IN THE SUPREME COURT OF FLORIDA

CASE NO.: 73,648

ROLANDO GARCIA,

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 ROLANDO GARCIA

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STATEMENT OF THE CASE

The appellant, Rolando Garcia, was the defendant in the trial court and the appellee, the State of Florida, was the prosecution. The parties will be referred to as they appear below. The symbol "R" will be used to designate documentary evidence and pleadings contained within the five volume record on appeal. **"TR"** represents the transcript of trial proceedings. All emphasis is supplied unless otherwise indicated.

On March 11, 1987, the defendant and co-defendant, Manuel Pardo, Jr., were charged in a twenty-four count indictment with eight counts of first degree murder, four counts of robbery, four counts of possession of a firearm while engaged in a criminal offense, three counts of forgery, three counts of uttering a forged instrument, and three counts of grand theft. **[R.** 16-34]

The defendant was initially tried with co-defendant Pardo on March 28, 1988. [R. 35] Prior to conclusion, a mistrial and severence from co-defendant Pardo was granted. [R. 451

A second trial of the defendant commenced on May 17, 1988. [R. 88] A mistrial was declared when the jury failed to reach a verdict. [R. 1351 This appeal stems from the defendant's conviction after a third trial.

Prior to trial, the defendant repeatedly moved to sever the various counts of the indictment from each other. [R. 219-222, 315, 406-4191 The trial court consistently denied the

defendant's motion except as to Counts **IX** through **XIII** involving the Musa-Quintero homicides and related offenses. [R. **315, 4321** Nevertheless, the trial court permitted the State to introduce evidence concerning the Musa-Quintero homicides in its case in chief finding such evidence to be relevant and thereby denying the defendant's "Motion in Opposition to Williams Rule Evidence." [R. **278-323, 433]** At the same time, the trial court granted the defendant's motion to exclude evidence relating to a homicide of one Michael Millot, with which the defendant was charged in a separate indictment. [R. **4331**

After the filing and resolution of various other motions not germane to this appeal, a trial by jury commenced on October **28, 1988.** Both prior to and during trial, the defendant repeatedly moved for a severance of offenses. [R. **219-222, 315-319, 406-419, 1025-1036, 1403-1413]** The jury ultimately returned its verdict declaring the defendant guilty of the homicides of Amador, Alfonso, Alvaro and Ricard and not guilty of the homicides and related offenses involving Ledo and Robledo. [R. **4031-4033,** Counts **V, VI, VII** and **VIII]** The trial court aquitted the defendant of possession of a firearm during a felony as charged in Counts **IV** and **XVI.** The defendant was adjudicated guilty on all remaining counts. [R. **4037-40461**

The jury's advisory sentencing proceeding commenced the following day. The defendant waived his right to present evidence. [R. **4067, 42471** The State presented no evidence

either. Ultimately, the jury recommended a sentence of life imprisonment for the murder of Amador and the death penalty for the murders of Alfonso [10-2], Alvaro **E8-41** and Ricard [10-2]. [R. **42911**

The trial court subsequently overrode the jury's recommendation with reqard to Amador and imposed four consecutive death penalties upon the defendant. [R. **896-9031** In addition, the trial court imposed prison sentences totaling fifty-five years on the remaining non-capital charges. [R. **9041** The defendant filed a Motion for New Trial which the trial court denied. [R. **9091**

This appeal follows.

STATEMENT OF THE FACTS

This case involves four double homicides and related lesser offenses. The murders are charted as follows for the convenience of the court:

Names	Amador(I) Alfonso(II)	Robledo(V) Ledo(VI)	Musa(IX) Quintero(X)	Alvaro(XIV) Ricard(XV)
Dates	1/22/86	2/27/86	4/22/86	4/23/86
Places	20 NW 87 Ave. Apt. 205, Miami	5601 NW 7 Ave. Apt. 612, Miami	1305 W. 46 St. #234, Hialeah	60 St. & W. 24 Ave.,
Motives	Drug Ripoff	Drug Ripoff	$50.00 Debt jewelry taken	Annoying drug boss - wrong place at wrong time
Modus	Shot in Apt. no other violence	shot in Apt. no other violence	Shot in Apt. severely beaten, violent struggle	Shot in Car, stuffed in trunk-run over by car,beaten, shot
Victims	Men, no drugs or alcohol in bodies	Men, no drugs or alcohol in bodies	Women, evidence of drugs, alcohol in bodies	Man and woman

In a separate indictment, the defendant was charged with the murder of Michael Millot (86-14719B). [R. 4331 On the Defendant's motion, the Musa-Quintero charges (Counts IX - XII) were severed. [R. 432, 1525-15361 The State, nevertheless, introduced evidence of the Musa-Quintero homicides since the

Court deemed them "relevant." [R. 4331

Drug trafficker Carlos Ribera was the State's chief prosecution witness. [R. 2184 et. seq.] While working at "Rainbow Video", a drug dealers' hang-out, Ribera met the defendant and severed co-defendant Manuel Pardo. [R. 2187-2188]

In late 1985, Ribera quit his employ at the video store to become a drug dealer. [R. 2189] He approaced Garcia. [R. 2190] He met with Garcia and specifically asked to participate in a cocaine off-load. [R. 2191-2192] Accord to Ribera, Garcia repeatedly bragged about his drug dealings and the good money he made. [R. 2197]

On one occasion, Garcia indicated to Ribera his intention to introduce him to his "uncle" Manuel Pardo, a federal agent, to set up a drug deal. [R. 2204] Garcia, according to Ribera, described how he used to be a hit-man and showed him newspaper clippings of his purported victims. [R. 2206] Garcia said he had killed "Mario" and ripped him off for two "keys". He talked about Luis Robledo and how he and Pardo had ripped him off. At Pardo's apartment, Garcia described how he and Pardo killed Mario Amador and Alberto Alfonso. [R. 2217] Pardo retrieved two Motorola radios from the closet which he and Garcia used to monitor the police. [R. 2219] Ribera was also shown a "diary" containing newspaper articles about the crime. [R. 2221-2222] During other visits to the apartment, Pardo and Garcia described how they killed Luis Robledo. [R. 2223-2225] Pardo explained that

he had known Robledo through his boss. [R. 22251 Pardo showed Robledo the Marine Corps fatigues he and Garcia had worn as well as the silencers and clips used. [R. 2226-22271 Pardo showed Ribera a .25 Baretta that he said was taken from Robledo as well as a .22. [R. 22291 Ribera later watched the defendant destroy the Baretta and throw it into the Okeechobee River along with Robledo's driver's license. [R. 2277-2278] Pardo also showed Ribera Amador's credit cards and Robledo's driver's license and credit cards. [R, 2231] At Garcia's direction, Pardo retrieved photographs of Amador and Robledo after they had been shot. [R. 2234-22351 Later, at a marina, Pardo took his silenced .22 Ruger, shot the wall, and said "this is how I did Luis [Robledo]." [R. 2252-22531

Garcia subsequently used Robledo's Kaufman & Roberts credit card to purchase a VCR. [R. 2236] Ribera accompanied Garcia when he used other of the victims' credit cards as well. [R. 22381

Ribera also related an occasion on which, while driving with Garcia and Pardo, Pardo strafed the home of drug dealer Sergio Godoy with rounds from a silenced .22 caliber Ruger. [R. 2240-22421 Garcia later tried to rid the car of casings, but one was found later by Ribera and turned over to the Hialeah police department. [R. 22461

Later the same day, Pardo directed Ribera to drive to a location to meet with "his boss" regarding a drug deal in Ohio.

