IN THE SUPREME COURT OF FLORIDA

CASE NO. **79,849**

MARIO LARA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

The symbol T. ___, refers to the upper right hand corner page numbers *of* the transcripts of the proceeding. The symbol R. ___, refers to the corresponding lower right hand corner page numbers by the clerk of the court. For ease of use, the Appellee has utilized both citations herein. The symbol SR. , refers to the supplemental record on appeal.

STATEMENT OF THE CASE AND FACTS

The defendant was convicted of first degree murder of Grisel Fumero, and second-degree murder and sexual battery of Olga Elviro. Lara v. State, 464 So. 2d 1173 (Fla. 1985). The trial court imposed a sentence of death, having found the following three (3) aggravators: 1) prior violent felonies; 2) the crime was committed to disrupt or hinder the lawful exercise of a governmental function; and 3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Id. At post-conviction proceedings, the trial court then vacated the sentence of death, having found ineffective assistance of counsel at the penalty phase. This Court affirmed. State v. Lara, 581 So. 2d 1288 (Fla. 1991). Resentencing before a new judge and jury took place in March, 1992.

A. State's Case in Chief

Roger Mittleman, the associate medical examiner, testified that on July 16, 1981, he assisted in a crime scene investigation. (T. 961, R. 1041). There were two crime scenes, one in the bedroom upstairs, and one in the kitchen downstairs. (T. 961, R. 1042). The first victim, Olga Elviro, was found in the upstairs bedroom, covered by a pillow and sheets, in between two beds. Id. When the covers were removed, the decedent was found to have been gagged about her mouth, bound tightly around the ankle, with the bindings coming up to the thigh, such that the knees were bent, and, her garments had been split open so as to expose her genitals. (T. 962-65, R. 1043-

45). When the gag was removed from her mouth, tissue paper was found in the back of her throat. (T. 965, R. 1046). The victim had been stabbed three (3) times. Id. One of the stab wounds was at the base of the neck and penetrated for a distance of nine inches, but was not fatal because it had not entered any vital organs. (T. 966, R. 1047). A fatal stab wound was found on the right chest, just below the breast. (T. 968-69, R. 1049-50). The third stab wound was found on the left chest, and was not fatal. Id. The cause of death was multiple stab wounds. (T. 970, R. 1051).

The second victim, Grisel Fumero, was found in the kitchen. (T. 972, R. 1053). She had a total of four gunshot wounds. Id. One gunshot entered the left side of the neck, exited the left arm, and was not fatal. (T. 943, R. 1054). Another shot was to the right hand and exited towards the palm of that hand. Id. This wound was aligned with a gunshot wound of the left chest, and meant that the right hand had been placed on the left chest at the time of the shot. Id. The presence of stippling in this wound reflected that the muzzle of the gun was within two to three feet of the victim's body. (T. 973, R. 1054-56). This wound was not fatal either. (T. 976, R. 1057). The next gunshot wound was to the middle of the chest, directly above the breast plate. (T. 975, R. 1056). The last gunshot wound entered the body in the area of the right arm and reentered the torso itself. Id. The first and last wounds also contained stippling. Id. Grisel Fumero's cause of death was multiple gunshot wounds.

Detective Buhrmaster testified that on September 30, 1980, he had been working with the Miami Police Department. (T. 1024, R. 1105). He was the lead investigator for the armed robbery of Raquel Carranza. Id. He arrested the defendant on October 2, 1980. (T. 1025, R. 1106). On January 20, 1981, the defendant was

released on bond for the above case. (T. 1028, R. 1109).

On March 16, 1981, the defendant was arrested for a rape that had occurred on March 7, 1981, Id. He was released on bond, in April, 1981. Id. On July 16, 1981, Buhrmaster became involved in the double homicide 'investigation herein. (T. 1029, R. 1110).

This witness described the layout of the building and the crime scenes herein. Id. He found Grisel Fumero lying face down in the kitchen. (T. 1030, R. 1111). Casings from a revolver were on the floor, and collected. Id. The revolver itself was also recovered, and was established to be the gun that killed this victim. (T. 1031, R. 1112). The casings were also matched to this gun. Id. The revolver is not like an automatic gun; it does not release or eject the shells. (T. 1032, R. 1113). "In order to fire the gun, the trigger has to be pressed, pulled, and the cylinder turns each time for a new cartridge to come up in front of the hammer." (T. 1033, R. 1114). The knife used to kill the second victim was also recovered from the scene, and was confirmed to have contained traces of her blood. (T. 1035, R. 1116).

The second victim was found in the bedroom upstairs. Mattresses, sheets, pillow cases and various items of clothing had been moved to the middle of the room. (T. 1036, R. 1117). The victim's body was found as these items were removed. Id. The victim had been bound, with the right wrist tied to the right ankle and the left wrist to the left ankle. (T. 1038, R. 1119). The victim had "Tissue, a gag" inside her mouth; the same binding material was also tied around the mouth to hold the tissue in. Id. The victim was wearing jeans which had been cut open, with each leg still on. Id.

The defendant was apprehended in New Jersey, approximately six days later. (T. 1040, R. 1121). He was hiding in a woman's apartment there. Id. The witness was present in the courtroom, on October 26, 1982, when the defendant was convicted of the aforesaid robbery of Raquel Carranza and sexual battery of Odalys Fumero. (T. 1040-41, R. 1121-28).

Odalys Fumero testified that Grisel Fumero, the capital murder victim, was her sister. (T. 1008, R. 1089). Grisel had been 18 years old when she died. Id. Odalys was thirteen (13) years old. Id. On March 7, 1981, Odalys had accompanied her sister on a date with Frank Rizzo, as a chaperone, to a Miami club. (T. 1009-10, R. 1090-91). The defendant, a friend of Frank Rizzo's, drove them to the club. Id. Odalys had never met the defendant previously. (T. 1010, R. 1091). She was not his date. (T. 1011, R. 1092). Odalys drank alcohol offered to her at the club, became dizzy and asked to go home. (T. 101 l-l 3, R. 1092-94).

The defendant told Grisel that he would take Odalys to a friend of his, and give her some coffee before she got home, so that her mother would not notice the effects of alcohol. (T. 1012-13, R. 1093-94). The defendant thus drove them to his friend's house and parked a half block away. (T. 1013, R. 1094). Odalys asked her sister to go to the house with her, but the defendant told Grisel to stay in the car. (T. 1014, R. 1095). Once inside the house, the defendant told Odalys to lay down on the couch and wait for coffee. (T. 1015, R. 1096). Odalys did so, and then found the defendant, in his underwear, on top of her. Id. The defendant took off her pants as Odalys was screaming for her sister. (T. 1016, R. 1097). The defendant told her to shut up, while pushing and hitting her. Id. Odalys was able to run to the door, but it was locked. Id.

The defendant caught up, and started hitting her again. Id. As Odalys was screaming, the defendant pushed her to the bathroom, where she fell and hit her head against the sink. (T. 1017, R. 1098). The defendant was telling her to shut up, and was slapping her. Id.

The defendant then raped her. (T. 1018, R. 1099). Odalys was a virgin at the time, and was bleeding. Id. The defendant then told Odalys to get dressed and keep quiet. (T. 1018, R. 1099).

After the defendant drove them home, Odalys began crying and told Grisel about the rape. (T. 1019, R. 1100). Grisel saw the blood between Odalys' legs, the bruises on her neck and her swollen mouth. (T. 1019-20, R. 1100-01). At first Grisel asked Odalys not to tell their mother about the rape. (T. 1022, R. 1103). Grisel was in love with Rizzo, and did not want him blamed for the defendant's actions. Id. However, after a few days, they in fact told their mother, who then took Odalys to the police station and filed rape charges. Id. Odalys stated that her sister, Grisel, was going to testify at the rape trial. (T. 1023, R. 1104).

The assistant state attorney for the above rape trial, Mr. Siegel, testified that Grisel had been listed as a prosecution witness and was cooperative. (T. 994-95, R. 1075-76). A deposition had been scheduled for July 16, 1981, the day after Grisel was murdered; the trial judge was to set the case for trial after said deposition. (T. 995-96, R. 1076-77). This witness also testified that he had been present in court, when the defendant was convicted for this sexual battery, on October 26, 1982. (T. 992, R. 1073). Likewise, he had been present for the defendant's conviction on the armed robbery of Ms. Carranzo on the same date. (T. 993, R. 1074).

Tomas Barcello's 1982 trial testimony was read to the jury. He lived in the house with the defendant, his brother, Arsenio Lara, and, Frank Rizzo. (T. 1091-92, R. 1172-3). Barcello had the upstairs bedroom. (T. 1092, R. 1173). The defendant, his brother and Rizzo lived in the downstairs apartment. (T. 1094, R. 1175).

Barcello testified that in the days prior to the Odalys rape trial, he had, on numerous occasions, seen the defendant telling Rizzo that the latter had to bring Grisel to their house, ask her to marry him, and convince her not to be a witness at said rape trial. (T. 1095-96, R. 1176-77). Grisel had thus moved into the defendant's house approximately four (4) days before her demise. (T. 1097, R. 1178). Barcello added that Rizzo had stated that he did not like Grisel; "that he was just waiting for the trial to be over"; and, that if he got rid of Grisel any sooner, the defendant would kill him. (T. 1099, R. 1180).

On the day before her murder, however, Grisel had been approached by Rizzo's other girlfriend, Maitay. (T. 1100-1, R. 1181-2). Maitay warned Grisel: "don't you realize that [Rizzol doesn't love you for any reason, that he wants you to serve as a witness for Mario [defendant] in a trial and after that he's going to kick you twice around. He's going to get rid of you." (T. 1101-2, R. 1182-83).

The defendant was present during this confrontation. Id. The defendant grabbed Maitay and pushed her out of the house. (T. 1102-3, R. 1183-84). The defendant then told Maitay, in part, "if you continue making such a ruckus, they're going to . . . give us each 100 years." (T. 1 103, R. 1184). Maitay left after the defendant assured her that Rizzo would do what the defendant told him to, and that he would leave Grisel when the trial was over. (T. 1 104, R. 1 185).

While outside, the defendant also told Barcello, that Olga Elviro, his girlfriend, had heard the gossip about his felony. (T. 1104-5, R. 1185-86). The defendant stated that Olga did not want to be with him anymore. Id. The defendant suspected that Marguerita Martinez had told Olga about the felony. Id. The defendant then went inside the house, where Grisel greeted him. The defendant gave Grisel a shove, and told her to, "Leave me alone." (T. 1104, R. 1185).

Later that night, Barcello was sleeping in his bedroom, when the defendant knocked on his door, and asked him to open up as he had company. (T. 1109, R. 1 190). Barcello got dressed and opened the door. Id. The defendant was standing there with Olga. (T. 1109-10, R. 1190-91). The defendant told Barcello to leave and wait for him outside. Id. The defendant frequently used Barcello's bedroom. (T. 1111, R. 1092). The defendant stated that he would later take Barcello to the hospital to see Marguerita Martinez, who had had a heart attack. Id.

Barcello waited outside, in front of the house. (T. 1115, R. 1196). He waited for approximately one-half hour, without hearing anything. Id. Barcello then saw the defendant coming down the stairs, heading towards Grisel's apartment. (T. 1116, R. 1197). The defendant knocked, and Grisel opened the door. Id. The defendant went in, and Grisel called for Barcello to go in as well. Id.

Grisel asked the defendant if he wanted to eat a steak that she had cooked. (T. 1 1 17, R. 1198). The defendant said, "that he didn't want anything." Id. The defendant went inside the bedroom on the left-hand side. Id. This was the same bedroom where the defendant's brother customarily kept a gun under a pillow. (T. 1157-58, R. 2238-39).

Barcello was with Grisel in the kitchen, when the defendant subsequently approached them. (T. 1118-20, R. 1199-2201). "He was standing like this [indicating shaking the leg]." Id. The defendant had his hand behind him, and was "looking steadily' at Grisel. (T. 1 120, R. 2201). The defendant told Grisel, "It's your fault that I have lost everything." (T. 1121, R. 2202). He then pulled out the gun that he was holding behind him, and started to shoot at Grisel, from a distance of less than three (3) feet. (T. 1121-22, R. 2202-3; T. 974, R. 1055). After the first shot, Grisel put her hand in front of her body, and asked the defendant, "why are you doing that to me." (T. 1122, R. 2203). The defendant responded, "Why am I doing that? Son of a bitch." Id. He continued firing, five more times, until the gun was empty, as Grisel was falling to the ground. (T. 1122-23, R. 2203-4).

Barcello exclaimed that the defendant was "a murderer." (T. 1 123, R. 2204). The defendant laughed, took out the empty shells from the gun, got more bullets out of his pocket, and started putting them in. (T. 1123-4, R. 2204-5). At this juncture, the defendant's brother entered the kitchen, and asked the defendant, "have you gone crazy? You're a murderer." (T. 1125, R. 2206). The defendant responded, "Keep calm. I'm going to kill you too." Id. Arsenio began crying, and told Barcello to leave, as "My brother is going to kill you. My brother's gone crazy." Id. Barcello then ran outside the house and hid in the yard. (T. 1125-26, R. 2206-7). The defendant came out looking for him, but did not find him, Id. The defendant then drove away from the house. Id. He was later apprehended by the police, in New Jersey, hiding in a woman's apartment. (T. 1040, R. 1121).

The 1982 trial testimony of Marguerita Martinez was also read to the jury. She

testified that she was friends with, and also related to, Olga Elviro. (T. 1045, R. 1 126). The latter would frequently stay at Martinez' house. (T. 1046, R. 1127). The defendant and Olga had been "going steady," for approximately two months. (T. 1047, R. 1128).

At approximately eight or nine o'clock on the evening of the murders, the defendant went to the Martinez home. (T. 1050, R. 1131). Olga was staying there. Id. The defendant and Olga talked in her room. (T. 1052, R. 1133). Martinez took the defendant some coffee. Id. She overheard that the defendant wanted Olga to leave with him. Id.

The defendant then came out to the living room. He went outside to his car, and then came back in, (T. 1055-56, R. 1136-37). He was now carrying two guns. Id. He then said, that he was going to take Olga, and that he was going to kill her, because, "he had never done that roll (sic)." (T. 1053, R. 1134; T. 1055-56, R. 1137-37).

Martinez told him that Olga was not leaving , that if he took her, "he would have to kill me." (T. 1053, R. 1134). The defendant responded that, "he would kill both of us." Id. Olga then came out of her room; she was nervous; she had heard the defendant. (T. 1054, R. 1135; T. 1057, R. 1138). Olga asked to speak with the defendant, but he responded that, "Anything you say now will be out of fear." Id.

The defendant then pointed the revolver at both women, whereupon Martinez fainted; she had heart problems. (T. 1057, R. 1138). Olga started crying and told the defendant that he had killed Martinez. (T. 1058, R. 1139). The defendant responded, "No, I didn't do it. She's not dead. I have a brother who has this kind of trouble." Id.

The defendant brought over a fan and stroked Martinez' chest. Id.

Martinez asked to be taken to a doctor, as she could not breathe. (T. 1059, R. 1140). The defendant agreed, and, he and Olga helped her. Id. Olga asked the defendant to leave his guns behind, and he did so. Id. the defendant then drove them to Jackson hospital. (T. 1060, R. 1141). When Martinez was admitted, Olga came in and told her that the defendant was upset. Id. The defendant then came in and told Martinez that he did not want to hurt her. Id.

Olga then stated that the defendant had called Rizzo, had told him that Martinez was in serious condition, and that Rizzo was coming to the hospital. (T. 1060-61, R. 1141-42). The defendant and Olga then left. (T. 1061, R. 1142). Rizzo was waiting for Martinez when she got discharged. (T. 1062, R. 1143). Rizzo drove Martinez to her house. (T. 1063, R. 1144). Olga, however, had Martinez' keys and the house was dark. Id. Rizzo thus drove over to the defendant's residence. Id. They discovered Grisel's body, in the kitchen, upon arrival. Id. Rizzo then notified a police patrol car of the murder (T. 1065, R. 1146).

Ms. Raquel Carranza testified that on September 30, 1980, she was working at her son's place of business, a veterinary supply store. (T. 979, R. 1060). She was alone. (T. 980, R. 1061). Ms. Carranza was sixty-eight years old at the time, (T. 980, R. 1061).

While she was on the telephone, two men came to the back door, knocked and motioned for her to open the door. Id. Ms. Carranza opened the door. Id. The men were well dressed. The defendant, however, wore a disguise; a heavy, blondish looking moustache, hair make-up, and dark glasses. (T. 982, R. 1063; T. 988, R.

1069).

The other man, Frank Rizzo, stated they were looking for a product but couldn't remember the name of it. (T. 981, R. 1062). Ms. Carranza asked who had referred them, when the defendant took out a pair of white gloves and proceeded to put them on. (T. 982, R. 1063). The defendant then motioned for Rizzo to do the same. Id. Ms. Carranza was frightened, as the defendant was not speaking. (T. 983, R. 1064).

The defendant then took out a gun, and motioned for Ms. Carranza to keep quiet. Id. The defendant asked for "dinero." Id. Ms. Carranza explained that the business was a mail business, and there was no "dinero." (T. 984, R. 1065). The defendant then motioned to Rizzo, who grabbed Ms. Carranza by her shoulders, sat her down on a bench and motioned for her to bend her head down. Id. The defendant took Ms. Carranza's pocket book, took all of the money out, approximately $100-200, and kept on insisting for "dinero." Id. The defendant had opened all of the drawers, looking for money, was throwing down papers and making a mess of the business. (T. 985, R. 1066). When he couldn't find anything, the defendant motioned to Rizzo. Id. The latter released Carranza. Id. The defendant came over, pointed his gun at her neck, and told her to "look at the wall," while motioning her to be quiet. (T. 985-86, R. 1066-67). The defendant was going to take her jewelry, but Ms. Carranza removed it herself and gave it to him. Id. The defendant then told her to keep quiet, stay there for five (5) minutes, and that if she did not do so, he would "come over and kill me." (T. 988, R. 1069). He then left.

