IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1002

VICTOR GUZMAN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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

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INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, imposed by the Honorable Dennis Murphy, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T." All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Victor Guzman's childhood was characterized by family strife, abuse, and grinding poverty. His father abandoned the family, and his mother became an alcoholic. He began to abuse alcohol regularly at a young age, and engaged in self-mutilation. He emerged from this childhood an alcoholic, with a cognitive disorder, major depression, and an IQ of 75.

Victor Guzman was born in Peru, the child of Victor Guzman, Sr., and his wife Fannie. (T. 2970, 2972). He lived in Pamplona Alta, a shanty-town outside of Lima. (Defense Exhibit A). Victor's maternal grandmother's house, where he grew up, had a dirt floor and walls made of cardboard. (T. 2926-2929). There was no running water. (T. 2927).

Victor's father abused his mother. (T. 2973-75). They would argue because he didn't come home at night, and he would beat her with a belt. (T. 3003-04, 3034). The fighting and abuse could be heard by anyone in the small home, including Victor and his brother, Juan Carlos. (T. 2602, 2973-75, 3003-05, 3034-35). Victor Sr. told his mother, Christina, that he wanted her to tell Fannie to take Victor and his younger brother Juan Carlos and move out. (T. 3005). Christina said no. Nevertheless, Fannie and the boys wound up going to her mother's house. (T. 3005).

Victor's father also abused Victor and Juan Carlos. (T. 2973-74). When he was unhappy with their behavior at home or in school, he would spank or hit them. (T. 3002). He also used a leather whip called a "San Martin." (T. 2974, 3010-3012, 3033). He would order the boys to undress and lie on the floor, and beat them with it. (T. 3011).

When Victor was seven years old, his father abandoned Fannie and the boys. (T. 2972, 2975, 2977, 2998). Victor Sr. went to live with his lover, Patricia Pardo and her daughter. (T. 2974-75, 3032). Patricia and Victor Sr. had two daughters together. (T. 2975). He favored the three girls over Victor and Juan Carlos. (T. 2978). Even after Victor Sr. left the family, though, he would come to Christina's house and "discipline" the boys with the San Martin. (T. 2296-97).

Fannie drank heavily after Victor Sr. left. (T. 2975, 3005, 3030). After their father left, the boys lived with their paternal grandmother, Christina. (T. 2975). They would sometimes go back and forth between living with Christina and living with Fannie, who continued to drink. (T. 2976, 3035). The drinking affected her ability to be a good mother. (T. 2975).

Victor himself began to drink by at least age fifteen. (T. 2978-79). He would drink constantly and experienced numerous blackouts. (T. 2609, 2871). When he drank, Victor would express sadness and rage about being abandoned by his father.

(T. 2978). At one family gathering Victor, drunk and sobbing, grabbed a picture of his father on the wall, threw it on the floor, and began stamping on it. (T. 3054-55).

Victor went to Argentina with his uncle Pablo Guzman and his wife Bridget to look for work. (T. 2983, 3055). Pablo and Victor were able to find work together, but Victor was always drinking. (T. 2983, 3037). His uncle implored him to stop, but he wouldn't listen. (T. 2983). His drunken behavior was such that he was barred from the boarding house where his cousin lived. (T. 3036).

When he drank, Victor would cut himself. (T. 2984). He kept a razor blade in his pocket, and he would use it to cut his own arms. (T. 2984, 2989, 3037, 3060). When asked why he would do it, Victor told his uncle he just wanted to because he felt bad. (T. 2984). At these times, he would express his resentment toward his father. (T. 3037).

When Pablo and Bridget returned to Peru, Victor remained in Argentina. (T. 3056-57). He was deported back to Peru about a year later. (T. 2984). He continued to drink heavily and self-mutilate. (T. 2613, 2985). He was clearly depressed and deeply affected by his father's rejection.

Victor Sr. moved to California with Patricia and their daughters. (T. 3008). Eventually his siblings moved to the same area. Pablo and Bridget moved there. (T. 3067). And Victor's uncle, Anselmo and, his aunt, Lucia, lived there as well.

(T. 2981, 3008). Victor arrived in California about a year after Bridget and Pablo. (T. 3068).

When Victor came to California, his father rejected him again. (T. 2981). His father did not even want him to come to the house. (T. 3008). Victor had to live at Anselmo's house. (T. 2981).

In California, Victor continued to drink and self mutilate. (T. 2616, 2985, 3059). Eventually he had to leave Anselmo's house because of his drinking. (T. 2985).

Victor was good when he wasn't drinking, as he had been in Peru and Argentina. (T. 2986, 3056, 3059-60). He would help around the house and was generally a nice person. But when he drank he would completely change. (T. 2987; 3056). The bad things Victor did were always when he was drunk. (T. 3063).

Victor's drinking made it hard for him to hold a job. He had a job at a warehouse, but was fired due to his drinking. (T. 2980-81, 2615-16). He had a job at a chocolate factory, but it ended the same way. (T. 2616, 3038). His cousin Veronica later worked at the same factory. The people told her that Victor was a good worker but they had to fire him because he would come to work drunk. (T. 3038).

Victor was deported to Peru, but by the year 2000 he made it back to California. (T. 2616-17). He then followed his brother to Miami. (T. 2618). Victor

was able to stay with Juan Carlos and Juan Carlos's girlfriend. (T. 2618). Victor got a job as a roofer, but missed work due to his drinking. (T. 2618). His employer said he was a good worker when he wasn't drunk. (T. 2619). After five or six months, Juan Carlos was deported and Victor was out on the street. (T. 2619). He stayed with people he knew from roofing. (T. 351, 2618-19).

In September of 2003, Victor was arrested in Miami Beach for having an open container of alcohol and police discovered an open warrant from Orlando. (T. 2619-20). He was then held on an immigration detainer near Jacksonville. (T. 2620).

In March of 2004, Victor Guzman was in jail in Clay County when detectives from Miami Beach and the City of Miami came to question him. (T. 315, 318). Told him that they had matched his DNA to a 2001 sexual assault. (T. 358-59). He eventually recognized a photo of the alleged victim, C.C. (T. 259). He admitted that he had sex with C.C., but said he did so with consent.[1] (T. 359-61).

[1] On April 22, 2004, the State filed an information charging Victor Guzman with attempted felony murder, in violation of Florida Statute 782.04(1) and 777.04(1), as well as lewd and lascivious battery on a child between 12-16 and sexual battery. (SR.). The information alleged that these crimes were committed on April 15, 2001. (SR.). Six years later the State filed an amended information charging the statutory offense of attempted felony murder in violation of Florida Statute 782.05(1), lewd and lascivious battery, and aggravated battery. (R. 1160-64). The State tried this case before the homicide case in order to use it as an aggravating circumstance. Mr. Guzman was found guilty on all three counts. (T. 2514-15, 2765-66; R. 1156-64).

The detectives went on to question him about a homicide that happened in Miami in 2000. Victor denied involvement in that case. (T. 343, 2168, 2172-73). He said he was sorry four or five times, but wouldn't say why, and he continued to deny knowing anything about the homicide. When they started to claim they knew he was guilty, Victor invoked his right to counsel. (T. 2172-73).

During the questioning, the detectives noticed marks on Victor Guzman's arms. (T. 337). Victor explained that he would cut them. (T. 337). He also told them he used to drink a lot and he would do bad things when he drank. (T. 337-38)

On June 1, 2004, the grand jury returned an indictment charging Victor Guzman with the first-degree murder of Severina Fernandez. (R. 25-26). The State noticed its intent to seek the death penalty.

Ms. Fernandez was found dead in her Miami apartment on December 9, 2000. She was last seen alive at around 3:30 p.m. when she went out to get a newspaper. (T. 1667). At around 6:00, a neighbor noticed that the inner door to the apartment was ajar. (T. 1669). The neighbor went inside and discovered Ms. Fernandez's body on the bed. She was on her back with her feet on the floor, looking up at the ceiling. (T. 1671). Her underwear had been pulled off one leg and she had multiple stab wounds. (T. 1671).

Crime scene investigators found blood in a number of locations, throughout the apartment. (T. 1699-1704). They found latent fingerprints in the kitchen, the

hall near the kitchen, the dresser, the glass of the front door, and a cup on an armchair. (T. 1785-91). Additional latent prints were found on the front-door knob, an ashtray, the telephone, and the lens of a pair of glasses. None of the latents matched Victor Guzman. (T. 2175).

Crime Scene Investigator Carolyn Grayer testified at trial that on April 20, 2004, she collected swabs from Mr. Guzman for DNA comparison. (T. 1833-35). She stated that she, "went with Detective Arostegui to [M]etro West jail." (T. 1835). Counsel immediately requested a sidebar and objected to the testimony that Mr. Guzman was in jail. (T. 1835). The Court denied a defense motion for mistrial. (1836).

In December of 2000, Stephanie Stoiloff reviewed samples collected in connection with the case for possible DNA analysis. (T. 1910). The rape kit samples were negative for semen. She determined that there was a male DNA profile on swabs of blood taken from the inside of the kitchen sink, the floor of the bedroom, a pink container on the dresser, and the top of the dresser. (T. 1948). The male profile could not be excluded as a contributor to a mixture found on a cup. (T. 1948).

In April of 2004, she received a DNA swab identified as coming from Victor Guzman. (T. 1956-58). The DNA profile matched that obtained from the swabs of the sink, bedroom floor, pink container, and dresser. (T. 1959). Stoiloff determined

that the chance of a randomly-selected person having this profile is one in 153 trillion. (T. 1971).

