

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 74,913

JOSE MAQUEIRA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RALPH BARREIRA
Florida Bar No. 0374490
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	1-54
ISSUES PRESENTED.....	55
SUMMARY OF THE ARGUMENT.....	56-59
ARGUMENT.....	60-77
I.	
THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.....	60-63
II.	
THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON AN IMPROPER QUESTION ASKED OF DET. CADAVID BY THE PROSECUTOR, TO WHICH THE DEFENDANT'S OBJECTION WAS SUSTAINED.....	64-68
III.	
THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.....	69
IV.	
THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO DEATH FOR THE MURDER OF RAQUEL RODRIGUEZ.....	70-77
CONCLUSION.....	78
CERTIFICATE OF SERVICE.....	78

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
Barfield v. State, 402 So.2d 377 (Fla. 1981).....	61
Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980).....	63
Brown v. State, 550 So.2d 527 (Fla. 1st DCA 1989).....	66
Buenoano v. State, 527 So.2d 194 (Fla. 1988).....	66
Clark v. State, 363 So.2d 331 (Fla. 1978).....	65
Cochran v. State, 547 So.2d 928 (Fla. 1989).....	72
Colorado v. Connelly, 479 U.S. 157 (1986).....	61
Cook v. State, 542 So.2d 964 (Fla. 1989).....	72
Davis v. State, 461 So.2d 67 (Fla. 1984).....	66
Deneby v. State, 400 So.2d 1216 (Fla. 1980).....	63
Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987).....	63
Farinas v. State, 15 FLW S555 (Fla. October 11, 1990).....	66
Floyd v. State, 497 So.2d 1211 (Fla. 1986).....	71
Harvey v. State, 529 So.2d 1083 (Fla. 1988).....	71
Irizarry v. State, 496 So.2d 822 (Fla. 1986).....	66
Jackson v. State, 451 So.2d 409 (Fla. 1986).....	72

TABLE OF CITATIONS CONT'D.

<u>Cases</u>	<u>Page</u>
Jackson v. Wainwright, 421 So.2d 1385 (1982).....	72
Johnson v. State, 486 So.2d 22 (Fla. 1st DCA 1986).....	66
Jones v. State, 449 So.2d 253 (Fla. 1984).....	72
Keen v. State, 504 So.2d 396 (Fla. 1987).....	67
Kokal v. State, 492 So.2d 1317 (Fla. 1986).....	71
Llida v. State, 501 So.2d 162 (Fla. 3d DCA 1987).....	67
Mack v. State, 461 So.2d 142 (Fla. 3d DCA 1984).....	67
Malone v. State, 390 So.2d 338 (Fla. 1980).....	61
Michael v. State, 437 So.2d 138.....	61
Miller v. State, 415 So.2d 1262.....	61
Nicholson v. State, 486 So.2d 688 (Fla. 3d DCA 1986).....	67
Puccio v. State, 440 So.2d 419 (Fla. 1st DCA 1983).....	63
Randolf v. State, 463 So.2d 186 (Fla. 1984).....	72
Rogers v. Richmond, 365 U.S. 534 (1961).....	63
Sims v. State, 444 So.2d 922 (Fla. 1983).....	72
Spivey v. State, 529 So.2d 1088 (Fla. 1988).....	61

TABLE OF CITATIONS CONT'D.

<u>Cases</u>	<u>Page</u>
State v. Angel, 547 So.2d 1294 (Fla. 5th DCA 1989).....	63
State v. Diguilio, 491 So.2d 1129 (Fla. 1986).....	67
State v. Murraray, 443 So.2d 955 (Fla. 1984).....	67
Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986).....	66
Wasko v. State, 505 So.2d 1314 (Fla. 1987).....	62
Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989).....	66

INTRODUCTION

Appellee, the State of Florida, was the prosecution in the trial court and Appellant, Jose Maqueira, was the defendant. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the first 282 pages of the record, and "T" the remaining pages, 283-1752. All emphasis is as in original unless otherwise specified.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The State rejects the defendant's factual recital as incomplete and inaccurate, and offers instead the following comprehensive summation of the testimony and exhibits presented at the suppression hearing, guilt and penalty phases.

MOTION TO SUPPRESS

THE DEFENDANT

The defendant was born in Cuba in 1962, came to the United States in 1980, and has spent the last five years in prison on a thirty-two (32) year sentence, which he received for attempted

second-degree murder, armed robbery, and a probation violation. (T.333, 34). He met Ramiro Gonzalez in prison three years ago, spent all his time with Gonzalez, and loved his good friend like a father. Gonzalez' mother would visit with the defendant, and both she and Gonzalez gave the defendant money on occasions, because the defendant shared his things with Gonzalez. (T.335). The defendant trusted Gonzalez.

The defendant knew that Gonzalez had arranged for the police to meet with an inmate named Santiago, and that because of Santiago's assistance to the police, Santiago obtained an early release. The defendant also knew that each time Gonzalez arranged for an inmate to meet the police, Gonzalez would get a benefit related to his parole date. (T.336). Gonzalez specifically told the defendant that he knew homicide detectives, including one named Falcon who was Gonzalez' cousin, and that each time Gonzalez provided information that solved a murder, Gonzalez' parole date would be advanced. (T.337).

About a year after the release of Santiago, the defendant told Gonzalez to contact his detective friends, but when Gonzalez did so, the detectives were apparently pessimistic, telling Gonzalez that they would not visit the defendant until they got specific information. (T.338). Gonzalez had told the defendant that he should not talk to the police until they promised him something first. The defendant then spoke to one of the

detectives by phone, and explained that he knew about a double murder, and the detective said they would come to see him. (T.339, 40).

In October 1977, Detectives Cadavid and Dominguez visited the defendant at Martin Correctional Institute. The detectives spoke with Gonzalez for fifteen minutes before seeing the defendant. (T.340). The defendant and detectives talked for twenty-thirty minutes before turning on the tape machine. During the pre-tape period, the defendant told Cadavid that the defendant wanted immunity from the double murder, a reduction of his thirty-two (32) year sentence for attempted second-degree murder and armed robbery, and no "problems" with immigration. Detectives Cadavid said that if the defendant testified against Lazaro Diaz and Carlos Villavicencio, Cadavid could "resolve" all three of his requests (T.341), and this promise was seconded by Detective Dominguez. Cadavid was willing to let one participant in the double murder go free in order to nail the other two. However Detective Cadavid did not say he had the authority to absolve the defendant, only that he had worked similar deals in the past. (T.342, 43).

Detective Cadavid told the defendant that the miranda waiver form was just routine, and not to worry about the "no promises" language on the form. Cadavid also told the defendant he didn't need a lawyer. (T.343). The detectives told the

defendant that he had to say "no promises" on the tape or the deal was off. (T.345).

The defendant was subsequently brought to Dade County, and was interviewed by Detective Cadavid at his office. At that time the defendant told Cadavid that he was upset because everything was supposed to have happened very quickly. Cadavid told the defendant they needed a second confession because the defendant made some mistakes the first time. Cadavid promised that after the second confession, Cadavid would resolve the immunity issue, that immunity was no problem, and that the detectives were only interested in getting Carlos Villavicencio for the double murder. (T.348). Cadavid then prepared the defendant "like a computer" so he would not make any mistakes in his second confession. (Id).

During this second taped confession the defendant twice answered "No" when asked if any promises had been made. The defendant explained that Cadavid told him to say "No," and that if he didn't say "NO" the tape could not be used as evidence, because the police are not allowed to make promises. (T.349). Besides correcting mistakes, Cadavid wanted a second confession so someone from his department could be a witness. (Id).

CROSS-EXAMINATION OF THE DEFENDANT

The defendant had a devil of a time trying to remember how many felony convictions he had, starting with "one," upping it a notch to "two," popping up to "four or five," then finally, when asked by the prosecutor if nine sounded accurate, stated "could be." (T.350-352). Actually, the State presented certified copies of eight felony convictions and a misdemeanor theft conviction. (T.354-356).

Prior to receiving promises from Detective Cadavid, he had told Cadavid about the double murder, but not his involvement therein. The defendant initially had told Gonzalez he knew about the murders, but not that he was involved. Gonzalez had then told the defendant he could expect no benefit unless he was personally involved in the crime. (T.357). After the defendant admitted to Gonzalez that he was present at the robbery and murder of the gas station owners (the instant case), Gonzalez told the defendant he would have to claim to be one of the shooters in order to expect any benefit (WOW!!, T. 358-361).

The defendant states that he did not reveal his role in the murders until given promises by Detective Cadavid. (T.361). The reason he did not mention any promises on the tape is because Cadavid told him not to . (T.364). The defendant knew from his prior contacts with the criminal justice system that it was

illegal for the police to make him promises to obtain a confession. (T.366).

At this point the prosecutor presented the rights waiver form the defendant executed in a prior case (his attempted second-degree murder case), which was admitted into evidence without objection. (T.367). The defendant admitted that he had refused to talk to the investigating detective and had asked for an attorney in that case, and that he understood his miranda rights.

The above testimony of the defendant occurred in the late evening of 7/13/89. It is out of sequence, in that the State's witnesses were called earlier that same day. The State presented the following witnesses.

DETECTIVE GEORGE CADAVID

Detective Cadavid, a City of Miami Homicide Detective, was assigned the murder at the time it occurred, in May of 1983. There were no leads until 1987, when he received a call from Sgt. Singleton from Metro-Dade Homicide. Sgt. Singleton told Det. Cadavid that an inmate at Martin Correctional Institute (hereafter MCI), Ramiro Gonzalez, had information on a Miami Homicide. Specifically, Gonzalez told Sgt. Singleton that an inmate named Jose Maqueira had confessed to shooting a woman

during a double murder. (T.376-77). Detective Cadavid had never heard of Ramiro Gonzalez nor had anyone else at the Miami Police Department.

Sgt. Singleton proposed that he and Detective Cadavid visit Gonzalez, as Gonzalez would only talk with Singleton present, at least initially. After several postponements, Sgt. Singleton had to cancel yet again and Detective Cadavid and his partner, Danny Dominguez, decided to visit Gonzalez without Singleton. (T.378). From the information Gonzalez had given Sgt. Singleton, they believed the double murder was of Miguel Rodriguez and Raquel Rodriguez. (T.379).

Upon arrival at MCI they spoke with Gonzalez for ten minutes, with Gonzalez revealing the following:

He said that Jose Maquiera confided him and told him that him and some other people had mentioned Carlos Villavicencio had planned to steal \$65,000 from a safe of a house and that he and Carlos had drove to the house, that the front door of the house was opened, that they went into the house, that Carlos Villavicencio went into the bedroom, that he had seen a woman towards the back of the house sitting down in his eyes using the phone, that he had hid behind the sofa, he then heard a shot.