B. Defense Case

The Appellant has exhaustively detailed every defense witness's account of the defendant's father's various acts of mistreatment of his family. The Appellee will thus not delve into said details.

The defendant's older sister, Marguerita Lara, detailed her father's mistreatment of herself, the defendant, their other siblings and their mother. (SR. 8-40). The children lived with their mother, and the father stayed with his own mother. (SR. 36). The father would visit the children every day, for "an hour or two, more or less." (SR. 45). The defendant "was the most chastised" of the siblings, because, he did "more bad things" than the others. (SR. 15, 22, 29). The defendant would get into fights at school, or eat eggs which were necessary for "breeding roosters"; the senior Mr. Lara raised roosters. Id. The defendant also drank alcohol used for the roosters, which is not as powerful as drinking alcohol. (SR. 38). The abuse occurred when the defendant was between the ages of nine and twelve years old. (SR. 24). When the defendant was approximately ten years old, he would climb onto a mango tree, near a lake, and would "scream," and "shout" for the devil, "Bermudez." (SR. 34-35).

When the defendant became a young man and left the house, "he had problems with his mother-in-law because he injured her with a machete." (SR. 40). The police in Cuba caught him, and he was given a 20 year sentence, of which he served six (6) years. (SR. 40-41). The defendant also had employment problems, as he would "leave [jobs] just like that and that is punishable in Cuba." (SR. 41). The defendant also entered the armed services of Cuba. (SR. 42). However, "[h]e was in jail the whole

time." Id. The defendant didn't want to do the service; he would "flee and flee until they would put him in prison." Id.

On cross-examination, this witness stated that although all of the defendant's siblings had been mistreated by their father, none had ever committed any robbery, rape or murders. (SR. 46). The reason why the defendant got out of Cuba was because he was always in prison. (SR. 47). The reason he frequently went to prison was because he was involved in a number of violent fights. (SR. 47-48). The defendant also beat his siblings. (SR. 48). However, he was never violent towards his own children. (SR. 48-49). When he got angry with his children, he would hit walls and furniture instead. Id. Likewise, although he did not want to work, when it was necessary to get a reduction in his prison term, he successfully completed his jobs. (SR. 49-50).

Carmenlina Lara, the defendant's first cousin, also detailed the defendant's father's mistreatment of his entire family and the defendant. (T. 1 167-93, R. 2248-74). While the father abused the defendant, his mother was very loving. (T. 1205-6, R. 2287). This witness, and the neighbors, were also kind to the defendant. Id. The defendant also had teachers who were concerned about him. Id. The witness also testified that the defendant, starting at the age of five, would "yell," talk, call, and pray to "Satan," whom he called "Bermudez." (T. 1194-96, R. 2275-77). The defendant was also able to "see" Bermudez. Id.

Rene Lara, the defendant's first cousin, also testified that he has known the defendant since he was a child. (T. 1452-53, R. 2542-43). The defendant was born in 1956. (T. 1455, R. 2545). In 1959, Rene, while in Cuba, was jailed for several

years. (T. 1453, R. 2543). Mr. Lara detailed the defendant's impoverished surroundings and the defendant's father's mistreatment of his wife, all of his other children, and the defendant. (T. 1455-67, R. 2545-57). As a young child, the defendant would go to a lagoon near his house and, "would start talking to himself"; he would say that he was speaking to someone, "the devil Bermudez." (T. 1467, R. 2557).

Ariberto Reyes, the defendant's father's employer and a friend of the family, also testified. (T. 1222-24, R. 2303-5). Mr. Reyes had visited with the defendant's father a few months prior to his testimony at the resentencing. (T. 1225, R. 2306). The defendant's father was "a trusted employee." Id. This witness also recounted the defendant's father's mistreatment of his family. (T. 1225-39, R. 2306-20). The defendant, as a child, "was always trying to do something bad"; he would hit his brothers, the neighbor, and did not get along with anybody. (T. 1232, R. 2313). None of the other siblings, however, had any mental problems. (T. 1233, R. 2314).

Mr. Reyas had also seen the defendant standing at the edge of a lagoon, talking; the defendant would call Satan and claimed he got answers back. (T. 1230, R. 2311).[1] Mr. Reyes was in daily contact with the defendant when the latter was growing up. (T. 1240-41, R. 2321-22). He got along very well with the defendant. Id. The other neighbors also would try and help the defendant. (T. 1247, R. 2328). Reyes also knew about the defendant's army experience. (T. 1249-51, R. 2330-32). The defendant once went AWOL, due to a fight with an officer, and hid in a hut, with a

[1] In an earlier deposition, the witness had stated that the defendant had not ever told him about hearing voices. (T. 1245).

machete. Id. He would not come out to the officers, so Reyes, after making the officers promise that the defendant would not be jailed, went inside and successfully persuaded the defendant to come out. Id.

This witness had never seen either the defendant, or his father, drink any alcohol while the defendant was growing up. (T. 1252-54, R. 2333-35). Mr. Reyes also kept in contact with the defendant, when the latter came to this country. Id. The defendant would visit Reyes' home once or twice a week. Id. The witness had never seen the defendant drink or be intoxicated. Id.

The first defense expert, Dr. Cava, had examined the defendant at the first trial in 1982, at the post-conviction proceedings in 1988, and prior to resentencing in 1992. (T. 1273-4, R. 2354-55). Both in 1982 and 1988, Dr. Cava had opined that the defendant was a "borderline personality," which is a "quasi personality disorder," and not schizophrenia. (T. 1327-29, R. 2408-10). Dr. Cava admitted that personality disorders do not constitute mental diseases or defects, according to the DSMR. (T. 1328-29, R. 2409-10).

Dr. Cava also stated that, originally, in 1982, he had obtained an "elaborate history" from the defendant, including "extensive" reports of his childhood mistreatment. (T. 1276, R. 2357). The defendant, however, had made no mention of the voice of "Bermudez" at said time. (T. 1342, R. 2423). Indeed, the first mention of "Bermudez" had been in 1988. Id. Likewise, during the initial 1982 interview the defendant had not mentioned ingesting any drugs or alcohol; again, the first mention of this alleged substance abuse was in 1988. (T. 1289-90, R. 2370-71).

In 1992, Dr. Cava opined that the defendant, at the time of the murder, had what "sounds like a psychotic experience"; that he had a "possibility" or "potential for decompensated paranoid schizophrenia." (T. 1307-8, R. 2388-89). This expert also added that the defendant's personality was consistent with paranoid schizophrenia, which is a major mental disorder. (T. 1299, R. 2382). The defendant's condition at the time of the crimes was also exacerbated by the use of drugs and alcohol. He was "at least partly in a drug driven state of delirium of excitement," and heightened "impulsivity." (T. 1293-94, R. 2374-75).

The above opinions, however, were based upon a) an unauthenticated report, dated 1990, by an unknown doctor in Cuba, having diagnosed a "thirty-six years old, Mario Albo Lara," with "paranoid schizophrenia," in Cuba, with a prescription for antipsychotic medication. (T. 17-18, R. 98-99, T. 1299-1300, R. 2380-81; T. 1315, R. 2396; T. 1321-22, R. 2402-3; R. 2865-69);[2] and, b) the defendant's recitation of the facts of the murder, and his own account of having ingested drugs and alcohol. (T. 1341, R. 2422). According to the defendant's account, relied upon by Dr. Cava, he had begun the evening by trying to visit a friend, Dr. Amiga (not Ms. Martinez), in Jackson Memorial Hospital, but the latter was not at the hospital. (T. 1290, R. 2371). He had thus gone to visit a lady friend, Kasha, and, they "drank whisky smoked some marijuana, both snorted and smoked some cocaine." Id. The defendant then allegedly went to another friend, El Nino, who had been a prison mate of his in Cuba, "to pick

[2] The uncontradicted evidence herein reflects that the defendant was born in 1956 (T. 1225, R. 2306) and came to this country in 1980 (T. 1292, R. 2373). At the age of thirty six, i.e., in 1986, he was incarcerated for the instant crimes in the United States. He was also "obviously" not in Cuba, or in contact with Cuban hospitals, in 1990. (T. 1320-21).

up a couple of grams of cocaine that he was holding for him." (T. 1291, R. 2372). The defendant "sniffed some" of the cocaine and put the rest in his pocket. Id. According to the defendant, he then went "straight home," went upstairs, and found victim Olga Elviro already dead. Id. The defendant then heard a voice, "Bermudez," telling him that the next person he would see would be the one who had committed the crime, and he had to avenge the death of the first person, by executing the second person. (T. 1307, R. 2388; T. 1317, R. 2398). The defendant thus, "simply executed the second victim or he thinks he did." (T. 1317-18, R. 2398-99). The defendant "remembers only having heard a blast and having realized that the other person was dead and he didn't remember actually pulling the trigger." (T. 1318, R. 2399).

With respect to the unauthenticated document from Cuba, Dr. Cava stated that a diagnosis of schizophrenia, like heart disease, does not change, although the patient's symptoms may be alleviated and the latter can appear normal. (T. 1303-4; R. 2384-5). Dr. Cava admitted, however, that during his past eleven (11) years of incarceration in this country, the defendant had not been treated for, or prescribed any medication for, such an illness. (T. 1324-25; R. 2405-06). This expert also admitted that it has been common practice, in prisons and state hospitals in Cuba, to administer anti-psychotic medication simply to control people whose behavior is not acceptable. (T. 1326, R. 2407).

As to the defendant's account of his actions prior to and during the murders, Dr. Cava admitted that he "couldn't say" whether his assessment of the defendant's clinical condition would be different, if, instead of the defendant's statements, he accepted: a) Ms. Martinez's testimony, which contradicted the defendant's accounts

of having ingested drugs and alcohol; b) Mr. Barcello's eyewitness account of how the capital murder victim had been shot; and, c) that defendant had in fact gagged, bound, raped and stabbed Olga Elviro, during the course of at least a half-hour, and then hidden her body. (T. 1344-46, R. 2425-27).

Defense expert, Dr. Carbonell testified that she examined the defendant in 1988 and in 1992. (T. 1369-70, R. 2450-51). She first administered the Spanish version of the Wechsler adult intellignence test. (T. 1374, R. 2455). The defendant had a "full scale score of 110." (T. 1376, R. 2457). He had "a verbal score of 103 and a performance score of 117." Id. These scores are "in the average range of intelligence." Id. Dr. Carbonell then administered the Leiter intelligence test, which is similar to an IQ score. (T. 1377, R. 2458). The defendant achieved a score of 82, in the low average range. Id. The next test was "the Canter Bender which is a screening test for brain damage." (T. 1379, R. 2460). "There was nothing on that test," that looked like brain damage. (T. 1379-80, R. 2460-61). The defendant was also given the MMPI. (T. 1381, R. 2462). The results reflect scores "similar to people who would be described as having what is called a marginal schizoid adjustment." (T. 1384, R. 2465).

Dr. Carbonell also reported that the defendant had been diagnosed, according to the record from Cuba, as a paranoid schizophrenic. (T. 1393, R. 2474). However, she has never diagnosed the defendant as a schizophrenic. (T. 1394, R. 2475). The defendant does not meet the psychosis period and other requirements of schizophrenia. Id.

This expert had two other "possible diagnoses." Id. The defendant may suffer

from a "schizophrenia form disorder," which means that he has psychotic symptoms, which either "last a short period of time or you can't document how long they lasted." Id. The other possible diagnosis is a "borderline personality disorder." (T. 1395, R. 2476). A person suffering from this disorder has problems "with adjusting with people, with getting along." Id. A sociopath, or a person with an antisocial personality disorder, also does not "cope well with others. They doen't cope well with society. They may be very harmful to others and they seem to lack any feeling for others. . . ." Id. The classic difference between "a schizophrenia form person or a borderline person" and a sociopath, is that the latter have the ability to "manipulate other people." (T. 1396, R. 2477).

Dr. Carbonell also detailed the defendant's childhood abuse, and reported that he had had auditory hallucinations since childhood. (T. 1390, R. 2471). According to this expert, there was a "local legend" about a "pirate called Bermudez that lived in the lake," near the defendant's residence. Id. The defendant reported hearing Bermudez "calling him and telling him to do things, mostly to hurt himself," and the defendant would do as he was told. Id. According to the defendant, he "didn't so much speak to Bermudez as Bermudez would say things to him." (T. 1391, R. 2472). Dr. Carbonell felt that the defendant was not malingering. (T. 1388, R. 2469; T. 1392, R. 2473). People who malinger make up "very bizarre symptoms," and add "visual components" to hallucinations, whereas the defendant reported only periodic verbal hallucinations. Id.

According to Dr. Carbonell, her diagnosis of borderline personality or schizophrenia form disorder consitutes a major mental illness. (T. 1396, R. 2477). The

defendant thus has been mentally ill all of his life. (T. 1397, R. 2478). At the time of the offenses herein, the defendant's mental capacity was substantially impaired, because he was under the influence of the Bermudez hallucination, which told him what to do. (T. 1405, R. 2486). The defendant's prior violent conduct in the armed robbery of Ms. Carranza, however, was not a result of any Bermudez hallucinations. (T. 1421-22, R. 2502-03). Likewise, the rape of Odalys Fumero was not commanded by Bermudez. (T. 1423, R. 2509).

According to Dr. Carbonell, in the instant case, the defendant had a "psychotic break." He saw Olga dead, he didn't know why she was dead, and he then "heard a voice that said the first person you see is the person that did this." (T. 1436, R. 2517). The defendant also neither remembered, nor, reported that he had shot the capital murder victim. Id. According to Dr. Carbonell, the defendant only remembers that he was standing with the gun, and that his brother told him he had committed murder. Id. According to the defendant, he then "knew he had done something big," and thus drove away to New York City. (T. 1435, R. 2516; T. 1437, R. 2518). The defendant had stated that, not only did he not remember shooting Grisel, but that it was not even worth assaulting her. (T. 1445, R. 2526). According to Dr. Carbonell, the statement was made because the defendant had "never assaulted a woman"; he "has a chivalrous attitude about women," and wouldn't harm them. Id. Dr. Carbonell was, however, aware that the defendant had beaten his sister, assaulted an elderly woman during the course of a robbery, and that he had assaulted a thirteen (13) year old girl by raping her. Id.

In any event, the psychotic break ended after the defendant shot Grisel Fumero,

but Dr. Carbonell was unable to say when it had begun, due to the defendant's lack of any memory of having killed Olga Elviro. (T. 1437-38, R. 2518-19). Dr. Carbonell opined that the psychotic break began at "some point" after the defendant came home from the hospital, but before Olga Elviro was actually dead. Id.

Defense expert, Dr. Miranda, testified that he had interviewed the defendant seven (7) times, from 1987 through 1992. (SR. 64). On direct examination, he stated that the defendant had consistently been able to recall and provide "reliable" information with respect to his background and developmental history; there was no evidence of malingering. (SR. 68, 77, 99-100). Dr. Miranda did not feel that the defendant had "exaggerated" his accounts. Id.

The defendant's father resided with the family part of the time, and, with his own mother the rest of the time. (SR. 80). The father never showed any affection to the defendant, but the mother did. (SR. 81). "The mother played a role of being a protector and being a nurturing person and also the healer, the one that applied medicine and tried to comfort" the defendant after abuse by the father. Id.

Having detailed the various acts of abuse by the father, Dr. Miranda concluded that the father's treatment had produced several reactions. (SR. 74). The defendant had developed a "disassociative kind of response" to escape his father's mistreatment. Id. This "disassociative" response had taken the form of a "being" named "Bermudez." (SR. 82). The defendant began hearing a voice from this being; "Bermudez" would give "[defendant] messages at certain critical times when he was either in danger or when he was facing one of these painful situations with his father." (SR. 83). Bermudez's messages all related to the defendant's relationship with his

father. (SR. 83-84). According to Dr. Miranda, the Bermudez phenomenon, "it may be, it may fit the technical definition of an auditory hallucination but -- but it has this other quality of being an actual entity." (SR. 95). Usually, in cases of auditory hallucinations, the person just hears a voice from some place and he cannot identify the source, "whereas in here there was an actual being that he referred to that he talked to and mainly that came and embodied him at times or took over." Id.

The defendant had also reacted by learning violence as a way of dealing with conflict or dealing with frustrating situations. Id. He imitated his father's abusive behavior, and Dr. Miranda expected that ha would in turn abuse his own children. (SR. 103-4; 156). However, Miranda acknowledged that the relatives' accounts reflected that the defendant was not violent towards his children and always controlled his actions toward them. (SR. 157).

The defendant had additionally responded with "emotional alienation" from the father, that is hating the latter and wanting to destroy him.[3] (SR. 74) Finally, the defendant had also responded with self-punishment, that is hurting himself. (SR. 74, 79).

Dr. Miranda also administered some psychological tests to the defendant, including the "Bender-Gestalt" test and the Wechsler Adult Intelligence Scale. (SR. 84-5). The defendant "received an IQ score of 99 and that is right in the average range." (SR. 89). Dr. Miranda had utilized the "Puerto Rican standards" for the test, and felt that, if United States norms had been utilized, the defendant's actual functioning,

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[3] Dr. Miranda recounted an incident where the defendant had sharpened his knife and was waiting for "the right moment" to hurt his father, but one of the siblings had talked him out of it. (SR. 74-5).

despite "more potential, " would fall "around borderline range." (SR. 89-90, 126-7). Dr. Miranda also felt that the defendant "may have suffered neurological damage" due to signs of difficulties "with drawing angles" and repeating numbers and reproducing designs from memory. (SR. 84-88). Dr. Miranda could not, however, say, within a "reasonable degree of psychological certainty, " that the defendant had brain damage or neurological damage. (SR. 124).

