IN THE SUPREME COURT OF FLORIDA

CASE NO. 73437 ~~73,456~~

MAURICIO BELTRAN-LOPEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT MAURICIO BELTRAN-LOPEZ

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Introduction

Appellant Mauricio Beltran-Lopez was the defendant in the trial court and will be referred to as Appellant or Mr. Beltran. His co-defendant in the trial court will be referred to as co-defendant or Espinosa. Appellee will be referred to as the State or the prosecution.

References to the record on appeal will be indicated by "R." References to the transcript will be indicated by "T." The record runs from R2357 to R2784; the transcript runs from T436 to T2790.

Statement of the Case

A Dade County Grand Jury indicted co-defendant Henry Jose Espinosa and Appellant Mauricio Beltran-Lopez on or about July 30, 1986, case number 86-19790 A and B. (R2357-2360) Both were charged with five crimes:

Count I: first-degree murder of Bernardo Rodriguez on July 10, 1986, by shooting him with a handgun and/or stabbing him, with premeditated design or during a robbery or burglary.

Count II: first-degree murder of Teresa Rodriguez by stabbing and/or asphyxiation and/or strangulation and/or suffocation, with premeditated design or during a robbery or burglary.

Count III: attempted first-degree murder of 11-year-old Odanis Rodriguez, daughter of Bernardo and Teresa, by stabbing.

Count IV: robbery of cash (over $300.) from Bernardo and/or Teresa.

Count V: burglary of the Rodriguez dwelling with knives and/or a handgun and/or making an assault on the occupants.

Appellant Mauricio Beltran-Lopez was arrested on July 14, before the arrest warrant was processed. (R2390) He and the co-defendant were both represented by the Public Defender's office until December 18, 1986, when private counsel Louis Casuso was appointed to represent Mr. Beltran following the

public defender's certification of conflict. (T436)

Motions to sever the defendants to try their cases separately were heard at least six times pre-trial:

June 10, 1987 (T440, denied T456)

June 11, 1987 (T463, denied T494)

July 1, 1987 (T519, no ruling; court's "gut feeling" is to sever (527))

February 12, 1988 (T545, denied T573)

February 17, 1988 (T589, no ruling)

August 29, 1988 (T692, denied T798)

During trial, motions to sever (along with motions for mistrial) were made three times during co-defendant's counsel's opening statement (T1164, 1172, 1206), and twice during co-defendant's testimony. (T1967-1969, 2143) In the penalty phase counsel moved again for a severance. (T2569) The State vigorously opposed efforts to have separate trials, to the extent of pressing for removal of co-defendant's counsel (the public defender) and appointment of new counsel. (R2456, R2467-2475) Finally, on February 17, 1988, the court disqualified the public defender, even noting in its order (R2478, fn 1) its refusal to sever the trials of the defendants.

More than two years after the alleged crimes, the case went to trial, beginning the guilt phase on August 29, 1988, and continuing until September 7. The verdicts (R2384-2385) were the same as to each defendant:

Count I: guilty of Bernardo's second-degree murder (as a lesser included offense) with a firearm and a deadly weapon.

Count II: guilty as charged of first-degree murder as to Teresa.

Count III: guilty as charged as to attempted first-degree murder of Odanis, with a deadly weapon.

Count IV: guilty of grand theft as a lesser included offense of robbery.

Count V: guilty as charged of burglary of an occupied dwelling, with a firearm and a deadly weapon, with an assault.

On September 9 the same jury heard from associate medical examiner Roger Mittelman for the State in the penalty phase. (T2539-2555) Mr. Beltran, who had not testified at trial, testified in this phase, consistent with his July 14, 1986, post-arrest statement to the police. (T2612-2661) The State had not introduced the statement, but Mr. Beltran's counsel introduced it at this stage, and it was provided to the jury. (T2628, R2713-2750)

After receiving the jury's advisory sentence, which recommended death by 8 to 4 for Mr. Beltran (R2712, T2732), in contrast to a nearly-unanimous 11 to 1 for co-defendant (T2732), the court set the case for sentencing.

On November 4, 1988, the trial court sentenced Mauricio Beltran-Lopez:

Count I: life imprisonment with a three-year minimum mandatory term for the firearm, as to Bernardo.

Count II: death, as to Teresa.

Count III: life imprisonment as to Odanis, with a three-

year minimum mandatory.

Count IV: five years as to grand theft.

Count V: life imprisonment as to the burglary, with a three-year minimum mandatory term. All sentences were to be served concurrently, and the court ordered that each defendant be given a copy of the extensive sentencing order. (T2744)

Mr. Beltran's motion for new trial was denied (R2755, T2788), and this appeal followed.

Statement of the Facts

On July 10, 1986, in the early morning hours, the police went to 9357 S.W. 36th Street, Dade County, Florida, in response to a call of two homicides. (T1292) Upon arrival they found the front door open, a bloody trail leading from it, and the body of Bernardo Rodriguez lying in the kitchen in a large pool of blood. (T1293-1294) He had been shot once and stabbed. (T1604, 1639) There were blood spatters on the plastic-covered furniture (T1792), and a bloody palm print later identified as that of Mauricio Beltran-Lopez on the refrigerator door. (T1717) There was a fingerprint identified as that of co-defendant Henry Jose Espinosa on the refrigerator, as well. (T1713)

In the master bedroom the body of Teresa Rodriguez, Bernaardo's wife, was found. (T1295, 1284) She had been stabbed, strangled, asphyxiated and/or suffocated with a telephone cord and/or a pillow. (T1655)

Neither of the couple's two daughters, Odanis, 11, or Odenia, 12, was in the house. (T1296) Odanis had been taken to Kendall AMI Regional Medical Center suffering from 16 stab wounds to the chest, stomach, back, arms, and hands. (T1898) Odenia, unharmed, had called a family friend who drove to the house and took Odanis and Odenia to the hospital from where they alerted the police. (T1281, 1285)

Both girls knew assailant Henry Espinosa, who had lived next door when the Rodriguez family lived in an apartment

on N. W. South River Drive. (T1232, 1241, 1404-1405) Odanis, from her bed in intensive care, still intubated and unable to speak, was able to point out co-defendant's picture from an array (T1437, Ex. 63, no. 5) shown to her, assembled with Odenia's verbal assistance.(T1411, 1435) He was quickly arrested and his residence quickly searched. (T1533-1534) From a prescription and receipt found there with Appellant Beltran's name on them, the police were directed to him as a suspect. (T1534-1535) Odanis identified him, too. (T1443, Ex. 64, no. 2 ; T1536-1537) In a garbage bag outside the Lanzas' house was $5,310. in cash. (T620) Mr. Beltran was arrested on July 15, 1986, and gave a lengthy and detailed post-Miranda statement to Detective Santos on that day. (T631 ff., R2713-2750) In it Mr. Beltran gave a complete account of the events of July 10, 1986.

