THE SUPREME COURT OF FLORIDA

CASE NO. 77-668

GUILLERMO OCTAVIO ARBELAEZ,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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

REEMBERTO DIAZ, ESQ.
DIAZ & BATISTA, P.A.
Attorneys for Appellant Arbelaez
1840 West 49th Street
Suite 105
Hialeah, Florida 33012
(305) 556-0005

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I

The State's argument that Appellant's telephone conversations with police officers, and subsequent confession did not violate his constitutional rights to remain silent, and to counsel, lack merit and should be rejected.

Appellant concedes that he was not in custody at the time he engaged in conversations with Detectives ***Martinez, Cadavid,*** *and F.B.I., Agent* ***Munoz.*** *The Court however, would undoubtedly agree that Appellant was in fact the target of a criminal investigation regarding the death of* ***Julio Rivas.*** *[1]*

The State is wrong in relying on ***Reichman v. State,*** *581 So.2d 133 (Fla. 1991). Clearly,* ***Reichman*** *can be distinguished from the case* ***sub judice*** *for several compelling reasons. Most importantly the fact that* ***Reichman*** *was not the target of a criminal investigation at the time he was questioned by police. Appellant, unlike* ***Reichman,*** *was not only a target of a criminal investigation, he had already been indicted.*

---

[1]. Appellant was indicted of first degree murder charges for the death of ***Julio Rivas*** *on* ***February 18, 1989.*** *[R.1-2], [R.350]. The Indictment was returned just four (4) days after the body of* ***Julio Rivas*** *was discovered, and a month before the conversations with the officers took place.*

In examining conversations between Appellant and the officers, another striking and distinguishing factor to ***Reichman*** *becomes apparent. In the case* ***sub judice****, the Appellant specifically inquired about his legal rights and what he could expect from the American Criminal System.* ***[S.R. 674-679], [S.R. 455-459].*** *All the officers involved in convincing the Appellant to return to the United States intentionally elected not to inform him that he had been indicted on first degree murder charges and that he was facing the death penalty for that crime. They intentionally elected not to advise the Appellant of his constitutional rights, despite his repeated inquires. They did explain to Appellant his sixth amendment rights to counsel, but that was obviously an attempt to reassure him that it safe to return to the United States.*

It is clear from the evidence of this trial that the officers used deceit and manipulative tactics in their efforts to lure the Appellant to return to the United States. The tactic was similar to the "christian burial" technique that has been traditionally criticized by the Court when used in connection with analyzing fifth amendment violations.

The State concedes at page 28 of its brief that the officers were giving information regarding his rights to the Appellant. The information given however, was only partially correct and designed not to educate the Appellant as to his constitutional rights so

that he could make a voluntary and intelligent decision. Instead, they wanted to gain his trust, get him to admit his crime, and convince him to return to this jurisdiction.

The State would also suggest that Appellant's request of the officers that his conversations with them be kept in "strict confidence" meant only that the officers should not discuss his statement with the press. That argument is clearly disingenuous and not supported by the evidence in this case. Nowhere in the record is such an assertion plausible. Had Appellant been advised of his rights at that point, he would have known that this particular conversation was not confidential.

The State suggests that Appellant's argument that miranda warnings were mandated because the criminal investigation regarding the death of ***Julio Rivas*** *had focused directly on him was rejected in* ***United States v. Long****, 866 F.2d 402 (11th Cir. 1989). That statement is unfortunately correct insofar as the federal judiciary is concerned. The same is not true however, in connection with this Court's prior rulings.*

This Court has never rejected the doctrine enunciated in ***B.L. v. State****, 425 So.2d 1178 (Fla. 3d D.C.A. 1983); and* ***Mosely v. State****, 503 So.2d 1356 (Fla. 1st D.C.A. 1987). This Court has also never adopted the reasoning in* ***State v. Aliotto****, 588 So.2d 17 (Fla.*

