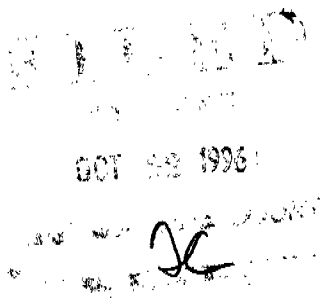
IN THE SUPREME COURT OF FLORIDA



CASE NO. 85,529

GERARDO MANSO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

GERARD0 MANS0 was charged by indictment with one count of first-degree murder, for the killing of Miguel Roque, and four counts of attempted first degree-murder, with respect to victims Ray Cruz, Douglas Zamora, Jorge Sanchez and George Moussa. (R. 1-6).

Manso, a disgruntled employee of Aircraft Modular Products, awaited the arrival of five (5) co-employees, who were returning from a computer class, on the evening of October 14, 1993. When those employees, returning in Jorge Sanchez's vehicle, arrived at the employer's parking lot, Manso, from the roof of the employer's building, fired shots from a sawed off shotgun at the five employees, while they were either exiting the vehicle or getting ready to do so. Manso struck and killed Miguel Roque, struck and critically injured Douglas Zamora and Ray Cruz, and failed to strike Sanchez and Moussa, while attempting to kill them,

A. Guilt Phase Evidence

A.1. State's Case-in-Chief

All four surviving victims recounted the events of October 14, 1993. Victim Jorge Sanchez was the machine shop supervisor for Aircraft Modular Products' first shift, which extended from 7:30 a.m. until 6:00 p.m. (T. 451-52). The defendant, who was the foreman for the second shift, from 4:00 p.m. until midnight, was under Sanchez's supervision. (T. 452-53, 545).

Sanchez testified that, on October 14, 1993, at approximately 4:00 p.m., Sanchez left with Moussa, Cruz, Zamora and Roque to attend a computer class, in Broward County, regarding new machinery. (T. 454-55). Sanchez drove everyone in his Bronco. (T. 455). The class ended at 8:00 p.m. and Sanchez drove everyone back to the workplace, arriving around 9:05 p.m. (T. 455-56). Zamora had been sitting in the front passenger seat, and the other three were in the back - Roque

behind the driver; Moussa in the middle; and Cruz on the rear passenger side. (T. 456).

After parking in the company lot, Sanchez exited the vehicle and started walking towards the place of business, when he heard a shot. (T. 456-57). Upon hearing the shot, Sanchez went back towards the Bronco and ducked behind it. (T. 457-58). Sanchez then heard Cruz say that he had been hit; Sanchez pulled Cruz towards the Bronco. (T. 457). Sanchez observed that someone was up on the roof of the business, right in front of the Bronco, and that the shots were coming from up on the roof. (T. 457). He heard several shots. (T. 457,460). The person on the roof was wearing some kind of plastic item over his head. (T. 457). Sanchez did not see what had happened to Zamora. (T. 460). When the police and paramedics arrived, someone opened the back door of the Bronco and Miguel Roque was observed face down, inside the truck. (T. 460). Roque was turned over and was heard uttering, "Why me?" (T. 460-61).

Victim Cruz testified that Zamora exited the vehicle before him, and that as Cruz was exiting, Zamora was shot and he observed Zamora fall. (T. 486-88). Cruz was then shot and went back towards the Bronco. (T. 488-89). Cruz was shot in the leg, hip, stomach, chest and arm. (T. 489).[1]

Victim Zamora testified that he and Sanchez were the first to exit the vehicle. Zamora stated that he took a few steps, heard a shot and was hit; he blacked out, but regained consciousness while on the ground. (T. 497-98). Upon regaining consciousness, he ran inside the place of employment. (T. 498-99). After he was hit, he heard what he described as "many" more shots. (T. 499). Zamora's

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[1] Cruz's medical records, for treatment of his injuries, were introduced into evidence. (T. 577-79; R. 233-540). His medical records refer to gunshot wounds to the right groin/arm and abdomen. (R. 398). Bullet fragments were "overlying the right lower lateral ribs." (R. 395). The gunshot wounds were accompanied by a fracture of the spine. (R. 396). There were "multiple gunshot wounds," including one to the chest, one to the abdomen, and one to the right thigh. (R. 406).

injuries included wounds through the lung, intestines, and forearm, among other injuries. (T. 502).[2] Zamora had a firearm with him that evening, but did not use it. (T. 503-504). He did not know of anyone else using that firearm. Id.[3]

Victim Moussa testified that after Zamora exited the vehicle, the three men in the back seat started moving, at which time Moussa heard a "bang." (T. 5 18). Cruz exited from the back and then Roque moved to get out, when Moussa heard another shot and found Roque leaning on him. (T. 521). After hearing yet another shot, Moussa heard Roque say "Why me?" (T. 522). The shooting continued, in what sounded to Moussa like "a lot of rounds." (T. 523). Moussa tried to figure out where the shots were coming from and then pulled out his own weapon and fired out the window. (T. 523-25). Moussa identified his own weapon, State's Exhibit 40. (T. 524). Moussa continued firing back until his own gun jammed; he then ran into the place of employment. (T. 526). He did not hear any more shots after he stopped firing his own gun. (T. 526).

Although Manso was the shift foreman, during the period of shooting and the time leading up to it, Manso was nowhere to be seen in the place of employment. Chris McCascin, a machine operator who was working that shift, and who worked under Manso's supervision, had tried finding Manso around 8:45 p.m., and looked throughout the plant. (T. 474-75). McCascin had taken his "lunch" break between 8:00 p.m. and 8:30 p.m. Upon returning, he tried finding Manso without success. (T. 473-75). McCascin did not see Manso until after the shooting was over. (T. 475).

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[2] Zamora's medical records, from treatment of the gunshot wounds, were admitted into evidence, and reflect the severity of his injuries. (T. 577-79; R. 541-962). One of the preliminary reports refers to "multiple gunshot wounds." (R. 554). The records also refer to a colostomy which was performed due to a gunshot wound to the abdomen. (R. 597, 635-36). Diagrams accompanying the reports reflect gunshot wounds to the abdomen, groin, upper chest, left wrist and right forearm. (R. 691).

[3] Subsequent testimony from Detective Sermon confirmed that Zamora's weapon had not been used. (T. 839-41).

While McCascin and most of the other employees at work were running towards the back of the shop for protection during the shooting, McCascin fell and was injured. (T. 476-79). He did not see Manso during this time. (T. 479). Manso came to McCascin's assistance about five minutes after the shooting ended. (T. 481).

Other witnesses similarly observed that Manso was not in the plant at the time of the shooting. Victim Moussa had managed to make it inside the building after he returned fire. (T. 526). He did not see Manso until approximately five minutes after the shooting ended, although he had "screamed" for the defendant as he had run into the warehouse for safety. (T. 531-32). The defendant then told Moussa that he had been in the bathroom, although Moussa, who had been facing the bathroom, did not see him emerge from that direction. (T. 532-34). Likewise, Joseph Reyes, the shipping/receiving supervisor, saw Zamora, Moussa and Sanchez run in, but did not see Manso until after the shooting was over. (T. 596-99). Upon hearing shots, Reyes decided, for his own protection, to retrieve his own firearm from his car in the parking lot; he quickly ran out, retrieved the weapon, and went back into the business. (T. 598). He never fired his own weapon, however. (T. 598). Reyes stated that he first saw the defendant walking from the direction of doors leading to the outside of the warehouse, (T, 598-99).

