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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant adds only that it will refer to Appellee's Answer Brief as (AB) in his Reply Brief.

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STATEMENT OF THE CASE

GUZMAN relies on the Statement of Case and Facts set out in his Initial Brief, except to point out two exeptions to the State's recitations contained in the Answer Brief.

Appellee's statement that only one purported conflict of interest is at issue on appeal is incorrect in that there are several conflicts of interest cited in the Initial Brief. Finally, the fact that GUZMAN testified did not render a denial of the Motion for Mistrial based upon the testimony elicited from Boyne as moot in that the ruling altered GUZMAN's strategy.

STATEMENT OF THE FACTS

Appellant relies on the Statement of the Facts set out in his Initial Brief.

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

A. The Court's failure to allow the recall of Artonyo Lee.

The State argues that the trial court's refusal to allow the recall of Lee was not error because (1) "Lee's responses could have been clarified at the time they were given" (AB 9) and (2) any error in such a denial was harmless due to the testimony of Detectives Flynt and Wright (AB 10). The state's first position illustrates a misunderstanding of GUZMAN'S initial argument, and their second illustrates a contempt for GUZMAN'S constitutional right to present witnesses on his behalf, as well as the jury's duty to weigh such evidence as presented.

The State's first point, that Lee's responses could have been clarified when given, is derived from the State's mistaken belief that GUZMAN originally argued it was Lee who misunderstood GUZMAN'S inquiries regarding Lee's knowledge of the victim. (AB 10) It is not GUZMAN'S argument that Lee misunderstood trial counsel's question, but instead that it was GUZMAN's trial counsel who misunderstood Lee's response. The responses given by Lee could not have been corrected when originally given, because the responses were not incorrect. Lee testified he did not "know" the victim, and this was a correct recollection of Lee's involvement with the victim. (T. 1387) However it was GUZMAN's trial counsel's misunderstanding that Lee could not recognize the victim

that was to lead to GUZMAN's request to recall Lee. (T. 1618-9) For this reason, the State's response is based upon an erroneous reading of GUZMAN'S Initial Brief, and as such presents no true rebuttal of the arguments raised regarding this issue.

The State finishes it's argument of this point by stating that any error would be harmless due to the fact that "the testimony that the Defendant wished to present through Lee was presented through Detectives Flynt and Wright." (AB 10) The State argues that the error was further mitigated by the fact that "even if Lee had testified, the State still would have been able to call Flynt and Wright to testify in rebuttal of Lee's testimony." (AB 10) This position flies in the face of GUZMAN'S right to present evidence on his behalf, and further encroaches upon the province of the jury by presupposing the weight they would give, if any, to the testimony of the Detectives in comparison to that of Lee. Under the State's argument, the need for witnesses to participate at all in a trial would be eliminated in that the police could simply testify for everyone. No doubt this would lead to greater judicial efficiency, but it certainly tramples on the GUZMAN's rights.

For these abovementioned reasons and those reflected in the Initial Brief, the trial court erred in restricting the recall of Lee. This error requires the remand of this matter for a new trial.

B. Restriction by trial court of certain inquiries by GUZMAN to Lee.

The State's response to this matter centers around their position that any testimony which Lee could offer regarding statements made to him by Curtis Wallace (Wallace) which could incriminate Wallace in the murder lacked those corroborating circumstances to show the trustworthiness necessary to allow those statements to come within an exception to the hearsay rule. (AB 12) The State comes by it's conclusion due to "Lee's numerous statements to law enforcement" and stating finally that the jury obviously "found Lee to be incredible." (AB 12) However, the verdict does not support the State's position regarding the juries' opinion of Lee, due to the fact that the main items for which Lee was called to testify were kept from the jury by those rulings made by the trial court illustrated above. Had the jury heard the testimony which was kept from them by several rulings of the trial court, then the verdict would properly reflect their reliance upon those statements. Without them, the verdict holds no insight on the weight given Lee.

The testimony of Lee regarding the statements by Wallace was corroborated by those circumstances surrounding the murder, as evidenced by the inquiries made of Wallace by the investigators. (T. 1360; 1372-3) As such, the testimony of Lee was improperly restricted and requires GUZMAN be granted a new trial.

