

IN THE SUPREME COURT OF FLORIDA

OMAR BLANCO,

CASE NO. 85,118

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The parties are referred to **as** they stood in the trial court, the defendant, Omar Blanco, and the prosecution, State of Florida. References to the Record on Appeal are marked by the symbol "R" followed by the appropriate page number. An appendix is attached which contains five exhibits.

Your undersigned attorney appears **as** a specially appointed appellate public defender as a result of this court's order allowing the withdrawal of the Office of the Public Defender and instructing the trial court to appoint private counsel.



## STATEMENT OF THE CASE

Omar Blanco was convicted of firstdegree murder and sentenced to death and both judgment and sentence were affirmed by this Court. *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) A subsequent appeal to **this** court from a denial by the trial court of Omar Blanco's petition for post conviction relief under Florida Rule of Criminal Procedure 3.850 was likewise rejected as was Omar Blanco's accompanying petition for a writ of habeas corpus. *Blanco v. Wainwright* and *Blanco v. State*, 507 So.2d 1377 (Fla. 1987).

Thereafter Omar Blanco filed a petition for a writ of habeas corpus in the Federal District Court. *Blanco v. Dugger*, 691 F.Supp. 308 (S.D. Fla. 1988) An appeal from the district court ultimately resulted in Omar Blanco receiving sentencing relief from the Eleventh Circuit Court of Appeals on the ground of ineffectiveness of counsel at defendant's penalty phase proceeding. *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) Mr. Blanco's conviction **was** left undisturbed in both the federal district and circuit courts. *Blanco v. Dugger* and *Blanco v. Singletary, supra*.

Omar Blanco's second penalty phase proceeding commenced on April 18, 1994. (R 3384-3390; 3411-3413) The jury's recommendation was 10 to 2 for the death penalty. (R 3410)

On January 6, 1995, the trial court, for the second time, sentenced Omar Blanco to death . (R 2425-2433) The trial judge filed his sentencing order the same day. (R 3515-3522) (Ex.1, Appendix)

Timely notice of appeal followed. (R 3524) **This** brief is **filed** in **support** thereof.

## STATEMENT OF THE FACTS

### Pre-penalty Phase Proceedings:

In preparation for trial, defense counsel approached the trial judge regarding the assistance of an expert witness in the area of psychiatry. (R 49) Defense counsel advised the court that he wished to retain a competent local psychiatrist who spoke Spanish inasmuch as Omar Blanco spoke no English. (R 3-11, 49) The trial judge requested the name of such an expert witness but indicated that he "did not want someone who is pro-defense". (R 50) Counsel's search for such a Spanish speaking psychiatrist was without immediate success. (R 54)

In a subsequent hearing defense counsel advised the trial judge that he had located and spoken with Dr. Dorita Marina, a Spanish speaking psychologist from Hialeah, Florida, who had examined Omar Blanco some five years earlier in connection with defendant's post conviction relief proceedings. (R 61-62) Dr. Marina indicated to defense counsel that she had previously evaluated Mr. Blanco and analyzed the results of psychological tests administered to him. (R 62) As a result of counsel's representations and request, the trial judge ordered the appointment of Dr. Marina to assist the defense. (R 66; 2566) One of Dr. Marina's statements to defense counsel was her belief that Omar Blanco suffered from organic brain damage. (R 61-67)

At the same court proceeding the State adamantly opposed defendant's motion to perpetuate the testimony of various defense witnesses residing in Cuba by arguing they

could just **as** easily travel to the United States to testify. (R 71-75) Thereafter, defense counsel travelled to Cuba using the **guise** of a tourist visa because the Cuban government would not allow any entry **by** persons seeking to make inquiry for use in a United State's court proceeding. (R 121-126; 130-135; 149-153; 163) Travel to Cuba by representatives of the State Attorney's Office was denied by that government. Defense counsel's travel to Cuba was the only alternative available **as** the Cuban government refused to allow Omar Blanco's elderly parents to leave the country together for fear they would not return. (R 130-133)

In his trip to Cuba, defense counsel took possession of certain childhood hospital records for Omar Blanco. (R 168) Also obtained were two taped statements of defendant's family members that had to be taken in Spanish because the county provided interpreter who accompanied defense counsel to Cuba was arrested by Cuban authorities upon arrival on the island. (R 168; 598)

After returning from Cuba with the above mentioned documents, defense counsel provided them to Dr. Marina who, after reviewing them, advised counsel that a psychiatrist was essential in explaining various areas of Omar Blanco's mental health **as** she did not have the necessary medical background to do so. (R 198-199) Because the psychiatrist who assisted Dr. Marina in 1988 was not able to be found, defense counsel requested the appointment of Spanish speaking Dr. Ricardo Castillo, a Dade County psychiatrist, who had been suggested by Dr. Marina. (R 198, 212) After much wrangling, the trial court authorized Dr. Castillo to work on Omar Blanco's case for only ten hours. (R 208-217) The trial judge "wanted to save the taxpayers as much money" as he could. (R 217)

Subsequently, defense counsel **came** back to the trial court to report that Dr. Castillo refused to work in **Broward** County at the rates prescribed. (R 224-226; 2717-2718) In the interim time, however, defense counsel had contacted a second Spanish speaking psychiatrist practicing in Tampa who had the necessary credentials for the task at hand. (R 224) This psychiatrist, Dr. Antonio Gonzales, was at the time working with another Cuban born Spanish speaking defendant being represented by the Office of the Public Defender and he **was** willing to travel and work in Broward County on a daily rate basis. (R 224-225)

Because neither the court nor the county wanted to pay Dr. Gonzales' required professional fee, defense counsel was sent out to look for yet another Spanish speaking psychiatrist. (R 229-233) The trial court directed counsel to contact Dr. Joseph Lapeyra a Spanish speaking psychiatrist, who was employed **by** Broward County's Prison Health Services. (R 230-231) It was a concern of the trial judge that because he was so "frugal" when it came to spending taxpayer's money, that maybe he shouldn't preside over "these type of cases". (R 229)

The following day, defense counsel reported back to the court that he was unable to contact Dr. Lapeyra, the psychiatrist suggested by the trial judge. (R 242-243) Again, the next day, counsel reported back to the court **his** continued inability to contact Dr. Lapeyra. (R 249-250) **As** a result, the trial judge somehow later that day communicated the name of a psychiatrist, Dr. Richard Maulion, to defense counsel. This is evidenced by the colloquy between court and counsel the following day wherein defense counsel stated that he had spoken with Dr. Maulion, the psychiatrist given to him by the trial judge.

(R 258) Counsel further advised the court that **he** had given certain documents to Dr. Maulion and was waiting to hear back from him as to whether he **would** get involved with the case at the rates which the county was willing to pay. (R 258-261)

Six days later the issue of the defense retention of a psychiatrist was again broached. (R 269-270) Counsel indicated Dr. Maulion's willingness to work at the prescribed rates. (R 270-271) When asked if defense counsel was satisfied with Dr. Maulion, defense counsel stated that from all outward appearances (except for forensic experience), the psychiatrist appeared to have the tools to accomplish the task. (R 260;271) Dr. Maulion appeared to counsel to be qualified and was Spanish speaking. (R 271) The trial judge was happy to utilize Dr. Maulion because he would be less expensive than the psychiatrist from Tampa that counsel wished to employ. (R2750)

Accordingly, pursuant to appointment by the trial court, Dr. Maulion commenced assisting the defense in preparation of Omar Blanco's penalty phase proceeding. (R 2805)

#### Penalty Phase Proceedings:

Thalia Vesos was the victim's niece and an eyewitness to the shooting death of her uncle, John Ryan. (R 1282-1284) On the night of January 14, 1982, **Ms.** Vesos was in **her** bedroom reading when Omar Blanco appeared in her bedroom door holding a gun. (R 1287-1288) The defendant motioned her to be quiet and then cut her telephone line. (R 1289) **Ms.** Vesos was instructed to remain in bed as Omar Blanco spoke in broken English. (R 1290) When John Ryan suddenly appeared in the hallway outside Ms. Vesos'

bedroom he attempted to knock the firearm from defendant's hand which caused Omar Blanco to shoot John Ryan even as the victim fell on top of the teenage girl. (R 1290-1291)

**Ms. Vesos** identified a brown purse carried by Omar Blanco and her watch which had last been placed on a table in the dining area of the house. (R 1285-1286; 1292) Also identified was a pair of socks worn **by** the intruder. (R 1289;1293)

It appeared to Ms. Vesos that her uncle surprised Omar Blanco and the gunshots only commenced after Mr. Ryan attempted to slap the gun from Blanco's hand. (R 1301) The shooting happened instantaneously. (R 1322)

Thalia Vesos spoke at length about the case with State Attorney Michael Satz and his investigator Walter LaGraves. (R 1309) This was in an effort on the prosecutor's part to assist the witness in her testimony. (R 1309)

John Matheson was a City of Fort Lauderdale Police Department crime scene technician dispatched to process the house of Thalia Vesos following the shooting of John Ryan. (R 1323-1325) Photographs of the scene were shot and physical evidence was collected, including shell casings and projectiles. (R 1326-1329) **Also** taken into evidence **was** a men's leather purse which contained a wallet, keys, driver's license, social security card, food stamp and miscellaneous personal papers. (R 1338) The purse also contained Ms. Veso's watch. (R 1340) Technician Matheson later came into contact with Omar Blanco at the police department where the defendant's hands were swabbed with an absorption kit to determine the presence of gun shot residue. (R 1344-1348)

Curtis Price, a City of Fort Lauderdale Police Officer received a BOLO on his radio

and shortly thereafter he observed Omar Blanco peddling past him on a woman's bicycle. (R 1366-1368) Officer Price, **based** on this information, took defendant into custody and returned him to the scene of the shooting. (R 1369) Mr. Blanco had no identification or money on him and was found **less** than one and one-half miles from **Ms. Vesos' house**. (R 1369-1370) Omar Blanco had no firearm in his possession. (R 1369-1370) The defendant, who spoke no English, did not resist arrest or attempt to flee from the officer. (R 1372-1373)

Keen Garvin, a forensic pathologist, performed the autopsy on John Ryan, the named victim in the Indictment. (R 1389-1395; 2438-2439) Dr. Garvin indicated that the decedent was shot seven times which was the cause of death. (R 1402-1403) Eight photographs depicting those wounds were introduced over defense objection. (R 1396-1402) The gunshots started at the victim's chin and went down *to his* abdomen. (R 1403-1420) Death would have occurred within five minutes with **loss** of consciousness within two minutes. (R 1421-1422)

The decedent's bloody shirt was identified by Dr. Garvin and later used **as** an **aid** during ballistics testimony. (R 1422; 1447-1451) The order of the gunshots and their exact distance was unknown. (R 1427-1430) Also unknown was the exact location of the shooter and decedent at the time of the shooting. (R 1430-1432)

Firearm's expert Dennis grey testified that seven firearm casings were fired from the same auto loading pistol. (R 1438-1445) Five recovered projectiles were fired by the same .380 caliber handgun. (R 1445-1446) Gunpowder residue on the decedent's shirt indicated that the firearm was approximately thirty-six inches from the body when



1 discharged. (R1447-1451).

