IN THE SUPREME COURT OF FLORIDA

OMAR BLANCO,

Appellant,

vs. Case No. 85,118

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE **300**
WEST PALM BEACH, FL. **33409**
(407) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

OMAR BLANCO,

Appellant,

vs. Case No. 85,118

STATE OF FLORIDA,

Appellee.

PRELIMINARY STATEMENT

Appellant, OMAR BLANCO, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellant was indicted on February 2, 1981, for the first-degree murder of John Ryan, and the burglary of Mr. Ryan's home while armed, allegedly committed on January 14, 1981. (R 2438-39). He was convicted as charged and sentenced to death, both of which were affirmed on appeal. Blanco v. State, 452 So. 2d 520 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 940, 83 L. Ed. 2d 953 (1985). This Court also denied Blanco's petition for writ of habeas corpus, and affirmed the denial of his motion for postconviction relief. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). A federal district court vacated Appellant's sentence and remanded for resentencing, which the Eleventh Circuit affirmed. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

On remand, defense counsel immediately requested appointment of a confidential mental health expert, which was granted at a later hearing. Defense counsel was supposed to inform the State of his chosen expert and submit a proposed order. (R 2504-05; T 49-50). At a status conference three weeks later, defense counsel indicated that he was trying to locate Dr. Melendez, who had evaluated Appellant during postconviction proceedings. (T 54). Six weeks later, at another status conference, defense counsel indicated that, although he had found Dr. Melendez, he had spoken

with Dr. Dorita Marina, a neuropsychologist who had also evaluated Appellant during postconviction proceedings. He wanted Dr. Marina appointed as the confidential expert but, because of the county's fee structure, he asked the court to set a $1,000 cap on Dr. Marina's services and appoint a neurologist for testing. The trial court granted the motion. (R 2539-44, 2545-50, 2565, ***2566;*** **T** 61-67).

Defense counsel also sought the appointment of the sociologist who had testified during the postconviction proceedings regarding Appellant's difficulties as a Muriel refugee. Though skeptical of its relevance, the trial court granted this motion as well. (R 2551-52, 2564; T 67-71).

Nine months later, defense counsel moved for the appointment of Dr. Anastasio Castiello, a psychiatrist; and Dr. Glenn Caddy, a psychologist. (R 2628-30). Counsel explained at a hearing that Dr. Marina had suggested a psychiatrist in order to interpret her findings and explain Appellant's potential for rehabilitation to the jury. (T 198-99). He wanted Dr. Caddy to explain the differences in mental health treatment between prisoners on death row and prisoners in general population so that counsel could argue that Appellant would get better treatment and could be rehabilitated if serving a life sentence. (T 199-200). The State objected to the appointment of Dr. Caddy, because Appellant had

already been appointed a psychologist, Dr. Marina, who could testify to the same. (T 200-01). It did not object to the appointment of Dr. Castiello, to the extent he was going to interpret Dr. Marina's test results; otherwise, the defense should find and use Dr. Melendez who had already evaluated Appellant. (T 208-10). Defense counsel indicated that he wanted Dr. Castiello to interpret test results, but objected to any fee cap. (T 212-14). The trial court agreed that Dr. Castiello should be given enough time to perform a competent evaluation, but refused to give him a "blank check." It suggested an initial cap of ten hours with leave for counsel to request more. (T 216-17). The written order appointing Dr. Castiello set an initial limit at $1,500. (R 2632).

One month later, defense counsel indicated that Dr. Castiello declined the appointment because he did not want to work outside of Dade County, especially under Broward County's fee schedule. (T 224, 226). He further indicated that Dr. Arturo Gonzales would evaluate Appellant, but demanded $2,000 per day. (R 2717-18; T 224-25). The county attorney objected to the flat fee, but intimated that his office would not appeal an order authorizing $100 per hour, instead of $50 per hour as indicated in the fee schedule. (T 229-30). At that point, defense counsel sought any suggestions he could get on a Spanish-speaking psychiatrist: "Judge, I'm in a posture now where I'm taking any suggestions I can

get, like I said." (T 230). In response, the trial court suggested a Dr. Lapeyra from Prison Health Services, and defense counsel agreed to contact him. (T 230-31).

Within the next two weeks, defense counsel informed the court that Dr. Lapeyra was not available, but that he had contacted Dr. Maulion. (T 242-45, 249-50, 258). Dr. Maulion had indicated that he charged $275 per hour for the evaluation and $1,000 per day to testify. Counsel gave him Dr. Melendez' postconviction testimony to review. (T 258-59). He did not know if Dr. Maulion had done forensic work, but noted, "I don't think it's that involved really where he has to do some extensive evaluation." (T 260).

A week later, defense counsel indicated that Dr. Maulion had agreed to evaluate Appellant. Based on what the county attorney had said at the prior hearing, counsel informed the doctor that the county would pay between $100 and $150 per hour. When asked by the trial court whether he was satisfied with Dr. Maulion, defense counsel stated, 'Yes, sir. He seems to be qualified. He is Spanish speaking. He seems to have all of the tools, at least, to be able to accomplish what we're seeking.'' (T 271). The trial court appointed Dr. Maulion on August 10, 1993. (R 2805).

A month later, defense counsel indicated that he got a preliminary report from Dr. Maulion and stated, "I've seen his works [sic]. He seems to be more than acceptable. He is doing an

excellent job." (T 427). Defense counsel also indicated that Dr. Maulion wanted extensive neurological testing, so Dr. Donald Rose, a neuropsychologist, was appointed, with an initial cap of $1,500. (R 2865; T 427). Dr. Rose, however, refused to perform the testing for $50 per hour, so the trial court authorized $100 per hour, and the county agreed not to fight it. (R 2887-88, 2890; T 445-48). Three days later, the trial court entered an order appointing Dr. Lee Bukstel to perform a neuropsychological evaluation for $50 per hour with an initial cap of $1,500. (R 2891). The reason for the substitution is not apparent from the record.

