IN THE SUPREME COURT OF FLORIDA

MANUEL COLINA,

Appellant,

v. CASE NO. 79,479

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

I. Castro's testimony was taken in the course of a prior judicial proceeding in which Colina was a party. The purpose of both proceedings was to determine the appropriate sentence for Colina for two first degree murders. Castro was not available to testify because he refused to testify despite being held in contempt of court. Defense counsel was given the opportunity to use prior cross-examination and to bring out new inconsistencies by the use of unsworn statements. The right of confrontation was not violated.

II. The trial court properly found that Castro was unavailable to testify since he refused to testify even after being held in contempt. The state did not procure Castro's unavailability. Such unavailability was based on the pendency of a pro se Florida Rule of Criminal Procedure 3.850 motion. The appointment of counsel for Castro was at the discretion of the trial court and such appointment cannot be said to have directly resulted in Castro's unavailability as a witness.

III. The aggravating factors that the murders were especially heinous, atrocious or cruel were properly found as the victims were savagely beaten on the head with a tire iron and were, at least, partially conscious during the attacks. *See, Bruno v. State,* 574 So.2d 76 (Fla. 1991); *Marshall v. State,* 17 F.L.W. 459, 461 (Fla. July 16, 1992).

IV. The sentencing court did not consider victim impact evidence in sentencing the appellant.

V. The nonstatutory mitigating factor of disparate treatment of an equally culpable codefendant was properly rejected as the evidence shows Colina chose the victims, planned the murders, and carried them out, and that Castro had much less involvement.

STATEMENT OF THE CASE AND FACTS

The facts of this case as previously found by this court are set out in *Colina v. State,* 570 So.2d 929 (Fla. 1990). Appellee has no dispute with the facts in regard to resentencing as recited in appellant's statement but has made relevant inclusions of additional facts within the argument section which do not bear duplication herein.

I. COLINA'S RIGHTS UNDER THE SIXTH AMENDMENT AND THE FLORIDA CONSTITUTION TO CONFRONT THE PRINCIPLE STATE WITNESS AGAINST HIM WAS NOT VIOLATED BY THE USE OF THE PRIOR TESTIMONY OF FELIX CASTRO AT THE RESENTENCING PROCEEDING.

Manuel Colina was tried and found guilty by a jury of his peers of the first degree murders of Cecilia and Angel Diaz. Subsequent to the verdicts of guilty, a separate penalty phase was conducted. The advisory sentence was unanimous for death as to each count. The sentencing judge followed the advisory recommendation and imposed two death sentences in August, 1987. This court affirmed the conviction on November 15, 1990, but reversed the sentences and remanded the matter for a new sentencing hearing. *Colina v. State,* 570 So.2d 929 (Fla. 1990). On January 27, 1992, a jury was empaneled and testimony commenced regarding recommendations to Judge Graziano for the resentencing of Colina (R 649).

Felix Castro testified for the state at the original trial and was cross-examined by Colina's attorney and subjected to redirect and recross (R 1196-1320). Castro refused to testify at the resentencing on Fifth Amendment grounds. Castro had filed a Florida Rule of Criminal Procedure 3.850 Motion and his appointed counsel had not fully investigated his claim (R 1021). The court adjudged Castro to be in contempt of court and committed him to the custody of the sheriff for 179 days. He could purge himself by testifying that very day (R 1023). The jury was brought back and Castro was given an opportunity to speak. Castro refused to answer questions on direct and cross-examination (R 1024-1025).

Based on Castro's behavior, Judge Graziano found Castro to be unavailable as a witness and his prior testimony was read by Lieutenant William Hord (R 1028; 1030). The court stretched the rules of evidence to make sure the defendant could confront and cross-examine Castro and allowed defense counsel on cross-examination to question statements that were not even sworn to (R 1273).

The appellant complains that under the Sixth Amendment to the United States Constitution he has the right to confront witnesses against him and that under the Florida Constitution he has the right to confront adverse witnesses at trial and that this right also applies to the penalty phase. Appellant recognizes that prior testimony becomes admissible upon retrial without violating confrontation requirements where a witness becomes unavailable, as the opportunity for effective cross-examination at the prior trial furnishes an indicia of reliability and satisfies the confrontation requirement. Appellant does not challenge the constitutionality of the hearsay exception contained in section 90.804(b), Florida Statutes (1992), or question its validity. He argues that the hearsay rule and confrontation clause are not coextensive, however, and that even statements properly admitted under the hearsay rules may be examined by the court to assure that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. An evidentiary rule may still violate the principle of confrontation where its application calls into question the integrity of the fact-finding process. The extreme circumstances

of this case are alleged to have robbed an otherwise legitimate rule of its validity because Castro provided seven accounts of the events prior to the commencement of the trial and changed his involvement in virtually every interview as well as the details of the murders. Appellant claims that it could not be predicted what Castro would say if called to testify. Appellant further argues that a purpose of cross-examination is to allow the jury to observe the witness as he spins his tale and to assess his demeanor. The use of Lieutenant Hord to acknowledge recorded inconsistencies lacked the basic clash and confrontation envisioned by the Sixth Amendment. An important function of cross-examination is to expose a witness' motive in testifying. Although Castro testified in 1987 that his deal with the state called for him to spend the rest of his life in prison, he really believed that with concurrent sentences and gain time he would only serve seven years. Appellant concludes that the difference is of such magnitude that it would have played a critical role in weighing the credibility of his testimony at either trial.