1 William Kinard, a forensic chemist with the United States Bureau of Alcohol, Tobacco and Firearms, testified that he used his atomic absorption spectrophotometer to detect the presence of gunpowder on swabs taken of Omar Blanco's hands. (R 1459-1475) The presence of this gunshot residue was consistent with a weapon being fired and held with both hands. (R 1475-1476) Conversely, gunshot residue is easily transferable. (R 1476-1481)

Finally, a certified copy of a 1981 judgment and conviction of Omar Blanco for armed robbery was entered into evidence as a stipulated court record. (R 1282) This concluded the state's case during the penalty phase. (R 1486) In total, the state's presentation consisted of forty-two physical exhibits through the testimony of six witnesses, all of which went directly to the actual commission of the crime and the guilt of Omar Blanco. (R 3384-3389)

On the defense side of the penalty phase proceeding, the initial witness was Alicia Oliva, a cousin of Omar Blanco who grew up with him in Cuba. (R 1562-1564) Ms. Oliva, a psychologist by training, lived in Havana while Omar Blanco lived in the rural province of Matanzas. (R 1564-1565) Omar Blanco resided on a farm which had neither plumbing nor electricity. The defendant's parents, Zenaida Alvarez and Horacio Blanco, had told their niece of the complications surrounding Omar Blanco's birth wherein he experienced a lack of oxygen. (R 1565-1566) As a child, Omar Blanco, suffered seizures where he would fall to the floor, swallow his tongue and gasp for air. (R 1566)

In adolescence, Omar Blanco continued to exhibit convulsions and abnormalities

that caused his parents to take him for treatment at the Psychiatric Hospital in Havana, known as Hospital Mazzorra. (R 1566-1567; 1579-1580) Omar Blanco made periodic visits to the psychiatric hospital where he was given medication. (R 1567-1568) Alicia Oliva was familiar with the various trips made by the Blancos from their rural home for the defendant's psychiatric care because the family would come to her house in Havana. (R 1567)

Since Alicia Oliva was approximately the same age as Omar Blanco she was familiar with both his childhood and early adult life. (R 1565, 1568, 1572) At age sixteen, the defendant was required to enter the military which caused him great emotional difficulty at being separated from his parents. (R 1568-1569) At times when home on pass, Omar Blanco would stay an extra day for which he would be punished upon his return. (R 1569)

**Ms.** Oliva described Omar Blanco as a studious individual who practiced the Jehovah's Witness religion, a religion not permitted in Cuba because of its member's refusal to swear to the Cuban flag or sing the Cuban National Anthem. (R 1569-1570) Because he was viewed as a political dissident, the Blancos' home was searched, the family threatened and their Bible destroyed. (R 1570) Omar Blanco's religious beliefs, including his refusal to **possess** a weapon, caused him to be viewed as a rebel within the military which in turn caused him to be persecuted. (R 1571) Mr. Blanco was denied military leave to visit his family and was, on occasion, sent to the sugarcane fields in Camaquay Province, for a six month stint cutting sugarcane. (R 1571-1572)

Despite his psychological problems, Omar Blanco was very close with his family throughout his life. (R 1572) Since he was a child, Omar Blanco worked on his parent's

small farm, plowing fields with the use of a bull and assisting in the subsequent planting.

(R 1572-1573)

While visiting Omar Blanco in jail, he complained to his cousin about continued headaches and exhibited abnormal color. (R 1573) Psychiatric problems were prevalent in defendant's family, having been suffered by Omar Blanco's mother, grandmother and aunt. (R 1573-1574)

Alicia Oliva further described Omar Blanco as a person with human worth and value, a person who was kind to his family and neighbors, and a person who worried about the health of his grandparents. (R 1574) Omar Blanco was well liked and always associated with persons of adequate conduct. (R 1574) The defendant always conducted himself appropriately. (R 1574)

Omar Blanco left Cuba when he was thirty years of age. (R 1572) He did so for the reason all Cubans want to leave Cuba - to find freedom. (R 1575) He left behind a son to which he was a good and loving father. (R 1503-1504) Since coming to the United States, he married Santa Cosme. (R 1578-1579)

Omar Blanco was further described as an individual of normal intelligence, a good baseball player, and a writer of decent poetry. (R 1581-1582) Nevertheless, he still exhibited symptoms of psychiatric problems. (R 1583)

Gonsalvo Rodriguez-Blanco, also a cousin, was born in Arabos, Matanzas, Cuba, the same place as Omar Blanco. (R 1586-1589) Although Mr. Rodriguez-Blanco later moved to Havana, approximately 250 kilometers away, he visited Omar Blanco and the remaining family several times each year. (R 1590) Gonsalvo Rodriguez-Blanco

confirmed that Omar Blanco suffered psychiatric problems as a child and he **was** treated at the psychiatric hospital located only a few blocks from his Havana house. (R 1589-1590) The witness **also** told of Omar Blanco's difficulty in the Cuban military which was the result of his practice of a religion not on the government's registration of approved religions. (R 1590-1591) **As** a result of the defendant's religious beliefs, his home was raided, his religious gatherings broken up, and his Bible destroyed. (R 1590-1591) **As** a child, Omar Blanco labored on the family farm and later in town at a dairy. (R 1592)

Omar Blanco's parents continue to reside on their small family farm in **Los Arabos** where they were visited by Gonsalvo Rodriguez-Blanco and defense counsel in March 1993 for the purpose of obtaining their tape recorded statements. (R 1592-1593) The trip from Havana to the Blanco farm in Mr. Rodriguez-Blanco's automobile took approximately six hours each way. (R 1593-1594) Because defense counsel **had** to leave Cuba the following day, time was limited in his effort to collect information in connection with the circumstances of Omar Blanco's childhood. (R 1593-1595)

The house where Omar Blanco grew up was a wooden structure without plumbing or electricity. (R 1595) It was later disassembled and physically moved so that defendant's parents could avail themselves of water and electricity. (R 1596)

Omar Blanco was a well liked boy who encountered difficulties with the authorities only because of his religious beliefs. (R 1597) The defendant **was** described as a family oriented person who was extremely kind. (R 1597) His marriage in Cuba resulted in a son. (R 1598)

In the military, Omar Blanco studied nursing. (R 1599-1600) He was a decent

baseball player. (R 1600-1601)

Caridade Padron was born and raised in the same region in Cuba as was Omar Blanco. (R 1601-1602) Their respective families were close and each father made his living planting sugarcane. (R 1602-1603)

As a child, Omar Blanco suffered from seizures which **Ms.** Padron had occasion to observe when visiting the Blanco home. (R 1603) These seizures **could last** for hours. (R 1603) Caridad Padron was herself a practicing Jehovah's Witness who was imprisoned for three months by Cuban authorities for doing so. (R 1603-1604) Omar Blanco was part of her religious study group and he too was taken as a prisoner for his illicit religious beliefs. (R 1604-1605)

**Ms.** Padron described Omar Blanco as a helpful family member who not only worked but was a good boy. (R 1605) The defendant was of normal intelligence but did suffer from epileptic seizures. (R 1608) These convulsions included classic signs of an epileptic seizure - rigidity in the extremities and the rolling back of the eyes. (R 1608-1610) The witness knew of Omar Blanco's military service and nursing study. (R 1608)

Marta Benejas also grew up in the Matanzas, **Los Arabos** region of Cuba where she knew Omar Blanco since they were children. (R 1610-1611) Her family, like the Blanco's, worked the ground for a living. (R 1611-1612) During their childhood she had occasion to observe Omar Blanco suffer seizures where he would spit through his mouth and fall to the floor. (R 1612)

**Ms.** Benejas spoke of her friendship with the defendant and how she cared for him like a brother. (R 1615) Growing up, Omar Blanco was a friendly person who studied the

Bible and who, at one point, was taken into custody by the authorities because of his religious beliefs. (R 1615)

Jeraldo Luis Herrera had known Omar Blanco since the ~~two~~ were little **boys** growing up in **Los Arabos**. (R 1619-1621) Both of their fathers worked on the farm. (R 1621) Mr. Herrera witnessed Omar Blanco **suffer** convulsions where he would fall to the floor and look **as** if he **was** going to die. (R 1621) Omar Blanco **was** taken to a local clinic near **Los Arabos** many times **as** well as the hospital in Havana. (R 1621)

Because of Omar Blanco's study of the Jehovah's Witness religion he was taken into custody by legal authorities. (R 1622) The lack of freedom in **Cuba** allowed arbitrary action by the police regarding arrest and detention. (R 1622-1623)

Mr. Herrera described Omar Blanco as an excellent person who worked on the farm. (R 1623) The defendant would share what he had with the other boys and showed no propensity for criminal acts. (R 1623)

Fidel Falcon, a Pastor of the Church of the Seven Day Adventist in Fort Lauderdale was born in Cuba and, at a parishioners's request, started counselling Omar Blanco in the Broward County jail on a monthly basis. (R 1653-1655) Pastor Falcon conducted approximately 20 Bible Study courses with Omar Blanco who, in the pastor's opinion, knew a lot about the Bible. (R 1655) The Pastor testified that Mr. Blanco appeared to be a person that had always practiced religion and that **the** defendant had faith in Jesus. (R 1655-1666) Further, Pastor Falcon confirmed that the practice of religion in Cuba is not easy. (R 1656) Those who attempt to **do** so are persecuted. (R 1656)

Fidel Falcon described Omar Blanco as a person of normal intelligence whom the

minister would like to continue to visit. (R 1658) The Pastor testified that Omar Blanco felt Christianity in his heart. (R 1656)

Rosa Chavianno-Pinnellos grew up in the same area in Cuba where Omar Blanco was born and their families lived close to each other. (R 1662) The defendant grew up with her children, including daughters Caridad Padron and Marta Benejas. (R 1662-1663) Ms. Chavianno-Pinnellos was close to Omar's mother, Zenaida Blanco. Her own husband worked in the fields planting sugarcane as did Omar's father, Horacio Blanco. (R 1663)

The witness specifically recalled Omar Blanco's **birth** which was described as a difficult one where the child suffered a **loss** of oxygen supply. (R 1663) This caused Omar Blanco to require future medical treatment. (R 1664) During his childhood, the defendant suffered seizures where his eyes would roll back and he would start screaming to the point that Mrs. Chavianno-Pinellos thought the boy was going to die. (R 1664-1665) Omar Blanco was frequently taken for medical treatment where he received substantial amounts of medication. (R 1665) To her knowledge, Omar Blanco was never cured of his medical affliction. (R 1665)