Mr. Beltran was not acquainted with the Rodriguezes, a Cuban family. (R2718) He had met Espinosa, a fellow Nicaraguan, in Guatemala City some time after the fall of the Somoza regime. (T1966) Both eventually went to Baton Rouge, Louisiana, where Mr. Beltran remained until shortly before these events. (T1584, 1985) He came to Miami to assist the Lanza family to move here from Baton Rouge (T1584), and renewed his acquaintance with Espinosa by the way.

On the night of July 9-10, 1986, Mr. Beltran and co-defendant had a late supper at an Italian restaurant on Coral Way, after which Espinosa asked Mr. Beltan to accompany him

while he attended to some matter that had been pending for a long time. (R2719-2720) Espinosa did not explain further.(R2721)

At about 2:30 a.m. Espinosa drove his car to 9357 S.W. 36th Street, rang the bell, and a person later identified as Bernardo Rodriguez answered the door. (R2722) Espinosa told Bernardo he had to speak to him, and was permitted to enter. (R2722) Mr. Beltran remained outside but the door was partly open, so he could hear loud voices but not what they said. (R2723) When he heard a noise like a chair being dragged, Mr. Beltran went in and saw Bernardo with a large knife in his right hand. (R2723-2724) Espinosa was unarmed. (R2724)

Mr. Beltran got between them as Bernardo threatened Espinosa, and was deeply cut in the web of his left hand, between the thumb and forefinger.(R2725, T1543) He ran outside as Espinosa and Bernardo struggled. (R2725) Mr. Beltran then came back in, where he saw Bernardo bleeding on the floor, and saw Espinosa stabbing him repeatedly in the neck. (R2727)

Just then Teresa Rodriguez appeared from the master bedroom armed with a handgun which Espinosa soon wrested from her. (R2728) Then he shot Bernardo once, in the stomach. (R2729) Mr. Beltran, bleeding heavily, went outside again, came back, and wrapped a dish rag around his hand. (R2730) He later discarded the cloth on the television set. (R2731)

Meanwhile Espinosa had followed Teresa into her bedroom where Mr. Beltran next saw him strike her twice in the face. (R2732) He put a pillow over Teresa's face, a phone cord on her neck.

(R2732) Espinosa stabbed Teresa repeatedly in the stomach. (R2732)

After Espinosa finished with Teresa, he told Mr. Beltran that the little girl had seen him and heard Teresa address him by name (R2740-2741, T1234); he told Mr. Beltran to kill her. (R2739-2740) When Appellant refused to do so, Espinosa said he would have to do it. (R2740) Espinosa knocked on Odanis's door, said that her mother wanted her. (R2741, T1234) When Odanis came out (in the belief that Henry would come in if she did not (T1235)), Mr. Beltran stopped her at Espinosa's order. (R2741) Odanis testified that Mr. Beltran grabbed her from behind, with a hand over her face, but she was clear that it was Henry Espinosa alone who stabbed her. (T1235-1236)

Odanis had peeked out earlier, too, and saw Espinosa holding a knife, threatening her mother. (T1230) She was able to identify Mr. Beltran, but his role was limited to holding her mother's arm. (T1230) She never said she saw him with a weapon.

As Mr. Beltran took a box of money (the $5,310. later found at the Lanza residence bore traces of blood consistent with that of Teresa and Odanis and with that of Bernardo and both defendants (T1802-1803)) off a table at Espinosa's direction, he slipped in the blood, grabbing a chair. (R2742, T1790, 1717)

Mr. Beltran saw Espinosa hold Odanis with his left hand over her face as he stabbed her repeatedly with his right. (R2743) When he was finished, Espinosa said he wanted to kill "the other little girl, too," and he tried to enter another room, but gave up when he found that the door was locked (R2744), finally

heeding Mr. Beltran's urgings to leave ("Let's go, let's go!") only when Mr. Beltran left himself. (R2745)

Espinosa took the knife and gun to his apartment at 741 Palermo in Coral Gables, washed the knife, and dumped his bloody clothes. (R2746) There was no visible blood on Mr. Beltran's clothes. (R2748) Then they drove to Key Biscayne where codefendant threw both weapons into the bay (Mr. Beltran showed the police where they were thrown (R2748, T2623)).

Mr. Beltran told the police that Espinosa later told him that Bernardo, when he lived next door to co-defendant, would tell Espinosa's then-wife Rosa that she should get a better husband, suggesting one Rene Hernandez as a candidate. (R2750) Espinosa explained that after Rosa divorced him she married Rene (R2750), and Espinosa always blamed the Rodriguezes for the collapse of his marriage and separation from his sons. (R2749, T1984)

Espinosa, at trial, tried to paint Bernardo as a drug trafficker who was trying to force Espinosa into the marijuana and cocaine smuggling business. (T1992-1993) Despite extensive investigation, however, the police could find no evidence linking Bernardo with any drug trade. (T1931) Similarly, Espinosa's outrageous allegation that Mr. Beltran was ever part of some Somocista hit squad called the "Vengadores" ("avengers" (T2767)) was as unsupported by evidence as his description of himself as a merely a librarian for the Somoza regime. (T1961) That Espinosa was acting out of motives of revenge, and just

took Mr. Beltran along for the ride, fits the known facts, and is a rational, if mundane, theory.

Summary of Argument

I. Appellant should have been afforded a separate trial: he moved for one several times, and he was, by the trial court's denial thereof, severely prejudiced and also deprived of a speedy trial in order to accommodate the State's convenience.

II. Appellant was deprived of his right to counsel when a significant portion of the charge conference was conducted in counsel's absence, an absence that was neither waived nor ratified. This was fundamental error.

III. Appellant's frequent involuntary unwaived absences from numerous proceedings amounted to a pattern of deprivation of his right to be present and, ultimately, deprived him of a fundamentally fair trial.

IV. Appellant's motion for judgment of acquittal should have been granted as to Counts I, II, IV , and V, where the State, as a matter of law, failed to prove its case against him. Count III should have been reduced to a lesser charge in accordance with the uncontroverted evidence.

V. It was error to sentence Appellant to a three-year minimum mandatory term on Count III as to which the use of a firearm was neither alleged nor proved.

VI. The death penalty should not have been imposed where two of the aggravating circumstances on which the jury was instructed were not proved beyond a reasonable doubt,

the jury was not given proper limiting instructions as to one of them, and the court failed to instruct the jury to consider two statutory mitigating circumstances that did apply. Relative guilt militated against imposition of the death penalty as to Appellant Beltran.