The MMPI testing of the defendant reflected elevated scores in, a) the "depression" scale; b) the "hysteria scale" which measures tendency to experience "physical symptoms when the source is actually a psychological one"; c) the "psychopathic deviant scale," which measures rebelliousness, nonconformism, and acting out potential; d) the "paranoia" scale, which indicates little ability to trust, "but also very strong desire for personal autonomy"; e) the "schizophrenia" scale, which detects disturbance in interpersonal relationships, and, e) "psychotenia" which refers to being obsessive compulsive. (SR. 107-8). These findings meant that "one of the components of [defendant's] personality would be schizophrenic--paranoid type of schizophrenia." (SR. 109). The personality evaluation of the defendant, however, also reflects that he has "tendencies towards violence," and, has "propensity for acting out anti-socially." (SR. 155).

Dr. Miranda also added that the defendant had been treated as a psychiatric patient, in Cuba. (SR. 97). He had been treated with "valium and other medications that he could not recall." (SR. 100). The defendant had committed "a number of anti-social acts." (SR. 98). When he was 17 years old, he had a fight with the mother of a woman that he had been living with, and with a brother-in-law. (SR. 98). They

"ended up fighting with machetes and, apparently, [defendant] was able to, to cut the others more than they did him." Id. The defendant had then "fled and had an episode of temporary amnesia." Id. He could not recall what had transpired until someone else described the details of the events, and "then he was able to bring back the memory." Id.

With respect to the instant crimes, however, the defendant has never recalled killing Olga Elvior. (SR. 101). In Dr. Miranda's opinion, "[i]f, indeed, [defendant] was responsible for killing the woman upstairs [Olga Elviro], to me this would be another instance of an amnesic phenomenon as when he fought with his mother-in-law and brother-in-law where his mind simply protected him from acknowledging that reality of what had happened." Id.

Dr. Miranda admitted that there was "such a disparity" between what the defendant had to do in order to kill Elviro, and, what the defendant related he actually did, that his opinion depended upon his acceptance of the defendant's version of the facts of the murders. (SR. 114-15).

As to the capital murder itself, Dr. Miranda first opined that the defendant was in a state of "impaired mental functioning", "his thinking was faulty even if he had not lost touch with reality." (SR. 113). The "faulty thinking" was due to Dr. Miranda's opinion that the defendant could have killed his own brother. Id. The defendant had stated to Dr. Miranda, "that right after the shooting of Fumero, . . . that his brother appeared and then he turned to his brother and began to pull the trigger but there were no bullets in the gun any more." Id. Dr. Miranda, however, stated that there was no "break with reality", as the defendant, "realized that he had to kill some one. He was

aware that there was a killing involved." Id. Thus, according, to Dr. Miranda, the defendant was "undergoing a psychotic episode" with respect to the first victim, Olga Elviro, but not with the second, capital murder victim, Grisel Fumero. (SR. 114). The defendant was "insane" at the time he murdered the first victim, but not during the ensuing capital murder. (SR. 117-18, 185).

At the conclusion of his direct examination, however, Dr. Miranda changed his above opinions, and concluded: "if he, [defendant], if he murdered both women and he murdered the woman that was upstairs and if that death took place in the sequence that I understood it, that that one was first and the one downstairs was second, the impact of what happened upstairs pushed him to that level of break with reality that I believe that took place when he fought with his mother-in-law and his brother-in-law. Am I making sense?" (SR. 119).

On cross-examination, Dr. Miranda admitted that, although he was basing his opinion upon the defendant's account of the facts of the murders, because he had no reason to doubt the reliability thereof, that he had in fact discounted other events related by the defendant, because they were "inaccurate," or "just plain careless" talking. (SR. 140). These events included the defendant's accounts to Dr. Miranda, of having cut the heads off of several chickens when he was angry at his father; having copulated with cows, calves, chickens, dogs and goats on a daily basis; and, having smoked 20 to 25 marijuana cigarettes a day, having smoked cocaine four to five times a week, in addition to taking 15 quaaludes a day. (SR. 147-50). The defendant had also reported visual hallucinations, which Dr. Miranda believed were not "visual hallucinations as much as a person who is impressionable," (SR. 159).

With respect to his "insanity" opinion, Dr. Miranda stated that the defendant had started out sane, as evidenced at least by his actions in looking for something to tie the victim up with, and procuring a knife to stab her with. (SR. 169-70). At some point "during" this murder, "maybe at the first sight of blood," he then, "reached a point of insanity, that is, he flipped out." (SR. 170-71). The defendant then only recalled having seen Elviro's body tied up and covered with blood; that he had touched her and found her dead, and, that he was walking down the stairs when he had heard the voice of Bermudez telling him to kill. (SR. 171). In Dr. Miranda's opinion, however, once the defendant heard the voice, he knew what he was doing, and, he knew it was wrong to kill a person. (SR. 171-72). The defendant had also told Miranda that he had then retrieved a gun "that has the capacity for six bullets," and emptied the gun into victim Fumero's body. (SR. 172). The defendant had added that he had also subsequently pulled the trigger on his brother, even though the voice of Bermudez never told him to kill a second person. (SR. 172).

Finally, Dr. Miranda admitted that there would be "problems" with respect to the information he had relied upon in reaching his opinions, if, he: a) accepted Ms. Martinez' account that the defendant had not in fact been ingesting drugs and alcohol with his other friends"; and, b) accepted Mr. Barcello's eyewitness account of Grisel's murder and motive. (SR. 182-84). Dr. Simon also added that his opinions as to insanity would be "probably erroneous" if he relied upon the eyewitness testimony as opposed to the defendant's account. (SR. 185-86).

C. State's Rebuttal Case

Dr. Lazaro Garcia testified that he was a court-appointed psychologist, and had personally evaluated the defendant. (T. 1508, R. 2598). Dr. Garcia administered psychological tests, had considered the defendant's childhood, the defense experts' reports, the trial testimony of Barcello and Martinez, and the defendant's sister's deposition. (T. 15 12, R. 2602, T. 1529, R. 2619, T. 1553, R. 2643).

Dr. Garcia concluded that the defendant "knew and was responsible for his actions at the time of the alleged offense." (T. 1509, R. 2599). There was nothing during the course of his evaluation to indicate that the defendant was suffering any mental illness, or "any major disorder." (T. 1509, R. 2599; T. 1511, R. 2601). The defendant does have a personality disorder. The difference between mental illness and personality disorders is:

> You can have a personality disorder and still be responsible for your actions. If you go into any prison you see a lot of anti-social behavior, a lot of anti-social personalities there but they are still responsible for their actions. They still know what they are doing, they just play be a different set of rules.

(T. 1510, R. 2600).

Dr. Garcia disagreed with the defense experts' diagnosis of schizophrenia. (T. 1513, R. 2603). Such a diagnosis is inconsistent with the defendant's report of hallucinations to some experts but not to others. (T. 1519, R. 2609). The defendant's account of how the offenses occurred also "kept changing," from one expert to

another. (T. 1513, R. 2603). The defendant had told Dr. Miranda that he had found Elviro tied up in blood in the bed, started hearing the voice of Bermudez, went downstairs, found Fumero, "and took a revolver that had six bullets, he remembered that it detail, and put six bullets in her." (T. 1519, R. 2609). The defendant, however, did not remember this account during Dr. Garcia's examination. Id. Likewise, the defendant had refused to talk about the account in 1982. (T. 1515, R. 2605). Dr. Garcia concluded, "obviously he didn't want to incriminate himself. . . . it is a goal oriented behavior of somebody trying to protect himself." Id. The defendant's history included other incidents demonstrating that the defendant is able to control his actions, when he wanted to. Id. When he was incarcerated in Cuba, for example, and was given an option to work in order to reduce his sentence, he successfully did so. Id. The diagnosis of schizophrenia is also inconsistent with the fact that over the past eleven (1 1) years of incarceration, defendant has not taken any medication for his condition and yet has not decompensated, not lost touch with reality, nor needed any hospitalization. (T. 1516-17, R. 2606-07).

Decompensation, or a loss of touch with reality, associated with schizophrenia, usually requires medication, hospitalization and psychotherapy, for two to four weeks before the patient compensates again. (T. 1521, R. 261 1). An alleged loss of touch with reality in the middle of the commission of a crime which involves tying the victim up, gagging her, and sexually attacking her, and, subsequent recovery into reality within minutes, is not consistent with schizophrenia. Ig. "That sounds more like a self-serving statement than a psychotic episode." Id. Likewise, a person in the psychotic phase would be "incoherent"; "you couldn't talk to him". (T. 1538, R. 2628).

Moreover, a person who is psychotic, or has lost contact with reality does not engage in "self-serving" behavior, or trying to avoid punishment or the consequences of his actions. (T. 1522, R. 2612; T. 1539, R. 2629).

The facts of the instant murders -- that the defendant was trying to prevent Grisel Fumero's testimony at his rape trial; that the defendant's girlfriend had found out about the rape trial and no longer wanted to be with him; that the defendant tried to get her to come back and, having failed to do so, threatened to kill her; that he subsequently tied, gagged, raped, and murdered the girlfriend; that he then went downstairs to his brother's bedroom, retrieved his gun, approached Grisel Fumero, told her that all of his problems were due to her, and shot at her till the gun was empty; that he then commenced reloading the gun and threatening other witnesses; and, that when the witnesses hid, the defendant got into his car and drove away to New Jersey, hiding out -- were all "consistent with a goal oriented behavior. Somebody who knows what they are doing, trying to avoid punishment, that is really a classic illustration of somebody trying to avoid punishment." (T. 1523-25; R. 2613-15)).

Dr. Charles Mutter testified that he was a court-appointed psychiatrist in the instant case. (T. 1568-70, R. 2558-60). Dr. Mutter saw the defendant on three (3) separate occasions, once in the presence of defense counsel, once in the presence of defense counsel and an interpreter, and once alone. (T. 1570-71, R. 2660-61). He also reviewed the trial testimony, other doctors' reports, and materials provided by both the defense and the prosecution. (T. 1571, R. 2661; T. 1597, R. 2687).

Dr. Mutter diagnosed the defendant with "a sociopathic personality disorder." (T. 1571, R. 2661). "He is a person who is in conflict with society, with rules and

regulations." Id. Persons with this disorder "are not suffering from any major disturbance that prevents them from knowing what they are doing or why they are doing it, they just have a conflict with society and usually are rebellious and have a behavior pattern." (T. 1572, R. 2662). A person who is a sociopath has a lifetime pattern of conflict with society, and, "his behavior is strictly geared for himself." (T. 1609, R. 2699). "He is a con artist, a liar, cheater, manipulator . . . . " Id. The defendant's preadolescent treatment by his father, certainly influenced the defendant, but did not, in and of itself, influence the decision of whether or not he would kill somebody; "Each person has his own choice that he makes on that." (T. 1586-87, R. 2676-77).

In Dr. Mutter's opinion, the defendant "has always known the difference between right and wrong and knew that also at the time of the offense." (T. 1573, R. 2663). Dr. Mutter did not find any major medical illness or defect in the defendant, but, "looking at the history, there is a possibility when he was in Cuba that he may have had a micro-psychotic episode." (T. 1573-4; R. 2663-4). Dr. Mutter explained that, in the materials reviewed by him, "there was some history", "at least there was a diagnosis made by somebody", in Cuba, that the defendant had a mental illness in that country. (T. 1577-78, R. 2667-68). However, if the defendant, "truly had a major mental disorder which we call schizophrenia", then he would have decompensated into that state without any medication. Id. Dr. Mutter had reviewed the defendant's records; the defendant had not taken any medication during his time in the United States. Id. Dr. Mutter stated the defendant's behavior was "hostile and impulsive". (T. 1575, R. 2665). However, he also added there were no "irresistible

impulses"; the defendant was not compelled by anything out of his control, "knew what he was doing and knew what he was doing was wrong at the time that this happened." (T. 1580, R. 2670).

The defendant's actions during the course of the crimes herein were also inconsistent with someone who has been commanded by a hallucination, as the defendant had a motive to kill Grisel Fumero. (T. 1575-76, R. 2665-66). The presence of a motive in the instant case, explained the defendant's actions. (T. 1589, R. 2679). Moreover, a person who is mentally ill does not believe that his actions are wrong. Id. "You don't run away from something unless you fear being caught and you don't fear being caught unless you know you did something wrong. I don't think you need a psychiatrist to figure that out. . . ." Id.

D. Sentence

The jury recommended a sentence of death, by a vote of 7 to 5. The trial judge then imposed a sentence of death, having found the following three (3) aggravators: (1) that there were prior violent felony convictions for the armed robbery of Raquel Carranza, sexual battery of Odalys Fumero, and, sexual battery and second degree murder of Olga Elviro; 2) that the murder was committed to disrupt or hinder the lawful exercise of governmental function; and 3) that the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R. 291 O-l 1). As noted by the Appellant, the trial judge found the severe maltreatment of the defendant during his early years to be a mitigating circumstance. (R. 2912). However, the court expressly rejected the defendant's claims with respect

to his mental state:

> There was considerable (and conflicting) expert testimony, some of which suggesting that at the time of the murder, the defendant's mental state was so unbalanced as to constitute a factor that would lessen his responsibility for the crime. The court does not agree with that suggestion.

(R. 2912).

SUMMARY OF ARGUMENT

I. The claim regarding the CCP aggravator was not preserved for appeal and, alternatively, is harmless error.

II. The claim that the court failed to advise the jury of the defendant's sentences for prior offenses is not preserved for appeal, and, is meritless, as the court is not required to instruct the jury as to non-capital sentences.

III. Claims regarding prosecutorial comments and evidentiary presentation have not been preserved for appeal, and, furthermore, relate to matters for which the evidence was admissible.

IV. The Caldwell v. Mississippi claim is not preserved for appeal and lacks merit, as the prosecutor did not minimize the role of the jury.

V. The claim alleging that the State misled the jury regarding expert witnesses is not preserved for appeal and, additionally, is refuted by the record.

VI. Photographs introduced into evidence were relevant and were therefore properly admitted.

VII. The claim regarding the "hindering governmental function" aggravator is not preserved for appeal, Additionally, that factor was properly applied on the basis of the

evidence herein.

VIII. The claim regarding jury selection has not been properly preserved for appeal. Additionally, a full Neil inquiry demonstrated that the prosecutor's peremptory challenges were supported by valid race-neutral reasons.

IX. The absence of written jury instructions from the record does not deprive the Appellant of full and fair appellate review as the transcript includes a verbatim recitation of the instructions given to the jury.

ARGUMENT

I.

THE JURY INSTRUCTION CLAIM WITH RESPECT TO THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR IS PROCEDURALLY BARRED AND HARMLESS BEYOND A REASONABLE DOUBT.

The resentencing herein was conducted prior to the decision of this Court in Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994), and that of the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926 (1992). There was no mention of unconstitutionality or vagueness of the CCP jury instruction. The State thus submits that the instant claim is not preserved for appeal. Moreover, in light of the evidence presented, arguments of counsel, and the trial judge's findings herein, the error in the CCP instruction was harmless beyond a reasonable doubt.

A. Preservation

Defense counsel herein submitted three (3) jury instructions with respect to the cold, calculated and premeditated aggravator (CCP). At the jury instruction conference, defense counsel, in response to the judge's question as to the first requested instruction with respect to CCP, stated that this aggravator was not applicable in light of the evidence presented, and that he was requesting that the jury not be instructed on same. (T. 1485-87, R. 2575-77). According to defense counsel, the evidence presented herein reflected a "domestic dispute", which negated cold, calculated premeditation, pursuant to this Court's decisions in Santos v. State, 591

So. 2d 160 (Fla. 1992) and Douglas v. State, 575 So. 2d 165 (Fla. 1991). Id. The trial court found said cases relied upon by the defense to be inapplicable, and denied the defense request that the jury not be instructed on CCP. (T. 1487, R. 2577).

Subsequently, again in response to the trial judge's questions with respect to the second defense requested instruction on the definition of "cold and calculated," defense counsel stated, "There really isn't any definition of cold and calculated that is sufficient." (T. 1489, R. 2579). The trial court thus denied the requested instruction. (T. 1490, R. 2580). Defense counsel then relied upon Roaers v. State, 511 So. 2d 526 (Fla. 1987) and Santos, supra, for the position that murders committed with "emotion or passion" are not cold or calculated. (T. 1491-92, R. 2580-81). The State responded that defense counsel was again relying upon "domestic" situations, which were not applicable herein. (T. 1491, R. 2581). The trial judge thus denied the defense request. Id.

With respect to the last defense requested instruction as to this aggravator, defense counsel argued that he had "tracked" the language in the case law from this Court. (T. 1493, R. 2583). The trial judge agreed that this Court's precedents, "establish a standard for the jury's consideration and the [trial] court's consideration in imposing the death sentence." (T. 1493, R. 2583). The trial judge ruled, however, that every correct statement of the law does not require a jury instruction thereon:

> THE COURT: I am denying it for the reason that I think these opinions from the Supreme Court interpreting these things establish a standard for the Jury's consideration and the Court's consideration in imposing the death sentence or not, but does not establish the requirement that the Court instruct the Jury on those things. For example, if the Jury should find that and the Court should ultimately impose the

> **death sentence and finds there were these factors, for example, then the Supreme Court in examining the basis for it would turn it aside saying this is not the case and so it would be silly for me to even say that I agree with it because I am compelled to agree with it. It is by the supreme Court but as far as putting that in an instruction, I think that is for the jury to determine and me to rule on if I get that far.**
>
> **What do you wish to address, Mr. Rosenblatt?**
>
> **MR. ROSENBLATT [Assistant State Attorney]: I was just going to say there was an opinion out of the Third District Court of Appeals where they expressed exactly what your Honor is saying that merely because it is an appropriate statement of law does not mean it makes a good jury instruction.**
>
> **THE COURT: Okay, I am denying number seven.**

(T. 1493-94, R. 2583-84).