[R. 2247-22481 Both Garcia and Pardo left in a vehicle driven by "El Negro". [R. 22481 Approximately an hour later, Pardo and Garcia returned, apparently upset. Pardo said he was going to kill "El Negro" if he didn't deliver. El Negro was upset, according to Garcia, because they had ripped-off two of El Negro's customers, Amador and Robledo. [R. 22511

Robledo met Fara [Quintero] whom Garcia described as "a stupid dike - a bitch that I know." [R. 22531 Later, Robledo accompanied Garcia to Quintero's apartment. He had given Quintero Robledo's credit cards to use to buy a number of VCRs. [R. 22551 On yet another occasion, when Quintero and Sara Musa, Quintero's roommate, were both present, a disagreement arose concerning $50.00 for the sale of a piece of Quintero's jewelry. [R. 22601 Garcia said that he could not believe "what these fucking chicks were doing to him. They were going around spreading rumors about them because of what happened with the $50.00." [R. 22511

On another occasion, Garcia and Pardo tried to find El Negro at his apartment. They were angry and discussed how they would kill him. [R. 22621 During their discussion about killing El Negro and how they were beat by Quintero over the $50.00 debt, Garcia and Pardo started talking about how they were going to kill Quintero. [R. 22641 When Pardo subsequently asked Ribera to drive to El Negro's house, Ribero refused. Pardo threatened to kill Ribera's children and family. [R. 22691

On April 22, 1986, Musa and Quintero were found dead. The frame of the entry door to the Musa-Quintero apartment was damaged. [R. 28971 The apartment was in disarray. A telephone cord was pulled from the wall. [R. 2897-28981 Property taken from the scene of the Musa-Quintero homicides was found pawned at a local pawn shop by the defendant. [R. 2918, 2927, 29411 Luis Robledo's credit card was found inside a cigarette package at the scene of the Musa-Quintero homicides. [R. 28961

Later, Ribera met with Pardo. After an armed confrontation, Pardo left, still threatening to kill Ribera's children saying that he was "going to do me like he did El Negro and how he did the girls." [R. 2269-22731 Shortly thereafter, Ribera saw a television news account about two girls being murdered in Hialeah. [R. 22731 Thereafter, Garcia showed Ribera photographs of El Negro and Fara [Musal after they had been shot admitting that they had killed them and threatening to "pay me back the same way he paid Fara and El Negro." [R. 22761

Ribera then left town for several days, returned, and called the police. [R. 22781

On April 23, 1986, the still warm body of Daisy Ricard was found at a construction site near the Lago del Rey Condominiums in Hialeah where Pardo lived. [R. 2961-2962, 29751 Ricard had been beaten on her face. [R. 2961-2962] Blood, apparently in addition to that of that of the victim, was found at the scene. [R. 2995-29961 Pardo's thumbprint was found on Ricard's

wristwatch found at the scene. [R. 2952, 3025, 3033] A pamphlet with Pardo's address on it was recovered from Ricard's apartment.

Ricard had been shot five times. [R. 3261-3264] She had suffered a blow to the head sufficient to cause a severe skull fracture and injury to her ear. [R. 3266-3268] The medical examiner opined that the gunshot wounds probably came first. [R. 3270] He did not believe the skull injury was caused by a baseball bat, but instead found the injuries consistent with having been run over by an automobile. [R. 3276-3278]

Meanwhile, two miles away, the body of Ramon Alvaro was found in the trunk of a car. [R. 2983] Alvaro had suffered multiple gunshot wounds to the upper body and head. [R. 3112] A woman's shoe and several softball bats were found with the body in the trunk. [R. 3115] The interior of the vehicle was found to be bloody, indicating a struggle. [R. 3120-3123] Blood found throughout Alvaro's automobile was type "O". Both Alvaro and Ricard had type "O" blood. [R. 3192-31981 Fingerprints of the defendant were identified on a plastic holder (Exhibit 2) and on the trunk lid of Alvaro's car (Exhibit 266). [R. 3171-31791

Although married, Daisy Ricard was having an affair with Alvaro, an employee in the medical laboratory office in which they both worked. [R. 30441 Ricard was also a friend of the family. [R. 3049]

The personal effects of both Ricard and Alvaro were recovered in January, 1987, from a canal. [R. 3001-30061

On April 23, 1986, two haggard-looking men, including one in obvious pain with a bandaged leg and crutches, were observed boarding an airline flight to New York. [R. 3010-30121

Manuel Pardo sought treatment for a gunshot wound to his foot in New York City at the Columbia Presbyterian Hospital. [R. 3204-32051 He told an investigating officer that he had been with his cousin, Rolando Garcia, by a movie theater at 147th Street and Broadway when a shot was fired from a passing vehicle. [R. 32051 After explaining that he was a Sweetwater police officer, Pardo refused the New York City police officer's offer to contact his department. [R, 32081 Garcia related a similar story to the officer. [R. 32111

During the course of his investigation, Sergeant McArthur identified the flight taken by the defendant and Pardo to New York and determined that they had flown under the names Manuel Cruz and Orlando Castro. [R. 3525-35301 On May 20, 1986, after interviewing the defendant, McArthur returned to Miami with the defendant. The defendant was not under arrest and returned voluntarily. [R. 3534-3535] Three days later, McArthur obtained a warrant for the defendant's arrest which he executed at his home. The defendant made no attempt to flee. [R. 3535-35461

Ballistics analysis indicated that more than one weapon was used in the Amador-Alfonso homicides. [R. 34541 All the projectiles, however, came from .22 caliber Ruger pistols. [R. 34551 Robledo and Ledo were killed with a .22 caliber Ruger also, but

not the same one used in the Amador-Alfonso slayings. [R. **34571** Two guns were also used in the Musa-Quintero murders. [R. **34581** The same weapon was used against Ricard, Alvaro, and Pardo's ankle. [R. **34591** Ricard was shot with the same two different guns used to shoot Alvaro. [R. **34601** Both Musa and Quintero were shot with one gun. [R. **34601** Regarding Robledo and Ledo, it could not be determined whether one or more than one gun was used. [R. **34641** One of the guns used in Amador-Alfonso was used in Musa-Quintero. [R. **34671** The casing found in Pardo's apartment matched a casing found in the vehicle at the scene of the Alvaro shooting. The Godoy dwelling shooting revealed casings coming from the same gun used in the Alvaro homicide and Ricard homicide. [R. **3468]** No weapons were recovered which had fired any of the projectiles or casings examined. [R. **34701**

Carlos Ribera was debriefed on May **5, 1986.** [R. **1942-19441** He was "somewhat disheveled, he was acting in a confused manner, his responses were not always responsive to the particular question that was being asked of him at that time, **. .**" [R. **19481** He described the setting of the Amadox-Alfonso homicides accura tely, however, and said he had received his information from the defendant. [R. **19521** Ribera also offered accurate information about the Robledo-Ledo homicides, [R. **1953-19541,** and the murder of Alvero (**"El** Negro"). [R. **1958-19591**

McArthur determined that Robledo's credit cards had been used to make purchases after his death. [R. **1962-19671** Due to the

proliferation of narcotics and paraphernalia in the premises, it was determined that Robledo had been involved in marijuana and cocaine trafficking. [R. 20581 There was no sign of forced entry. [R. 2059] A box for a Baretta .25 caliber pistol was found, but no the firearm itself. [R. 20601 Robledo's Visa card was found at the scene of the Musa-Quintero homicides. [R. 19691

A search warrant was obtained for Manuel Pardo's residence. [R. 19731 That search produced Robledo's Shell credit card [R. 19751 and a briefcase containing newspaper articles concerning the Amador, Robledo, Ledo, and Alfonso homicides. [R. 1978-19841 Also found were documents describing Pardo's treatment for a gunshot wound at the Columbia Presbyterian Hospital in New York on April 24, 1986, the same day Alvero's body was found. [R. 19861 Also found were a Sweetwater Police Department gold sergeant badge and identification card consistent with Ribera's statements concerning what Garcia had told him. [R. 1988-19891 Pardo's telephone book was seized containing the name of victim Robledo. [R. 19901 The police also recovered a "diary" (State's Exhibit 8) into which newspaper articles concerning the Amador-Alfonso and Robledo-Ledo homicides were pasted. [R. 1991-1994] Numbers in the front of the diary were determined to be the serial numbers of firearms, a Ruger .22 caliber and two semi-automatic pistols. [R. 2041-2048] An employee of Firearms International, Louis Reiter, tentatively identified the defendant ("that could be him") as the purchaser of the firearms under the

name Amador. [R. 20521 The diary contained entries consistent with Ribera's information, consistent with certain of the homicides and the theory that Amador and Alfonso were the victims of a cocaine rip-off, and included the name "Roly" which was Ribera's nickname for the defendant. [R. 1997] Pardo's Sweetwater Police Department business card had a list of telephone numbers on it including that of the defendant Garcia. [R. 20161 Two-way radios, such as Ribera described were used in the crimes, were also seized. [R. 2019] The beginnings of a crude safe were found in the closet of the master bedroom, consistent with Ribera's information that Garcia had rented a jackhammer with [Robledo's] credit card to drill the floor and put a safe in for weapons and explosives. [R. 20241 The closet also contained flattened .22 caliber bullets. [R. 2025-20261

