

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,437

MAURICIO BELTRAN-LOPEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

JUL 23 1990  
CLERK OF COURT

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AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH  
JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA  
CRIMINAL DIVISION

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BRIEF OF APPELLEE

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Beltran-Lopez then filed a motion to sever his trial from Espinosa<sup>2</sup> alleging irreconcilable defenses. (RB.2461-2466). Beltran-Lopez specifically contended that his defense was antagonistic and mutually exclusive to Espinosa's since he was going to blame Espinosa for the crime without accepting any responsibility whatsoever. (RB.2462). At the hearing thereon, both Beltran-Lopez and Espinosa advised the trial court that they were going to testify at trial and place the entire blame on the other. (RB.243-244). The trial court denied the motion to sever. (RB.363).

Trial commenced on August 29, 1988. The State's first witness was Odanis Rodriguez.

Odanis Rodriguez, the daughter of the murder victims, Bernardo and Teresa Rodriguez, was eleven years old on the date of the incident. She lived with her parents and older sister, Odenia. (RB.790-791). On the night of the incident, the sisters went to bed around 10:00 P.M. Each girl had her own bedroom, which rooms were adjacent to each other. During the night, Odanis was awakened by a loud noise emanating from inside the house. Odanis then heard her mother's and Espinosa's voices. (RB.792-793). She recognized Espinosa's voice because they used to be neighbors. (RB.798). Before she could react, the telephone

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<sup>2</sup> Espinosa also filed a motion to sever alleging irreconcilable defenses. He claimed that Beltran-Lopez was totally responsible and was not going to accept any criminal responsibility.

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## INTRODUCTION

The Appellant, **Mauricio Beltran-Lopez**, was the defendant below. The State of Florida, was the prosecution below. Since Appellant was tried with his codefendant, **Henry Jose Espinosa**, the Appellant will be referred to as Beltran-Lopez, the codefendant will be referred to as Espinosa and the Appellee will be referred to as the State. The symbol RB will designate the record on appeal.

## STATEMENT OF THE CASE AND FACTS

On July 30, 1986 Beltran-Lopez and Espinosa were indicted on two counts of first degree murder for the killing of Bernardo Rodriguez and his wife Teresa, one count of attempted first degree murder against their daughter Odanis Rodriguez; armed robbery, and armed burglary. (RB.2357-2361). Beltran-Lopez pled not guilty and demanded a jury trial.

Prior to trial, Beltran-Lopez moved to suppress his confession alleging that it was not freely and voluntarily made. (RB.2416-2417). Although the trial court denied the motion, the State, in order to avoid a Bruton<sup>1</sup> problem or require separate trials, advised the trial court that it was not going to introduce the confession at trial. (RB.16-17).

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<sup>1</sup> Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

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in her room rang. Thereafter, a second man, later identified as Beltran-Lopez opened her bedroom door and pulled the telephone cord from the wall and left with the cord. (RB.794-795, 832).

Odanis then heard talking, so she opened her door and saw her mother, Espinosa and Beltran-Lopez. She observed Espinosa holding a knife, while Beltran-Lopez was holding her mother. Odanis, responding to her mother's signals, went into her room and locked the door. (RB.796-798). Odanis then heard her mother say to Espinosa, "Don't, Henry, don't." (RB.799-800). Espinosa then came to her bedroom door and told Odanis that her mother wanted to see her. As soon as Odanis opened the door, Beltran-Lopez grabbed her from behind and held her nose and mouth. Espinosa then started stabbing her. (RB.801-802).

The next thing Odanis remembered was that her sister and Maria Blanco dragged her out of the house and brought her to the hospital. While there, Odanis described Beltran-Lopez to the police as having black hair, an acne scarred face and chubby cheeks. (RB.802-803). While in the hospital, the police showed Odanis a photo line-up. Although she had tubes in her mouth, and was unable to speak, she picked Espinosa out of the line-up. She was shown a second photo line-up, whereat she picked Beltran-Lopez out as the man who held her mouth and nose while Espinosa stabbed her. (RB.804-806).



Maria Blanco, a family friend, was awakened that night by a telephone call from Odenia. Odenia told her something was happening and to come right over. She arrived at the Rodriguez' residence within twenty minutes and she found Odenia in her sister's room. She saw Bernardo on the floor between the kitchen and dining room and Teresa was on her bed with her feet dangling over the edge. Blood was everywhere. (RB.846-850). Odenia told Blanco that her parents were dead, but Odanis was still alive. Blanco then took Odanis to the hospital. After staying at the hospital for some time, Blanco and Odenia were driven to Blanco's home by the police. There Odenia slept and later in the afternoon was questioned by police. (RB.850-853).

Officer Victor Perterman, of the Metro Dade Police Department, was the first officer on the scene. He observed a blood covered house, with Bernardo on the kitchen floor and Teresa on the bed with her legs dangling over the edge. He then secured the scene. (RB.857-862).

Roger Taaffe, a crime scene technician for the Metro Dade Police Department arrived on the scene at 6:10 A.M. He was the lead technician. (RB.874-876). Taaffe photographed and sketched the scene. The sketch showed 25 areas where blood was collected. A photograph showed a wooden knife holder with a knife missing therefrom. (RB.885). A large quantity of blood with print or palm ridge patterns was found on the refrigerator door, and it

was latent processed. (RB.889). Blood with ridge patterns was also found on a plastic slip cover and it was removed so latent comparisons could be done. (RB.890). Blood droplets and a blood soaked rag were located on the television and they were collected. (RB.893). Teresa Rodriguez was located in the master bedroom with a pillow over her head and a phone cord off to the side. The pillow was collected. (RB.896-897). The blood stains and items that contained blood were collected by Officer Ecott. (RB.905). A total of 41 latents were lifted from the scene and sent to identification. (RB.925-927).

