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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,888

THE STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

MARIO ALBO LARA,

Appellee/Cross-Appellant.

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

BRIEF OF APPELLANT/CROSS-APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RALPH BARREIRA
Florida Bar No. 0374490
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rhodes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

Appellant/Cross-Appellee, the State of Florida, was the prosecution in the trial court and Appellee/Cross-Appellant, Mario Albo Lara, was the defendant. The parties will be referred to as they stood in the lower court. The 1884 page record on appeal, which includes the transcript of the Rule 3.850 evidentiary hearing, will be designated by the symbol "R". All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

The defendant's convictions and sentence of death were affirmed by this Court on direct appeal in Lara v. State, 464 So.2d 1173 (Fla. 1985). On May 14, 1987, the defendant filed a Motion to Vacate Judgment and Sentence pursuant to Fla.R.Crim.P. 3.850 (R.54-129). On July 15, 1987, the defendant filed a "supplement" to his 3.850 motion along with an appendix (R.131-213). The State filed a response (R.219-246). The trial court conducted an evidentiary hearing on the defendant's 3.850 motion (R.850-1884). The defendant filed a post-hearing memorandum (R.770-797), as did the State (R.798-827). The trial court entered an order granting relief as to the sentence on the basis that trial counsel's performance at the sentencing phase was ineffective for failing to present certain mitigating evidence (R.830-832), but the court denied relief as to the convictions. The State filed a motion for rehearing (R.833-836), which was denied (R.840). The State appealed the order insofar as it granted relief as to the sentence, and the defendant cross-appealed as to the portion of the order denying relief from conviction. This appeal follows.

STATEMENT OF THE FACTS

The testimony at the evidentiary hearing may be summarized as follows:

Dr. Joyce L. Carbonell

Dr. Carbonell is an Associate Professor of Psychology at Florida State University (R.924). She evaluated the defendant on three occasions in 1988 (R.933). She performed several psychological tests on the defendant. The defendant's performance varied widely, with his basic intelligence score in the normal range (R.937-939). The defendant's score on the MMPI was consistent with a schizophrenic personality (R.939, 940).

Dr. Carbonell diagnosed the defendant as "not a well man" (R.945), whose condition was difficult to diagnose, due to the defendant's refusal to discuss or admit his problems. The defendant has a persistent schizophrenic disorder with chronic auditory hallucinations, and a history of self-abuse (R.946). He does have periods of normal behavior. The defendant experiences dissociative reactions typical of children who have been seriously abused. He has developed an alternative reality indicative of severe psychosis (R.947). He is subject to auditory hallucinations in which the devil orders him to act (R.948). His family history displays a pattern of mental illness, and the defendant was hospitalized and treated in Cuba

for mental illness. His condition is best described as "schizophreniform", meaning his psychotic episodes are more frequent than a typical borderline psychotic personality (R.949). It is extremely difficult to determine the length of his psychotic episodes.

When the defendant was approximately 10 years old, the devil or voice which controls him ordered him to jump out of a tree (R.951). The defendant has been hearing the voice ever since, and the defendant calls the voice "Bermudez" (R.952). Bermudez is a legendary figure that haunts a lake near the defendant's home in Cuba. The defendant's family reports that he would act normally and then suddenly turn into a madman (R.953). Such sudden behavioral changes are typical of schizophrenics. Bermudez would have total control over the defendant (R.956), which is typical of command hallucinations. The defendant does not want to admit his illness, which is why he became angry when his attorney discussed the insanity defense with him (R.958).

The defendant had an impoverished and brutal upbringing at the hands of his father (R.962), as did his brother. There is little chance that a child under those conditions will develop normally (R.966). The defendant has a history of self-abusive behavior, including possibly a suicide attempt (R.967). Around the period of the murder, his friends and relatives reported alternately normal and then bizarre behavior (R.968). The

defendant was also using cocaine and other drugs at that time, although the amount is unknown, and drug use could only aggravate his illness (R.969).

In her opinion, at the time of the offense, and for years previous, the defendant had suffered from an extreme emotional disturbance. Additionally, because he was suffering a psychotic episode at the time of the offense, he could not conform his conduct to the requirements of law (R.971). The defendant was also insane at the time of the offense because his will was overborne by the command hallucination which ordered him to kill (R.972, 973). The defendant reported that he found himself at the top of the stairs (his hog-tied, raped and stabbed girlfriend was dead in the upstairs bedroom), with his brother's gun, and Bermudez ordered him to shoot the first person he saw (the second victim, for which he received the death sentence). The defendant denied any involvement in his girlfriend's death (for which he was found guilty of second degree murder and sexual battery), (R.973-975), saying he loved her and could not have killed her. In her opinion, the defendant does hear the voice of Bermudez (R.978, 979). The defendant believes he must obey the voice, and does so automatically (R.986, 987. It is not a question of whether the defendant knows right from wrong: he simply has no choice, in his mind, but to obey (R.987).

As to competency at trial, Dr. Carbonell hesitated to offer an opinion because it would have required observation of the defendant at that time (R.990). Based on his cultural, language, and mental difficulties, she states it is "really questionable" whether the defendant was competent (R.991-996).

CROSS EXAMINATION

Dr. Carbonell has been retained by C.C.R. in approximately fifteen cases (R.1007). The defendant has a full scale I.Q. on the E.I.W.A. test of 110 (R.1027, 1028), and she could not determine if the defendant had any brain damage. The Bender-Gestalt test was within the normal limits. She was aware that the shooting (downstairs) victim was a state witness in the defendant's upcoming rape trial, in which he was accused of raping her sister (R.1029). She did not believe this was a motive to murder her, because the defendant believed he would be found innocent of the sister's rape based on consent (R.1030). She was aware that the defendant and his girlfriend had fought because of the pending rape charge, and she was also aware that the defendant had threatened to kill his girlfriend and another woman, Margarita Martinez, earlier the same day that the murders occurred (R.1034). Dr. Carbonell again emphasized that the defendant steadfastly maintains he did not kill his girlfriend (R.1037). She was aware that the defendant fled after the murders (R.1040). When she questioned the defendant about his

pending robbery charge, he stated "They couldn't identify me" (R.1041).

EXAMINATION BY THE COURT

The defendant was not under medication during trial or at the time of her evaluations, as far as she knows (R.1058). There is no evidence of brain damage (R.1059).