Rolando Garcia testified in his own behalf. He explained that Manny Pardo had been a friend for approximately ten years. [R. 35521 Garcia also acknowledged his association with Ribera through the Rainbow Video Store. [R. 35531 He denied being present at the scene of the shooting at the Godoy residence. [R. 35541 He explained that he knew Godoy as a drug user who associated with Ribera regarding drug transactions. [R. 3555-35571 Garcia introduced Ribera to Pardo as well as Alvaro and Sara [Quintero]. [R. 3607-36081 Ribera was looking to get involved in the drug business and wanted to participate in an off-load. [R. 36091

Garcia testified that the last time he saw Alvaro alive was at the La Carretta Restaurant when he went to collect **$25.00** he had earned cleaning Alvaro's car. [R. 3610] He explained that two days before he had washed Alvaro's car at the request of his wife. [R. 37251

Garcia denied having showned Ribera any newspaper articles. [R. **36121** He explained, when asked about his palm print on the plasitc protector in which the articles were kept, that his finger prints could have been anywhere in Pardo's house since he regularly associated with him and had, in fact, helped Pardo and his wife move into their house. [R. **3612-36131**

Garcia explained that he believed Pardo to be a good police officer and a good friend until Pardo took him to see the body of Alvaro in the trunk of the car. [R. 3614] He explained that Pardo had called him by telephone and told him he had been shot. [R. **36151** Garcia went to Pardo's apartment and followed him while Pardo drove Alvaro's car to the contruction sight where Alvaro's body was found. [R. 3618] Demanding to know what was going on, Pardo opened the trunk of the car revealing Alvaro's body. Garcia immediately closed the trunk of the car, grabbed the keys, and threw them. [R. **36181** He was scared. [R. **36191** Garcia said to Pardo, "You're fucking crazy, man," and got into Pardo's car because he was shaking so much he could not drive his own car back. [R. 3620] Arriving at Pardo's house, Pardo decided to seek medical treatment from a local doctor. Garcia helped

Pardo and did not call the police, due to fear and loyalty to his friend. [R. **36221**

Garcia explained that he used a driver's license given to him by Ribera to buy guns for Pardo for a reason he did not know. [R. **3622-36231** Garcia denied placing an order for six Rugers while admitting he had provided false information on one occasion at the firearms shop. [R. 3624-3625] He admitted using credit cards provided to him by Ribera to purchase the various items of property described in the indictment. [R. **36251** Garcia admitted having sold jewelry he received from Ribera at a pawn shop across from Rainbow Video Store. [R. **3634-36351**

Garcia also denied having bought his parents' house trailer with the proceeds of drug sales, while admitting that he had used drugs together with Ribera. [R. 3628-3629] Garcia explained that he worked at a paint and body shop and washed cars and boats to make ends meet. [R. **36291**

In New York, after hearing that the police were looking for him, he went to the police station. [R. **36431** He admitted lying to the police initially when they accused him of murdering the people whose credit cards he had used. Prior to that, he had not known that the owners of the credit cards were dead. [R. **36451** He did not know that Amador was dead until told by McArthur. [R. **36451** He denied knowing Ledo or Alfonso at *all.* CR. **3647-36481** He denied having ever been to the Quintero-Musa residence. [R. **36481**

Garcia explained that the .25 caliber pistol was destroyed by Ribera. [R. 3652-3653] He denied having shown any picture of any victims or any photographs of anybody dead. [R. 36551 While explaining that Pardo had a lot of guns, Garcia insisted he had never shot a gun in his entire life. [R. 3655, 3664-36651

On rebuttal, Sgt. McArthur recounted an interview with Garcia in which he had admitted being with Ribera at the Godoy residence shooting, but denied that Pardo was present. [R. 3755-37561 According to McArthur, Garcia also admitted cocaine transactions with Pardo, Girling, and Mesa. [R. 37571 Garcia admitted an acquaintence with Godoy and an ability to read and write. [R. 37591

Ribera, also in rebuttal, catagorically contradicted the defendant's allegations about him. CR. 3769-37711

SUMMARY OF THE ARGUMENT

I.

The fundamental defect in the defendant's convictions lies in the fact that the State prosecuted him for at least three separate double homicides at the same time. The trial court's consistent refusal to grant the defendant's repeated pleas for severance constituted reversible error. The distinct offenses of which the defendant stands convicted and sentenced to the ultimate penalty of death involved separate victims, different locations, different motives, different methods, and spanned a time period of no less than three months. The acts charged by the State were neither connected acts nor related offenses within the jurisprudence of this Court permitting consolidation. The defendant is entitled to new and separate trials.

11.

In addition to the misjoinder of the six homicides for which the defendant was on trial, the trial court permitted the State, over vociferous objection, to demonstrate to the jury the defendant's guilt of two other, separate and distinct murders. This constituted reversible error. The introduction of such evidence not only compounded the prejudice suffered by virtue of the misjoinder of counts, it violated Florida Statute §90.404 and

denied the defendant a fair trial. The irremediable prejudice suffered by the defendant by virtue of his depiction as a mass murderer can only be corrected by the grant of a new, fair trial.

III.

Not content to inflame the jury with evidence of eight gory murders, the State was permitted to introduce evidence of the defendant's involvement in the reckless shooting of an occupied dwelling, his involvement since childhood in "cooking" crack cocaine, and his alleged importation of cocaine and other narcotics. In addition, the State on several occasions was permitted by the trial court to offer gratuitous testimony concerning the defendant's involvement in other, uncharged homicides and unrelated criminal investigations being conducted against him. This evidence grossly offended the general rule prohibiting the introduction of collateral and unrelated evidence as well as the defendant's receipt of a fair trial. A new trial should be granted.

IV.

The trial court erred in permitting the prosecution to cross-examine the defendant relative to his failure to call his sister to testify on his behalf. This tactic, undertaken by the State, undermined the defendant's right to the presumption of

innocence, improperly shifted the burden to the defense in the jury's eyes, and constituted an impermissible comment on the defendant's Fifth Amendment right to remain silent. Where, as here, the defendant at no time opened the door to such offending testimony, its introduction constituted reversible error entitling the defendant to the vacation of his convictions and a new trial.

V.

The trial court erred in overriding the jury's recommendation of a sentence of life imprisonment and by thereafter sentencing the defendant to death for the murder of Mario Amador where it simply cannot be said that no reasonable person could differ as to the appropriate penalty. This jury could reasonably have found various mitigating circumstances to exist and its judgment should have been given deference by the trial court. Because it was not, the defendant's death sentence should be reversed.

VI.

The death sentences imposed against the defendant for the murders of Alfonso, Alvaro and Ricard each suffer serious defects and should therefore be vacated with directions to order the defendant's resentencing. With regard to each victim, the trial court improperly considered aggravating circumstances which the

State failed to prove beyond a reasonable doubt. Due to the existence of various mitigating circumstances, this cause should at the very least be remanded.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS TO SEVER THE UNRELATED PAIRS OF HOMICIDES IMPROPERLY JOINED IN THIS INDICTMENT THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The defendant was charged by indictment with three separate pairs of homicides. They were, however, improperly joined in this single trial. The acts alleged and the offenses charged were not "connected acts" or "related offenses" within the meaning of those terms in the rules permitting consolidation and joinder and it was error to try these different double homicides together. The defendant is entitled to new, separate trials.

Garcia was charged with killing Mario Amador and Alberto Alfonso (Counts I + II) on January 22, 1986, at 20 N.W. 87th Avenue, Miami. He was also charged with killing Luis Robledo and Ulpiano Ledo (Counts V + VI) on February 27, 1986, at 5601 N.W. 7th Avenue, Miami. In addition, the defendant was charged with having perpetrated the homicides of Ramon Alvaro and Daisy Ricard (Counts XIV + XV) on April 23, 1986, at 60th Street and W. 24th Avenue, Hialeah. The acts charged in each pair of counts related to a different set of victims at different times on different dates in different places. Beyond the fact that each double homicide was purportedly committed by the defendant and his

severed co-defendant, Manuel Pardo, the only relationship between the acts and offenses charged is that each relates to the same type of crime and the same defendant.