C. Exclusion of Yarbrough Testimony.

The State argues that the testimony of Yarbrough was properly limited because "there is no evidence anywhere in the record to support Guzman's assertion that the sword was ever used in this prior altercation." (AB 13) This statement is incorrect and based upon an incomplete reading of the record.

During a proffer surrounding Yarbrough, the prosecutor read from a statement given to Detective Alison Sylvester by Yarbrough, in which Yarbrough stated that, during the aforementioned altercation, "the guy came in with knife and David was with the sword..." (T.1334) It is exactly this statement which had been previously given by Yarbrough which illustrates the evidence which GUZMAN was attempting to elicit from Yarbrough. Because the State's response raises no true rebuttal to the argument previously submitted by GUZMAN, GUZMAN would rely upon that previously submitted argument.

II. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN GIVING NON-STANDARD JURY INSTRUCTIONS IN THE PENALTY PHASE

Appellee admits that part of the standard jury instructions for use in criminal cases were not given when the trial court failed to give the following instruction:

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

This standard instruction was not given, despite the trial court having said it would not deviate from the standard instructions. (R. 18)

Despite Appellee's argument, it is clear that no limiting instruction was given to the jury so as to prevent them from considering extraneous matters as described in the Initial Brief. (R. 150-1) Without the limiting instruction, it is unclear what factors motivated a majority of the jury to choose to recommend the death penalty in the penalty phase of the trial. What is clear is that much non-relevant, superfluous information was heard by the jury including GUZMAN's drug usage, him acting as a "canine" in protecting Cronin while she acted as a prostitute, his "rambo" knife and otherwise. (T. 1142, 1311, 1817-8) The cumulative effect on the jury of such testimony would no doubt sway them to believe that GUZMAN was a "bad man". As such, the Appellee's argument must fail in that it is only speculative as to whether the jury improperly considered non-statutory aggravating circumstances. Whether or not the jury was "invited", as suggested by the state, to consider any of these other non-statutory aggravating factors is irrelevant to the case at bar. (AB 16)

The Appellee argues that juries are presumed to follow their jury instructions. (AB 15) Unfortuanately, the jury was never given an opportunity to follow the above referenced standard jury instruction because it was never given. The jury instructions in this case were not proper and deprived GUZMAN of his right to a fair sentencing. As such, sentence should be reversed and remanded for a new sentencing phase of the trial.

III. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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 State answer wholly fails to address GUZMAN's argument that the trial court erred in failing to dismiss the Public Defenders' Office from representing GUZMAN because of the severe and continuing conflicts.

In particular, when it was discovered by trial counsel for GUZMAN that they would have to impeach Arthur Boyne (Boyne) because of Boyne's previous statement to the trial counsel (who was also Boyne's counsel at the time the statement was made) that Boyne would do anything to get out from under the death penalty, GUZMAN was not given the opportunity to address his conflict of interest problem. (T. 1060-9) Despite Boyne's waiver of any conflict, there is a continual obligation on the part of the Public Defenders' Office to protect its attorney/client privilege with all of its clients. There can be no doubt from the record that the Public Defenders' Office was inhibited from attacking Boyne's testimony and his motivation for testifying against GUZMAN. Once this major conflict was discovered, GUZMAN should have been given an opportunity to be heard on the conflict problem and proceed with new counsel.

The state cites the case of Duncan v. Alabama, 881 F. 2d 1013 (11th Cir. 1983) for the proposition that Boyne properly waived any conflict of interest. (AB 19) However, Duncan addresses the issue of a Defendant waiving any conflict of interest in his representation by trial counsel. The instant case differs in that it involves a witness waiving his conflict of interest. The Defendant in the instant case was not given the opportunity to protest the conflict of interest after it was discovered that impeachment of Boyne would be necessary.

As such, GUZMAN's right to effective counsel was controverted by this conflict and his Sixth Amendment rights were violated. Accordingly, the judgment of the court should be reversed and the cause remanded for a new trial.

