IN THE FLORIDA SUPREME COURT

ENRIQUE GARCIA, :

Appellant, :

vs. : Case No. 64,841

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Benito Torres, also known as Benito Contreras, was a regular customer of the West Farm Market near Palmetto. (R1286, 1987-1988,2005) He had traded with the market on credit, but the owners cut his credit off because he was not paying his bills. (R2005,2031)

At times Torres lived at the home of Connie and Jessie Martinez, which was near the market. (R1988-1990)

Willie and Martha West owned the Farm Market. (R1987) Willie was 69 years old, and his wife was 65. (R2018,2025) They employed Hazel Rosenna Welch as a clerk. (R1990,2002)

Cashing payroll checks was one of the services provided by the market, and large amounts of cash were kept inside, hidden in various places. (R1999,2003-2004) Rosenna Welch never cashed checks; Mrs. West did that. (R2003)

On the Monday before the crimes involved in this appeal took place, Benny Torres began concocting a plan to rob the West Farm Market. (R984-985,1444) He discussed the idea during that week with three friends with whom he worked at Harllee Farms. (R1504,1515) Torres said he intended to kill any witnesses to the robbery. (R1444,1505) All four men were in agreement on that. (R1505)

On Friday of that week, which was October 8, 1982, the four men entered the Farm Market in mid-morning. (R1144-1145,2006) They wanted to have some checks cashed, but Mrs. West advised them that the market did not have enough cash on hand to cash all the checks. (R1144-1145,2008) She suggested

they return later, after her husband returned from the bank with more money. (R1445,2008)

The men returned to the Farm Market around 1:00, arriving in a beige or tan, older car. (R1445,2010) Mrs. West told them they had almost waited too long to cash their checks because the market had cashed many checks since that morning, and the money had been depleted. (R2012) However, she agreed to cash as many checks as she could. (R2012)

One of the men said, "All right, that's it; let's go." (R2013) He grabbed Mrs. West and he and one of the others pushed her toward a back room. (R2013) All four men had pulled out guns. (R2013)

Benny Torres had a gun pointed at Rosenna Welch. (R2015) One of the other men had her open the cash register and he poured money from the register into a blue bag that looked like a sock which Torres was holding. (R2015-2016)

Welch could hear Mrs. West telling the men there was no more money. (R2019) The men threatened to kill Mrs. West unless she gave them the money. (R2026)

Benny Torres took Welch into the back room, where she saw things in disarray. (R2023) He put her in a chair at the desk. (R2022) The men made the Wests lie on the floor. (R2024) Welch heard one shot and then several shots. (R2027) She whirled around and was shot herself several times, in the side, and in the stomach as the men were leaving. (R2027) Welch did not know who fired any of the shots. (R2028,2031) She waited until the four men left the market and she heard the car start up and leave, then she crawled into the front part of the

store. (R2028-2029) She was unable to telephone for help, as the men had disconnected the phone. (R2028)

Charles Campbell and his brother-in-law, Clete Fortwendel, entered the store as customers around 1:00 on that day. (R1010) They found Welch behind the counter. (R1010) She said, "I'm dying. I need help," and, "We'd been robbed and shot." (R1013,1022) In the back room the men found Mr. West and Mrs. West, who was making a gurgling sound. (R1014-1015, 1022-1023) Campbell went to the GM Cafe to summon aid. (R1014, 1022)

Belinda Daisey called an ambulance, then left the cafe to assist the people at the Farm Market. (R1036-1038) She saw a lady there sitting behind a counter, who said she had been robbed and shot. (R1036-1037) Daisey heard the woman say to Sheriff's Deputy Turner, "I was shot and robbed by three Mexicans, and one was Benny. They live right down the street. Two houses on the right." (R1042,1075-1076)

Paramedics Margaret Foy and Michael Keller found Mr. West to have some labored respiration and his heart was still beating. (R1079,1087) Mrs. West was in a similar condition. (R1079) Both people were unconscious and unresponsive the entire time the emergency medical technicians were working on them. (R1079) Both Mr. and Mrs. West went into full cardiac arrest before they arrived at Manatee County Memorial Hospital. (R1080,1088) When Mr. West arrived at the emergency room he had no pulse rate or blood pressure. (R1094) Mrs. West likewise had no spontaneous heartbeat or respiration and was unresponsive to stimuli. (R1101) Efforts to revive the Wests ceased within

about half an hour of their arrival at the hospital. (R1096-1097,1101-1102)

The cause of Willie West's death was a gunshot wound to the head. (R1136) Martha West died from multiple gunshot wounds of the head. (R1144) The shots were fired from a distance, as there was no stippling or powder burn around the wounds. (R1164-1165)

On the afternoon of October 8, Geraldo Gaona helped his brother-in-law, Appellant Enrique Garcia, spraypaint Garcia's light brown car black. (R1399-1404)

Garcia was arrested on the evening of October 8 just outside Bowling Green pursuant to a BOLO. (R1312-1315,1611)

On October 19, 1982 a Manatee County Grand Jury indicted Benito Torres, Louis Pina, Urbano Ribas, Jr., and Enrique Garcia for conspiracy to commit armed robbery with a firearm of Willie and Martha West, first degree premeditated murder of Willie West, first degree premeditated murder of Martha West, attempted first degree murder of Rosenna Welch, robbery of Rosenna Welch, robbery of Willie West, and robbery of Martha West. (R2531-2534) The attempted murder and the three robbery counts alleged that Benito Torres and Enrique Garcia carried firearms during the commission of these offenses. (R2533-2534)

The public defender's office was originally appointed to represent Garcia, but withdrew on November 8, 1982 due to a conflict of interest. (R3058-3059) An attorney in private practice, J. Roger Bone, was appointed to represent Garcia on December 15, 1982. (R2557)

After his arrest Garcia made four separate statements to law enforcement authorities, one of which, his December 30, 1982 statement to Deputy James McCrosson of the Manatee County Sheriff's Department, was the subject of a pretrial motion to suppress. (R2722-2723) The motion was heard by the Honorable Robert E. Hensley on November 1, 1983. (R2468-2507) Deputy McCrosson testified at the suppression hearing. (R2470-2484) He met Enrique Garcia on the morning of December 30, 1982 to transport him from Polk County Jail back to Manatee County Jail. (R2473) He did not intend to question Garcia, and did not advise him of his constitutional rights. (R2473,2475,2482-2483) He did ask Garcia if he had been treated fairly by the jailers in Polk County, to which Garcia responded that he had been treated fairly by some, and not by others. (R2473-2474)

Garcia asked McCrosson if he would be going down to court with his partners, Pina and Torres. (R2476) McCrosson answered that he would not be able to talk with his partners and that he did not know whether they would go to court together. (R2476)

Garcia also asked about his attorney and whether he would be able to talk to him before going to court. (R2476) McCrosson told Garcia he would probably be able to talk to his lawyer as soon as they got back. (R2476-2477) Garcia said he was "going to kill his attorney by choking him with his bare hands," and was going to sue the lawyer for not talking to him yet. (R2477) McCrosson asked Garcia who the attorney was, but he did not know his name. (R2477)

Later during the drive to Manatee County Garcia said he had spoken with someone from the state attorney's office

who only wanted him to confess to something he did not do. (R2478-2479) He said, in essence, that he did not have anything to do with the crime, and then said he did not have any witnesses because he and his partners did not leave any, unless one of them told lies. (R2478-2479)

