IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 89,640

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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The symbol (T.), plus the page number, will refer to Transcript in Volumes I-XXVI which were also consecutively numbered as pages 1 through 2371 by the court reporter in the record on appeal.

IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 80,750
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

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.

The case proceeded to jury trial on September 14, 1992. The jury found GUZMAN guilty as charged of first degree murder and armed robbery. At the penalty phase the trial court sentenced GUZMAN to death finding five aggravating circumstances and no mitigating circumstances. Appellant filed a Notice of Appeal to the Florida Supreme Court.

The Florida Supreme Court reversed the conviction and sentence of death and remanded for a new trial. Mandate and opinion was issued. (R.01-10)

The court appointed special private counsel who was conflict free to represent GUZMAN in his new trial. (R.1617)

GUZMAN filed numerous motions (R. 70-337) The vast majority

of which were denied by the trial court.

This case proceeded to jury trial on December 2, 1996. During the third day of jury selection on December 4, 1996, GUZMAN decided to waive a jury trial for guilt or innocence and to waive an advisory jury for sentencing. (R.403) This waiver was conducted in open court on the record and the defendant GUZMAN stated his reasons for the waiver on the record. (T 1235-1248)

The State's primary case consisted of two witnesses who alleged that GUZMAN had confessed the murder to them (Martha Cronin and James Paul Rogers) (T. 1149) and (T. 1405). All of other witnesses presented circumstantial evidence concerning the murder.

During Roger's testimony at trial he testified that Rogers never wanted to get together with GUZMAN again after GUZMAN allegedly confessed in jail to the murder of Colvin "because he done told me he killed somebody in Miami" (T. 1946 and 1965) GUZMAN made a Motion for Mistrial which was denied. (T 1946) Said testimony was the subject matter of a pretrial Motion In Limine (T 1962, 1963, 1964) Rogers had not testified at the first trial. Rogers signed an Affidavit stating that GUZMAN never confessed to him. The affidavit was introduced into evidence and read into the record (T. 1929, 1930) Rogers was a seven-time convicted felon. (T. 1929)

Dr. Steiner the medical examiner testified live at trial and a video tape of his statements at the crime scene on August 12, 1997 was played. In his video taped statements, Dr. Steiner said that the victim's sword (T. 1444) could not have been the murder

weapon because it would have been in worse shape. Dr. Steiner identified the identical sword as the murder weapon at trial. Dr. Steiner also identified a fishing knife as a possible murder weapon. He also said each of these weapons had physical characteristics which could not be present on the murder weapon.

At the conclusion of the State's case, GUZMAN'S Motion for Directed Verdict was denied. (T. 1967-1974) GUZMAN renewed his Motion for Directed Verdict at the conclusion of the defense case. (T. 2235)

GUZMAN also testified in his own defense (T. 2089) The State called one rebuttal witness then rested. (T. 2230, 2234)

Following deliberation the trial court found GUZMAN guilty of the charge of First Degree Murder and Armed Robbery (T. 2282) (R.448-458) the penalty phase began on December 27, 1996. GUZMAN filed a Motion for Judgment of Acquittal At The Sentencing Hearing And Alternative Motion to Dismiss with copies of law citations attached. (R.426-447) The State presented one witness and the defense presented no witness. (T. 2311, 2313) Following deliberations the judge rendered his sentencing decision. The trial court sentenced GUZMAN to death finding five aggravating circumstances and no mitigating circumstance. (R.459-469) Appellant filed a Notice of Appeal. This court has jurisdiction Article 5, Section 3 (B)(1), Florida Constitution.

STATEMENT OF THE FACTS

David Colvin (hereinafter Colvin) was killed on Saturday, August 10 or Sunday, August 11, 1991. (T. 1438) His body was discovered on Monday, August 12, 1991 at the Imperial Motor Lodge (hereinafter motel) in Daytona Beach, Florida by the motel custodian. (T. 1320) Colvin had been killed by a series of stab wounds and incise wounds inflicted by a large knife. (T. 1435) At the time of his death, Colvin had a blood alcohol level of .34. (T. 1453)

Colvin had lived at the motel for several months prior to his death. (T. 1308) Colvin had a brawl with a sword and knife with an unknown assailant some time prior to his death. (T. 1483-1487)

In late July, 1991, JAMES GUZMAN (GUZMAN) moved into the motel. (T. 2090) Several days after having moved into the motel, GUZMAN met Martha Cronin (hereinafter Cronin) on August 1, 1991. (T. 1635) GUZMAN and Cronin began living with each other shortly thereafter. (T. 1636)

GUZMAN met Colvin after moving into the Motel, but prior to meeting Cronin. (T. 2092) GUZMAN had helped Colvin move himself and his girlfriend from Room 205 of the motel to Room 114. (T. 1324) GUZMAN had used Colvin's telephone in Room 205 prior to the move. (T. 2098) The custodian of the motel testified that he moved this telephone to Colvin's new room as part of Colvin's move. (T. 1478)

On August 10, 1991, Colvin asked GUZMAN to drive his car for him to a gas station in Daytona Beach because Colvin did not have a driver's license. (T. 2099, 2100) 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. 2103, 2104) At the International House of Pancakes (IHOP), a man by the name of Curtis Wallace (hereinafter Wallace) got into an argument with Colvin. (T. 2106, 2107) Thereafter, GUZMAN drove Colvin back to the Motel. (T. 2108) around twelve o'clock noon.