IV. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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

Despite the State's denial, it is clear that the trial court was concerned enough about the prosecutor's conduct to admonish the prosecutor and give instructions to the jury about what an expert goes through to procure fees. (T.1480,1602-03) The assistant state attorney's "tactics" continually violated the trial court's order and may have influenced the jury arrive at a verdict that it may not have otherwise reached had the prosecutor obeyed the Judge.

As such, the acts and comments of the prosecutor so prejudiced GUZMAN that it vitiated the entire trial and requires a reversed of his conviction.

V. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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 State's response to GUZMAN's Initial Brief, the State argues that the Court did not err in the dismissal of juror Schantz because the trial court, after observing the juror's demeanor and response on voir dire, made a determination that the juror would be unable to put aside her personal feelings and follow the law. (T. 736) The State bases its argument upon the Court's statement, made while approving the State's challenge for cause, and finding that the juror was "very hesitant and questionable whether she could follow the law". (T.736, AB 23) The State fails to address whether the findings of the Court were supported by the record.

This Court in Trotter vs. State, 576 So. 2d 691 (Fla. 1990) stated that, while the trial judge is burdened with the determination of whether a juror's views will prevent that juror from the performance of his duties as a juror, on appeal the question becomes whether the findings of the trial judge are "fairly supported by the record". Id. at 694 Upon review of the record, it is clear that the trial court's findings are not

supported by the record. Any vacillations which the juror may have had did not rise to a level that would call for her dismissal for cause.

When originally questioned by the prosecutor regarding her beliefs about the death penalty, juror Schantz does state unequivocally that she believes the taking of a life is wrong, but she rehabilitates herself by time and again stating that she is prepared to apply the law regardless of her personal feelings about the death penalty. (T. 630-633) This is nowhere more prevalent than when asked by the prosecutor how she can reconcile her moral stance regarding the death penalty with her application of the law, she states "well, I believe in the law. I believe that that's what God wants us to follow, the law, but personally, I just don't feel that it is right to take another life. . .". (T. 632-633) When further asked by the prosecutor if she would choose between her moral stance and the law, she unequivocally states whe would choose the law. (T. 633)

The only fluctuation in the juror's adamant expression of her ability to apply the law comes after a fairly confusing question asked by the prosecution to which the juror responds that she is not sure how she would react if faced with the possibility of convicting GUZMAN of something "pretty serious. . .but you could avoid that consideration of the death penalty". (T. 635) This confusion is later cleared up when the juror is asked by the prosecutor the same question in a different, yet seemingly no less confusing, manner. The juror replied that in deciding guilt, if

offered an option other than first degree murder, the juror would not be more inclined to take that other option simply due to the fact that it would release her from the obligation of dealing with the death penalty. (T. 638) It is this rehabilitation which should cause this Court to find the juror had sufficiently stated her ability to rely on the law, and not on any moral conviction that she may or may not have regarding the imposition of the death penalty.

There was further confusion created by the prosecutor which led to the juror seeming to waiver again. However, this waiver can be directly attributed to confusing statements made by the prosecutor. This begins by the prosecutor misstating what the juror had said and then focusing on this misstatement and confusing the juror with her responses. (T. 641-643) Any confusion caused by this line of questioning was again cleared up by the statements of the juror when asked by counsel for GUZMAN if her reservations about the death penalty would substantially interfere with her ability to which she states unequivocally "no, no". (T. 644)

For the following reasons, the Court should recognize that the trial court's findings are not supported by the record and should therefore find GUZMAN was denied his right to a fair and impartial jury and should be granted a new trial on that basis.

VI. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN A WITNESS TESTIFIED THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF A CRIME

GUZMAN asserts that the trial court erred in failing to grant a mistral when Boyne testified that GUZMAN had previously been convicted. The State fails to refute the problem of GUZMAN being considered a "bad man" because of these allegations. The "relatively innocuous" remark, as the State calls it, that GUZMAN had been previously convicted no doubt left a stigma upon GUZMAN that could not have been alleviated by the curative instruction of the Court. (AB 25)

The second reason the State claimed that GUZMAN's appeal of the trial court's error in granting a mistrial is without merit is that GUZMAN testified subsequently. (AB 25) Unfortunately, once a ruling has been made by the Court, the trial counsel must play the hand with which he has been dealt. The trial strategy in this matter was incurably altered by the statement of Boyne and dictated that GUZMAN testify. As such, it violated GUZMAN's right to a fair trial and denied him due process.

