THE SUPREME COURT OF FLORIDA

CASE NO. 77,668

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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INTRODUCTION

The symbol "R. ___" in this brief refers to the Record on Appeal which contains the transcripts of the suppresion hearing below. The trial transcripts are included in the "Supplemental" Record on Appeal which is referred to herein as "SR. ___". The Appellee has also filed a Motion to Supplement Record on Appeal with: 1) a stipulated deposition utilized at the suppression hearing, and 2) the transcript of the sentencing hearing. These attachments to the State's motion to Supplement are referred to as "SR2. ___."

STATEMENT OF THE CASE AND FACTS

The Appellant's Statement of the Facts contains material omissions and is thus rejected by the Appellee, who submits the following account of the proceedings below:

A. Suppression Hearing

The Appellant filed a motion to suppress all of his oral and written statements to government agents on the grounds that these were obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. (R. 101-106) On February 6, 1991, the trial court held a hearing on the suppression motion. (R. 294-395) The defendant did not testify.

Detective G. Cadavid's deposition, admitted pursuant to a stipulation (R. 364-66), reflects that this witness was assigned to the homicide division of the City of Miami Police Department in 1988. (SR2. p. 3) He was born in Medellin, Colombia, the same area that the defendant is from. (SR2. p. 4) Cadavid speaks the dialect typical of Medellin, Colombia. (SR2. p. 5) On March 16, 1988, during the investigation of the homicide of five-year-old Julio Rivas Alfara, in Miami, Florida, Detective Martinez asked Cadavid to make a telephone call to Medellin, Colombia to contact the defendant's family, because his accent would help. (SR2. pp. 3-4, 10) The detectives, at this time did not know and had no idea that the defendant was in Colombia. (SR2. p. 9)

Cadavid called and the defendant's mother identified herself. (SR2. p. 6) Cadavid identified himself as a homicide detective with the City of Miami Police Department and asked the defendant's mother if her son was home and if he could speak to him. Id. The defendant then took the phone and identified himself. (SR2. p. 7)

Cadavid again identified himself as "Detective Cadavid the City of Miami Police Department in Miami in the United States," and stated, "nicely that I needed to talk to him about a problem here, that happened here in Miami." Id. The defendant immediately responded that, "Yes, I know. I'm in trouble," and stated that he wanted to come back to Miami. Id. The defendant then added that he could not come back to the United States because of a lack of proper documentation and money. (SR2. p. 8) Cadavid responded that he could help with the documentation through the American Embassy and also provide him with plane fare to the United States. Id. Cadavid also told the defendant that he would have to go before a judge, and that he would have to stand trial. (SR2. p. 12) The defendant did not ask, and Cadavid did not mention, the penalty for homicide. (SR2. p. 13) The defendant then gave Cadavid another telephone number where he could be contacted after Cadavid made arrangements with the American Embassy. (SR2. p. 12) The telephone conversation was brief, having lasted for "five minutes or less" in its entirety. (SR2. p. 8) Cadavid did not advise the defendant of any Miranda rights.

Cadavid then called the American Embassy in Bogota, Colombia, and spoke to Rubin Munoz. (SR2. pp. 15, 19) Cadavid told the latter that he had a murder in Miami, that the offender was now in Medellin, Colombia, and that the offender was willing to return to the United States, but that he needed a visa to do so. (SR2. pp. 10-11) Cadavid did not speak in terms of extradition, which was not at issue as the defendant had volunteered to come back to the United States. (SR2. 11)

On the same day, Cadavid called the defendant back. (SR2. p. 14) The defendant was not home, but his brother answered. Id. Cadavid again

identified himself as a detective from Miami. Id. The defendant's brother stated that the defendant was planning to return to the United States as soon as possible and asked if the police would pay for the defendant's plane ticket because the family had no money. (SR2. p. 15) Cadavid stated that the police department would pay for the ticket. (SR2. 14) He then gave the defendant's brother the telephone number and name of Rubin Munoz, at the American Embassy in Bogota, as a contact person who would help make travel and visa arrangements for the defendant. (SR2. 14, 19) The defendant's brother, in this conversation, also mentioned that the defendant suffered from chronic epileptic seizures and had been through psychiatric treatment when he was 18 to 20 years old, in Colombia. Id. The defendant's brother stated that he could provide the medical paper work and Cadavid asked him to send it. (SR2. 15) Cadavid never received any paper work. Thereafter, Cadavid had no contact with the defendant, whom he has never even met. (SR2. 15, 18)

Munoz testified that in March, 1988, he was a "legal attache" assigned to the United States embassy in Bogota, Colombia. (R. 299) Legal attaches are diplomats assigned by the F.B.I. to United States' embassies overseas, as State Department officials. Id. They are liaison officers with the host country law enforcement and security agencies. Id. One of their functions is also to assist any law enforcement agency in the United States, local, state or federal, in law enforcement investigatory matters overseas. (R. 301) However, legal attaches do not have any jurisdiction to perform any law enforcement function, such as arresting, etc., in the host countries. (R. 312)

Munoz stated that in March, 1988, he received a message from the Miami Police Department that they wanted assistance in obtaining a visa for a

defendant who had volunteered to return to the United States. (R. 300, 308) Munoz was not in any way part of the homicide investigation proceeding in the City of Miami Police Department. (R. 303) He was not even aware of the charges at the time. Id.

Thereafter, on March 24, 1988, Munoz received a telephone call from the defendant. (R. 300) Munoz took the call because of the previous message from the Miami police department. Id. The defendant stated that he was calling from his home in Medellin, Colombia. (R. 300, 301) The defendant added that he had spoken to detectives from the Miami Police Department, "and that he had some problems in the States, that he was wanted for a murder, and he wanted to return to, in effect, face the music. He had left Miami initially for fear of what would happen to him and once he returned to his home in Medellin, his family apparently talked him into going back and facing prosecution." (R. 303)

The defendant also stated that he had caused the death of his girlfriend's son. (R. 305) He explained that he had been living with the mother of the victim. Id. They had planned to get married and he had been giving her his paychecks. (R. 305) There had been an argument and the defendant had seen the mother in a vehicle with another man, kissing. Id. The defendant had confronted her and she had told him that she did not want anything more to do with him. Id. The defendant then stated that he threw her son off a bridge at the causeway and let the boy drown. Id. The defendant prefaced his explanation of the killing by stating to Munoz that: "as a Latin you would understand the best way to get to a woman is through her children." Id.

Munoz told the defendant that the latter would need a Colombian passport prior to procuring a visa to return to the United States. (R. 301) The defendant was advised that Munoz could not assist him in obtaining a Colombian passport. The defendant was told he would have to obtain the passport on his own by obtaining a national identification card or the equivalent of a military card from the Colombian government. (R. 302)

During the course of this telephone conversation, Munoz did not read the defendant any Miranda rights. (R. 307) The defendant did seem concerned about the judicial system in the United States and indicated that he could not afford an attorney. (R. 310) He wanted to know the procedure under the circumstances. Id. Munoz told the defendant that, "an attorney would be appointed for him, . . . that he had the same rights and privileges as any other United States citizen before a court of law in the United States." Id.

Munoz had a total of three (3) telephone conversations with the defendant. (R. 305) After the first telephone call detailed above, which was initiated by the defendant, Munoz telephoned the defendant twice, at the latter's home in Medellin. (R. 306, 314) The latter two conversations were with the defendant and his mother regarding the defendant's progress in obtaining his Colombian passport. Id. Ultimately, Munoz did not assist or obtain a visa for the defendant. Id. The defendant returned to the United States without ever visiting the United States embassy in Bogota; apparently he went to the embassy in Barranquilla, Colombia, instead. (R. 307) All of Munoz's contacts with the defendant were through telephone conversations, between the cities of Bogota and Medellin; Munoz never even met the defendant. (R. 314)

Detective E. Martinez testified that he was the lead investigator in this homicide. Four days after the murder of the victim, on February 18, 1988, Martinez obtained a warrant for the defendant's arrest. (R. 350) However, the defendant could not be arrested as the police could not find him.

Martinez had listened to the March 16, 1988 conversation between the defendant and Detective Cadavid on an extension telephone. (R. 318) Thereafter, on March 24, 1988, prior to the defendant's conversation with Munoz, Martinez called the defendant at the alternate number given by the latter to Detective Cadavid. Martinez told the defendant that F.B.I. Agent Munoz at the American Embassy in Colombia would assist in obtaining a visa for him. Martinez identified himself as a police officer from the City of Miami Police Department investigating the death of Julio Rivas. (R. 322) Martinez, at all times, informed the defendant that there was a warrant for his arrest for this homicide and that he would be arrested upon arrival in the United States. (R. 364) Martinez also gave his telephone number at the City of Miami Police Department to the defendant. (R. 322)

Thereafter, several telephone conversations ensued between the defendant and Martinez. The defendant initiated some of this contact by calling Martinez at the police department in Miami. Id. In one of these telephone conversations, the defendant told Martinez that he was represented by an immigration attorney in Miami who was in possession of his identification card, which was needed for obtaining his Colombian passport. (R. 357) He asked Martinez to contact this attorney and obtain the identification card for him. Id. Martinez did contact the immigration attorney, but the latter was not in possession of the card. During the course of the conversation with the immigration attorney, the latter informed

Martinez that the defendant had stated he was being represented by an attorney named Martinez. (R. 355) Detective Martinez immediately called the defendant to inform the latter once again that he was a police officer and to clarify any confusion on the part of the defendant. (R. 354-5) However, the defendant admitted that he had always known Martinez's identity and status, and that he was not confused. Id.