Then the male victim screamed out that the lady started running towards the front of the house and that as they were both leaving the house, that Maquiera told him that he shot the woman and ran out and they took off.

Q. After hearing these facts from Mr. Gonzalez, did you determine that in fact you were here on the right case?

A. Definitely.

(T.379, 80).

The Detectives then interviewed the defendant. The defendant insisted that Gonzalez be present. (T.381). Detective Cadavid read the defendant his rights from a form, in Spanish, and he, the defendant and Det. Dominguez signed and dated the form. Spanish is Det. Cadavid's first language. The form was admitted into evidence. (T.383). Detective Cadavid specifically asked the defendant if any promises had been made to him in exchange for talking with the police, and the defendant said no. (T.384). Det. Cadavid made *no* promises to the defendant in order to elicit his statement. (T.385).

The defendant did tell Cadavid that he wanted help with his 32 year sentence, wanted immunity for the double murder, and did not want to be deported to Cuba. (T.386). Cadavid told the defendant:

A. I told him I am not authorized I don't have the power. I can't promise anything. The only thing I did tell I would tell the judge and I would tell the State Attorneys that he would come straightforward with the information.

Q. Did you indicate to him in anyway that you could give him or that you could see that he would get immunity or a reduction in sentence or help with his immigration problem?

A. No.

Q. Did you make him any promises with regard to any of these things?

A. No.

(T.386).

The defendant went on to relate his role in the double murder, and then agreed to give a taped version (which was admitted into evidence). The transcript of the tape is accurate (T.388, R.113-128). The interview took place 10/5/87.

During the interview Gonzalez never made any promises to the defendant, and the defendant never told him of promises made by Gonzalez, (T.389, 90), nor did Gonzalez mention any such promises.

After returning from Miami, another inmate named Pedro Torres called and told him the defendant had confessed to a double murder, and Torres provided details, and told Cadavid he had sent him a letter containing these details to Cadavid. (T.390, 91). Cadavid subsequently received a call from the defendant, in which he acknowledged confessing to Pedro Torres. (Id).

Detective Cadavid took another taped statement from the defendant on 11/24/87, at the homicide office. The tape and

transcript (R.132-157) were admitted into evidence, and the transcript is accurate. (T.392). Detective Cadavid had spoken with Assistant State Attorneys Abe Laeser and Oscar Morrero, who thought that it would be a good idea to learn from the defendant whether he had been promised anything by Gonzalez. This was the specific purpose underlying the second taped statement. (T.392, 393). During that interview the defendant stated that Gonzalez had not made any promises. (T.394, R.133).

Det. Cadavid reiterated that he did not promise the defendant anything in exchange for his testimony. (T.396). Each time the defendant brought up the subject of immunity, etc., Cadavid would stress that he had no authority to do it, it was up to the State Attorney and Judge. (T.397).

On cross-examination, Cadavid acknowledged that Det. Singleton informed him that it was Gonzalez' style to become friendly with an inmate prior to informing on that inmate. (T.397). He knew that as a reward for information in past cases, Gonzalez had received favorable recommendations to the parole board. (T.398). Cadavid himself wrote such a letter to the parole board. Most cold cases are solved from information given by informants. (T.399).

At the time of his 10/5/87 interview of the defendant, the defendant was alert and did not appear mentally slow or

impaired in any way. (T.405). During the interview Cadavid did not tell the defendant he could ultimately receive the death penalty for the crime. (T.406). The defendant wanted Gonzalez present during the interview because the defendant trusted him (T.407). Det. Cadavid told the defendant he would make his cooperation known to the prosecutor and the judge, and that is the *only* assurance he gave the defendant. (T.409). He did not inform the defendant that help from either the prosecutor or judge was an impossibility. (T.411).

Other than 10/5/87, the only time the defendant questioned Det. Cadavid about immunity, a reduced sentence, and deportation was in a telephone call subsequent to the 11/24/87 interview. In that call the defendant was upset that the case against co-defendant Carlos Villavicencio had been no-actioned for lack of evidence, and the defendant wanted to know what would happen to him. Cadavid told the defendant the same thing he told him on 10/5/87, that it was up to the prosecutor and the judge. (T.412).

The reason for the second interview of the defendant was that prosecutors Abe Laeser and Oscar Marrero were concerned that, in the first taped interview, the defendant was not asked if Gonzalez had made any promises, and the prosecutors wanted to learn whether the defendant had in fact been promised anything by Gonzalez. (T.416, 417). Cadavid did not tell the defendant to say "no promises" on the tape. (T.417).

DETECTIVE AL SINGLETON

Sgt. Singleton is a member of the Metro-Dade Homicide squad. Ramiro Gonzalez had provided reliable information to Sgt. Singleton in prior cases. He received a call from Gonzalez concerning the instant case in May 1987. (T.425, 26). Gonzalez told him that Gonzalez knew an inmate who was involved in a homicide several years back, and who wanted to give the police information on the homicide. During this telephone conversation Sgt. Singleton would ask Gonzalez for details of the homicide and Gonzalez would then speak with someone in Spanish, then provide the details to Singleton in English. (T.426). From these details Sgt. Singleton determined what homicide Gonzalez was describing, and that it was a City of Miami case. He then turned over the information to Det. Cadavid. (T.426, 27).

Ramiro Gonzalez did not "report in" with Sgt. Singleton, nor was he operating under the direction of Sgt. Singleton. When Gonzalez had information, Sgt. Singleton would listen (T.427). Sgt. Singleton did not send Gonzalez snooping around the prison for information (T.428), nor did he ever request that Gonzalez be put in a cell with a particular inmate, and it would be improper to do so. (Id).

On cross-examination, he stated that Gonzalez first provided him with information on a case in 1983. The second case he is aware of where Gonzalez provided assistance was in 1986. There are two other Metro-Dade cases, cited by defense counsel from Gonzalez' deposition, of which Singleton was unaware. (T.429-431). Sgt. Singleton wrote one letter to the parole board on Gonzalez' behalf. (T.431).

RAMIRO GONZALEZ

Gonzalez has been in jail since 1976 for second-degree murder and attempted first-degree murder stemming from a domestic dispute. (T.433). He met the defendant after the latter's arrival at MCI. Both he and the defendant knew Santiago Cantino at MCI. Santiago was released because of his assistance to the Metro-Dade Police Dept. After Santiago's release, the defendant approached Gonzalez and requested that he arrange a meeting with Gonzalez' friends at Metro-Dade, because the defendant had information on a case and wanted to get the same deal as Santiago. (T.434, 35). The defendant told Gonzalez about the double murder case, and Gonzalez then called Sgt. Singleton. (T.435, 36). Gonzalez never pressured the defendant into describing the murders.

The defendant was present when Gonzalez called Sgt. Singleton. (Id). They called Singleton again the next day.

During these calls Sgt. Singleton never promised the defendant anything nor did he tell the defendant it was in his best interest to cooperate with the detectives. (T.438). In his prior activity with Metro-Dade, he was never paid, nor was he ever instructed to seek out information from other inmates (T.438, 39), nor placed with a certain inmate to gather information. (Id).

During the 10/5/87 interview of the defendant by Det. Cadavid, Cadavid never promised the defendant anything in exchange for his testimony nor did he threaten him in any way. (Id). He was present during subsequent conversations between Det. Cadavid and the defendant, and at no time did Cadavid make any promises to the defendant. (T.441).

When Gonzalez was recently transferred to Dade County, he was in the same cell with the defendant for two days. The defendant told him that he had talked to his two lawyers, and that if Gonzalez would testify that Detective Cadavid promised the defendant immunity, a reduced sentence and no deportation, the case would be over. (T.442, 43).

On cross-examination, Gonzalez stated that while at MCI, he became a good friend of the defendant's, and that the defendant trusted him. (T.444). He and the defendant discussed the fact that the double murder could result in the death

penalty, but the defendant felt his co-participants would get the chair and he would end up getting a benefit (T.445), like Santiago got. Gonzalez never told the defendant he could get what Santiago got, rather he told the defendant that all he could do was introduce the defendant to the detectives. (T.445). Gonzalez did not work out the deal for Santiago, rather that was between Santiago and the police. (Id).

In October of 1987, when he arranged the defendant's meeting with the police, Gonzalez hoped his assistance would help him get an earlier parole date. (T.446). Gonzalez had told the defendant his was a very dangerous case because two people were killed, but the defendant persisted in his belief he could do as well as Santiago. (T.447). He warned the defendant to be careful. He was present when Det. Cadavid told the defendant that Cadavid had no power to promise the defendant anything, that it was up to the State Attorney. (T.448). He was present when the defendant told Cadavid he wanted immunity, a reduction of his current sentence, and no deportation. (T.450). When the defendant would call Cadavid, Cadavid would tell the defendant that the State Attorney had to make the decision. (Id). Cadavid did tell the defendant he would do what he could for the defendant. (T.451).

On redirect, Gonzalez stated that the defendant knew that Santiago was not a participant in the crime about which he gave

the police information, and Gonzalez further stated that neither himself nor Det. Cadavid ever led the defendant to believe he could get the same treatment (release) as Santiago. (T.451).

At this point in the hearing the State rested, and the defense called Pedro Torres.

PEDRO TORRES

Torres knew the defendant at MCI, and learned that the defendant had provided Det. Cadavid with information concerning a double murder. (T.452, 53). He was present on one occasion when the defendant spoke with Cadavid by telephone. On another occasion Torres was speaking to Cadavid and Cadavid asked to speak with the defendant, although Torres does not know what they spoke about. Cadavid never discussed what benefits if any the defendant would receive for his cooperation, but the defendant had told Torres that he wanted immunity, a reduced sentence, and no deportation. (T.453-55). In his deposition Torres had stated that in a phone conversation with Cadavid, Cadavid told Torres to tell the defendant he was trying to arrange a meeting with the prosecutor to discuss the defendant's desire for immunity. (T.456).

On cross-examination by the State, Torres stated that the defendant readily discussed the details of the murder with Torres

without any prompting from Torres. Torres also served as interpreter for the defendant in his calls to Sgt. Singleton, and at no time did Singleton promise the defendant anything. (T.461). During these discussions the defendant would repeatedly state his three wishes, and each time the Detectives would tell the defendant they had no authority to make any promises regarding his "wish list." (T.461, 462). At no time did the defendant tell Torres that the police had promised to grant any of his wishes, nor did the defendant tell Torres that Gonzalez had ever promised the defendant anything. (T.462, 63).

TRIAL EVIDENCE

RACHEL RODRIGUEZ

Rachel is the only daughter of Raquel Rodriguez and Miguel Rodriguez, the victims in this case. Her parents were married twenty-five years. Her mother was a homemaker and her father owned and operated a gas station near their home, where he worked from early in the morning to late at night. (T.894, 895). Rachel lived in the converted garage attached to her parents home.

