IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,750

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The symbol (R.), plus the page number, will refer to Volumes I, II, III, IV and XV which were consecutively numbered as Pages 1 through 681 by the court reporter in the record on appeal. Volumes I through IV constitute pages 1 through 666 and Volume XV constitutes pages 667 through 681. Volume I constitutes the transcript of the penalty phase of the proceedings. Volume II and III are made up of pretrial motions and hearings. Volume IV is made up of the charge to the jury and the verdict in the guilt phase, plus certain motions and the penalty verdict form concerning the penalty phase. Volume XV is made up of the transcript of the sentencing phase of the proceedings.

The symbol (T.), plus the page number, will refer to Volumes V - XIV and XVI through XXII which were also consecutively numbered by the court reporter in the record on appeal. Volumes V through XIV constitute Pages 1 through 1286 and Volumes XVI through XXII constitute Pages 1287 through 2135. Volumes V through XIV and XVI through XXI are made up of the trial transcript. Volume XXII is made up of the transcript of certain pretrial motions and hearings.

IN THE SUPREME COURT OF FLORIDA

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STATEMENT OF THE CASE

JAMES GUZMAN (GUZMAN) was arrested for the murder of David Colvin (Colvin) on December 13, 1991. GUZMAN was indicted for first degree murder and armed robbery with a deadly weapon on January 7, 1992. (R.277) An arraignment had been attempted on January 6, 1992, but this could not be held because no indictment or information had been filed. (T.2063-2067) At the January 6, 1992 hearing, the court was advised that the Public Defenders' Office would be moving to withdraw from the case in that the public defenders' office was representing Martha Kronan (sic-should be Cronin) who was to give evidence against GUZMAN in the case. (T.2063) A private attorney, David Vedder, had been contacted by GUZMAN because of the conflict and appeared at the hearing. (T.2063)

The public defenders' office continued to represent GUZMAN after the January 6, 1992 hearing. GUZMAN filed a pro se motion to dismiss counsel that was heard on March 2, 1992. (R.286; T.2069) His primary concern at the time was that the Public

Defenders' Office was representing Martha Cronin (hereinafter Cronin). (R.286; T.2072) In addition, the Public Defenders' Office was representing John Sara, who the State had originally intended to call as a witness against GUZMAN. (R.2073) At the hearing, the assistant public defender testified that he was appointed to represent GUZMAN on December 14, 1991 and that because the Public Defenders' Office was currently representing John Sara, he did prepare a Motion to Withdraw because of the conflict. (R.289) Subsequently, the assistant public defender received a memorandum from James Gibson, the elected Public Defender, advising that no assistant public defender could file any Motions to Withdraw on the basis of conflict until the public defender's committee on conflicts reviewed the matter. (T.2074) This review had not been done by the time GUZMAN was arraigned on January 28, 1992. (T.2075)

The assistant public defender had advised GUZMAN that there was a conflict and that the Public Defenders' Office could not take any further action on behalf of GUZMAN until such time as the matter was judicially resolved. (T.2074-75) On February 18, 1992, the Public Defenders' Office determined that there was no conflict of interest. (T.2075) Thereafter, the assistant public defender requested the withdrawal of his Motion to Withdraw to align himself with the position of the Public Defenders' Office. (T.2076)

Subsequently, the assistant public defender who was representing GUZMAN was advised of a set of circumstances involving Cronin, who was a primary witness against GUZMAN. At the time of

GUZMAN's arrest, the Public Defenders' Office was representing Cronin. The State Attorneys' Office arranged to have Cronin released from the Volusia County Branch Jail on December 12, 1991 for the purposes of investigating the GUZMAN case. (T.2076) The Public Defenders' Office did not consent or stipulate to the State Attorneys' Office interviewing Cronin while the Public Defenders' Office represented her. (T.2078) After hearing the testimony about these conflicts and GUZMAN's allegations that he was being rendered ineffective counsel, the trial court denied GUZMAN's pro se motion to dismiss counsel and found there to be no conflict concerning the Public Defenders' Office, Cronin, John Sara and GUZMAN. (R.296; T.2119, 2122)

Thereafter, the assistant public defender filed a Motion to Withdraw dated June 3, 1992 in which he claimed a conflict arose in the Public Defenders' Office when the public defender was representing both GUZMAN and a person by the name of Paul James Rogers, Jr. (hereinafter Rogers). (R. 175) A hearing was held on this Motion to Withdraw on June 12, 1992. (R.361, 416) Rogers had been incarcerated with GUZMAN and advised the State Attorneys' Office that GUZMAN had confessed to him and that he was going to testify in court against GUZMAN. (R.177) Rogers had initially contacted the Daytona Beach Police Department to testify against GUZMAN on May 29, 1992. (R.181)

Eventually, Rogers was represented by a private court appointed attorney. (R.188) Rogers gave a deposition of the alleged confession, but he never testified at the trial of GUZMAN.

Because of the potential conflict, the Public Defender's Office had moved to withdraw. GUZMAN agreed to the Motion to Withdraw because of the conflict with Rogers. (R.215) GUZMAN did not feel comfortable with the representation of an assistant public defender because of the conflict of interest problems and the public defender continuing to not represent him as GUZMAN thought he should be represented. (R.215)

The Court took the Motion to Withdraw under advisement. (R.217) After taking more testimony, the Court denied the Motion to Discharge Counsel and the Motion to Withdraw. (R.231) Subsequently, the Public Defenders' Office withdrew its Motion to Withdraw based on the conflict between GUZMAN and Rogers in that Rogers was appointed private counsel so as to obviate the conflict problem. (R.234, 254, 265) In addition, the assistant public defender who was representing Rogers testified that he had not conveyed any information about the GUZMAN case and did not know anything about the GUZMAN case. (R.266) Despite the Public Defenders' Office having withdrawn its Motion to Withdraw, the court found that there were no grounds for any potential conflict of interest. (R.268) In addition, the court once again denied GUZMAN's oral motion to discharge the public defender. (R.268, 546)

GUZMAN filed numerous motions, including a Motion for Use of Special Verdict Form for the unanimous jury determination of statutory aggravating circumstances, Motion to Prohibit any reference to the advisory roll of the jury at sentencing, Motion

to Declare §921.141(5)(i) unconstitutional, Motion for Additional Preemptory Challenges and Motion to Declare the Death Penalty Unconstitutional based on prosecutorial discretion. (R.317, 318, 319, 319, 320, 321-348, 349-341, 354-356) All of the above-referenced Motions were denied by the trial court. (T.18, 19, 20, 25-29, 31-33)

On September 11, 1992, the public defender filed yet another Motion to Withdraw citing a conflict between their representation of GUZMAN and Arthur Boyne (hereinafter Boyne). (R.412, 553) As reflected in the transcript of the hearing on June 3, 1992, the assistant public defender representing GUZMAN also represented Boyne. The Motion reflected that the Public Defenders' Office currently represented Boyne in an appeal to the Fifth District Court of Appeal and had not received an unequivocal waiver of the attorney/client privilege from Boyne. (R.412, 553) This Motion was filed September 11, 1992. The trial court, through the Honorable Robert W. Rawlins, denied the Motion to Withdraw based on the conflict between Boyne and GUZMAN. (T. 13) The court made this ruling, despite not being aware that Boyne was charged with first degree murder and had been represented by the Public Defenders' Office in the murder case. (T.1055) Judge Rawlins had not been the judge through the prior pretrial motions, including the various Motions to Withdraw and pro se Motions to Dismiss counsel.

This case proceeded to jury trial on September 14, 1992. During jury selection, the trial court upheld two challenges for cause made by the State against jurors. (T.736, 230)

The State's case consisted of two witnesses who alleged that GUZMAN had confessed the murder to them (Cronin and Boyne). (T.1217-63; 1029-1098) All other witnesses presented circumstantial evidence concerning the murder.

During Boyne's testimony at trial, he testified that he asked GUZMAN as to whether he was worried since he had already been convicted. (T.1043) GUZMAN's made a Motion for Mistrial that the Court took under advisement. (T.1043)

At the conclusion of the State's case, GUZMAN's Motion for Judgment of Acquittal was denied. (T.1316-17) GUZMAN's Motion for Mistrial because of Boyne's statements was again taken under advisement and eventually denied. (T.1315)

The defense had several witnesses in this case. Among them, were Artonyo Lee (Lee) and James Yarborough (Yarborough). The Court did not allow Lee to testify to certain matters and did not allow the defense to recall Lee to testify concerning the last time that he had seen the decedent alive. (T.1360-8, 1618-22) In addition, the defense attempted to have Yarborough testify as to an altercation between the victim and another person, but the Court refused to allow this testimony. (T.1321-22)

The testimony of GUZMAN's expert witness, Dr. Choporis, elicited two Motion's for Mistrial when the prosecutor continued to breach the court directions in his questioning of the doctor in voir dire and during his cross examination. (T.1480)

GUZMAN also testified in his own defense. (T.1812; 1925) The State called one rebuttal witness, then rested. (T.1926-30)

During the charge conference, GUZMAN requested several modifications in the standard jury instructions and requested several special instructions in writing. (R.578-599) These requests were denied by the trial court.

Following deliberations, the jury found GUZMAN guilty as charged of first degree murder and armed robbery. (R.577)

The penalty phase began on September 29, 1992. The State presented one witness and the defense presented only GUZMAN. (R.27-164) In the meantime, the court denied the motion for a mistrial and judgment of acquittal. Following deliberations, the jury returned an advisory verdict recommending the death sentence 10-2. (R.600)

The trial court sentenced GUZMAN to death finding five aggravating circumstances and no mitigating circumstances. (R.634-652) Appellant's motion for new trial was denied by the trial court following a hearing. (R.653) Appellant filed a Notice of Appeal. (R.654) This Court has jurisdiction. Article V, Section 3(b)(1), Florida Constitution.