The remainder of Martinez's telephone contacts with the defendant involved periodical checks on the latter's progress in obtaining the proper documentation for entry to the United States. During one of these telephone conversations, the defendant requested "confidentiality," but only in terms of "media coverage." (R. 353) The defendant also stated that he liked working and inquired as to the availability of jobs in prison. (R. 354) Martinez responded that work was per se available in prison, but never indicated or promised that the defendant would have a job in prison. Id. Martinez did not advise the defendant of any Miranda rights in any of his telephone conversations.

Finally, the defendant called Martinez, informed him that he had obtained the proper documentation, and asked if Martinez would send him a plane ticket. Martinez went to the Miami International Airport and arranged for a ticket to be transferred to the airport in Colombia. (R. 321) The defendant then picked up this ticket at the ticket counter in the Colombian airport. He boarded a plane to Miami alone, unaccompanied by any law enforcement agents, foreign, federal or state. (R. 324)

Upon arrival in Miami at 1:00 p.m. on April 11, 1988, the defendant was met by Martinez at the airport. (R. 324, 327) Martinez identified himself and assisted the defendant through customs without asking

any questions, and without any discussion with the defendant. (R. 325-26) Upon exiting the airport, Martinez informed the defendant that he was under arrest for the homicide of Julio Rivas and read him his Miranda rights in Spanish. Martinez ascertained that the defendant had a sixth grade education, understood his rights, was coherent, did not appear under the influence of narcotics or alcohol, and was not threatened or promised anything in return for making any statements. (R. 326, 333-35) Martinez had also been previously informed by the defendant's family that the defendant was under medication for epilepsy. (R. 361) He then inquired if the defendant had taken his medication and whether he needed any. Id. The defendant had taken his medication for that day. (R. 160) This medication, Depakote, did not cause any disorientation in the defendant. Id. The defendant waived his Miranda rights, and stated that he wanted to make a statement and did not want an attorney present. (R. 329)

Martinez then placed the defendant in his vehicle. The defendant was not handcuffed. During the car ride out of the airport, the defendant admitted having thrown the victim off of a bridge on the Rickenbacker Causeway. (R. 330) Martinez asked if the defendant would show him the exact location. The defendant consented. Id. Due to the timing of the defendant's arrival, Martinez asked if the defendant wanted lunch. (R. 329) In accordance with the defendant's wishes, the two went to lunch at a local Wendy's restaurant. The defendant then directed Martinez to the Rickenbacker Causeway, told him to make a U-turn on the high bridge, Powell bridge, counted four posts, and told Martinez to stop. He then stated that on the day of the crime he had stopped his car there, raised the hood in order to pretend he was stranded, and had then thrown the child off the bridge at that location. (R. 330-31)

Martinez then drove the defendant to the police headquarters. (R. 331) At the station, Martinez placed a written Miranda waiver form in front of the defendant, and again read him his Miranda rights. (R. 331-39) The defendant again acknowledged his rights, placed his initials beside each of the rights, and signed the waiver form in the presence of Martinez and another witness, officer Sam. Id.

Approximately two hours after his arrival in Miami, the defendant then gave a tape recorded statement to Martinez, wherein he again acknowledged his Miranda rights and waived them. (R. 342-45) After the tape recorded statement, Martinez asked the defendant if he would consent to a video recording of his statement. (R. 345) The defendant consented and immediately a video recorded statement was given in which he again acknowledged his Miranda rights and waived them. (R. 345-46) The defendant was then jailed.

The defendant did not testify. The tape recorded and video recorded statements were both reviewed by the trial judge. (R. 349) After hearing arguments from both the State and the defense on February 8, 1988, the trial court denied the defendant's motion to suppress. (R. 395)

B. Guilt Phase

The trial of this cause began on February 13, 1991 before the Honorable A. Kornblum.

1. State's Case

Lester Escoto testified that on February 14, 1988 he was a security guard at a high-rise located at 1865 Brickell Avenue, Miami, Florida. (SR. 329) The building has a marina where boats are parked. (SR. 332) At approximately 3:00 to 3:30 p.m. that afternoon, Escoto went to the dock area and observed the body of a child floating in the water. (SR. 330, 332) Escoto

and a co-worker, F. Tria, jumped in the water, took the child out and placed him on top of the dock. (SR. 333) The child was dead. (SR. 334) Escoto observed various bruises on the child's body. Id.

Prior to retrieving the body, police and fire rescue had been called and arrived at the scene quickly. (SR. 335) Efforts to revive the child were not successful. Id. A crime scene technician, H. Infante, photographed the body. (SR. 309) Homicide Detective Martinez was also present at the scene and took the photos to a residence where a missing child had been reported that afternoon. (SR. 541) The dead child was then identified as five year old Julio Rivas Alfara by his mother, Graciela Alfara. Id. Graciela Alfara also reported that the defendant could not be found at that time. (SR. 562)

Harlan Alfara testified that he has lived with his aunt, Graciela Alfara, and his two cousins, Evelyn and Julio since 1986, in Miami. (SR. 346, 355) This witness had known the defendant from approximately two months prior to February 14, 1988 because defendant had moved into their house. (SR. 347) He and the defendant shared a room in the back of the house. (SR. 360-61) The defendant got him a job at his own place of work, the Sheraton Hotel in Key Biscayne. (SR. 357) The defendant would give Graciela money for rent payments. (SR. 362) At work, the defendant had told Harlan that he loved Graciela, but that she didn't love him, and asked Harlan for his help. (SR. 362) The witness had told the defendant that there was nothing he could or would do. Id.

On February 13, 1988, Harlan arrived home at approximately 7 or 8 p.m. Id. Harlan watched television and did not speak to the defendant, as the latter appeared to be thinking. (SR. 363) Harlan then went to bed and woke at

approximately 12:30 a.m., having heard what sounded like an argument in the living room. (SR. 365) He did not hear what was said and fell asleep within five minutes. (SR. 366)

The witness woke at 7:00 a.m. on February 14, 1988. (SR. 369) The defendant was awake and dressed. (SR. 369) The victim was also in the living room, watching television. (SR. 372) The defendant looked "strange," like "someone is not sleeping and stays up thinking." (SR. 370) He did not look as if he had been crying or under the influence of alcohol, drugs or medication. Id. Harlan asked if the defendant was going to work, and the defendant stated that he was not. Id. Harlan then went into the shower at approximately 7:30 a.m. and heard the defendant and the victim leave while he was in the shower. (SR. 350)

Harlan then went to work and came home at approximately 4:30 p.m. (SR. 351) The defendant had not appeared at his place of work. Id. Graciela was looking for her son and the defendant. Id.

Francisca Morgan testified that she was a waitress at the Cafeteria Blanquita for approximately eight (8) months prior to February 14, 1988. (SR. 374-75) Graciela Alfara also worked at this cafeteria. (SR. 375) Ms. Morgan knew the defendant, as the latter was a customer of the cafeteria and would come in once or twice a week during the period when she worked there. (SR. 382) On February 14, 1988, the defendant arrived at the cafeteria at approximately 8:00 to 8:30 a.m. (SR. 376) The witness served the defendant coffee and cigarettes at that time. Id. The defendant appeared "normal," like he usually appeared. (SR. 382-83)

Juan Londrian testified that on February 14, 1988 he went to the Cafeteria Blanquita at approximately 8 to 8:15 a.m. (SR. 385) The defendant

arrived a few minutes later in his Volvo. Id. This witness had known the defendant for six years prior to that date. (SR. 385, 392) Mr. Londrian is a carpenter and the defendant had been his "helper." (SR. 393, 385) He also knew the defendant from frequenting the cafeteria. (SR. 385)

Mr. Londrian and the defendant sat together at the counter and the latter had coffee. (SR. 386) The defendant told him "that bitch is going to remember me for the rest of her life." Id. Londrian knew that the defendant was talking about Graciela Alfara. He knew that they had planned to be married but had broken up a week before, because he had spoken to the defendant several days before this. (SR. 386-7, 391) The defendant repeated his comments about Graciela "remembering him for the rest of her life," several times. (SR. 387) He appeared "very calm" while making these comments. (SR. 388) The defendant then left the cafeteria a few minutes later. (SR. 386)

Graciela Alfara testified that at approximately 10:00 to 10:30 a.m. on February 14, 1988 the defendant called her house. (SR. 492-93) Her daughter answered the call but she did not speak to the defendant. Id.