While in Cuba, Omar Blanco practiced religion and studied the Bible which ultimately caused his imprisonment at times for **up** to three months. (R 1665-166) While in the Cuban military, Omar Blanco would overstay his leave home and then be arrested by the police. (R 1667-1668) Ms. Chaviano-Pinellos attributed this conduct to the fact that Omar was not right in his head and didn't think of the consequences of remaining away from the military. (R 1668)

Since coming to the United States, the witness and defendant have corresponded

on about a weekly basis. (R 1668-1669) **Ms. Chaviano-Pinellos** says that she **does** so because she loves Omar Blanco and because he has been a good **boy** since early childhood. (R 1669) **Despite** her advanced age and unemployment, she sends the defendant small amounts of commissary money from time to time. (R 1669) Finally, she described Omar **Blanco as** an honorable person who was very dear to everyone, including her own children who loved him **as** if he was a blood brother. (R 1670)

Simeon Pinnellos had known Omar Blanco **his** entire life, having grown up in the **Los Arabos** province of Matanzas in Cuba. (R 1675-1676) Both he and Omar Blanco were farmers in Cuba as were their fathers. (R 1676) The defendant would spend time at the Pinnellos home playing with the children. (R 1677)

**As** a result of medical problems, Omar Blanco was taken periodically to a hospital in Havana. (R 1680) When in the military, the defendant would forget to return from leave at the required time which would cause a problem for him with the authorities. (R 1680)

Omar Blanco enjoyed a special relationship with his father and he worked very hard on the family farm. (R 1680-1681) The Blanco home had neither water nor electricity and Omar Blanco would most often be the one to pull water from the well and bring it to the house. (R 1681)

Because the witness **was** also a Jehovah's Witness, he and Omar Blanco studied the Bible together which at times **caused** the police to come and arrest the defendant during a group **study** session. (R 1681-1682) Mr. Pinnellos described Omar Blanco as an excellent person, a boy from the farm and a worker. (R 1682) He continues to correspond with the defendant who Pinnellos **says** has good qualities. (R 1682-1683)



Lillia Lopez first met Omar Blanco when she was nineteen years **old**. (R 1683-1685) She was introduced to the Blanco family when she traveled **as** an evangelist to various farms. (R 1684-1685) Ms. Lopez had no problems with Cuban authorities regarding her religion because it **was** prior to 1957. (R 1685) Only after communism swept the island did the government abolish the practice of religion. (R 1685)

Upon immigrating to the United States, **Ms. Lopez** has corresponded with and physically visited Omar Blanco in prison. (R 1686-1687) She has assisted the defendant in his religious studies and considers him to be a religious person. (R 1687) **Ms.** Lopez was instrumental in placing Omar Blanco in touch with his current wife, Santa Cosme. (R 1687-1688) The witness described **Ms.** Cosme **as** a very good girl who was **also** religious and Omar Blanco as a person with a good heart. (R 1688)

Sante Cosme, who is from Puerto Rico, first met Omar Blanco in Miami and later recognized his photograph in a Bible owned by her sister in faith, Lillia Lopez. (R 1726-1727) Starting at that time in 1989, **Ms.** Cosme corresponded with the defendant **and** visited him in prison. (R 1709) **A** lot of their communication involves religion and according to the witness, Omar Blanco, has accepted Christ and is now a Christian. (R 1709-1712)

The friendship as a result of their various letters and visits ultimately blossomed into love and in 1992, Santa Cosme and Omar Blanco were married. (R 1710) In their correspondence, the defendant writes **Ms.** Cosme love poems which he **adapts** from poems already written by others and provided to him by his new wife. (R 1711) Santa Cosme professed her love for Omar Blanco **and** indicated that their religious beliefs are

the foundation of their union. (R 1712)

The next testimony provided on the defense side of the case was a reading of a transcript of a statement taken by defense counsel in Cuba from Omar Blanco's parents, Horacio and Zenaida. (R 1716-1717) As explained by the trial judge, defense counsel obtained these statements from the defendant's parents who reside in Cuba. The trial court further advised the jury that while they would hear the questions by defense counsel and the answers from each witness, there would be no cross examination of either witness by the State because the prosecutors were forbidden by the Cuban government to enter the country. (R 1716) Defense counsel was only able to obtain the statements from Omar Blanco's parents by travelling to Cuba without the knowledge or permission of the Cuban government. (R 1716-1717)

Zenaida Blanco was fifty-eight years old and had lived in Los Arabos since she was fifteen years old. (R 1718) Omar was born in their house that had no water or electricity.

(R 1718) There was a difficulty with the birth which was Zenaida's first and at age fifteen.

(R 1718-1719) No physician or midwife attended the birth which was complicated by the size of the baby, the position of the delivery, the size of the mother and the lateness. (R 1718-1719) Omar Blanco needed immediate medical attention because he looked bad due to oxygen deprivation. (R 1719) Upon delivery the baby was purple in color and spitting blood. (R 1719-1720) Omar Blanco did not cry after his delivery. (R 1720)

During childhood, Omar Blanco was different from her other children as he was not a happy child and could not stand to be separated from his parents. (R 1720) Anytime Omar could not see his mother or grandmother, he would immediately start to cry. (R

1720)

Around age twelve, Omar Blanco fell from a horse and thereafter developed a nervousness that disrupted both his sleeping and eating habits. (R 1721-1722) The local doctor advised the Blancos to take Omar to a psychiatrist for treatment of his nervous condition and his seizures. (R 1722-1723)

Around the family farm, Omar worked hard and was obedient to his parents. (R 1723) He pulled water from the well and would bring it to the house. (R 1723-1724) The distance was approximately one kilometer between the well and the house. (R 1724) The Blanco home had neither plumbing nor electricity during the time the children resided there. (R 1726)

Omar Blanco's grandmother suffered from psychological illness which affected Omar Blanco greatly and made him very sad. (R 1724-1725) The defendant's grandmother was mentally ill for eight years where she would be depressed and cry almost daily. (R 1726-1726) Her screams could be heard by the neighbors and many times she would run into the street. (R 1227) His grandmother's behavior adversely affected Omar Blanco and although she continually promised Omar she would stop, she did not. (R 1227-1228)

Omar Blanco's aunt also exhibited signs of psychiatric and/or psychological illness where she would cry insistently and refuse to leave the house. (R 1728) Both grandmother and aunt were hospitalized for their mental problems. (R 1728-1729)

Throughout his childhood Omar Blanco remained an affectionate child who worked hard and was dedicated to his family. (R 1729) The defendant's problems with the Cuban

military were more a result of his religious beliefs than his desire to visit with his family. (R 1729-1730) Omar Blanco's military service commenced when he was but sixteen years of age and up until that time, he had never spent a night away from his house. (R 1730) Omar Blanco always needed family comfort and even as a youngster, he wanted to come home from school to be with his parents. (R 1730) When Omar would come home on leave from the military he always wanted to stay longer as he had problems being separated from his family. (R 1731)

The Cuban authorities advised Mrs. Blanco to make Omar forget about his religious ideas but she refused. (R 1731-1732) On one occasion the authorities tore pages from the defendant's Bible and told him that it was worthless paper which brought Omar Blanco to tears. (R 1732) A religious Omar Blanco would attend secret church services on a weekly basis. (R 1732) As a result of his religious beliefs and activity, Omar Blanco was denied military leave and ultimately incarcerated. (R 1732-1734) Because defendant's religious beliefs prohibiting the handling of weapons interfered with his military duty, Omar Blanco eventually was designated as a political prisoner and imprisoned at El Morros in Havana. (R 1734) The defendant was thereafter released and sent to harvest sugarcane for a six month period. (R 1374)

Following his stint cutting cane, Omar Blanco was discharged from the military but his harassment by the Cuban authorities continued because of his religious activities. (R 1735) This included defendant's incarceration for an alleged theft which the authorities knew was unfounded. (R 1735-1739)

Based on the Cuban Government's continued persecution of Omar Blanco, he made

the difficult decision to leave Cuba. (R 1737) This caused defendant to leave behind friends and family who loved him. (R 1738) Omar was the first of the Blanco family to leave Cuba for the United States. (R 1739)

Upon his arrival in the United States, Omar Blanco was placed in a refugee camp. (R 1740) After a short period of time he was released through the efforts of a friend, whose address and telephone number Omar carried with him to the United States. (R 1742)

Omar Blanco's father Horacio, age sixty-nine, told of the difficulty with Omar's birth and his failure to receive adequate oxygen. (R 1741) Horacio Blanco described his son as a good child who was dedicated to his family and the work of the family on their small farm. (R 1741-1742) As did his father and grandfather, Omar started working the fields of the family farm at the tender age of eight years. (R 1742) Omar Blanco would take water from the well and carry it almost a kilometer to the house on a daily basis. (R 1742-1743) The defendant was well liked by the people of the community. (R 1743)

At one point in time Omar Blanco suffered a head injury which caused him to thereafter suffer psychological problems for which he received treatment at a local hospital and later at the Mazzorra Psychiatric Hospital in Havana. (R 1743-1748) Several other family members have suffered psychological difficulties over the years including Omar's grandmother, aunt and cousin. (R 1744) The grandmother's problems were severe enough to require electric shock treatment and her subsequent long term admission to the psychiatric facility at Mazzorra. (R 1744) His grandmother's mental problems so affected Omar that his own psychological state deteriorated. (R 1744) Omar and his grandmother

had been very close and it affected the grandchild to watch what was happening to his grandmother. (R 1744-1745)

Omar received psychological treatment on various occasions. (R 1745) His religious beliefs caused the police to come to the **Blanco** house and seize family Bibles. (R 1745) This too, greatly affected Omar. (R 1746)

Because of the Cuban government's persecution of Omar, he left for the United States. (R 1747) Horacio gave Omar his birth certificate and told him that he could not forbid him to leave. (R 1747)

Next called on behalf of the defendant was Dr. Richard **Maulion**, the psychiatrist designated by the trial court to assist the defense. (R 1762) Dr. **Maulion** presented an impressive list of academic and professional credentials including a fellowship in the American Academy of Psychoanalysis, board certification in psychiatry by the American Board of Psychiatry and Neurology and the American Board of Quality Assurance and Utilization Review of Physicians and an instructor's position in psychiatry at Tulane University. Additionally, Dr. **Maulion** was the president of the Broward County Psychiatric Society and a member of the council of the Florida Psychiatric Society. Dr. **Maulion** was chairman of the Physician Recovery Network of the Broward County Medical Association and Chief of Staff of the medical Executive Committee at the Retreat Hospital. The doctor also was a member of the Bioethics Committee at Broward General Hospital and the founder of a charitable foundation. Dr. **Maulion** previously worked in two Veteran's Administration Hospitals and at the Charity Hospital in New York. At the time of his testimony, Dr. **Maulion** maintained a psychiatric practice where he saw both outpatients

and inpatients. (R 1762-1764) The psychiatrist was offered, and accepted by the prosecution with no objection, as an expert in psychiatry. (R 1766)

Against that backdrop of academia, Dr. **Maulion** was asked if he had occasion in his professional capacity to have had contact with **Omar Blanco** which he answered in the affirmative. (R 1766) The natural follow-up question posed to Dr. **Maulion** by defense counsel as to whether he saw **Omar Blanco** in the courtroom was astonishingly met with a negative response.’ (R 1767) This set the stage for the primary substantive expert testimony on behalf of **Omar Blanco** as follows.