Garcia asked McCrosson about receiving his mail. (R2480) McCrosson said he would not be allowed to correspond with other inmates, but otherwise he should have no problem. (R2480)

Enrique Garcia also testified at the suppression hearing. (R2485-2492) McCrosson told him it was his lawyer's fault that the lawyer had not been to see him yet. (R2486) Until McCrosson told him, Garcia did not even know a lawyer had been appointed to represent him. (R2489) McCrosson's statement made him angry and hysterical. (R2486,2489-2490) Garcia testified that he did not bring up the subject of his lawyer, McCrosson did. (R2489-2490)

Garcia did not recall McCrosson asking him any questions about the incident (at the Farm Market), although McCrosson did ask him other questions after Garcia became angry. (R2486-2487)

Garcia did not make the statement about not leaving any witnesses, or any other incriminating statements during the drive with McCrosson. (R2488,2492)

After hearing argument of counsel the court merely denied the motion to suppress, without further comment. (R2505)

Garcia, through his counsel, filed various other pretrial motions in addition to the motion to suppress. These included several motions to dismiss (R2634-2644), a motion for

additional peremptory challenges (R2736), and a motion for change of venue with affidavits in support thereof. (R2738-2743)

This cause proceeded to a jury trial beginning on November 14, 1983, with Judge Hensley presiding. (R1)

Rosenna Welch, who survived the wounds she received at the Farm Market, testified at Garcia's trial concerning the incident on October 8, as discussed above. (R1986-2034)

The State also put into evidence the several statements Garcia made to law enforcement personnel. The first of these was made to Detective Gregory Stout of the Manatee County Sheriff's Department on the night of October 8, 1982. (R1337, 1360-1361) It was tape recorded at the Hardee County Sheriff's Department. (R1360-1361) After being advised of his Miranda[1/] rights, Garcia told Stout he had loaned his car to Joe Perez, a friend of Benny Contrares, on October 4. (R1376-1377) Perez was only supposed to have the car for a couple of hours, but he did not bring it back. (R1378) When Garcia next saw it on the afternoon of October 8 the car, which was brown, had been painted black. (R1376,1389,1393) Benny had a little bundle of money and a small revolver. (R1385-1386) Benny said he was knee-deep in trouble because he had killed someone, and it would not matter to him if he killed again. (R1388)

The second statement was taped later the same night, October 8. (R1442) Before beginning to take this statement Stout told Garcia he thought he was lying, and informed Garcia of information Stout had received from Geraldo Gaona. (R1441)

1/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Garcia asked Stout if he was not a "shooter" whether what would happen to him would be as bad as what would happen to a shooter. (R1441) Stout replied, "[I]f you did not actually take part in the shooting, what will happen to you will probably be less than the shooter." (R1441)

The tape began with Stout reading Garcia his Miranda rights. (R1442-1443) On the tape Garcia mentioned that Stout had told him he could get Garcia less time. (R1443-1444) Garcia then went on to describe the planning and carrying out of the robbery. (R1444-1478) Only Joe Perez and Benny Contrares had guns; they were the ones who did the shooting. (R1446,1449) Garcia did not see any of the shooting because he and Louis Pina were on the way to the car when it took place. (R1446-1447)

Before they went into the store Joe and Benny said they had to kill everyone so there would be no witnesses. (R1449) But Garcia and Louis Pina said they were not going to kill anyone. (R1471)

Stout told Garcia that if he was telling the truth, what would happen to him would not be nearly as serious as what would happen to the shooters. (R1471)

Garcia told Stout he did not want to hurt anyone, but only wanted money. (R1473)

The tapes of the above interviews with Garcia were admitted into evidence over defense objections. (R1373)

Also played to the jury over objection was the tape of an interview Stout had with Garcia on October 11, 1982. (R1490-1552) During this interview Garcia picked out a picture of Junior Ribas as being the man he knew as Joe Perez. (R1496-1497)

Stout told Garcia it was not going to change anything if he told them his entire involvement in the crime. (R1501)

Garcia described the planning of the robbery, which began on Monday when the four men were working at Harllee Farms. (R1504,1515)

When Junior was looking for money during the robbery, he gave his gun to Garcia to hold. (R1499)

Afterward, Benny told Garcia he had shot one of the ladies five times to make sure she was dead. (R1535,1551)

Finally, the State introduced the statements Garcia made to Deputy McCrosson during the ride to Manatee County. (R1725-1739)(McCrosson did not, however, testify about the threats Garcia made against his attorney.)

In addition to the statements Garcia made to the police, the State put into evidence admissions Garcia allegedly made to another inmate, Johnny Huewitt (who had been convicted of a felony three times (R1783)), when they both were in Manatee County Jail. (R1766-1802) According to Huewitt's testimony, Garcia admitted shooting a man and a woman at the Farm Market. (R1778-1779) Garcia supposedly also told Huewitt that he (Garcia) ran out of bullets and ordered one of his partners to shoot the second woman. (R1779,1788) Among those present during this conversation was Clarence Gissendanner. (R1798)

Gissendanner was called as the sole defense witness during the guilt phase of Garcia's trial. (R2058) He testified that Garcia never admitted shooting anyone. (R2059) Garcia said he and the others went to do a robbery, but Garcia did

not know there was going to be a shooting. (R2059) He and another participant were in the car when the shooting took place. (R2059) Garcia expressed remorse over the shootings. (R2059)

The two murder charges were submitted to the jury on theories both of premeditation and felony murder. (R2169-2171, 2173-2175) The jury returned specific verdicts of guilty of felony murder on these counts. (R2202,2792,2793) On the other counts, the jury found Garcia guilty as charged, but did not find that he carried a firearm during the attempted murder of Rosenna Welch. (R2202-2203,2791,2794-2797)

Sentencing phase of Garcia's trial took place on November 25, 1983. (R2206) The State presented no further evidence. (R2213) Maria Garcia, Appellant's sister, testified that Enrique was a loving brother who tried to help around the house and babysat for his brothers and sisters. (R2215-2216, 2219) There were eight children in the family. (R2215) Ricky (Enrique) left school at age 14 to work as a migrant farm worker to help his family. (R2217) He gave the money to his mother, keeping only a basic allowance for himself. (R2217)

Garcia got married when he was 18. (R2218) He was good to his two year old son. (R2219)

Josephine Garcia, Ricky's mother, testified that Ricky's father abandoned the family when Ricky was only six years old. (R2221) Mrs. Garcia earned money to raise her family by working in the fields. (R2221) She described the hard life she and Ricky endured as migrant farm workers. (R2221-2223)

Enrique Garcia testified that he had never been arrested for a felony. (R2227) As an adult he had never been arrested for any crime other than traffic offenses. (R2227-2228)

The court instructed the jury on the following aggravating circumstances: (1) the crime for which Garcia was to be sentenced was committed while he was engaged in commission of or an attempt to commit the crime of robbery, and (2) the crime for which Garcia was to be sentenced was committed for avoiding or preventing a lawful arrest. (R2259) The instruction on the latter circumstance was given over Garcia's objection. (R2208)

The court instructed the jury on these mitigating circumstances: (1) no significant history of prior criminal activity, (2) Garcia was merely an accomplice in the offense, and his participation was relatively minor, (3) Garcia's age, and (4) any other aspect of Garcia's character or record and any other circumstances of the offense. (R2259-2260)

The jury recommended by votes of eight to four that the court impose the death penalty for both Willie West's and Martha West's killing. (R2271,2846-2847)