A. The facts of Teresa Rodriguez's death do not bring it out of the ambit of the majority of homicides. The injuries to the surviving little girl clearly motivated the court to instruct the jury as to heinous, atrocious and cruel although the evidence did not support its application to the homicide. Moreover, there was no limiting instruction as to what constitutes heinous, atrocious and cruel so as to pass constitutional muster.

B. Evidence that the dominant or only motive for the homicide was witness elimination was not forthcoming; therefore it was error to instruct as to avoiding or preventing lawful arrest.

C. Proportionality analysis required that Appellant receive a life sentence rather than the death penalty.

D. There should have been instructions to consider the statutory mitigating circumstances that Appellant was, at most, only an accomplice, and that he was under the duress or domination of co-defendant Espinosa, as to which there was ample evidence.

Argument

I. APPELLANT'S TRIAL SHOULD HAVE BEEN SEVERED FROM THAT OF THE CO-DEFENDANT TO PRESERVE HIS SPEEDY TRIAL RIGHTS AND TO AVOID UNDUE PREJUDICE, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

The State was not willing to let any consideration of prejudice to Mr. Beltran or his speedy trial rights interfere with its determination to avoid severance in this case. In following the State's lead and consistently denying severance, the trial court committed reversible error.

Section 918.016, Florida Statutes, provides:

> When a continuance is granted to one or more of several defendants, the court may proceed with the trial of the defendants who have not been granted a continuance.

Despite Mr. Beltran's repeated announcements of readiness for trial (even in the tactically less-favorable position of first to be tried, cf. Abbott v. State, 334 So. 2d 642 (Fla. 3d DCA 1976)) (T491, 593), the State treated attention to his rights as a matter of the State's convenience rather than one of statutory, let alone constitutional magnitude. Barker v. Wingo, 407 US 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); Miner v. Westlake, 478 So. 2d 1066 (Fla. 1985); Garcia v. State, 498 So. 2d 401 (Fla. 1987).

Florida Rule of Criminal Procedure 3.152 (b) (1) (i) says that the court shall (emphasis added) order severance of defendants and separate trials

> upon a showing that such order is necessary to protect a defendant's right to a speedy trial, or is appropriate to promote a fair determination of the guilt or innocence of one or more defendants[.]

Considering first the speedy trial portion of this rule, the record reflects that, at the very least, Mr. Beltran waited five months for trial (from March 28 to August 29, 1988) beyond his counsel's motion for speedy trial and announced readiness to begin at once. (T593, 595) At least as early as June of 1987 (almost a year after defendant was arrested) the court and counsel were aware that the issue of whether or not to sever pitted judicial economy against Sixth Amendment and due process rights. (T479) At that same hearing the prosecutor argued the trauma and inconvenience to the witnesses of having two trials (T487), but the record clearly shows that it was the State's convenience, not the witnesses', that was served by the unnecessary delays in trying Mr. Beltran. The State was willing to forego introduction of Mr. Beltran's statement (T453), and to inject itself into the matter of whether co-defendant Espinosa should continue to be represented by the public defender's office, solely in order to avoid severance. (R2456, T480, 522, 523, 524) The State was utterly unconcerned with the propriety of its position as it impacted upon Mr. Beltran's right to go to trial in any sort of timely fashion. This was reversible error.

As Miner v. Westlake, supra, demonstrates, convenience

to the State is not an exceptional circumstance that will extend the speedy trial rule time, and for the court to persist in refusing to sever every time the State objected thereto was "not a discretionary act. . . but an erroneous conclusion of law." Id. at 1067. No "substantial justice" to the State was even asserted, merely the supposed inconvenience to the witnesses (read "to the State") of severance. Fla. R. Crim. 3.191 (f); Miner v. Westlake, supra.

It may be briefly noted that the witnesses referred to are the daughters of the murder victims, who traveled from New York for the trial. Balanced against any alleged extra trauma to them in coming to Miami twice are the undoubted facts that putting off the inevitable may have been more traumatic for them; neither was subjected to unpleasant cross-examination (it was both brief and gentle); and all their expenses were paid. See, Darby v. State, 463 So. 2d 496 (Fla. 1st DCA 1985), approved 482 So. 2d 1368 (Fla. 1986) (extension of speedy trial period and denial of severance to save State travel expenses of witnesses; held: for State's convenience, reversed and remanded with orders to discharge defendant). While not dispositive, these facts put into perspective the real issue that it was the State's convenience, none other, that prevailed on this point.

In contrast, Mr. Beltran sat in jail, presumed innocent, for from five to 14 months longer than necessary prior to trial solely because the court refused to grant a severance.

The most restrictive reading of the case law cannot lead to any other conclusion but that this was reversible error.

The second portion of Fla. R. Crim. P. 3.152 (b)(1)(i) was also violated in cavalier fashion sub judice. Mr. Beltran's counsel moved as early as June 2, 1987, to sever the defendants' trials. (R2450) At that point the court was aware that Mr. Beltran had given a post-arrest statement to the police:

> Court: I have been told outside of your presence that the State is not planning on using that [Appellant's statement].
> Mr. Casuso [Appellant's counsel]: I have been told the same.
> Court: Now, it's official. It's on the record.

(T451) That is not a a sufficient reason by itself to deny a motion to sever.

Counsel and the court at that June 10 hearing had a long discussion about whether, because the assistant public defender representing the co-defendant had also represented Mr. Beltran for some six months, it would be possible for him to cross-examine Mr. Beltran at a joint trial. Yet the motion for severance was denied. (T456)

On at least five other occasions (June 11, T494; July 1, T519; February 12, 1988, T573; March 28, T596; August 29, T798) pre-trial and at several points during the trial (T1163, 1172, 1967, 1969), a motion to sever was made and should have been granted. Various grounds were raised besides that of the prejudice to Mr. Beltran of exposure to cross-examination by his former attorney, but the most cursory reading of the instant record reflects that the State and the experienced trial judge lost sight of the goal here: that Mr. Beltran

was entitled to a fair trial.

It became apparent early in the trial, if not before, that a joint trial would not be a fair trial. During co-defendant's counsel's opening statement he sought to bring in prejudicial and irrelevant matters about Mr. Beltran's background. (T1161) Interestingly, co-counsel sought to use the same sort of testimony that he had not been permitted to use in Roberts v. State, 510 So. 2d 886, 892 (Fla. 1987), cert. denied ___US___, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1987): "These are not character things. These are admissions from Beltran to my guy." (T1167) (emphasis supplied) In Roberts this attorney tried to assassinate the character of one of the victims under the guise of eliciting friendly conversation between her and the defendant. The crucial difference was that in Roberts the court correctly kept it out, while at bar the court erroneously and critically failed to grant a severance at once, despite having been put on notice at this early stage of the trial what co-counsel's tactics would be.

