IN THE SUPREME COURT OF FLORIDA

MANUEL A. COLINA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 71,124

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Defendant was charged via a two-count Indictment with the First Degree Murder of Cecilia Diaz and Angela Diaz (R-9).[1/] The Defendant was arraigned on said Indictment on February 16, 1987, and entered a plea of not guilty through his Court-appointed counsel, William Butler (R-15). The cause was set for Pre-Trial Conference on April 2, 1987, and Trial on April 27, 1987 (R-17). On February 18, 1987, the Defendant filed a Demand for Discovery and Motion for Statement of Particulars (R-19). The State filed its initial answer to discovery on February 27, 1987 (R-20).

On March 5, 1987, the Defendant filed a Motion for

1/ (R) refers to the record on appeal of the instant case.

Appointment of Expert pursuant to Rule 3.216(a), FRCrP (R-23). Said Motion was granted on March 10, 1987 (R-24).

The Defendant, at the Pre-Trial Conference of April 2, 1987, filed a Motion for Continuance which was granted (R-28-30).

The Defendant again appeared for Pre-Trial Conference on May 7, 1987, with both parties announcing ready for Trial. The Court ore tenus ordered all disclosures to be made by May 27, 1987 (R-49).

On May 15, 1987, the Office of the Public Defender filed a Certificate of Conflict nunc pro tunc to February 16, 1987, and the Court granted the Public Defender's motion to withdraw and appointed William E. Butler to represent the Defendant (R-90-92).

On June 10, 1987, the State filed a Notice to rely upon similar fact evidence (R-143).

The cause proceeded to trial on Jun 22, 1987 (R-493). Prior to commencement of ~~voir~~ ~~dire~~ examination the State advised the Court that the Court-appointed interpreter, Cecilia Gregory, was a potential witness at the trial (R-496-501). The Court, therefore, inquired of Ms. Gregory (R-501-511).

After the jury was selected the Defendant, out of the presence of the jury, made several ore tenus motions. First, the

Defendant moved in limine to exclude photographs marked as State' Exhibit F for identification **(R-938-940).** The Court found this motion to be premature **(R-940).** The Defendant next moved in limine to exclude similar fact evidence **(R-940).** The Court found this motion to be premature **(R-942).** The Defendant moved in limine for the State to be prohibited in referring to the identity of the bodies until such time as identity was established **(R-942-943).** Said motion was denied by the Court **(R-943).**

The Defendant's motion for a directed verdict of acquittal made at the close of all the evidence was denied by the Court **(R-1896-1898).**

The jury found the Defendant guilty of both Counts of Murder in the First Degree **(R-322).** Subsequent to the taking of evidence during the penalty phase of the trial the jury unanimously recommended that the Defendant receive the death penalty as to both Counts of the Indictment **(R-323-324).**

The Defendant timely filed his Motion for New Trial on July **9, 1987 (R-325-326).**

The Defendant was sentenced to death on August **18, 1987 (R-325-326).**

Notice of Appeal was filed on August **26, 1987 (R-409).**

STATEMENT OF OF THE FACTS

Manuel Colina is a Cuban immigrant who came to this country in May 1980. His occupational and residential history since that time is relatively uncertain. He came to reside in the Putnam County area sometime in the latter part of 1986 (R1201).

During the last week in December 1986, a neighbor of Angel and Cecilia Diaz noticed the Diaz home empty and the car gone (R968-969). On January 5, 1987, Henry Piaz, a relative, reported that Mr. and Mrs. Diaz were missing to the Putnam County Sheriff's Office (R974). Deputy Sheriff Daniel Keel responded to the call and went to the Diaz home near West River Road in a rural area of Putnam County. Upon arrival he entered the Diaz home and found it in a disturbed condition. He then looked around the outside area where he discovered two bodies in a small clearing near the trailer (R977-993).

The crime scene was examined and photographed by members of the Sheriff's Office and the Florida Department of Law Enforcement (R431-472). The bodies evidenced substantial decay and were missing the heads and a substantial part of certain limbs as a result of insect and animal activity (R1548). On January 28, 1987, a search of the surrounding area resulted in the discovery of a human skull (R1194).

A post-mortem examination of Mrs. Diaz disclosed a bruise to the left upper part of the chest inflicted at or just before the time of death (R1539). There were no skeletal injuries

(R1540). Her feet had been tied after her death (R1540). A lack of lividity indicated a rapid loss of blood from above the neck R1541-1542). There were no injuries to the organs within the chest or abdomen (R1542). The skull fragments found at or near the scene revealed multiple fractures to the head and facial area (R1546-1547).

A post-mortem examination of Mr. Diaz disclosed that his ankles had been tied after death (R1550). There were no force type injuries to the body R1550). A lack of lividity again indicated that there was massive hemorrhage at the time of death from an area above the chest (R1550-1551). The skull portion discovered near the scene was examined and it revealed massive blunt injuries causing fractures to the skull and facial areas (R1552). Death to both victims was caused by trauma to the head.

On January 13, 1987, Felix Castro and Manuel Colina were arrested in Houston, Texas for the murders of Angel and Cecilia Diaz (R1625). Upon his arrest, Manuel Colina denied his identity and claimed to be Servando Garcia from Mexico (R1626-1637). He later acknowledged his identity but denied knowledge of the murders (R1640).

At trial Felix Castro testified that he was a friend of Colina and that he had known him about three months (R1201). On December 18, 1987 he met Colina in the morning and the two smoked some "rock" or "crack" cocaine (R1199). They later went onto the street in an attempt to obtain money to buy more of

the drug. Colina indicated that some people he worked for owed him some money and he wanted to go there and then leave town (R1213-1214). The two went to the home of Albert Spells and asked for a ride to the West River Road area near the Diaz home. Spells agreed to give them a ride but first he had to do some work laying sod at a Taco Bell restaurant under construction. After that work was finished, he drove Colina and Castro to a dirt road near the Diaz home (R1218-1222).

