

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79849

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MARIO ALBO LARA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**FILED**

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CLERK, SUPREME COURT

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Chief Deputy Clerk

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

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INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that the Court allow oral argument in this capital appeal.

TABLE OF CONTENTS

	<u>Page</u>
REQUEST FOR ORAL ARGUMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE AND FACTS .....	1
<b>The State's Case For Aggravation</b> .....	1
Roger Mittleman .....	1
Raquel Carranza .....	2
Dennis Siegel .....	3
Odalys Cardozo Fumero .....	3
Sgt. John Buhrmaster .....	4
Margarita Martinez .....	5
Tomas Barcelo .....	8
<b>The Defense Case for Mitigation</b> .....	9
Carmenlina Lara .....	9
Ariberto Reyes .....	14
Margarita Albo Lara .....	18
Dr. Edmund Cava .....	23
Dr. Joyce Carbonell .....	31
Dr. Simon Miranda .....	37
Rene Lara .....	42
<b>The State's Rebuttal</b> .....	45
Dr. Lazaro Garcia .....	45

	<u>Page</u>
Dr. Charles Mutter .....	.49
The Deliberations and Sentence .....	51
SUMMARY OF ARGUMENT .....	52
ARGUMENT .....	56
(I) THE JURY WAS UNCONSTITUTIONALLY INSTRUCTED ON THE VAGUE AND OVERBROAD "COLD, CALCULATED, PREMEDITATED" AGGRAVATOR .....	. 56
(II) THE FAILURE TO INFORM THE JURY OF WHAT A LIFE SENTENCE WOULD ACTUALLY MEAN FOR THIS DEFENDANT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS .....	.62
(III) THE PROSECUTION MADE OTHER CRIMES THE FOCUS OF THIS PROCEEDING AND MADE UNCONSTITUTIONAL ARGUMENTS FOR THE DEATH PENALTY .....	.66
(IV) THE PROSECUTORS AND TRIAL COURT MISINFORMED THE JURY ABOUT ITS CAPITAL SENTENCING ROLE .....	.69
(V) THE PROSECUTORS KNOWINGLY MISLED THE JURY WITH INACCURATE INFORMATION .....	70
(VI) THE PROSECUTION'S USE OF GRUESOME PHOTOGRAPHS RENDERED THE PROCEEDINGS FUNDAMENTALLY UNFAIR .....	72
(VII) THE HINDERING GOVERNMENTAL FUNCTION AGGRAVATOR WAS INVALIDLY APPLIED .....	73
(VIII) THE PROSECUTORS ENGAGED IN A PATTERN OF STRIKING AFRICAN-AMERICAN JURORS .....	74
(IX) THE ABSENCE OF THE WRITTEN JURY INSTRUCTIONS FROM THE RECORD VIOLATES MR. LARA'S RIGHTS TO FULL AND FAIR APPELLATE REVIEW .....	.75
CONCLUSION .....	79
CERTIFICATE OF SERVICE .....	79

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Alcortav. Texas.</u> 355 U.S. 28 (1959) .....	71
<u>Amoros v. State.</u> 531 So.2d 1256(Fla. 1988) .....	56
<u>Antwine v. Delo.</u> 54 F.3d 1357 (8th Cir. 1995) .....	68
<u>Banda v. State.</u> 536 So.2d 221 (Fla. 1988) .....	56
<u>Barclay v. Florida.</u> 463 U.S. 939 (1983) .....	63
<u>Batson v. Kentucky.</u> 476 U.S. 79 (1986) .....	75
<u>Besabarav. State.</u> 656 So.2d 441 (Fla 1995) .....	60-61
<u>Burnette v. State.</u> 151 So. 2d 9 (Fla. 1963) .....	77
<u>Caldwell v. Mississippi.</u> 472 U.S. 320 (1995) .....	. 68, 69. 71
<u>California v. Romos,</u> 463 U.S. 992 (1983) .....	63
<u>Carmenates v. State.</u> 654 So. 2d 601 (Fla. App. 1995) .....	78
<u>Castro v. State.</u> 547 So.2d 111 (Fla. 1989) .....	68
<u>Cave v. State,</u> 660 So.2d 705 (Fla. 1985) .....	. 68, 72
<u>Chappell v. State.</u> 423 So.2d 984 (Fla. 3d DCA 1982) .....	78
<u>Christian v. State.</u> 550 So.2d 450 (Fla. 1989) .....	56
<u>Clemons v. Mississippi.</u> 494 U.S. 738 (1990) .....	76
<u>Coleman v. Brown.</u> 802 F.2d 1227 (10th Cir. 1986) .....	71
<u>Delap v. State.</u> 350 So. 2d 462 (Fla. 1977) .....	77. 78
<u>Donnelly v. DeChristoforo,</u> 416 U.S. 637 (1974) .....	71
<u>Drake v. Kemp.</u> 762 F.2d 1449 (11th Cir. 1985) .....	68
<u>Draper v. Washington,</u> 372 U.S. 487 (1963) .....	76-77
<u>Espinosa v. Florida.</u> 112 S.Ct. 2926 (1992) .....	59

	<u>Page</u>
<u>Godfrey v. Georgia</u> , 446 U.S. 420 (1980) .....	59
<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976) .....	62, 76
<u>Griffin v. Illinois</u> , 351 U.S. 12 (1956) .....	76
<u>Hammond v. State</u> , 1995 WL 157010 (Ala. Cr. Mar. 3, 1995) .....	77
<u>Hansbrough v. State</u> , 509 So. 2d 1081 (Fla. 1986) .....	73
<u>Hardy v. United States</u> , 375 U.S. 277 (1964) .....	77
<u>Haves v. State</u> , 660 So.2d 257 (Fla. 1995) .....	68
<u>Jackson v. State</u> , 648 So.2d 85 (Fla. 1994) .....	. 58, 59, 60
<u>Jones v. State</u> , 569 So.2d 1234 (Fla. 1990) .....	. 53, 63, 64, 66
<u>Jurek v. Texas</u> , 428 U.S. 262 (1976) .....	62
<u>Kearse v. State</u> , 662 So.2d 677 (Fla. 1995) .....	58
<u>Keen v. State</u> , 504 So.2d 396 (Fla. 1987) .....	68
<u>King v. State</u> , 436 So.2d 50 (Fla. 1983) .....	56
<u>Larav. State</u> , 464 So.2d 1173 (Fla. 1985) .....	1
<u>Lawrence v. State</u> , 614 So. 2d 1092 (Fla. 1993) .....	73, 74
<u>LeDuc v. State</u> , 365 So.2d 149 (Fla. 1978) .....	69
<u>Lee v. State</u> , 499 So.2d 66 (Fla. 3d DCA 1987) .....	77
<u>Lesko v. Lehman</u> , 925 F.2d 1527 (3d Cir. 1991) .....	. 68, 71
<u>Mann v. Dugger</u> , 844 F.2d 1446 (11th Cir. 1988) .....	69-70
<u>Maulden v. State</u> , 617 So.2d 298 (Fla 1993) .....	61
<u>Mayer v. City of Chicago</u> , 404 U.S. 189 (1971) .....	76, 77
<u>Maynard v. Cartwright</u> , 486 U.S. 356 (1988) .....	59, 74
<u>McCleskey v. Kemp</u> , 481 U.S. 279 (1987) .....	53, 63, 66

	<u>Page</u>
<u>McCray v. State</u> . 416 So.2d 804 (Fla. 1982) .....	56
<u>Miller v. Pate</u> . 386 U.S. 1 (1967) .....	71
<u>Morgan v. State</u> . 515 So.2d 975 (Fla. 1987) .....	62
<u>Morgan v. State</u> . 377 So. 2d 212 (Fla. 3d DCA 1979) .....	78
<u>Newlon v. Armontrout</u> . 885 F.2d 1328 (8th Cir. 1989) .....	68, 71
<u>Padillav. State</u> . 618 So.2d 165(Fla. 1993) .....	60
<u>Parker v. Duqquer</u> , 498 U.S. 308 (1991) .....	76
<u>Perry v. State</u> . 522 So.2d 817 (Flu 1988) .....	73
<u>Preston v. State</u> . 444 So.2d 939 (Fla 1984) .....	56
<u>Pugatch v. State</u> . 560 So. 2d 4 19 (Fla. 4th DCA 1990) .....	77-78
<u>Richardsonv. State</u> . 437 So.2d 1091 (Flu. 1983) .....	56
<u>Riley v. Wainwright</u> , 527 So.2d 656 (Fla. 1987) .....	59
<u>Robertson v. State</u> . 611 So. 2d 1228(Fla. 1993) .....	73
<u>Robinson v. State</u> . 487 So.2d 1040 (Fla. 1986) .....	68
<u>Rogers v. State</u> . 511 So.2d 526 (Fla 1987) .....	56, 57
<u>Santos v. State</u> . 591 So.2d 160 (Fla 1992) .....	57
<u>Satterwhite v. Texas</u> . 486 U.S. 249 (1988) .....	62
<u>Simmons v. Beyer</u> , 1995 WL 3406 (3rd Cir. 1995) .....	77
<u>Simmons v. South Carolina</u> . 114 S.Ct. 2187 (1994) .....	63
<u>Simmons v. State</u> . 200 So. 2d 619 (Fla. 1st DCA 1967) .....	77
<u>Smith v. State</u> . 515 So.2d 182(Fla. 1987) .....	69
<u>State v. Alen</u> , 616 So.2d 452 (Fla 1993) .....	75
<u>State v. Henderson</u> . 109 N.M 655. 789 P.2d 603 (1990) .....	63, 66

	<u>Page</u>
<u>State v. Lara</u> , 581 So.2d 1288 (Fla 1991) .....	1
<u>State v. Neil</u> , 457 So.2d 481 (Fla. 1984) .....	74, 75
<u>State v. Slappy</u> , 522 So.2d 18(Fla. 1988).....	75
<u>Strinaer v. Black</u> , 112 S.Ct. 1130 (1992) .....	59
<u>Swain v. Alabama</u> , 380 U.S. 202 (1965) .....	75
<u>Taylor v. State</u> , 583 So.2d 323 (Fla. 1991) .....	68
<u>Tedder v. State</u> , 322 So.2d 908(Fla. 1975) .....	69
<u>Thompson v. State</u> , 565 So.2d 1311 (Fla. 1990).....	72
<u>Troedel v. Weinwright</u> , 667 F. Supp. 1456 (S.DFla. 1986). <u>aff'd</u> 828 F.2d 670 (11th Cir. 1987) .....	71
<u>Turner v. State</u> , 573 So.2d 657 (Miss. 1990).....	. 63, 66
<u>United States v. Atilus</u> , 425 F.2d 816 (5th Cir. 1970) .....	77
<u>Washington v. State</u> , 432 So.2d 44 (Fla. 1983) .....	56
<u>Willicmsen v. Kangaroo, Inc.</u> , 608 So. 2d 586 (Fla. 1st DCA 1992) .....	.78
<u>Wilson v. Kemp</u> , 777 F.2d 621 (11th Cir. 1985) .....	. 68, 71
<u>Witt v. State</u> , 387 So. 2d 922 (Fla. 1980) .....	77
<u>Wyatt v. State</u> , 641 So.2d 355 (Fla. 1994) .....	72
<u>Yancey v. State</u> , 267 So. 2d 836 (Fla. 4th DCA 1972) .....	77
<u>Zant v. Stephens</u> , 462 U.S. 862 (1983) .....	73, 74



## STATEMENT OF THE CASE AND FACTS

Mario Lara was convicted of second degree murder in the death of his girlfriend, Olga Elviro, and first degree murder in **the** death of Grisel Fumero. Lara v. State, 464 So. 2d 1173, 1174, 1175 (Fla. 1985). **The** trial court imposed a death sentence. This Court affirmed. Id. Mr. Lara received ineffective assistance of counsel at capital sentencing and the death sentence was vacated. State v. Lara, 581 So. 2d 1288 (Fla. 1991).

**The** jury was provided the bare, vague terms of the "cold, calculated, premeditated" aggravator, over defense objections and requests for the limiting construction. The jury voted 7-5 for death (R 2984). The trial court imposed a death sentence (R 2912).

### The State's Case For Aggravation

Roger Mittleman works for the medical examiner's office (R 958-59). He testified at length about Olga Elviro (R 961, et seq.).<sup>1</sup> He testified that she was found upstairs between two beds; was covered by a pillow and sheets; had been tied; and there were multiple stab wounds in **the** chest area (R 961-965). Graphic photographs of Olga Elviro were shown to the jury (R 962, 963, 964-65), including challenged photos depicting "the bindings in place ... the exposure of the genitals ..." (R 964).<sup>2</sup> The witness then discussed the autopsy of Olga Elviro at length (R 965-71). He testified that Ms. Elviro had abrasions,

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<sup>1</sup>The original jury found Mr. Lara guilty of second degree murder in the death of Olga Elviro. Defense counsel's objections and admonitions about not making that offense a feature of this trial were not heeded, as the State's presentation showed. This issue is discussed in the Argument section of this brief.

<sup>2</sup>Defense counsel objected to the photos as gruesome (inflammatory); because they had not been published *at* the original trial; because photos from the original trial were available; and because they improperly made the Elviro offense a focus of this resentencing for the death of Grisel Fumero (R 953-57; see also R 2841 (reproducing two of the photographs)). The trial court allowed the photographs in (R 957).

"a bruise on her left breast and in addition **there were** three stab wounds" (R 965). A knife "consistent with the wound" was shown to the jury (R 966-67).

The photos were shown to the jury again and each stab wound was discussed in detail (R 968-70). After this testimony about the decedent who was not the reason for the sentencing hearing, the prosecutor asked some questions about Grisel Fumero, the decedent for which Mr. Lara was being sentenced. Grisel Fumero "had a total of four gunshot wounds" (R 972), all to the front chest area of her body (R 974, 975). There was no facial wound (R 976). The gun was probably two to three feet from the body when she was shot (R 974). Photos of the gunshot wounds were shown to the **jury** (R 975). The cause of death was multiple gunshot wounds (R 977).

Raquel Carranza was then called by the prosecution. Defense counsel renewed his objections to this testimony, which **the** court overruled (R 978). Ms. Carranza worked at a veterinary supply store in 1980 (R 979). "[T]wo gentlemen" knocked on the door and she let them in (R 980). She talked to them-- "[t]hey wanted to buy some products" (R 981). "Mr. Rizzo (Francisco/Frank Rizzo) ... was the one that did all of the talking" (R 981). He "told me that they were looking for a product but they couldn't remember the name" (R 981). Mr. Lara was the other person with Rizzo; Mr. Lara "was very thin" (R 982).

Ms. Carranza testified that she was "at their mercy" (R 983). Mr. Lara said "dinero" to her (R 983; 986). Mr. Lara had a gun -- "Then Mr. Rizzo took his [Mr. Lara's] gun" (R 984). "Rizzo grabbed me by my shoulders and he sit me down on a bench" (R 984). Rizzo "poke[d] [her] with the gun" (R 984). Lara took some money (R 984, 985).<sup>3</sup>

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<sup>3</sup>The witness testified that she knew Dr. Francisco Amigo (R 987). During the prior Rule 3.850 proceedings, Dr. Amigo testified. He was a veterinarian and Mr. Lara's sponsor. He described Mr. Lara as strange, disturbed and unable to function properly. Mr. Lara took drugs and *drank*. During **the** time period of this robbery, Mr. Lara was out of control and could not cope. Dr. Amigo was not called as a witness at the resentencing.

Ms. Carranza identified Mr. Lara at a subsequent lineup (R 989). They "took my jewelry and my money" (R 987). Her sister was knocking on the front door during the robbery (R 985). Mr. Lara did not physically injure Ms. Carranza or her sister.

After this detailed testimony about this unrelated offense, Dennis Siegel was called by the prosecution (R 991). Defense counsel renewed his objections, which the trial court overruled (R 991).

Dennis Siegel is an assistant state attorney in Broward County (R 992). In 1981-82 he was an assistant state attorney in Dade County (R 992). He testified that he was present in the courtroom on October 26, 1982, when Mr. Lara was convicted of "sexual battery involving Odalys Cardozo Fumero" (R 992).<sup>4</sup> He also testified that he was present in the courtroom when Mr. Lara was convicted of the robbery of Raquel Carranza (R 993).<sup>5</sup> The State introduced certified copies of the convictions, defense counsel renewed his objections and the court overruled the objections (R 993).

Assistant State Attorney Siegel testified that Grisel Fumero was a witness in the Odalys Fumero sexual battery case (R 994-95). Defense counsel's objections to questions about "the defendant [being] released on bond" were overruled (R 997). Siegel testified that the docket sheet indicated he had been released on bond (R 998).

Odalys Cardozo Fumero was the next prosecution witness (R 1006). Defense counsel renewed his objections to this testimony, which the court overruled (R 1007). Ms .

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<sup>4</sup>Odalys is the sister of Grisel Fumero, the decedent in this case. Mr. Lara pled guilty in that case after his capital conviction and death sentence. He was assured that that case would not be used against him in any subsequent proceedings. His counsel from that case (Stuart Adelstein), however, was not called at the resentencing to explain this. Mr. Lara was charged with sexual battery and carnal intercourse with a person under eighteen (R 2845).

<sup>5</sup>This conviction also occurred after the capital conviction and involved the assurance to Mr. Lara described in the preceding footnote.

Fumero testified that she was "close" to her sister, Grisel; "a lot" close (R 1008). She testified that on March 7, 1981, she accompanied Grisel "on a date with her boyfriend, Frank Rizzo" (R 1008). She, Grisel, Rizzo and Mario went to a club (R 1009). There was music going on at the club and she and the others were drinking (R 1010-12).

**They** then drove to a friend's house; Frank Rizzo and Grisel Fumero stayed in the car; Odalys Fumero and Mario Lara went in the house (R 1014). She testified that in the house Mr. Lara took her pants off; hit her (R 1016); and raped her (R 1018). She testified that "[w]hen the defendant raped" her, it hurt (R 1018). She said that she told him he "was going to **pay** for this" and he told her to "shut up" and "get dressed" (R 1018). When they got home, she told Grisel "that Frank's friend raped" her (R 1019). Odalys first testified that her sister did not notice anything about her face or body when they got home (R 1019). Later, she testified that "[a]ll my mouth [was] swollen and I was bruised..." (R 1020). A Halloween photo of Odalys and her family was shown to the jury (R 1020-21).

Grisel Fumero was in love with Frank Rizzo and asked Odalys not to tell her mother (R 1022). However, a few days later they told their mother and the mother went to the police (R 1022). Charges were filed (R 1023).

Sgt. John Buhrmaster was the next State witness. He is with the Miami Police Department (R 1024). He was involved in the Raquel Carranza robbery case (R 1024-25). He spoke with Ms. Carranza (R 1025). He arrested Mr. Lara (R 1026). Ms. Carranza identified the "skinny person" as Lara (R 1027-28).