STATEMENT OF THE FACTS

David Colvin (hereinafter Colvin) was killed on August 10 or 11, 1991. (T.930, 1564) His body was discovered on August 12, 1991 at the Imperial Motor Lodge (hereinafter motel) in Daytona Beach, Florida by the motel custodian. (T.812) Colvin had been killed by a series of stab wounds and incise wounds inflicted by a large knife. (T.920, 925) At the time of his death, Colvin had a blood alcohol level of .34. (T.948)

Colvin had lived at the motel for several months prior to his death. (T.1294) Colvin had at least one altercation with an unknown assailant some two month prior to his death. (T.1321)

In late July, 1991, JAMES GUZMAN (GUZMAN) moved into the motel. (T.1813) Several days after having moved into the motel, GUZMAN met Martha Cronin (hereinafter Cronin) on August 1, 1991. (T.1218) GUZMAN and Cronin began living with each other shortly thereafter. (T.1219)

GUZMAN met Colvin after moving into the Motel, but prior to meeting Cronin. (T.1862) GUZMAN had helped Colvin move himself and his girlfriend from Room 205 of the motel to Room 114. (T.1870) GUZMAN had used Colvin's telephone in Room 205 prior to the move. (T.1871) The custodian of the motel testified that he moved this telephone to Colvin's new room as part of Colvin's move. (T.817)

On August 10, 1991, Colvin asked GUZMAN to drive his car for him to a gas station in Daytona Beach because Colvin had an infection in his foot and he did not have a driver's license. (T.1814) After having driven Colvin to the gas station, Colvin and

GUZMAN went to a tavern known as the Office Bar. The parties drank a beer there about 10:20 a.m.. Subsequently, GUZMAN drove Colvin to the International House of Pancakes in Daytona Beach and they ate breakfast. (T.1814-15) At the International House of Pancakes (IHOP), a man by the name of Curtis Wallace (hereinafter Wallace) got into an argument with Colvin. (T.899-900; 1816) Colvin then gave GUZMAN $20.00 to pay for the breakfast while he talked with Wallace. (T.1816) Thereafter, GUZMAN drove Colvin back to the Motel. (T.1816)

GUZMAN testified that he gave the keys to the car and motel room back to Colvin, then went back to Cronin's room who was getting ready to go to work as a prostitute. (T.1816) Cronin worked as a prostitute on Ridgewood Avenue in Daytona Beach to support herself and her crack cocaine habit. (T.1217, 1790) GUZMAN began providing protection for her after they met. (T.1817) At about 3:30 in the afternoon of August 10, 1991, GUZMAN testified that Cronin brought Curtis Wallace back to her room where GUZMAN was staying. (T.1818-9) GUZMAN testified that Wallace had a piece of jewelry (a ring) that he wanted to sell. GUZMAN told Wallace that he could get rid of the ring for Wallace, but Wallace was reluctant to deal with GUZMAN because of their antipathy towards each other. (T.1820) Cronin convinced Wallace to let GUZMAN take the ring so it could be traded for drugs and cash. (T1820) GUZMAN then got the ring and called a person that he knew would want this kind of jewelry. (T1820)

Cronin testified differently at trial. She claimed that on August 10, 1991, after a day of prostitution, she had come back in to her room (#108) at the motel that she shared with GUZMAN. (T.1219,1222) She testified that GUZMAN told her that he was going help Colvin by driving him to the bank. Thereafter, she went to sleep and awakened when GUZMAN came back into the room. (T.1223) Cronin testified that GUZMAN showed her Colvin's car and motel room keys, then told her what they were. Cronin then went to work as a prostitute and left the room about 11:00 a.m.. (T.1224) Cronin testified that she came back into the room about 2:30 or 3:00 p.m. that same day. (T.1225) Cronin testified that about thirty (30) minutes after she arrived, GUZMAN came back to the room with a plastic bag and looked upset. Cronin said she asked him what was wrong, but that he left the room without answering. Shortly thereafter, GUZMAN returned to the room and told her "I did it". Cronin testified that she asked what he had done. (T.1226-7) Cronin testified that GUZMAN then said he killed Colvin and showed her the ring that he supposedly got from Colvin after having killed him. (T.1227) Cronin testified that she did not want to hear the details of the killing. Despite her request, Cronin testified that GUZMAN told her that Colvin had passed out and that GUZMAN had stabbed him with Colvin's own samurai sword. (T.1227) Cronin testified that both she and GUZMAN examined the ring and discussed what they could get for it. (T.1228) Cronin testified that GUZMAN then called a person that he knew that would want this kind of jewelry. (T.1230)

The testimony is unrefuted that GUZMAN took the ring to a drug dealer by the name of Leroy Gadson a/k/a "Paco". (T.1823, 1186) GUZMAN rode his bike to show Paco the ring and to trade it for crack cocaine and cash. (T.1188) After having procured the crack cocaine and cash, he brought the crack back to Cronin. (T.1233) Cronin testified that she was very upset because GUZMAN had not gotten enough for the trade. (T.1233)

GUZMAN testified that he left Cronin's motel room after having returned and taking one hit of the crack cocaine because Wallace was present. (T.1823) Cronin testified that Wallace was not present at the time that GUZMAN came back with the cocaine. She testified that she and GUZMAN consumed the crack cocaine. (T.1234)

The testimony is unrefuted that GUZMAN returned that night to get more cocaine and cash from Gadson as part of the trade for the ring. (T.1823) GUZMAN then testified that he gave Cronin the rest of the crack cocaine and that she subsequently gave it to Wallace. (T.1824)

GUZMAN testified that he then left the motel to go stay with a friend at another apartment complex in Daytona Beach. GUZMAN testified that he returned on Sunday, August 11, 1991. (T.1826) GUZMAN testified that Cronin asked him to come back because she knew that he was upset because Wallace was staying with her, in addition to her ex-boyfriend. (T.1827) GUZMAN decided to return after Cronin came looking for him and they then smoked crack together. (T.1827-8)

GUZMAN then testified that the police detectives knocked on the motel room door on August 12, 1991 when they were investigating the murder of Colvin. (T.1828) The detectives talked with both Cronin and GUZMAN, who both told the detectives that they knew nothing about the murder. (T.1115-20; 1125; 1829) The detectives gave GUZMAN their card, told him to keep in touch and left afterwards. (T.1829)

Subsequently, GUZMAN moved from the Imperial Motor Lodge and moved from place to place. He kept in touch with the detectives to let them know where he was. (T.1172, 1831)

Testimony from Detectives Flynt and Wright showed that they had interviewed two witnesses, Artonyo Lee (hereinafter Lee) and Curtis Wallace, on August 12, 1991 and thereafter. (T.1625, 1697) Both of these witnesses had told the detectives that they had seen Colvin alive at the coke machine at the motel on the night of August 10, 1991 (Saturday) at about 8:00 or 9:00 p.m.. (T.1673, 1677) Colvin had been wearing his ring at the time. (T.1677) In addition, Lee implicated Wallace in the killing. (T.1683, 1700)

On November 14, 1991, GUZMAN was shot by Wallace in an altercation concerning Cronin. (T.1846) Wallace had beaten Cronin and GUZMAN had confronted Wallace. (T.1853) Wallace then pulled a gun and shot GUZMAN (T.1853).

GUZMAN broke up with Cronin when she was in jail. GUZMAN went to visit Cronin the jail on December 12, 1991 to tell Cronin that he was leaving her and that he wanted nothing more to do with her. She started crying and GUZMAN left. (T.1855)

On December 13, 1991, GUZMAN contacted Detective Sylvester. Sylvester asked where GUZMAN was and after he told her, Detective Sylvester came to talk to GUZMAN along with another detective. (T.1834, 1150) At that time, they arrested GUZMAN for the murder of Colvin and transported him to Daytona Beach Police Department. GUZMAN then demanded an attorney be appointed for him. (T.1154)

GUZMAN was booked and taken to the Volusia Branch Jail. (T.1836) At that time, he was placed in the same block with Arthur Boyne (hereinafter Boyne). (T.1038) Boyne was being held in Volusia County Branch Jail on a charge of first degree murder. (T.1037) Boyne testified that GUZMAN confessed that he killed Colvin. (T.1041) Boyne also wrote a letter that was introduced into evidence at trial that attested to GUZMAN's good character and denied that GUZMAN ever confessed to Boyne. (T.1084)

SUMMARY OF ARGUMENTS

POINT I: The trial court erred in excluding evidence and witnesses that GUZMAN attempted to present in violation of Appellant's right to due process. GUZMAN attempted to call a witness to testify that the victim had been seen alive after the time that his primary accuser testified that GUZMAN confessed to the murder. In addition, GUZMAN attempted to have a witness testify as to incriminating statements made by another person concerning the killing of the victim. Finally, GUZMAN attempted to have a witness testify as to a previous altercation that the victim had with a third person. The trial court did not allow any of the above-referenced testimony. Such a denial violated GUZMAN's due process rights to a fair trial.

POINT II: The trial court erred in giving non-standard jury instructions in the penalty phase. Failure of the trial court to limit the jury to considering only those aggravating circumstances as reflected in §921.141(5) was error.

POINT III: The trial court erred in failing to dismiss the public defenders' office from representing GUZMAN because of the public defender's continuing conflict. The public defender represented no less than four (4) persons that the State listed as witnesses against GUZMAN. At trial, the two primary accusers of GUZMAN had been or were being represented by the public defenders' office. Such a conflict of interest required new counsel be appointed for GUZMAN or, in the alternative, rendered public defender's representation of GUZMAN ineffective.

POINT IV: The trial court erred in failing to grant several Motion for Mistrial because of prosecutorial misconduct. The action of the prosecutor, particularly in his questioning of the defense expert witness, vitiated the entire trial because of his continual quarreling with the witness in violation of the court rulings.

POINT V: The trial court erred in dismissing a juror who expressed opposition to the death penalty. Although the juror expressed to the death penalty, she specifically testified that she could uphold the law. Therefore, the trial court erred in granting the State's request that she be dismissed for cause. The wrongful dismissal for cause violated GUZMAN's constitutional rights and require that a new trial be granted to him.

POINT VI: A mistrial should have been granted when a witness testified as to a previous conviction of the Appellant. Such testimony would taint the jury's perception of the Appellant and violate his due process rights. As such, a mistrial should have been granted and a new trial should be ordered.

POINT VII: The trial court erred in admitting gruesome photographs into evidence during the penalty phase. These inflammatory and irrelevant photographs would so taint the jury as to prevent GUZMAN from receiving a fair trial.

POINT VIII: The trial court erred in allowing the introduction of a survival knife into evidence. The knife was never shown to have anything to do with the murder and would only serve to inflame the

jury and have no evidentiary value. Because of the introduction of the knife, GUZMAN's due process rights were violated and he should be granted a new trial.

POINT IX: The conviction of JAMES GUZMAN was not supported by competent, substantial evidence. The only direct evidence linking GUZMAN with the murder was an alleged confession that he made to a crack addict/prostitute and a convicted first degree murderer. This evidence does not rise to the level of competent and substantial evidence that is required for a conviction. As such, GUZMAN's conviction should be reversed.

POINT X: The trial court erred in restricting the time and scope of GUZMAN's argument in the penalty phase. The court limited the time for argument to one hour and did not allow GUZMAN to argue to the jury the public policy reasons behind the death penalty. This inhibition of the Defendant's argument violated his due process rights. As such, GUZMAN should be granted a new penalty phase hearing.