On November 29, 1983 Garcia asked the court to order a presentence investigation prior to sentencing him and to grant him an additional sentencing hearing before the court at which he could present further evidence. (R2508-2512) The court initially agreed to a PSI "on all of those counts which do not have a minimum mandatory sentence" (R2511), but later reversed himself and did not require a PSI. (R2528) The court denied an additional sentencing hearing. (R2512)

Sentencing was held on December 14, 1983. (R2514-2529) The court imposed sentences of death upon Garcia for the two homicides. (R2529,2922-2923) He sentenced Garcia to 15 years on the conspiracy count, and a consecutive life sentence for the robbery of Rosenna Welch, with a three-year minimum mandatory. (R2528,2921,2924-2925) On Garcia's motion the court dismissed count four, for attempted murder. (R2528) On counts six and seven, for robbery of the Wests, the court imposed no sentence, but did adjudicate Garcia guilty. (R2528-2529,2919-2920)

In his written "Judgment" pertaining to the sentences of death the court found three aggravating circumstances and one mitigating. (R2926-2927, Appendix, pp.1-2)

None of the three other men indicted with Enrique Garcia received a sentence of death. (R3032-3033,3041-3042,3050-3051)

Garcia filed his notice of appeal on January 11, 1984. (R2943) His appointed counsel was permitted to withdraw from representing him further, and the Public Defender for the Tenth Judicial Circuit was appointed to represent him in this appeal. (R3008)

ARGUMENT

ISSUE I.

ENRIQUE GARCIA'S ABSENCE FROM SEVERAL STAGES OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

A number of times during the proceedings below counsel for Garcia purported to waive his presence. The first such time occurred at the pre-trial conference held on November 14, 1983. (R1-15) Defense counsel simply announced, "I will waive the presence of the defendant at this pre-trial conference." (R5-6) The court and the attorneys then discussed Garcia's motions for change of venue, additional peremptory challenges, and sequestration of the jury, as well as the procedures to be followed in selecting the jury. (R6-15)

The second instance occurred during a hearing as to whether Cindy Ziroll would be permitted to testify in court and identify Garcia as one of four men she saw in the parking lot of the West Farm Market on October 8, 1982, two of whom were sitting in a car and two of whom (including Garcia) were running from the building. (R1561,1563-1564,1568,1591) Defense counsel stated, "Yes, we will waive the presence of the defendant as to this particular hearing on in-court identification, your honor." (R1580) The court denied Garcia's motion to suppress Ziroll's in-court identification (R1591), but ultimately she was not called to testify before the jury. (This hearing was held in the middle of the trial.)

Garcia next was absent when the court and counsel took up defense objections to certain evidence on grounds chain-

of-custody had not been established. (R1872-1906) Garcia's attorney said (R1872):

> MR. BONE: May it please the court, I have spoken with my client. I have advised him that at this hearing we will be discussing the admissibility of evidence based upon the chain of evidence and not substantive evidence being taken.
>
> He has requested that he waive his presence and be allowed to go upstairs and have dinner.

This time Garcia was present when his counsel announced the waiver, and the court asked him, "Is that correct, Mr. Garcia?" (R1872) Garcia answered, "Yeah." (R1872)

Defense counsel also waived Garcia's presence at the conference on jury instructions, which was unreported. (R2090) He explained that he had talked with Garcia and given him the choice, and Garcia had expressed his desire to remain "upstairs" during the conference. (R2090-2091)[2/]

Counsel for Garcia next waived his presence during a discussion between the court and counsel concerning how to answer a question propounded by the jury. (R2196)

Later defense counsel told the court Garcia wished to wait upstairs for the verdicts, and to waive his presence if there were any further questions from the jury. (R2199) Garcia was present when his counsel made this statement, and counsel asked him, "If they have further questions, you want to waive your presence to the questions?" Garcia answered, "Yes." Garcia

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[2/] Counsel for the State and for Garcia agreed on the instructions that were given to the jury. (R2162)

said he just wanted "to stay up there," and told the court he was satisfied about everything. (R2199-2200)

Counsel next waived Garcia's presence when the jury asked to and did rehear the testimony of Geraldo Gaona, Garcia's brother-in-law. (R2200-2201) (During the trial Gaona had testified to helping Garcia paint his car on the afternoon of the incident at the Farm Market, and had testified to certain statements Garcia made to him. (R1399-1426))

The next waiver occurred during the penalty phase when the jury was brought back into the courtroom after they had begun deliberations so that the court could give them verdict forms for the second homicide, which had been omitted when they first retired. (R2263-2266) Counsel said his client had expressed a desire not to return to the courtroom until a verdict on penalty was reached. (R2264)

Yet another waiver took place during the penalty phase when the court and counsel discussed the jury's question as to whether two life terms would run concurrently, and when the jury reconvened to hear the court's answer. (R2267-2270)

Finally, counsel waived Garcia's presence at the hearing of November 29, 1983 at which the defense asked for a presentence investigation and an additional sentencing hearing. (R2509) Counsel told the court he had spoken to Garcia the day before, and Garcia had agreed to waive his presence. (R2509)

The Sixth and Fourteenth Amendments to the United States Constitution give a criminal defendant the right to be present at every stage of his trial. As the Supreme Court of the United States noted in Illinois v. Allen, 397 U.S. 337, 90

S.Ct. 1057, 25 L.Ed.2d 353,356 (1970):

> One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370, 36 L.Ed. 1011, 13 S.Ct. 136 (1892).

This Court has acknowledged that a defendant "...has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175,1177 (Fla.1982). This right extends to all phases of the trial. Shaw v. State, 422 So.2d 20 (Fla.2d DCA 1982). In a capital case in particular the defendant "...has a right to be, and must be, present...." Fails v. State, 60 Fla. 8, 53 So. 612,613 (Fla.1910).

Furthermore, standards regarding the defendant's right to be present have been incorporated into the Florida Rules of Criminal Procedure in Rule 3.180. This rule specifically provides that a criminal defendant shall be present at any pretrial conference (unless waived by him in writing), and at all proceedings before the court when the jury is present (as well as at various other stages of the proceedings) Fla.R.Crim.P. 3.180(a)(3), (5). One of the events for which counsel attempted to waive Garcia's presence was the pre-trial conference. Contrary to the requirement of the rule, the record does not reflect any written waiver by Garcia. (R2531-3028) Nor was Garcia present when the jury returned to the courtroom to hear Geraldo Gaona's testimony read back to them, and he was absent twice during the penalty phase when the jury was present.

Defense counsel's purported waivers were insufficient. They did not demonstrate that Garcia knowingly and intelligently waived his presence.

In Francis, supra, this Court faced a similar issue. Francis voluntarily absented himself during jury selection in order to use the restroom. When asked by the court, defense counsel waived Francis' presence. Jury selection continued in the courtroom, and then was moved, at counsel's request, to the jury room. Francis returned but was left in the courtroom. The jury was selected in his absence. This Court reversed the case for a new trial holding that counsel's waiver was insufficient and that Francis' silence did not constitute a waiver. The record failed to show that Francis knowingly waived his right to be present, or ratified his counsel's actions taken in his absence. See State v. Melendez, 244 So.2d 137 (Fla.1971).

The record reflects only twice during the nine instances of purported waivers when Enrique Garcia himself expressed in court his desire to waive his presence. Even these two times, the colloquy was minimal, with no evidence that Garcia was fully informed of his right to be present, or was aware of the potential prejudice he could suffer by absenting himself from the proceedings. See Francis, supra.