The police responded to the scene of the shooting within a few minutes. During the course of their investigation, they discovered a shotgun, which had been found in the backyard of a cottage near the business. (T. 419-20). The weapon had been discovered the morning after the shooting, by Magala Lyuis, who lived in that cottage; Lyuis contacted the police and turned over the weapon. (T. 436). While Lyuis had not heard the shooting, a "thud" on Lyuis' roof had been heard. (T. 435).

The shotgun, when turned over to the police, had "grind marks" on it, indicative of an attempt to obliterate the serial number, (T. 419-20). Additionally, the shotgun's barrel had been

sawed off. (T. 558-9). Ray Freeman, the State's firearms examiner, explained how serial numbers are required on all firearms manufactured in the United States, and that no such number appeared on the recovered shotgun. (T. 558-59). It appeared as though someone had attempted to remove the manufacturer's markings, including the serial number. (T. 559). Freeman further explained how those markings, even though removed, could be restored, through the smoothing of the area and the application of acid. (T. 560-63). Upon going through that process, Freeman was able to determine the firearm's serial number - W987818M. (T. 564).

Detective Sermon traced the serial number and found that it belonged to a shotgun which had been sold by the Sports Authority, in Miami, in 1989. (T. 642-43). The ATF forms which accompanied the sale of that firearm were admitted into evidence, confirming the sale date, in November, 1989, and further reflected that Manso was the purchaser. (T. 646-48; Exhibits 89-90). A document examiner for the State identified the signature on the ATF form, and compared it to Manso's signature on Exhibit 75, which was his employment application at Aircraft Modular Products, and concluded, with 100 per cent certainty, that Manso signed the ATF form. (T. 65 1 -54).[4]

Ray Freeman, the firearms examiner, also provided a detailed explanation of the nature of the defendant's firearm, a Remington 12 gauge bump shotgun, and the manner in which it worked. (T. 556-57). That weapon can accommodate up to five shells without requiring reloading. (T. 557). Five fired shells had been recovered at the scene of the shooting, and these were tested by Freeman, to determine whether they came from the Remington. Freeman's conclusion was that the five shells, did indeed, come from this shotgun. (T. 566-68). A shotgun shell has a plastic "pellet cup" holding round pellets which explode when the shell ejects. (T. 360). The shells utilized by the defendant

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[4] The employment application, Exhibit 75, bearing Manso's signature, was identified and introduced through the personnel director and records custodian of Aircraft Modular Products. (T. 581-84; R. 963-71).

each held "twelve, thirty-three caliber" pellets. (T. 566).

Freeman also examined other physical evidence from the scene and came to the following conclusions: wadding, which is also contained in a shotgun shell, was consistent with having been fired from the Remington; small pieces of the plastic pellet cup were similarly consistent with having come from the Remington; and, a large number of lead shotgun pellets found on the rear right floor of the Bronco were consistent with having been fired from the Remington and its shells. (T. 56871). A spent projectile which had been found under the deceased Victim Roque when Detective Pat Diaz went to the hospital to check on the victims, was further identified as being consistent with the lead pellets fired from the Remington and originating from one of the five shells examined. (T. 572, 445-49).

Manso had also been initially interviewed, shortly after the shootings, by Detective Juan Sanchez. The latter was interviewing all employees, approximately a dozen (12), who were working that evening. (T. 657-58). At that time, Manso had said that shortly after the end of his 8:00 p.m. dinner break, he heard shots, possibly two, while he was operating some machines. He then heard more shots, and saw some employees run past him. He joined those employees and ran to the rear of the warehouse. When the shooting subsided, he went to the front of the warehouse, where he saw one of the wounded employees. He also saw the manager, Moussa, by the bay door, clearing an automatic weapon. He then waited for the police. (T. 658-59). Manso also described what he deemed a suspicious incident to this detective. During the prior week, according to Manso, a "Columbian" stopped by the business, in a white Cadillac, looking for Sanchez. Manso said that the same vehicle and Columbian occupants had again come by, on the evening of the shooting, again seeking Sanchez. (T. 660-62). The defendant stated that he had overheard the occupants of the Cadillac saying "something about they were tired of George Sanchez giving them the runaround. (T.

662).

On October 21, 1993, one week after the shootings, Manso voluntarily went to the police station, pursuant to a prearranged meeting, for further questioning. (T. 664-66). By this time, the police had identified the murder weapon as the one belonging to Manso. (T. 641-54). Insofar as Manso spoke limited English, Sarah Moore, the secretary for Detective Robert Gaitly, acted as an interpreter when Gaitly questioned Manso. (T. 667-71, 676). Manso was given his Miranda warnings prior to this questioning. (T. 669-71, 677). Detective Gaitly ascertained that Manso had slept for six hours the night before the interview and further determined that Manso did not appear to be under the influence of drugs or alcohol, (T. 677-78). Gaitly learned that Manso had come from Cuba 13 years earlier, was 41 years old, married and a high school graduate. (T. 679). He had been the foreman in the computer machine shop and had been with Aircraft Modular Products for the past six (6) years, (T. 679). When Manso was questioned about guns that he owned, he acknowledged owning a .45 caliber handgun, a .36 hunting rifle, and an antique muzzle loader; he denied owning any shotgun. (T. 68 1). He also denied any involvement with the shootings. Id.

A few hours later, Detective George Plasencia, who is bilingual, conducted further questioning of the defendant, (T. 682-84). The defendant was again given Miranda warnings. (T. 685-87). Plasencia then confronted the defendant with the ATF form for the Remington shotgun. The defendant responded that he had purchased the gun, but had given it to a friend who had taken it to Costa Rica shortly after it had been purchased. (T. 688). The defendant admitted that it was his signature which appeared on the ATF form. (T. 688).

When Plasencia advised the defendant that this weapon had been found at the scene of the shootings, the latter promptly admitted his involvement in the homicide. (T. 688). The defendant initially stated that he had not wanted to kill Roque; he had intended to kill Sanchez, Moussa and

Zamora. (T. 688-89). Roque, allegedly, had been his friend. (T. 689). According to the defendant, Moussa and Sanchez were his supervisors and were making his job impossible. (T. 689). Manso had heard a rumor that he was going to be fired; he was also resentful of employees with less seniority than him having gotten promotions; and, he had been denied raises. (T. 689). The defendant had thus decided to kill Moussa and Sanchez. (T. 689).

The defendant also stated that on the day of the shooting, he had placed the shotgun in his car. (T. 689). He was aware that the victims went to computer class on Tuesday and Thursday nights, and that they returned around 9:00 p.m. (T. 689). At 8:30 p.m., the defendant had gone to his car and parked near the spot where Sanchez would park upon returning. (T. 690). The defendant stated that he had then retrieved the shotgun, together with a box of "double-aught" cartridges, and went back inside. (T. 690). Manso stated that he had cut off the end of the gun and grinded the serial numbers off of it, to avoid detection. (T. 690).[5] Manso then went to the rear of the business and climbed the ladders to the roof. (T. 690). He loaded the shotgun and placed a plastic garbage-type bag over his torso, to protect himself from the rain. (T. 690).