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. 2108, 2109) Cronin worked as a prostitute on Ridgewood Avenue (US 1) in Daytona Beach to support herself and her crack cocaine habit. (T. 1635, 1636) GUZMAN began providing protection for her after they met. (T. 2093) At about 3:00 p.m. in the afternoon of August 10, 1991, GUZMAN testified that Cronin brought Curtis Wallace back to her room where GUZMAN was staying. (T. 2112) 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. 2113) Cronin convinced Wallace to let GUZMAN take the ring so it could be traded for drugs and cash. (T. 2113) GUZMAN then got the ring and called a person that he knew would want this kind of jewelry. (T. 2115)

Cronin testified differently at trial. She claimed that on August 10, 1991, after a morning of prostitution, she had come back

in to her room (#108) at the motel that she shared with GUZMAN. (T. 1642) She testified that GUZMAN told her that he was going to help Colvin by driving him to the bank. Thereafter, she went to sleep and awakened when GUZMAN came back into the room. (T. 1644) 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. 1646) Cronin testified that she came back into the room around 2:00 p.m. that same day. (T. 1647, 1649) 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. 1652) 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. 1652) Cronin testified that GUZMAN told her that Colvin had passed out and that GUZMAN had stabbed him with Colvin's own samurai sword. (T. 1655) Cronin testified that both she and GUZMAN examined the ring and discussed what they could get for it. (T. 1656) Cronin testified that GUZMAN then called a person that he knew that would want this kind of jewelry. (T. 1657)

The testimony is unrefuted that GUZMAN took the ring to a drug dealer by the name of Leroy Gadson a/k/a "Paco". (T. 1658) GUZMAN rode his bike to show Paco the ring and to trade it for crack cocaine and cash. After having procured the crack cocaine and

cash, he brought the crack back to Cronin. (T. 1659) Cronin testified that she was very upset because GUZMAN had not gotten enough for the trade. (T. 1659)

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. 1659) 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. 1660)

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. 1660) GUZMAN then testified that he gave Cronin the rest of the crack cocaine and that she subsequently gave it to Wallace. (T. 2118)

GUZMAN testified that he then left the motel to go stay with a friend at another apartment complex in Daytona Beach. GUZMAN testified that Cronin asked him to come back. (T. 2124)

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. 2128) The detectives talked with both Cronin and GUZMAN, who both told the detectives that they knew nothing about the murder. (T. 2128) The detectives gave GUZMAN their card, told him to keep in touch and left afterwards. (T. 2134)

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. 2134)

Testimony from Detectives Flynt and Wright showed that they had interviewed two witnesses, Artonio Lee (hereinafter Lee) and Curtis Wallace, on August 12, 1991 and thereafter. (T. 2010) 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. 2011) Colvin had been wearing his ring at the time. In addition, Lee implicated Wallace in the killing. (T. 1521, 1530)

Carmelo Garcia testified (T.2023) in February, 1992 he met a prostitute, Martha Cronin who used the alias Terri (R. 2026) They smoked crack cocaine together and had sex. (T,. 2029) Martha Cronin told Garcia about her boyfriend GUZMAN "He's in jail for killing somebody, but he didn't really kill nobody. I just told the police that ... because I had a warrant for my arrest". (T.2029) Cronin testified that at the time she gave GUZMAN up to police she would do absolutely anything to get out of jail. (T. 1768)

Cronin said GUZMAN really didn't kill nobody and that she lied to police.

Garcia did not know GUZMAN in February 1992. Garcia first met GUZMAN in the Volusia County Branch Jail in 1995. (T.2034) Garcia then told GUZMAN what Cronin had told him in 1992.

On November 14, 1991, GUZMAN was shot by Wallace in an altercation concerning Cronin. (T. 2152) Wallace had beaten Cronin and GUZMAN had confronted Wallace. (T. 2152) Wallace then

pulled a gun and shot GUZMAN (T. 2152).

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. 2145)

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. 2147) 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. GUZMAN made no statements to police. (T. 2157)

GUZMAN was booked and taken to the Volusia County Branch Jail. At a later time, he was placed in the same block with James Paul Rogers (hereinafter Rogers). Rogers was being held in Volusia County Branch Jail on a charge of Grand Theft. Rogers testified that GUZMAN confessed that he killed Colvin. (T. 1908) Rogers also wrote an Affidavit that was introduced into evidence at trial that denied that GUZMAN ever confessed to Rogers. (T. 1931)

SUMMARY OF ARGUMENTS

POINT 1: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL WHEN A STATE WITNESS TESTIFIED ABOUT THE DEFENDANT'S PRIOR MURDER CONVICTION.

POINT 2: THE CONVICTION OF JAMES GUZMAN WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

POINT 3: THE TRIAL COURT ERRED IN FAILING TO DISMISS THE STATE'S CASE BASED ON DOUBLE JEOPARDY.

POINT 4: VARIOUS ISSUES.

POINT 5: THE DEATH SENTENCE IS DISPROPORTIONATE UNDER THE FACTS OF THIS CASE.

POINT 6: 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).

POINT 7: 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).

POINT 8: 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)

ARGUMENT

POINT 1

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL WHEN A STATE WITNESS TESTIFIED ABOUT THE DEFENDANT'S PRIOR MURDER CONVICTION.

The Trial Court committed constitutional harmful error in denying the defendant's Motion for Mistrial when the State's witness Paul Rogers testified about GUZMAN'S prior murder conviction.

The State called James Paul Rogers as a witness. Mr. Rogers had seven prior felony convictions. (T. 1893) James Paul Rogers was in the Volusia County Branch Jail with GUZMAN in May of 1992. (T. 1894) They were roommates in the same cell for a time. (T. 1897) James Paul Rogers testified that GUZMAN made a jail house confession to him and GUZMAN told Rogers that he killed the victim David Colvin by stabbing him with a sword ten or eleven times. (T. 1907)

On redirect examination the following questions and answers occurred between the State Attorney and James Paul Rogers. (T. 1946)

"Question: Did you ever want to get together with Mr. Guzman again after he told you about this homicide?

Answer: No because he done told me he killed somebody in Miami, and that he",

"Mr. Keating: Motion for Mistrial".

In support of his motion, the defense cited the case of

Farrell v. State 682 So.2d 204 (Fla. 5th DCA, 1996) (T. 1948) The State cited Williamson vs. State, 681 So.2d 688 (Fla. 1996). The State argued that Rogers statement goes to state of the mind of the declarant and the reason why he was afraid of GUZMAN and why he did not come forward on earlier occasions to testify against the defendant. (T. 1947) The defendant argued that the probative value was outweighed by unfair prejudice §90.403 Fla.Stat. (T. 1962)

GUZMAN'S case was one of whom do you believe, and thus, evidence showing that GUZMAN had committed a similar crime became extremely significant.