Therefore, the trial court's denial of the motion for mistrial should be reversed and a new trial ordered.

VII. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ADMITTING GRUESOME PHOTOGRAPHS INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL BELOW IN VIOLATION OF THE DEFENDANT'S FOURTH AMENDMENT RIGHTS

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

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

In response to GUZMAN's appeal for relief regarding the Court's erroneous introduction of inflammatory physical evidence over his timely objection, the State argues that GUZMAN's claim is specious on the grounds that GUZMAN's claim is based upon an erroneous factual premise, i.e., that the State did not tie itself to the theory that the victim's sword was the only murder weapon. (AB 28) The State further argues that this evidence is relevant due to the testimony of the medical examiner Dr. Steiner which purports to show that some of the wounds sustained by the victim may have been caused by the survival knife. (AB 28)

Although this may be the position of the Attorney General's office, it was not the position of the State Attorney in charge of prosecuting GUZMAN. During the guilt phase of the trial, the survival knife was brought into evidence so as to illustrate the bad character propensity to crime of GUZMAN. This is evidenced by

statements made by the prosecutor in both his opening and closing remarks. While discussing the knife, the only statements made by the prosecutor about its use in any type of violent activity, was during his opening statement where the prosecutor stated that the evidence should show that the Defendant entered David Colvin's (Colvin) room and "he may have struck him with the survival knife". (T. 757-8) However, the prosecutor earlier paints a picture of GUZMAN contemplating a possible murder of the victim while sitting and turning the survival knife in his hand. (T. 757) This inflammatory and prejudicial evidence was further facilitated in the prosecutor's closing statement where he states the following:

> "notice the macho term, "canine". It makes you kind of picture a doberman walking Ridgewood Avenue. How many macho terms are connected with this Defendant, through his own mouth, godfather, criminal, macho, godfather. He carries a **Rambo** knife, speaks of survival." (T.1974, emphasis added)

Nothing in any argument made by the prosecutor in any of his statments before the jury in any way ties the knife into his case as the murder weapon. Every time he refers to it, it is done in a way to point to the evil propensity of GUZMAN.

This point is emphasized further when compared with how the prosecutor addresses the sword. In the prosecutor's opening statemnt, when portraying for the jury the morbid murder of Colvin, the prosecutor speaks only of the "small, decorative sword" which hung on David Colvin's wall. (T.758) The same can be said for the prosecutor's closing sililoque outlining how Colvin's wounds were inflicted, discussing the thrusting of the sword, never mentioning

the cutting by a survival knife. (T. 1967) The distinction is nowhere clearer than in the prosecutor's final rebuttal arguemnt before the jury in which he states "the man was murdered in his bed and the sword, ladies and gentlemen, I suggest to you is our murder weapon". (T. 2010)

The survival knife was not proposed by the State to be added to whatever evidence it may have had against GUZMAN, but instead was brought forward to illustrate his bad character, his propensity to crime and thus demonstrate to the jury his evil nature. For this reason, the prejudicial effect ot the admission of the knife into evdience was overwhelming compared to any probative value it may have had. As such, GUZMAN should be granted a new trial due to the Court's erroneous allowance of the entry of this evidence.

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

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

X. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN RESTRICTING THE SCOPE AND TIME OF APPELLANT'S ARGUMENT IN THE PENALTY PHASE OF THE TRIAL

The State argues that there was no abuse of discretion by the trial court in limiting the closing argument in the penalty phase.

Once the trial court has made an arbitrary limit on Defendant's argument time in a penalty phase first degree murder trial, the trial counsel must play the hand with which he is dealt. Although GUZMAN's closing argument did not consume the full hour, it is clear that GUZMAN would have attempted to argue for additional time had he been allowed to originally. (R. 158) However, with the initial constraints made by the trial court, GUZMAN had to adjust to the arbitrary time limit imposed. As such, GUZMAN was unduly inhibited in his strategy and such prohibition prejudiced him.

