IN THE SUPREME COURT OF FLORIDA

MANUEL COLINA,

Appellant,

vs. Case #: 79-479

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SUMMARY OF ARGUMENTS

POINT I: The introduction of the testimony of Felix Castro given at the former trial of the defendant after the court found him to be unavailable denied the Appellant his constitutional right of confrontation. Although, it is not argued that ¶90.804 which allows the use of such testimony is a valid exception to the hearsay rule, its application can, under certain circumstances, be of such a nature and quality as to defeat the more fundamental right of confrontation. In this case the witness, Felix Castro, had so often given conflicting, implausible and self-serving accounts of the events at issue in the trial as to make his former testimony inately unreliable, and therefore demanded the right of confrontation.

POINT II: The unavailability of Felix Castro, who had never before asserted a Fifth Amendment privilege, was the result of the prosecution's efforts to obtain counsel for him immediately before the rehearing with the expectation that such counsel would inform Castro of his right to refuse to testify and advise him to exercise same. These steps taken by the State were a deliberate strategy to enable the State to utilize Castro's former testimony rather than put him on the stand subject to cross examination and violated ¶90.804's requirement of good faith.

POINT III: The court's finding with respect to each count

that the murders were especially heinous atrocious and cruel was inappropriate to this aggravating factor or was unsupported by the record, which furnished no evidence of conscious suffering or anxiety on the part of the victims. It also failed to show any evidence of pleasure or deliberate infliction of pain by the defendant. The use of a tire iron and the events which occurred after death produced graphic results but the record is lacking in any evidence of suffering by the Diazes.

POINT IV: The prosecution summoned to the witness stand the two children of the victims for the purpose of presenting victim impact evidence. Their testimony did not relate to any statutory aggravating factors. Although the Constitutional ban on such evidence has been lifted, the Florida sentencing scheme has not been amended to allow such evidence.

POINT V: The evidence showed that the prime movant and beneficiary of these murders was the co-defendant Felix Castro who, because of a deal with the state, received a life sentence while Colina has been sentenced to death. Florida law recognizes a non-statutory mitigating factor for disparate treatment of equally culpable co-defendants which should have been found.

IN THE SUPREME COURT OF FLORIDA

MANUEL A. COLINA,	)	
	)	
Appellant,	)	
	)	
VS.	)	Case # 79,479
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Defendant was charged via a two count Indictment with the First Degree Murder of Cecilia and Angel Diaz. The cause proceeded to trial on June 22, 1987. The Defendant was found guilty on both counts as charged. The jury entered a unanimous recommendation of death.

The Defendant was sentenced to death on August 18, 1987. Appeal was taken to this Court. On November 15, 1990, this Court affirmed the findings of guilt but struck the death penalty and remanded to the Circuit Court of Putnam County for rehearing on the penalty phase. Colina v. State, 570 So.2d 929 (Fla. 1990).

The case proceeded to Pre Trial on February 28, 1991. (R12) The court denied the State's motion for appointment of an expert in the field of psychology (R 166) and further denied the State's Motion to Continue (R 169-170). The case was set for rehearing on March 25, 1991, but was continued when insufficient jurors

were assembled. (R 179). The case was a again set for hearing on July 15, 1991 (R 182). The State moved to continue and said motion was granted by the court with rehearing scheduled for December 9, 1991(R 181-182).

The State requested that judicial notice be taken of the death of the medical examiner in the case Dr. Robert McGonaghie. (R 194). The State also filed a motion to declare the co-defendant Felix Castro unavailable to testify based on a motion for post conviction relief filed by Felix Castro (R 214). The prosecution also moved that Castro be appointed an attorney (R 214).

Rehearing began on December 9, 1991 before Judge Uriel Blount. Jury selection proceeded and a jury was impaneled on December 10th. The State called their first witness, the co-defendant Felix Castro (R 257).

Castro was represented at the hearing by John Sproul who was appointed that day to represent him (R 258) at the request of the prosecuting attorney (R 214). The witness refused to testify on fifth amendment grounds and on the advice of his attorney. (R 257-263). The State moved to declare the witness unavailable and the defense moved for a mistrial (R 265).

The court granted the defense motion and declared a mistrial (R 268).

The State filed a motion to reconsider the earlier ruling on non-availability (R 272). The matter was heard by Judge Blount who deferred ruling to Judge Graziano (R 312).

The rehearing was reconvened on January 27, 1992, this time before Judge Gayle Graziano. Hearing was held on the Defendant's motion in limine on the admission of collateral crimes and was granted (R 832). A motion in limine regarding the admission of certain photos (R 191) was heard and ruling reserved (R 839). Motions in limine with regard to similar fact evidence and the meaning of certain tattos (R 199) became moot when the State announced that neither matter would be raised.

Trial began. Castro again refused to testify and was declared unavailable by the court, allowing his testimony from the last trial to be read into the record. (R 1028). His testimony from the original trial was read into the record by Detective Chris Hord, the arresting officer (R 1140-1234). Castro was found in contempt of Court on January 29, 1992.

On January 29, 1992 the jury returned a recommendation that the court impose the death penalty by a vote of 7 to 5. (R 565). On February 7, 1992, Judge Graziano denied a motion for rehearing (R 618) and imposed a death sentence on each count (R 649). This appeal followed.

STATEMENT OF FACTS

In the early evening hours of December 18, 1986, Manuel Colina and Felix Castro went to the home of Angel and Cecilia Diaz in a rural part of Putnam County. The result of their visit was the death of Mr. and Mrs. Diaz by blunt trauma inflicted by repeated blows to the head.

