IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,436

HENRY JOSE ESPINOSA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY TO APPELLEE'S BRIEF

Due to the rules relating to the length of briefs, and because this Reply Brief is already in excess of the allowed number of pages, we specifically reply to some, but not all of the state's arguments herein. We adopt and incorporate by reference all arguments and citations of authority raised and cited in our Initial Brief, as though set forth in their entirety herein. We reassert and rely on all matters raised in the Initial Brief, and we do not waive any matters not specifically addressed in our Reply Brief.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING ESPINOSA'S REPEATED MOTIONS FOR SEVERANCE DUE TO THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY HIS CO-DEFENDANT'S IRRECONCILABLE AND ANTAGONISTIC DEFENSES, AND BY THE COURT'S REFUSAL TO ALLOW ESPINOSA TO PRESENT HIS FULL DEFENSE, IN VIOLATION OF THE RIGHTS GUARANTEED BY ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Antagonistic Defenses

The thrust of this point on appeal is that the trial court erred in denying a severance of defendants since they could not receive a fair trial because their defenses were antagonistic and mutually exclusive. Based upon the record presented in this case, Espinosa was entitled to a severance.

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The state suggests that Espinosa knew prior to trial that his defense and that of co-defendant Beltran were going to be antagonistic, and therefore Espinosa could prepare for trial without being prejudiced. We respectfully reply that whether Espinosa had a sufficient chance to look both ways at the railroad crossing, or not, the locomotive was going to run over him going just as fast, no matter how carefully he looked. In this case, looking both ways (or having prior knowledge of antagonistic defenses) could not help him.

The state's argument on this point relies on this Court's decision in McCray v. State, 416 So.2d 804, 806 (Fla. 1982), which holds that the object of the severance rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime; rather the rule is designed to assure a fair determination of each defendant's guilt or innocence. The opinion further provides that the question of whether a severance ought to be granted must necessarily be answered on a case by case basis; and neither the fact that a defendant might have a better chance of acquittal in a separate trial, nor the fact that there is hostility among defendants is a sufficient reason, by itself, to require a severance.

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We find that the key phrase here is "by itself" meaning that a better chance of acquittal without more, or hostility among defendants without more, will not necessarily require a severance. And we also note that this Court held that the question of whether a severance should be granted must necessarily be answered on a case by case basis. McCray, supra, 416 So.2d at 806.

In McCray, the denial of a severance was held to be proper on the basis of the record presented. Using the case by case analysis, the trial transcript here demonstrates a conflict in defenses so irreconcilable that a jury would infer the guilt of Henry Espinosa due to that conflict alone. The forced joinder of Henry Espinosa and Mauricio Beltran compelled a condition of antagonism between them so extreme that it rendered a basic fair trial for Espinosa, impossible.

Espinosa's problem here was not Beltran's statement, which was not admitted during the guilt/innocence phase of the trial. His problem was that even though the defendants knew prior to trial that their defenses would be antagonistic, it was impossible for Henry Espinosa to prepare to adequately defend himself from the vicious attack leveled against him by Beltran's counsel. This is the unfairness which could not be surmounted in this case.

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Espinosa was brutally attacked on cross examination by Beltran's counsel as much, if not more than by the prosecutor. It is difficult enough to try to defend oneself against the state, but to have to face two accusers adds an unconstitutional dimension to the trial.

The state argues that a severance was not required just because Espinosa testified but Beltran did not. We do not agree. Beltran had every intention of testifying until he saw his co-defendant brutalized by his (Beltran's) own counsel on cross examination. As a result of the severe antagonism between defendants, as highlighted by Beltran's counsel on cross examination of Espinosa, Beltran changed his mind and did not testify.

As a result, Espinosa was accused and prosecuted by Beltran, but was left without any opportunity to confront and cross examine this accuser, in violation of his rights to due process, confrontation and cross examination as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. While knowing that Beltran's defense was that Espinosa committed the crimes, there was no way that Espinosa could have prepared to defend himself against the grilling cross examination he received from Beltran's counsel. A severance was necessary to ensure a fair determina-

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tion of Espinosa's guilt or innocence. There could be no fair trial for Espinosa facing two accusers.

The state argues that Beltran's decision not to testify is irrelevant to the issue of severance. As authority, it relies on Dean v. State, 478 So.2d 38 (Fla. 1985). We find that Dean is not on point since in that case, the co-defendant testified and blamed the defendant. The defendant did not testify, this antithesis of the situation in the instant case. At least Dean had an opportunity to fully cross examine his accuser.