5th D.C.A. 1991). This Court's ruling in ***Reichman*** *does not compel a conclusion that* ***Alioto,*** *and not* ***B.L.,*** *or* ***Mosely*** *is the law of the State.*

Alioto, *like* ***Reichman,*** *involved activities by police officers in the course of investigating a crime scene. Indeed,* ***Aliotto*** *was not even a suspect at the time she engaged in conversations with the police officers that resulted in her making incriminating statements.*

Finally, in determining that Appellant was entitled to certain constitutional rights at the time he was arrested, does not impose a significant limitation of police investigations. In the case ***sub judice*** *no police investigations were taking place. The Officers had already indicted the Appellant, the purpose of their conversations with Appellant was simply to get him to confess to the crime charged and to convince him to return to the United States. The latter does not require an advise of constitutional rights but the former certainly does. See also* ***Traylor v. State,*** *596 So.2d 957 (Fla. 1992).*

II

The unsolicited statements by the witness calling the Appellant a murdered and a son of a bitch were a dramatic outburst of rage and anger that unequivocally affected the rights of the Appellant to a fair trial. ***Rodriguez v. State****, 433 So.2d 1273 (Fla. 3d D.C.A. 1983). The guilt or innocence of a defendant must be determined in an environment that assures a truth finding process and that justice will be served.*

The State in its argument that ***Chaney v. State****, 267 So.2d 65 (Fla. 1972), upholds the Court's ruling with regard to his request for a mistrial fails to consider the fact that the Court in* ***Chaney*** *was dealing with an out of court statement by a person not a witness in the trial. Similarly, the State fails to point out in relying on* ***Messer v. State****, 330 So.2d 137 (Fla. 1976), that the outburst in question was not even heard by the jury.*

III

*The murder of **Julio Rivas** was a senseless and abominable crime. The fact that it was a child is the single most painful factor. But as sad and as senseless as it was; it was not especially heinous, atrocious, or cruel. This factor has been generally applied to tortious murders, evincing a desire to inflict a high degree of pain. It has also been applied to murderers who appear to take pleasure in the suffering of a human being. See generally **Jackson v. State**, 530 So.2d 269, 273 (Fla. 1988); **Cherry v. State**, 544 So.2d 184, 187 (Fla. 1989).*

The State's argument in support of its position that the capital felony was especially heinous, atrocious, or cruel is based on the assumption that the victim was strangled. The evidence introduced at trial, contrary to the State,s argument was not convincing in that respect. The testimony of the medical examiner was that the victim died of asphyxiation. However, it was clearly pointed out that asphyxiation could occur from strangulation and or drowning. The alleged confession of the Appellant clearly explains that Appellant did not strangled the victim. He states that he grabbed the victim and in seconds threw him over the bridge. The child never had a chance to realize what was happening.

IV

The State raises no addition legal issues that merit addressing in this Reply Brief in its argument numbered IV and V. It addresses, primarily issues of fact that have dealt with in the briefs filed.

CONCLUSION

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

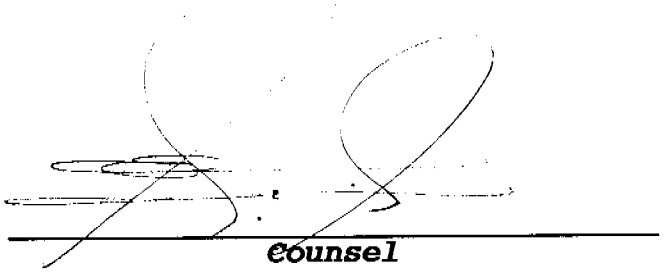
Respectfully submitted,

DIAZ & BATISTA, P. A.
Attorneys for Appellant
1840 West 49th Street
Suite 105
Hialeah, Florida 33012
Telephone: (305) 556-0005

By _____
Reemberto Diaz, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General at 401 N.W. 2nd Avenue, Miami, Florida 33128, on this 8th day of July, 1992.



Counsel