On July 12, 1986, Taaffe photographed and processed for prints a silver colored Toyota. (RB.905-906). A 38 caliber cartridge was found in the trunk as well as blood stained clothing. (RB.907-908). Prior to dealing with the Toyota, Taaffe photographed Espinosa, which showed he had a scratch on his face. At that time, Espinosa's watch was impounded since blood was found on its face. (RB.922, 928).

Odenia Rodriguez was 12 years old at the time of the incident. She confirmed that she lived with her parents and her younger sister Odanis and that her room was adjacent to her sister's. (RB.965-967). During the night, she was wakened by her mother's screams. She opened her bedroom door and saw her father on the kitchen floor in a pool of blood. Although she did not see her mother, she heard her mother say, "Odenia, Odenis, don't

open the door." Odenia went back in her room, locked the door, and called Maria Blanco. (RB.968-969). Odenia then heard her mother tell Espinosa that if he would leave she would not call the police. She then heard Espinosa go to her sister's room and tell her sister to come out because her mother wanted to see her. Odenia recognized Espinosa's voice since she spoke to him often when they were neighbors. (RB.970-972). Shortly thereafter, Maria Blanco arrived and they took Odanis to the hospital. Once at the hospital, Odenia gave the police a statement, but she did not tell them that she recognized Espinosa's voice because she was confused. However, later that afternoon, after she slept at Blanco's house, she told the police that she recognized Espinosa's voice. Subsequently, she was shown a photo line-up and she picked out Espinosa. (RB.973-978, RE.1407-1412).

Detective Pasquale Diaz, of the Metro Dade Police Department, was assigned to the homicide team investigating the incident. (RB.990-992). Diaz responded to the hospital in order to speak with Odanis. He first spoke with her doctor concerning her condition and was advised that she suffered multiple stab wounds and was in the operating room. (RB.993-996). Diaz then spoke with Odenia, who was upset and crying. Later that afternoon he responded to Blanco's residence and spoke with Odenia. At that time, she told Diaz that Espinosa killed her mother, because she recognized his voice as the one she heard in the house. (RB.996-1001). Diaz then transported Blanco and

Odenia to the homicide office. Once there, Odenia was shown a photo line-up, whereat she picked out Espinosa as the man whose voice she recognized. Odenia explained to Diaz that the reason she did not tell him about the voice before was out of fear Espinosa might return. (RB.1001-1005). On July 14, 1986 Diaz returned to the hospital in order to show Odanis a photo line-up. Although she was unable to speak, she was alert and pointed to Beltran-Lopez as one of the men involved. (RB.1006-1008).

Richard Ecott, a crime scene technician for the Metro Dade Police Department, was part of Officer Taafe's crime scene team. (RB.1024-1025). He first responded to the hospital to secure Odanis' nightgown. He then responded to the scene where he was directed to collect blood samples. (RB.1026-1027). Ecott collected blood samples by either taking the item the blood was on or scrapping dried blood off of the item. (RB.1033). Samples were taken from floor tiles, the rag on top of the television, flakes of blood from a living room chair, kitchen tiles, a throw rug found near Bernardo Rodriguez, the tablecloth from the dining room table, the front door doorknob, bedroom floor tiles from Odanis' room, carpet from the master bedroom, the telephone from the master bedroom, flakes from the living room table, the doorknobs from the girls' bedrooms, the pillow case covering Teresa's face, Teresa's panties, the plastic cover on the dining room chair, and the freezer door. All blood samples were sent to serology. (RB.1036-1067).

Michael Fisten, a homicide detective for the Metro Dade Police Department, was a member of the homicide team. (RB.1086-1087). He was given the task to locate the perpetrators. In accordance therewith, on July 10, 1986 in the evening hours he responded to the hospital to show Odanis a photo line-up. Prior to dealing with Odanis, Detective Fisten spoke with her doctors to determine if she was coherent. After being advised that Odanis was alert and coherent, Detective Fisten spoke with Odanis. Although intubated and unable to speak, Odanis nodded that she understood what was occurring. When asked if she knew who did it, she nodded in affirmative. Detective then presented her with the photo line-up and she nodded in the affirmative when shown Espinosa's picture. (RB.1089-1098).

On July 12, 1986, Diaz arrested Espinosa in a parking lot in Hialeah. After the arrest, Espinosa's silver Toyota was impounded and searched. As a result of the search, a 38 caliber bullet was seized. (RB.1099-1101). Diaz then proceeded to Espinosa's residence and there he found a medical prescription with Beltran-Lopez' name. Diaz also learnt where Beltran-Lopez lived. (RB.1101-1102).

On July 14, 1986, around 10:00 A.M. Detective Fisten returned to the hospital. Odanis told him that there was another man involved, who she did not know, but who was Nicaraguan.