Dr. **Maulion**’s psychiatric evaluation revealed that further testing was required in that **Omar Blanco** showed elements of organic brain syndrome. (R 1767) The suggested testing was to be performed by a neurologist and neuropsychologist. (R 1767-1768) Dr. **Maulion** predicated that an MRI and EEG test along with a neurological workup would reveal a lesion around the defendant’s frontal temporal lobe. (R 1768) He had absolutely no doubt that **Omar Blanco** had a brain injury. (R 1770)

Dr. **Maulion** explained how a psychiatrist puts together the various elements regarding the psychological and organic aspect of the functioning of the brain. (R 1761) He advised how only the psychiatrist was uniquely qualified to do so because he not only possesses a knowledge of the psychological dynamics of why somebody would do something or act in a certain way, but the psychiatrist also possesses an understanding

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Later in his testimony, Dr. **Maulion** tried to explain that as a psychiatrist, he tries to forget his patients as fast as he can so that he won’t recognize them in the mall. The doctor says he is not a good physiognomist. (R 1791) The prosecutor’s very first remark on cross examination was a sarcastic reference to Dr. **Maulion**’s memory or lack thereof. (R 1791- 1792)

of the physical aspects of the individual. (R 1768-1769) Others who act as technicians for the psychiatrist include a neuropsychologist who performs a battery of tests to pinpoint where the deficits are and a clinical psychologist who performs tests on the personality and psychological structure. (R 1769)

Dr. Maulion reviewed medical records for Omar Blanco that had been provided to him by defense counsel.\* The document appeared to be a summary of psychiatric evaluation and treatment. (R 1770-1771)

After his review of the document and information provided by the psychologist and neuropsychologist, it was Dr. Maulion's firm opinion that Omar Blanco was suffering from an "organic effective disorder" which means that some areas of his brain were damaged. (R 1772) Accordingly, defendant could act perfectly normal one minute but totally irrational the next, (R 1772-1773) Omar Blanco's formal diagnosis also included "status post traumatic birth with central nervous system brain injury, history of seizures and fits,

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Defense counsel entered Cuba utilizing a tourist visa because the Cuban Government would not allow entry by anyone who intended to make inquiry in connection with the criminal justice system of the United States. The prosecution refused to travel to Cuba given the circumstances. Upon arrival at the airport in Havana, an interpreter travelling with defense counsel was taken into custody by Cuban authorities and thereafter defense counsel had to rely upon a fellow attorney from the Office of the Capital Collateral Representative for all translations. Travel to Cuba was necessary so as to interview defendant's elderly parents who had been refused exit visas, While in Cuba, defense counsel was assisted by a cousin of defendant, Gonzalvo Rodriguez Blanco, who lives in Havana. As part of his assistance to counsel, Gonzalvo Blanco enlisted the aid of a cousin, Estella Cusman, who had access to the Psychiatric Hospital of Havana. Ms. Cusman was somehow able to obtain Omar Blanco's psychiatric record summary from the hospital and she then turned it over to her cousin who passed it along to defense counsel. This record, entitled Resumen de la Historia Clinica, was given to defense counsel with the proviso that should he be found in possession of the document, counsel would not tell the authorities how he came to obtain it. Defense counsel then smuggled it out of the country, a task he described as being done with great fear and trepidation. (R 12 1-126; 132-135; 149-153; 163; 598; 1496-1514; 1548-1560)



and present cognitive impairment". (R 1773) One of the neuropsychiatric aspects of traumatic brain injury is labeled "effective liability" which means that an individual "can be perfectly all right now and in just a moments notice, he can turn around and be either irritable, sad, depressed, angry, or violent". (R 1774) Symptoms include headaches, dizziness, irritability and problems with concentration. (R 1774) Aggressive outbursts are very commonly associated with brain injury. (R 1775)

Omar Blanco's birth history as a blue baby indicates he didn't get enough oxygen which resulted in damage to the brain that would affect him throughout his entire life. (R 1775) Coupled with head trauma in later life, a diagnosis of organic defective order was appropriate. (R 1776)

The seizures described by various lay persons accurately describe what one expects in grand mal and petit mal seizures. (R 1777-1778) Such seizures are induced by brain trauma. (R 1777) A person with brain injury has no ability to put the "brakes on" and stop himself from what his impulse is telling him to do. (R 1780) A person committing a burglary as was Omar Blanco, and who suffered from a brain injury, would experience startled response that is exaggerated when confronted by a resident as was the situation herein. (R 1780-1781) A person such as Omar Blanco would not respond with judgment or the measuring of consequences but instead would simply experience a primitive response and eliminate the threat with whatever means were available. (R 1781-1782)

Dr. Maulion was of the opinion that Omar Blanco committed the subject capital felony while under the influence of extreme mental or emotional disturbance. (R 1783) Further, the psychiatrist believed that Omar Blanco's capacity to appreciate the criminality

of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R 1785) Many examples of defendant's past conduct as related by various witnesses support this conclusion. (R 17851786)

Dr. Maulion then gratuitously added that it was his opinion that Omar Blanco didn't even commit the crime. (R 1786) This statement was made within a lengthy answer during cross examination (R 17851787)

In reviewing the psychiatric hospital records from Cuba, Dr. Maulion was able to ascertain that in 1964, Omar Blanco was evaluated by a child psychiatrist and was found to have "organic brain syndrome with psychopathic syndrome associated". The doctors in Havana performed an E.E.G. which came back abnormal with paroxysmas, predominately in the frontal region. Omar Blanco was given the medication Gonvulseen, or Phenytoin, which in the United States is called Dilantin and it was given in the same doses as psychiatrists are giving today. (R 1787) Omar Blanco was also administered the accompanying drugs of Haloperidol which like the Phenytoin, he was to take three times a day. (R 1787) Finally, the defendant was given the medication Synapax which is a Benzodiazipne. (R 1788)

Simply based on the amount of medication prescribed, one can conclude that the psychiatrists found something wrong with Omar Blanco when he was a child. (R 1788) The psychiatric report from the hospital in Havana confirmed the diagnosis made by Dr. Maulion in his evaluation of Omar Blanco. (R 1789) The report was admitted into evidence. (R 1790) (Ex. 2, Appendix)

On cross examination Dr. Maulion acknowledged that he had only started doing

criminal forensic work although he had testified in a couple of civil cases several years ago. He could not remember their names. (R 1792-1793) Ninety-nine percent of the doctor's practice was private patients but he had recently asked to be included on the county approved mental health evaluation list. (R 1792-1793) His forensic testimony in Omar Blanco's case was his first ever in a criminal case. (R 1793) Dr. Maulion could not remember when he reviewed the defendant's psychiatric report summary that had been obtained by defense counsel in Cuba. (R 1793)

Dr. Maulion further testified that brain damage causes lack of judgment, lack of thinking through the consequences and social inappropriateness. (R 1801) The hospital record from Cuba reflected that Omar Blanco was not born in a hospital, delayed to cry and was born purple. (R 1803)

When asked to recall the names of witnesses who gave observations upon which the psychiatrist relied, he could not do so. (R 1804) Nor did Dr. Maulion read all of eyewitness Thalia Vezos' testimony. (R 1805) As for the different medications that had been prescribed to Omar Blanco, the psychiatrist did not ask the defendant when that medication stopped. (R 1809) When asked about the result of the Rad-R administered by neuropsychologist Dr. Lee Bukstel, Dr. Maulion could not even locate that particular test result in the report. (R 1813)

In his interview with Omar Blanco, which lasted only one hour, Dr. Maulion was accompanied by his assistant, a non-medical/mental health clerical worker. (R 1814) The psychiatrist saw no problem in bringing along a friend during the forensic interview and thereafter soliciting that individual's opinion as to subject's mental health. (R 1814-1816)

Dr. Maulion assessed Omar Blanco's intelligence in the "dull normal" range with an I.Q. of seventy-five to eighty. (R 1834-1835) When given a proverb, the defendant demonstrated an inability to abstract. (R 1837-1839)

As for poems purportedly authored by Omar Blanco, it was Dr. Maulion's opinion that they probably were not written by the defendant despite his testimony in a prior proceeding that they were. (R 1838-1841) It was the psychiatrist's belief that defendant's related testimony that he had attended medical school was also untrue. (R 1841)

Although Dr. Maulion recommended a full neurological workup to be in order following his evaluation, only the psychological testing was performed, (R 1843) Although Omar Blanco told the psychiatrist he suffered seizures over the years, the doctor thought it would be stupid to ask the defendant the number of such attacks. (R 1855-1856)

Dr. Maulion confirmed during re-direct examination that it was the trial judge that selected him for this case. (R 1867) He further stated that he was paid by the court. (R 1871)

Once again, Dr. Maulion stated that seizures can be the result of brain damage, and in this case the neuropsychological reports suggest brain damage. (R 1872-1873) Brain damage does not repair itself. (R 1873)

The psychiatric records summary from the Psychiatric Hospital of Havana appeared to Dr. Maulion, to be exactly what it purported to be - a medical records summary by the Ministry of Public Health, properly signed and stamped as is customary in Latin American countries. (R 1873-1874) The document also contained a clinical history number. (R 1875)

Because the prosecutor had attacked the validity of this record in his cross examination, defense counsel sought to establish if the psychiatrist knew how the document came into possession of defense counsel. (R 1874) The trial court would not allow this line of inquiry. (R 1874-1875)

Dr. Lee Bukstel, a clinical neuropsychologist, maintained a private practice which focused on persons known to have or suspected of having neurocognitive deficits secondary to either brain injury or brain disease. (R 1893-1895) A diplomat in the area of neuropsychology, Dr. Bukstel evaluated and administered a psychological battery of tests to Omar Blanco pursuant to an appointment by the trial court. (R 1900-1901) The psychologist had previously testified in the courts of Broward County as an expert witness and did so below without objection by the prosecution. (R 1901-1902)

Dr. Bukstel, unlike Dr. Maulion, recognized Omar Blanco sitting before him in the courtroom. (R 1902-1903) Over a period of four sessions, Dr. Bukstel spent approximately fourteen hours evaluating and testing Omar Blanco. (R 1905-1906) An exhaustive history was taken and a comprehensive battery of psychological tests was administered. (R 1906-1907) In addition, the psychologist reviewed the report of Dr. Maulion and Dr. Marina and the psychiatric records of defendant obtained from Cuba. (R 1908) Prior testimony and police records were also reviewed by Dr. Bukstel as part of his evaluation process. (R 1908-1909)

