IN THE SUPREME COURT OF FLORIDA

OMAR BLANCO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,118

REPLY 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. References to the State's Answer Brief are marked **by** the symbol "SB" **followed by** the appropriate page number.

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.

As set forth in his initial brief and oft repeated **by** the State in its answer brief, Omar Blanco will once again acknowledge that he was neither entitled to the expert of his own choice[1] nor to a court appointed expert with unlimited funding nor to an expert offering a favorable psychiatric opinion. **(SB** 20-25) Instead, the defendant asserts, and the state takes no exception to, the principal that he had a constitutional right to meaningful access to expert assistance **so as** to have a fair opportunity to present his defense.[2] In that regard, Omar Blanco was entitled to the assistance of a competent psychiatrist, a matter

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[1] It must be observed, however, that Omar Blanco may very well have been entitled to a competent psychiatrist of his own choosing. ***see Morgan v. State,*** **639** So.2d 6, **12** (Fla. 1994)("clearly, an indigent defendant has a constitutional right to choose a competent psychiatrist of his or her personal choice and is entitled to receive funds to hire such **an** expert.)(citations omitted)

[2] On numerous occasions in its brief, the State notes that the trial court granted defendant's request for the appointment of other experts, none of which were retained or utilized by defense counsel except for neuropsychologist Dr. Lee Bukstel, who testified at trial, and psychologist Dr. Dorita Marina, who did not testify, but whose findings were submitted via Dr. Bukstel. (SB **2-4,** 15-17, 19) Any legal significance this fact has regarding the issue of Dr. Maulion's appointment and incompetence **is** left unstated by the prosecution.

clearly recognized by the prosecution below. (**R 49)**

Defense counsel had sought to locate Dr. Ferenando Melendez who had evaluated Omar Blanco during his post-conviction proceedings but whose current whereabouts were unknown. Thereafter, defense counsel requested the services of Dr. Ricardo Costello but the trial judge would not authorize payment of anything other then that allowed by the Chief Judge's Administrative Order, a ruling that caused the doctor to decline any appointment. Finally, counsel asked for authorization to retain Dr. Arturo Gonzales who would work for **a** set daily fee. Once again the appointment was denied because of the psychiatrist's' requested fee, which while not being unreasonable, was outside the Chief Judge's Administrative Order.

This turn of events understandably left defense counsel in the position of having no choice but to take suggestions from the court on how to proceed. In response the trial judge told counsel to contact and attempt to retain Dr. **Joseph** Lapeyra from Prison Health Services who turned out to be unavailable. Thereafter the trial judge provided to counsel the name of another psychiatrist, Dr. Richard Maulion, a doctor the court preferred over Dr. Gonzales because he would work at a cheaper rate. Consequently, this psychiatrist, who was unknown to any of the parties involved, became Omar Blanco's sole witness in the field of psychiatry based on his cost and his apparent reputation **as** not favoring the defense.[3]

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[3] The State's assertion that Dr. Maulion was located and chosen by defense counsel **and** was defendant's "ultimate **choice"** as his **expert** witness in the field of psychiatry **is simply** not **a fair** characterization. **(SB 5,** 25)

The State argues that because defense counsel, shortly after meeting Dr. Maulion, expressed his satisfaction with the psychiatrist's outward ability, that he can not now be heard to complain. **(SB** 18-19, 23-25) Such **a** statement ignores the mandate that "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". *Ake v. Oklahoma,* 470 **U.S. *68,*** 83, 105 S.Ct. 1087, 1096-97 (1985) Omar Blanco simply desired a psychiatrist who was capable and qualified for the task at hand which Dr. Maulion clearly wasn't, notwithstanding counsel's initial impressions to the contrary. *cf. Martin v. Wainwright, 770* F.2d 91***8,*** 934 n. 28 (11th Cir. 1985) (While a claim of bias **as** to an expert witness specifically sought by defense counsel may not be appropriate' a claim of incompetency **is** cognizable.)