Rogers did not testify in GUZMAN'S first murder trial in 1992. In fact, Rogers signed an affidavit before the first trial stating that GUZMAN never confessed to him at all. (T. 1929) In the second trial Rogers recanted his former recantation. (Defendant's Exhibit #8, T. 1930)

This testimony was the subject of an Order granting defendant's pretrial Motion in Limine, (T. 1949) (T. 1959) (R. 383) on a certificate dated November 13, 1996. The motion stated: "It is also expected that James Paul Rogers will state that GUZMAN threatened to do to Martha Cronin like the murder he did in Miami to the prostitute there." (T. 1959) (T. 1963) The Order Granting Motion in Limine And In Part Deferring Motion in Limine states:

"The defendant's Motion in Limine is granted for the testimony of Paul James Rogers who is expected to state that Guzman threatened to do to Martha Cronin like the murder he did in Miami to the prostitute there." (R. 366, 367)

Said order directly controlled and prohibited Rogers' testimony regarding the Miami murder. The introduction of Rogers' testimony violated the court's order and denied GUZMAN a fair trial.

Earlier in Rogers' testimony, the State Attorney was warned that his attempt to introduce this testimony was prohibited by Order In Limine. (T. 1924, 1923)

The State Attorney withdrew the question then (T. 1924, 1925) only to have Rogers mention it later. (T. 1946)

This is purported Williams Rule Evidence (F.S. 90.404 (2) (b) 1) to show GUZMAN committed a similar crime in Miami. It was only offered to prove GUZMAN'S bad character. The State never gave proper notice of its intent to use Williams Rule Evidence. Proof of guilt was not clear and convincing, therefore the violation of the Williams Rule may not be considered harmless Adan v. State, 453 So.2d 1195 (3rd DCA 1984).

The defendant argued that the testimony from Rogers was so inflammatory that the prejudicial value far outweighed the probative value and that it constituted unfair prejudice to GUZMAN. (T. 1962)

The court denied the Motion for Mistrial on the authority of the Williamson case. The court struck the response given by witness Rogers. (T. 1965)

The court stated: "Further, what did I learn this morning, Mr. Keating, from that testimony that I did not already know, based on the pleadings and the prior hearings in the case?

Mr. Keating: You found out this morning from this witness that GUZMAN had committed a murder against a prostitute in Miami.

The Court: Didn't I know that from the Motion in Limine?

Mr. Keating: I put it in the Motion in Limine.

The Court: Yes sir." (T. 1964)

The Farrell case at 682 So.2d 204 (Fla.5th DCA 1996) supports GUZMAN'S position. In Farrell a prosecution for Lewd and Lascivious Assault, the trial court erred in admitting the testimony from a child victim that the defendant said he had been in prison for molesting another child; even though such statement would have been relevant to explain why the child feared the defendant and delayed reporting of the incident. The court held that the statement should not have been admitted because its probative value was outweighed by its unfair prejudice.

How is a Motion for Mistrial construed when done in a Non Jury Trial?

In Daniels v. State, 634 So.2d 187 (Fla.3d DCA 1994) defendants were convicted of a home invasion and robberies and were sentenced as habitual offenders to life sentences after a bench trial in the Circuit Court of Dade County. The defendants appealed. The appellate court held that the defendants failed to overcome the presumption that the court's verdict at a bench trial was based solely upon admissible evidence. The reference by the state to two other robberies during the opening statement was later ruled inadmissible by the trial court. The court then gave the defendants the option of moving for a mistrial and having the case

heard by a jury or proceeding with her sitting as trier of fact. The defendants chose to rely on the judge's ability to disregard inadmissible evidence and the trial court expressly stated that she would exclude evidence of non-charged crimes.

The presumption that a trial judge sitting as a finder of fact disregards erroneously admitted evidence is overcome only if the court discloses that the trial judge relied upon erroneous evidence. Supra at page 190

In Daniels the Defendant and the State agreed to waive trial by jury like GUZMAN. Following opening statements, Judge Smith revisited the Williams Rule question and ruled that evidence pertaining to Bruening and Watson robberies would be admissible to show identity, but the evidence of the other robberies was not similar enough to warrant admission. Judge Smith advised the defendants that she had heard certain evidence before excluding it from trial. However, all three defendants chose to proceed without a jury. (page 189, 190 Supra)... "Following closing argument, the trial court excluded the evidence of the Bruening and Watson robberies. The court found the evidence against the defendants in the Zarco case to be overwhelming."

The issue before the Daniels court was "Whether the trial court erred in allowing the state to introduce evidence of two other collateral and unrelated home invasion robberies and then announcing it would not consider such evidence". The rule, as reiterated in State v. Arroyo, 422 So.2d 50, 51 (Fla. 3d DCA 1982), is that where a trial judge sitting as a fact finder "erroneously

admits evidence, he is presumed to have disregarded the evidence and the error of its admission is deemed harmless." This presumption is overcome only if the record discloses that the trial judge relied upon the erroneous evidence.

"In the instant case, the trial judge explained to the defendants that the evidence of two of the four robberies referred to during opening statements was inadmissible." Daniels at 190 and 191

The court in Daniels stated at 191. "Moreover, because the trial judge expressly stated that she was excluding evidence of the noncharged crimes and that the evidence of guilt in the charged crimes was overwhelming without the excluded evidence, the defendants have failed to overcome the presumption that the court's verdict was based solely upon admissible evidence."

The judge below did not give GUZMAN the option of having his case heard by a jury after the Rogers' statement.

The trial court below took inconsistent positions about whether he had known about the testimony of Rogers before it came in. (T. 1958)

"Mr. Keating: You're talking about Farrell?

The Court: Yes.

Mr. Keating: Yes, but then you did, too, in this case, and that is by virtue of my motion --

The Court: I knew nothing about that testimony before it came in.