As seen above, defense counsel's arguments at the resentencing may be fairly characterized as having taken the position that the CCP aggravator was not at all applicable because the evidence herein allegedly reflected a "domestic" situation, and that there were no "sufficient" definitions for the terms cold and calculated. There were no objections on the grounds that the standard jury instructions herein were "vague" or "unconstitutional." As such, the objections in the court below should not be deemed to have preserved the instant claim for appellate review. See, Roberts v. Sinaletary, 626 So. 2d 168, 169 (Fla. 1993) ("The record here does not reflect any objection on the grounds of unconstitutionality or vagueness of the instruction given. Instead, defense counsel objected to the applicability of the instruction in this case. We have repeatedly held that claims are procedurally barred where there was a failure at trial to object to the instruction on the grounds of vagueness or unconstitutionality

[Citations omitted]"); Windom v. State, 656 So. 2d 432, 439 (Fla. 1995) (general objection to the CCP instruction that, "I would object to that on those grounds, constitutional grounds, basically," is insufficient); Street v, State, 636 So. 2d 1297, 1303 (Fla. 1994) (claim of erroneous jury instruction procedurally barred where the instruction requested was insufficient).

B. Harmless Error

In the event that the objections in the court below are deemed to have preserved the instant claim, the State submits that any error herein was harmless beyond a reasonable doubt, in light of the evidence presented, arguments of counsel, and the trial judge's findings herein. This Court has repeatedly held that giving the prior CCP standard jury instruction is harmless beyond a reasonable doubt where, "the murder could only have been cold, calculated, and premeditated, without any pretense of moral or legal justification even if the proper instruction had been given." Walls v. State, 641 So. 2d 381, 387 (Fla. 1994); see also, Wuornos v. State, 644 So. 2d 1000, 1008 (Fla. 1994); Archer v. State, 21 Fla. L. Weekly S119 (Fla. 1996).

B.l - Evidence Presented

In determining harmlessness, the evidence as to each of the four elements of this aggravator must be analyzed to determine whether it has been sufficiently established. Wuornos, 644 So. 2d at 1008. In making such a determination, the

prevailing party's theory of the case, when supported by substantial, competent evidence, controls; the judge and jury are entitled to reject contrary theories which are based upon self-serving or unbelievable, contradictory evidence. Wuornos, 644 So. 2d at 1008-09, citing Walls, 641 So. 2d at 387-88.

The first element to be thus considered is that the murder was "cold." Id. As noted by this Court, witness elimination killings by their "very nature" are cold. Archer, 21 Fla. L. Weekly at S119, citing Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991). "The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts though perhaps also supported by expert opinion." Walls, 641 So. 2d at 387-88.

In the instant case, as detailed in argument VII herein, there was uncontroverted, direct evidence that the capital murder victim was a material witness, listed for the prosecution, in rape charges against the defendant made by the victim's sister. Again, pursuant to direct and uncontradicted evidence, the trial court found that the defendant had conspired, on numerous occasions and during a period of at least several days prior to the murder, with Frank Rizzo, the defendant's housemate who was also the capital murder victim's companion, to prevent the victim from testifying at his upcoming rape trial. The defendant himself had admitted that Rizzo was under his control; the defendant had insisted that Rizzo lure the victim to live at their house by promising her marriage. The victim had then in fact moved in. Rizzo's other girlfriend, however, had warned the victim, in the defendant's presence, of these plans, during the day before the commission of the murder. This plan having failed, the defendant then, according to eyewitness testimony, shot the victim, having

expressly told her, immediately prior to firing, that she was the cause of his problems. In light of such evidence, the trial court concluded that the motive for this murder was to prevent the victim from testifying at the defendant's rape trial. The State respectfully submits that the element of coldness has thus been established.

The second element is that the murder was the product of a prearranged design to commit murder before the fatal incident. Wuornos, 644 So. 2d at 1008. As noted above, the uncontroverted and direct evidence herein established that the defendant lured the victim to live in the same building where he resided. In the hours prior to the murder, the defendant had armed himself with two guns. While his girlfriend, Olga, persuaded him to leave these guns behind at Ms. Martinez's residence, the defendant did so, only with the knowledge that there was another gun at his house, in his brother's bedroom.[4]

The defendant then called the victim's companion, Rizzo, and asked him to go to the hospital, and take care of Ms. Martinez. While Rizzo was away at the hospital, the defendant went back to the house. He first murdered Olga in the upstairs apartment. He then came downstairs, headed straight for his brother's bedroom and retrieved the gun from under the pillow; there were additional bullets in the defendant's pocket. (T. 1123, R. 2204). The defendant then went to the kitchen, where the victim was standing with Mr. Barcello. The defendant approached the victim, while hiding the gun behind him. When he got within three (3) feet of the victim, he then began firing, having first announced his motive, as noted above. The

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[4] Mr. Barcello, another resident at the house, testified that it was the defendant's brother's custom and habit to place a gun under a pillow in the bedroom, whenever he was not at work.

State submits that, "[b]y definition, this sequence only could be the product of a careful plan or prearranged design." Wuornos, 644 So. 2d at 1008 (evidence that defendant had armed herself in advance, lured the victim to an isolated location, and proceeded to kill him so she could steal his belongings, was sufficient to satisfy the element of prearranged design, beyond a reasonable doubt).

The third element is that there must be "heightened premeditation," which this Court has found "present when the prevailing theory of the case established 'deliberate ruthlessness' in committing the murder." Wuornos, 644 So. 2d at 1008, citing Walls, 641 So. 2d at 388. In the instant case, the evidence established that the defendant first bound, gagged, raped, tortured and murdered Olga, in the upstairs apartment, during the course of at least thirty (30) minutes. The capital murder victim was then executed as set forth above. The defendant shot at this victim, from a distance of less than three (3) feet, until the gun was empty. After he fired the first bullet, the victim put her hand in front of her body, and asked the defendant, "Why are you doing that to me?" (T. 1122, R. 2203). The defendant responded, "Why am I doing that? Son of a bitch." Id. He continued to fire five (5) more times, as the victim was falling to the ground.

When Barcello exclaimed that the defendant was "a murderer", (T. 1123, R. 2204), the defendant laughed, took out the empty shells from the gun, and started getting more bullets out of his pocket. (T. 1 123-4, R. 2205). At this juncture, the defendant's brother entered the kitchen, and asked the defendant, "have you gone crazy? You're a murderer." (T. 1125, R. 2206). The defendant responded, "Keep calm I'm going to kill you too." Id. Barcello thus ran outside of the house and hid in

the yard. (T. 1125-26, R. 2206-07). The defendant came out looking for him, but did not find him. Id. The defendant was then seen driving away from the house. Id. He was later apprehended by the police, in New Jersey, hiding in a woman's apartment. (T. 1040, R. 1121). The State submits the third element has also been satisfied. Wuornos, supra; Walls, supra.

The fourth and final element is that the murder must have no pretense of moral or legal justification. Wuornos, 641 So. 2d at 1008. This element consists of "any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide." Walls, 641 So. 2d at 388. This Court has, "repeatedly rejected claims that purely subjective beliefs of the defendant, without more, could establish a pretense of moral or legal justification." Id. The evidence in the instant case reflects that there was absolutely no provocation by the defenseless victim herein. The State submits that the final element of CCP has also been satisfied. Wuornos, supra; Walls, supra.

The Appellant has argued that the defendant suffered from, "substantial mental illness, " "irrationality," substance abuse on the day of the murder, and, at the time of the murder, the defendant was under the influence of, "the hallucination of the voice of Bermudez [which] had instructed Mr. Lara to kill the first person he saw because that was the person that killed Olga Elviro." Appellant's brief at p. 61. The State respectfully submits that said claims are all based upon self-serving, contradictory and untrustworthy accounts, which are also inconsistent with the facts presented. The judge and jury were thus well within their discretion to reject these claims. Wuornos,

644 So. 2d at 1008-09; Walls, 641 So. 2d at 387-88.

First, as noted by the Appellant, the trial judge herein did indeed accept mitigation testimony that the defendant had a very abusive childhood, and that such abuse had a negative effect on the defendant when he became an adult. (R. 2912). The Appellant has, however, neglected to mention that the trial judge, based upon the conflicts in the mental health testimony, unequivocally rejected any claim that the defendant was mentally unbalanced at the time of the murder herein. Id. This conclusion is well supported by the record which reflects that not only was the basis for the defense mental health experts' opinions untrustworthy and inconsistent with the facts of the murder, but that the opinions contradicted each other as well.[5]

With respect to the claim of "substantial mental illness," the defense experts' diagnoses are notable. Dr. Cava stated that in 1982 and 1988, his diagnoses were that the defendant suffered from a borderline personality. This expert testified that this meant a "quasi personality disorder," which he admitted did not qualify as a mental disease or defect in the DSMR. In 1992, Dr. Cava changed his diagnosis, and stated that the defendant's condition was consistent with that of paranoid schizophrenia, as diagnosed by an unknown doctor. Dr. Cava had relied upon an unauthenticated document, dated 1990, and which referred to a "36 year old" Mario Lara; the defendant, at the relevant dates contained in said document, was incarcerated in the United States. The next defense expert, Dr. Carbonell, did not make a diagnosis of schizophrenia, despite possession of records from Cuba, on the grounds that the defendant did not meet the criteria for such a diagnosis. Dr.

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[5] See statement of the case and facts at pp. 15-31.

Carbonell's diagnosis of "borderline or schizophrenia form personality disorder," despite her protestations to the contrary, likewise did not qualify as a mental disease or defect in the DSMR.

The last defense expert, Dr. Miranda, expressed an opinion which varied with each page of his testimony, even during direct examination by defense counsel. This expert first stated that the defendant, "if" he had in fact murdered Elviro, was experiencing an "amnesic phenomenon." (SR. 101). The defendant, did not however, experience any "break with reality" during the capital murder. (SR. 113). Dr. Miranda then opined that the defendant had a "psychotic episode" and was "insane" during the Elviro murder, but again not at the time of the capital murder. He then changed his conclusion, and stated that the impact of the Elviro murder had pushed the defendant to a "break with reality" during the capital murder as well. (SR. 1 19). In any event, on cross-examination, this expert admitted that his conclusion with respect to the defendant's state of mind would be "probably erroneous," if he accepted the physical evidence and eyewitness testimony. (SR. 182-86).

Finally, both of the expert rebuttal witnesses, Drs. Mutter and Garcia, unequivocally rejected any claim that the defendant suffered from substantial mental illness. There were no irresistible impulses; the defendant had a motive to kill and knew exactly what he was doing.

The defense experts' opinions as to defendant having acted under the influence of the voice of Bermudez likewise demonstrate reliance upon contradictory and self-serving evidence. It should first be noted that at the time of the original trial in 1982, the defendant, despite providing other extensive accounts of his developmental history

to Dr. Cava, had never mentioned "Bermudez." This account was first provided in 1987, during post-conviction proceedings. In any event, all of the defendant's relatives and friends who had previously allegedly observed the defendant's encounters with Bermudez, testified that the defendant would either talk with, scream at, or pray out loud to Bermudez. The defendant even told Dr. Miranda that he had "talked to" Bermudez. (SR. 95). While the defendant claimed that the voice of Bermudez commanded him to kill as he was walking down the stairs, (SR. 171), Mr. Barcello, who saw the defendant at that time, did not mention the defendant having any conversations with any imaginary or absent beings. (T. 1115-16, R. 1197-97). Indeed, far from having such imaginary conversations, the defendant, after coming down the stairs, knocked on the victim's door and had a conversation with her. (T. 1116-17, R. 1197-98). The victim had asked the defendant if he wanted to eat a steak that she had cooked. Id. The defendant responded, "That he didn't want anything." Id.[6]

The alleged "psychotic break with reality," prior to or during the first victim's murder and subsequent onset of Bermudez, was also refuted by the physical evidence. Both of the rebuttal expert witnesses stated, and even defense expert Miranda admitted, that the defendant's actions in binding Elviro to prevent her escape, gagging her to prevent her screams from being heard, procuring a knife to stab her, and finally

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[6] The State also notes, that again, in contradiction to the relatives' testimony and defendant's accounts to Dr. Miranda, defense expert Carbonell testified that the defendant's history reflected that he "didn't so much speak to Bermudez as Bermudez would say things to him." (T. 1391). Carbonell further found the defendant's hallucinations to be credible as they did not involve visual components, whereas the defendant had reported visual hallucinations to Miranda, and the relatives stated that the defendant would "see" Bermudez.

hiding her body under sheets and mattresses, were all inconsistent with any reality break or psychotic episode.

Finally, the Appellant's claim of substance abuse prior to the crimes is based upon untrustworthy evidence. Robinson v. State, 574 So. 2d 108, 111 (Fla. 1991). Every defense expert herein admitted that such substance abuse and opinions based thereon, were solely derived from the defendant's report of such abuse. The defendant's account of having visited Dr. Amiga, a woman named Kasha, and his friend El Nino, at which times he had ingested alcohol and drugs, were directly refuted by the record. Ms. Martinez's testimony established that at these times the defendant was threatening Elviro and herself, and that thereafter he drove them to the hospital and stayed there, before returning home and killing Elviro.[7]

As noted previously, in light of the contradictory, self-serving and untrustworthy evidence relied upon by the Appellant, the judge and jury were well within their discretion to reject the instant claims. Walls, Wuornos, Robinson, supra.

B.2 - Arguments of Counsel

Lastly, in determining the effect of an improper instruction, it is presumed that

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[7] The Appellant's argument that Martinez' account demonstrated defendant was irrational is without merit. Earlier during the day of the murder,the defendant had admitted to Barcello that Elviro had found out about the rape charge, and no longer wished to see him. The defendant then went to Martinez' house where Olga was staying and asked her to leave with him. When she refused, he threatened to kill both her and Martinez, who was also present. When Martinez fainted, Olga acquiesced to go with the defendant, provided he leave behind his weapons. The defendant agreed. There was thus no irrational conduct. That the defendant's eyes "looked different" when he was threatening Elviro and Martinez, has no bearing on the defendant's mental condition. Even according to defense expert Miranda, the defendant did not experience any break with reality until some time during Elviro's murder, hours later.

the jurors took the entire record into account, including the evidence actually adduced. Yates v. Evatt, 500 U.S. ___, 111 S.Ct. 1884, 114 L.Ed. 2d 432 (1992). Indeed, the trial judge herein instructed the jury that its recommended sentence must be based on the "facts" as found from the evidence. (T. 1682-83, R. 2772-73). Moreover, the combined arguments of counsel can render an ambiguity harmless. United States v. Black, 843 F. 2d 1456, 1462 (D.C. Cir. 1988); United States v. Linn, 889 F. 2d 1369, 1373 (5th Cir. 1989) (failure to give an instruction harmless, where information in the instruction was itemized by defense counsel and government concurred in the same); Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992) (argument of defense counsel explaining HAC to the jury was a proper factor in the harmless error analysis of erroneous instruction); see also, Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. 2177, 129 L.Ed. 2d 133, 149 (1994) (Ginsberg, J., concurring) ("... the due process requirement is met if the relevant information is intelligently conveyed to the jury; due process does not dictate that the judge herself rather than defense counsel provide the instruction [citation omitted]. I do not read Justice Blackmun's opinion to say otherwise. ").

During the penalty phase arguments of counsel, both counsel addressed said aggravator. The prosecutor first summarized the mental health evidence, (T. 1642-52, R. 2732-42), and then concluded that the defendant was not mentally ill:

> There are some very, very sick people out there who, indeed, are very bad, but there are some bad people out there who are not sick. They know what they are doing, they know right from wrong and just don't care.
>
> Look at the crime. There was a rampage at McDonalds, somebody goes in there and indiscriminately

> kills at McDonalds. Is there a motive to that killing? There is a motive to this killing. He acted deliberately and he should be held accountable for that.

(T. 1652, R. 2742). Having addressed the defendant's mental state, the prosecutor then summarized the evidence with respect to each element of CCP:

> After butchering Olga upstairs, he walks down deliberately after realizing his plan has failed, that Rizzo cannot keep Cliceria under control; that she is going to testify against him; is going to put him in jail or help put him in jail, he goes downstairs past Tomas into the bedroom, gets his brother's gun, comes back out, past Tomas and shoots her, striking her four times, reloads, goes after Tomas and that is what you can consider.

(T. 1654, R. 2746). Contrary to the Appellant's argument herein, the prosecutor's reference to Olga Elviro's murder did not mean that the CCP aggravator should be based upon her murder. Rather, as noted previously, the prosecutor was arguing that the manner of Elviro's murder refuted any claim of a psychotic break with reality at said time, as claimed by the defense experts.

Defense counsel, in turn, argued that the defendant's actions were, "a product of a diseased mind," which was not cold and not calculated. (T. 1674, R. 2764). Defense counsel added:

> What he was doing in his scheme of things, he was acting in a rage. This is the part of the rage of a man who the doctors have told you about violence begets violence. Whether it is Olga, whether it is Grisel, it is a man who reacts with violence and he has been convicted of that, but beyond a doubt that this is cold, that this is calculated, no, it is not cold, calculated.
>
> He at that time felt that his life was ruined as you heard Tomas say and within his frame of reference, which is not our frame of reference, we are not talking about a reasonable frame of reference, he saw this situation as the

> **end of his existence and he started pulling that trigger. Is it cold, is it calculated beyond and to the exclusion of every reasonable doubt? If you have a doubt, the answer is no, that cannot be an aggravating circumstance.**

(T. 1674-75, R. 2764-65).