In an attempt to defend Dr. Maulion's credibility and competence in the face of repeated and persistent impeachment on material issues by the prosecution below, the State now points to trial counsel's own defense of the psychiatrist in his closing statement to the jury. **(SB** 19-20) Such an argument by the State in this court as justification for Dr. Maulion's incompetence must fail just as defense counsel's did in the trial court. It is no argument at all.

In a fall back position, the State asserts that Dr. Maulion's incompetence cannot **be** determined from this record and is more properly presented in a motion for post-conviction relief. (SB 22-23, 25) The State attributes the psychiatrist's obvious forensic shortcomings to some form *of* "trial strategy" that can't be gleaned from the transcript. **(SB** 22-23) Thus, the fact that the expert witness spent but one hour interviewing Omar Blanco is described

by the State as being "irrelevant" and the fact that the psychiatrist could not even identify Mr. Blanco in the courtroom is labeled "of minor importance". (SB 19-20, 25)

For the state to argue that trial counsel "undoubtedly guided, if not determined" Dr. Maulion's evaluation of Omar Blanco is without merit. **(SB** 22-23) If the State is suggesting that defendant's trial lawyer thought it would be a good idea for Dr. Maulion to take along a lay companion for Omar Blanco's mental health evaluation and then solicit that friend's opinion as to Omar Blanco's psychiatric condition, then the record clearly sustains the ineffectiveness of defendant's trial counsel and a new penalty phase proceeding is in order.

In a similar vein is the psychiatrist's unabashed and unsolicited opinion as to the defendant's innocence which was, of course, in direct contradiction to all of defense counsel's representations to the jury during voir dire examination and opening statements. Other glaring deficiencies in Dr. Maulion's work which are apparent from the record and which are incredibly attributable to "trial strategy" by the State include his failure to read transcript testimony, his failure to remember various documents provided for his review, his inability to name those persons whose observations about defendant he relied upon, his failure to make inquiry to defendant regarding important and pertinent issues, and his inability to find test information within his own file. Finally, Dr. Maulion provided answers inconsistent with those previously given, recited incorrect proverbs and admitted his failure to review the trial transcript or depositions taken in preparation for Mr. Blanco's new penalty phase proceeding. **(SB** 46-47)

Contrary to the State's position, it is difficult to comprehend how the presentation

in a post conviction trial court forum would make these actions or lack thereof any more understandable or justifiable under the guise of "trial strategy" than they would upon a current review in this court. **(SB** 23) The ineffectiveness and incompetence of the psychiatrist selected by the trial judge to assist defendant is clearly apparent on the face of the record and the issue of same has been adequately preserved below. Refusal to address the issue of Dr. Maulion's competence in this appeal would be a "waste of judicial resources". *Owen v. State, 560* So.2d *207,* **21**2 (Fla. 1990); *Reaves v. State,* **669** So.2d 352 n l (**4th** DCA 1996)

The State has not adequately countered the argument that Omar Blanco was denied meaningful access to expert assistance other than to repeatedly state that it should be litigated at some future date in a different forum. Dr. Maulion's performance in conducting a psychiatric examination and presenting his evaluation at trial fell reasonably below that of a competent forensic psychiatrist. This deficiency substantially prejudiced Omar Blanco to the extent of affecting the outcome of the proceeding **as** is evident from the trial Judge's sentencing order. cf. *Knight v. State,* 394 So.2d 997 (Fla. 1981)

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. 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.

Dr. Maulion testified that it was his expert psychiatric opinion that Omar Blanco was acting under extreme duress at the time of the offense. (R **1784)** Even though that duress came at the hands of the decedent himself, the doctor believed that because of defendant's organic brain damage, the confrontation and struggle with the victim which preceded the actual shooting became "catastrophic" in terms of the mental duress suffered by Mr. Blanco. (R 1782-1785) In refusing to give an instruction on "extreme duress" the trial judge ruled that the duress in question must come from **a** person other than the victim himself pursuant to the language of the applicable statute. (R 2261-2263) Although such a requirement is not within the wording of Florida Statute 921.141(6)(e) and despite expert opinion testimony that the duress mitigator applied to the defendant, the request that it be given was rejected.

