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JAN 15 1992

THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

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CASE NO. 77-668

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT ON SENTENCING HEARING

**CRIMINAL APPEAL FROM THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA**

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ISSUES PRESENTED FOR REVIEW

I

Whether the murder of Julio Rivas was especially heinous, atrocious, or cruel.

II

Whether the murder of Julio Rivas was cold and premeditated, without any pretense of moral or legal justification.

III

Whether the mitigating circumstances presented were legally sufficient to override the aggravating circumstances presented, and warrant the death penalty.

STATEMENT OF FACTS

The Appellant, *Guillermo Octavio Arbelaez*, was convicted of the crimes charged in the Indictment on *February 19, 1991*. [T. 217-218]. On *March 4, 1991*, the Court held the sentencing hearing and the jury, by a vote of eleven to one, recommended the Appellant be sentenced to death for the murder of *Julio Rivas*.

On *March 14, 1991*, the Court imposed the death sentence. [T. 243-255]. The Court declared, in reaching its decision, that it had considered at length all of the evidence in the case. The Court stated that it had independently reviewed and weighed the evidence presented before the jury and to the Court. It found three (3) aggravating circumstances: (1) The capital felony was a homicide that was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification [R. 246]; (2) the capital felony was specially wicked, evil, atrocious or cruel. The killing of *Julio Rivas* was done without conscience or pity; and (3) The capital felony was committed in the course of a kidnapping. [R.251].

The Court found the mitigating circumstance of Appellant having no significant prior criminal history. [R. 251]. The second mitigating circumstance the Court found was the fact that Appellant

voluntarily returned to the United States to face the consequences of his actions. [R.252].

These facts supplement Appellant's Initial Brief and together form the basis for this Appeal.

ARGUMENT

I

The evidence presented at trial failed to show beyond a reasonable doubt that the crime was especially heinous, atrocious, or cruel. The evidence clearly showed that the Defendant called the child's mother from a public telephone in Key Biscayne. When the mother refused to answer the Defendant's call, Appellant, in a moment of rage, drove to the bridge, and threw the child to the ocean. Appellant did not torture the child either mentally or physically.

Appellant was the victim of severe mental torturing, by a cold and calculating woman who raped him of his scarce savings, and his honor. See Cook v. State, 542 So.2d 964 (Fla. 1989); Cherr v. State, 544 So.2d 184 (Fla. 1989); Rivera v. State, 545 So.2d 864 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Rivera v. State, 545 So.2d 864 (Fla. 1989); Antone v. State, 382 So.2d 1205 (Fla. 1980); and Mendendez v. State, 368 So.2d 1278 (Fla. 1979).

II

That the murder was cold, calculated and premeditated, without any pretense of moral or legal justification is simply not the case. This was clearly a crime of passion. A crime committed by an extremely emotionally disturbed man who saw the woman he loved and trusted, betray him before his very own eyes. He could not believe her reaction to his emotional and devastating pain. Giving this scenario, one could hardly suggest that the crime was cold and calculating, and without any pretense of moral justification. Mitchell v. State, 527 So.2d 179 (Fla. 1988); Peede v. State, 474 So.2d 808 (Fla. 1985); Thompson v. State, 456 So.2d 444 (Fla. 1984); and Floyd v. State, 497 So.2d 1211 (Fla. 1986). The man was clearly grieving and desperate. See also Mitchell v. State, 527 So.2d 179 (Fla. 1988); Hill v. State, 515 So.2d 176 (Fla. 1987); and Farinas v. State, 569 So.2d 425 (Fla. 1990).

III

The mitigating circumstances established in this case and the fact that the Defendant's actions were the result of extreme mental or emotional disturbance clearly warrant an override of the death penalty imposed. Brown v. State, 526 So.2d 903 (Fla. 1988). The emotional rage of the Defendant may be considered even if is not supported by the psychological evaluation. Johnson v. State, 442 So.2d 185 (Fla. 1983); See also Adams v. State 412 So.2d 850 (Fla. 1982); and Fead v. State, 512 So.2d 176 (Fla. 1987).

Appellant presented sufficient evidence to show that he was acting in a rage, revolting to the substantial emotional domination that Ms. Alfaro had exerted over him. He did not appreciate the criminality of his conduct. This is clearly evident in the confession to Agent Munoz and Detective Martinez. In each of these occasions, the Defendant seemed to think that he had acted out of passion, and that such passionate reaction made his actions justifiable. The Court must not sentence a man to death simply because his cultural background and upbringing conflicts with the values of this Court and our society in general. See generally Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); and Brown v. State, 526 So.2d 903 (Fla. 1988).

Finally, the Defendant's confession and voluntary return to the United States to face criminal charges such a significant mitigating factor that it, alone, should compel an override of the death penalty imposed in this case. Had the State of Florida sought to extradite the Defendant, no death penalty could have been imposed. To execute this Defendant after he voluntarily returned and confessed to his crime, would be violative of our rules of fair play and benevolence.

CONCLUSION

For the reasons stated herein this cause should be reversed and remanded for a new sentencing hearing and the Appellant be sentenced to life.

Respectfully submitted,

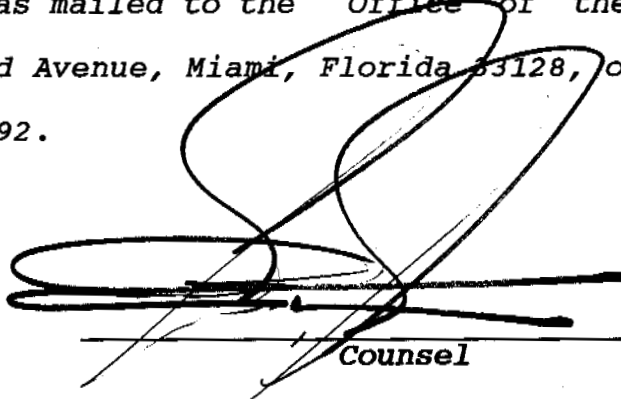
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BY _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General at 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 15th day of January, 1992.



A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom. The signature is written over a horizontal line.

Counsel