Dr. Juan Clark

Dr. Clark testified as to the perception of "marielitos", Cuban refugees who arrived via the 1980 mariel boatlift, by the general population and other earlier arrivals from Cuba (R.1072-1085). Had he been called as a witness, he could have helped dispel the popular negative myths about marielitos (R.1086).

Carmelina Lara

She is the defendant's cousin, and has known him since birth (R.1095), and saw him every day as they were growing up. The defendant's father beat him and his other children repeatedly (R.1096), but especially Mario. When Mario was born his head was swollen, and it was several days before the swelling receded (R.1100). Mario was very moody as a child. Often he would fight, and other times he was very withdrawn (R.1101). His father hit him with ropes and even threw a machete at him (R.1102). Sometimes his father would tie him up and beat him.

His father burned him once and broke his arm (R.1104). Mario would run away to avoid his father. Mario began drinking alcohol as a teenager (R.1106). Mario was poorly fed and would sneak over to her house for food (R.1108). Mario was not a normal child, but very strange (R.110). Mario was not in trouble with the police in Cuba, but was put in prison for deserting the army (R.1114, 1115). She did not volunteer to Mr. Adelstein (trial counsel) the information about the defendant's mental problems, because she was ashamed (R.1121).

Dr. Simon Miranda

Dr. Miranda is a psychologist who specializes in child abuse and neglect (R.1147). He performed various tests on the defendant in 1987 and 1988, and found that, from the standpoint of American culture, the defendant's level of functioning is borderline, whereas compared to the rural Cuban population, his intellectual function is average (R.1155). His measured I.Q. on the E.I.W.A. test was 99 (R.1155). His conclusion is that the defendant functions in our society in the borderline range, with potential for greater intellectual development (R.1157). The defendant's abnormal relationship with his father retarded his intellectual growth (R.1159).

The results of MMPI and MCMI testing revealed serious psychopathology in the defendant (R.1163), consistent with the diagnosis of borderline personality disorder, with a definite

schizophrenic disorder present (R.1163). The defendant scored in the deviant range for potential child abuse, indicating a history of abuse by his own parent or parents (R.1164), and also showed high susceptibility to alcoholism. The defendant has strong passive aggressive tendencies, with a potential for violent explosions (R.1166). The findings indicate a definite schizophrenic disorder.

The defendant suffered from incredible physical abuse as a child, which shaped his personality disorder (R.1169). The defendant trusted no one, and developed paranoid tendencies. The defendant developed reckless and self-destructive behaviors (R.1171). The voice of Bermudez came to the defendant at an early age, it was his ally and mentor, and was part of the defendant's coping mechanism (R.1172). Virtually all of the defendant's psycho pathology and intellectual and moral underdevelopment are due to his abusive upbringing (R.1175).

The defendant does have periods of normal functioning, especially when in a stable environment (R.1178). The defendant has also shown indications of selective amnesia, the ability to suppress the memory of ugly events (R.1180).

Bermudez would often tell the defendant to run away, or alternatively to kill or be killed, events which the defendant would then forget (R.1181, 1182). The voice was a way of coping

with unpleasant events, and was very limited in time and place (R.1182). It still speaks to him occasionally. The voice is the defendant's unconscious mechanism for casting responsibility for his actions on an outside power (R.1184). It gives him strength to do what he otherwise could not do himself. When the defendant was at the top of the stairs, the voice said "The first person that you meet, the first person that you encounter, is the one who did this (the rape-murder of his girlfriend in the upstairs bedroom). Kill that person."

Dr. Miranda believes the defendant was insane when he shot the second victim at the bottom of the stairs, because in the defendant's mind, he had to obey Bermudez (R.1185, 1186). However, Dr. Miranda cannot tell if the defendant knew right from wrong, or whether he was indifferent to that distinction. The defendant was insane because he had no conscious power to resist (R.1186). However Dr. Miranda does note that the defendant knew he should be punished for the murder, which is one reason he cannot discern whether the defendant knew the shooting was wrong, but was compelled to do it nonetheless (Id).

Dr. Miranda believes that the defendant was suffering from an extreme emotional distress, and unable to conform his conduct to the requirements of law, at the time of the murder (R.1187). The defendant's use of drugs and alcohol on the day of the murders also contributed to the severity of his psychotic

reaction. The defendant refused to admit any involvement in his girlfriend's murder (R.1190).

As to competency, he went through the McNaghten competency test with the defendant. In his first interview with the defendant, Dr. Miranda had felt that he was probably competent (R.1193). At the time he had not gone through the specific criterion for competency with the defendant.

At this point in his testimony the trial court conducted its own inquiry of Dr. Miranda. The court asked when the defendant, for the first time, disclosed the information about Bermudez ordering him to shoot the victim. Dr. Miranda stated that to his knowledge he was the first person to learn of the participation of Bermudez from the defendant. The defendant specifically told him that he never told defense counsel about Bermudez (R.1203, 1204). Dr. Miranda stated that his amnesiac reaction to killing his girlfriend might be an indication of guilt, and hence knowledge that it was wrong (R.1207).

Again on direct examination by present counsel, Dr. Miranda stated that one of the problems with the defendant is his need to conceal the voice and anything else that would make him appear crazy (R.1217). The defendant is not malingering, in his opinion (R.1219), and the defendant is not fabricating Bermudez (R.1224).

Returning to competency, Dr. Miranda believes the defendant was not competent because he was "psychologically absent" from much of the proceedings (R.1226). This came about because of his unfamiliarity with the system, his borderline intellectual functioning, language barrier, and feelings of futility (R.1226, 1227). When the defendant heard adverse testimony which he considered lies, he figured this was just like in Cuba, and lost interest in the proceeding (R.1227).

CROSS EXAMINATION

The defendant had told Dr. Miranda that he took 10-15 qualudes a day, which Dr. Miranda acknowledged was impossible (R.1256). Because the defendant denied killing his girlfriend, Dr. Miranda never considered whether there might be a rational motive for that murder (R.1261). Dr. Miranda is aware that the defendant's girlfriend was threatening to leave him because of his rape charge (R.1263), and that the downstairs victim was a witness against him in that case (R.1264). Dr. Miranda does not attach importance to these facts, because the defendant told him he was never worried about the rape charge (Id).