Sgt. Buhrmaster then described Mr. Lara's being released on bond (R 1028). He then became "aware that the defendant was a subject or defendant in [the] rape case" (R 1028). He arrested Mr. Lara on March 16, 1981 (R 1028). He described the "defendant[s] ... [being] released on bond" in that case -- April of 1981 (R 1028). He also

went to ~~the~~ scene "of a double homicide ~~that~~ occurred ... on July 16, 1981" (R 1028-29). He was shown and identified the photos (R 1029, 1031, 1035, 1037, 1038, 1039).

The ~~female~~ who had been shot (Grisel Fumero) was downstairs in the kitchen (R 1030). Casings and the gun were found on the kitchen floor (R 1030). When Mr. Lara was arrested, he told the police that the "murder weapon" was at his home (R 1034)-- i.e., the "scene." Mario Lara, Arsenio Lara (Mario's brother), Frank Rizzo, Tomas Barcelo and Grisel Fumero all lived there, and Olga Elviro -- Mr. Lara's girlfriend -- stayed there often.

After this introductory testimony, the prosecution asked Sgt. Buhrmaster detailed questions about Olga Elviro (R 1035).<sup>6</sup> He testified ~~that~~ a knife was found at the home and it had blood on it (R 1036). He "found a ... body of a young female [Olga Elviro] ... in the upstairs bedroom" (R 1036). He described the room, beds, mattresses, miscellaneous clothing, sheets and pillow cases from the room (R 1036). The exhibits from the bedroom were shown to the jury (R 1036-37). He described the photographs (R 1037-39). He discussed the condition of the body in detail (R 1038-39).

Sgt. Buhrmaster said that "the defendant was [arrested] in ... New Jersey ... hiding in a woman's apartment" (R 1040). He was present in the courtroom "when the defendant was convicted ... of the robbery of Raquel Carranza and the sexual battery rape of Odalys Cardozo Fumero" (R 1040-41).

The prosecution read to the jury the testimony of Margarita Martinez from the original trial (R 1044). She knew Olga Elviro (R 1045). She knew Mario Lara (R 1046). Mario and Olga (Elviro) "were boyfriend and girlfriend. They were going steady" (R 1047).

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<sup>6</sup>As noted earlier, the original jury convicted Mr. Lara of second degree murder on the count involving Olga Elviro. Grisel Fumero was the decedent in this capital sentencing. As the State witness testimony reflects, Grisel Fumero was not the focus of the State's presentation. Defense counsel's previous objections and warnings about the unfairness of such a proceeding had been overruled.

She met Grisel Fumero "once ... when she visited my home with Francisco [Rizzol, her boyfriend" (R 1047). She met Grisel a "few **days**" before the murder (R 1048). **The day** she met Grisel (Fumero): Mario (Lara), Olga (Elviro -- Mario's girlfriend), Francisco (Rizzo -- Grisel's boyfriend), and Grisel (Fumero) all had visited her house and were there together (R 1048). Ms. Martinez had "a private talk ... with Olga ... about her relationship with Mario" (R 1049).

On ~~the~~ evening of ~~the~~ offense, Olga came to her house (R 1050). Mario also came over (R 1050). They had also been over briefly in the afternoon (R 1050). ~~That~~ evening, Olga and Mario were talking. Mario wanted Olga to leave with him (R 1052).

Margarita Martinez testified ~~that~~ "[h]is eyes were different" and ~~that~~ he said he was going to kill Olga and Margarita (R 1053). Olga told Margarita she was going to speak with Mario and called to him (R 1054). "[H]e was talking to me from the sofa when he said he was going to kill **the** two of us ..." (R 1054). Mario went to the car and got a small gun and a larger gun (R 1056-57). Then, "he started talking to me, when he told her he was going to kill her and all that" (R 1057). Ms. Martinez thought "at the beginning" that Mario was not serious (R 1057), but then "he pointed the revolver ~~at~~ us" (R 1057). Ms. Martinez testified ~~that~~ she fainted (R 1057), but heard things when she was on the floor (R 1057-58). She described what she heard:

[Olga] hugged me and she was crying and she told him that I had a heart trouble, that he had killed me.       \* \* \*

He said, "No, I didn't do it. She's not dead. I have a brother who has this kind of trouble."                               \* \* \*

He brought the fan, ~~the~~ ventilator, and he started to stroke my chest with his hand (R 1058).

Ms. Martinez **said**, "Takeme to the doctor ... [s]o he took me to the hospital with [Olga]" (R 1058-59). "He helped me. Mario and [Olga]helped me" (R 1059).

Olga told him "not to take the guns. He said,'No, I'm not going to take the guns. ' He went and put them underneath my bed." (R 1060). They locked up her house (R 1059). Mario did not have the guns with him after that (R 1059). The guns were not in the car (R 1059), they were **left** in her house (R 1059-60).

When Margarita was in the hospital, Olga told her that "Mario didn't want to do anything ... he's out there and he's almost crying because he sees that you're like this" (R 1060). Margarita asked Mario to come in und

he stroked my head with his hund and he said, "I didn't want to hurt you." So I said,"Well, no, that's nothing" and he kissed me and ... said, "We'll be out there." (R 1060).

When Olga "came in and told me he was upset and he was crying, I told him to come in, and that's when I told him, 'Don'tworry, **There's**nothing wrong with me'" (R 1086). Olga told Margarita that Francisco (Rizzo)was coming to see her (R 1061).

Francisco came to the hospital (R 1062-63). Olga and Mario left (Id.). Francisco left with Margarita when she was discharged a little later (R 1063). They went to Mario's/Francisco's/Grisel's home (R 1063). As they went in, Francisco called for Arsenio (Mario'sbrother) and Margarita saw Grisel shot on the kitchen floor (R 1063). The lights were on in the house -- it was all lighted (R 1064). Francisco (Rizzo) said,"They've killed what I loved the most" (R 1064). She told Rizzo to **take** her home (R 1064). On the way, he stopped a patrol car (R 1065).

Ms. Martinez learned that Olga (Elviro) had been killed from an investigator (R 1066). She testified about what Olga and Mario were wearing (R 1068-69). Mario's shoes **were** clogs (R 1082).

The prosecution then read the jury the original trial testimony of Tomas Barcelo (R 1087). He testified about how he came to the United States from Cuba (R 1087-90). In 1981, he lived in Miami (R 1090). He moved in with Arsenio Lara; Mario and Francisco Rizzo also lived there as did Grisel Fumero (R 1091-92, 1135). Other people also lived in the house (R 1135). Mario, Arsenio, Francisco, and Grisel all lived in the same apartment downstairs (R 1094, 1135). Grisel and Francisco had a relationship (R 1094).

Olga Elviro was Mario's girlfriend (R 1105). Barcelo testified that Mario told him Olga "didn't want to be with him any longer because of what they had told her" (R 1105).

Barcelo went to sleep at 11:00 p.m. (R 1109). He knew nothing about Margarita Martinez going to the hospital (R 1109). Later, Mario knocked on his door (R 1109); he was with Olga, his girlfriend (R 1110); they went in to use the room (R 1110). Mario and Olga had used the room in the past (R 1111, 1114).

Barcelo left and sat outside (R 1115). He sat for about a half hour and did not hear anything (R 1115, 1142-43). He saw Mario come out and start "knocking" on his own first floor door (R 1116, 1143). Grisel opened the door; Mario walked in; Barcelo went and followed him in (R 1116). Grisel and Barcelo went to the kitchen (R 1118).

Mario came out of the bedroom area into the kitchen (R 1120). His "foot" and "leg" were "shaking" (R 1120). "He told Grisel 'It's your fault that I have lost everything'" (R 1121). Mario had Arsenio's gun from the bedroom (R 1121, 1157-58). "He fires" (R 1122). Grisel said "Mario, why are you doing that to me" (R 1122). Mario said "Why am I doing that? Son of a bitch" (R 1122).

Mario kept pulling the trigger and "[w]hen it didn't fire any longer, he continued firing, but it didn't fire any more" (R 1123). "I turned towards him and I told him he was a murderer" (R 1123). He said, "Oh, I'm a murderer?" (R 1123). He kept pulling the trigger



at Grisel; it "sounded like clack, clack"; "[n]o more bullets left... [b]ut he kept pulling the trigger" (R 1123-24).

Mario remained standing in the same place pulling the trigger of the empty gun (R 1124). Then, he "started putting [other] bullets in, laughing. Q: Laughing? A: Yes" (R 1124).

Arsenio came into the kitchen in his underwear (R 1125). He told Mario, "My brother, have you gone crazy? You're a murderer" (R 1125). Mario told him that he was going to kill [Arsenio] too" (R 1125). Arsenio told Barcelo to leave. He said, "My brother's gone crazy" (R 1125). Mario remained on the same spot. Barcelo left (R 1125). Arsenio and "an uncle of Mario's" later found Barcelo in the yard (R 1127). Arsenio told him to leave, "that he was going to call the police" (R 1128). On the day after the incident, Barcelo told Margarita Martinez that Mario had "gone crazy" (R 1158).

#### The Defense Case for Mitigation

Carmenlina Lara lives in Miami (R 1167). She is 57 years old (R 1169) and has two children -- a 29 and 23 year old (R 1167). She and Mario are first cousins (R 1168). Mario's father is her uncle (R 1168). She knows all the members of Mario's family (R 1169-70). She knew Mario and the family in Cuba and was in close contact with them (R 1169-70). She lived within a short walking distance ("about half a block", R. 1174) and saw them daily (R 1174). The town where Carmenlina and the Laras lived is rural and far from Havana (R 1169-70). Carmenlina **was** present when Mario **was** born -- "that's out in the country and you don't go to the doctor" (R 1170). Mario was born in 1956 (R 1173).

The place where Mario and his mother and siblings lived "wasn't really a house. It was a roof, two walls ..." (R 1170). It was a room with "dirt floors," no bathrooms, no

showers (R 117 1). Mario's mother, Mario and Mario's seven brothers and sister lived in that squalor (R 117 1). The room was "very small", a "small piece" (R 117 1).

There was no "stove to cook food" (R 1173). The room had no tables, no furniture at all other than a small bed that the father would use when he came to sleep with Mario's mother (R 1173). The children slept on the dirt floor (R 1173).

The father did not live in there (R 1173). He had an adjacent house where he lived (R 1173-74). The house where he lived and the shack where he kept his family were on the same farm (R 1174). The house where the father lived had two bedrooms, a living room, a dining room, a kitchen, good floors and a good roof (R 1175). The father would have lunch and dine in his house, away from the family (R 1175).

Mario was treated "very brutally" by his father (R 1175). From the day Mario was born and throughout Mario's childhood the father "would hit the mother two or three times a week and then him [Mario] he would hit everyday" (R 1175-76). He would beat the mother "in front of the children" (R 1176). The father was "violent" and used "wood or a can," "his fist" and "[w]hatever he would find in front of him" in his beatings (R 1176). Carmenlina and the children would see the mother "bleed" and "bruises, damages" because of the beatings --she also "had a miscarriage at eight months because of one of the beatings" (R 1177). As a young child, Mario saw his mother beaten into the miscarriage (R 1177, 1178). Ever since Mario was born, he saw these beatings (R 1177). On one occasion when the father was striking "Mario brutally [Mario's mother] entered and went to take [Mario] away from him. He pushed her. He smacked her around . . . She said that she could not take anymore... She took two containers of what they call rapid ink which is a liquid that is used for polishing shoes." (R 12 16). She attempted suicide as a result of seeing the brutality her son suffered (R 12 16- 17).

The father made the mother take care of his cocks (R 1177). Since the cocks would fight, they would be bruised and then the father would go "at her and he hit her" (R 1178). Mario saw his mother brutally beaten (R 1178). Mario would cry over this (R 1178).

Carmenlina saw the father mistreat and beat Mario from when he was "a year old until he left for the military service" (R 1178). The father would beat Mario and the other children "for whatever reason" (R 1178). If they ate eggs or plantains or went to the cockpit, they would be beaten (R 1178).

Almost everyday he would hit [Mario] that I remember. I remember a lot. One time it was because he climbed a coconut tree, . . . He hit him. There was a stick next to the tree and he hit him. He broke two ribs and he dislocated a kidney. [Mario] was in the hospital . . . about three months (R 1179).

The father used anything on Mario (R 1179) -- rope (R 1181), sticks (R 1182), boards (R 1182), a machete (R 1182). In addition to being violent, the father's treatment of the children was "[b]ad, bad" (R 1180). He would not care for "the children's needs such as eating and clothing" (R 1180). "The groceries would go to the [father's] house" and the father would feed himself there (R 1180, 1181). The small quantities of food the mother and the children got were "by rations in the morning" (R 1180). The rations were three small cans of rice (R 1180-81).

The children wore "[w]hatever the neighbors gave them" (R 1181). Mario would be beaten daily (R 1182), "for anything" (R 1182). Mario "couldn't do one thing that a child would do because his father would hit him for everything" (R 1182).

[I]f he found a stick, he would hit him with a stick. If he found a board, he would hit him with the board. If he . . . found a machete, he would hit him with the machete (R 1182).

Mario lost a finger from a beating with the machete (R 1182-83).

"Since Mario started walking," the father would tell him "that he shouldn't have been born, that he was an ill born, that he didn't have a mother" (R 1183). The father would tie Mario "in the well upside down . . . [b]y one foot" (R 1187).

As a result of what he suffered, Mario was "different" than other children, such as Carmenlina's children (R 1184-85, 1186). Mario was "unsettled, but just for that you can't hit a child" (R 1185). When there were people around, Mario felt like he was suffocating -- "he couldn't be there because he was like suffocated. He would leave" (R 1186). Mario had this constant suffocating feeling from age "five or six" (R 1186).

Mario would go to Carmenlina's house and tell her he was afraid of returning to where he lived (R 1187). On one occasion when he went to Carmenlina's house

my father was there, his uncle. So my father brought him back...so Mario's father tied him up for about two days...That time he tied him from a bucket in the well by one foot with his head facing down (R 1187).

Carmenlina's father found Mario tied like this in the well after the second day and untied him (R 1188). Mario did not do "anything to deserve the type of beatings that he got from his father" (R 1190).

When Mario was a young child, his teacher told Carmenlina "to tell Mario's father to take Mario to a doctor because she saw Mario was not well" (R 1189). Carmenlina told Mario's father, but he did not express concern (R 1189). Later, "there was a meeting at school" and a teacher told the father "to take him [Mario] to a doctor, that she saw that Mario wasn't well, and he [the father] didn't pay attention" (R 1190). Like the teachers, Carmenlina later told the father "many times" about "getting psychiatric treatment for Mario" (R 1192). The father was indifferent.

"[T]hey never had food" at home; the father did not "provide his son with a sufficient amount of food to eat"; neighbors felt bad and would "give them something" (R 1190).

They wore "[w] whatever people would round up and give to them" (R I 191). Mario slept on the floor; he never showered (there was nowhere to bathe); he used "the woods" as a bathroom (R 1191). The father never showed Mario any affection (R 1191-92). The family never celebrated birthdays or Christmas (R 1191-92).

Mario would bleed from the father's beatings (R 1192). When the father "would tell him I wish you were never born" Mario "would start crying" (R 1193). The father used foul language when speaking to Mario and he told the child "your mother is this or that. You shouldn't have been born. You don't have a mother. You should die. Imagine" (R 1193).

Mario would talk to "Bermudez", he "would yell it" (R 1194).

When he started, may God forgive me, calling Bermudez he was about five years old. That's when he first started... he started yelling Bermudez, that Bermudez should come and take him, that he didn't have a life... (R 1194).

Bermudez is the devil (R 1196; R. 1194, "scram"). "Sometimes he would be walking and he would start yelling, calling him [Bermudez]" (R 1195).

Mario believed he saw Bermudez -- he would say, "Look at him here, see him here" and "he would start yelling" and calling to him (R 1195). "He would call him" and he believed that he saw him -- "I know that he [Mario] would see him" (R 1195).

Mario "would sit next to a lagoon and he would start yelling for him [Bermudez] there and he would have long conversations there" with Bermudez (R 1195). He did this often, (R 1195-96), day or night (R 1196). "He would stay there a long time" talking to Bermudez (R 1196).

Carmenlina thought that "it wasn't normal" --a "five or six year old boy... talking to the devil" (R 1196). Mario, from an early age, "was crazy"-- "[n]o child that does that can be normal" (R 1196). She told the father Mario needed help (R 1197). The father did not care. The neighbors and Carmenlina could not take Mario to the hospital or to get help

from doctors because "his father didn't permit this" (R 1197). The father "had lots of reasons to take him to a doctor, but he wouldn't take him" (R 1197).

Mario was "the only one" in the village that was so abnormal and crazy (R 1197).

As the years went by, Mario became "more abnormal, more violent, more crazy" (R 1198).

[Mario] would have sudden impulses. Let's say if he were at school, he would leave. Then he would sit by himself and he would stay there hours and hours talking [with no one else around]. . . but if you were to hear him it was a tremendous conversation. He would start playing with the children and then he would do the same thing [go off for these conversations] . . . [H]e would get this urge... (R 1198).

"[T]his wasn't normal in a child" (R 1198). Carmenlina became even more concerned about him "as he got older" (R 1198). If Carmenlina could have, she would have taken him to doctors (R 1198-99).

Mario's father was very bitter (R 1208). Mario "never had any love" (R 1208). "He never had anything. He was raised that way" (R 1208). Carmenlina and the neighbors would send food over because they felt bad for Mario (R 1205). Mario's mother could not take the children to visit her own mother and father (Mario's grandparents) because she had no money for the bus (R 1205).

When Mario called out to Bermudez, "he would scream it out. You could hear it" (R 1213). Mario "would be having conversations with someone that you couldn't see" for "long periods at a time to this entity, this being" (R 1213). He would "be sitting next to the lagoon where Bermudez supposedly resided" for "hours" talking to Bermudez (R 12 14). At school, Mario "would like choke", felt "claustrophobic", could not breathe (R 12 14).

Ariberto Reyes (R 1220) is an elderly man who came to the United States because of the oppression in Cuba (R 1221). He has sons and grandchildren (R 1222). He lived

in the town in which Mario Lara grew up and came to know the Lara family (R 1222-23). He knows Mario since birth (R 1223). He employed Mario's father (R 1224).

The father's relationship with Mario was "[v]ery bad always" (R 1225). Even from the time Mario was a year old, the father would "treat him very bad" (R 1225). The father would beat Mario very often (R 1226). "He would hit him very hard" (R 1226). Mario "would cry often"; and Mario's mother would ask Ariberto to speak to the father to try to convince him not to mistreat the child (R 1226, 1227). Ariberto Reyes saw the father hit Mario on several occasions and "I would ask him -- I would scold him for the mistreatment that he inflicted on the son" (R 1226).