POINT XI: The jury instruction on "reasonable doubt" was ambiguous and therefore denied GUZMAN his due process rights. The use of the improper instruction violated GUZMAN's due process rights.

POINT XII: The trial court erred in refusing to give a jury instruction for third degree murder in that there was competent, substantial evidence that would have justified such a verdict.

POINT XIII: The trial court's refusal to give the Defendant's specially requested jury instructions denied his due process rights. The jury instructions used by the court were fundamentally

flawed and prejudicial to GUZMAN. As such, he should be granted a new trial on this matter.

POINT XIV: The trial court erred in finding that the murder was done in a heinous, atrocious and cruel manner. The record shows that the victim had a .34 blood level at the time of his death. There was no indication that the victim was made to suffer prior to his death. As such, the trial court erred in finding this aggravating factor.

POINT XV: The trial court erred in finding that the murder was committed to avoid lawful arrest. The victim in this case was not a law enforcement officer. There was no indication that the murder was solely and primarily to eliminate the victim as a witness. As such, the trial court erred in finding this aggravating factor.

POINT XVI: The trial court erred in finding that the murder was done in a cold, calculated and premeditated manner. The evidence does not support a finding beyond a reasonable doubt that the killing of the victim was intentionally planned. As such, the trial erred in finding this aggravating factor.

POINT XVII: The death sentence is disproportional under the facts of this case in that there were not sufficient aggravating circumstances to justify the court imposition of the death sentence.

POINT XVIII: Florida's death penalty statute is unconstitutional in that it allows the death recommendation to be returned by a bare majority vote. In the case at bar, the jury came back with a death penalty recommendation based on a majority vote. Such a majority

vote recommendation violates GUZMAN's constitutional rights. As such, GUZMAN should be sentenced to life imprisonment rather than death.

POINT XIX: The trial erred in denying various pre-trial motions filed by the defense. The various motions filed by the defense were summarily denied by the trial court. The denial of these motions violated the due process rights of GUZMAN. As such, this matter should be reversed and remanded for a new trial.

I. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY AND WITNESSES THAT DEFENDANT ATTEMPTED TO PRESENT IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS

The trial court denied GUZMAN his due process rights to present evidence by committing three major errors, namely the denial of GUZMAN's request to recall Artonyo Lee (Lee), the limitation of the testimony of Lee and the limitation of the testimony of James Franklyn Yarborough (Yarborough). These three errors individually were harmful in that they denied GUZMAN his right to put on a defense, and collectively these errors served to deny GUZMAN a fair trial.

A. DENIAL OF GUZMAN'S REQUEST TO RECALL LEE

GUZMAN originally called Lee to, inter alia, testify as to statements made to Lee by Curtis Wallace (Wallace) which tend to incriminate Wallace in the murder of David Colvin (Colvin). (R1360) Later GUZMAN sought to recall Lee to testify about seeing Colvin alive between 9:00 P.M. and 12:00 midnight of August 10, 1991. (T.1618) GUZMAN had failed to question Lee about this point because when Lee was asked if he "knew" the victim, Lee stated he did not. (T.1387) GUZMAN was under the impression that when Lee stated he did not "know" the victim, Lee meant that he did not know of his existence, nor could he recognize him. Upon reflection by GUZMAN, this incorrect impression was discovered. (T.1618-19) GUZMAN attempted to have Lee recalled to the stand, reasoning that Lee had knowledge relative to the case which had not been brought

in previously due to GUZMAN'S misunderstanding. (T.1619-21) The prosecution objected to the recall of Lee on the grounds that Lee was "absolutely devoid of any credibility whatsoever", and so urged the court "not to allow this fool to be recalled." (T.1618-21) The court granted the prosecutions objection because, according the court, GUZMAN had "ample opportunity to go into this the first time he (Lee) was called and this is not something that is new or that has been discovered since he was on the stand." (T.1622)

Although courts have discretion as to whether a witness is to be recalled, GUZMAN contends that the trial court abused its discretion in denying his request to recall Lee.

Of the evidence presented in this case, the only evidence directly linking GUZMAN to the murder is the testimony of Martha Cronin (Cronin) and Arthur Boyne (Boyne). Cronin's testimony contained, in part, a reference that at or about 3:00 P.M. on the afternoon of August 10, 1991, GUZMAN told her he had killed Colvin. (T.1226-7)

GUZMAN sought to recall Lee to elicit testimony that Lee saw Colvin alive at some time between 9:00 P.M. and midnight on August 10, 1991, thus discrediting the testimony of Cronin. (T.1619-21)

In the case of Moran v. State, 274 So.2d 26 (1st DCA 1973), the First District Court of Appeals was faced with a similar legal question. Moran, appealing a conviction for incest, had been denied his request to recall a witness on his behalf at trial after

learning that the witness had forgotten certain information when she initially testified because she was scared. In reversing Moran's conviction, the court stated

> The record indicates that there were only two principal witnesses upon whose testimony an adjudication of guilt could stand or fall. The jury was face with the decision to believe either the appellant or the alleged victim, and their decision would essentially dispose of the issue of guilt. Hence, it was vital that they hear any witness who might shed light upon the credibility of either of the principal witnesses. Id. at 29

The same court in Brooks v. State, 172 So.2d 876 (1st DCA 1965), upheld the recall of a witness in a case, reasoning that "a trial is not a game, but is a search for the truth." Id. at 884. If admitted, Lee's testimony would directly contradict an important part of Cronin's testimony.

It is apparent from the ruling of the trial court that the Judge did not feel the mistake of counsel warranted the recall of Lee. GUZMAN contends that in a case of this magnitude, where a possible sanction is the most ominous available, the trial court should not restrict the pursuit of justice by the strict adherence to the rules of practice. As stated by this court:

> Rules of practice and their employment in the conduct of trials are not inflexible. Their strict or technical enforcement cannot straight jacket the justice of the cause. Primarily, they are formulated and employed so that the Court may regulate and keep within legal bounds the general conduct of the trial. This Court has always recognized that a trial Court has wide latitude in regulating the conduct of trials in order that the administration of justice be speedily and fairly achieved in an orderly, dignified manner and befitting the gravity of the business in hand. In this function the trial Judge exercises the sound discretion with which he is vested. This discretion may be invoked and its exercise reasonably required for many reasons. It may be invoked when counsel in the stress of the trial overlooks or

> fails to offer proof of material matter or otherwise fails in his duty to his client in the conduct of his case. In a grave case, as here, where defendant's life was in jeopardy his ineptitude alone is enough. This discretion wisely used to the end that the justice of the cause be achieved should none the less impair the Judge's control of the proceedings of the trial.

Hahn v. State 58 So.2d 188 (Fla 1952) at 191. Although the decision to recall witnesses rests within the discretion of the trial judge, it was an abuse of that discretion to restrict GUZMAN from recalling Lee in this case. The failure of the trial court to allow the recall of Lee constituted error and requires the remand of this matter for a new trial.

B. DENIAL OF GUZMAN'S RIGHT TO QUESTION LEE BY THE TRIAL COURT

The second error by the trial court involved the restriction of GUZMAN'S questioning of Lee about statements made to Lee by Wallace which tended to incriminate Wallace in the murder of Colvin. (T. 1360) During proffer, Lee was asked to testify about statements made by Wallace regarding his possession of a ring which was known to be owned by Colvin. The prosecution objected to this testimony on the grounds that Lee had previously testified Wallace had showed him an unrelated ring, and it was the position of the prosecution that the ring which Lee was to testify about was that unrelated ring. (T.1372-3) The court sustained the objection. (T.1373) When GUZMAN sought to clear up the confusion by asking Lee about statements Wallace made regarding the victim's ring, the same objection was raised and sustained. (T.1373)

GUZMAN later attempted to question Lee about statements made to him by Wallace regarding the murder. The prosecution objected, contending that the testimony was not admissible on the grounds that it was hearsay. The court sustained the objection. (R.1377)

GUZMAN contends that such evidence that he attempted to introduce through Lee is admissible in that it tends to shift the suspicion to another, and as such the admissability of such evidence is measured as if the other person were on trial for the offense charged.

In the case of Moreno v. State, 418 So.2d 1223 (3rd DCA 1982) an appeal from a conviction of culpable negligence, Florida's Third District Court of Appeal stated that "where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission."Id. at 1225 Florida courts have also recognized the Defendant's right to prove his innocence by the introduction of proof of the guilt of another. Moreno; see also Rivera v. State, 561 So.2d 536 (Fla. 1990).

In looking at the admissability of evidence which shifts suspicion to someone other than the defendant, the Florida Supreme Court has stated that "If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense." State v. Savino, 567 So.2d 892 (Fla. 1990). If this reasoning is adopted in deciding the case at bar, the testimony of

Lee regarding what he was told by Wallace would be admissable in that it would be excepted from the hearsay categorization as an admission against interest.

By restricting GUZMAN's questioning of Lee regarding these statements made to Lee by Wallace, the court violated GUZMAN's right to present such evidence which may lead the jury to believe that someone other that the GUZMAN was the perpetrator of the offense. This ruling constitutes a violation of GUZMAN's due process rights and require GUZMAN be granted a new trial.

C. TRIAL COURT EXCLUSION OF YARBOROUGH TESTIMONY

The third error involved the restriction of GUZMAN's examination of Yarborough. Yarborough was called by GUZMAN to testify as to an altercation which took place some time prior to the murder. This altercation involved the victim (Colvin) and an unknown assailant. The samurai sword, which was the murder weapon in the case at bar, was used in the incident. (R.1321) As GUZMAN began his questioning of Yarborough, the prosecution entered an objection to the testimony. The objection was sustained on the grounds that the appellant had not yet laid a predicate which would place the incident in a relevant time frame. (R.1322-3) After GUZMAN elicited the fact that the altercation may have taken place some two months prior to the murder, the prosection objected to further questions concerning the incident on the grounds that the incident had occurred at a time so remote from the murder as to render testimony about the incident to be irrelevant to any

material issue in the case. (R.1325) The trial court sustained this objection and limited the testimony of Yarborough to exclude his recollections regarding the altercation. (R.1325)

Following the reasoning stated above in the cases of Moreno and Rivera, supra, evidence regarding the previous altercation should have been presented as long as it was shown to be admissible and relevant.

In gauging the admissability of testimonial evidence in terms of remoteness in time, the court must look at the effect of the passage of time on the evidence. Heuring v. State, 495 So.2d 894 (1st DCA 1986) When looked at in this manner, remoteness precludes the use of evidence that has become unverifiable through loss of memory, unavailability of witnesses and the like. Id. at 894

In the instant case, Yarborough was having no problem recalling the incident. If Yarborough would have had any difficulty recalling the incident, there was a statement made by Yarborough to the police at the time of the incident which he could have used to refresh his memory. (T.1338-40)

The testimony of Yarborough was relevant to shift the suspicion of guilt to someone other than GUZMAN by showing that someone other than GUZMAN had both a motive to kill Colvin and knowledge of the murder weapon. Because the integrity of the evidence was not affected by the passage of the time upon Yarborough's memory and because such evidence was relevant to show the guilt of someone other than GUZMAN, the court erred in keeping it from the jury.