Graciela is a waitress at Cafeteria Blanquita. (SR. 491) February 14, 1988 was her day off from work. (SR. 492) She had known the defendant by sight for approximately seven months, because he was a customer at the cafeteria. (SR. 494) The defendant had lived at her house, in a room in the back, for approximately a month. (SR. 494, 499) The defendant paid her $150 toward rent when he first moved in. (SR. 503) Several days after he moved in, Graciela had intimate relations with the defendant. (SR. 499-500) However, these relations stopped several days later because the defendant touched Graciela's daughter's breasts. (SR. 500-01) Graciela then asked the defendant

to move out of her house. (SR. 502) The defendant asked to stay until February 15, 1988, because that was when he would get paid. (SR. 502) Graciela stated that she had never discussed marriage plans with the defendant. (SR. 500)

On February 13, 1988, Graciela had been waiting for the defendant to move out and he had packed his clothes. (SR. 518) After work that day, she went out to dinner with a customer. (SR. 505-508) The customer drove her home at approximately 11:30 p.m. (SR. 508-509) Graciela went into the house and the defendant asked her where she had been. (SR. 510) Graciela told him and added that, "he has nothing to do with me." (SR. 511-12) The defendant was nervous but not angry, and talked about "why I was doing this and he hadn't done anything bad to me." (SR. 511) The discussion lasted approximately one-half hour and Graciela went to sleep with her daughter, as the defendant was sleeping on the sofa. (SR. 513, 514)

On February 14, 1988 Graciela woke at 7:00 a.m. in order to wake Harlan up for work. (SR. 515) The defendant was up and did not speak to her. Id. She went back to sleep until 10:30 when the defendant called the house. (SR. 516) She then looked for her five year old son, Julio, but could not find him. (SR. 495) When Harlan arrived home in the afternoon and told her that the defendant had not been at work, she called the police to report her son missing. (SR. 495-6) Graciela had never before, or on that day, given the defendant permission to take her son away from home. (SR. 493)

Pedro Salazar testified that the defendant arrived at his house at approximately noon on February 14, 1988. (SR. 406) Salazar did not hear the defendant's car and thought that the latter had walked. (SR. 407) This witness had known the defendant for approximately three years and was "like a

brother" to him. (SR. 416) The defendant told Salazar that, he had to leave the country, was in a rush, and would like a ride to the airport. (SR. 407) The defendant seemed nervous at this time and his hands and body were shaking. (SR. 429)

The defendant told Salazar that he "threw a child over the bridge," "the Key Biscayne bridge," earlier that day. (SR. 407-8) The defendant had added that he also "squeezed the boy's neck," and saw the child floating in the water after he had thrown him. (SR. 409, 415)

Salazar also noticed a "scratch" on the defendant's neck. (SR. 413) The defendant explained that he had taken "revenge" because the child's mother had gone out with another man and he was jealous. (SR. 411-12) Salazar drove the defendant to the airport. (SR. 412)

Dr. Thomas Lee, an oceanographer at the University of Miami, was qualified as an expert pursuant to the stipulation of the parties. (SR. 520-522) He testified that he had consulted the records of weather and tide conditions, and studied the condition of the waters of Biscayne Bay in the area of Rickenbacker Causeway. (SR. 523-52) In his opinion, the body of a five year old child thrown from the Powell Bridge at approximately 10:00 to 10:30 a.m. February 14, 1988 was consistent with the body floating to around the area it was recovered at 3:00-3:30 p.m. that day.

The defendant's vehicle was found the next day by Detective Martinez in Coral Gables (SR. 542, 32), close to where the Salazar family lived. (SR. 545) Detective Martinez observed that the dashboard of the vehicle had been pulled apart and damaged. (SR. 543) The air conditioning panel was off the dashboard, with the knob of one of the switches having fallen to the floor. The damage was consistent with something having come

into contact with the panel. (SR. 323-26) A bag of male clothing was found in the trunk. (SR. 326)

The medical examiner testified that the child's cause of death was asphyxia. (SR. 751) The child's neck had a large bruise, consistent with the child being grasped at the upper part of his neck with a hand, and also consistent with attempted strangulation. (SR. 748-49) The child's lungs were also unusual in that they were not only hyperinflated and congested with blood, but also the airways had a considerable amount of frothy material, i.e., air mixed with fluid. (SR. 749) Asphyxia and death were caused by both strangulation and drowning. (SR. 750)

The three-foot nine inch, fifty-two pound body, also had numerous other bruises. There was a large bruise on the right thigh (SR. 73), a few bruises on the right leg (SR. 744), a number of bruises on the side and center of the chest (SR. 737), and multiple abrasions on the face and forehead. (SR. 741) The abrasions on the face and forehead had distinctive geometric configurations, consistent with the child's head and face being knocked or pressed into something with a similar configuration. (SR. 741)

The injuries to the legs, chest, face and head were consistent with a struggle in the car, with the body coming into contact with protruding sharp objects. (SR. 757) All of these injuries were "recent," occurring near the time of death (SR. 741-42), while the child was still alive. (SR. 743-44) The child did not have any of these injuries beforehand, according to his mother. (SR. 755)

Finally, Detective Cadavid, Mr. Munoz and Detective Martinez testified in substantial conformity with their testimony at the suppression hearing, detailed at pp. 1-9 herein. The defendant's tape recorded and video

recorded confessions were admitted into evidence through Martinez' testimony, and translated transcripts thereof were published to the jury.

The defendant's confessions reflect that he was 31 years old at the time of the crime. (SR. 598) He had lived in the United States for eleven years. (R. 158) He met Graciela Alfara approximately 2 to 3 years prior to the crime, at the cafeteria. (R. 138) He "liked her" and used to give her good tips." Id. He moved into her house approximately 3 1/2 months prior to the homicide. (R. 162) She had asked him to help her move and he felt sorry for her. (R. 139) He therefore moved in and would give her money for rent, groceries, etc. Id.

The defendant had stated that they had wedding plans for February 15, 1988. (R. 164, 167) However, "as the date came near she would say to me, 'no,' that each one should go there (sic) own way and we would continue to see each other and everything. But I said, 'Yes, to her, ..." (R. 164)

On February 13, 1988, the defendant got out of work early, went to the cafeteria, and saw Graciela getting into another male's vehicle. (R. 164) The defendant stated that he "didn't like that," so he had a beer and went to the house. Id. Graciela was not home, so the defendant went looking for her and was told by his friends that she was "exploiting" him. (R. 165) The defendant went to the house, "quiet and with complexes." Id. Graciela arrived around midnight and the defendant saw her kissing and then come into the house with a rose and cosmetics. Id. The defendant grabbed her roughly and asked her if she was aware of what she was doing. Id. She responded, "Yes" (Id.), and told him she did not love him. (R. 141) The conversation

was brief, and the defendant "kept telling her, get a knife and stab me." (R. 141-142) Graciela then went to her room and the defendant remained on the sofa. (R. 142, 166)

At approximately 7:30 a.m. the next day, the child, Julio, went into the living room. (R. 142) The defendant told the child to go out by the back door and get into his car so they would go to work. (R. 142) The child did so without telling anybody. (R. 167) The defendant stated that at this point, "it came into my mind that, that would be my vengeance. Then she will be sorry for the rest of her life." (R. 142)

The defendant and Julio then left in his car and went to the cafeteria. (R. 168) The defendant told the child to stay in the car, and went inside himself for coffee. Id. The defendant told his friends at the cafeteria, "she's going to be sorry for the rest of her life." Id. His "intentions then was to go and revenge myself with the child." Id. When he said "she is going to be sorry ...," he meant that he was going to take the child and "drown" him. (R. 169)

Having finished his coffee, the defendant stated that he then "took off for Key Biscayne, my purpose already was to throw him in the sea." He kept going around Key Biscayne but "was not capable," "did not dare," until he called up the house. (R. 142, 170) When Graciela did not speak to him, he went to Powell Bridge, and parked the car at the fourth post on the bridge. (R. 170) He then opened and raised the hood, "just in case, if people would see us they would think we were broken down, but we were not, it was so to throw the child there." (R. 144) The defendant then went to the passenger side, opened the door, took the child out and threw him over the bridge. Id. Detective Martinez testified that the location on the bridge pointed out by the defendant was 70 feet above water. (SR. 575)

The defendant then drove away and abandoned his car, after taking some clothing out of it. (R. 171) When asked about the damage to the car's dashboard, the defendant stated that he had inflicted the damage himself, in an effort to burn the car, after abandoning it. (R. 173) The defendant then walked to his friend Salazar's house where he told the latter what he had done. (R. 146) He bathed and changed his clothes at Salazar's house. Id. He then obtained some money from Salazar, was driven to the airport and flew to Puerto Rico under an assumed name. Id. Thereafter, his family sent him a ticket and he went to Colombia. (R. 148)

In Colombia, the defendant told his family what he had done and they were frightened. (R. 178) The defendant "didn't feel right in Medellin" and was thinking of coming to Chicago or New York, until the police called him and talked to him. Id. Speaking with the police gave him "more courage," and he "returned to pay for what I did." (R. 178-9) The defendant stated, "I don't know if I did it in a moment of a madness, desesparation, or my illness, I don't know how to qualify it, but what I did was not correct." (R. 179) He added that, "I hope they might give me work to work in the prison itself,". (R. 179)

2. The Defense Case

The defendant testified on his own behalf. (SR. 766-836) He stated that he was thirty three years old at the time of trial. (SR. 766) He was born in Medellin, Colombia, but had left there and lived in Bahamas, Panama and Venezuela prior to coming to the United States in 1980. Id. Upon arrival in the United States, he began working with a restaurant chain. (Sr. 767) He has never been married and has no children. (SR. 768) His family, parents and five brothers and sisters, live in Medellin, Colombia. (Sr. 768-

69) He is epileptic and sometimes takes medication for his condition. (SR. 780, 782) The defendant then testified about his relationship with Graciela Alfara in substantial conformity with his confessions detailed above. (SR. 768-94)

As to the facts of this crime, however, the defendant testified that he left with the victim in order to personally inform his bosses that he would not be working that day. (SR. 795) At the cafeteria he did tell his friend that Graciela would feel sorry. However, he really meant that he would "beat" Graciela and her male friend, if they were together again. (SR. 796) The defendant stated that he then went to his place of work but prior to reaching it, he changed his mind and decided to take the child back home. Id. On the way back to the house, the car developed mechanical problems on the bridge and stopped. Id. He then got out of the car, raised the hood and "forgot" about the child. Id. He then heard a scream and saw the child floating in the water. (SR. 797) The defendant then testified that he ran away because he thought, "since I had the problem with her the previous night, they're going to think that I did it."