The father treated Mario "very harshly" (R 1227). He would hit Mario "in the head and give him bumps in the head" (R 1226).

That started since he was a year and some months old, and then it continued more severely when he was three or four years old. He would punish him. He would even kick him when he was four years old (R 1227).

The father "wouldn't feed [Mario] all day" (R 1227). Different "punishments" began when Mario was three years old: "he would tie him up and he would tie him by the foot as if he were a pig on a tree. I would see that very often" (R 1227). The father would also tie Mario "upside down" and would be "hanging him" (R 1227).

Ariberto would 'let him loose. The only person that was able to do that was myself . . . because the mother couldn't get involved or else he would also hit the mother" (R 1228). Ariberto "frequently" saw "the father tying Mario to a tree [or] tying him upside down and hanging on a tree" (R 1228).

Can you imagine? I would ask him, "How is it possible? How could you treat your son that way?..." [I] even told him . . . that it was even almost better to kill him [than] treating him that way... (R 1228).

The father beat Mario so hard that "they took him unconscious to . . . the hospital and he was in the hospital for quite awhile" (R 1229).

"He broke his ribs. He cracked his head" (R 1229). Mario would talk to Ariberto about the mistreatment he received, looking for kindness (R 1229-30).

Ariberto Reyes testified about finding young Mario "talking alone" at the edge of a lagoon calling out to the devil (R 1230). Mario would see "his shadow or reflection on the water" (R 1230). "He would call scatan. Then I would ask him, 'Who is that?'" (R 1230). Mario would say "that that was a very strong person" (R 1230).

"[S]everal other people heard [Mario] make those comments" (R 1230). Ariberto "asked him, 'Are you talking by yourself?' And he said, 'No, I'm not talking by myself. They answer me" (R 1230). Mario "wasn't well . . . I never heard anybody say those things about scatan . . ." (R 1231). Ariberto would take him away from the lagoon (R 1230).

Ariberto felt the boys mental state was not good -- Mario was different than other children, "they weren't like him" (R 1231). Mario had trouble getting "along with anybody" (R 1232). "Even at school, the teacher told the father to take him to the psychiatrist, that that wasn't something normal, natural" (R 1232). The father was indifferent (R 1232). Mario was disturbed (R 1232). He would hear voices (R 1244). "His father's treatment," the "beatings," made Mario that way -- "How is it possible," Ariberto asked, for that treatment "not to do him any harm?" (R 1232). Mario was beaten "about the head" and this "does a lot of harm" (R 1232). The other children in the family did not have Mario's mental problems "because it was a different kind of punishment" that Mario received (R 1233). The father would punish all the children, but the others had "slighter punishments," not as harsh as the punishments Mario received (R 1243).



Ariberto wanted to get Mario psychiatric help and told the father he could help get that assistance (R 1233-34). The father's response, however, was that Mario "had to be punished" (R 1234). Ariberto talked to the mother "but [she] couldn't do anything" (R 1234).

Mario was raised in "a shack . . . a dirt floor without any sanitary installations for anybody. That was Mario's house . . . It didn't have any rooms" (R 1235). The mother and children all lived there and slept "wherever they could" (R 1235). In the shack "it was a dirt floor. That was all" (R 1235). The father would go over from his house occasionally -- "[i]t wasn't anything which you would consider normal" (R 1235).

Food and clothing for the children was "[v]ery scarce, everything was very scarce" (R 1236). They were terribly poor (R 124 1). As Mario was growing up he did not have clothes (R 1236). Sometimes he had "[h] and-me downs" and "many times he wouldn't go to school because he didn't have anything to put on" (R 1237).

Mario's father would punish Mario for no reason at all; the father was "a very violent man"; he was "a brute, he's dumb and he's abusive" (R 1237). He never showed love and affection to Mario, only violence (R 1237). Mario's father never celebrated a birthday with the boy (R 1237). He never held his son -- "that never existed there" (R 1238). He would use bad words towards Mario (R 1238). He would curse Mario's mother and say to Mario 'you're a son of a this and a son of a that in front of his mother" (R 1238). He would tell Mario "you're the son of a prostitute" (R 1238).

The father would tell Mario he wished Mario never had been born:

He would curse at him everyday . . . and on many occasions . . . he said to him, "The food that I give to you, it is better to give it to-the dog." It's even embarrassing to say so, but that's the truth (R 1239).

He treated "his animals better than his children . . . he would treat anything better than [his] son. That [mistreatment] had no limits" (R 1239).

Mario's mother loved him but couldn't provide enough to eat "because she didn't have it" (R 1239-40). She "couldn't protect him" from his father (R 1240). When Mario was shown affection (by Ariberto or his mother) he responded to that affection (R 1240). But the father did terrible things to his son (R 1242). Neighbors would try to help with clothes -- "they felt sorry for them" (R 1247, 1248). Ariberto eventually distanced himself from this family because of the father (R 1242, 1249).

Mario had a fight in the Cuban Army and went AWOL (R 1249-50). He went to a hut on his father's farm and shut himself in (R 1250). He would not come out -- military officers, his father and his mother tried to coax him out but he remained shut in (R 1250). They called Ariberto Reyes. Ariberto talked to him, showed kindness and affection, and was able to get him to come out (R 1251).

Ariberto then talked to the officers:

about the kind of a childhood that he had, how he was raised, that they should take him to a psychiatric place ... because he had had a very harsh treatment when he was a child and . . . that wasn't natural coming from any person... (R 1255).

Ariberto recommended to the Army "that he go into a psychiatric hospital" (R 1255). "It's a person that you believe is crazy. [The hospital] would be the cure" (R 1256).

Mario **was** eventually hospitalized and diagnosed as a paranoid schizophrenic (Def. Exh. C, R 2862, seq.).

Margarita Albo Lara (R 1 259)<sup>7</sup> is Mr. Lam's sister (SR 3, 5). She is six years older than Mario (SR 3). She has four children and three grandchildren (SR 6).

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<sup>7</sup>Ms. Albo-Lara was in Cuba and could not obtain a visa for the trial. Her testimony was perpetuated and is transcribed in a supplemental record volume filed in this Court. The citation to that volume employed in this brief is "SR \_\_\_\_."

Margarita suffers from a "[sickness of the nerves]" and retired from her government job due to that illness (SR 6-7). She is under a doctor's care and takes medicine (SR 7). The doctor prescribed tranquilizers (SR 7-8).

There were eight children in the Lora family -- the children are approximately two years apart (SR 8), five boys and three girls (SR 8-9). They grew up in a home

on a soil floor. We didn't have doors. We didn't have beds. We didn't have the beds where to sleep. We went through a lot of hunger. We went through hunger and we didn't have clothes nor shoes and we didn't have lunch for school (SR 10).

From Mario's youngest years, their father mistreated Mario (SR 11).

"A lot of mistreatment he would give him. Blows everywhere." (SR 11). Mario had to be "interned in a hospital" twice "due to the blows that he gave him" (SR 11). One beating affected Mario's small kidneys (SR 11). People noticed how swollen Mario had become due to the beating and he was taken to the hospital (SR 11). Margarita saw the father beat Mario and cause "this swelling" -- she wrapped Mario up before he went to the hospital (SR 12).

Mario's father would hit Mario with anything; he would use a rope on Mario; he also beat their mother (SR 12). Mario saw this (SR 13). She would be beaten in front of the children (SR 13). He would also "drag her by her hair" (SR 13). The father beat the mother "[m] any times." (SR 13). Margarita described her father as a "hangman, that means like a furious animal" (SR 14). He directed his fury at the children; he was like an animal with the children (SR 15).

"Mario was the most chastised" of the children (SR 15). Anything Mario did was bad for the father -- "For example, to take something and eat it, for him that was bad and he would hit him for it" (SR 15). "He would hit him, give him **blows**, and after he **would** hit

him, he would tie him, he would throw him” (SR 15). He would tie and throw Mario “into the sugercanes or to the yucca plantation, to anyplace” (SR 16). “That happened to him [Mario] many times” (SR 16). During the hospitalizations resulting from the beatings, Mario’s father never visited him (SR 18).

The father was about 6’5”; he was strong (SR 16). He would “tie [Mario] to trees... We would have to go out looking for him” (SR 17). The father “would tie him and didn’t say [where he was] so we would have to go and look for him. Otherwise, he would die” (SR 17). Mario would get angry and mad “because he was defenseless” (SR 17). Mario was small; he was a defenseless child, “nine, 10, 11 years old” (SR 18).

The father “would hit him with a...rope...that rope would have a screw and he would hit him over the head and tear him with the screw... [P]eople there who saw him...wanted to accuse [the father] to the police...” (SR 19-20). The screw was four or five inches long; had grooves on it; and was at the end of the rope (SR 20).

The father hit Mario “over the head” with this object (SR 20). “When he would hit him, it wouldn’t matter where he would hit him” (SR 20). Mario had injuries to his body “but . . . to his head more” (SR 21). “You would see” on the skin of his head the markings left by this object (SR 21). As a child, Mario was black and blue and bled (SR 21).

Mario’s father never took care of Mario (SR 21). The father only wanted “to make him [Mario] do hard work and to hit him. He never received a phrase of care or anything” (SR 21-22). He would approach Mario only “to mistreat him” (SR 22). The father was “physically cruel at all times towards Mario.. . [a]lways” (SR 22). The “physical cruelty on Mario” was constant, even when Mario was as young as five (SR 22).

At school, the teacher would first complain about Mario but when she “started knowing him . . . she wouldn’t complain about him anymore. The teacher became sorry

for Mario" (SR 22). A complaint from school resulted in Mario being "mistreat[ed]. . . to the maximum" (SR 22). The teacher learned about the beatings -- the father would get Mario from school and beat him all the way home (SR 23).

Mario had some fights in school because "[t]hey would give him nicknames" (SR 23). When the father learned this, he "[m]istreat[ed] him, hit him until [the father] would get tired" (SR 23).

The father would beat Mario with the belt, the rope, "whatever he would find" (SR 23). The father tied Mario and hanged him upside down (SR 24). He "hung him from the support beam of a well with his head hanging downwards" into the well (SR 25). Mario's feet were black "due to the rope" with which he was tied (SR 25). Mario was like that a long time; some people ultimately untied him; and he was taken to a neighbor's house where they tended to his feet (SR 25).

Margarita also has scars from her father's blows; he hit her with a machete because she did not fetch wood as quickly as he wanted; she was 13 at the time (SR 26). The father also broke her arm (SR 27). She wanted to tell the doctor about their father "but my mother never did want to" (SR 27). She was 14 (and Mario 8) when their father broke her arm (SR 27).

The father also used abusive language and was mentally cruel (SR 28). He would say: "I'm going to kill you, jerk, or what I would like to do is to make you disappear" (SR 28). She "always thought" he would kill them (SR 28).

Margarita believed their father was going to kill Mario (SR 29). He was more cruel towards Mario than the other children (SR 29). Mario would do things like eating raw eggs "because he was hungry" (SR 30). The father would "mistreat him" for it (SR 30).

There were “many times that he would hang him or tie him to a tree and leave him there lost” (SR 30). The father would tell Mario he wanted to kill him (SR 31). The father frequently hit their mother; Mario not only was abused, but saw the abuse the father inflicted on others, including beatings of the mother during her pregnancies (SR 32-33).

When Mario would see their father beat his brothers and sisters, he would hit himself (SR 33). “He would go on himself and tear his clothes and would hurt himself like this with his nails” (SR 33). Mario did this to himself often (SR 33). He would also scream out, “Oh, dad, you’re killing me” (SR 33).

Mario would also call the devil (SR 33). He would go out to a lake and call out to the devil (SR 34). He would scream, “I want to join the devil. Let the devil come.” (SR 34). The devil’s name is Bermudez and Mario would call the devil by that name (SR 34). Mario did this often, particularly in the evenings (SR 35).

The family would hear him by the lake at night shouting to the devil (SR 35). “[T]here **was** something wrong with Mario” (SR 35). The father would say that Mario was crazy (SR 35).

The father did not stay in the shack where the mother and children lived (SR 35). He lived in his mother’s separate house (SR 35). He lived “in better conditions than us” (SR 36). The shack was not his home, “but he would come to our house everyday to boss around and to punch us and that” (SR 36). The father had “a bed to sleep on” in his house, “[w]e didn’t” (SR 36). “I never knew during my childhood what breakfast was or lunch. It was flour sometimes without butter and sometimes . . . rice so that we’d make rice soup so that we all would eat. We were always starving to death” (SR 37). For clothing, the father would “pick up old clothes” and “give us that” (SR 37).

Mario could not learn at school (SR 37). He started drinking alcohol when he was about 11 or 12 (SR 38). He began drinking because of "the life that we were having . . . it was not a human being's life" (SR 38). Mario drank alcohol that was kept around for the roosters (SR 38). He would be drunk at **age** 11 or 12 (SR 38).

Margarita described Mario's childhood from birth until teenage years: "[H]is childhood was a terrible childhood... [I]f I would have to repeat it, I would prefer to die... I wouldn't want to even remember it" (SR 39). The father used roosters to raise money but he would spend the money with his women (SR 43). When he came to the shack where the children lived, he would spend "an hour or two hours" (SR 45). Mario did stupid things, but "to the old man they were bad things and he would hit him" (SR 46).

Mario also had difficulties after he left home; could not control himself; and injured his mother-in-law with a machete (SR 40). He spent six years in Cuban prisons (SR 41). Mario had several jobs in Cuba but he never could hold down a job for long (SR 41). He worked at construction (SR 41). But, he "would leave [the job] just like that and that is punishable in Cuba" (SR 41). Mario was drafted, but had problems in the service (SR 42).

When Mario grew up there were a number of incidents where he fought with men (SR 48). He hit his sister (SR 48). He hit his brother with a rock on his chest (SR 48). He married in Cuba and had children (SR 48-49). He did not strike his own children (SR 49). When he got angry he would hit the walls and the furniture (SR 49).

Dr. Edmund Cava is a psychiatrist (R 1263). He has been in practice for thirty-five years (R 1264) and has an extensive professional background (R 1265-72).<sup>8</sup>

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<sup>8</sup>Dr. Cava worked at several psychiatric hospitals (R 1265-66); is Board Certified by the American Board of Psychiatry (R 1266); has been a supervising psychiatrist at Jackson Memorial Hospital for over 25 years (R 1267); and is a professor at the University of Miami School of Medicine (R 1267), where he trains medical students and resident psychiatrists (R 1268). He has served as an expert witness several times (R 127 1-72).

Dr. Cava first examined Mr. Lara in April of 1982 at the time of the original trial proceedings (R 1272-73). He saw Mr. Lara again in 1988 and January, 1992 (R 1274). He has also reviewed a great deal of information about the case (R 1275). The results of his examinations were consistent with each other and with Mario's psychiatric examination and treatment in Cuba (R 1307, 1311).

Dr. Cava learned that Mario's father was extremely abusive; punished the children with heavy blows and the rope for minor failures in their chores; and Mario told Dr. Cava that his mother would cry about the beatings but the beatings would not stop (R 1276-77). Mario "was beaten into serious enough condition that he required hospitalization" (R 1277). Several of the siblings are nervous and emotionally injured almost to the point of being disabled from the incessant abuse (R 1277). Margarita Lara's videotaped testimony is consistent with what the doctor learned from Mario (R 1278). It reflects that the father was cruel, "almost to a murderous degree," and that he was "near psychotic in his treatment of the family" (R 1278).

People who undergo such abuse carry it inside of them (R 1280). When a child is brutalized in this way and has such pain inflicted, the child incorporates that "behavior into their life style" and "take[s] a similar posture . . . toward other people" (R 1281). It is "[a]lmost an automatic mold or identification to that which they were exposed" (R 1281). This is one of the most brutal and harsh cases of child abuse that "I've come in contact with" (R 1282).

"[T]he younger the child is [when abuse occurs], the more profound the impact" (R 1282). When the abuse begins in early childhood, it has a more profound and pervasive effect in coloring that person's later behavior and view of the world (R 1282). Mario suffered emotional, physical and verbal abuse, saw his mother and siblings suffer



abuse and all of this affected his development (R 1282-84). Seeing his mother and siblings abused created anguish that can be as serious as the abuse Mario himself suffered (R 1283). Seeing one's mother abused has great debilitating effects (R 1283-84) -- it is as "terrifying an experience as a small child can have, and rage producing" (R 1284). The mother's attempting suicide and the other abuse Mario saw "is terrifying to a small child . . . particularly [when seen] repeatedly" and leaves the "person very frightened about their own basis of survival on earth" (R 1284).

[C]hildren... make sense out of their world in terms of what they're able to bring into their experience, into their eyes and ears, and if a child sees brutality and ruthlessness and cruelty, that is the kind of a world that they construct in their own mind. That is the way they begin to think of the world as being (R 1285).

Children formulate permanent views of the world from their immediate childhood surroundings: if their surroundings are violent, they think the world is violent, accept that that is "the way it is" and operate inside of that level (R 1285-86).

Given what he went through, Mr. Lara has several problems. He has mental instability "in a variety of areas" (R 1287); unstable interpersonal behavior, mood and self image (R 1287); unstable, intense interpersonal relationships (R 1287); impulsive and unpredictable behavior (R 1287); unstable mood (R 1287); physically self damaging behavior (R 1287); and intense anger and "lack of control over this anger" (R 1287). Mr. Lara suffers from "a profound identity disturbance . . . a sense of emptiness at the level of core identity, and a great deal of uncertainty about identity [and] self image..," (R 1287).

Mario Lara's mental state is chaotic and bewildered (R 1287). He has a borderline personality disorder (R 1286, 1288), which includes "enormous shifts of attitude" -- one moment he will "idealize a person and put them on a pedestal and the next moment they will hate them with a murderous intensity" (R 1288). He experiences rage; "tremendous

attitudinal and mood fluctuation"; and, at the same time, is extremely dependent (R 1288). Such people are "very volatile" and their "moods are extremely tempestuous and stormy" (R 1288). They have psychotic episodes when "they are not [in] a state of reality" (R 1289). These problems are consistent with the abuse Mario suffered (R 1286, 1304-07).

On the day of the offense Mr. Lara had "partaken in substances to a considerable amount. He had had cocaine and . . . marijuana. He had a considerable amount of alcohol" (R 1290). He was concerned about a friend of his, Doctor Amigo, who had been hospitalized at Jackson Memorial Hospital (R 1290). He drank whiskey, smoked marijuana and snorted and smoked cocaine (R 1290). The marijuana, cocaine, whiskey, more marijuana and more cocaine he had both "sniffed and smoked" produced "a very powerful manic like type of excitement which . . . clouds people's judgments and causes them to behave in aggressive and irrational ways" (R 1290-9 1), especially people like Mario, who are already disturbed.