About five minutes later, the Bronco arrived. Zamora exited first, and Manso aimed at the lower portion of the body to wound Zamora and "teach him a lesson" - Le., "not to mess with" Manso. (T. 690). Manso claimed to be a good shot, as he used to go hunting. Upon seeing that he hit Zamora, he fired a second shot, this one at the person behind Zamora - Ray Cruz, who was sitting in the right rear of the car. (T. 691). The defendant stated, that as Cruz exited the vehicle, the defendant aimed below the wounds already inflicted, and fired another shot at Cruz; his intention

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[5] Moussa testified that the plant had a band saw, which cuts metals, and which could have cut the shotgun barrel in the manner which it had been cut. (T. 543-44). Moussa also identified and explained the operation of the plant's grinding machines. He looked at the shotgun, and concluded that the plant's grinder could have affected the shotgun so as to leave it in the condition that it was in when retrieved by the police, (T. 542).

was not to kill Cruz. (T. 69 1). The defendant stated that he had then fired another shot from the roof, towards the passenger seat, where he believed Moussa was sitting. Finally, the defendant had fired his last two rounds, intending to kill Sanchez. (T. 691). These last shots were fired towards the front windshield, where he believed Sanchez was. (T. 691). The defendant admitted that he intended to kill Sanchez and Moussa; he stated that he believed Roque, his friend, had exited the vehicle before he started shooting. (T. 691). The defendant continued shooting until he ran out of ammunition. (T. 691). He then proceeded to discard the shotgun over the side of the building and went back downstairs, mixing with other employees. (T. 691-92). The defendant prepared a diagram for Detective Plasencia, giving the layout of the scene of the crime and indicating where the various parties were at the time he fired the shots. (T. 692-96).

After the conclusion of the above informal, non-transcribed statement, Plasencia proceeded to obtain a formal, transcribed statement, with a stenographer - Lori Kaufman - present, and with the assistance of an interpreter - Estela Pujals. (T. 696-99). Plasencia, who is bilingual, heard the translations as they were being made, and stated that they were accurate. (T. 699-700). The transcript of this formal statement, was admitted into evidence and read for the jury. (T. 702, et seq.). Plasencia again went over the defendant's Miranda rights and again determined that the latter was not under the influence of drugs or alcohol. (T. 703-706). The transcribed statement reflects that the defendant had arrived at work between 3:00 p.m. and 3:30 p.m. (T. 707). He had brought two weapons in the car - the shotgun and a .45 caliber pistol. (T. 707). He stated that he had brought the second weapon because he had been contemplating suicide. (T. 708).

According to his transcribed statement, between 8:25 and 8:30 p.m., the defendant retrieved the shotgun from the car, in anticipation of the return of the others from the computer class. (T. 709-10). After retrieving the shotgun, he used the shop's saw and grinder to modify it; he utilized the

saw to cut off the stock and used the grinder to scratch off the serial numbers. (T. 712). He finished this in approximately 15 minutes, at about 8:45 p.m. (T. 713-14). Manso then went to the roof, using a plastic bag to protect himself from the rain. (T. 714-15). He then placed five cartridges into the shotgun, the maximum capacity. (T.716). When Sanchez's vehicle arrived and parked, the defendant was directly in front of, and above, it. (T. 717). Zamora was the first to exit, from the front passenger seat. (T. 717). The defendant stated that he had no intention of killing Zamora; he wanted to "scare" him, and shot towards his lower body, from the waist down, (T. 718). The defendant then shot Cruz, who was behind Zamora. (T. 7 18). Once again, the defendant stated that he had aimed towards Cruz's lower body, with no intention of killing the latter. (T. 718). Manso stated that, due to the rain and the plastic cover, his vision was impaired, and he could not see too well; he was thus unsure if he had hit Cruz. (T. 7 19).

Manso also stated that he believed that his friend, Roque, had exited the vehicle and that Moussa remained in the rear of the vehicle. (T. 719-20). He fired one shotgun shell towards the person in the rear of the vehicle, believing it to be Moussa, and intending to kill Moussa. (T. 720). The defendant also thought that one other person, Sanchez, remained in the front driver's seat, and fired two shotgun shells towards him, through the vehicle's windshield. (T. 720). The defendant stated that he intended to kill Sanchez, because Sanchez had made his life impossible. (T. 720-21). The defendant stated that he then discarded the plastic bag and gun, went down the ladder, and intended to go to his car for the other weapon, to kill himself. (T. 721). The police, however, arrived before he was able to do so. (T. 721). The defendant stated that he had contemplated committing the homicide the day before the shooting. (T. 722).

The defendant then again reiterated his intention to kill both Sanchez and Moussa. (T. 723). The defendant stated that he had seniority over Sanchez, but Sanchez got the supervisory position.

(T. 723-24). Additionally, Sanchez was allegedly a drug trafficker, while the defendant was a "good man," who "never hurt anybody." (T. 723-24). Sanchez had also been Colombian, and had fired several Cuban employees, because he did not like Cubans. (T. 724). The defendant did not like the way Sanchez had treated him at work. (T. 724). The defendant also intended to kill Moussa, the general manager, because Moussa had given raises to other employees but not the defendant. (T. 725). With respect to Zamora, the defendant stated:

> **Q.** Besides Mr. Moussa and Mr. Sanchez, is there anybody else that you had intentions of killing?
>
> **A.** Douglas Zamora. Not really kill him but I wanted to scare him.

(T. 725). The defendant had trained Zamora, but Zamora got a promotion to morning supervisor. (T. 725).

Evidence regarding the defendant's motive for the shootings also came in through victim Moussa. Moussa noted that he had hired the deceased victim, Roque, as a programmer, about three months prior to the shooting. This was a better position than the defendant's; moreover, the defendant was not qualified for that job. (T. 514-15). Furthermore, the defendant had spoken to Moussa regarding job difficulties between the day and night shifts, as to who was producing what and how much. (T. 545-46).

The remainder of the State's case consisted, in large part, of evidence regarding the crime scene, from crime scene technicians. This evidence included details as to the locations of the various shells, casings and shotgun pellets which were found. This evidence was detailed in Exhibit 1, an oversized poster/sketch of the crime scene. (T. 356-57). Among the pertinent findings were the following. The distance from the top of the roof (denoted "J" on the sketch), to the windshield of the Bronco ("I"), was approximately 28 feet. (T. 358). Three (3) shotgun casings were found on the

top of the roof. (T. 359). Shotgun shells were also found near the Bronco. (T. 359-60). Parts of the plastic pellet cups ("C," "D," and "G") were found in several locations. Some were near the vehicle, but some, denoted "G," went all the way across the parking lot. (T. 360). Spent casings were found at points A and B. (T. 379-80). Shotgun wadding, another component of the shell, discharged when the weapon discharges, was found at point H. (T. 389, 396) The crime scene technician also introduced photos of the crime scene, and described the roof of the building and the ladders which provided access to the roof. (T. 361-64).[6]

The condition of the Bronco was also detailed by a crime scene technician. There were seventeen (17) projectile holes through the front windshield. (T. 374-75). The driver's side window had been broken. (T. 371-72). On the passenger side, the door was open and there was a pool of blood, just below the window. (T. 372). Glass was found on the asphalt by the driver's side, (T. 375). Several holes in the rear roof of the vehicle were consistent with the entry of shotgun pellets into the vehicle through the rear roof, (T, 373,376; R. 146-48). Other physical evidence related to shots fired from a .9 mm. Lugar pistol, the one which Moussa had been shooting. (T. 401-13; 572-75).

Dr. Price, the medical examiner who performed the autopsy on Victim Roque, attributed the cause of death to multiple gunshot wounds. (T. 622-26). There were nine (9) separate wounds to the back; one (1) pellet exited the front of the chest, and eight (8) pellets were found in the chest area. (T. 616-17). More pellets were found in the victim's legs. (T. 617). Other injuries ensued from flying glass. (T. 619).

At the conclusion of the State's case-in-chief, the defendant's motion for judgment of

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[6] Other witnesses established that it would take approximately one minute to get up the ladder to the area on the roof where Manso was shooting from. (T. 547-48).

acquittal, directed towards the attempted murder counts, was denied. (T. 758-59).