Mr. Keating: If I can show you where I brought it up

pretrial, that might assist the court right now." (T. 1958)

The court then implied that the trial court already knew that GUZMAN had committed a murder against a prostitute in Miami based on the defendant's pretrial Motion in Limine. (T. 1964)

Rogers' statement was later not admitted and was stricken (T. 1965). Nevertheless, the harm had been already done. The fact finder's perception had been tainted and spoiled. The utterance was irreversible.

Based upon the above colloquy, the trial judge relied upon erroneous evidence or in the alternative the trial judge failed to show that the inadmissible evidence did not contribute to his verdict. Therefore, the presumption is not overcome that the trial court sitting as a fact finder disregarded erroneously admitted evidence. The court below made no such finding in the verdict. (R. 420-421)

In GUZMAN'S case the trial court made no finding that the evidence of guilt was overwhelming without the excluded evidence of Rogers statements. The evidence of guilt was not overwhelming.

When the Supreme Court reviews this to see if evidence of guilt was overwhelming the court should not consider the fact that GUZMAN testified himself in the defense case because that decision may have been predicated upon Rogers' preceding testimony.

When the court looks for overwhelming evidence of guilt the court must consider that Martha Cronin recanted her testimony. Carmelo Garcia so testified (T. 2029) Paul Rogers recanted his testimony under oath by affidavit. Cronin and Rogers are GUZMAN'S

two main accusers. This is a credibility contest among Guzman, Rogers, Martha Cronin and Carmelo Garcia. The evidence of guilt is not overwhelming in the state's case-in-chief without the Rogers' testimony regarding the Miami murder.

In Keen v. State, 504 So.2d 396 (Fla. 1987) Keen was convicted of First Degree Murder. Keen got a jury trial. The state filed a pretrial Notice of Intent to Rely on Williams Rule Evidence. The court reserved ruling on the matter instructing the state that there will be no mention of the incident until there was a ruling. After the direct testimony of Shapiro at trial, the state again attempted to raise this issue. The trial court rejected this testimony, explicitly ruling that it was not going to be permitted at trial. Before the close of its case-in-chief the state again raised the subject with the trial court. The court again specifically denied the state's request. After the close of the state's case Keen testified in his own behalf and on direct examination the prosecutor asked Keen "Didn't you describe to Ken Shapiro how you and Patrick Keen had tried to beat Patrick Keen's wife to death with a rock in North Carolina in 1973?" The defense's motion for mistrial was denied by the trial court. Keen claimed that his motion for mistrial should have been granted because this improper question was so inflammatory and prejudicial that it destroyed Keen's right to fair trial. We agree." Keen at 401 "When such irrelevant evidence is admitted it is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of

guilt of the crime charged." Keen at 401

How does this presumption of the harmful error in GUZMAN work against the contrary presumption of harmless error in a non jury trial? Is the Keen presumption available in a non jury trial? Does the Keen presumption not shift the burden to the State to show harmless error? The State cannot do so beyond a reasonable doubt.

The court dismissed the state's argument that the evidence against Keen was overwhelming and that the error in asking a single question, therefore, was harmless.

"The properly admitted evidence at trial against Keen was sufficient to support a jury verdict of guilty. However, it would be legerdemain to characterize the evidence as overwhelming; the real jury issue presented in this trial centered on the credibility of Shapiro versus the credibility of Keen. While an improper question by a prosecutor may, in light of the overwhelming evidence of guilt and the nature of the question, be considered a harmless error, see, e.g., Straight, 397 So.2d at 909, the focus of harmless error analysis must be the effect of the error on the trier of fact:... The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful." Keen at 401

State v. DiGuilio, 491 So.2d 1129, 1138-1139 (Fla. 1986).

"The State has not met this burden here and we are unable to say beyond a reasonable doubt that the prosecutor informing the

jury, albeit under the guise of question, that Keen had previously attempted to murder his brother's wife had no impact on the verdict; indeed common sense would indicate to the contrary." Keen at 402

"Because the prosecutor improperly placed prejudicial information before the jury which had no relevance except to show Keen's bad character and propensity for violence, Keen's right to a fair trial was compromised. In our system of criminal justice, one of the primary functions of the judiciary generally, and of this Court in capital cases specifically, is to ensure that the rights of the individual are protected. Harmful and prejudicial error having occurred below, we reverse and remand for a new trial." Keen at 402

In Ward v. State, 559 So.2d 450 (Fla. 1 DCA 1990), the appellate court reversed the trial court's denial of defendant's motion for mistrial.

"During direct examination of the victim, the prosecutor asked how long she had known appellant prior to the evening of the alleged assault. The victim replied ... `It was right after-he was already in prison and it was after he got out.' Defense counsel then asked to approach the bench, and the trial court immediately stated:

"I will deny your motion." Ward at 450

"In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), the supreme court defined the harmless error test as requiring the State to prove that there was no reasonable possibility that the error

contributed to the conviction...the appellate court's function is to determine what effect the impermissible evidence had on the trier of fact." Ward at 451

The court found that the State has failed to bear its burden of establishing that the erroneous statement made by the victim was harmless beyond a reasonable doubt based upon contradictory testimony among four witnesses (two for the defense and two for the State.)

The court in Ward found that there exists at least a "reasonable possibility" that the impermissible statement made by the victim improperly influenced the jury's verdict. Ward at 451

In GUZMAN'S case there are contradictory statements among two state witnesses Martha Cronin and Paul Rogers and two defense witnesses James Guzman and Carmelo Garcia. See Martha Cronin's letter to Detective Allison Sylvester and Paul Roger's affidavit recanting. (T. 1694-1698), (T. 1930)

In GUZMAN'S case there is a reasonable possibility that Rogers impermissible statement improperly influenced the court's verdict.

In Bass v. State, 547 So.2d 680 (Fla. 1 DCA 1989), Mr. Bass appealed from his convictions for fleeing from a police officer, driving while his driver's license was suspended, resisting arrest with violence and battery on a law enforcement officer.