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the jury so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed.2d 1039 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979). Especially in the case such as the one at bar, a rule allowing wide latitude in the presentation of evidence by defendant in a capital trial should be applied. A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to the state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States v. Nixon, 418 U.S. at 713. In the weighing process, the fundamental constitutional right to present witnesses should prevail. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. Case law in Florida is clear that it is error for the trial court to exclude evidence which tends in any way even indirectly, to prove a criminal defendant's innocence, and that all doubt of

admissibility of this type of evidence should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982). The refusal of the trial court to allow Yarborough to testify violates GUZMAN's due process rights and require that GUZMAN be granted a new trial.

CUMULATIVE EFFECT OF THE EXCLUSION OF TESTIMONY

The testimony of Lee, regarding the statements of Wallace, and the testimony of Yarborough, regarding an earlier altercation between Colvin and an undisclosed assailant, were key elements in GUZMAN's defense. Both pieces of evidence would implicate someone other than GUZMAN as the murderer. Lee's testimony regarding seeing Colvin alive was essential to discredit the major witness against GUZMAN. The exclusion of this evidence had the cumulative effect of prejudicing GUZMAN by limiting his right to put on a defense in his behalf, and did so to such an extent as to deprive him of a fair trial. On these grounds, GUZMAN is entitled to a new trial.

II. THE TRIAL COURT ERRED IN GIVING NON-STANDARD JURY INSTRUCTIONS IN THE PENALTY PHASE

The jury instructions proposed and submitted by the State to the Court for the penalty phase failed to include the following standard phrase:

> "the aggravating circumstances that you may now consider are limited to any of the following that are established by the evidence: See Florida Standard Jury Instructions in Criminal Cases, F.S. 921.141(5).

The defense objected to the omission of this instruction at the penalty phase charge conference. (R.97) Despite that, the Court overruled the defense objection to omitting standard jury instructions. (R.98) The court gave the instructions to the jury without the limiting language shown above. (R.150-1) The defense renewed its objection to the omission of a standard jury instruction, but the court again overruled it. (R.158) This occurred after the trial court specifically said it would not deviate from the standard instructions. (R.18)

In the case at bar, the failure of the court to limit the aggravating circumstances which the jury could consider constituted error. The timely objection to the admission of the jury instruction by defense counsel obviates the need for GUZMAN to prove fundamental error. Walton vs. State, 547 So.2d 622 (Fla. 1989), cert. denied 493 U.S. 1036 (1989) Florida Statute §921.141 makes it incumbent upon the Court to properly instruct the jury as to those circumstances which they may consider during the penalty phase of a capital case. The omission was not cured by any of the other instructions given by the trial court in the penalty phase.

In the instant case, the jury had heard and been exposed to many extraneous items that could not be considered by the jury as "aggravating circumstances" under the applicable statute. These included a) the introduction into evidence of GUZMAN's "rambo" survival knife (T.1142,1311); b) the drug usage of GUZMAN and the witnesses that pervaded the day to day life of the parties involved (T.1818); c) GUZMAN acting as a "canine" in protecting Cronin while she acted as a prostitute. (T.1817); and d) extraneous details of the previous crime that GUZMAN had committed. (R.27-87)

The cumulative effect on the jury of such testimony and evidence would no doubt sway the panel to believe that GUZMAN was a "bad man". Without the limiting instruction that directed the jury to consider only those factors allowed by F.S. 941.141(5), jurors may well have based their decision to vote for the death penalty on inappropriate factors.

The failure of the trial court to instruct the jury to limit its consideration of aggravating circumstances to those listed in the standard jury instruction was reversible error. The omission deprived GUZMAN of a fair trial and his right to due process. As such, the sentence should be reversed and remanded for a new sentencing phase of the trial.

III. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PUBLIC DEFENDERS' OFFICE FROM REPRESENTING GUZMAN IN THAT THE PUBLIC DEFENDERS' OFFICE HAD A SEVERE AND CONTINUING CONFLICT OF INTEREST BECAUSE OF ITS REPRESENTATION OF PRIME WITNESSES AGAINST GUZMAN AND BECAUSE THE CONTINUING CONFLICT RENDERED THE PUBLIC DEFENDER'S REPRESENTATION OF GUZMAN INEFFECTIVE

The record shows that at one time or another the Public Defenders' Office had at least four conflicts of interest in their representation of James Guzman. (T.2063, 2073, 2118, R.175, 412, 553) These include the Public Defenders' representation of John Sara at the same time that they were representing Guzman, the representation of Paul Rogers during the time they represented GUZMAN, the representation of Martha Cronin (Cronin) during the time that they were representing GUZMAN and the Public Defenders' representation of Arthur Boyne (Boyne) at the same time that they were representing GUZMAN. Eventually, Cronin and Boyne were the primary accusers of GUZMAN in that they testified that GUZMAN had confessed to them that he killed David Colvin. (R.1217-1243, 1037-1045) No other evidence directly linked GUZMAN to the killing of Colvin.

Just days prior to trial, the Assistant Public Defender moved to withdraw from representation of GUZMAN when the State, at the last minute, disclosed that a former client of GUZMAN's assistant public defenders and a current client of the public defenders' office would be called as a witness for the State. (T.12-13) At the hearing conducted on the time, the State assured the trial court and GUZMAN that the witness (Arthur Boyne) fully waived all

confidentiality of the attorney-client relationship and that the testimony of Boyne would not be presented by the State if it would create a conflict of interest between the Public Defenders' Office and the witness. (T.12-13) The court denied the assistant public defender's Motion to Withdraw. (T.13) Defense counsel continued to represent GUZMAN when the Motion to Withdraw was denied, even though it had good cause to withdraw.

At trial, the conflict of interest arose contrary to the assurances of the prosecutor that the conflict would not affect the fairness of the proceeding. Specifically, the State presented Boyne as a witness who allegedly heard GUZMAN admit that he killed Colvin and obtained only a ring for his efforts. (T.1041) On cross-examination, Boyne then denied making statements to GUZMAN's attorney, who was Boyne's attorney at the time that the statements were made, that he would do anything to get out from under the death penalty and first degree murder prosecution for which he was charged. (T.1083) The assistant public defender intended to call himself and another assistant public defender to rebut Boyne's assertion that he would do anything to get out from under the death penalty. (T.1060-9) The assistant state attorney moved to exclude the testimony because the assistant public defenders were not on the witness list. (T.1063) The assistant public defenders never did testify at the trial.

The waiver of the attorney-client privilege by Boyne in no way removed the ethical impediment that would prevent the impeachment of Boyne through testimony that would necessarily have to come from

GUZMAN's attorney. When Boyne denied making several statements that he would do anything to avoid a conviction, GUZMAN's defense counsel was placed in the untenable and unethical position of becoming a witness to the present case to impeach his client (Boyne), also charged with first degree murder. This event affected the fairness of GUZMAN's trial and constitutes a valid basis that justifies a new trial. Perez vs. State, 474 So.2d 398, 400, Footnote 4, (Fla. 3rd D.C.A. 1985)

A conflict of interest exists whenever one defendant stands to gain significantly by counsel producing probative evidence or advancing plausible arguments that are damaging to the cause of another defendant, for whom the same counsel is acting. Oliver vs. Wainwright, 782 Fed.2d 1521 (11th Cir. Court of Appeals, 1986), cert. denied 479 U.S. 914 (1986) An actual conflict of interest also exists if counsel's course of action is affected by the conflicting representation. Porter vs. Wainwright, 805 F.2nd 930, 11th Circuit Ct. of Appeals, 1986, rehearing denied en banc, 810 F.2d 208 (11th Cir. Ct. of Appeal) cert. denied 482 U.S. 918. Prejudice is presumed once a defendant has shown that his counsel represented conflicting interests and that the conflict of interest has adversely affected his lawyer's performance. Burger vs. Kemp, 483 U.S. 776 (1987)

If a public defender is appointed to represent two or more defendants found to be insolvent and determines that neither he nor his staff can counsel all of the accused without a conflict of interest, the public defender is under a duty to move the Court to

appoint one or more members of the Florida Bar to represent those accused. Florida Statute §925.035(1). The assistant public defender in this matter moved to withdraw three times based on three separate conflict of interest potentials. The most serious conflict of interest was when the assistant public defender attempted to elicit testimony from Boyne on the stand as to whether he had ever said that he would do anything to get out of prison. (T.1060,1083) Obviously, when Boyne denied ever saying this, a conflict arose in that the assistant public defender was inhibited in his attempt to impeach Boyne. Because of the nature of the allegations against GUZMAN, that being the accusation that he had confessed to Boyne, it was crucial that every effort be made to impeach Boyne's credibility. However, the conflict clearly created a situation in which the assistant public defender could not do this. As such, this severely prejudiced GUZMAN's case.