Detective Fisten then left to obtain another photo line-up. He returned to the hospital in the late afternoon and presented Odanis with the second photo line-up. Odanis immediately picked out Beltran-Lopez as the second man. (RB.1103-1108). Immediately thereafter an arrest warrant was obtained for Beltran-Lopez and he was arrested at the Lanza's residence. At the time of the arrest, Beltran-Lopez had a wound on his left hand between his index finger and thumb. (RB.1108-1109). After the arrest, the Lanza's residence was searched, and a pouch with Beltran-Lopez' identification and money was found in a garbage can outside the residence. (RB.1116-1117). There was \$5,310 in the pouch and the money had blood on it. The bloody bills were then sent to serology. (RB.1118).

Alba Luz Lanza, at the time of the incident, knew Beltran-Lopez for two years and Espinosa for one month. (RB.1135-1138). In July, 1986, she was aware that Beltran-Lopez and Espinosa were sharing an apartment. Early in that month, both men came to her home. Beltran-Lopez had a wound on his hand between the thumb and forefinger. The wound was recent and it did not look as if it received medical treatment. Beltran-Lopez stated that he received the wound while working on his car. (RB.1139-1140). While in Lanza's house, Beltran-Lopez, who was carrying a small briefcase, asked Lanza to hold it for him. Beltran Lopez opened the bag and revealed that money was inside. Beltran-Lopez told her he got the money as a loan from his boss and that she should

not tell anyone about it. They then left and returned later in the afternoon. Beltran-Lopez then spent the next couple of nights, while Espinosa departed. (RB.1141-1144). During Beltran-Lopez' stay at the Lanza's, Espinosa was arrested and Alba Lanza became aware of the incident. Lanza asked Beltran-Lopez if he was involved, but he initially denied involvement. Lanza confronted Beltran-Lopez again, and this time he admitted that he went to the Rodriguez' residence to make a drug deal and that Espinosa assisted him. (RB.1152,1157,1161). Thereafter, the police came to her house and arrested Beltran-Lopez. After the arrest, Lanza threw the briefcase with the money in the trash. (RB.1146).

Roger Mittleman, the associate medical examiner involved in the case, responded to the scene. He found Bernardo lying in the kitchen area in a pool of blood and Teresa in the master bedroom. Both had stab wounds, while only Bernardo had a gunshot wound. Teresa was lying across the bed with her feet dangling over the edge. She had a pillow over her face and her nightgown was ripped. She had stab wounds on her abdomen, across her neck and the imprint of two necklaces was also evident across her neck. She also had petechial hemorrhages in her eyes. (RB.1170-1172). Petechial hemorrhages are indicative of strangulation. (RB.1181). Dr. Mittleman performed autopsies on both victims. The autopsy of Bernardo revealed six stab wounds, two of which caused considerable bleeding. It also revealed a gunshot wound in the

left lower chest. The bullet went through the diaphragm, liver, spleen and exited through the ribs. The bullet fragment was recovered. The cause of death was gunshot wound to the chest associated with stab wounds. (RB.1186-1205). The autopsy of Teresa revealed abrasions on her face that were consistent with being smothered by a pillow. (RB.1206-1207). She had petechial hemorrhages, which indicated that she was alive when she was being strangled. (RB.1208-1209). She was stabbed six times, and was alive while she was being stabbed. The autopsy also revealed that the stab wounds were defensive wounds. (RB.1216-1219,1239). The cause of death was multiple stab wounds associated with strangulation. (RB.1221). The wound to Beltran-Lopez' hand was consistent with knife slippage. (RB.1225).

Tracey Lowe, a fingerprint examiner for the Metro Dade Police Department, compared latents lifted from the scene with Beltran-Lopez' and Espinosa's standard prints. Espinosa's latent was found in blood on the top portion of the refrigerator door. (RB.1279). The bloody palm print on the refrigerator door was Beltran Lopez'. (RB.1286). The palm print and fingerprint on the plastic seat cover were Beltran-Lopez'. (RB.1288-1289).

Kathleen Nelson, a serologist for the Metro Dade County Police Department, responded to the scene. (RB.1314). During her investigation she received tubes of blood from the victims and from Beltran-Lopez and Espinosa. From these tubes of blood she



was able to determine the respective blood types. (RB.1316-1330). Based on her analysis, the blood on the refrigerator, the bloody palm print and the dining room chair contained a mixture of Bernardo Rodriguez' and Beltran-Lopez' blood. The spatter on the dining room chair was consistent with an injured Beltran-Lopez stabbing Bernardo. The mixture of blood was inconsistent with a violent struggle. (RB.1335-1340,1358-1359, 1379). The bloody rag on the television also contained a mixture of Bernardo's and Beltran-Lopez' blood. (RB.1342). The pillow case that was found over Teresa's face contained her blood and Bernardo's. Bernardo's blood stain on the pillow case was as a result of blood transfer. (RB.1347-1348). Bernardo's blood was transferred from the bloody rag found on the television, which rag contained a mixture of Bernardo's blood and Beltran-Lopez' blood. Bernardo's blood transfer stain on the pillow case was consistent with someone wearing that rag around their hand and pressing that rag against the pillow case which is on the pillow, and which is over Teresa's face. It was not only consistent because of the transfer patterns, but because the ends of fingers were also observable on the pillowcase. The blood stains left by the fingers were more intense than that left by the transfer stain, because it was the fingers that made the direct contact. (RB.1360-1364). The blood spatter found on Espinosa's red bathing suit was consistent with Teresa or Odanis Rodriguez' blood. The spatter was of medium velocity, indicative of a beating or stabbing. (RB.1367).