On 5/25/83, a Thursday, Rachel left the house to purchase flowers around 9:30 a.m. When she returned her mother was rocking in a chair on the porch, and the front door metal grill was open. (T.896). This was unusual because her mother never

left the grill open. Her mother asked her to come in for coffee, but Rachel said she first had to put the flowers in a vase, and Rachel proceeded into the garage/efficiency. (T.897). Her father was at home that day, because he was planning a trip to Costa Rica to bring back a relative who had managed to reach Costa Rica from Cuba. (T.898).

While inside her apartment, Rachel heard two shots from her house. She ran outside and toward the front door of her parents home. There was not more than three seconds between the two shots. (T.898). As she reached the corner of the house, two men ran rapidly past her, between the house and her car. The first was 130 lbs, dark hair, slightly dark complexion, thin, with bushy eyebrows and a small face. He was wearing a dark colored shirt. (T.899, 900). The other man had lighter hair, short and unkempt, with small eyes and lighter skin. They ran to a blue car and fled. She does not know if they saw her. (T.900).

She entered her parents home and saw her mother sobbing on the floor, grasping her stomach. Her mother screamed to close the door because they might return, and yelled to Rachel to go to her father. She entered the bedroom and saw her father lying on the bed covered with blood. There was white matter and tissue coming out his nose. She cleared the debris from the airway and pounded his chest, but he did not respond. (T.901).

Rachel ran to the phone and called the police. She returned to her mother and told her that father was okay, so that she would not give up hope. At that point Fire Rescue arrived. (T.902).

Her mother was screaming in pain as they lifted her onto the gurney and into the ambulance, and one of the medics stated it looked bad, and that he didn't think she would make it. (T.903). Although Rachel did not know at the time, there was a safe in the house, which was empty. (T.903).

Det. Cadavid visited her in 1987 and showed her some sets of pictures. They were groups of six photos each. She selected photo number four from one of the groups. He was the man she saw holding a gun, the second man to run past her. She did not get a good view of the first man, but the second one had only been six feet away. (T.906, 907).

The prosecutor then backtracked, and asked if Rachel had seen anything unusual when she parked her car upon returning from the flower shop. Rachel stated she saw a man standing by the light pole at the corner of her house, just standing there doing nothing. (T.907, 908). He did not look threatening and she hadn't paid close attention to him, however later on, she remembered she had seen the man at her parents house and her father's gas station. (T.908).

Det. Cadavid showed her a second photo spread, and she picked out number one as the person under the lamp post. (T.910). Her father kept a gun in the house, but she doesn't know where.

On cross-examination, she stated she did not identify the defendant's picture as being the third man at the scene. (T.921). She did not see this third person (the first person to run by her) so she could not identify him. She never saw the third man's face. (T.922). She heard later that her father supposedly had \$70,000 in cash in his safe, but she knows nothing about that. (T.923). She does not know anything about an airline ticket for Costa Rica in the name of Ryna Cucet, and does not know who, if anyone, was going to accompany her father to Costa Rica. (T.925).

On redirect, she emphasized that there was definitely a third man, she just did not see him well enough to identify him. (Id).

ROBERT SARNOW

Sarnow is a crime scene technician with Miami Police Department. He arrived at the scene at 11:15 a.m., 5/25/83. The male victim was lying on the bed with his legs dangling over, nearly touching the floor. On the floor below the victim's feet

was a quantity of yellow rope. A five shot holstered revolver was found in a partially open drawer in the bedroom. (T.930, 31). A spent casing was found at the head of the bed. (T.933). No other spent casings were found in the house. There was a travel bag located on the bed.. (T.937). The spent casing was .38 calibre. (T.940).

On cross-examination, he stated he lifted 26 latents at the crime scene, and to his recollection none were matched to the defendant. (T.948, 49). The travel bag appeared to have been in the process of being packed. It is possible that the rope at the victim's feet could be used to tie up the bag. (T.950).

MELVIN ZAHN

Zahn is a Firearms Examiner with the Metro-Dade Crime Lab. He examined a projectile and a spent casing in this case. The projectile was from the body of Miguel Rodriguez. The projectile is a .38 calibre automatic bullet, as would be fired from a semi-automatic pistol. It is a copper jacket projectile. (T.959). The casing recovered in the bedroom is a .38 calibre automatic casing, and is consistent with the projectile from Miguel Rodriguez' body. (T.962). The fact that two shots were fired, and only one spent casing was found, is consistent with the second shot (into Rachel Rodriguez' stomach) having been fired from a revolver, which do not eject spent casings. (T.962-964).

Based on a photograph of Miguel Rodriguez' wound, and stippling measurements from the medical examiner, the weapon was probably a foot and no more than two feet away when fired. (T.967).

DR. JAY BARNHARDT

Dr. Barnhardt is an assistant medical examiner who, by stipulation, testified as to the autopsy results from records prepared by the original examiner who performed the autopsies. As to Raquel Rodriguez, there was extensive evidence of medical intervention. She had breathing tubes inserted in her windpipe to assist her breathing. Another tube had been inserted through her nose down into her stomach to drain blood from her stomach. She had surgical incisions across her chest and abdomen to explore internal injuries. (T.974, 74).

The bullet entered her torso twenty-two inches below the top of the head (she was 5'1", T.974) and 3/4" left of the vertical midline. It travelled front to back and slightly downward. The bullet exited her left lower back, at waist level, having travelled downward two inches from the entrance wound. (T.976). The bullet ripped into the anterior abdominal wall and penetrated the transverse colon. It then tore through the left liver lobe, then penetrated several loops of small intestine

before cutting a major vein, the vena cava, deep in her abdomen. She lost a tremendous amount of blood from this injury, and indeed her abdominal cavity contained four quarts of blood when opened for surgery. During the autopsy an additional quart was observed in the same area. Raquel Rodriguez died from internal bleeding caused by a gunshot wound. (T.977, 78).

Miguel Rodriguez was shot in almost the same location as his wife, in the upper left abdomen, twenty inches from the top of his head and one inch left of the vertical midline. (T.981). There was no exit wound. The bullet plowed through his heart, aorta and right lung, and lodged in his right chest. (T.982). The entrance wound had a large stippling pattern (T.983), indicating the gun was within two feet. (T.984). Small amounts of blood had leaked from each of the internal wounds, and there was blood in the stomach, which the victim had swallowed while coughing up blood from his perforated lung. (T.985). Cause of death was the gunshot wound described above. (T.988).

LT. LANGE WILSON POOLE

Lt. Poole is a member of Fire Rescue. He arrived at the scene at 10:44 a.m. 5/25/83, and attended a female victim who had been shot in the stomach. Another crew was working on a male victim in the bedroom. The woman was on the floor in the hallway next to the front doorway area. (T.994). She was diaphoretic

(sweating) and had low blood pressure, 90/70. He put in his report that she was bleeding and in severe pain, as she was moaning. They were able to restore full consciousness by pumping her with fluids and placing her in a pressure suit to restore blood pressure. (T.996). However her blood pressure fell again, which they knew indicated internal bleeding.

CARLOS MONTERO

Officer Montero of Miami Police Department heard the emergency call at 10:40 a.m 5/25/83, and arrived two minutes later, the first officer at the scene (T.1038). As he entered the door a female victim was on the living room floor screaming that she was shot, and that her husband needed help. She was lying on her stomach with her upper body propped up by one arm. She kept pointing to the bedroom and saying to help her husband. She was holding her stomach area. (T.1039).

Officer Montero entered the bedroom and saw the male victim lying on the bed with his feet on the ground, and he was covered with blood. He felt his neck for a pulse and found one, but at that point the victim spit out a large ball of blood, after which his pulse disappeared. (T.1041). Montero returned to the female victim, who was groaning loudly, and in response to her inquiry told her that her husband was fine. (T.1041).

Despite her injuries, she was able to answer questions about her attackers: two white males, both medium build, one wearing a dark blue shirt and dark pants, both of whom fled through the front door. The one who shot her was wearing the dark blue shirt and dark pants. She described his gun as a revolver. Officer Montero then described her actions during the final conversation of her life:

Q. As you are talking to her, does she do anything physically to you?

A. Yes. At about that time she took hold of my arm.

Q. How? Describe that for the jury.

A. She gripped my arm, my left arm with both of her hands and it felt really cold.

Q. How hard was she holding on to your arm, sir?

A. It was a grip that I really couldn't pull away from. It was pretty tight.

Q. Did you look in her eyes?

A. Yes. I was always noticing that her eyes seem kind of glazed now as if she was losing it and her voice was also weakening.

Q. Was she still moaning during this period of time?

A. Yes, she had moaned and complained of the pain.

Q. But she still is communicating with you?

A. Yes, she would answer all my questions.

(T.1044, 45).

She was able to describe the events of the shooting. She was sitting on her porch with the front door open. She invited her daughter in for coffee, then went into the kitchen to prepare same. She heard noises at the front of the house, then an explosion. She ran from the kitchen toward the front door, and saw two white males running out the front door. At that point the one wearing a dark blue shirt and dark pants turned toward her and shot her in the stomach. (T.1046). She did not see the other man holding a gun, and heard no conversation between the two. (T.1047. She further described the man who shot her as a white latin male, about 5'6" and 130 lbs, dark hair, wearing a blue sleeved T-shirt and dark pants. The other man was a white latin male, 5'6", medium build, wearing a white sleeved T-shirt. She could not provide as full a description of this second man. (T.1048-50).

Mrs. Rodriguez was continually moaning and groaning throughout this period of questioning. (T.1050). Ofc. Montero learned from neighbors that the murderers fled in a light blue dodge dart. (T.1052, 1055). On cross-examination, he stated he was not able to get information at the scene from the daughter, Rachel, because she was too hysterical. (T.1055, 56).

DET. GEORGE CADAVID

Det. Cadavid is a member of the "cold case" homicide squad at Miami Police Department. Part of his duties include questioning suspects, and in his experience 95% of suspects will try and minimize their involvement in a criminal episode. (T.1059). This case was no exception.

Det. Cadavid had responded to the original scene, 5/25/83. He then described the scene. (T.1060-1064). Detective Cadavid learned that Miguel Rodriguez was leaving that day for Costa Rica to bring back family members who had reached that country from Cuba. He was to be travelling there with Ryna Cucet, a friend of Miguel and Raquel Rodriguez, and he was supposed to pick her up on the way to the airport. (T.1065).

During the initial investigation, the only suspect was Lazaro Diaz, a home invasion specialist who drove a blue car similar to the one described above. Diaz was questioned, but denied involvement, though Cadavid did take a photograph of his vehicle. (T.1066, 67).