The right to counsel under the Sixth Amendment of the Constitution of the United States, Article I, Section 16 of the Florida Constitution encompasses the right to assistance of counsel whose loyalty is not divided between clients without conflicting interests. Glasser vs. United States, 315 U.S. 60 (1942); Davis vs. State, 461 So.2d 291 (Fla. 1st DCA 1985) In this case, an objection was raised by GUZMAN and a Motion to Withdraw was filed by the assistant public defender based on the apparent and actual conflicts of interests involved as described above. Although the trial court conducted an evidentiary hearing concerning the conflict, it is apparent from the transcript of the trial that this

conflict was never resolved and that GUZMAN's right to have the effective assistance of counsel was controverted by the conflict. Because of this, GUZMAN's Sixth Amendment right to effective assistance of counsel was violated. Accordingly, the judgment of the court should be reversed and the cause remanded for a new trial.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT SEVERAL MOTIONS FOR MISTRAL REQUESTED BY THE DEFENDANT BECAUSE OF PROSECUTORIAL MISCONDUCT WHICH WAS SO PREJUDICIAL TOWARDS THE DEFENDANT THAT IT VITIATED THE ENTIRE TRIAL

During the trial of GUZMAN, the prosecutor repeatedly violated court instructions that gave rise to several motions for mistrial. The prosecutor continued to editorialize about jurors' answers (T.187) and continued to testify himself despite court admonitions. (T.1117,1181,1213, 1893 and 1984) However, the most egregious misconduct on the part of the prosecutor was his questioning of the expert witness of the defense, Christopher Choporis, M.D.. The prosecutor's misconduct with Dr. Choporis was as follows:

a. Constantly interrupting Dr. Choporis when he was trying to answer questions after the prosecutor had been instructed to refrain by the court. (T.1445, 1446, 1473 and 1499, 1500)

b. Repeatedly asking questions for which the court had already ruled the prosecutor could not ask. (T. 1453, 1462, 1465, 1604)

c. Misleading the jury (T.1474)

d. Making actions, facial gestures and exhibiting behavior prejudicial to Defendant (T.1580)

e. Continual quarreling by the assistant state attorney with the witness for which he was admonished by the court. (T.1604)

The prosecutor's continual misconduct in his questioning of Dr. Choporis provoked GUZMAN to move for a mistrial because the assistant state attorney was improperly trying to sway the jury as to why Dr. Choporis was testifying for the defense, despite the

repeated admonitions by the trial court to discontinue the line of questioning. (T.1480) The trial court denied the request for the mistrial (T.1480), but the Defendant renewed that motion for mistrial because of the cumulative effect of what the prosecutor was saying and when the prosecutor subsequently began comparing salaries with Dr. Choporis. (T.1602) The court once again denied the mistrial, but found it necessary to instruct the jury what an expert goes through in procuring fees in an indigency case. (T.1602, 1603)

In addition, the defense also requested a mistrial at the end of the evidence being presented based on the prosecutor continually muttering statements under his breath to the jury that could not be picked up by the court reporter. (R.1920) The court denied this motion for mistrial also. (R.1924)

The cumulative effect of the prosecutorial misconduct was so prejudicial as to vitiate the entire trial. Cobb vs. State, 376 So.2d 230 (Fla. 1979) The prosecutor's continual disregard of the court's rulings and instructions concerning the examination of Dr. Choporis was clearly prejudicial to the Defendant's case. In the instant case, the issue of the time of death was crucial to the finding of guilt or innocence of GUZMAN by the jury. The main accuser of GUZMAN, Martha Cronin, testified that GUZMAN had confessed to her about the murder on August 10, 1991 at about 3:00 p.m.. (T.1225) Dr. Choporis was attempting to testify that the

time of death was well past the time that Cronin testified GUZMAN had confessed to her. (T.1564) This testimony would have corroborated that of Artonya Lee. (T.1620)

The prosecutor's unfair remarks and his continuing effort to testify influenced the jury to arrive at a verdict that it might not otherwise have reached had the prosecutor obeyed the judge. This continual harping on the method of how Dr. Choporis was to be compensated or not be compensated certainly took the jurys' minds off the issue at hand, that being the credentials of Dr. Choporis and his testimony concerning the time of death which conflicted with the State's expert. As such, the actions and comments of the prosector so prejudiced GUZMAN that it vitiated the entire trial. Therefore, the court should reverse this conviction and remand it for a new trial. State vs. Murray, 443 So.2d 955 (Fla. 1984); State vs. Helton, 551 So.2d 1267, 1268 (Fla. 1st DCA 1989)

V. THE TRIAL COURT ERRED IN DISMISSING A JUROR FOR CAUSE WHO EXPRESSED OPPOSITION TO THE DEATH PENALTY, BUT WHO TESTIFIED SHE COULD UPHOLD THE LAW

In the case at bar, Juror Schantz clearly indicated that she was prepared to apply Florida law as instructed by the Judge. (T.630) Although she testified that she did not agree with the death penalty, she did testify that she could vote to impose the death penalty even through she did not agree with it. (T.633,639, 640, 644)

Defense counsel asked Juror Schantz about her ability to follow the law as follows:

> Q. "Do you think the specter of the death penalty out there will in any way sway your ability to be fair and impartial and apply the law the Court gives you to the facts?"
>
> A. "No, I don't". (R.640)

In addition, Juror Schantz testified that she did not believe that her reservations about the death penalty would interfere with her ability to fairly determine which crime, if any, for which the Defendant would be guilty. (T.644)

The prosecutor challenged Juror Schantz for cause alleging that Schantz could not be sure that she could follow the law in the penalty phase. The prosecutor claimed that Schantz would compromise her verdict against the evidence in the guilt phase. The Court reserved ruling on this issue. (T.645) Eventually, the Court granted the State's motion challenging Schantz for cause stating:

> "My recollection is not exactly that as stated by the State Attorney, but similar thereto. She definitely does not agree with the death penalty, that was her first statement. She was very hesitant and questionable as to whether she could follow the law. In my opinion, based on the answer she gave to both counsel, for those reasons I will grant the challenge for cause on her". (T.736)

The challenge for cause failed the Adams vs. Texas, 448 U.S. 38, 45 (1987) and Wainwright vs. Witt, 469 U.S. 412, 424 (1985) standard. The testimony did not show that the juror could not follow the law and the Court's instructions, thereby putting her personal feelings aside. The record indicates that Juror Schantz never came close to expressing the unyielding conviction and rigidity of opinion regarding the death penalty which would allow her to be excused for cause. As concluded in Adams,

> "to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their view about such a penalty would be to deprive the Defendant of an impartial jury to which he or she is entitled under the law . . .These individuals were not so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer it constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded." 448 U.S. at 50-51

The exclusion of even one juror in violation of the Constitutional standards as enunciated by the United States Supreme Court is constitutional error which goes to the very integrity of

the legal system and can never be considered a "harmless error". Graves vs. Mississippi, supra., Davis vs. Georgia, 429 U.S. 122 (1976); Chandler vs. State, 442 S.2d 171 at 174-175.

Accordingly, GUZMAN was tried in front of an unconstitutionally seated jury. GUZMAN's judgment and sentence must be reversed and remanded for a new trial before a fair and impartial jury.

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN A WITNESS TESTIFIED THE APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A CRIME

Arthur Boyne (Boyne) acted as a witness against GUZMAN in the trial below. During Boyne's testimony he testified as followed:

> Q. "All Right. What did he say to you?"
>
> A. "His statement was in response to a question that I had asked. Originally, he said that he felt that his case looked pretty good. The State had no evidence against him, and I mentioned just casually "aren't you concerned with the fact you have already previously been convicted?" (T.1043) (Emphasis added)

The defense immediately moved to strike that statement and moved for a mistrial. The Court granted the Motion to Strike and instructed the jury to disregard the comment that was made. In addition, the Court reserved ruling on the Motion for a Mistrial. (T.1043)

Subsequently, the defense renewed their Motion for a Mistrial based on Boyne's testimony. (T.1315) Eventually, the trial court denied the Motion for Mistrial (T.1924)

This testimony was particularly prejudicial to GUZMAN in that it was given by Boyne, who at the time he testified was incarcerated on the charge of first degree murder in the Volusia County Branch Jail. (R.1037-38) Boyne not only testified that GUZMAN was convicted of a previous crime, but the jury also could infer that he was convicted of the charge for which he was on trial.

This Court has recognized that any evidence that a Defendant has committed a similar crime will frequently prompt a jury to more readily believe that the Defendant has committed the crime for which he is charged because such testimony predisposes the mind of a juror to believe a prisoner guilty. Nickels vs. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925)

In the case at bar, the jury heard the testimony of Boyne, an accused murderer, allegedly talking with GUZMAN in jail about GUZMAN having "already previously been convicted". (T.1043) This obviously would cause the jury to think that GUZMAN is of bad character and would have a propensity to commit a crime or, in the alternative, that he had already been convicted of the crime for which he was charged. Because this testimony was so prejudicial, its admission should be presumed harmful error because of the danger that a jury would take such testimony as evidence of guilt of the crime charged. Straight vs. State, 397 So.2d 903 (Fla. 1991), cert. denied 454 U.S. 1022 (1981)

Because this evidence was so prejudicial, the trial court's denial of a Motion for Mistrial should be reversed and a new trial ordered.

VII. THE TRIAL COURT ERRED IN ADMITTING GRUESOME PHOTOGRAPHS INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL BELOW IN VIOLATION OF GUZMAN'S FOURTH AMENDMENT RIGHTS

During the penalty phase in the trial below, the Court allowed in certain photographs of a body of a woman who was killed by GUZMAN in an unrelated matter. The photographs of the nude body of the woman included a depiction of a gunshot wound that has been inflicted to her head. Despite not being relevant to the proceedings at hand and extremely prejudicial to GUZMAN, the Court allowed the introduction of the two photographs of the nude female with the gunshot wound over Defendant's objection. (R.61)

Photographs should be received into evidence with great caution. Thomas vs. State, 59 So.2d 517 (Fla. 1952) The test for admissibility of photographs is relevancy. Zamour vs. State, 361 So.2d 776 (Fla. 3d D.C.A. 1978) A photograph is admissible if it properly depicts a factual condition relating to the crime and if it is relevant in that it aides the Court and jury in finding the truth. Booker vs. State, 397 So.2d (Fla. 1981) Even if photographs are relevant, Courts must still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford vs. State, 307 So.2d 433 (Fla. 1975) cert. denied 427 U.S. 912, 96 Supreme Court 3227 (1976).

In Duncan vs. State, 619 So.2d 279 (Fla. 1993), this Court stated that an admission of a gruesome photograph of a victim of a prior unrelated murder perpetrated by the Defendant was error in the sentencing phase of a first degree murder trial, as the prejudicial effect of the photograph outweighed the probative

value. The Duncan court ruled that the photograph in that case was unnecessary to support aggravating factors of a conviction of a prior violent felony as a certified copy of the judgment and sentence regarding that crime has been introduced. In addition, there was extensive police testimony in that case about the circumstances of the prior murder and the nature of the injuries inflicted. This Court ruled that the error in Duncan was harmless in that little reference was made to the photograph and the photograph was not urged as a basis for the death recommendation, nor was it otherwise made focal point of the proceedings.

In Elledge vs. State, 613 So.2d 434, 436 (Fla. 1993), a first degree murder case, this court found the admission of numerous photographs of a corpse was error in that the Defendant in the case admitted the killing and the location of the gunshots on the decedent's body was irrelevant to the "prior felony conviction" aggravating circumstance. This, along with other errors cited by this Court, was used as a basis to reverse and remand the case for a new sentencing.

In the case at bar, such error in allowing the photographs into evidence was not harmless. The condition of the body of the decedent from the prior unrelated crime was a focal point of the State's argument throughout the questioning of Detective Hebding during the penalty phase. Such reference to the gruesome photographs prejudiced GUZMAN and only served to inflame the

passions of the jury, thus violating the Defendant's right to due process of the law. As such, this matter should be remanded for a new sentencing hearing.