The two men walked a short distance to the Diaz home where Colina instructed Castro to stay out of sight. Colina went to the door and contacted Mr. Diaz and asked him for a jack to change a tire on a car that was nearby. Mr. Diaz called for a jack and came outside where he observed Castro standing nearby. Colina went inside the trailer while Castro stayed outside and spoke with Mr. Diaz. A short time later Colina jumped out of the trailer and told Castro to do something. Castro then struck Mr. Diaz with a wooden club he was holding. Colina then struck him again with a metal crowbar or tire iron (R1226-1239).

The two then carried the body of Mr. Diaz to a clearing in the woods behind the trailer where Mrs. Diaz's body was already laying. Castro testified that she was already dead but later indicated that he may have heard a moan. Mr. Diaz's pants slipped off while Castro was carrying his legs. Colina told Castro to get something to tie them up with. Several lengths of clothesline were cut and the Defendant began using

it to bind the bodies. Castro testified that Colina struck several more blows to the heads of the victims as they lay there. (R1242-1248).

The two men then cleaned the blood out of the trailer and searched for valuables, taking a small amount of cash, some alcohol, jewelry and other items from Mr. Diaz's wallet. They then took the Diaz car and returned to Palatka where they bought some beer and some more "crack" (R1250-1256).

After parting that night, Castro met with his girlfriend and the two returned to the Diaz home where Castro took the TV set. It was sold and the money used to buy more crack (R1260-1262).

The following day, Castro and Colina met again. They drove to a nearby town where they committed two burglaries. Once again, the money obtained was used to buy "crack" (R1264-1267). The two then left the Putnam County area and drove to Houston, Texas in the Diaz car. They stopped at a mission in Mobile, Alabama where they also obtained some additional clothing. After they arrived in Houston, the car was sold and the two men went their separate ways. They were arrested on January 13, 1987 (R1267-1275).

Colina testified in his own behalf. He related that he had accompanied Castro to the Diaz home and hid while Castro went to the door (R1765-1773). He observed Castro attack Mr. Diaz and then fled on foot (R1775-1778). He walked and ran back to Palatka. He saw Castro later that night driving the

Diaz car. Castro ordered the Defendant not to say anything. Later, Colina returned to the Diaz house with Castro and an unnamed black male. He saw blood in the home. Castro searched the home for something more to steal and left with some beer and cigarettes (R1779-1786). The next day the two left for Houston (R1788-1791).

Two inmates from the Putnam County Jail testified that they had spoken to the Defendant while he was in custody awaiting trial and that he acknowledged killing one or both of the victims (R1683, R1694).

SUMMARY OF ARGUMENTS

POINT I: During both the guilt and penalty phases of the trial, the prosecution introduced evidence with little or no probative value to any relevant issue, but which carried a strong risk of introducing ethnic prejudices and fears into the proceedings. In addition, the prosecutor's habit of labeling the Defendant as a "Marielito" and questioning his need for an interpreter also served to thoroughly taint the proceedings.

POINT 11: The prosecution introduced testimony during the guilt and penalty phases that the Defendant had previously stolen and fenced property, possessed a kilo of cocaine, had hurt other people, had stabbed a person in the county jail, had killed white people in a prison riot, had murdered other people and tied up their bodies, had tied up girls with handkerchiefs and was a habitual criminal while in Cuba. These crimes were in addition to any for which he had been convicted or which were related to the charged offenses. So frequent and prejudicial, as well as unreliable, was this evidence of collateral crimes that it became an overriding feature of the trial and rendered wholly inadequate both the findings of guilt and the recommendation and sentence of death.

POINT 111: Throughout the Defendant's testimony, the prosecution raised and the trial court sustained hearsay objections to all verbal remarks made by other persons which were offered by the

defense, without regard to whether or not they were offered to prove the truth of the matters asserted. Accordingly, the trial court excluded statements made by the state's key witness which were offered to prove he knew the victims and other statements which were offered to explain the Defendant's actions during the course of events that were the subject of the trial. The proscription placed on the Defendant against any third party statements was so thorough as to effectively deny the Defendant an opportunity to present his version of the case.

POINT IV: During the penalty phase of the trial, the prosecution introduced into evidence a distasteful black T-shirt and testimony aimed at showing that the Defendant felt no remorse for the commission of the crimes. This evidence was not legally relevant to any of the four aggravating circumstances presented to the jury or to any other statutory factor. It was also contrary to repeated holdings of this court that lack of remorse shall not be considered as part of the capital sentencing process.

POINT V: The trial court found that the capital felonies were especially heinous atrocious and cruel. The evidence offered to the jury on this question related almost entirely to the character of the victims contrasted with the malevolent character of the accused. The trial court's findings, similarly, dwelt

on this theme. No evidence was presented, no argument was offered and no findings were made that the victims suffered through any period of torment or contemplation prior to the killings nor that their deaths were unnecessarily slow or torturous. The evidence was not conclusive, but it appears that the victims died or lost consciousness quickly after a sudden and unexpected attack.

POINT VI: The trial court found that the murders were committed in a cold, calculated and premeditated manner. This aggravating factor is reserved for those killings which evidence heightened premeditation. It is usually applicable to execution or contract style killings or to a killing that involves an extended period of reflection. The facts found by the trial judge to support this finding were that the killings were premeditated and deliberate and were inflicted upon kind and generous victims. The court's findings reflect a complete misunderstanding of the gravamen of this factor and warrant reversal.

POINT VII: The trial court also found that the killings were committed to avoid a lawful arrest. Where the victims of a murder are not law enforcement officers, this factor requires very strong proof that the sole or dominant motive for the killing is to avoid arrest. There was some evidence to support the court's conclusion. But it did not rise to the level of proof beyond a reasonable doubt. There was also evidence to

show that the Defendant's original intent was to bind his victims and leave the area.

POINT I

THE FINDINGS OF GUILT AND SENTENCES OF DEATH WERE FUNDAMENTALLY TAINTED BY EVIDENCE AND ARGUMENTS MADE TO THE JURY CALCULATED TO AROUSE ETHNIC PREJUDICE DURING THE GUILT AND PENALTY PHASES OF THE TRIAL

During the course of the trial and in the penalty phase, the state made certain comments and introduced testimony which had as its intended or unintended consequence the injection of ethnic issues into the trial.