Toby Wolson took over as the analyst for this case in 2005. (T. 2022). He analyzed additional swabs taken at Ms. Fernandez's apartment. (T. 2029). He determined that two – one from next to the bed and one from the dining area in front of the kitchen doorway – matched Mr. Guzman's profile. (T. 2031).

Dr. Emma Lew testified about the results of an autopsy performed by Christopher Wilson. She stated that Ms. Fernandez was eighty years old at the time of her death. (T. 2106). Wilson documented 58 knife wounds, some of them defensive. (T. 2102, 2122). Two were stabs that penetrated the aorta. (T. 2105). Her hyoid bone was broken. (T. 2122-23). There was a bruise under the scalp from blunt trauma. (T. 2109). The cause of death was determined to be multiple stab wounds and trauma to neck or strangulation. (T. 2107). There was no trauma to the vaginal area. (T. 2131).

Detective Arostegui testified about the interrogation in Clay County. He testified that Mr. Guzman denied having anything to do with the crime and repeatedly said he was sorry. (T. 2168-70). He also informed the jury that when he told Victor Guzman that he knew he was guilty, "he said he wanted a lawyer." (T. 2172-72).

The State and defense rested, and the court denied the defense motions for judgment of acquittal. (T. 2191-97, 2201-07).

The State began its closing argument by saying:

> Members of the jury, horrific, an atrocity, gruesome, ghastly, grizzly. What word would you use to describe this indescribable and unthinkable murder?

(T. 2251).

During its initial closing argument, the prosecutor told the jury that the defense had the burden to "answer some definite questions."

> Mr. White's going to get up here and make a closing argument, and he should answer some definite questions in this case. Mr. White, on the first theory, imperfect human beings, what evidence is there, other than a possibility that mistakes are made in this case before Judge Murphy on September 10th and the other days we've been in trial?
>
> **Mr. White, what evidence in this case is there of contamination?** Crime Scene Investigator Martin swabbed the box, she took the evidence, she put it into a container, she put it into a bag, she brought it to property. They sealed the bag. The sealed bag was brought to Miami-Dade crime lab. The analysts received the sealed bag. They broke the seal. They examined some evidence. They resealed the bag, an[d] it was returned to the City of Miami Police Department. **I unsealed, I unsealed evidence in this case.** It came to court sealed. The DNA swabs on the armrest and backrest in State's Exhibit 61, this is sealed. DNA evidence of Defendant Guzman standards, State's Exhibit 65, sealed. All the red tape. I'm the one who opened this, because I wanted you to see what was inside, see the care that was taken, that contamination did not take place. **Mr. White didn't take**

> **out any of this evidence and show you, ah, this is what happened, this is where the contamination took place**, because there's no evidence of contamination in this case.
>
> What evidence in this body of evidence is there that DNA science has been discredited? And then another question for Mr. White: Why did Defendant Guzman apologize to Detective Arostegui?

(T. 2270-71).

The prosecutor also compared the defense to a "student who doesn't say anything," referring back to an example the defense had used in voir dire to explore the right to remain silent and the burden of proof:

> Defense counsel used the example of two kids in a classroom. One kid hits the other, the teacher asks the students, all right, did you hit him, and the student says no. And then he changes that example a little bit and he says, **then what do you do with the student who doesn't say anything? In this case, what you have are the DNA analysts, and they're not saying one thing**. I mean, they're testimony doesn't conflict, it complements each other. It corroborates each other. There's no conflict in the testimony. This is not a case about credibility. This is not a case."

(T. 2257-58).

The prosecutor ended his argument by naming Mr. Guzman as a personification of evil:

> And Lola unwittingly opened that door to death, destruction, torture, and pain, and his name is Victor Guzman, and he knows it.

(T. 2273).

Subsequent motions for new trial and mistrial were denied. (T. 2296-97, 2389-2422).

The jury found Mr. Guzman guilty as charged.

In the penalty phase, the state called Ms. Fernandez's niece Isabel Reyes and her friend, Delphina Rodriguez, to present victim impact testimony. (T. 2516-37).

Dr. Lew testified again to Ms. Fernandez's wounds. (T. 2539-61). She believed that there was evidence of a sexual battery because of a "mirror-image" blood smear on Ms. Fernandez's thigh and abdomen, and because she was partially disrobed. (T. 2546-47). She testified that Ms. Fernandez would have experienced great pain, and further opined that there would be "psychiatric, emotional pain." (T. 2561).

The State rested.

The defense called three experts, Drs. Merry Haber, Michelle Quiroga, and Brad Fisher.

Dr. Quiroga is a neuropsychologist. (T. 2852-52). She teaches psychology at the University of Miami Miller School of Medecine and is Director of Neuropyschology at Mt. Sinai Medical Center in Miami Beach. (T. 2854-55). She spent eighteen hours with Victor Guzman 2007 performing testing and evaluations. (T. 2857-60). Dr. Quiroga did further testing in 2011. (T. 2872). She determined that Victor was moderately impaired in the areas of complex attention, sequencing,

and focus. (T. 2863). He demonstrated severe impairment on a test involving processing verbal feedback. (T. 2863). He showed mild impairment in abstract thinking, math, processing speed and sequencing. (T. 2863).

Dr. Quiroga concluded that Victor was moderately to mildly cognitively impaired. (T. 2863). His intelligence was borderline, with a full-scale IQ of 75. (T. 2862). She diagnosed him with a cognitive disorder, depressive disorder, and substance abuse in remission. She concluded that Victor was under the influence of extreme emotional disturbance at the time of the killing. (T. 2880).

Dr. Haber, a clinical psychologist, agreed that Victor was under the influence of extreme emotional disturbance. (T. 2634). She diagnosed Victor with a cognitive disorder, personality disorder with narcissistic traits and borderline personality features, and substance abuse. (T. 2641-43).

Dr. Brad Fisher is a clinical psychologist and clinical forensic psychologist. (T. 2712). He has specialized in prison classification and prediction of dangerous behavior. (T. 2714-16). He has developed national guidelines for prisoner classification. (T. 2724). Dr. Fisher met with Victor Guzman four times, performed clinical testing, and reviewed his jail records. (T. 2727-30). Victor had no significant disciplinary history. (T. 2727). Over the course of ten years in jail Victor had received only one disciplinary report for misbehavior. (T. 2728). There was no record of any kind of violent behavior while he was in jail. (T. 2728).

Family support would help Victor succeed at being a good inmate. (T. 2732). Dr. Fisher predicted that Victor would continue to adjust well in prison and would not pose a danger. (T. 2738).

Samuel Ramos is a volunteer pastor and chaplain in Miami-Dade Corrections. (T. 2767-69). He has served in that capacity for 22 years. (T. 2769). By the time of trial he had known Victor Guzman for eight or nine years. (T. 2771). When Pastor Ramos first met him, Victor already had a Bible study group. (T. 2771). Whenever Ramos arrived, Victor would rouse the other inmates to come attend services. (T. 2771-72). Victor would preach or read the Bible with other inmates every day when the pastor was not there. (T. 2773). After Victor was transferred to another jail, he continued to write to Ramos. (T. 2774). Victor's expression of faith was sincere. (T. 2774). Pastor Ramos believed that Victor would continue to minister to and menter other inmates if he were senenced to life in prison. (T. 2775).

Pastor Jorge Montero testified to Victor Guzman's reconciliation with his father. (T. 2787). Pastor Montero was aware of Victor's problems with his father. (T. 2787). But when Victor learned his father was coming from California to visit, he told Montero he had forgiven his father. (T. 2788). He wanted only to embrace him. (T. 2788-89).

Gustavo Canales is a volunteer chaplain in the Miami-Dade Corrections system. (T. 2801). He had met Victor Guzman some six or seven years before. (T. 2805). Victor would assist Canales with services. (T. 2806). He would lead the opening or closing prayers. (T. 2806). Victor would participate in services every time. (T. 2806). Canales believed that Victor's expression of faith was sincere and he would go and teach others to repent. (T. 2808).

Ryan Ansley was housed in the same pod as Victor at the Turner Guildford Knight detention facility. (T. 2819-21). He joined Victor's Bible study group. (T. 2821). Victor's study group meets six nights a week. (T. 2825). Mr. Ansley believed that Victor provided leadership within the pod that helped keep the peace. (T. 2832). He has defused potential fights. (T. 2832). Victor has expressed his remorse to Mr. Ansley. (T. 2832). He believed that if the jury sentenced Victor Guzman to life imprisonment, he would continue to be a servant to God and mentor other inmates. (T. 2837). He told the jury, "The only rehabilitation I've ever seen in the years that I've been incarcerated is Victor Guzman."

The defense introduced a video depicting the conditions where Victor Guzman grew up. (T. 2923; Defense Exhibit A). Victor's family testified to his troubled early life, described above. They expressed their ongoing support for him. (T. 2987; 3090). They agreed that the good man they knew would change completely when he drank. (T. 2986; 3039; 3063).

After hearing closing arguments, the jury returned an advisory verdict. By a bare seven-to-five majority, the jury recommended that Victor Guzman be sentenced to death. (T. 3225; R. 1523).

The trial court held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla.1993), at which the state introduced a transcript of C.C.'s testimony in case number F04-7903. (R. 1731-51). Victor Guzman was sworn and addressed the Court., expressing his remorse to Ms. Fernandez's family. (T. 3289-94).

On April 25, 2013, the trial court sentenced Mr. Guzman to death. (T. 3316; R. 2071-80).

SUMMARY OF THE ARGUMENT

I. The trial court erred when it refused to grant a mistrial after the jury learned that Mr. Guzman may have been jailed on other crimes. The investigator who collected the DNA standard from Mr. Guzman testified that he was in jail at the time. The lead detective exacerbated this problem when he testified that – before the date this sample was collected – he "was told that there was a possible DNA match," and went to interrogate Victor Guzman.