The jury's focus was thus upon its proper object; the defendant's mental status and whether his actions were the product of any illness. Had the jury been properly instructed, their focus would not have changed. The jurors herein either did not find the defendant's alleged mental diseases, as they were entitled to, or did so find, in which case the defendant certainly was not prejudiced in any way by the instruction given.

Finally, even if the issue is deemed preserved and the CCP instruction is deemed erroneous, any such error must be deemed harmless in light of the strength of the remaining aggravating factors. This is especially true insofar as the prior violent felony factor was extremely compelling, with both numerous and substantial prior violent felonies. Any error as to the CCP instruction must therefore be harmless. See, Rogers, supra.

In sum, the instructional error claim herein is both procedurally barred and harmless beyond a reasonable doubt.

II.

THE TRIAL COURT DID NOT ERR IN FAILING TOj PROVIDE MISLEADING INFORMATION IN RESPONSE TO THE JURY'S QUESTION.

The Appellant contends that the trial court erred in failing to inform the jury that the defendant had been sentenced to two consecutive terms of 99 years for the 1982 convictions of sexual battery and second degree murder of Olga Elviro, and that he thus would not be released from prison. The Appellant's claim is procedurally barred, as there was no request for providing such information until after the jury had retired for deliberation. Moreover, this claim is without merit as the trial court is not required to instruct the jury as to non-capital sentences, pursuant to this Court's precedents, and, such an instruction would be neither accurate nor responsive to the jury's question in the instant case.

It is undisputed in the instant case that the trial judge properly informed the jury that the defendant would serve a minimum mandatory term of twenty-five years, without parole, if sentenced to life imprisonment for the capital offense. (T. 1680, 1684, R. 2770, 2774). Defense counsel did not at any time, prior to the jury retiring for deliberations, mention or request that the jury be informed of the consecutive sentences with respect to the second degree murder and sexual battery of Olga Elviro. The sentences as to these two counts were not entered into evidence. In fact, defense counsel had requested and received an instruction that the defendant, "is on trial to determine the sentence recommendation of life or death as to the First Degree

homicide of Grisel Fumero only. Mario Lara's recommendation must not be considered for the second degree homicide or rape convictions of Olga Elviro, other than as an aggravating factor." (R. 2884). Furthermore, defense counsel had successfully precluded the State from mentioning the defendant's extensive disciplinary/criminal activities in jail[8] during the interim ten year period between the original sentencing and resentencing herein, on the ground that there was and would be no argument by the defense as to any possibility for rehabilitation or good conduct in jail. (T. 1448-50, R. 2529-31).

Defense counsel was not, however, in any way precluded from arguing the sentences received by the defendant, In fact, defense counsel, at closing, did argue that the defendant, "is never going to get out of prison, so the recommendation is whether he is going to go to prison forever or whether he is going to be executed by your recommendation"; "I am asking for life in prison. He is not getting out". (T. 1664, R. 2754; T. 1670, R. 2760).

During deliberations, the jury then asked, "Is the time already served credited toward the time to be served if we should offer life in prison." (T. 1667, R. 2777). The trial judge was concerned about providing the correct answer in the affirmative, and thus influencing the jury:

> I don't want to be influencing the jury. If I were to answer this directly and just say the answer is yes, that is signaling a response that I would just as soon not participate in.

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[8] Said actions ranged from disorderly conduct, possession of a weapon, possession of contraband, fighting, disobeying orders, and assault, from 1983 through 1989. (T. 1448, R. 2529). The State had also been prevented from delving into an assault charge which had occurred only several weeks prior to resentencing.

> If I were to tell them that, yes, that is true, however he is also facing other sentences on other things which are consecutive, that would be making another signal and I am very disturbed about the prospect, in any sense getting involved in the jury's deliberations and I would like some guidance from the counsel.

(T. 1688, R. 2778).

Defense counsel's suggestion was to "just send" all of the defendant's sentences back to the jury, without more. (T. 1690, 2780). The State's position was that defendant would in fact receive credit for time served, and, that other sentences or parole eligibility concerns were not a proper consideration for the jury. (T. 1687-91, R. 2777-2781). The trial judge offered to not comment on the defendant's parole eligibility, and instead instruct the jury: "you have already received all the instructions that are to be considered by you along with the exhibits and your recollection of the testimony." (T. 1691, R. 2781). Defense counsel was then asked if the proposed instruction was, "a satisfactory compromise?" (T. 1692, 2782). Defense counsel's only response was; "Well, my recommendation [only send back all of the sentences], Your Honor, but obviously you are going to send that back so- - ". Id. The trial judge thus answered the jury's question in accordance with the proposed compromise. Id.

There were no arguments by the defense at any time that the jury was provided with inaccurate information, or that the defendant had been deprived of any constitutional rights. Likewise, there was no suggestion below that defendant was parole ineligible, or that there was any certainty that he would not be released from jail, either. Indeed, as noted by the trial court and the prosecution, there were no guarantees with respect to when defendant could be paroled on the consecutive term

of year sentences for the second degree homicide and sexual battery convictions. (T. 1691-92, R. 2781-2); See also Fla. Stat. 947.16(3) (1982)(defendant is in fact parole eligible on such sentences, despite their being consecutive and even when the trial court has retained jurisdiction over a portion of said sentences).

As seen above, none of the arguments now advanced on appeal were made in the court below. The instant claim by the Appellant is thus procedurally barred. See Steinhorst v. State 412 So. 2d 332, 338 (Fla. 1982)(in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); See also Fla.R.Crim.P. 3.390(d)("No party may raise or appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict,...").

The instant claim is also without merit. This Court has expressly held that the trial court's instant response to similar questions by a capital re-sentencing jury is neither error nor prejudicial. See Waterhouse v. State, 596 S. 2d 1008, 1115 (Fla. 1992), wherein the jury asked: a) when the defendant would be eligible for parole and did time served count towards the parole time, and, b) if paroled on the capital crime, would the defendant be returned to the other jurisdiction where he had been previously convicted of second degree murder, to finish the sentence imposed in that jurisdiction. The trial court, much like that herein, had informed the jury that they would have to depend on the evidence and instructions already given to them. This Court held, "[T]he trial court did not abuse its discretion in refusing to answer the jury's questions". Waterhouse, at 596 So. 2d 1115. This Court noted:

With regard to the first question, the jury instructions

> adequately informed the jury that a life sentence carried a minimum mandatory sentence of twenty-five years. See *King* v. ***Dugger,*** 555 So. 2d 355, 359 (Fla. 1990). With regard to the remaining questions, it cannot reasonably be argued that the jury would have been less likely to recommend the death penalty had it been informed that Waterhouse would receive credit for the ten years he had already served on death row and that the court could not know whether Waterhouse would be extradited to New York once he was paroled in Florida.

Id.

Moreover, "there is no need to instruct the jury on the penalties for non capital crimes a defendant has been convicted of". Gorby v. State, 630 So. 2d 544, 548 (Fla. 1993); See also Nixon v. State, 572 So. 2d 1336, 1344-45:

> As we recently noted in ***King v. Dugger, 555 So.*** 2d 355, 359 (Fla. 1990), *"Lockett* requires that a sentencer 'not be precluded from considering, ***as a mitigating factor,*** **any** aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character. prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to aive the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the non-capital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the non-capital offenses as a mitigating factor. The jury was aware of the non-capital offenses for which Nixon was convicted, counsel urged those convictions as mitiaation. and the jury was instructed that the factors which it could consider in mitigation were unlimited.

(emphasis added). Likewise, in the instant case as previously noted, the defense was not precluded from presenting any evidence nor arguing anything it wished with

respect to the non capital convictions or sentences thereon. The jury was aware of said offenses, counsel urged that defendant would never be released from prison, and the jury was instructed on the catchall instruction that it should consider, in mitigation, any other aspect of the defendant's character or record, and any other circumstance of the offense. (T. 1681, R. 2771). There was thus no error and no prejudice to the defendant herein.

Finally, the Appellant's reliance upon Jones v. State, 569 So. 2d 1234 (Fla. 1990), Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), Turner v. State, 573 So. 2d 657 (Miss. 1990), and State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1992) is unwarranted. First, unlike the instant case, all of said decisions involved timely requests for instruction and/or arguments. Second, all of said decisions involve situations where the trial court would not allow any argument or instruction on the fact that, the defendant was either parole ineligible under state law, or, subject to specific minimum mandatory sentences.

In Jones, supra, the defendant was convicted of two counts of first degree murder. The defense thus requested that it be allowed to argue that he could be sentenced to two consecutive minimum twenty-five year prison terms on the murder charges, should the jury recommend life sentences. This Court held that defense counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. Jones, 569 So. 2d at 1239-40. Jones thus clearly involved capital sentencing minimum mandatory options, which are within the province of the jury's consideration. Moreover, the Court, in allowing "argument" in Jones, did not mention, let alone

require, specific instructions in this regard by the trial judge.

Simmons, supra is also inapplicable herein. Simmons had presented unrebutted evidence that, "due to his unique psychological problems, his dangerousness was limited to elderly women, and that there was no reason to expect further acts of violence once he was isolated, in a prison setting". 129 L.Ed.2d at 139. Simmons had also established that the jury in his case reasonably believed that he could be released on parole if not executed. The prosecution in Simmons, had made generalized arguments of future dangerousness, in support of the death sentence. Yet, Simmons' defense counsel, despite repeated and timely requests, was prohibited from any mention of the true meaning of the non-death sentencing alternative before the jury, under State law - i.e., life without parole. A majority of the United States Supreme Court agreed that in the penalty phase of a state capital trial, due process requires that the defendant be allowed, in rebuttal, to inform the jury, "by way of argument by defense counsel or an instruction from the court", of his ineligibility for parole under state law, where future dangerousness is at issue. 129 L.Ed. 2d at 146 (emphasis added).[9] The Court, however, also acknowledged that, "[i]n a State in which parole

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[9] The citation above is from the plurality opinion of Justice Blackmun; joined by Justices Stevens, Souter and Ginsburg (emphasis added); see also, 129 L.Ed.2d at 149 (Justice Ginsburg concurring)("As a subsidiary matter, Justice O'Connor's opinion clarifies that the due process requirement is met if the relevant information is intelligently conveyed to the jury; due process does not dictate that the judge herself rather than defense counsel provide the instruction. See post, at ___, 129 L.Ed.2d at 151. I do not read Justice Blackmun's opinion to say otherwise."); 129 L.Ed.2d at 151 (Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, concurring)("I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention by way of argument by defense counsel or an instruction from the Court - as a means of responding to the State's showing of future dangerousness".)

is available. how the jury's knowledge of narole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not liahtlv second auess a decision whether or not to inform a iurv of information reaarding parole", 129 L.Ed.2d at 145 (emphasis added).

Likewise, Turner and Henderson, supra, involved the trial court's denial of a timely request to inform the jury that a sentence of life imprisonment meant that the defendant was either parole ineligible, or would serve a minimum of twenty-five years, respectively. In the instant case, as noted previously, defendant was in fact parole eligible, and the jury was adequately instructed that defendant would serve a minimum of twenty-five years without parole. The Appellant's claim herein is thus procedurally barred and without merit.

III.

THE APPELLANT'S CLAIM OF MISCONDUCT AS TO THE STATE'S EVIDENTIARY PRESENTATION AND ARGUMENTS IS NOT PRESERVED AND IS WITHOUT MERIT.

The Appellant contends that the defendant's other crimes were made a focus of the resentencing, and that the prosecution's arguments were impermissible. These contentions are not preserved for appeal, as the grounds now presented were not argued in the court below. Moreover, the defendant's other crimes constituted valid evidence of the prior violent felony aggravator, and as such were fully admissible at the resentencing. The prosecution's unobjected to and accurate summary of said

evidence in its arguments to the jury was thus proper.

A . **Evidentiary Presentation**

The Appellant, in this Court, contends that his "other crimes" - that is the aggregate of the defendant's crimes in Cuba, his prior violent felony convictions in the United States, and his contemporaneous crimes upon victim Elviro, committed at the time of the capital offense - became a focus of the resentencing. No such argument was, however, presented in the court below. Rather, the record reflects that prior to the presentation of any evidence, defense counsel herein only argued that the second degree murder and rape of Victim Elviro should not become the "focus" of the resentencing (T. 91 1, R. 992). According to the defense, there was a "colorable" claim of focus if there was any medical examiner testimony as to this homicide, and, "photos and stuff" with respect to Elviro's murder were not permissible. Id. Defense counsel recognized that the focus argument, with respect to the Elviro crimes, was a "fact by fact call", and that he would object accordingly. (T. 912, R. 993).

With respect to the armed robbery of Ms. Carranza and the sexual battery of Ms. Fumero, defense counsel's position was that no evidence of same was at all admissible, on the grounds that the formal adjudications and convictions for said crimes had taken place after the original sentencing proceedings in 1982. (T. 912, R. 993; T. 919-922, R. 1000-1003). Defense counsel also added that any evidence which was not utilized in the prior trial, should not be admitted at the resentencing. (T. 914-15, R. 995-96). No other grounds were argued at any time during the

resentencing.

The State argued that the details of both the capital crime and second degree murder and rape of Elviro were relevant and necessary, and that the prior convictions for armed robbery and sexual battery, of Ms. Carranzo and Ms. Fumero, respectively, were admissible as prior violent felony aggravator evidence, pursuant to this Court's precedents. (T. 913, R. 994; T. 917-921, R. 998-1002).

The trial court rejected the defense argument that the armed robbery and sexual battery convictions were not admissible, (T. 922, R. 1003). The court, however, agreed that any evidence not introduced at the prior trial would be ruled upon, on an individual basis, prior to its introduction at the resentencing. (T. 915, R. 996). Thereafter, there were no additional grounds argued at any time during the resentencing.

There were no objections, on any of the above set forth grounds, at any time during any of the initial (or closing) arguments by the prosecution. (T. 925-941; R. 1006-1022).

During the first witness's, medical examiner's, testimony the State then sought to introduce two (2) photographs which had not been introduced at the prior trial. (T. 953-957, R. 1034-38). Defense counsel objected on the grounds that said photos were "graphic", and introduction of same would make the second degree homicide "a focus of this proceeding". (T. 953, R. 1034). The first photograph depicted a stab wound on the base of Elviro's neck and, showed the gag placed down her throat and covering her mouth. The second photograph showed how this victim had been bound when her body was discovered; she had been "hog tied", with each wrist having been

tied to one ankle, the garments cut away, so as to expose the genital area and facilitate sexual battery, (T. 954-5, R. 1035-6; T. 957-8, R. 1038-9). The trial judge allowed the first photograph into evidence, in lieu of another admitted at the 1982 trial, based upon the medical examiner's" representation that the former depicted Elviro's wound more clearly than the latter, and that it also showed the gagging of Elviro's mouth. (T. 954-55, R. 1035-6). The second photo was also admitted into evidence, because it was the only one available which fully reflected how the victim had been bound when her body was found. (T. 957, R. 1038).

There were no other objections, based upon the prior defense arguments, during the medical examiner's testimony. Likewise, there were no such objections during the crime scene technician, Sgt. Buhrmaster's, testimony, which went to both the capital murder and the second degree murder and rape of Elviro.

The defense then renewed its previous objections prior to the testimony of Mr. Barcello and Ms. Martinez. Mr. Barcello, however, did not testify as to any details with respect to Elviro's murder, or other prior violent felonies. He was the eyewitness to the capital murder, and testified with respect to details establishing the CCP and hindering of law enforcement aggravators. The only mention of Elviro, in his testimony, was that the defendant had asked him to wait outside, while the defendant and Elviro utilized his bedroom. Likewise, Ms. Martinez did not testify as to any prior violent felony convictions or details of the Elviro murder, Ms. Martinez recounted the sequence of the defendant's movements and actions in the evening hours preceding

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[10] The medical examiner, who testified at the resentencing, Dr. Mittleman, was not the same as the one who had testified at the 1982 trial. (R. 2836).

the murders. Contrary to the defendant's self-serving statements that he had spent this time with another girl friend and other friends, ingesting alcohol and other drugs, (ST. 123-4; SR. 174-5), Ms. Martinez testified that the defendant had spent the time threatening Elviro and herself. The defendant had then taken them to the hospital, and after luring the capital murder victim's companion to the hospital, left with Elviro to go to his residence where the murders were then committed.

The defense also renewed its objections, without articulating any additional grounds, i.e. based solely upon the contention that these prior convictions were not at all admissible, prior to the testimony of Ms. Carranzo, Ms. Fumero, and Assistant State Attorney Siegel. Ms. Carranzo testified how the defendant had robbed her of jewelry and cash, while holding a gun on her. Ms. Fumero testified how the defendant had forcibly raped her. Mr. Siegel testified that the defendant had pled guilty to both of said crimes and been adjudicated guilty of same by the court. This witness also testified as to the hindering of law enforcement aggravator; the capital murder victim was a cooperative witness and had been scheduled to testify in the Fumero rape trial prior to her demise.