When the defendant heard testimony he disliked, there "may" have been a conscious decision to tune out the proceedings (R.1267, 1268). The defendant was referring to witness Tomas Barcelo, the only eyewitness to the shooting who testified (the

defendant's brother Arsenio refused to testify, and was jailed for contempt). The defendant understood the significance of Barcelo's testimony, which affected the defendant's decision to tune out (R.1268). The defendant did not specify what part of the trial he didn't understand, he just said "I could not follow the thread of these proceedings" (R.1269). When the defendant began the trial he thought the proceedings were fair, but when he heard damaging testimony he believed he was being railroaded like in Cuba (R.1273).

EXAMINATION BY THE COURT

Dr. Miranda agrees that the McNaghten competency test is designed to be administered pretrial, and many of its questions are not appropriate for a retrospective evaluation (R.1279).

Art Koch

Art Koch is an Assistant Public Defender who began litigating capital cases in 1982, the year the instant trial occurred (R.1305). His purpose in testifying was to support the defendant's allegation that trial counsel was ineffective for failing to request sequestration of the jury during deliberations. He testified that the legal basis for such a request existed since the Florida Supreme Court's decision in Raines v. State, 65 So.2d 558 (Fla. 1953), (R.1310). In his opinion, it would be deficient conduct for a defense attorney, in

1982, to fail to request sequestration during jury deliberations in a capital case (R.1314), even though the Florida Supreme Court did not rule that such sequestration was required until 1984 (R.1316) Livingston v. State, 458 So.2d 235 (Fla. 1984). Under questioning from the trial court, Mr. Koch admitted that the Public Defender's Office had no policy in 1982 as regards requests for sequestration in capital cases, nor had he seen any memorandums circulated on the subject (R.1322-1324). Mr. Koch does not remember the issue surfacing in many cases up through 1982 (R.1330), nor was it normal practice for jurors to be sequestered during that time period (Id).

Dr. Edmund Cava

Dr. Cava is a psychiatrist who first evaluated the defendant in 1982 prior to trial (R.1355). He was limited in his evaluation because the defendant would not discuss the events surrounding the murder, as per his attorney's instructions (R.1356). In his recent contacts with the defendant he was provided with addition background material, which confirmed his initial impression (in 1982) that the defendant suffered extreme cruelty as a child and an incredibly abusive upbringing (R.1358, 1359). Although trial counsel did not provide the extensive background materials provided subsequently by C.C.R., this new information merely confirmed and amplified what he already knew (R.1360). Dr. Cava had received the same type of information in 1982 from the defendant's sponsor, Dr. Amigo (R.1361).

Dr. Cava knew from his initial evaluation that the defendant was seriously disturbed, and that his use of drugs and alcohol compounded the problem (R.1362). In interviewing the defendant in 1988, six years later, considerable distortion and inaccuracy is expected (R.1364). In his 1982 evaluation, he diagnosed the defendant as suffering a borderline personality disorder (R.1388). Such individuals have periods of normal functions but are prone to destabilization into psychotic episodes (R.1390). Drug use can contribute to the onset of such episodes (R.1391). In 1982 Dr. Cava noted that the defendant had at least one such schizophrenic-psychotic episode while in Cuba. (R.1392). Schizophrenia was once thought to be primarily hereditary, but now childhood trauma and experiences are believed to play a more significant part (R.1393). Dr. Cava took all this into consideration in his 1982 diagnosis. The symptoms were obvious. The defendant was not psychotic during the 1982 interview, but Dr. Cava could not speculate if the defendant had suffered a psychotic break during the murder, because the defendant would not discuss the crime (R.1394).

In 1982 the defendant had reported hearing voices in Cuba (R.1395). The reports of family members provided by C.C.R. confirm that the defendant suffered periodic psychotic episodes during his upbringing in Cuba (R.1397).

In 1988 the defendant's memory of the offense was "Kaleidoscopic and confused (R.1400). The defendant described periods of amnesia, which in some cases is indicative of a multi-personality disorder (R.1402). The defendant has experienced times where one part of his personality orders the other to act (R.1403). In 1982, the only time the defendant admitted hearing voices was in the hospital in Cuba. Dr. Cava learned from the reports of Dr. Miranda and Joyce Carbonell that the defendant had been hearing a specific voice throughout his life (Id). The defendant reported a serious substance abuse problem since entering the United States (R.1406), and that he used cocaine within an hour of the offense. Based on the defendant's description, Dr. Cava believes the defendant was in a "toxic psychotic state" at the time of the murders (R.1408). The defendant's history of head trauma suggests the possibility of brain damage, but only extensive testing could reveal its existence (R.1409).

The defendant has a very complex, multiple psychiatric syndrome, a "grab bag" of psychopathology (R.1410). There is a high probability he suffered from a mental defect at the time of the offense (R.1411). The defendant gave the following version of events:

Q. Could you relate to us what you have learned about the offense recently from Mr. Lara?

A. Do you want me to describe what he remembers?

Q. Sure.

A. Or what he tells me that he remembers?

Q. Sure.

A. Well, the story ---

Q. Bringing in to bear what you have already indicated with the problems of memory and so forth.

A. Including how he had spent the day before the incident or just the incident itself?

Q. Just the incident itself, and then we can break it down

A. All right. The story that he gave is that after having made a number of social calls during the course of a day, where he repeatedly partook of intoxicants of different kinds, hallucinogens, alcohol, etcetera, etcetera, he finally had a last snort.

THE COURT: What type of hallucinogens?

THE WITNESS: Marijuana exclusively, as far as I know.

THE COURT: Okay.

THE WITNESS: Marijuana is a hallucinogen.

THE COURT: Okay.

THE WITNESS: Of course, depending on the dosage, it can equal LSD.

But, anyway, he had been smoking all day practically, but toward evening he had also had some cocaine, smoked

it and inhaled it, sniffed, and then he finally had sniffed some cocaine with a friend of his in Hialeah just before going home.

The story he tells me is that he arrived at his home, where a couple of friends of his were using his apartment downstairs, so he was sleeping in an empty room upstairs on the second floor. Apparently it is a rooming house he was staying at or an apartment house.