II. The prosecution won its conviction by using improper arguments. It shifted the burden of proof to the defense, telling that defense counsel "should answer some definite questions." Among them were, "What evidence is there … that mistakes are made in this case?," "What evidence in this case is there of contamination?" and, "Why did Defendant Guzman apologize to Detective Arostegui?" The state comented on Mr. Guzman's silence, comparing his to the "student who didn't say anything." The prosecutor went on to inflame the jury, beginning his argument argument with, "Members of the jury, horrific, an atrocity, gruesome, ghastly, grizzly. What word would you use to describe this indescribable and unthinkable murder?," and ending it with, "And Lola unwittingly opened that door to death, destruction, torture, and pain, and his name is Victor Guzman, and he knows it."

III. The court erred in excluding evidence that Victor Guzman offered to plead guilty. This is a legitimate and often-used mitigating factor.

IV. The prosecutor again employed improper arguments in the penalty phase. It misrepresented the law and denigrated mental health mitigation. It misstated the facts as to the mitigating factor of remorse. And it misrepresented the law and facts with regard to the prior conviction aggravator.

V. The prior conviction aggravator is invalid in this case. This aggravator was proven based on convictions that are invalid on their face. Each count was barred by the statute of limitations.

VI. The sentencing order failed to meet the basic requirements of *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). The judge's analysis of mitigation, when there was any, was cursory, without any discussion of the relevant facts or the reasons for assigning little weight to them. It also created a nexus requirement for some mitigation and relied on facts not supported by the record.

VII. In evaluating fundamental error, the Court must apply the "reasonable probability of a different result" standard established in *Strickland v. Washington*, 466 U.S. 668 (1983). Though the court has phrased the fundamental-error standard as though it were outcome-determinative, it has equated fundamental error and the *Strickland* prejudice standard.

VIII. The imposition of a death sentence based on a bare seven-to-five jury recommendation violated *Ring v. Arizona*, 536 U.S. 584, 589 (2002), as well as Article I, sections 9, 16, 17, and 22 of the Florida Constitution.

IX. The errors in this case, when taken together, deprived Victor Guzman of a fair trial, due process of law and a reliable sentencing process.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE JURY LEARNED MR. GUZMAN MAY HAVE BEEN JAILED FOR OTHER CRIMES.

The State elicited testimony that suggested Mr. Guzman was in jail on other charges, and that his DNA was in a database of offenders. "Evidence of collateral crimes, wrongs, or acts committed by the defendant is admissible if it is relevant to a material fact in issue; such evidence is not admissible where its sole relevance is to prove the character or propensity of the accused." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). This evidence deprived Mr. Guzman of his right to a fair trial and reliable sentencing procedure. *See* U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

Crime Scene Investigator Carolyn Grayer testified that on April 20, 2004, she collected buccal swabs from Mr. Guzman for DNA comparison. (T. 1833-35). Asked by the State what she did, Grayer answered, "I responded to Metro West with a detective, Andy Arostegui." (T. 1834). Asked what she meant by "responded," Grayer explained, "I went with Detective Arostegui to [M]etro West jail." (T. 1835). Counsel immediately requested a sidebar and objected to the testimony that Mr. Guzman was in jail. (T. 1835). The Court denied a defense motion for mistrial. (1836). The defense argued that since the police wouldn't have arrested him without the DNA match, jurors would assume that Mr. Guzman was

in jail for another crime. (T. 1836-37). The judge agreed that, "The inference is that he was in custody at the time …" (T. 1838-39). The court struck the testimony.

"[A]n accused's right to a fair and impartial jury is violated when a jury is improperly made aware of a defendant's arrest for unrelated crimes either during the jury selection process or during the trial proper." *Wilding v. State*, 427 So. 2d 1069, 1070 (Fla. 2d DCA 1983); s*ee also Jackson v. State*, 729 So. 2d 947, 951 (Fla. 1st DCA 1998); *Richardson v. State*, 666 So.2d 223 (Fla. 2d DCA 1995). In *Jackson*, the trial court inadvertently informed the jurors that there were four counts, when three had been severed. In *Richardson*, a prospective juror worked as a corrections officer. In the presence of the venire, she suggested that she knew the defendant through her job. The district court held that the judge erred in failing to strike the entire panel.

A similar error arose when Detective Arostegui testified about interrogating Mr. Guzman. He stated, "Well, the next thing that occurred is on March 9, 2004, I was told that there was a possible DNA match." (T. 2150). The defense immediately objected. (T. 2150). The judge observed, "I guess its another cat out of the box." (T. 2152). The defense moved for mistrial, noting, "this is the same problem we had with the reference to Metro West …" (T. 2152). The judge granted a motion to strike the testimony, but denied the motion for mistrial. (T. 2152-54).

This had the unmistakeable effect of telling the jury that Mr. Guzman's DNA was already in a database of criminal offenders. In *Chambers v. State*, 742 So. 2d 839 (Fla. 3d DCA 1999), the detective contacted the "robbery clearing house" in order to share or exchange information about Chambers with other agencies. "The only obvious relevancy of such evidence was to attack Chambers' character and to demonstrate his possible involvement in other uncharged robberies." *Id*. at 840.

The trial court erred in denying the defense motions for mistrial. The Court reviews the denial of a motion for mistrial for abuse of discretion. *See Tumblin v. State*, 29 So .3d 1093, 1103 (Fla. 2010). "When a prospective juror comments on a defendant's criminal history and expresses some knowledge of the defendant himself, it is an abuse of discretion not to strike the venire." *Reppert v. State*, 86 So. 3d 525, 526 (Fla. 2d DCA 2012). Where jurors learn that a defendant may have been arrested for other crimes during voir dire, courts have consistently held that a new trial is required. *See Jackson*; *Richardson*; *Evans v. State*, 36 So. 3d 185, 186 (Fla. 4th DCA 2010). This is true even where the trial court recognizes the error and attempts to remedy it with curative instructions. *See Turner v. State*, 51 So. 3d 542 , 543 (Fla. 5th DCA 2010). There is no principled distinction between a jury that learns of other crimes before a trial and one that learns of them during trial.

II. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State,* 711 So. 2d 205 (Fla. 3d DCA 1998).

> As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Here the prosecution repeatedly made improper arguments. Not satisfied with merely striking hard blows, it struck foul ones. *See Berger*, 295 U.S. at 88. This prosecutorial misconduct deprived Victor Guzman of due process of law and trial by an impartial jury. U.S. Const. amend. V, VI, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.

A. Burden-Shifting and Comments on Silence

As a matter of due process, the State is required to prove all elements of a crime beyond a reasonable doubt. A defendant is not obligated to produce evidence to establish his innocence. *Hayes v. State,* 660 So.2d 257, 265 (Fla.1995) (citation omitted). Therefore it is error for a prosecutor to make comments, or introduce evidence that "shift[s] the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Gore v. State,* 719 So. 2d 1197, 1200 (Fla. 1998); *see also*

Hayes v. State, 660 So. 2d 257, 265 (Fla. 1995); *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991).

The State expressly shifted the burden of proof to the defense. During his initial closing argument, the prosecutor told jurors that the defense needed to "answer some definite questions."

> Mr. White's going to get up here and make a closing argument, and he should answer some definite questions in this case. Mr. White, on the first theory, imperfect human beings, what evidence is there, other than a possibility that mistakes are made in this case before Judge Murphy on September 10th and the other days we've been in trial?
>
> **Mr. White, what evidence in this case is there of contamination?** Crime Scene Investigator Martin swabbed the box, she took the evidence, she put it into a container, she put it into a bag, she brought it to property. They sealed the bag. The sealed bag was brought to Miami-Dade crime lab. The analysts received the sealed bag. They broke the seal. They examined some evidence. They resealed the bag, an[d] it was returned to the City of Miami Police Department. **I unsealed, I unsealed evidence in this case.** It came to court sealed. The DNA swabs on the armrest and backrest in State's Exhibit 61, this is sealed. DNA evidence of Defendant Guzman standards, State's Exhibit 65, sealed. All the red tape. I'm the one who opened this, because I wanted you to see what was inside, see the care that was taken, that contamination did not take place. **Mr. White didn't take out any of this evidence and show you, ah, this is what happened, this is where the contamination took place**, because there's no evidence of contamination in this case.
>
> What evidence in this body of evidence is there that DNA science has been discredited? And then **another**

> **question for Mr. White: Why did Defendant Guzman apologize to Detective Arostegui?**

(T. 2270-71).[2]

The prosecution's argument was a textbook example of burden-shifting. *See, e.g., Bell v. State*, 108 So. 3d 639, 648-49 (Fla. 2013); *Ealy v. State*, 915 So. 2d 1288, 1291 (Fla. 2d DCA 2005). In *Bell* the prosecutor argued: "[I]f you are looking for a reason to not believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances." The Court held this improper, stating: "By stating that 'there is no evidence' to contradict the victim's testimony, the prosecutor highlighted Bell's failure to present any evidence impeaching the State's witness."

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[2] This forced defense counsel to respond in his own closing argument:

> Now, I was also asked a number of questions, and I'm not going to answer the questions that Mr. Warfman proposed directly …
>
> * * *
>
> If you needed to hear the other side of the story, then you're -- you don't need to be on the jury in this case, because the judge will tell you that's not the burden. Mr. Warfman can ask me questions all he wants, but the point is not what I even say. The point is what they've proven by the evidence.

(T. 2282, 2292).