With respect to his confession, the defendant testified that Detective Martinez "lied" and "tricked" him. (SR. 810) He stated that this detective had told him that he had a brother in jail, who worked during the day and only slept at the jail at night, and that the defendant would be able to do the same. Id. The defendant then agreed to say what Martinez told him to. (SR. 810-811, 814)

The defense rested after the defendant's testimony. (SR. 836) The State then presented Detective Martinez as a rebuttal witness. Id. Martinez testified that he does not have a brother in jail, that he never

told the defendant that he could go out and work like his brother, and that he never rehearsed or told the defendant what to say. (SR. 836-37)

The jury found the defendant guilty of kidnapping and first degree murder on February 19, 1991. (SR. 963)

C. Penalty Phase

The penalty phase before the jury commenced on March 4, 1991. (SR. 968 et seq.) The State presented no additional witnesses, and made argument based upon the evidence from the guilt phase. (SR. 977) The defense presented six (6) witnesses.

Detective Martinez testified that during the course of his investigation, he determined that the defendant has no record of prior felony convictions. (SR. 979) Martinez also added that the defendant returned voluntarily, and without any threats to influence his decision. (SR. 981)

Juan Londrian testified that he had known the defendant for approximately eight years and saw him almost on a daily basis. (SR. 983) He never saw the defendant engaging in criminal activity, or acting violently. Id. The defendant was hard working and never indulged in narcotics or alcohol in significant amounts. (SR. 983-4) The defendant would take a pill every two days for epilepsy. (SR. 989) He never saw the defendant act in any abnormal manner. (SR. 984-5)

Pedro Salazar testified that the defendant has been his family's friend for more than three years. (SR. 990) The defendant had lived with the Salazar family for approximately six months. Id. This witness had never seen the defendant taking narcotics or drinking alcohol in excess. (SR. 991) The defendant had not engaged in any criminal activity, and was a hard working individual. Id.

Adelfa Salazar, Pedro's mother, testified that the defendant was a close friend and she trusted him enough to allow him to live at their house. (SR. 994) She never saw him engage in any criminal, immoral or anti-social behavior, and he was hard working and respectful. (SR. 995) The defendant had several epileptic attacks when he lived with them; the defendant would have strong convulsions and couldn't remember what happened during these attacks. (SR. 996)

Marta Salazar, who also lived with Pedro and Adelfa, testified in substantial conformity with the other two witnesses.

Dr. Raul Lopez testified that he is a neurologist in Miami, Florida. (SR. 1005) In 1984 he treated the defendant after the latter had an epileptic attack. (SR. 1006) The defendant had epilepsy and a history of seizures for several years. (SR. 1007) He had previously been treated with anti-convulsion medication, which had ceased to be effective. (SR. 1007, 1009) Dr. Lopez thus prescribed another anti-convulsion medication in March, 1984. Subsequently this medication was also changed. (SR. 1010-11) The side effects of the last medication prescribed by Lopez, Depakote, are stomach upsets, nausea, weight gain, and a mild shaking of the hands. (SR. 1011) Lopez had prescribed 500 milligrams of this medication, twice a day in November 29, 1984. (SR. 1014-15) Lopez then lost contact with the defendant until January 1986 when the latter came to Baptist Hospital following another convulsion. (SR. 1019) The defendant had not been taking his medication as instructed. (SR. 1015) Lopez specifically stated that "depression," "fatigue," etc., were not part of the defendant's medication's side effects. (SR. 1012-13)

After argument by the parties and instruction by the court, the jury returned an advisory sentence of death a vote of 11 to 1, on March 4, 1991. (SR. 1056)

D. Sentencing

The sentencing hearing took place on March 14, 1992 (SR2. 22 et seq.) after submission of sentencing memoranda by both parties. (R. 240-42, 257-63). No additional witnesses were presented by the parties. In accordance with its presentation before the jury, the State argued three aggravating factors: (1) that the murder was committed during the course of a kidnapping: (2) that the crime was especially heinous, atrocious or cruel,; and (3) that the crime was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification. (SR2. 35-37, R. 240-42).

The defense argued that the only aggravating factor proven was murder during commission of a kidnapping. (R. 258). In mitigation, the defense argued: (1) lack of criminal history; (2) that the defendant's actions were the result of extreme mental or emotional disturbance; (3) that the defendant did not appreciate the criminality of his conduct; (4) the age of the defendant and (5) that he had expressed remorse by voluntarily returning to the United States and confessing. (R. 257-61; SR2. 28-34).

The trial court found that the three aggravating factors argued by the State were proven beyond a reasonable doubt. (R. 246-51). The court first found the homicide was committed in the course of a kidnapping in accordance with the jury verdict. (R. 251). With respect to the second factor, the court stated:

> Defendant's statements to Juan Londrian, Pedro Salazar, Rubin Munoz and Detective

> Martinez are all consistent with a cold and calculated plan to avenge his perceived dishonor at the hands of Ms. Alfaro. Indeed, Defendant told Munoz something to the effect "what else was I to do"?
>
> Had the victim been Ms. Alfaro, then perhaps there was a pretense of moral justification. But the victim was innocent of any wrongdoing, real or perceived. He was executed by the Defendant in a carefully planned act of vengeance. This factor was proven. Dufour v. State, 495 So.2d 154 (1986); Jackson v. State, 522 So.2d 802 (1988).
>
> (R. 250; see also SR2. 36-37)

With respect to the third factor, HAC, the court, first having noted that despite the defendant's police confession to the contrary, the medical examiner's testimony was that the victim's injuries were consistent with manual strangulation and a struggle (R. 248), stated:

> One can imagine the sheer terror of the boy in either being choked and beaten and dragged from the car and thrown, alive, off of the bridge, or if Defendant is to be believed, the boy's shock and horror, to have an adult he loved and trusted, to suddenly and without any reason, throw him into the bay. Even at five years of age, Julio must have helplessly anticipated his impending death. Sanchez-Velasco v. State, 570 So.2d 908 (1990); Lemon v. State, 457 So.2d 1012 (1984). This factor was proven.
>
> (R. 251; see also SR2. 37-38).

The trial court found one statutory mitigating factor, that the defendant had no significant history of prior criminal activity. (R. 251-52). With respect to other statutory and nonstatutory mitigation argued by the defense, the court stated:

> Having provided support for Ms. Alfaro and her children, and having professed his love for

> her, he was enraged when he saw her with another man after she had told him previously to move out.
>
> In his mind, he had to avenge the perceived affront to his honor and dignity and focused on Julio as the means to that end.
>
> But this Court cannot conclude that either his distorted thinking or his epilepsy had any bearing on his killing of the child to the extent that he was under the influence of any mental or emotional illness at the time of the killing or that he was unable to appreciate the criminality of his act.
>
> The Court does find in mitigation, however, that Defendant showed some remorse in voluntarily returning to this jurisdiction, knowing he would be prosecuted, but probably unaware that he might be sentenced to death if convicted.
>
> This factor was proven.
>
> (R. 252).

The trial court then imposed the death sentence, after noting that, "This Court is fully aware that in determining whether to impose life imprisonment or death, the procedure is not a mere counting process of aggravating circumstances, but instead a reasoned judgment as to what factual situation requires the imposition of the death penalty and which circumstances can be satisfied by a sentence of life imprisonment in light of the totality of the circumstances." (R. 253-54).

This appeal ensued.

SUMMARY OF THE ARGUMENT

I. Miranda warnings were not required when the defendant was speaking to officers, from his residence in Colombia, on the telephone, as he was not in

custody at that time. Thus, the statements made during the telephone conversations were admissible and there was no illegality which could taint any post-arrest statements which were made subsequent to receipt of all Miranda warnings.

II. The emotional outburst of the victim's mother while testifying did not result in reversible error. It was limited to one brief occasion, was followed by judicial admonitions to the witness, and was promptly dealt with by cautionary instructions to the jury to disregard what they had heard from the witness's emotional outburst.

III-V. The aggravating factors which the trial court relied on are supported by the evidence. The court did not err in failing to find that the defendant was under extreme emotional or mental disturbance, as that factor was not supported by the evidence. The imposition of the death penalty in this case is consistent with that imposed in other cases which this Court has affirmed, where the aggravating and mitigating factors are comparable.

ARGUMENT

I.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

The Appellant argues that the lower court erred in denying the motion to suppress his statements. The Appellant maintains that Miranda warnings should have been given prior to the pre-arrest telephone conversations while the defendant was in Colombia. He has argued that the failure to give such warnings rendered the pre-arrest statements inadmissible and further tainted the subsequent statements, obtained in Miami, after the

defendant had been arrested and had been given full warnings. The fundamental flaw in the Appellant's arguments is that there was no need to administer Miranda warnings prior to any of the telephone conversations between the defendant and any of the officers. The defendant was not in custody at that time and had it within his power, any time he so desired, to merely hang up the telephone, cease talking to the officers, and avoid further contact with the officers. Indeed, the defendant undoubtedly knew that if he hung up the telephone, there would be no adverse ramifications from any such refusal to speak to Miami police officers, who were on another continent and who had no authority over the defendant while he was in Colombia.