It might be argued that the Amador-Alfonso and Robledo-Ledo crimes were most similar, although occurring over a nearly two-month span of time. Both were alleged to have been drug "rip-offs" in which the victims were executed during the course of what was supposed to have been a drug transaction. [R. 1873, 18781 All of the victims were men without alcohol or drugs in their bodies and there existed no evidence of an altercation or other violence prior to the killings by multiple gunshots to the head. A search of Pardo's residence revealed newspaper articles concerning the Amador-Alfonso and Robledo-Ledo homicides. [R. 1978-1984] Pardo's "diary" was seized in which newspaper articles concerning the Amador-Alfonso and Robledo-Ledo murders were pasted. [R. 1991-1994] The diary contained entries consistant with the theory that Amador and Alfonso were the victims of a cocaine rip-off. [R. 19971

With regard to the murder of Alvaro and Ricard, the evidence considered in a light most favorable to the State may have allowed the inference that Ramon Alvaro was the boss of Garcia and Pardo in the drug business. [R. 2247-22481 Alvaro, according to the State's theory, was upset because Garcia and Pardo were eliminating his customers. [R. 22511 Alvaro was found in the trunk of his car. [R. 22231 The interior of the vehicle was

covered with blood indicating a struggle. [R. **3120-31231** Ricard's body was found two miles away at a construction site near the Largo Del Rey condominiums where Pardo lived in Hialeah, [R. **2961-29691** She had been beaten on the face. [R. **2961-29621** She had suffered a blow to the head sufficient to cause a severe skull fracture and injury to her ear which the medical examiner found to be consistent with having been run over by an automobile. [R. **3266-3268, 3276-3278]** No motive was offered for Ricard's homicide, but it was demonstrated that she was having an affair with Alvaro with whom she worked in a medical laboratory. **[R. 30441**

As the State conceded during argument on the defendant's Motion for Severance, it was "not relying on similarity of offenses or temporal proximity. * * * A month apart is not temporal connection, a mere similarity is not proper for a motion for joinder. We're not relying on those." [R. **15321** Instead, the State argued the joinder of the Alvaro-Ricard homicides solely because Ricard "gets angry these people are killing are his drug customers" and the resulting "falling out between Ramon and the defendants" ultimately cost Alvaro his life. **[R. 15341** It argued, speciously, that "the killing of the people in the first and second double homicides is a motive for the killing in the third double homicide." [R. 1535] That simply was not true. The mere fact that the victims may have had relationships between themselves as well as with the defendants does not justify the

joinder of otherwise separate and distinct crimes against specific victims.

In Davis v. State, 431 So.2d 325 (Fla. 3d DCA 1983), upon which the State relied at trial, the court held that the aggravated assault and the subsequent murder of a witness to the aggravated assault were offenses related in sequence by a causal connection. Therefore, the court held severance of offenses to have been properly denied. Davis, of course, is distinguishable from the case at bar inasmuch as there was a clear transactional and episodic relationship between the two crimes. Here, despite the State's ingenious suggestion of some superficial connection, each of the three episodes remain separate and distinct.

The joinder of these charges, especially the Alvaro-Ricard homicides, cannot be justified under any legitimate theory or the Rules of Criminal Procedure. Every defendant has a constitutional right to a fair trial on each criminal accusation without the prejudice that necessarily results from the consolidation for trial of criminal charges relating to separate factual events. See, Paul v. State, 385 So.2d 1371 (Fla. 1980), adopting the dissent in Paul v. State, 365 So.2d 1063, 1065 (Fla. 1st DCA 1979); State v. Williams, 453 So.2d 824 (Fla. 1984).

Florida Rule of Criminal Procedure 3.150, regarding joinder of offenses and defendants provides:

> (a) Joinder of offenses. Two or more offenses which are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors or

> both, are based on the same act or transaction or on two or more connected acts or transactions.

Furthermore, Rule 3.152 provides for relief from improper joinder:

> (a)(2) In case two or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severence of the charges upon timely motion thereof.

Garcia timely moved prior to trial for a severence of offenses. [R. 219-222, 1531] The denial of that motion was error. This Court's interpretation of Rule 3.150(a) in both Williams and Paul compelled the severance of the unrelated offenses with which the defendant was charged where those charges were based on similar but separate episodes, separated in time, "connected" only by superficial circumstances and the accused's alleged guilt in each instance. This interpretation of the rule has been repeatedly followed by Florida courts. Brown v. State, 502 So.2d 979 (Fla. 1st DCA 1987); Jones v. States, 497 So.2d 1268 (Fla. 3d DCA 1986); Thames v. State, 454 So.2d 1061 (Fla. 1st DCA 1984); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983); Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981); Rubin v. State, 407 So.2d 961 (Fla. 4th DCA 1981); Tyson v. State, 379 So.2d 1321 (Fla. 1st DCA 1980); McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981).

Above all, a similarity of circumstances does not justify

joinder under Rule 3.150(a). The Macklin court for example, condemned the joinder of two separate criminal episodes involving taxi cab hold-ups five days apart at locations less than one block apart where both cab drivers were dispatched to the area by a prior phone call. Similarly, in McMullen v. State, supra, the court reversed the defendant's convictions which resulted from a single information charging twenty counts of robbery arising from five separate criminal episodes. The court held that the similarity of circumstances resulting from the fact that the robberies all took place in the northwest quadrant of Dade County, within a nine-day period, and that four of the five robberies involved fast food restaurants, did not warrant joinder under Rule 3.150(a). Thus, precisely the same conclusion is compelled here.

In addition, the improper joinder of all of the defendant's homicides and all of the supposedly related lesser offenses also made this prosecution much more complex than it needed to be. As prosecutor Mendelson offered prior to trial:

> Judge, in my tenure as an attorney, I have not seen a more complex case than this case. We are talking about I would suggest at least six homicides being tried together and three other homicides coming in as collateral crime evidence and other collateral crime evidence.
>
> It is a vast, complex case . . . [R. 1490, 3/24/88]

Moreover, where offenses are improperly joined in one information or indictment, severance is mandatory since prejudice

is conclusively presumed. Macklin v. State, supra; Thames v. State, supra. As Judge Smith offered in Paul v. State, supra at 1066:

> [T]he more important purpose of requiring separate trials on unconnected charges is to assure that evidence adduced on one charge will not be misused to dispel doubts on the other, and so effect a mutual contamination of the jury's considerations of each distict charge.

Such is precisely the prejudice suffered by the defendant here. The three separate and distinct double homicides with which Garcia was charged remained unconnected except to the extent that Garcia and Pardo were alleged to have committed each of them. The Alvaro-Ricard homicides cannot even be called similar or of the same type or quality as the Amador-Alfonso or Robledo-Ledo murders. Each of the pairs of crimes, at least, should have been tried separately. Because they were not, the defendant suffered an irremediable prejudice and his conviction cannot stand. The defendant's convictions and sentences of death must be reversed.

POINT 11.

THE TRIAL COURT'S FAILURE TO PRECLUDE THE STATE'S INTRODUCTION OF THE UNRELATED, COLLATERAL, IRRELEVANT, AND UNCHARGED MUSA-QUINTERO HOMICIDES CONSTITUTED PREJUDICIAL ERROR AND DENIED THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION

In addition to the improper joinder of the three double homicides for which the defendant was tried, the State was also permitted to offer evidence of the homicides of Sara Musa and Farah Quintero which, even the State admitted, could not be properly charged within the same indictment. Conceding that such evidence was not admissible under Florida Statute §90.404, the State successfully argued that proof of the Musa-Quintero homicides was "relevant." It was wrong and the trial court was misled into admitting palpably prejudicial evidence which denied Garcia a fair trial.

Indeed, this record reveals that the only real reason the State presented evidence of the Musa-Quintero homicides was to demonstrate the defendant's propensity to kill people. In opening statement, the prosecutor offered:

> Mrs. Antonacci: You will also be hearing evidence about two additional murders that the defendant, Rolando Garcia and co-defendant and co-conspirator Manuel Pardo committed. The first-degree murder of Sara Musa and Farah Quintero. You will not be asked to deliberate and reach a verdict on those particular murders. However, you will be hearing evidence that this defendant committed those murders as well.