Mario also has a history of substance abuse in the United States (R 1292). The effects of substances heightened the difficulties Mr. Lara already had from his mental problems. 'Cocaine is a very powerful stimulant' and creates a greater tendency "toward impulsive, reckless behavior" (R 1292-93). It produces a sense of grandiosity: "People will do things [on] . . . cocaine that they would not dare do if they were not on the effect of cocaine" (R 1293). Continued substance abuse such as Mr. Lara's -- for a year or more -- "will tend to color more and more the person's behavior" (R 1293). It exacerbates the problems associated with the underlying mental problem (R 1294). Alcohol also promotes recklessness -- it "narcotize[s]... part of the brain" and people will "do things impulsively and recklessly without having the ability to think about the long term consequences of what they're doing" (R 1294).

At the time of the offense, Mr. Lara was under the effect of cocaine, marijuana and alcohol and he was “at least partly in a drug driven state” of “delirium” (R 1293). The “combination of cocaine and alcohol in a person who is already impulsive to begin with is a lethal combination” (R 1294). It undermines the understanding of right and wrong; impairs the ability to understand the consequences of one’s actions (R 1295); and increases the problems associated with Mr. Lara’s underlying condition (R 1294).

Dr. Cava discussed Mr. Lara’s history of psychosis in Cuba (R 1297-99). In his 1982 report he wrote that Mr. Lara’s history indicated “a period of schizophrenic decompensation” in Cuba (R 1298). Mr. Lara was prescribed medication; “he was hearing voices and could not sleep”; he “would hear and see whatever he had in his thoughts. He would awaken from his sleep and see and hear things and . . . they would continue while he **was** awake” (R 1298).

Defense exhibit C is a report about Mario from Dr. Castillo-Diaz, Mental Health of Artemesa, Ministries of Public Health, Cuba (R 1299). The diagnosis was “paranoid schizophrenia” (R 1300, 1301). This diagnosis is consistent with what Dr. Cava found (R 1301).

Paranoid schizophrenia is a major mental disorder . . . characterized [by] the loss of judgment, loss of reality, . . . and a tendency to replace external observations with delusions, hallucinations and notions that originate internally (R 130 1).

Mario was given strong medication for his condition. The psychiatric report from Cuba relates “delirious hallucinations with ideas of reference which means ideas of persecution, particularly paranoid types of manifestations . . . and [that] the voices direct him towards self punishment . . .” (R 1308). He believed the voices “wanted to injure him[,] to put him in difficulties and this tormented him a great deal” (R 1308). They told him it

“will end with his own life” (R 1308). He was given “very powerful” anti-psychotic medication (R 1309) -- high doses “reserved for people who are very psychotic” (R 1309-10), “very sick” (R 1314). Nothing approaching that dosage would be prescribed “unless the person was very, very psychotic” (R 1326). The report demonstrates “many psychotic manifestations” (R 1327). When the drugs were suspended, the manifestations would recur (R 132 1, 1327) and “he would relapse into a psychotic crises” (R 13 10).

Mario told Dr. Cava about “having heard voices which he [Mario] attributed to Bermudez” (R 1302). Bermudez is “the devil that spoke to him when he was a child when he was being abused...” (R 1302).

He described these as . . . having occurred during the time that the crime was committed, that he had . . . heard the voice of Bermudez which he identifies as the devil at the time that the murder was committed (R 1302).

Mario was in a schizophrenic, psychotic state at the time of the offense and lacked contact with reality (R 1302-03). His judgment about people was grossly affected and distorted (R 1303). He was decompensating -- decompensation is a major shift in judgments about one’s environment into judgments “that are derived from the eruptions of internal experiences” (R 1303). Decompensation identifies a mentally ill person’s going into a psychotic, dysfunctional state (R 1304).

Paranoid thinking and schizophrenic paranoid thinking are related to childhood “psychological abuse and having [been] brought up in a punishing, accusing environment” (R 1305). The “constant punishment and accusation and blame” inflicted by the father resulted in Mr. Lard’s schizophrenia -- it was developed “in the context of the family” (R 1306). There is “a very slim chance” that someone with Mr. Lard’s childhood history would be a “normal person” because of the specific personality deformation that

takes place (R 1306). Mario's history of paranoid decompensation in Cuba is consistent with his decompensation at the time of the crime (R 1308).

Mario and Dr. Cava discussed Mario's going to the lake where he would have conversations with the voice, Bermudez -- he would "hear a voice coming from over a lake near his farm . . . and this voice came from an entity that identified itself as Bermudez . . . and he would get various instructions and . . . reassurance from this satanic hallucination" (R 13 12). Mr. Lara was a "troubled and very disturbed young boy" (R 13 14).

Mr. Lara believes that he walked in and found one victim (Olga Elviro) dead, the voice of Bermudez then told him that the next person he saw committed this murder and after seeing the second victim (Grisel Fumero) he killed her or he thinks he killed her (R 13 17- 18). He "was acting on instructions . . . from the voice of Bermudez and . . . was doing an act of retribution for the person having committed the murder" (R 1318). He does not remember all of what happened (R 13 18).

Mr. Lara is "an extremely disturbed man" (R 13 18). He has a "psychotic process in his mind" (R 13 18). Although it is not manifested at all times, it is within him and "he can decompensate into full blown paranoid schizophrenia" (R 13 18- 19). Rejections, stress, fatigue, alcohol and substance abuse can tip such a person into a psychotic state (R 13 19). His childhood predisposed him to this mental illness (R 13 19).

On cross-examination, Dr. Cava explained that a borderline personality disorder means that the person is "near the brink . . . somewhere between sane and insane" (R 1327). A borderline personality disorder "shades into a full blown psychotic state. It's almost a shade of gray . . ." (R 1328). Mr. Lara is not a sociopath -- "he is not healthy enough to be a sociopath," he is "too overwhelmed by moods" and too needy of drugs and substances to relieve himself of his chaotic, lonely and stormy emotions (R 1330).

Psychopaths are better organized than Mr. Lara (R 1330-31). Mr. Lara is not cold-blooded enough to be a sociopath (R 133 1).

A “coked up and psychotic” person would engage in the rampage that was Mr. Lara’s behavior at the time of the offense, a person “in a state of mental abnormality” (R 1331). “They lose -- impulse control. They release impulses” (R 1331).

Although Mr. Lara’s mother loved him, she presented another example of victimization; was not a protective figure (R 1334); lied to the doctors about how Mario received his injuries in order to protect the father; and gave the boy a mixed picture (R 1335). Others did not stop the father and showed Mario “the futility of seeking protection” while “his father was behaving monstrously” -- there was no real intervention to protect him from “the harm that [the father] was doing [to] him” (R 1337). From this the child generalized: “this is an evil world and if there are some people who are not evil, they are kind of helpless and impotent and they don’t amount to too much, anyway, and they cannot do much to protect” (R 1337). Mario would try to help his mother and for this he “got hurt and punished, but he diverted [his father’s] ... offer[ing] himself as a victim instead of his mother” (R 1337-38). He “wanted to protect his mother” (R 1338).

Mr. Lara is “a very sick man” (R 1346). If

the victim was indeed going to testify against him . . . and he murdered her in a brutal way like that, if he had had any degree of systematic organization in his behavior, he would have known that he would be the immediate -- easily the immediate first suspect. . . . [H]e did it in front of witnesses. It was certainly not the kind of an organized systematic behavior that a well organized criminal does, but more like a very sick person.

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[H]e committed a murder in front of an eye witness. If he was ready to leave the state, he could have gone a little bit sooner and not committed the murder, avoided the rape trial ... the whole thing sounds very disorganized [and is] the kind of behavior that a very sick man would indulge in (R 1348).

Mario's behavior was not rational, not healthy and disturbed (R 1349-50).

When asked a hypothetical about "an unprovoked attack" by Mr. Lara towards a girl friend at the jail, Mr. Cava explained that psychotics are provoked "by things that to another person may seem trivial" -- Mr. Lara is always "an impulsive, irrational, potentially very irrational person" (R 1360).

Dr. Joyce Carbonell (R 1364) is a clinical psychologist and, since 1978, has served as a professor of psychology at Florida State University (R 1364-65).<sup>9</sup> Dr. Carbonell examined Mr. Lara four times, three in 1988 and once in 1992 (R 1369-70). She administered a number of psychological tests (R 1370); reviewed the depositions and transcripts (R 1371); and reviewed the mental health reports (R 1371). She also read letters about Mr. Lara from Cuba, reviewed records from Cuba on the Lara family history of mental illness and spoke with a number of people who knew Mr. Lara, including family and friends (R 1372).

Mario Lara's paternal grandfather died in a mental institution (R 1372). Several family members have been medicated for a variety of reasons (R 1372). Mario was psychiatrically hospitalized in Cuba and medicated with anti-psychotic drugs (R 1372-73). Defense exhibit C describes Mario's psychiatric hospitalization in Cuba (R 1373; see also R 2863 (Def. Exh. C)).

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<sup>9</sup> Dr. Carbonell has an extensive educational and professional background (R 1369-70); teaches graduate courses; is the director of the Florida State University psychology clinic; and trains psychologists (R 1365). She does research involving prison inmates for the federal government's National Institute of Justice project on the prevention of violence (R 1366-67). She sees clients in private practice (R 1367); consults for the Florida Department of Professional Regulation where her task is to evaluate the work of other psychologists and psychiatrists (R 1367); and consults for the Florida office of disability determination (R 1367). She trains law enforcement officers (R 1267); consults for the Tallahassee hostage negotiation team (R 1267-68); does forensic work for the courts (R 1268); and has worked at state hospitals (R 1368). Dr. Carbonell serves on panels which research and address issues of child abuse and neglect (R 140 1).

Dr. Carbonell psychologically tested Mr. Lara using the Spanish versions of the tests (R 1374). Mr. Lara has problems with abstraction and this makes it difficult for him to make judgments (R 1378). The testing showed that Mr. Lara is "a very disturbed person" (R 1381). It showed Mr. Lara's "difficulty functioning in the real world" (R 1384). It showed paranoia and schizoid adjustment (R 1384). Mr. Lara has "numerous mental health symptoms" (R 1386). He has periodic auditory hallucinations which are common in such mentally ill people (R 1388).

Mr. Lara did not want Dr. Carbonell to think he was crazy (R 1387-88). He was not malingering and tried to downplay his problems (R 1388).

Mario's childhood was abusive. There were eight brothers and sisters in the family (R 1389). People described the father "as an animal. He beat them and it was not just abuse but it was neglect . . . they were unfed" (R 1389). Neighbors would sometimes clothe and feed them "although the neighbors reported that they would get in trouble with the father if they fed the children too often" (R 1389).

At one point the father "threw gasoline on him [Mario] and threatened to set him on fire" (R 1389). The father

indented tied him upside down over a well and left him hanging there until other people rescued him; tied him over the yoke of two donkeys tied together and beat him; cut off half of his finger with a machete; tied him up out in the sugar cane fields and left him there and people would have to go looking for him; beat him severely enough so that he was hospitalized... (R 1389).

Mario has had auditory hallucinations since childhood (R 1390). He "would hear the voice" of "Bermudez that lived in the lake" and he

indented would hear this voice calling him and telling him to do things, mostly to hurt himself, and that fits with other people's descriptions that they would find him banging his head against a tree, that he would cut himself up, that he would throw himself out of a tree and do a lot of self damaging behavior... (R 1390).



Bermudez "would say things to him" (R 139 1). The voice would come on its own, he could not make it come to him nor could he make it go away once it did come (R 139 1). Mario remembers hearing the voice from a very young age (R 139 1). When the voice came to him it was a mandate, it told him what to do (R 1391). The voice is a command hallucination -- a command hallucination "says do X and for people who have them, they feel compelled to do what the voice tells them..." (R 139 1-92).

Mario is not sophisticated enough to make up a hallucination that looks so clinically correct (R 1392). People who make them up add components Mario did not describe and claim the hallucinations are there all the time (R 1392). Mr. Lara, on the other hand, "is embarrassed about this and tries not to talk about it" (R 1392).

Mario "knows he was standing there with the gun. Other people said he did it and, therefore, he believes that he must have been the one who did it . . ." (R 1393). He does not deny it but does not remember all of it (R 1393).

Mr. Lara has a history of psychotic behavior. There are records from Cuba that indicate that he was diagnosed as a paranoid schizophrenic, that he was on medication for schizophrenia, and the records also indicated when he was taken off that medication, that he would . . . decompensate into paranoid states again where he would begin to hear voices [and] act irrationally.... [T]he reports from . . . people [are] that he could be going along, he would be nice, he would be fine, and then all of a sudden you wouldn't know what happened. He would be angry, he would be upset, he would be yelling at people... (R 1394).

Mr. Lara has a history of psychotic and dissociative episodes where he would lose his sense of being (R 1394). His history is consistent with a schizophrenic disorder and a borderline personality disorder (R 1394). Borderline people "hover just across the line from psychosis. They are people who... shift in and out over that line. They have problems . . . adjusting with people, . . . getting along. They have those periods where they really don't function [rationally] . . ." (R 1394-95). They have psychotic episodes (R 1395).

Mr. Lara fits this diagnosis and the diagnosis fits with Dr. Carbonell's test results which showed a chronic marginal schizoid disturbance (R 1395).

Mr. Lara is not a sociopath. He doesn't fit that label -- a "schizophrenic . . . person or a borderline person doesn't have that mask of sanity that . . . [is] described [in sociopaths] ." (R 1396). Rather, borderline people like Mr. Lara are seen by others "as being weird and different and odd" (R 1396). People described Mr. Lara as "eerie, that you have got a funny feeling from being with him" (R 1396).

Mr. Lara suffers from a major mental disorder (R 1396). The borderline disorder and schizophrenic disorder are mental illnesses (R 1396). Borderline people traditionally were diagnosed as "borderline schizophrenics" (R 1396), from where the diagnosis gets its name. Mr. Lara

has been mentally ill all of his life. Even from reports of him as a small child he was noted to be very different. He would go to school, but then he would jump out of windows and run away and hide in the fields... [T]here are letters from teachers . . . who describe him as strange and different, and this has pretty much been life long (R 1397).

There is no question that Mario's childhood affected him (R 1398). "A major part of formation of what you are occurs at a very early age..." (R 1398). That is when the child goes through states "where they're learning to trust other people . . . [and] develop some sense of themselves" (R 1398). If

you're constantly abused, your ability to develop any reasonable conception of yourself is going to be destroyed, to develop normal social relations, to develop some kind of trust. Children are very dependent and they tend to continually look to a parent despite of the [ab]use for that, and if you're put in a situation where nothing in your life is predictable, you're not going to come out . . . stable . . . [or with] any good ability to interact (R 1398).

Abused and neglected children have serious problems as adults (R 1399). They cannot cope with other people and they have problems in proper functioning (R 1399).

People who have been abused are more likely to commit crimes in adulthood (R 1399). There is “a high rate of problems in children who have been abused and neglected” because “they have failed to develop . . . normal ways of coping, . . . normal methods of interaction” and they don’t have the coping skills to achieve things that other people have (R 1399). Abused children do not have normal learning and development (R 1399). When the child’s development and growth are disturbed, “you’re going to leave a permanent mark” (R 1400). Mario lacks coping skills (R 1406).

Mario’s case is “at the high end of abuse of children” (R 1401). It is rare that a child who goes through this severe level of abuse can make it (R 1402). Those who do had someone who rescued them and took them out of that situation (R 1402). There was no such person in this case -- others were afraid of the father; Mario had no safe haven (R 1402); his mother was not a figure of strength, had problems of her own, was abused herself and was unable to step in and rescue her son (R 1402-03).

The offense is consistent with Mr. Lara’s history and his decompensating into psychotic states (R 1403). There is record testimony from prior proceedings

where people said . . . he would on a given day not recognize them, not know them, be angry if they touched him, and then days later would be himself again. [There were] periods of time where all of a sudden he would begin to do things that were self injurious, pound his head on trees and cut himself open and then attack another person and then go back to being sort of a nice person again. . . [T]hat’s a serious mental health problem. . . [T]hat’s what happens with borderline people and it happens [with] schizophrenia... (R 1404).

Mr. Lara’s problems also have a genetic component (R 1404). The abuse made it much worse (R 1405). “It takes both ... together” to explain Mario’s mental illness (R 1405).

Mr. Lara’s capacity was substantially impaired at the time of the offense (R 1405). “This is a person who has command hallucinations that tell him what to do, who has . . .

periods . . . where he doesn't act like himself ,... doesn't know . . . what he's doing . . ." (R 1406).

On the day of the offense, Mr. Lara had been drinking and he has a history of alcohol and drug abuse (R 1425). Mr. Lara heard a voice that told him the first person he saw did this (killed Olga Elviro) (R 1432). When he walked downstairs, he saw Grisel Fumero.

Dr. Carbonell explained on cross-examination that psychotic breaks occur under stressful situations (R 1436). Mr. Lara remembers "that he saw Olga dead and that he loved her" (R 1436). In his disturbed mental state, he "didn't know why she was dead, and what he heard was a voice that said the first person you see is the person that did this..." (R 1436). He went downstairs and Grisel opened the door (R 1433). He remembers picking up his brother's (Arsenio's) gun (R 1433). He then remembers standing there (R 1436). "Arsenio told him he did" (R 1436). In such psychotic episodes people disassociate and decompensate (R 1437). It is difficult to pinpoint when the psychotic break actually began because he does not believe that he killed Olga (R 1438). The break or decompensation likely started before Olga was killed -- "It's difficult to talk to a person about what they did when they decompensate because they don't know" (R 1438). People who "start to decompensate do not all of a sudden look remarkably different in a moment... It is something that happens internally" first and then is manifested in behavior (R 1438).

Mario believes that the situation with Olga Fumero which resulted in the sexual battery charge was consensual sex (R 1445).

Dr. Simon Miranda (R 145 1-53)<sup>10</sup> is a clinical psychologist (SR 54) and child psychologist (SR 61).<sup>11</sup>

Dr. Miranda evaluated Mr. Lara seven times, 3 times in 1987, once in 1988, twice in 1991, and once in 1992 (SR 64). The results of these evaluations were consistent (SR 91). He tested Mr. Lara using the Spanish versions of psychological tests (SR 88-89).

Mr. Lara's developmental history is marked by violent and brutal maltreatment by his father (SR 69). Mario lived in a primitive home with no beds (SR 69); it was "a hut made with palm tree materials for the walls [and] . . . roof"; "there was a dirt floor" (SR 80). There was "very little food, " no shoes, clothing was very scarce (SR 80). The conditions were "not just poverty" but "deprivation" (SR 80).