In early January of 1987, officers responded to the Diaz home and began a search of the area under the direction of Roger Sassaman of the Putnam County Sheriff's Office. Two bodies were found and the matter was turned over to the homicide division for investigation (R 857-862).

The crime scene was examined, photographed and otherwise processed by members of the Sheriff's Office and members of the Florida Department of Law Enforcement. (R 864-912).

A post mortem examination by Dr. McGonaghie revealed that the couple had been dead over a week and up to three to four weeks and showed substantial signs of decay (R 950). The head of Mrs. Diaz was absent (R 951) as a result of insect and animal activity (R 958). A bruise was found on the left shoulder and left upper chest inflicted at or just before the time of death (R 952). No skeletal injuries were found (R 953). The body had been tied at the hands and feet after death had occurred (R 953). No lividity was found and no blood was present (R 954). A rapid loss of blood from above the neck had occurred (R 955). There was no evidence of forcible blows to the body (R 956).

The examination of Mr. Diaz disclosed that the head and neck were absent (R 959) as a result of insect and animal activity (R 958). The body was tied at the wrists and ankles and such tying occurred after death (R959-960). There was no lividity (R 960). Death was the result of trauma to the head caused by two or more blows (R 962). There were no signs of injuries below the neck (R 965). One major fracture to the back of the skull could have been the fatal blow (R 971-972).

Dr. William Ross Maples, a forensic anthropologist, testified that he could identify the weapon that struck one of the blows to Mrs. Diaz (R 987). He identified a metal rod introduced by the State as the weapon (R 988). He testified that five or six blows appeared to have been struck to the head of Mrs. Diaz (R 988) and probably multiple blows were delivered to the head of Mr. Diaz (R 989).

Felix Castro refused to testify on Fifth Amendment grounds (R 1015). His counsel indicated he had so advised his client (R 1021). His testimony was read into the record from the previous trial held in 1987.

Castro testified that he was a friend of Manuel Colina and that he had known him about three months (R 1145). On December 18, 1986 the two had met in the morning (R 1153). Colina indicated that some people he worked for owed him money and he wanted to go there and then leave town (R 1159). The two went to the home of Albert Spells and asked for a ride to the West River Road area. Spells agreed to give them a ride

but first he had to do some work laying sod at a Taco Bell restaurant under construction. After that work was finished, he drove Colina and Castro to a dirt road near the Diaz home (R 1164-1162).

The two men walked a short distance to the Diaz home where Colina instructed Castro to stay out of sight. Colina went to the door and contacted Mr. Diaz and asked him for a jack to change a tire on a car that was nearby. Mr. Diaz called for a jack and came outside where he observed Castro standing nearby. Colina went inside the trailer while Castro stayed outside with Mr. Diaz. A short time later Colina jumped out of the trailer and told Castro to "do something." Castro then struck Mr. Diaz with a wooden club he was holding. Colina then struck him again with a metal crowbar or tire iron. (R 1173-1189).

The two then carried the body of Mr. Diaz to a clearing in the woods behind the trailer where Mrs. Diaz's body was already laying. Castro testified that she was already dead but later indicated that he may have heard a moan. Mr. Diaz's pants slipped off while Castro was carrying his legs. Colina told Castro to get something to tie them up with. Several lengths of clothesline were cut and the Defendant began using it to bind the bodies. Castro testified that Colina struck several more blows to the heads of the victims as they lay there (R 1189-1203).

The two men then cleaned the blood out of the trailer and

searched for valuables, taking a small amount of cash, some alcohol, jewelry and other items from Mr. Diaz's wallet. They then took the Diaz car and returned to Palatka where they bought some beer (R 1204-1211).

Colina asked Castro if he had touched anything and Castro indicated he had touched the TV so Colina told him to go get it. Colina wouldn't go with him but he told Castro to find a girl (R 1218). Castro and a girl named Linda returned to the Diaz house and Castro took the TV and sold it on the street for cocaine (R 1219).

The following day, Castro and Colina met again. They left the Putnam County area and drove to Houston, Texas in the Diaz car. They stopped at a mission in Mobile, Alabama where they also obtained some additional clothing. After they arrived in Houston, the car was sold and the two men went their separate ways (R 1224-1232). Castro was arrested January 13, 1987 (R 1233).

Colina did not testify but the State introduced his prior accounts of the murders. Colina initially denied his identity but later acknowledged that he was Manuel Colina and that he had gone to the Diaz house on the night of the murders. He related that he stood away from the house not knowing what Castro's intentions were. He fled when he saw Castro attack Mr. Diaz from behind. Castro then picked him up in the Diaz car and the two returned to the Diaz house where Colina and Castro searched for valuables (R 1065-1069).

Russell McClintock testified that he and Colina had a fight in the jail and Colina indicated that he had already killed two people and one more didn't make any difference (R 1110).

Another inmate, Terry Ivey, testified that Colina indicated he had done it, Colina, he said, gave few details but indicated he was by himself (R1308-1313).

Over defense objection, Jackie Vickers was allowed to testify that he heard the statement made to McClintock (R 1324).

The defense called Jordan Vann, Jr. to the stand who indicated that he recalled when Colina was working for the Diazes on Shaggy Lane. On one occasion Castro and Colina borrowed some items for use in the work (R 1286-1287).

Juan Colon testified that the two had come to his shop on the day of the murders seeking a ride to the area of the Diaz home. He indicated that Colina was very nervous and that Castro made repeated requests for a ride which was denied. he had known both men for some time. Castro he said was a tough bullying type while Colina was quiet (R 1344-1346).