In September 1987 Cadavid received a call from Sgt. Singleton of Metro-Dade Homicide. Singleton related that an inmate named Ramiro Gonzalez, who had provided Singleton reliable information in prior cases, had called on behalf of a fellow inmate, and that the inmate had admitted involvement in a double

murder of a couple in their home, a couple who owned a gas station. (T.1069). Det. Cadavid immediately remembered the case.

On 10/5/87, Cadavid and his partner travelled to MCI to interview Ramiro Gonzalez and the defendant. He talked first to Gonzalez, who related the events of the murder as told him by the defendant:

A. I asked him what information he had and what did he learn and he said that Jose Maqueira again wanted to talk to us and that Jose Maqueira had told him that he and another guy by the name of Carlos Villavicencio, who lived together from the time and knew each other from Cuba had shot and killed these people in the house and he went into detail by telling me that someone had the combination and had a key to the safe of the house and that the person who maybe he didn't know went ahead and got a hold of Jose Maqueira and Carlos Villavicencio and went by the house and they noticed that the front door was open. He [Carlos] immediately made a right into the bedroom and that Jose Maqueira had told him that he had hid behind the sofa in the living room of the house because the woman was on the phone and had his back towards him and that within moments he heard a shot coming out of the bedroom, that he heard the man scream.

At that point, Maqueira told him that he started running towards the front of the house. As he ran down past the bedroom where Carlos Villavicencio was also running out, that he caught a glimpse of the victim, describing him to me, that he was laying on his back across the bed, which is exactly the way we found him, and he then turned around and shot the woman who was running towards them. Got in the car and left.

Q. Nothing about Villavicencio putting a gun to his head?

A. No.

(T.1071, 72).

Detective Cadavid then spoke with the defendant. The defendant wanted Gonzalez present, and Cadavid agreed. The defendant then asked if the Detectives could help him get his current 32 year sentence reduced, prevent his deportation to Cuba, and obtain immunity in the instant case. (T.1073). Detective Cadavid made clear that he could not promise him that any of these would be fulfilled, that he had no power to do so, and that all Cadavid could do was make his cooperation known to the State Attorney and Judge. (T.1073, 74). The defendant agreed and was willing to talk based on the above representation, which Dr. Cadavid stated was a perfectly legal representation. (Id).

After explaining he could not promise the defendant that any of his wishes would be fulfilled, Det. Cadavid read the defendant his miranda rights. (T.1077-79). The defendant then described the planning of the robbery, and the events surrounding the murders:

A. He said that he and Carlos Villavicencio had been living together, that they had known each other from Cuba ever since they were small kids. He also said that Carlos Villavicencio had been a co-defendant in this case, some priors cases before and said that a man by the name of Lazaro, who he knew, couldn't remember his last name, had gone over to

their apartment and that Lazaro said that there was a house that he knew of that had \$65,000 in the safe, that he had the key to the safe and the combination to the safe and that they agreed to do it, that they went with Lazaro a week or a week and a half before the incident and they surveilled the house as well as the gas station.

They said that the two people who live in the house were an older latin couple. They know their names and that they own the gas station about a block, a block and a half away from the house. That at times while checking the house and the gas station they would have coffee at a restaurant/bar right next to the gas station and that on several occasions they saw the older man at the gas station and then they would drive past the house to wait for an opportunity. The opportunity was to find the door open.

The day of the incident, said that Lazaro picked him up like usual. They went over to his house. He gave them guns. He said he gave him a .38 which was consistent with the shooting of the woman and that he gave Carlos Villavicencio an automatic pistol which he thought was a Browning, which is also consistent with our finding at the scene and that Lazaro also gave him some ropes and that the instruction from Lazaro to them was that he had the combination he gave him. He gave him a key of some kind or an adapter that you put on the top of the safe to turn to the combination and they were supposed to get inside the house, tie up the man and the woman and force them to tell them where the safe was and also to yank out the phones and put them in a room where there's no phone. Told them to take their time doing that.

From the house after he gave them the guns and the rope they drove over to the gas station. They had some coffee at the

restaurant next door and noticed that the man, the victim was not there. They then drove to the house, and keep in mind they are in two different cars now. He says that Carlos is driving Lazaro's which is a 2-door, blue car. And he's in the car with him and Lazaro is driving another car, but he doesn't remember the color of the car.

After they had the coffee and realized that the man is not here, they drive past the house and they notice that the front iron gate is open and the front door is wide open. He tells me -- I asked him for description of the house and he gives me a description of the house which fits to a T.

He said that after they drove past the house and they realized that the front door was opened and the gate, that they met at the opposite corner and that's where Lazaro said here's an opportunity, do it. They circled the block. They parked the car in the corner. He claimed to have gotten out of the car, put the .38 in the back of his pants while Carlos Villavicencio put the automatic in the front of his pants. They walked to the house. He said that Carlos Villavicencio walked in first and he made an immediate right, which is consistent with the bedroom being on the southeast corner.

He said that he noticed that the woman, the older woman was on the back of the house in the Florida Room. Her back towards him. She's on the phone. So he went in and hid behind the sofa. He said within moments there was a shot that came out of the bedroom and that the man screamed out. He said at that point the woman started running from the direction of that living room area towards the bedroom and that as she ran by he saw the man laying face up on the bed with blood on his chest and that Carlos Villavicencio was on his way out and that Carlos then pointed the gun at him and

said, I got my hands dirty, now it's your turn to get dirty and that at that time the woman was running towards him he fired a shot. Didn't see her fall. And then ran out to the car and they left and they went back to Lazaro's house where Lazaro took the rope and the guns.

(T.1080-84).

After relating this version to Det. Cadavid, the defendant agreed to repeat the process on tape. The tape was admitted into evidence (T.1085), and a transcript provided to the jury. (T.1088, R.113-128).

During his discussions with the defendant on 10/5/87, the defendant stated he had told Ramiro Gonzalez all about his involvement in the crime, and on a later date the defendant told Cadavid he had told another inmate, Pedro Torres, the details of the crime as well. (T.1091).

Det. Cadavid showed Rachel Rodriguez three photo line-ups, each containing six pictures. The first contained a photo of Carlos Villavicencio, and the third a photo of Lazaro Diaz. (T.1092). Rachel picked out the photo of Lazaro Diaz as the man she saw standing by the lamp post at the corner of her house, the same man she had seen at her father's gas station on a prior occasion. She picked out the photo of Carlos Villavicencio as the second man who ran by her, whose face she had clearly seen. She did not identify anyone from the photo display containing the

defendant's picture. She had not gotten a good look at the first man who ran past her, however she had stated he was wearing dark clothing. The defendant had told Cadavid he was wearing a dark colored shirt, possibly black, and that he was definitely wearing black leather pants. (T.1093-1101). (Raquel Rodriguez had told Ofc. Montero that the man who shot her was wearing a dark blue shirt and dark pants. T.1042).

During his initial interview of the defendant, 10/5/87, the defendant had identified a picture of Lazaro Diaz as the man who planned and participated in the crime with him, and whom he knew as Lazaro. This is the same Lazaro Diaz who was the initial suspect in 1983, and who owned the blue Dodge Dart Cadavid photographed at the time. (T.1100-1103).

Detective Cadavid interviewed the defendant a second time on 11/24/87. The Assistant State Attorneys assigned to the case had requested this second interview to determine if the defendant had received any promises from Ramiro Gonzalez, a subject not covered in the initial 10/5/87 taped interview. (T.1103, 04). At this point the tape and transcript (R.132-157) of this interview was admitted in evidence. (T.1104, 05).

HIGHLIGHTS OF DEFENDANT'S CONFESSIONS

The two confessions to Det. Cadavid (R.113-128, 132-157) contain certain facts which gel completely with the physical evidence and testimony of Rachel Rodriguez. Some of the critical points of corroboration are as follows:

1). Lazaro Diaz was the one who knew the people at the gas station (Rachel testified she had seen Diaz at the station). (R.115).

2). The defendant carried a .38 calibre revolver and Carlos Villavincencio a small automatic. (R.117, 145, 146, 152). (Raquel, who the defendant admits shooting, was shot with a .38 calibre bullet and no shell casing was found, i.e. a revolver was used. Miguel, who the defendant states was shot by Carlos, was killed with a .38 automatic, the shell casing being located at the foot of his bed.

3). The defendant knew the correct address of the gas station. (R.119), that the house had iron bars in front, and that the door was open. (R.120, 136, 137).

4). The defendant correctly described the layout of the house. (R.121).

5). The defendant accurately described the position of Miguel on the bed after being shot by Carlos (R.122, 149) and that each victim was shot once.

6). Lazaro Diaz had waited outside by the corner of the house. (R.123, 148). (Rachel testified that Lazaro Diaz was standing by the lamp post at the corner of her house.

7). When the defendant and Carlos left the house running, *the defendant was running ahead of Carlos*. (R.153). (Rachel stated that Carlos was the second man to run past her).

8). After the crime, Carlos told the defendant that while in the bedroom, Miguel Rodriguez had tried to pull a weapon from a drawer next to the bed. (R.155). (Miguel's revolver was located in a partially open drawer next to the bed).

9). The defendant accurately described the rope found in the bedroom as the one Carlos had carried into the house. (R.127).

10). The defendant accurately described Miguel Rodriguez as the man working at the gas station. (R.140).

11). The defendant and Carlos drove Lazaro's four-door blue car (R.93, 94) to the house, and Lazaro took a different car. (R.146). (Rachel testified that only the two men running from the house drove away in the blue car).

12). There was no one at the gas station just prior to the crime. (R.147).

13). The woman came running from the back of the house toward the front, and he was facing her when he fired a single shot at her. (T.153).

14). As stated above, the defendant said he was wearing a dark shirt and black pants (R.155), and Rachel described the first person who ran by her as wearing dark clothing, and her mother said the man who shot her had a dark blue shirt and dark pants.

15). Carlos told him that the woman had died on the way to the hospital. (R.156).

CROSS EXAMINATION OF DET. CADAVID

Ramiro Gonzalez was, according to Sgt. Singleton, a reliable informant, who would befriend an inmate before obtaining information from him. (T.1111). Cadavid knew the defendant would be paroled before his 32 year sentence was completed, and that the double murder could potentially carry a life sentence or the electric chair. (T.117). On 10/5/87, he talked with the defendant for forty minutes before taking the taped statement. (T.1119). During that period he made absolutely no promises of lenient treatment, no promises regarding immunity, a reduction of his 32 year sentence, or help with the defendant's immigration problems. (T.119, 20). He did promise the defendant he would make his cooperation known to the prosecutor and the judge. (T.1120).