So he went upstairs on his way to his room, and he found one of the other empty rooms -- the door was open, and he looked inside, and there he found the corpse of Olga, his girlfriend. He checked her out. He found that she was bloody. He substantiated that she was dead, and apparently at that moment he heard a voice saying, "The first person you run into as you leave is the man who did this to you."

"This to you" in terms of having killed his girlfriend.

BY MR. NOLAS:

Q. Man or person?

A. "First person." He did not say "man." It was Bermudez's voice.

Then what he describes is sort of having gone into some sort of trancelike altered state where he could not even say for sure if he had gone down the stairs or flown out the window, but the next thing he describes is having found himself downstairs with a gun in his hand, and he had just apparently -- he claims that he does not remember having shot the second victim. Griselda I think it is. I have to look it up.

THE COURT: Yes.

THE WITNESS: He found himself with a gun in his hand, and here was this other person, this other young woman dead in front of him.

His brother came over to him, put his arm around him, took the gun away from him, and said, "You have just disgraced yourself." And he realized that he had apparently shot the second person.

BY MR. NOLAS:

Q. Did he say that his brother took the gun away from him?

A. Let me review my notes. That is what I am remembering right now.

THE COURT: Do you speak Spanish or were you using an interpreter?

THE WITNESS: No. I speak Spanish.

THE COURT: Are your notes in Spanish or English?

THE WITNESS: They are in English.

(Thereupon, there was a brief pause in the proceedings, after which the following proceedings were had in the presence of the Defendant:)

THE WITNESS: Okay. "When the voice tells me to do this, I don't know if I went downstairs by the staircase, by the window or what. The next thing I knew I was downstairs with a gun in my hand and the dead woman in front of me. I returned to my reason. I saw the gun in my hand, the dead woman." And I put in brackets, "Grisel Fumero."

Mario goes on to say, "I thought I must have done it."

He then explained that the downstairs apartment that he was using, he was renting, had no electricity because Francisco Rizo had not paid the electric bill even though he had given him the money to do so. So there was only light coming through a kitchen from a cord that was brought from upstairs.

He adds that his brother, Arsenio Albo Lara, was sleeping in the living room on a mattress on the floor. "It seems he was awakened by the shots." He evidently said, "you disgraced yourself, you disgraced yourself," and he came over, took the gun from me. I said, 'I'm going from here.' I entered in my car and left."

BY MR. NOLAS:

Q. And he went away.

A. That is his account, yes.

Q. Did he deny responsibility to you for killing Grisel? Did he say, "I'm not responsible for this," or did he say, "I did this; I must have done this," or something to the effect?

A. His description, it is as if he came out of an altered state, and he saw the evidence, and he acknowledged that he must have committed that crime, and also his brother informed him that he had, so he accepted that.

(R.1411-1415).

Dr. Cava does not know if the defendant knew right from wrong at the time of the crime, and he doubts that moral considerations entered into the defendant's mind at that time

(R.1416). The defendant was being driven by uncontrollable impulses at that point (Id). The voice kept telling him to get away after the murder (Id).

The defendant suffered an extreme emotional disturbance at the time of the crime and throughout his life (R.1418, 1419). The defendant has been unable to conform his conduct to the requirements of law also throughout his entire life (R.1419, 1420).

As to competency, in 1982 he felt the defendant was competent to stand trial, based on the defendant's positive interactions with his trial counsel (R.1424). Dr. Cava still believes the defendant is competent to stand trial, as he has no gross logical deficiencies, he is alert and acclimated, and understood the nature of the charges and legal proceedings (R.1425). The new materials provided by C.C.R. only amplified what he already knew (R.1427).

CROSS EXAMINATION

In 1982, the defendant specifically told Dr. Cava "I didn't do the crime, and I don't want to talk about anything related to that" (R.1428). The defendant also said he had not heard any voices since entering this country (Id). The defendant did not tell anyone about Bermudez until 1987, when examined by Dr.

Miranda (R.1430). In 1988 the defendant told Dr. Cava that he didn't discuss Bermudez in 1982 because his attorney told him not to discuss the crime (R.1432). Bermudez is the devil, and has been ordering him to do things since he was a child (R.1433). The only indication of the defendant's drug use the day of the murders is from the defendant (R.1435). Dr. Cava agrees that the defendant's version of the events is grossly inconsistent with witness Tomas Barcelo, who stated the defendant arrived at the house with his girlfriend, they went to the upstairs bedroom together, and the defendant emerged a half hour later alone (R.1436). Dr. Cava agrees that the defendant might simply be lying, or it could be "retrospective falsification" or confusion (R.1437).

Heriberto Reyes Lemos

Dr. Lemos knew the defendant his whole life, as the defendant's father worked for him (R.1471). When the defendant was born his head was swollen. The defendant's father punished the defendant very harshly (R.1473). The defendant did crazy things, and his father would punish him, like by tying him up and hitting him with branches (R.1474). The defendant would sometimes injure himself on purpose. His father would give him impossible jobs, then punish him because he couldn't do them (R.1476-1478). Mr. Lemos states that he is ashamed to talk of such matters (R.1479). The defendant began drinking when he was 12 years old (R.1480). The defendant cut himself on purpose

(R.1483). The defendant ran away from the army but was captured and jailed (R.1484). The defendant would become violent for no reason, and he spent a lot of time by himself (R.1488). No one contacted him about the defendant's trial, and he would have testified if asked (R.1490).

Carmen Bal Albo

Ms. Albo is the defendant's sister-in-law, and is married to the defendant's brother Arsenio (who was an eyewitness to the crime, but refused to testify against the defendant and was jailed for contempt). She met the defendant in 1980. The defendant acted very strangely, and would get angry for no reason (R.1497). He spent a lot of time alone. He never told her about hearing voices (R.1499). The defendant smoked marijuana all the time. The defendant was obsessed with his wife and children in Cuba (R.1500), and was under a lot of stress. He was upset that the police suspected him of bombing Dr. Amigo's pet store (his sponsor). On the night of the defendant's convictions, she and Rene Lara and Carmelina Lara all went to his lawyer's office (the sentencing phase was set for the next day), and they told the lawyer all about the defendant's abusive childhood, drug and mental problems (R.1502, 1503). She told the lawyer she was willing to testify, but she was not called (Id), nor asked to locate anyone else. If the lawyer had asked, she would have helped raise money to pay another doctor to examine the defendant (R.1506). His brother and sister also have mental problems (R.1567, 1568).