Raymond and Albert Spells testified that it was Castro who solicited the ride to West River Road and gave directions to the residence (R 1348-1356)

Linda McCaskill testified that she met Castro the night of the murders. She never met Colina. The two went drinking together for several hours with Castro buying the drinks. They rode out to the Diaz home in the Diaz car. Castro went inside and returned with the TV set. He indicated it was his

and he was going to sell it. The set was sold and the two went to Vic's (a local bar) and drank some more and smoked cocaine. Castro never seemed nervous during this time (R 1360-1365).

Castro's girlfriend and the mother of his child testified that they had met the Diazes when she was pregnant (R 1369). She also related that Castro referred to them as Mama and Papa (R 1377). It was indicated that the information that the Diazes had $3,000 in their trailer (R 1208) came from Donato Jiminez (R 1370).

POINT I

THE APPELLANT'S RIGHT UNDER THE SIXTH AMENDMENT AND THE FLORIDA CONSTITUTION TO CONFRONT THE PRINCIPLE STATE WITNESS AGAINST HIM WAS VIOLATED BY ALLOWING THE STATE TO INTRODUCE HIS TESTIMONY FROM THE ORIGINAL TRIAL PROCEEDING

The Appellant first stood trial on the charges for which he now stands convicted and under a sentence of death in July 1987. The principle witness against him at that time was the co-defendant Felix Castro. Castro had entered into an agreement with the State that, in return for his testimony against Manuel Colina, the State would not seek the death penalty and would not recommend consecutive sentences as to the twenty-five year minimum mandatory sentence (R 535).

Castro testified at the trial and was cross-examined by Castro's attorney, Mr. William Butler. He was also subjected to redirect and recross (R 1196-1320). When called to testify in the resentencing hearing by the State, Mr. Castro refused to testify on Fifth Amendment grounds. He was, accordingly, found to be unavailable for trial by Judge Graziano and the State was allowed to introduce his testimony from the first trial over defense objection (R 1028-1029).

The court relied upon ¶90.804, Forida Statutes which provides in relevant part:

90.804 Hearsay exceptions; declarant unavailable.

(1) "Unavailability as a witness" means that the declarant:

(a) Is exempted by a ruling of the court on the ground

of privilege from testifying concerning the subject matter of his statement;

(b) Persists in refusing to testify concerning the subject matter of his statement despite and order of the court to do so;

...

(2) HEARSAY EXCEPTIONS.- The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(a) Former testimony.- Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

The Sixth Amendment to the United States Constitution provides in part that:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defense." U.S.C.A. Const.Amend 6.

The Sixth Amendment has been made applicable to the States by the Fourteenth Amendment's guarantee of due process of law, Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965).

In addition, the Florida Constitution, ARTICLE I, SECTION 16. Rights of accused and victims.- provides:

> (a) In all criminal prosecutions the accused shall upon demand, be informed of the nature and cause of the accusation against him, and shall be FURNISHED a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. (emphasis added)

In Engle v. State, 438 So.2d 803 (Fla. 1983) this court said:

> The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge.

438 So.2d at 813.

The confrontation clause has, accordingly been applied to the sentencing process, Spect v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Tompkins v. State, 502 So.2d 415 (Fla. 1986).

The objects and purposes of cross-examination are numerous. Although the primary objective is to secure the right of cross-examination, Mattox v. United State, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), other ends are served by this right as well. Confrontation compels the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief," Barber v. Page, 390 U.S. 719, 721; 88 S.Ct. 1318, 1320 (1968) (Citing Mattox v. United States, supra)

It has also been recognized that the exposure of a witness' motivation in testifying is a proper and important function of confrontation, Delaware v. Van Arsdale, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). Victims may recant their former testimony, Gregory v. State, 573 So.2d 73 (Fla. 4th DCA 1984). A witness may testify quite differently and less convincingly when he has to look at and face the man he is accusing, Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

In Pointer v. State of Texas, holding that the right of confrontation is fundamental, the Supreme Court stated:

> [N]o one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case...The decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases...There are few subjects, perhaps, upon which this Court and other courts have been more unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

380 U.S. at 404-404, 85 S.Ct. at 1068.

The reasoning for admission relied on by the State to satisfy confrontation is that if a witness is unavailable his testimony from a prior trial "is admissible if it bears adequate 'indicia of reliability.' Reliability may be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Ohio v. Roberts, 448 U.S. 56 at 66, 100 S.Ct. 2531 at 2539. It is an established rule that prior testimony becomes admissible upon retrial without violating

confrontation requirements, where a witness becomes unavailable, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). The opportunity for effective cross-examination at the prior trial furnishes the "indicia of reliability" and satisfies the confrontation requirement.

The Appellant does not challenge the constitutionality of the hearsay exception contained in ¶90.804(b), Florida Statutes nor does he question its validity. It is recognized that the Sixth Amendment right to confrontation is riddled with exceptions, Ohio v. Roberts, supra. These exceptions are commonly set out in the evidence codes of the various jurisdictions in those provisions dealing with hearsay. But although the hearsay rule and confrontation clause serve the the same values they are not coextensive, California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

In United States v. Menichino, 497 F.2d 935 (5th Cir. 1974) the court noted that:

> [E]ven statements properly admitted under 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...[A] case by case analysis is necessary to determine whether under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extrajudicial declaration.

407 F.2d at 943. (citing United States v. Adams, 446 F.2d 681 (9th Cir. 1971).

The Supreme Court has noted that a valid and long accepted evidentiary rule may still violate the principle of confrontation

where its application "calls into question the integrity of the fact finding process." Chambers v. Mississippi, 410 U.S. 284, at 295, 93 S.Ct. 1038 at 1046, 35 L.Ed.2d 297 (1973). The State has arguably met and complied with ¶90.804, however, that compliance alone does not assure that confrontation has been satisfied. The Chambers Court recognized that many legal rules function well within a relevant range, but that extreme circumstances can rob an otherwise legitimate rule of its validity. Such is the case at bar.