Four months before the resentencing, Appellant filed a motion seeking an evidentiary hearing to present newly discovered evidence of his innocence. (R 2934-37). The trial court granted the motion and heard evidence from both parties on February 25, 1994. (T 523-663). After reviewing post-hearing memoranda (R 3029-43, 3064-3352), the trial court denied Appellant's motion for postconviction relief. (R 3396, 3406-07; T 703). That ruling is the subject of Appellant's consolidated appeal in case number 83,829.

Appellant's resentencing began on April 18, 1994. After several days of jury selection, and opening statements, the State began its case by admitting into evidence certified copies of conviction on an armed robbery and armed burglary committed by Appellant in 1981. (T 1282). Thereafter, the State presented the

testimony of Thalia Vesos, who stated that she lived at **2701** N.W. 35th Drive in Fort Lauderdale with her mother and her uncle, John Ryan. (T 1283). On January **14, 1982,** she was **14** years old. Her mother had left the day before to go overseas, and her uncle was taking care of her. (T **1283-84**).

While watching television in her room around 10:00 p.m., she noticed a man standing in the hallway, wearing a pair of maroon-colored socks over his hands, and holding a gun. (T **1287-88,** 1289). The man put the gun up to his lips and indicated for her to be quiet. In broken English, he asked her where her phone was and cut the line. He then asked her if anyone else was home, and she told him that her uncle was home. (T 1289, 1290). He asked her to be his friend and touched her hand. (T 1289-90). When he went out into the hallway, she got out of bed. He saw her and ordered her to get back in. (T **1290**). While he was standing there talking to her, her uncle came down the hall and asked the man what he was doing. When her uncle tried to knock the gun out of the man's hand, the man shot her uncle several times. (T 1290-91). She rolled over, thinking the man would shoot her next, and her uncle jumped or fell on top of her. She felt a bullet hit his back. (T 1291). When the man left, her uncle rolled off of her, and she tried to crawl out the window, but could not, so she ran out the front door to the neighbor's house. (T **1291092**). A brown purse

the man was carrying under his arm, and the maroon socks, were later found in her room. (T 1292-93).[1]

Next, John Matheson, a crime scene technician with the Fort Lauderdale Police Department, testified that he found seven spent shell casings and four projectiles in the hallway and in Thalia Vesos' bedroom. (T 1327-29). He also recovered a pair of maroon socks in Vesos' bedroom, and a brown purse containing a wallet, keys, papers, a driver's license, a social security card, food stamps, a small knife, a screwdriver, and Thalia Vesos' watch. (T 1337-40). The cords on the phones in the kitchen and in Thalia Vesos' bedroom had been cut. (T 1341). He swabbed Appellant's hands and the inside of one of the shell casings for gunpowder residue. (T 1345-47).

The State's next witness was Officer Price, who testified that he was parked in his patrol car 1.4 miles from the victim's home when he saw a man matching the description of an earlier dispatch riding a ladies bicycle. He stopped the man (Appellant) at 11:57 p.m. and took him back to the scene. (T 1368-69). They passed several bodies of water on the way. (T 1370).

Next, the medical examiner testified that he recovered two bullets from John Ryan. Mr. Ryan, however, had been shot seven

---

[1] For purposes of the motion for postconviction relief, defense counsel also proffered Thalia Vesos' testimony regarding her description of the man she saw. (T 1313-20).

times--once in his neck, once to the front right shoulder, once to the front of the arm, once to the back of the arm, and three to the back. (T 1403-21). He estimated that the victim did not live more than five minutes, and was conscious for one and a half to two minutes. (T 1421-22).

Dennis Grey, a firearms examiner with the Broward County Sheriff's Office, testified that all of the shell casings were fired from the same .380 automatic. (T 1445). Given the minimal or nonexistent gunpowder residue around the wounds, Mr. Grey opined that all of the shots were fired from at least 36 inches away. (T 1447-51).

The State's final witness was William Kinard, a forensic chemist for the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms. Mr. Kinard testified that the swabs from the back of Appellant's right hand, and from the back and front of Appellant's left hand, revealed gunpowder residue, which was consistent with firing a gun using a two-handed grip. (T 1474-75).

On his own behalf, Appellant presented the testimony of ten lay witnesses, the statements of his mother and father, and the testimony of Dr. Maulion and Dr. Bukstel. To the extent it is not argumentative, the State accepts Appellant's synopsis of their testimony.

At the close of Appellant's case, defense counsel presented additional documentary evidence relating to the motion for postconviction relief, only a few of which the trial court found to qualify as newly discovered evidence. (T 2213-25). Regardless, the trial court found that such evidence did not affect its prior ruling denying Appellant's motion. (T 2228, 2292-93).

Following closing arguments, the jury recommended a sentence of death by a vote of ten to two. (R 3410; T 2393). Five months later, Appellant filed a motion to disqualify the trial judge, based on newly discovered information that the judge was an assistant state attorney in Broward County during Appellant's trial and postconviction proceedings. (R 3474-77). At a hearing on October 28, 1994, the trial court denied the motion as legally insufficient on its face. (R 3505; T 2411). Neither party presented additional evidence or argument at this hearing relating to Appellant's sentence. (T 2414). On January 4, 1995, the Fourth District Court of Appeal denied Appellant's petition for writ of prohibition. (R 3507).