There were no objections after the presentation of the State's evidence as set forth above. There were no objections nor any requests for mistrial or other mention of the Elviro homicide, or other crimes, having become a focus of the resentencing. Likewise, there were no objections during the defense presentation of evidence, on cross examination of the defense witnesses or otherwise, that "other crimes" were becoming the focus of resentencing. Indeed, the defendant's "anti-social acts" in Cuba, such as his machete attacks on his mother-in-law and brother-in-law, his

contemplation of a knife attack on his father, and his constant incarceration in Cuban jails, were all brought out during the direct examination of defense witnesses by defense counsel. (ST. 47, SR. 98; ST. 23-4, SR. 74-75; ST. 40-41, SR. 40-41). Finally, there were no objections, on the grounds argued in the court below or on appeal herein, after the defense presentation of evidence, nor during or after the prosecution's closing arguments to the jury.

As seen above, the Appellant's claim herein, that "other crimes" - that is, the defendant's crimes in Cuba and his prior violent felonies' convictions including the second degree murder and rape of Elviro, the armed robbery of Carranzo and Sexual battery of Fumero - became a focus of the resentencing, was never raised in the court below. As such, said argument is now procedurally barred. See Steinhorst v. State, at 412 So. 2d 338 ("In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

With respect to the contention argued in the court below - that the two photos depicting the manner in which victim Elviro had been found and Ms. Martinez's testimony recounting the defendant's actions in the hours preceding both murders, made the Elviro crimes a focus of the resentencing - same is without merit. The aggravating factor of prior violent felonies includes other violent offenses which resulted in contemporaneous convictions along with the capital murder. See, eg., Cook v. State, 542 So.2d 464, 970 (Fla. 1989); Lucas v. State, 376 So. 2d 1149 (Fla. 1979). Not only were the second degree homicide and rape of Elviro relevant to the aggravating factor which the prosecution was permitted to establish, but details

of said offenses, including photos and medical examiner testimony as to the manner of death, were admissible in conjunction with the proof of the prior convictions. The prosecution was not limited to merely establishing the facts, of said convictions. See, eg. Delap v. State, 440 So. 2d 1242, 1255 (Fla. 1983); Elledge v. State, 346 So. 2d 998 (Fla. 1977); Dufour v. State, 495 So. 2d 154, 163 (Fla. 1986)(rejecting arguments that the prosecution "went too far" with the evidence of the prior violent felony convictions); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1942)(medical examiner testimony with respect to the autopsy of the victim of a prior second degree homicide admissible at resentencing proceedings); Lockhart v. State, 655 So. 2d 69, 73 (Fla. 1995) ("there was no error in admitting the eight photographs from the [prior violent] Indiana crime. The admissibility of photos is within the trial court's discretion and will not be disturbed on appeal absent a showing of clear error. [citation omitted]". The photos, although gruesome, did not become an impermissible feature at the penalty phase).

The Appellee would also note that in a typical situation, the same jury would have heard the guilt phase evidence of both the capital murder, and, the second degree homicide and rape herein, before making its recommendation of life or death on the capital murder. What this resentencing jury heard with respect to the Elviro crimes was no different, and indeed considerably less than what any original sentencing jury would necessarily have heard with respect to the latter crimes. Cf., Valle v. State, 581 So. 2d 40, 45 (Fla. 1991) (no error in permitting prosecution to recount guilt phase evidence for sentencing jury in resentencing proceedings); Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1987)(". . . it is within the sound discretion of the trial

court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital proceedings to make wise and reasonable decisions in a vacuum."); Lucas v. State, 568 So. 2d 18, 21 (Fla. 1990) (testimony from two surviving victims was proper, as resentencing jurors must be made aware of the underlying facts); Compare, Cave v. State, 660 So. 2d 705, 709 (Fla. 1995)(where several witnesses" testified as to the facts of the crime, presentation of a video re-enactment, which "dramatized" the crime, was cumulative and prejudicial at resentencing).

Moreover, the manner of Elviro's death and the account of the defendant's actions and movements in the hours preceding the murders, were directly relevant to rebut the defense theory of mitigation in the instant case. According to the defense experts herein, the defendant had had a psychotic "break with reality" at some time prior to or during Elviro's murder. This, in turn, had led to the onset of the voice of "Bermudez", who had commanded the defendant to exact revenge and kill the first person whom he came into contact with - i.e., the capital murder victim. (St. 50-1, 68, SR. 101-06, 119; T. 1436-40, R. 2517-21.) According to the defense experts, the defendant's mental condition had been exacerbated by the influence of various drugs and alcohol which he had ingested with his friends immediately prior to the murders. The ingestion of drugs and alcohol had occurred only according to the defendant's own self-serving accounts. (ST. 123-24, SR. 174-75; ST. 65, SR. 116; T. 1426-7, R. 2507-9). The defense experts, however, admitted, and the State's rebuttal witnesses reaffirmed, that a "break with reality" was inconsistent with goal

oriented behavior. (ST. 118-20, SR. 169-71; T. 1521-23, R. 261 l-l 2; T. 1523-25, R. 2613-15; T. 1589, R. 2679). The Elviro photographs which showed, a) that she had been gagged to prevent her screams from being heard by the other occupants of the house, b) that she had been bound so as to prevent her escape and facilitate sexual battery, c) that the defendant had to procure a knife to stab her, d) the nature of the wounds inflicted, and, a) that the victim had then been hidden under sheets, pillows and mattresses, to delay the detection of her body; were admittedly incompatible with any break with reality. Id. Likewise, Ms. Martinez's account refuted the defendant's version that he had spent the evening with other friends, ingesting alcohol and drugs. The above details of the Elviro crime presented by the prosecutor thus further served to rebut the defense's case for mitigation. See, eg. Wuornos v. State, 644 So. 2d 1012, 1017 (Fla. 1994) (evidence of other crimes is relevant to controvert defendant's theory of the penalty phase); Rhodes v. State, 638 So. 2d 920, 925 (Fla. 1994)(admission of the weapon used in a prior armed robbery and testimony as to the manner it had been procured, although not necessary to establish the aggravator, was relevant where it served to rebut any inference of long-term mental problems being at the root of the prior offense as well as being the cause of the capital murder).

Likewise, the State, contrary to the defense arguments presented in the court below, was entitled to present evidence of the defendant's violent crimes of armed robbery and sexual battery, which were both committed prior to the capital offense, with convictions thereon obtained prior to the resentencing herein. Dougherty v. State, 419 So. 2d 1067, 1069 (Fla. 1982). Again, the prosecution was not limited

to merely establishing the fact of such convictions; details of such crimes are admissible:

> Details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial. *Rhodes v. State, 547 So.* 2d 1201, 1204 (Fla. *1989); Tompkins v. State, 502 So.* 2d 415, 419 (Fla. 1986), *cert. denied, 483* U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987). Such testimony "assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." *Rhodes,* 547 So.2d at 1204. Further, hearsay testimony is admissible, provided that the defendant has a fair opportunity to rebut it. § 932.252(1), Fla. Stat. (1989); *Tompkins, 502* So.2d at 419.

Waterhouse v. State, at 596 So. 2d 1016; See also, Delap, Elledge, Dufour, Lockhart, supra.

Aggravating and mitigating factors are not mere numbers which are totaled when they are weighed. The substance of each factor must be evaluated in determining the weight to be accorded to it. Therefore, when the jury is asked to weigh an aggravating factor based upon convictions for prior violent felonies, it is reasonable that the jury be given the pertinent facts of those other offenses. Moreover, presenting the details of each crime through the testimony of the victim thereof, as was done in the instant case," is permissible, and does not constitute making such convictions a "feature" of sentencing. See, eg., Lucas, 568 So. 2d, 21 (Fla. 1990)(testimony from two surviving victims, which in part described their own physical and mental suffering, held not a "feature"); Stano v. State, 473 So. 2d 1282

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[11] The victim in each crime detailed the defendant's actions. Apart from such testimony, the State merely presented testimony from the Assistant State Attorney, who was present when the defendant pled guilty and was adjudicated of the crimes.

(Fla. 1985)(evidence of eight other murder convictions in sentencing proceedings); Rogers v. State, 511 So. 2d 526 (Fla. 1987)(evidence of two other robberies did not become feature of case); Burr v. State, 466 So. 2d 1051 (Fla. 1985)(evidence of three other crimes did not become feature); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (evidence of several murders).

Finally, cross examination of defense witnesses with respect to the defendant's crimes in Cuba, was also not error. As noted previously, there were no objections to such cross examination on any of the grounds complained of on appeal. Furthermore, the defendant's anti-social acts in Cuba were also elicited by defense counsel during the direct examination of both the defense expert Miranda, and the defendant's sister. While the defense theory was that such acts were indications of a major mental illness, schizophrenia, the State's rebuttal witnesses testified that the consistent and lifelong pattern of defendant's violence was more compatible with the diagnosis of a socio-pathic personality disorder, which is not a major mental illness. (T. 1571-73, R. 2661-63). Again, once a defendant advances a theory of mitigation and opens the door by presenting extensive psycho-social history, the State is permitted to rebut such a theory through cross-examination of defense witnesses. See, Wuornos, at 644 So. 2d at 1009-10; See also, Parker v. State, 476 So. 2d 134, 139 (Fla. 1985)(no error in admitting evidence of prior juvenile criminal offenses, where the defense extensively explored the defendant's "past personal and social developmental history, including a prior criminal history. "); Muehleman v. State, 503 S. 2d 310, 315-16 (Fla. 1987)(the admission into evidence, during penalty phase, of a "'Juvenile Social History Report' detailing [defendant's] juvenile criminal record" was proper, where "psychiatric

expert witness for the defense stated that he had considered the report in formulating his opinion." This Court also held that there was no error in allowing three (3) police officers to testify as to prior crimes of burglary, theft, assault and possession of drugs, in order to "expose the jury to a more complete picture of those aspects of this defendant's history which had been put in issue."); Hildwin v. State, 531 So. 2d 124, 127 (Fla. 1988)(penalty phase testimony as to uncharged crimes admissible where the defendant opened the door to this type of evidence); Johnson v. State, 608 So. 2d 4, 1 O-l 1 (Fla. 1992)(no error in permitting cross examination and full inquiry of defense witness, as to prior crimes and history utilized by witness, to determine whether witness' opinion had a proper basis).

In sum, the Appellant's claims with respect to the State's evidentiary presentation in the court below are both procedurally barred and without merit.

B. Arguments Bv The Prosecution

As noted previously, there were no objections, on any of the grounds asserted on appeal or indeed those argued in the trial court prior to the presentation of evidence, to the prosecution's initial or closing arguments. There were no motions for mistrial at any time, either. As such, the Appellant's current complaints, with respect to the prosecution's argument in the court below, are not preserved for appeal and are procedurally barred. Ferauson v. State, 417 So. 2d 639, 641 (Fla. 1986); Craia v. State, 510 So. 2d 857, 964 (Fla. 1987)(where objections to closing argument were "not specifically made to the trial court", same cannot be raised for the first time on

appeal and will not be considered.).

Moreover, there was nothing improper in the State's closing arguments. The Appellant first complains of the prosecutor having detailed the defendant's actions during the Elviro murder. As noted above, however, the details of this prior felony conviction involving the use of violence, is admissible and assists the jury in evaluating the character of the defendant and the circumstances of the crime, so that the jury can make an informed recommendation as to the appropriate sentence. Waterhouse, at 596 So. 2d 1016. Moreover, the prosecutor's account of the defendant's goal oriented behavior, in gagging Elviro so as to prevent her screams from being heard by other occupants of the house, binding her so as to prevent her escape and facilitate sexual battery, and then hiding the body, was relevant to rebut the defense theory that the defendant had a psychotic break with reality at some point prior to during her murder. Comments based on relevant evidence are not error. Lucas v. State, 568 So. 2d 21 (Fla. 1990). Likewise, the prosecution's summary of the defendant's criminal behavior in Cuba, which as noted above was elicited by the defense in its direct examination of defense witnesses, in support of its argument that the defendant had a history of ability to control his actions when it suited him, (T. 1641-2, R. 2731-2), and that his behavior was more consistent with a personality disorder rather than major mental illness, was a fair comment on evidence. It was thus not improper. Lucas, supra.

Likewise, there was nothing improper in the prosecutor's comment that he was requesting the death penalty not only because it was his job, but because: "in this case, not only right but it is, in fact just." (T. 1619, R. 2709). (Emphasis added).

Having stated the obvious,[12] the prosecutor then accurately explained the function of aggravating and mitigating factors, (T. 1622-27, R. 2712-13), summarized the defense arguments and evidence adduced at the penalty phase, (T. 1623-1655, R. 2714-2745), and stated that, if the jury found the aggravating factors outweighed the mitigation, then a recommendation of death was appropriate. (T. 1659, R. 2748). The State fails to see any impropriety in said argument, and the Appellant has not cited any case law demonstrating any error in same.

The next complained of statement, that the jury should not, "confuse sympathy for mitigation because mitigation is not sympathy", (T. 1656, R. 2746), was not improper either. See, Valle, at 581 So. 2d 47 (prosecution may argue that the jury should not be swayed by sympathy); See also, Saffle v. Park, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (I 990). The prosecution's next comment, "[t]he death penalty is a message sent to certain members of our society who choose not to follow the rules", Id., is in the same posture. This Court has disapproved of "messages to the community" comments, but has not deemed same to be fundamental error. See, Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); Crump v. State 622 So. 2d 963, 971-72 (Fla. 1993). The statement herein, however, was not such a comment. The prosecutor was simply stating that the death penalty is a message to murderers - i.e., those who choose not to follow the law. Such a comment not only states the obvious, but it does not pressure the jurors to send a message to the community.

The Appellant's contention with respect to the prosecutor's Biblical quote is also

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[12] See Newton v. State 178 So. 2d 341, 344 (Fla. 2d DCA, 1965)(prosecutor is charged with the duty of seeing that "justice" is done by endeavoring to ascertain true facts).

without merit. The prosecutor stated, "[T]he Old Biblical injunction 'ye shall have one manner of law as well as for the strangers as one for your own community.' One manner of law; he [defendant] is to be treated like everyone else and he has been." (T. 1657, 2747). Biblical references are not improper, let alone per se reversible error without an objection. See, Street v. State, 636 So. 2d 1297, 1303 (Fla. 1994)(Biblical quotations are not per se improper. "'[c]ounsel should not be so restricted in argument as to prevent references by way of illustration to principles of divine law relating to transactions of men as may be appropriate to the law."' Citing Paramore v. State, 229 So. 2d 855, 860-1 (Fla. 1969).

Finally, the Appellant's claims, that the prosecutor presented a war on crimes argument, told the jury to have courage, that the victim was not protected, and that the law imposed a duty to vote for death, (T. 1657-59; R. 2747-49), are also without merit. In context, the prosecutor simply told the jury that the propriety of death penalty in general had been determined by the legislature, that the recommendation of death was not an easy task, but that regardless of whether the jurors liked the law, "if you find that the aggravating factors do indeed outweigh the mitigating factors," they should then return a recommendation of death. (T. 1657-9, R. 2747-49). The comments served to remind the jury of the solemnity of its duty and were thus not improper. See, Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990)(appeals to common sense and for justice not improper). Thus, the Appellant's claims herein, with respect to both the State's evidentiary presentation and its arguments to the jury, are procedurally barred. Furthermore, said claims are without merit. .

IV.

THERE WAS NO MISINFORMATION ABOUT THE JURY'S CAPITAL SENTENCING ROLE.

The Appellant contends that the prosecutor minimized the jurors' sense of responsibility in its arguments, and, that the trial judge did not instruct the jury properly, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim is procedurally barred as there were no objections to the prosecutor's complained of statements , nor did the defense request any additional or different jury instructions. See, Combs v. State, 525 So. 2d 853, 856 (Fla. 1988), J-lunter v. State, 660 So. 2d 244, 253 (Fla. 19951, Dugger v. Adams, 489 U.S. 401, 402, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

Moreover, the instant claim is without merit, as the prosecutor did not minimize the jury's role. The complained of argument herein in its entirety was as follows:

> The time you have spent in trial will probably have represented the hardest decision making, most soul searching time of your lives. Your role is to act as advisors to the court. You are Judge Kahn's advisory committee. You tell him what the conscience of the community feels about this crime.

(T. 1659, R. 2749).

Not only did the prosecutor not minimize the jury's role, the above argument was a correct statement of Florida law. See Grossman v. State, 525 So. 2d 833, 846 (1988); C o m b s at 525 So. 2d 857-8. Furthermore, the Appellant has neglected to mention that the prosecutor herein also argued to the jury that, "the Court will weigh your recommendation with great care and give it great weight. So it is not

something where you just pass the buck along but something you all must think about and weigh quite heavily." (T. 1623, R. 2713). Likewise, the trial judge herein instructed the jury, "the law requires, that you, the jury, render to the Court an advisory sentence as to what punishment will be imposed on the defendant. I will tell you that the Court gives great weight to your decision." (T. 907-908, R. 988-989). The Appellant's claim herein is thus procedurally barred and without merit.

V.

THE PROSECUTOR PRESENTED THE JURY WITH ACCURATE INFORMATION.

The Appellant contends that the prosecution misled the jury in its arguments with respect to the distinctions between defense retained and court appointed psychological experts, This claim is procedurally barred as there were no objections, on any grounds, to either the prosecution's arguments or the evidence adduced on this matter during the course of the resentencing. See, Steinhorst v. State, at 412 So. 2d 338 ("in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below".). The Appellant's argument herein, that the State's rebuttal witnesses were not in fact court appointed experts, was likewise never raised in the court below and is procedurally barred. Steinhorst v. State.