The principle witness for the state, Felix Castro, had testified that he had not assisted the victims or reported the crimes and that he had given false information to investigators because he was afraid (R1302-1308).

On redirect examination the trial court permitted the prosecution to proceed as follows:

> PROSECUTOR: You indicate that you're afraid of him.
>
> A. Yes
>
> Q. Manuel Colina.
>
> A. (Nods head)
>
> Q. Well, could that fear be because of what you saw him do on the 18th of December?
>
> A. Not only that, you know what he told me before that too. What I had seen that day --
>
> Q. What was the basis for your fear of Manuel Colina, now that that's become relevant?
>
> A. Because he had told me, you know, he had hurt other people before that, you know, and he don't like nobody to --

DEFENSE COUNSEL: Your honor, I object to this line of questioning. I think we are getting into an entirely different area which is going to cause some problems.

THE COURT: May be, but I think the door is open. And the objection, if it's based on the fact that it's not brought out on cross-examination, if that's what I understand the legal basis to be.

DEFENSE COUNSEL: Yes sir.

THE COURT: No sir, it's overruled.

PROSECUTOR: You indicated that your were afraid of Manuel Colina, right?

A. Yes, I was.

Q. And you had basis other that the fact than just what you had seem him do?

A. Yes.

Q. Where was he from?

A. He's from Cuba.

Q. And what had he told you that made you *so* afraid of him?

A. Well, he told me that he was on -- like -- he was inside a Navy base down there and they used to do lots of things down there, you know, like buy girls with handkerchiefs. When he got over here, he was in a riot, a big riot with a couple of people, and they killed white -- they used to like to kill white people.

Q. Did you believe him?

DEFENSE COUNSEL: Your Honor, I object.

A. Well, that day I believed him, yes, I believed him.

(R1313-1315)(emphasis added).

The defense moved for a mistrial which the judge denied based on the state's argument that the defense had opened the

door on cross-examination by asking eight times about the witness' fear of the Defendant (R1316). (Actually, the Defense asked about fear of the Defendant only twice after it had been raised spontaneously by the witness.) (R1307-1308)

During the state's closing argument the prosecutor continued in this vein referring to the Defendant as "the poor, misunderstood Cuban from the Mariel boat lift" (R1508), and later "the little Marielito, as he wants to call himself" (R 2023). In truth, the Defendant had testified, only, that he was from Cuba and that he came to this country on May 8, 1980 in the boatlift (R1762). Later the State hit heavy on the ethnic issue:

> MR MCLEOD: [mimicing the Defendant] I've been to Ft. Myers in 1966 or '67, must've come back from the Bay of Pigs six years late or something. Jordan Van? I don't know who Jordan Van is. Cuba? No, I'm Mexican, I'm a Texan, Mexican. Palatka phone number? Some black guy in Texas, some black guy in Texas.
>
> This is great how every time he has a problem with identification, like the guy that supposedly went back with them to the trailer: just a black guy, some black guy.
>
> On the 14th of January 1987 he's Manuel Colina Ardenis, now, he's a Cuban, he's a Marielito. 1980 is when he came here.

(R2013-2014).

The Defendant had use of a translator throughout the course of the trial due to a lack of fluency in the English language. The prosecution played on this aspect of the Defendant's background as well by questioning several witnesses about whether

or not the Defendant could speak English (R1202, R1641, R1665). During closing argument the prosecutor argued:

> He said he reads, writes and speaks the English language. Interesting, on cross-examination and direct examination, you had to kind of stop him to translate to him most of the time.
>
> Cross-examination of Mr. Montero: Have you ever had illegal aliens give you the wrong names? Yeah How about murderers? Yeah.

(R2013).

Finally, as the prosecutor neared the end of his argument:

> First degree murder motive, unbridled evil, that's what does this. Evil that lies, and evil that splashes heads like so many rotten Cuban melons, which is what you had in this case.

(R2043).

From the outset of the trial there were very heavy and unmistakable Latin overtones to the proceedings. The Defendant was a Cuban immigrant. The co-Defendant and principle state witness was also Cuban. The victims were of Hispanic origin as well, and a Spanish interpreter was required throughout the proceedings.

The jury did not include a single member of Hispanic origin. The trial setting was a fertile ground for appeals to ethnic prejudices and fears. Under the circumstances it was incumbent upon both the court and the prosecution to affirmatively guard against any evidence or argument which might give play to such feelings, rather than look for ways to exploit them.

The State of Florida has experienced large scale emigrations from Latin America in the last few decades. While much of the

nation's experience with civil rights has dealt with the question of race, in this State, the concerns over national and ethnic origins must clearly recognize the friction that has and continues to exist between the Hispanic population and much of the rest of the State. The term "Marielito" which was used liberally by the prosecutor has come to refer, as the presiding judge noted in handing down his sentence, to "boat lift immigrants who were incarcerated [criminals] in Cuban prisons" (R2218).

"Racial prejudice has no place in our system of justice and has long been condemned by this Court." Robinson v. State, 520 So.2d 1, 7. This Court, in Robinson, noted that a presiding judge should not only sustain an objection to comments of the nature presented in this case, but should go further and reprimand the prosecuting officer to impress upon the jury the impropriety of such argument or testimony. It was further noted that such remarks may in some instances be so prejudicial that a mistrial should be granted. In the instant case, the prosecutor was permitted to elicit testimony that the Defendant liked to kill white people and overruled the Defendant's objection.

The prosecutor's later arguments, although not objected to by the defense, plainly injected a strong risk of ethnic prejudice into these proceedings and constituted fundamental error, Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974).

Such considerations are especially important in capital

sentencing proceedings, Turner v. Murray, 476 U.S. 1 106 S.Ct. 1683, 1688, 90 L.Ed.2d 27 (1986).