On cross-examination, she denied being angry with the defendant because her husband was jailed for refusing to testify (R.1512), or telling the defendant's lawyer she was angry with the defendant. She does not know if anyone else in the family was angry with the defendant.

Dr. Franciso Amigo

He has known the defendant since childhood, and was his sponsor when the defendant first arrived from Cuba. He testified at the sentencing phase about the defendant's abuse by his father (R.1522), but he could have given additional examples of brutality if asked, including when his father broke the defendant's arm (R.1523). Dr. Amigo was in prison with the defendant in Cuba, and the defendant acted very strange, saying he had a pact with the devil, and always staying by himself (R.1527). One time in America, the defendant threw a fan at Dr. Amigo because Amigo told him to either shut the window or turn off the air conditioner (R.1531). The defendant also threw a plate at him. The defendant would act normal for awhile, then have short relapses into bizarre behavior (R.1532). After the fan incident, the defendant said a force inside him made him do it (R.1532). The defendant often spoke of the voice that controlled him. (R.1532). Dr. Amigo stated that he wanted to tell the jury about the defendant's mental problems, but the defendant's lawyer would not let him (R.1537).

Rene Lara

Mr. Lara is the defendant's uncle, "almost like his brother" (R.1540). The defendant's father hit all the family members, but especially the defendant (R.1542). Once he beat the defendant with rope with a screw attached (R.1543), rendering the defendant unconscious and requiring hospitalization. To punish the defendant for his crazy behavior, his father would sometimes leave him tied up in a sugar cane field. The defendant's father beat his mother, even during her pregnancies (R.1546). Once after Mario ate some special eggs which were bred for cockfighters, his father hung him over a well (R.1547). The defendant was often tied to a tree for his beatings (R.1548). Mario would sometimes cut or beat himself, because he wanted to do harm to his father but could not.

The defendant's father hogged all the available food, and the children would go hungry (R.1549). The house was a parasite infested pigsty (R.1550). His father once attacked the defendant with a machete (T.1550), after the defendant had cut his father's horse with it (R.1551). The defendant would have to eat green corn, raw, or he would starve (R.1552). (At this point in the testimony, the interpreter broke into tears and had to be excused (R.1553, 1554). When the defendant's father roasted a pig, the only part he would let the family have was

the head (R.1555). The children would often come to Rene Lara's house for food, and didn't want to leave (R.1555). The father would beat them if he found out. One time the defendant was beating his father's donkey, so his father tied him to the donkey and beat him (R.1557). Mario would run away and spend the night in the fields (R.1558). The defendant would call to the devil in the lagoon, telling him to "come out, come out" (1559). The devil was called Bermudez. Mario would sit by the lagoon at night, screaming for Bermudez (R.1560). The defendant started drinking alcohol when he was 12 years old (R.1561). He believed that by having the devil on his side, people would be afraid of him (R.1561, 1562). People would complain to his father about his strange behavior, and his father would beat him as punishment (R.1563).

When the defendant came over from Cuba, the defendant bought a pistol and was always getting into fights (R.1567), and drank every day. His eyes had a crazy look that scared people (R.1568).

The defendant's lawyer had asked Rene Lara to fill out some papers, but never asked him to testify (R.1569), even though Rene told the lawyer about the defendant's mental illness and abused childhood (R.1570). Rene was perfectly willing to testify had he been asked, and to donate money to hire another expert (Id).

CROSS EXAMINATION

Mr. Lara denied having told the defendant's lawyer that he would not testify because he was angry with the defendant because Arsenio (the defendant's brother) was in jail (R.1571). Mr. Lara had told the lawyer the same things he said today about the defendant's childhood and mental problems (R.1572). He had come to the lawyer's office with Carmen, who interpreted, and Carmelina. He was present throughout the trial, but no one asked him to say anything (R.1574). The defendant's lawyer never told him how important his testimony would be for the defendant (R.1575). Had he been asked, he would have testified.

Amed Collazo

Mr. Collazo went to elementary school with the defendant in Cuba (R.1577). One time the defendant came to school with marks on his back, which the defendant said were from his father hitting him with a rope. Sometimes when the defendant was punished at school, he would hit his head against the wall (R.1579). The defendant was easily provoked, and always getting in fights. The defendant spent alot of time alone. The defendant missed much school and got poor grades (R.1580). When the defendant was 14 years old he began drinking and getting drunk. When he was drunk he would get in fights which were

"famous" (1583). The defendant's reputation was that he was crazy. After coming to America the defendant drank, smoked marijuana and did cocaine.

The defendant did not like to work, and quit a construction job after one day (R.1586). The defendant didn't care about anything but getting drunk (R.1587). The defendant's mental condition got worse after arriving from Cuba (R.1589). The defendant's lawyer never contacted him, but if asked he would have testified (R.1590).

CROSS EXAMINATION

Mr. Collazo never visited the defendant in the jail (R.1590), nor did he tell anyone he would be willing to help the defendant. In Cuba when people scolded the defendant, he would throw rocks at them and attack them (R.1594). When the defendant got mad he really got crazy.

Rita Suarez (First State witness):

Ms. Suarez is the interpreter who interpreted the defendant's trial for him and also his discussions with trial counsel, Stewart Adelstein (R.1620, 1621). The defendant never indicated that he did not understand what was happening at trial (R.1622). She spent around thirty hours at the jail with the defendant and Mr. Adelstein, and during that period Mr.

Adelstein would explain what would happen at trial (R.1622, 1623). The defendant did not express any confusion or misunderstanding during the two week trial (R.1623 1624). At the end of each trial day, the defendant and Mr. Adelstein would discuss the days events, and during these discussions the defendant did not indicate any misunderstanding of what had occurred (R.1626). Prior to trial the defendant and Mr. Adelstein discussed the witnesses, their testimony, how the jury would be selected and what would occur during the trial (R.1627). The defendant was never a big talker, but he did make comments like "Well, call my brother, you know, who can help you with that", and the defendant also suggested that Adelstein call Carmen as a witness (Id). The defendant always seemed to be paying attention and understanding what was going on (R.1628, 1629). During certain testimony the defendant would smirk and say "they're lying" (R.1630, 1631).