The other case on which the state relies, O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983) is inapplicable for the same reason. That case holds that the accused's decision to testify is unrelated to a determination of the propriety of a severance. There is nothing in the opinion to indicate that the defendant was deprived of an opportunity to cross examine his accuser the co-defendant, the situation in this case.

Rule 3.152(b)(1)(i) of the Florida Rules of Criminal Procedure provides for a severance before trial "[u]pon a showing that such order is necessary . . . to promote a fair determination of the guilt or innocence of one or more of the defendants."

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We note that in spite of the trial court's expression of displeasure when federal cases were cited in support of the motion for a severance (R 471), the state has cited and relied on federal case law in support of some of its arguments. In keeping therewith, we have reviewed in more detail the federal law concerning the severance issue, and find a number of illuminating cases to share with the state and the Court.

As the federal courts have long recognized, when joinder of defendants or offenses causes an actual or threatened deprivation of the right to a fair trial, severance is no longer discretionary. United States v. Boyd, 595 F.2d 120 (3rd Cir. 1978); Baker v. United States, 329 F.2d 786 (10th Cir. 1964).

It is well recognized that "joinder of defendants requires a balancing of the right of the accused to a fair trial and the public's interest in the efficacious administration of justice." United States v. Zicree, 605 F.2d 1381, 1386 (5th Cir. 1980).

And it is clear from the instant record, that "efficacious administration of justice" was the trial court's only concern here. It appears that the right to a fair trial was not even placed on the scale. The trial judge stated that he did not "like to try cases separately. . . I think it is a

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waste of everybody's time." (R 457); and ". . . most judges like to sit back and let the defense attorneys do whatever they want . . . and accuse anybody of anything they want. I don't think that the law has ever said that that is unfair to either." (R 469).

But no defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several defendants in one trial rather than in multiple trials. United States v. Boscai, 573 F.2d 827 (3rd Cir.1978). As the First Circuit held in King v. United States, 355 F.2d 700, 702 (1st Cir. 1966), "[a] joinder of . . . defendants involves a presumptive possibility of prejudice to the defendant. . ." Indeed, it appears that in this case, "the only real purpose served by permitting a joint trial . . . may [have been] the convenience of the prosecution in securing a conviction." United States v. Fountz, 540 F.2d 733, 738 (4th Cir. 1976).

It hardly seems fair to have a rule of law that a defendant is not entitled to a severance simply because his chances of acquittal would be better in a separate trial; where that rule seems to result in the somewhat absurd rule of law that the prosecution is entitled to a joint trial because its chances of conviction are better, or easier.

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The courts have recognized that antagonistic defenses can prejudice co-defendants to the degree of creating the impossibility of receiving a fair trial. United States v. Crawford, 581 F.2d 489 (5th Cir. 1978). Hence, a severance is required where an antagonistic defense admits to some or all of the elements of the charge, United States v. Roberts, 583 F.2d 1173 (10th Cir. 1978); or where the "defendants present conflicting and irreconcilable defenses and there is a danger that the jury will unjustifiably infer that the conflict alone demonstrates that both are guilty." Rhone v. United States, 365 F.2d 980 (D.C. Cir. 1966).

State and federal constitutional due process principles soundly reject a prosecution which creates an intolerable atmosphere of hostility which is inconsistent with constitutional guarantees of a fair trial.

For all of the foregoing reasons, and because nothing Espinosa was able to do or could have done could have mustered the Herculean efforts required to avoid the inherent prejudice he suffered by virtue of his joint trial with Mauricio Beltran, Espinosa should be granted a new trial at which he is tried alone and fairly, by a single accuser on behalf of the State of Florida alone.

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Espinosa Could Not Defend Himself in a Joint Trial

On this point, we contend that Espinosa was precluded from presenting evidence about Beltran's past history as the leader of a Nicaraguan death squad called the "Vengadores," and his nickname "La Bestia" or "the Beast" by which he was known due to his violent and vicious tendencies, including torture and murders.

The state argues that the testimony was too remote in time and therefore inadmissible in a joint trial or even in a separate trial, citing Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied, 103 S.Ct. 274 (1982). We have read and reread Hitchcock, but cannot find any definition or standards by which to measure "remote" in order to determine whether that decision might be applicable here or not.

And in any event, it was testimony about a witness's violent tendencies for purposes of impeaching the credibility of the witness, that Hitchcock sought to elicit in his case. Here, on the other hand, the violent tendencies of the co-defendant were crucial to Espinosa's theory of defense.