The repeated and unwarranted injection of testimony and argument calculated to appeal to ethnic prejudice and fear violated the Defendant's Fifth, Sixth and Fourteenth Amendment rights and warrants reversal of both judgment and sentence.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT EVIDENCE OF COLLATERAL OFFENSES AND SUBSTANTIAL UNCHARGED MISCONDUCT

As a general proposition, it is accepted that evidence of collateral crimes or acts committed by the Defendant are inadmissible if their sole relevance is to establish bad character or propensity of the accused. Williams v. State, 110 So.2d 654 (Fla. 1959).

Evidence of collateral acts or crimes can be admitted where the conduct sheds light on the entire context out of which the charged offense arose. Smith v. State, 365 So.2d 704 (Fla. 1978). Accordingly, the state properly introduced evidence during the course of the trial that the Defendant and Felix Castro used and purchased "crack" cocaine before and after the killings (R1211, R 1257-1259). It is arguable, that several more burglaries committed the day following the killings in order to obtain still more money with which to purchase cocaine (R1264-1267) also fit into this category; as would the giving of false identities and information to authorities and investigators to avoid detection.

Evidence that the Defendant was previously convicted of felony offenses was also proper impeachment after the Defendant testified. ¶90.610(1), Florida Statutes.

However, it is just as clear that frequent testimony of collateral crimes offered by the state did not fit into this or any other category recognized for admission of this type

of evidence. Felix Castro testified, without objection, that the Defendant always came to him "to help him with something or get rid of something he stole, sell it." (R1213).

The Defendant did preserve for appeal his objection to other collateral crimes evidence. Castro's testimony that the Defendant tied up girls with handkerchiefs and participated in a prison riot and killed white people was held admissable, despite defense objection (R1315). The Court also allowed an inmate from the county jail to testify that the Defendant claimed to have had a "kilo of cocaine" while he was in Houston (R1886, R1892). This issue was objected to when first raised by the state on cross-examination and the objection was overruled (R1807-1809). The court did sustain objections and granted motions to strike testimony concerning a threat said to have been made by the Defendant (R1887-1892), and an aggravated battery which occurred in the jail (1713-1717). In each instance the motion of the defense for a mistrial was denied.

During the penalty phase of the trial the state introduced the testimony of Det. Chis Hord that:

> [T]here were couple of emotions that I have uncovered, one is that this is somewhat of a sexually motivated endeavor, that the tying of bodies of people is something that he does, that he even laughed at where the bodies were disposed of while he was tying them and bludgeoning them.

(R2116)(emphasis added).

On cross-examination of the Defendant, during the penalty phase, the prosecutor proceeded as follows:

PROSECUTOR: Is it your testimony here today that you did not -- that you were not let out of the Mariel Prison prior to coming to the United States?

A. No, senor.

Q. What's the tattoo that appears on your chest?

A. They are the names of my three sons -- children.

Q. The numbers that appear on your chest?

A. They're names.

Q. They're names. Okay, and how about the tattoos on your hand.

A. I put it in 1968.

Q. It does not stand for habitual criminal in the Cuban prison system?

A. No, senor.

Q. This document is incorrect?

A. That's not what I have on my arms.

Q. You don't have five dots?

A. Yes sir.

Q. And it doesn't mean you're a habitual criminal though, right?

A. For me, no sir.

(R2167-2168).

Although the fact that the Defendant may have been a habitual criminal in Cuba was denied, it was improper for the state to inform the jury under the guise of a question that the Defendant had a lengthy criminal history in Cuba. Keen v. State, 504 So.2d 396 (Fla. 1987).

So frequent was the introduction and suggestion of

uncharged criminal conduct on the part of the Defendant raised by the state that it became an overriding feature of the trial. Some of this type of evidence was, no doubt, admissible and in other instances was not properly objected to. However, there were sufficient objections and motions made by the defense to this type of evidence to permit the court to properly address these concerns. Overall, the accumulation of uncharged crimes placed before the jury was such that the only appropriate 'remedy was to grant the Defendant's motion for a new trial. Robinson v. State, 487 So.2d 1040 (Fla. 1986). As this Court Stated in Craig v. State, 510 So.2d 857 (Fla. 1987):

> In a criminal trial, it is generally improper to admit evidence tending to show that the accused committed crimes other than those of which he stands accused..."[C]ollateral crime" evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that he committed the other crime or crimes, he probably committed the crime charged....The jury's attention should always be focused on guilt or innocence of the crime charged and should not be diverted by information about other matters.

510 So.2d at 863.

The presentation and suggestion of crimes attributable to the Defendant was of such frequency and prejudicial effect that the Defendant was denied a fair trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments. The judgment and sentence should be set aside and the Defendant granted a new trial.

POINT III

THE COURT ERRED IN EXCLUDING FROM EVIDENCE ALL STATEMENTS OF FELIX CASTRO OFFERED BY THE DEFENSE

Essentially, the trial of Manuel Colina came down to a swearing contest between the Defendant and Felix Castro, his accomplice in the killings of Mr. and Mrs. Diaz. Each had provided statements and testimony making it clear that they had gone to the home of the victims on December 18, 1986. From that point, their versions of the incidents of that night differ greatly with each placing primary responsibility for the killings on the other. The credibility and consistency of the testimony of each played a central role in the proceedings.

During his testimony, Felix Castro quoted the Defendant extensively (R1213, 1214, 1217, 1219, 1223, 1225, 1226, 1230, 1231, 1234, 1237, 1243-1244, 1246, 1248, 1250, 1252, 1255, 1256). A careful review of Castro's testimony reveals that the verbal conduct of the Defendant played a major role in the completeness of the account he gave to the jury. There is no doubt that these statements of the Defendant were admissible.

However, during the testimony of the Defendant, the trial court prohibited the introduction of anything Felix Castro said. During the direct examination of the Defendant:

> DEFENSE COUNSEL: Mr. Colina, do you know whether or not Felix Castro knew Mr. and Mrs. Diaz.
>
> A. Perfectly.
>
> Q. Did he ever say anything about Mr. and Mrs.

PROSECUTOR: Objection, hearsay, calls for hearsay.

COURT: Arguments?