A.2. Defendant's Case

Manso testified on his own behalf. The defendant stated that prior to the shooting, he had been working with some machines and training three employees. (T. 764). At about 9:00 p.m., he was near the front door, when he heard the first shot. (T.764). He then ran towards a bathroom which was located in the front of the building, and saw Zamora. (T. 765-66). He then saw Moussa, carrying a pistol. (T. 767). The police arrived about five minutes after the shooting started. (T. 767).

Manso testified that the police obtained statements from him by promising not to deport him. (T. 768). He claimed that he had told the police that he did not shoot Roque; that he did not use the shotgun; that he did not say anything about a plastic bag; and, that he did not make any incriminating statements to the police. (T. 769-70). The defendant then testified that he did not grind numbers off the gun; that he did not cut off the gun's barrel; and, that he had not shot at any of the other victims. (T. 771).

On cross-examination, the defendant then changed his story; whereas he had previously denied making any incriminating statements, the defendant now asserted that he made the incriminating statements to Detective Plasencia, because the police "forced" him to. (T. 785-90). He testified that he was threatened by the police before the transcribed statement. (T. 790). The defendant also added that all of the information in his confession, including "anguish" over job problems and thoughts of suicide, had been suggested to him by the police. (T. 786-88).

A.3. State's Rebuttal Case

On rebuttal, Detective Fabriguez, who was present during Plasencia's questioning of Manso, asserted that there had been no threats or promises; neither officer told Manso to say that he had murdered Roque; neither officer ordered him to identify the murder weapon. (T. 794-98). Detective

Plasencia similarly reiterated that there were no threats or statements regarding deportation; he never ordered Manso to state what he had done. (T. 800-803). The interpreter present during the statement, also testified and added that Manso was not reading from any script. (T. 808). Additionally, the stenographer also testified and similarly observed that the detective did not have Manso reading answers from a pre-prepared script. (T. 8 16). She, too, confirmed that there were no threats and that Manso was not told, by the detective, what he should say. (T. 8 16-17).

Raul Somarriba, one of Manso's co-workers, testified that he received a call from the defendant after the latter's arrest. (T. 828-30). The defendant had identified himself, and, Somarriba recognized the voice. (T. 830,832). Somarriba inquired why Manso "did it," and Manso responded: "I had to do it, don't ask me any more, What I'm sorry for is I did not hit George Sanchez." (T. 831).

After the prosecution rested its rebuttal case, a renewed motion for judgment of acquittal was denied. (T. 832-33). The jury subsequently returned a verdict of guilty of one count of first degree murder and four counts of attempted first degree premeditated murder, as charged. (T. 898).

B. Penalty Phase Proceedings

B.1. State's Case In chief

The State presented four witnesses during its case-in-chief in the penalty phase proceedings. Detective John King had investigated the murder of Luis Gutierrez in August, 199 1. During that investigation, King heard that Gutierrez had had an affair with the defendant's wife. (T. 933-34). The defendant was arrested for the Gutierrez murder two (2) years later, on October 21, 1993 and was subsequently convicted for that murder, (T. 934-35). The judgment of conviction was entered into evidence. Id.

Detective Fabriguez, when interviewing the defendant about the instant case, had also

questioned him about the shooting of Gutierrez. (T. 938-42). The defendant gave Fabriguez a transcribed statement regarding that shooting. (T. 947-61). That statement, which had been introduced into evidence in the defendant's trial for the Gutierrez murder, was introduced into evidence in the penalty phase proceedings of this case. (T. 948-61). In that statement, the defendant related how, after learning of his wife's affair with Gutierrez, he stalked Gutierrez, pursued Gutierrez's vehicle, and confronted Gutierrez. Id. The defendant stated that after Gutierrez drove away, he then followed this victim, with no "intention" to kill, but in order to continue the argument. (T. 956). However, he then caught up to the victim, pulled his vehicle next to that of the victim, and shot the latter, through the passenger side window, with the same shotgun later utilized in the crimes herein. Id.

Roger Koch, the president of Aircraft Modular Products, testified that he had hired Roque, the decedent, because he was well qualified for his position; he had been hired about three months prior to the murder. (T. 963-65).

Lastly, Kenya Roque, the victim's wife, provided brief testimony regarding the. decedent's background. (T. 967-70). The decedent was thirty three years old. He had been a mechanical engineer. The couple had one daughter who was approximately a year and eight months old when the victim was murdered.

B.2. The Defense Case

The defendant's penalty phase case included testimony from one sister and two brothers, Martha Manso, Ricardo Manso and Orlando Manso. These witnesses all related how the family, consisting of the mother and father and several other siblings, left Cuba in 1969, while leaving the defendant behind. The defendant, 15 at the time, was eligible for military service and was therefore unable to leave. (T. 979-80, 984, 992). The defendant joined the family in the United States in 1980,

approximately thirteen (13) years prior to the crimes herein. (T. 975).

Martha Manso asserted that the defendant sought psychiatric help while in the military in Cuba, but that he had not told her about any electric shock treatments. (T. 978-79). She stated that the defendant was quiet, not aggressive, and, "'just wasn't all there." (T. 978). When asked to explain, Ms. Manso responded that she felt so because the defendant would not "stick up" or say anything during family arguments. (T. 979-80). Ricardo Manso referred to psychiatric electric shock treatments that his brother received in the Cuban military, but, on cross-examination, it was elicited that he had previously acknowledged that the defendant had never told him about this; he had only heard it second-hand through an unidentified cousin. (T. 990). Orlando Manso observed that the defendant was "loose in his mind," because he occasionally got lost and could not find his car when they would go hunting. (T. 993-95).

The family members stated that the family left Cuba because of the mother's mental illness, schizophrenia, for which she needed treatment in the United States. (T. 984). According to the defendant's siblings, after the defendant arrived in the United States, he periodically took his mother's medication because her pills would be missing; the family, however, did not want to confront the defendant. (T. 979,986, 992). It was further established that the mother's pills were then discontinued; her medication was given through injections by the doctor. (T. 995-96).

The two brothers also stated that the defendant suspected his wife was having an affair, that he was depressed and reserved. (T. 987, 989, 993). The brothers also heard the defendant complain about job problems - the failure to get a promotion to day manager; and, people on the job making fun of him. (T. 988, 994). All three family members stated that the defendant had been a good husband and father to his children. (T. 981, 989, 994).

The defendant then testified on his own behalf. He was born on April 22, 1952 and had two

children, ages nine and four; he was married, and his wife was approximately 10 years younger than him. (T. 1004-1005). The defendant was the eldest of seven siblings.(T. 1005). At the time that his family left Cuba, he was unable to leave due to his eligibility for military service. (T. 1005-1007). When his family left, he initially lived with a cousin, but was mistreated by her husband. (T. 1006). He worked on a field and went to school until he was drafted, at age 16. (T. 1006).

The defendant stated that prior to military service, approximately two weeks after his parents left Cuba, he attempted to commit suicide. (T. 1007). There was also another alleged suicide attempt at age 27, when he threw himself in front of a bus and was hospitalized. (T. 1007, 1009-10).

The defendant stated that during his military service, he was twice hospitalized, for "shocks," injections and pills. (T. 1007- 1008). He further asserted that he was mistreated in the military; being forced to wear wet clothes if there had been rain on the prior day, being "closed" on several occasions, and having his food thrown to the ground. (T. 1008). After the second hospitalization, he was discharged, having served less than two years in the army, and obtaining a discharge prior to the normal duration of service. (T. 1008). Subsequently, he worked at a sugar refinery. (T. 1009).