It is well established that Miranda warnings are needed only prior to "custodial interrogation," and that the failure to administer such warnings prior to any noncustodial questioning will not result in the suppression of any statements made during such noncustodial questioning. Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). In Beckwith, the Supreme Court emphasized that the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), related solely to "'the admissibility of statements obtained from an individual who is subjected to custodial police interrogation.'" 425 U.S. at 345, quoting Miranda, supra, 384 U.S. at 439.

The integral connection between Miranda warnings and custodial interrogation was again strongly emphasized in Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), where the Court held that admissions made by a probationer to his probation officer without prior Miranda warnings were admissible in the subsequent criminal prosecution. Both the United States and Minnesota Supreme Courts had noted that Murphy was

not "in custody" and it was therefore concluded that Miranda was inapplicable. 465 U.S. at 430-31. Miranda warnings are required "[t]o dissipate 'the overbearing compulsion . . . caused by isolation of a suspect in police custody. . .'" Murphy, 465 U.S. at 430, quoting United States v. Washington, 431 U.S. 181, 187, n. 5, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977). The "extraordinary safeguard" of Miranda warnings "'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.'" Murphy, 465 U.S. at 430, quoting Roberts v. United States, 445 U.S. 552, 560, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980).

In Murphy, the Supreme Court went to great lengths to maintain that a variety of factors incidental to the in-person questioning of the probationer by his probation officer did not warrant the same level of treatment as custodial interrogation settings. Thus, it did not matter that the probation officer could compel Murphy's attendance and truthful answers. 465 U.S. at 431. Nor did it matter that the probation officer consciously sought incriminating evidence. Id. Nor did it matter that there were no observers to guard against trickery. Id. at 432.

Custodial interrogation was deemed unique because it thrusts the individual into "an unfamiliar atmosphere" or "an interrogation environment" in which psychological ploys can successfully be exploited. Id. at 433. Moreover, "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." Id. Such factors are clearly lacking in the instant case, where the defendant was in his home country, in his family residence, on the family phone, surrounded by close family members, and capable of terminating the phone call at any time.

Thus, Miranda warnings are required only when a suspect is in custody and subjected to custodial interrogation. See also, Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) ("Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'"); Correll v. State, 523 So.2d 562, 564 (Fla. 1988); Caso v. State, 524 So.2d 422, 423 (Fla. 1988).

The determination of whether a suspect is in custody is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (quoting Oregon v. Mathiason, supra, 429 U.S. at 495); Caso, supra. Furthermore, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). See also, Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985), cert. denied, 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); Caso, supra, 524 So.2d at 423-24. Thus, "the trial court had to ascertain whether, in view of all the circumstances, a reasonable person in [the defendant's] position would have believed he was not free to leave when he made the statements." Riechmann v. State, 581 So.2d 133, 137 (Fla. 1991).

Applying the foregoing principles to the instant case, it can readily be seen that the defendant was not in custody when he was speaking to the officers by telephone. As noted above, he was in familiar surroundings - i.e., his residence - in a foreign country, hundreds of miles away from the Miami police, surrounded by his closest relatives, who were giving him advice, and he had merely to hang up the phone to terminate the conversation and end any contact with the police. Anyone in his position would believe

that they were "free to leave" as there was absolutely no impediment preventing the defendant from hanging up the phone and going wherever he wished to within Colombia. Situations which are far more adversarial, and which subject a suspect to considerably greater pressure, have routinely been held not to constitute custodial interrogations. Oregon v. Mathiason, supra, and California v. Beheler, supra, both involved police interviews of suspects at police stations, and both were deemed noncustodial situations, where suspects voluntarily were speaking to the police. Likewise, Correll, supra, involved a police station interrogation, where the defendant was not under arrest, was surrounded by relatives, was free to leave, and thus deemed not to be in custody. Notwithstanding that situations such as Mathiason, Beheler and Correll involved voluntary questioning, those situations certainly involve higher levels of pressure and greater potential for coercion than do intercontinental phone calls to a suspect's residence.

Indeed, in at least two cases, telephone calls made by police officers to defendants, which have resulted in statements by defendants, have been deemed to be noncustodial interrogations which were not governed by the requirements of Miranda. Jackson v. State, 317 So.2d 454 (Fla. 4th DCA 1975); Walters v. State, 677 S.W.2d 629 (Tex. App. 1987).

In view of the foregoing, it must be concluded that the defendant was not in custody during the telephone conversations with the officers to whom he spoke; Miranda warnings were not required prior to those conversations; statements made during those conversations were therefore admissible; and post-arrest statements made after the receipt of Miranda warnings were therefore not tainted by any prior illegality. It must be carefully emphasized that the only situations involving a lack of Miranda

warnings were the brief telephone conversations while the defendant was still in Colombia. All statements made while the defendant was in custody in the United States were given after the receipt of Miranda warnings.

The Appellant, in arguing that the defendant was in custody, relies on the four factor test set forth in Alberti v. Estelle, 524 F.2d 1265, 1267 (5th Cir. 1975), cert. denied, 426 U.S. 954, 96 S.Ct. 3182, 49 L.Ed.2d 1194 (1976), and B.L. v. State, 425 So.2d 1178 (Fla. 3d DCA 1983). That four-factor test has been expressly abrogated by more recent cases. See, e.g., United States v. Corral-Franco, 848 F.2d 536, 539-42 (5th Cir. 1988); State v. Alioto, 588 So.2d 17 (Fla. 5th DCA 1991). As noted above, the current inquiry is solely whether a reasonable person in the suspect's place would believe he was free to leave. Caso, supra; Mathiason, supra; Beheler, supra; Alioto, 588 So.2d at 18; United States v. Long, 866 F.2d 402 (11th Cir. 1989); Correll, supra.

Finally, even if it were to be concluded that the defendant was in custody at the time of the telephone conversations in Colombia, reversal would still not be warranted. Pursuant to Oregon v. Elstad, 470 U.S. 298, 314, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), when an initial statement given by a defendant is inadmissible due to a failure of the police to administer Miranda warnings, "[a] subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." Thus, even if the initial statements during the telephone conversations were inadmissible, the subsequent statements, made in

Miami several weeks later, after both full Miranda warnings and a lengthy interlude, would be admissible. Since the subsequent statements, which are fully set forth in the Statement of Facts herein, fully incriminated the defendant, especially when viewed in conjunction with the corroborative evidence of the medical examiner and the defendant's confessions to his friends, any error regarding the admissibility of statements made during the initial telephone conversations would have to be deemed harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Accordingly, for the foregoing reasons, it must be concluded that the trial court did not err in denying the motion to suppress the defendant's statements.

II.

THE LOWER COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL FOLLOWING A WITNESS'S EMOTIONAL OUTBURST, WHERE THE INCIDENT IN QUESTION WAS LIMITED IN NATURE AND WAS FOLLOWED BY APPROPRIATE CURATIVE INSTRUCTIONS.

The Appellant argues that the lower court should have granted a motion for mistrial after the emotional outburst of a witness, Graciela Alfara, the mother of the victim. The witness's emotional conduct before the jury was very brief in nature, did not apprise the jurors of anything that they were unaware of, and was promptly addressed by the court through questioning of the jurors and cautionary, curative instructions to the jurors. Under such circumstances, the conduct in question did not rise to the level required for granting a mistrial and did not prejudice the defendant.

After Ms. Alfara was sworn in as a witness, the court reporter noted that she was crying during the administration of the oath and the prosecutor requested a break for her to collect herself. (SR. 474) Moments later, the reporter parenthetically notes that the witness said something in Spanish to the defendant. (SR. 474) The judge promptly admonishes the witness not to look at the defendant and not to talk to the defendant, further advising her to just answer questions posed to her by counsel. (SR. 474)

Defense counsel then approached the bench, and at sidebar stated that Ms. Alfara had "just called Mr. Arbelaez a murderer and a son of a bitch in Spanish," and sought a mistrial. (SR. 475) The judge responded that he would instruct the jury about the situation. (SR. 476) Defense counsel then sought to have an interpreter advise the court, outside the presence of the jury, as to what had been said. (SR. 476-77) The jury was sent to the jury room. Id. Outside the presence of the jury, the interpreter indicated that the witness "called him [defendant] a murderer and you murdered my little boy and son of a bitch." (SR. 477) The judge then again addressed the witness, admonishing her to answer only counsels' questions and asking her to compose herself. (SR. 477-78) The judge also indicated that upon failure to comply with his instructions, Ms. Alfara could be held in contempt of court. (SR. 478)

After defense counsel renewed his motion for mistrial (SR. 479), the judge stated:

> The witness didn't say more than the indictment, and that is that he is accused of murdering her child. I just don't see how in the frame of everything about this case that could be considered so prejudicial as to require me to grant a mistrial.

(SR. 480)

The judge then inquired as to what should be said in a curative instruction to the jury and defense counsel indicated, "whatever you think is appropriate, I am just willing to go along with the Court." (SR. 480-81) Defense counsel then sought to have a record of what the various jurors understood. (SR. 481)

The jury wass then brought back into court. (SR. 482) The court asked bilingual jurors to identify themselves, and three jurors did so. (SR. 482) Those three jurors remained in the courtroom, while the others were sent back to the jury room. Id. The judge then questioned the three Spanish speaking jurors, one at a time, while the other two remained in the hallway outside the courtroom. (SR. 483) The first of the three Spanish-speaking jurors understood that the witness "was saying you murderer, your murderer," and nothing more. (SR. 483) She denied discussing the matter with any of the other jurors. (SR. 484) The judge then advised her to disregard the statement and continued:

> You can understand that she is emotional, and nevertheless, that has no place in this courtroom. You were told that at the very beginning and I'm telling you now that you are not to be emotional in any way about your duty. You must disregard any obvious emotions, and her statement, which is a pure conclusion on her part. He is only a murderer in the event that you prove or the evidence proves he is a murderer beyond a reasonable doubt.