The court held that the prosecutor's comments during closing argument were improper and prejudicial, and they reversed his convictions. "A key factor below was the credibility of both witnesses in the absence of any other direct corroborative

evidence. Our review of the record reveals this case to be close rather than on in which the guilt of the defendant was overwhelming."...However, in a two witness swearing match where there is little or nothing to corroborate the testimony of the witnesses, witness credibility is pivotal and inappropriate prosecutorial comment which might be found to be harmless in another setting may become prejudicially harmful." Bass at 681 and 682

In GUZMAN'S case the credibility of Martha Cronin, Paul Rogers, and Carmelo Garcia was the key factor because there was nothing to corroborate the testimony of the state witnesses.

This court should follow the ruling in Bass and reverse and remand for a new trial.

In Floyd Williams, v. State of Florida, 22 FLW D 1137, (4th District, Case No. 95-0132. Opinion filed May 7, 1997.) Defendant was convicted of armed burglary and robbery with a firearm on largely circumstantial evidence and the theory of principals. His two co-defendants were convicted of these and other crimes. On appeal he argued that "it was error to admit evidence that he was recently released from jail and in failing to grant a mistrial for closing argument by the prosecutor that defendant had `gotten himself in trouble in Miami' when there was no evidence to that effect. We agree and reverse."

"When a defendant moves for a mistrial based on the improper admission of collateral crime evidence, the motion is addressed to the sound discretion of the trial court. Salvatore v. State, 366

So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L.Ed. 2d 115 (1979). When this kind of irrelevant evidence is admitted, however, there is a presumption that the error was harmful, because of `the danger that the jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'

"Straight v. State, 397 So.2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S. Ct. 556, 70 L.Ed. 2d 410 (1981). A reviewing court may affirm the conviction only if the state proves beyond a reasonable doubt that the verdict could not have been affected, and showing that the evidence against a defendant was overwhelming is insufficient. Castro v. State, 547 So.2d 111 (Fla. 1989)."

"We do not think the state has overcome the presumption of harmful error in this case. Defendant was convicted upon circumstantial evidence of guilt, and under the law of principals. The evidence adduced, while certainly enough to permit a conviction, was not so one-sided as to withstand the prejudicial effect of the testimony about just being out of jail."

"We are unable to say beyond a reasonable doubt that this error did not affect the verdict, and accordingly reverse and remand for a new trial. Czubak, 570 So.2d 925."

"During the state's closing argument, the prosecutor made the following assertion:

`Now we don't know what kind of trouble Floyd had gotten himself into when he went to Miami, but Floyd had gotten himself in

some kind of trouble in Miami. These two young guys that come up-.'

At that point, defense counsel objected and moved for a mistrial.

"The trial judge sustained the objection and admonished the jury to disregard the prosecutor's comments, but he refused to grand a mistrial. This too was error."

"While we might not have reversed solely o the basis of this comment, when considered against the background of the testimony about just being released from jail, we find the argument intolerably prejudicial." "Where, as is true in this case, the evidence is fairly close and circumstantial, this kind of argument can only serve to tip the scales unfairly." Floyd Williams v. State Supra

The trial court below should have granted the Motion for Mistrial and given GUZMAN a new trial without any mention of GUZMAN'S prior murder conviction in Miami or given GUZMAN the option of a jury trial then. Daniels v. State, 634 So.2d at 190.

POINT 2

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 Martha Cronin and the other being to James Rogers.

Cronin was a prostitute who was addicted to crack cocaine (T. 1635, 1683) She and GUZMAN became involved with each other prior to the death of the victim in this matter. (T. 1686) They both lived at the same hotel as the victim. Cronin testified that on August 10, 1991, that James GUZMAN came into her hotel room with a bag. (T. 1650) Subsequently, he left and came back without the bag. Thereafter, Cronin testified that GUZMAN stated that he killed Colvin. (T. 1652) She testified that thereafter she looked at the ring that GUZMAN allegedly got from Colvin to discuss how much that they could get for it. (T. 1656) Thereafter, she shared the crack cocaine that GUZMAN procured from the trade/sale of the ring to Leroy Gadson. (T. 1659) In excess of three months later, on November 24, 1991, Cronin told police that GUZMAN told her the details of the murder. (T. 1666)

At that time that Cronin told police about the GUZMAN confession, she was facing charges of unlawful possession. She told the police she wanted a deal first. (T. 1667, 2000, 1862, 1863) These charges were dropped after her testimony. (T. 1743, 1744) In addition Cronin received several other benefits

from the State including her being "unarrested" for a outstanding warrant and released from custody to a beach side motel where she could continue to engage in her criminal activities including prostitution and drug dealing. (T. 1734, 1735, 1736)

The defense witness, Carmelo Garcia, testified that he met Cronin in the winter of 1992. Cronin told Carmelo Garcia that she had lied about GUZMAN'S confession because she wanted to avoid arrest. (T. 2029) In fact, Cronin recanted to Carmelo Garcia that GUZMAN had ever confessed to her or was guilty of murder. (T. 2032) Cronin lied about GUZMAN to stay out of jail herself. (T. 2032)

The state witness that testified against GUZMAN was Rogers who was being held at the Volusia County Branch Jail at the same time that GUZMAN was on a charge of First Degree Murder. (T. 1897) The alleged jail house confession supposedly occurred when GUZMAN unilaterally blurted out to Rogers that he had killed the victim. (T. 1906, 1907)

Rogers also recanted his testimony pretrial. Rogers admitted that he gave an affidavit in 1992, stating that GUZMAN never confessed to him. (T. 1930)

The State also presented evidence that GUZMAN'S thumb print was found on Colvin's phone. (T. 1623, 1625) GUZMAN admitted using the telephone in Colvin's two rooms (205 and 114). (T. 2098) In addition, the State's own witness testified he moved the phone for Colvin when he moved from Room 205 to Room 114. (T. 1478)

Testimony was presented through Detective James Flynt,

Detective Alyson Sylvester and Detective Stevie Wright that Artonio Lee and Curtis Wallace 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.. The police considered this information to be reliable. (T. 1521, 1522, 2011, 2012) This testimony shows Colvin was indeed alive after the time that GUZMAN allegedly confessed to Cronin about his killing, that being on August 10, 1991 (Saturday) before 3:00 p.m.. (T. 1649) In addition, Artonio Lee implicated Curtis Wallace in the killing of David Colvin. (T. 1521, 1530) The State's case failed to disprove the defense theory that Colvin was still alive at 9:00 p.m. on August 10, 1991 and the murder was done by someone other than GUZMAN.