In *Ealy* the prosecutor argued: "And what reason do you have that has been presented to you from this witness stand here and throughout the course of this trial do you say to yourselves, 'can't possibly be his fingerprints. It's not his fingerprints?'" The district court found error, explaining: "The prosecutor's comments impermissibly shifted the burden to Mr. Ealy to disprove that the fingerprints were his and suggested that his failure to do so was indicative of his guilt." *See also Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000) ("we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been."); *Jackson v. State*, 832 So. 2d 773, 778 (Fla. 4th DCA 2002) ("[w]hat evidence was presented in this case that makes you believe Brimm was incorrect, not what evidence is before you" "shifts the burden to appellant to present evidence to show Brimm was incorrect.")

The arguments in this case differ from *Bell*, *Ealy*, and the other cases cited above in one respect. In those cases the State's arguments implied that the defense had a burden. Here, the prosecutor *told* jurors defense counsel had a duty to meet that burden or explain why not.

The last of the prosecutor's challenge-questions ("Why did Defendant Guzman apologize to Detective Arostegui?") also implicated Mr. Guzman's failure to testify. Any comment "fairly susceptible" of being interpreted as a comment on a defendant's exercise of the right to remain silent violates the Fifth Amendment of

the United States Constitution and Article I, Section 9 of the Florida Constitution. *Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000); *State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla. 1986). The standard for determining whether a comment is "fairly susceptible" of being thus interpreted is a liberal one. *Id*. "It is clear that comments on silence are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict." *DGuilio* at 1136. In this case, the State repeatedly alluded to Guzman's failure to testify, and introduced evidence that he terminated interrogation by invoking his right to counsel.

Burden-shifting arguments and comments on the failure to testify often go hand in hand. *See, e.g., Rodriguez* at 39. The prosecutor argued that counsel needed to explain something only Mr. Guzman could know: "And then another question for Mr. White: Why did Defendant Guzman apologize to Detective Arostegui?" State comments on the defense's failure to produce evidence that only the defendant can supply are comments on the defendant's failure to take the stand. *See Id.* at 38.

This comment must be considered in light of the fact that the State introduced evidence that Mr. Guzman invoked his right to counsel during the interrogation. Detective Arostegui interrogated Mr. Guzman for approximately three hours. (T. 2185). During the last 45 minutes, Mr. Guzman apologized without

explaining why. Arostegui began to tell him that he *knew* Victor was involved. Mr. Guzman responded by invoking his right to counsel:

> Towards the last 45 minutes, I will say, of the interview, he kept saying that he was sorry, and I'm sorry, and I'm sorry. And I said, well, what do you mean by, I'm sorry? Are you sorry, you know, that you're talking to me, you don't want to tell me what happened? Or what are you sorry for? Are you sorry for yourself or what are you sorry for? And he says, I'm sorry, I'm sorry. And at some point, this is in the last 45 minutes about, and he just – I kept telling him that, basically, telling him that I knew that he was involved, and he said he wanted a lawyer.

(T. 2172-73).

A comment on a defendant's invocation of his right not to answer questions violates his right to remain silent. *See DiGuilio* at 1131. In *DiGuilio* an officer testified, "After that, he advised me he felt like he should speak to his attorney." *Id.* at 1131. The Court held that, "comment on a defendant's invocation of his right to remain silent after he has answered some questions is constitutional error." *Id*. *See also, Jones v. State*, 748 So. 2d 1012 (Fla. 1999) (detective's testimony that, "the first interrogation ended when Jones invoked his right to remain silent" was error); *Mack v. State*, 58 So. 3d 354 (Fla. 1st DCA 2011) (defendant "said he'd rather talk to his attorney, and he didn't want to talk to me anymore.").

Detective Arostegui's testimony was tantamount to a confession. In *Moss v. State*, ____ Fla. L. Weekly ___, 2015 WL 3986146 (Fla. 1st DCA July 1, 2015), detectives attempted to reinterview the defendant after confirming that his DNA

matched swabs from the victim, and he declined to answer further questions. The district court explained:

> The more significant, but legally improper, point to be drawn from the second interview is that Moss changed course and invoked his right to remain silent after the DNA test results were in and he was confronted by police a second time. From the exercise of Moss's right to remain silent, the jury could have inferred that Moss essentially admitted he was caught.

Id.[3] Here, as in *Moss*, the natural inference for the jury from Mr. Guzman's exercise of his rights was that he "essentially admitted he was caught."

The prosecutor yet again commented on Guzman's silence in his discussion of defense counsel's voir dire hypothetical. Defense counsel had explored the jurors' ability to respect Mr. Guzman's right to not testify and the burden of proof. He addressed juror 70, a retired teacher, using the example of a dispute between two students. (T. 1558-62). The juror said he would want to hear out both sides. (T. 1558). Counsel explained the juror would have to set aside that expectation and asked what would happen if one of the student gave his side of events while the other didn't speak. (T. 1558-59). The juror said he wouldn't believe everything the first student said because he had to hear both sides. (T. 1559). Asked what would happen if one side wouldn't say anything, the juror said, "But eventually he will."

[3] *Moss*, however, objected to this testimony and his case was resumed for harmless error.

(T. 1559). The juror eventually agreed that a student who wouldn't talk would not necessarily be guilty, and he would have to evaluate the accuser's story. (T. 1561).

In closing argument, the prosecutor compared the defense to "the student who doesn't say anything":

> Defense counsel used the example of two kids in a classroom. One kid hits the other, the teacher asks the students, all right, did you hit him, and the student says no. And then he changes that example a little bit and he says, **then what do you do with the student who doesn't say anything? In this case, what you have are the DNA analysts, and they're not saying one thing**. I mean, they're testimony doesn't conflict, it complements each other. It corroborates each other. There's no conflict in the testimony. This is not a case about credibility. This is not a case."

(T. 2257-58). The defense objected, and reserved a motion. (T. 2258). The defense subsequently moved for mistrial on the basis that this was a comment on the defendant's right to testify and shifted the burden of proof. (T. 2295-96).

B. Inflammatory Arguments

This Court has said:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolloti v. State, 476 So. 2d 130, 134 (Fla. 1985). The prosecutor lost no time in violating this rule. The first words of his closing argument were:

> Members of the jury, horrific, an atrocity, gruesome, ghastly, grizzly. What word would you use to describe this indescribable and unthinkable murder?

(T. 2251). The prosecutor went on to criticize defense counsel for not using sufficiently emotional language:

> So when Defense counsel tells you in his opening statement, this is a tragedy, of course its a tragedy, but he undersells a little bit. This is the most vicious of vicious murders that happened about 12 years ago.

(T. 2257). Finally, he named Mr. Guzman as a personification of evil:

> And Lola unwittingly opened that door to death, destruction, torture, and pain, and his name is Victor Guzman, and he knows it.

(T. 2273). *See Brooks v. State*, 762 So. 2d 879, 900 (Fla. 2000); *King v. State*, 623 So.2d 486, 488 (Fla. 1993). When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So.2d 353, 359 (Fla.1988). The prosecutor's lurid descriptions had nothing to do with the issues before the jury. It could only have served to divert jurors from a dispassionate application of the law to the facts of the case.

C. Fundamental Error

The defense failed to object to this testimony. Consequently, the Court reviews for fundamental error. *See Fletcher v. State*, 40 Fla. L. Weekly S355 (Fla. June 25, 2015); *Mendoza v. State*, 964 So. 2d 121, 132 (Fla. 2007). The proper application of this standard is discussed in Argument VII, *infra*.

"Prosecutorial improprieties 'must be viewed in the context of the record as a whole to determine if a new trial is warranted.'" *LaMarca v. State*, 785 So. 2d 1209, 1214 (Fla. 2001) (quoting *Sireci v. State*, 587 So. 2d 450, 452 (Fla. 1991)). In the context of the record as a whole, these errors worked a deprivation of due process. The prosecution eschewed its burden of proof, flouted Mr. Guzman's right to remain silent, and invited the jury to convict him on the basis of incensed passion rather than a logical analysis of the case.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF MR. GUZMAN'S WILLINGNESS TO PLEAD GUILTY DURING THE PENALTY PHASE.

A trial court may neither refuse to consider nor preclude the jury from considering any relevant mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393, 398 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The judge nevertheless excluded evidence of his willingness to accept responsibility for

this crime and plead guilty. By prohibiting the introduction of relevant mitigation, the trial court deprived Victor Guzman of his rights under the state and federal constitutions. U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.[4]

Victor Guzman told the court he was guilty and was willing to waive his rights and plead guilty and be sentenced to life without parole. (T. 2468-69; 3256-57). The State moved in limine to exclude evidence of "plea negotiations," citing *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990),[5] *Happ v. State*, 596 So. 2d 991 (Fla. 1992),[6] and *Donaldson v. State*, 772 So. 2d 177 (Fla. 1998). (R. 1093-94). The judge rejected defense counsel's argument that Mr. Guzman's offer to plead guilty was not a "plea negotiation" subject to exclusion. (T. 2468-69).

A defendant's willingness to plead guilty is routinely relied on as mitigation. *See Carter v. State*, 980 So. 2d 473, 479 (Fla. 2008); *Franklin v. State*, 965 So. 2d 79, 88 (Fla. 2007); *Troy v. State*, 948 So. 2d 635, 654 (Fla. 2006); *Nelson v. State*, 850 So. 2d 514, 521 (Fla. 2003); *Davis v. State*, 698 So. 2d 1182, 1187 (Fla. 1997). In *Ault v. State*, 15 So. 3d 175, 197 (Fla. 2010), the Court referred to the

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[4] The Court reviews both the exclusion of penalty-phase evidence and a trial court's rejection of a mitigating circumstance for abuse of discretion. *See Hill v. State*, 515 So. 2d 176, 178 (1987); *Ault v. State*, 53 So. 3d 175, 188 (2010). However, a judge has no discretion to exclude or ignore mitigating evidence. *See Hitchcock*, 481 U.S. at 398

[5] *Vacated on other grounds*, 505 U.S. 1215 (1992).