(SR. 484) The juror indicated that she understood the court's statements. (SR. 484)

The second Spanish-speaking juror heard the witness twice call the defendant a murderer and further, "[w]hen she was standing she looked at the pictures and she said, my little boy." (SR. 485) This juror indicated that the other jurors were asking what Ms. Alfara said; he himself denied replying to the other jurors, but stated that "the other lady out here

before" - i.e., Ms. Carmona, the first juror questioned by the court - had said "murderer" and nothing more. (SR. 485-86) The judge then admonished this juror:

> Now, please, I don't want you to discuss this with the rest of the jurors. But I am going to instruct you to disregard the unsolicited statement of the witness. You understand that the witness is emotional?
>
> MS. BRENNES: Right.
>
> THE COURT: But emotion has nothing, no place in this courtroom. You have a duty to determine guilt or innocence from the evidence. Whether, in fact, what she said and what the indictment says is true is your responsibility, and the statements prove those allegations and have to prove those allegations by and beyond every reasonable doubt.
>
> Do you understand that?
>
> MS. BRENNES: I understand.
>
> THE COURT: You are to disregard what she said.
>
> MS. BRENNES: Yes.

The judge then questioned the third juror, Ms. Hernandez, who understood that Ms. Alfara had said: "A bastard. An assassin. Murderer." (SR. 487) She heard nothing else. (SR. 487) She noted that some of the other jurors already knew what had been said - i.e., "murderer" - but "[t]hat is about it." (SR. 487) This juror did not discuss it. (SR. 487) As with the other two jurors, the court admonished this juror not to discuss the matter with the other jurors, to disregard the emotional conclusions of the witness and to determine the case on the basis of whether the State proved the allegations by evidence beyond a reasonable doubt. (SR. 488) The juror indicated that she understood the court's instructions. (SR. 488)

The entire jury panel was then recalled and the court gave the following instruction:

> Ladies and gentlemen, it has been suggested by your fellow jurors some of you understood what the witness said, which was unsolicited, and directed towards the defendant.
>
> All I can say to you is that "I'm sure you understand that the witness is emotional. As I explained to these other jurors and you were told at the very beginning, emotional outbursts have no place in this courtroom.
>
> The conclusions of a witness which you have heard me sustain objections to time after time have no place in this courtroom, and I must instruct you to disregard these statements made by the witness.
>
> In order for you to find the defendant guilty, the State must prove the allegations, including hers, by evidence beyond and to the exclusion of every reasonable doubt.
>
> (SR. 488-89)

After the above instructions the court also inquired whether each juror could disregard the witness' conduct:

> Can you all assure me that you are going to disregard the unsolicited conclusions and emotional conclusions of this witness, which have not been proven? You all can do that?
>
> (SR. 489)

All of the jurors individually responded in the affirmative.

Defense counsel then requested that the judge furnish him the opportunity to provide some case law on this issue the following day, and the judge indicated that he would reserve time on the motion for counsel to do so, further adding that "[r]ight now, the motion is denied. No, I'm sorry, this ruling is reserved." (SR. 490)

The following morning, defense counsel advised the court that he was able to find just one case from the Third District Court of Appeal with general language regarding the type of situation at issue, reflecting that

the issue was essentially one within the court's discretion. (SR. 533-34) After further argument of counsel (SR. 534-37), the judge denied the motion and made the following findings:

> In addition, I think we ought to note for the record that the reason for her outburst apparently was because, as she approached to take the oath, some photographs of the child, the deceased child, were on the clerk's desk, and she happened to see that.
>
> I don't think it was intentional or that the State or the witness intended to make that outburst. It was just spontaneous because of what happened.
>
> I don't think that this rises to the level that would require me to grant a mistrial. Yesterday I think what she said was a conclusion to which I instructed the jury not to consider. And I think that the jury instructions are sufficient.
>
> The motion will be denied.

(SR. 537)

The foregoing detailed facts clearly reflect that the witness's outburst was of a limited nature and did not provide the jury with any factual information of which they would otherwise be unaware. The trial judge dealt with the situation in prompt, detailed and thoroughgoing manner, ascertaining what the jurors had heard and advising them not only to disregard the witness's statement, but to ignore any emotional appeals and to decide the case solely on the basis of the evidence. Due to the prompt and efficient manner in which the court dealt with this situation, it can clearly be said that there was no error in denying the motion for mistrial, as the incident did not rise to the level of prejudice required for a mistrial. That conclusion, and the harmlessness of the incident, are further corroborated by the strength of the State's evidentiary presentation against the defendant.

As a general rule, "a mistrial is appropriate only when the error committed was so prejudicial as to vitiate the entire trial." Duest v. State, 462 So.2d 446, 448 (Fla. 1985). Moreover, after objectionable comments have been made, curative instructions admonishing the jurors to disregard such comments are routinely deemed sufficient to cure any error arising out of such comments. Id.; see also, Ferguson v. State, 417 So.2d 639 (Fla. 1982); Greer v. Miller, 483 U.S. 756, 766, n. 8, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987).

Determinations of whether outbursts of witnesses or trial spectators warrant a mistrial rest within the discretion of the trial court and are evaluated in terms of whether there is prejudice to the defendant. See, e.g., Chaney v. State, 267 So.2d 65, 69 (Fla. 1972) (no abuse of discretion in denying mistrial where prosecutrix in rape case became hysterical in presence of jury, exclaiming that she could not look at defendant again, and victim's aunt then approached defense counsel and criticized him for defending defendant); Messer v. State, 330 So.2d 137, 141 (Fla. 1976).

Pertinent factors in the instant case are the following: (1) the outburst was limited to a brief comment; (2) the comment, accusing the defendant of being a murderer, added nothing to the case, as the jury already knew that the prosecution had charged the defendant with murder; (3) any jury would inherently know that the mother of a murdered child would be emotional and upset; (4) the court carefully ascertained what the jurors heard and understood; (5) the court carefully and promptly gave curative instructions, admonishing the jurors, both individually and as a group, to disregard what had been said and to ignore any emotional appeals and to decide the case

solely on the evidence; (6) the jurors all agreed that they could follow the court's instructions.

Courts from other jurisdictions, when confronted with similar factual situations, have routinely held that trial judges acted within their discretion when denying motions for mistrial after outbursts by witnesses or spectators. See, e.g., Richmond v. State, 302 Ark. 498, 791 S.W.2d 691 (1990) (outburst of victim's wife, while testifying in homicide case, asking "God. How could you do that to him? You devil."; court gave cautionary instruction to jury); White v. State, 336 S.E.2d 777, 781 (Ga. 1985) (in murder case, motion for mistrial was deemed properly denied, where spectator sobbed and cried out, "I hope they burn both of you," where spectator was removed from courtroom, cautionary instructions were given, and incident was just a single outburst); Clegg v. State, 655 P.2d 1240 (Wyo. 1982) (motion for mistrial properly denied, where cautionary instruction given after victim, while testifying, called the defendant a "goddamn liar"); Christian v. United States, 394 A.2d 1, 22 (D.C. App. 1978), cert. denied, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979) (no abuse of discretion in denying motion for mistrial where, as defendant left witness stand, spectator in audience shouted, "You killed my babies. And shot my woman. . . . They killed them."); Messer v. State, 247 Ga. 316, 276 S.E.2d 15, 22 (1981), cert. denied, 454 U.S. 882, 102 S.Ct. 367, 70 L.Ed.2d 193 (1981) (no abuse of discretion in denying motion for mistrial where, during testimony of state witness, victim's father lunged toward defendant, screaming that defendant would pay and would be liable); People v. Lucero, 750 P.2d 1342 (Cal. 1988) (In Bank) (during prosecutor's closing argument in murder case, victim's mother screamed out the reason why victims were not heard screaming in

defendant's house; court held that there was no abuse of discretion in denying mistrial where cautionary instruction to disregard was given and it was an isolated outburst). People v. Bates, 532 N.Y.S.2d 611 (N.Y. App. 1982) (no error in denying mistrial where witness in audience gestured disbelief during defendant's testimony and jurors were admonished to disregard); State v. Morales, 513 N.E.2d 267, 271 (Ohio 1987) (no error in denying mistrial in murder case when victim's brother, during testimony of defendant's father, accused defendant's father of lying; court gave cautionary instruction and noted it was a single incident).

The only reported case on which the Appellant herein relies is Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983), a case in which the precise utterances of the emotional witness are not recited, a case in which there is no indication of any curative instruction having been given, and a case in which the emotional epithets of the witness appear to have been repeated several times, as evidenced by the appellate court's reference to epithets having "interspersed" the witness's testimony. Thus, Rodriguez is clearly distinguishable from the instant case, as well as the numerous cases finding mistrials to be unwarranted.