From Mario's earliest years the father would beat him "with any kind of object, with various objects" (SR 70). School was interrupted because the father injured the child so severely (SR 70). Mario had to be hospitalized because the father gave him a severe beating that left bruises and marks on his body; Mario became inflamed and swollen; and his kidneys were injured (SR 70-71).

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<sup>10</sup>Dr. Miranda was unavailable at the time because he had to be out of the country. His testimony was perpetuated and played to the jury (R 1453). The transcript is included in the same supplemental volume identified earlier in this brief and is cited **as** "SR \_\_\_\_."

<sup>11</sup> Dr. Miranda has special expertise evaluating children in abuse cases for the courts and State Attorney's office (SR 55, 62, 132). Most of the cases he handles through court appointments or in private practice involve family violence (SR 55). During his career, he has evaluated over 5,000 children (SR 55). Dr. Miranda served as an expert in abuse and neglect cases 30 to 50 times a year over a 10 year period (SR 56). He has also been involved **as** a forensic expert in many other types of **cases** (SR 57). Dr. Miranda has **a** substantial educational and professional history (SR 55-63); has worked in psychiatric hospitals; and has taught psychology (SR 57-60). He has worked at the Department of Pediatrics of the University of Miami School of Medicine (SR 60) and was the psychologist for the Dade County Child Protection Team (SR 60).

The father would tie Mario "to a tree, as embracing the tree and [would] just leave him there in that position" (SR 71). He would also tie him out in the fields and leave him there (SR 71). He tied him by the feet "upside down over the opening of a well and left him there hanging" (SR 71). Mario's feet turned black due to the rope (SR 71).

The father's physical abuse extended for several years; there **were** "very frequent [abusive] encounters"; and there was also "frequent, harsh treatment" aside from the physical abuse, such as deprivation of food (SR 72). In dealing with the father, Mario had no happy or tender moments, and did not even have "neutral situations" (SR 72-73). The father "never, ever showed affection or even kindness" (SR 81).

The physical and emotional abuse was severe (SR 81). The damage to Mr. Lara included times when the father struck him in the head and rendered him unconscious (SR 84). The "maltreatment was so severe and so frequent that just the presence of the father created a state of anticipation" (SR 73). Clinically, this case is "the worst classification [of abuse] short of . . . actually . . . killing him . . ." (SR 82). It "impact [ed] in this child's life . . . forever" (SR 82). As long as Mario lives he will carry the mental and emotional effects with him (SR 82). The level of intensity was such that those happenings are stamped "in his brain forever" (SR 82).

There was also violence directed against Mario's brothers and sisters (SR 73). "[D]irectly or indirectly" Mario's development was thus consistently marked by violence (SR 73). When he was not being used himself he would see his mother beaten or would hear the sounds of beatings and the screaming of the children (SR 73).

[T]he father's treatment of Mr. Lara produced several reactions . . . [One] was the need to disassociate himself from the reality of the brutality of the father . . . [He had to] create in his mind some way to cope with **this**, with this man that was violent, that was much bigger than him, that had all the power . . . [The] disassociative kind of response . . . [was necessary] to

escape that reality... Another [reaction] was the direct learning of violence, of aggression and violence as a way of dealing with conflict or dealing with frustrating situations... Another response **was** alienation, an emotional alienation from . . . the father going all the way to hating the father... He also had the reaction of self-punishment as another . . . maladapted way of responding to the pain and frustration from the father's treatment (SR 74).

Mario had thoughts of revenge, as is common in "children who are victims, particularly victims of physical abuse" (SR 74-75).

Dr. Miranda has a great deal of experience in investigative evaluations of child abuse cases, i.e., determining the truth of what, if any, abuse occurred (SR 76-77). The history in Mr. Lara's case is consistent, reliable and confirmed (SR 77-78). Mr. Lara did not exaggerate; if anything, he wanted to downplay what he went through (SR 78).

As a child, Mario also felt "frustrated, particularly when the father was hitting the other children" (SR 79). The father would take each child into the hut "one by one" and assault them (SR 79). While the other children were being beaten, Mario "would scratch himself ,... strike himself, hit his own body..." (SR 79). Mr. Lara's history includes various acts of self-aggression -- he mutilates himself, slashes himself, cuts his own skin, makes himself bleed (SR 79).

As a result of what he was undergoing, Mario "began to hear a voice" from "a being that he called Bermudez" (SR 83). This symptomology stemmed from the need to cope with a "father who basically tortured him" (SR 84). "It is a mental illness" (SR 84). "[W]hat he lived . . . with his father was chaotic . . . disorderly . . . unpredictable . . . immediately life threatening and . . . he was living that from the mind . . . and the body of a child" (SR 94).

There were no signs of malingering on the testing (SR 90). He "wants to come across as normal" (SR 90). This is contrary to the idea of malingering (SR 100). A malingerer will say "I am crazy" (SR 100). Mario, on the other hand, does not want others

to think there is something wrong with his mind (SR 90-91). If anything, he tries to exaggerate his assets and abilities because of his need to try to appear normal (SR 91).

The personality tests Dr. Miranda administered (which have built-in validity scales) did not fit any malingering, lying or exaggeration testing profiles (SR 106). There was no clinical indication of deception (SR 107, 151). Mr. Lara's testing "showed disturbance in practically every area . . . measured" (SR 107). His highest score was on the measures of paranoia (SR 107), consistent with his childhood history.

The testing and Dr. Miranda's evaluations disclosed that Mr. Lara has schizophrenic problems, one component of his make-up is the "paranoid type of schizophrenia" (SR 109). He has a history of auditory hallucinations (SR 108). He has a major mental illness and disturbance of thinking in which auditory hallucinations are very common (SR 109). Mario's early life reflects his schizophrenic process, includes the being or voice that talked to him (SR 110), and includes other manifestations of his mental disturbance (SR 112). In Cuba, Mario was treated as a psychiatric patient at a mental hospital (SR 97).

Mario does not believe he killed the woman upstairs (Olga Elviro) (SR 101). What he recalls is "that he walked into the room and saw the woman dead and then this phenomenon of hearing a voice came" (SR 101). The voice indicated to Mario that the first person he would see is the person responsible for Olga's death and he must kill that person (SR 101).

As to Olga Elviro's death, it is an amnesic phenomenon "where his mind . . . protected him from acknowledging that reality of what happened, and it's a phenomenon of extreme disassociation" (SR 101). Such disassociation is well known in the psychiatric and psychological literature (SR 102).



Mario's mental illness and adult behavior have a direct relationship to the trauma he underwent in childhood, "what his father did to him" (SR 103). His life "was very much affected by what he experienced as a child" (SR 102). He has "a very violent, very disturbed life all the way from his childhood on, and I can see sufficient reasons in this father's extreme abuse of him to set off . . . mechanisms . . . of disassociation . . . and of the imitation of aggression and violence..." (SR 102). Mario had direct learning of aggression: behaviors were ingrained which imitate the behaviors of his father, the aggressor; it is an effect often seen in people who are subjected to abusive treatment (SR 103). The child subconsciously incorporates the behavior learned from the parent into his own identity (SR 103-04). Mario has incorporated the aggression -- identification with the aggressor is a known phenomenon which arises from fear (SR 104).

Mario has an extensive history of alcohol and substance abuse (SR 115). He began abusing alcohol in his early adolescence (SR 115). In the United States, he was a heavy user of cocaine, marijuana (SR 115), and alcohol (SR 116). This substance and alcohol abuse would exacerbate his thought disorder and his problems with impulse control (SR 116). In an already impaired brain such as Mr. Lara's, it irritates and affects the brain (SR 116). These substances further affect the preexisting condition of mental disturbance (SR 116). Mr. Lara reported that on the date of the offense he smoked marijuana, took cocaine and drank significant amounts of alcohol (SR 175, 180).

At the time of the offense, Mr. Lara had impaired mental functioning, lessened and weakened control of his impulses and his thinking was faulty (SR 113). The impact of "what happened upstairs pushed him to that level of break with reality" (SR 119). He believes he found the woman already dead and at that point the voice began to speak to him and say kill the first person you see because that person is responsible (SR 169,

1 70). He “flipped out” (SR 170) and remembers heeling next to Olga and crying (SR 170). He accepts that he killed Grisel because he has been told that he did (SR 173). Arsenio told him.

Rene Lara (R 1451) is fifty-two years old and has two children (R 1452). He knows Mario Lara since Mario was a child (R 1452). Rene’s mother and Mario’s mother were sisters (R 1476); he and Mario are first cousins (R 1454). Rene lived in Artemesa, the same town as Mario (R 1454). He knows Mario since birth (R 1455). There were eight children in the Lara family (R 1479).

Mario’s father was strong and violent (R 1455). The house where Mario lived was a “hut, a small house on the side of a path where there were no doors, there **was** nothing” (R 1457). The father “didn’t take care of that home” because he lived in his own house (R 1457). He would go there to sleep with Mario’s mother and to create problems for and beat the children (R 1457).

He would beat all the children “but mainly this child [Mario]” (R 1457). He treated the mother “as if she were a slave” (R 1457). He would beat her, “never brought meals” to the family and the family lived “off the food that the neighbors gave” (R 1457). The father ate meals at his own house (R 1457). Rene brought them food but it was not much (R 1458). The father “treated all of them very roughly. He hit them a lot, he didn’t feed them” (R 1459).

Mario was a boy “that didn’t laugh. We thought that he was mute, that there was something wrong” (R 1459-60). Mario would soil himself; “[y]ou could see that he wasn’t well”; he “didn’t laugh with the other children” (R 1459). He “always had like a fixed stare”, would not play and had trouble paying attention (R 1468).

Rene recalled the father grabbing one of the cocks and using it to beat Mario -- he "killed it over [Mario's] head . . . He hit him so many times over the head that he bursted the cock over him . . ." (R 1459). Mario was "just a child," "around three" at the time (R 1459). On another occasion, "the boy soiled himself" and the father grabbed him and "put him inside of the soil in front of everybody..." (R 1459). There were many such abuses (R 1460).

The father was especially cruel to Mario; would soy in front of everyone that Mario "shouldn't have been born"; would tell Mario, "You should have died before you were born" (R 1460). He told Mario, "Your mother should hove exploded before you were born" (R 1462). The father would say Mario was dumb and "that he couldn't have bred a son like this" (R 1466). He would say, "this son can't be mine, he is dumb. He doesn't talk" (R 1466-67). The father thought Mario was dumb and crazy and "that is why he beat the boy" (R 1360, 1462).

Rene witnessed "extreme cruelty"; Mario was hanged over a well (R 1460); he "hung him in a well" and "left him there hanging" (R 1461). The father said no one should take Mario down "and he was a big guy so people respected him because they thought he [the father] **was** crazy" (R 1461). Mario was hanged there overnight; finally at daybreak neighbors released him (R 146 1). It was a deep well (R 1461); the boy's head was hanging into the well (R 146 1-62); the mother "didn't dare" release him (R 1462); the "boy was green" from hanging there the whole night; Mario's father became angry with the neighbors who released Mario (R 1462).

When Mario was a little over two, the father put his head in a bucket of water and almost drowned him (R 1463). He first beat Mario and then stuck his head in the bucket (R 1464). The mother asked the father not to drown the child; the father let Mario go and punched the mother "two or three times" (R 1464).

As a child, Mario did not have hair; was "very skinny and scrawny" (R 1464); would soil himself (R 1469); had trouble understanding and speaking (R 1463); and was a distracted and slow child (R 1469). Mario began going off to the lagoon when he was three or four (R 1466). Rene described a time when the father found Mario by the lagoon, beat him and dragged him back to the farm by one foot (R 1466).

Mario would stay by the lagoon talking "to someone but nobody was there... he wouldn't leave there . . ." (R 1467). He would stay by the lagoon at nights (R 1467). He would be "speaking to the devil. He used to call the devil Bermudez" (R 1467). "He would say he was speaking to the devil but nobody would see anything" (R 1467-68).

Rene believed there was something wrong with Mario; Mario was odd, distracted, "talk[ed] strange things" (R 1469). Mario's father would use foul language with Mario; he would tell the mother, "that son of yours, he's a real son-of-a-bitch, a degenerate... [H]e never expressed himself well of that child... As a child he hated that boy ever since he was born" (R 1469).

Mario's father hit him with a "thick rope" that was used to hit the ox (R 1470). The father would beat Mario and leave him on the ground (R 1470). Mario was hit on the head (R 1471).

For him [the father] this boy was the worst. He thought that he was abnormal and...it seemed...he wanted to get rid of this boy... He was bad with all the boys but since this one was dumb and more distracted, .. he had more of a grudge against him (R 1471).

Rene believed the father wanted to kill Mario -- "what he did to this boy, you can't do this to a person . . . least of all . . . your own child" (R 1471-72).

As Mario grew, the abuse continued. He was beaten; he was left tied up in a sugar cane field from early morning to late afternoon (R 1473); and the father became

angry when Rene's family released him (R 1474). Other times, he would tie him to the oxen (R 1475).

Mario "didn't speak clearly" when he was young, but he would mention Bermudez, the devil (R 1478). Mario could not control his bowels (R 1479). He "was always sickly . . ." (R 1482). He became aggressive (R 1482). He "wasn't normal" (R 1482).

### The State's Rebuttal

Dr. Lazaro Garcia is a psychologist (R 1 507-08).<sup>12</sup> He testified that Mr. Lara is competent and sane (R 1509). When he saw Mr. Lara, he did not see a major disorder but "he has serious personality problems" (R 1509). He described the "sanity" standard in Florida (R 1511-12).

Dr. Garcia read the other doctors' reports and said he "generally agreed" with their conclusions, but he had "one dissenting opinion" (R 1513). He testified that this was based on Mr. Lara's statements to Dr. Miranda in 1988 that he remembered only "part of what happened," while with Dr. Garcia Mario remembered less (R 15 14). He also testified that Mario's initial refusal to talk about the incident with Dr. Carbonell was "somebody trying to protect himself" (R 15 15).

Dr. Garcia testified that Mr. Lara is competent,<sup>13</sup> wanted to protect himself and "[a]nother thing that was noteworthy is that in Cuba he was in the Army and he had problems adjusting, he was incarcerated. While in prison, he was given an option that if he worked he could reduce his sentence, he did that" (R 15 15). Dr. Garcia said: "I

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<sup>12</sup>Dr. Garcia testified that he has been in private practice since 1984 and has been appointed by the courts (R 1508). He stated nothing else about his qualifications and stated no special experience. His qualifications and experience comprise less than a page of the transcript (R 1508).

<sup>13</sup>Competency was not an issue at the resentencing.

predict, for example, that throughout this trial, the defendant has probably acted quite appropriately because he doesn't want to make a scene" (R 15 16).

Mr. Lara has not been taking medication. "It could happen" that a schizophrenic would not be on medication, but it "speaks against it" (R 1517). Dr. Garcia did not test Mr. Lara's intelligence and estimated his IQ in the "low average to average range" (R 15 18). "[E]ven if he were mildly mentally retarded, he would probably be found competent . . ." (R 15 18). Mr. Lara has a low level of formal education (R 15 18). Dr. Garcia also testified that Mario's "emotional reactions" were appropriate with him and the other doctors (R 15 19) and Mario was not hallucinating when Dr. Garcia saw him (R 1520).

Regarding Mr. Lara's hearing voices in childhood, Dr. Garcia said: "You could have hallucinations when you were young as a child but schizophrenia is a diagnosis" (R. 1520). Dr. Garcia did not think Mr. Lara was schizophrenic (R 1520).

Mr. Lara's aggressive behavior "was learned in nature" (R 1522). Whether behavior can be changed "is a complex question" (R 1523). "Aggressiveness sometimes is impulsive in nature . . . You have to be motivated to change and that is one of the problems with individuals who are psychopathic..." (R 1523).

On cross-examination, Dr. Garcia said he evaluated competency and sanity (R 1526). He understood that when Mr. Lara would not discuss the incident with previous doctors, it was on the instructions of defense counsel (R 1527). He followed the lawyer's instruction (R 1527).

Dr. Garcia learned about Mr. Lara's childhood from Mr. Lara and it is also documented in various other sources (R 1529).

Mario Lara has a very traumatic, a very -- he experienced a great deal of abuse as a child. He was both traumatized by his father in a very serious

manner that was credible to me, consistent with the make-up of a criminal individual and . . . consistent with reports he gave to other doctors (R 1529).

Mario's descriptions were consistent with Margarita Lara's account (R 1530). Mario "experienced a great deal of pain as a child" (R 1530). This childhood background is consistent with adult violent crime (R 1531). Mario had to

work very hard in a very abusive family ... [H]is father would hit him with anything that was around... [T]hese beatings would occur on average of...three times a week . . . [H]e was hanged from a well...that kind of severe punishment, you know, just going on and on . . . a very traumatic childhood (R 1532).

Mario was tied in the cane field and left there overnight (R 1532). Everyone "got hit"; "the mother also"; this was a dysfunctional family (R 1532). The father caused severe trauma to Mario's kidneys and Mario was hospitalized for months (R 1532). The abuse of Mario was "[s]evere, brutal, I am not arguing with you, I am saying I agree . . . that he suffered a very traumatic childhood" (R 1534). If Dr. Garcia had seen Mario when Mario was a child he would have recommended psychiatric care (R 1535). He would have recommended that Mario be taken away from his father because "you want to remove the child from the destructive environment" (R 1535).

A child like this, who does not receive care, tends to become the reproduction of his father (R 1536). "People who have been abused as children become abusive themselves by a tremendous degree... [T]hey learn to deal with stressful situations by aggressing..." (R 1536), and, in Dr. Garcia's experience, such abused children have become criminals (R 1537) and psychotic (R 1537). Such abuse aggravates a pre-morbid condition, a psychotic episode (R 1537).

Schizophrenia usually begins in teenage years (R 1539). Child abuse is one of its causes (R 1541). The early years are the most important for personality formation

(R 154 1). Personality becomes ingrained in those years and remains the “consistent characteristic of the individual” (R 1542).

Dr. Garcia would consider the diagnosis of a major thought disorder (R 1547) on the basis of the facts that Mr. Lara was abused in his early formative years (R 1546) and was diagnosed as a schizophrenic and given antipsychotic medicine at age sixteen (R 1547). From that history, Dr. Garcia would say “well, maybe this person is crazy” (R 1547). When someone is diagnosed as schizophrenic, they are schizophrenic for life (R 1560). There is no cure for it (R 1560) and it is always there, even though the schizophrenic is not always in an acute state (R 1561). They go in and out of reality during their life (R 156 1). Stress worsens the condition (R 156 1, 1562). They can be “doing well” and then will begin to hear voices (R 1563). Mario’s behavior was ingrained by age 5 or 6 because of “[t]he experience of the traumas he received” (R 1549).