In an attempt to justify the trial judge's ruling, the State cites three cases for the proposition that the duress in issue can not come from the victim so as to make applicable the "duress" mitigating instruction. None of these cases - *Toole v. State,* 479 So.2d 731 (Fla. 1985); *Barwick v. State,* 660 So.2d *685* (Fla. 1995); and ***Walls** v. State,* 641 So.2d 381 (Fla. 1994) - specifically state that the duress in question must necessarily emanate from a person other than the victim. Instead these cases reject the applicability of the duress instruction under the particular facts and circumstances therein based on the premise that duress as used in the statute refers not to the vernacular internal pressure but rather to external provocation such as the use of force or threats, none of which was present in those situations, Any reliance on *Toole, Barwick* and *Walls* is simply misplaced. The State's further citation of *Wuornos v. State,* 676 So.2d 972 (Fla. 1996) is not germane in that *Wuornos* involved a completely different statutory mitigating circumstance, i.e. a victim being a participant in the defendant's conduct or consenting to the act. F.S. 921.141(6)(c) (1989).

As an alternate position, the State argues that even if the trial judge should have given the jury defendant's requested duress instruction, the failure to do so was not harmful as "it would not have...affected the jury's recommendation or the trial courts' ultimate sentence, even when coupled with the other mitigating circumstances". (SB 28) Again the State's citations are not applicable. The case of *Capehart v. State, 583* So.2d 1009 (Fla. 1991) involved three other valid aggravating circumstances and but one non-statutory mitigating circumstance while *Rogers v. State,* 51 I So.2d 526 (Fla. 1987) entailed two valid aggravating circumstances in the face of that trial judge overlooking a

single non-statutory mitigating circumstance.

Consequently, the failure of the trial court to instruct on the mitigating circumstance of "duress" cannot be deemed error that was harmless beyond a reasonable doubt. **"Had** the jury been properly instructed that it could consider this specific mitigating factor, it might have not recommended death. **A** jury recommendation of life is entitled to great weight and may not be overruled unless there was no reasonable basis for it." *Toole*, ***supra*** at 734. Omar Blanco has been prejudiced by the trial courts' refusal to give a proper instruction that might have led to a different recommendation. See ***Robinson*** *v. State*, 487 So.2d 1040 (Fla. 1986). Reversal 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 DEFENDANT'S PRIOR PENALTY PHASE PROCEEDING.

In its brief, the State dismisses the trial judge's specific statement in his sentencing order that the original jury returned an eight to four death recommendation as a mere procedural history recitation. **(SB** 29-30) If it **is was** only the trial judge's intention to set forth that a prior advisory death sentence had been returned, then why detail the numerical vote? The lower court also went on to note that the matter was only now back for a new sentencing proceeding because of intervention by the federal courts.

A fair overall reading of the sentencing order suggests that to some degree the trial judge felt compelled to again follow the **jury's** death recommendation. The decisions cited in the State's brief are not applicable in that both deal with factual recitations in support of aggravating circumstances found **by** the court in those cases. In the instant matter **is** a statement of fact which represents the product of **a** prior proceeding in which Omar

Blanco had ineffective counsel.

The apparent consideration of this inappropriate factor violates the principles of Florida Statute 921.141 **as** interpreted by ***Ross*** *v. State,* **386** So.2d 1191 (Fla. 1980) Reversal is required.

POINT IV ON APPEAL

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

In the trial court's analysis of Omar Blanco's impoverished background, it found that although proven, it should be afforded "little weight" since there was no evidence that any of defendant's siblings who came from the same background had engaged in criminal conduct. (R 3519) Contrary to the State's argument in its brief, defendant is not "challenging the weight accorded this factor" as much as he is attacking the legal reasoning employed so as to arrive at that designation. (SB 32) The specific reasoning of the trial judge was to give defendant's impoverished background "little weight" solely because there was "no evidence that other family members followed a course of criminal conduct as Mr. Blanco did". (R 3519) The sentencing order does not, as the state asserts, "merely note the lack of evidence that [defendant's] siblings were similarly affected by their background but instead it relies upon that fact in determining how much weight to assign Omar Blanco's background.

