IN THE FLORIDA SUPREME COURT

OSCAR TORRES-ARBOLEDO,	:	
Appellant,	:	
vs.	:	Case No. 66,354
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Oscar Torres-Arboledo, will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding Issues I., II., III., IV., V., VIII., and IX.

ARGUMENT

ISSUE I.

THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY FROM ITS WITNESSES CONCERNING WHAT THE VICTIM, PATRICIO LORENZO, SAID TO THEM.

Appellee apparently concedes that Dr. Mallea's hearsay testimony concerning statements Patricio Lorenzo made to him was inadmissible under the hearsay exception which permits introduction of statements made for the purpose of medical diagnosis or treatment, but argues the testimony was admissible under the exception for statements under belief of impending death. §90.804(2)(b), Fla.Stat. (1985) However, the court below explicitly ruled the testimony not to qualify under this exception for "dying declarations." (R 358, 359-360)

Moreover, the evidence of record would not support a finding that Lorenzo's words constituted a statement under belief of impending death. To qualify under this exception, the declarant must have made his statement under the belief that his death was imminent and inevitable, and while entertaining no hope of recovery. Tillman v. State, 44 So.2d 644 (Fla.1950); Johnson v. State, 113 Fla. 461, 152 So.176 (Fla.1934); Mills v. State, 264 So.2d 71 (Fla.1st DCA 1972). Nothing was presented below to show that Lorenzo knew he was going to die. He was only shot twice, in the arm (superficially) and chest. (R 362,560) Lorenzo did not give Mr. Mallea any indication he knew he was dying (R355,357), nor, apparently, did

Dr. Mallea tell Lorenzo he was about to die. (R 353-357,361-366) The fact that Lorenzo asked to be taken to the hospital after he was shot (R 336,339,370), and asked for a specific doctor after he arrived at the hospital (R 355-356), indicates that Lorenzo entertained some hope of recovery; otherwise, he probably would have requested a clergyman.

Lorenzo's act of giving his medal and chain to Dr. Mallea with instructions to give it to his (Lorenzo's) family was a totally equivocal act, not proof Lorenzo was aware he was about to expire. He may have wanted his family to have these items because he was anticipating a lengthy hospital stay. Or perhaps he wanted them preserved as evidence of a crime.

Appellee's claim that any error in admitting Dr. Mallea's testimony was "harmless in light of the overwhelming evidence which includes the direct evidence of eyewitness identification of Appellant" (Brief of Appellee, p. 11) is incorrect, because the evidence was far from overwhelming. The supposed eyewitness, George Williams, offered no testimony that he saw an attempted robbery at Pat's Paint and Body Shop. (R 718-751) Without a robbery attempt, there was no first degree murder, as there was no evidence of premeditation. (Please see Issue VII. in Oscar Torres-Arboledo's initial brief.) Furthermore, Williams' ability to recognize people was highly suspect, at best. Immediately after the events at Pat's Paint and Body Shop, Williams went outside and tackled an innocent bystander he thought he recognized as one of the perpetrators. (R 731-732) And when Williams initially viewed a photopack containing a

picture of Oscar Torres-Arboledo, he failed to tell police that the picture of Appellant was that of the man who shot Patricio Lorenzo. (R 741-742)

ISSUE II.

THE COURT BELOW ERRED IN IMPROPERLY RESTRICTING OSCAR TORRES-ARBOLEDO'S CROSS-EXAMINATION OF AN IMPORTANT PROSECUTION WITNESS, RAYMOND JACOBS.

A party may impeach a witness by showing that he is biased. §90.608(1)(b), Fla.Stat.(1985) This is the primary reason evidence of pending charges is admissible -- to show that the witness may be biased in favor of the State because of his desire to obtain favorable treatment on the charges he faces.

ISSUE III.

THE COURT BELOW ERRED IN PERMITTING THE VICTIM'S DAUGHTER TO TESTIFY FOR THE STATE AT OSCAR TORRES-ARBOLEDO'S TRIAL.