Felix Castro had provided seven accounts of the events of December 18, 1986 prior to the commencement of the trial. He changed his involvement in virtually every interview. He first denied any knowledge of the murder and denied even being from Florida (R 1238). Then he claimed that he was there and saw Colina hit Mr. Diaz but then became frightened and ran away (R 1243, 1245). In later accounts he acknowledged that he helped to move the bodies (R 1247, 1251). Finally, he grudgingly admitted to hitting Mr. Diaz but he didn't want to (R 1190).).

It is known that Albert Spells, a man known well by Castro (R 1240), drove the two to the area of the Diaz home and Castro testified accordingly at trial (R 1164-1172). But four times prior to trial Castro concealed the identity of Spells claiming that they hitchhiked with an unknown black male (R 1240, 1241) or that Colina got a black man to drive them (R 1242). Spells and his brother Raymond both acknowledged that it was Castro

who solicited the ride to the Diaz home (R 1348, 1353).

It is also known that after the killings the Diaz car was stolen by Castro, which Castro admitted at trial (R 1211). However, on three previous occasions he claimed Colina had stolen the car (R 1244, 1246, 1248). It is known that later that night Felix Castro and Linda McCaskill went back to the Diaz home where Felix Castro stole the Diaz TV (R 1219). Until that discovery, however, Castro, had twice accused Colina of stealing the TV (R 1244, 1246). The Diaz home was searched. Castro claimed at one time that he never left the living room (R1258) and on another occasion he said he searched throughout the entire home and described it (R 1256).

In his testimony he admits he took Mr. Diaz's wallet (R 1258) but he previously claimed that Colina took it (R 1259). At trial he said the TV was too loud for him to hear what was going on at the Diaz home, but at deposition he said the TV, which he later stole, didn't work (R 1265).

At the first trial Castro claimed not to have known the Diazes. This was pivotal to the original court's finding that the killings were done to eliminate witnesses and was based on Castro's testimony that in response to his question why they were killed Colina answered they knew me and didn't know you (R 1213). In fact, Castro very likely worked with Colina at the Diaz house (R 1287). Castro also called the Diazes Mama and Papa, a name they were purportedly known by (R 1377).

In February 1991, Castro changed this version and

claimed that Colina killed them to protect him since Colina was planning to leave the area (R 1267). At the same deposition Castro claimed he had no knowledge that the Diazes had even died until he was informed of such in Texas (R 1267).

Pivotal to the court's finding that the killing of Mrs. Diaz was heinous, atrocious or cruel was the testimony of Castro that he heard Mrs. Diaz moaning and saw her struck in the clearing where the bodies were found (R 1200). Yet in his last account given in February 1991, Castro stated he never heard Mrs. Diaz moan and never saw her struck at all (R 1270).

The court did allow the defense to use Lieutenant Hord, the chief investigator in the case to acknowledge these recorded inconsistencies in the testimony and prior statements of Felix Castro. This afforded the defendant some manner of impeachment but the manner of the cross, as any reading of the record will show, was necessarily cumbersome and lacked the basic clash and confrontation envisioned by the Sixth Amendment. Lloyd Paul Stryker once described the cross examination of a lying witness in the manner of a terrier throwing fear into a rat. In this case it was more like reading a blueprint. Castro is a liar. But no jury would tolerate treating Lt. Hord in the contemptuous fashion that Castro deserved to be treated. There are times in the course of the cross where Lt. Hord is evasive, partisan or works with the prosecutor in a fashion which Castro could not. (See R 1252-1256).

A purpose of cross-examination is to allow the jury to

observe the witness as he spins his tale and assess his demeanor. But this jury was treated instead to the calm deliberative presentation of a veteran witness and senior law enforcement officer whose presentation and reputation added to the legitimacy of this former testimony.

While certainly impeachment is an important function of cross examination, the opportunity to test the plausibility of a witness is also a crucial element of cross-examination. Castro blamed Colina for everything. Colina planned it all but never told Castro anything. Colina delivered all but one minor blow which Castro probably acknowledged more because it was a requirement of his plea bargain than because it was true. Even when Castro went back for the TV it was Colina's idea. Even the idea that he take a girl with him is Colina's. At one time Castro gave an account which was impossible, He related that he saw Mrs. Diaz hand her husband a shirt, moments later Colina came up from behind Mr. Diaz and hit him. When the two dragged the body to the clearing over a hundred feet behind the home, Mrs. Diaz's body was already there. (R 1249-1251). Confronted with this impossibility, Lt. Hord remarked "That is what he said." (R 1251).

In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) it was recognized that a proper and important function of cross-examination is to expose a witness' motive in testifying. At Colina's trial in 1987 Castro testified that his deal called for him to spend the rest of his life in

prison (R 1145). But in his motion for post conviction relief he relates that he understood he would receive concurrent sentences and that he would be eligible for gain time (R 237). This was consistent with the statements of both the prosecutor and Mr. Castro's defense counsel who expressed a similar belief at his sentencing (R 238-239). Castro stated at his deposition in February 1991 that he believed that with concurrent sentences and gain time he would serve only seven years (R 133-134). Castro is by no means a sophisticated person and could easily have been induced to believe that a recommendation would carry more weight than it ultimately did. Seven years also closely approximates what he would actually have served if the gain time in effect at the time was being applied to the minimum mandatories as the court and his attorney believed (R 238-239).

The deal Castro testified about in 1987 and the deal he really believed he would be receiving were substantially different. The difference is in fact of such a magnitude that it would have played a critical role in weighing the credibility of his testimony at either trial. To get seven years on these charges Castro would have sold his mother to the Gypsies.