A teacher suggested psychiatric help for Mario but the father said “no” (R 155 1). The father kept Mario away from psychiatric help although friends told him to get help for the boy (R 1551).

In Dr. Garcia’s opinion, Mario Lara is “emotionally handicapped” (R 1555). The handicapping “occurred very early in life” (R 1556) and was ingrained in early childhood (R 1556). If Mario had come to the United States in early childhood and been put “in a Dade County public school, he would have been one of those children that would have been immediately detected and placed in an emotionally handicapped [setting]...” (R 1556). Dr. Garcia would have recommended psychiatric care (R 1556). He has no question that Mario’s adult behavior was the result of the father’s mistreatment (R 1557).

By five or six, Mario already had “a very poor self concept,” a “negative self concept” (R 1558). His behavior **was** inadequate, inappropriate and he could not fit in



(R 1558). Because of the trauma, it is very probable that Mario believed he was bad or evil (R 1558-59) and worthless (R 1559).

Dr. Charles Mutter is a psychiatrist (R 1568-69) who entered private practice in 1963 (R 1569). He has testified over a thousand times (R 1570). Dr. Mutter does not treat children (R 1602). When he saw Mr. Lara, he had the assistance of an interpreter (R 1571). He testified that Mr. Lara has a “sociopathic personality disorder” (R 1571) which includes immaturity (R 1572).

Dr. Mutter said a “major mental disorder is when a person has what we initially call insanity” (R 1572). He stated the Florida standard for insanity (as a guilt phase defense) (R 1573). In his opinion, Mr. Lara is not insane (R 1573), although he may have had a “micropsychotic episode” in Cuba (R 1574).

Mr. Lara's behavior at the time of the crime was “impulsive behavior” (R 1575). Dr. Mutter did not believe that Grisel Fumero was the first person Mr. Lara saw after the hallucination said “kill the first person you see” (R 1575). Dr. Mutter also said: “if he was told to do this for any reason, he would not just kill one, he would kill everybody in his path’ (R 1575).

Mr. Lara's childhood history is one of “severe child abuse”; he was made to believe “the world was a pretty terrible place”; he had to immunize himself (R 1579). Dr. Mutter stated that Mr. Lara “knew what he was doing was wrong” at the time of the crime (R 1580). The treatment Mr. Lara received from his father influenced his “pattern of behavior development” (R 1587).

Dr. Mutter said he disagreed with some of what Dr. Miranda found in his report (R 1581, 1583). He went through the competency criteria and testified that Mr. Lara was competent (R 1581-82). He agreed with Dr. Miranda that Mr. Lara is a “psychologically

disordered individual" (R 1583) and that there was a "deviant lifestyle dominated by physical abuse and psychologically destructive treatment [by] his father" (R 1583). He disapproved of the statement in Dr. Miranda's report that Mr. Lara did not deserve to be executed because psychologists should not state such opinions (R 1584).

He disapproved of Dr. Carbonell's report because, according to Dr. Mutter, she did not include a section detailing her mental status examination (R 1585). He did not talk to Drs. Cava, Carbonell or Miranda (R 1596-97).

On cross-examination, Dr. Mutter testified that the medication provided to Mr. Lara when he was psychiatrically hospitalized in Cuba is a "neuroleptic drug" used to control behavior in people who are psychotic, have a major mental disorder, have impulse disorders (R 1590). It is generally used with schizophrenics (R 1591). Schizophrenia usually "begins in children, adolescents to teenagers or young adults" (R 1592). In general, "once this diagnosis is made" the person remains a schizophrenic throughout life, can remit and can go back into an active attack (R 1593-94). Schizophrenia has biosocial and psychological components -- "the way we were treated as children and social events" -- as well as a chemical basis (R 1593). Emotional factors and biological factors cause it (R 1594).

Mr. Lara was not malingering about his childhood (R 1598). Mr. Lara and witness statements indicate "that he was very much abused" (R 1598). The abuse is at the high end of the scale (R 1598). The treatment of young children "certainly influence[s]" their later functioning (R 1599-1600). With a child like Mr. Lara, Dr. Mutter would try to get him out of that environment and provide treatment (R 1601). The abuse has "a severe negative impact on any human, absolutely" (R 1601). "Psychiatrically, this child would need to be placed in an environment where he would be...protected from harm" (R 1602).

Dr. Mutter would put a child like Mario “in a hospital or structured setting . . . [for] repairing and reconditioning . . . to see if [the mistreatment] can be undone because if you don’t, it becomes fixed” (R 1603). Mistreatment “going on over and over again for long periods of time . . . [can result in] a character disorder” (R 1605). “Some people may decompensate and develop a major mental disorder and stay that way all of their life . . . [They] go into a world of their own... [develop] schizophrenia...” (R 1606).

Mario was diagnosed as schizophrenic in Cuba (R 1607). He was found to be a paranoid schizophrenic and very immature, impulsive and aggressive (R 1610). The drugs prescribed were consistent with that diagnosis (R 1607-08). A person can be schizophrenic and antisocial at the same time (R 1609).

Dr. Mutter did no testing of Mr. Lara (R 1611). Psychological tests, according to Dr. Mutter, do not “have anything to do with competency or sanity” (R 1614), the areas he was examining.

### The Deliberations and Sentence

During its deliberations, the jury asked the court: “Is the time already served credited toward the time to be served if we should offer life in prison?” (R 2882, 1687). The trial court, defense counsel and the prosecutor agreed that the jury was concerned with Mr. Lara’s potential release and eligibility for parole (R 1687-92). In fact, Mr. Lara’s sentences are consecutive. He will never be released (See Argument II).

Defense counsel requested that the jury be instructed on Mr. Lara’s actual sentences (R 1689, 1690, 1692). The trial court declined and sent the jury a note stating: “You have already received all the instructions that are to be considered by you, along with the exhibits and your recollection of the testimony” (R 2822).

The jury returned a 7-5 death verdict (R 2894).

The trial court found “cold, calculated, premeditated”; “disrupt or hinder the lawful exercise of governmental function or enforcement of laws”; and previous convictions in aggravation (R 2910-11). The trial court also found:

As mitigating circumstances, evidence was introduced to establish that the defendant’s early years were horrific. He was brutalized by his father beginning at infancy, and that maltreatment continued beyond the defendant’s first ten years of life. The defendant lived an early life of physical and verbal abuse, with no positive interaction from his father, and very little from others. Extensive psychological and psychiatric expert testimony established that such brutalization had a profound and negative effect on the defendant’s conduct when he became an adult. The court accepts all of those facts as mitigating circumstances (R 29 12).

The trial court imposed death.

#### SUMMARY OF ARGUMENT

I. Defense counsel objected to the vague “cold, calculated, premeditated” aggravator instruction and requested that the jury be provided the limiting constructions this Court has held necessary. The court overruled the objections and, at the prosecutor’s urging, denied the requests. The State argued for death on the basis of this aggravator. The jury was instructed on the aggravator in the bare terms that this Court has condemned as unconstitutionally vague and overbroad. The jury vote was 7-5 for death. A properly instructed jury could have concluded that the heightened mental state necessary for this aggravator did not exist and, at least, could have had a reasonable doubt about the mental state necessary for this aggravator. There was substantial evidence upon which a reasonable juror could have based a vote for life. The constitutional error is not harmless beyond a reasonable doubt.

II. Mario LARA will never get out of prison. His original sentence for the second degree murder and sexual battery counts involving Olga Elviro was 99 years on each, consecutive to each other and consecutive to the first degree murder sentence. The jury

did not know this. The jury learned that Mr. Lara is a mentally disturbed, dysfunctional and impaired individual who will never get better. The jury was worried about when he would be released. During deliberations, it sent a question to the trial court expressing concerns about the actual time Mr. Lara would spend incarcerated. Defense counsel requested that Mr. Lara's actual sentences be provided to the jury. The trial court declined. The jury voted 7-5 for death. A jury's misunderstanding about the actual effect of a life verdict unconstitutionally infects the validity of the death sentence. The jury must receive accurate information on any matter "that might cause it to decline to impose death", McCleskey v. Kemp; ~~Jones v. State~~, including what a vote for life would actually entail. This jury did not receive such information and was allowed to vote for death on the basis of a misunderstanding of what a vote for life would mean. Such a death sentence is arbitrary, capricious, unreliable and unconstitutional.

III. Defense counsel objected and sought to limit the State's reliance on other crimes. The trial court overruled the objection but warned the prosecutors not to make other crimes a focus. The prosecutors ignored the warning; made other crimes (including uncharged acts) a focus of their presentation; presented detailed evidence about other crimes; and graphically argued them to the jury. The prosecutors also asserted that they were seeking death not because it was their job, but "because it is right"; told the jury to send a message through the death penalty; quoted the Bible; made a war on crime argument; told the jury to show courage by imposing death; asserted that the victim had no lawyer; and told the jury that the law "impose[d]" a duty to vote for death. This Court has condemned such misconduct, as do the reliability and fundamental fairness requirements of the United States Constitution. The prosecutors'

arguments and evidentiary presentation, from beginning to end, were improper and rendered these proceedings fundamentally unfair.

Iv. The prosecutors and trial court repeatedly minimized the jury's sense of responsibility for the death sentence. They informed the jurors that their vote was merely "advisory", a "recommendation", without a corresponding instruction that great weight would be given to their verdict, whether for life or for death. Such a proceeding cannot be squared with the United States Constitution and warrants the granting of relief.

V. Beginning with voir dire, throughout the proceedings and then in closing argument, the prosecutors asserted that the doctors they called were independent "court" experts, while the doctors the defense called were not. This was misleading and inaccurate, and the prosecutors knew it. Both sides asked for experts and both sides had experts appointed by the court. There was nothing independent about the doctors the State specifically asked for and they were not "court" experts. In a case where mental health evidence was a significant issue, this misconduct was prejudicial and warrants relief under the sixth, eighth and fourteenth amendments.

VI. Defense counsel objected to the use of gruesome photographs of Olga Elviro (who was not the decedent in this case). The photographs, however, were paraded before the jury throughout the proceedings. The admission of these photographs served no purpose other than to inflame the jury. There was no question that Mr. Lara killed Ms. Elviro; that she died of stab wounds; and that Mr. Lara was convicted of second degree murder for her death. These photographs were irrelevant, created undue prejudice and served no purpose other than to inflame and mislead the jurors and divert them from proper weighing of aggravation and mitigation. The use of these photographs exceeded

the bounds this Court has established, violated due process and rendered the proceedings fundamentally unfair.

VII. The hindering governmental function or enforcement of laws aggravator was overbroadly applied. No limiting constructions were provided in the jury instructions or stated in the trial court's order. Where, as here, the prosecution relies on circumstantial evidence or other crimes to establish this aggravator, every reasonable hypothesis that hindering/disrupting governmental functions was not the sole or dominant motive must be eliminated. There was substantial evidence about Mr. Lara's disturbed functioning providing a reasonable doubt that hindering or disrupting was the sole or dominant motive. No such limiting constructions were applied below, however. This aggravator failed to narrow the class of persons eligible for death and the error warrants the granting of relief.

VIII. The prosecutors engaged in a pattern of striking African-American jurors. Three African-American jurors were peremptorily challenged. Defense counsel moved to strike the panel. The court seated the third juror, finding the prosecutor's statements about that juror inadequate, but declined to strike the panel. The prosecutor's statements were no more sufficient for the other two jurors. The panel should have been stricken. Relief is appropriate.

ix. Appellate counsel requested that the written instructions provided to Mr. Lara's jury be included in the record. There can be no full and meaningful review without a complete record and appellate counsel cannot provide effective assistance without the complete record. The current record does not include the written instructions. Those instructions and any issues arising therefrom are proper matters for review on appeal. Mr. Lara's death sentence should be vacated.

## ARGUMENT

(I)

### THE JURY WAS UNCONSTITUTIONALLY INSTRUCTED ON THE VAGUE AND OVERBROAD "COLD, CALCULATED, PREMEDITATED" AGGRAVATOR

Defense counsel requested that the court instruct the jury on the necessary limiting constructions applicable to the "cold, calculated, premeditated" aggravator:

The phrase "cold, calculated and premeditated" refers to a higher degree of premeditation than that which is normally present in a pre-meditated murder. This aggravating factor applies only when the facts show a calculation before the murder that includes a careful plan or prearranged design to kill, or a substantial period of reflection and thought by the defendant before the murder of Grisel Fumero.

(R 2889, Defendant's requested instruction 7, citing Rogers v. State, 511 So.2d 526 (Fla. 1987), Amoros v. State, 531 So.2d 1256 (Fla. 1988), and Preston v. State, 444 So.2d 939 (Fla. 1984)).

"Cold" means without emotion or passion. "Calculated" means planned in advance.

(R 2887, Defendant's requested instruction 5).

A mental infirmity or aberrant or abnormal conduct which interferes with the normal process, although insufficient to reduce the guilt for the degree of homicide, nevertheless may be considered to rebut a claim of cold and calculated nature of a homicide.

(R 2892, Defendant's requested instruction 10, citing Banda v. State, 536 So.2d 221 (Fla. 1988), and Christian v. State, 550 So.2d 450 (Fla. 1989)).

The number of shots fired at a victim does not establish in itself a cold calculated homicide.

(R 2883, Defendant's requested instruction 1, citing McCray v. State, 416 So.2d 804 (Fla. 1982), Washington v. State, 432 So.2d 44 (Fla. 1983), Richardson v. State, 437 So.2d 1091 (Fla. 1983), and King v. State, 436 So.2d 50 (Fla. 1983)).



Defense counsel argued for the limiting constructions this Court has found necessary for the “cold, calculated, premeditated” aggravator and objected to the bare instruction on the aggravator (R 1485-86, 1489-90, 1492-94, 1504, objecting to State’s aggravation instruction number three, “cold, calculated, premeditated”). In addition to the cases cited to the court in writing, defense counsel cited and relied on this Court’s opinion in Santos v. State, 591 So.2d 160 (Fla. 1992), in his argument (R 1486-87). He explained that there was not any definition “of cold and calculated that is sufficient” in the instruction drafted by the State (R 1489). He cited Rogers v. State, 511 So.2d 526 (Fla. 1987), and explained that cases such as Rogers and Santos outlined the applicable limiting constructions and that those constructions should be provided to Mr. Lora’s jury (R 1490-91). “What I am trying to point out to the Court is that the fact of the homicide cannot speak for itself; that we are talking about a higher level here and I have pretty much tracked the language of the cases . . . [The aggravator requires] a higher level. [Otherwise, it] is just going to be a retracking of the conviction itself” (R 1493).

The prosecution objected to defense counsel’s requests (R 1490, 1491, 1492, 1494). The trial judge denied the defense requests, overruled counsel’s objections (R 1487, 1490, 1494, 1501, 1504, 1685-86, 2889, 2887, 2892, 2883), and stated he was going to provide the jury with the State’s proposed instruction, over defense objection (R 1504).

The jury was then instructed on this aggravator in the very terms that this Court has condemned: “the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification” (R 1680). The prosecutor argued to the jury that it should apply this aggravator (R 939, 1653-54). The prosecutor said: “Look at these pictures, can there be any doubt that this was done in a cold, calculated fashion?” (R 1654). He relied on the

death of Olga Elviro (i.e., not the offense for which Mr. Lara was being sentenced) to support his argument on this aggravator (R 1654). No limiting construction was prodded to the jury.

Defense counsel renewed his requests at the conclusion of the jury instructions and the court noted, "[m]y rulings remain the same" (R 1685-86). As in Kearse v. State, 662 So.2d 677, 686 (Fla. 1995):

[D]efense counsel objected to the form CCP instruction at trial [and] requested an expanded instruction that essentially mirrored this Court's case law explanations of the terms . . . Thus, the issue has been properly preserved. . .

See also Jackson v. State, 648 So.2d 85, 90 (Fla. 1994) (an objection to the bare instruction on the CCP aggravator at trial preserves the issue for appeal). The challenge to the improper "cold, calculated, premeditated" instruction is properly preserved in Mr. Lara's case. This appeal presents the constitutional issue to this Court. Kearse, 662 So.2d at 686; Jackson, 648 So.2d at 90.

The instructions requested by defense counsel would have provided the limiting constructions this Court has held necessary to cure the vagueness, overbreadth and unconstitutionality this aggravator imposes on the jury's deliberations:

Without legal guidance that the coldness element is only present when the killing involves "calm and cool" reflection . . . or when the murder is "more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder" . . . the average juror may automatically characterize all premeditated murders as CCP. This Court has also explained that calculation must involve a "careful plan or prearranged design" . . . Yet, the jury receives no instruction to illuminate the meaning of the terms "cold", "calculated", or "premeditated."

Jackson, 648 So.2d at 89 (citations omitted).

In order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold)

. . . ; and that the defendant had a careful plan or prearranged design . . . (calculated) . . . ; and that the defendant exhibited heightened premeditation (premeditated) . . . . Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court [in Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)]. . .

Jackson, 648 So.2d at 89-90 (citations omitted); ~~see also id.~~ at 90 n.8 (outlining an instruction on the limiting constructions which is consistent with what defense counsel sought in Lara).

This Court has expressly recognized that the bare “cold, calculated, premeditated” instruction is vague, overbroad, allows for arbitrary results and is unconstitutional. Jackson. The “cold, calculated, premeditated” instruction provided to Mr. Lara’s jury suffered from these flaws and renders this death sentence constitutionally invalid. Stringer v. Black, 112 S.Ct. 1130 (1992) (the death sentence is invalidated when the state employs an aggravator that fails to properly guide the jury as to what it needs to find); Maynard v. Cartwright, 486 U.S. 356 (1988) (same); ~~Godfrey v. Georgia~~, 446 U.S. 420 (1980) (same).

“When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from the death side of the scale.” Strinaer, 112 S.Ct. at 1137. If the jury’s vote is tainted by an unconstitutional procedure, “then the entire sentencing process necessarily is tainted by that procedure.” Riley v. Wainwright, 527 So.2d 656, 659 (Fla. 1987). “If a weighing state decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.” Espinosa v. Florida, 112 S.Ct. 2926, 2929 (1992).

This jury heard substantial mitigating evidence (See Statement of the Case, testimony of Carmenlina Lara, Ariberto Reyes, Margarita Albo Lara, Rene Lara, Dr. Edmund Cava, Dr. Joyce Carbonell and Dr. Simon Miranda). As the trial court found:

[T]he defendant's early years were horrific. He was brutalized by his father beginning at infancy, and that maltreatment continued beyond the defendant's first ten years of life. The defendant lived an early life of physical and verbal abuse, with no positive interaction from his father, and very little from others. Extensive psychological and psychiatric expert testimony established that such brutalization had a profound and negative effect on the defendant's conduct when he became an adult. The court accepts all of those facts as mitigating circumstances (R 29 12).