A number of organic factors were suggested in the interview and evaluation including anoxia (birth injury due to lack of oxygen), multiple traumatic brain injuries during childhood and a seizure disorder. (R 1909-1910)

The hospital records from Cuba reflected that Omar Blanco suffered a mild degree Of mental retardation and behavioral problems secondary to organic brain syndrome. (R 1910) The defendant was placed on anticonvulsants as a child for his seizure disorders. (R 1910-1911) Omar Blanco was viewed to have a psychopathic syndrome with an E.E.G. that indicated tin abnormality in the frontal lobe regions of his brain. (R 1911) The information contained in the psychiatric records summary was relied upon by Dr. Bukstel in the formulation of his opinions and conclusions. (R 1913) In administering a neuropsychological battery of tests, the psychologist noted that a number of the tests would not render reasonably reliable results due to the language barrier involved, Dr. Bukstel not speaking Spanish and Omar Blanco not speaking English.<sup>3</sup> (R 19151916) Further, those psychological tests which contain a cultural bias were viewed accordingly in the interest of reliability. (R 1917-1919)

Results of the Wexler Adult Intelligence Scale-Revised revealed Omar Blanco to be in the border-line range of intellectual functioning which is the range just above the mentally deficient range. (R 1920-1921) In terms of the overall population, defendant would be in the eight or ninth percentile. (R 1921)

In the Ravens Standard Progressive Matrices test, Omar Blanco performed in the mild mental deficiency range. (R 1922-1923) The defendant on the Wisconsin Card Sorting Test demonstrated a tendency toward perservation thinking which historically has been viewed as a sign of brain dysfunction. (R 1927-1928) Results of the MMPT test

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The Broward County list of Court authorized neuropsychologists did not contain any that spoke Spanish. (R 2152)

suggested some depression of the apathetic variety along with milder tensions, worry, fear, brooding, uncomfortable feelings, disruptive puzzling/confusing thoughts, persecutory ideas and feelings of alienation socially. (R 1940)

Omar Blanco also complained of mental insufficiency and mental dullness. (R 1941) Test findings show defendant to have limited psychological resiliency and fortitude. (R 1941) Other results show him to be someone who is stoic and rigid and who tends to overcontrol any felt anger or hostility which leads to brief temper outbursts. (R 1941-1942)

Dr. Bukstel testified that Omar Blanco suffers from brain disfunction where one would expect to find evidence of impulsivity. (R 1945/1946) To this end, the medical records from Cuba were right on point when addressing the fact that Omar Blanco exhibited problems with impulsivity subsequent to his brain injury. (R 1946) Dr. Bukstel's test findings match up to the conclusions set forth in the psychiatric records of Omar Blanco retrieved from Cuba. (R 1946-1947)

In applying his test and evaluation findings to the actions of defendant as related by Thalia Vezos, Dr. Bukstel stated they appeared to be one of impulsive behavior rather than thought out behavior. (R 1949-1951) It was the psychologist's opinion that at the time of commission of the shooting, Omar Blanco appreciated the criminality of his conduct but his ability to conform his conduct to the requirements of law was substantially impaired based on the mental diagnosis of organic brain syndrome. (R 1953) Dr. Bukstel did not feel that Omar Blanco was under the influence of extreme mental or emotional disturbance at the time of the shooting in question. (R 2052)

Dr. Bukstel, based on his fourteen years of neuropsychological testing, emphasized

that the mere presence of inconsistencies in results of various tests or recorded observations does not in any way invalidate the overall clinical evaluation process. (R 2148-2149) Pointing out such inconsistencies had been the prosecutor's main theme during his cross examination of Dr. Bukstel. (R 2141-2142) The psychologist stated that forming a clinical judgment takes into consideration all sources of information including the test findings, the history, the records review and behavioral observations. (R 2149) To do otherwise, explained Dr. Bukstel, would be to conduct a simple numerical tabulation and if there was an inconsistency, simply throw out the findings, which process would not require a professional mental health person but merely a calculator. (R 2149-2150) Instead, it is an interactive process between psychologist and patient, (R 2149-2150)

Dr. Bukstel readily acknowledged that there were built in problems with the neuropsychological testing of Omar Blanco because the test battery was written in English and since he spoke only English and Mr. Blanco spoke only Spanish, all communication had to go through an interpreter. (R 2149-2155) Nevertheless, it was the psychologist's opinion that it was better to administer the battery of neuropsychological tests and temper the result accordingly because of the language barrier and be able to provide the court with some useful information, then to simply through up one's hands and not administer the examinations and consequently know nothing. (R 2154-2155)

As to the validity scales within the various tests, Dr. Bukstel testified that Omar Blanco's validity scale configuration was not consistent or suggestive of someone who was attempting to over embellish or over exaggerate or over emphasize complaints. (R 2155-2157) Dr. Bukstel did not consider Omar Blanco to exhibit a malingering profile. (R 2157-



2158) In fact, it was a valid profile. (R 2158)

Omar Blanco's tendency to exaggerate or embellish his own self worth as in saying he went to medical school and played on the Cuban national baseball team was consistent with his hypomania scale (ego inflation scale) which was elevated. (R 2158) Clearly, defendant did not attend medical school in Cuba or play for the national baseball team. (R 2160-2161)

In fact, Omar Blanco did not report to the psychologist a lot in the way of physical, cognitive, or emotional symptoms. (R 2165) Such lack of reporting is not consistent with someone who is attempting to make himself look bad. (R 2165) Omar Blanco's seizures during childhood are consistent with organic brain syndrome as is his complaint of headaches resulting from a prior head injury. (R 2167) The medications prescribed for defendant by the psychiatrists in Cuba were those administered for seizure disorders, problematic behavior secondary to organic brain syndrome and depression. (R 2168-2171) It is apparent from the Cuban medical records, according to Dr. Bukstel that, Omar Blanco was being tested for mental problems over and above his seizure disorder. (R 2171) The psychiatric record for Omar Blanco as generated at Psychiatric Hospital of Havana, while reading somewhat awkwardly, made sense in the use of terminology and there was no reason to believe it was anything other than an authentic and official document. (R 2171-2173) Accordingly, the trial court admitted into evidence an English translation of the record which itself was written in Spanish. (R 2173-2180) (Ex. 3, Appendix)

Also, unlike Mr. Maulion, Dr. Bukstel would not allow another individual

unconnected with the case into the interview process. (R 2181) finally, Dr. Lee Bukstel reiterated that his conclusion as to Omar Blanco's mental health was based upon and took into consideration all the materials he reviewed, all that he personally observed, all the test results, all his interviews with defendant, all his conversations with his colleagues and all other relevant information gathered by him. (R 2186-2187) It was the neuropsychologist's opinion that Omar Blanco's ability, at the time of the offense, to conform his conduct to the requirements of law was substantially impaired. (R 2187)

This concluded the defense evidence and testimony in mitigation. (R 22052206; 2305) Following instructions from the trial judge, the jury returned a sentencing recommendation of death by a vote of ten to two. (R 2393)

#### Sentencing Proceedings:

Prior to the actual imposition of sentence, defense counsel reiterated that portion of his sentencing memorandum concerning the inability of the defense to put before the jury competent expert mental health testimony. (R 2419; 3471) Because of the system employed in Broward County as dictated by administrative orders of the chief judge, Omar Blanco was compelled to use as an expert witness a psychiatrist so lacking in forensic skills that he was more detrimental to the defendant than helpful. (R 2420-2422) The prosecution had no comment on this observation by counsel. (R 2422)

Thereafter the trial judge read his sentencing order into the record. (R 2425-2433) The order sentenced Omar Blanco to death for the murder of John Ryan. (R 2433)

## SUMMARY OF ARGUMENT

### POINT I ON APPEAL

Omar Blanco was denied the assistance of a capable and qualified expert in the field of psychiatry. Two particular Spanish speaking psychiatrists requested by defense counsel were both refused by the Court because their fee requirements, although not unreasonable, were in excess of those allowed in Broward County per administrative order. Instead, the trial judge appointed Dr. Richard Maulion to serve as defendants expert psychiatrist because he spoke Spanish and would work at the rates prescribed by the county. Dr. Maulion's forensic evaluation and trial testimony was incompetent and ineffective, and because of it, Omar Blanco was denied a fair penalty phase proceeding. A new sentencing trial is required.

### POINT II ON APPEAL

Psychiatric testimony was given below that Omar Blanco was acting under extreme duress at the time of the offense. Nevertheless, the trial court declined to instruct the jury that a statutory mitigating circumstance exists if the defendant acted under extreme duress at the time of the crime. The trial judge apparently did not believe this opinion testimony of Dr. Maulion and therefore refused an appropriate instruction. This was error since there was evidence in the record adequate to support an instruction. A new penalty phase proceeding is required.

### POINT III ON APPEAL

The trial judge improperly gave consideration to the death recommendation of the jury in Omar Blanco's initial penalty phase proceeding. Although the present jury's recommendation might have been entitled to some weight, the prior death recommendation, which has since been vacated, was entitled to none. Accordingly, the trial court failed to conduct an "independent evaluation" concerning aggravating and mitigating circumstances as required by Florida's death penalty scheme. Resentencing is required.

### POINT IV ON APPEAL

The legal analysis employed by the trial judge in evaluating Omar Blanco's impoverished childhood was flawed. Any absence of criminal behavior by other Blanco family members does not impact on the condition experienced by defendant in his formative years. This non-statutory mitigating circumstance should have been given something other than "little weight" as was done by the trial court. Resentencing is required.

### POINT V ON APPEAL

The death penalty is not proportionally warranted for Omar Blanco. Unlike defendant's first appeal, the present record contains substantial mitigating evidence, including the fact that, at the time of the offense, Omar Blanco's capacity to conform his conduct to the requirements of law was substantially impaired. Other significant mitigation

included defendant's impoverished background, his organic brain damage, his strong religious beliefs, his oppression in Cuba, his dull intelligence and his loving relationship with his family. Despite the presence of two statutory aggravating circumstances - felony murder/pecuniary gain and prior violent felony - Omar Blanco's mental/psychological deficiencies and otherwise good character traits, prevent this offense from being classified as the "most aggravating" and "most indefensible" of crimes. The entire picture of mitigation and aggravation does not warrant the death penalty for Omar Blanco. A reduction in sentence to life imprisonment is required.