In any event the State would note that the Appellant's claim herein is refuted by the record and without merit. First, contrary to the Appellant's contention herein,

the record is abundantly clear that the State's rebuttal witnesses, Drs. Garcia and Mutter, were court appointed. At the hearing, immediately prior to the 1992 resentencing alluded to by the Appellant, the prosecution, in no uncertain terms, made it clear that it was requesting court appointed experts in the instant case: "[prosecutor]: We were asking the court just to appoint Independent court appointed experts". (T. 3, R. 43). The prosecutor had stated "I would ask the Court to consider appointing Dr. Mutter and Dr. Lazaro Garcia. Id. Defense counsel, upon having been informed of who the State wished to have appointed as court experts, stated that he had no objection and only wanted to be present at any evaluation of the defendant by said experts. (T. 5-7; R. 45-47). The trial court signed the standard competency form order. (T. 3, R. 43).

At a hearing approximately three weeks later, on November 5, 1991, the prosecutor merely stated, to the court: "One doctor you have appointed (sic) I believe has completed his work. The second doctor is in the process of (sic) completing it". (T. 3, R. 51). Contrary to the Appellant's suggestion, the record thus does not indicate that the doctors worked for the prosecution.

Thereafter, during the presentation of rebutal evidence by the State at the resentencing, Drs. Mutter and Garcia, without any objections whatsoever, testified that they had been court appointed to examine this defendant, in 1992, for competency and sanity, in the defense counsel's presence. (T. 1508, 1570-71, R. 2598, 2660). Both defense counsel and the prosecutor had presented these experts with relevant witness transcripts and doctor's reports, prior to the expert's reports and rendition of any opinion. (T. 1595-97, R. 2685-7; T. 1525-6, R. 2615-16).

In contrast, defense expert, Dr. Miranda, testified, on direct examination by defense counsel, that he had been originally retained in 1987 by post conviction defense counsel. (SR. 65; See also cross examination testimony at SR. 125). Dr. Miranda had based his opinions solely upon the defendant's self-serving account of his whereabouts and actions prior to and during the murders. (ST. 131-135, SR. 182-186). Likewise, defense expert, Dr. Cava, again on direct examination, also testified that he had been retained by the defense. (T. 1273, R. 2354; T. 1333, R. 2414). Dr. Cava had examined the defendant in 1982, 1988 and 1992; Dr. Cava stated that he had never testified for the State in any criminal case. (T. 1274, R. 2355; T. 1333, R. 2414). The last defense expert, Dr. Carbonell, also on direct examination by defense counsel, stated that she had evaluated the defendant pursuant to defense counsel's request. (T. 1386, R. 2467). Dr. Carbonell also stated that she has never been hired by the State in any penalty proceeding. (T. 1408, R. 2489).

The State would note that, Dr. Carbonell, again in direct examination by defense counsel, admitted that it was "important" in any evaluation, and particularly in the instant case, that a defendant know <u>who</u> has sent the mental expert to perform the evaluation:

> **... it is important that the person know when they talk to me who sent me, why I'm there.**
>
> **In Mr. Lara's case, I presented him with a letter from his attorney explaining who I was and telling him that he should speak to me because he was very suspicious, and during the course of the interview, I had to remind him again that he had permission to speak to me and that his attorney said he should speak to me, because he was concerned about whether or not he should do that.**

(T. 1386, R. 2417).

It is axiomatic that the prosecutor is entitled to establish bias by the defense expert witnesses. ***See, eg.*** Henry ***v.*** State, ***574 So.*** 2d ***66, 71*** (Fla. ***1990); Ehrhardt, Florida Evidence*** (I 995 ed.), 702-4, pp. 528-30 ("In addition, each of the methods of attacking the credibility of a lay witness specified in section 90.608 may be used to attack the credibility of an expert. For example,... the expert's past pattern of testifying for one side in litigation [is] admissible to show a possible bias or prejudice on the part of the witness."). The prosecutor may also, examine the basis for an expert opinion and attack its credibility accordingly. See, Johnson v. State, at 608 So. 2d 1 O-l 1. The prosecutor's comment herein, that the defense retained experts were advocates for the defendant, whereas the court-appointed doctors were not, was based upon unobjected to and accurate testimony as seen above. As such it was neither misleading nor improper. The Appellant's reliance upon Toedel v. Wainwright, 667 F. Supp. 1456 (S.D.Fla. 1986); Miller v. Pate, 386 U.S. 1 (I 967), Alcorta v. Texas, 355 U.S. 28 (1959), Donnellv v. DeChristoforo, 416 U.S. 637 (1 974), Caldwell v. Mississippi, 472 U.S. 320 (1985), and progeny, is unwarranted. All of said cases involved the knowing use of false testimony, or irrelevant, inflammatory and erroneous arguments to the jury. Such was not the situation in the instant case. The Appellant's claim herein is procedurally barred and without merit,

VI.

THE PROSECUTION'S USE OF RELEVANT PHOTOGRAPHS WAS NOT ERROR.

The Appellant contends that two (2) photographs of Olga Elviro, which were not admitted at the original trial, were erroneously admitted at resentencing because they were gruesome. The Appellant argues that these photos were not relevant, as it was "conceded" that Elviro died of stab wounds and the original jury found the defendant guilty of second degree homicide. The instant claim is without merit.

As noted in argument three herein, the two photos at issue were relevant and admissible. The first photograph depicted a stab wound on the base of Elviro's neck and, showed the gag placed down her throat and covering her mouth. The second photograph showed how this victim had been bound; she had been "hog tied", with each wrist having been tied to one ankle, the garments cut away, so as to expose the genital area and facilitate sexual battery. (T. 954-5, R. 1035-6; T. 957-8, R. 1038-9; R. 2841, 2843). The trial judge allowed the first photograph into evidence, in lieu of another admitted at the 1982 trial, based upon the medical examiner's[13] representation that the former depicted Elviro's wound more clearly than the latter, and, that it also showed the full extent of the gagging of Elviro's mouth and throat. (T. 954-55; R. 1035-6). The second photo was also admitted into evidence, because it was the only one available which fully reflected how the victim had been bound when her body was found. (T. 957, R. 1038). The State would note, that contrary to the Appellant's

[13] The medical examiner, who testified at the resentencing, Dr. Mittleman, was not the same as the one who had testified at the 1982 trial. (R. 2836).

argument herein, said photos were not utilized in opening arguments. Likewise, they were not "paraded" during the State's case in chief. The two photos were utilized by the medical examiner in his testimony consisting of approximately two pages of transcript. (T. 963-4, 964-5). Thereafter, only the crime scene technician made a single, unobjected to, reference to the second photo, in less than five (5) lines of testimony; he stated that the photo depicted how he had initially found victim Elviro's body. (T. 1039, R. 1120). Likewise, during closing arguments, the prosecutor made only one, again unobjected to, general reference to the photos of the Elviro murder; the record does not reflect that the prosecutor was specifically referring to the two photos at issue herein. (T. 1654, R. 2744).

In any event, allegedly gruesome photographs are admissible if they properly depict the factual conditions relating to the crime, and, if they are relevant in that they aid the court and jury in finding the truth. Booker v. State, 397 So. 2d 910, 914 (Fla. 1981); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994). Relevance is to be determined without regard to the alleged gruesome or offensive nature. Adams v. State, 412 So. 2d 850, 853 (Fla. 1982); Thomoson v. State, 565 So. 2d 1310, 1314 (Fla. 1990). In the instant case, as noted previously in Argument three herein, the details of a prior violent felony are relevant as such evidence "'assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.'" Waterhouse v. State, at 596 So. 2d 1016, citing Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). Such details include photographs of the victims of prior violent crimes. Wyatt v. State, at 641 So. 2d 360, (photos of victim of prior homicide

admissible); Lockhart v. State, at 655 So. 2d 73 (eight (8) photos of prior crime admissible); Waterhouse, supra.

Moreover, the manner of Elviro's death was directly relevant to rebut the defense theory of mitigation in the instant case. According to the defense experts herein, the defendant had had a psychotic "break with reality" at some time prior to or during Elviro's murder. This, in turn, had led to the onset of the voice of "Bermudez", who had commanded the defendant to exact revenge and kill the first person whom he came into contact with - i.e., the capital murder victim. (ST. 50-1, 68, SR. 101-06, 119; T. 1436-40, R. 2517-21.) The defense experts, however, admitted, and the State's rebuttal witnesses reaffirmed, that a "break with reality" was inconsistent with goal oriented behavior. (ST. 118-20, SR. 169-71; T. 1521-23, R. 261 l-l 2; T. 1523-25, R. 2613-15; T. 1589, R. 2679). The defendant had hidden Elviro's body under sheets, pillows, and mattresses. When her body was uncovered, the photographs at issue showed: a) that she had been gaged to prevent her screams from being heard by the other occupants of the house, b) that she had been bound so as to prevent her escape and facilitate sexual battery, c) that the defendant had to procure a knife to stab her with and had plunged the knife nine (9) inches into the base of her neck. The defendant's actions were admittedly incompatible with any break with reality. Id. The details of the Elviro crime presented by the prosecutor thus further served to rebut the defense's case for mitigation. See, eg. Wuornos v. State, 644 So. 2d 1012, 1017 (Fla. 1994)(evidence of other crimes is relevant to controvert defendant's theory of the penalty phase); Rhodes v. State, at 638 So. 2d 925.

The instant claim is thus entirely without merit. Assuming, arguendo, that the admission of said photos was error, the Appellee submits that same was harmless beyond a reasonable doubt, in light of the minimal testimony thereon. Thompson v. State, 619 So. 2d 661, 266 (Fla. 1993)(admission of autopsy photograph of victim, which was not essential in light of other photos introduced, was harmless beyond a reasonable doubt)

VII.

THE HINDERING GOVERNMENTAL FUNCTION AGGRAVATOR WAS PROPERLY APPLIED.

The Appellant contends that the jury was not provided with a limiting instruction on the disruption or hindrance of governmental function or enforcement of laws aggravator. See, Fla. Stat. 921.141(5)(g). The Appellant argues that said aggravator is "similar" to the "avoid arrest" aggravator, Fla. Stat. 921 .141(5)(e), and the jury should have therefore been instructed that the "dominant or sole motive" was to disrupt/hinder governmental function. There was, however, no such argument presented in the court below; nor did defense counsel ever request any instruction other than the standard jury instruction given herein. The instant claim is thus procedurally barred. Wvatt, at 641 So. 2d 360 (alleged errors in the penalty-phase jury instructions, which were not objected to in the trial court, found not to be preserved for appeal); Vaught v. State, 410 So. 2d 147 (Fla. 1982); Steinhorst, supra.

The Appellant also claims that the trial court erred in finding the instant

aggravator, as evidence of same was based upon "circumstantial evidence and inferences," and the State failed to "eliminate every reasonable hypothesis" that the murder could have been a result of the defendant's "disturbed functioning". See Brief of Appellant at pp. 73-4. First, as noted above, the "sole motive" argument herein was not presented to the trial judge in the court below, and thus cannot now be raised in this court. The State would note that even with respect to the avoid arrest aggravator, relied upon by the Appellant, "[a] motive to eliminate a potential witness to an antecedent crime," is sufficient. Fotopoulos v. State, 608 So. 2d 784, 792 (Fla. 1992); Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988). Moreover, "[s]uch a motive can be inferred from the evidence. . . ."; an express statement of motive is not necessary. Fotopoulos, 608 So. 2d at 792; Swafford, 533 So. 2d at 276-77; see also, Routly v. State, 440 So. 2d 1257, 1263 (Fla. 1983). Furthermore, this Court has rejected the premise that alleged conflicts in evidence undermine a judge's finding of an aggravator. See, Wuornos v. State, at 644 So. 2d 1029 ("In a general sense we first find that the premise underlying Wuornos' argument - that the relevant evidence was conflicting - does not of itself undermine a trial court's findings of aggravators and mitigators. The State's theory of the case prevailed here, and we therefore view the record in the light most favorable to the prevailing theory."); see also, Lara v. State, 464 So. 2d 1173, 1180 (Fla. 1985) (This Court rejected Lara's argument that the instant aggravator was not proven beyond a reasonable doubt as, "a more reasonable explanation for the [capital] killing was his emotionally overwrought condition immediately following his killing of his girlfriend. Lara had asserted that this explanation was more reasonable, because the jury returned a second-degree murder

verdict for the killing of the girlfriend, rather than a first-degree premeditated murder verdict.).

In the instant case, the trial judge, as noted in Argument I,[14] based upon the State rebuttal witnesses' opinions and the conflicts in the defendant's experts' testimony, expressly rejected any claim that defendant's mental state was unbalanced so as to in any way lessen his responsibility for the crime. The trial judge then concluded that the instant aggravator had been established in light of the following factual findings:

> 2. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (921 ,141[5][g]).
>
> This was established beyond any reasonable doubt. Trial for the sexual battery of Odalys Fumero was scheduled probably to begin the day after this murder. The rape victim's testimony established that her sister Grisel (the murder victim) would have provided extremely damaging testimony against the defendant in the rape trial, because after the rape the victim went immediately to the automobile where Grisel waited. Grisel learned what had happened and observed the battered condition of the rape victim, and thus became the only available witness to corroborate the victim's testimony as to the result of the violence of the sexual assault. The testimony of Thomas Barcello (by transcript of his testimony at the prior trial - that witness was not to be found for these proceedings although the State made a diligent effort to locate him and learned that he was also being sought by other law enforcement authorities) showed the defendant's anxiousness to rid himself of this witness. In fact, as the defendant was about to murder Grisel, he told her that she was the cause of his troubles.

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[14] See pp. 43-46 herein.

(R. 2593).

The trial court's conclusion that Grisel was murdered to prevent her testimony at the defendant's trial for the rape charge is supported by the following eidence adduced at the sentencing. Odalys Fumero testified that she was the capital murder victim's sister. (T. 1008, R. 1089). She was thirteen (13) years old when she was raped by the defendant. The circumstances were that Odalys had accompanied her sister, Grisel, on a date with Frank Rizzo, as a chaperone, at a Miami club. (T. 1009-10, R. 1090-91). The defendant, a friend of Rizzo's, drove them to the club. Id. Odalys had never met the defendant previously; she was not his date. (T. 1010, R. 1091). Odalys drank alcohol offered to her at the club, became dizzy and asked to go home. (T. 1011-1013, R. 1092-94).

The defendant told Grisel that he would take Odalys to a friend of his and give her some coffee, before she got home, so that her mother would not notice the effects of alcohol. (T. 1012-13, R. 1093-94). The defendant thus drove Grisel and Odalys to his friend's house and parked a half block away. (T. 1013, R. 1094). Odalys asked her sister to go to the house with her, but the defendant told Grisel to stay in the car. (T. 1014, R. 1095). Once inside the house, the defendant then attacked Odalys, hitting her, prior to the rape. (T. 1014-17, R. 1096-98). The defendant then told Odalys to get dressed and keep quiet. (T. 1018, R. 1099).

After the defendant drove them home, Odalys began crying and told Grisel about the rape. (T. 1019, R. 1100). Grisel saw the blood between Odalys' legs, the bruises on her neck and her swollen mouth. (T. 1019-20, R. 1100-01). At first Grisel asked Odalys not to tell their mother about the rape. (T. 1022, R. 1103). However,

after a few days, they in fact told their mother, who then took Odalys to the police station and filed rape charges. Id. Odalys testified that her sister, Grisel, was going to testify at the rape trial. (T. 1023, R. 1104).

The assistant state attorney for the above rape trial, Mr. Siegel, testified that Grisel had been listed as a prosecution witness, and that she was cooperative. (T. 994-95, R. 1075-76). A deposition had been scheduled for July 16, 1981, the day after Grisel was murdered; the trial judge was to set the case for trial after said deposition. (T. 995-96, R. 1076-77).

Witness Barcello testified that in the days prior to the above trial, he had, on numerous occasions, heard the defendant talking with Rizzo, who lived at the defendant's house and was Grisel's boyfriend. (T. 1095-96, R. 1 176-77). The defendant was constantly asking Rizzo to bring Grisel to their house, ask her to marry him, and convince her not to be a witness at above said rape trial. (T. 1095-96, R. 1176-77). Grisel had thus moved into the house approximately four (4) days before her demise. (T. 1097, R. 1178). Barcello added that Frank Rizzo had stated that he did not like Grisel; "that he was just waiting for the trial to be over"; and, that if he got rid of Grisel any sooner, the defendant would kill him. (T. 1099, R. 1180).

On the day before her murder, however, Grisel had bean approached by Rizzo's other girlfriend, Maitay. (T. 1 100-1, R. 1 181-2). Maitay warned Grisel: "don't you realize that [Rizzol doesn't love you for any reason, that he wants you to serve as a witness for Mario [defendant] in a trial and after that he's going to kick you twice around. He's going to get rid of you." (T. 1101-2, R. 1182-3). The defendant was present during this confrontation. Id. The defendant got Maitay out of the house and,

told her,". . . if you continue making such a ruckus, they're going to . . . give us each 100 years." (T. 1103, R. 1184). Maitay left after the defendant assured her that Rizzo would do what the defendant told him to, and that Rizzo would leave Grisel when the trial was over. (T. 1104, R. 1185).

Barcello also testified that he was an eyewitness to Grisel's subsequent murder. Barcello was with Grisel, in the kitchen, when the defendant subsequently approached them. (T. 1118-20, R. 1199-2201). The defendant had his hands behind him, and was "looking steadily" at Grisel. (T. 1 120, R. 2201). The defendant told Grisel" "It's your fault that I have lost everything." (T. 1 121, R. 2202). He then quickly pulled out the gun that he was holding behind him and started to shoot at Grisel, from a distance of less than three (3) feet. (T. 1121-22, R. 2202-3; T. 974, R. 1055). After the first shot, Grisel put her hand in front of her body, and asked the defendant, "why are you doing that to me?" (T. 1122, R. 2203). The defendant responded, "Why am I doing that? Son of a bitch." Id. He continued firing, five more times, until the gun was empty, as Grisel was falling to the ground. (T. 1122-23, R. 2203-4).