Finally, the denial of a mistrial can also be upheld on a harmless error analysis. In this vein, it is essential to note the overwhelming evidence of guilt, including the defendant's own confession, as detailed in the statement of facts. It is further relevant to note that this case just involved the single, brief comment, whereas cases finding prosecutorial comments appealing to juror sympathies to be reversible have routinely involved repeated, cumulative comments. See, e.g., Garron v. State, 528 So.2d 353 (Fla. 1988) (multiple prosecutorial comments resulted in

reversal due to cumulative nature); Rhodes v. State, 547 So.2d 1201, 1205-06 (Fla. 1989) (multiple prosecutorial comments warranted reversal due to cumulative nature, while court noted that none of the comments standing alone might have been egregious enough to warrant reversal). Thus, the isolated nature of the instant case, coupled with the overwhelming evidence and the prompt admonitions to the jurors, all serve to put this case in a category in which any error must be deemed nonprejudicial and harmless.

III.

THE MURDER OF JULIO RIVAS WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The Appellant has argued that the evidence presented at trial was insufficient to prove that the murder was heinous, atrocious or cruel. He has stated that, he "did not torture the child either mentally or physically."

The record reflects that in his confession to the police, the defendant stated that, after driving around Key Biscayne for hours, he parked his car, raised the hood to pretend he was stranded, walked to the passenger side, picked up the child who came to him willingly and without struggle, and flung him over the bridge to drown him. The distance from the bridge to the water was 70 feet. The child floated for hours before his body was retrieved.

More importantly, prior to throwing the child over the bridge while still alive, the defendant also attempted to strangulate the victim, as he admitted to his "close friend," Salazar. The medical examiner corroborated the attempted strangulation by the bruises and hemorrhaging around the child's neck, and the condition of his internal organs. The cause

of death was asphyxiation, consistent with both strangulation and drowning. Apart from being strangled and drowned, the child had also previously been terrorized, by the struggle and injuries inflicted on him inside the car. The struggle inside the car was evidenced by the damage to the car's dashboard, which the defendant admitted had occurred on the day of the crime, and the medical examiner's testimony as to the numerous bruises and distinctive, geometric patterned abrasions on the child's legs, chest, face and head.

As stated by the trial court, the "sheer terror" of the five year old victim under these circumstances is beyond imagination. The above evidence is precisely that which justifies the finding that the murder was heinous, atrocious or cruel. The fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony. Adams v. State, 412 So.2d 850, 857 (Fla. 1982). Moreover, "it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986). As aptly stated by this Court in Adams, supra, "A frightened eight-year old girl being strangled by an adult man should certainly be described as heinous, atrocious, and cruel." See also, Holton v. State, 573 So.2d 284, 292 (Fla. 1990) (victim strangled by pieces of nylon cloth); Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991) (cause of death was asphyxiation due to smothering)

The Appellant's reliance upon Cook v. State, 542 So.2d 964 (Fla. 1989); Rivera v. State, 545 So.2d 864 (Fla. 1989); Amoros v. State, 531 So.2d

1256 (Fla. 1988); Antone v. State, 382 So.2d 1205 (Fla. 1980); and Mendez v. State, 368 So.2d 1278 (Fla. 1979), is misplaced. Each of those cases involved instantaneous or near instantaneous deaths by gunfire, during a robbery or burglary, where the victim and defendants were not acquainted. Cherry v. State, relied upon by the Appellant, involved the invalidation of this aggravating factor because the elderly victim had died of cardiac arrest during a burglary.

Assuming arguendo that this factor is found to be invalid, based upon the strength of the remaining aggravating factors, one of which has not been contested, and the relative weakness of the mitigating factors, it must be concluded that the trial court would have imposed the same sentence of death without the finding that the murder was heinous, atrocious or cruel, and that any erroneous finding of this factor must be deemed harmless beyond a reasonable doubt. Several cases have similarly found the striking of an aggravating factor to be harmless when the remaining aggravating and mitigating factors are considered. See, e.g., Robinson v. State, 574 So.2d 108, 112 (Fla. 1991); Holton v. State, 573 So.2d 284 (Fla. 1990); Gore v. State, 17 F.L.W. S247 (Fla. April 16, 1992); Rogers v. State, 511 So.2d 526 (Fla. 1987).

IV.

THE MURDER OF JULIO RIVAS WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL JUSTIFICATION.

In order to meet the standards of this aggravating factor, it must be shown that the defendant's actions were the product of a careful plan or prearranged design. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). The

trial court found that the defendant "executed" the victim "in a carefully planned act of vengeance," as evidenced by his statements to Landrian, Salazar, Munoz, and Martinez.(R. 250)

In his statement to Martinez and Munoz, the defendant stated that on the day of the crime he felt he had been "dishonored" at the hands of Ms. Alfara, because she had gone out with another male. He stated that, "the best way to get to a woman is through her children." (R. 305) He repeatedly asserted that at 7:30 a.m. on February 14, 1988, when he told the child to get into the car, he "intended" to drown the child, so as to make Ms. Alfara "remember him" and "be sorry for the rest of her life."

One half hour later, the defendant stopped for coffee and repeated his latter comments to Mr. Landrian. The unrefuted testimony by the witnesses who observed him at that time, Landrian and Morgan, was that the defendant was calm and appeared to be his usual self. The defendant then drove around the area that he had designated for the drowning for two to three hours, with the child. The defendant then called Ms. Alfara, ostensibly to inquire whether she would take him back. At no time did he ever say that he was in a rage, or "extremely emotionally disturbed," after this call. In fact, his subsequent actions demonstrate a careful prearrangement and presence of mind. After arriving on the bridge, the defendant parked and raised the hood of his car, pretending to be stranded, and in order to prevent passersby from observing his actions. He then carried out his previously expressed intent. After drowning the child, he went to the only friends whom he knew could and would help him. He bathed, changed his clothes, obtained money, went to the air port and travelled out of the country under an assumed name. It was only after committing the crime that the defendant appeared to be nervous in any fashion.

Thus, contrary to the Appellant's argument, this was not a crime of "passion" by an "extremely emotionally disturbed" individual. The sequence and defendant's own explanation of his actions support the trial court's finding of a cold, calculated, carefully prearranged plan of action. Rogers, supra; see also, Turner v. State, 530 So.2d 45, 51 (Fla. 1987) (CCP upheld where the defendant had threatened to kill the victims who were his estranged wife and her roommate. The defendant believed the victims had a lesbian relationship. Upon "reflection," he broke into their house, shot his estranged wife and stabbed her fleeing roommate. This Court noted that any assertion of "uncontrollable frenzy" was belied by the defendant's actions in hiding as a policeman drove by and resuming his attack thereafter); compare, Santos v. State, 591 So.2d 160, 163 (Fla. 1991) (Inference of "'cold' deliberation" was deemed negated when the unrebutted expert testimony established that the defendant's highly emotional and ongoing domestic dispute with the victim and her family had "severely deranged him." The unrebutted expert testimony also established that the defendant "was under extreme emotional distress at the time of the murders, was involved in a denial phenomenon, had an impaired capacity to appreciate the criminality of his conduct, and had an impaired capacity to conform his conduct to the requirements of the law." Additional corroboration of the defendant's deranged mental state was evidenced by factual testimony that similar stress had sent the defendant into a "psychotic state" during the early stages of his trial.).[1]

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[1] The Appellant's reliance upon 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), Floyd v. State, 497 So.2d 1211 (Fla. 1986), Hill v. State, 515 So.2d 176 (Fla. 1987), and Farinas v. State, 569 So.2d 425 (Fla. 1990), is misplaced. All of these cases involve situations where the record did not reflect any evidence of a prearranged design or heightened premeditation.

There was no pretense of "moral justification" in the instant case either. As aptly stated by the trial judge:

> Had the victim been Ms. Alfara, then perhaps there was a pretense of moral justification. But the victim was innocent of any wrongdoing, real or perceived. He was executed by the Defendant in a carefully planned act of vengeance.
>
> (R. 250) (emphasis added)

Killing a five-year-old child whom one has no connection to, and who has never harmed anyone, only to cause the child's mother sorrow, suffering and memories of the defendant for the rest of her life, does not constitute any pretense of moral justification. The trial judge was thus correct in his finding of this aggravating factor. See, Klokoc v. State, 589 So.2d 219, 220 (Fla. 1991) (CCP upheld where on the day of the crime the defendant stated that, if his wife did not call him that evening, "he would make her sorry for the rest of her life by killing their nineteen-year-old daughter," and then shot his daughter that evening as the latter slept).

Assuming arguendo that this factor is found to be invalid, based upon a comparison of the remaining aggravating factors, one of which has not been contested, and the mitigating factors, it must be concluded that the trial court would have imposed the same sentence even in the absence of this factor, and that any erroneous finding of this factor must be deemed harmless beyond a reasonable doubt. Several cases have found the striking of an aggravating factor to be harmless when the remaining aggravating and mitigating factors are considered. See, e.g., Robinson, supra; Rogers, supra; Holton, supra; Gore, supra.

V.

THE LOWER COURT DID NOT ERR IN FAILING TO FIND MITIGATING FACTORS.