It should not have come as any surprise that when Espinosa took the stand he immediately and impermissibly characterized Mr. Beltran as one who was involved in the drug business as long as a decade before the events at issue. (T1967) Mr. Beltran's attorney was forced to make a speaking objection in order to get a side-bar, and it became evident that Mr. Beltran had been irretrievably prejudiced by Espinosa's testimony: Espinosa had said that he met Mr. Beltran while

the latter was doing a ten-pound marijuana deal in a Guatemala City park. (T1969) Four of the jurors had understood the not-yet-translated testimony (T1975-1980), and they had translated it for the other nine. (T1980) There was no evidentiary support for co-defendant's characterization of Mr. Beltran, but it bolstered co-defendant's portrait of Mr. Beltran as an experienced criminal and a willing participant in victim Bernardo Rodriguez's supposed marijuana transporting operation. (T2029)

Espinosa's entire story put all of the blame for the murders on Mr. Beltran and undoubtedly prejudiced him. As the "A" defendant, Espinosa always knew that he would be free to put his story first before the jury. Since Mr. Beltran had given a complete post-arrest statement to the police, Espinosa was at no risk that Mr. Beltran, if he testified, would spring any surprises, because he could be impeached if he attempted to do so. Because Espinosa had given only a sketchy post-arrest statement (partially suppressed), he was not similarly exposed, and was free, as he did, to spin any tale he liked, leaving the "B" defendant, Mr. Beltran, with no course but to deny or, as he did, not testify at all.

At a separate trial Mr. Beltran might well have testified, to his benefit, because his statement was entirely consistent with the evidence. Moreover, he was manifestly <u>not</u> the one who stabbed the little girl, and the jury's 8 to 4 vote (as against 11 to 1 for Espinosa) might well have been even more favorable at a separate trial.

This case meets the test for severance set out in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), because it is clear that the trial court abused his discretion in denying the many motions for severance. Unlike Menendez (where no pre-trial motion was made) from the beginning co-counsel announced his intention to accuse Mr. Beltran for all of the crimes (despite irrefutable evidence to the contrary). No curative instructions, other than that directed at the co-defendant during his testimony, were issued. Id. at 1280.

> Severance should be granted liberally whenever potential prejudice is likely to arise in the course of the trial.

Id., citing "ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance" §2.3 (b)(ii)(1968).

The instant case should be governed by the rule of Rowe v. State, 404 So.2d 1176 (Fla. 1st DCA 1981)(unless severance was granted, the defendants are going to be in the posture of prosecuting each other with the State standing by), State v. Clarke, 448 A.2d 1208 (R.I. 1982)(it would violate the essential concept of fair trial to require an accused to defend against the two-sided attack of a prosecutor and a co-defendant), United States v. Gonzalez, 804 F.2d 691 (11th Cir. 1986)(court must balance the right of defendants to a fair trial absent the prejudice inherent in a joint trial against the interests of judicial economy and efficiency; U.S. Const. Am. 6), and United States v. Crawford, 581 F.2d

489 (5th Cir. 1978)(court should grant severance if jurors in joint trial may not be able to determine culpability of defendants fairly, impartially and solely on the basis of the evidence relative to each individual defendant).

Having failed to sever Mr. Beltran's trial from that of the co-defendant, the trial court erred, mandating reversal of the instant conviction and a new trial.

II. THE TRIAL COURT ERRED WHEN IT CONDUCTED A MAJOR PORTION OF THE CHARGE CONFERENCE IN THE ABSENCE OF APPELLANT'S COUNSEL, IN VIOLATION OF APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

When the court convened the charge conference he asked, "Can we start without Casuso (Mr. Beltran's trial counsel)?" (T2172) No one answered, but the court launched right into the conference, and significant argument ensued about whether the aggravating circumstance of "heinous, atrocious and cruel" was permissible any longer in light of the recent Supreme Court case of Maynard v. Cartwright, ___US___, 108 S.Ct. 1853, ___L.Ed.2d___ (1988). The trial prosecutor and his legal advisor participated, and co-defendant's counsel argued the point inarticulately but at length. Co-counsel's motion in limine was finally denied after the State's Mr. Mendelson assured the court that there was "no doubt" that this aggravating circumstance could be sustained notwithstanding Maynard v. Cartwright, supra. (T2183) No argument on behalf of Mr. Beltran was presented.

Fifteen minutes after the conference began, Appellant's counsel Mr. Casuso arrived and announced that he would join co-counsel's motion. (T2184) He also waived, at that point, Appellant's presence. (T2184)

Although the trial judge purported to give trial counsel a précis of what had gone before, the record shows that

his summary was inadequate and inappropriately reassuring. (T2184) Counsel could have had no idea, from what he heard, that one of the most important arguments relative to penalty had just been fought and lost, and that he had been deprived of any input in the discussion. For him to waive his client's presence and not object and move for a mistrial, in the circumstances, is hardly to be wondered at.

Without question, no waiver of counsel occurred. Faretta v. California, 422 US 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Similarly, there can be no question that the charge conference is an integral part of a criminal trial, as to which representation by counsel in a capital case has been recognized as vital for more than 50 years, even before Gideon v. Wainwright , 372 US 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Powell v. Alabama,287 US 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

Furthermore, at no time was counsel's absence waived or ratified by counsel or by Appellant. The court commented when Mr. Casuso arrived that counsel was 15 minutes late and, obviously, the court was free to apply appropriate sanctions for that violation of the court's schedule. What the court was not free to do was to deprive Mr. Beltran of his fundamental Sixth Amendment right to be represented by counsel. Powell, Gideon.

Nor was this error harmless. This court in Thompson v. State, 507 So.2d 1074 (Fla. 1987), applied harmless error

analysis to a fact situation far less critical than this one and found that depriving a defendant of counsel during a recess mandated reversal. How much more devastating is depriving a defendant of counsel during a charge conference; during the portion, moreover, that concerned what was, arguably, the most crucial aggravating circumstance as far as this defendant was concerned. If counsel had had an opportunity to persuade the court not to apply this factor to Mr. Beltran, it is entirely likely that the jury would have recommended life rather than death (their vote was 8 to 4 as to Mr. Beltran). Judge Snyder having made it clear (T2529) that he would not override the jury's recommendation, the elimination of this aggravating factor might well have made a life or death difference.