The State then rested. (RB.1463). Espinosa then moved for a judgment of acquittal on the grounds that the circumstantial evidence did not refute all reasonable hypothesis of innocence. This motion went to the two first degree murder counts, and the armed robbery and armed burglary count. Espinosa conceded the sufficiency of evidence for the attempted first degree murder count. Beltran-Lopez joined in said motions. (RB.1509-1511).

Espinosa then put on his case. (RB.1465). Roland J. Vas, a homicide detective for the Metro Dade Police Department, was a member of the team investigating the incident. (RB.1465-1466). Pursuant to his investigation, he learnt that a car located in the victims' driveway belonged to Maria Castellanos. He responded to her residence and saw some activity inside the house. He observed an armed latin male bolt from the house and run away. (RB.1469-1472). Vas eventually entered the residence and smelled marijuana. He also observed drug paraphernalia and a large amount of suspect marijuana. (RB.1471-1481). A beeper was located which had the same number as a beeper found in the victims' residence. (RB.1488). The suspect marijuana turned out to be bogus. (RB.1489).

Tracey Lowe was recalled on behalf of Espinosa. (RB.1517, RE.1951). Based on her investigation, Bernardo Rodriguez' prints were found in Castellanos' car and residence. (RB.1518-1520).

Espinosa then testified in his own behalf. (RB.1525-1712). In 1976 Espinosa lived in Nicaragua and worked for the Somoza regime and upon its fall in 1979, he fled to Guatemala. He met Beltran-Lopez, for the first time, in Guatemala. (RB.1527-1533). In 1979, both he and Beltran-Lopez came to Miami and they became good friends. (RB.1550-1554).

In 1983, Espinosa became neighbors with the victims. During their relationship, Bernardo Rodriguez told Espinosa that he needed money, so he was going to start dealing marijuana. Espinosa told Bernardo that he did not want to get involved. (RB.1554-1559). A couple of months before the incident in question, Bernardo told him he was selling marijuana and offered him a legal job driving trucks. (RB.1561-1565). Espinosa then contacted Bernardo regarding the truck driving job. After being advised that the job was managing the hauling away of concrete by three trucks, Espinosa accepted the job. (RB.1570-1575).

Two weeks before the incident, Espinosa hired Beltran-Lopez to help him drive the trucks. Beltran-Lopez then moved in with Espinosa. (RB.1579-1582). On the night of the incident, Espinosa and Beltran Lopez arrived at the victims' house to pick up the trucks. When they entered the house, Bernardo asked Espinosa to haul some marijuana for him. Espinosa refused, but Beltran-Lopez agreed. Bernardo then threatened Espinosa in order to force him

to transport the drugs. Teresa brought out her 38 caliber gun and pointed it at Espinosa. Beltran-Lopez then grabbed the gun and Bernardo grabbed a knife and attempted to stab Beltran-Lopez. Beltran-Lopez avoided the knife and then shot Bernardo. Beltran-Lopez and Bernardo then started fighting. Espinosa moved away from the action and bumped into Teresa. Odanis then opened her bedroom door and Espinosa told her to close and lock it. Teresa then told Espinosa to stop because she did not want the police involved. Beltran-Lopez and Bernardo were still struggling and Beltran-Lopez was getting the better of him. He started kicking and stabbing Bernardo. After Beltran-Lopez finished with Bernardo, he turned his attention to Teresa. He pushed her on the bed and started stabbing her. At this time, Espinosa tried to separate Beltran-Lopez from Teresa and was successful. At this time Teresa was still alive. Beltran-Lopez then wanted to kill Odanis because she saw him and could be a witness. Beltran-Lopez called her out of the room. She opened her door, and Beltran-Lopez gave the knife to Espinosa and told him to kill her. Beltran-Lopez covered her nose and mouth and ordered Espinosa to kill the girl. Out of fear for his life Espinosa stabbed Odanis once. Beltran-Lopez was then distracted by the telephone ringing and Espinosa left Odanis alive. Beltran-Lopez returned with a telephone cord and proceeded to strangle Teresa. Beltran-Lopez then returned to the girl's room and Espinosa told him she was dead. Espinosa then started to leave, but Beltran-Lopez did not follow. Espinosa got into his car and when

Beltran-Lopez arrived he told him that he went back to kill the girl that Espinosa left alive. (RB.1590-1637). The reason Espinosa did not go to the police was because Beltran-Lopez threatened to kill his family and Espinosa believed him. (RB.1648).

At the conclusion of Espinosa's testimony, he rested his case. (RB.1709). Beltran-Lopez rested his case without presenting any evidence. (RB.1712). Espinosa and Beltran-Lopez then moved for judgments of acquittal, which were denied. (RB.1722-1736). After closing arguments, the jury was instructed and the jury subsequently returned verdicts finding both Espinosa and Beltran-Lopez guilty of the first degree murder of Teresa Rodriguez, second degree murder of Bernardo Rodriguez, attempted first degree murder of Odanis Rodriguez, grand theft and armed burglary. (RB.2035-2036).

At the penalty phase, the State presented Roger Mittleman, the associate medical examiner who performed the autopsy on Teresa Rodriguez. It was his opinion that she was alive when she was being stabbed and when she was being suffocated and strangled. Her death was agonizing. She had defensive wounds from the stabbing and was conscious during the attack. (RB.2105-2112).

Espinosa presented several witnesses during the penalty phase. However, the trial court excluded a witness, Espinosa's former public defender since she was formerly part of the defense team. Her testimony was proffered and it would have been that during her representation Espinosa was a nice person. (RB.2137-2140).

