IN THE FLORIDA SUPREME COURT

HECTOR MANUEL IRIZARRY, :

Appellant, :

vs. : Case No. 66,947

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, Hector Manuel Irizarry, will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding the Statement of the Facts and Issues I., II., III., IV., V., VI.A., VI.B., VI.C., VII., VIII.

STATEMENT OF THE FACTS

Appellee's statement that Hector Irizarry "began beheading Carmen [Irizarry] and attempted to behead Mr. [Orlando] Hernandez" (Brief of Appellee, p.3) is inaccurate. Carman was was not "beheaded," as the blow to her neck did not produce a complete decapitation. (R309-310) And there was no proof that Irizarry was trying to "behead" Orlando Hernandez when he allegedly struck him with a machete.

Irizarry would also note that Appellee's Statement of the Facts contains argument and expressions of opinion which should have no place in the factual portion of the brief.

ARGUMENT

ISSUE I.

THE COURT BELOW ERRED IN DENYING HECTOR IRIZARRY'S MOTION FOR MISTRIAL AFTER STATE WITNESS SERGEANT ANDREW DELUNA TESTIFIED CONCERNING A POLYGRAPH TEST THAT IRIZARRY AGREED TO TAKE.

Defense counsel did not "open the door" to the inadmissible polygraph evidence, as Appellee claims. There was no need for Sergeant DeLuna to refer to the polygraph in order to answer the question posed. Furthermore, a witness with such extensive law enforcement experience (11 years with the Hillsborough County Sheriff's Office - R316) should be aware of the highly prejudicial nature of such testimony and curb the urge to make reference to a polygraph exam when responding to any question that does not directly require such a response.

As for the alleged procedural default due to defense counsel waiting until Sergeant DeLuna finished testifying before he moved for a mistrial, counsel explained that he delayed making the motion so as not to draw more attention to the improper testimony. (R357) Counsel should not be faulted for pursuing a course of action designed to minimize the harm occasioned by prejudicial testimony from a state witness. Cf. Meade v. State, 431 So.2d 1031 (Fla.4th DCA 1983). Irizarry would also note that the prosecutor below made no assertion that the motion for mistrial was untimely, and the trial court considered Irizarry's motion for mistrial on its merits. (R362-372)

ISSUE II.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE AT HECTOR IRIZARRY'S TRIAL TWO MACHETES WHICH WERE IRRELEVANT AND PREJUDICIAL.

In addition to the cases cited in Irizarry's initial brief, please see Little v. State, 474 So.2d 331 (Fla.1985), in which the court held that photographs of the defendants holding guns were irrelevant and should have been excluded from their trial for armed robbery.

ISSUE III.

THE COURT BELOW ERRED IN DENYING HECTOR IRIZARRY'S MOTIONS FOR MISTRIAL DUE TO IMPROPER REMARKS OF THE PROSECUTOR DURING HIS FINAL ARGUMENTS TO THE JURY.

Appellee argues as if Irizarry did not object at all to any of the improper remarks the prosecutor made. With regard to the prosecutor's comments during the first part of his bipartite closing argument (he argued first and last), Irizarry objected and moved for a mistrial as soon as the prosecutor finished speaking. (R603) His counsel explained that he waited to object because he thought it bad form to interrupt his opponent's final argument, and the offending remarks came very close to the end. (R603) According to Meade v. State, 431 So.2d 1031 (Fla.4th DCA 1983), which Irizarry cited in his initial brief, his objection was sufficiently timely.

As to the later remark by the assistant state attorney, in which he labeled Irizarry as a "murderer," defense

counsel moved for a mistrial immediately after the improper comment was made. (R645-646) There can thus be no disputing the timeliness of this motion.

United States v. Lacayo, 758 F.2d 1559 (11th Cir. 1985), from which Appellee quotes at pages 21 and 22 of its brief, involved the total absence of any objection to the prosecutor's remarks, and so is irrelevant to the instant appeal.

ISSUE IV.