Because this is the most serious of all cases, a capital case, this Court should not presume a knowing and intelligent waiver when such does not appear in the record with unmistakable clarity. Capital cases demand strict adherence to the requirement of the defendant's presence throughout the proceedings. Strict adherence was lacking here, and Garcia is entitled to a new trial as a result.

ISSUE II.

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT ENRIQUE GARCIA'S TRIAL STATEMENTS GARCIA MADE TO LAW ENFORCEMENT PERSONNEL.

In order to introduce a criminal defendant's out-of-court statements at his trial the State bears the burden of proving that, under the totality of the circumstances, the statements were freely and voluntarily given. DeConingh v. State, 433 So.2d 501 (Fla.1983), cert.den., 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); Brewer v. State, 386 So.2d 232 (Fla.1980); Reddish v. State, 167 So.2d 858 (Fla.1964). With regard to Garcia's second statement to law enforcement personnel on the night he was arrested, the record not only fails to establish that the State carried its burden of proving voluntariness, but affirmatively shows that the statement was not the product of Garcia's willingness to confess, but was induced by suggestions of lenient treatment.

Before taping Garcia's second statement, Deputy Gregory Stout of the Manatee County Sheriff's Department told Garcia that if he did not actually take part in the shootings at the Farm Market, then what would happen to Garcia would "probably be less than the shooter." (R1441) On the tape Garcia mentioned that Stout had told Garcia he could get him "less time." (R1443-1444) And later during the interview Stout told Garcia that if he was telling the truth, what was going to happen to him was "not going to be nearly as serious" as what was going to happen to a shooter. (R1471)

Clearly, Stout's promises of leniency induced Garcia to make his confession. Before the promises were made the only

statement Garcia made was exculpatory. (R1374-1396) The fact that Garcia referred during the taped interview to Stout's representation that he could get Garcia less time (R1443-1444) shows that this was very much a factor in his decision to confess.

At the time the defendant makes a confession his mind must be free to act, uninfluenced by fear or hope. Frazier v. State, 107 So.2d 16 (Fla.1958); Collins v. Wainwright, 311 So.2d 787 (Fla.4th DCA 1975), cert.dism., 315 So.2d 97 (Fla.1975). In Collins the court quoted with approval from the United States Supreme Court case of Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897) as follows:

> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner....

311 So.2d at 789. A number of Florida cases have recognized the invalidity of confessions rendered after promises of leniency were made, such as those made to Garcia. E.g., Fex v. State, 386 So.2d 58 (Fla.2d DCA 1980); In the Interest of G.G.P., 382 So.2d 128 (Fla.5th DCA 1980); Fillinger v. State, 349 So.2d 714 (Fla.2d DCA 1977), cert.den., 374 So.2d 101 (Fla.1979); Brewer, supra.

Furthermore, the improper influence which motivated the Friday night confession continued when Stout took another statement from Garcia on Monday morning, October 11. Brewer, supra. The State did not meet its burden of proving that the taint attaching to Friday's confession had dissipated before

questioning began on Monday. Gaspard v. State, 387 So.2d 1016 (Fla.1st DCA 1980). Additionally, during the October 11 confession Stout injected another improper influence into the interview when he told Garcia it was "not going to change anything" if he confessed his "entire involvement in this crime." (R1501) Obviously, whatever Garcia said was going to change things, and Stout's telling him otherwise was calculated to delude Garcia as to his true position. See Frazier, supra.

With regard to the statements Garcia made during the drive from Polk County Jail to Manatee County Jail, the State failed to prove from the totality of the circumstances that these statements were freely and voluntarily made as well. Again, there was no showing Garcia was not still acting under the influence of his earlier confession which was improperly induced. Garcia was not advised of his constitutional rights during the trip. (R2473,2475,2482-2483) Although Deputy McCrosson may not specfically have asked Garcia about his case, he did ask him about other matters, including the related matter of who Garcia's attorney was. (R2477) Garcia had been incarcerated for almost three months without seeing his attorney. (R2486-2487),[3/] and the discussion concerning a lawyer threw him into a hysterical state of mind. (R2490) Garcia believed McCrosson was deliberately trying to upset him by mentioning his lawyer. (R2489-2490)

[3/] There was a period of well over one month, from November 8, 1982 to December 15, 1982, when Garcia was unrepresented because the public defender's office had withdrawn and substitute private counsel had not yet been appointed. (R2557,3058-3059)

McCrosson's conduct constituted the functional equivalent of questioning, thus bringing into play the safeguards of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). See also Neal v. State, 451 So.2d 1058 (Fla.5th DCA 1984).

Under the circumstances which prompted Garcia's statements to McCrosson, one cannot conclude that they were made freely and voluntarily. Nor did the trial court so conclude. He merely denied the motion to suppress without any specific finding of voluntariness. (R2505) Mere denial of a motion to suppress does not constitute a clear finding that the statement which is the subject of the motion was made voluntarily. McDole v. State, 283 So.2d 553 (Fla.1973); Greene v. State, 351 So.2d 941 (Fla.1977). Failure of the trial court to establish such a finding on the record with unmistakable clarity constitutes reversible error. Peterson v. State, 382 So.2d 701 (Fla.1980).

Admission of Garcia's confessions into evidence cannot be deemed harmless error. The State's only eyewitness, Rosenna Welch, never specifically identified Garcia as being one of the four participants in the events at the Farm Market. (R2029) Nor was she able to say who fired the shots or (except for Benito Torres) what role each person played in the crimes. And, of course, she had no knowledge of the planning of the crimes, which gave rise to the conspiracy charge. Thus the State needed Garcia's confession in order to convict him.

It is true that thrice-convicted felon Johnny Huewitt testified to Garcia's alleged statement about participating in

the incident and shooting two people. (R1778-1779,1783) However, defense witness Clarence Gissendanner rebutted Huewitt's statements (R2058-2059) and, more importantly, the jury obviously found Huewitt's testimony unworthy of belief in convicting Garcia of felony murder. (R2202,2792,2793) Thus Huewitt's testimony did not render harmless the error in admitting Garcia's confessions.

The three inculpatory statements Garcia made to law enforcement authorities should never have been admitted into evidence. Because they were, Garcia must be given a new trial.

ISSUE III.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PRIOR CONSISTENT STATEMENTS MADE BY ROSENNA WELCH IN ORDER TO BOLSTER THE TESTIMONY SHE GAVE AT TRIAL.

Deputy Gregory Stout of the Manatee County Sheriff's Department went to the West Farm Market on October 8, 1982, arriving there at about 1:28 p.m. (R1337-1338) Over Garcia's objection, the court permitted Stout to testify to what Rosenna Welch said to him when he spoke to her at the market. (R1339-1340) Welch told him three or four Mexicans came into the store, and they all had guns. They pushed her into a back room, sat her on a chair, and demanded money while pointing a gun in Mr. and Mrs. West's faces. (R1340) When the men did not get the amount of money they thought was in the store, they had the Wests lie on the floor and shot them. (R1340)

The hearsay statements to which Stout testified were essentially consistent with Welch's trial testimony. It was improper for the State to use Welch's prior consistent statements to bolster the testimony she gave at trial. Van Gallon v. State, 50 So.2d 882 (Fla.1951); Holliday v. State, 389 So.2d 679 (Fla. 3d DCA 1980); Lamb v. State, 357 So.2d 437 (Fla.2d DCA 1978); Brown v. State, 344 So.2d 641 (Fla.2d DCA 1977).