The confrontation clause can in most cases be satisfied by the proper application of ¶90.804, Florida Statutes as in the case of Dr. McGonaghie whose testimony from the first trial was received without objection or claim of error due to his unavailability. But if Dr. McGonaghie had repeatedly given differing accounts of his findings to such a degree that it

could not be predicted what he would say if called to testify a different result might be appropriate. A sentence of death should stand on a pillar of great strength. Castro, who according to the prosecutor is a man to whom an oath has no meaning at all (R 1277), is no such pillar.

The use of Castro's testimony from the first trial denied the Appellant of a vital right and need of confrontation to such a degree that the application of ¶90.804 denied him his rights under the Fifth, Sixth and Fourteenth Amendments and warrants reversal of the sentences of death.

POINT II

THE COURT ERRED IN FINDING THAT FELIX CASTRO WAS UNAVAILABLE TO TESTIFY

This court noted in its earlier opinion, that the relative roles of Felix Castro and Manuel Colina were a "major issue during the penalty phase," Colina v. State, 570 So.2d 929 at 931 (Fla. 1990).

Each of the two men placed virtually the full burden for the slayings on the other. The physical evidence and independent witnesses establish that Mr. & Mrs. Diaz died as a result of multiple trauma to the head. A wooden club and a tire iron were used. The Diazes were found bound at the feet and hands. However, in both instances the tying occurred after they had already died (R 964-965).

Neither Castro nor Colina are particularly effective as witnesses for whichever side chooses to call them. Colina's testimony was unanimously rejected at the last trial, and as previously noted in the earlier argument, Castro's testimony was subject to attack for a string of inconsistencies and inaccuracies and was highly self serving.

The State was spared the necessity of calling Felix Castro when the court declared he was unavailable to testify. But was his unavailability merely fortuitous or did the State engage in a trial strategy designed to make Castro unavailable?

The Supreme Court stated in Ohio v. Roberts, supra:

> The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes

> of the ... exception to the confrontation clause unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.

448 U.S. at 74, 100 S.Ct. at 2531 (citing Barber v. Page, supra.)

Numerous cases have dealt with the requirements of a good-faith effort to obtain the presence or testimony of a witness. In Barber, it was held that it was not sufficient to show that a witness was in a federal prison in another state. In Hitchcock v. State, 578 So.2d 685 (FLa. 1990), this Court held that a diligent search which failed to locate a witness did satisfy the requirement. In Pope v. State, 441 So.2d 1073 (Fla. 1983), the Court dealt with Rule 3.190(j)(6) dealing with perpetuated testimony and stated that the rule requires more than a perfunctory attempt to contact a witness. There is no clear cut answer as to how far a proponent of such testimony must go but due diligence must be shown. Geographical distances, inconvenience, reluctance of a witness to testify, health concerns do not show the state was unable to to procure attendance, McClain v. State, 411 So.2d 316 (Fla. 3rd DCA 1982).

On the one hand, case law makes it clear that the State had an affirmative duty to act with due diligence and good faith to make Felix Castro available to testify. Without such efforts a finding of nonavailability is inappropriate.

¶90.804(1), Florida Statutes provides:

> However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of the party who is the proponent

of his statement in preventing the witness from attending or testifying. [emphasis added]

If Felix Castro's unavailability was due to the "instigations or actions of the proponent of the hearsay statement, section 90.804 specifically provides that the declarant is not 'unavailable.'" Ehrhardt, Florida Evidence, Vol. 1, 1992 Edition ¶804.1 at 660.

Felix Castro was sentenced in 1987 after a negotiated plea of guilty. He appeared and testified fully at a deposition in February 1991, shortly before the first scheduled trial date (R 54-163). Castro was unrepresented at that time and, although his testimony was up to his usual standards, there was no assertion of the privilage.

In November 1991, Castro filed a motion for Post-Conviction Relief asserting that his Public Defender, Mr. Howard Pearl had poorly advised him due to his status as a deputy sheriff with the Marion County Sheriff's Office. This was one of a spate of Rule 3.850 motions filed after this fact was discovered.

On December 9, 1991, the rehearing on the sentence began. The next day, the State, without consultation with Castro, moved to declare him unavailable to testify. In paragraph 3 of the State's motion the "State requests and moves for the appointment of counsel on behalf of Felix Castro to advise Felix Castro in legal matters concerning his testimony and his 3.850 Motion for Relief."(R 214) On December 10th, after the jury was empaneled, Felix Castro was called to testify. He appeared with

John Sproul, Esquire who stated:

> My name is John Sproul, I'm an attorney practicing law here in Palatka, Florida.
>
> As this Court is aware, I have by order signed today, been appointed to represent Mr. Castro in a proceeding which is being brought under the Rules of Criminal Procedure to review his sentence received.
>
> I have briefly had an occasion to look at the Petition he has filed. It seems to have two grounds of possible relief or two grounds under which relief may be granted.
>
> In view of the fact that the ultimate sentence that Mr. Castro may receive from this or from this Court may hinge on any number of things that he has indicated to me that he wants to invoke his privilege of not testifying under the Fifth Amendment of the Constitution.

(R 258).

Later in that session Castro was questioned:

> PROSECUTOR: Okay, sir. I can assure he is competent counsel. The Judge who appointed him thinks that he can adequately represent you. Have you discussed your motion to set aside your plea and --
>
> A. He tells me not to say anything.
>
> Q. So you're not going to say anything.
>
> A. Nothing.

(R 263).

The Judge declared a mistrial.

The State promptly filed a motion to reconsider on January 8, 1992 which was heard but not decided on January 10, 1992.

Trial reconvened on January 27, 1992. On January 28th Felix Castro was again called to testify.