#### POINT VI ON APPEAL

The statutory aggravating circumstance of felony-murder as set forth in Florida Statute 92.141(5)(d) is unconstitutional on its face and as applied in this case. All of the felonies listed therein are also felonies which constitute felony-murder pursuant to Florida's felony-murder in the first degree statute. As such, this statutory aggravating circumstance fails to genuinely narrow the class of persons eligible for the death penalty as every person convicted of felony-murder qualifies for the aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder in that all persons convicted of felony murder start ~~off~~ with this aggravator, even if that person was not the actual killer or even if there was no intent to kill. Because persons convicted of premeditated murder are not automatically subject to the death penalty, the felony-murder aggravating circumstance is completely irrational and constitutionally infirm. Reversal is required.

POINT VII ON APPEAL

Imposition of the death penalty by way of electrocution constitutes cruel and unusual punishment. Because Florida's statute provides for a procedure that invokes unnecessary and wanton infliction of pain, unnecessary mutilation of the body and unnecessary psychological torture, it is unconstitutional as a cruel and unusual punishment. Resentencing Omar Blanco to life imprisonment is appropriate.

POINT I ON APPEAL

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 BLANCO WAS INEFFECTIVE AND INCOMPETENT AS A FORENSIC MENTAL HEALTH EXPERT.

Early in his representation of Omar Blanco, and without objection from the state, defense counsel sought the assistance of a Spanish speaking psychiatrist. (R 49) The retention of such a qualified mental health expert to assist the defense took on even greater importance after defense counsel spoke to Dr. Dorita Marina, a Spanish speaking psychologist from Dade County who had previously examined Omar Blanco in connection with his petition for post conviction relief filed by the Capital Collateral Representative. (R 61-62) It was Dr. Marina's belief that defendant suffered from organic brain damage and that further evaluation and testing were appropriate. (R 62-64)

Thereafter, defense counsel travelled to Cuba where he obtained medical records from the Psychiatric Hospital of Havana relating to Omar Blanco's psychiatric history. (R 168) Upon Dr. Marina's review of these records, she advised counsel that the services of a qualified psychiatrist were essential to explain various aspects of Omar Blanco's mental health. (R 198-199; 2628-2630)

In this regard, Dr. Marina recommended Dr. Ricardo Castillo, a Spanish speaking psychiatrist practicing in Dade County. (R 198,212) When defense counsel requested authorization from the court to retain Dr. Castillo, the trial judge expressed reluctance to do so because of the expense involved and the court's desire to "save the taxpayers as much money" as possible. (R 217) After pleading with the court for the assistance of Dr. Castillo, the trial judge authorized ten hours of work by the psychiatrist on Omar Blanco's behalf. (R 217)

After contacting Dr. Castillo and providing him with a copy of the Administrative Order<sup>4</sup> regarding expert fees in Broward County, the psychiatrist declined to become involved in defendant's case. (R 224) Consequently, defense counsel contacted another Spanish speaking psychiatrist who coincidentally at the very time, was assisting the Public Defender's Office on a case involving a Spanish speaking Cuban born defendant. (R 224) This expert witness, Dr. Arturo Gonzales, practiced in Tampa and was willing to fully assist in the defense of Omar Blanco for a fee of \$2,000 per day which would include everything such as travel, document review, interview and consultation. (R 225) Having spoken to this psychiatrist at length prior to presenting his name to the court and having obtained his name by way of the Office of the Public Defender, defense counsel expressed his desire for the retention of Dr. Gonzales as there were no other qualified and Spanish

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Administrative Order, In Re: Expert Fee Guidelines, #III-93-D-6 (Jan. 1993) provides for payment of psychiatrists at the rate of \$150 per psychiatric evaluation. Deposition and court testimony is paid at the rate of \$150 per hour. All other time spent on a defendant's case including research, documentation review and consultation with counsel is paid at the maximum rate of \$50.00 per hour. Prior court approval is required or counsel may risk personal responsibility for the expert fee incurred. (Ex. 4, Appendix)



speaking psychiatrists known to him and the need for such an expert was great. (R 225-226; 27 17-27 18)

A lawyer from the County Attorney's Office was in attendance at the hearing and advised the trial court that the county opposed the defense request for Dr. Gonzales due to the restrictions on expert fees as set forth in the Chief Judge's Administrative Order. (R 229) When asked if the county was in a position to assist defense counsel in obtaining a Spanish speaking psychiatrist at rates lower than Dr. Gonzales, the assistant county attorney responded in the negative. (R 230)

Because the trial judge refused to expend the funds necessary to allow the defense to retain the services of Dr. Gonzales, defense counsel threw the matter open to suggestions, (R 230) As a result, the trial court told counsel to contact Dr. Joseph Lepeyra, an employee of Broward County Prison Health Services, to see if he could work with the defense "on the side". (R 231) Defense counsel told the court that he wasn't even sure if Dr. Lapeyra was a psychiatrist and in any event, the doctor was ill. (R 231-233) Once again defense counsel for Omar Blanco recited his need for a competent psychiatrist as a result of a repeated expression of necessity related to him by psychologist Dr. Marina. (R 232)

Several days later, and after numerous attempts to contact Dr. Lepeyra, defense counsel advised the trial court that the doctor was no longer with Prison Health Services and was not returning any messages left by counsel. (R 242-243; 249-250) The trial judge then volunteered to assist in the matter and sometime later that day communicated the name of Dr. Richard Maulion to defense counsel. (R 258)

pursuant to the trial court's instructions, defense counsel contacted the psychiatrist provided by the court and was told that the latter spoke Spanish and would work at the rates provided for by the county per the administrative order. (R 258-261) When asked by the trial court if defense counsel would be satisfied with Dr. Maulion, counsel stated that the doctor spoke Spanish and except for forensic experience, outwardly appeared to be qualified. (R 260; 269-271) In response, the trial judge said he was happy to utilize Dr. Maulion because it would cost less than Dr. Gonzales. (R 271)

Consequently, Omar Blanco was required to utilize as his mental health expert a psychiatrist chosen by the trial court rather than Dr. Gonzales as requested by the defense. 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 pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

There was no issue as to whether the defendant was in need of the expert assistance of a psychiatrist. The predicate for this need is clearly established in the record and was never contested by the prosecution. (R 49; 217) Indeed, it is improper for the state to interfere with an indigent defendant's retention of experts. In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees indigent defendants the right to meaningful access to expert assistance if that expert assistance is relevant to a defense. An indigent defendant has a right to the tools necessary for a "fair opportunity to present his defense". 105 S.Ct. at 1092-1093. Further, in discussing the balancing of

the interests of the state and an indigent defendant, the court noted:

A state may not legitimately ascertain interest in maintenance of a strategic advantage over the defense if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

105 S.Ct. at 1094

The only reason expressed by the lower court for refusal to allow the retention of either Dr. Castillo or Dr. Gonzales was the cost involved.<sup>5</sup> This is best evidenced by the trial judge's remark that maybe he shouldn't be handling capital murder cases because he was too "frugal" when it came to authorizing the expenditure of taxpayer money. (R 229)

There was never any discussion that the fee requested by Dr. Gonzales was unreasonable - only that it was in excess of the chief judge's administrative order regarding expert fees. Although the County attorney has the right to contest the reasonableness of a particular expert fee since the county is responsible for payment, at no time did the county attorney assert unreasonableness. *Fla. Stat. 27.34(2)* Instead, the county attorney merely directed the trial judge to the chief judge's administrative order.

When defense counsel for an indigent client acts responsibly in an application for the assistance of a specific expert witness who would be useful to the defense and whose

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Although at an earlier hearing regarding the retention of a psychiatrist, the trial judge did state that he did not want to appoint a psychiatrist who was "pro defense", (R 49-50)

fee is not challenged as unreasonable, counsel's request should be granted. see *Garron v. Bergstrom*, 453 So.2d 405 (Fla. 1984); *State v. Hamilton*, 448 So.2d 1007 (Fla. 1984); *Gamer v. State*, 445 So.2d 413 (Fla. 4th DCA 1984); *Carrasquillo v. State*, 502 So.2d 505 (Fla. 1st DCA 1987). Omar Blanco's constitutional right to effective and adequate representation should have been superior under the particular facts and circumstances herein, to a local administrative order which allowed for the denial of funds necessary for the assistance of a competent mental health expert. In *Ake*, the Court made it clear that when assistance of a psychiatrist is appropriate in a given case, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense". 105 S.Ct. at 1096-1097 (*emphasis added*)

Omar Blanco acknowledges that he had no constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. 105 S.Ct. at 1097 He was, however, constitutionally entitled to an expert who was capable and qualified for the task at hand. e.g. *Burch v. State*, 522 So.2d 810 (Fla. 1988) In view of the great difficulty experienced by defense counsel in obtaining a Spanish speaking psychiatrist in whom he had confidence, it certainly would not have been unreasonable for the trial judge to follow defendant's preference, given Dr. Gonzales' availability, qualifications, and reasonable cost. *Thorton v. State*, 339 S.E. 2d 240, 241 n.2 (Ga. 1986) In *Ake*, the court observed that "in the context of a capital sentencing proceeding", the interest of both the defendant and the state in fair adjudication at sentencing is "compelling" and "profound" and outweighs "monetary considerations". 105 S.Ct. at 1096 The court also found that

the probable value of psychiatric assistance on relevant issues in the sentencing phase was “evident” in noting:

[W]here the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist and to assistance in preparation at sentencing phase.

105 S.Ct. at 1096

The selection of Dr. Richard Maulion by the trial court as the psychiatrist appointed to assist the defense in preparation of mental health mitigation could not have proven more helpful to the prosecution had there been no appointment at all. Although Dr. Maulion may have appeared outwardly capable, he was totally ineffective in both his evaluation of Omar Blanco and his courtroom testimony regarding defendant’s mental health.

The stage was set for Dr. Maulion’s ineffectiveness less than five minutes into his direct testimony when the psychiatrist was asked if he saw in the courtroom Omar Blanco, the person he had interviewed and evaluated and for whom he was now testifying. (R 1766-1767) Dr. Maulion simply responded that he didn’t see him in the room. <sup>6</sup> (R 1767)

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Dr. Maulion’s subsequent explanation only compounded the situation when he explained that as a psychiatrist, he learns to forget his patients as fast as he can. This, according to the doctor, prevents people who are accompanied patients of the psychiatrist from learning their friend is visiting a psychiatrist should they encounter Dr. Maulion in a shopping mall. (R 179 1) This, as pointed out by the prosecution in closing argument, made sense only if Dr. Maulion walked around with a sign hung on himself that read “psychiatrist”. (R 2320) Finally, the prosecution’s very first comment on cross-examination was a sarcastic remark regarding the doctor’s memory (R I 79 I - 1792)

It would not be presumptuous to assert that a reasonable minded juror would view any testimony of Dr. Maulion that followed to be suspect.