DEFENSE COUNSEL: Your honor, the person about whom this Statement is attributable has been a witness in this cause, and this is an exception to the hearsay rule.

PROSECUTOR: No way. I object. There's not -- this has not been placed in issue, wasn't asked of that witness, and, therefore, it's not even impeachment, it's hearsay.

COURT: I believe *so.* Sustained.

(R1760-1761).

At a later stage of the direct examination the following occurred:

DEFENSE COUNSEL: If you would, whenever, the car pulled up, would you tell us what happened then?

INTERPRETER: He says when he saw the car park, he could see, like, perfectly how Felix Castro walk out of the car, and he had a bottle of rum in his hand, his left hand, and a knife in his right hand.

Q. Okay, what happened?

I. He put the bottle of rum on top of the car and he grabbed him by the shirt and put the knife in his neck. He told him that he was the only witness.

PROSECUTOR: Objection, hearsay.

COURT: Mr. Butler.

DEFENSE COUNSEL: Your Honor, again, the witness has been here, he has testified, and we would suggest that there is an exception to the hearsay rule in regard to this testimony.

PROSECUTOR: Not one in law, your Honor. State objects.

COURT: No sir, not one that I can remember from

the Evidence Code. Sustained.

DEFENSE COUNSEL: Mr. Colina, do not tell us what he said; okay?

A. Okay.

(R1779-1780).

These rulings by the court were very clearly erroneous as the statements were not in fact hearsay at all. Hearsay, as defined by the Florida Evidence Code, "is a Statement... offered in evidence to prove the truth of the matter asserted," ¶90.801(1)(c), Fla. Stat.. The hearsay rule was never meant to be a blanket proscription against all out of court statements. Rather, the hearsay rule was aimed at statements of a testimonial nature. A statement that is offered to prove the matter contained in the statement. The definition of hearsay is an assertion oriented definition, Ehrhardt, Florida Evidence, ¶801.2 (2d Ed. 1984). As Professor Ehrhardt Stated in his discussion of the definition of hearsay:

> An out-of-court Statement which is not offered to prove the truth of the matter asserted, i.e., to prove the facts contained in it are true, is not hearsay. An out-of-court Statement by a garage mechanic to A that his brakes are defective is not hearsay if it is offered to prove that A had notice of the defective brakes. However, if the Statement is offered to prove the brakes were, in fact, defective, it is hearsay.

Id. at 439.

These initial rulings precluded the Defense from introducing statements made by Felix Castro which were behavioral rather than assertive in nature. The first statement was offered

by the defense not to prove anything truthful concerning the Diazes, but, rather to demonstrate that Castro knew who they were. The second statement was, similarly, not offered to prove the truth of the matter asserted. The Defense was hardly trying to prove that Manuel Colina was the only witness to the Diaz killing. Rather, the defense sought to join the non-verbal act of placing a knife to the Defendant's throat with the verbal act that accompanied it. A full opportunity to relate his version of the events of December 18th required no less than the ability to describe not only the physical behavior of Felix Castro but his verbal behavior as well.

The effect of these rulings and the blanket inclusion of the entire Evidence Code in the Court's ruling had a telling effect on the testimony of the Defendant, as the following excerpts demonstrate:

> DEFENSE COUNSEL: Would you tell us what happened when the car pulled up behind the house.
>
> A. When the black boy parked the car behind the house, Felix Castro told him, the black boy --
>
> PROSECUTOR: Objection. Anything he said, that's hearsay.
>
> COURT: The objection is --
>
> DEFENSE COUNSEL: I'm just going to --
>
> DEFENSE COUNSEL: Manuel, you know, tell us what happened, not so much what was said; okay? Now, anything that you say is okay, but not what other people said; okay?

(R1783-1784)(emphasis added).

DEFENSE COUNSEL: Okay. Would you tell us, without saying what was being said, would you tell us what you did then or what he did.

A. He saw the car was parked in front of the house of Raymond Spells. He went over to the window, the car window, and he told him to leave, that he didn't want any problems. He woke up, and I'm not going to say the words that he said. But he start talking a lot of things. And he told me -- and he told me to go with him --

PROSECUTOR: Objection as to anything that Felix Castro said.

COURT: All right. Wait just a minute.

(R 1787-1788)(emphasis added).

DEFENSE COUNSEL: Now, when you saw Felix later that day, what happened then?

INTERPRETER: He was very nervous and he was drunk. And he told him that he --

PROSECUTOR: Objection.

Q. No

COURT: Who told who, I don't know who he is yet.

Q. Who was it, Mr. Azula?

A. Felix Castro.

Q. What you say is okay. What Felix Castro says is not okay; okay?

(R1788-1789).

The above portions of the Defendant's testimony provide ample evidence that the prosecutor, the trial judge and, after the initial rulings by the court, the defense counsel were proceeding under a total constraint against the admission of anything that Felix Castro said during the course of these events. It is highly likely that Felix Castro made assertive

statements during the nights events that the defense may have sought to introduce as proof of their content and which would have been encompassed by the hearsay rule, but each of the above instances dealt with statements that were admissable, not as an exception to the hearsay rule, but because they lay the foundation and explain the behavior of the parties involved in that night's events. Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1984).

As noted earlier, this trial was in large part a test of the credibility of the the two men, Colina and Castro. The results of the trial court's rulings allowed the state's witness to give a full and complete account of his version but limited the Defendant to a hollow rendition lacking in context and credibility. Castro's version was a dramatic and graphic portrayal of the tragic deaths of the Diazes. Colina's was a silent movie. Under these circumstances, the court's failure to properly apply the hearsay rule denied the Defendant his rights under the Fifth, Sixth and Fourteenth Amendments to a fair trial, and warrants reversal of the judgment and sentence.

POINT IV

THE COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE DURING THE PENALTY PHASE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES

During the penalty phase, the state introduced into evidence, over defense objection, a black T-shirt described by the judge as follows:

> It contains the printing on the front of the representation is that of a semi-nude young lady on top of a partial skull. The young lady -- and the words on the right-hand side of the T-shirt would be "sweet" and on the other side of the T-shirt would be "death," they're in a kind of fluorescent white and surrounded by red streaks.