The use of prior testimony is allowed where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available. *Thompson v. State,* 17 F.L.W. 342, 344 (Fla. June 4, 1992); *Hitchcock v. State,* 578 So.2d 685 (Fla. 1990); *Layton v. State,* 348 So.2d 1242 (Fla. 1st DCA 1977). The record reflects that the prior

testimony met this criteria. Where the court admits the entire testimony, including cross-examination, no confrontation clause violation occurs. *Hitchcock v. State,* 578 So.2d 685, 691 (Fla. 1990); *see also, Chandler v. State,* 534 So.2d 701 (Fla. 1988). This case is not so extraordinary as to be exempt from these general principles.

In this case not only was prior cross-examination available, although its reading was waived, (R 1098) but counsel was allowed to bring out inconsistencies on the basis of statements which were not even sworn to by Castro. The state rightfully characterized this as "getting two bites at the cross apple." (R 1098). The state was at a further disadvantage because Castro was not available so as to afford him an opportunity to explain or deny the prior statements pursuant to section 90.614(2), Florida Statutes (1992). The trier of fact in this case obviously assured herself that there was a satisfactory basis for evaluating the truth of the prior testimony by allowing the defense to bring out virtually every utterance Castro ever made. The integrity of the fact-finding process was hardly tainted by the fact that Castro was originally reluctant to admit his involvement. Many inconsistencies in detail are attributable to Castro's various rambling, non-sequential accounts of the events or due to the dimming of memory four years later. Any complained of inconsistencies were before the jury and court. From Castro's post-trial depositions it is clear his testimony would be much the same and such testimony is supported by physical evidence. The fact that any alleged inconsistencies

were not come at by a clash of wills does not mean there has been no right of confrontation. The terms of Castro's plea agreement were before the jury and judge (R 1280). Obviously Castro hoped to benefit from his testimony in some manner and his recent disenchantment with such benefit does not reflect on whether his prior testimony was truthful.

II. THE COURT PROPERLY FOUND THAT FELIX CASTRO WAS UNAVAILABLE TO TESTIFY.

At trial, Castro testified that, after he and Colina smoked some cocaine, they went to the Diazes' residence to collect money they owed him for work he had performed; that upon arriving at the residence, Colina asked Angel Diaz for a jack to change a tire; that Angel came outside and spoke with Castro while Colina was inside the residence; that Castro battered Angel in the back of the head and then Colina, who had come back outside, hit Angel with a tire iron; that the two men then carried Angel behind the residence, where Cecilia was lying; that, at Colina's direction, Castro cut up a clothesline so Colina could tie up the victims; and that Colina then struck each victim several times. Castro further testified that, before departing from the premises, he and Colina stole various items, including cash, jewelry, alcohol, and the Diazes' automobile; that they used the cash to purchase alcohol and Colina sold the jewelry to purchase cocaine, which the two men smoked; and that Castro drove back to the victims' residence and stole a television, which he used to acquire more cocaine. Castro also testified that he and Colina committed two more burglaries before departing for Houston, Texas, where they were eventually arrested. In contrast, Colina testified that he fled the scene after seeing Castro hit Angel numerous times; that he did not see Castro again until later that night when Castro pulled up beside him driving the Diazes' automobile; that Castro got out of the automobile holding a bottle of rum and a knife; that he placed the knife against Colina's throat and asked Colina

to get into the automobile; and that they then returned to the victims' home, where Castro stole some goods prior to their departure for Texas. The prosecution also presented the testimony of a number of inmates at the Putnam County Jail that Colina admitted to them, while he was in jail, that he killed the two victims. The jury convicted Colina on two counts of first-degree murder. Colina's convictions were upheld on appeal by this court. *Colina v. State,* 570 So.2d 929 (Fla. 1990).

Castro originally testified against Colina pursuant to a May 11, 1987, stipulation and agreement with the state in which he would be allowed to enter pleas of guilty in exchange for *truthful* testimony. The state agreed not to seek the death penalty and not to "recommend" consecutive minimum mandatory incarcerative sanctions under section 785.082(1), Florida Statutes (1987) (R 1277-1280). Castro realized he could spend his life in prison (R 1145).

After resentencing was ordered by this court, Castro was deposed in 1991 and gave a statement of events (R 54-163). Sometime after, he became disenchanted with his sentence and in November, 1991, filed a motion for post-conviction relief complaining that his guilty pleas were entered involuntarily because he relied on counsel's advice, not knowing that counsel was a deputy sheriff (R 221). Castro was to be a state witness and the state would have knowledge whether he would cooperate or not. The state indicated that it had reason to believe that Castro would *not* provide additional testimony at resentencing prior to counsel being appointed (R 214). At that point in time

this court had already determined that evidentiary hearings were required in cases in which Howard Pearl represented defendants to determine whether his service as a special deputy sheriff affected his ability to provide effective legal assistance. *See, Herring v. State,* 580 So.2d 135 (Fla. 1991). It is hard to imagine that counsel would not be ultimately appointed to represent Castro in his pending 3.850 hearing under such circumstances. In view of the convergence of the 3.850 motion with Castro's role as a witness the prosecutor behaved ethically in asking that counsel be appointed rather than seeking to drag admissions from Castro as a witness to be used against him pro se. Castro refused to testify on December 10, 1991 (R 258-163). On January 27, 1992, Castro again refused to testify (R 1014-1015). He refused to answer further questions despite a court order to respond to questions concerning his reasons for not testifying and questions that did not concern his involvement in the offense (R 1016). Castro was held in contempt and given a further opportunity to testify in order to purge himself, which he declined to do (R 1023-1025).