The jury heard considerable evidence about Mario Lards disturbed, impaired and deficient mental functioning beginning in childhood, affecting him in adulthood and affecting his mental state and conduct at the time of the offense (See Statement of the Case, testimony of Dr. Cava, Dr. Carbonell and Dr. Miranda). Even the State's expert, Dr. Mutter, agreed that Mr. Lards behavior at the time of the offense was "impulsive behavior" (R 1575). He and Dr. Garcia, the State's other expert, acknowledged that this is not a case devoid of mitigation (See Statement of the Case, testimony of Dr. Garcia and Dr. Mutter). Margarita Martinez testified that Mr. Lara's "eyes were different" that evening (R 1503) and described strange, bizarre and illogical conduct by Mr. Lara which would allow a reasonable juror to conclude that this was not "calm and cool reflection": a "careful plan or prearranged design"; careful "plotting"; "heightened premeditation"; or an offense devoid of "frenzy, panic, rage" or impulsive conduct. See Jackson (and cases cited therein); cf. Padilla v. State, 618 So.2d 165, 170 (Fla. 1993) (on impulsive act is not "cold, calculated, and premeditated" even if there is evidence of pre-planning).

A properly instructed jury could have concluded that a heightened mental state did not exist here in light of Margarita Martinez's description. See Besabara v. State, 656

So.2d 441, 444-46 (Fla. 1995) (the random nature of the defendant's acts negates the "cold, calculated, premeditated" aggravator). The trial jury in fact found that the killing of Olga Elviro immediately before Grisel Fumero was killed was a frenzy and not even sufficiently premeditated to warrant a first degree murder conviction. Tomas Barcelo described Mr. Lara at the time of the offense as standing there with his "leg" and "foot" shaking (R 1120). Barcelo told Grisel Fumero, the decedent, that Mr. Lara "is mad" (R 1106). Mr. Lara kept pulling the trigger and "[w]hen it didn't fire any longer, he continued firing, but it didn't fire any more" (R 1124). Mr. Lara's brother said Mario had "gone crazy" (R 1125). According to Tomas Barcelo, Mr. Lara began laughing (R 1124); said he was going to kill his own brother (R 1125); and, after the offense, Barcelo told Margarita Martinez that Mr. Lara had "gone crazy" (R 1158).

The testimony of Dr. Cava, Dr. Carbonell and Dr. Miranda described Mr. Lara's substantial mental illness, irrationality, hallucinations and how the hallucination of the voice of Bermudez had instructed Mr. Lara to kill the first person he saw because that was the person that killed Olga Elviro. Grisel Fumero was the first person that he saw -- she opened the door when Mr. Lara knocked on his own downstairs apartment. Lara, 464 So.2d at 1175. The jury also learned that Mr. Lara had been drinking and taking drugs on the day of the offense, substances that certainly undermine the capacity for a careful plan cold prearranged design or heightened premeditation.

There **was** substantial mental health and lay evidence from which a juror could conclude that this offense involved impulsive conduct by a mentally disturbed and impaired individual. See Maulden v. State, 617 So.2d 298, 303 (Fla. 1993) (the aggravator is inappropriate where mental health expert testimony indicates that the defendant was emotionally or mentally troubled and in a "dissociated", "depersonalized" state). There

was evidence which a juror could have relied upon indicating that this was not a careful plan or prearranged design; that impulses and emotions were involved; that mental disturbance was involved; that Mr. Lara was not rational; that the crime did not involve "heightened" premeditation and thoughtful plotting; and that it did not involve "cool" and "calm" reflection. Under the appropriate limiting construction, a juror could have concluded that there was a reasonable doubt about the heightened mental state necessary for this aggravator. Given the substantial mitigation and significant evidence about Mario Lara's disturbed, dysfunctional and impaired mental health that the jury heard, it would be arbitrary and capricious to hold the jury error harmless beyond a reasonable doubt. See Satterwhite v. Texas, 486 U.S. 249,258 (1988) (given the discretion afforded to a capital jury, the reviewing court should be hesitant in finding capital sentencing errors harmless beyond a reasonable doubt).

This improperly instructed jury voted for death by the slimmest possible margin, 7 to 5. Morgan v. State, 515 So.2d 975, 976 (Fla. 1987) (it is significant to harmless error analysis that only one vote made the jury's verdict one of death). This jury heard significant mitigating evidence. This constitutional error is not harmless beyond a reasonable doubt.

(II)

THE FAILURE TO INFORM THE JURY OF WHAT A LIFE  
SENTENCE WOULD ACTUALLY MEAN FOR THIS DEFENDANT  
VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The United States Supreme Court has emphasized that it is "essential that the jury have before it all possible relevant information about the defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976); ~~Gregg v. Georgia, 428 U.S. 153, 204~~ (1976) (it is important for the jury to have as much information as possible when it makes

the sentencing decision). The United States Constitution therefore limits the state's ability to narrow a jury's consideration of any matter that could "cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis added). It is constitutionally appropriate to provide the jury with accurate information about what a life sentence would actually entail. ~~California v. Ramos~~, 463 U.S. 992 (1983).

When the implications of a life sentence become an issue, the jury needs to know what sentencing the defendant to life will mean. Several courts have so held, ~~Turner v. State~~ 573 So.2d 657 (Miss. 1990), ~~cert. denied~~, 500 U.S. 910 (1991); ~~State v. Henderson~~, 109 N.M. 655, 789 P.2d 603 (1990); the Model Penal Code so indicates, see Ramos, 463 U.S. at 1009 n.23 (quoting Model Penal Code section 210.6 [1962] (the jury should know what the actual implications are if it does not vote for death)); ~~Turner~~, 573 So.2d at 674-75 (quoting Model Penal Code and so holding); and this Court has recognized that the actual effect of a life verdict for the particular defendant "is a relevant consideration of 'the circumstances of the offense' which the jury may not be prevented from considering." Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990).

As this Court noted in Jones, a jury should know about consecutive sentencing and the fact that the defendant will likely not get out. Jones, 569 So.2d at 1239-40, relying on McCleskey, 481 U.S. at 304 (the jury must receive accurate information on any matter "that might cause it to decline to impose the death sentence").

A jury's misunderstanding about the actual effect of a life sentence unconstitutionally infects the validity of the death sentence. Simmons v. South Carolina, 114 S.Ct. 2187, 2197-98 (1994). "It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum . . ." Barclay v. Florida, 463 U.S. 939, 950 (1983), cited in Simmons, 114 S.Ct. at 2197-98.

Mario Lara's actual sentence on the non-capital counts (Olga Elviro) was:

that as to Count II, Second Degree Murder and Count III, Sexual Battery, MARIO ALBO LARA . . [is] sentenced to 99 years imprisonment for each crime. It is specifically ordered that the sentences in Count II and III will run consecutive to each other and consecutive to any and all other sentences previously imposed upon the defendant for any offense [including the first degree murder sentence] . . . [The Court . . . retains jurisdiction over one-third (1/3) of the combined sentences imposed. . .

Statev. Lara, original sentencing order, p.4 (emphasis added) (appended to this brief).

The jury knew nothing about this.

Mr. Lara received an additional fifteen year sentence for the Carranza robbery case (R 2854) and an additional 15 year sentence for the (Odalys) Fumero sexual battery/carnal intercourse with a person under 18 case (R 2845). The judgments provided, however, would have led the uninformed jury to believe that everything (including the first and second degree murder sentences) would run together and that Mr. Lara would be released in 25 years, with credit for 10 years served. Cf. Jones, 569 So.2d at 1239 (the jury should have been allowed to learn that Jones was facing two consecutive minimum 25-year sentences). Indeed, the judgments and sentences provided to the jury stated that the Carranza robbery and (Odalys) Fumero sexual battery/carnal intercourse with a person under 18 sentences would be served "concurrently" (R 2849, 2855). This jury had no idea that there were two 99 year sentences, consecutive to each other and consecutive to the capital sentence, with the trial court retaining jurisdiction. This jury had no idea that Mr. Lara would never be released, even though the actual time Mr. Lara would spend in prison was a central concern.

The trial judge, the prosecutor and defense counsel all recognized that this jury was concerned about what a life sentence for Mario Lara would entail. See e.g., R 1689



(trial court's comment that "it does not take a rocket scientist" to understand what the jury is concerned about); R 1687-93 (discussion between the court and attorneys). The jury's question reflected its concerns about what life would actually mean. It interrupted its deliberations to inquire of the court: "[i]s the time already served credited toward the time to be served if we should offer life in prison?" (R 2882, 1687).

Defense counsel requested that the jury be instructed on what the actual sentences were:

[I]t would be proper to let the jury know what he was sentenced to -- on what Mr. Lara was sentenced to on the second degree murder and on the robbery . . . (R 1689).

\* \* \* \*

Why don't we just send them back all the sentences, I mean, after all (R 1689).

\* \* \* \*

Now, my suggestion is to send them back all the sentences and just let them go from there (R 1690).

The court declined. The jury voted 7-5 for death (R 2894).

This jury had substantial mitigation. That very ~~some~~ mitigating evidence also indicated that Mr. Lara was extremely mentally disturbed and would never get better. The first words out of the prosecutor's mouth (in opening statement) were, "What on earth does society do with a man who... [graphically discussing Mr. Lara's criminal record]?" (R 925-26).

Members of this jury believed Mr. Lara's life should be spared. The jury, however, was concerned about Mr. Lara's being released any time soon. The truth is that he will not be -- given his actual consecutive sentences, he will not ever be released and certainly not soon. The jury learned nothing about this, although the trial court agreed with defense counsel that potential release and the actual time to be served was the jury's concern.

This is not a case where potential release and the real meaning of a life sentence can be considered speculative considerations. They were the jury's actual concerns, as all the participants below recognized. Defense counsel's request "would have given the jury **accurate** information on what a life sentence actually meant for this defendant] and would have served to correct misimpressions" in the jury. State v. Henderson, 789 P.2d at 606-07; Turner, 573 So.2d at 674-75 (relying on due process and fundamental fairness). It would have provided the jury with truthful information that may have caused it to "decline to impose the death sentence." McCleskey, 481 U.S. at 279. It would have counseled the jury on "a relevant consideration . . . which the jury may not be prevented from considering." Jones, 569 So.2d at 1240. As it stands, it is very likely that this death sentence resulted from the jury's misimpressions and misunderstanding. In a case with such substantial mitigation, such a verdict from a 7-5 jury cannot be considered constitutionally reliable; violates the sixth, eighth and fourteenth amendments to the United States Constitution; and cannot be squared with this Court's concerns that the death penalty not be imposed in an arbitrary and capricious manner.

(III)

THE PROSECUTION MADE OTHER CRIMES THE FOCUS  
OF THIS PROCEEDING AND MADE UNCONSTITUTIONAL  
ARGUMENTS FOR THE DEATH PENALTY

Prior to the sentencing, defense counsel expressed concerns that other crimes not become the focus of the sentencing; moved to limit evidence and argument on other crimes; and objected (R 9 11-13, 9 19). The court warned the prosecutors not to make other crimes a focus (R 921). The first words out of the prosecutor's mouth on opening, however, were graphic descriptions of other crimes (R 925-30). Defense counsel **again** objected and the court overruled the objection (R 925). The prosecutor then harangued

the jury on the death of Olga Elviro (for which Mr. Lara was not being sentenced) (R 936-37) and presented an impassioned plea for death on the basis of other crimes (R 940-4 1). Defense counsel's objections were overruled (R 940). The State's case then involved detailed and graphic descriptions of other crimes; defense counsel's objections to the testimony were overruled (See Statement of the Case, testimony of Roger Mittleman, Raquel Carranza, Dennis Siegel, Odalys Fumero, Sgt. John Buhrmaster). Inflammatory photographs of Olga Elviro were shown to the jury and discussed in detail (Id.).

Every defense witness was cross-examined about other crimes, including acts from Cuba and conduct during incarceration. The prosecution's rebuttal witnesses were asked about such acts. Other crimes became a focus of the prosecutor's presentation (See Statement of the Case).

The prosecutor's closing argument included graphic descriptions of the death of Olga Elviro (who was not the decedent at issue in the sentencing) (R 1626, 1636-37). He talked about "the knife which tortured Olga" (R 1635) and that witnesses did not hear "[Olga's screams or cries or anguish" (R 1636). He also graphically argued other, unrelated crimes (R 1630-35), and uncharged acts (R 1638, 164 1-42).

The prosecutor told the jury that he was not asking for death "because it is my job, I am doing it because it is right . . . [and] just" (R 16 19). He told the jury: "Don't confuse sympathy for mitigation because mitigation is not sympathy. The death penalty is a message sent . . ." (R 1656). He quoted the Bible (R 1657). He presented a war on crime argument (R 1657-58). He told the jury to have courage in imposing death (R 1657); that the victim was not "protected by a lawyer" (R 1659); and that the law "imposes" the duty to vote for death (R 1659). From beginning to end, the State's conduct here is not what this Court expects from Florida's prosecutors. The State's evidentiary presentation and

arguments, in their entirety, are not tolerable in a system that seeks to avoid the arbitrary, capricious and unreliable imposition of capital punishment.

This Court has condemned such prosecutorial conduct in capital sentencing proceedings and has held that death sentences resulting from such proceedings cannot be upheld as reliable. Castro v. State, 547 So.2d 111, 115-16 (Fla. 1989) (other crimes); Keen v. State, 504 So.2d 396, 401-02 (Fla. 1987) (improper prosecutorial argument and other crimes); Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) (same); Cave v. State, 660 So.2d 705, 709 (Fla. 1995) (“This was solely a resentencing proceeding, so the issue of guilt was unquestioned. The facts of the murder, kidnapping, and robbery were previously established. . . . Under these circumstances . . . [the detailed depiction of the crime in a video] was irrelevant, cumulative, and unduly prejudicial. . . .”); Taylor v. State, 583 So.2d 323, 329-30 (Fla. 1991) (improper and inflammatory argument); Haves v. State, 660 So.2d 257, 265-66 (Fla. 1995) (argument on the basis of improper hearsay).<sup>14</sup>

Prosecutorial argument misconduct has also been held to render the death sentence improper under the United States Constitution. Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995); Lesko v. Lehman, 925 F.2d 1527, 1545-47 (3d Cir. 1991); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449, 1458-60 (11th Cir. 1985).

Relief is appropriate when prosecutorial misconduct might have affected the jury's decision to vote for death. Caldwell v. Mississippi, 472 U.S. 320 (1995). The misconduct here affected this death sentence. The misconduct here violated the sixth, eighth and

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<sup>14</sup>In Lora, as in Haves, the jury heard a great deal of improper hearsay about what Grisel Fumero, Odalys Fumero, Olga Elviro and other witnesses had said.

fourteenth amendments; is inconsistent with this Court's capital sentencing jurisprudence; and warrants the granting of relief.

(IV)

THE PROSECUTORS AND TRIAL COURT MISINFORMED  
THE JURY ABOUT ITS CAPITAL SENTENCING ROLE

The prosecutors tried to minimize the jurors' sense of responsibility for a death verdict, making assertions such as, "Your role is to act as advisors to the Court," and "You are Judge Kahn's advisory committee" (R 1659). After these arguments, the court repeatedly told the jurors that their verdict was only a recommendation (R 1682, 1683, 1684); that it was "advisory" (R 1678, 1683); that it was only an "advisory sentence" (R 1679, 1680, 1683, 1684). The court told the jury that "the final decision as to what punishment shall be imposed is the responsibility of the judge" (R 1679). The court did not inform the jury during these instructions that the law required the court to give "great weight", or even any weight, to its verdict, whether the verdict was life, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, LeDuc v. State, 365 So.2d 149 (Fla. 1978); Smith v. State, 515 So.2d 182, 185 (Fla. 1987).

"As the Supreme Court noted in Caldwell, this kind of suggestion induces jurors, who are 'placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice', to delegate wrongly their sentencing responsibility [to the judge]." Mann v. Ducquer, 844 F.2d 1446, 1458 (11th Cir. 1988) (en banc). The improper comments and responsibility-minimizing instructions here, like those in Mann, were made "at a time when the prosecutor [and court] was purportedly outlining the role of the jury." Mann, 844 F.2d at 1458 n. 12. This error under Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann

v. Dugger, establishes that Mr. Lara's death sentence is constitutionally infirm and warrants the granting of relief.

(V)

THE PROSECUTORS KNOWINGLY MISLED  
THE JURY WITHIN ACCURATE INFORMATION

Prior to the sentencing, defense counsel moved for the appointment of the mental health experts later called by the defense at sentencing. The resentencing prosecutor was present and did not object. The trial court granted the motion (Transcript of Sept. 17, 1991, hearing at 6).

Prior to the sentencing, the prosecutors specifically moved for the appointment of Dr. Mutter and Dr. Garcia "since the defense got . . . experts"; defense counsel was not present for this part of the transcript (Transcript of Oct. 14, 1991, hearing at 2-4). The prosecutor told the judge to use the standard "competency" order (Id.) Defense counsel then reached the courtroom. The motion was granted. The record indicates that these two doctors worked with the prosecution (Transcript of November 5, 1991, hearing at 3).

Beginning with voir dire (R 4 15, 441), throughout the proceedings (R 1508, 1509, 1568-71, 1361, 1418, SR 65, 125), and then in closing argument (R 1642, 1643, 1644, 1646, 165 1-52), however, the prosecutors told the jury that the doctors they called were independent court experts but the defense experts were not. The prosecutors made assertions like:

On occasion he [Dr. Cava] was appointed to be impartial by the Court . . . Only when the Court appoints him does he become impartial because when the defendant hires him or presumably if the State hires him he is an advocate because we are the ones footing the bill . . . [Y]ou have the two doctors procured by and hired by the defendant. You have got the two [Mutter and Garcia] doctors appointed by Judge Kahn. You are the ultimate arbiters of who to believe, of which testimony is acceptable and which testimony is not acceptable . . . (R 1651-52).

This continuing assertion was misleading and inaccurate. Both sides asked for the appointment of experts and each side's requests were granted. There was nothing independent about the prosecutions doctors. Neither of the State's doctors -- doctors the State specifically asked for -- was a "court" expert. The prosecutors knew this. They knowingly misled the jury.

The United States Constitution does not tolerate the knowing presentation of misleading matters by prosecutors. ~~See Troedel v. Wainwright~~, 667 F. Supp. 1456, 1458-59 (S.D. Fla. 1986), ~~aff'd~~ 828 F. 2d 670 (11th Cir. 1987); ~~Miller v. Pate~~, 386 U.S. 1 (1967); Alcorta v. Texas, 355 U.S. 28 (1959); ~~Donnelly v. DeChristoforo~~, 416 U.S. 637, 647 (1974) (condemning prosecutorial introduction of misleading matters); ~~Caldwell v. Mississippi~~, 472 U.S. 320 (1985) (condemning prosecutorial use of misinformation in jury arguments); Wilson v. Kemp, 777 F. 2d at 623-28 (same); ~~Coleman v. Brown~~, 802 F. 2d 1227, 1239 (10th Cir. 1986) (same); Newlon v. Armontrout, 885 F. 2d at 1335-37 (same); ~~cf. Lesko v. Lehman~~, 925 F. 2d at 1545-47 (condemning improper prosecutorial assertions). Relief is appropriate in such cases where the error might have affected the result. ~~Troedel; Caldwell.~~

In a case where the mental health evidence was a significant issue, this prosecutorial misconduct may well have affected the result and was therefore prejudicial under the sixth, eighth and fourteenth amendments.