[6] *Vacated on other grounds*, 506 U.S. 949 (1992).

"significant nonstatutory mitigation" in *Davis*, including, "Davis was capable of accepting responsibility for his actions and had shown remorse for his conduct and offered to plead guilty …"

None of the State's cases stand to the contrary. Hitchcock attempted to introduce evidence that the *State* had offered a life sentence in exchange for a guilty plea. 578 So. 2d at 690. He argued that this testimony was admissible to show that the State originally believed life imprisonment to be an appropriate sentence. The Court concluded that the State's offer was not relevant to mitigation, particularly because Hitchcock rejected the offer. *Id. Donaldson* also involved an attempt to use a State plea offer as mitigation. *See* 772 So. 2d at 188. *Happ* summarily rejected an attempt to introduce "evidence of plea negotiations" as mitigation, without elaborating on the nature of the proffered evidence. 596 So. 2d at 996-97. As in *Hitchcock* and *Donaldson*, Happ had attempted to introduce evidence that the State had been willing to agree to a life sentence in exchange for a guilty plea. *See* Brief of Appellant at 70, *Happ v. State*, No. 74634 (Fla. May 7, 1990).

IV. PROSECUTORIAL MISCONDUCT IN PENALTY-PHASE CLOSING ARGUMENT

"A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence …" *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999). "[T]he prosecutor has a duty to seek justice—not merely 'win' a death recommendation." *Fletcher v. State*, 40 Fla. L. Weekly S366 (Fla. June 25, 2015). The prosecutor's closing argument in this case undermined the fairness of the penalty phase proceedings by repeatedly misrepresenting the law and the facts with respect to mitigating and aggravating factors before the jury, in violation of his right to due process, fair trial, and a reliable sentencing process. *See* Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

A. Misrepresenting the Law and Denigrating Mental Health Mitigation

A mitigating circumstance is "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Campbell v. State*, 571 So. 2d 415, 419 n.4 (Fla. 1990) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), *overruled on other grounds Trease v. State*, 768 So. 2d 1050 (Fla. 1990). The prosecution,

however, told jurors that the expert testimony of Drs. Haber and Quiroga had no "role in this case."

> State has not offered psychological evidence in this case. State doesn't believe it's got a role in this case. It's not going to explain why he murdered Lola. It's not going to explain that this was not heinous, atrocious, and cruel. Use your common sense. These experts don't add to your understanding of any mitigation.

(T. 3154). The State's message was clear: the expert testimony was irrelevant because it did not disprove the aggravating circumstances.

The prosecutor made a similar point earlier in his argument when he said:

> This is what heinous, atrocious, and cruel looks like in real life. Not in the mind of someone who's got their head buried in some kind of book and tells you some stuff that they've read and try to account for what happened. This is real and this is what heinous, atrocious, and cruel looks like.

(T. 3136). The prosecutor contrasted the aggravation, which was "real," with "some stuff" the doctors had fished out of "some kind of book." This characterization only served to denigrate the psychological mitigation offered on Mr. Guzman's behalf. A prosecutor may not denigrate mitigation using words such as "flimsy" or call it an "excuse." *See Delhall v. State*, 95 So. 3d 134, 167-68 (Fla. 2012); *Brooks v. State*, 762 So. 2d 879, 903 (Fla. 2000). To call mitigation "some stuff" from "some book" is equally deprecating.

B. Misrepresentation of the facts as to the mitigator of remorse.

The State also misstated the evidence in order to dispute another mitigator, Mr. Guzman's remorse. The prosecutor argued that Mr. Guzman did not confess his crimes to his family, the ministers, or prisoners while he awaited trial. (T. 3145). He pointed to the testimony of Bryan Ansley, who housed with Mr. Guzman at the jail:

> He had a conversation with the convict Ansley, and there's no jailhouse recordings where someone might overhear him, he told him he committed this murder. He didn't express an iota of remorse to the convict, Ansley, and there was nothing preventing him from doing it.

(T. 3145). The claim that there are "no jailhouse recordings" and detainees cannot be overheard has no basis in the record.

Moreover, the evidence did show that Mr. Guzman expressed remorse to Ansley:

> Q. Did he express to you remorse about his crimes?
>
> A. Yes. He does. I mean, I know you hear people say the burden is his. I know for a fact and I don't know how to convey to you-all how I know this, you know, besides him saying it. Between, you know, I have not literally seen him cry, but you can hear it in his voice and the shake in his voice, you know, I know that he's remorseful for what he's done. To only turn back the hands of time, which we all know it's impossible.

(T. 2382). This testimony was not undermined during cross-examination. The prosecutor asked what Mr. Guzman said when he admitted his crimes to Ansley, and Ansley explained. The prosecutor then asked:

> Q. What did he say to you other than describing what you said? Did he say, I'm sorry I did that, or anything like that?
>
> A. **At that time**, no, he just – I think he just wanted me to know what he was convicted of or accused of or what he did actually. He told me, you know, he did it. He said he had taken a life.

(T. 2840-41).

C. Misrepresentation of the law and facts with regard to prior felony aggravator

While improperly urging the jury to discount relevant mitigating factors, the prosecution also misstated both the facts and the law in order to increase the weight given to the prior violent felony aggravator. During the penalty phase, the State introduced copies of the amended information and record of conviction in case number F04-7903. (T. 2514-15, 2765-66; R. 1156-64). These reflected that Mr. Guzman had been convicted of attempted felony murder pursuant to section 782.051, lewd and lascivious battery, and aggravated battery. It also introduced a photograph of the victim in that case, C.C. (R. 1154). The State did not call C.C. to testify or present any other evidence concerning F04-7903.

In closing argument, the prosecutor told jurors that these convictions meant that Victor Guzman "tried to kill C.C., a child," and that, "he was convicted of lewd and lascivious battery, meaning without consent." (T. 3137). Neither statement is true. Intent to kill is specifically excluded from the crime of attempted felony murder under section 785.051. *See* Fla. Std. Jury Instr. (Crim.) 6.3 ("In order to convict the defendant of Attempted Felony Murder, it is not necessary for the State to prove that he had an intent to kill."). Lack of consent is not an element of lewd and lascivious battery. *See* § 800.04(2) (2000).

D. Fundamental Error

There was no contemporaneous objecting to these improper comments. The Court thus reviews for fundamental error. The proper application of this standard is discussed in Argument VII, *infra*. As noted above, "prosecutorial improprieties must be viewed in the context of the record as a whole." *LaMarca v. State*, 785 So. 2d at 1214. Moreover, guilt-phase error may be viewed cumulatively with improper penalty-phase arguments. In light of the bare majority vote, the Court must conclude that these errors undermined the fairness of the penalty proceeding to the extent that it tainted the jury's verdict.

V. THE PRIOR CONVICTION AGGRAVATOR IS INVALID.

The State introduced copies of the amended information and record of conviction in case number F04-7903. (T. 2514-15, 2765-66; R. 1156-64). These reflected that he had been convicted of attempted felony murder pursuant to section 782.051, lewd and lascivious battery, and aggravated battery. All three of these convictions are invalid on the face of the information because they violate the statute of limitations.[7]

A prosecution for a first-degree felony must be commenced within four years. *See* § 775.15(2)(a), Fla. Stat. (2000). A prosecution for a second-degree felony must be commenced within three years. *See* § 775.15(2)(b), Fla. Stat. (2000). Attempted felony murder pursuant to section 782.051 is a first-degree felony. *See* § 782.051(1), Fla. Stat. (2000). Lewd and lascivious battery on a child between 12 and 16 is a second-degree felony. *See* § 800.04(4), Fla. Stat. (2000). Aggravated battery is a second-degree felony. *See* § 784.045, Fla. Stat. (2000). A prosecution is commenced upon the filing of an information or other charging document. *See* § 775.15(5)(a), Fla. Stat. (2000).

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[7] The court generally review a trial court's finding of an aggravator to determine whether the trial court applied the right rule of law and whether competent substantial evidence supports the finding. *King v. State*, 130 So. 3d 676, 683 (Fla. 2013), *cert. denied*, 134 S. Ct. 1323 (2014). In this case the validity of the prior convictions is a pure question of law, and therefore reviewed de novo. *See, e.g.*, *Griffin v. State*, 160 So. 3d 63, 67 (Fla. 2015).

On April 22, 2004, the State filed an information charging Mr. Guzman with the non-existent[8] offense of "common-law" attempted felony murder, in violation of Florida Statute 782.04(1) and 777.04(1), as well as lewd and lascivious battery on a child between 12-16 and sexual battery. (SR.). The information alleged that these crimes were committed on April 15, 2001. (SR.).

On May 3, 2010, over nine years after the alleged incident occurred, the State filed an amended information. (R. 1160-64). For the first time, the State charged Mr. Guzman with the statutory offense of attempted felony murder, a first degree felony, in violation of Florida Statute 782.05(1), and aggravated battery, a second degree felony, in violation of Florida Statute 784.045(1)(a)1. The amended information also recharged Guzman lewd/lascivious battery on a child 12-16 years old.

The conviction for lewd and lascivious battery, the one count charged in both the original and amended informations, is patently barred by section 775.15. The State filed the original information on April 22, 2004, more than three years after April 15, 2001. (SR.). Under the statute in effect in April, 2001, there was a limited extension of the statute of limitations for certain offenses, among them lewd and lascivious battery:

[8] *See State v. Gray*, 654 So.2d 552 (Fla.1995).