The appellant argues that the court erred in finding Castro unavailable as a witness because Castro's unavailability was the product of deliberate strategic steps taken by the prosecution.

Appellee would ask, first, what the state had to gain by making Castro unavailable as a witness? Castro testified at trial. Colina testified at trial. Obviously, the jury believed Castro. His convictions were affirmed. The facts of the case supporting the convictions have already been established. Such

facts could well have been presented to the jury to establish a factual background. The state had every reason to believe that Castro would testify favorably to its cause since his February 1991 deposition indicates, despite any alleged discrepancies, that Colina was the dominant figure and supports the finding of aggravating factors. Appellant seems to suggest that the resentencing reopened the guilt phase, as well, so he could attempt to demonstrate residual doubt of guilt. Resentencing was much more limited than that and the state had nothing to gain by Castro's unavailability. The fact that Castro was not present to explain any alleged inconsistencies in his statements was certainly not helpful to the state. Were Castro seeking to profit from his 3.850 motion the natural urge would be to damn Colina even more.

The court, not the state, ultimately made the decision to appoint counsel for Castro. If Castro is successful in his pro se motion he could again subject himself to the death penalty. The appointment of counsel is at the discretion of the court, *see, Isley v. State,* 565 So.2d 389 (Fla. 5th DCA 1990), and the trial court did not abuse its discretion in appointing counsel for Castro. The state did not act improperly in apprising the court of the unique circumstances of the case. There is no indication that Castro wanted to testify even before counsel was appointed or that he would have testified had counsel not been appointed.

Castro was clearly unavailable pursuant to section 90.804(1)(b), Florida Statutes (1992), as he persisted in refusing to testify concerning the subject matter of his

statement despite an order of the court to do so. There is no indication that Castro will ever consent to testify. He could stand trial. He could appeal the denial of his 3.850 motion for years in state and federal court. There was no rush to judgment in this case.

Appellant cannot be heard to complain of weak cross-examination of Castro at the original proceeding when counsel was allowed to point out further inconsistencies.

III. THE SENTENCING COURT PROPERLY FOUND THAT THE MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Circuit Judge Graziano, in determining that the murder of Cecilia Diaz was especially heinous, atrocious or cruel, found as follows:

> The Defendant carefully planned the murder of Cecilia Diaz and Angel Diaz. He chose as his weapon of destruction, a tire iron. Medical evidence showed that with repeated and violent blows to the facial area and head, life was beaten out of Cecilia Diaz. Evidence indicates an apprehension of death as she was beaten first in the home, then dragged over one hundred yards behind the house, to be beaten again. Medical testimony was that Cecilia Diaz could have survived the bashing of her face, but not of her skull. The Co-Defendant's testimony indicates she moaned and struggled, thereby causing the Defendant to continue his tortuous bashing, until her skull was in pieces, to assure her death.

(R 650).

Judge Graziano also found the murder of Angel Diaz to be especially heinous, atrocious or cruel. Her findings, as set out in the sentencing order, are as follows:

> The facts adduced at trial established conclusively that Angel Diaz was struck first by this Defendant's co-participant, Felix Castro, in the back of the head with a tree limb and was there upon knocked to the ground. Thereafter, the deceased, Angel Diaz, was come upon by Manuel Colina who had armed himself with a tire iron. When the deceased, Angel Diaz, attempted to rise from the ground from having been knocked down, he was struck at least twice more there and then by Manuel Colina with the tire iron. The testimony of Dr. William Maples

> established that one of the bony defects in the back of Angel Diaz's skull was consistent with the unique tooling of the tire iron. There is record evidence that Manuel Colina inflicted great pain on Angel Diaz during the course of the first degree murder.
>
> The fashion in which Angel Diaz was murdered is evidence upon which the record supports a finding of this capital felony having been committed in an especially heinous, atrocious or cruel manner.
>
> The murder of Angel Diaz occurred relatively contemporaneous with the murder of Cecilia Diaz by the hand of the defendant, Manuel Colina. The evidence adduced at trial described one or the other of the victims moaning at points in time before the final blows were leveled upon their heads by the Defendant while in the presence of each other as they lay dying in the back section of their property. They were found lying in relative proximity to one another and were nude or semi-nude when recovered, and tied about the hands and feet. Medical evidence concluded that the victims had already literally bled to death before they were tied by the Defendant Colina.

(R 654-655).

Appellant argues, as to the murder of Cecilia Diaz, that several of the judge's findings do not support this aggravating factor: (1) the fact that the defendant carefully planned the murder supports, not this, but the cold, calculated and premeditated aggravating factor and is unsupported by the record as no weapons were brought to the scene and Castro testified that Colina wanted to tie the victims up and leave them before the fatal blows were administered (2) the choice of a tire iron as the weapon is not relevant as a blow from it could cause

immediate loss of consciousness and a quick death with no suffering (3) while medical evidence showed that death was caused by repeated blows to the facial area and head of the victim, there is no evidence that she survived the initial blow or remained conscious throughout so as to have an apprehension of death after being struck in the house then dragged to the clearing and beaten again; there were no skeletal injuries to indicate defensive wounds (4) although medical testimony indicates she could have survived some of the blows, Dr. Maples also noted that any of the blows could have been fatal (5) while Castro's 1987 testimony indicates that she moaned and struggled and was beaten further by the defendant, he was certain in 1991 that he heard nothing from her and never saw her struck; a hose was required to clean the blood from the trailer, indicating a severe blood loss; it is unlikely anyone would moan after such blows; and a moan does not mean that consciousness has been regained.