In his talk with Ramiro Gonzalez prior to speaking with the defendant, Cadavid asked Gonzalez if he promised the defendant anything, and Gonzalez stated no. (T.1123). The defendant had been reluctant to give a taped statement until Gonzalez assured him it was normal police procedure. (T.1123, 24). Ramiro Gonzalez' motive in helping the police was to get an early parole date. (T.1128). Gonzalez told the defendant he wouldn't get railroaded because Gonzalez knew what the law was. (T.1128). Detective Cadavid wrote a letter to the parole board on Gonzalez's behalf. (T.1132).

It is Cadavid's standard procedure, when taking a statement, to tell the subject that Cadavid cannot promise him anything except that he will make their cooperation known to the prosecutor and Judge. The defendant here accepted that representation without argument or complaint. (T.1139). Cadavid took a written statement from Gonzalez 11/23/87, and Gonzalez again stated he made no promises to the defendant. (T.1144). The purpose of the second interview of the defendant, 11/24/87, was to specifically ask the defendant if Gonzalez had promised him anything. (T.1145). At this point in time Det. Cadavid was helping to prepare a case for the grand jury. (T.1146).

Cadavid reiterated that he did not make any promises to the defendant, it is his job to obtain confessions in a legal manner, and that is exactly what he did in this case. (T.1148).

On redirect, Cadavid stated that Gonzalez' role in prior cases was to introduce inmates who had information on unsolved murders to the detectives, but this was the first case where the inmate with information had actually committed the murder. (T.1152).

The State then rested, as did the defendant.

PENALTY PHASE

The State commenced its presentation with certified copies of the defendant's conviction for attempted second-degree murder and armed robbery, in Circuit Case No. 85-2807, and the two first-degree murder, armed burglary, and attempted armed robbery convictions in the instant case. (T.1381-83). The State then called the following witnesses:

RAMIRO GONZALEZ

Gonzalez described the version of the murder related to him by the defendant in prison. (T.1386). When Carlos Villavicencio exited the bedroom, the woman was running, and the defendant told Carlos that he (the defendant) would take care of her, and the defendant then pulled out a .38 calibre gun and shot her from two yards away. (T.1388). When Gonzalez asked the defendant why he shot the woman, the defendant replied it was because she had witnessed the crime. (T.1389). The day before Det. Cadavid came to MCI for the initial interview, the defendant told Gonzalez that he was going to tell the police that Carlos put a gun to his head and forced him to shoot, so that he would not look so guilty. (Id). After Cadavid left, the defendant asked Gonzalez if he thought Cadavid believed his gun to the head fairytale, and Gonzalez replied that he didn't know. (T.1390).

As to the motive for killing the woman, the defendant had said he killed her because she saw them. The man was already dead, but "she could talk." (Id).

On cross-examination Gonzalez stated that he has another parole hearing in 1990, and that the prosecutor in the instant cases promised to write a letter on his behalf to the parole board. (T.1406). Gonzalez has had to be moved frequently for his own safety. (T.1408).

On redirect examination, Gonzalez stated he received threats because of his assistance in this case. He and the defendant were together at the Dade County Jail, and the defendant acted hostile and with hatred toward Gonzalez, and told his friends at the jail about Gonzalez. (T.1411). Two weeks ago Gonzalez and Pedro Torres were in a holding cell, and the defendant passed by. The defendant stated "Ramiro Gonzalez, Pedro Torres, you did it well to me, where are you going to get into now." (T.1412, 13). Gonzalez interpreted that as meaning the defendant would get him no matter what prison Gonzalez was sent to. (Id).

PEDRO TORRES

Torres was in MCI for burglary when he met the defendant there in 1987. They worked in the barbershop together. (T.1419, 20). In October of 1987 the defendant and Ramiro Gonzalez were summoned by loudspeaker, and Torres subsequently saw them talking with two detectives, and when the defendant emerged Torres asked

him what was he doing with the police, and the defendant said he would explain later. (T.1421). Two days later the defendant asked Torres to interpret in a phone call with Sgt. Singleton. Afterwards the defendant told Torres he had confessed a murder to the police. Torres asked the defendant if they gave him his rights, and the defendant said yes. Torres told the defendant the police couldn't make any promises, and the defendant replied. "Well, I asked him," and went on to explain the three wishes he gave Det. Cadavid. The defendant never said Det. Cadavid promised him anything. (T.1422, 23).

Torres thought that the defendant's statement about Carlos putting a gun to his head and forcing him to shoot the woman seemed odd. Torres asked the defendant why his partner would make him shoot the lady. His response makes good reading:

Q. What did he tell you the truth really was?

A. He told me that he had said that to the police because he didn't want to look like he voluntarily shot the person that he shot.

Q. What did he say really happened?

A. Well, he said that he walked in there, all right, and the guy went to the bedroom where the man was and had heard a shot and he ran towards where his partner was because he didn't know who got shot, whether it was his partner that got shot or whether it was the victim.

At that point in time, the lady ran towards the bedroom and confronted both of them.

Since one of them was already dead, they didn't want to leave no witnesses, so he told his partner: I'll take care of this, and turned around and shot the lady.

Q. Now, when he said: I'll take care of this, who was the one who you are referring to?

A. Jose Maqueira.

Q. So he just turned around and shot her so she couldn't identify him?

A. Yes, sir.

Q. Did you ask him why would he kill this lady?

A. I did. I asked him why.

He said it was for identification purpose, that they could identify both of them, so they could leave no witnesses.

(T.1424, 25).

Two weeks ago Torres and Ramiro Gonzalez were in a holding cell, and as the defendant walked by them he stated "Ramiro Gonzalez, Pedro Torres, what have you done to me? Where are you going to hide from now?" Torres interpreted that as a threat, and reported it to the guard. (T.1426).

Torres had been working with Det. Cadavid on another case, and Cadavid had promised him a letter to the parole board for that. (T.1429). He has not been promised anything in the instant case. (T.1433).

The State then rested, and the defendant called the following witnesses:

DR. MURRAY HABER

Dr. Haber is a clinical psychologist. (T.1477). She interviewed the defendant twice, obtaining a history and conducting an evaluation to determine the existence of mitigating evidence. (T.1479).

The defendant was born in Havana Cuba. He lived in the maid's room. His mother, who divorced his father when he was very young, worked two jobs and was rarely at home, so he spent a lot of time at his godparents. He would see his father once a month, and his father would hit the defendant. When the defendant was eleven he fell off the roof and suffered amnesia, broken mouth, and teeth. He was hospitalized for two months, and upon his release his father punched him in the mouth for falling off the building. He did not see his father again until before leaving for the United States when he was sixteen, and the meeting was "unpleasant." (T.1480, 81).

When the defendant was twelve his mother married Elvidio, an alcoholic who beat his mother. The defendant and Elvidio would get in fist fights because of Elvidio's treatment of his

mother. (T.1482). The only time he and Elvidio got along was when the defendant brought Elvidio alcohol, and they would drink together. The defendant began drinking when he was thirteen. Also at thirteen, he hit Elvidio with a stick and ran away to his godparents, where he stayed for six months. He dropped out of school at fourteen. He can read, but does not speak English. (Id).

Carlos Villavicencio introduced the defendant to marijuana at age fourteen. Carlos was six years older than the defendant, and was his role model/mentor. The defendant would do whatever Carlos wanted. (T.1483). At fourteen the defendant received probation for burglary. He came to the United States with Carlos when he was sixteen. He worked in an electronics factory for two weeks, but cut his hand and had to quit. Though only seventeen, he drank regularly in bars.

He moved to Miami Beach after winning \$1,000 in an illegal lottery. He began to drink and use drugs heavily, and his girlfriend introduced him to quaaludes and amphetamines. He sold these drugs to support his habit. (T.1485). A year later he met another woman, again an older woman, who was an alcoholic. His two six-packs a night increased to two quarts of whiskey between the two of them, which they augmented with "speed balls," an intravenous mixture of heroin and cocaine. And of course, the defendant was dealing drugs to support his habit. The defendant would have blackouts from his alcohol and drug use. (T.1486).

Prior to his arrest he had a \$200 - \$300 a day heroin habit, which he peddled along with nonuser Carlos. He was also committing crimes to support his habit. He had several arrests for burglaries prior to striking pay dirt with his attempted murder/armed robbery case. He has eight felony convictions and one misdemeanor. (T.1487).

In all the crimes where the defendant used guns, he had an accomplice. "This is not a person who is a leader. He is a follower. The pattern was established when he was a child." (T.1488).

As to the instant murder, he was living with Carlos at the time, and did not sleep the night before, because he had to wait for Carlos to fall asleep before shooting heroin. Carlos didn't take kindly to their drug profits going down the vein, so to speak. (Id). Another man picked them up, and they were going to rob a house with \$65,000 in a safe, to which they had the combination. The defendant drank one beer before going to the house. Carlos shot the man, then forced the defendant at gunpoint to shoot the woman. He did not know he killed her, and told Dr. Haber he was remorseful. (T.1489).

The defendant "is an abused individual and as a consequence he's an abuser." He has serious emotional problems

which under the DSM III, is categorized as a severe substance abuse disorder. He suffers from an "extreme emotional disturbance" as reflected in his "lack of [good] judgment." (T.1491).

The defendant follows older people, he always has, and his older role models have all been very unhealthy ones, especially Carlos, whom he cannot say no to. He came from a broken home. This is someone who never had a chance from the time he was very young. (Id).

No one who does this much alcohol and drugs can come close to functioning like a normal person. (T.1492). The defendant can be rehabilitated, as long as he is re-educated and in a substance-free setting. (Id). The defendant stated he never thought he would kill anyone, he can't believe he killed someone, and he feels remorse for it. (T.1493). If Carlos told him to pull the trigger while holding a gun to his head, the defendant would do it.

On cross-examination, she stated she relied exclusively on what the defendant told her in making her evaluation (T.1498, 99), and she assumed he was telling her the truth. (T.1502). The defendant was goal-oriented, competent, and reasonably intelligent. In Cuba he would lie to his mother so he could get money from her to buy alcohol and drugs. (T.1503). The defendant

told Dr. Haber that he was arrested on the attempted murder case because he returned voluntarily to the scene to get medical treatment for his accomplice. (T.1504). Dr. Haber was blissfully ignorant of the fact that the defendant had in fact fled in his vehicle, until pulled over and forced out of his car by Officer Merrill. (T.1505).

The defendant told Dr. Haber he had in fact committed the attempted murder, and said nothing about anyone forcing him to commit the crime. Dr. Haber was unaware that the defendant told his wife, Elsa, that someone had put a gun to his head and forced him to commit that crime.