At the final sentencing hearing on January 6, 1995, defense counsel complained about Dr. Maulion's testimony: "I felt like he was really not a forceful witness for the defense . . . ." (T 2419). "[A]s an expert I think [he] gave the jury the appearance he was the least of the experts in the case." (T 2420). He also

complained about the fee structuring system and how unfair it was to indigent defendants. (T 2420-21). When the trial court commented that "[t]here was no complaints at all up to the testimony" (T 2421), defense counsel agreed, and noted that his complaints were all in retrospect, but faulted Dr. Maulion's lack of experience in testifying, and the lack of Spanish-speaking psychiatrists in general. (T 2421-22).

Thereafter, the trial court sentenced Appellant to death for the murder of John Ryan. In aggravation, it found that Appellant had been convicted of a prior violent felony, had committed the murder during the course of a burglary, and had committed the murder for pecuniary gain, which it merged with the "felony murder" aggravator. In mitigation, it found that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired--which it gave "considerable weight"; that Appellant had a potential for rehabilitation--which the court gave "little weight"; (3) that Appellant is a father--which the court gave "little weight"; (4) that Appellant has dull intelligence--which the court gave "greater weight . . . than given to the two factors above"; (5) that Appellant had an impoverished background--which the court gave "little weight"; (6) that Appellant had organic brain damage--which the court gave "little weight" since it was part of the basis for that statutory mental mitigator found;

(7) that Appellant maintained his innocence--which the court gave 'little weight"; (8) that Appellant was oppressed in Cuba--which the court gave 'little weight"; (9) that Appellant possessed good character traits--which the court gave "little weight"; (10) that Appellant had strong religious beliefs--which the court gave 'little weight"; (11) that Appellant cooperated with the police--which the court gave "little weight"; and (12) that Appellant has a loving relationship with his family--which the court gave "little weight." (R 3517-21; T 2425-33). Ultimately, the trial court found that "the aggravating circumstances in this case outweigh the mitigating circumstances present.'' (R 3521). This appeal follows.

SUMMARY OF ARGUMENT

Issue I - Appellant was not entitled to a psychiatrist of his choice, nor was he entitled to a court-appointed psychiatrist with unlimited funding. The trial court appointed a psychiatrist, a neuropsychologist, a psychologist, a neurologist, and a sociologist at the county's expense. Because Dr. Maulion was not a persuasive witness does not mean that he was constitutionally ineffective. Nor can such a claim be proven on the face of the record. Rather, such a claim is more appropriately raised in a motion for postconviction relief.

Issue II - There was no evidence to support an instruction on the mitigating factor that Appellant acted under the influence of extreme duress or substantial domination. The victim's attempts to protect himself and his niece by struggling with Appellant did not support such an instruction.

Issue III - The trial court noted the original jury's death recommendation only as a fact in Appellant's procedural history; it did not rely upon same in determining Appellant's sentence. Nor did it give undue weight to the resentencing jury's recommendation. The written sentencing order shows that the trial court understood and performed its duty to independently weight the evidence.

Issue IV - The trial court considered evidence of Appellant's impoverished background in mitigation and accorded it 'little

weight." Appellant's sentence should not be vacated because Appellant believes the trial court should have accorded it more weight.

Issue V - Appellant's sentence of death is proportionate to sentences in other cases under similar facts.

Issue VI - This Court has repeatedly found that the "felony murder" aggravating factor does not constitute an "automatic" aggravator. Appellant has presented nothing to undermine this Court's previous rulings.

Issue VII - This Court has repeatedly held that electrocution is not cruel and unusual punishment. Appellant has presented nothing to undermine this Court's previous rulings.

ARGUMENT

ISSUE I

WHETHER APPELLANT **WAS** ENTITLED TO THE MENTAL HEALTH EXPERT OF HIS CHOICE AND WHETHER HIS APPOINTED EXPERT WAS COMPETENT (Restated).

At his original trial, Appellant presented no mental health testimony for mitigation purposes. During his state postconviction proceedings, however, he presented the report of Dr. Fernando Melendez, a psychologist who opined that Appellant "suffers from organic brain damage and falls into the dull-normal range of intelligence"; and the testimony of Felix Masud-Piloto and Juan Clark, sociologists "who reviewed, at length, Cuban immigration to the United States and the negative public perception of Mariel refugees." Blanco v. Wainwrisht, 507 So. 2d 1377, 1381-83 (Fla. 1987). During his federal postconviction proceedings, he presented the testimony of Dr. Harry Krop, a clinical psychologist, and Dr. Dorita Marina, a clinical psychologist and psychoanalyst. Blanco v. Dugger, **691** F.Supp. **308, 324-25** (S.D.Fla. **1988),** aff'd, 943 F.2d 1477 (11th Cir. 1991).

At Appellant's resentencing, defense counsel moved for the appointment of a confidential mental health expert, which was granted at a later hearing. Defense counsel was supposed to inform the State of his chosen expert and submit a proposed order. (R 2504-05; T 49-50). At a status conference three weeks later,

defense counsel indicated that he was trying to locate Dr. Melendez, who had evaluated Appellant during postconviction proceedings, (T 54). Six weeks later, at another status conference, defense counsel indicated that, although he had found Dr. Melendez, he had spoken with Dr. Dorita Marina, the psychologist who had evaluated Appellant during federal postconviction proceedings. He wanted Dr. Marina appointed as the confidential expert but, because of the county's fee structure, he asked the court to set a $1,000 cap on Dr. Marina's services and appoint a neurologist for testing. The trial court granted the motion. (R 2539-44, 2545-50, 2565, 2566; T 61-67).[2]

Nine months later, defense counsel moved for the appointment of Dr. Anastasio Castiello, a psychiatrist; and Dr. Glenn Caddy, a psychologist. (R 2628-30). Counsel explained at a hearing that Dr. Marina had suggested a psychiatrist in order to interpret her findings and explain Appellant's potential for rehabilitation to the jury. (T 198-99). He wanted Dr. Caddy to explain the differences in mental health treatment between prisoners on death row and prisoners in general population so that counsel could argue that Appellant would get better treatment and could be