The State claimed that Welch's statements to Stout were part of the res gestae, and they were apparently admitted on that basis. (R1339) The statements were not, however, properly part of the res gestae. They were not "so closely connected with a main fact in issue as to constitute a part of the trans-

action," Smith v. State, 311 So.2d 775,777 (Fla.3d DCA 1975), cert.den., 327 So.2d 35 (Fla.1976), but were merely a narrative of a past event. Green v. State, 93 Fla. 1076, 113 So. 121 (Fla.1927). Welch had already talked to several other people (Charles Campbell (R1013), Clete Fortwendel (R1022), Belinda Daisey (R1037), Deputy Thomas Turner (R1042,1075-1076)) before Stout arrived on the scene. See Johnson v. State, 63 Fla. 16, 58 So. 540 (Fla.1912). In Lamb, supra, the court rejected the State's argument that prior consistent statements the victim made to a police officer at the scene were admissible as part of the res gestae. The court noted:

> This statement was made to the police after they arrived at her apartment in response to her telephone call. By the time the police arrived, the events of the crime had long occurred and terminated. Further, in fact, Ms. Davis [the victim] had time in which to reflect upon her statement.

357 So.2d at 439.[4/] This same rationale applies to the case now before this Court (except that Welch did not telephone the police herself), and the Court should reject any contention by the State that Welch's statements to Stout were part of the res gestae.[5/]

Where, as here, the witness who provides the corroborating statement is a police officer the danger of improperly influencing the jury is particularly grave, as a jury will

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[4/] The court followed Lamb in McRae v. State, 383 So.2d 289 (Fla.2d DCA 1980).

[5/] Garcia would also point out that the only reason contained in Section 90.801(2)(b), Florida Statutes for justifying the admission of prior consistent statements of a witness is "to rebut an express or implied charge against him of improper influence, motive, or recent fabrication." Clearly, this exception to the rule against admitting prior consistent statements does not apply here.

generally regard the officer as disinterested and objective, and therefore highly credible. Perez v. State, 371 So.2d 714 (Fla. 2d DCA 1979). The testimony of Stout bolstered the testimony of the State's only eyewitness to the events at the Farm Market and "cloaked it with a vicarious integrity which undoubtedly enhanced its probative value." Roti v. State, 334 So.2d 146,148 (Fla.2d DCA 1976). Garcia is therefore entitled to a new trial.

ISSUE IV.

THE COURT BELOW ERRED IN ADJUDICATING ENRIQUE GARCIA GUILTY OF THE TWO ROBBERIES WHICH WERE THE FELONIES UNDERLYING HIS FELONY MURDER CONVICTIONS.

The jury specifically found Garcia guilty of first degree felony murder in the homicides of Willie West and Martha West. (R2202,2792,2793) Because the robberies of the Wests were the felonies which formed the basis for the felony murder convictions, the trial court imposed no sentences for the robberies, but did adjudicate Garcia guilty on these charges, which were counts six and seven in the indictment. (R2528-2529, 2919-2920) Pursuant to Bell v. State, 437 So.2d 1057 (Fla. 1983), Smith v. State, __So.2d__ (Fla.4th DCA, Case No. 83-829, opinion filed August 1, 1984), Jones v. State, __So.2d__ (Fla. 4th DCA, Case No. 83-1054, opinion filed June 27, 1984), and State v. Harris, 439 So.2d 265 (Fla.2d DCA 1983), the court should have neither adjudicated Garcia guilty nor sentenced him for the robberies which underlay his convictions for felony murder. See also Linehan v. State, 442 So.2d 244 (Fla.2d DCA 1983).[6/]

6/ But see Hawkins v. State, 436 So.2d 44 (Fla.1983), which is questioned in Garcia v. State, 444 So.2d 969 (Fla.5th DCA 1983).

ISSUE V.

THE COURT BELOW ERRED IN SENTENCING ENRIQUE GARCIA FOR NON-CAPITAL OFFENSES WITHOUT BENEFIT OF A PRE-SENTENCE INVESTIGATION.

Enrique Garcia, through his counsel, asked the court below to order a presentence investigation. (R2509) The court did order a PSI with respect to those counts of the indictment not carrying a minimum mandatory sentence. (R2511,2855) However, at Garcia's sentencing hearing the court inexplicably reversed himself, and passed sentence without benefit of a PSI. (R2528-2529)

Garcia had not previously been found guilty of a felony (or even arrested for one). (R2227) Therefore, pursuant to Florida Rule of Criminal Procedure 3.710, he was entitled to have the court consider a PSI before imposing a sentence other than probation.

Garcia is aware that this Court has held no PSI is necessary in capital cases. E.g., Thompson v. State, 389 So.2d 197 (Fla.1980); Hargrave v. State, 366 So.2d 1 (Fla.1978), cert. den., 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Thompson v. State, 328 So.2d 1 (Fla.1976).[7/] However, these cases should not abolish Garcia's right to have the court consider a PSI as it related to the non-capital counts of the indictment, especially where the court had already ordered a PSI.

7/ But see Holmes v. State, 429 So.2d 297 (Fla.1983), in which this Court cited trial counsel's failure to request a presentence investigation in finding that he rendered ineffective assistance to the defendant in a capital case.

ISSUE VI.

THE SENTENCING RECOMMENDATION MADE BY THE JURY WAS TAINTED BY IMPROPER ARGUMENTS OF THE PROSECUTING ATTORNEY AND BY THE COURT'S INCOMPLETE ANSWER TO A QUESTION FROM THE JURY.

The jury's sentencing recommendation is an integral part of Florida's death penalty sentencing scheme. §921.141(1), (2), Fla.Stat. (1983); State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943. Consequently, taints in the jury recommendation process fatally taint any resulting death recommendation and sentence imposed in accordance with it. See Elledge v. State, 346 So.2d 998 (Fla.1977). Garcia's sentencing jury was tainted and his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution.

A. Prosecutor's Arguments

At the penalty phase of Enrique Garcia's trial, he objected twice to the arguments the assistant state attorney was making to the jury, and finally moved for a mistrial. (R2238-2241) Here are some excerpts from the prosecutor's remarks:

> Now, we are talking about Martha and Willie West, a suffering.
> You heard what Deputy Turner said: Willie West didn't recognize me; I went to help him and he pulled the checkbook closer to him. His last act: suffering. (R2238)
>
> * * *
>
> A hopeless struggle, then, was created after the crime was over, and we had an unnecessary, untimely death of these two people, these two people who were totally innocent, who were sentenced to death by this defendant and his partners on the 4th of October, the 5th, the 6th, the 7th, and they were executed

> in accordance with that plan on the 8th, totally innocent, helpless people.
>
> And the defendant's statement: We didn't beat them up; we just went there to kill them.
>
> I suggest to you that when you look at the decisions this defendant made in the best place on this planet to live, in this land of opportunity, when you look at the decision he made that week and that day, he rejected many things.
>
> I suggest to you that he forfeited his right to continue when he made the decision and did what he did.
>
> I suggest that in not using a mask, in not hiding Benny Torres' face, there is an indifference to life.
>
> Killing witnesses is horrible-- (R2239)
>
> * * *
>
> ...[T]hink when you think about the totality of the circumstances in this case the facts that separate this case from other tragic first degree murder cases. Think of these two factors: the robbery, what you know about this case, and the fact that these were unnecessary killings of totally innocent people. (R2240)

The prosecutor claimed that he was arguing why killing witnesses is so bad. (R2238-2239) In reality what he was doing, as defense counsel pointed out to the court (R2240-2241), was telling the jury that these crimes were especially heinous, atrocious and cruel, and cold, calculated and premeditated. This was improper because the court did not submit these aggravating factors to the jury in his instructions. (R2259) The State thus injected a misleading element into the jury deliberations on penalty, rendering them tainted and violative of Garcia's rights.