CROSS EXAMINATION

There were other interpreters who interpreted for the defendant prior to trial (R.1633). She spent at least thirty hours at the jail with Adelstein and the defendant, sometimes on Saturday, as there was a lot of preparation and discussion. Adelstein did most of the talking, explaining things to the defendant (R.1634). Mr. Adelstein explained his defensive strategy to the defendant (1635). Mr. Adelstein and the

defendant also conferred during breaks in the trial (R.1637). The defendant had a very intense look in his eyes during the trial (R.1642). During the jury selection the defendant said he did not want a particular women on the jury because of the way she was looking at him (1644).

EXAMINATION BY THE COURT

During the discussions in the jail, when Adelstein asked the defendant questions, the defendant appeared to understand and be responsive to the questions (R.1648). She remembers the defendant and Adelstein discussing the insanity defense, but they decided to use another defense (R.1650). The defendant never admitted having committed the murders (Id). Mr. Adelstein explained to the defendant that he could get the death penalty (R.1651). Prior to the sentencing phase, Adelstein and the defendant discussed the witnesses who could testify as to his tough background (R.1651, 1652). The defendant himself never talked about his background. The role of the prosecutor and Judge was explained by Adelstein, and the defendant appeared to understand (R.1653). Adelstein and the defendant appeared to get along very well (R.1654). Adelstein explained to the defendant that he could testify, it was his decision, but Adelstein advised against it, and the defendant agreed. In her opinion, she thought the defendant didn't care much about the trial because he was sure he would be convicted (R.1655).

Adelstein told the defendant during voire dire that he had so many strikes, and to let him know if there was a particular juror the defendant didn't like (R.1656).

There was a conference at Adelstein's office prior to the sentencing phase, with the defendant's family present. The discussion was about who was going to testify the next day. She does not remember Adelstein rejecting any possible witnesses (R.1658). The defendant himself never talked about his background, rather that information came from his family (R.1659). The defendant tried to help Adelstein, and was very cooperative (R.1662, 1663). Mr. Adelstein visited the defendant three times after the sentencing, and the defendant did not act any differently than he had prior to receiving the death penalty (R.1666).

Stuart Adelstein (called by the defendant).

Mr. Adelstein, the defendant's trial counsel, does solely criminal defense work (R.1678). The defendant's was his first capital case. The vast majority of pretrial preparation went to the guilt phase (R.1681). The location of eyewitness Tomas Barcelo by the State, on the eve of the trial, was a devastating blow to the defense, as the only other eyewitness, Arsenio Lara (the defendant's brother) refused to testify (R.1681).

In preparation for the penalty phase, Adelstein had retained Dr. Cava and interviewed various family members, whom he hoped to call as witnesses (R.1681). He interviewed Arsenio and his then girlfriend Carmen, as well as Rene Lara and his wife.

Prior to the surfacing of witness Tomas Barcelo, the State had a rather weak, circumstantial case (R.1682, 1683). The arrival of Barcelo threw Adelstein into a "mass panic" (R.1684). Prior to that the only eyewitness was Arsenio, whom it was obvious would not testify, so the defense theory was "I didn't have anything to do with it" (R.1685). The theory was chosen after discussions with the defendant, who denied any involvement in the murders (R.1685). The arrival of Barcelo caused Adelstein to concentrate exclusively on the guilt phase (R.1686). He asked the court for a continuance, which was denied (R.1687). After Barcelo appeared, he briefly considered an insanity defense but rejected it (R.1688).

In relation to Dr. Cava, he told the defendant not to discuss the facts of the case with him (R.1691), but he did give Cava a summary of the State's evidence. At the time he retained Dr. Cava, he had very little background information to give him (R.1692). If Adelstein had it all to do over again, he would do a lot of things differently, like make a more compelling motion for continuance, better background investigation, and hired more

doctors and experts (R.1694). Also, if he had known about the extreme cruelty the defendant experienced, he would have more closely evaluated the defendant's competency (R.1695).

Adelstein had contact with Arsenio and Carmen, Dr. Amigo, and Rene Lara and his wife. Despite this he had very little knowledge about the defendant's background, other than that he was abused, because everytime he asked the relatives for details they said "talk to Mario" (R.1696). Carmen, Arsenio and Rene, when asked how the defendant's father abused him, said "Get that information directly from Mario" (Id). As for Mario, he admitted being abused by his father but refused to provide specifics (R.1697).

During the trial Adelstein was "scared. upset. very worried. Confused", which is one reason he sought a continuance (R.1699). It was not until the trial testimony of Tomas Barcelo that the defendant admitted being present at the time of the murders (R.1701, 1702). At that point I asked him if he would admit to shooting the lady if he testified, and he said yes, he would tell the truth (Id). The defenant was fixated on a minor point of Barcelo's testimony, whether the downstairs light was on or off (R.1703, 1704). The defendant also considered the separate rape and robbery case as more important than the murder case (Id). He was offended by the rape charge because he felt he was unjustly charged (R.1712). The only thing the defendant

ever said about the murders was that he was not involved (R.1714), and had no knowledge of what occurred (R.1715).

Adelstein and the defendant communicated back and forth during the trial, although he doesn't remember specific conversations except about Barcelo and his brother Arsenio (R.1717). The defendant sometimes took on a cold stare that was frightening (R.1718). The verbal responses from the defendant indicated that he understood what Adelstein was talking about (R.1722), or at least Adelstein thought so at the time. The brutal nature of the crime made Adelstein suspicious about the defendant's mental health. Looking back on it, he has some doubts about whether the defendant really understood what was happening (R.1728), and he should have asked for another competency evaluation during trial (R.1730).

Looking back, he should have objected to sequestration during deliberations. (R.1736). When the defendant was arrested in Union City, he told the arresting officers that he had put the gun on the table, which is where the police had found it (R.1741). The defendant, however, denied being given Miranda warnings and denied making the statements (R.1742).

After the verdict of guilt, Adelstein returned to his office with the defendant's family members, who were very upset (R.1743). After considerable efforts to calm everyone down,

Adelstein talked to them all about the defendant's background and the penalty phase (R.1745). There was insufficient time to prepare. Adelstein had decided not to use Dr. Cava during the jury portion of the penalty phase, due to Cava's broad assertions that anyone who commits a murder is mentally ill and lacking mental capacity (R.1746). Dr. Cava was extremely "pro-defense". Adelstein should have asked the court for another doctor (R.1748). It was his impression that the court only allowed him one expert.