Flor De Marti Sandoval knew Espinosa for eight years. During that time he was a respectful man, who treated his wife and son well. (RB.2125-2130).

Reverend Fernando Paulino met Espinosa while he was in jail awaiting trial. Espinosa studied the bible with him and the Reverend felt that Espinosa was a nice man. (RB.2141-2144).

Aurora Duque met Espinosa while he was in jail. During that time, her opinion of Espinosa was that he was a good person, decent and respectful. (RB.2147-2149).

Maria Isabel Arolega met Espinosa in May of 1986. She felt that he was good with children and was a decent man. (RB.2152-2155).

Eugenia Diaz met Espinosa while he was in jail and is in love with him. She felt that Espinosa was a good person. (RB.2158-2162).

Espinosa spoke to the jury on his own behalf. (RB.2164-2175). Thereafter Espinosa rested.

Beltran-Lopez then presented his case. Elodia Lopez-Espinosa, his mother, testified that Beltran-Lopez was a good son, who had never been in trouble with the law before. (RB.2176-2178).

Beltran-Lopez then spoke to the jury on his own behalf. He stated that he came to Miami three or four weeks before the incident to help the Lanza's move here. He was friends with Espinosa and was living with him at the time of the incident. Beltran-Lopez, before the incident, did not know Teresa Rodriguez, but had met Bernardo Rodriguez once before. He met him while with Espinosa. On the night of the incident, he was with Espinosa and Espinosa told he had to take care of some business that was pending for quite awhile. He had no idea that the business involved the victims. After he was arrested, Beltran-Lopez gave a statement to the police. He told the police that on the night of the incident Espinosa drove to the victims' house and they both exited. Espinosa rang the bell and Bernardo opened the door. After Espinosa and Bernardo exchanged greetings, Espinosa went inside while Beltran-Lopez remained outside. After awhile, Beltran-Lopez, upon hearing noises, entered the residence. He saw Bernardo with a knife and Espinosa

holding him up. Beltran-Lopez tried to pull them apart and when Espinosa let go of Bernardo's arm, the knife fell and cut Beltran-Lopez' hand. Beltran-Lopez then saw Teresa come out of her room with a gun. At this time she pointed it at Espinosa and told him to leave and she would not call the police. Espinosa then grabbed the gun from her and shot Bernardo. Beltran-Lopez denied ever going into the master bedroom and stabbing Teresa. After Espinosa shot Bernardo, Beltran-Lopez ran out of the house. He eventually returned and saw Teresa on her bed being beaten with a pistol by Espinosa. Beltran-Lopez remained outside the bedroom and watched as Espinosa stabbed Teresa. He denied ever pushing a pillow over Teresa's face. He admitted taking the money. He admitted holding Odanis while Espinosa was stabbing her. He also stated that he talked Espinosa out of killing Odenia. (RB.2178-2195).

The jury then returned to consider its recommendation. The jury recommended the death penalty by a vote of eight to four for Beltran-Lopez and eleven to one for Espinosa. (RB.2298).

On November 4, 1988, the trial court, following the jury's recommendation, imposed the death penalty on Beltran-Lopez. (RB.2304). The trial court found the following aggravating circumstances: the defendant was previously convicted of a felony involving the use of violence to the person; the defendant was engaged in the commission of an armed burglary; the capital



felony was committed for the purpose of avoiding or preventing a lawful arrest; and that the capital felony was especially heinous, atrocious and cruel. The trial court found the statutory mitigating circumstance that the defendant did not have a significant history of prior criminal activity and the nonstatutory mitigating circumstance that he was a good son. (RB.2764-2775).

He was also sentenced to life imprisonment with a three year minimum mandatory term for the second degree murder conviction; life imprisonment with a three year minimum mandatory term for the attempted first degree murder conviction; five years for the grand theft conviction; and life imprisonment with a three year minimum mandatory term for the armed burglary conviction. All sentences to run concurrently. (RB.2750-2761).

This appeal then followed.

POINTS INVOLVED ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SEVER DEFENDANTS.

II.

WHETHER THE TRIAL COURT ERRED WHEN IT CONDUCTED A PORTION OF THE CHARGE CONFERENCE IN THE ABSENCE OF BELTRAN-LOPEZ' COUNSEL.

III.

WHETHER BELTRAN-LOPEZ' ABSENCE FROM PRETRIAL CONFERENCES, MOTION HEARINGS AND THE CHARGE CONFERENCE MANDATE A NEW TRIAL.

IV.

WHETHER THE EVIDENCE WAS SUFFICIENT TO WITHSTAND JUDGMENT OF ACQUITTALS ON EACH COUNT.

V.

WHETHER THE TRIAL COURT ERRED IN SENTENCING BELTRAN-LOPEZ TO A THREE YEAR MINIMUM MANDATORY TERM ON COUNT III, WHERE THE USE OF A FIREARM WAS NEITHER ALLEGED NOR PROVED.

VI.

WHETHER THE TRIAL COURT ERRED IN SENTENCING BELTRAN-LOPEZ TO DEATH.

## SUMMARY OF THE ARGUMENT

### I.

The contention that the trial court erred in refusing to sever defendant is meritless. Here both defendants knew well before trial that they were blaming the other for the crime. Therefore Beltran-Lopez was not prejudiced in preparing his defense. Furthermore, since Espinosa testified, and Beltran-Lopez was afforded full and complete cross-examination, he cannot be heard to complain. Finally, no prejudicial evidence was entered against him as a result of the joint trial.