In the instant case, unlike in Mills v. State, 462 So.2d 1075 (Fla.1985), cited by Appellee at page 16 of its brief, testimony of the family member (Maria Ferrer, Patricio Lorenzo's daughter) was not necessary for any legitimate purpose. Appellee's statement that Ferrer established and corroborated the identification of the jewelry which was the subject of the robbery (Brief of Appellee, p.18) is inaccurate. Firstly, there was no robbery, only an alleged attempt. Secondly, Ferrer could not give competent testimony concerning what property was the subject of the alleged attempted robbery because she was not present when it occurred. Her testimony could only have

been for "the underlying purpose of gaining the sympathy of the jury or prejudicing it against" Oscar Torres-Arboledo, Mills, 462 So.2d at 1080, by placing before the jury Patricio Lorenzo's status as a man with a family. The prosecutor below made use of Ferrer's testimony during his penalty phase argument to the jury when he spoke of "a trail of blood, of dispair [sic] and destruction and families who have had a loved one shot to death." (R 951)

The following comment by the court in Barnes v. State, 348 So.2d 599 (Fla.4th DCA 1977) is fully applicable to the case presently before this Court:

> [C]riminal trials are meant to be tried as cooly and as dispassionately as possible and to present a close relative of the deceased should be avoided to prevent the interjection of sympathy for the victim or undue prejudice against the accused.

348 So.2d at 601.

ISSUE IV.

THE COURT BELOW ERRED IN REQUIRING OSCAR TORRES-ARBOLEDO TO STAND TRIAL IN IDENTIFIABLE JAIL CLOTHING.

At page 22 of its brief Appellee quotes a dissenting opinion from the Seventh Circuit Court of Appeals, apparently in support of its argument that Oscar Torres-Arboledo's trial counsel was not ineffective for failing to utter the words "I object" when his client was brought into the courtroom in a jump suit with the words "County Jail" written on the back thereof. However, the Fifth Circuit has viewed the issue in a somewhat different light than the dissenting Judge Easterbrook. For example, in Brooks v.

State of Texas, 381 F.2d 619 (5th Cir.1967) the court granted habeas corpus relief where the defendant's trial counsel failed to object to his being tried in prison clothes. Similarly, in Hernandez v. Beto, 443 F.2d 634 (5th Cir.1971), defense counsel did not lodge an objection to his client standing trial in prison clothes because it was a common practice for prisoners held in jail to be tried in prison clothes, and counsel deemed a motion for civilian attire to be frivolous. The Fifth Circuit again granted habeas relief noting the " 'negative inferences [that] can be, and more than likely are, created in the minds of the jurors when the accused is brought into court and tried in prison clothing.' " 443 F.2d at 636. [Court quoting district court judge with approval.]

Furthermore, while defense counsel for Torres-Arboledo did not use the words "I object," he certainly called the court's attention to the serious problem of his client's appearance before the jury in jail-issued clothing.

Appellee suggests that Torres-Arboledo could have worn the wrinkled yellow shirt he had been issued. (Brief of Appellee, p.22) However, apparently, that shirt was in an unwearable condition due to the actions of jail personnel, and through no fault of Torres-Arboledo. Thus it is not true, as Appellee claims, that Torres-Arboledo was not forced to appear in jail clothes, or that he freely decided to wear such garb; he had little choice after his jailers wadded up his shirt and threw it in his property basket.

ISSUE V.

THE COURT BELOW ERRED IN FAILING TO CONDUCT AN INQUIRY ON THE RECORD TO ASCERTAIN WHETHER OSCAR TORRES-ARBOLEDO WAS VOLUNTARILY, KNOWINGLY, AND INTENTIONALLY RELINQUISHING HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO TESTIFY.