Appellant further argues, as to the murder of Angel Diaz, that the findings are either inapplicable to this aggravating factor or are unsupported by the record: (1) the use of a tire iron is, again, not relevant (2) testimony that Mr. Diaz attempted to rise after being struck by Castro at which time the defendant attacked him with a tire iron is self-serving and does not demonstrate that Mr. Diaz could feel or comprehend what was happening; Dr. McConaghie indicated that Castro's blow to the back of Mr. Diaz' head fractured his skull making it unlikely that he would have instantly recovered as Castro claimed; Castro

never testified that he regained consciousness (3) there is no record evidence that Manuel Colina inflicted great pain on Angel Diaz (4) the fact that the murder occurred relatively contemporaneously with the murder of Cecilia Diaz does not support this aggravating factor unless each is forced to watch the other die, which did not occur in this case (5) the finding that one or the other moaned at points in time is unsupported by the record as it was alleged and later retracted by Castro that Mrs. Diaz moaned and he never stated that Mr. Diaz moaned (6) there is no evidence that they were killed in each other's presence, in fact, Mr. Diaz was outside the home and Mrs. Diaz was inside (7) the nude or semi-nude condition of the bodies and tying of the hands and feet occurred after death or loss of consciousness, which matters are not proper considerations in finding this aggravating factor (8) the finding that the medical evidence was that they bled to death, not being challenged as unsupported by the record, is, evidently, being attacked on the basis of relevance.

Appellant argues generally as to both findings of fact that the HAC factor does not apply where loss of consciousness occurs followed shortly by death. Neither the medical examiner nor the forensic anthropologist were able to determine how quickly the Diazes lost consciousness. Dr. Maples noted that he was unqualified to comment on the time of death or pain and suffering endured. There was massive hemorrhage to both victims with a rapid loss of blood from the head or above the neck. Although multiple blows were delivered appellant argues they may have

occurred after death. Appellant further argues there is no evidence of unnecessary or prolonged pain or torture to the victims or mental anguish as the evidence indicates that the Diazes lost consciousness or died quickly without a struggle and the assaults were unexpected and afforded little time for contemplation. Neither defendant tormented the victims or displayed pleasure at their fate.

It is clear that the finding that the murder of Cecilia was committed in an especially heinous, atrocious or cruel manner does not rest upon the introductory factual recitation that Colina "carefully planned the murder of Cecilia and Angel Diaz."[1]

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[1] The record does support the fact that Colina carefully planned the murders. Colina knew the Diazes and had painted their house (R 1080). Castro and Colina were friends and would check out places Colina wanted to hit (R 1149). Colina had to leave town and needed money (R 1160). Colina did not want anyone to see him being dropped off at the Diaz trailer (R 1171). He did not want his ride to the trailer to wait (R 1171). He was going to tell Mr. Diaz that Dinato Jiminez had a flat tire and needed a jack (R 1174). He warned Castro not to let the Diazes see him (R 1175). Colina then chatted and ate with the Diazes (R 1179). Mr. Diaz gave Colina a jack (R 1181). Colina instructed Castro to talk to Mr. Diaz and keep him busy while he took care of the old lady. Castro was to take care of the old man (R 1184). Colina secured the jack handle (R 1190). Something hit the floor in the kitchen of the trailer (R 1190). After speaking to Castro, Mr. Diaz went to the door of the trailer and asked his wife for a shirt. There was no reply and someone, presumably Colina, just handed him a shirt (R 1188). As Mr. Diaz was speaking to Castro Colina jumped out the door and said to Castro "you going to do something about it now?" Castro then hit the man and knocked him out (R 1189). Colina hit him with a tire iron (R 1192). He carried it with him as he instructed Castro to help him carry Mr. Diaz to the back of the trailer (R 1196; 1199). Mrs. Diaz had already been brought there. From the waist down she was naked (R 1197). Colina gave Castro a knife to cut and tie them with clothes line (R 1199). Colina hit them again (R 1199). Colina instructed Castro to watch for cars (R 1203). Colina hosed down the crime scene then searched the trailer for $3,000.00 that he suspected was hidden (R 1204-1208). Colina indicated he continued hitting the Diazes because they knew him (R 1213). He left town in the Diazes' car and drove to Texas (R 1224-1226).

Contrary to appellant's assertion, the choice of a weapon has immense relevance. It is relevant to the norm of approximate or anticipated length of suffering. One would not expect the victim of a shotgun blast to linger as long as one who has been beaten to death, or the act of killing to take so long. Ab initio, one knows that the killings were not clean, so to speak, and involved protracted violence. The fact that blows were administered by a tire iron is also relevant to rule out the death having been caused by Castro, who used a tree limb on the other victim.