GUZMAN testified that the had received the victim's ring from Curtis Wallace and then traded it for crack cocaine and cash. (T. 2116)

Cronin, Rogers, Carmelo Garcia and GUZMAN all had previous criminal records at the time they testified.

Dr. Steiner the Medical Examiner testified that two (2) different weapons were consistent with victim's wounds (T. 1416) (T. 1418) based on a single edged knife..one inch wide. (T. 1456) Dr. Steiner testified that he observed no weapons at the crime scene. (T. 1417) Dr. Steiner could not say for sure that either knife could have been the murder weapon (T. 1418) (See Exhibit 3 & 4) In the majority of cases the Medical Examiner is so undecided except in the rare situation where "you get into a knife that may

have a serrated blade." (T. 1418) Dr. Steiner implied that a knife with serrated blade would leave more clearly identifiable marks to say for certain it was the murder weapon. Yet, Dr. Steiner later admitted that the knife in evidence had a serrated blade. (T. 1458) There was no blood or fingerprints of GUZMAN found on either alleged murder weapons. Dr. Steiner did not remember a video of the crime scene. (T. 1418)

It was Dr. Steiner's "opinion that the death occurred early on Saturday evening August 10, 1991 approximately 6:00 p.m. - 9:00 p.m. and give or take, either end, another two or three hours." (T. 1438)

On cross examination the crime scene video was played (T. 1442) Dr. Steiner identified his voice on it (T. 1444) On the August 12, 1991, video he said: "And I don't think it is that sword... I would think it would be in worse shape that it is." (T. 1444)

Dr. Steiner testified "that this man had eaten within probably an hour of death." Noodles were found in the victim's stomach during autopsy. Dr. Steiner assumed the victim had eaten dinner around 6:00 p.m. or 7:00 p.m. (T. 1450) That is inconsistent with GUZMAN'S testimony that he and Colvin ate breakfast at the International House of Pancakes before noon. (T. 2108)

It was Dr Steiner's best estimate of time of death to be Saturday evening from 9:00 p.m. until 12:00 midnight on August 10, 1991. (T. 1448) Technically, midnight, Saturday was August 11, 1991. Dr. Steiner was never given any history, like Artonio Lee's

or Curtis Wallace's, that the victim was seen alive Saturday night at midnight on August 10, 1991. (T. 1449) Even adding a couple of hours on either side of Steiner's best estimate for time of death would get it to 6:00 p.m., Saturday night at the earliest. (T. 1449) Therefore, GUZMAN could not have confessed to Martha Cronin before 3:00 p.m., Saturday that he killed Colvin.

It was Dr. Steiner's opinion that the murder weapon was a standard edge blade and not a serrated edge nor double edged blade. (T. 1456) Dr. Steiner however, agreed that State's Exhibit #11, one of the alleged murder weapons had a serrated edge (T. 1458) and if used as the murder weapon would show a wound with a "serrated margin on one side." (T. 1458)

Dr. Steiner equivocally agreed that State Exhibit #4, a sword, one of two alleged murder weapons was double edged. (T. 1458) This is the same sword about which Dr. Steiner stated on the crime scene video tape "I don't think it is that sword." (T. 1459) Dr. Steiner's testimony describing the characteristics of the samurai sword (doubled edged) and survival knife (serrated edge) effectively eliminated either as the murder weapon. It was Dr. Steiner's opinion that the homicide could have happened between 11:00 p.m. and midnight on Saturday, August 10, 1991. (T. 1465) That is totally consistent with the testimony of Artonio Lee and Curtis Wallace that the victim was alive just before then.

The evidence of time of death and murder weapon was inconclusive and is consistent with a reasonable hypothesis of innocence

The evidence presented at trial does not rise to a level of "competent, substantial evidence" that justifies convicting JAMES GUZMAN. The defendant made a Motion for Judgment of Acquittal at the conclusion of the State's case and at the conclusion of the entire case. (T. 1967) and (T. 1748) The trial court denied said motions. (T. 1974) and (T. 2235)

In a court-tried case the test of whether there is substantial evidence to sustain the conviction is "whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond as reasonable doubt that the defendant was guilty, and that such evidence is inconsistent with any reasonable hypothesis of his innocence." Gordon v. United States, 438 F.2d 858, at page 868 (5th Circuit 1971)

A Motion for Judgment of Acquittal is evaluated on the basis of whether the State has presented legally sufficient evidence on which a jury can legally find a verdict of guilty. McKnight v. State, 341 So.2d 261 (Fla. 3d DCA 1977) Of course in this case, GUZMAN had a non jury trial. When the motion is made at the conclusion of all the evidence, which includes any defense evidence presented, the determination is not limited to the evidence presented by the State but includes the defense evidence. McGeorge v. State, 386 So.2d 29 (Fla. 5th DCA 1980).

The defense evidence may conclusively negate facts previously introduced by the State. In the instant case the defense presented evidence that conclusively negated the alleged confessions of GUZMAN to Cronin and to Rogers.

In determining whether the judge below could find guilt beyond a reasonable doubt, this court must apply the special rules concerning circumstantial evidence.

The test is whether the trier of fact reasonably could conclude that every reasonable hypothesis but that of guilt has been excluded. Amato v. State, 296 So.2d 609 (Fla. 3d DCA 1974).

The obvious reasonable hypothesis of innocence was that GUZMAN could not have committed the murder and confessed to Cronin on Saturday afternoon when the victim was still alive Saturday or Sunday night.

The law in a case involving circumstantial evidence is the following: "A conviction cannot be sustained-no matter how strong the evidence suggests guilt-unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972 (Fla. 1977) Another reasonable hypothesis of innocence is that Curtis Wallace committed the murder.