Next, Dr. Maulion explained he spent but one hour interviewing and evaluating Omar Blanco. (R 1767) The psychiatrist was accompanied by a friend who worked in a clerical capacity at the doctor's office and who had no medical or psychology background. (R 1814) If this conduct was not bad enough by itself, Dr. Maulion, following the "forensic examination", solicited his companion's opinion as to Omar Blanco's mental health. (R 1814-1816)

In his testimony, which was the first ever for Dr. Maulion in a criminal case, the psychiatrist unabashingly expressed his belief that Omar Blanco was not even guilty of the murder for which he had already been convicted. (R 1786; 1812) This opinion was, of course, not solicited by either counsel, and was in direct contradiction to everything the jury had been told by both counsel and the court during voir dire examination and in preliminary remarks explaining the nature of these penalty phase proceedings. Not surprisingly, the jury obviously rejected Dr. Maulion's other opinions by virtue of their advisory sentence.

Other glaring deficiencies in the psychiatrist's work included his failure to fully read the transcript testimony of the crime's eyewitness, his failure to recall various documents or the date of their receipt by him, his failure to be able to name those witnesses whose observations about defendant he relied upon, his failure to ask important and pertinent questions of defendant, his inability to find certain test information within his own file and his providing answers inconsistent with those given in his pre-trial deposition. (R 1792-

1817; 1825-1856) Dr. Maulion was unfamiliar with various facts of the actual shooting, didn't read the transcript of the prior trial or current depositions, and used incorrect proverbs with defendant such as "one bird in the hand is worth ten in the bush". (R 1804-1808; 1837-1838; 1847)

All of these areas provided ample fodder for the prosecution's closing argument which touched upon Dr. Maulion's "intense" one hour interview, his inability to even recognize Omar Blanco in court; his bringing a friend along for the forensic evaluation and soliciting an opinion thereafter, his failure to review all relevant materials or speak to witnesses who observed Omar Blanco, and his failure to ask pertinent questions of defendant himself. (R 2320-2330) Finally, in the state's sentencing memorandum to the trial court, all of Dr. Maulion's incompetence was detailed. (R 3435; 3451-3456)

This apparent and recognizable ineffectiveness of Dr. Maulion obviously had an impact on the trial judge who recited the various aspects of the psychiatrist's incompetence in rejecting the doctor's opinion that Omar Blanco was under the influence of extreme mental or emotional disturbance at the time of the commission of the offense. (R 3517-3518) The sentencing order states that this mitigating circumstance was not established by a reasonable quantum of evidence based on the above discussed areas and the totality of Dr. Maulion's testimony. (R 3518)

This court has recognized that the "impressiveness" of an expert's credentials and the thoroughness of his work may affect a case. *Henry v. State*, 574 So.2d 66, 70 (Fla. 1991) Consequently, because Omar Blanco was not provided with an effective and competent psychiatrist to assist him in the presentation of mental health mitigation, he was

denied a fair penalty phase hearing. It is ironic that the very trial judge who insisted on the appointment of Dr. Maulion as an expert mental health witness later rejected his testimony as unworthy of belief. Reversal is required.



POINT II ON APPEAL

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE OF ACTING UNDER EXTREME DURESS; TESTIMONY WAS PRESENTED TO THE JURY SO AS TO WARRANT THE INSTRUCTION.

During his direct examination, Dr. Maulion was asked if, based on his psychiatric expertise, he was of the opinion that Omar Blanco was acting under extreme duress at the time of the offense. (R 1784) The psychiatrist's conclusion was that the defendant "was under extreme duress" albeit that duress was at the hands of the victim himself. (R 1785) Dr. Maulion believed that because of Omar Blanco's organic brain damage, the confrontation and struggle preceding the shooting became "catastrophic" in terms of mental duress experienced by defendant. (R 1782-1785)

Given that the "duress" described by Dr. Maulion referred to external provocation rather than internal pressure, it meets the criteria of Florida Statute 921.141(6)(e) which provides as a mitigating circumstance the fact that "the defendant acted under extreme duress or under the substantial domination of another person". see *Too/e v. State*, 479 So.2d 731, 734 (Fla. 1985) An appropriate jury instruction is required when there is evidence in the record in support of the issue addressed in the requested jury instruction. This is so even if the trial judge himself doesn't believe the evidence cited as requiring the

jury instruction. *Stewart v. State*, 558 So.2d 416 (Fla. 1990); *Robinson v. State*, 487 So.2d 1040 (Fla. 1986) In *Robinson* this court reversed the defendant's death sentence as a result of the trial court's refusal to instruct on statutory mitigating circumstances that the trial judge perceived to be unsupported by competent and substantial record evidence. In noting that while the trial judge may not have believed the mitigation testimony, others might have and therefore it was adequate to instruct the jury on. *Id.* It was further observed:

The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence and instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive.

487 So.2d at 1043

Failure to instruct on statutory circumstances dealing with mental mitigation is of special significance since "mental mitigation evidence is among the most compelling that can be presented" during penalty phase proceedings. *Mills v. State*, 603 So.2d 482, 487 (Fla. 1992)(J. Kogan dissenting) It was reversible error to fail to give the standard jury instruction regarding duress as a statutory mitigating circumstance. (R 2256-2261; 2301-2303; 3401-3405) A new penalty phase proceeding is required.

POINT III ON APPEAL

THE TRIAL COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION AND IMPROPERLY CONSIDERED THE DEATH RECOMMENDATION IN DEFENDANTS PRIOR PENALTY PHASE PROCEEDING.

In his sentencing order, the trial judge recited how the jury in Omar Blanco's initial trial returned a death recommendation by a vote of eight to four. (R 3515) The trial court also noted that defendant's first death sentence was affirmed by this tribunal and was only vacated after the federal courts became involved. Finally, the trial court stated that it found, as did the jury, that the aggravating circumstances outweigh the mitigating circumstances. (R 3521) Because the trial judge gave virtual complete deference to the jury's death recommendation and took into account a, since vacated, prior jury's recommendation of death, the death sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 2, 9, 16, and 17 of the Florida Constitution.

As previously set forth in *Ross v. State*, 386 So.2d 1191 (Fla. 1980), the fact that the jury recommends the death penalty does not require the trial court to impose that penalty. Rather, the trial judge must exercise his reasoned judgment in deciding whether the death penalty should be given. 386 So.2d at 1197. "Florida's statutory scheme

requires the reasoned judgment of the trial judge to be interposed between emotions of the jurors and a death sentence.” *Id.* The trial judge is “guided by, but not bound by, the findings of the jury”. *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973)

Even though a jury determination is entitled to great weight, the trial judge is “required to make an independent determination, based on the aggravating and mitigating factors”. *King v. State*, 623 So.2d 486, 489 (Fla. 1993)(and cases cited therein) The unique responsibilities of the trial judge in Florida’s statutory death penalty scheme dictate an “independent evaluation” concerning aggravating and mitigating circumstances. *Corbett v. State*, 602 So.2d 1240, 1244 (Fla. 1992)(and cases cited therein) It is the trial judge who has the principal responsibility for determining whether a death sentence is appropriate. *Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993)

There is no legal authority for a trial judge to take into account the sentencing recommendation of a jury whose advisory sentence has been subsequently vacated on the ground that the defendant was not adequately represented by counsel during that proceeding. *Blanco v. Singletary*, 943 F.2d 1477 (11 th Circ. 1991) In light of the trial court’s recitation and apparent consideration of this inappropriate factor, the sentencing of Omar Blanco violated the principles of *Florida State* 921 .141 as interpreted by *Ross*, *Dixon* and *King*. Resentencing is required.

POINT IV ON APPEAL

THE TRIAL COURT ERRED IN ITS  
EVALUATION OF DEFENDANT'S  
IMPOVERISHED BACKGROUND AS A NON-  
STATUTORY MITIGATING CIRCUMSTANCE.

The trial court erred in its legal analysis of Omar Blanco's impoverished background as offered by the defense as a non-statutory mitigating circumstance. Although the court in its sentencing order found this factor had "been proven", it afforded it "little weight". (R 3519) The reasoning offered for this finding was that "all of Mr. Blanco's family came from the same background and there was no evidence that they followed a course of criminal conduct as Mr. Blanco did." (R 3519)

This analysis by the trial judge was legally flawed. The lack of criminal actions of other family members cannot be held to summarily dismiss an impoverished background of the defendant.<sup>7</sup> Such reasoning leads to preposterous results that depend on the number of other family members that exist. How many other family members would be required to engage in criminal acts before a trial judge would give this factor "some weight" or "great weight"? What happens to an only child or an orphan or a child that is both?

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Although not in this record, it appears that Omar Blanco's brother may have engaged in some criminal conduct in that he was also in prison while in Cuba. *Blanco v. Wuinwright*, 507 So.2d 1377, 1381 (Fla. 1987)

This analysis is as flawed as that condemned by this court in *Nibert v. State*, 574

So.2d 1059 (Fla. 1990):

Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that **he** had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find that analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstances, despite well-settled law to the contrary.

574 So.2d at 1062

The uncontroverted evidence was that Omar Blanco grew up on a small rural farm in Cuba that had neither plumbing nor electricity. From age eight, Omar Blanco, worked the sugarcane fields along side his father and grandfather. On a daily basis, he pulled water from the well and carried it a kilometer to the farmhouse, There was every reason for the trial court to recognize this non-statutory mitigating circumstance and give it at least

some weight. see, e.g., *Brown v. State*, 526 So.2d 903, 908 (Fla. 1988 )(defendant's disadvantaged childhood constitutes valid mitigation and must **be** considered), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371 (1988)

The failure of the trial judge to afford this non-statutory mitigating circumstance the weight it deserved deprived Omar Blanco of his rights pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution. Resentencing is required.

POINT V ON APPEAL

THE DEATH PENALTY IS NOT  
PROPORTIONALLY WARRANTED IN THIS  
CASE.