The defendant testified that he came to the United States in 1980, at which time his parents were in the process of obtaining a divorce. (T. 1010). His mother, who was schizophrenic, was being treated and medicated at this time and he began taking her pills shortly after his arrival in the United States. (T. 1011). The defendant claimed he took his mother's medication because he was afraid of ending up like his mother. Id. His mother was "locked up," "sometimes once a week." Id. The defendant claimed to have heard voices ever since his parents left Cuba and that he continued to hear those voices. (T. 1010- 12). In Cuba, the voices told him that his parents left because they did not love him. (T. 1011-12).

The defendant stated that he had been treated as a suicide risk in the Dade County Jail and

added that he often contemplated suicide. (T. 10 12- 13). However, he had never actually harmed himself, because, "Always something happened. I always thought about my consequences." Id. The defendant also stated that he felt "bad" about the death of Gutierrez and "worse" about the death of Roque. (T. 1012). He added that he did not believe that he had the right to live because he took two lives, and he expressed a desire for the electric chair. (T. 1013). He did not believe that he was crazy. (T. 1014).

Cross-examination of the defendant commenced immediately thereafter. In response to the first question, the defendant stated, "Tell the fat lady I don't want to answer any of her questions." (T. 1014-15). The defendant then threw the microphone base at the prosecutor. (T. 1 0 15). The trial court immediately ordered a recess and excused the jurors. During this recess, defense counsel sought a competency evaluation. (T. 10 16). As the experts for both parties, Drs. Haber and Garcia,[7] were already present in court, the judge appointed them to conduct the competency evaluation. (T. 1016, R. 1126).

The experts interviewed the defendant and, approximately two hours later, the court commenced an evidentiary hearing regarding the defendant's competency. (T. 1018). Dr. Merry Haber concluded that the defendant was incompetent, that he had suffered a psychotic break, and, that he needed to be hospitalized, medicated and restored to competency. (T. 1023). Dr. Garcia concluded that the defendant was competent to proceed and he expressly rejected Dr. Haber's conclusion regarding a psychotic break. (T. 1024-25).

As part of the competency determination, the judge also sought the observations of the court

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[7] Upon notice, after the conclusion of the guilt phase, that the defense would present mental mitigation testimony by Dr. Haber, the State had sought and been granted an evaluation of the defendant by Dr. Garcia.

interpreter who had been present in the courtroom at the time of the incident. The judge additionally sought the observations of the corrections officers who accompanied the defendant from the courtroom and back to the jail facilities. (T. 1037-38). Prior to recessing for the day, the interpreter testified; the corrections officers testified the next morning, when the competency proceedings continued, (T. 1037-38, 1044-48).

The trial judge then concluded that the defendant was competent to proceed, basing that decision on the in-court testimony of the experts and other witnesses, as well as on the judge's own observations of the defendant throughout the court proceedings. (T. 1050-59). A copy of this comprehensive ruling is provided as Exhibit B in the Appendix to the Appellee's brief.

Before recessing for the remainder of the morning, the trial judge also advised the defendant that he should inform the court, upon the return from the morning recess, as to whether he would answer questions on cross-examination. (T. 1058-59). The judge advised the defendant of the potential consequences of a refusal to answer the questions. Id. When proceedings resumed after the recess, the defendant stated his willingness to answer questions on cross examination (T. 106 1). Cross-examination then proceeded, without any further incidents. (T. 1061-65). The cross-examination answers reflect that the defendant responded cogently to each and every question posited. Id.

The extensive details regarding the competency proceedings, the experts' opinions, the lay witnesses' observations, and the judge's comprehensive ruling, have been set forth in Argument II, infra.

On cross-examination, the defendant admitted that he had never previously mentioned hearing voices. (T. 1062). He denied ever stating that he regretted not killing Sanchez, and he asserted that he did not know how he felt about his lack of success in killing Sanchez. (T. 1062-63).

The defendant, however, did not remember whether he had expressed any remorse prior to his penalty phase testimony. (T. 1065). The defendant also did not recall grinding down the serial number of the shotgun; he did, at this time, admit the shooting, stating that he shot "without seeing." (T. 1063). He also concurred that the story about the Colombians looking for Sanchez was a lie. (T. 1064). With respect to his abilities, the defendant stated that his job at Aircraft Modular was not complex, "even a ten year old" could allegedly operate the machinery he was in charge of. Id.

The defense then presented Dr. Merry Haber, a psychologist, as an expert witness. Dr. Haber first interviewed the defendant on January 24, 1995. (T. 1066). She provided a detailed narrative of that interview, which had lasted about two hours. (T. 1067-74). During this interview, the defendant had told Dr. Haber the following: His mother, who had been hospitalized for schizophrenia, left Cuba with her family when the defendant was 15. The defendant, being of military age, had to remain in Cuba, staying with a cousin. (T. 1067-68). In the military, people laughed at the defendant and accused him of being an orphan who was unworthy, because he was abandoned. (T. 1068). The defendant started fighting with other people while in the military. (T. 1068). During his service, he was hospitalized and given shock treatment, after which he returned to service for another five months, prior to a second hospitalization and release from the army. (T. 1068).

The defendant then started working on a sugar-cane field. He eventually was in an automobile accident in which the others involved had been killed. (T. 1068-69). The defendant did not see his parents until they visited him in 1979 and made plans for him to go to the United States. (T. 1068-69). Upon his arrival, his parents were in the midst of a divorce and he lived with his mother and a brother, Richard, who had been born while the family was in the United States. (T. 1069).

Dr. Haber stated that the defendant's mother would have violent episodes and would be taken to the hospital; the defendant was afraid that she was having shock treatments, although he was unaware of any such treatment. (T. 1069). The defendant stated that he started taking his mother's pills since he could not control himself; he could not deal with reality and thought that he was like his mother. (T. 1069, 1076). Dr. Haber noted that the mother's medication had been changed from pills to injections; the defendant had not taken any medication in injection form. Id.

The defendant remained a loner until he met his wife and then had five very happy years, until he learned about his wife's affair. (T. 1069-70). The defendant felt mocked by this. (T. 1070). He did not plan to kill the lover; it just happened because the defendant had chased him. (T. 1070). The defendant thought his wife would return to how she had previously been, and apologize to him; however, she did not behave as expected, and he could not convince her to apologize. (T. 1070-71).. There were several separations, during which time the defendant lived with his mother and started taking her medication. (T. 1071). As a result of his wife's affair, the defendant believed that people at work, including some of his wife's relatives, were laughing at him. (T. 1071).

The defendant had further grievances at work, as his boss would tell him that his work was not "perfect." (T. 1072). He stated that he was denied an expected promotion; he thought this was due to the influence of his wife's family. (T.1072). The defendant was also unable to sleep well, for a period of two years after the first murder (of Gutierrez), and, continued taking his mother's medication. (T. 1072).

The defendant said that he constantly thought about suicide; that he was never happy; that he feared ending up like his mother. (T. 1074). Finally, the defendant had, upon inquiry, denied hearing voices and denied seeing things at this interview. (T. 1073). Dr. Haber testified that she had found the defendant to be "competent and to understand what was going on at that time." (T. 1074).

Dr. Haber then related the events at a second examination which took place on January 27, 1994. (T. 1074). The defendant then spoke about his military service, describing a "demon attack," during which the defendant picked up a stick and started hitting people until he was tied down and given an injection. (T. 1075).