---

[2] Defense counsel also sought the appointment of the sociologist who had testified during the postconviction proceedings regarding Appellant's difficulties as a Muriel refugee. Though skeptical of its relevance, the trial court granted this motion as well. (R 2551-52, 2564; T 67-71).

rehabilitated if serving a life sentence. (T 199-200). The State objected to the appointment of Dr. Caddy, because Appellant had already been appointed a psychologist, Dr. Marina, who could testify to the same. (T 200-01). It did not object to the appointment of Dr. Castiello, to the extent he was going to interpret Dr. Marina's test results; otherwise, the defense should find and use Dr, Melendez who had already evaluated Appellant. (T 208-10). Defense counsel indicated that he wanted Dr. Castiello to interpret test results, but objected to any fee cap. (T 212-14). The trial court agreed that Dr. Castiello should be given enough time to perform a competent evaluation, but refused to give him a "blank check." It suggested an initial cap of ten hours with leave for counsel to request more. (T 216-17). The written order appointing Dr. Castiello set an initial limit at $1,500. (R 2632).

One month later, defense counsel indicated that Dr. Castiello declined the appointment because he did not want to work outside of Dade County, especially under Broward County's fee schedule. (T 224, 226). He further indicated that Dr. Arturo Gonzales would evaluate Appellant, but demanded $2,000 per day. (R 2717-18; T 224-25). The county attorney objected to the flat fee, but intimated that his office would not appeal an order authorizing $100 per hour for the evaluation, instead of $50 per hour as indicated in the fee schedule. (T 229-30). At that point, defense

counsel sought any suggestions he could get on a Spanish-speaking psychiatrist: "Judge, I'm in a posture now where I'm taking any suggestions I can get, like I said." (T 230). In response, the trial court suggested a Dr. Lapeyra from Prison Health Services, and defense counsel agreed to contact him. (T 230-31).

Within the next two weeks, defense counsel informed the court that Dr. Lapeyra was not available, but that he had contacted Dr. Maulion. (T 242-45, 249-50, 258). Dr. Maulion had indicated that he charged $275 per hour for the evaluation and $1,000 per day to testify. Counsel gave him Dr, Melendez' postconviction testimony to review. (T 258-59). He did not know if Dr. Maulion had done forensic work, but noted, "I don't think it's that involved really where he has to do some extensive evaluation." (T 260).

A week later, defense counsel indicated that Dr. Maulion had agreed to evaluate Appellant. Based on what the county attorney had said at the prior hearing, counsel informed the doctor that the county would pay between $100 and $150 per hour. When asked by the trial court whether he was satisfied with Dr. Maulion, defense counsel stated, 'Yes, sir. He seems to be qualified. He is Spanish speaking. He seems to have all of the tools, at least, to be able to accomplish what we're seeking." (T 271). The trial court appointed Dr. Maulion on August 10, 1993. (R 2805).

A month later, defense counsel indicated that he got a preliminary report from Dr. Maulion and stated, "I've seen his works [sic]. He seems to be more than acceptable. He is doing an excellent job." (T 427). Defense counsel also indicated that Dr. Maulion wanted extensive neurological testing, so Dr. Donald Rose, a neuropsychologist, was appointed, with an initial cap of $1,500. (R 2865; T 427). Dr. Rose, however, refused to perform the testing for $50 per hour, so the trial court authorized $100 per hour, and the county agreed not to fight it. (R 2887-88, 2890; T 445-48). Three days later, the trial court entered an order appointing Dr. Lee Bukstel to perform a neuropsychological evaluation for $50 per hour with an initial cap of $1,500. (R 2891). The reason for the substitution is not apparent from the record.

During the resentencing, Appellant called Dr. Maulion and Dr. Bukstel on his behalf. (T **1761-1875,** 1893-2187). He chose not to call Dr. Marina or Dr. Clark, the sociologist. Though Dr. Maulion was impeached by the State on several points, defense counsel defended Dr. Maulion's evaluation techniques in closing argument: Dr. Maulion was appointed for a very limited purpose--to look at the materials and test results and determine whether Appellant exhibited indicia of organic brain damage. He found that he did, and opined that Appellant met the elements of the two statutory mental mitigators, Thus, the fact that he only met with Appellant

for an hour was irrelevant because he principally based his opinions on other things. (T 2358-61).

At the final sentencing hearing, however, defense counsel complained about Dr. Maulion's testimony: "I felt like he was really not **a** forceful witness for the defense . . . ." (T 2419). "[Ala an expert I think [he] gave the jury the appearance he **was** the least of the experts in the case." (T 2420). He also complained about the fee structuring system and how unfair it was to indigent defendants. (T 2420-21). When the trial court commented that "[t]here was no complaints at all up to the testimony" (T 2421), defense counsel agreed, and noted that his complaints were all in retrospect, but faulted Dr. Maulion's lack of experience in testifying, and the lack of Spanish-speaking psychiatrists in general. (T 2421-22).

In this appeal, Appellant frames the issue as follows:

> THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO RETAIN A MENTAL HEALTH EXPERT OF HIS CHOICE; THE PSYCHIATRIST ASSIGNED BY THE COURT TO ASSIST OMAR BLANC0 WAS INEFFECTIVE AND INCOMPETENT AS A FORENSIC MENTAL HEALTH EXPERT.

Brief of Appellant at 39. After complaining that he was precluded from engaging experts of his choice, and that he "was required to utilize . . . a psychiatrist chosen by the trial court," id. at 42, Appellant concedes that 'he had no constitutional right to choose

a psychiatrist of his personal liking or to receive funds to hire his own," id. at 44. Thus, as framed, the first part of his issue concededly has no legal support.