> If the victim of a violation of s. 794.011, former s. 794.05, Florida Statutes 1995, s. 800.04, or s. 826.04 is under the age of 16, the applicable period of limitation, if any, **does not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier.** … If the offense is a first or second degree felony violation of s. 794.011, and the crime is reported within 72 hours after its commission, paragraph (1)(b) applies. This subsection applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before December 31, 1984.

§ 775.15(7), Fla. Stat. (2000). Under this subsection, the three-year deadline for charging the second-degree felony of lewd and lascivious battery began on either the date C.C. reported the offense or on her sixteenth birthday, whichever came first. Because the offense was reported on April 15, 2001, the State had until April 15, 2004 to charge Mr. Guzman. The version of section 775.15 in effect at the time of the offense controls the time for filing. *See, e.g., Torgerson v. State*, 964 So. 2d 178 (Fla. 4th DCA 2007).[9]

[9] The amended statute of limitations, which took effect on October 1, 2001, changed "age of 16" to "age of 18." It left untouched the provision triggering the three-year period when the offense was reported to law enforcement. *See* § 775.15(7), Fla. Stat. (2001). A later amendment extended the time for filing to one year after a defendant was identified by DNA. *See* § 775.15(8)(a), Fla. Stat. (2004). By its own terms, that amendment applies only to "any offense that is not otherwise barred from prosecution on or after July, 2004." *See* § 775.15(8)(b), Fla. Stat. (2004).

The aggravated battery count, too, is a straightforward violation of the statute of limitations. Aggravated battery is a second-degree felony. The State had three years from April 15, 2001, in which to file this charge. The State first charged aggravated battery in the amended information on May 3, 2010.

The State charged Mr. Guzman with statutory attempted felony murder when the four years had long passed – nine years and eighteen days after the crime occurred. While there is an exception where a charge in an amended information "can be deemed to have been merely a continuation of the original information," it does not apply here. *See Bongiorno v. State*, 523 So. 2d 644 (Fla. 2d DCA 1988) (citing *Rubin v. State*, 390 So. 2d 322 (Fla. 1980); *Mead v. State*, 101 So. 2d 373 (Fla. 1958). There was no charge to continue because the original information failed to charge a crime at all. It alleged an attempt, under section 777.04(1), to commit the crime of felony murder, under 782.04(1). (SR). It did not allege premeditated intent to kill, only that the attempt occurred in the course of a sexual battery. The Court declared this crime to be nonexistent in 1995, six years before the date of the offense and nine years before the State filed the original information. *See State v. Gray*, 654 So. 2d 552 (Fla. 1995).

Even if common-law felony murder were a real offense, the amended charge could not effect a continuation of the original prosecution. In *Battle v. State*, 911 So. 2d 85 (Fla. 2005), this Court recognized that the *statutory* offense of

"attempted felony murder" is a completely different crime from the nonexistent offense of common-law attempted felony murder. Statutory attempted felony murder under section 782.051 was originally enacted as "felony causing bodily injury." *See* ch. 96-359, § 1, at 2052, Laws of Fla. The Legislature subsequently amended the crime, renaming it "attempted felony murder." *See* ch. 98-204, § 12 at 1970, Laws of Fla. As amended, 782.051(1) provides:

> Any person who perpetrates or attempts to perpetrate any felony enumerated in s. 782.04(3) and who commits, aids, or abets an **intentional act that is not an essential element of the felony** and that could, but does not, cause the death of another commits a felony of the first degree....

Section 782.05 requires as an element "an intentional act that is not an essential element of the felony…," which was not an element of the common law crime of attempted first degree felony murder. *See Battle*, 911 So. 2d at 88 (Trial court's failure to instruct that defendant committed, aided, or abetted an intentional act "that [was] not an essential element of the felony," was error, as this constituted omission of an essential element of charged offense of attempted felony murder).[10]

Where the subsequent information "broaden[s] or substantially amend[s] the original charges," it is not a continuation of the original prosecution but a new prosecution, and thus subject to the statute of limitations. *See Harper v. State*, 43

[10] *See also King v. State*, 800 So. 2d 734 (Fla. 5th DCA 2001); *Neal v. State*, 783 So.2d 1102 (Fla. 5th DCA 2001).

So. 3d 174 (Fla. 3d DCA 2010); *Labrador v. State*, 13 So. 3d 1070 (Fla. 3d DCA 2009). In *Labrador* the court rejected an amended information in which the State "brought a new charge, alleging a new and distinct crime with different elements, under a completely different statute." *Labrador* at 1072. That is precisely what the State did here.

The Court should reverse Mr. Guzman's sentence based on this invalid aggravation, despite the fact that the convictions in case number F04-7903 are now pending appeal. This Court has held that there is no error in finding the prior conviction aggravator based on convictions not final on appeal. *See Ruffin v. State*, 397 So. 2d 277, 282 (Fla. 1981); *Peak v. State*, 395 So. 2d 492, 499 (Fla. 1980). This is so because the conviction is "presumed to be correct." *Ruffin* at 282. Here there can be no such presumption because the convictions are invalid on their face.

VI. ERRORS IN THE SENTENCING ORDER

The trial court failed to expressly evaluate the proffered mitigating cicrumstaces. The sentencing order imposed an unlawful "nexus" requirement when finding and weighing mitigation. Finally, the order relies on facts the State never proved. Each of these errors require that the Court remand for resentencing. U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.

A. The trial court failed to expressly evaluate mitigation

"When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant …" *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990), *overruled on other grounds Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000). "[I]n order to facilitate appellate review, [the court] must expressly consider in its written order each established mitigating circumstance." *Id.*; *see also Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995).

The trial court failed to properly analyze a number of mitigators. The court must, "expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence presented …" *Oyola v. State*, 99 So. 3d 431, 447 (Fla. 2012). It must also, "expressly and specifically articulate why the … evidence warranted" the weight it assigns to mitigation. *Id.* Thus a court must provide an "evaluation and analysis" of why it rejected mitigation or assigned it limited weight. *Id.* This the trial court failed to do when it sentenced Victor Guzman to die.

The trial court rejected the statutory mitigator of extreme mental or emotional disturbance. It briefly described some of Dr. Haber's testimony on this point and gave reasons for rejecting it. But the court failed to discuss or even acknowledge the fact that a second doctor, Dr. Quiroga, had also testified that Mr.

Guzman satisfied this mitigator. Considering only half the evidence concerning a mitigating circumstance is not an express evaluation of the evidence. *Compare Davis v. State*, 148 So. 3d 1261, 1275 (Fla. 2014) (distinguishing *Oyola* where "The trial court, over a span of three pages of its sentencing order, analyzed the testimony that was pertinent to the alleged mitigating circumstance and explicitly stated its reasons for not finding the statutory mitigating circumstance.").

The nonstatutory mitigation received even less "analysis." The judge assigned "slight weight" to the fact that Victor witnessed the abuse of his mother and brother. His only explanation of this weight was: "Defendant presented testimony from several family members that his father would hit his mother and that he was abusive. There was testimony he would hit the brother." (R. 2076).

The judge assigned "little weight" to the fact that Victor was beaten by his father. He stated: "The Defendant presented testimony that his father would physically hit him when he skipped school, got bad grades, or needed discipline." The judge not only failed to explain why he gave this abuse so little weight, it failed to acknowledge the nature of the abuse. The evidence established that Victor's father would force him to undress and lie on the floor. (T. 3011). Then his father would beat him with a **leather whip**. (T. 2974, 3010-3012, 3033).

Victor's father rejected him once again when Victor came to California. (T. 2981, 3008). The judge gave this mitigator minor weight, stating only: "Defendant lived with his uncle in California after his father moved there." (R. 2076).

A feature of the case in mitigation was the fact that Victor had demonstrated excellent behavior in jail and posed no future danger in prison. The judge gave these factors "little weight" and "slight weight." (R. 2078). He explained his analysis as to both by stating: "Brad Fisher testified about the Defendant's excellent jail behavior."

The defense presented four witnesses regarding Victor's ministry in jail and his ability to act as a mentor. The judge's analysis was: "Defendant presented the testimony of other inmates and pastors. The court gives this mitigator slight weight." As to Victor's remorse, the order states: "Defendant also expressed remorse at the *Spencer* hearing. The court gives this little weight."

In several instances the judge omitted *any* mention of the basis for the mitigation or its weight. Victor was affected by his anger and resentment towards his father. The judge evaluated the weight of this mitigation by stating: "The Defendant proved the existence of this mitigator. The court gives it little weight." (R. 2077). As to Victor's lack of education, the judge wrote: "The Defendant proved the existence of this mitigator. The court gives it slight weight." (R. 2077). The judge's discussion of Victor's repentance and dedication to God was the same:

"The Defendant proved the existence of this mitigator. The court gives it slight weight." (R. 2079).

The judge even went so far as to omit any mention of whether a mitigator had been proven and skip straight to the weight. As to Victor's family's desire to maintain a relationship with him, the judge wrote only: "The Court gives this little weight." (R. 2079). As to Victor's emotional scars, the judge wrote: "The court gives this slight weight."

In each case, the judge's discussion of the mitigation falls well short of what is required. In *Orme v. State*, 25 So. 3d 536, 549 (Fla. 2009), the judge failed to discuss the evidence concerning Orme's abusive father. This Court found error, explaining: "However, the trial court failed to discuss any of this evidence in its sentencing order. The trial court's statement that Orme's parents were divorced but that he had a loving stepmother was an insufficient analysis of this mitigator." The analysis in *Orme* was if anything more detailed than that which the judge performed in this case.