In the week leading up to the crimes herein, the defendant stated that he wanted to control himself and started taking his mother's medication to calm himself down. (T. 1075). He hoped the harassment and mockery at work would stop, and he asked his wife to stop working, thus adding to his financial pressures. (T. 1075-76). Manso again discussed his suicide attempts. (T. 1077). As to the crimes herein, the defendant "felt that he had to shoot" the victims. He also stated that "voices constantly talk to him" and "dominate" him. (T. 1077, 1080-8 1). The voices, which the defendant also claimed to see on occasion, had additionally told him to lie in court and deny committing the crimes. (T. 1080-8 1).

Dr. Haber also administered the Millon Clinical Multiaxial Inventory III, an objective psychological test, consisting of 175 true/false questions. (T. 1077). "The way he took this test his scores were exaggerated"; "he paints things as worse than they might be." (T. 1078, 1088). One method of scoring this test, "Axis One," showed "a severe mental disorder at this time"; it "suggested" either a schizophrenia or a post-traumatic stress disorder, and, "a major depression," which, the doctor noted, was not unusual for someone facing the death penalty. (T. 1078-79). This method of scoring also suggested a "delusional disorder," meaning that one's thinking is not accurate. (T. 1079). As noted on cross-examination, this method of scoring the test, Axis one, reflected the defendant's state of mind as of the time of the test, not at the time of the murder. (T. 1088-89).

The second way of scoring the test, "Axis Two," focused on the underlying pattern of

behavior throughout the defendant's entire life, and indicated a "depressive disorder" and a "dependent disorder." (T. 1079). When the defendant is under pressure, he "decompensates" and the "thought disorder, the schizophrenia," gets worse. (T. 1079-80). Dr. Haber admitted, however, that she could not give a "formal" or "exact" diagnosis of the Axis one "thought disorder" or "schizophrenia" which sometimes get worse, because, "we don't know exactly." (T. 1079-80, 1083).

Based on the foregoing, Dr. Haber opined that the defendant was "severely impaired," and that he had a "severe emotional disturbance at the time." (T, 1083). On cross-examination, Dr. Haber stated that she could not give "an exact diagnosis" of the emotional disturbance that defendant had acted under during the shooting, but that he had been "in a decompensated mental condition." Id. This decompensation had been caused due to "some turmoil" and stress from the first murder, that of Gutierrez in 1991. (T, 1089). Dr. Haber added that "marital stress," "financial stress," and "delusional stress" from the belief that people were mocking him, had also contributed to the decompensation. Id. Dr. Haber also stated that the underlying Axis Two personality disorders which the defendant has suffered throughout his life, are not considered a "major mental illness." (T. 1089). People who suffer these disorders function in every day society the same as people who don't have disorders. (T. 1089-90).

B.3. State's Rebuttal Case

The State, in its rebuttal case, presented three (3) witnesses. Roger Koch, the defendant's employer, described the jobs which the defendant had held, emphasizing that as a machine operator and night shift supervisor, the defendant held jobs which had high levels of responsibility and included high skill levels as to the machines which he operated, checked and set up. (T. 1092-94). The defendant also had supervisory duties over others, holding a "demanding job," which was the highest paid manufacturing job in the company. (T. 1095). Koch never observed any strange

behavior on the part of the defendant or any manifestations of mental illness, (T. 1096).

Jorge Sanchez, one of the surviving victims, in response to the defendant's testimony regarding remorse, stated that one week after the offenses, Sanchez had given a testimonial of gratitude for his own survival, at a church service. The defendant, attending the same congregation, then got up and gave his own testimonial, stating that he was "grateful to God nothing happened to him because 30 seconds before the shooting, he was checking the parking lot of the company and that nothing happened to him." (T. 1100-1101).

Lastly, the State called Dr. Lazaro Garcia, a psychologist, as a rebuttal witness. Dr. Garcia had interviewed the defendant three times and obtained a psychosocial history which was consistent with that obtained by Dr. Haber. (T. 1103- 1104). In the first mental status examination administered by Dr. Garcia, the doctor was looking for signs of any psychosis - i.e, whether the defendant was out of touch with reality. (T. 11 05-1 106). There were no such signs, and Dr. Garcia did not observe any evidence of mental illness, Id. The defendant was, however, depressed. (T. 1110).

Dr. Garcia also administered psychological testing. The defendant's IQ test reflected a score which was slightly above that of mental retardation, but was not that of a retarded person. (T. 1107-08). The doctor noted that low scores can be caused by faking and had the defendant take some other tests, such as the digit symbol test, which indicated to the doctor, by virtue of the low score, that the defendant was not "doing his very best" when taking the examination. (T. 1108-1109). However, even taking the test scores at face value, the doctor concluded that the defendant still understood the consequences of his behavior. (T. 1109).

Yet another test, the apperception test, which consists of telling stories on the basis of pictures, caused Dr. Garcia to conclude that the defendant was not psychotic; he was logical, goal oriented, coherent and frustrated. (T. 1110). The Bender Visual Test, in which the subject draws

pictures, negated the possibility of organic problems. (T. 1111). The defendant's performance was somewhat slow, and this was attributed either to the defendant's depression or to the defendant's intent. (T. 1111).

Dr. Garcia thus concluded that the defendant was not suffering from any major mental illness. (T. 1111). He was depressed and has probably suffered from dysthymia, a depressive disorder, for much of his life. (T. 1112). Said "disorder" merely indicates that a person is not functioning to the best of his capacity; it is not a serious illness. (T. 1112). The defendant was simply reacting to life events, resulting in a general psychological "discomfort." (T. 1112). The defendant also had a personality disorder - paranoid-type personality, which means he is suspicious, misinterprets events, and feels people are trying to harm him. (T. 1113-14). In the context of the crimes committed by the defendant, Dr. Garcia observed that while personality disorders cause friction with others, they do not cause one to kill. (T. 1115). People suffering from these disorders "have options available," and most function without trouble. Id. The defendant's disorders made him a very unhappy individual, however, "once he reached that, how he solves that problem, how he deals with that, is something that he decides." Id.

Dr. Garcia also attributed great significance to the defendant's age, 42. The absence of any psychological problems other than the alleged treatment in the Cuban military some 25 years earlier, was a significant fact indicating the absence of psychiatric maladjustment. (T. 1116). Dr. Garcia questioned the usefulness and propriety of administering the MCMI test (administered by Dr. Haber) to a person of the defendant's age. (T. 1116-17). This test focuses on schizophrenia and that is an illness generally ascertainable in those in their late-teens or early 20's; schizophrenics generally do not marry or hold highly technical jobs either. (T. 1117- 18). Schizophrenia is a major psychiatric illness; people suffering from it have psychotic breaks even with medication and when they are

appropriately treated by a psychiatrist. (T. 1127). During psychotic breaks, schizophrenics act upon auditory hallucinations; "voices that tell them to act in a certain manner." T. 1128).

Dr. Garcia was then questioned as to his last evaluation which had occurred in court on the prior day. Dr. Garcia observed the defendant subsequent to the attack, and testified that he had found him to be competent and likely to be malingering. (T. 1118). While Dr. Haber had concluded that that incident was indicative of a psychotic break, Garcia testified that had there been a psychotic break, the defendant would not have been able to testify in court on the following day. (T. 1118-19). The defendant, according to Garcia, was "trying to give the appearance of suffering from a psychotic or a major psychiatric disorder." (T. 1119). The events of the prior day, when the defendant became violent in the presence of the jury, judge and attorneys, were indicative of malingering because the incident was "opportunistic," (T, 1120). The pattern of the defendant's responses to questions posited, with a selective inability to recall, was not consistent with someone having a psychotic break. (T. 1120). A person having a psychotic break would not be able to respond to questions in the self-serving manner in which the defendant had responded. (T. 1120-21). For example, the defendant was unable to remember his name, but was able to answer questions as to his psychiatric history. (T. 1121). The defendant also reported auditory, visual, and tactual hallucinations; this combination is very unlikely. (T. 112 1-22). Dr. Garcia has also asked whether defendant felt he was being moved from one place to another, which is not a psychiatric symptom; It came from a movie seen by Dr. Garcia. (T. 1122). The defendant had responded in the affirmative, stating that he felt people taking him from one place to another. Id.