There was evidence that Cecilia survived the initial blow, was conscious, and would have had an apprehension of death. After she was carried to the back yard of the trailer Colina told Castro "he should have killed this bitch while he was in the kitchen "because the old lady gave him a hard time (R 1200). She had a bruise on the top of her left shoulder (R 952), which could have been inflicted by the tire iron, (R 974) which appellee would submit could have occurred as the result of dodging a blow.[2] It is highly probable that her right arm was injured and hemorrhaged since it was skeletonized while none of her other extremities were and animals are attracted to wound areas (R 1001). Although Dr. McConaghie testified at the earlier trial that there were no skeletal injuries to the arm, (R 952) Dr. Maples, a foremost expert in forensic anthropology in America, to

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[2] Dr. McConaghie testified the left shoulder and the left upper part of the chest showed a dark purple, slightly hardened area, with several incisions, revealing the blood-stained tissue underneath it, indicating that this was a bruise and not an area of decomposition (R 951-952).

whom Dr. McConaghie deferred to in dealing with bony injuries, (R 972-973) testified that one of the victim's forearms was broken (Cecilia's) and it was highly probable her right arm was injured and the skin broken, (R 993-1000) although he did not know whether there was a fracture before the bones were chewed by animals (R 993). That she defensively fielded a blow with her arm would be consistent with Colina's claim that she had given him a hard time.[3] Colina's statement also reflects knowledge that she was alive for some period of time. The loudness of the television (R 1190) would seem to indicate that she did not go quietly into the night. There is also the matter of her missing underwear (R 1197).

Cecilia was struck in the head at least five or six times with the tire iron (R 988). One blow probably crushed the area of the cranial vault where the spinal cord opens into the brain case and another blow caused the fracture lines to be split apart; there was a blow to her temporal bone; at least one blow struck the middle part of the face in the area of the eyes, nose and upper jaw; another blow probably broke the lower jaw (R 989). As a result of the blows her left temporal bone was crushed in and broken away (R 988). Both sides of her lower jaw were broken away (R 988). There was no damage to the top of the skull and Dr. Maples opined that it was quite likely the victims were on

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[3] Dr. Maples testified that "normally" they would put their hands up," although he did not know how effectively elderly people could have intercepted blows from a weapon that moves quite fast and is directed (R 992). He opined that the probability was greater that there was some injury to the arm. The most likely event was that the arm had some sort of hemorrhaging trauma.

the ground or laying down when the blows were struck (R 1004). Cecilia was the first victim to be assaulted. Since her husband was right outside the trailer it is probable that Colina just incapacitated her in the trailer and did his real handiwork out of earshot and sight in the clearing behind the trailer. This would be consistent with fact that the blows were struck while the victim was lying down. Blows to the facial area are not normally lethal (R 1006). Thus, it is apparent that at least two of the blows did not kill her and at least three or four more blows were needed to effect her death. That the beginning blows were not fatal is obvious because Colina acknowledged that he had not killed her in the kitchen. The injury on the right forearm would indicate that she had given Colina a hard time, as he stated to Castro. She was hardly dispatched in one fell swoop as Colina would have this court believe. Under such circumstances there is no way she could not have gleaned beforehand her ultimate fate.

Castro testified in 1987 that after they had carried Angel to the spot behind the trailer where Cecilia had already been placed he was instructed by Colina to get something to tie them up and handed a knife to cut some line off the clothes line (R 1196-1198). Castro cut some line. He then testified that "one of them started getting up" and he saw Colina swinging the thing again. Colina said he had to knock them out again[4] (R 1199).

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[4] The original trial testimony indicates that Castro couldn't be sure if it was Angel or Cecilia who was getting up because he had his back to them but he saw Colina swinging the tire iron. Colina said he had to knock "them" out again (R 1199). In his later deposition Castro said he told the truth when he took the stand (R 150).

Castro testified that when he came back with the rope the "old lady" started to wake up and was moaning.[5] Colina hit her on the back of the head with the tire iron and said, in the words of Castro, "he should have killed this bitch while he was in the kitchen, because the old lady gave him a hard time." (R 1200). As Castro walked to the front of the yard to watch for any cars he could hear Colina swinging the tire iron but didn't see what he was hitting (R 1203). Chief Homicide Investigator Lieutenant William Hord of the Putnam County Sheriff's Office assisted in the publication of the prior testimony of Felix Castro (R 1140). On cross-examination defense counsel elicited testimony that in his February 26, 1991 deposition Castro stated that Cecilia never said anything or mumbled and he never saw Colina hit her[6] (R 1270-1271).

Contrary to the appellant's assertion, Castro was not at all "certain" in 1991 that he had heard nothing from Cecilia and never saw her struck. In fact, Colina admitted that he had forgotten a lot of things in four years and was foggy on some of

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[5] The original trial testimony indicates that she was not getting up off the ground but was making noise, like moaning, going "oh." (R 1245).

[6] The February 26, 1991 deposition reflects Castro as saying he could not tell if she was alive as he never touched her. She never said anything or mumbled or anything else like that. She didn't move (R 100). As he was going toward the road he heard Colina hitting them a couple of times (R 98-99). On cross-examination he stated that he never saw or heard Cecilia get hit. He did recall Colina saying something like he should have killed the bitch (R 155-156). As he was leaving he heard him hitting them again (R 157). Castro was foggy on some of the details of what happened (R 158).

the details of what happened[7] (R 158). His deposition statement is not irreconcilable with his trial testimony as there is a difference between speaking, mumbling and just moaning. Castro did not retract but distinctly remembered his statement about killing the bitch and recalled in deposition Colina saying something like "he should have killed the bitch." (R 155-156). Even if he did not recall in deposition witnessing Colina hit her in the back of the head with a tire iron he did hear Colina hitting them a couple of times (R 98-99). Obviously Cecilia was alive at that point in time for Colina to have commented that he "should" have killed the bitch. Castro even stated in his deposition that he didn't see any blood on her at that point in time (R 90). Thus, the judge was correct in concluding that at that point in time Colina continued his torturous bashing, until her skull was in pieces, to assure her death, irrespective of whether she was heard to moan by Castro. A hose was not "required" to clean the blood from the trailer and it is the height of speculation to conclude that the severe blood loss took place in the trailer and not in the clearing. The purpose for the hosing was to eliminate footprints and even the ground where the victims had lain was washed down (R 1205). The trailer was not the only targeted hosing area. Castro never stated that there was a lot of blood in the kitchen, only that it spread as the water hit it. He did not even observe the blood prior to the