HECTOR IRIZARRY'S CONVICTIONS MUST BE REVERSED BECAUSE OF IMPROPER COMMUNICATION BETWEEN THE BAILIFF AND THE JURY DURING DELIBERATIONS.

At page 26 of its brief Appellee states that "[w]hatever juror question was asked was heard by defense counsel." This is not true. Irizarry's attorney made it very clear that he was not in a position to hear what transpired during the exchange between the bailiff and the jurors. (R688)

Appellee relies upon Crews v. State, 442 So.2d 432 (Fla.5th DCA 1983) to support its assertion that "it is not clear that an improper communication with jurors automatically mandates a new trial" (Brief of Appellee, p.27). However, in Crews the court found no communication between the bailiff, a deputy sheriff, and the jurors.

ISSUE V.

THE TRIAL COURT ERRED IN EXCLUDING A PROSPECTIVE JUROR FROM HECTOR IRIZARRY'S TRIAL BECAUSE OF HER RESERVATIONS CONCERNING CAPITAL PUNISHMENT, AS A JURY SELECTED IN SUCH A MANNER IS NOT REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY, AND IS ALSO MORE PRONE TO CONVICT, IN VIOLATON OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The United States Supreme Court did not reject the holding of Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) in either Wainwright v. Witt, 469 U.S.__, 105 S.Ct.__, 83 L.Ed.2d 841 (1985) or Witt v. Wainwright, __U.S.__, __S.Ct.__, 84 L.Ed. 2d 801 (1985), as Appellee suggests. Wainwright v. Witt was decided shortly before Grigsby v. Mabry and involved different issues. In Witt v. Wainwright the Court summarily denied Witt's application for stay of execution and petition for writ of certiorari; the memorandum decision did not resolve nor even address the issues raised in Grigsby v. Mabry. (Justice Marshall, joined by Justice Brennan, recognized the importance of deciding the issues raised in Grigsby in his dissenting opinion in Witt v. Wainwright.) Furthermore, if the Supreme Court had already rejected Grigsby, it is unlikely the Court would have granted certiorari in that case.

ISSUE VI.

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY 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.

A.

The Trial Court Erred In Finding That The Capital Felony Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

Appellee is speculating when it says,

> Carmen Irizarry was executed so that she would not be a witness to the attempted homicide of Orlando Hernandez; and, Hector Irizarry attempted to eliminate Orlando Hernandez so that he would not be a witness to the homicide of Carmen Irizarry.

(Brief of Appellee, p.35). The trial court made no such finding; he did not find this to be a witness-elimination situation.

The trial court's finding, quoted at pages 35 and 36 of Appellee's brief, that Hector Irizarry was

> jealous and angry following victim Carman Irizarry's request of Defendant to move out of her solely owned residence in order that victim Orlando Hernandez could move in with her

(R981) belies the existence of the cold, calculated and premeditated aggravating circumstance. The court's own words show that the homicide of Carman Irizarry was committed in the heat of passion and was by no means the cold, dispassionate murder contemplated by this aggravating factor.[1/]

1/ Interestingly, the State concedes at page 47 of its brief that "[c]learly, there was passion in this homicide."

B.

The Trial Court Erred In Finding That The Capital Felony Was Especially Heinous, Atrocious Or Cruel.

The State's reliance upon Jennings v. State, 453 So.2d 1109 (Fla.1984)(Brief of Appellee, p.37) is misplaced. The conviction therein was vacated in Jennings v. Florida, __U.S.__, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985), and this Court remanded the cause for a new trial in Jennings v. State, 473 So.2d 204 (Fla.1985).

Appellee asks, "What was the mental anguish of Carmen Irizarry? Does the record reflect to what degree Carmen Irizarry agonized over her ultimate fate?" (Brief of Appellee, p.37) The evidence showed that Carman Irizarry apparently was asleep when the first machete blow was struck, and died very quickly. (R276,312,314-315) Thus she necessarily suffered little or no mental anguish and could not have "agonized over her ultimate fate."