(R1630).

This piece of evidence was offered during the findings phase of the trial and was denied admission by the court, after hearing the testimony of the investigating officer that it was the shirt worn by the Defendant at the time he was arrested several weeks after the date of the offense (R1628-1634). However, during the penalty phase, the state once again offered the item into evidence arguing to the court that the shirt was evidence of "the fact that he never, in any way showed any remorse in this case" (R2118), and "how this individual is not -- in no way has remorse and in fact is wearing a flag of his crime." (R2122). Laying the grounds prior to its introduction, the state questioned the lead investigator on the same subject and was told: "Mr. Colina has never shown me any remorse over these things having happened." (R2115). Upon displaying the shirt to the jury, the investigator was asked:

Q. Was that what the individual had on on the 13th day of January of 1987?

A. Yes sir.

Q. Does that give you some cause to believe that these murders, or as the Defendant did so, was cold and calculated, heinous, atrocious or wicked?

A. Yes sir, to me.

Q. Okay, did it lend to your testimony regarding remorsefulness and the lack thereof on behalf of the Defendant?

A. Yes sir, that there is no remorse.

(R2125).

Four years prior to this trial and in frequent holdings since that time, the Florida Supreme Court has stated in unmistakable terms that "lack of remorse should have no place in the consideration of aggravating factors." Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). See also Robinson v. State, 520 So.2d 1 (Fla. 1988); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985)("It is error to consider lack of remorse for any purpose in capital sentencing.")

The admission of this testimony and the item of clothing worn by the Defendant weeks after the date of the killings were not appropriate to prove any aggravating factor and served only to inflame the passions of the jury. The Defendant's sentence of death was severely tainted by the judge and jury's consideration of this improper aggravating circumstance and requires that the Defendant's sentence be set aside.

POINT V

THE COURT ERRED IN FINDING THAT THE MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

During the course of the trial, substantial evidence was presented dealing with the manner of death and its aftermath. The state introduced photos of mutilated corpses taken at the time the bodies were discovered, approximately 17 days after the believed date of death. The bodies, at that time, were already in an advanced state of decomposition and, as a result of insect and animal activity, the heads and parts of the limbs of the victims were gone. The medical examiner and an expert in forensic anthropology testified, based on their examinations of skull fragments, that the Mr. and Mrs. Diaz died as a result of multiple skull fractures caused by multiple blows to the head by a blunt instrument (R1539-1553, 1580-1590).

Neither Dr. McConaghie nor Dr. Maples testified as to how quickly the victims lost consciousness or how quickly death occurred. Certain questions were asked, however, that indicate that death or unconsciousness came quickly. There were no skeletal injuries to the arms of Mrs. Diaz to indicate any defensive wounds (R1540). Her body had been carried to a spot behind the Diaz trailer where the Defendant made some effort to tie her up, but the evidence showed that her feet had been tied after death (R1540). The blows caused a very rapid loss of her blood from above the neck (R1541-1542). There were

no injuries to the organs within the chest or the abdomen (R1542).

The examination of Mr. Diaz yielded similar results, showing repeated blows to the head, rapid loss of blood, no force type injuries to the body and death occurring prior to being tied (R1549-1552).

The medical testimony is consistent with a sudden, unexpected attack which resulted in a quick loss of consciousness and death. This is consistent with the testimony of Felix Castro except that Castro testified that he heard a moaning sound when the bodies were taken to the spot where they were left.

The graphic quality of the State's photo and video evidence gives rise to an instinctive sense that this crime was committed in a manner that was extremely heinous, atrocious and cruel. The headless bodies found at the scene weeks after the slayings give rise to a sense of repugnance that is difficult to set aside. This Court has noted that murder is, by its very nature, a heinous offense. But the aggravating circumstance embraced by the statute requires additional acts which set the crime apart from the norm of capital felonies. State v. Dixon, 283 So.2d 1 (Fla. 1975); Blanco v. State, 452 So.2d 520 (Fla. 1984).

Although the use of a club or tire iron produced a graphic result, it appears, also, to have produced a quick death with a minimum of suffering. No defensive wounds were discovered and there is nothing to indicate any excessive suffering or

torment on the part of either victim. Boenoano v. State, 13 FLW 401 (Fla. 1988).

In presenting their case to the jury on the question of whether the killings were heinous, atrocious or cruel, the state did not attempt to show that the deaths of Mr. and Mrs. Diaz were unnecessarily slow or torturous. The state looked outside the offense to impermissible extraneous factors to make this case to the jury. Detective Hord testified:

> PROSECUTOR: Detective Hord, could you, please, relate to the jury by the way of comparison whether or not this crime is especially heinous, atrocious or cruel. And would you, please, indicate the facts that support that to the jury.
>
> A. Sir, I cannot think of another offense that I've -- of this nature, that I've investigated, that hasn't had a clear personal connection between the Defendant, or the perpetrator and the victims.
>
> Q. What do you mean by that?
>
> A. Be it a marital problem, be it sane real close psychological, physical association with these people. This is so different, sir, There's -- the connection between the victim and -- the victims and the Defendant in this case was nothing more than the people were trying to help him. They had no family connections. These people wanted to help everyone of their race.
>
> Q. When you say "race", you mean Hispanic?
>
> A. Hispanic origin, yes, sir.
>
> Q. All right.
>
> A. They had come down here and retired. And there is a growing Hispanic community in this area, and they wanted to help people, you know their origin. They offered this man their home to live in, they offered him food, they offered him financial help, such as they could afford. This is the way he repaid them. The other cases I've worked, I've never seen anything like this, sir.

> *Q.* As to the acts themselves, the mode of murder, that being compared to a gunshot wound or a knife, or something like that, have you seen anything like that before?
>
> A. Sir, I've only seen one other that's even close, and that is still not solved.

(R2113-2114).