Up until the evening after the verdict he had only sketchy information about the defendant's background, because the relatives all said "get it from Mario" (R.1755). Mario had refused to discuss his father, except to say he was strict but that he loved him (R.1756).

CROSS EXAMINATION

Adelstein worked full time on the case for 4-6 weeks prior to trial (R.1762). According to Arsenio, after the murders the defendant gave him his watch and said "I've just done something terrible. I want to give you this to remember me by. I will not be taken alive (R.1771, 1772). The defendant told Adelstein not to worry about Arsenio testifying (R. 1773). The defendant knew his brother would not testify. The defendant was adamant, until Barcelo testified, that he was not involved in the

killings (R.1774). The defendant told Adelstein, when questioned about his past, "Don't worry about it," and that he did not want to talk about it (R.1779). The defendant kept saying "I love my father. He was a strict man, but I love him very much, and I don't want to talk about it." Adelstein explained how important his background was for the sentencing phase, but it didn't do any good. (Id).

Adelstein had a good and trusting relationship with the defendant (R.1781). The defendant never mentioned hearing a voice at the time of the murder. The defendant testified at the motions to suppress and discharge. (R.1784). The defendant appeared to understand Adelstein's explanations of what would occur at trial (R.1786). Adelstein did not consider the defendant's behavior unusual during the trial (R.1788). Defendant's often fixate on trivial details. The defendant appeared to understand the strengths and weaknesses of the case (R.1792).

After the verdict, Carmen, Rene Lara, Rene Lara's wife, and one or two other family members met with Adelstein. Adelstein hoped that all of them, and also Dr. Amigo, would testify at the penalty phase (R.1794). He asked each of them if they were willing. Rene Lara did not want to testify because he had a pending criminal charge, but Rene said his wife could testify, and she did so. All of the others refused to testify, except

Dr. Amigo, and the defendant did not want him to testify before the jury (R.1794-1796).

EXAMINATION BY THE COURT

At one point, Dr. Amigo blamed the defendant for the firebombing of his clinic (R.1797). The defendant did not want him to testify. Adelstein wanted to put on every relative or friend whose testimony was acceptable to the defendant (R.1799). He believes he specifically asked Carmen to testify when he was telling the family how important it was for them to testify (R.1800). The only person the defendant did not want to testify was Dr. Amigo. The defendant changed his mind and consented to Amigo testifying before the Judge (R.1801). The defendant would take his advice about tactical decisions except when it concerned his family and background.

It was Adelstein's desire to have everyone at the meeting testify, as long as the defendant consented (R.1804). Adelstein discussed the insanity defense with the defendant, but the defendant would not consider it because he would not admit committing the crimes, or that he was crazy. Adelstein discussed the concept of mitigating evidence with the family at the meeting (R.1809). Up until the instant trial, Adelstein had never asked that the jury be sequestered during deliberations (R.1825). He did not nor did he observe other attorneys asking for sequestration prior to Livingston v. State, supra (R.1826).

Roy Kahn (by the State)

In 1982 it was not normal practice for defense attorneys to request sequestration during jury deliberations (R.1842), in fact he only saw it done once in the entire time he has been a criminal attorney. In his opinion, Livingston brought about a change in the practice in state courts regarding sequestration in capital cases (R.1845).

Dr. Edmund Cava (recalled by the defendant).

He may have told Adelstein that anyone who kills another person is sick or ill (R.1851). Murder is an anti-social crime committed by anti-social personality types, which is a diagnosable psychiatric condition.

Carmen Albo (by the defendant).

She was present at the critical post-guilty verdict meeting with Adelstein. He wanted somebody, anybody who could testify for the defendant about his background (R.1853, 1854). Carmen states that she never told Adelstein she did not want to testify, and neither did Rene Lara. Adelstein decided not to call Rene Lara as a witness because of a pending police matter. Adelstein decided to use only Carmelina (Rene Lara's wife) because everyone else's testimony would just be repetitive (R.1854).

SUMMARY OF PENALTY PHASE TESTIMONY

At the penalty phase Adelstein called Carmelina Lara to testify before the sentencing jury, and Dr. Amigo and Dr. Cava testified before the court.

Carmen Lara

She is Rene Lara's wife and the defendant's aunt (R.2088, case no. 62,691). She has known the defendant since birth. The defendant's father beat him so badly the defendant would be rendered unconscious (R.2089), and have to be hospitalized. His father beat him with a rope. The beatings started when the defendant was 5 years old, and once the defendant was hospitalized for a month because of a beating (R.2090). His father beat him almost every day. His father beat everyone. The witness then produced a picture of the defendant's mother, who was in Cuba (R.2091), as well as the defendant's children, also in Cuba. She stated that she constantly had to rescue the defendant and his siblings from their father's violence (R.2095).

Dr. Edward Cava

Dr. Cava was given reliable information on the defendant's background from Dr. Francisco Amigo, a veterinarian who had known the defendant his whole life (R.2137). The defendant was repeatedly and harshly abused by his father for frivolous

reasons. He was assigned impossible tasks by his father, and then beaten with sticks and ropes when he failed to carry them out. When the defendant was 8 years old, he spent two or three months in the hospital after a severe beating (R.2138). A child faced with such abuse has two alternatives: to become humble and passive, or to internalize and identify with the brutality so that it becomes a part of his personality, which is what happened with the defendant (R.2139). This part of the defendant's personality remains with him for life. Although hospitalized for a mental breakdown in Cuba, the defendant has never received any remedial psychiatric help (R.2140). The defendant has a very injured, damaged personality (R.2141). His personality is explosive, aggressive, and potentially self-destructive (R.2144). He is subject to overpowering emotional outbursts (R.2145), intense moods of rage which overcome him and which he cannot control (R.2146).

Dr. Francisco Amigo

The defendant's father beat the defendant with sticks and ropes from when he was 6 years old, and one time his father threatened to set him on fire (R.2149). His father gave him impossible tasks and beat him when he failed. Mario badly needs psychiatric help and rehabilitation, and if he had gotten it earlier he would not be facing the electric chair (R.2151).