The state also contends that the public policy reasons for capital punishment are not relevant to a closing argument in the penalty phase. (AB 33) The state's analysis that this is an argument for non-statutory mitigators is incorrect and wholly speculative. GUZMAN was unable to argue any policy reasons behind the death penalty versus a life sentence in a first degree murder conviction. The basis of the decision of the jury as to whether to impose a life sentence or the death penalty on GUZMAN is certainly relevant to the penalty phase. This court should allow a broad range of argument in a capital defendant's case. This is especially true in light of Hitchcock v. Dugger, 481 US 393 (1987) and its progeny. As such, the failure of the trial court to allow such argument prejudiced GUZMAN and requires a new penalty phase hearing be held on this matter.

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

The State argues several reasons why GUZMAN's claim is meritless. First, the State feels that GUZMAN waived this issue for appeal on the grounds that he did not raise a timely objection to the instruction. This argument would be decisive but for the fact that this is fundamental error and therefore GUZMAN failure to timely object does not preclude his ability to bring this issue on appeal. The fundamental nature of this error is brought forth upon the realization this erroneous instruction on reasonable doubt violated GUZMAN's fundamental right to due process in a fair trial due to the instruction's failure to cause the jury to force the State to meet the appropriate burden. Through this failure, the State would be allowed to rob GUZMAN of his life without proper due process of law.

Next, the State argues that the instruction is proper due to the fact that it was set out in the standard jury instructions as well as approved by this Court. This reason could also be definitive of this issue if law were a static and non-evolving area. However, the volumes of case law surrounding just the area of criminal litigation illustrates the point that the law is an evolving area of values and concepts. Just because a concept had been previously approved, does not presume that this concept would be dispositive for the ages. As this Court is well aware, the imposition of concepts upon differing fact situations bring out possible errors with that concept. That is the case here. For these reasons, this Court should grant GUZMAN the relief originally prayed for for the reasons originally stated.

XII. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTIONS FOR THE LESSER INCLUDED OFFENSE OF 3RD DEGREE MURDER

The State attempts to argue that GUZMAN misreads the evidence and the law in regard to his requested jury instruction on third degree murder.

The State's puzzling comment that "first, the verdict of guilt on a robbery court is a rejection by the jury of not only second degree murder and manslaughter, but also the lesser included offenses of robbery and theft" (AB 34) certainly does not vitiate GUZMAN's argument that he was improperly refused a third degree murder instruction. The theory put forth by GUZMAN in his Initial Brief clearly shows that had the jury been instructed on third degree murder, considered the evidence and testimony of the GUZMAN and the other witnesses, and the arguments of Defendant's counsel, a reasonable jury could have concluded that a third degree murder conviction was appropriate as opposed to a first degree murder conviction which they eventually rendered.

As such, the omission of the instruction on third degree murder is reversible error and requires that GUZMAN be granted a new trial.

XIII. THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S SPECIALLY REQUESTED JURY INSTRUCTIONS DENIED DUE PROCESS, A FAIR JURY TRIAL AND A RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

XIV. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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)(h)

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

XV. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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)

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

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

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

XVII. THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST WITHIN THE MEANING OF FLORIDA STATUTE §921.14158

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal and reiterates only that the evidence fails to support as the only reasonable conclusion that Colvin was killed primarily to eliminate him as a witness.

XVIII. PROVISIONS 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

GUZMAN relies on the argument and authority set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

XIX. IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING VARIOUS PRE-TRIAL MOTIONS FILED BY THE DEFENSE

GUZMAN relies on the arguments and authorities set forth in the Initial Brief of Appellant in reference to this Point on Appeal.

CONCLUSION

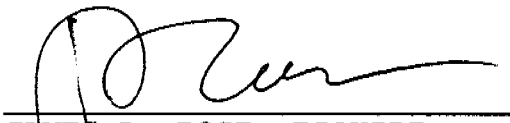
Based on the foregoing reasons and authorities, Appellant respectfully requests this Honorable Court to grant the following relief:

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, 444 Seabreeze Blvd., 4th Floor, Daytona Beach, FL 32118 and to JAMES GUZMAN, A-395352, 41-1092-A-1, Union Correctional Institution, Post Office Box 221, Raiford, FL 32803, this 28 day of March, 1994.

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