B. The Trial Court Imposed a "Nexus" Requirement

"… Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." *Cox v. State*, 819 So. 2d 705, 723 (Fla. 2002); *see also Orme v. State*, 25 So. 3d 536, 548 (Fla. 2009) (error to assign no weight to mitigator because "it was

not relevant to the murder"). The trial court nevertheless devalued the mitigating effect of Mr. Guzman's 75 IQ and borderline intellectual functioning because "The vast majority of people suffering from mental retardation, even those that are severely mentally retarded, know that one should not kill others and the vast majority of them do not kill anyone." The weight of this mitigation is not dependent on whether Mr. Guzman's intellectual deficits caused him to commit murder. *Cf. Williamson v. State*, 107 So. 3d 688, 698 (Fla. 1996) (giving only some weight to mitigator where defendant's siblings had suffered the same dysfunctional upbringing yet gone on to be successful).

C. The trial court relied on facts not supported by the record.

The Court reviews a judge's findings regarding aggravators and mitigators to determine if they are supported by sufficient competent evidence *in the record*. *See Stephens v. State*, 787 So. 2d 747, 761 (Fla. 2001). "[I]t is crucial that a sentencing order only reflect facts drawn from the record in the particular case." *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997). Reliance on facts outside the record denies a defendant's right to due process. *See Gardner v. Florida*, 430 U.S. 349 (1977); *Porter v. State*, 400 So. 2d 5 (Fla. 1981); U.S. Const. amends. VIII, XIV; Art. I, § 9,17, Fla. Const.[11]

[11] The Court reviews the reliance on facts not in evidence for harmless error. *See Krawczuk v. State*, 92 So. 3d 195, 201-02 (Fla. 2012).

In finding the HAC aggravator, the judge relied on his finding that, "Defendant rubbed his hands against her wounds, for his own satisfaction." (R. 2072). No testimony supports this. This is a quote from the prosecution's guilt-phase opening statement. (T. 1631-32). Dr. Lew only agreed with the prosecutor that "there had been blood, maybe, spread around," and it "might have been spread around, frankly, by her killer." (T. 2137-38).

In weighing the prior conviction aggravator, the judge relied on the fact that Mr. Guzman had been convicted of "lewd and lascivious assault on a child under the age of 12." (R. 2073). In fact, Mr. Guzman was convicted of an assault on "a person 12 years of age or older but less than 16 years of age." (R. 1156-64). Weighing the felony-murder aggravator, the judge noted that "the blood hand print on her abdomen matched the blood handprint on her thigh." (R. 2074). There was no evidence of a blood handprint in either location. (T. 2104; 2252). Dr. Lew testified that there was a "mirror-image" blood smear on Ms. Fernandez's thigh and abdomen. (T. 2546-47).

When the court rejected the extreme mental or emotional disturbance mitigator, it rejected the possibility that Victor Guzman had been drinking: "There was testimony that the Defendant would lose jobs because of his drinking. He was employed at the time of the murder." The testimony about this period contradicts this. Dr. Haber testified that when Victor Guzman came to Miami:

> [H]e stayed with [Juan Carlos and his girlfriend] 5 or 6 months, and during which time he worked. He got a job as a roofer, part-time, but he was drinking and he couldn't get to work, especially on Mondays. And his brother gets deported.
>
> * * *
>
> Now, Victor can't stay with her. He's kind of on the street, living with roofer friends off and on, staying with this one staying with that one. It's during this time that Severina Gonzalez was murdered, and a 12 year old some time later, four months later, was molested in Flamingo Park on Miami Beach.
>
> * * *
>
> His employer who owned the roofing company, Alex Novvo, said that Victor always seemed to him as having good potential when he didn't drink, kind of like a Dr. Jekyll and Mr. Hyde. He was the good Dr. Jekyll, but when he drank he would snap, and he would come in to work bloody in the morning. But he was a good worker when he wasn't drunk. That was pretty consistent throughout his inconsistent employment history.

(T. 2618-19). The evidence shows that during this period Mr. Guzman was drinking, he was still getting some work, but his drinking was interfering with his ability to work.

VII. THE COURT MUST APPLY *STRICKLAND*'S "REASONABLE PROBABILITY" TEST IN DETERMINING FUNDAMENTAL ERROR.

Some of the issues in this appeal are unpreserved and subject to review for fundamental error. *See, e.g.*, *Mosley v. State*, 46 So. 3d 510, 519 (Fla. 2009). The Court has repeatedly stated that, "Error is fundamental when it reaches down into the validity of the trial such that a guilty verdict could not have been obtained in the absence of the error." *See Fletcher v. State*, 40 Fla. L. Weekly S355 (Fla. June 25, 2015).[12] But the Court has also equated fundamental error with the standard for proving prejudice from ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1983). *See Chandler v. State*, 848 So. 2d 1031, 1046 (Fla. 2003). That test requires a defendant to prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*. at 694.

The *Strickland* test does not require a defendant to prove that counsel's deficiencies more likely than not changed the outcome of the case. *Id.* at 693;

[12] The Court has on occasion used different formulations. *See, e.g., Mendoza v. State*, 964 So. 2d 121, 132 (Fla. 2007) ("For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." (quoting *Randall v. State*, 760 So. 2d 892, 901 (Fla. 2000)); *Fletcher* ("An error is not fundamental unless improper comments are so prejudicial that they tainted the jury's verdict.").

Porter v. McCollum, 130 S.Ct. 447 (2009). The United States Supreme Court has stated:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different." *Id*. at 694.

Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

The fundamental-error requirement that a defendant show, "that a guilty verdict could not have been obtained in the absence of the error," would thus appear to be a much higher bar than *Strickland*'s "reasonable probability" standard. Nevertheless, this Court has equated the two, holding that if a defendant cannot meet the (seemingly higher) fundamental error standard, he necessarily cannot meet the "reasonable probability" standard. *See Chandler* at 1046.

In *Chandler* the attorney failed to object to a number of improper prosecutorial comments. On direct appeal, Chandler unsuccessfully argued that the error was fundamental. When on postconviction he alleged that the attorney had been ineffective, the Court wrote: "Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that

trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test." *Chandler*, 848 So. 2d at 1046. The Court held, in other words: If an error isn't bad enough to be fundamental, it can't be bad enough to be *Strickland* error.

This Court has since shown that it meant what it said. It has continued to apply *Chandler* to equate fundamental error with *Strickland* prejudice. In *Lowe v. State*, 2 So. 3d 21 (Fla. 2008), the Court considered the claim that counsel had been ineffective in permitting jurors to hear an unredacted tape of the interrogation. It wrote:

> On direct appeal, this Court found that "any error in admitting the unredacted portions of the tape was not fundamental error." Because the Court found no fundamental error, Lowe fails to demonstrate that counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the trial under *Strickland*. *See Chandler v. State*, 848 So.2d 1031, 1046 (Fla. 2003) ("Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* standard.").

Id. at 38 (internal citation omitted). *See also Gonzalez v. State*, 990 So. 2d 1017, 1028 (Fla. 2008) ("Because Gonzalez failed to show that the comments amounted to fundamental error on direct appeal, Gonzalez fails to demonstrate that counsel's failure to object to the comments resulted in prejudice under Strickland."); *Rogers*

v. State, 957 So. 2d 538 (Fla. 2007) ("This Court has held that counsel's failure to object to improper comments cannot prejudice the outcome if the comments were raised on direct appeal and do not rise to the level of fundamental error."). The district courts of appeal have followed suit. *See Millan v. State*, 55 So. 3d 694, 696 (Fla. 3d DCA) *rev. denied* 72 So. 3d 746 (Fla. 2011); *Davis v. State*, 12 So. 3d 918 (Fla. Dist. App. 2009).

Because the Court has equated the fundamental error standard with *Strickland*'s prejudice prong, the unpreserved errors in this case must be reviewed to determine whether there is a reasonable probability that the outcome would have been different absent the errors.

VIII. THE IMPOSITION OF THE DEATH SENTENCE BASED ON 7 TO 5 VERDICT AND JUDICIAL FACT-FINDING DENIED VICTOR GUZMAN THE RIGHT TO TRIAL BY JURY.

A. Section 921.141 Violates Ring

The judicial fact-finding required by Section 921.141 violates the Sixth, Eighth and Fourteenth amendments as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584, 589 (2002), as well as Article I, sections 9, 16, 17, and 22 of the Florida Constitution.[13] In light of *Apprendi*, "the

[13] This issue presents a pure question of law, subject to review de novo. *See, e.g.*, *Griffin v. State*, 160 So. 3d 63, 67 (Fla. 2015).

relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (emphasis in the original). Moreover:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. *If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.*

Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 869 (2006).

There can be no doubt that the Florida capital sentencing scheme violates the Sixth Amendment as interpreted by *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. A Florida defendant convicted of first-degree murder may be sentenced to death if and only if the judge makes findings of fact rendering the defendant death-eligible. Section 921.141 expressly requires that the judge make "specific written findings of fact." § 921.141(3), Fla. Stat. (2000).

This Court has refused to apply *Ring*, relying on pre-*Ring* cases in which the United States Supreme Court upheld the Florida death penalty. *See, e.g.*, *Marshall v. Crosby*, 911 So. 2d 1129 (Fla. 2005) (citing *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*,

428 U.S. 242 (1976)). *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990). The Court explained:

> As earlier indicated, see *supra,* at 2432, 2436, this is not the first time we have considered the constitutionality of Arizona's capital sentencing system. In *Walton v. Arizona,* 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 648 (quoting *Hildwin v. Florida,* 490 U.S. 638, 640–641(1989) *(per curiam)*). ***Walton*** **found unavailing the attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton,* were the aggravating factors "elements of the offense"; in both States, they ranked as "sentencing considerations" guiding the choice between life and death.** 497 U.S., at 648, 110 S.Ct. 3047 (internal quotation marks omitted).