> All totaled, you will be hearing evidence about eight murders that this defendant committed. Fight people died at Rolando Garcia's hands. [R. **18711**

Upon the State's concession that the Musa-Quintero charges (Counts IX - XIII) might not be properly joined ("Frankly I'm not willing to take a chance on that." [R. 1528]), the trial court granted the defendant's Motion for Severance as to those counts. [R. **15301**

Nevertheless, the State, by a "Notice of Intent to Introduce Williams Rule Evidence", forecast its intent to offer proof of the defendant's involvement in the Musa-Quintero homicide. [R. **15371** At the hearing held on the defendant's Motion in Opposition to the Introduction of Williams Rule Evidence, the State retreated from its position, conceding that the issue was really one of relevance and materiality and that the "Williams rule" provided it no additional strength. [R. **1538-15401**

Indeed, the Musa-Quintero homicides were entirely different from those charged in the indictment. They were not drug related but stemmed, according to the State, from some perceived slight on the part of Garcia and Pardo over a fifty dollar debt. [R. **2251, 22641** Unlike the other crimes, the perpetrators took jewelry from the victims and beat the victims severely prior to their deaths. [R. **2912]** Unlike the other crimes, the frame of the entry door to the Musa-Quintero apartment was damaged. [R. **28971** The apartment was in disarray. A telephone cord was

pulled from the wall. [R. 2987-2898] Conceding that the evidence relating to Musa and Quintero did not constitute "similar crimes evidence" under Fla. Stat. §90.404, the State nevertheless convinced the trial court that its proof was relevant. The only conceivable basis for the court's finding involved the solitary fact that Luis Robledo's credit card was found inside a cigarette package at the scene. [R. 2896]

While this credit card evidence might quite convincingly link the defendant, who was already implicated in the Robledo murder, to the Musa-Quintero homicides, it nevertheless remained utterly and irrevocably immaterial and irrelevant to any issue of fact in any of the homicides charged. There being no similarity of offenses sufficient to justify consolidation of the Musa-Quintero homicides with the others charged, the Musa-Quintero evidence did not become relevant simply because the defendant was shown to have probably committed that crime, too. As such, both the State and, more importantly, the trial court seriously misapprehended to the defendant's detriment the basis for the admission of "relevant" evidence.

It is generally accepted that evidence in criminal trials must be "strictly relevant to the particular offense charged." Williams v. New York, 337 U.S. 241 (1949). The admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict. Williams v. United States, 168 U.S. 382

(1897); Hall v. United States, 150 U.S. 76 (1893); United States v. Allison, 474 F.2d 286 (5th Cir. 1973).

It has been repeatedly held, as in Green v. State, 190 So.2d 42 (Fla. 2d **DCA** 1966), that evidence of another offense wholly independant of the case being tried must be excluded if it has no direct bearing and proof of the instant case, and where its only offense even though the offenses are similar or of a like nature.

It is fundamental that immaterial questions should be excluded on proper objection. Eatman v. State, 48 Fla. 21, 37 So. 576 (Fla. 1904). In other words, evidence on collateral issues having no bearing on the defendant's guilt should be excluded. Tully v. State, 69 Fla. 662, 68 So. 934 (Fla. 1915). Evidence is only admissible which proves, or tends to prove a fact materal to the issues sought to be proved. Strickland v. State, 122 Fla. 384, 165 So. 289 (Fla. 1936).

Not only may the prosecutor not adduce every description of evidence which according to the prosecutor's theory may be supposed to elucidate the matter in dispute, but each person charged with the commission of an offense must be tried on evidence legally tending to show his guilt or innocence. Simmons v. Wainwright, 271 So.2d 464 (Fla. 1st **DCA** 1973); Thomas v. State, 202 So.2d 883 (Fla. 3d **DCA** 1967). In short, the test of admissibility is relevancy and the test of inadmissibility is lack of relevancy. Williams v. State, 110 So.2d 654 (Fla. 1959); **B.A.A.** v. State, 333 So.2d 552 (Fla. 3d **DCA** 1976).

Here, the prejudice engendered by the joinder of three separate double homicides in the same trial was enormously exacerbated by the trial court's admission of evidence of the defendant's involvement in two additional, severed, homicides. Little could have been more prejudicial to the defendant's receipt of a fair trial than the jury's exposure to evidence of the defendant's complicity in an uncharged double homicide along with those with which he was charged. No jury could be reasonably expected to resist the implication that a defendant charged with four homicidal episodes must be guilty of having killed someone. The offer of such a temptation does not, however, comport with the guarantees of due process of law under either the Florida or Federal Constitutions. The defendant's convictions should be reversed. He should be granted new, separate trials at which evidence of his involvement in collateral and uncharged homicides should be excluded from the jury's consideration.

POINT III.

THE TRIAL COURT REPEATEDLY ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE COLLATERAL AND IRRELEVANT EVIDENCE OF UNRELATED COLLATERAL OFFENSES FOR NO REASON OTHER THAN TO DENIGRATE THE DEFENDANT'S CHARACTER AND INFLAME THE JURY AGAINST HIM IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Throughout this trial, the State inflamed the jury with evidence which it should never have been permitted to present involving the defendant's participation in completely unrelated drug deals and importations, a drive-by shooting of an individual's house unrelated to any offense charged in this indictment, and the defendant's participation in "other murders." The prejudice suffered by the defendant thereby, in addition to that engendered by the improper joinder of offenses and introduction of uncharged homicides, denied the defendant a fair trial and due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

GRATUITOUS TESTIMONY OF OTHER MURDERS AND INVESTIGATIONS

This appeal is from the defendant's third trial on the same charges. The first trial was mistried due to the failure to sever defendants. [R. 135] The second trial resulted in a hung jury. [R. 45] There is no question that any reference to those trials by the State or its witnesses was taboo. This is so for

the reason, among others, that the jury may infer that the accused has committed other uncharged crimes or invite an inference of guilt unsupported by the facts in evidence. Ailer v. State, 114 So.2d 348 (Fla. 2d DCA 1959); Sherman v. State, 255 So.2d 263 (Fla. 1971); Lofton v. State, 273 So.2d 70 (Fla. 1973).

Prosecution witness Lieutenant Foulk testified to his receipt from chief accuser Ribera of a .22 caliber casing and .25 caliber magazine which he had not brought to court. [R. 33461 On cross-examination, Foulk admitted that he did not know where the evidence was. [R. 33471 When asked when he had last seen them, Foulk answered, unresponsively, "At the other murder trial." [R. 33471 Introducing the spectre of yet an "other murder trial" in addition to three charged double homicides and evidence of a fourth, inferred Garcia's involvement in yet other uncharged homicides. While declining a curative instruction, defense counsel accepted the court's invitation to make "a motion" which the trial court denied apparently believing that the answer had been invited by defense counsel's question. Defense counsel, however, by asking "when", asked for a date or time, not a place or event. The officers response was gratuituous and callous to the defendant's receipt of a fair trial.

In addition, during the State's direct examination of its chief prosecution witness, Carlos Ribera, the prosecutor appears to have deliberately invited the jury to infer Garcia's involvement in other, uncharged murders. While describing

Ribera's interrogation by various Hialeah police officers, Ribera explained:

> * * * They were asking about different -- different cases that I didn't know about that they thought had relationship with these people. . .[R. **2282-22831**

The prosecutor followed up with a question designed to elicit Ribera's offending response:

> Q: Were they asking you about other Hialeah cases to see if you could help them with anything else?
>
> A: Yes, because their name had come up in several investigations of other homicides and I didn't know anything about them. . . [R. **22831**

The defendant's immediate objection and Motion for Mistrial was denied by the trial court. [R. **22841** The defendant rejected the court's offer to give a cautionary instruction. [R. **2284-2285]**

The implication of Ribera's response is undeniable - it invited the jury to infer the defendant's guilt of yet more uncharged murders. The trial court's rationalization ("I understand that answer to have to do with the murders of the ladies, but that's how I understood it." [R. **2284])** simply does not comport with a record which demonstrates that there were other uncharged homicides for which the defendant was being investigated (and ultimately charged) and where Ribera had

already described in detail his knowledge of the Musa-Quintero homicides. [R. **2253-2260, 2269-2273,** 2276] The conclusion is inescapable that a reasonable jury would have been free to infer the defendant's guilt of other, uncharged murders. That is impermissible and unfair. The defendant is entitled to a new trial.

EVIDENCE OF THE DEFENDANT'S UNRELATED DRUG INVOLVEMENT AND IMPORTATION SCHEMES

Granted, it was relevant for the State to establish Garcia's drug-related relationship with Amador, Alfonso, Robledo, Ledo and Alvaro in order to conform the proof to its theory that their homicides were drug-related. It does not follow, however, that every specific and collateral act of drug-related misconduct on the part of Garcia was thereby made admissible. In fact, such testimony as the State introduced was irrelevant, immaterial, and overwhelmingly inflammatory.