PROSECUTOR: State your full name please?

A. My name is Felix Castro.

Q. Do you recognize the defendant Manuel Colina, in this case?

A. Yes.

Q. How is it that you recognize him?

A. I know him?

Q. When did you know him Mr. Castro?

A. A long time ago.

Q. Do you remember a couple, an old couple whose names were Cecilia and Angel Diaz?

A. Excuse me, I didn't come here to testify against nobody. So you ask me any questions I told youe before I wouldn't testify. I will plead under the Fifth Amendment.

(R 1014-1015)

Thereafter Castro declined to answer any further questions despite the court's order that he answer those questions involving his reason for not testifying and also any questions that have nothing to do with his involvement in a particular offense (R 1016). Mr. Sproul argued to the court that Mr. Castro's refusal to testify was proper, that he had not had time to fully review and investigate the motion and that in his opinion it was in Castro's best interest not to testify (R 1021).

The advice given to Castro by his recently appointed Attorney was as would be expected of an Attorney whose obligation it is to act wholly in his client's best interest. Castro had nothing to gain by testifying, and might possibly gain something if a deal could be made for his testimony as was done before. Mr. Sproul could not know if his motion would succeed or if Castro would incriminate himself by his testimony in such a fashion as would injure him in a later trial. Castro had the

right to plead the Fifth, United States v. Wilcox, 450 F.2d 1131 (5th Cir. 1971), and out of an abundance of caution any lawyer would likely urge him to do so.

This came as no surprise to the prosecuting attorney who noted on December 11th: "I anticipated that this was probably what would happen, once an attorney was appointed to advise him about further testimony before the court had an opportunity to react or act on his -- the motion for post judgment relief" (R 264-265). The State's motion for contempt was also meaningless as the prosecutor observed: "Judge, I guess contempt is kind of a waste of time" (R 263).

It is inconceivable that if the State actually needed and desired this testimony that they would move, on their own, for the appointment of an attorney likely to muzzle their chief witness. The State got what they wanted from Castro four years earlier and wanted to take no further chances. It was not the function of the prosecuting attorney in the case of State v. Colina to see to the appointment of an attorney in State v. Castro on a 3.850 motion which had been ruled on in several other cases without any involvement by Mr. Whitson.

Castro had given eight previous accounts of the episodes of December 18, 1986 and had never once exercised his Fifth Amendment right.

The cases on unavailability have dealt primarily with the physical presence of the witness, but there are alternatives as well to the exercise of a privilage. Castro's motion would

not be pending forever and this hearing could have awaited the resolution of that matter. Castro could have been granted use immunity as requested by the defense (R 1017), See United States v. Wilcox, supra.

This trial was to be essentially a confrontation between Colina and Castro to be weighed and judged by a jury. Four years ago limitations placed on Colina's testimony precluded that from occurring, Colina v. State, supra. This time it was Castro's testimony that was denied the jury. Preparation for this trial consisted largely of preparing to cross-examine Castro. To have subjected Colina to a savage cross by the prosecutor without a similar opportunity for the defense created an imbalance which necessarily affected the decision of the defense not to call the defendant.

In Ohio v. Roberts, supra, the Supreme Court closely examined the nature and effectiveness of the cross-examination which occurred at a preliminary hearing in deciding the matter. It is accepted that the confrontation clause guarantees only the opportunity for effective cross-examination, not effective cross-examination itself. However, the anemic cross-esamination conducted by Mr. Butler on the Appellant's behalf is certainly relevant in considering the prosecution's actions (R 450-487).

Although Castro contradicted himself virtually everytime he spoke as detailed more particularly in the preceding argument Mr. Butler's impeachment for prior inconsistent statements is fully set forth below:

DEFENSE COUNSEL: When Chris Hord arrested you, or when they whoever it was that arrested you, took you into custody did you give Chris Hord a statement?

A. Yes, I did.

Q. Was it the truth?

A. No sir, it was a lie?

Q. It was a lie?

A. I just wanted -- Ijust wasnted to --

Q. Well let me ask you about that. When he asked you what had happened you lied to him; is that correct?

A. Yes, I just wanted to make sure I was safe?

Q. Okay, Now sometime on the way back to Palatka did you tell --did you and Officer Hord and another officer drive from there back to Palatka, or did you fly back?

A. No, we flew back.

Q. You flew back, okay. When you got back to Palatka did you tell Officer Hord another story?

A. Yes, I did.

Q. Okay, were parts of it a lie also?

A. Yes, it was part lie.

Q. Okay, after that did you tell Officer Hord another story?

A. No, I didn't tell him -- yes, I talked to a sheriff, yes, I did.

Q. Which sheriff?

A. Sheriff of this town. I mean, a captain.

Q. Is he a bald headed fellow?

A. Yes, Captain Miller.

Q. Captain Miller?

A. Right.

Q. Did you tell him another story?

A. Yes, I did?

Q. So basically, you've told the police officers from Putnam County Sheriff's Department at least three stories that are differentt ffom the one you've told here today haven't you?

OBJECTION

Q. Were there any lies in that statement to Captain Miller?

A. Yeah, there were lies.

Q. Yeah, okay, so basically you've lied to officers of the Putnam County Sheriff's Office on at least three different occasions about your story haven't you?

A. Yes, I did.

Q. Any other lies that you've told?

A. No, sir.

Q. No, Just those.

(R 480-483)

The unavailability of Felix Castro was a blessing for the State and denied Manuel Colina of the opportunity for a face to face confrontation with the only witness to his actions at the time of the murder. If, however, Castro's unavailability was the product of deliberate strategic steps taken by the prosecution the requirement of ¶90.804(1) are not met and the admission of Castro's former testimony violated the Appellant's Fifth, Sixth and Fourteenth Ameendment rights and require that the sentence of death be reversed.