At the time of the charge conference the defendant had not testified, and his post-arrest statement had not been put into evidence. Both events occurred in the penalty phase. Mr. Beltran's statement was entirely consistent with the physical evidence, as was his testimony, and in his testimony he did not attack the jury's verdict, as his co-defendant did.(T2598-2604) If counsel had had an opportunity to argue at the charge conference, it cannot be said that he would not have been able to use his knowledge of the defendant's statement, his demeanor, and his veracity to persuade the court that it would be inappropriate to apply the aggravating factor of heinous, atrocious and cruel to the jury instructions as

they might reflect Appellant's participation. Powell v. Alabama, supra, Maynard v. Cartwright, supra. It must be pointed out that co-counsel, on this occasion and throughout the trial, had no case law to show the court, he did not appear to be familiar with the law cited by the State, and he frequently was unnecessarily forgetful in his recollection of the undisputed facts. It was part of his trial tactics to attack Mr. Beltran at every turn. Clearly Mr. Beltran's interests were not protected by co-counsel's argument in Mr. Casuso's absence at the charge conference.

For all of these reasons, reversal due to this error is mandated.

III. APPELLANT'S INVOLUNTARY UNWAIVED ABSENCES AT PRE-TRIAL CONFERENCES, THE CHARGE CONFERENCE, AND POSSIBLY AT POINTS DURING THE TRIAL DENIED HIM DUE PROCESS OF LAW, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

Mr. Beltran was certainly and not voluntarily absent from no less than five pre-trial conferences and the charge conference. As to the latter, discussed more fully in Issue II of the brief, Appellant's counsel waived Mr. Beltran's presence upon his own arrival 15 minutes into the conference. There is no indication anywhere in the record that Mr. Beltran ever ratified that waiver, but even if he did, his counsel's absence would have made the waiver unknowing, unintelligent, and involuntary in view of the fact that counsel could not provide Appellant with sufficient information, due to his own absence, to allow him to make a valid waiver. Johnson v. Zerbst, 304 US 458, 585 S.Ct. 109, 82 L.Ed. 1461 (1938); Schneckloth v. Bustamonte, 412 US 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Amazon v. State, 487 So.2d 8 (Fla. 1986). On this ground alone Appellant is entitled to a new, fundamentally fair, trial.

This record reflects that Appellant was virtually never present during important motions, arguments, and scheduling matters.

Precedent was set with the December 18, 1986, hearing when the public defender filed a notice of conflict. (T438) Appellant was described as "in custody," and obviously was not

brought to court. Private counsel was appointed, but no one explained the course of events to Mr. Beltran.

A major hearing was held on June 10, 1987, when such matters as no fewer that 13 motions filed on Appellant's behalf, possible conflict of interest on the part of the public defender (who continued to represent the co-defendant) as it might affect cross-examination of Mr. Beltran at trial, and Mr. Beltran's post-arrest statement were discussed. (T440-460) The corrections officer in court told the judge that they would bring Appellant out from the holding cell, but it is clear from the record that that never happened.

The first of several motions to sever was heard on that day, too. (R2450) It may be, as this court found in Garcia v. State, 492 So.2d 360 (Fla. 1986), that "defendant's presence would not have aided defense counsel in arguing motions for change of venue, . . . to sequester the jury," and similar matters, but argument on a motion to sever would be riveting to Mr. Beltran, where denial meant waiting more than a year to go to trial, and joinder considerably enhanced the prosecution's chances of convicting him of first-degree murder. The decision not to introduce Appellant's statement in the State's case in chief was announced at the June 10 hearing, too. (T453) Certainly these were matters as to which Appellant could have assisted counsel, and it is evident that they were matters of deep concern to him, and whose import could be made fully intelligible to him. Francis v. State, 413 So.2d

1175 (Fla. 1982)(defendant had constitutional right to be present as stages of his trial where fundamental fairness might be thwarted by his absence), Fla. R. Crim. P. 3.180 (a)(3).

On December 4, 1987, a hearing was held at which a motion to appoint Elizabeth Loftus, an expert on eyewitness identification testimony, was heard. (T531) There is no indication that Appellant was present for a motion which was likely to be of far greater importance to him than to co-defendant Espinosa.

Espinosa was well known to the Rodriguez family, having lived next door for more than a year. (T1988) He was identified by name by decedent Teresa Rodriguez, whose words were overheard by both of the surviving daughters. (T1234, 1264) Appellant, on the other hand, was a stranger to the family. (T1257) Thus, the court's ruling on this motion (it was denied) was far more crucial to Mr. Beltran that to his co-defendant. But Mr. Beltran was not present, and no waiver was obtained then or later.

The next occasion when Appellant was not present was on February 17, 1988. At this hearing counsel waived Appellant's presence but his absence was not ratified at any time by Appellant himself, in contravention of Rule 3.180. This was a short but important hearing where new counsel was appointed for co-defendant (T585), and the State was invited to try Mr. Beltran first. (T589) The State, fatally, declined

to do so (see Issue I, supra).

When Appellant's counsel moved for a speedy trial on March 28, 1988, the record does not indicate whether Appellant was present. (T592) There was no waiver by counsel or ratification by Appellant, however. Again important matters of vital interest to Appellant were discussed: Appellant's counsel announced ready for trial (T595), co-defendant's counsel would not be ready within 30 days (T594), and the court told the State to pick a jury at once and try Appellant alone. (T596) Again Appellant was deprived of his right to be present, a right important enough that Rule 3.180 mandates it.

Appellant's absence at these pre-trial conferences was clearly error. It was not voluntary. Justice Shaw's concurring opinion in Muehleman v. State, 503 So.2d 310 (Fla. 1987), points out that an accused in a first-degree murder case does not come and go at will. The hearing on June 10, 1987, illustrates Justice Shaw's observation very well: the corrections officer said that they would bring Appellant out, but in view of the court's announced intention to re-convene in another courtroom, that was not done. (T443) This case was not re-convened, however, and Appellant was depr ived of his right to be present.

A careful examination of the record reveals that neither the transcript nor the clerk's minutes reflect Appellant's presence or absence all day during trial on August 30 or during the morning session on August 31. Taken together with all of

the other important occasions when the record affirmatively shows that Mr. Beltran was deprived of his right to be present, it cannot be assumed that his rights on these occasions were carefully protected. For all of these reasons, reversal is required. Francis v. State, supra.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AFTER THE PRESENTATION OF ALL THE EVIDENCE WHERE THE EVIDENCE, AS A MATTER OF LAW, FAILED TO ESTABLISH APPELLANT'S GUILT AS TO COUNTS I, II, IV, AND V, AND REQUIRED REDUCTION OF COUNT III TO A LESSER OFFENSE, THEREBY DENYING HIM HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW

The only direct credible evidence of Appellant's involvement in any of these crimes was that of Odanis Rodriguez. She testified that she saw him (unarmed) holding her mother's arm (T1230), and, much later, she testified that when she came out of her room he grabbed her from behind. (T1235) He never had a weapon, and it was Henry Espinosa, the State conceded, who stabbed her, not Appellant. (T2378)

Circumstantial evidence against Appellant was thin: a bloody palm print on the refrigerator that could have resulted from a fall. (T1833) A bad cut in the web of Appellant's left hand that was consistent with his explanation to the police that he stepped between Henry and Bernardo, trying to ward off a knife blow aimed by Bernardo at Henry. (R2725) A fabric impression on the pillowcase covering Teresa Rodriguez that, at most, was "consistent with" the rag found on top of the television set. (T1839)

On the other hand, there were far more innocent explanations or incidents of lack of evidence. It is undisputed that Mr. Beltran did not know the Rodriguez family but co-defendant did; Espinosa and his ex-wife had lived next door to them for more than a year. It was Henry's idea to go

to the Rodriguez home. Whatever was the source of the dispute between Bernardo and co-defendant, it was, clearly, a personal one. Not even the State posited that this was a home invasion robbery; the evidence simply does not support any such theory.