Appellee begins its argument by claiming that the holding of People v. Curtis, 681 P.2d 504 (Colo.1984) has been rejected by Florida courts (plural), but then cites cases from only one Florida court, the Second District Court of Appeal, in support of this assertion. Torres-Arboledo is not aware of cases from other Florida district courts of appeal which have rejected Curtis, nor, more importantly, does Torres-Arboledo believe the issue herein has been directly addressed by this Court.

ISSUE VIII.

THE COURT BELOW ERRED IN DENYING OSCAR TORRES-ARBOLEDO'S MOTION FOR DISCHARGE, AS HE WAS NOT BROUGHT TO TRIAL WITHIN THE TIME LIMITS SET FORTH IN THE INTERSTATE AGREEMENT ON DETAINERS.

Undersigned counsel would first note that there is an error on page 43 of Oscar Torres-Arboledo's initial brief. Section 941.47 of the Florida Statutes is cited for the proposition that the Interstate Agreement on Detainers is to be liberally construed to effectuate its purposes; the correct citation should be to section 941.45(9).

Appellee seems to say at page 35 of its brief that Torres-Arboledo's waiver of the 120-day speedy trial provision

under the Interstate Agreement on Detainers somehow also constituted a waiver of his speedy trial right under the 180-day provision of the Agreement. Appellee cites no authority in support of this proposition, probably because there is none.

There is no reason in law or logic why a waiver of the shorter speedy trial period should constitute a waiver of the longer speedy trial period, particularly when all persons involved seemed to acknowledge that Torres-Arboledo was preserving whatever rights he had under the 180-day provision. (R 1084-1085,1092-1093)

Furthermore, the courts of this State have recognized the validity of limited waivers of speedy trial. See, e.g., S.D. v. State, 409 So.2d 1118 (Fla.2d DCA 1982); Johns v. State, 340 So.2d 528 (Fla.2d DCA 1976); State v. Gray, 370 So.2d 432 (Fla.1st DCA 1979).

At page 36 of its brief the State refers to testimony appearing in the record on appeal at pages 980-985. Contrary to what Appellee states, this testimony came not from "the Clerk of the California court," but from the case records manager at Folsom State Prison. (R 981) Nowhere in her testimony did this witness say that "Appellant declined to attack the extradiction [sic]," as Appellee claims at page 36 of its brief. Furthermore, her testimony concerning what was said at a hearing in California on January 13, 1984 was hearsay, admitted over Oscar Torres-Arboledo's timely objection. (R 982-983)

ISSUE IX.

THE TRIAL COURT ERRED IN SENTENCING OSCAR TORRES-ARBOLEDO TO DEATH OVER THE JURY'S LIFE RECOMMENDATION AS THE RECOMMENDATION WAS FULLY JUSTIFIED UNDER THE FACTS OF THIS CASE, AND TORRES-ARBOLEDO DOES NOT DESERVE THE DEATH PENALTY.

The court below did not articulate any specific reasons for rejecting Dr. Gerald Mussenden's testimony concerning Oscar Torres-Arboledo's intelligence and capacity for rehabilitation, and so Appellee attempts to cure this defect by speculating as to possible reasons why Judge Graybill acted as he did.

Appellee's argument has two main thrusts: (1) Dr. Mussenden was deceived by Torres-Arboledo and (2) Dr. Mussenden overlooked the "dynamics" of Torres-Arboledo's California homicide conviction.

In support of the first part of its argument, Appellee cites Torres-Arboledo's attempt to discharge his attorney and his use of an interpreter in court, even though he has some knowledge of English, as proof that Torres-Arboledo was "manipulative." (Brief of Appellee, pp.37-38) According to Appellee, Torres-Arboledo "attempted to create an incompetency of trial counsel claim for collateral attack" by declining to communicate with defense counsel prior to trial. (Brief of Appellee, p.37) Appellee thus ascribes great intelligence and understanding of the American legal system to Torres-Arboledo, a native of Colombia. (R 784,915) It is clear from the record that Torres-Arboledo's attempt to dismiss his defense counsel was motivated solely by his belief that his court-appointed attorney was not adequately representing him, and was not an attempt