The law is well-settled that indigent defendants do not have the right to an expert of their choice. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). Nor are they entitled to a court-appointed expert with unlimited funding. See § 914.06, Fla. Stat. (1993) ("In a criminal case when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to the issues of the case, the court shall award reasonable compensation to the expert witness that shall be taxed and paid by the county as costs in the same manners as other costs."). Nor are they entitled to a favorable psychiatric opinion. Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995).

Here, the trial court allowed defense counsel to choose not only the psychiatrist of his choice, but it allowed counsel to choose a psychologist, a neuropsychologist, a neurologist, and a sociologist of his choice. His chosen psychiatrists simply refused to work under the county's fee schedule, and the trial court refused to write a 'blank check." Given that there are finite resources from which all indigent defendants can apply for assistance in their defense, such a decision was well within the trial court's discretion. See Martin v. State, 455 So. 2d 370,

371-72 (Fla. 1984) ("The appointment of experts is discretionary. § 914.06, Fla. Stat. (1983). The test for overturning a trial court ruling on appointing an expert is whether there has been an abuse of discretion."). See also Burch v. State, 522 So. 2d 810, 812 (Fla. 1988) (finding no abuse of discretion for refusal to appoint expensive expert on PCP where local experts were qualified); Ake, 470 U.S. at 77 ("[This] Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . ."). The second part of Appellant's claim must be analyzed closely. At one point it is stated as follows: "Because Dr. Maulion turned out to be ineffective almost to the point of appearing totally incompetent in the field of psychiatry, Omar Blanco was denied due process of law . . . ." Id. at 42. To the extent Appellant claims that Dr. Maulion was, in fact, incompetent, as opposed to merely "ineffective almost to the point of appearing incompetent," the State submits this Court cannot determine from this record whether such a claim is true. The extent of the witness' evaluation, the extent of the materials provided to him, the nature of his testimony, etc., are so closely related to trial strategy and the competence of trial counsel that this claim is more properly presented in a motion for postconviction relief. Defense counsel, who is different from appellate counsel, undoubtedly guided, if not

determined, the scope of Dr. Maulion's evaluation and could have affected the quality of it as well. This is simply not the proper forum to determine Dr. Maulion's competency, especially given trial counsel's post-trial general complaints as to the doctor's persuasiveness as a witness. Cf. McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991) (citation omitted) ("Claims of ineffective assistance of counsel are generally not reviewable on direct appeal but are more properly raised in a motion for postconviction relief. The trial court is the more appropriate forum to present such claims where evidence might be necessary to explain why certain actions were taken or omitted by counsel."); Owen v. State, 560 So. 2d 207, 212 (Fla. 1990) (stating that ineffectiveness claims can only be raised on direct appeal "under rare circumstances" where issue has been preserved and is apparent on face of record).

Be that as it may, the pith of Appellant's complaint is really that Dr. Maulion was unpersuasive--that he failed to produce the intended effect of persuading the jury to recommend life. After all, as noted, defense counsel's complaints at the final sentencing hearing were that Dr. Maulion 'was really not a forceful witness for the defense . . . ." (T 2419). However, as the trial court noted, defense counsel was happy with Dr. Maulion's work up until Dr. Maulion actually testified. He even stated as much at a pretrial hearing. (T 427). In fact, at no time prior to trial did

counsel complain that Dr. Maulion was not performing his function as an expert witness. Moreover, he ultimately made the decision to present Dr. Maulion's testimony--even though he knew that his testimony would conflict with that of Dr. Bukstel! And once the State impeached Dr. Maulion and argued the conflicts between the two doctors' opinions, defense counsel had **seven days** before the end of the trial to complain to the trial court. Or he could have **raised** the issue **five and a half months** later at the allocution hearing. Instead, he waited **eight months,** until the final sentencing hearing, to present his complaint. Even then, his complaints were not that the doctor did not perform **a** competent evaluation. Rather, they were that Dr. Maulion **was** not **a** persuasive witness. (T 2419-22).

Only now, on appeal, with a different attorney than that at trial, does Appellant claim that Dr. Maulion performed an incompetent evaluation (or almost appeared incompetent). However, there is a vast difference between a witness' competence and his or her effectiveness or persuasiveness. Simply because the State was able to impeach Dr. Maulion's testimony does not mean that he performed **an** incompetent evaluation. As defense counsel explained to the jury, Dr. Maulion **was** appointed for **a** very limited purpose--to evaluate all of the other experts' test results and analyses, and relate those to the jury in medical terms. Appellant **had a**

neuropsychologist, a neurologist, and a psychologist appointed to perform the psychological and neurological testing. According to defense counsel when he requested the appointment of a psychiatrist, all the doctor was supposed to do was to relate the findings to the jury. Thus, the fact that Dr. Maulion only spent an hour with Appellant and/or could not even identify him in the courtroom is of minor importance. He was not appointed to evaluate Appellant personally. He was appointed to interpret test results and explain them to the jury.

In sum, Appellant was appointed a psychiatrist of his choice, but was properly denied unlimited funds for the evaluation. Although two of defense counsel's chosen psychiatrists refused to work under the county's fee schedule, his ultimate choice, Dr. Maulion, agreed to do so, and defense counsel gave every indication pretrial that he was satisfied with Dr. Maulion's work. Post-trial, defense counsel merely complained that Dr. Maulion was unpersuasive. To the extent he now claims on appeal that Dr. Maulion, in fact, performed an incompetent evaluation, such an allegation cannot be resolved on this record, and is more appropriately raised in a motion for postconviction relief. Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE **"EXTREME DURESS OR SUBSTANTIAL DOMINATION"** MITIGATING FACTOR (Restated).