The State's experts provided little more than speculation. Serologist Nelson readily agreed that the rag found on the television set might not have made the impression on the pillowcase that was the centerpiece of the State's case against Appellant in Teresa's death. (T1849) Any fabric could have made such a mark. (T1839) Ms. Nelson's extensive testimony about cast-off blood was interesting but probative of little except what was evident and not challenged by either side: Mr. Beltran, Bernardo, Teresa, and Odanis were all cut. There was none of Mr. Beltran's blood in Teresa's room, Ms. Nelson testified, and the pillowcase in particular did not have any of his blood. (T1794) That was because, the State imaginatively hypothesized, the terry cloth rag or towel soaked up every last trace.

Dr. Mittelman, on direct examination, agreed with this State hypothetical: In stabbing Bernardo repeatedly, Mr. Beltran's left hand slid down the handle and was deeply sliced by the knife blade, yet he did not drop the knife in agony at once. (T1659) Even if Dr. Mittelman's assertion is accepted, that pain might not be felt at first in the fury of the attack, the prosecution case goes on to require an acceptance of an incredible scenario. The State's theory was that Mr. Beltran somehow wrapped his heavily bleeding hand and proceeded to launch an

animal-like attack upon Teresa, meanwhile fastidiously allowing no drop of blood to get on the pillowcase or elsewhere in her bedroom, and at the same time managed to strangle her with a telephone cord so hard that finger impressions were left in the pillowcase and her necklaces were imbedded in her flesh. Those possibilities are mutually exclusive.

On cross-examination the veteran madical examiner retreated to a more reasoned, if less exotic, view. He agreed that to use a ligature argued the availability of two good hands. (T1669) He could not picture such a strangulation with one hand--it "doesn't serve a purpose." (T1669) Moreover, Dr. Mittelman testified that Appellant's cut was consistent with a defensive wound. (T1670)

Significantly, the State could have put the matter to rest by introducing evidence as to whether Mr. Beltran is right- or left-handed. It was in the State's power to do so: Fla. R. Crim. P. 3.220 (b)(1)(viii) provides the means whereby the prosecution may obtain specimens of the accused's handwriting, as was done to obtain his fingerprints and palm prints. (R2409) What simpler way to observe which hand is dominant?

An examination of the evidence as it applied to Mr. Beltran alone reveals why the State was so determined to have a joint trial and, in order to get one, it was willing to pass up the possible introduction of Mr. Beltran's statement (which was exculpatory with regard to the homicides, yet entirely consistent with the evidence). Evidence against the co-defendant was

ample, both direct and circumstantial, so by proceeding on a principals theory the prosecution was able to convict Mr. Beltran despite the weakness of the case against him.

A principal may be charged and convicted of the substantive crime, and his guilt can be established by circumstantial evidence, but that evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Gains v. State, 417 So. 2d 719 (Fla. 1st DCA 1982). Here the circumstantial evidence failed to establish beyond a reasonable doubt that Mr. Beltran had the specific intent to participate as an aider and abettor in the crime charged. Stuckey v. State, 414 So.2d 1160 (Fla. 3d DCA 1982). To condemn a man to death on the basis of a rag and the incredible testimony of the unquestionably culpable co-defendant is to disregard the concept of proof beyond a reasonable doubt and to fall back on some lesser standard--mere suspici on, perhaps.

In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime. Staten v. State, 519 So.2d 622, 624 (Fla. 1988) (citations omitted). In the case at bar there is no evidence that Mr. Beltran intended any crimes or that he did any act in furtherance of either of the homicides. Touching or holding Teresa's arm, as Odanis said he did, is not dispositive, for even if it could be discerned from the record that touching her arm had any criminal significance, it is not

possible to extrapolate that tableau into the bloodthirsty attack that later took place. The manner of Teresa's death is far more consistent with the personal animus that Espinosa had nursed against Bernardo and, after he was killed, turned on the woman at least in part because she could identify her husband's murderer. Again, Mr. Beltran had no role in these events.

As to Odanis, the lack of intent to harm her by Mr. Beltran is evident, but in the presence of a man who has just dispatched two people and is armed with a large butcher knife, one is likely to obey when ordered to grab the little girl as she emerges from her room. That was, she testified, the extent of his involvement in the assault on her. Unlike the defendant in Staten v. State, supra, Mr. Beltran had no prior knowledge of any criminal activity, he plotted nothing, and he was not armed at any time. More is needed than a suspicion or belief that under the circumstances he knew of the crimes until they actually occurred. Gains v. State, supra.

While the evidence obviously rebuts any idea that Mr. Beltran acted with premeditation, the alternative,that he was guilty of felony murder, can be as briefly disposed of. The trial court accepted the view of the State that an invitee may be converted into a burglar for purposes of instructing the jury on felony murder in the course of a burglary or robbery. The jury easily rejected robbery, returning a verdict on grand theft.

The happenstance that some money was taken on the way out did not transform this case to felony murder. There was no

evidence that, as required, the homicides took place "in the perpetration of, or in the attempt to perpetrate. . . burglary." Section 782.04 (1)(a) e, Section 810.02, Florida Statutes.

The motion for judgment of acquittal should have been granted because the reasonable inference that Mr. Beltran had no knowledge of the crimes until they actually occurred was not excluded, he was without criminal intent, he was not proved to be the assailant of either of the homicide victims and was definitely not Odanis's attacker, and the expert testimony could do no more than suggest some hypotheses. A conviction in a capital case cannot rest on such shakey ground.

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

At sentencing the court imposed a life sentence on Count III, with a three-year minimum mandatory prison term. As to this count (the attempted first-degree murder of Odanis Rodriguez with a knife) the imposition of the minimum mandatory term was error. There was no evidence that a firearm was used and Mr. Beltran was not so charged. (R2358) Peck v. State, 425 So.2d 664 (Fla. 1983), Cox v. State, 530 So.2d 464 (Fla. 5th DCA 1988), Moss v. State, 495 So.2d 234 (Fla. 5th DCA 1986), cause dismissed 503 So.2d 327. Resentencing on this count is required.