B. Court's Incomplete Answer To Jury Question

During their deliberations on the penalty to recommend to the court, the jury had a question as to whether if life

sentences were imposed they would run concurrently. (R2267,2845) In discussing with counsel the answer he would give, the court expressed his intention to tell the jury that the decision as to what punishment should be imposed was the responsibility of the judge. (R2267-2268) Defense counsel opposed the giving of such a limited instruction, and asked for a complete instruction as to the law and the functions of the court. (R2268-2269) The court denied counsel's request (R2269), and answered the jury's question as follows (R2270):

> I cannot answer that question. I refer you to page one of the main instructions that I have given you, the first two sentences of the second paragraph.
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

This instruction was incomplete and misled the jury. It failed to apprise the jurors of the importance of their role in the sentencing process. See Tedder v. State, 322 So.2d 908 (Fla.1975); McCampbell v. State, 421 So.2d 1072 (Fla.1982); Walsh v. State, 418 So.2d 1000 (Fla.1982); Malloy v. State, 382 So.2d 1190 (Fla.1979). The instruction also failed to direct the jury's attention to its proper function: to consider and weigh the aggravating and mitigating circumstances in order to decide whether the penalty of death was warranted. §921.141(2), Fla.Stat. (1983). Because the jury deliberations thus were not properly focused by a complete instruction from the court, the jury was left to ponder its concern over whether life sentences would run concurrently, and may well have imposed two death penalties upon Garcia in order to forestall the possibility that the court would impose concurrent life sentences if the jury recommended life.

Where, as here, the court reinstructs the jury in response to a question, any reinstruction must be complete on the subject involved. Hedges v. State, 172 So.2d 824 (Fla.1965); Cole v. State, 353 So.2d 952 (Fla.2d DCA 1978); Payne v. State, 395 So.2d 284 (Fla.3d DCA 1981); see also Fla.R.Crim.P. 3.400(c). The instruction given by the court below was incomplete and tended to emphasize the role of the judge while de-emphasizing the important role and proper functions of the jury in the capital sentencing scheme. See Cole, supra. The jury's penalty recommendation was therefore tainted, and Garcia is entitled to a new sentencing trial.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING ENRIQUE GARCIA TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[8/]

Garcia would first note that the trial court's two-page sentencing order fails to comply with Section 921.141(3)(b), Florida Statutes, which requires specific written findings of fact when the court imposes a sentence of death. The court's "barebones" order is written in conclusory terms. Although the court found three aggravating circumstances and one mitigating, there is only the briefest discussion of the facts pertaining to one of the aggravating circumstances.

The primary purpose of requiring findings in aggravation and mitigation to be in writing is to provide a meaningful opportunity for this Court to determine whether the sentencing judge viewed the issue of life or death within the statutory framework. Holmes v. State, 374 So.2d 944 (Fla.1979), cert.den., 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980). The minimal order prepared by the court below fails to allow for this meaningful review, and renders virtually impossible any intelligent discussion by counsel of the court's findings in

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[8/] Two particular aspects of this case which tainted the jury's penalty recommendation have already been discussed in Issue VI. of this brief. This issue (Issue VII.) deals with improper argument to the court by the prosecutor, the court's submission to the jury of an improper aggravating circumstance, and the propriety of the court's findings in aggravation and mitigation.

aggravation and mitigation. Therefore, it would be most appropriate for this Court to require the trial court to submit a sentencing order which conforms to Section 921.141(3)(b) before proceeding with this appeal. See Hall v. State, 381 So.2d 683 (Fla.1979); LeDuc v. State, 365 So.2d 149 (Fla.1978), cert.den., 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). (Garcia previously raised the issue of the inadequacy of the sentencing order in a motion he filed in this Court entitled Motion to Relinquish Partial Jurisdiction for Preparation of a Clarified Sentencing Order and Motion for Extension of Time for Filing Initial Brief, which was served on September 10, 1984.)

A.

Improper Argument By Prosecutor

Several times during his argument to the court at the sentencing hearing of December 14, 1983 the prosecutor referred to the killing of the Wests as being planned in advance. (R2520-2522) Garcia objected to these remarks and moved for a mistrial, because the jury had found him guilty only of felony murder, not guilty of premeditated murder. (R2521-2523)

A prosecutor is prohibited from commenting on matters unsupported by the evidence produced at trial. Huff v. State, 437 So.2d 1087 (Fla.1983). In this case the jury specifically found that the evidence produced at trial did not support a finding that Enrique Garcia was guilty of planned, premeditated murder. Therefore, the prosecutor's argument was improper.

The State's argument was improper for the additional reason that premeditation is not one of the aggravating circum-

stances enumerated in Section 921.141(5), Florida Statutes. Only those circumstances listed in the statute may be considered by the sentencer. Miller v. State, 373 So.2d 882 (Fla.1979); Purdy v. State, 343 So.2d 4 (Fla.1977), cert.den., 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977).

We cannot know what impact the State's improper argument had on the court. However, the court apparently felt he could consider the prosecutor's comments, as he neither granted Garcia's motion for mistrial nor sustained his objections.

B.

The Trial Court Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance That The Capital Felonies Were Committed For The Purpose Of Avoiding Or Preventing A Lawful Arrest.

The court below instructed the jury on the aggravating circumstance that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest over Garcia's objection (R2512,2259), and found this circumstance to exist in his sentencing order. (R2926, Appendix, p.1) The order did not set forth any facts in support of the finding. (R2926, Appendix, p.1)

In order to establish this aggravating circumstance where, as here, the victims are not law enforcement officials, proof of intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla.1978), cert.den., 74 S.Ct. 294 (1982); Menendez v. State, 368 So.2d 1278 (Fla. 1979). That proof was lacking here. Although there may have been some talk among the four men involved in the crimes before

they went to the Farm Market about eliminating witnesses, the jury rejected any finding that Enrique Garcia had this purpose by finding him not guilty of premeditated murder, but guilty only of felony murder. Menendez v. State, 419 So.2d 315 (Fla. 1982).

It may be true that Benito Torres wished to eliminate witnesses, as he was known to the people at the Farm Market, but his motives and actions should not be imputed to Enrique Garcia for purposes of deciding whether the death penalty is appropriate. In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) the Supreme Court of the United States emphasized the need for the sentencer to focus upon the individual culpability of the particular defendant who is being considered as a candidate for a death sentence. See also Menendez, supra.

This aggravating circumstance should not have been submitted to the jury, nor found by the trial court. Because it was, Garcia's death sentence should be reversed.

C.

The Court Below Erred In Finding As An Aggravating Circumstance That The Capital Felony Was Especially Heinous, Atrocious And Cruel.