### II.

Beltran-Lopez's contention that his counsel was absent from part of the charge conference does not require reversal. The only thing that occurred was argument concerning the constitutionality of the aggravating circumstance of heinous, atrocious and cruel. Since this Court has found said circumstance to be constitutional, any error was harmless. Further, upon counsel's arrival, he ratified the proceedings which occurred during his absence.

### III.

The next contention that Beltran-Lopez was absent during pretrial proceeding is also meritless. The proceedings he was absent for concerned legal argument for which he could not help counsel. Therefore he was not prejudiced by his absence.

#### IV.

His contention that the evidence was insufficient on all counts, is clearly meritless. He was identified in the residence and the physical established he played an active role in killing Teresa Rodriguez.

#### V.

The trial court did err when it imposed a three year minimum mandatory sentence for the attempted first degree murder with a knife of Odanis Rodriguez.

#### VI.

The death penalty was properly imposed on Beltran-Lopez since the facts established that Teresa Rodriguez was stabbed and strangled in order to avoid arrest for the murder of her husband. The evidence established the four valid aggravating circumstances of heinous, atrocious and cruel; the murder was committed to avoid arrest; the murder was committed during a burglary; and he had a prior violent felony conviction. These circumstances clearly outweighed the statutory mitigating circumstance of no previous criminal history and the nonstatutory mitigating circumstance of being a good son.

## ARGUMENT

### I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SEVER DEFENDANTS.

Beltran-Lopez contends that the trial court erred in denying the motion to sever defendants since they could not receive a fair trial based on the fact that the defenses were antagonistic and mutually exclusive. Based on the facts of this case, Beltran-Lopez was not entitled to severance.

In McCray v. State, 416 So.2d 804 (Fla. 1982) this Court stated the law as it pertains to severance of defendants:

Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants . . . ." As we stated in Mendez v. State, 368 So.2d 1278 (Fla. 1979), and in Crum v. State, 398 So.2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the 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. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish

the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In situations less obviously prejudicial than the *Bruton* circumstance, the question of whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), cert. denied, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. *United States v. Herring*, 602 F.2d 1220 (5th Cir.), cert. denied, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 732 (1979); *United*

*States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); *Perez; Hawkins v. State*, 199 So.2d 276 (Fla. 1967), *vacated on other grounds*, 408 U.S. 941, 92 S.Ct. 2857, 33 L.Ed.2d 765 (1972). If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

Id. at 806 (footnotes omitted).

In the instant case Beltran-Lopez had an opportunity to confront and cross examine fully his codefendant. There was no confusing or improper evidence submitted to the jury in this joint trial, since the trial court properly precluded Espinosa from testifying about Beltran-Lopez' background in the Nicaraguan army, since it was too remote in time to be relevant. Hitchcock v. State, 413 So.2d 741 (Fla. 1982) *cert. denied*, 103 S.Ct. 274 (1982). Furthermore, Beltran-Lopez' decision not to testify was exclusively his own and his failure to testify is irrelevant as applied to the severance issue. Dean v. State, 478 So.2d 38 (Fla. 1985); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983).

Beltran-Lopez also contends severance should have been granted to protect his speedy trial rights. Miner v. Westlake,

478 So.2d 1066 (Fla. 1985). The only problem with this argument was that it was never presented to the trial court as a grounds for severance. Furthermore, Beltran-Lopez waived speedy trial, thereby negating this ground for severance. (RB.46).



## II.

THE TRIAL COURT DID NOT ERR WHEN IT  
CONDUCTED A PORTION OF THE CHARGE  
CONFERENCE IN THE ABSENCE OF  
BELTRAN-LOPEZ' COUNSEL.

Beltran-Lopez contends that reversible error occurred when the trial court commenced the charge conference without his counsel being present. Under the facts of this case no error occurred and, if it was error, it was harmless.

The record reveals that the charge conference began with codefendant Espinosa's motion to declare the aggravating factor of heinous atrocious and cruel unconstitutional. (RB.1738-1749). After the trial court denied the motion, Beltran-Lopez' counsel arrived and was informed by the trial court of what had transpired. Defense counsel, without objection, then joined the proceedings. He was allowed to join in Espinosa's motion and present any additional argument. (RB.1750). Thereafter the charge conference began in earnest. (RB.1751). Under these facts it is clear that the charge conference had not officially begun and defense counsel ratified the proceedings held without him. Therefore, no error occurred. Burgess v. State, 369 So.2d 686 (Fla. 1 DCA 1979).

Assuming arguendo that error had occurred, the error was harmless. The only event that transpired was the denial of the

Espinosa motion, under Maynard v. Cartwright, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), to declare the aggravating factor of heinous atrocious and cruel unconstitutional. The error was harmless because this Court in Smalley v. State, 546 So.2d 720 (Fla. 1989), has held that the Maynard v. Cartwright, doctrine is inapplicable to Florida's aggravating factor of heinous, atrocious and cruel.

III.

BELTRAN-LOPEZ' ABSENCES FROM  
PRETRIAL CONFERENCES, MOTION  
HEARINGS AND THE CHARGE CONFERENCE  
DOES NOT MANDATE A NEW TRIAL.

Beltran-Lopez contends that his involuntary absences from pretrial matters and the charge conference violated his right to a fair trial. The specific hearings he was not present at were:

1. The December 18, 1986 hearing on the public defender's notice of conflict of interest. (RB.1-4).

2. The June 10, 1987 hearing on the possible conflict of interest of having the public defender continue to represent the codefendant Espinosa and the denial of the motion to sever on the ground of conflict of interest. (RB.84).