Through various witnesses, the prosecution established the defendant's sideline as a small-time seller of narcotics. John Hegerty, having met Garcia on a construction job, came to know the defendant as a seller of "grams or quarters" of cocaine. [R. **24501** Through Hegerty, however, the prosecutor exposed the jury to the idea that Garcia had been involved in "the cooking of cocaine." [R. **24511** Although the trial court sustained the defendant's objection, the broader and irrelevant implication of the defendant's involvement in the processing of crack cocaine

was improperly injected into this homicide trial.

Ostensibly to establish Ribera's motivation for associating with Garcia in the first place (he wanted to involve himself in a drug off-load for some quick cash), the State perpetuated through Ribera an assault on the defendant's character and propensity for criminal behavior:

> Q: Was there a reason that you were talking to the defendant about the possibility of an off-load?
>
> A: Because he always talked about how -- how much drug deals he did; that he was a cocaine cooker -- he cooked cocaine in drug labs: that he's been doing this since he was 14 years old; and the contacts that he has and his uncle and the marina that's also in it. [R. 2191-2192]

While that particular response escaped objection, the State persisted in the elicitation of irrelevant and highly prejudicial narcotics testimony:

> Well, he referred to the trailer that his parents lived in, that he had purchased it with one of his drug deals.
>
> He was always mentioning about when, since he was fourteen, he was always cooking coke.
>
> * * *
>
> He would show me boats in the C & F Marina that had hidden compartments.
>
> He would just go on and on and on.
>
> Q: what did he tell you about the compartments?
>
> A: That that's where they stored the coke and they were hidden compartments, so if they were stopped or anything, they just couldn't see

> the coke or the drugs that they were bringing in.
>
> Mr. Surowiec: Objection, I have a motion if I could, please.
>
> * * *
>
> Mr. Surowiec: I move for a mistrial at this point. [R. 2197-2198]

The trial court denied the defendant's Motion for Mistrial but instructed the jury, at the defendant's request, that Garcia was not on trial for any drug offense. [R. 2201-2203]

At a time characterized by unparalleled hysteria concerning an ever-growing drug problem and specifically the scourge of cocaine in general and crack cocaine in particular, the State's exploitation of the defendant's purported prior cocaine "cooking" and importations could not have been more prejudicial. They were, more important, entirely irrelevant to the simple proposition the State otherwise easily proved - that Ribera sought Garcia's association because he believed him to be capable of involving him in a drug deal. The State's overkill is characteristic of the way it tried this case and cannot be justified under any legitimate theory of prosecution. Only a new trial can cure the prejudice the defendant suffered.

THE GODOY SHOOTING INTO AN OCCUPIED DWELLING

The State introduced into evidence, through the testimony of Officer Terrence Bouie, the details of an April 2, 1986, shooting

involving the defendant into the occupied dwelling of Sergio Godoy at 2277 W. 55th Street in Hialeah. [R. 3245-32461 This shooting injured no one and was committed from a slowly moving vehicle. The link of the shooting to Garcia and Pardo was established by Ribera who admitted being in the vehicle. [R. 2240-22421 Garcia, according to Ribera, later tried to rid the car of the expended casings but Ribera found one which had been overlooked and turned it over to the Hialeah Police Department. [R. 22461 That casing matched those found at the scene of the Alvaro and Ricard homicides. [R. 34681 The Godoy shooting was, however, otherwise unrelated to the offenses charged in the indictment. The mere fact that the State could establish the defendant's guilt of the Godoy dwelling shooting did not make that shooting relevant or material to this case. Again, the only sure effect of such testimony was to demonstrate Garcia's violent and unsavory character. Not content to establish the defendant as a serial murderer and a cocaine-cooking narcotics-importer, it portrayed him as in individual who would shoot indiscriminately at one's occupied home. It was therefore, inadmissible and so overly prejudicial as to deny the defendant a fair trial. A new trial should be granted.

POINT IV.

THE PROSECUTION IMPERMISSIBLY CROSS-EXAMINED THE DEFENDANT REGARDING HIS FAILURE TO SOLICIT THE TESTIMONY OF HIS SISTER, THEREBY IMPERMISSIBLY COMMENTING ON THE DEFENDANT'S FAILURE TO PRESENT EVIDENCE AND IMPROPERLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

For no apparent reason but to further inflame the jury against the defendant, the prosecutor cross-examined the defendant regarding his failure to present the testimony of his sister. The substance of the prosecutor's accusatory confrontation of the defendant faulted him for his purported failure to present evidence he was under no obligation to present at all. Without provocation by the defendant or the invitation of the defense in general to the elicitation of such testimony, the State's improper inquiry effectively shifted the burden of proof in the jury's eyes impermissibly to the defendant, faulted him for failing to meet that burden, and implied his lack of candor and forthrightness. The conduct of the prosecution was unfair and the trial court's failure to sustain the defendant's objection was error.

The issue of the defendant's sister was created entirely by the State during its cross-examination of Garcia. No mention of the sister was made by the defense during opening statement, through the examination of any other witness, or even during

Garcia's direct examination. The State elicited the first testimony about Garcia's sister when it questioned Garcia about his knowledge of Pardo having been shot:

> Q. Mr. Garcia, where were you when your co-defendant, Manny Pardo, called you to give you the news about being shot?
>
> A. In my house -- in my parents' trailer.
>
> Q. How did you get to Pardo's house?
>
> A. My sister took me over that day.
>
> Q. And you sister could have verified, to this jury that, in fact, you went there, couldn't she?
>
> A. My sister could have verified she takes me over to Manny Pardo's house a lot of times. She takes me to work a lot of times.
>
> Q. No, no, no. I am talking about that day. She could have sat in that chair --
>
> A. Right.
>
> Q. -- and told the jury --
>
> A. Uh-hmmm.
>
> Q. -- that she took you to Pardo's house that afternoon, couldn't she? [R. 3684-36851

Wrapping up her cross-examination, the prosecutor then asked, accusatorily:

> Q. Your sister could have testified, couldn't she?
>
> A. Yes. She could have and so could a lot of people in my family, but I am not going to make them go through that.
>
> Ms. Weintraub: One moment, Your Honor.

> Mr, Surowiec: I object to the inference that the sister can't testify, State could have subpoenaed her if they wanted to. [R. 37421

One of the most fundmental rights recognized by the United States Constitution is the right to remain silent under the Fifth Amendment and not have that silence used against the accused at trial. Miranda v. Arizona, 384 U.S. 436 (1964); Doyle v. Ohio, 426 U.S. 619 (1976); United States v. Hale, 422 U.S. 71 (1975). By the same token, comments on absent witnesses which have the effect of suggesting that an inference be drawn against the defendant because he failed to call a witness are not permitted. Bradley v. United States, 420 F.2d 1891 (D.C. Cir. 1969).

A clear distinction is drawn between prosecutorial comments which may lead the jury to believe that the defendant has the burden of proving his innocence and those cases in which the prosecutor's comment is invited to rebut an issue raised first by the defendant. Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983). For example, the State may be permitted to comment on the defendant's failure to produce alibi witnesses. Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975). It may permissibly comment on the failure of the defense to call a witness whom the defendant claimed was favorable to his case. Allen v. State, 320 So.2d 828 (Fla. 4th DCA 1975), dismissed, 330 So.2d 725 (Fla. 1976). It is not permissible for the State to create an issue and thereafter fault the defendant for having failed to present the testimony to resolve it. It is this tactic that the court

condemned in Bayshore v. State, 437 So.2d 198 (Fla. 3d DCA 1983).

Moreover, an inference adverse to the defendant is permitted when the defendant fails to call witnesses only when it is shown that the witnesses are peculiarly within the defendant's power to produce and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent. Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982) (Pearson, J. concurring). In the instant case, as in Kindell and Bayshore:

> The State not only "totally failed to establish the competency and availablity of the . . . [father as an] alibi witness as a predicate to its argument, but - even more egregiously - itself created in order to later destroy the alibi defense." Id at 199, citing Kindell at 1288.

The same reasoning applies here to the testimony of the sister and the "argument" of the prosecutor presented through the cross-examination of the defendant. The Bayshore court applied the test "whether or not we can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion be reached, the judgment should be reversed." Id at 199. It thereafter reasoned that the prosecutor's comments may have led the jury to believe that appellant had the burden of proving his innocence, and reversed and remanded the cause for a new trial. The same result should apply here.