In this appeal, Appellant claims that he presented evidence to support an instruction on the 'extreme duress or substantial domination" mitigating circumstance, and that the trial court abused its discretion in failing to give it. **Brief of Appellant** at **49-50.** "Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented." Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989) (citing **Fla. Stand. Jury Instr. in Crim. Cases 78** (1981)). See also Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991) (same), cert. denied, 112 S. CT. 1596, 118 L. ED. 2D 311 (1992). "The trial court has discretion not to instruct on factors clearly unsupported by any evidence . . . ." Johnson v. Sinaletary, 612 So. 2d 575, 577 n.2 (Fla. 1993).

At the charge conference, defense counsel argued that the following testimony by Dr. Maulion required an instruction on the 'extreme duress" mitigating circumstance:

> He was under extreme duress. It would have been extreme duress for a normal person to be in a situation in which you're in a way caught inside somebody else's house with a gun in your hand, and that somebody is trying to grab the gun from your hand. Which, of

> course, could turn into your death too. Because if that gun could have been pulled out of his hands, I'm not sure if the victim wouldn't have used it, okay.

(T 1785, 2256-61). In response to defense counsel's argument, the trial court ruled that the terms 'extreme duress" and "substantial domination" have to be read together, and that the "extreme duress/substantial domination" must come from a person other than the victim. (T 2261-63).

The trial court's interpretation of this mitigating factor was correct. In Toole v. State, 479 So. 2d 731, 734 (Fla. 1985), this Court held that "[d]uress is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats." In Toole, wherein the defendant argued with the victim and then burned down the boarding house in which the victim resided, this Court affirmed the rejection of this mitigating factor, where "[t]here was no evidence that appellant acted under external provocation." Id. See also Barwick v. State, 660 So. 2d 685, 690 n.9,10 (Fla. 1995) (affirming rejection of 'extreme duress" mitigator where defendant, alone, broke into apartment to commit theft and killed resident who "resisted" him); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994) (affirming trial court's refusal to instruct on 'extreme duress" mitigator where defendant, alone, broke into trailer to commit

theft and killed residents surprised by his intrusion). To require an instruction on this mitigator where the defendant breaks into a residence and surprises an occupant who attempts to defend himself and others against harm would produce an absurd application of this factor. Cf. Wuornos v. State, 676 So. 2d 972, 975 (Fla. 1996) (finding defendant's claim absurd that victim contributed to acts leading to his death by procuring prostitute and thereby assuming risk of bodily harm; "The statute does not encompass situations in which the killer surprises the victim with deadly force."). Given the lack of evidence showing that Appellant was being provoked by someone other than the victim, the trial court properly refused to instruct the jury on this mitigating factor.

Even if the trial court should have instructed the jury on this mitigating factor, however, Appellant's sentence should nevertheless be affirmed. Weighed against two aggravating factors ("prior violent felony" and "felony murder/pecuniary gain"), this mitigating factor would not have, within a reasonable probability affected the jury's recommendation or the trial court's ultimate sentence, even when coupled with the other mitigating circumstances. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955 (1992). Therefore,

this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE III

WHETHER THE TRIAL COURT GAVE UNDUE WEIGHT TO THE JURY'S RECOMMENDATION AND WHETHER IT IMPROPERLY CONSIDERED APPELLANT'S PREVIOUS DEATH RECOMMENDATION (Restated).

The trial court began its written sentencing order with the following procedural history:

> The defendant **was** tried in June, 1982 for the offenses of Murder in the First Degree and Armed Burglary. The jury found the defendant guilty of both and at the penalty phase, the jury returned an eight to four recommendation that **the defendant be sentenced to death in the electric chair.** The judgment and sentence was affirmed by the Florida Supreme Court but, at the federal level, the District Court for the Southern District of Florida granted a Writ of Habeas Corpus. The District Court **was** affirmed by the Eleventh Circuit Court of Appeal and the case was remanded to the trial court for a new sentencing hearing.
>
> This court empaneled a new jury and conducted a sentencing hearing from April 18, 1994 to May 5, 1994. This new jury returned a recommendation of death in the electric chair by **a** vote of ten to two,
>
> This **court** afterwards, requested memoranda from both, counsel for the state and counsel for the defendant, and the memoranda were received in September, 1994. This court then held a further sentencing hearing, also known as a Spencer hearing, on November 4, 1994, in order for both sides to make further

> legal argument. On that date, both counsel stated that they had no other arguments for the court to consider, The court set final sentencing for this date January 6, 1995.
>
> This court, having reviewed the transcripts of the guilt phase of the original trial, having heard the evidence presented in the new penalty phase and having had the benefit of legal memoranda and the argument of both parties, finds as follows:

(R 3515-16). Following its discussion of aggravating and mitigating factors, the trial court concluded:

> This court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. This court finds, as did the jury, that the aggravating circumstances in this case outweigh the mitigating circumstances present.

(R 3521).

In this appeal, Appellant claims that his sentence is unconstitutional because the trial court relied on the original jury's death recommendation and "gave virtual complete deference to the [resentencing] jury's death recommendation." Brief of **Appellant** at 51-52. It is obvious from reading the sentencing order that the trial court referred to the original jury's recommendation only as a fact in Appellant's procedural history. Given its specific enumeration of everything that it relied upon in determining the sentence, there is no reason to believe that it

relied upon this procedural fact in determining Appellant's sentence. Cf. Parker v. State, 641 So. 2d 369, 377 (Fla. 1994) (finding that trial court's mention in narrative of facts of sentencing order that defendant left victim to **bleed to death in** street was merely a fact and not a nonstatutory aggravator). Further, it is readily apparent that the trial court understood its duty to independently weigh the aggravating and mitigating factors. Its concluding paragraph amply illustrates its understanding. Appellant has made no showing to the contrary. Cf. Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986) ("There is nothing in the court's order or elsewhere in the record to suggest that the trial court imposed the death penalty because it felt compelled to do so by the jury's recommendation."). Thus, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE IV

WHETHER THE TRIAL COURT GAVE SUFFICIENT WEIGHT TO APPELLANT'S IMPOVERISHED BACKGROUND AS A NONSTATUTORY MITIGATING CIRCUMSTANCE (Restated).