Dr. Haber stated it "might have been important" to know that the defendant told his girlfriend, Deborah Longoria, that he had committed numerous home invasion robberies not only with Carlos, but with others as well. (T.1511, 12). The defendant told Dr. Haber that in Cuba, he would tell his godparents he was going to run away unless they gave him money to buy alcohol. (T.1514). Dr. Haber cannot make any assurances that the defendant will refrain from violent conduct in the future. (T.1515). The defendant said that drugs and alcohol gave him "courage" to do things he wouldn't do sober. No one forced him to use drugs and alcohol, but he was "pressured into that by the role model in his life, his stepfather," by Carlos, and other peer pressure. (T.1516).

The defendant did not blame alcohol for the murder. He knew what he was doing when he went to rob the house. The defendant was not insane. (T.1518). The defendant was never abused by his stepfather, although they fought when the stepfather got drunk and "occasionally" attacked his mother. The defendant had a great relationship with his godparents (T.1520), as well as his mother. All but one day of the month he was with his godparents or mother, usually the godparents. His father had remarried and had a little girl, the defendant's half-sister. On the one day a month he visited his father, he would have fights with his half-sister, and his father would discipline him by hitting and punching him. (T.1521). Dr. Haber is not surprised that the defendant told his wife he didn't commit the murder, and agreed that the defendant is manipulative. (T.1524).

THE DEFENDANT

The defendant's natural father left his mother before he was born. (T.1532). The defendant's mother worked two jobs, and he only saw her at night. He got along well with his mother. (T.1533). He met his natural father when he was five, and saw him once or twice a month until he was eleven. During those visits he would argue with his younger half-sister, and his father would discipline him by slapping him on the arm, thigh, or back. When he was eleven his father punched him in the mouth.

This occurred after the defendant's release from the hospital after falling off a ledge. The defendant had asked his mother to take him to his father's house, and once there the defendant and his father had an argument. His father told him to look at him when he was speaking, and the defendant replied that he heard with his ears, not his eyes. At that point his father punched him in the mouth. (T.1534, 35). The fall off the ledge had rendered him unconscious, but the defendant does not know for how long. (T.1536).

The defendant's mother remarried when the defendant was eleven or twelve. His stepfather drank too much. When he drank with the defendant everything was fine, but when he drank alone he would push the defendant's mother around and argue a lot. They would fight, and often the defendant would leave and go to a friend, his godparents, or the park. Once he stayed at his godparents for six months. (T.1537, 38). The defendant started drinking when he was twelve or thirteen, and smoked marijuana at fourteen, with Carlos. (T.1539). He would smoke it two or three times a week, always on the weekend. The defendant was very close to his godparents, whom he saw almost everyday. (T.1540).

The defendant was arrested in Cuba for "bicycle robbery, I stole in the beach, for home robberies," and the defendant was sometimes drunk when he committed the crimes. He drank almost every day. (T.1541). The defendant "sneaked into the Peruvian

Embassy" when he was sixteen, and then came to the United States. At first he stayed with his godfather's sister, for two or three months. He was snorting cocaine, using marijuana, and drinking 8-12 beers a day during this period (T.1543), mostly at bars with older people. Some were robbers, and most did drugs.

When the defendant was seventeen he won an illegal lottery, bought a car and moved to Miami Beach with some friends. He had worked for two months as an assistant electrician, then cut his hand and was fired. He had a job at a bakery in Miami Beach, but that ended when he went to jail. (T.1546).

The defendant made money selling drugs with Carlos, especially when he was injecting heroin and cocaine. He was also drinking one or two bottles of vodka or whiskey a night. He blacked out many times. (T.1547). His habit cost \$200-\$400 a day. The defendant's heroin addiction lasted nine months. The evening prior to the murders he had injected heroin and cocaine. The next morning he had "one or two beers" before leaving to commit the crime. (T.1551). There was no plan to kill anyone, Carlos put a gun to his head and forced him to shoot. The lady couldn't see Carlos holding the gun to his head because the defendant was between the lady and Carlos. (T.1552). The defendant did not tell Ramiro Gonzalez or Pedro Torres that he shot the woman so she couldn't identify him. He did not threaten them both two weeks prior to trial, rather he just gave them a dirty look. (T.1553, 54).

The defendant states he has been an alcoholic most of his life: "I've always been a slave on drugs all my life and everything I did was because of that. Had I not used it and had studied, I would have been somebody else." (T.1555). The defendant lived "a bad life" because of the drugs, but is now cured. He is sorry for what happened but "I didn't want to do it." The defendant admits he has a lot to pay for, "but I would like to have a chance and start studying in prison and work and change my life." (T.1555). The defendant has married and loves his wife. The defendant feels bad about the murders, and has repented. The defendant has asked God to forgive him, and that's all he can do. (T.1556).

CROSS-EXAMINATION OF THE DEFENDANT

The defendant has been convicted of twelve felonies. (T.1560). The defendant admitted to selling cocaine, but denied selling heroin. The defendant states the only two robberies he's committed in the United States were the two of which he was convicted. He doesn't remember telling his ex-girlfriend, Deborah Longoria, he committed at least five home invasion robberies. (T.1568, 69). The defendant lied to his wife when he told her his partner in the jewelry store (attempted murder) case put a gun to his head and forced him to commit that crime: "Well, why do I have to give her my own problems and headaches."

(T.1570). The defendant is not sure if he told his wife he was innocent in the instant case. (T.1572). After the instant crime, the defendant continued to hang out with Carlos. (T.1574).

DEBORAH LONGORIA

Longoria was the defendant's girlfriend for the two years prior to his incarceration. She supported herself by working as a prostitute. They shared two bottles of Galiano or Amaretto a day, also vodka and rum, plus they free-based cocaine and used marijuana. The defendant injected heroin and cocaine, but she did not. (T.1580, 81). She is eight years older than the defendant. She met Carlos Villavicencio the same time as the defendant. He also had a drug habit, and was wild. (Id). Carlos had a bad influence on the defendant, and she persuaded the defendant not to spend so much time with Carlos. The defendant looked up to her for guidance because she was quite a bit older than him. (T.1582).

On cross-examination by the State, she stated she met the defendant at a girlfriend's house where the defendant was selling cocaine. (T.1583). During their relationship the defendant used between two and eight grams a day. (T.1584). They drank large amounts of alcohol to bring them down from the cocaine. They also did quaaludes, until the supply stopped. (T.1585). The defendant was already doing cocaine when she introduced him to free-basing.

Longoria stated that during their relationship she also worked as a nude dancer, and she paid a lot of the bills. The

defendant got him income from selling cocaine, and "I think he did a few robberies" (T.1587), at the most five during their two years together. The defendant didn't need to obtain much money because "As I said, I made a very, very good living. He didn't need to do too much else." (T.1588). Most of the time she paid the rent. (T.1591, 92).

As to the attempted murder/robbery case, for which the defendant received 32 years, the defendant said it was not his idea, but he never said anyone forced him to commit the crime. (T.1593). When she met the defendant he was living with Carlos. They spent a lot of time together, and the defendant never indicated he was afraid of Carlos. (T.1594). During their relationship the defendant indicated he loved and missed his mother in Cuba, that he loved his brother, and also had a good relationship with a grandmother type person and grandfather type person in Cuba. (T.1596).

ELSA MAQUEIRA

She met the defendant over the phone a year prior to the instant trial. The defendant called her every night, and soon thereafter she went to visit him in prison. (T.1602, 03). She visited him every Friday and Sunday, and on Sunday they would attend church. Sometimes she would see him four times a week. (T.1604). Her aunt, uncles and niece also visited the defendant.

After four months (June-October) she asked the defendant to marry her. She did not know about the instant case at that time. (T.1605). The last time they were in church the defendant told her he had killed a lady because "they were going to kill him if he didn't." (T.1606). He didn't want to do it. If she had met him earlier, none of this would have happened. She has a beautiful family and they love the defendant very much. (T.1607).

On cross-examination, she states the defendant is very intelligent and very mature. (T.1608). When the defendant told her about the attempted murder/robbery of the jewelry store, he told her he had surrendered to the police, and that his accomplice forced him to commit the crime by putting a gun to his head. (T.1610-12).

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

II.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON AN IMPROPER QUESTION ASKED OF DET. CADAVID BY THE PROSECUTOR, TO WHICH THE DEFENDANT'S OBJECTION WAS SUSTAINED.

III.

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

IV.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT FOR THE MURDER OF RAQUEL RODRIGUEZ.

SUMMARY OF THE ARGUMENT

I.

There was no evidence presented at the suppression hearing that Ramiro Gonzalez promised the defendant anything, and indeed the defendant stated in his second taped confession that Gonzalez had not made him any promises. In any event Gonzalez was not working under the direction of any law enforcement officer, and hence even had he made the defendant promises they would not be attributable to the State. Det. Cadavid vehemently denied making any promises to the defendant other than an assurance that he would make the defendant's cooperation known to the prosecutor and judge, which is perfectly proper. Det. Cadavid's testimony in this regard was corroborated by both Gonzalez and Pedro Torres, another inmate to whom the defendant confessed. The trial court specifically found that the defendant's testimony was not credible, and the court was perfectly entitled to disbelieve the defendant's testimony (that Det. Cadavid promised him immunity, a reduction of his current 32 year sentence, and a resolution of his immigration problem), which testimony directly conflicted with that of all the other witnesses.

II.

The prosecutor should not have asked Det. Cadavid what he thought would happen after the defendant was arrested and given counsel, which presumably was intended to elicit Cadavid's

opinion that, after being appointed, the defendant's counsel would then make allegations concerning promises made the defendant by Ramiro Gonzalez. Defense counsel's objection to this question was sustained, and defendant's counsel specifically declined to seek a curative instruction. The State initially submits that sustaining the objection was sufficient, as the jury never heard Det. Cadavid's opinion as to what the defendant's as yet unappointed counsel might have alleged at some future date. Secondly, a curative instruction would definitely have sufficed. Thirdly, any error was definitely harmless given the overwhelming evidence of the defendant's guilt, as explained under Issue III.

III.

The defendant is certainly correct in maintaining that without his two taped confessions to Det. Cadavid and his confession to Ramiro Gonzalez, there is no evidence linking the defendant to the crime. The problem the defendant has is that those confessions are perfectly admissible, and when they are combined with the physical evidence, the eyewitness testimony of Rachel Rodriguez, and the dying declaration of Raquel Rodriguez, the evidence of guilt is overwhelming beyond measure. Indeed, defendant's counsel admitted the defendant's guilt, and argued instead that the jury should disregard the confessions because they were induced by improper promises. There was however no evidence at trial of any such promises (the defendant did not testify). In short, the evidence of guilt was thoroughly

overwhelming, and the evidence of the voluntary nature of the confessions was totally uncontradicted. Any error under Issue II was therefore harmless.

IV.