Considering the brutality of the crimes, the lack of evidence that Espinosa had problems with the Rodriguez family, the positive testimony from Odanis that Espinosa had been a good friend to her and to her family; and by contrast

considering that Beltran had no prior relationship or friendship with them, as Espinosa did, the court's refusal to allow Espinosa to develop evidence that Beltran was known as "The Beast," that he led a Nicaraguan hit squad called the "Vengadores" and that in that capacity he murdered, maimed and tor tured thousands of people, deprived Espinosa of presenting a significant aspect of his defense.

The trial court improperly weighed Espinosa's right to present his defense with credible testimony, against Beltran's right to be tried free of prejudice. The court sided Beltran, but that decision would not have had to be made in a separate trial. Tried separately, Espinosa would have been tried fairly and been allowed to present his defense.

POINT II

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN PRECLUDING TWO CRITICAL ASPECTS OF ESPINOSA'S DEFENSE, THE CRIMINAL BACKGROUND OF BERNARDO RODRIGUEZ, AND THE MILITARY KILLER BACKGROUND OF MAURICIO BELTRAN, IN VIOLATION OF ESPINOSA'S RIGHTS HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Precluded Evidence Re: Mauricio Beltran

On this issue, we rely on the argument in our initial brief, and on the foregoing argument in Point I in this reply brief.

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Precluded Evidence Re: Bernardo Rodriguez

With respect to the fact that Bernardo Rodriguez was a convicted felon and the trial court's refusal to allow that fact into evidence, the state argues that there was no error because Espinosa was allowed to present some evidence connecting Rodriguez with drug dealing; and because evidence of Rodriguez's prior conviction was irrelevant and inadmissible.

We respectfully disagree. Yes, as the state recounts, Espinosa was permitted to present evidence through Detective Vas that a car parked in front of the Rodriguez residence on the night of the incident, belonged to Maria Castellanos; and that a search of the Castellanos residence yielded a marijuana packaging and distribution center. Yes, Vas also testified that he found a beeper in the Castellanos house with a number matching Bernardo Rodriguez's beeper. Yes, the state's fingerprint expert testified that she found Bernardo Rodriguez's fingerprints not only in Castellanos's car, but also in her residence.

And yes, Espinosa testified that Rodriguez told him that he was dealing in marijuana; and yes, Espinosa did testify that the Rodriguezes tried to force him to transport marijuana, and that Beltran went wild when Espinosa refused to do as they ordered him to.

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But the one truly convincing and compelling piece of evidence, Bernardo Rodriguez's federal marijuana trafficking conviction, was kept from the jury.

Why was it so compelling, and so critical to Espinosa's defense? Because maybe the jury did not find Espinosa to be credible. Maybe the jury felt sorry for the two young Rodriguez girls who had lost their parents, and wanted very much to give the deceased father and mother the benefit of the doubt.

Perhaps the jury wanted to believe that it was mere coincidence that a car parked in front of the Rodriguez home belonged to Maria Castellanos and that a search of her residence revealed a marijuana packaging and distribution center; and that a number on a beeper found by police in the Castellanos house matched the victim's beeper; and that Bernardo Rodriguez's fingerprints were found in Castellanos's car and residence. Perhaps the jury felt (or wanted to believe) that there was a totally innocent explanation for all those facts.

And perhaps they did not believe Espinosa when he testified that Bernardo Rodriguez told him that he was involved in dealing marijuana; or that Bernardo and Teresa Rodriguez tried to force him to transport marijuana against his will.

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But the one solid piece of evidence that they would not be able to overlook, or to attribute to any innocent explanation would be hard evidence, documentation, that Bernardo Rodriguez had been prosecuted by the United States Government for trafficking in marijuana, and that he was a convicted drug felon, and that he was on probation for that conviction.

The two cases cited by the state for the proposition that evidence of Bernardo Rodriguez's conviction are irrelevant because specific acts of a deceased are admissible only when offered by the defendant in support of a defense of self defense, Rolle v. State, 314 So.2d 167 (Fla. 3rd DCA 1975) and Webster v. State, 500 So.2d 285 (Fla. 1st DCA 1986), do not apply here.

Rolle and Webster concern admission into evidence of testimony of the victim's reputation for violence, where the defendant's defense is self-defense. Rolle holds at 314 So.2d 168, that evidence of specific acts of violence is not admissible to show that the deceased had a violent and dangerous character.

A history of violence was not what Espinosa wanted to show here, and it was not for the same purpose either. And we note that in Rolle, the defendant was permitted to testify that the victim was a dope addict and a robber.

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Likewise, in Webster, the court excluded evidence of the victim's reputation for violence, one of the reasons being that the evidence offered by the defense came from the victim's college campus rather than his residential community. We are led to believe by the opinion that had the evidence offered been the victim's reputation in his residential community, the result might have been different.