Similarly, in Michaels v. State, 429 So.2d 338 (Fla. 2d DCA 1983), the State commented in closing argument on the failure of the defendant to call the defendant's daughter as a witness. It had been demonstrated during the trial that the defendant's daughter was present when the alleged crime occurred and was available to testify. The second district held that it was clearly improper for the State to comment on the defense's failure to call witnesses, citing Kirk v. State, 227 So.2d 40 (Fla. 4th DCA 1969). Also in reliance upon Michaels and Kirk, the Fourth District in Trinca v. State, 446 So.2d 719 (Fla. 4th DCA 1984), reversed the defendant's conviction for the prosecutor's improper injection of the improper issue of the defendant's failure to produce the testimony of his step-daughter.

Reference by the prosecuting attorney to a criminal defendant's failure to call certain witnesses impinges primarily upon two related constitutional rights. The first is the defendant's right to remain silent which places a concommitant obligation on the State not to comment on the defendant's exercise of that right. In this context, such a comment is prejudicial error. Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978). The second is the presumption of innocence, again to be considered together with the State's obligation to come forward with evidence sufficient to prove the defendant guilty beyond a reasonable doubt. Thus, a comment that indicates to the jury that the defendant has the burden of proof on any aspect of the

case will constitute reversible error. Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983) and cases cited therein. From these concerns has evolved the general rule that such comments constitute prejudicial and therefore, reversible error. Kirk v. State, 227 So.2d 40 (Fla. 4th DCA 1969); Michaels v. State, 429 So.2d 338 (Fla. 2d DCA 1983).

The prosecutor's repeated cross-examination relative to a witness the defendant purportedly should have, but did not, call to testify in his defense was simply unfair. It faulted the defendant in the jury's eyes for suppressing if not concealing what the State implied was relevant and material evidence. In fact, the testimony of the defendant's sister relative to the issue about which the defendant was cross-examined (how he got to Pardo's house on a particular occasion) mattered very little in this multi-homicide prosecution. what the State's tactic did accomplish was to suggest to the jury that the defendant had a burden of proof to present his sister as a witness and that he had failed in his obligation and had thereby failed to meet his burden of proof. That ingenuous ploy should be condemned by this court and remedied by the grant of a new, fair trial.

POINT V.

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE IMPRISONMENT AND IN SENTENCING THE DEFENDANT TO DEATH FOR THE MURDER OF MARIO AMADOR THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW RESULTING IN THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

This competent jury heard evidence concerning the defendant's alleged involvement in four double homicides. It discriminated between the circumstances involved in each, acquitted the defendant of two of the murders, recommended the imposition of death for three of the murders, and recommended a sentence of life imprisonment with regard to the murder of Mario Amador. [R. 42911 This considered judgment of the jury clearly reflected a careful weighing of the circumstances surrounding that crime and should have been honored by the trial court. The trial court's override of that recommendation and imposition of the ultimate sentence of death in its stead, should be reversed by this court on appeal.

The trial court made erroneous findings relative to aggravating circumstances. It found, for example, that "the capital felony was committed for pecuniary gain" while also finding that "the commission of this capital felony was while the defendant was engaged in the commission of the robbery of Mario Amador." At best, these two aggravating circumstances, based on

the same robbery motive, merged and the application of both constitutes an improper doubling. See, Cherry v. State, 14 F.L.W. 225 (Fla. April 27, 1989). Further, the trial court found "the crimes for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification." [R. 8981 The trial court relied upon the testimony of witnesses Heggerty and Ribera which it summarized as follows:

> [W]itness John Heggerty testified that he stated to "watch out for Rolly because he is going to rip you off." Mr. Heggery (sic) told witness Carlos Ribero (sic) that instead of money in the suitcase the defendant had shredded paper in order to purchase cocaine. [R. 8981

What may be proved by this record beyond a reasonable doubt is that the defendant premeditated the robbery of Amador. There is, however, no evidence beyond a reasonable doubt to establish that he pre-planned Amador's murder, at least not in the degree required to support this aggravating circumstance. As this Court held in Rogers v. State, 511 So.2d 526 (Fla. 1987), there must be sufficient evidence to support beyond a reasonable doubt "the heightened premeditation described in the statute, which must bear the indicia of 'calculation.'" Id, at 533; Smith v. State, 515 So.2d 182 (Fla. 1987). Indeed, there is little to suggest that Amador's homicide, as distinguished from his robbery, was not an "afterthought." Hill v. State, 14 F.L.W. 446 (Fla. Sept.

14, 1989).

By the same token, the trial court improperly found that the jury could not reasonably have found any mitigating circumstance applicable. The jury might well have found that the defendant had no significant history of prior criminal activity. The defendant had no prior criminal conviction record of any kind. The trial court appears to have properly found that the defendant's "lack of conviction record" constituted a mitigating circumstance. [R. 9011 ("The Court considered all possible mitigating circumstances discussed in Part A of this order and finds that none apply, except lack of conviction record.") This circumstance, of course, applied equally to all four homicides, including that of Amador. The unrefuted evidence showed that the defendant sold and used relatively small amounts of cocaine and marijuana. [R. 24501 His involvement in kilogram deals of cocaine was disputed. The jury could reasonably have found that despite the defendant's criminal involvement with narcotics that it did not constitute a "significant history" of activity.

The jury could reasonably have found that the defendant was an accomplice in the offense but that the offense was committed principally by Pardo. While, as the trial court reasoned, "witnesses Heggerty and Ribera testified as to this defendant's plan to rob Mr. Amador", neither they, nor anyone else, testified to the defendant's plan to kill Amador. Nothwithstanding the court's reliance on evidence of two guns being used against

Amador and Alfonso, there exists in this case no evidence to show which of the two defendants committed the murder or that the defendant was not merely following Pardo's lead. The State's principle physical evidence - the diary and newspaper articles, were written and maintained by Pardo in Pardo's apartment. The safe, guns, badges and police radios were all shown to have been kept by Pardo in his apartment. [R. 1978-1994, 2016-2026] The jury might well have found that the defendant's participation in the Amador homicide was relatively minor.

"A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community. . ." Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). under the standard set forth in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), a trial judge may not override a jury recommendation of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." If there is a reasonable basis in the record to support the jury's recommendation, an override is improper. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987). In some instances, the presence of valid mitigating circumstances discernible from the record may be the decisive factor when determining whether a reasonable basis exists for the life recommendation. Id.; Francis v. State, 520 So.2d 670, 677 (Fla. 1988) (Barkett, J. dissenting). If it can be determined that the life recommendation was based on valid mitigating factors, then an

override may be improper. Ferry v. State, supra at 1376.

Here, it simply cannot be said that no reasonable person could differ as to the appropriate penalty. The defendant's death penalty for the Amador homicide should be reversed.

POINT VI.

THE DEATH SENTENCES IMPOSED AGAINST THE DEFENDANT FOR THE MURDERS OF ALFONSO, ALVARO, AND RICARD ARE ALL DEFECTIVE AND SHOULD BE VACATED WITH DIRECTIONS TO ORDER THE DEFENDANT'S RE-SENTENCING

For all of the reasons described in Point 5, supra, the trial court should have considered as mitigating circumstances Garcia's lack of a significant history of prior criminal activity, Garcia's relatively minor role compared to that of the clearly dominant Pardo, and Garcia's utter lack of a criminal conviction record prior to this case.

With regard to Alfonso, Alvaro, and Ricard, the jury recommended by non-unanimous verdicts the imposition of the sentence of death. The trial court in each case misapplied at least one aggravating circumstance.

ALFONSO AND RICARD

The trial court found in both instances that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest." The trial court reasoned:

> The evidence establishes that Roberto Alfonso, co-victim Mario Amador's roommate, was in the wrong place at the wrong time. The defendant planned to rob and murder Amador and did so. Unfortunately for Alfonso, he witnessed these crimes and had to be eliminated, if the defendant was to avoid detection. This need to eliminate Alfonso was clearly the dominant motive for his murder. [R. 9011
>
> * * *
>
> As with Roberto Alfonso, Ms. Ricard was tragically in the wrong place at the wrong

> time. She was murdered because she was present when the defendant and Pardo murdered Alvaro and her elimination as a witness was necessary so they could avoid detection. . . Indeed, the evidence establishing this aggravating circumstance is even stronger than for the murder of Alfonso because the defendant and Pardo put Ricard in the trunk of a car and drove her to an empty field where they dumped her. . . (R. 903-9041

By its findings, the trial court merely adopted the State's hypotheses. There was, however, a remarkable dearth of evidence presented by the State to establish these aggravating circumstances beyond a reasonable doubt. In fact, there existed no proof whatsoever as to the motive for either Alfonso's or Ricard's murders. The most that can be said is that the evidence was consistent with the State's theory.