Apart from Martha Cronin and Paul Rogers testimony, the State did not present any evidence that suggested that GUZMAN committed any crime nor that GUZMAN did in fact confess to the crime.

Please note that the State Attorney did not use Paul Rogers' testimony in GUZMAN'S first trial because Rogers recanted his testimony. Rogers' defense attorney also recanted Roger's testimony in open court on the record in the former trial.

In State v. Moore, 485 So.2d 1279 (Fla. 1986) a grand jury indicted Moore for First Degree Murder based on the sworn testimony of two witnesses. Following the grand jury indictment the

witnesses recanted their grand jury testimony in sworn depositions claiming they lied to the grand jury because of police coercion. Moore at page 1280.

After the recantations the defendant moved to dismiss. The State responded by acknowledging that it had no substantive evidence of respondent's guilt (Moore at 1280). The Motion to Dismiss was granted by the trial court.

The case was remanded to the trial court after the appeal. Prior to the trial the State obtained perjury convictions against the two witnesses based upon their contradictory statements. At Moore's trial the State relied completely on the witnesses' testimony before the grand jury that Moore had killed the victim. The witnesses appeared and testified they lied to the grand jury. The District Court certified a question as follows: "Whether a conviction can be sustained which is based solely upon recanted grand jury testimony of witnesses who admitted they perjured themselves when giving the testimony relied upon to sustain the conviction"? The court held as a matter of law that in a criminal prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt.

The court held that the State's proof was legally insufficient as a matter of law to prove guilt beyond a reasonable doubt, Moore at 1282, because the conviction was based entirely on prior inconsistent statements.

According to defense witness, County Judge Freddie Worthen, Martha Cronin had aided and abetted perjury in his court to get out

of jail soon after she implicated GUZMAN. (T. 1982, 1983)

In U.S. v. Orrico, 599 F.2d 113 (6th Cir. 1979) the defendant was convicted of a crime in Federal Court. The Appellate Court reversed and remanded for the entry of a Judgment of Acquittal, having concluded that insufficient evidence was introduced to sustain the verdict of guilty. The government introduced into evidence a statement which the defendant's bookkeeper signed. Said statement was offered and received at Orrico's trial as the bookkeeper's past recollection recorded pursuant to Evidence Code §803.5. That was the only evidence of the defendant's involvement in any way to the depositing of two checks. At the trial the government witness professed to remember nothing. That government witness had given wavering and somewhat inconsistent versions of her story in the past.

In Orrico the central element of the crime with which the defendant was charged was established entirely through the use of out of court statements, made at the time when the defendant had no opportunity to cross examine the witness as to the accuracy of those accusations. Orrico at page 117. The court held that the government offered the out of court statements as sole evidence of a central element to the crime charged. "In whole the government has failed to sustain its burden of proving guilt beyond a reasonable doubt." Orrico at 119.

The evidence presented at trial does not rise to a level of "Competent substantial evidence" that justifies convicting James

Guzman. The evidence is insufficient to warrant a conviction. As such, GUZMAN'S conviction of First Degree Murder should be reversed.

POINT 3

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE STATE'S CASE BASED ON DOUBLE JEOPARDY.

The fifth and fourteenth Amendments to the United States Constitution and Article I, Section 9, Florida Constitution protect an individual against second prosecution for the same offense after acquittal or conviction.

In the instant case GUZMAN was tried and convicted of First Degree Murder in 1992. Said conviction was overturned by the Florida Supreme Court. Guzman v. State, 644 So.2d 996 (Fla., 1994) Thereafter GUZMAN was retried in the instant case.

In GUZMAN'S Supreme Court case supra the Florida Supreme Court recognized that GUZMAN'S previous Public Defender, Ray Cass, made a timely motion to withdraw before trial and had setforth clearly his conflict of interest with the witness Boyne. Boyne's waiver of his attorney client privilege in the first trial was unquestionably insufficient to cure the conflict setforth by Mr. Cass, the Public Defender. The trial court in the first trial, erroneously denied Mr. Cass's Motion to Withdraw based upon the State Attorney's assurance to the judge that no conflict existed and thereby denied GUZMAN the right to conflict free counsel.

GUZMAN filed a Motion for Judgment of Acquittal At Sentencing Hearing Or In Alternative Motion to Dismiss. (R. 426-447) (T. 2364) Said Motion was denied by the trial judge. Said motion raised the bar of double jeopardy. The grounds for the motion state "The State of Florida by and through its Assistant State Attorney, Vince

Patrucco, in GUZMAN'S first trial in September, 1992 intentionally and knowingly presented the trial testimony of Arthur Boyne. Mr. Patrucco represented to the trial Judge, Honorable Robert Rawlings, Jr. (retired) that there was no conflict of interest in the public defender's simultaneous representation of Boyne and Guzman. This proved false. When Boyne testified a mistrial should have been granted in the first trial. It was not. Guzman's attorney could not effectively cross examine Boyne."

Wynn v. Pound, 653 So.2d 1116 (5DCA, 1995). In Wynn the trial court sua sponte declared a mistrial when the State called a witness who was represented by the same public defender's office who represented defendant. The issue on appeal was whether the mistrial arose from manifest necessity in which case double jeopardy would not bar a retrial; or whether the Court acted improperly without first exploring less drastic possible alternatives in which case double jeopardy would bar retrial. The court held: "The record in this case does not support a finding of manifest necessity for a mistrial. Defendant is discharged."

In the instant case there has been no manifest necessity for retrial. The former State Attorney was at fault for causing the first trial to be reversed. A mistrial should have been granted in the first trial sua sponte when Boyne testified. The State could have proceeded without Boyne as they did in this December, 1996 trial. There was no misfortune, manifest necessity or accident in the State's case (first trial;) only the intentional tactic and act of the former State Attorney to violate Guzman's constitutional

right to conflict-free counsel, cross examination of witness and due process under Federal and Florida constitutions.

Hopping v. State, 674 So.2d 905 (1st DCA, 1996). "The prohibition against double jeopardy is fundamental. The failure to raise a double jeopardy claim does not in and of itself serve as a waiver of the claim."