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S RULE 3.850 MOTION AS TO THE SENTENCE AND IN ORDERING A NEW SENTENCING PROCEEDING.

SUMMARY OF ARGUMENT

The State does not dispute that portion of the trial court's order finding that the background and mental health testimony presented at the 3.850 hearing was quantitatively and qualitatively superior to that presented by counsel at the penalty phase, and that had it been presented, the sentencing outcome may well have been affected. The problem with the order is that it fails to address the key issue of whether the information revealed at the hearing was available to defense counsel, because if it was not then counsel cannot be faulted for failing to present it. Trial counsel's own testimony at the hearing demonstrated that he wanted to present all of the defendant's available family members at the penalty phase, but only one, Carmelina Lara, was willing to testify. The defendant's friend, Dr. Amigo, was willing to testify, but the defendant would not agree to allow his testimony until after the jury rendered its advisor verdict. In short, counsel was forced to use a pop gun because the shotgun refused to come out of the closet.

As for the expert testimony concerning the defendant's mental illness, trial counsel had called Dr. Cava during the second (judge) portion of the penalty phase, and had a valid reason for not wanting him to testify before the jury. The testimony of all three experts concerning the defendant's

schizophrenia, borderline personality disorder, and the existence of Bermudez and the "devil made me do it" scenario, are based on revelations by the defendant five years after trial, as well as indepth descriptions of the defendant's childhood from relatives, the same relatives who repeatedly told Adelstein to "get the details from Mario" concerning his upbringing, with Mario then telling Adelstein "I don't want to talk about it". The defendant never told Adelstein or anyone else about hearing the voice of the devil. The defenant has never admitted the upstairs murder and refused to admit the downstairs one until faced with Tomas Barcelo's eyewitness testimony during trial. Even though Adelstein told the defendant not to discuss the facts of the murder, this advice was superfluous because the defendant had been adamently denying the crime all along, and his first words to Dr. Cava were "I didn't do it". The point here is that the medical testimony at the hearing was based on information from the defendant and his relatives given years after trial, information which neither he nor his family were willing to convey prior to or during trial. The Constitution guarantees effective assistance of counsel, not of family members and the defendant himself.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING
THE DEFENDANT'S RULE 3.850 MOTION AS
TO THE SENTENCE AND IN ORDERING A
NEW SENTENCING PROCEEDING.

It is indeed unfortunate that the evidence presented at the hearing was not presented at the penalty phase, however that same evidence discloses that it was the defendant and his family members who prevented counsel from developing and presenting that evidence at trial. Where counsel's failure to present certain mitigating evidence is based on the defendant's lack of cooperation and the witnesses' reluctance to cooperate and testify, counsel is not ineffective. Cave v. State, 529 So.2d 294, 297 (Fla. 1988), Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), and Messer v. Kemp, 760 F.2d 1080, 1091-1092 (11th Cir. 1985).

Adelstein testified that he wanted to call all the family members present at the post-guilty verdict meeting, including Rene Lara, his wife Carmelina Lara, Arsenio's wife Carmen, and one and perhaps two other whose names Adelstein could not recall. He also wished to call Dr. Amigo. Adelstein testified that only Carmelina Lara and Dr. Amigo consented to testify, and he specifically recalls that Rene Lara (who by far gave the most poignant testimony of the defendant's abused background at the

hearing) refused to testify because he had a pending criminal charge. The defendant vetoed the testimony of Dr. Amigo, and only relented after the jury rendered its advisory verdict. It must be stressed that prior to that meeting, the family members had obstinately refused to provide details of the defendant's background in Cuba, telling Adelstein to get the details from the defendant, who then told Adelstein, just as obstinately, that he did not want to discuss his background. In short, Adelstein was stuck between a rock and a hard place, not because of a failure of effort on his part, but rather because of the defendant's and his family's lack of cooperation.

Turning to the testimony of the three experts, the defendant attempts to make much of Adelstein's advice not to talk to Dr. Cava about the facts of the crime. Adelstein gave this advice because of the defendant's adamant denial of any participation in the offense, and given these repeated denials Adelstein's advice was hardly unreasonable. See Bundy v. Dugger, 850 F.2d 1402, 1412 (11th Cir. 1988). In any event the defendant specifically stated to Dr. Cava that he was not involved in the crimes, thus Adelstein's advice was superfluous.

The defendant told Dr. Cava that he had not heard any voices since coming to America. The defendant also never told Adelstein about Bermudez and the "devil made me do it" information, which of course would have been inconsistent with

his blanket denial of any involvement in the crimes. The record reflects that the defendant never told anyone about Bermudez until 1987 and 1988, when the three experts examined him for the specific purpose of uncovering mitigating evidence for his 3.850 motion.

The three expert opinions offered at the hearing were all direct products of extensive reports from family members of the defendant's abused and disturbed upbringing and behaviors, as well as indepth interviews with the defendant in 1987 and 1988, at which the defendant "bared his soul" and told all about Bermudez and his devilish role in the second murder. Of course, the defendant continues to this day to vehemently deny the murder and rape of his girlfriend upstairs, doubtless because the State did not produce an eyewitness to that crime. In any event the focus here must be on 1982 and not 1987 or 1988. The detailed history provided by the relatives was not available in 1982 because the relatives were not quite so cooperative at that point, telling counsel to "get the details from Mario." For his part the defendant refused to talk about his background except to say that it was strict, but that he loved his father nonetheless. As for the facts of the offense in 1982, as far as the defendant was concerned, there were none, because he did not commit the crime. The defendant's remarkable revelations in 1987 and 1988, which along with the relatives reports form the backbone of the experts' diagnosis, was simply not available in

1982 because of the defendant's denial of any involvement. It was not counsel's decision that the defendant should deny involvement, or that the defendant should keep Bermudez a secret until five years after trial.

In sum, the informational basis for the experts findings were not available to defense counsel in 1982, and he therefore cannot be faulted for not developing and presenting those findings at the 1982 trial.

CONCLUSION

The trial court's order vacating the death sentence and granting a new sentencing proceeding is erroneous, and should this be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



RALPH BARREIRA
Florida Bar No. 0374490
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLANT/CROSS-APPELLEE was furnished by mail to BILLY NOLAS, Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 10 day of July, 1989.



RALPH BARREIRA
Assistant Attorney General