VI. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH, THEREBY DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION, WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The aggravating circumstance of heinous, atrocious and cruel was not proved beyond a reasonable doubt, it was not appropriate in this case, and no limiting instruction defining the term was given

At the start of the charge conference where the possible aggravating circumstances pursuant to Section 921.141, Florida Statutes, were discussed, the trial court expressed the view (T2154,2173) that Section 921.141 (6)(h) was no longer applicable under Maynard v. Cartwright, ___US___, 108 S.Ct. 1853 (1988), decided on June 6, 1988. In that case the United States Supreme Court found that the Oklahoma death penalty statute did not offer sufficient guidance to the jury in deciding whether to recommend imposition of the death penalty on the ground that the capital felony was heinous, atrocious and cruel. Relying pm Godfrey v. Georgia, 446 US 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court found that the Oklahoma language ("especially heinous, atrocious or cruel") gave no more guidance to the jury than Godfrey's "outrageously or wantonly vile, horrible or inhuman." Maynard v. Cartwright, at 1859.

At bar the State argued that a Florida case had come down "17 days after Maynard" wherein our supreme court had

decided the issue in light of Maynard, and upheld Florida's "heinous, atrocious and cruel" instruction. (T2175) (Note that this argument was held in the absence of Mr. Beltran's counsel; see Issue II, supra) The case referred to is Buenoano v. State, 527 So. 2d 194 (Fla. 1988), decided on June 23, 1988. Unfortunately for the State's guarantee to the trial court (T2183), Buenoano does not mention Maynard, and does not reflect any awareness that the Florida court might have had of the Maynard decision. What it does say, in rejecting Buenoano's assertion that arsenic poisoning inflicted over a period of weeks was not heinous, atrocious and cruel, was that her husband-victim suffered "considerable pain and torture." The testimony was that he became sick gradually, suffered hallucinations, vomiting, nausea, fever, and diarrhea, and that it took at least two weeks for him to succumb. Thus, should it be possible (or advisable) to assume that the Buenoano court relied on a case it did not cite in rendering its opinion, the facts in Buenoano are so different from the case at bar that the mere inclusion of the words "considerable pain and torture" (at page 199 of the Buenoano opinion) cannot reasonably be read as an acknowledgement that the court relied on Maynard v. Cartwright and found that Florida's statute passed muster under that case.

A reliance on Maynard v. Cartwright, supra, would have led the trial court, correctly, to decline to instruct this jury that they could consider the aggravating circumstance of heinous, atrocious and cruel. There is virtually no first-degree murder

case that does not include that catch-all aggravating circumstance, but there was little here to set this case apart from other homicides (again, attention must be centered on the homicide victim, not on her surviving daughter).

Dr. Mittelman's testimony is the sole support for this circumstance. True, he testified that medical evidence of petechiae (small hemorrhages in the eyes) proved that Teresa was alive when a pillow was possibly pressed over her face. (T2543) There is no evidence, however, that she was conscious for more than a few seconds. (T2543-2548, T2551-2552) Mr. Beltran was wearing shorts and both men were wearing short-sleeved T-shirts, yet neither one showed a scratch or bruise possibly inflicted by Teresa, a woman with long fingernails who was allegedly aware and struggling for her life. And Dr. Mittelman agreed that if Teresa passed out she did not suffer. (T2555)

The aggravating circumstance that is most frequently attacked is heinous, atrocious and cruel. State v. Dixon, 283 So.2d 1 (Fla.1973)

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. (emphasis added) Buenoano v. State, supra , Roberts v. State, 510 So.2d 885 (Fla. 1987) (victim hit repeatedly with baseball bat; lingered for hours conscious, in agony, and aware that he was bleeding to death, unable to move or cry out); Medina v. State, 466 So.2d 1046 (Fla. 1985) (victim, stabbed ten times, was gagged and

took ten to 30 minutes to die); Heiney v. State, 447 So.2d 210 (Fla. 1984) (defendant continued to beat victim with a claw hammer until his brain was pulped, his ear was hanging on by a fragment, and his eye was completely exploded).

Cases where this circumstance has not been upheld have been, on the other hand, arguably more conscienceless or pitiless, even torturous, than the instant case. See, for example, Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983) (victim shot in stomach at close range with shotgun; lingered conscious, in pain, and aware of impending death for some three hours; heinous, atrocious and cruel could not be applied).

The facts in the instant case, and the trial court's failure to follow Maynard v. Cartwright, supra, require that a new sentencing proceeding be held.

B. Avoiding or preventing lawful arrest was erroneously applied where it was not proved beyond a reasonable doubt that the capital felony was committed with the dominant or only motive one of witness elimination

At the end of the guilt phase of the trial, Mr. Beltran's counsel moved for a new jury panel to hear the penalty phase, in that prior testimony about the stabbing of 11-year-old Odanis Rodriguez would so influence the jury that they would vote for the death penalty regardless of anything else they had heard, or would hear. (T2476) When counsel could not produce a case on point, the court summarily denied his motion. (T2476) Rejection of counsel's motion out of hand led the court into an error of epic proportions: He instructed the jury that they could consider as to Mr. Beltran whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (i.e., eliminating a witness). Section 921.141 (6) (e), Florida Statutes.

Such an instruction might apply to the co-defendant, who was well known to Teresa Rodriguez, the murder victim (as well as to her daughters, both of whom testified at trial). See, Harmon v. State, 527 So.2d 182 (Fla. 1988) (victim knew defendant well; accomplice spoke defendant's name during robbery, thus assuring that legally blind victim could identify him). Mr. Beltran was a complete stranger to the Rodriguezes, however, and there was testimony that there was little available light by which Teresa Rodriguez might have identified him. (T1276, 1296)

The court clearly applied this aggravating circumstance not because of Teresa, who died, but because of Odanis, who lived. In this respect Maynard v. Cartwright, supra, is instructive. There, the defendant shot the decedent dead with one blast of a shotgun. The man's wife survived two shotgun blasts to the legs, two stabs, and a slit throat. In reciting the facts of the case relative to sentencing, the United States Supreme Court relied on the facts relevant only to the victim who died (he heard the blast that injured his wife). Id. That should have been done sub judice.