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[7] It is also possible Castro was time specific in his deposition statement and was referring to his not having witnessed the assault upon Cecilia prior to when she was removed from the trailer as he answered "the only one I heard him hit was the old man, see, because the lady was already back there." (R 155).

hosing (R 91). Considering the fact Colina told Castro in the clearing that he had to "knock them out again" (R 1244) it is extremely likely that, at the least, moaning or some other more forceful indicia of a reawakening was occurring for Colina to again beat them.

The relevance of the fact that a tire iron was chosen as a weapon has been discussed above at length and will not be reargued as to the murder of Angel.

Castro's testimony that Angel was attacked with a tire iron by Colina, while attempting to rise, after being struck by Castro is borne out by the evidence. Castro admitted hitting Angel in the back of the head (R 1189). When the old man started getting up again Colina hit him with the tire iron (R 1192). In deposition Castro stated that he knew Angel was alive because he heard him grumbling, trying to get up (R 90). Castro grabbed Angel's legs and Colina grabbed his hands to carry him to the back. Castro dropped him and that is when Angel started waking up (R 90). He slipped because he was kicking or struggling as he was being carried back. He opened his eyes (R 94). Castro heard someone beating on Angel. Then they picked him up again and carried him to the back (R 94). At this point in time, according to Castro's trial testimony, one of them started getting up and Colina said he had to knock them out again (R 1199). Colina kept hitting them. He hit them two or three times in front of Castro (R 1203). The blows split Angel's head open (R 1202). Colina started tying Angel's hands (R 1202). As Castro left to watch for cars he could hear Colina swinging the tire iron again (R

1203). Even Dr. McConaghie observed that "more than one blow by more than one object could have been leveled upon the male victim (R 977). Dr. Maples noted that there was a large fracture curving across the back of the skull (R 983). A tree limb would not have caused beveling in the center of the back of the cranial vault. A tire iron would have caused enough penetration to produce a beveled surface (R 986). He also opined that the hemispherical fracture around the head was unlikely to have been caused by a tree limb (R 990). Castro's blow to the back of Angel's head with a tree limb could not have caused the other fractures to the temporal bone, lower jaw and above the right ear (R 983-984). Colina told jail trustee Terry Ivey that he had committed the murders (R 1302) and runabout Russell McClintock that he had "killed two motherfuckers and one more didn't matter" (R 1110). Castro never claimed that Angel "instantly" recovered, in fact, he testified that the old man was knocked out (R 1189).[8] Dr. McConaghie testified only that the major fracture to the back of the head "could" have been caused by a fatal blow (R 972). A forensic anthropologist such as Dr. Maples has an advantage over a pathologist because at the time of the autopsy the view of bony injuries is obscured and the anthropologist devotes time to removing overlying material and reconstructs the bone slowly and methodically (R 979). Dr. Maples, to whom Dr. McConaghie deferred, felt that a tree limb would not have caused bevelling in the back of the cranial vault and that there were multiple

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[8] Castro said in his deposition he stayed with the old man for a while as he lay there unconscious and then they pulled him off to the side so no one could see them (R 80).

blows. Castro testified that Angel started getting up. Obviously, one must be conscious to do that and capable of feeling and comprehending.

Unfortunately, Angel Diaz cannot testify as to the pain he endured. No medical expert could say with certainty. Pain is a relative thing. Humans can only imagine each other's suffering. From Castro's testimony we know that Angel came around several times only to be further struck by Colina. From that testimony and further medical opinion it is clear Angel was not simply beaten but bludgeoned to death. One cannot imagine a more appalling or agonizing death, especially for an elderly man.[9]

The fact that the murder of Angel occurred relatively contemporaneous with the murder of Cecilia is a fact that should be considered in determining if this aggravating factor applies. There must be enormous mental anguish when the realization grips the victim that his earthly, frail body has been committed into the hands of a bludgeoner. One spouse need not watch the other die for the anguish to be magnified. It would be far worse to have to wonder, if only momentarily, if your spouse was undergoing the same punishment while you are virtually helpless to do anything about it. After twenty years of marriage to a professor who was kind and gentle (R 1451; 1454) it would be hard to imagine that Angel did not have thoughts of "Sissy" as he struggled to get up or that Cecilia did not wonder about her husband as she tried to defend herself in the trailer. The

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[9] Castro did not want to see Angel's face. It was bloody. When Colina lastly hit him with the tire iron he split his head open (R 1202).

record supports a finding, however, that the Diazes were actually treated to the spectacle of each other's demise. Cecilia was not killed in the kitchen (R 1200). After they were brought to the clearing, Colina had to knock them out again (R 1199). As Castro walked away he could still hear Colina swinging the tire iron (R 1203). The judge acknowledged in her order that the tying of the wrists and feet occurred after death and the mere mention that they bled to death and were found partially nude as part of the factual scenario does not serve to taint the proper finding of the HAC factor.

There is no record support for appellant's assertion that the assaults were unexpected and the Diazes lost consciousness and died quickly without a struggle, and Castro's testimony directly contradicts this scenario. As previously discussed, the Diazes had to be knocked out several times before being bludgeoned to death. Thus, multiple blows did not occur after death. Medical odds are that Cecilia's right forehand was injured in the fracas. The Diazes were certainly the subjects of prolonged pain, torture and mental anguish.