POINT IV

THE TRIAL COURT ERRED IN SENTENCING ESPINOSA TO DEATH; THEREBY DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; THE SENTENCE MUST BE VACATED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

Espinosa was Denied Time and Money to Present Important Evidence in Mitigation

When the sentencing phase was about to begin, defense counsel asked the court for sufficient additional time and for expense monies to pursue substantial mitigating evidence which had just been revealed to him by Espinosa, namely that Espinosa had been seriously abused as a child by his mother, both physically and mentally. Espinosa's mother and siblings in Guatemala were willing to travel to Miami to testify at the sentencing phase, but they were without funds to make the trip.

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The state's brief on this issue myopically directs itself to one, narrow argument, that Espinosa waited too long to file his motion since he knew that he was facing the death penalty from the outset of the case; and that during trial, the court announced more than once that if the jury returned a verdict of first degree murder, the sentencing phase would begin the following day.

While it is true that Espinosa did know that he was facing the death penalty, and that the trial judge did announce that the sentencing phase would being without delay so Espinosa probably could have brought this matter to counsel's attention earlier, it is clear from this record that the trial judge considered the request for cost monies for counsel to travel to Guatemala, or to bring the Espinosa family to Miami to pursue this mitigating evidence a total waste of time, and an attempt to subvert the system.

The state's brief says that after defense counsel admitted that during trial he had advised Espinosa of the trial court's policy regarding penalty phases, "[t]he trial court then found the motions to be untimely and denied it," giving as a record reference, page 2493.

We have reviewed page 2493 and find that trial counsel argued that if the state is going to prosecute an insolvent,

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indigent defendant, they have to provide all reasonable expenses and costs to help him prepare his defense; and that he was giving the court in good faith, what Espinosa told him about the abuse in his past which would be significant mitigation. The trial court responded:

> If you would have brought this to my attention at any time - I scheduled this hearing. I'm not going to unschedule it.

That is not exactly a ruling that the motion was denied because it was untimely. It was more like a ruling that nothing would disturb the court's schedule once it was set, even if it meant depriving the defendant of the opportunity to present a complete defense in the fight for his life.

We note that in this Court's recent decision in Heiney v. Dugger, _____ So.2d _____ (Fla. 1990), 15 F.L.W. S47, the cause was reversed and remanded for an evidentiary hearing on the issue of ineffectiveness of counsel for failing to present nonstatutory mitigating evidence, including an assertion that Heiney suffered severe abuse as a child from a violent father who sometimes tied Heiney to a cement block in the back yard.

If this Court considers the failure of counsel to present this evidence to be sufficiently significant as a

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possible indication of ineffective assistance of counsel, then surely here, when it was brought to the trial court's attention by counsel acting in good faith, the trial court's refusal to give counsel an opportunity to pursue and present such evidence also ought to be reversible error.

This request was not just denied because it was untimely. The record is clear that it was denied because the trial court wanted to proceed "as quickly as possible" with the penalty phase, and because the court found the request to be a "subversion of the system," and an attempt to undermines the foundations of American justice.

Although Henry Espinosa was on trial for his life, the trial judge refused to "spend. . . the money to bring witnesses from Guatemala" so as not to "depriv[e] the people of the State of Florida of their hard-earned funds. . ." (R 2491 to 2492), and "if I get reversed, that's fine. I mean, that's the way the system works." (R 2497).

Error to Instruct on Heinous, Atrocious and Cruel

State's arguments to the contrary, the evidence did not show that Teresa Rodriguez died a torturous death. Giving an instruction on the aggravating factor of especially heinous, atrocious or cruel was not proper in this case, and finding

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that aggravating factor was not correct. This crime was not accompanied by such additional acts as to set the crime apart from the norm. It did not show a conscienceless or pitiless crime which was unnecessarily torturous to the victim. The test of cruel and heinous simply was not met in this case. See, for example Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied 431 U.S. 925 (1977); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974); Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and citations of authorities and those raised and cited in the Initial Brief of Appellant, Henry Jose Espinosa respectfully urges this Honorable Court to reverse his conviction and sentence of death, that is to grant him a new trial for the unfairness of his prosecution, or at least to vacate his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply Brief of Appellant Henry Espinosa was mailed on February 21, 1990 to MICHAEL NIEMAND, Assistant Attorney General, Suite N-921, 401 N.W. Second Avenue, Miami, FL 33128; to NANCY C. WEAR, Attorney for Mr. Beltran, P.O. Box 144775, Coral Gables, FL 33144-4775; and to MR. HENRY JOSE ESPINOSA, No. 113994, Florida State Prison, R-3-S-7, P.O. Box 747, Starke, FL 32091.

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