This same approach was followed with respect to the penalty phase testimony of Capt. Miller:

> Q. Are there any about, in your investigation and the investigation of the Putnam County Sheriff's Office about Angel and Cecilia Diaz being somebody that could've caused somebody to get so upset as to murder them?
>
> A. No sir. I knew the people, I live in that area. I knew them to be religious individuals who attend the same church as I do. And they were well thought of within the religious community as well. They had a fine reputation with the Hispanic and non-Hispanic people within the community, and well thought of. Anybody that knew them liked them.

(R2146).

> *Q.* Directing your attention specifically to the mode and fashion of this murder, have you seen anything like that before?
>
> A. No sir. This is -- it's the cruelest of the -- all the offenses I've seen.

(R2147).

Consideration of the last comments by both Det. Hord and Capt. Miller is peculiar in that the medical testimony established that none of the wounds inflicted by the Defendant were observable at the time the bodies were seen by these men. The skull portions that revealed the manner of death were discovered later away from the bodies (R1194)

The trial court adopted these themes in finding this aggravating circumstance:

> Under Subsection (h) of the statute I find the capital felony was especially heinous, atrocious and cruel. This Defendant, Manuel Colina is a Mariel boatlift Cuban immigrant. He came to Putnam County and was absorbed into the count's growing Hispanic community.
>
> Angel and Cecilia Diaz were devout Catholics, who were Hispanic as well. Albeit their immediate preceding address was New York. The Diaz's had come to Putnam County upon retiring, and to spend the rest of their lives together.
>
> The testimony at trial showed that they were willing and receptive members of the Hispanic community, and that this good Samaritan behavior resulted in their brutal murders.
>
> The Diazes, out of generosity, gave a job to Manuel Colina, and offered him their home for lodging if he required the same. Their intent was the fruit of Christian love and duty.
>
> The recipient of this generosity, tragically, however, was the malevolent Manuel Colina.
>
> The Defendant gained knowledge of their home and resources. Upon a need, apparently, for crack cocaine, and so as to satiate some ill wrought and nefarious appetite, he arrived at their home in December of 1986 with a companion. And after deceiving them into a ruse where he purported to need help with a tire change, brutally murdered both of them with a metal tire tool.
>
> The medical testimony showed conclusively that with repeated and violent blows to the facial area, and to other areas of the head, life was beaten maliciously from Angel and Cecilia Diaz.
>
> The evidence showed that while engaged in this bludgeoning spree, the Defendant apparently delighted in his activity by laughing and calling the female a "bitch." The Defendant stripped the clothing from both victims, and dragged them to a wooded area behind their home. He bound the hands and feet of both victims after they were dead.

> The fashion in which the elderly Diaz couple was murdered, and the fact that they only bestowed compassion and generosity on their assassin, which was returned with brutal murder, conclusively indicates to this Court that this aggravating circumstance is abundantly appropriate, and even standing alone would warrant the death penalty.

(R2214-2216).

The trial court based its finding of especially heinous, atrocious and cruel on an array of improper considerations. The fact that the Diazes were devout Catholics, were elderly, were generous and had helped the Defendant were the primary reasons listed by the Court for this finding. But as this Court Stated in Jackson v. State, 498 So.2d 906:

> The lifestyle, character traits and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious, or cruel.

498 So.2d at 910.

The trial court also considered events occurring after the victims' death to support this finding. This too was improper in light of this Court's decisions in Jackson v. State, 451 So.2d 458 (Fla. 1984) and Halliwell v. State, 323 So.2d 557 Fla. 1975), which held that this aggravating factor cannot be supported by evidence of a defendant's actions after the victim was unconscious or dead. This Court has specifically deemed it impermissible to consider that a defendant dumped the body "in a rural area, disrobed, with the weather elements and animals to further act upon the body." Drake v. State, 441 So.2d 1079,1082 (Fla. 1983).

Past decisions of this Court have refused to find this

aggravating circumstance absent some finding that there was unnecessary or prolonged pain or torture to the victim, Squires v. State, 450 So.2d 208 (Fla. 1984); or where the victim suffers mental anguish prior to their death. Stano v. State, 460 So.2d 890 (Fla. 1984). In the present case the evidence, though not conclusive, indicates that the Diazes died or lost consciousness quickly, and without a struggle. And that the assaults were unexpected and afforded little time for the type of torment or contemplation envisioned by the statute.

This case gives rise to the same concerns addressed in Trawick v. State, 473 So.2d 1235 (Fla. 1985) where:

> [T]he trial court's findings are replete with statements that are not specifically linked to any statutory aggravating circumstance. While some of the findings may properly relate to statutory aggravating circumstances, the lack of clarity makes it difficult for us to sort out the relevant and sufficient findings from the irrelevant or insufficient ones....In effect the trial judge went beyond the proper use of aggravating circumstances in his sentencing findings and the sentence of death cannot stand.

473 So. 2d at 1240.

There, as here, the appropriate remedy was to set aside the sentence of death.

POINT VI

THE COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

The final aggravating factor found to be warranted by the trial court was that the capital felonies were committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

The court stated its finding as follows:

> Under Subsection (i) of the appropriate statute I find that the capital felony was a homicide, and was committed in a cold, calculated and premeditated manner, without any pretense of moral, legal justification.
>
> The Court finds from the evidence at the trial that given the totality of the the facts, and the atrocity of the murder, that a latin maxim, word from tort law, is appropriate as to this aggravating circumstance: res ipsa loquitor, the thing speaks for itself.
>
> Obvious from the Jury's verdict, premeditation was proven beyond a reasonable doubt. Likewise, there is no question in this Court's mind that Manuel Colina knew he was going to kill the Diazes upon going to their residence, and that he was fully aware that the multiple blows to their heads with a metal tire tool would cause, and were intended to cause their deaths.
>
> Inherent with this finding is that the victims' (sic) conduct was calculated. One need only consider the victims, their apparent kindness, generosity and humility, coupled with the way in which they were murdered, to see that their murders by one whom they befriended, is a cold calculated thing.

(R2217)(emphasis added).