POINT III

THE COURT ERRED IN FINDING THAT THE MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL

The Judge found two aggravating circumstance with respect to Count I. That the murder of Cecilia Diaz was committed for pecuniary gain and that it was especially heinous, atrocious and cruel (R 650).

The Judge found three aggravating circumstance with respect to Count II. That the defendant was previously convicted of another capital felony to wit: the murder of Cecilia Diaz in Count I, that the capital felony was committed while the defendant was engaged in a robbery, and that the capital felony was especially heinous, atrocious or cruel.

This court has noted that murder is, by its very nature, heinous, atrocious and cruel. But the aggravating circumstance embraced by the statute requires additional acts which set it apart from the norm of capital felonies, State v. Dixon, 283 So.2d 1 (FLa. 1975); Blanco v. State, 452 So.2d 520 (Fla. 1984).

This factor is present only in torturous murders exemplified either by a desire to inflict a high degree of pain or by utter indifference to or enjoyment of the suffering of another, and does not apply where loss of consciousness occurs followed shortly by death, Richardson v. State, 17 FLW S241 (Fla. 1992).

This court has found this factor present where the victim pleaded for mercy, Davis v. State, 17 FLW S462 (Fla. 1992);

or where the victim was conscious throughout a series of torturous attacks, Thompson v. State, 17 FLW S342 (Fla. 1992). Neither of those factors are present here.

The court heard the testimony of a medical examiner and a forensic anthropologist. Neither were able to say how quickly the Diazes lost consciousness. There were no skeletal injuries to Mrs. Diaz to indicate defensive wounds (R 953). There was massive hemorrhage to both victims with a rapid loss of blood from the head or above the neck (R 955, 960). Mr. Diaz's skull was fractured at the rear, where the first blow is alleged to have been struck (R 971-972). Although their were multiple blows delivered these may have been delivered after death (R 965).

Dr. Maples testified as to the location and force of blows but preceded his testimony by noting that he is not qualified to comment on such matters as time of death and pain or suffering (R938). Castro testified that Mr. Diaz began to move and was quickly struck again by the Appellant, but never testified to his ever regaining consciousness.

With respect to count I, the court based its finding that the murder was heinous atrocious or cruel on the following facts:

1. That the defendant carefully planned the murder.

2. That he chose a tire iron as his weapon.

3. That medical evidence showed that death was caused by repeated blows to the facial area and head of the victim.

4. That evidence shows there was an apprehension of death

as she was struck in the home and dragged to the clearing and beaten again.

5. Medical testimony indicates she could have survived some of the blows.

6. That Castro's testimony indicates she moaned and struggled, and was beaten further by the defendant.

These findings will not support this aggravating factor. The fact that a murder is carefully planned may support a finding of the aggravating factor of cold, calculated and premeditated manner, but it is not a relevant factor for this aggravator. Even if it was, such a finding is wholly unsupported by the record. No weapons were brought with the defendants, Castro repeatedly testified that Colina wanted to tie them up and leave before he delivered the blows Castro claims he delivered.

The choice of a weapon, in this case a tire iron, is not relevant unless the choice of the weapon leads to unnecessary pain, anguish or suffering. A blow to the head from a heavy tire iron could cause immediate loss of consciousness and quick death with no suffering as is required for this aggravator.

Repeated blows were struck to the head of Mrs. Diaz, but there is no evidence that she survived the initial blow or remained conscious throughout. Although Dr. Maples testified that she could have survived certain blows he also noted that any of the blows could have been fatal.

In his 1987 testimony Castro claimed to have heard Mrs. Diaz moan in the clearing where her body was found, but was

certain in 1991 that he heard nothing from her and never saw her struck (R 1270-1271). Castro's testimony describes a blood loss in the trailer so severe as to require a hose to clean it out (R 1206). If so it is hardly likely that anyone would moan after such blows. Nor does a moan establish a regaining of consciousness.

The findings relied on by Judge Graziano are either inapplicable to this aggravating factor or are unsupported by the record.

With respect to Count II, the Court found that the death of Angel Diaz was heinous, atrocious or cruel based on the following findings:

1. That the defendant attacked Mr. Diaz with a tire iron after he attempted to rise after being struck by Castro.

2. That the testimony of Dr. Maples established that the tire iron was used.

3. That there is record evidence that Manuel Colina inflicted great pain on Angel Diaz.

4. That the murder occurred relatively contemporaneously with the murder of Cecilia Diaz.

5. That one or the other moaned at points in time.

6. That they were killed in the presence of each other.

7. That they were nude or semi-nude when recovered, and tied about the hands and feet.

8. The medical evidence was that they bled to death.

Once again, the court's findings are either inappropriate

for this aggravating factor or are unsupported by the record.

It is alleged that Mr. Diaz began to rise after being struck by Castro. Aside from the wholly self-serving nature of this testimony, it does not show that Mr. Diaz regained that presence of thought to feel or comprehend what was happening, nor is it likely that the blow to the back of his head, which Castro claims he delivered and which Dr. McGonaghie indicated fractured the skull, would have enabled Mr. Diaz to recover almost instantly as Castro claims.

The use of a tire iron is not relevant if the weapon causes a quick loss of consciousness or death.

There is absolutely no record evidence of pain suffered by Angel Diaz.

There is no basis for finding this factor based on contemporaneous deaths unless each is forced to watch the other die which has never been alleged to have occurred in this case.

It was alleged and later retracted by Castro that Mrs. Diaz moaned, but never that Mr. Diaz did.