As seen above, the trial court's factual findings are amply supported by the record evidence. The trial court's conclusion is also in accordance with this Court's well established precedents. See, Koon v. State, 513 So. 2d 1253, 1256-7 (Fla. 1983) (the hindering of law enforcement aggravator was found to be "supported by ample evidence," where the victim was a witness in federal counterfeiting charges against the defendant; a federal magistrate had stated in defendant's presence that the charge would have been dismissed if there were one less accusatory witness, the defendant had "berated" the victim about his upcoming testimony, and, after the

murder, the defendant had been heard saying, "Dead men can't tell no (sic) lies."); Shere v. State, 579 So. 2d 86, 88 (Fla. 1991) (aggravator upheld, where evidence reflected that defendant had been advised that the victim was, "a 'big mouth' who had 'ratted out' on the defendant as to an earlier crime); Antone v. State, 382 So. 2d 1205 (Fla. 1980) (aggravator upheld where the victim's murder prevented his testimony before a grand jury). See also, Lara v. State, 464 So. 2d at 1180.

As seen above, the Appellant's claim herein with respect to the limiting construction of this aggravator has not been preserved for appeal. The claim with respect to erroneous findings by the trial judge is without merit.

VIII.

THE LOWER COURT DID NOT ERR IN REFUSING TO REINSTATE TWO BLACK JURORS ON WHOM THE STATE HAD EXERCISED PEREMPTORY CHALLENGES.

The Appellant's sparse presentation of facts omits those facts from which this Court may clearly conclude that: (a) the issue raised by the Appellant has not been properly preserved for appellate review, and, (b) the trial court conducted a full and fair Neil inquiry whereby it ascertained that the two black jurors at issue were excused by the State pursuant to valid, race-neutral reasons.

When the State exercised a peremptory challenge on Juror Williams, defense counsel objected, requesting a Neil inquiry, after pointing out that the State had exercised five peremptory challenges, with three of them having been exercised on black venire members. (R. 51 O-l 1; T. 429-32). After the judge corrected defense counsel, by noting that the State had thus far exercised six peremptory challenges, the

defense noted that the three black jurors stricken were Williams, Braxton and Lampkins. (R. 511-12; T. 430-31). Although the judge initially asserted that objections to the prior challenges to Braxton and Lampkins had been waived, by virtue of not being contemporaneous objections, defense counsel asserted that those challenges were at issue because they were part of the pattern which had been established through the most recent challenge to Williams. (R. 512-14; T. 431-33). After defense counsel reiterated the significance of the challenges to the prior jurors as part of the "pattern", the judge acknowledged the propriety of defense counsel's assertion: "You said that a couple of times and I accept that." (R. 514; T. 433).

The prosecutor then proceeded to give reasons for the peremptory challenges for all three of the stricken black jurors:

> As far as Braxton was concerned she indicated that she was very concerned about psychological testimony in that -- I'm sorry, her neighbor -- I'm sorry, her aunt had this nervous breakdown and she was confused about psychological testimony or the value of that testimony, and primarily because of her experience or personal experience with her own aunt having some form of nervous condition. I excused Ms. Braxton.
>
> The next juror was Ms. Lampkins. If I can have a moment to look at my notes. She indicated that she had a sister on drugs and that she felt that that condition, you know, would amount to a mitigating factor of some sort so that an individual would not be responsible, and the issue in this case is responsibility for one's actions, and she felt that because of the drug usage of her sister, that would be a consideration in this type of case. Also, she indicated that she had at one point in her career worked at the Women's Detention Center and seen the effects of abuse on different individuals and how that might cause her to act in a certain fashion, and that was one of the reasons -- another reason why we excused Ms. Lampkins.

> **Finally, as to Ms. Williams, the juror who was immediately in the box before, the question I asked her about three or four or -- I'm sorry, maybe four or five times was to give me an answer or weighing aggravating versus mitigating and what her feeling were about the death penalty and she never gave me an answer. She indicated she would want to listen to the evidence back and forth, that she wanted to have -- when I asked her specifically about the death penalty, she never gave me an answer. When I asked her about the value of psychological testing, she indicated that she had no real experience with that other than the experience she had with her brother. That might be good, but when I asked her as a sitting juror to interpret that evidence and what weight she might give it, she said she had no experience in that area and felt that she couldn't or wasn't in a position where she could really weigh that type of material, and for that reason I excused Ms. Williams.**

(R. 514-16; T. 433-35). Defense counsel's subsequent response to these reasons accepted many of them, as the prosecutor's assertions, for the most part, were not asserted to be erroneous, Defense counsel's main retort was, in essence, to assert that the prosecutor had not established a basis for challenges for cause; the defense did not assert that the given reasons were not race-neutral:

> **Concerning Ms. Williams, her responses were that she would make the decision as to guilt or innocence based upon the evidence. Basically she was getting a little mixed up between the mitigating and aggravating words which I think caused her some problems, and she never ever said she could not impose the death penalty. She said she would be careful and weigh both sides and make up her mind and she never indicated anything more than a reference for the sanctity for life, but she never said she couldn't vote for it and she said she would listen to the instructions of the Court at all times. I think she had trouble with the words aggravating and mitigating.**
>
> **Mrs. Braxton's only testimony that I recall about psychiatric care was that she had an aunt who had nervous breakdown in 1987 and again had a nervous breakdown in**

> 1989 and was referred to Crisis which was around 216th Street in Goulds, later became Deerings. She said that she was working for Metro-Dade, but beyond that she indicated no predilection for or against psychiatric testimony that I heard.
>
> Regarding Mrs. Lampkins, Mrs. Lampkins stated time and time again that she could follow the law. In fact, I wrote that down as a response. She did, in fact, work at the Women's Detention Center, but she drew -- there were no conclusions drawn from her work at the Women's Detention Center there than she could follow the law. That was the word that she used.
>
> Other than that, I can see no reasons that anyone gave, these three women gave which in any way would show that they could not be a fair juror other than the --

(R. 516-17; T. 435-36). The prosecutor then added that Ms. Lampkins specifically stated that she did not think that she could be fair; that "it was difficult in child abuse cases and she doesn't want to sit." (R. 517-18; T. 436-37). The judge then made explicit findings as to each of the three panel members, as follows:

> My ruling is as follows: I find that there is a good explanation on behalf of the State as to Braxton. I find it to be racially neutral. As for Lampkins, I find in my recollection and based upon the explanation given by the State as to Lampkins and Braxton, that there are racially neutral reasons and I find their being excused acceptable. I don't think there was any pattern of a racial basis for exclusion, and although I interrupted Mr. Band, I acknowledge that Osolase was black and that the State had accepted her and by backstrike the defense had excused her. So that indicates that lack of any pattern of racially motivated excusals.
>
> So the combination of reasons are enough to convince the Court that Braxton and Lampkins were not racially motivated. I emphasize for appellate purposes that my observations as to Osolase was not to indicate that this excuses the State, but just as an indication, very minor, that the State was not by any design excusing all blacks

from the jury.

> As to Ms. Williams, I find that the explanation is not adequate from the State to overcome an implication that perhaps this was the case and jn an abundance of caution she will be seated over the State's objection.

(R. 518-19; T. 437-38). The prosecution then noted that it had already accepted two other blacks, who were then seated on the jury (Davis and Stokes) and had accepted yet one other, Vereen, whom the defense had subsequently stricken. (R. 519; T. 438). The prosecution further asserted, as to juror Williams, that her views on capital punishment were to be evaluated in conjunction with the State's attempted peremptory challenge; that the State was not seeking a challenge for cause. (R. 519-20; T. 438-39). The judge abided by his prior ruling. (R. 520; T. 439).

When the judge made his ruling, defense counsel did not assert that the judge had either failed to consider jurors Braxton or Lampkins or that the judge had erred in accepting the State's challenges to those jurors. Even more significantly, when the jury was fully chosen and sworn in, defense counsel did not renew any objection as to the peremptory challenges to Braxton or Lampkins; nor did the defense accept the jury subject to any prior objections.

In view of the foregoing, it is clear that the instant claim is not properly preserved for appellate review, See, Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993) (at time of swearing of jury, defense must renew prior objections to State's peremptory challenges or accept jury subject to prior objections, in order to preserve claim for appellate review, and in order to preclude defense from deceiving trial judge into believing defense was satisfied with the jury which was ultimately seated).

Second, the prosecutor's reasons as to all three jurors provided valid, race-neutral reasons for peremptory challenges, and were supported by the record. Although the defense got the benefit of the judge's ruling as to juror Williams, the State clearly had a valid, race-neutral reason as to her, based upon her answers regarding the weighing of aggravating and mitigating factors in the penalty phase. The prosecutor initially attempted to ask William's views on the death penalty, and the first two times such questions were asked, she evaded them, refusing to give an opinion. (R. 506-7; T. 425-6). When questioned about her ability to recommend death if the aggravating factors outweigh the mitigating factors, William's initial answer was, "I don't know yet." (R. 508; T. 427). When the prosecution continued with the same line of questioning, regarding whether she would recommend life if the mitigation outweighed the aggravating factors, Williams responded, "I don't understand what you're saying now." (R. 509; T. 428). Additionally, it must be noted that this juror had two adult sons who had been prosecuted by the Dade County State Attorney's Office for drug offenses, and one of those sons was currently incarcerated. (R. 486-87, 500-502; T. 405-6, 419-21). Furthermore, as noted by the prosecution, this juror expressly indicated that she did not know how she would be able to deal with psychological testimony. (R. 506; T. 425).

Thus, although the defense got the benefit of the court's ruling as to Williams, the proffered reason, regarding her equivocation on the death penalty processes, was clearly a valid, race-neutral reason. See, e.g., Kramer v. State, 619 So. 2d 274, 276 (Fla. 1993); Atwater v. State, 626 So. 2d 1325, 1327 (Fla. 1993); Walls v. State, 641 So. 2d 381, 386 (Fla. 1994); Holton v. State, 573 So. 2d 284, 287 (Fla. 1990).

Likewise, an expressed uncertainty about how one, as a juror, would deal with psychological testimony, is clearly a race-neutral reason, and is clearly significant in the context of penalty-phase proceedings where psychological testimony will be presented. See, e.g., Happ v. State, 596 So. 2d 991, 996 (Fla. 1992) (race-neutral reason for prosecutor's peremptory challenge in capital case where juror was a psychology teacher in community college). Thus, although the trial judge disallowed the State's peremptory challenge as to Williams, not only was that ruling erroneous, thus giving the defendant an unwarranted benefit, but, the defendant's current efforts to bootstrap the instant claims onto the fact that the Williams challenge was disallowed should therefore be given no credence. As the judge noted, he was only acting as he did in an "abundance of caution."

In any event, the State notes that as to juror Lampkins, the record fully supports the prosecutor's assertion that she stated that she could not be fair and had troubles sitting on a penalty-phase jury. Lampkins stated, "I don't think I would like to sit on the jury." (R. 277; T. 196). Similarly, she said, "I don't think I could be fair." (R. 277; T. 196). Those statements alone fully support the prosecutor's peremptory challenge. Kramer, supra; Atwater, supra; Walls, supra. Additionally, this juror had worked in the medical records division of the Women's Detention Center and could not deal with the problems she encountered there, as she suffered from stress. (R. 274-75; T. 193-4). Her experiences in the Detention Center would, by her own admission, affect her. (R. 277-79; T. 196-8). At the Detention Center, she had been exposed to many instances of child abuse, and this led her to concur with defense counsel's assessment that "all children are not raised equally." (R. 278-79; T. 197-98). Once again, in a case where

psychological evidence was going to be important, including such potential mitigating matters as the effect of the defendant's childhood and upbringing, the factual basis for the prosecution's concerns was evident. Happ, supra. The challenge to Lampkins was race-neutral.

Lastly, as to Braxton, as the prosecutor noted, this juror had extensive dealings with an aunt who suffered from two nervous breakdowns and she had cause to consult with the doctor who treated her aunt. (R. 206-208, 213; T. 125-7, 132). Ms. Braxton was very close to her aunt (R. 206-8; T. F125-7), and was very upset as a result of what transpired. (R. 213; T. 132). Once again, in a case where psychological testimony wasat issue, the prosecution had legitimate concerns about how personal experiences would affect Ms. Braxton in this area. This was all the more true in light of her acknowledgment of how upsetting she had found her aunt's ordeal. Such views could reasonably be expected by the prosecution to contribute to an unduly sympathetic view of a defendant who presents testimony as to psychological problems. Happ, supra. In sum, the instant claim is procedurally barred, and without merit.

IX.

THE ABSENCE OF THE WRITTEN JURY INSTRUCTIONS SUBMITTED TO THE JURY DOES NOT DEPRIVE THE APPELLANT OF FULL AND FAIR APPELLATE REVIEW.

The record supports the conclusion that the written jury instructions which were submitted to the jury were in no way different from the instructions which the judge

read to the jury. Under such circumstances, the absence from the record on appeal of the actual written jury instructions does not, in any way, deprive the Appellant of full and fair appellate review.

At the outset of the charge conference, the judge indicated that he wanted the attorneys to "go over" the instructions which the respective parties had submitted. (R. 2574; T. 1484). The ensuing conference reflects that the parties reviewed the instructions which were going to be given to the jury. After the jury instructions were actually read to the jury, the judge inquired whether he had neglected to "give any instructions that I said I would give." (R. 2775; T. 1685). Defense counsel did not assert that the judge had omitted any instructions which he had said he would give. Defense counsel did not assert that the judge had inadvertently misread any matters from the written instructions. The only objections from defense counsel were the renewal of the same objections made during the charge conference. (R. 2775-6; T. 1685-6). Those objections did not, in any way, relate to any alleged discrepancies between the written instructions and the reading of those instructions to the jury. Under such circumstances, the only reasonable conclusion is that the instructions read to the jury were the same as the written instructions which were given to the jury during the deliberations.

The omission of a portion of a transcript or a document from a record on appeal does not, in and of itself, deprive a criminal defendant of an adequate opportunity for full and fair appellate review. The omission must be viewed in light of whether the particular absence causes any prejudice. Thus, in a recent case, the Fourth District Court of Appeal carefully analyzed the significance of a missing portion of transcripts

in an appeal from a murder conviction, and concluded that the particular omission was not prejudicial, in accordance with this Court's prior precedents, and federal law, as follows:

> Appellant contends that *Delap [v. State, 350 So.* 2d 462 (Fla. 1977)] requires reversal when *any* part of a transcript is missing. However, not all omissions of transcript result in reversal for a new trial. *See Gaskin v. State,* 591 So. 2d 917, 920 (Fla. 1991), *cert. granted and vacated on other grounds, ___ U.S. ___,* 112 S.Ct. 3022, 120 L.Ed. 2d *894 (1992); Bruno v. State, 574 So.* 2d 76, 81 (Fla.), *cert. denied, 502* U.S. 834, 112 S.Ct. 112, 116 L.Ed. 2d 81 (1991). The question to be asked is whether the portions are *necessary* for a complete review.
>
> In *White v. State, 939* F. 2d 912, 914 (11 th Cir. *199 1) , cert. denied, White v. Singletary,* U.S.___, 112 S.Ct. 1274, 117 L.Ed. 2d 500 (1992), defendant alleged that he was denied meaningful review on direct appeal because the appellate court reviewed an incomplete transcript. The Eleventh Circuit held that since defendant failed to demonstrate how the defective transcript prejudiced his direct appeal, he was not entitled to relief on the claim. In a footnote the court explained that when a portion of the transcript is unavailable and the defendant is represented by the same attorney at trial and on appeal, reversal is not required absent a showing of hardship to the defendant and a prejudicial effect upon his appeal. *Id.* at n. *4; see also United States v. Selva, 559* F. 2d 1303, 1305 (5th Cir. 1977).[15]

Velez v. State, 645 So. 2d 42, 44 (Fla. 4th DCA 1994). Such principles are even more compelling in the context of missing written jury instructions, when there is a verbatim transcription of those jury instructions, and neither the prosecutor nor the

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[15] In federal direct appeals, by virtue of a federal statute applicable only to such appeals, prejudice will be presumed only when a defendant is represented by different counsel on appeal and the missing portion of the transcript is both "substantial and significant." White v. State, 939 F. 2d 912, 914 at n. 4 (1 1 th Cir. 1991).

defense attorney, in response to the judge's express questioning, asserted that there was any omission from the verbal reading of the instructions or any discrepancy between the reading and the written instructions. Under such circumstances, the absence of the written instructions from the record does not furnish the basis for any relief.[16] See also, Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991); Bruno v. State, 574 So. 2d 76, 81 (Fla. 1991); Bransford v. Brown, 806 F. 2d 83 (6th Cir. 1987) (absence of jury instruction transcripts was not denial of due process where defendant's appellate counsel was able to consult with trial counsel and no prejudice was demonstrated).

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[16] It should be noted that when the Appellant previously filed a motion to relinquish jurisdiction to the trial court for that court to reconstruct the missing written instructions, the Appellant did not provide any affidavit or other representation by trial counsel or any other party asserting that there was any alleged discrepancy between the written and verbal instructions. Since defense counsel obviously read and reviewed the written instructions and had the opportunity to object on the basis of any such discrepancy, this is a matter which defense counsel presumably would have noted and would have a recollection of, had there been any such discrepancy of significance.

CONCLUSION

Based on the foregoing, the sentence imposed herein should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE was furnished by prepaid first class mail to BILLY H. NOLAS, ESQ., 437 Chestnut Street, Suite 501, Philadelphia, Pennsylvania 19106, on this 17 day of June, 1996.

FARIBA N. KOMEILY
Assistant Attorney General

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