Very clearly, the judge's recitation is a misstatement

of the law as it applies to this factor. A jury finding of premeditation is not an inherent finding of cold or calculated nor does it speak for itself to that effect. Simple premeditation of the type necessary to support a conviction is not sufficient to meet this standard. Jent v. State, 408 So.2d 1024 (Fla. 198). "What is required is a heightened form of premeditatioi ...Those that are executions or contract murders fit within that class." Hamblen v. State, 527 So.2d 800 at 805 (Fla. 1988). In Nibert v. State, 508 So.2d 1 (Fla. 1987) this Court stated with respect to this factor:

> We have consistently held that application of this aggravating factor requires a finding of heightened premeditation; i.e., a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder.

508 So.2d at 4.

The evidence produced at trial indicated that the Defendant and Felix Castro went to the home of the victims to burglarize the residence or rob the occupants to obtain money with which to purchase crack cocaine; a drug that was consumed both before and after the crime and which apparently triggered additional thefts the following day. There was no testimony as to any planning or coordination between Colina and Castro beyond a statement to the effect that Colina would take care of the woman. The nature of the attacks and the repeated blows take on far more the character of a "crack" induced frenzy than they do a contemplative, methodical killing. The behavior after the killings, when the Defendant moved the Diazes to a spot behind

the trailer and tried to tie them up, coupled with his statements at the time, indicate a belief, albeit a mistaken one, that they were alive and needed to be restrained for a while. This behavior was not consistent with a long standing plan to kill the Diazes. Rather, it seems to reflect an initial plan to incapacitate them and leave the area, as Colina had planned, rather than to murder them.

The facts surrounding these killings do not show the "particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator" that this factor requires, Nibert v. State, 508 So.2d 1, 4 (Fla. 1987) citing Preston v. State, 444 So.2d 939 at 946 (Fla. 1984). The judge correctly described this crime as a "crack" killing in announcing his sentence. It was a senseless crime, but it evidenced little planning or purpose.

POINT VII

THE COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST

The second aggravating factor found by the trial court to exist was that the killings were done for the purpose of avoiding or preventing a lawful arrest. The court based this finding on the fact that the victims knew the Defendant and that the Co-Defendant, Felix Castro stated that the Defendant killed them because they knew him (R2214).

The pertinent portion of Castro's testimony was as follows:

> PROSECUTOR: Did you ever ask the Defendant before then why he had hit those people so much?
>
> A. I kept asking him why, you know, why we had to do that, you know, because there was no purpose for it.
>
> Q. And what did he say?
>
> A. He said don't -- he told me: They know me, but they don't know you. I Don't know why he told me that.
>
> Q. He said they don't know -- they knew him?
>
> A. They knew him and they didn't know me.
>
> Q. Were you arguing about it?
>
> A. Yes. I kept asking him what was the motive. He said: Don't keep asking me. I said: Okay I'll forget about it.
>
> Q. And you forgot about it?
>
> A. No, not to this day.

(R1255-1256).

There was other testimony concerning the Defendant's stated

reason for the killings. The state called Troy Eubanks to testify as to a conversation he had with the Defendant while in the County Jail. He testified:

> PROSECUTOR: Who said what?
>
> A. He said he knowed I had found the skull; I said yeah, I was the one that had found it when I was on the work crew.
>
> Q. And what did he say then?
>
> A. Then he told me how he had killed that man.
>
> Q. Okay. And did he tell the reason why he killed the man?
>
> A. Yeah, he said they wasn't paying him enough money to keep their yard up.

(R1693-1694).

During the penalty phase of the trial, Det. Hord testified:

> Q. I asked you before, whether or not you developed in your investigation by talking to Dinato Jimenez whether or not the Defendant was mad at the Diazes?
>
> A. Yes sir.
>
> Q. Was he?
>
> Q. Yes sir.
>
> Q. And was it for a lack of pay for jobs or jobs that he was supposed to have done?
>
> A. It was more that he felt he was insulted at the amount he was offered to do some work that -
>
> Q. Thought they could afford more?
>
> A. Yes sir.

(R2142).

This Court has previously held that, "when the victim is not a law enforcement official[,] [p]roof of the requisite intent

to avoid lawful arrest and detection must be very strong." Riley v. State, 366 So.2d 19, 22. This factor is inappropriate where there are several explanations for why the murder may have been committed and the elimination of a witness is merely one of them. Jackson v.State, 502 So.2d 409 (Fla. 1986).

In Riley, this Court found the factor applicable where the record supported the view that only one interpretation was possible. The killing in that case arose after the danger of later identification was expressed by one of the perpetrators. In Rogers v. State, 511 So.2d 526 (Fla. 1987) this Court held:

> This particular factor requires clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness.

511 So.2d at 533.

There is no doubt that the ability of the victims to identify the Defendant would furnish a motive to extend a simple robbery into a murder. But the mere fact that a victim could later identify the Defendant is not sufficient to support this aggravating factor. Bates v. State, 465 So.2d 490 (Fla. 1985); Hansbrough v. State, 509 So.2d 1081 (1987). The Defendant's brief attempt to explain his motive for the killing when questioned repeatedly on the matter is hardly the proof required to meet the standard for this aggravating factor.

The trial judge quite accurately described this killing as "crack" related, and, in all likelihood, the effects or after-effects of this drug stripped the Defendants of any great concern for theirs or their victims welfare. The almost bizarre

behavior of the Defendant in trying to bind his already deceased victims coupled with his earlier statement that he wanted to leave the area (R1213-1214) is inconsistent with the finding that he was solely or predominantly concerned with their later identification. Given the state of mind and the demonstrated behavior of Colina and Castro that night, it is difficult to accept that Mr. and Mrs. Diaz would have been spared this attack had they not known the Defendant.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the verdict and judgment of guilty be set aside and the cause remanded for a new trial.

The penalty phase and sentences of death were also subjected to those infirmities previously described and if the judgment is permitted to stand, it is respectfully submitted that the sentences of death should be set aside and sentences to life imprisonment substituted thereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the Attorney General for the State of Florida by regular U.S. Mail this 11th day of January 1989.

Attorney for Appellant