In his botched attempt to relieve this elderly couple of $3,000.00, Colina exhibited an extreme and outrageous depravity that set the murders apart from the norm of capital felonies, and displayed an utter indifference to their suffering. *See, Santos v. State,* 591 So.2d 160 (Fla. 1991). Their lives were not even valued at $1,500.00 apiece. Colina was willing to bludgeon them on the off chance that the truth of mere gossip he had heard would be substantiated by the finding of $3,000.00. It was a

gamble. Thus, he valued their lives at nothing at all. No suffering was too great for them to endure to secure Colina a shot at some cold cash. This aggravating factor has been deemed to apply to bludgeoning murders and murders where the victim has been savagely beaten. *See, Heiney v. State,* 447 So.2d 210 (Fla. 1984) (victim bludgeoned with a claw hammer); *Penn v. State,* 574 So.2d 1079 (Fla. 1991) (victim beaten with a hammer); *Zeigler v. State,* 580 So.2d 127 (Fla. 1991) (victim beaten savagely on the head with a blunt instrument); *Bruno v. State,* 574 So.2d 76 (Fla. 1991) (victim savagely beaten on the head and shoulders with a crow bar more than ten times); *Marshall v. State,* 17 F.L.W. 459, 461 (Fla. July 16, 1992) (victim was attacked twice and at least partially conscious during the second attack and was struck six times on the back of the head; *Owen v. State,* 396 So.2d 985, 990 (Fla. 1992) (sleeping victim was struck on the head and face with five hammer blows and she awoke screaming and struggling after the first blow). This case certainly fits in that category. There is clear evidence the injuries were sustained while both victims were alive. *See, Gilliam v. State,* 582 So.2d 610 (Fla. 1991). The suspected wound to Cecilia's right forearm supports the fact that she mounted a defense, as Colina, himself, acknowledged, and further supports the finding of this factor.

Under the facts of both these cases, there is no reasonable possibility the trial court would have concluded that the remaining valid aggravating factors were outweighed by the mitigating evidence. *See, State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla. 1986). Thus, the trial court would have imposed the same

sentence as to both murders even without the findings that the murders were especially heinous, atrocious or cruel and any possible erroneous finding of this factor was harmless beyond a reasonable doubt. *See, Gore v. State,* 17 F.L.W. 247, 250 (Fla. April 16, 1992).

IV. THE COURT DID NOT ERR IN ALLOWING THE PROSECUTION TO SUBMIT VICTIM IMPACT EVIDENCE.

Prior to resentencing the defense filed a motion in limine to preclude the state from introducing evidence of nonstatutory aggravating circumstances, specifically victim impact evidence relating to the victim's friends or family (R 202). The motion hearing minutes of January 27, 1992, indicate that this December 3, 1991 motion in limine was *granted* (R 373). No testimony was elicited before the jury (R 1450). After the jury was removed the state was allowed only to "submit" victim impact evidence to the court alone (R 1450). Section 921.143(1)(a), Florida Statutes (1992), requires the sentencing court to permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim if the victim has died from causes related to the crime, to appear before the sentencing court for the purpose of making a statement under oath for the record or submitting a written statement. This does not mean that such statement must be considered in imposing sentence. In this case it was *not*. After the victims appeared Judge Graziano addressed them as follows:

> You need to also understand that I am bound by the laws of the State as to what I consider when the matter comes up for purposes of sentencing. And even though you have a right to be heard, and the next of kin should be heard, it is not one of those matters that I can consider and deal with in what I -- when I impose a proper sentence.

(R 1459).

In accordance with her statement, the findings of fact in support of the death penalty do not reveal any consideration at all of the victim's statements or the presence of nonstatutory aggravating factors. Such undertaking has always been viewed as harmless by this court. *See, Grossman v. State,* 525 So.2d 833 (Fla. 1988); *LeCroy v. State,* 533 So.2d 750 (Fla. 1988).

Post-*Payne v. Tennessee,* 111 S.Ct. 2597 (1991), this court has recognized the constitutionality of presenting evidence regarding the impact of the victim's death on the victim's family. *Hodges v. State,* 595 So.2d 929, 933 (Fla. 1992). That such evidence could be characterized as nonstatutorily aggravating is not constitutionally fatal. Although the use of aggravating circumstances was initially justified as a way to guide the sentencer's discretion, it appears that the United States Supreme Court now views them solely as a means to establish death *eligibility*.[10] In the past, sentencers have considered both statutorily defined and nonstatutory aggravating circumstances. *See, Proffit v. Florida,* 428 U.S. 242, 256-57 n.14 (1976) (plurality opinion) (upholding sentence based on combination of statutory and nonstatutory circumstances); *Zant v. Stephens,* 462 U.S. 862, 878 (1983); *Lindsey v. Smith,* 820 F.2d 1137, 1153 (11th Cir. 1987) (the Eleventh Circuit permitted consideration of the defendant's being on parole when the alleged murder was committed as an aggravating

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[10] In *Blystone v. Pennsylvania,* 494 U.S. 299 (1990), the Court held that a state could preclude a sentencer from evaluating the *weight* of a particular aggravating circumstance and noted that "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Id.* at 306-07.

factor). The only constitutional impediment occurs when the death penalty is imposed without the finding of at least one statutorily defined aggravating circumstance. *Stephens,* 462 U.S. at 876-79 n.14; *See, Barclay v. Florida,* 463 U.S. 939, 957 (1983) (plurality opinion) (reading *Proffit v. Florida,* 428 U.S. 242 (1976), as questioning the propriety of a sentence based entirely on nonstatutory aggravating circumstances). There would seem to be no bar to a jury and judge considering victim impact evidence aside from or in conjunction with statutorily enumerated aggravating factors.