In its written sentencing order, the trial court made the following findings regarding Appellant's mitigation of impoverished background:

> 4. **Impoverished background.** This factor has been proven, however, **all** of Mr. Blanco's family come from the same background and there is no evidence that they followed a course of criminal conduct as Mr. Blanco did. This factor is therefore given little weight.

(R 3519). In this appeal, Appellant claims that the trial court's analysis was 'legally flawed" because of its consideration of Appellant's family's criminal history. **Brief of Appellant** at 53-**55).** In effect, Appellant is challenging the weight accorded this factor, given that it was, in fact, found to exist.

As this Court stated in Campbell v. State, **571** So. 2d 415, 419 (Fla. 1990) (emphasis added), "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." If mitigation is found, "[t]he relative weight given each mitigating factor is within the judgment of the

sentencing court." Windom v. State, 656 So. 2d 432, 440 (Fla. 1995). See also Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993) ("It is the assignment of weight that falls within the trial court's discretion in such cases."); Campbell, 571 So. 2d at 420 ("[T]he relative weight given each mitigating factor is within the province of the sentencing court."); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995) ('Once the factors are established, assigning their weight relative to one another is a question entirely within the discretion of the finder of fact . . . ."). "Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991). Moreover, "[i]t is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances." Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989).

In considering whether Appellant's impoverished background was of a mitigating nature and, if so, how much weight it deserved, the trial court merely noted the lack of evidence that Appellant's siblings were similarly affected by their background. While Appellant may have a differing opinion of the weight of his impoverished background, the trial court's assessment was proper. Cf. Barwick v. State, 660 So. 2d 685, 695-96 (Fla. 1995) (affirming rejection of childhood abuse based, in part, on fact that "siblings were likewise abused and they apparently grew up to be responsible

persons"); Consalvo v. State, 21 Fla. L. Weekly S423, 427 (Fla. Oct. 3, 1996) (finding no abuse of discretion in trial court's decision to accord childhood trauma very little weight based on its assessment of effect of trauma and motives for murder).

Even if the trial court should not have considered the fate of Appellant's siblings in weighing this factor, there is no reasonable probability that his sentence would have been different. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955 (1992). Consequently, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE V

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATE TO OTHER CASES UNDER SIMILAR FACTS (Restated).

Regarding the murder of John Ryan, the trial court found the existence of two aggravating factors: 'prior violent felony" and "felony murder/pecuniary gain." Although it also found the existence of one statutory mental mitigator, to which it gave "considerable weight," as well as several nonstatutory mitigating factors, to which it gave "minimal weight," it ultimately determined that "the aggravating circumstances in this case outweigh the mitigating circumstances present." (R 3521). As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990).

Here, the evidence established that Appellant entered the home of John Ryan and his niece, Thalia Vesos, with a handgun. He cut the phone cord in the kitchen and approached Vesos in her bedroom. Putting the gun to his lips, he motioned for Vesos to be quiet, and then cut the phone cord in her bedroom. When he went out into the hallway, she got out of bed, so he told her to get back in. At

that point, John Ryan approached Appellant and asked him what he was doing. Ryan tried to knock the gun out of Appellant's hand, and Appellant shot him several times. Ryan then lay down on top of Vesos, shielding her, and Appellant shot Ryan several more times before fleeing the house. (T 1288-91, 1341).

To mitigate this senseless murder, Appellant presented evidence to establish (1) that his ability to conform his conduct to the requirements of law was substantially impaired--which the trial court gave "considerable weight"; (2) that Appellant had a potential for rehabilitation--which the court gave "little weight"; (3) that Appellant is a father--which the court gave "little weight"; (4) that Appellant has dull intelligence--which the court gave "greater weight . . . than given to the two factors above"; (5) that Appellant had an impoverished background--which the court gave "little weight"; (6) that Appellant had organic brain damage--which the court gave "little weight" since it was part of the basis for that statutory mental mitigator found; (7) that Appellant maintained his innocence--which the court gave "little weight"; (8) that Appellant was oppressed in Cuba--which the court gave "little weight"; (9) that Appellant possessed good character traits--which the court gave "little weight"; (10) that Appellant had strong religious beliefs--which the court gave "little weight"; (11) that Appellant cooperated with the police--which the court gave 'little

weight"; and (12) that Appellant has a loving relationship with his family--which the court gave 'little weight." (R 3517-21).

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991), cert. denied, 116 L. ED. 2D 102 (1992); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

The two aggravating factors found in this case, which Appellant does not challenge, are supported by competent, substantial evidence and, according to the trial court, fax outweigh the mitigating evidence presented. As a result, the trial court conscientiously concluded that death was warranted. Contrary to Appellant's assertion, his sentence is not disproportionate to other defendants' sentences for similar murders.

Those cases to the contrary cited by Appellant are easily distinguishable. For example, in Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), this Court found that 'the circumstances surrounding the actual shooting are unclear." Here, on the other hand, the facts surrounding the shooting a very clear given Thalia Vesos' eyewitness testimony. Further, this Court in Terry discounted the weight of the "prior violent felony" aggravator because it was based on offenses contemporaneous to the murder, one of which was an aggravated assault committed by the codefendant with an inoperable gun. Id. at 965-66. Appellant's prior violent felony conviction, on the other hand, is not based on a contemporaneous act. Rather, Appellant had previously committed an armed burglary and armed robbery in 1981, which under Terry's rationale should be of great weight. Cf. Ferrell v. State, 21 Fla. L. Weekly S166, 166 (Fla. April 11, 1996) (finding sentence proportionate based on single aggravator of "prior violent felony" despite existence of "a number of mitigating circumstances"); Henderson v. Sinsletarv, 617 So. 2d 313, 315 (Fla. 1993) (finding "prior violent felony" constituted "weighty aggravating factor"); Parker v. Dusser, 537 So. 2d 969, 972 (Fla. 1988) (same).