VIII. THE TRIAL COURT ERRED IN OVERRULING GUZMAN'S OBJECTION AND ALLOWING THE INTRODUCTION OF INFLAMMATORY PHYSICAL EVIDENCE THAT WAS IRRELEVANT AND UNRELATED TO THE MURDER

GUZMAN was the owner of a survival "rambo type" knife as shown by testimony in the trial below. (T.1221) The State's theory of the case in this matter was that GUZMAN killed the victim by use of the victim's own Samurai sword. It was never alleged that GUZMAN used the survival knife as a murder weapon. Despite these facts, the State moved to introduce the "Rambo" knife into evidence over defense objections. (R.1142, 1311)

The initial introduction of the irrelevant and prejudicial knife constituted clear error. In the case of Castro vs. State, 547 So.2d 111, 114 (Fla. 1989), this Court concluded that the introduction into evidence of an irrelevant steak knife was found to have prejudiced Castro's right to a fair penalty phase hearing. The erroneous admission of the relevant collateral crime's evidence "is presumed harmful error because of the danger that a jury will take the bad character propensity to crime thus demonstrated as evidence of guilt of the crime charged". Straight vs. State, 397 So.2d 903, 908 (Fla. 1981), Accord Peek vs. State, 488 So.2d 52, 56 (Fla. 1986)

The testimony in the case at bar never linked the knife with any facet of the crime for which GUZMAN was convicted. The knife presented into evidence was patently irrelevant and completely prejudicial. As such, GUZMAN should be granted a new trial in this matter.

IX. THE CONVICTION OF JAMES GUZMAN WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE

GUZMAN was convicted solely on the basis of two alleged confessions that he made, one being to Cronin and the other being to Boyne, plus other circumstantial evidence.

Cronin was a prostitute that was addicted to crack cocaine. (T.1219) She and GUZMAN became involved with each other prior to the death of the victim in this matter. (T.1218) They both lived at the same hotel as the victim. Cronin testified that on August 10, 1991, that GUZMAN came into her hotel room with a bag. (T.1226) Subsequently, he left and came back without the bag. Thereafter, Cronin testified that GUZMAN stated that he killed Colvin. (T.1227) Cronin testified that she did not want to hear anything more about the matter. (T.1227) She testified that thereafter she looked at the ring that GUZMAN allegedly got from Colvin to discuss how much that they could for it. (T.1228) Thereafter, she shared the crack cocaine that GUZMAN procured from the trade/sale of the right to Leroy Gadson. In excess of two months later, Cronin testified that GUZMAN told her the details of the murder. (T.1238)

At the time that Cronin was testifying in regard to GUZMAN matter, she was facing charges of unlawful possession. These charges were dropped after her testimony at GUZMAN's trial. (See Appendix A)

The other witness that testified against GUZMAN was Boyne, who was being held at the Volusia County Branch Jail at the same time GUZMAN was on a charge of First Degree Murder. (T.1037) The alleged jail house confession supposedly occurred when GUZMAN

unilaterally blurted out to Boyne that he had killed the victim. (T.1041) Boyne also wrote a letter that admitted into evidence confirming GUZMAN never told him anything about the murder. (T.1084)

The State also presented evidence that GUZMAN's thumb print was found on Colvin's phone after he moved. (T.994) GUZMAN admitted using the telephone in Colvin's former room (205), but that he never used the telephone in the room where Colvin was murdered. (R.1871) However, the State's own witness testified he moved the phone for Colvin when Colvin moved from Room 205 to Room 114. (T.817)

In regard to Boyne, GUZMAN's case was only one of several murder cases in which he testified after having received "confessions" from accused persons who were incarcerated with him. (T.1087)

Testimony was presented through Artonyo Lee, Detective James Flynt and Detective Wright that Curtis Wallace and Artonyo Lee had seen David Colvin, the victim, alive on August 11, 1991 (Sunday) at 8:00 or 9:00 p.m. or on August 10, 1991 (Saturday) at 8:00 or 9:00 p.m.. (T.1702, 1657, 1652) This testimony shows Colvin alive after the time that GUZMAN allegedly confessed to Cronin about his killing, that being Saturday at 3:00 p.m. (T.1225) In addition, Artonyo Lee implicated Curtis Wallace in the killing of David Colvin. (T.1706)

GUZMAN had testified that he had received the victim's ring from Curtis Wallace and then traded it for crack cocaine and cash. (T.1819-20)

Cronin, Boyne and GUZMAN all had previous criminal records at the time they testified.

The evidence presented at trial does not rise to a level of "competent, substantial evidence" that justifies convicting JAMES GUZMAN. As such, his conviction of First Degree Murder should be reversed.

X. THE TRIAL COURT ERRED IN RESTRICTING THE SCOPE AND TIME OF APPELLANT'S ARGUMENT IN THE PENALTY PHASE OF THE TRIAL

The trial court limited the closing argument of the Defendant in the penalty phase to one hour of time. This arbitrary limit of the Defendant's argument in the penalty phase of a first degree murder trial is an unreasonable restriction on the Defendant's right to present his case to the jury. Hickey vs. State, 44 So.2d 1271 (Fla. 5th D.C.A. 1986); May vs. State, 89 Fla. 78, 103 So. 115 (1925); Neil vs. State, 451 So.2d 1058 (Fla. 5th D.C.A. 1984); Pittman vs. State, 440 So.2d 657 (Fla. 1st D.C.A. 1983) The closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial. Herring vs. New York, 422 U.S. 853, 859 (1975) As such, the arbitrary limitation of time by the court imposed prior to the beginning of the penalty phase argument by the defense unduly inhibited the Defendant's strategy and prejudiced the Defendant.

In addition, the trial court sustained a State objection to the defense discussing the public policy behind the death penalty during the penalty phase. (R.143, 144) The defense attempted to go into the reasons why a sentence of life should be imposed rather than the death penalty by explaining the theory behind sentencing a person for his crime. (R.143) The court sustained the objection of the State to this argument. This argument was clearly responsive to the issues of the case, that being whether the jury would recommend the imposition of a life sentence or the death penalty against the Defendant. The trial court's refusal to allow

the defense to argue the reasoning behind the sentence is clearly prejudicial to the Defendant. A wide latitude for argument to a jury is permitted. Thomas vs. State, 326 So.2d 413.

Certainly in an argument of the penalty phase of a First Degree Murder conviction, defense counsel should be allowed to comment on the theory of capital punishment vs. life imprisonment. The failure of the trial court to allow such argument and limit the time for argument prejudiced GUZMAN and requires that a new penalty phase hearing be held.

XI. THE INSTRUCTION ON REASONABLE DOUBT DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL

The trial court instructed the jury that "A reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt" (t.567,1765). In Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992), such an instruction was found proper. The court reached the merits notwithstanding that there was no objection to the instruction at trial. Bennett v. State, 173 So. 817 (Fla. 1937) approved reaching the merits of an instruction on reasonable doubt notwithstanding the lack of an objection. Woods was wrongly decided on the merits.

The Supreme Court has long disapproved instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1881). It has approved of only one definition of the term; In Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954), while disapproving an instruction given by the trial court, it wrote that "the instruction should have been in terms of the kind of doubt that would make a person hesitate to act". Hence, the following instruction was approved in United states v. Turk, 526 F.2d 654, 669 (5th Cir. 1976):

> A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would not hesitate to act upon it in the most important of your own affairs.

It is safe to say that speculation and the force of imagination come into play when one is determining to act in the most important of one's affairs, and that a doubt founded on speculation or an imaginary or forced doubt will cause one to

hesitate to act. Hence, our standard instruction is unconstitutional. Thus, in Hager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and in other instances, may be so given as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy", flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Hager.

Woods, supra, is also incorrect in another regard. There, discussing Cage v. Louisiana, 111 S.Ct. 328 (1990), it was written that Cage does not "... place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable." 596 So. 2d at 158. This applies an incorrect legal standard for determination of the

adequacy of a jury instruction. The correct standard is whether there is "a reasonable likelihood" that the jury applied the instruction in an unconstitutional manner. Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990); Estelle v. McGuire, 112 S.Ct. 475, 482 (1991). Further, the significant question is not whether a juror could understand that the law requires acquittal when there is a reasonable doubt, but whether the definition of reasonable doubt was improper. Hence, Woods was wrongly decided.

The instruction in this matter for reasonable doubt is crucial because the finding of guilt by the jury came down to whether they believed GUZMAN or Cronin and Boyne.

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. The instruction violated GUZMAN's right to due process and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, this Court should order a new trial.

The improper instruction was independently prejudicial as to penalty proceedings, for it resulted in the jury's use of an improper standard in determining the existence of aggravating circumstances in violation of Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

XII. THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTIONS FOR THE LESSER INCLUDED OFFENSES OF 3RD DEGREE MURDER

GUZMAN's request for an instruction on third degree murder was denied by the Court. (R.557-60) GUZMAN's testimony was that he obtained the ring, through Cronin, from Wallace and traded/sold it to Leroy Gadson ("Paco") for crack cocaine and money. (T.1870) The time of death of Colvin was contested, and the evidence was that Colvin was seen alive after GUZMAN exchanged the ring for cocaine. (T.1624-39) It is reasonable to conclude that Wallace returned to Colvin's room after delivering Colvin's ring to GUZMAN to exchange for cocaine, that Colvin then confronted Wallace and was killed by Wallace. A conviction for third degree murder against GUZMAN would be appropriately supported by those facts, with the underlying felony either conspiracy to deal in stolen property and/or sale or delivery of cocaine.

In the case at bar, the instructions given the jury, over defense objection, were misleading and defective. A defendant charged with a "degree" crime, such as first-degree murder, is entitled to have the jury instructed on **ALL** crimes of lesser degree that are supported by the evidence.

> When the offense charged is first degree murder, whether grounded specifically alleged premeditated design, or whether committed in the perpetration of certain felonies as proscribed by §782.04, Florida Statutes, F.S.A., the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree. (citation omitted).

Brown vs. State, 124 So.2d 481, 483 (Fla. 1960) See Green vs. State, 475 So.2d 235 (Fla. 1985) (Defendant charged with first-degree murder is entitled to instruction on third-degree murder if there is evidence to support the charge).

The omission of the instruction on third degree murder forms a basis to grant a new trial. Tamayo vs. State, 237 So.2d 251 (Fla. 3rd D.C.A. 1970); Gallo vs. State, 491 So.2d 541 (Fla. 1986).

XIII. THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S SPECIALLY REQUESTED JURY INSTRUCTION(S) DENIED DUE PROCESS, A FAIR JURY TRIAL AND RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE 1, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A trial court has a fundamental responsibility to give the jury full, fair, complete and accurate instructions on the law. Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992). The standard jury instructions, though presumed correct, not always are. See, Yohn v. State, 476 So.2d 123 (Fla. 1985) (standard jury instruction concerning law of insanity incorrect); Sochor v. Florida, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (standard jury instruction concerning "especially heinous, atrocious or cruel" statutory aggravating factor unconstitutionally vague.).