V. THE COURT DID NOT ERR IN REFUSING TO FIND THE NONSTATUTORY MITIGATING FACTOR OF DISPARATE TREATMENT OF EQUALLY CULPABLE CODEFENDANTS.

As to both the murders, the sentencing court found that disparate treatment of equally culpable co-defendants was not an applicable nonstatutory mitigating circumstance:

> The only nonstatutory mitigating factor presented by the Defendant was the disparate treatment between himself and his Co-Defendant, FELIX CASTRO. FELIX CASTRO plead guilty to both these murders and was sentenced to two consecutive life sentences without possibility of parole for fifty (50) years. The Defendant argued that he should not receive any greater sentence. Had the evidence established the same degree of culpability, then this factor would be heavily weighed. However, all the evidence disputes any equal or greater culpability by the codefendant. The Defendant, MANUAL COLINA, chose the victims, planned the murders and carried them out. The Co-Defendant, while assisting and participating, had a much lesser participation and involvement.

(R 651-52; 656).

Appellant quarrels with Judge Graziano's findings, arguing that it was Castro who received information from Dinato Jiminez that the Diazes had $3,000.00 in their home; solicited transportation to the Diaz home from three different people; was the heavy and Colina the nervous, quiet one who approached Juan Colon on the day of the murders; ended up with the Diaz car, Mr. Diaz's wallet and jewelry; and returned to the Diaz home with a date to steal a TV set then drank and used crack without the slightest trace of concern. Appellant concludes that he will die and Castro will live only because he didn't get to the state first.

This court has held that disparate treatment of an equally culpable codefendant is a valid nonstatutory mitigating circumstance. *Campbell v. State,* 571 So.2d 415 (Fla. 1990); *see, also, Fuente v. State,* 549 So.2d 652 (Fla. 1989); *McCampbell v. State,* 421 So.2d 1072 (Fla. 1982). In the past, disparate treatment has not been found to exist where the facts are not the same or the defendant was the dominating factor. *Jackson v. State,* 366 So.2d 752 (Fla. 1978); *Rogers v. State,* 511 So.2d 526 (Fla. 1987). That is clearly the case here.

Castro merely told Rhonda Birney *after* he was arrested that the Diazes might have had $3,000.00 in their possession. He indicated only that the source of the information was Dinato Jiminez (R 1370). That does not mean that Castro exclusively possessed such information as Jiminez was also a friend of Colina (R 1369). In fact, Castro met Colina through Jiminez and testified Colina was always with Jiminez (R 1146). He further testified that after Colina had killed the couple and was searching the house he told Castro that the Diazes had hid $3,000.00 in there (R 1208).

Castro only solicited transportation to the Diaz home because Colina told him that they owed him money (R 1159) and Castro used to help him out all the time (R 1159). Colina had trouble being understood in English (R 1353).

Not knowing what Colina, who had to leave town and needed money, was contemplating, and seeing Colina nervously stand behind Castro, who was doing all the talking, biting his nails, it could well appear to Juan Colon that Colina was the quiet type

while Castro was a tough guy (R 1346). Such observation hardly serves to establish culpability.[11]

Castro "ended up with" the Diaz car because Colina did not know how to drive a car (R 1211) which is probably the reason he enlisted Castro in a search for rides. Castro picked up the wallet because it fell out of Angel's pants as he was being carried (R 1195). Colina took the chain from Cecilia's neck (R 1260). The only jewelry Castro got was the jewelry he had, the chain and Angel's watch (R 1260). Colina disposed of the jewelry (R 1216). After the bludgeonings it hardly mattered.

Castro returned to the Diaz home because he had not had the foresight of Colina to wear a pair of socks on his hands and had picked up the television (R 1217-1218). He took Linda McCaskill because he was afraid to go back there alone (R 1218-1219). Castro cried over the deaths of Angel and Cecilia (R 1377). He tried to get money to come back home (R 1378).

The trial court properly determined that Colina chose the victims, planned the murders, and carried them out, and that Castro had much less involvement.

Even in the event this court should find a nonstatutory mitigating factor was wrongfully rejected, death is still the appropriate penalty in view of the aggravating circumstances. *Cf. Pace v. State,* 596 So.2d 1034 (Fla. 1992).

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[11] From a defense proffer it is now known that Dinato Jiminez warned Castro's girlfriend to take her boys somewhere because Colina had just bashed in someone's head and was coming to kill her (R 1375).

CONCLUSION

Based on the arguments and authorites presented herein, Appellee respectfully prays this honorable court affirm the sentence of the trial court in all respects.

Respectfully submitted,

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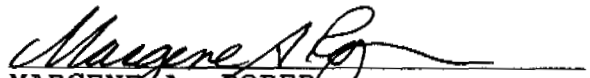

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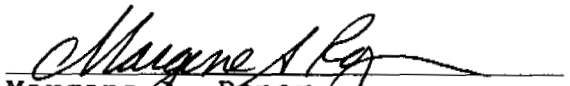
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Kevin R. Monahan, 613 St. Johns Avenue, Palatka, Florida 32177, this 28th day of September, 1992.



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