In order to support a finding that a murder has been committed for the purpose of avoiding a lawful arrest under Section 921.141 (5)(e) Florida Statutes (1981), the evidence must establish beyond a reasonable doubt the defendant's intent to avoid arrest or detection through the killing. Dufour v. State, 495 So.2d 154 (Fla. 1986). There must be a showing that the dominant or sole motive for the murder was the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed. 294 (1982). It is by now well established that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. As this court

held in Doyle v. State, 460 So.2d 353 (Fla. 1984):

> We have consistently held that where the victim is not a law enforcement officer, the state must prove beyond a reasonable doubt that the dominant motive for the murder was the elimination of witnesses. [Citations omitted] Id. at 358.

Moreover, this court held in Riley v. State, 366 So.2d 19 (Fla. 1978):

> Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Id. at 22.

The mere fact that a victim might be able to identify an assailant is insufficient. Oats v. State, 446 So.2d 90, 95 (Fla. 1984); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Bates v. State, 465 So.2d 490 (Fla. 1985). In every case in which this aggravating circumstance has been upheld by this court, the facts are clearly distinguishable. Compare, Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, _____ U.S. _____, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984) (defendant stated that he shot robbery victim a second time to prevent his testifying against him); Clark v. State, 443 So.2d 973 (Fla. 1983) (defendant told cellmate that victim could identify him, victim knew defendant, victim knew or soon would know that violent felony had been committed on her husband); Vaught v. State, 410 So.2d 147 (Fla. 1982) (victim announced that he recognized assailant, defendant shot victim five times to make sure he was dead).

In the instant case, the victims were not police officers. Any contention that the defendant killed solely to avoid identification is mere speculation. Because, as in Bates v. State, supra, the proof is insufficient to establish the commission of these murders in order to avoid or prevent lawful arrest, such aggravating circumstances cannot justify the defendant's sentence of death.

ALVARO

With regard to Alvaro, the trial court improperly found that "the capital offense" was especially heinous, atrocious and cruel." The trial court relied on evidence demonstrating that Alvaro had succumbed to multiple gunshot wounds:

> The evidence establishes that Alvaro was shot repeatedly while sitting defenseless in his car. According to the medical examiner, he was first shot in his right side and right upper back. These shots, while debilitating, were not fatal. The medical examiner so testified because of the large amount of blood which formed around those wounds, which indiciated (sic) that Alvaro's heart remained pumping after these shots were fired. While Alvaro was suffering from the effects of these initial shots, he was shot three times in the head, and was thus put out of his misery.

The term "heinous" as used in Florida Statute §921.141(5)(h) means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. The word "cruel" describes conduct designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Alford v.

State, 307 So.2d 433 (1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 155; Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 454, 70 L.Ed.2d 598; State v. Dixon, 283 So.2d 1 (1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295. The homicide of which the defendant stands convicted, as senseless and inexcusable as it was, was not heinous, atrocious or cruel under established law. The trial court erred in basing its imposition of the death penalty on this aggravating factor.

The "heinous, atrocious and cruel" aggravating factor applies to a capital crime the actual commission of which is accompanied by such additional acts as set the crime apart from the norm of capital felonies. Its application is restricted to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Blanco v. State, 452 So.2d 512 (Fla. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 940, 83 L.Ed.2d 953.

The application of this aggravating circumstance has been deemed to be appropriate to offenses "shockingly evil." Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1976) (murder of nine year old daughter). It has been applied to murders committed in connection with abductions, confinement, sexual abuse and execution-style killings. Smith v. State, 424 So.2d 7206 (Fla. 1982), cert. denied, _____ U.S. _____, 103 S.Ct. 3129, 77 L.Ed.2d 1379. The aggravating circumstance has been upheld in torture

murders. Thompson v. State, 389 So.2d 197 (Fla. 1980).

This case does not involve torture or the defendant's desire to inflict suffering. The record fails to establish either the infliction of an extraordinary degree of pain or prolonged anticipation on the part of the victim sufficient to establish the degree of suffering required to invoke the wicked, heinous, and cruel aggravating circusmstances. The victim, Alvaro, was simply shot to death, Indeed, as pathetic as such a recognition may be, there can be little question that death by multiple gunshot wounds constitutes the most common and therefore the "norm" of criminal homicides,

This case is much like Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied, 105 S.Ct. 941, 83 L.Ed.2d 953, where one shot penetrated the victim's heart causing death within ten seconds, the evidence disproved any possibility of prolonged and torturous captivity, and there was no evidence that the victim apprehended his death more than moments before he died. This court found the heinous, atrocious and cruel aggravating circumstance inapplicable even though the victim was shot twice. Thus, this case is unlike Scott v. State, 494 So.2d 1134 (Fla. 1986) (victim brutally beaten, driven to deserted area, became conscious, undoubtedly suffered stark terror from awareness of likelihood of death at hand of abductors and was mercilessly beaten second time); Cooper v. State, 492 So.2d 1059 (Fla. 1986) (murder victims were acutely aware of their impending deaths,

were bound and rendered helpless, a gun pointed at the head of one of them misfired three times, and another pleaded for his life); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (killing of victim took fifteen minutes, victim begged and pleaded for his life, defendant laughed and joked about how ling it took victim to die, defendant enjoyed unmercifully the pain and suffering victim was forced to endure, and defendant discussed how he would kill victim by strangulation); and Francis v. State, 473 So.2d 672 (Fla. 1985), cert. denied, 106 S.Ct. 870, 88 L.Ed.2d 908 (defendant forced victim to crawl on his hands and knees and beg for his life, victim was taped with his hands behind his back, placed on a toilet stool for a period in excess of two hours, victim was placed in fear of death by way of injection of Drano and other foreign substances into his body, and finally defendant shot his victim in the heart causing death).

Most recently, in Craig v. State, 510 So.2d 857 (Fla. 1987), this Court reviewed the defendant's conviction of two counts of first-degree murder and two sentences of death. The facts in Craig established that both victims had suffered execution-style killings. When the first gunshot wounds failed to inflict mortal injury, the defendant directed a co-defendant "to shoot [the victim] as he was not yet dead." [Id. at 2691 This court, reversing the finding of the trial court, agreed with appellant's argument that the murders were not especially heinous, atrocious, or cruel. While finding the murders to be fully premeditated,

this court noted, as it must in the case at bar, that "the murders were carried out quickly by shooting." Accordingly, based on its interpretation of the statute and well-established precedent, this court found insufficient support in the evidence for the trial court's finding. Tafero v. State, 403 So.2d 355 (Fla. 19811, cert. denied, 455 U.S. 983 (1982); Lewis v. State, 377 So.2d 640 (Fla. 1979); Kampff v. State, supra.

Similarly, in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 1430, 79 L.Ed.2d 754, this court rejected especially heinous, atrocious and cruel as an aggravating circumstance under circumstances substantially more torturous and painful, both psychologically and physically, than in the instant case. In Teffeteller, the victim sustained massive abdominal damage due to a shotgun blast inflicted by the defendant but remained conscious and coherent for approximately three hours. He underwent emergency aid both at the scene and at the hospital and ultimately died on the operating table. This court nevertheless concluded:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm of capital felonies. [Id. at 8461

Teffeteller, therefore, controls the legal conclusion that the aggravating circumstance of heinous, atrocious and cruel does not apply here. The homicide of which the defendant stands

convicted was not, under established case law, especially heinous, atrocious and cruel. The trial court erred in its contrary conclusion and in basing its sentence of death upon such a finding.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the defendant Rolando Garcia respectfully prays this Court to reverse his convictions and sentences. He prays for a new trial untainted by the improper comments of the prosecution and the introduction of improper evidence of collateral acts of misconduct. He particularly urges that any subsequent prosecution be for only one crime at a time and that the State not be permitted to join unrelated and distinct offenses together so as to inflame the jury and render his receipt of a fair determination impossible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 on this 4th day of December, 1989.

GEOFFREY C. FLECK, ESQ.