The Appellant maintains that the lower court erred in failing to find the mitigating factors of extreme mental or emotional disturbance, and failure to appreciate criminality of conduct, which would then preclude the imposition of the death penalty in the instant case. The only mitigating factors found by the trial court were that the defendant had no significant history of prior criminal activity and that the defendant showed remorse in voluntarily returning to this jurisdiction for trial. (R. 251-52) The lower court expressly found that no other mitigating factors existed. (R. 251) As to the alleged connection between the defendant's rage at his former lover and the killing of the child, the lower court explicitly found that this was not a mitigating factor:

> Having provided support for Ms. Alfaro and her children, and having professed his love for her, he was enraged when he saw her with another man after she had told him previously to move out.
>
> In his mind, he had to avenge the perceived affront to his honor and dignity and focused on Julio as the means to that end.
>
> But this Court cannot conclude that either his distorted thinking or his epilepsy had any bearing on his killing of the child to the extent that he was under the influence of any mental or emotional illness at the time of the killing or that he was unable to appreciate the criminality of his act.

(R. 252)

The lower court properly rejected as a mitigating factor anything related to alleged emotional distress, rage, appreciation of the criminality of conduct, etc. These factors were not "reasonably established

by the greater weight of the evidence and there was substantial competent evidence to support the trial court's rejection of these circumstances as mitigating factors. See, Campbell v. State, 571 So.2d 415 (Fla. 1990); Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990); Gore v. State, 17 F.L.W. S247 (Fla. April 16, 1992). "Finding or not finding a specific mitigating circumstance applicable is within the trial court's domain, and reversal is not warranted simply because an appellant draws a different conclusion." Stano v. State, 460 So.2d 890, 894 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985);

This Court, in Adams v. State, 412 So.2d 850, 857 (Fla. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), rejected a similar argument:

> . . . the defendant says that there should be an independent determination and finding that at the time the crime was committed the defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was substantially impaired. The defendant says that his deteriorating marital situation and his wife's apparently blatant infidelity with one of his friends led to his extreme mental or emotional disturbance and clearly hampered his capacity to appreciate the criminality of his conduct or to conform it to the requirements of law. There is little, or no, causal relationship between defendant's marital problems and an eight-year-old little girl [the victim]. There was no testimony that defendant had suffered from mental illness in the past. . . . The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

(emphasis added). So, too, in the instant case, the trial court could properly find that there was no connection between the defendant's anger at his girlfriend and the infliction of violence on the young child. The fact that the trial court, in Adams, found the mitigating factor of extreme mental or emotional disturbance, in no way compels this Court to find that the trial

court erred in not finding it in the instant case. Not only are the facts on which the Adams trial court relied for this factor not set forth in this Court's decision, but this Court did not decree that the trial court had to find such a mitigating factor to exist.

By contrast, in the instant case, several facts support the trial court's rejection of any such factor. Not only was there no connection between the alleged rage against the mother and the killing of a totally innocent child, but the passage of approximately 24 hours, from the time that the defendant first saw Graciela with another man, until the time that he killed the child, provided time for rational reflection in which to dissipate the immediacy of any anger in a relationship of short duration such as that of the parties herein. Moreover, according to the witnesses who observed the defendant prior to the crime, and while he was discussing his intentions, the defendant appeared to be calm and was his usual self.

Accordingly, it must be concluded that the trial court correctly refused to find any mitigating factor based upon emotional or mental disturbance. Stano, supra; Lucas, supra. Cases upon which the Appellant relies are clearly distinguishable, as they involve situations in which the jury recommended life. See, e.g., Fead v. State, 512 So.2d 176 (Fla. 1987); Brown v. State, 526 So.2d 903 (Fla. 1988). To the extent that the defendant is saying that this alleged mitigating factor must provide the basis for overturning the death sentence, since the instant case involved a recommendation of death from the jury, reliance upon jury override cases is entirely improper. See, e.g., Hudson v. State, 538 So.2d 829, 831-32 (Fla. 1989); Lemon v. State, 456 So.2d 885, 888 (Fla. 1984).

As to the claim that the defendant did not appreciate the criminality of his conduct, that was repudiated by his immediate flight after the killing, his effort at concealment, by raising the hood of the car to avoid detection on the bridge, and his telephone conversations with the officers in which he admitted that he knew he was in trouble. Additionally, a similar claim regarding the ability to appreciate criminality of conduct was rejected by this Court in Adams, supra.

The Appellant also argues that he should not be sentenced to death "simply because his cultural background and upbringing conflicts with the values of this Court and our society in general." Supplemental Brief of Appellant, p. 8. The Appellant does not embellish what is being referred to as his "cultural background and upbringing." Presumably, this is a reference to one of his statements to Agent Munoz, that Munoz, as a Latin, would understand that the best way to get to a Latin woman is through her child. Most emphatically, the defendant is not receiving the death sentence simply because his cultural background and upbringing conflict with the values of American justice. The defendant is receiving the death sentence, not for those cultural values, but for the brutal murder which he committed.

The Appellant is apparently suggesting that there is something mitigating about seeking revenge on a Latin woman by brutally murdering her child. Such repugnant notions have no concept within American jurisprudence. Indeed, regardless of whether the Appellant's claim that some form of "Latin" characteristic exists has any veracity, there is clearly nothing mitigating about it. In essence, all that the defendant was saying was that a Latin woman would be hurt by inflicting injuries on her child. There is nothing cultural, Latin or otherwise, about that. Maternal pain upon the murder of a

child is undoubtedly a universal characteristic. One need only turn on the daily news to see the anguished faces of mothers in any nation, upon learning of deaths of children through the ravages of war, urban riots, natural catastrophes or automobile accidents.

Furthermore, even if there were something uniquely "Latin" about such maternal bonds, this Court has no reason to attribute any mitigating value to the defendant's effort to destroy that which is most important and personal to his former girlfriend. Mitigating factors "must, in some way, ameliorate the enormity of the defendant's guilt." Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). There is nothing referred to in the defendant's cultural background, which in any way ameliorates the enormity of his guilt. Lest this Court become involved in a mutlicultural thicket, by finding that some form of "macho" revenge is sanctioned, or understood, in other societies, and therefore deserves mitigating value in American courts of law, let it be carefully considered that such reasoning would inevitable lead down a truly repugnant path. If such "macho" revenge were deemed to be of mitigating value by virtue of another culture's acceptance of it, would we not then have to similarly attribute mitigating value to a German neo-Nazi who kills an American Jew in Florida and claims that his culture instilled and sanctioned such a value in him? Would this Court have to attribute mitigating value when a South African in Florida killed a black person who insulted him and who then claimed that his culture sanctioned violence against blacks? Those who enter this country are expected to abide by its laws and norms. Practices which, even if accepted in other countries, are contrary to this nation's laws, have no entitlement to any form of mitigating value in the context of a brutal murder.

The Appellant's brief also indirectly suggests that it is asserting a claim that the death penalty in the instant case is disproportionate when compared to that imposed in other cases. In this case, three strong statutory aggravating factors exist: the murder was cold, calculated and premeditated; the murder was especially heinous, atrocious or cruel; and the murder was committed during the course of a felony. On the other hand, there is but one statutory mitigating factor, the absence of a significant prior criminal history, and one nonstatutory factor, remorse. As to the remorse, that factor is not even particularly strong. As noted by the trial judge, although the defendant did voluntarily return to face the charges, he was not aware of the penalty. Moreover, once he testified at trial, he was no longer even admitting to having killed the child. Such trial testimony is hardly consistent with a claim of remorse, and significantly undermines whatever remorse might previously have been demonstrated. As in Mann v. State, 17 F.L.W. S220, 221 (Fla. April 2, 1992), the defendant's "real complaint is that the judge did not give greater weight to his remorse, but the weight to be given a mitigator is left to the trial judge's discretion."

The Appellant also suggests that the fact that he confessed and voluntarily returned should be considered as a factor in overriding the death penalty. There is nothing inherently mitigating about the fact that a defendant has confessed. Many defendants in murder cases, including many who have received death penalties, have similarly confessed, without having the confession negate the death sentence. Indeed, if a confession could preclude the imposition of the death sentence, few defendants would not confess. To the extent that the confession is tied into the defendant's remorse, that is

fully discussed above, and there is no basis for the defendant to complain about the minimal weight which the trial judge accorded the remorse.

The Appellant also asserts that if Florida had sought to extradite the defendant, the death penalty could not have been imposed. That, however, is a moot question in this case, as extradition was never at issue.

In view of the substantial aggravating factors, and the relatively minimal mitigating factors, the sentence of death in this case must be deemed proportional with that imposed in other cases. See, e.g., Adams, supra (death sentence for killing of young child affirmed with three aggravating factors - heinous, atrocious or cruel; murder committed during felony; murder committed to avoid arrest - and three mitigating factors - no significant prior criminal history; defendant acted under extreme mental or emotional disturbance; and defendant's youth); Mann v. State, 17 F.L.W. S220 (Fla. April 2, 1992) (death sentence for killing a young child affirmed with three aggravating factors - prior violent felony, murder during commission of felony, and heinous, atrocious or cruel - and several nonstatutory mitigating factors, including remorse); Arango v. State, 411 So.2d 172 (Fla. 1982) (single aggravating factor of heinous, atrocious or cruel and single mitigating factor of absence of prior criminal activity, resulted in affirmance of death sentence). Most significantly, it can readily be seen that the mere absence of a significant prior criminal history, and a questionable showing of remorse, can in no way be deemed to offset the enormity of the killing of a young child, given the several aggravating circumstances that exist in the instant case. (SR. 591-592; R. 135-155, 157-183)

CONCLUSION

Based on the following reasons and authorities cited herein, Appellee respectfully submits that the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Brief of Appellee was furnished by mail to REEMBERTO DIAZ, Esq., Diaz & Batista, P.A., 1840 West 49th Street, Hialeah, Florida 33012 on this 11 day of May, 1992.

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