3. The December 4, 1987 hearing on the motion to appoint an eyewitness identification expert, which was denied. (RB. 97-103).

4. The February 17, 1988 hearing, where his presence was waived, where the public defender was disqualified from representing Espinosa and a new counsel was appointed. (RB.144-154).

5. The March 28, 1988 hearing where his counsel filed a demand for speedy trial. (RB.156-160).

6. The charge conference where defense counsel waived his presence. (RB.1750).

Beltran-Lopez was not prejudiced by his absence from pretrial proceedings, where although a number of rulings were adverse to him, each of the motions heard involved matters as to which Beltran-Lopez, if present, could not have assisted defense counsel in arguing. Roberts v. State, 510 So.2d 885 (Fla. 1987); cert. denied, 108 S.Ct. 1123 (1988). Since there is no requirement that a defendant be present at a charge conference, Beltran-Lopez' absence therefrom was not erroneous. Randall v. State, 346 So.2d 1233 (Fla. 3 DCA 1977).

Finally, Beltran-Lopez contends that since the record does not affirmatively reflect he was present for a day and a half day trial, this absence further exacerbated the situation. Since the burden is on Beltran-Lopez to show that he was in fact absent during the foregoing days, and he has failed to do so, he is estopped from raising the issue. United States v. Botrine, 523 So.2d 767 (5th Cir. 1975).

IV.

THE EVIDENCE WAS SUFFICIENT TO WITHSTAND JUDGMENT OF ACQUITTALS ON EACH COUNT.

Beltran-Lopez contends that the evidence was insufficient to support the first degree murder count, the second degree murder count, robbery count and the burglary count. He also contends that the evidence required a reduction of the attempted first degree murder count, but fails to tell us what it should be reduced to. A concise review of the facts clearly establishes that this position is devoid of any merit whatsoever.

Beltran-Lopez was observed by Odanis Rodriguez holding Teresa Rodriguez by the arm, while Espinosa stood over her with a knife in his hands. (RB.769-798). She also identified Beltran-Lopez as the man who, during the argument between Teresa and Espinosa, came to her room and ripped the telephone out of the wall. (RB.794-795, 832). Odanis also identified Beltran-Lopez as the individual who held her while Espinosa stabbed her. (RB.801-802).

Beltran-Lopez, while staying with Alba Lanza, admitted that he went to the Rodriguez' residence to do a drug deal and that he was assisted by Espinosa. (RB.1152-1161). He also gave Lanza a briefcase with money in it and that the money had blood stains on it. (RB.1141-1146).

Dr. Mittleman was the associate medical examiner who performed the autopsies on the victims. Both victims had multiple stab wounds. The wound on Beltran-Lopez' hand was consistent with knife slippage. (RB.1170-1225).

Tracey Lowe, a fingerprint examiner, found Beltran-Lopez' prints on the refrigerator door and on a plastic seat cover of a chair. (RB.1288-1289).

Kathleen Nelson, a serologist, testified that certain blood samples collected contained a mixture of Bernardo Rodriguez and Beltran-Lopez' blood. The blood spatter that the sample was taken from was consistent with an injured Beltran-Lopez stabbing Bernardo. It was inconsistent with a violent struggle. (RB. 13335-1340, 1358-1359, 1379). The bloody rag on the television also contained a mixture of Bernardo's and Beltran-Lopez' blood and the blood stain on the pillow case found on Teresa's face contained a blood stain that was transferred from the bloody rag. The blood stain on the pillow case was consistent with someone wearing the rag around their hand and pressing that hand against the pillowcase. (RB.1342-1364).

Based on the foregoing the evidence was more than sufficient to withstand a judgment of acquittal as to all counts. Further, as to the attempted first degree murder count,

defense counsel conceded the sufficiency of the evidence.  
(RB.1509-1511).

V.

THE TRIAL COURT ERRED IN SENTENCING BELTRAN-LOPEZ TO A THREE YEAR MINIMUM MANDATORY TERM ON COUNT III, WHERE USE OF A FIREARM WAS NEITHER ALLEGED NOR PROVED.

Beltran-Lopez was convicted of attempted murder of Odanis Rodriguez with a deadly weapon. (RB.2682). The written sentence did not impose a three year minimum mandatory term. (RB.2759). However, the oral sentence did impose such a term. (RB.2310). As such the minimum mandatory term must be vacated. Lopez v. State, 470 So.2d 58 (Fla. 3 DCA 1985).



VI.

THE TRIAL COURT DID NOT ERR IN  
SENTENCING BELTRAN-LOPEZ TO DEATH.

Beltran-Lopez contends the aggravating circumstance of heinous, atrocious and cruel was erroneously given since under Maynard v. Cartwright, \_\_\_ U.S. \_\_\_, 108 S.Ct. 1853, 100 S.Ct. 372 (1988), said circumstance is unconstitutional because it provides no guidance to the jury as to what heinous, atrocious and cruel means. This Court has rejected this argument in Smalley v. State, 546 So.2d 720 (Fla. 1989).