Finally, based upon the defendant's confession and the actions he had taken to protect himself, Dr. Garcia concluded that the defendant appreciated the criminality of his acts and was "well aware of the consequences of his behavior." (T. 1123). Dr. Garcia also concluded that the

defendant's goal oriented behavior at the time of the crimes was inconsistent with a major psychiatric disorder, and, inconsistent with "a person reacting to something internal that has nothing to do with reality." (T. 1127-28). The defendant's actions at the time, thus did not "lend credence" to having acted under an "emotional or mental disturbance." Id. After Dr. Garcia's testimony, the State rested, and the jury, after closing arguments and jury instructions, rendered a verdict recommending the death penalty by a vote of 10-2. (T. 1157-58; R. 1143).

C. **The Trial Court's Sentence**

On February 14, 1995, the trial court heard additional arguments from counsel regarding the proper sentence, (T. 1162-84). The court had before it the written sentencing memoranda submitted by both parties. (R. 1144-60). At that time, the court inquired whether defense counsel had anything additional to offer the court and defense counsel did not. (T. 1167). After hearing additional arguments of counsel, the court adjourned and resumed the sentencing proceedings on February 27, 1995. (T. 1184, et seq.). At that time, the court imposed the sentence of death. (T. 1186, et seq.),

The court found that the following three (3) aggravating factors existed: (1) the defendant was previously convicted of other violent felonies, the murders of Gutierrez and the four (4) attempted murder counts herein; (2) the defendant knowing created a great risk of death to many persons; and (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 1166-99). With respect to mitigating factors, the court found that the evidence of mental and emotional disturbance, was entitled to some, but not much weight. The judge assessed the expert testimony and found that Dr. Haber's conclusions were not persuasive, in light of Dr. Garcia's testimony and other pertinent facts of the crimes. While the judge did not believe that this statutory mitigating factor had been established, the judge did give the factor some weight. (R. 1180). The judge further found that the statutory mitigating factor that the

defendant did not appreciate the criminality of his conduct was not established, and thus did not give it any weight. (R. 1181-7). The court noted that neither evidence nor argument was presented as to any other statutory mitigating factors and that none existed. (R. 1181). The court found that the following additional nonstatutory mitigating factors were established: (1) mistreatment in the Cuban military (R. 1181-88); (2) the defendant was a good parent and family man (R. 1188). These factors were given either minimal or moderate weight by the court, as denoted in conjunction with the finding on each factor. Other factors advanced by the defense were expressly evaluated and rejected by the court. As the court found that "the aggravating circumstances clearly and remarkably outweigh the mitigating circumstances", the court imposed the sentence of death for the murder of Miguel Roque. (T. 1218-20; R. 1192-94). For the four attempted murders, the defendant received life sentences, which were consecutive to the death sentence and consecutive to one another. (T. 1219-21; R. 1194-95). The judge's findings are set forth in a detailed written thirty (30) page sentencing order included as Exhibit A in the Appendix to the brief of Appellee. (R. 1166-99).

SUMMARY OF THE ARGUMENT

I. The defendant's convictions for the attempted first degree murders of victims Cruz and Zamora are supported by substantial, competent evidence, both from the defendant's own statements and from the physical evidence,

II. The trial court properly found that the defendant was competent, during the penalty phase proceedings, when that finding was based upon a full evidentiary hearing, during which one expert conclusively asserted that the defendant was competent. The claim regarding the absence of written reports was not preserved for appellate review. Additionally, written reports are not required by the applicable rules. Not only is the court's conclusion supported by the record, but, the Appellant's attacks on various findings in the court's order are misguided.

III. None of the current arguments with respect to Dr. Garcia's testimony have been preserved for appeal. Moreover references to the competency evaluation in Dr. Garcia's testimony did not violate any rights of confidentiality under either Rule 3.21 l(e), Florida Rules of Criminal Procedure, or the Fifth Amendment, because the defendant had waived any such rights by previously interjecting pertinent issues into the penalty phase proceedings, and because the doctor did not refer to any substantive or incriminating statements made by the defendant. The Sixth Amendment was not violated because the competency hearing referred to was one done pursuant to the request of and notice to defense counsel.

IV. The claim regarding the scope of Dr. Garcia's rebuttal testimony has not been preserved for appellate review. Additionally, the facts of the case show that the testimony was within the proper scope of rebuttal evidence.

V. The claims regarding ineffective assistance of trial counsel must first be raised in the trial court. Additionally, the first such claim is conclusively refuted by the record. As to defense counsel's subsequent suspension from the bar, such facts do not demonstrate per se ineffectiveness, as the defendant has failed to establish a nexus between that suspension and counsel's conduct in the trial herein.

VI. The claim regarding the inability to elicit the number of times the defendant's mother was hospitalized is not preserved for review, since there was no proffer demonstrating what the answer would be or its relevance. Additionally, this claim has no merit, since the defense fully established that the mother had been schizophrenic and had been hospitalized.

VII. The trial court properly concluded that there was no discovery violation, since the statement at issue had no potential significance unless and until the defendant took the stand and claimed remorse. Alternatively, any error herein is clearly shown by the record to be harmless.

VIII. The Appellant's arguments with respect to limitation of the defense closing argument are not preserved for appeal and are refuted by the record.

IX, The trial court acted within its discretion in determining the weight to be given to various mitigating factors. The Appellant incorrectly asserts that some of the trial court's factual findings are not supported by the record. Furthermore, the court's findings regarding the CCP and great risk of death factors are fully in accordance with this Court's decisions as to these aggravators.

X. The trial court did not mention or rely on the defendant's future dangerousness. The mention of dangerousness and the defendant's prior violent acts were made in the context of addressing and rejecting the defense mental health experts' testimony as to these matters.

XI. The Caldwell v. Mississippi claim is not preserved for review. The court's instructions, moreover, were entirely accurate and in accordance with Florida law.

XII. The various attacks on the death penalty statute are not preserved for appellate review. These claims have, moreover, been repeatedly rejected by both this Court and the Supreme Court of the United States.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENTS OF ACQUITTAL ON THE CHARGES OF ATTEMPTED FIRST DEGREE MURDER

Although the Appellant stated, in one of his pretrial statements, that he did not intend to kill either Zamora or Cruz, the convictions for attempted first-degree murder of those two victims are supported by sufficient evidence of an intent to kill. Such evidence derives both from the physical evidence, which belies the defendant's self-serving statements, and the inconsistencies and lies within the defendant's own statements, which suffice to deprive his self-serving assertions of any

credibility.

Questions of intent, as with all other states of mind, are typically established through inferences derived from the totality of the circumstances. See. e.g., Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981). Furthermore, a defendant's self-serving statements are not binding when they are either contradicted by other statements made by the defendant or by other evidence adduced in the case. See. e.g., Bunderick v. State, 528 So. 2d 1247 (Fla. 1st DCA 1988) ('jury may disbelieve events related by defense as to facts on which State had presented contrary evidence); Bradford v. State, 460 So. 2d 926 (Fla. 2d DCA 1984), rev. denied, 467 So. 2d 999 (Fla. 1985) (same); Odom v. State, 109 So. 2d 163 (Fla. 1959) (defendant's testimony may be evaluated in same manner as that of any other witness).

