is to object and request an instruction from the Court that the jury disregard the remarks. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Duest v. State, 462 So.2d 446 (Fla. 1985), and a long line of cases consistent therewith. The more logical and accurate holding of these cases is that a trial court can not be faulted for failing to grant a mistrial if a curative instruction would have otherwise cured the error. While the burden is then higher upon the defendant to show the degree of prejudice required to constitute reversible error, it is simply not true that the issue is automatically altogether waived.

Improper remarks [or testimony] may be of "such character that neither rebuke nor retraction may entirely destroy their sinister influence..." Cf. Gordon v. State, 104 So.2d 524, 540 (Fla. 1958). Here, defense counsel sought to avoid emphasizing the offending testimony. He explained to the Court that he did not want to "highlight" it with a curative instruction. The reason for such a tactical decision is quite obvious - nothing could have been more damaging or capable of "sinister influence" than prosecution witness Ribera's revelation that the defendant was being investigated by the police, not only for the eight murders charged, but for "several" other homicides Ribera knew nothing about. The testimony was so unfairly prejudicial and so inflammatory that defense counsel correctly determined that no curative instruction could have possibly ameliorated the disasterous effect of such testimony.

Trial counsel's tactics were not only understandable but

appropriate. In State v. Bates, 422 So.2d 1033 (Fla. 3d DCA 1982), appellant contended on appeal that the trial court erred in denying his motion for mistrial because a police officer testified that the victim told him that appellant had stated to her that he had been in prison before. Trial counsel objected, moved for a mistrial, and objected to a curative instruction explaining that "any such instruction would not be sufficient to cure the prejudice resulting from the hearsay statement that appellant had been in prison." Id. at 1034. Despite the fact the court proceeded to instruct the jury to disregard the offending testimony, the appellate court concluded that the refusal of the trial court to grant a mistrial was reversible error. Here, the reference to "several investigations of other homicides" involving the defendant could have been no less inflammatory than an indication that the defendant had been in prison before. If the Bates comment warranted reversal even though a curative instruction to disregard was given, certainly reversal is appropriate here.

In Palmer v. State, 486 So.2d 22 (Fla. 1st BCA 1986), cited by the State in its Brief of Appellee, the court decided that trial counsel's failure to move to strike or request curative instruction resulted in the dispositive question on appeal being whether the offending testimony constituted fundamental error, i.e., that it "was indelibly prejudicial to appellant." Id at 23. The palmer court decided under its particular facts, that the offending testimony was not fundamentally prejudicial to the defendant there, distinguishing it from the circumstances of

Toth v. State, 297 So.2d 53 (Fla. 2d DCA 19741, in which a witness testified as a matter of fact that Toth had already plead guilty to the charge for which he was on trial. The Toth court reached the merits of appellant's claim and reversed his conviction and sentence despite trial counsel's failure to request a curative instruction after his timely objection was overruled.

Other courts, as well, under similar circumstances, have recognized the futility of curative instructions to cure the prejudicial effect of particularly inflammatory testimony. In Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983), the court held that error in allowing the jury to hear testimony by a police officer that the defendant had a "prior felony past" was not cured by a cautionary instruction which did not tell the jury that the offending testimony was inadmissible or that they jury should disregard it. Even an accurate and liberal charge to the jury in the defendant's behalf was held by this Court in Wilson v. State, 183 So. 748, 134 Fla. 199 (19381, to fail to cure the error in admitting evidence of another similar but unconnected offense. By the same token, an instruction to disregard did not cure the error in the prosecutor's inquiry of an arresting officer who related the hearsay testimony of an informant who stated the defendant was guilty of possessing the marijuana at issue. Davis v. State, 350 So.2d 834 (Fla. 2d DCA 1977).