Id. at 598. The Court overruled *Walton*, "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. The Supreme Court overruled *Walton* because it followed *Hildwin*. It would be error to follow *Hildwin* again.[14]

[14] The constitutionality of Florida's death penalty is now before the United States Supreme Court. *See Hurst v. Florida*, 135 S. Ct. 1531 (2015) (granting certiorari).

B. The Sixth Amendment and Article I, Section 22 Require Juror Unanimity

The jury that determines the elements authorizing a death sentence must be unanimous. The Sixth Amendment does not authorize any jury verdict to be determined by a bare majority vote, much less a capital one. Florida's guarantee of jury unanimity is, if anything, even firmer than the Sixth Amendment. *See* Art. I, § 22, Fla. Const.

The United States Supreme Court has never upheld a verdict based on a bare majority vote. The Sixth Amendment requires juror unanimity in federal trials. *See Andres v. United States*, 333 U.S. 740 (1948). While the Court has allowed non-unanimous state verdicts to stand in *Johnson v. Louisiana*, 406 U.S. 356 (1972) (9-3 verdict), and *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) (10-12 verdict), neither of those decisions authorize a verdict by a bare majority. *Johnson* was not decided under the Sixth Amendment.[15] *Apodaca*'s authority is tenuous. *Apodaca* had no majority opinion. The four justices of the plurality believed that the Sixth Amendment does not guarantee unanimous juries. The five others agreed that it did. *See* 406 U.S. at 404 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 369-

[15] Johnson's conviction predated the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See Johnson* at 358; *see also DeStafano v. Woods*, 392 U.S. 631 (1968).

70 (Powell, J., concurring in the judgment in Apodaca).[16] Justice Powell, however, concluded that the Fourteenth Amendment did not fully incorporate the Sixth Amendment against the states. That proposition has since been rejected. *See McDonald v. City of Chicago*, 561 U.S. 742, 765-66 (2010) (plurality opinion).[17] *Powell* himself, moreover, stated that *Apodaca* did not imply that verdicts on less than a 10-2 majority would be constitutional. *See* 406 U.S. at 377 n.21. As this Court has observed, Florida stands as the only state in which a jury can find a defendant eligible for death by less than a unanimous verdict. *See State v. Steele*, 921 So. 2d 538, 550 (Fla. 2005).

The Florida Constitution independently guarantees a unanimous jury. Jury unanimity is a necessary ingredient of Florida's right to trial by jury. *See Bottoson v. Moore*, 833 So. 2d 693, 714-15 (Fla. 2002) (Shaw, J., concurring); *id.* at 709-10 (Anstead, C.J., concurring); *id.* at 723-24 & n.63 (Pariente, J., concurring). Article I, Section 22 requires that the right to trial by jury "shall remain inviolate." This language dates back to Article I, Section 6 of the Constitution of 1838, which provided that the right to trial by jury "shall for ever remain inviolate." *Bottoson*, 833 So. 2d at 714-15 (Shaw, J., concurring). This has been interpreted to mean that

[16] *Johnson* and *Apodaca* were decided on the same day. Justice Powell's opinion concurring in *Johnson* and concurring in the judgment in *Apodaca* is published with the opinions in *Johnson*.

[17] *McDonald* contains a discussion of *Apodaca*'s fractured decision. *Id.* at 766 n.14.

the jury trial right, as it existed at common law, must remain intact. *See id.* at 714 (Shaw, J., concurring); *see also Buckman v. State*, 34 Fla. 48, 55, 15 So. 697, 699 (1894).

At common law, the jury's verdict had to be unanimous. *Bottoson*, 833 So. 2d at 714 (Shaw, J., concurring); *see Motion to Call Circuit Judge to Bench*, 8 Fla. 459 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"). Accordingly, *Brown v. State*, 661 So. 2d 309, 311 (Fla. 1st DCA 1995), held that the defendant was denied his right to trial by jury on the element of using a firearm during the commission of the offense when the jury "having convicted the defendant of manslaughter" failed to check the relevant box on the verdict form, and only five of the six jurors subsequently agreed that the defendant had indeed used a firearm. "In a jury trial," the court emphasized "'the truth of every accusation ... should ... be confirmed **by the unanimous suffrage** ... of [the defendant's] equals and neighbors....'" *Id*. (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769). *See also* § 775.01, Fla. Stat. (2001) ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.")

C. "Prior-Conviction" Exception

The *Ring* error in this case is not cured by an exception for cases involving aggravators based on prior or contemporaneous convictions. Relying on *Apprendi*'s "fact of a prior conviction" exception, this Court has "rejected claims that a death sentence is unconstitutional under *Ring* where the prior violent felony aggravator is present." *Kopsho v. State*, 84 So. 3d 204, 220 (Fla. 2012). The Court has applied the same exception where the murder in the course of a felony aggravator is based on separate convictions. *See Johnson v. State*, 969 So. 3d 938, 961 (Fla. 2007); *Douglas v. State*, 878 So. 2d 1246, 1264 (Fla. 2004). This exception does not apply in this case.

The exception does not apply here because there are no valid convictions underlying the aggravators. Though the trial court found the "murder in the course of a felony" aggravator based on attempted sexual battery, that issue was never before the jury. The indictment only charges Mr. Guzman with murder, and it alleges both premeditated and felony murder. (R. 25-26). The jury was instructed on both theories and returned a general verdict. (R. 994-96, 1013).[18] The

[18] Even if the jury had found Mr. Guzman guilty of attempted sexual battery, a death sentence based on that aggravator would violate the Eighth Amendment. Where the same crime used to establish felony murder is then used as an aggravating factor, the Florida death penalty fails to genuinely narrow the class of murders eligible for the death penalty. *See Douglas*, 878 So. 2d 1264-69 (Pariente, J. concurring in the result only).

convictions underlying the prior violent felony aggravator are invalid. *See* Argument V, *supra*.

Even if it applied, the prior conviction exception would not render Mr. Guzman's sentence constitutional. Eligibility for the death penalty is not determined by the existence of a single aggravator. The finder of fact must determine "[w]hether sufficient aggravating circumstances exist …" § 921.141(2) and (3), Fla. Stat. (2000). *See Duest v. State*, 855 So. 2d 33, 56 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part). As Justice Rehnquist explained:

> The language of the statute, which provides that the sentencer must determine whether "sufficient aggravating circumstances exist," § 921.141(3)(a), indicates that any single statutory aggravating circumstance may not be adequate to meet this standard if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.

Barclay v. Florida, 463 U.S. 939, 954 (1983). Because the jury is not required to make any separate finding on the question of eligibility, it is not possible to tell in the case of a nonunanimous recommendation whether dissenting jurors disagreed as to the existence of aggravating factors, their sufficiency, the ultimate weighing of aggravating and mitigating circumstances, or all three.

Finally, the validity of *Apprendi*'s prior-conviction exception remains in doubt. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme

Court appeared to hold that prior convictions are not elements of an offense which must be alleged in the charging document and proved beyond a reasonable doubt at a jury trial. The Court's more recent opinion in *Apprendi*, however, questioned *Almendarez-Torres*. *See* 530 U.S. at 489-90.[19] The *Apprendi* majority declined to directly address the question of prior convictions. The court, however, plainly suggested that its reasoning concerning hate-crime enhancements in *Apprendi* would apply to determinations of recidivism. 530 U.S. at 489-90.[20] Perhaps more significantly, Justice Thomas – whose vote was necessary to the 5-4 majority in *Almendarez-Torres* – repudiated that decision and argued that prior convictions are elements which must be proven to a jury beyond a reasonable doubt whenever those convictions will yield an increased sentencing range. *See Apprendi v. New Jersey*, 530 U.S. 499-523 (2000) (Thomas, J. concurring).

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[19] In addition, the *Apprendi* majority concluded that the holding of *Almendarez-Torres* was limited to the question of whether prior convictions need be alleged in an indictment. *See Apprendi*, 530 U.S. at 488 (In *Almendares-Torres*, "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.").

[20] "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uni-form course of decision during the entire history of our jurisprudence." *Apprendi*, 120 S.Ct. 2362 (footnote omitted).

D. Eighth Amendment

The Eighth Amendment, moreover, requires that the death penalty be imposed by a unanimous jury, not a judge. The Appellant recognizes that the Supreme Court rejected this argument in *Spaziano v. Florida*, 468 U.S. 447 (1984). Nevertheless, it is jurors who must "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). In applying the Eighth Amendment, the Supreme Court looks to contemporary law and practice to determine the national consensus underlying evolving standards of decency. *See Graham v. Florida,* 560 U.S. 48 (2011). Florida's outlier status demonstrates that section 921.141 cannot be squared with the Eighth Amendment: Of the 31 states that have retained the death penalty, 27 give the jury the final word on the sentence. *See Woodward v. Alabama,* 134 S.Ct. 405, 407 (2013) (Sotomayor, J. dissenting from denial of certiorari).

IX. CUMULATIVE ERROR

The cumulative effect of the above errors deprived Victor Guzman of a fair trial, due process of law, and a reliable sentencing process. The prosecution relied on comments on silence and a litany of other improper arguments to win convictions and a death sentence. Cumulatively, these errors together with the

other errors identified above undermine any confidence in the outcome of Mr. Guzman's trial and sentencing.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Sandra Jaggard, Assistant Attorney General, Dept. of Legal affairs, 444 Brickell Ave, Suite #650, Miami, FL 33131 via the Court's e-filing portal on July 20, 2015.

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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