The State proved the "in the course of an armed burglary and attempted armed robbery" aggravating factor through the defendant's two taped confessions to Det. Cadavid, the defendant's confessions to Ramiro Gonzalez and Pedro Torres, and the discovery of the hidden safe by Rachel Rodriguez. As for witness elimination, both Gonzalez and Torres testified the defendant told them he killed the woman so she could not identify him. Gonzalez also testified that prior to the defendant's first meeting with the police, the defendant told Gonzalez he planned to tell the police that Carlos forced him at gunpoint to shoot the woman, so that the defendant would look less guilty. The defendant also told Torres he lied to the police about Carlos forcing him to shoot.

As for heinous, atrocious, or cruel, the State had conceded below that this aggravating circumstance did not apply, and the jury was not instructed on same. Because this court has held that the victim's suffering must be intended, and it is clear that if anything, this defendant desired the victim's death to be as instantaneous as possible, the State must concede this factor was improperly applied. However, it is absolutely clear

that the trial court would have imposed, and this court would uphold, the death sentence absent this factor.

The trial court in no way, shape or form was required to find the statutory mitigating factor of extreme duress, because the defendant's testimony (that Carlos put a gun to his head and forced him to shoot) was directly contradicted by Gonzalez, Torres, the dying declaration of Raquel Rodriguez, and the eyewitness testimony of Rachel Rodriguez. The defendant presented totally deficient evidence of "substantial domination" by Carlos, this evidence consisting of Dr. Haber's opinion that Carlos was the defendant's role model, and that the defendant could not say no to Carlos. The defendant's confessions to Gonzalez and Torres show that the murder of Raquel Rodriguez was totally a one man show by the defendant.

The trial court considered and then properly rejected the defendant's nonstatutory mitigating evidence as having little or no mitigating value. Finally, the defendant's suggestion that the death sentence herein is disproportionate is downright ridiculous.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED THE
DEFENDANT'S MOTION TO SUPPRESS
STATEMENTS.

The factual recital in the defendant's brief is simply inaccurate. There was in fact no evidence at the suppression hearing that Ramiro Gonzalez promised the defendant anything in order to induce his confessions to Gonzalez and Det. Cadavid. The defendant testified that he asked Gonzalez to arrange a meeting with the police. (T.338). The defendant was fully aware that Gonzalez would receive a benefit (favorable recommendation to the parole board) for his role, and of Gonzalez' past dealings with the police. That is why he sought Gonzalez' help. The defendant never alleged Gonzalez made him any promises. He did testify that Gonzalez warned him to extract specific promises from the Detectives before telling them anything. (T.339, 40). All of the defendant's allegations regarding promises concerned Det. Cadavid.

Not only was there no evidence of promises by Gonzalez, there was also a wealth of direct evidence that no such promises were made. In his second taped statement to Detective Cadavid, the defendant specifically stated that no promises were made to him by Gonzalez. (T.133). Det. Cadavid testified that Gonzalez never promised the defendant anything during their joint meeting

10/5/87, and that the defendant never mentioned any promises by Gonzalez, nor did Gonzalez mention any. (T.389, 90). Gonzalez testified he did not promise the defendant anything, nor did he tell the defendant it was in his best interest to cooperate with the police. (T.438). Pedro Torres testified the defendant never mentioned any promises by Gonzalez. In short, there is no record support for the defendant's allegation of promises by Gonzalez.

Even had Gonzalez made promises to the defendant, they would not have rendered the defendant's confessions inadmissible. As found by the trial court (T.466), Gonzalez was not operating under the direction of the State, and indeed Det. Cadavid had never heard of either Gonzalez or the defendant, and would still be ignorant of their existence had not the defendant asked Gonzalez to arrange their meeting. Whatever occurred between Gonzalez and the defendant was not arranged by, sponsored by, encouraged by or known to any State agent, and hence is not attributable to the State. See Spivey v. State, 529 So.2d 1088, 1091, 1092 (Fla. 1988), citing Colorado v. Connelly, 479 U.S. 157 (1986) (coercive activity by the State is a necessary predicate to finding that a confession is involuntary.) See also, Miller v. State, 415 So.2d 1262, 1263 (informant only becomes state agent when "deliberately used to secure incriminating information."), Michael v. State, 437 So.2d 138, 140 (it is irrelevant that inmate/informant had worked with police in prior unrelated investigations), Malone v. State, 390 So.2d 338 (Fla. 1980), and Barfield v. State, 402 So.2d 377 (Fla. 1981).

The defendant's allegations of promises by Det. Cadavid were totally contradicted by Det. Cadavid (T.385, 386, 396, 397, 409), Ramiro Gonzalez (T.437, 439, 451), Pedro Torres (T. 461-63), the defendant's second taped confession (R.133), and the defendant's miserable credibility, including eight prior felony convictions (which he had extreme difficulty admitting to, T.350-56). The trial court specifically found that the defendant's testimony was not credible. (T.466). It is interesting that the defendant testified that Det. Cadavid promised to "resolve" his big three wish list (T.341, 348), yet he also hedges and says Det. Cadavid didn't actually say he had the authority to resolve them, but rather said he had worked similar deals in the past. (T.342, 343). Additionally, the defendant's testimony that Det. Cadavid told him, prior to both taped confessions, that the defendant had to lie on the tape and say Cadavid made him no promises, otherwise the deal was off, is just total rubbish. It was also specifically refuted by Det. Cadavid. (T.417).

The bottom line here is that the trial court was thoroughly entitled to disbelieve the defendant's version of events, and instead accept the version presented by the State's witnesses and the taped confessions, as outlined above. This factual finding carries with it a presumption of correctness. See Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987), and cases cited therein. The State would also note that the standard of

proof is preponderance of the evidence. Deneby v. State, 400 So.2d 1216 (Fla. 1980), State v. Angel, 547 So.2d 1294 (Fla. 5th DCA 1989), and Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). The defendant's attempted reliance on Rogers v. Richmond, 365 U.S. 534 (1961), is profoundly misplaced. Rogers held that the reliability of the confession is irrelevant in determining its voluntariness. It certainly did not hold that the credibility of the defendant's allegations of coercion are irrelevant. If it had, every defendant would allege he was promised a free ride, and by this allegation automatically receive his complimentary pass.

The State's final point is that Det. Cadavid's assurance (or if it makes the defendant feel better, "promise") to the defendant, that he would make his cooperation known to the prosecutor and judge, is a perfectly proper representation to make, see Puccio v. State, 440 So.2d 419, 421 (Fla. 1st DCA 1983), Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980), modified on other grounds, 410 So.2d 1343 (Fla. 1982), and cases cited therein.

II.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON AN IMPROPER QUESTION ASKED OF DET. CADAVID BY THE PROSECUTOR, TO WHICH THE DEFENDANT'S OBJECTION WAS SUSTAINED.

It is not entirely clear what answer the prosecutor was attempting to elicit. Det. Cadavid was testifying on redirect concerning a meeting he had with two prosecutors on 11/23/87. Cadavid had testified on direct and cross that the prosecutors were concerned that, in the initial 10/5/87 taped statement, Cadavid had neglected to ask the defendant whether Gonzalez made him any promises.¹ Thus the purpose of the 11/24/87 interview was to obtain a recorded statement from the defendant to the effect that Gonzalez made him no promises. (T.1103, 04, 1145). At the time of the 11/23/87 meeting with the prosecutor, Det. Cadavid was helping to prepare the case for the grand jury. (T.1146). Obviously the defendant had not yet been arrested and hence had no attorney at the time of the meeting.

The prosecutor's question at issue here was an attempt to ascertain Det. Cadavid's (and apparently the two prosecutors' as well) state of mind at the meeting, and specifically, what he

¹ Det. Cadavid had testified at the suppression hearing that in the pre-tape interview 10/5/87, the defendant had said that nobody promised him anything prior to meeting with Cadavid (T.384), and neither the defendant nor Gonzalez mentioned any promises made by Gonzalez prior to the meeting. (T.389, 90).

thought would happen after the defendant was arrested and received counsel:

What did you all know that had happened
as soon as this defendant get an
attorney? (T.1152, 53).

Although the prosecutor used the words "had happened," it is clear from context that the prosecutor was asking Det. Cadavid about his opinion, on 11/23/87, of what Cadavid thought would happen as soon as the defendant was charged and provided counsel. Presumably the prosecutor expected Det. Cadavid to respond that he anticipated defense counsel would make allegations concerning promises made by Gonzalez, since nothing in the defendant's first taped statement contradicted such as allegation.

If the above interpretation of events is correct, then the prosecutor's question was certainly improper, as Det. Cadavid's opinion about what the defendant's future counsel might allege is totally irrelevant. Additionally, the actions of defense counsel are not a proper subject of inquiry, as such questions can only denigrate the defendant's sixth amendment right to counsel. Indeed, under no interpretation of events can the question be deemed proper. However, defendant's counsel's objection was sustained, and counsel specifically declined to request a motion to strike or curative instruction. Such a request was a prerequisite to a motion for mistrial. See Clark v. State, 363 So.2d 331, 335 (Fla. 1978), Brown v. State, 550

So.2d 527 (Fla. 1st DCA 1989), and Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989). It is not within the province of trial counsel to determine whether a curative instruction would be sufficient, rather he must afford the trial court the opportunity to correct the perceived taint by curative instruction. It is then for the appellate court to assess whether the curative instruction was sufficient. See Farinas v. State, 15 FLW S555 at S557, n.7 (Fla. October 11th, 1990).

This Court has held curative instructions sufficient under circumstances for more egregious (and far less ambiguous) than are present herein. See Buenoano v. State, 527 So.2d 194 (Fla. 1988), (references to defendant having torched the victim's home to collect insurance money, a crime not charged in indictment, cured by instruction to strike and disregard), Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986), (comment that defendant had been in jail for another offense cured by instruction), Johnson v. State, 486 So.2d 22 (Fla. 1st DCA 1986), (comment that witness thought defendant had pled guilty to crime charged could have been cured by instruction), Irizarry v. State, 496 So.2d 822 (Fla. 1986), (reference to defendant's polygraph test cured by instruction), and Davis v. State, 461 So.2d 67 (Fla. 1984), (same). In short, the instant claim was not properly preserved at trial, and hence should be deemed waived by this Court.

The State's primary position, however, is that the improper question constituted harmless error beyond any doubt given the absolutely overwhelming evidence of the defendant's guilt. See State v. Diguilio, 491 So.2d 1129 (Fla. 1986), State v. Murraray, 443 So.2d 955 (Fla. 1984), Keen v. State, 504 So.2d 396 (Fla. 1987). See also Nicholson v. State, 486 So.2d 688 (Fla. 3d DCA 1986), rev. den., 500 So.2d 545, Llida v. State, 501 So.2d 162 (Fla. 3d DCA 1987), and Mack v. State, 461 So.2d 142 (Fla. 3d DCA 1984), rev. den., 471 So.2d 43.