Although he did not submit this aggravating circumstance to the jury for its consideration (R2259), the trial court found the capital felony to be especially heinous, atrocious and cruel. (R2927, Appendix, p.2) (His sentencing order referred to the "capital felony" (singular), and failed to differentiate between the homicide of Willie West and the homicide of Martha West. (R2927, Appendix, p.2)) He recited the following facts

in support of his finding (R2927, Appendix, p.2):

> The testimony shows that these killings were done in execution style while the victims lay on the floor. In addition, Mr. West was killed in the presence of Mrs. West in order to frighten Mrs. West into disclosing where money was hidden. When Mrs. West continued to deny there was any hidden money, she also was killed, execution style.

The fact that the Wests may have been killed in one another's presence is not relevant for purposes of this aggravating circumstance. See Riley, supra.

As for the manner in which the Wests were killed, this Court held as recently as September 6, 1984 that an execution style shooting death did not qualify as heinous, atrocious or cruel. Parker v. State, __So.2d__ (Fla., Case No. 63,700, opinion filed September 6, 1984).

The fact that the Wests were shot more than once does not qualify the homicides for this aggravating circumstance. In Blanco v. State, __So.2d__ (Fla., Case Nos. 62,371 and 62,598, opinion filed June 7, 1984) the victim was shot seven times, and this Court found the homicide not to be especially heinous, atrocious or cruel.

Nor is it determinative of this aggravating circumstance that the Wests lived for a short while after being shot. In Teffeteller v. State, 439 So.2d 840 (Fla.1983), cert.den., __U.S.__, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), this Court rejected the finding of heinous, atrocious or cruel even though the shooting victim "lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death...." 439 So.2d at 846.

The homicides of the Wests were simple shooting deaths which did not qualify for this aggravating circumstance. E.g., Maggard v. State, 399 So.2d 973 (Fla.1981), cert.den., 454 U.S. 1059; Armstrong v. State, 399 So.2d 953 (Fla.1981), cert.den., __U.S.__, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); Cooper v. State, 336 So.2d 1133 (Fla.1976), cert.den., 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). They were unaccompanied "by such additional acts as to set the crime[s] apart from the norm of capital felonies," and were not "conscienceless or pitiless crime[s] which [were] unnecessarily torturous to the victim[s]." State v. Dixon, 283 So.2d 1,9 (Fla.1973), cert.den., 416 U.S. 943. Therefore, the court erred in finding this aggravating circumstance, and Garcia's sentence of death should be reversed.

D.

The Court Below Erred In Restricting Garcia's Presentation Of Mitigating Evidence And In Failing To Consider The Mitigating Evidence He Was Allowed To Present.

Twice during the proceedings below Garcia was prevented by the court from presenting mitigating evidence. During the penalty phase before the jury, he was not allowed to introduce into evidence a picture of his home. (R2225-2226) (This was one photo in a series.) Later, Garcia was denied an additional sentencing hearing at which to present further evidence of his background. (R2512)

Garcia was entitled to a sentencing hearing at which the court would entertain evidence that was relevant to his sentence. Fla.R.Crim.P. 3.720(b).

Furthermore, the Constitution of the United States requires that the sentencer consider all relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The court below not only failed to allow Garcia to present all the mitigating evidence he had, but failed to consider the mitigating evidence Garcia was allowed to present. The court found only one mitigating circumstance: Garcia had no significant history of prior criminal activity. (R2927, Appendix, p.2) He found no other mitigating circumstances, without discussion. (R2927, Appendix, p.2) Yet Garcia had presented evidence concerning his broken home life (R2221), his hard life as a migrant farm worker (R2221-2223), the fact that he was a good son who dropped out of school at age 14 to help his family (R2217,2223), the fact that he was a good brother to his seven brothers and sisters (R2215-2216,2219) the fact that he was married, with a young son to whom he was good (R2218-2219), and the fact that he was only 20 years old at the time of the crimes. (R2215)

Decisions of this Court have suggested that at least two of the facts that emerged during the penalty phase of Garcia's trial may constitute legitimate nonstatutory mitigating circumstances: (1) The defendant's parenthood. Jacobs v. State, 396 So.2d 713 (Fla.1981). (2) The defendant's troubled home life or family background. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). (See also Eddings, supra.)

Additionally, Garcia's age of 20 qualifies as a statutory mitigating circumstance which the court should have

found. See, e.g., §921.141(6)(g), Fla.Stat. (1983); Lightbourne v. State, 438 So.2d 380 (Fla.1983), cert.den., __U.S.__, __S.Ct. __, 79 L.Ed.2d 725 (1984); Foster v. State, 436 So.2d 56 (Fla. 1983), cert.den.,104 S.Ct. 734; Washington v. State, 432 So.2d 44 (Fla.1983); Hitchcock v. State, 413 So.2d 741 (Fla.1982), cert. den., __U.S.__, __S.Ct.__, 74 L.Ed.2d 213 (1982); Adams v. State, 412 So.2d 850 (Fla.1982), cert.den., __U.S.__, __S.Ct.__, 74 L.Ed.2d 148 (1982); Brown v. State, 381 So.2d 690 (Fla.1980), cert.den., 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

Because the trial court did not even discuss the substantial mitigating evidence put forth by Garcia, this Court is left to speculate as to what he did or did not consider, a wholly unacceptable state of affairs. Magill v. State, 386 So.2d 1188 (Fla.1980), cert.den., __U.S.__, __S.Ct.__, 78 L.Ed.2d 173 (1983); see also Eddings, supra, especially concurring opinion of Justice O'Connor, and Mann v. State, 420 So.2d 578 (Fla.1982). This Court should reverse Garcia's death sentence for further proceedings.

E.

Conclusion

Section 921.141, Florida Statutes was misapplied in the penalty proceedings below. This misapplication of Florida's death penalty sentencing scheme renders Gardner's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments. See, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.den., 416 U.S. 943.

ISSUE VIII.

THE COURT BELOW ERRED IN GIVING THE PENALTY RECOMMENDATIONS RETURNED BY THE JURY GREATER WEIGHT THAN THAT TO WHICH THEY WERE ENTITLED.

During the penalty phase of Garcia's trial the court instructed the jury as follows (R2258):

> As you have been told, the final decision as to what punishment should be imposed is the responsibility of the judge.
>
> However, as you have also been told, your recommendation cannot be lightly taken by the judge and must be given very strong consideration.
>
> In fact, the law is that a recommendation of a jury should not be overruled unless there is no reasonable basis for it existing;
>
> However, it is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence based upon your determination of whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweight [sic] any aggravating circumstances found to exist.

In his sentencing order the court noted that he was imposing the death penalty "independent of, but in agreement with the advisory sentence recommendation of the jury." (R2926, Appendix, p.1) Later in the order the court said he was "in agreement with the jury that the aggravating circumstances outweigh the mitigating circumstances." (R2927, Appendix, p.2)

It is obvious from the above statements of the court, particularly the excerpt from his penalty phase instructions to the jury, that he gave greater weight to the jury's recommendations than that to which they were entitled under Florida law. Particularly telling is the court's instruction that the

recommendation of the jury should not be overruled unless there is no reasonable basis for it existing. The court obviously had in mind the standard set forth in Tedder v. State, 322 So.2d 908 (Fla.1975), which applies only to the court's override of a jury's recommendation of life. Ross v. State, 386 So.2d 1191 (Fla.1980).

The trial court in Ross committed the same error as the trial court here. In reversing Ross's death sentence this Court said:

> ...[T]he trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence.