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990).

Here, objections to the standard jury instructions and proposed instructions were submitted to the trial judge in writing. (R.578-599). The trial court overruled the objections and refused to give the instructions. Appellant again asserts each objection to the standard instructions made below and in particular argues that the following rulings denied due process, a fair trial and a reliable sentencing recommendation contrary to the Fifth, Sixth,

Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution.

With reference to statutory aggravating factors, several unconstitutionally broad terms must be expressly limited and carefully defined to avoid arbitrary and capricious imposition of the death penalty. Unless instructed by the trial court that use of such terms as "heinous, atrocious or cruel" and/or "cold, calculated and premeditated" is necessarily limited to the definitions of those terms provided by the court, jurors are left free to use far broader and commonly understood meanings with arbitrary, capricious and unconstitutional results.

> We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. [citations omitted]. In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands[.]

Stringer v. Black, 117 L.Ed.2d 367, 378-379 (1992). The failure to give an instruction limiting the jury's consideration of the statutory aggravating factors to only the circumstances as defined by the court was an abuse of discretion resulting in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

The reliability of the death penalty is suspect based on several standard jury instructions given here over objection. The proposed instructions would have cured the defects. The standard preliminary instruction is objectionable because it can reasonably be read as limiting the things that may be presented as mitigation to "the nature of the crime and the character of the defendant." The limitation violates the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22. Penry v. Lynaugh, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Instructing the jury that the sentencing decision rests "solely" with the trial judge and that the recommendation is "advisory" (R.582) is misleading and incorrect, as explained in Espinosa, supra, and it is prejudicial in that it tends to diminish the responsibility of the jury in violation of the Eighth and Fourteenth Amendments and Article I, Section 17. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985).

The instructions given the jury as to the statutory aggravating factors failed to adequately channel the discretion of the jury to recommend the death penalty in violation of the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. The instructions given as to an "especially heinous, atrocious or cruel" aggravating factor (R.587) and a "cold, calculated and premeditated murder, with no pretense of moral or legal justification" (R.587) aggravating factor fail to limit the class of people eligible for the death penalty and are too broad and unconstitutionally vague in violation of Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), Sochor v. Florida, 112

S.Ct. 2114, 119 L.Ed.2d 326 (1992), Maynard v. Cartwright, 486 U.S. 356 (1988), Shell v. Mississippi, 111 S.Ct. 313 (1990), Godfrey v. Georgia, 446 U.S. 420 (1980).

The standard instruction states that the jury "should" recommend a life sentence if the aggravating circumstances do not justify the death penalty. (R.588). The term "should" is too equivocal. It fails to mandate a life recommendation when a death penalty is not justified by sufficient statutory aggravating circumstances. As commonly understood, the term "should" fails to instruct jurors that a life recommendation is required in cases where the statutory aggravating circumstances fail to justify a death sentence and instead suggests that the option remains open to recommend a death sentence even in the absence of sufficient statutory aggravating factors in violation of the Fifth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. (R3027). See, Cage v. Louisiana, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Counsel asked for an instruction to be given during the jury charge that would define mitigation as follows:

> "Mitigation" is defined broadly as any aspect of the defendant's character or record and any of the circumstances of the offense that reasonable may serve as a basis for imposing a sentence less than death.

(R.595). That definition is found verbatim in Campbell v. State, 571 So.2d 415, 419, fn. 4 (Fla. 1990) and Lockett v. Ohio, 438 U.S. 586, 604 (1978). The absence of that instruction failed to insure that the jury would perceive what, as a matter of law, must be weighed in opposition of the aggravating considerations.

Similarly, the trial court refused the request that the jury be instructed that, as a matter of law, mitigation includes but is not limited to an abused childhood, remorse, and a potential for rehabilitation. (R.596). There was evidence concerning the potential rehabilitation of GUZMAN. In the absence of an instruction from the court informing the jurors that such factors must necessarily be considered as mitigation, the jury may well have disregarded the evidence and summarily rejected the argument of counsel because they were not so instructed by the court. The arbitrary refusal to instruct the jury that as a matter of law such things as an abused childhood or a potential for rehabilitation, if proved to exist, must be weighed against imposition of the death penalty denied due process, a fair trial and a reliable sentencing recommendation in violation of Article I, Sections 9, 16, 17 and 22 of Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A sentencer cannot be precluded from considering valid mitigation, Lockett v. Ohio, 438 U.S. 586, 604-605 (1978), nor can a sentencer refuse to consider valid mitigation. Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982). See, Penry v. Lynaugh, 492 U.S. 302 (1989) (Eighth Amendment requires that jury be allowed to consider mental retardation as a mitigating circumstance.).

In order to provide a constitutional and consistent standard for determining whether the aggravation "outweighs" the mitigation, counsel asked for the following instruction: "If a reasonable quantum of competent, uncontroverted evidence has been presented as to a particular mitigating factor, the mitigation consideration has been adequately proved." (R597). The omission of that instruction renders the "outweigh" standard for imposition of the death penalty impermissibly vague and susceptible to arbitrary and freakish application contrary to the requirements of due process and reliably consistent sentencing in violation of Article I, Sections 9, 1 6, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Cage v. Louisiana, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Because the instructions below were unconstitutionally infirm as set forth in the record at pages R.580-599 and as other-wise argued above, the death penalty is based on a tainted and unreliable jury recommendation. Accordingly, the death sentence must be vacated and the matter remanded for a new penalty phase.

XIV. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS DONE IN A HEINOUS, ATROCIOUS OR CRUEL MANNER WITHIN THE MEANING OF FLORIDA STATUTE §921.141(5)(e)

The trial court found that the murder of Colvin was proven beyond a reasonable doubt, to be heinous, atrocious or cruel (HAC) within the meaning of Florida Statute §921.141(5)(e). (R.648-9) In the case at bar, the victim was shown to have a blood alcohol level of .34 at the time of his death. (T.948) The court ruled that the crime was heinous, atrocious and cruel beyond a shadow of a doubt because evidence indicated that the killer was shown to have stood in one position to one side of the bed in which the victim was lying. The victim was shown to have raised his head one foot or so off of the surface of the bed during the assault. The court found that there was a defensive wound in that the small finger of the victim's left hand which had been injured. The court also cited that there was some nineteen (19) wounds inflicted by the killer. The court found the murder weapon to be a sabre-like sword which was used to hack and chop at the victim's head, and indicated that the incised wounds evinced movement by the victim during the attack and was therefore conscious for some portion of the attack and experienced both terror and pain during the attack. In addition, the court cited that the Defendant carried a large survival knife on his person, yet chose to use the victim's own samurai sword. (R.649)

Because of the blood alcohol level of the victim, he was obviously impaired to a high degree if he was even conscious. There was no indication whatsoever that the victim was intentionally made to suffer.

The common thread in the cases showing the HAC factor is that the victim was made to intentionally suffer prior to being killed. Omelus vs. State, 584 So.2d 563, 566 (Fla. 1991); Teffeteller vs. State, 439 So.2d 843 (Fla. 1983); Amoros vs. State, 531 So.2d 1256, 1260-61 (Fla. 1988) In Porter vs. State, 564 So.2d 1060, 1063 (Fla. 1990), this Court rejected the trial court's application of the HAC factor where the evidence was "consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful". (emphasis on original) In the case at bar, there is no indication that the killing was meant to be deliberately and extraordinarily painful.

It is of vital importance to the Defendant and the community that "any decision to impose the death sentence be, and appear to be, based on a reason rather than a caprice or motion". Gardner vs. Florida, 430 U.S. 349 (1977) It if can be shown that a particular person intended that a victim suffer, a rational basis exists for application of the HAC factor. Cochran vs. State, 547 So.2d 928, 931 (Fla. 1989) There is no proof in the case at bar that the killer intended that Colvin suffer unnecessarily, especially when the blood level of the victim was shown. Because the judge based the death penalty on this improper consideration, this sentence of death must be reversed. See also Herzog vs. State, 439, 1372 (Fla. 1983); Santos vs. State, 591 So.2d 160 (Fla. 1991)

XV. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST WITHIN THE MEANING OF FLORIDA STATUTE §921.141(5)(e)

The sentencing order reflects that the trial judge found that GUZMAN murdered the victim to avoid a lawful arrest as follows:

> "The applicability of §91.141(5)(e), that a capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape form (sic) arrest, is established beyond a reasonable doubt by Defendant's statements as well as by other testimony and physical evidence in the case. The victim had known the Defendant long enough and well enough to easily identify the Defendant and certainly would have done so had the Defendant robbed but not killed him. Also, the Defendant had observed and remarked on separate occasions within a week of the murder that David Colvin would be easy to rob and that if he robbed someone he would have to kill him because "dead witnesses don't talk". Defendant had been released from prison less than four months' prior to the murder. His intent to avoid being returned to prison is manifest from the evidence". (R.648)

It is respectfully submitted that, as a matter of law, the evidence here is insufficient to support application of this statutory aggravating factor.

A special rule applies when this factor is to be applied for the murder of a person who is not a law enforcement officer. Unless it is shown beyond a reasonable doubt that a pre-existing determination was made to murder a person solely or primarily to eliminate that person as a witness, the statutory aggravating factor set forth in §921.141(5)(e), Florida Statute, 1993, is inapplicable. Garron vs. State, 528 So.2d 353, 360 (Fla. 1988);

White vs. State, 403 So.2d 331, 338 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983) (Elimination of witness must be "dominant motive" behind murder where victim is not a police officer.)

The evidence fails to support as the only reasonable conclusion that Colvin was killed primarily to eliminate him as a witness. The evidence supports other reasonable conclusions as to why Colvin was killed. The State never presented any evidence to show the sole or dominate reason for Colvin to be killed was to eliminate his as a witness to a crime. As such, the statutory aggravating factor set forth in the above-referenced statute was improperly found and weighed here when the death penalty was imposed. Accordingly, the death sentence must be reversed and the matter remanded for a new penalty phase.