He next contends that the aggravating circumstance of heinous, atrocious and cruel is not supported by the record. The point also is meritless. In order for this aggravating circumstance to apply, the murder must be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. Dixon v. State, 283 So.2d 1 (Fla. 1973) cert. denied, 94 S.Ct. 1950 (1974). The mind set or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies. Phillips v. State, 476 So.2d 194 (Fla. 1985). In the instant case, Roger Mittleman, the associate medical examiner who performed the autopsy on Teresa Rodriguez, testified that she was alive when she was being stabbed, and some of the stab wounds were defensive wounds. Teresa was also alive while she

suffocated and strangled. Her death was agonizing. (RB. 2105-2112). These facts clearly establish that her death was unnecessarily torturous and therefore this aggravating circumstance applies. Perry v. State, 522 So.2d 817 (Fla. 1988) (Finding of aggravating circumstance that killing was especially heinous, atrocious, and cruel was supported by evidence that defendant tried and tried again to kill the victim, that she was brutally beaten in the head and face, that she was choked and repeatedly stabbed in the chest and breast as she attempted to ward off the knife, that she died of strangulation associated with stab wounds, and that the attack occurred within the supposed safety of her own home). Thompkins v. State, 502 So.2d 415 (Fla. 1986) (Finding that murder was especially heinous, atrocious, or cruel was supported by evidence that victims' death was caused by strangulation and medical examiner's testimony that death by strangulation is not instantaneous, and evidence that victim was not only conscious but struggling and fighting to get away when defendant strangled her). Hansbrough v. State, 509 So.2d 1081 (Fla. 1981) (Finding that murder was heinous, atrocious and cruel was sufficiently supported by evidence that some of victim's 30 or more stab wounds were defensive wounds, indicating she was aware of what was happening to her and that she did not necessarily lose consciousness immediately). Nibert v. State, 508 So.2d 1 (Fla. 1987) (Finding that murder was heinous, atrocious and cruel was supported by evidence that victim was stabbed 17 times, that some of the

victim's wounds were defensive wounds, and that victim remained conscious throughout stabbing).

He next contends that the evidence does not support the aggravating circumstance that Teresa's murder was committed for the purpose of preventing an lawful arrest. In order for this circumstance to be invoked when the victim is not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). In the instant case Teresa was killed after Beltran-Lopez and Espinosa first killed her husband. She begged them to leave and told them she would not call the police. Teresa knew her assailants and could positively identify them. (RB.799-800). This strong evidence certainly supports the aggravating factor in question. Correll v. State, 523 So.2d 562 (Fla. 1988) (Evidence supported finding of aggravating factor that murder was committed for purpose of avoiding arrest where one murder was of defendant's daughter who was a witness to murders and there was no reason to kill her except to eliminate her as a witness.) Harvey v. State, 529 So.2d 1083 (Fla. 1988) (Murders were committed for purpose of avoiding arrest, supporting imposition of the death sentence, where the defendant was known to the victims, and they were killed to avoid victims identifying defendant in robbery of victims' home). Hooper v. State, 476 So.2d 1253 (Fla. 1985) (Evidence in prosecution for murder of nine year old girl,

including fact that defendant, prior to killing girl, had killed her mother in her presence, was sufficient to support aggravating circumstance that murder was committed to avoid lawful arrest.)

Beltran-Lopez does not challenge the validity of the other two aggravating circumstances. The factors that the capital felony occurred during the commission of a burglary is supported by the burglary conviction. The prior conviction of a felony involving the use of violence to the person is supported by the contemporaneous conviction of the murder of Bernardo Rodriguez and the conviction for the attempted first degree murder of Odanis Rodriguez. LeCroy v. State, 533 So.2d 750 (Fla. 1988).

Beltran-Lopez next attempts to make a proportionality argument contending that the evidence did not establish premeditation and therefore there was no intent to kill. This position is ludicrous since the evidence established that it was Beltran-Lopez who suffocated Teresa Rodriguez when he placed his bleeding hand on the pillow over her head and pressed down. Clearly, this shows intent to kill and therefore Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) does not apply.

Finally he contends that the trial court failed to find two statutory mitigating factors: (1) that the defendant was an

accomplice in the capital felony committed by another person and his participation was relatively minor and (2) that the defendant acted under extreme duress or under the substantial domination of another person. The record reflects that the trial court considered the mitigating evidence submitted on these points, but rejected it. (RB.2772). This Court has long held that in determining whether mitigating circumstances exist, it is the trial court's duty to resolve conflicts in the evidence and that court's determination is final, if supported by competent substantial evidence. Furthermore, finding or not finding that any mitigating circumstance has been established and any weight given to it is within the trial court's domain and reversal is not warranted because a defendant draws a different conclusion. Lopez v. State, 536 So.2d 226 (Fla. 1988); Stano v. State, 460 So.2d 890 (Fla. 1984) cert. denied, 105 S.Ct. 2347 (1985).

Here substantial competent evidence existed for the trial court's rejection of these two mitigating circumstances. The evidence establishes that Beltran-Lopez actively participated in suffocating Teresa and attempted to kill Odanis. Clearly this was sufficient for the trial court to reject Beltran-Lopez' self serving statement that he was dominated by Espinosa.

As evidenced by the foregoing, the trial court properly found five aggravating circumstances. When weighed against the

statutory mitigating circumstance of no significant criminal history and the one statutory mitigating circumstance that he was a good son, the death sentence was properly imposed.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that the judgment and sentences, including the death sentence, of the lower court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to NANCY C. WEAR, Attorney for Appellant Beltran-Lopez, P.O. Box 144775, Coral Gables, Florida 33114 on this 8 day of January, 1990.



MICHAEL J. NEIMAND  
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