The defendant's two taped and extremely detailed confessions to Det. Cadavid, and his confession to Gonzalez as related through Det. Cadavid, when combined with the physical evidence and the eyewitness testimony of Rachel Rodriguez, together comprise overwhelming and indeed undisputed evidence of the defendant's guilt. The match between the confessions and the State's physical and eyewitness testimony is a uniformly perfect one, as set forth above. Defense counsel was forced to concede, in both opening statement and closing argument, that the defendant committed the crimes charged. His only defense was that the jury should disregard the confessions because they resulted from promises of lenient treatment and other benefits by Det. Cadavid. Yet at trial there was no evidence whatsoever of any such promises. The defendant did not testify. Det. Cadavid vehemently denied making any such promises. The defendant stated in his second taped statement that the police had not promised

him anything in exchange for his statement. Thus the State's evidence of the voluntary nature of the confession was both overwhelming and uncontradicted. If ever there was a case in which an error should be deemed harmless based on overwhelming evidence of guilt, it is definitely the instant one.

III.

THE TRIAL COURT PROPERLY DENIED THE
DEFENDANT'S MOTION FOR JUDGMENT OF
ACQUITTAL.

The defendant's argument on this issue is predicated on the inadmissability of his confessions. No doubt about it, without the confessions the State had no case. Unfortunately for the defendant, the confessions were properly admitted, as set forth above.

IV.

THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT TO DEATH FOR THE MURDER OF RAQUEL RODRIGUEZ.

The State proved beyond a reasonable doubt that the murder occurred during the course of an armed burglary and attempted armed robbery. The defendant's confessions to Det. Cadavid, and his confessions to Ramiro Gonzalez and Pedro Torres, who both testified at the penalty phase, together with the discovery of the hidden safe by Rachel Rodriguez, overwhelmingly establish that the defendant along with Lazaro Diaz and Carlos Villavicencio, planned this home invasion robbery for two weeks, passing by the house numerous times until finally finding the front door open. Once again the defendant relies on the alleged inadmissibility of his confessions to support his sufficiency of evidence claim. Again, these statements were properly admitted.

The State proved beyond a reasonable doubt that the defendant himself murdered Raquel Rodriguez to eliminate her as a witness. Both Pedro Torres and Ramiro Gonzalez testified that the defendant told them he killed the woman because she saw the defendant, and thus could have identified him. They also testified that the defendant told them he lied to Det. Cadavid about Carlos putting a gun to his head and forcing him to shoot the woman, and that he told this lie to make it appear he didn't shoot her intentionally. They further testified the defendant

told them that when the woman ran toward them, the defendant told Carlos, "I'll take care of this," then turned and shot the woman. (T.1386-1390, 1424, 25). This account gels with the victim's dying declaration, in which she stated that as they started to run out the door, one of the men, the one wearing a dark shirt and pants, wheeled around and shot her. (T.1046).

Based on this testimony, the aggravating circumstance of witness elimination was properly found by the trial court. See Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), and Floyd v. State, 497 So.2d 1211 (Fla. 1986). As for the defendant's "the devil made me do it" nonsense, the State notes that Rachel Rodriguez testified there were only three seconds between the shots (T.898), the victim's description of events totally contradicts the defendant's version, and finally, the defendant admitted at the penalty phase that he lied to his wife when he told her that his codefendant in the attempted murder case put a gun to his head and forced him to commit that crime. The defendant stated he told her this lie because, "well, why do I have to give her my own problems and headaches." (T.1570). What a guy!!

The State reluctantly concedes that the evidence herein does not support the trial court's finding of heinous, atrocious or cruel. The prosecutor below had conceded this factor did not apply, and had not argued the applicability of this factor nor

was the jury instructed thereon. (T.1689, 90). In finding this aggravating factor, the trial court relied primarily on the defendant's evil motive for the killing, (R.267), which is properly encompassed under the witness elimination aggravating factor. The court also relied on the physical and mental pain, including concern for her husband's condition, which the victim suffered after the shooting. This certainly was severe, which is why the State's concession is made with great reluctance. However, it would be disingenuous for the State to argue that the defendant intended this suffering, when it is obvious that the very last thing the defendant intended was for Raquel Rodriguez to remain conscious, and hence able to describe her attackers. The defendant's intent was to immediately terminate the victim's existence. The State therefore concedes that the trial court erred in finding this aggravating factor. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989), Jackson v. State, 451 So.2d 409 (Fla. 1986), and Cook v. State, 542 So.2d 964 (Fla. 1989).

On the other hand, this definitely is a case where this Court can safely conclude that the "reasoned judgment" of the trial court was not affected by the improper aggravating factor, i.e., the trial court would have imposed death absent the stricken factor. See Randolph v. State, 463 So.2d 186 (Fla. 1984), Jones v. State, 449 So.2d 253 (Fla. 1984), Sims v. State, 444 So.2d 922 (Fla. 1983). This Court's words in Jackson v. Wainwright, 421 So.2d 1385 (1982), cert. den., 103 S.Ct. 3572,

pet. granted (as to death sentence based on improper jury instruction) 837 F.2d 1469 (11th Cir. 1988), are fully applicable to the instant case:

It is apparent on the face of the findings by the trial judge that the result of the weighing process would not have been different had the impermissible factor not been present. *Jackson*, 366 So.2d at 756. It is beyond reason to conclude that the trial judge's decision to impose the death penalty would have been affected by the elimination of the unauthorized aggravating circumstance. *Brown v. State*, 381 So.2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

Id. at 1388.

There are three telling aggravating factors in this case: the murder occurred during a long planned armed home invasion burglary/attempted robbery. The defendant's prior violent felonies included not only the murder of Miguel Rodriguez in this case, but also an attempted second-degree (as reduced) murder during the armed robbery of a jewelry store. Finally, the defendant himself shot Raquel Rodriguez solely to eliminate her as a witness to the murder of her husband. As stated above, the trial court based its finding of heinous, atrocious and cruel in large part on the evil motive behind Raquel's death, and certainly this was a legitimate consideration, albeit under the properly found aggravating factor of witness elimination. In its sentencing order the trial court stated that the aggravating factors "vastly overshadows any mitigating circumstances set

forth herein or propounded by defense in its argument (emphasis added)." (T.271). There is absolutely no doubt that the trial court would have imposed death absent consideration of heinous, atrocious and cruel. And as discussed below, there were no statutory mitigating factors and no meaningful nonstatutory mitigating factors presented.

As to the statutory mitigating factor of Extreme Duress or Substantial Domination of Another, the trial court's reasons for rejecting this factor (R.268, 69) are supported by the record. The only duress the defendant suffered when he shot Raquel Rodriguez was his fear of being apprehended. The defendant presented the nebulous testimony of Dr. Murray Haber, to the effect that Carlos Villavicencio was the defendant's role model, and that the defendant was a follower who could not say no to Carlos. Yet when Raquel Rodriguez ran toward them, it was the defendant who told Carlos "I'll take care of this," and then proceeded to cover his tracks by eliminating the sole eyewitness. The defendant's girlfriend, Debra Longoria, testified the defendant was not intimidated by Carlos. Carlos was his good buddy. Where is the evidence of substantial domination? There is, to be sure, none at hand.

As for the defendant's abused childhood, this Court is accosted by another gaping myth. The defendant's own testimony shows that his mother and godparents raised him until he was

twelve, his father having divorced his mother before he was born. He stayed with his godparents during the day and his mother at night. He loved them and they loved him. No abuse there. During this period he visited his natural father once or at most twice a month. While there he would quarrel with his younger half-sister, and his father would punish him with open handed slaps to his arms, thigh, or backside. When the defendant was eleven, he visited his father after recovering from a bad fall. They argued, the defendant made a smart aleck remark to his father, and his father exploded and punched him in the mouth. This single incident was the only real abuse the defendant suffered in his entire childhood.

According to the defendant, when he was twelve his mother remarried. His stepfather did not abuse the defendant, but he would get drunk and then occasionally fight with and hit his mother, which in turn sparked fights between the defendant and his stepfather. That is unfortunate, but is certainly does not constitute an abusive childhood.

The defendant's other "mitigating" factor is his history of drug and alcohol abuse. The jury was surely impressed with this history, especially the defendant's activities as a heroin and cocaine pusher, the income from which he augmented with occasional robberies, according to Debra Longoria, and it certainly was touching how she met the defendant at a friend's

house, where the defendant had dropped by to sell some cocaine. This Court will obviously make its own assessment of the mitigating virtue of this evidence. The State would stress, however, that the defendant specifically stated he was not under the influence of drugs or alcohol at the time of the murder. In his confession to Det. Cadavid he stated they stopped at the restaurant/bar next to the victim's gas station, and drank coffee before leaving to commit the crime. He told Dr. Murray he had one beer that morning, and during the penalty phase testified he had one or two beers. The instant crime, which occurred at 10:30 a.m., was planned and rehearsed over a two week period. The defendant's memory of the events that morning was incredibly detailed even though four years had passed between the murder and his confessions.

In sum, there is no evidence the defendant's drug and alcohol abuse had any bearing on these murders, other than the fact that the robbery was supposed to net \$65,000, which split three ways represents a whole slew of forty hour work weeks the defendant would once again be able to avoid. Maybe the State is missing something, or then again, maybe the concept of what a reasonable human being would consider mitigating has gotten lost in the 3.850 shuffle. Just a thought. In any event, the trial court can hardly be taken to task for attaching little or no weight to this evidence. Finally, the trial court stated that the aggravating factors "vastly overshadows any mitigating

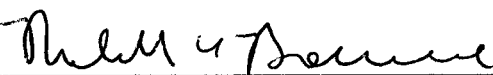
circumstances set forth herein or propounded by defense in its argument" (emphasis added). (T.271). It is clear the trial court took the whole picture into account, including the jury's death recommendation. The trial court stated it had reviewed the entire record "... to determine whether there might possibly exist anything else, whatsoever, of a nonstatutory mitigating nature..." (T.270). The trial court's decision to impose death was clearly a "reasoned judgment," one which is eminently deserving of affirmance by this Court. As for the defendant's argument that this sentence is disproportionate to similar cases in which death has not been imposed, *GET OUTTA HERE!!* No way, Jose.

CONCLUSION

The judgment and sentence entered below are proper, and should be affirmed.


Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General


RALPH BARREIRA
Florida Bar No. 0374490
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to CALIANNE LANTZ, Esquire, 9100 South Dadeland Blvd., Suite 512, Miami, Florida 33156 on this 30 day of October, 1990.


RALPH BARREIRA
Assistant Attorney General

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