As previously observed by this court, "any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different". *Fitzpatrick v. State*, 527 So.2d 809, 811 (Fla. 1988) Its "application is reserved for the "most aggravated" and "most indefensible of crimes".<sup>8</sup> *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973)

Unlike Omar Blanco's first appeal, which came to this court without any record mitigating evidence, the present record contains substantial mitigating evidence both statutory<sup>9</sup> and non-statutory.<sup>10</sup> *Blanco v. State*, 452 So.2d 520, 526 (Fla. 1984) ("The

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As in another case reduced on proportionality grounds, the pre-penalty phase life plea offer if Omar Blanco would withdraw his newly discovered evidence claim, shows that "the state itself originally concluded that the crime did not warrant imposition of the death penalty and agreed to a plea bargain of life imprisonment until [the defendant] himself insisted otherwise *Elam v. State*, 636 So 13 12, 1315 (Fla. 1994) (*See* Affidavit of Counsel, Ex 5, Appendix)

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"Statutory mitigating evidence" is any evidence tending to prove the existence of those factors described in section 921.141(6), Florida Statutes (1995) *Maxwell v. State*, 603 So.2d 490, 491 n 1 (Fla 1992)

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"Nonstatutory mitigating evidence" is evidence tending to prove the existence of any factor that "in fairness or in the totality of the defendant's life or character, may be considered as extenuating or reducing the degree of moral culpability for the crimes committed" or anything in the life of the defendant which might militate against the appropriateness of the death penalty" *Maxwell, supra*, at 491 n 2 (and citations contained therein)



defense presented no evidence in mitigation".) Because of the very different record now before the Court, Omar Blanco's death sentence should be reduced as the "entire picture of mitigation and aggravation...does not warrant the death penalty". *Smalley v. State*, 546 So.2d 720, 723 (Fla. 1989); *Proffitt v. State*, 510 So.2d 896, 897 (Fla. 1987)(upon appeal from a resentencing proceeding directed by the federal courts, the record was different from Proffitt's earlier sentencing appeal and included more mitigating evidence which required this court to reduce Proffitt's death sentence to one of life imprisonment)

The trial court found two aggravating circumstances: felony murder/pecuniary gain and prior violent felony. (R 3516-3517) *Florida Statute* 921.141(5)(b),(d),(f) On the other hand, the trial judge found the statutory mitigating circumstance that defendant's capacity to conform his conduct to the requirements of law was substantially impaired. (R 3518-3519) The court rejected the mental health mitigator that the offense was committed while defendant was under the influence of extreme mental or emotional disturbance because the judge did not believe the testimony of Dr. Maulion, the psychiatrist appointed by the court and whose appointment is assigned as error in Point I above.

As to non-statutory mitigating circumstances, the trial court found (but gave little weight to) defendant's potential for rehabilitation, his fatherhood, his impoverished background, his organic brain damage, his unwavering declaration of innocence, his oppression in Cuba, his good character, his strong religious beliefs, his cooperation with police and his relationship with his family. Omar Blanco's dull intelligence was given "greater weight". (R 3519-3521) e.g *Carterv. State*, 560 So.2d 1166 (Fla. 1990)(organic brain syndrome); *Morris v. State*, 557 So.2d 27 (Fla. 1990)(dull normal intelligence);

*Holsworth v. State*, 522 So.2d 348 (Fla. 1988)(difficult childhood); *Thompson v. State*, 456 So.2d 444 (Fla. 1984)(good son and father); *Brown v. State*, 526 So.2d 903 (Fla. 1988)(potential for rehabilitation); *Washington v. State*, 362 So.2d 658 (Fla. 1978) (cooperation with police); *Washington v. State*, 432 So.2d 44 (Fla. 1983)(good character); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994)(family background and personal history)

Despite the mental health problems attributed to Omar Blanco and despite his impoverished childhood and otherwise good character traits, the trial court determined that death was the appropriate sentence. Regardless, the death penalty is not proportionally warranted.

The "proportionality review" conducted by this court in every death case has been described as follows:

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases*. It is not a comparison between the number of aggravating and mitigating circumstances.

*Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991) Omar Blanco's death sentence is not a proportional penalty in light of this court's opinion in *Terry v. State*, 668 So.2d 954 (Fla. 1996). In *Terry*, as in the present case, there existed the two statutory aggravating circumstances of a prior violent felony and felony murder/pecuniary gain. 668 So.2d at

965 The trial court in *Terry* found no statutory mitigating circumstances and rejected Terry's minimal non-statutory mitigation. *Id.* The shooting in *Terry* was a "robbery gone bad" whereas the shooting herein can fairly be **described** as a "burglary gone bad". *Id.* In setting aside Terry's death sentence, this court noted the lack of mitigation, but still found the "circumstances insufficient to support the imposition of the death penalty. *Id.* at

966 Omar Blanco's case is also disproportionate to *Farinas v. State*, 569 So.2d 425 (Fla. 1990) In *Farinas*, this court sustained the aggravating circumstances of "heinous, atrocious, or cruel" and "felony-murder kidnapping", but nevertheless reduced Mr. Farinas death sentence in finding the mitigating circumstances of "extreme mental or emotional disturbance" and "domestic confrontation". 569 So.2d at 431 Omar Blanco's substantial mental mitigation and other non-statutory mitigation supports the conclusion that the death penalty is not proportionately warranted. see *Kramer v. State*, 619 So.2d 274 (Fla. 1993)(death penalty not proportional despite aggravating circumstances of "prior violent felony" and "heinous, atrocious, or cruel" in view of mitigation consisting of alcoholism, mental stress, loss of emotional control and potential for rehabilitation.)

It is respectfully submitted that when compared to *Terry*, *Farinas*, and *Kramer*, the aggravators<sup>11</sup> and mitigators<sup>12</sup> in Omar Blanco's record do not meet the test laid down in

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Neither of the two statutory aggravating circumstances found by the trial judge involve the more serious factors of heinous, atrocious, cruel, or cold, calculated premeditation. These two aggravating factors have been described by this court as being the "most serious" of the statutory aggravating Circumstances. *Maxwell, supra* at 493 n.4 ("By **any** standards, the factors of heinous, atrocious, or cruel, and cold, calculated premeditation are of the most serious order.")

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Conversely, this court has held that mental and psychological deficiencies are among the weightiest of mitigating factors. e.g. *Santos v. State*, 629 So.2d 838, 840 (Fla. 1994)

*Dixon*, "to extract the penalty of death for only the most aggravated, the most indefensible of crimes". 283 So.2d at 8. The death sentence in this case violates Article I, Section 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteen Amendments to the United States Constitution. Reversal is required.

POINT VI ON APPEAL

FLORIDA STATUTE 921.141(5)(d), THE  
FELONY MURDER AGGRAVATING  
CIRCUMSTANCE, ~~IS~~ UNCONSTITUTIONAL ON  
ITS FACE AND **AS** APPLIED IN THIS **CASE**.

Florida Statute 921.141(5)(d) which ~~is~~ the statutory aggravating circumstance of "felony murder" violates both the Florida and United States Constitutions. The use of this aggravating circumstance renders Omar Blanco's death sentence unconstitutional pursuant to Article I, Section 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Defendant filed a motion in the trial court to declare this aggravating circumstance unconstitutional. (R 2637-2642) This motion was denied. (R 274-280; 2244-2247) The jury was instructed on the aggravating circumstance and the trial judge found it as one in his sentencing order. (R 3402; 3516)

Aggravating circumstance (5)(d) states:

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, sexual battery, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Florida Statute 921.141(5)(d).

All of the felonies set forth as aggravators are also felonies which constitute felony-murder pursuant to Florida's Murder in the First Degree Statute. *Florida Statute 784.04(1)(a)(2)*.

Before a statutory aggravating circumstance can meet constitutional criteria under the Eighth and Fourteenth Amendments, it "must genuinely narrow the class of persons eligible for the death penalty" and it "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder". *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742-2743 (1983)

Florida's felony-murder aggravating circumstance performs no narrowing function since every person convicted of felony-murder automatically qualifies for the aggravator. It certainly provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony-murder start off with this aggravating circumstance while those convicted of premeditated murder do not. Thus a person who had no intent to kill or a person who was not even the actual killer is treated more harshly than a person who has the intent to kill and in fact does kill. It is not rational to make the person who does not kill and/or intend to kill automatically eligible for the death penalty while not doing so for the person who does the actual killing and does so from a premeditated design. Consequently, this statutory aggravating circumstance as set forth in *Florida Statute 921.141(5)(d)* violates the Eighth and Fourteenth Amendments pursuant to the opinion in *Zant, supra*. see also *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979); *Engberg v. Meyer*, 820 P.2d 70, 87-92 (Wyo. 1991)

A new sentencing hearing is required.<sup>13</sup>

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Defendant recognizes that this court has rejected this argument but **asks** for reconsideration of the issue. e.g. *Johnson v. State*, 660 So.2d 648 (Fla. 1995)

## POINT VII ON APPEAL

### IMPOSITION OF THE DEATH **PENALTY** BY WAY OF ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

The availability of less cruel but equally effective methods of execution render electrocution a cruel and unusual punishment. A punishment which might have been constitutionally permissible in the past can become unconstitutional when **less** painful methods of execution are developed. *Furman v. Georgia*, 408 U.S. 239, 279 (Brennan, J. concurring), 342 (Marshall, J. concurring), 430 (Powell, J. dissenting)

A motion to declare *Florida Statute 922.10* unconstitutional was filed in the trial court. (R 2666-2667) This statute which provides that a death sentence shall be executed by electrocution, requires a procedure that involves unnecessary and wanton infliction of pain, unnecessary mutilation of the body and unnecessary psychological torture. *Glass v. Louisiana*, 471 U.S. 1080, 1086-88, 105 S.Ct. 2159, 2164-65 (1985)(Brennan, J. Dissenting); See Gardner, *Executions and Indignities -- An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio State L.J. 96, 125-127 (1978); "Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States", by Helen Prejean, C.S.J. (Random House, 1993) Defendant's motion was denied following hearing on the motion. (R 338)



Electrocution is cruel and unusual punishment with the availability of **less** cruel alternatives and as such it violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.<sup>14</sup> Because no statutory alternative exists, **Omar** Blanco's death sentence should **be** vacated and one of life imprisonment imposed.

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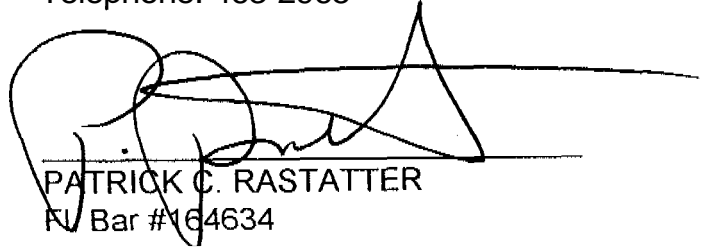
Defendant recognizes this court's **prior** opinions to the contrary. e.g. *Buenoano v. State*, 565 So.2d 309, 311 (Fla. 1990)

CONCLUSION

Based on the foregoing arguments and citations of authority, it is respectfully submitted that this court should vacate Omar Blanco's death sentence and either reduce defendant's sentence to life imprisonment, remand for a new sentencing hearing, or remand for resentencing, whichever is appropriate.

Respectfully submitted,

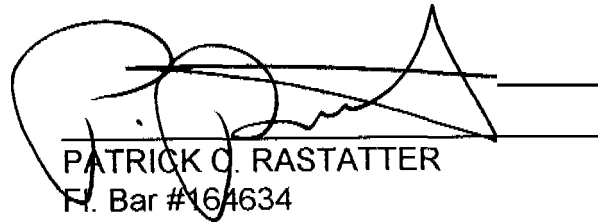
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant ~~has been~~ furnished this date to the Office of the Attorney General , 1655 Palm Beach Lakes, Suite 300, West Palm Beach, Fl 33401-2299 by delivery/U.S. Mail this *31* day of July, 1996.

  
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IN THE SUPREME COURT OF FLORIDA

OMAR BLANCO,

CASE NO. 85,118

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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