to somehow manipulate the system. (R 1022-1035) Indeed, Appellee concedes as much at pp.37-38 of its brief: "Appellant had deep feelings that if the extradiction [sic] evidence were presented to the jury, that the jury would dismiss the charges against him." Torres-Arboledo's belief that his counsel was not doing enough to obtain the evidence from California regarding his extradition to Florida was the reason for his request to have his attorney dismissed. (R 1027-1035) That Torres-Arboledo may have been mistaken as to the importance or legal effect of the evidence he wanted does not diminish his sincerity, nor demonstrate that he was "manipulative."

Also, for Appellee to say that Torres-Arboledo "declined to communicate" with his attorney prior to trial is misleading. While there may have been periods of time when legitimate disagreements between client and counsel led to an absence of communication, Torres-Arboledo expressed his willingness to talk with defense counsel to try to work out the differences. (R 1033-1034,1043)

With regard to Torres-Arboledo's use of an interpreter in court, as he is from Colombia, English is not his first language. It makes perfect sense that he would choose to have legal proceedings in a system foreign to him translated into his native tongue, despite the fact that he may have considerable facility in English, particularly when those proceedings are critical to his future and his very life.

It is also very important to note that the tests Dr. Mussenden gave Torres-Arboledo were designed to detect any signs of

deception or an attempt to manipulate, and they showed no such behavior by Torres-Arboledo. (R 915-920)

The record as a whole fails to substantiate the State's contention that Dr. Mussenden's conclusions regarding Oscar Torres-Arboledo were invalid because he was somehow manipulated by Torres-Arboledo.

Likewise incorrect is the State's contention that Dr. Mussenden failed to factor Torres-Arboledo's California homicide conviction into his personality assessment of Torres-Arboledo. Dr. Mussenden was aware of this conviction (R 935), and so presumably gave it whatever weight he deemed appropriate. Contrary to a statement by Appellee, the prosecutor's cross-examination of Dr. Mussenden on the subject of this conviction was not "limited because it was not elicited on direct examination." (Brief of Appellee, p.39) After the prosecutor elicited the fact that Dr. Mussenden was aware of the California conviction, the court did sustain a defense objection on relevancy grounds to this single question: (R 936-938)

> Were you also aware in the case in California, finger prints of his were found on the vehicle, in which the man that was murdered, died after being shot four times?

But the prosecutor thereafter abandoned not only this line of questioning, but all further cross-examination of Dr. Mussenden. (R 938) Thus he was not prevented from exploring whether the defense expert had given adequate consideration to the California conviction, he merely chose not to pursue the matter.

Appellee questions what Oscar Torres-Arboledo "ever accom-

plished for himself, his family, and society with his intelligence." (Brief of Appellee, p.44) We know from the record that Torres-Arboledo attempted to obtain an education, attending college in Colombia for two years, until his father's death forced him to drop out. (R 915) He then came to the United States for economic opportunities, to advance himself, and worked as a painter, and on the docks processing crabs. (R 915-916,933) He also made diligent efforts to learn English, and had made considerable progress in this regard. (R 914,922-923,924) While these accomplishments might not qualify him for Who's Who, it must be remembered that Torres-Arboledo was barely in his twenties when he came to the United States, and the record does portray a profile of an individual who is highly motivated to better himself and improve his lot in life.

One element which Appellee fails to address in his argument is that the jury may well have recommended a life sentence for Torres-Arboledo not solely on the basis of Dr. Mussenden's testimony, but because the offense herein, a simple shooting, just does not warrant imposition of a sentence of death. There is nothing particularly aggravated about the offense that would set it apart from other homicides so as to justify imposition of the ultimate penalty.

CONCLUSION

Appellant, Oscar Torres-Arboledo, renews his prayer that this Court will grant him the relief requested in his initial brief.

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 16th day of January, 1987.

Robert F. Moeller
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