In urging reversal on this point the suffering of the child has not been overlooked. But there is not a scintilla of evidence in this record to indicate that, as the law requires, witness elimination was "the dominant or only motive" for the homicide. Floyd v. State, 497 So.2d 1211 (Fla. 1986). Such proof must be "very strong." Riley v. State, 366 So.2d 19 (Fla. 1978). That the victim knew his or her assailant is not enough. Perry v. State, 522 So.2d 817 (Fla. 1988); Caruthers v. State, 465 So.2d 496 (Fla.1985). As far as the evidence shows, it is likely that the killings were precipitated by, first, Bernardo's and then Teresa's arming themselves. See Armstrong v. State, 399 So.2d 953, 963 (Fla. 1981). Mere speculation by the State that witness elimination was the dominant motive behind a homicide can not be considered as an aggravating circumstance for the purpose of capital sentencing. Scull v. State, 533 So.2d 1137 (Fla. 1988) (defendant admitted he had a cocaine deal in

the works with his victims; after killing them he set fire to the house where their bodies lay and fled in their car; when he became involved in an accident in the car he fled on foot: remanded for resentencing because the sentencing order was "replete with error.")

This aggravating circumstance has no application to Mr. Beltran. As with numerous other prejudicial events at this trial, Mr. Beltran was tarred with co-defendant's brush. It is undisputed that co-defendant knew the Rodriguezes, so no one stopped to look at this circumstance separately as it might apply to Mr. Beltran alone. Without a doubt, if Mr. Beltran had been tried separately, this circumstance would not have been included in the sentencing order. If it did not apply in Perry (defendant was former neighbor of victim), Scull, and Caruthers (even if the victim had known the defendant for many years, the State, without more, cannot establish this aggravating circumstance), it cannot properly apply in this case to Mr. Beltran.

In assigning aggravating circumstances for the jury's consideration the trial court cannot inject events not actually present. White v. State, 403 So.2d 331, 337 (Fla. 1981) (a person may not be condemned for what might have occurred (emphasis in original); rejecting, "What would have happened [if others had appeared at the home where six victims were shot execution-style] can only be the subject of conjecture"). At bar the judge was clearly influenced by the injuries in-

flicted on young Odanis, but those injuries, she testified, were inflicted solely by Henry Espinosa, and she completely recovered from them. Because those are the facts, there is no support in this record for the portion of the order that "the capital felony was committed [by Mr. Beltran] for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Section 921.141 (6)(e), Florida Statutes. Without consideration of this aggravating circumstance it cannot be said that this jury would not have recommended life for Mr. Beltran, and the court had already announced that he would follow the jury's recommendation. (T2529) Remand for a new penalty phase before a new jury is thus required.

C. THE TRIAL COURT ERRED IN FAILING TO APPLY PROPORTIONALITY ANALYSIS IN ARRIVING AT A SENTENCING DECISION

What is clear from this record is that Mr. Beltran must have been convicted upon a theory of felony murder because the evidence was not sufficient to show that he joined in the intent or action of killing Teresa Rodriguez. Brumbley v. State, 453 So.2d 381 (Fla. 1984). In Enmund v. Florida, 458 US 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held that the Eighth Amendment does not permit imposition of the death penalty on a person participating in a felony during which a murder is committed but who does not himself kill, attempt to kill, intend that a killing take place or intend or contemplate that lethal force will be used. Such a penalty is grossly disproportionate here where, on the evidence, Mr. Beltran did not intend to commit any felony, and the credible direct testimony demonstrates that he took no role in either homicide. Enmund v. Florida, supra. It was thus plainly error to sentence Mr. Beltran to death.

D. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO TWO ADDITIONAL STATUTORY MITIGATING CIRCUMSTANCES: THAT APPELLANT WAS, AT MOST, AN ACCOMPLICE, AND THAT APPELLANT ACTED UNDER THE DURESS OR DOMINATION OF THE CO-DEFENDANT

It was error for the trial court to limit the statutory mitigating circumstances to only one (lack of significant criminal record) where the record shows that Section 921.141 (7)(d) and (e) also apply.

As discussed elsewhere, Mr. Beltran had no motive to harm the Rodriguezes, the evidence does not prove his guilt beyond a reasonable doubt, and the evidence does show the co-defendant's motive and guilt beyond any doubt at all. Even if this court were to reject all of Mr. Beltran's arguments in the guilt phase, however, his status as an accomplice should be considered in assessing penalty. I was not Mr. Beltran's idea to go the house, it was not he who became involved in an altercation with Bernardo, and he did not arm himself.

Similarly, Mr. Beltran deserves consideration, at the penalty phase, for the reason that he was under duress or domination by Espinosa, who took him to the house and inter alia, ordered him to grab Odanis when Espinosa lured her out of her bedroom. Mr. Beltran has a basis for seeking the mercy of society. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

With regard to non-statutory mitigating circumstances, the court should have taken note of Mr. Beltran's testimony and his statement, both of which came in at the penalty phase. His statement was entirely consistent with the evidence as it was independently developed by the State, yet it was given before he could have learned any of the facts from any outside source. Unlike Espinosa's "testimony," Mr. Beltran's statement could (and did) survive both cross-examination and rational scrutiny. Just one example may be cited: Mr. Beltran told the police that Espinosa's motive all along was to get even with Bernardo for, as Espinosa saw it, coming between him and his ex-wife Rosa by urging her to get a better husband. Bernardo even suggested a candidate, Rene Hernandez. (R2750) That was a simpler, more mundane, and yet far likelier explanation for the night's events than the tangled web that Espinosa wove.

Because the record supports the addition of two more mitigating circumstances, and because the court failed to adequately consider appropriate non-statutory mitigating circumstances, remand for re-sentencing is required.

* * *

A proper re-weighing of aggravating and mitigating circumstances, amply supported by the record, must show that it was error to impose the death penalty on Mr. Beltran. Even if the conviction for the murder of Teresa Rodriguez were to be upheld, a life sentence, not death, would be the

appropriate sentence. Menendez v. State, 419 So.2d 312 (Fla. 1982).

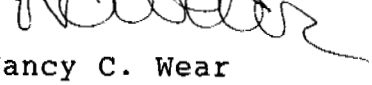
Conclusion

Appellant was convicted of the most serious of crimes and sentenced to the ultimate penalty after a trial marred by infirmities of constitutional magnitude. Improperly tried with another whose guilt was wrongly attributed to Appellant, deprived of the assistance of counsel and an opportunity to be present, incorrectly sentenced, Appellant was denied Fifth, Sixth, Eighth and Fourteenth Amendment rights. Individually and collectively the trial court's errors deprived Appellant of a fair trial. Because neither his conviction nor his sentence is sustainable on this record, both must be reversed by this court on appeal.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was forwarded to the Office of the Attorney General, Suite N921, 401 N.W. 2d Ave., Miami, Florida 33128; to Sheryl J. Lowenthal, Esq., Attorney for Henry Espinosa, Suite 206, 2550 Douglas Road, Coral Gables, Florida 33134; and to Mauricio Beltran-Lopez, no. 113995, Florida State Prison, P.O. Box 747, R-1-N-7, Starke, Florida 32091, this 28th day of September, 1989.

Respectfully submitted,



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