In Appellant's next cited case, Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993), this Court found that "[t]he evidence in its worst light suggests nothing more than a spontaneous fight,

occurring for no discernible reason, between a disturbed alcoholic and a man who **was** legally drunk." Such was hardly the case here.

Finally, in Farinas v. State, 569 So. 2d 425 (Fla. 1990), also cited by Appellant, this Court struck the CCP aggravator, but found the HAC and 'felony murder" aggravators valid. However, it found that Farinas murdered his estranged girlfriend, who was also the mother of his child, while under the influence of an extreme mental or emotional disturbance. Id. **at 431.** It found "significant" the fact that "the murder was the result of a heated, domestic confrontation." Id. Thus, it vacated Farinas' sentence. Again, Appellant's case is not even remotely factually similar, nor does it contain the degree of mental mitigation present in Farinas.

Rather, Appellant's case is more proportionate to Consalvo v. State, 21 Fla. L. Weekly S423, 428 (Fla. Oct. 3, 1996), Finney v. State, 660 So. 2d 674 (Fla. 1995), and Watts v. State, 593 So. 2d 198 (Fla. 1992). In Consalvo, the defendant burglarized **a** neighbor's apartment and stabbed her to death when she reached for the phone to call the police. In aggravation, the trial court found that the murder was committed during the commission of a burglary and to avoid arrest. In mitigation, it gave "very little weight" to the defendant's employment history and abusive childhood. This Court found Consalvo's death sentence proportionately warranted.

In Finney, the defendant burglarized a woman's apartment, stabbed her to death, then stole her VCR. In aggravation, the trial court found that the defendant had been convicted of a prior violent felony, that the murder was committed for pecuniary gain, and that the murder was especially heinous, atrocious, or cruel. In mitigation, it found that the defendant had contributed to the community, had positive personality traits, would adjust well to prison and had a potential for rehabilitation, had a deprived childhood, and loved his daughter. This Court found Finney's death sentence proportionately warranted.

Finally, in Watts, the defendant forced his way into a couple's home and demanded money. When he began to sexually assault the wife, the husband intervened, and they struggled. The defendant shot the husband and fled. In aggravation, the trial court found that the defendant had previously been convicted of a prior violent felony, that he committed the murder during the course of a sexual battery, and that he committed the murder for pecuniary gain. In mitigation, it found that the defendant had a low I.Q., and that he was 22 years old at the time of the crime. This court found Watts' death sentence proportionately warranted.

As in Consalvo, Finney, and Watts, Appellant's death sentence is proportionate to those of other defendants in similar cases.

Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE VI

WHETHER THE "FELONY MURDER" AGGRAVATING FACTOR IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED (Restated).

In this appeal, Appellant claims that the "felony murder" aggravating factor is unconstitutional because "every person convicted of felony-murder automatically qualifies for the aggravator." **Brief of Appellant at 61-63.** Although Appellant "recognizes that this court has rejected this argument," he seeks reconsideration of it. Id. at 63 n.13. However, Appellant has presented nothing in his five-paragraph argument which would warrant receding from this Court's long line of cases. E.g., Bunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995); Johnson v. State, 660 So. 2d 648 (Fla. 1995); cf. Whitton v. State, 649 So. 2d 861, 867 n.9 (Fla. 1994) (finding no valid reason to overrule precedents regarding "heinous, atrocious, or cruel" aggravating factor instruction), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

ISSUE VII

WHETHER DEATH BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT (Restated).

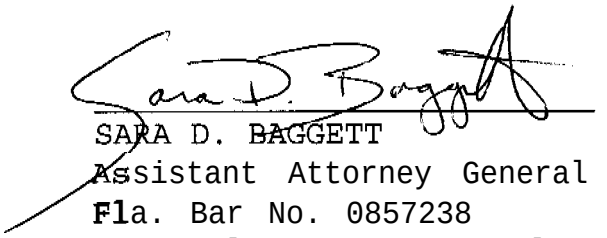
Although Appellant "recognizes this court's prior opinions to the contrary," he nevertheless argues that Florida's method of execution constitutes cruel and unusual punishment. Brief of **Appellant at 64-65.** However, Appellant has presented nothing in his three-paragraph argument which would warrant receding from this Court's long line of cases. E.g., Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990); Fotosoulos v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992); cf. Whitton v. State, 649 So. 2d 861, 867 n.9 (Fla. 1994) (finding no valid reason to overrule precedents regarding 'heinous, atrocious, or cruel" aggravating factor instruction), cert. denied, 116 S. Ct. 106, 133 L. Ed. 2d 59 (1995). Therefore, this Court should affirm Appellant's sentence of death for the first-degree murder of John Ryan.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's sentence of death.

Respectfully submitted,

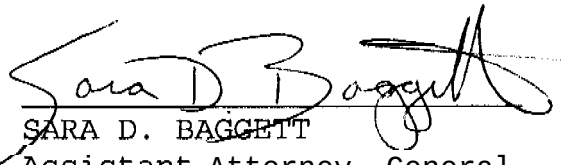
ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Patrick C. Rastatter, Esquire, Glass & Rastatter, P.A., 524 So. Andrews Avenue, Suite 301N, Fort Lauderdale, Florida 33301, this 11th day of December, 1996.



SARA D. BAGGETT
Assistant Attorney General