In short, a curative instruction will not necessarily erase the effect of improper testimony from the minds of jurors. Singletary v. State, 483 So.2d 8 (Fla. 2d DCA 19851 (an accu-

sed's right to a fair and impartial jury is violated when a jury is improperly made aware of a defendant's arrest for unrelated crimes. . .during the trial. . .) Here, virtually nothing could have been more prejudicial to the defendant than the jury's exposure to testimony that the defendant was being investigated by the police for even more murders than the eight he faced at trial. As the Court appropriately recognized in Odom v. United States, **377** F.2d **853, 860** (5th Cir. **1967):**

> Juries do not facilely forget, and we have the lingering suspicion that the malodorous epithet "jailhound" may explain the incongruent verdict. The attempt to sanitize testimony by admonition may sometimes succeed, but its success will very often depend upon how virulent the diseased testimony was.
>
> * * *
>
> . . .[W]here as here, the improper evidence was calculated to make such an impression on the jury that no direction from the court, however strong, can eliminate the prejudice thereby created, the trial court must declare a mistrial.

The same conclusion is compelled here.

For all the same reasons, Detective Foulk's reference to "the other murder trial", could not have been cured by a curative instruction, and by suggesting to the jury even more evidence of murder prosecutions not before it, could not have been more devastating to the defendant's receipt of a fair trial. The State's argument that a question beginning with the word "When?" invites a response other than date and time is ingenuous. The State, as well as the trial court, are wrong to place the blame on defense counsel for purportedly "opening the door" to a

response from an experienced, trained professional police-officer witness about "the other murder trial" during the prosecution of a multiple homicide case.

With regard to the evidence described in appellant's initial brief relative to the defendant's alleged drug importations and cocaine "cooking", the State is correct, at least in one cynical way, to suggest that, "Given all the evidence in this case, this relatively innocuous testimony..." does not, in context, amount to much. To express the State's position another way, the defendant was so severely and unfairly prejudiced by his joint trial on six separate murders, the jury was so inflamed by its exposure to two other uncharged murders, and due process was so deeply effended by repeated insinuations that the defendant had been involved in yet other undescribed slayings, that evidence of freebase cocaine and smuggling cocaine in hidden boat compartments could not have substantially swayed the jury's passions against the defendant any more than they already were. The State is probably correct.

That is exactly why these convictions must be reversed.

IV.

THE PROSECUTION IMPERMISSIBLY CROSS-EXAMINED THE DEFENDANT REGARDING HIS FAILURE TO SOLICIT THE TESTIMONY OF HIS SISTER, THEREBY IMPERMISSIBLY COMMENTING ON THE DEFENDANT'S FAILURE TO PRESENT EVIDENCE AND IMPROPERLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

With regard to point IV, the appellant respectfully relies upon the arguments advanced and authorities presented in his initial brief.

## V.

**THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE IMPRISONMENT AND IN SENTENCING THE DEFENDANT TO DEATH FOR THE MURDER OF MARIO AMADOR THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW RESULTING IN THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

The State's bloodlust is unjustified for precisely the reasons observed by Justice McDonald in Thomas v. State, 456 So.2d 454 (Fla. 1984):

> I concur with the affirmance of conviction but dissent to the imposition of the death penalty. The jury recommended life. Juries reflect the conscious of the community. Twelve people, all from different walks of life but representing a community's views, after being instructed on the matters that they should consider, have exercised their discretion to recommend life imprisonment on two counts of homicide. The trial judge has rejected their recommendations and imposed death. Why? The answer is not apparent. [Id. at 461; McDonald, J., dissent.]

This Court has consistently rejected jury overrides by trial courts imposing death penalties except in "the most extreme and clear circumstances" or where the jury recommendation is based on a record which strongly shows an inappropriate "emotional appeal, prejudice, or some similar impact". Thomas v. State, at 460, 461.