In *Barwick v. State,* 660 So.2d 685, 695-696 (Fla. 1995) this court **"expressly**

recognized an abused or deprived childhood is one factor that is mitigating in nature" and one that must be considered regardless of the effect that it may have had on an accused's siblings. Omar Blanco's severely impoverished and disadvantaged childhood in rural **Cuba** where he lived without electricity or plumbing and where he worked the fields at **age** eight should have been afforded consideration on its own merit without regard to his siblings. The failure of the trial judge to properly evaluate this mitigating circumstance and give it the appropriate weight was harmful error. *Pardo v. State,* **563** So.2d 77, 80 (Fla. 1990)(this court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law). Reversal is required.

POINT V ON APPEAL

THE **DEATH** PENALTY **IS** NOT PROPORTIONALLY WARRANTED IN THIS **CASE.**

As explained in the Initial Brief, this record comes to the court in a much different posture than defendant's first appeal. Because of this very different record that now contains substantial mitigating evidence, 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)

The State relies on *Consalvo v. State,* 21 Fla. L.Weekly S423 (Fla. Oct. 3 1996), *Finney v. State,* 660 So.2d 674 (Fla. 1995) and *Watts v. State,* 593 So.2d 198 (Fla. 1992) to argue that death is proportional in the this case. However, all of these three cases are much more aggravated and have **less** mitigation. In *Consalvo,* there exited two statutory aggravators, no statutory mitigating circumstances, and two non-statutory mitigating circumstances which were given "very little weight" in a situation where the victim received

three stab and five superficial wounds. In *Finney*, where the victim was bound, gagged, stabbed thirteen times and died from drowning in her own blood, there existed three statutory aggravating circumstances, no statutory mitigating circumstances, and five non-statutory mitigating factors. Finally, in *Watts* there were three statutory aggravating factors, one statutory mitigator (age) and one non-statutory mitigator (low I.Q.) in a matter where the defendant committed a murder during the course of a sexual battery and where the court specifically found an absence of statutory mental health mitigation.

In discussing the three comparable proportionality cases cited in defendant's initial brief, the State argues that they are factually distinguishable. (SS 38) While this may be an accurate observation, the State fails to recognize that these cases are cited for the general principle that there are prior decisions of this court with more aggravation and less mitigation then the present case and that have been reduced to life. E.g. *Terry v. State,* *668* So.2d 954 (Fla. 1996); *Farinas v. State,* **569** So.2d 425 (Fla. 1990); *Kramer v. State,* 619 So.2d 274 (Fla. 1993).

Omar Blanco's case almost mirrors that of ***Curtis v. State***, 21 Fla. L. Weekley S442 (October 10, 1996). Therein, Curtis was convicted of a robbery/murder where the court found the exact **two** aggravating circumstances **as** are present herein - that the murder was committed in the course of a felony and for pecuniary gain (merged **as** one aggravator) and that the defendant had been convicted of a prior violent felony. In reversing defendant's death sentence, this Court noted Curtis' "substantial mitigation" which consisted of a single statutory mitigation (age 17 years) and the non-statutory mitigating circumstances of remorse, adjustment to prison life and help to a schoolmate and the fact

that the actual killer was sentenced to life imprisonment. Omar Blanco's mental health mitigation is surely comparable to that *of Curtis* and because the aggravating circumstances are the same, this defendant's death sentence is disproportionate. **see *also* *Morgan* *v. State*, 639** So.2d 6 (Fla. 1994)(death sentence held disproportionate with aggravating factors of felony murder **and** heinous, atrocious, or cruel in view of statutory mental health mitigation, age, and other non-statutory mitigating circumstances.)

A comparison of the circumstances of the present case with the above decisions of this court **does** not allow **a** conclusion that this crime is one of "the most aggravated, the most indefensible of crimes" for which the death penalty is reserved. *Fitzpatrick* ***v.*** *State*, 527 So.2d 809, 811 (Fla. 1988)(quoting *State v. Dixon*, 283 So.2d 1, 8 (1973), *cert. denied,* 416 **U.S.** 943, 94 S.Ct. 1950 (1974) Reversal is required.

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 17 day of JAN. , 1997.

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