XVI. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS DONE IN A COLD, CALCULATED AND PREMEDITATED (CCP) MANNER WITHIN THE MEANING OF FLORIDA STATUTE §921.141(5)(i)

The trial court found that the murder of David Colvin was committed in a cold, calculated or premeditated (CCP) manner without any pretense or moral or legal justification. (R.650) In order for the trial court to make such a finding, the evidence must prove beyond a reasonable doubt that the murder was committed with reflection and planning, similar to execution or contract type murders. Hansbrough vs. State, 509 So.2d 1081, 1086 (Fla. 1987) There must be "a careful plan or pre-arranged design to kill". Rogers vs. State, 511 So.2d 526 (Fla. 1987) CCP focuses on the state of mind of the perpetrator. Mason vs. State, 438 So.2d 374 (Fla. 1983) An intentional and deliberate killing during the commission of another felony does not necessarily qualify for the premeditation and aggravating circumstance. Maxwell vs. State, 443 So.2d 967 (Fla. 1983) The fact that the underlying felony may have been fully planned ahead of time does not qualify the crime for CCP if the plan did not include the commission of the murder. Jackson vs. State, 498 So.2d 906 (Fla. 1986); Lawrence vs. State, 614 So.2d 1092 (Fla. 1993)

In the case at bar, the victim was stabbed repeatedly. However, without more, multiple wounds did not prove the heightened premeditation required. This court has rejected the premeditation circumstances even though the victim suffered several gunshot wounds. See Hamilton vs. State, 547 So.2d 630 (Fla. 1989);

Crouthers vs. State, 465 So.2d 469 This court has also found that a beating death with multiple wounds is also not necessarily CCP. King vs. State, 436 So.2d 50 (Fla. 1983)

Because the evidence in the instant case does not show beyond a reasonable doubt that it was done in a cold, calculated or premeditated manner without any pretense of moral legal justification, the finding of this particular aggravating circumstance must be reversed by this Court.

XVII. THE DEATH SENTENCE IS DISPROPORTIONATE UNDER THE FACTS OF THIS CASE

The sentencer found five aggravating circumstances in the sentencing order. (R.646) As set forth in the preceding points, the majority of the factors are not valid. As such, a death sentence is improper where the sentencer erroneously rejected and/or failed to properly weigh the aggravating and mitigating consideration presented by this record. Campbell vs. State, 571 So.2d 415 (Fla. 1990)

The death penalty is reserved for the most aggravated and least mitigated of first degree murders. As quoted by this court in Fitzpatrick vs. State, 527 So.2d 809 (Fla. 1988):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Fitzpatrick, 527 So.2d at 811.

In the case at bar, the jury returned only a majority verdict for the death penalty. It is respectfully submitted that a death sentence under these facts is disproportionate. This is not the most aggravated and least mitigated of first-degree murders. Thus, the death sentence should be reversed and the matter remanded for imposition of a life sentence.

XVIII. PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS THE DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE OF THE JURORS VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Florida's capital sentencing statute has the jury participating as a co-sentencer in the penalty phase. Johnson vs. Singletary, 612 So.2d 575 (Fla. 1993) The jury's recommendation is an integral part of a death sentence process. The jury's recommendation, whether it be for death or life imprisonment, must be given great weight. Grossman vs. State, 525 So.2d 833, 839, 845 (Fla. 1988) Florida's death sentence scheme does not require jury unanimity or even a substantial majority agreement to return a death recommendation. It also fails to require unanimous or even substantial majority agreement as to whether a particular aggravating circumstance has been proven beyond a reasonable doubt. United States Supreme Court cases have repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett vs. Ohio, 438 U.S. 586, 604 (1978); Sumner vs. Shuman, 483 U.S. 66, 72 (1987)

GUZMAN recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare majority jury recommendations. Brown vs. State, 565 So.2d 304, 308 (Fla. 1990); Jones vs. State, 569 So.2d 1234, 1238 (Fla. 1990). However, with the recent United States Supreme Court decision of Sochor vs. Florida, 112 S. Ct. 2114 (1992) and Espanoza vs. Florida, 112 S.Ct. 2926 (1992), GUZMAN believes the time is right to revisit the previous rulings. Florida's capital

sentencing scheme violates that Sixth, Eighth and Fourteenth Amendments because of its failure to require unanimous agreement or even a substantial majority vote of the jurors in order to return a death verdict. It further violates those Constitutional guarantees because of its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists. Under the law of this State, aggravating circumstances substantively define those capital felonies for which the death penalty may be imposed. Vaught vs. State, 410 So.2d 147, 149 (Fla. 1982)

Because GUZMAN unsuccessfully raised the issue below and because this death sentence was based on a 10-2 jury death recommendation, this sentence cannot constitutionally be carried out. This Court should reverse and remand for and imposition of life imprisonment.

XIX. THE TRIAL COURT ERRED IN DENYING VARIOUS PRE-TRIAL MOTIONS FILED BY THE DEFENSE

The trial court erred in denying various Motions filed and argued by GUZMAN.

A. GUZMAN's Motion for Disclosure of penalty phase evidence, Motion in Limine Re: Penalty Phase and Motion to Compel the State to furnish penalty phase witnesses.

The defense filed a Motion for Disclosure of Penalty Phase Evidence (R.459-62), Motion in Limine Re: Penalty Phase (R.476-477) and a Motion to Compel State to furnish penalty phase witness list (R.463-464) These Motions were denied by the trial court. (T. 18-22) These three motions requested information and to prohibit arguments that the State would be using during the penalty phase of the GUZMAN matter if he was found guilty of crimes for which he was indicted.

It is respectfully submitted that the failure of the State to provide this information denies GUZMAN due process and violates the notice requirements of the Federal and State Constitutions. Adequate notice provides significant Constitutional protection for a defendant. See Mays vs. State, 519 So.2d 618 (Fla. 1988) It has been held that fairness can rarely be obtained by secret one-sided determination of facts decisive of rights in that notice of a case against a Defendant is his most meaningful protection. Fuentes vs. Shevan, 407 U.S. 6780 (1972) Procedural due process is not a static concept. The minimal procedural requirements necessary to satisfy due process requirements depend on circumstances and interest of the parties involved. Morrisey vs. Brewer, 408 U.S.

471, 481 (1972) "Due process is flexible and calls for such procedural protections as the particular situations demand".

Belated notice that the State is relying on certain penalty phase witnesses and certain evidence in the penalty phase works a denial of due process under the 5th, 6th and 14th Amendments and Article I, Section 9 and 16 of the Florida Constitution. The 6th Amendment right "to be informed of the nature and cause of the accusation" is applicable to the State through the due process clause of the 14th Amendment. In Re: Oliver, 333 U.S. 257, 273-74 (1948) "No principal of procedural due process is more clearly established that the notice of a specific charge, and a chance to be heard at a trial of the issues raised by that charge. . . are among the constitutional rights of every accused". Cole vs. Arkansas, 33 U.S. 196, 201 (1948) A unanimous United States Supreme Court found in Cole a denial of due process and stated:

> "it is as much a violation of due process to send an accused to prison following a conviction of a charge in which he was never tried as it would be to convict him upon a charge that was never made. . . to conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court".

The same reasoning applies here, where issues concerning imposition of death penalty were litigated without notice and/or a meaningful opportunity be heard at the time.

It cannot reasonably be claimed that the interests of fairness do not require a defendant to know what evidence is going to be presented against him in a penalty phase and what witnesses are

going to be presented against him, while allowing the state to argue extraneous matters to the jury. It is incumbent upon the court, as a neutral enforcer of the Constitutional rights, to require proper notice. For the aforesaid reasons, the trial court should have granted the motion referred to above. Failure to grant the motions above constitute reversible error and justifies a new trial.

b. GUZMAN's Motion to Prohibit any reference to the advisory role of the jury at sentencing.

The Defendant filed a Motion to prohibit any reference to the advisory role of the jury at sentencing. (R.468-69) The trial court denied the motion of the Defendant. (T.18)

Reference to the advisory role of the jury would violate due process of law in a fair trial pursuant to Articles I, Section 2, 9, 16, 17 and 22 of the Florida Constitution and the 5th, 6th, 8th and 14th Amendments to the United States Constitution. As reflected in the United States Supreme Court opinion of Caldwell vs. Mississippi, 472 U.S. 320 (1985) "it is unconstitutionally impermissible to rest a death sentence under the determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere".

As such, the trial court's denial of the motion to prohibit any reference to the advisory role of the jury at sentencing was error. Such error rose to the extent that it justifies a new trial for GUZMAN.

c. GUZMAN's Motion in Limine Regarding Grand Jury

The Court denied the Defendant's Motion in Limine Regarding Grand Jury. (T.26-27; R.470-472) The Motion attempted to prohibit the State from commenting on, in the presence of the jury, the indictment filed against the Defendant that was returned by the Grand Jurors of Volusia County. The defense argued that such arguments and comments would have a tendency to impress upon the jury the idea that their fellow citizens had already made up their mind that the Defendant was guilty. Such comments would prejudice the Defendant.

The trial judge's denial of the Motion in Limine regarding Grand Jury is error that prejudiced the Defendant. As such, the Defendant should be granted a new trial.

d. GUZMAN's Motion for Statement of Particulars Re: Aggravating Circumstances and Motion to Elect and Justify Aggravating Circumstances.

The trial court denied GUZMAN's Motion for Statement of Particulars Re: Aggravating Circumstances and Motion to Elect and Justify Aggravating Circumstances. (T.25-8; R.446-8, R.466-8) The denial of these motions violates GUZMAN's sixth amendment rights to counsel and rights to due process of law. Notice of this information is critical to a defendant in that all crimes are contained in the statutes. Without specification by the prosector, the Defendant is left to defend the panoply of potential charges. This violates the due process rights of GUZMAN in that he was not

given sufficient notice of the specific charges that were going to be used against him. As such, GUZMAN should be granted a new trial.

CONCLUSION

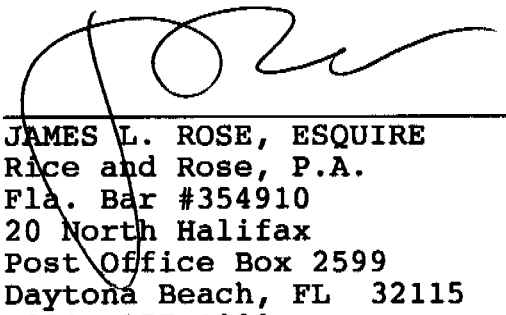
Based on the foregoing reasons and authorities, Appellant respectfully requests this Honorable Court to grant the following relief:

a. As to Points 1, 2, 3, 4, 5, 6, 8, 11, 12, 13 and 19, reverse JAMES GUZMAN's conviction and remand for a new trial.

b. In regard to Points 7, 10, 14, 15, 16, 17 and 18, vacate the sentence and remand for re-sentencing with a new jury.

c. As to point 9, reverse the conviction of the Defendant.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MARGENE ROPER, ESQUIRE, 210 N. Palmetto Avenue, Ste. 447, Daytona Beach, FL 32114 and to JAMES GUZMAN, A-395352, 41-1092-A-1, Union Correctional Institution, Post Office Box 221, Raiford, FL 32803, this 19 day of October, 1993.

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