There is no evidence that they were killed in each others presence and in fact the opposite is true. Mr. Diaz was outside the home and Mrs. Diaz was inside.

The nude or semi-nude condition of the bodies and the tying of the hands and feet occurred after death or loss of consciousness (R 964-965). Matters occurring after death or loss of consciousness are not proper considerations with respect to this factor, Jackson v. State, 451 So.2d 458 (Fla. 1984);

Halliwell v. State, 323 So.2d 557 (Fla.1975). This Court specifically found it impermissible to consider that a defendant left the body "in a rural area, disrobed, with weather elements and animals to further act upon the body." Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983).

An aggravating factor must be proven beyond a reasonable doubt. The factual findings used by the judge rise to nothing more than conjecture. Past decisions of this Court have refused to find this aggravating circumstance absent some finding that there was unnecessary or prolonged pain or torture to the victim, Squires v. State, 450 So.2d 208 (Fla. 1984); or where the victim suffers mental anguish prior to their death, Stano v. State, 450 So.2d 890 (Fla. 1984). In the present case the evidence, though not conclusive, indicates that the Diazes died or lost consciousness quickly and without a struggle. The assaults appear to have been unexpected and afforded little time for the type of contemplation envisioned by the statute. Neither defendant ever tried to talk to or torment the victims or expressed or displayed any sort of pleasure at the fate of the Diazes.

The death of Angel and Cecilia Diaz produced a visually graphic result, but the evidence shows no indication of suffering. The sentencing judge relied on inappropriate and unsupported findings to support the aggravating factor of especially heinous, atrocious or cruel.

POINT IV

THE COURT ERRED IN ALLOWING THE PROSECUTION TO SUBMIT VICTIM IMPACT EVIDENCE

After the completion of the presentation of evidence to the jury and closing arguments by counsel, the jury was instructed on the law and sent into deliberations. During the deliberations the Court allowed the State to call Elias Diaz and Julia Diaz, the children of the victims. This evidence was submitted for the specific purpose of demonstrating the impact of the offense on the witnesses and others, as well as to demonstrate the personal characters of the deceased (R 1450-1458).

For many years this issue was governed by the United States' Supreme Court's decisions of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1986) and South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct.2207, 104 L.Ed.2d 876 (1988) which held that evidence and argument relating to the impact of the victim's death on the family and evidence relating to the victim's personal characteristics are per se inadmissible at a capital sentencing hearing.

In April 1991 The Supreme Court overruled Booth and Gathers in the case of Payne v. Tennessee, 111 S.Ct. 2597 (1991). Accordingly, there is no longer a Constitutional limitation on such evidence as was offered by the prosecution to the court. However, Florida law still prohibits the introduction of evidence

of non-statutory aggravating circumstances, Miller v. State, 373 So.2d 882 (Fla. 1979); Drake v. State, 441 So.2d 1079 (Fla. 1983). The Payne decision would seem to allow the Florida Legislature to enact additional aggravating factors relating to victim impact and victim character, however, until the Legislature acts, this type of evidence remains inadmissible, unless it goes to a statutory aggravating factor, which in this case it did not.

The judge heard this testimony out of the the hearing of the jury, however, I am unaware of a rule of law which permits the judge to consider in arriving at her sentence matters which it is impermissible for a jury to hear, except as it relates to ruling on the admissibility of the evidence. This testimony was not proffered to the court, it was delivered as direct testimony, and was both highly emotional and prejudicial.

POINT V

THE COURT ERRED IN FAILING TO FIND THE NON-STATUTORY MITIGATING FACTOR OF DISPARATE TREATMENT OF EQUALLY CULPABLE CODEFENDANTS

The court correctly noted that the defense of Manuel Colina consisted almost entirely with examining the relative roles of the two participants. Although it is not a statutory mitigating factor, this court has frequently held that the disparate treatment of equally culpable co-defendants is a valid non-statutory mitigator and the court so instructed the jury. Fuente v. State, 549 So.2d 652 (Fla. 1989); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Harmon v. State, 527 So.2d 182 (Fla. 1988).

The State made a deal with Felix Castro which spared him the death penalty. The State pursued the death penalty against Colina with success and vigor. Judge Graziano stated that she would have weighed heavily this factor if the evidence had shown the same degree of culpability (R 651-652). But she found that 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 652).

This finding is, of course, based entirely and without any corroboration on the unconfronted prior testimony of Felix Castro. This testimony was entirely self-serving and contrary to the evidence. It was Castro who received information from Dinato Jimenez that the Diazes had $3,000 in their home (R 1370).

It was Castro who solicited transportation to the Diaz home from three different people (R 1344, 1348, 1353). It was Castro who was the heavy and Colina the nervous, quiet one who approached Juan Colon on the day of the murders (R 1345-1346). When it was over, it was Castro who ended up with the Diaz car, and Mr. Diaz's wallet and jewelry (R 1259). It was Castro whose cold indifference was such that he could return several hours later to the Diaz home with a date to steal a TV set and then go back to drinking and using crack without the slightest trace of concern (R 1363-1365).

Mr. Butler stated at the first sentencing of Manuel Colina in August 1987 that if it had been Colina who had been returned from Texas and appointed counsel first, then he had no doubt that he would be standing there that day next to Felix Castro and not Manuel Colina.

That, members of this Court, is why Colina will die and Castro will live.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the sentences of death on each of the two counts be set aside and the matter be remanded for a new hearing or alternatively with instructions for the court to enter a sentence on each count to life imprisonment with the mandatory minimum sentence of twenty five years.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Office of the Attorney General for the State of Florida, 225 N. Ridgewood Ave., Daytona Beach, FL 32014 by U.S. Mail this 15th day August 1992

Attorney for Appellant