386 So.2d at 1197.

The rationale behind not giving great weight to a jury's recommendation of death is the preservation of the third step in Florida's procedure for imposing a death sentence--the interposition of the reasoned judgment of the trial judge between the emotions of the jury and a death sentence. §921.141(3), Fla.Stat.; State v. Dixon, 283 So.2d 1 (Fla.1973), cert.den., 416 U.S. 943; Ross, supra. Such a reasoned independent judgment was not made in this case.

Besides evidencing a lack of independent judgment, the court's erroneous instructions to the jury tainted the jury vote on the penalty to be imposed.

For these reasons, Garcia's sentence of death must not be allowed to stand.

ISSUE IX.

SENTENCING ENRIQUE GARCIA TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL THE WESTS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Garcia argued to the trial court that he could not be sentenced to death under the Eighth Amendment to the United States Constitution because he was guilty only of felony murder and there was no proof he was the actual trigger man. (R2208-2209,2526) Garcia's position was consistent with the holding of the United States Supreme Court in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) that the death penalty may not be levied against a defendant who did not himself kill, attempt to kill, or intend to kill.

Even though the jury specifically found Garcia guilty of felony murder, the court below failed to take account of this fact in his sentencing order (or anywhere else) by discussing the applicability of Enmund to Garcia's situation. (R2926-2927, Appendix, pp.1-2) This failure is itself reversible error. In Brumbley v. State, __So.2d__ (Fla.Case No. 56,006, opinion filed June 14, 1984) this Court held as follows:

> We have already concluded that appellant's conviction for first-degree murder rests upon the felony murder rule because the evidence was not sufficient to show that appellant joined in the intent of Smith to kill Rogers. In Enmund v. Florida, the United States Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on a person participating in a felony during which a murder is committed but who does not himself kill, attempt to kill, intend that a killing take place or intend or contemplate that lethal force will be used. 458 U.S. at 797. In the present case the trial court's findings of fact in support of the sentence of death do not

> specifically discuss evidence of the extent of appellant's involvement in the murder and the events leading up to the murder. Without such findings of fact by the trial court, we have no basis for concluding that appellant's sentence of death meets the Enmund test. Therefore, it is necessary that the case be remanded to the trial court to consider whether the death penalty may be applied in this felony murder case.

Pursuant to Brumbley, at a minimum this cause must be remanded for the trial court to consider whether Enmund permits the death penalty to be applied in this felony murder case.

Furthermore, the evidence presented below will not support a finding that Garcia may be sentenced to death consistent with Enmund. The primary focus in Enmund is upon the defendant's intent. The Court stated:

> American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to "the degree of [his] criminal culpability," [citation omitted] and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.

73 L.Ed.2d at 1153. The jury decided the issue of Garcia's intent in returning verdicts of felony murder--he had no premeditated intent to kill. Even if one or more of Garcia's coactors possessed an intention to kill (i.e., eliminate witnesses), this state of mind must not be imputed to Garcia for purposes of assessing the death penalty; Enmund requires the sentencer to concentrate solely on the personal responsibility and moral guilt of the individual who is being sentenced.

Also relevant to this issue is the dearth of concrete evidence showing exactly what role Garcia played in the events at the Farm Market. The sole eyewitness could not say.

The evidence here is certainly susceptible, to say the least, of the reasonable hypothesis that Garcia did not himself kill, attempt to kill, or intend to kill the Wests. He is entitled to the benefit of this hypothesis. See McArthur v. State, 351 So.2d 972 (Fla.1977); Mayo v. State, 71 So.2d 899 (Fla.1954). His death sentence thus is barred by the Eighth Amendment to the Constitution (Enmund) and must be reversed.

ISSUE X.

ENRIQUE GARCIA'S SENTENCE OF DEATH DENIES HIM EQUAL JUSTICE UNDER THE LAW, AS NONE OF THE OTHER PARTICIPANTS IN THE INCIDENT AT THE FARM MARKET WAS SENTENCED TO DIE.

Of the four men involved in the robberies and shootings at the West Farm Market, only Appellant, Garcia, has been sentenced to die. Benito Torres entered pleas of guilty and was sentenced to concurrent terms of life imprisonment for the two murders he committed. (R3029,3032-3033) Louis Pina was found guilty after a trial and was sentenced to consecutive life terms for the two killings. (R3038,3041-3042) Urbano Ribas, Jr., entered pleas of nolo contendere and was sentenced to concurrent life terms for the two homicides. (R3047,3050-3051)

Slater v. State, 316 So.2d 539,542 (Fla.1975) established the principal that defendants in a capital case "should not be treated differently upon the same or similar facts." Slater received the death penalty for a murder while the triggerman pleaded nolo contendere and received a life sentence. This Court reduced Slater's sentence of death to life imprisonment, finding that he had been denied equal justice under the law.

The evidence presented below did not establish that Garcia was the triggerman. The sole eyewitness, Rosenna Welch, did not know who fired any of the shots. (R2028,2031) In finding Garcia guilty only of felony murder (not premeditated murder) in the deaths of the Wests, the jury obviously concluded that he was not the triggerman. Thus the triggerman was one of the three who received life sentences, while the non-triggerman,

Garcia, was sentenced to die. This is precisely the situation condemned in Slater.

The evidence also did not show that Garcia was in any other way more culpable than his three companions. Rosenna Welch did not testify to what (if anything) Garcia did at the Farm Market. The evidence did show that it was Benito Torres, not Garcia, who concocted the plan to rob the market; the prosecutor even conceded this in his opening statement to the jury. (R984-985,1444) In decisions of this Court the one who planned the crime has generally been held to be more culpable and hence more deserving of the death penalty than one (such as Garcia) whose participation was less. See, e.g., Downs v. State, 386 So.2d 788 (Fla.1980), cert.den., 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert.den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Smith v. State, 365 So.2d 704 (Fla.1978), cert.den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

The sentences co-defendants receive are relevant considerations for the judge and jury in determining the appropriate sentence in a capital case. Bassett v. State, 449 So.2d 803 (Fla.1984); McCampbell v. State, 421 So.2d 1072 (Fla.1982); Barfield v. State, 402 So.2d 377 (Fla.1981); Messer v. State, 330 So.2d 137 (Fla.1976), cert.den., 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). In Garcia's case, however, neither the jury nor the judge had an opportunity to consider the disposition of the co-defendants cases, which occurred after Garcia was sentenced. (R2919-2925,3029-3055) This Court does have the

advantage of knowing that Torres, Pina, and Ribas all were given life sentences. In the exercise of its review function the Court should examine Garcia's case very closely to see whether or not his actions justify execution of the ultimate penalty while those of Torres, Pina, and Ribas do not. If this Court will do this it must conclude that Garcia is no more culpable than the others and, pursuant to Slater, his death sentences must be reversed.

CONCLUSION

Upon the arguments presented in Issues I. through III., Enrique Garcia asks this Honorable Court to grant him a new trial. If he is not granted a new trial Garcia asks the Court to reverse his sentences of death with directions to impose two life sentences, or, alternatively, grant him a new sentencing trial, or a new sentencing hearing before the court, for the reasons expressed in Issues VI. through X. He also requests that his judgments of conviction for the robberies of Willie West and Martha West be set aside, as discussed in Issue IV., and asks that he be given a new sentencing hearing on his non-capital convictions after a presentence investigation is ordered and considered by the trial court, as discussed in Issue V.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 27th day of September, 1984.

Robert F. Moeller

ROBERT F. MOELLER

RFM:js