Accordingly, the State's reliance on such cases as Francis v. State, 473 So.2d 672 (Fla. 1985) is misplaced. This court in Francis could find no possible basis for the jury's recommendation of life imprisonment except the emotional appeal

of defense counsel's closing argument:

> On the present record, we find no reasonable basis discernible from the record to support the jury's life recommendation. Perhaps, the jury's recommendation was the result of the highly emotional closing argument of defense counsel made on March 29, 1983, the Tuesday before Easter Sunday, which amounted to a non-legal sermon referencing several times to Easter, The Last Supper of Jesus and his disciples, and the covenant of God's love for humanity which must be passed along with the cup of forgiveness to the next generation of children. [Id. at 676-6771

Here, no such claim can be made. Defense counsel's argument to the jury during the penalty phase constituted a restrained analysis of the facts. [R. 4196-4224]

Other of the State's cases involve homicides distinct for their degree of atrocity, at least in comparison to the death by gunshot suffered by Amador. Bolender v. State, 422 So.2d 833 (Fla. 1982) (Bolender acted as the leader and organizer in these crimes and inflicted most of the torture leading to the victims' deaths):

> Bolender used a hot knife to burn Nicomedes Hernandez on the back and inflicted slash wounds on two of the victims. He also shot Hernandez in the leg in an effort to make him reveal the location of his cocaine and inflicted the stab wounds and gunshot wounds that led to the victims' deaths. [Id. at 837]

Pentecost v. State, 545 So.2d 861 (Fla. 1989) and Harmon v. State, 527 So.2d 182 (Fla. 1988), in fact involved reversals by this Court of the trial courts' override of jury life recommendations.

This jury could reasonably have found that the defendant had no significant history of prior criminal activity. It could have found that co-defendant Pardo was the motivating factor behind the defendant's participation and could have reasonably determined the defendant's culpability to have been thereby mitigated. The state concedes the trial court's error in considering both pecuniary gain and the commission of the robbery to be aggravating circumstances and, as demonstrated in his initial brief, the trial court should not have found that the crime was "cold, calculated and premeditated". In short, in light of the totality of the circumstances presented, it simply cannot be said that no reasonable jury could have recommended life. Fead v. State, 512, So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Tedder v. State, 322 So.2d 908 (Fla. 1975). The jury override in this case was improper and should be reversed by this court on appeal.

## VI.

### THE DEATH SENTENCES IMPOSED AGAINST THE DEFENDANT FOR THE MURDERS OF ALFONSO, ALVARO, AND RICARD ARE ALL DEFECTIVE AND SHOULD BE VACATED WITH DIRECTIONS TO ORDER THE DEFENDANT'S RE-SENTENCING

With regard to point VI, the appellant respectfully relies upon the arguments advanced and authorities presented in his initial brief.

## CONCLUSION

It is apparent that the most sensational trials and prosecutions involving the most egregious allegations are the most susceptible to the abuse of an accused's constitutional rights. If hard cases make bad law, bad crimes make hard prosecutions, apparently because of the natural inclination of the State to engage in the overzealous pursuit of convictions. Rolando Garcia could quite simply have been tried fairly and cleanly on any one of his alleged double homicides. Instead, the State tried him unfairly and uncleanly for three unrelated double homicides, a pair of killings even it admitted could not properly be joined, and the repeated insinuation that the defendant was guilty of even more horrible crimes than the State was able to demonstrate to the jury. Because no jury under the circumstances could have given Rolando Garcia a fair trial in light of the State's overkill, reversal of his convictions and sentences is compelled. The defendant is entitled to new, separate trials.

Respectfully submitted,

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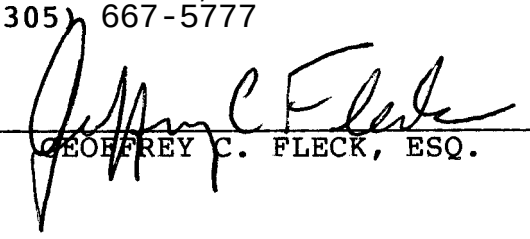
BY: 
GEOFFREY C. FLECK, ESQ.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant is forwarded to Ralph Barrera, Assistant Attorney Genera, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128, this 31st day of March, 1990.

GEOFFREY C. FLECK, ESQ.