Luther v. State, 661 So.2d 906 (2d DCA, 1995). "If defendant does not request mistrial, retrial will violate double jeopardy unless manifest necessity required court to declare it." See Cohens v. Elwell, 600 So.2d 1224 (1st DCA, 1992) GUZMAN never requested a mistrial in his first case.

GUZMAN was placed in double jeopardy by virtue of this second trial. Manifest necessity did not justify the second trial. The Florida Supreme Court in the first appeal did not rule that a new trial was due to manifest necessity. No mistrial was granted in the first trial nor was one requested.

The State of Florida and the trial court had a fair and equal opportunity to take GUZMAN to trial the first time but they failed to do so properly when the trial court denied Mr. Cass's Motion to Withdraw before trial and during trial. GUZMAN had been prejudiced. The former prosecutor Patrucco's actions and the trial court's denial could only have been intended to "provoke a mistrial so as to afford the prosecutor a more favorable opportunity to convict GUZMAN". It should be noted that Boyne did not testify in the second trial.

GUZMAN timely raised the double jeopardy issue by Motion for

Judgment of Acquittal At Sentencing Hearing And Alternative Motion to Dismiss (T. 2364), because for double jeopardy to attach in a non- jury proceeding the court must have begun hearing evidence. State v. Woodruff, 676 So.2d 975 (Fla. 1996).

McFadden v. State, 540 So.2d 844 (3d DCA 1989) During opening statements the defendant's attorney stated that the defendant was offered a polygraph and accepted. The state moved for mistrial which the defendant argued against. The trial court granted a mistrial over the defendant's objections. The appellate court held that the retrial was barred by double jeopardy since there was no manifest, urgent or absolute necessity in the interest of justice that a mistrial be declared under the circumstances. McFadden at 846

C.A.K. v. State, 661 So.2d 365 (Fla. 2d DCA 1995)

"The prosecution failed to sustain its burden of showing that mistrial in a proceeding against a juvenile was justified by manifest necessity and, thus, double jeopardy barred retrial, particularly in light of trial judge's failure to discuss any alternatives before declaring mistrial on ground of conflict of interest on part of defense counsel, who also represented a witness called by the state to testify."

The court held that double jeopardy barred retrial. The defendant filed a Motion to Dismiss the petition filed against her on the grounds that there was no manifest necessity for the mistrial and that it would constitute double jeopardy to retry her. Judge Altenbernd in concurring opinion addresses the issue of non-

jury trial. "Second, this case, does not involve a trial by jury. In a non-jury setting, the same judge can preside as the trier of fact at a second setting of the case. If a trial judge continues the proceeding, rather than declaring a mistrial, and arranges for another attorney to represent the juvenile in the remainder of the case, a technical violation of double jeopardy may be avoided." See R.M. v. State, 603 So.2d 64 (Fla. 3d DCA 1992).

In United States v. Dinitz, 424 US 600, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1975) the Supreme Court stated at page 610.

"The double jeopardy clause will present no obstacle to a retrial if a conviction is set aside by the trial judge or reversed on appeal."

"The double jeopardy clause does protect the defendants against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct by judge or prosecutor, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. Dinitz at 611

In the instant case, it was bad faith conduct by the former prosecutor Vince Patrucco which caused the reversible error which the supreme court recognized. This bad faith conduct by the former prosecutor afforded the prosecution a more favorable opportunity to convict the defendant the second time. The second time around GUZMAN received unfavorable publicity which affected his decision

to waive a jury trial. (T. 1215) The former prosecutor Mr. Patrucco's bad faith actions were done in order to prejudice GUZMAN'S prospects for an acquittal. The former prosecutor's actions were motivated by bad faith or undertaken to harass or prejudice the defendant. At the very least, this court should remand for a hearing where the issue of the State's motivation can be explored.

Therefore, the retrial violated GUZMAN'S constitutional right not to be twice put in jeopardy.

POINT 4

VARIOUS ISSUES

The following various issues are of special concern to GUZMAN:

1. The state only showed a suspicion that the ring in question was stolen and failed to prove as required by law the elements of Robbery.

2. The trial court erred in overruling defendant's objection made at trial to Martha Cronin's testimony being hearsay. (T. 1652) The record fails to reflect what exception to the hearsay rule made Cronin's testimony admissible.

3. Cronin's testimony was inadmissible because it was obtained illegally and in violation to criminal law. (R. 411, 413, 414, 415, 416, 417)

4. In accordance to F.S. 90.614.1 Rogers trial testimony should not have been believed by trial judge, because Paul Rogers gave an out-of-court sworn statement that was inconsistent with his trial testimony. It was clear and evident that Rogers did not tell the truth in one sworn statement; therefore, neither statement given by Rogers should have been believed.

5. GUZMAN feels that his legal right to appeal and get a ruling on the errors and misconduct made and committed by both Judge and prosecutor during his first trial were violated, in that out of nineteen legal issues raised, only one received a ruling, leaving the other eighteen without a decision. GUZMAN feels that had a ruling been made in his favor, after consideration of the

alleged misconduct and errors stated among the remaining legal issues, a second trial might have been barred by the double jeopardy clause.

POINT 5

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

The sentencer found five aggravating circumstances in the sentencing order. (R.646) 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.

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.

POINT 6

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 840, 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 emotion". Gardner vs. Florida, 430 U.S. 349, 358 (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 So.2d 1372 (Fla. 1983); Santos vs. State, 591 So.2d 160 (Fla. 1991)

POINT 7

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 dominant reason for Colvin to be killed was to eliminate him 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.

POINT 8

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.462) 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) 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.

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, 4 reverse JAMES GUZMAN's conviction and remand for a new trial.

b. In regard to Point 5, 6, 7 vacate the sentence and remand for re-sentencing with a new jury.

c. As to point 3 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 hand delivery to KENNETH NUNNELLY, ESQUIRE, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 and by mail delivery to JAMES GUZMAN, Florida State Prison, R-1-S-15, P.O. Box 181, Starke, Florida, 32091, this _____ day of August, 1997.

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