C.

The Trial Court Erred In Failing To Give Adequate Consideration To The Evidence Presented Concerning Hector Irizarry's Mental And Emotional State At The Time Of The Homicide.

According to Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984), the trial court was not free to disregard the unrebutted testimony of the defense expert, Dr. Mussenden. Yet this is what the court did in refusing to recognize Hector Irizarry's mental and emotional problems as substantial mitigating factors after Dr. Mussenden concluded that Irizarry was

under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R733-735)

Appellee seems to suggest that the supposed "cooling off" period between the time Hector Irizarry was asked to vacate his ex-wife's residence and the time of the homicide somehow reduced the mental strain under which Irizarry labored when the killing occurred. Dr. Mussenden's testimony, however, showed that the exact opposite occurred: the pressure built up within Irizarry as he brooded over his situation, until he finally exploded like "an Atom bomb." (R734-735,740,755-756)

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

At pages 42 through 43 of its brief Appellee says, "There are several recent decisions from this Court in support of judicial overrides of jury recommendations of life imprisonment," then cites six cases. Appellee's prefatory statement is misleading, because in two of the cases it cites (Barclay v. State, 470 So.2d 691 (Fla.1985) and Huddleston v. State, 475 So.2d 204 (Fla.1985)) this Court found the trial courts' override of the juries' life recommendations to be improper under the standard set forth in Tedder v. State, 322 So.2d 908 (Fla.1975).

Appellee claims that there is no statutory or non-statutory mitigation to support the jury's life recommendation in the instant case (Brief of Appellee, p.45), yet the trial judge himself found two statutory mitigating circumstances: (1) Irizarry had no significant history of prior criminal activity; and (2) Irizarry had lived 40 years with no significant prior criminal history. (R983) Thus, even if one ignores the substantial additional evidence Irizarry presented in mitigation, these two mitigating factors provide a reasonable basis for the jury's recommendation.

ISSUE VIII.

THE TRIAL COURT ERRED IN SENTENCING HECTOR IRIZARRY TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONATE TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee attempts to remove this case from other cases of domestic homicide merely because Hector and Carman Irizarry were legally divorced. That fact is of little consequence here in view of the depth of the feelings Hector continued to harbor for Carman. Hector did not want to leave her house in Plant City, as he still loved her. (R499) In fact, Hector asked Carman to remarry him, to which she responded, "No way, Jose." (R345)

Dr. Mussenden's testimony clearly established that Hector Irizarry remained "romantically involved" with his ex-wife. (R733-734,746) The fact that the relationship had ap-

parently become one-sided precipitated the homicide. Appellee concedes that "[c]learly there was passion in this homicide," but goes on to state:

> whatever the motivational focus of that passion might be it was not established that it was the purported domestic relationship that existed prior to the murder.

(Brief of Appellee, p.47). On the contrary, Dr. Mussenden established beyond peradventure that the domestic relationship between Hector and Carman was the "motivational focus of that passion." (R733-735,746) To say, as Appellee does at page 47 of its brief, that it was not established that Hector and Carman "had any type of relationship other than that of a landlady and boarder" is ludicrous.

Kampff v. State, 371 So.2d 1007 (Fla.1979), which was cited in Irizarry's initial brief, and is cited by Appellee at page 47 of its brief, is especially analogous to Hector and Carman Irizarry's situation. Kampff and his wife had been divorced for three years before he killed her. During that period Kampff, as did Irizarry, brooded over the breakup of the relationship and begged his wife to remarry him. Kampff killed his wife when he suspected that she was becoming romantically involved with someone else. Carman Irizarry was killed after she began living with her new boyfriend, Orlando Hernandez. This Court found John Kampff's crime not to warrant the death penalty. Likewise, the crime for which Hector Irizarry was convicted does not warrant the death penalty.

CONCLUSION

Appellant, Hector Irizarry, renews his prayer for 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 2nd day of January, 1986.

Robert F. Moeller
ROBERT F. MOELLER