(VI)

THE PROSECUTION'S USE OF GRUESOME  
PHOTOGRAPHS RENDERED THE PROCEEDINGS  
FUNDAMENTALLY UNFAIR

Defense counsel objected to the prosecution's gruesome photographs of Olga Elviro (R. 953) and renewed his objections throughout the proceedings. The photographs which had not come in at the original trial and sentencing but were allowed in at resentencing appear at R. 2841 and 2843. They were paraded before the jury in the State's opening, during witness testimony (see Statement of the Case) and in the State's closing argument.

Olga Elviro was not the decedent at issue in this resentencing. The admission of these gruesome photographs served no purpose other than to inflame and mislead the jurors, and divert them from a proper weighing of aggravation and mitigation. Cf. Cave v. State, 660 So.2d at 709 (since "[t]his was solely a resentencing proceeding", the introduction of a detailed video of the crime was irrelevant, cumulative and unduly prejudicial).

The primary focus for admitting photographs is relevancy. Wyatt v. State, 64 1 So. 2d 355 (Fla. 1994); Thompson v. State, 565 So. 2d 1311, 13 14 (Fla. 1990); Fla. Stat. Section 90.402 (1993). Even when photographs are arguably relevant, they should not be used when they might create undue prejudice; mislead the jury; inflame the jury; or divert the jurors from proper considerations.

Here, they were not relevant. It was conceded that Olga Elviro died from three stab wounds and that the original jury found Mr. Lora guilty of second degree murder for her death. The photographs certainly were prejudicial, as shown by the prosecutors' continued use of the photographs; detailed and graphic statements about the condition



of the body (using the photographs); and use of the photographs to argue for death on the basis of the killing of Olga Elviro (who was not the victim in this case).

The use of photographs here exceeding the bounds this Court has established; rendered the proceedings fundamentally unfair; and violated due process and the eighth amendment.

(VII)

THE HINDERING GOVERNMENTAL FUNCTION  
AGGRAVATOR WAS INVALIDLY APPLIED

The jury was instructed, without any limiting construction, on the disrupt or hinder governmental function or enforcement of laws aggravator. In order for these types of aggravators to apply, it must be established beyond a reasonable doubt that the dominant or sole motive was to disrupt/hinder governmental function or enforcement of laws. See e.g., Perry v. State, 522 So.2d 817, 820 (Fla. 1988) (discussing the similar “avoid arrest” aggravator); Lawrence v. State, 614 So. 2d 1092, 1096 (Fla. 1993) (same); Hansbrouh v. State, 509 So. 2d 1081, 1086 (Fla. 1986) (same); Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (same). The “mere fact that the victim might have been able to identify her assailant is not sufficient...” Hansbrough, 509 So. 2d at 1086; Robertson, 611 So. 2d at 1232. Without such limiting constructions, the aggravator is subject to overbroad application and fails to genuinely narrow the class of persons eligible for death, in violation of the eighth and fourteenth amendments. Zant v. Stephens, 462 U.S. 862, 876 (1983).

Where, as here, the prosecution’s argument for the aggravator is based on circumstantial evidence and inferences, the prosecution must eliminate every reasonable hypothesis that hindering or disrupting governmental function was not the

sole or dominant motive, i.e., that there may have been other reasons for the killing. Here, there was significant evidence about Mr. Lara's disturbed functioning establishing a reasonable doubt that this was the dominant motive or sole motive; a properly instructed jury could have found a reasonable doubt; and the trial court erred in failing to so find. Where, as here, the prosecution relies on "other crimes" to support such an aggravator, its application is suspect. Lawrence, 614 So. 2d at 1096.

No limiting constructions were provided to the jury or identified in the trial court's order. The application of this aggravator violated ~~Zant v. Stephens~~, ~~Moynard v. Cartwright~~ and the sixth, eighth and fourteenth amendments.

(VIII)

THE PROSECUTORS ENGAGED IN A PATTERN  
OF STRIKING AFRICAN-AMERICAN JURORS

Defense counsel moved to strike the panel because of the prosecutor's use of peremptory challenges to strike African-American jurors.

Move to strike the panel. The State has exercised. . . five challenges at this point and three of them have been exercised against black persons. I want to know why [the] three have been exercised pursuant to all of the applicable case law . . . And I'm talking about Neil. . . (R 429-30).

A discussion then ensued (R 430-3 1). Defense counsel stated: "I have a pattern of challenges that I must abide by so I'm not waiving anything. I'm suggesting that the pattern establishes the Neil violation" (R 431). The court said it would consider the challenge to the striking of the third African-American juror, but the striking of the other two should have been made earlier (R 43 1-32). Defense counsel explained: "To make my position clear, I believe that there are certain patterns that derive from jury challenges. At this point I have found that there were three, which taken into consideration. . . has revealed . . . a pattern . . . I challenged the pattern of what they're

doing and I would like an explanation as to each one of them” (R 432). Counsel also articulated why he was moving to strike the panel based on the pattern:

[I]t is not my position to impute a motive based upon one single challenge at the time that we have basically four or five or six people seated. I’m simply saying that I came to a point in the State’s challenges where I believe there is a pattern of challenging black jurors (R 432-33).

The prosecutor stated his position on why he challenged the jurors (R 433-34). Defense counsel challenged the prosecutor’s assertions (R 435-36). The trial court found that the explanation stated by the State for the third juror was not adequate (R 438) but that a pattern had not been established. The third juror was seated.

The defense motion to strike the panel should have been granted. What was said about the other two jurors was no more sufficient than the statements about the third juror (which the trial court found inadequate). The proceedings violated ~~Botson v. Kentucky~~, 476 U.S. 79 (1986), State v. Neil, 457 So.2d 481 (Fla. 1984), State v. Sloppy, 522 So.2d 18 (Fla. 1988), State v. Allen, 616 So.2d 452 (Fla. 1993), and ~~Swain v. Alabama~~, 380 U.S. 202 (1965). Relief is appropriate.

(IX)

THE ABSENCE OF THE WRITTEN JURY INSTRUCTIONS FROM THE RECORD VIOLATES MR. LARA'S RIGHTS TO FULL AND FAIR APPELLATE REVIEW

Appellate counsel filed several motions for inclusion of the written jury instructions in the record. These instructions were drafted by the State and provided to the jury. This Court previously agreed that the written instructions should be included in the record and directed the Circuit Court Clerk to locate them. The Circuit Clerk ultimately represented to this Court that the requested written instructions could not be located in the Clerks office. Appellant filed an additional motion explaining that the instructions were necessary before the appeal could be heard. The instructions are necessary for proper

briefing and for the full review that this Court has held to be required in capital **cases**.

As this brief demonstrates, jury instruction issues are involved in this appeal. There may well be other issues arising from the written instructions which cannot be briefed because of their absence. Indeed, the jury charge colloquy itself is difficult to decipher (and in some instances impossible to follow) because of the absence of the written jury instructions.

Appellant's counsel submitted that:

[i]t is very likely that the deficiency in this record is one that can be corrected by the trial court. The Trial Judge is available, as are the prosecutor and defense counsel who handled the proceedings below. A limited remand will allow the Trial Judge to conduct an expeditious reconstruction hearing, make the necessary findings as to the contents of the missing instructions and certify the findings to this Court. This Court will then be able to fully review this case on a complete and proper record -- something that cannot be done on the basis of the current, incomplete record.

(Appellant's Motion of January 22, 1996, at pp. 1-2).

This is a capital appeal. A full and proper record is critical. Appellant therefore urged the Court to allow a reconstruction hearing (Id. at 2). The Court denied the motion.

Full and meaningful appellate review is indispensable to the reliability and affirmance of capital punishment. See e.g., Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990); Gregg v. Georgia, 428 U.S. 153 (1976). An indigent capital defendant, such as Appellant herein, is entitled to a full and accurate record in order for such review to be effectuated. See e.g., Griffin v. Illinois, 351 U.S. 12 (1956).

The United States Supreme Court has explained that "[i]n all cases" it is the "duty of the State" to provide "adequate and effective...appellate review...." Mayer v. City of Chicago, 404 U.S. 189, 193-94 (1971); see also Draper v. Washington, 372 U.S. 487, 496

(1963) (relied upon in Mover). A complete record is essential to such review. Mcayer, 404 U.S. at 198. See also Simmons v. Beyer, 1995 WL 3406, \*7 (3rd Cir. 1995) (granting habeas relief due to the incompleteness of the record reviewed by the state courts); United States v. Atilus, 425 F.2d 816, 816-17 (5th Cir. 1970) (granting relief due to incompleteness of record); Hammond v. State, 1995 WL 1570 10, \*2 (Ala. Cr. App. 3, 1995) (vacating capital conviction due to incompleteness of record and holding that the fact that there are “missing portions” of the record “adversely affects” the appellant’s “substantial right” to full appellate review). The United States Supreme Court has also noted that it is impossible for appellate counsel to provide effective representation when the complete record is not made available. Hardy v. United States, 375 U.S. 277, 282 (1964). Under such circumstances there is no proper appellate review. Id.

This Court has long emphasized the Florida and United States Constitutions’ requirements of full and meaningful appellate review, Burnette v. State, 151 So. 2d 9, 9-10 (Fla. 1963); Delap v. State, 350 So. 2d 462, 462-63 and n. 1 (Fla. 1977); Witt v. State, 387 So. 2d 922 (Fla. 1980), and has stressed that such review cannot be afforded on less than a complete and accurate record. Delap v. State, 350 So. 2d at 463 and n. 1 (holding that “the defendant has the right to a complete review” and vacating the capital conviction due to the incompleteness of the record); Burnette v. State, 151 So. 2d at 9-10 (same).

The entitlement to a complete record includes all instructions provided to the jury. See Yancey v. State, 267 So. 2d 836, 836-37 (Fla. 4th DCA 1972), citing Hardy v. United States, 375 U.S. 277 (1964); see also Lee v. State, 499 So.2d 66 (Fla. 3d DCA 1987) (appellate review cannot be conducted without complete record); Simmons v. State, 200 So. 2d 619, 620-21 (Fla. 1st DCA 1967) (full appellate review “is a necessary ingredient of due process” and cannot be afforded on less than a complete record); Pugatch v. State,

560 So. 2d 4 19 (Fla. 4th DCA 1990) (without a complete record “appellate review would be futile”); cf. Willimnsen v. Kanqaroo, Inc., 608 So. 2d 586 (Fla. 1 st DCA 1992) (“hearing de novo” necessary in trial court when complete record is unavailable for appellate review).

The defendant’s “right to a complete review” in capital cases, Delap, 350 So. 2d at 463 n. 1, is especially important on questions of what law was provided to the jury. Florida law has long held that when the written jury instructions deviate from what the jury is told orally, Morqan v. State, 377 So. 2d 212 (Fla. 3d DCA 1979), and when the written instructions provided to the jury are incomplete, unclear or improper, Chappell v. State, 423 So.2d 984, 984-85 (Fla. 3d DCA 1982); Carmenates v. State, 654 So. 2d 60 1 (Fla. App. 1995), the proper remedy is reversal

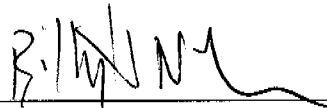
Here, because the written instructions have not been provided, Appellant (indeed, both parties) and this Court are foreclosed from fully and properly evaluating such issues. No improprieties or other concerns about the written instructions can be reviewed as this case now stands -- on the current, incomplete record there is no way to consider such issues.

Without knowing what the written jury instructions told the jury about the law, the jury’s function, aggravation, mitigation, the weighing process, expert testimony, sympathy or bias, etc., this Court cannot provide the full and meaningful review that is integral in capital **cases**. The gap in the record infringes on Mr. Lord’s rights to meaningful appellate review and effective assistance of counsel on appeal, and warrants vacation of the death sentence.

CONCLUSION

Appellant's death sentence should be vacated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by United States Mail, postage prepaid, to Fariba Komeily, Assistant Attorney General, 40 1 NW Second Avenue, Suite 921N, Miami, FL 33128 this 7th day of February, 1996.



Billy H. Nolas





FILED

AUG 24 1982  
IN THE CIRCUIT COURT OF  
THE ELEVENTH JUDICIAL CIRCUIT  
CIRCUIT OF FLORIDA, IN  
AND FOR DADE COUNTY

STATE OF FLORIDA,  
Plaintiff,

vs.

MARIO ALBO LARA,  
Defendant.

CRIMINAL DIVISION  
CASE NUMBER 81-026182  
JUDGE FREDRICKA G. SMITH

SENTENCING ORDER

THIS CAUSE came before the Court for a trial by jury and a verdict was rendered by the jury finding the defendant MARIO **ALBO LARA**, guilty of First Degree Murder, Second Degree Murder and Sexual Battery.

Following the guilty verdict, the trial jury convened to consider evidence **presented at** a penalty proceeding, authorized by Florida Statutes 921.141. The *jury*, after hearing additional evidence, retired, deliberated, and returned its advisory sentence as to Count I, First Degree Murder. *The jury*, in open court, by a majority vote of **its** members, by a vote of eight **to** four, recommended that the Court impose the death penalty upon the defepdant, MARIO ALBO **LARA**, for the murder of Grisel **Fumero**.

The Court, independent of, but in full agreement with the advisory sentence rendered by the jury, and after full consideration of each of the aggravating and mitigating circumstances in Florida Statute 921.141, does hereby impose the penalty of death upon the defendant, MARIO ALBO **LARA**, as to Count **I**, First Degree Murder.

In so doing, the Court has fully considered both the evidence and testimony received at trial, at the penalty phase of the trial and during the sentencing proceeding, and pursuant to Florida Statute 921.141 (3) does hereby make the following written findings upon which it **has** based its sentence of death: (1)

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(1) Only those aggravating circumstances on which evidence was offered and which apply in this case **will** be set forth in the Court's order. For convenience, the Court will refer to the factors by the letter used to denote the comparable subsection in Florida Statutes 921.141.

8 REC 11541 PG 2871

AGGRAVATING FACTORS

- (b) Whether the **evidence** shows that the defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

FINDING: The evidence includes the conviction of defendant for the Second Degree Murder and Sexual Battery of Olga Elviro, both, crimes of extreme violence. The conviction for these crimes was a fact at the time the jury-made its sentencing recommendation and at the time the Court imposes the death penalty. See King v. State, 390 **So.2d** 315 (Fla. 1980).

- (g) Whether the evidence shows that the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law.

FINDING: The evidence at trial shows that the victim of the First Degree Murder, Grisel Fumero, was a witness whom the State intended to call in the trial of **MARIO ALBO LARA** for sexual battery against Odalys Cardozo, Grisel Fumero's sister. The trial in that case (#81-5788) was scheduled to begin on July 13, 1981, the week defendant murdered Grisel Fumero.

There was evidence at the trial, specifically the testimony of **Tomas** Barcello, indicating that defendant had conspired with Fransico Rizo to prevent Grisel Fumero from being a witness in the earlier sexual battery case. Defendant apparently wanted to avoid being convicted and sentenced for that crime. See Autone V. State, 382 **So.2c** 1205 (Fla. 1980).

- (1) Whether the murder was committed in a cold, calculated, and premeditated manner without any **pretence** of moral or legal justification.

FINDING: The testimony of **Tomas Barcello**, an eye witness to the murder of **Grisel Fumero**, indicates that **MARIO ALBO LARA**, faced **Grisel Fumero**, said that it was because of her that everything was **going** wrong, and without the slightest provocation fired at her five or six times at close range. Defendant then removed the fired casings from the cylinder and began to reload the gun. When **Tomas Barcello** said that defedant was a murderer, defendant simply laughed.

'MITIGATING FACTORS

The law requires the Court to consider any mitigating circumstances which may outweigh the aggravating circumstances. In this case there is no evidence of any of the mitigating circumstances specifically set forth in the statute. The only arguable mitigating circumstance is the history of abuse suffered by the defendant as a child as testified to at the sentencing hearing by Mr. Amigo. There was no evidence that the defendant's actions in murdering **Grisel Fumero** were in any way influenced or affected by any childhood experience. The Court has considered this history but does not find it to be a relevant factor in this crime. Further, even if applicable, this mitigating factor is clearly outweighed by the aggravating circumstances.

In conclusion, the Court finds that there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the sentence of death. As stated above, this Court has found no statutory or non-statutory mitigating factors to exist. After fully evaluating all of the evidence in this case, the Court feels compelled to follow the advisory sentence of the trial jury.

The depravatiy of **MARIO ALBO LARA'S** acts in killing a defenseless, 18 year old girl in order to prevent her from testifying against him in a criminal case, cannot be tolerated in our society and requires the imposition of the death penalty as recommended by the jury.

It is therefore the judgment and the sentence of **the** Court that as to Count I of the Indictment in this case that MARIO ALBO **LARA** be adjudicated guilty of Murder in the First Degree in the death of Grisel Fumero and that the defendant be sentenced to death in the electric chair.

It is further the judgment and sentence of the Court that as to Count II, Second Degree Murder and Count III, Sexual Battery, MARIO ALBO **LARA** be adjudicated guilty and be sentenced to **99** years imprisonment for each crime. It is specifically ordered that the sentences in Count **II** and III will run consecutive to each other and consecutive to any and all other sentences previously imposed upon the defendant for any offense.


Furthermore, the Court, pursuant to Florida Statute **947.16(3)** hereby retains jurisdiction over one-third (**1/3**) of the combined sentences imposed in Counts **II** and III on the following ground:

The crimes committed by the defendant demonstrate a degree of violence, sadism, and depravity that is difficult to comprehend and identify as human behavior. The manner in which Olga Elviro was bound, gagged and violated before she was savagely stabbed to death, shows the defendant to be dangerous person, not amenable to rehabilitation.

The defendant should not be released back into the community without careful judicial scrutiny.

It is therefore ordered that MARIO ALBO **LARA** be taken by the proper authorities into the custody of the Department of Corrections and be kept under close confinement, to be executed at a time, date, and place to be set according to law.

DONE AND ORDERED on this the **23** of August, 1982, in Miami, Dade County, Florida.

  
FREDRICKA G. SMITH  
Circuit Court Judge  
Eleventh Judicial Circuit