With respect to the defendant's statements regarding the shooting of Zamora, in his initial statement to Detective Plasencia, he stated that "[h]e intended to kill Jorge Sanchez, Jorge Moussa and Douglas Zamora. Those are the persons he intended to kill not his best friend, Miguel Roque." (T. 689). Thus, the initial statement started out with an express assertion of intent to kill Zamora. Subsequently, defendant asserted that he did not intend to kill Zamora. (T. 7 18). He wanted to scare Zamora and shot towards his "lower parts, from the waist down." (T. 7 18). In yet a subsequent portion of his statement, the defendant again acknowledged his intent to kill Zamora, before receding from that assertion:

> **Q.** Besides Mr. Moussa and Mr. Sanchez, is there anybody else that you had intentions of killing?
>
> **A.** Douglas Zamora. Not really kill him but I wanted to scare him.

(T. 725).

Besides the contradictory statements of intent regarding the shooting of Zamora, the physical

evidence belies the defendant's assertions that he only intended to scare Zamora and that he shot towards the lower parts of the body. Evidence regarding Zamora's wounds indicated "multiple gunshot wounds," with wounds to the abdomen, groin, upper chest, left wrist and right forearm. (T. 577-79; R. 554,691). Zamora had suffered wounds through the lung, intestines and forearm, among other injuries. (T. 502). Furthermore, the weapon which the defendant utilized was a shotgun, which sprays numerous pellets over a wide area, and does not limit the injuries to a single entry point. Moreover, by the defendant's own admission, it was raining at the time of the shooting, and, from a distance of approximately 28 feet from the place where he was, to the area of the car where the victims were exiting, the defendant was not able to see well for the purpose of taking careful aim towards any particular part of the body, (T. 719). Thus, the wounds which the defendant actually inflicted on Zamora were extremely inconsistent with the defendant's professed intent to merely scare Zamora by shooting the lower part of the body.[8] It is therefore abundantly clear from both the various statements made by the defendant and the physical evidence, that the defendant possessed the requisite intent to kill for purposes of attempted first degree murder.

With respect to the shooting of Cruz, the defendant did state, on several occasions, that he did not intend to kill Cruz. (T. 691, 718). As with Zamora, the defendant asserted that he aimed towards Cruz's lower parts, with no intention of killing.(T. 718). Once again, however, the physical evidence belies the defendant's claim and thereby enables the fact finder to reject the self-serving assertion. Cruz suffered gunshot wounds to the right groin, arm and abdomen. (T. 577-79; R. 398).

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[8] The intent to kill is closely related to the element of premeditation, which is defined as "a fully-formed conscious purpose to kill." Sireci v. State, 399 So. 2d 964,967 (Fla. 1981). As such, either of those elements may be established through evidence regarding the nature of the weapon used, the manner in which the offense was committed, and the nature and manner of the wounds inflicted. Id.

Bullet fragments were "overlying the right lower lateral ribs." (R. 395). The wounds were accompanied by a fracture of the spine and there were multiple gunshot wounds, including one to the chest, one to the abdomen and one to the right thigh. (R. 406; T. 489). As with Zamora, the nature of the weapon, and the ammunition, and, the defendant's impaired vision, all negated the assertion that the defendant intended to inflict wounds only on the lower extremities.

Of further significance is the evidence that the defendant fired not once, but two separate times at Cruz. In the initial statement to Detective Plasencia, the defendant stated that the "second shot that he fired was to the person directly behind Douglas Zamora who was Ray Cruz who was sitting in the rear right passenger side." (T. 691). Not only did the defendant fire one shot at Cruz while he was still believed to be sitting in the car, at a point in time when the defendant could hardly be taking aim at lower extremities which would have been protected by various portions of the interior of the vehicle, but, once Cruz exited, the defendant "also proceed[ed] to aim below the wounds and fired a shot at him to wound him. , . ." (T. 691). Thus, not only were two separate shots said to have been fired at Cruz, but, the second was fired after a point in time when the defendant had already inflicted some wounds on Cruz.[9] Thus, the inconsistencies within the defendant's own statements, coupled with the nature of the wounds inflicted and the nature of the weapon and ammunition utilized, all serve to support the conclusion that the defendant possessed the intent to kill Cruz and to negate his own self serving assertions to the contrary.

In view of the foregoing, the convictions for the attempted first degree murders of Zamora and Cruz are supported by sufficient evidence.[10]

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[9] Otherwise, the defendant would not be aiming "below the wounds" which had already been inflicted. (T, 691).

[10] It should be noted that the Appellant's argument pertains solely to the attempted murder convictions as to Cruz and Zamora, not to the other two victims, Moussa and Sanchez.

II

THE TRIAL COURT DID NOT ERR IN FINDING THE DEFENDANT COMPETENT TO PROCEED AT THE PENALTY PHASE PROCEEDINGS.

During the course of the penalty phase proceedings, the defendant's behavior in court caused the trial court to interrupt the proceedings and conduct a competency proceeding. After the evaluation of the defendant by two mental health experts, an evidentiary hearing was conducted. The testimony of Dr. Garcia, at that hearing, was clear and unambiguous - the defendant was competent to proceed with the trial. The penalty phase proceedings resumed the next day. As a result of Dr. Garcia's clear, unambiguous and unqualified opinion, the trial court properly concluded that the defendant was competent to proceed. With respect to the claim that the experts did not submit written reports to the court, this claim was never raised in the trial court, is not fundamental, and is thus not preserved for appellate review.

A. Factual Background

The penalty phase proceedings commenced on February 2, 1995. (T. 923, et seq.). After the prosecution presented its penalty-phase case and rested (T. 973), three of the defendant's relatives testified in the defendant's case-in-chief. (T. 974-95). The defendant then testified on his own behalf. (T. 1004-15). During direct examination by defense counsel, the defendant coherently and articulately responded to each and every question propounded by defense counsel. (T. 1004- 15). All of his answers were clearly responsive to defense counsel's questions.

Cross-examination by the prosecution then commenced, and the first question proceeded as

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Furthermore, the Appellant's own argument acknowledges that in the event these two attempted first degree murder convictions are deemed to have insufficient evidence of intent, the remedy is to reduce those convictions to attempted second degree murder convictions, for which the intent need only be to act in an imminently dangerous manner, with a reckless disregard of human life. See, Brief of Appellant, pp. 32-33.

follows:

> **Q.** Mr. Manso, when you had your trial you were telling the members of this jury that you didn't kill Miguel Roque.
>
> A. Tell the fat lady I don't want to answer any of her questions.
>
> (Thereupon, the defendant threw the microphone at the state attorney after which the courtroom was clear, and the jury was excused to the jury room, and a short recess was taken after which the following proceedings were had:).

(T. 1014-15). At this point, defense counsel sought a competency evaluation. (T. 10 15). The court ascertained that the mental health expert witnesses for each party were already present in court," and further learned, from counsel and the experts, that the defense expert would need about one hour for an evaluation and the prosecution's expert about 45 minutes. (T. 10 15). The court then appointed Drs. Haber and Garcia, for the purpose of conducting a competency evaluation. (T. 10 16). A written order appointing the doctors was entered on that day as well. (R. 1126).

After excusing the jury, the judge observed that it was 3:30 p.m., and, in light of the time the experts needed for the evaluations, the court expressed the desire to have the evaluations completed by 5:00 or 5:30 p.m. on that day. (T. 1018). During the ensuing recess, the experts used the jury room for the purpose of conducting the evaluations. (T. 1018). Later that afternoon, after the evaluations were completed, the court proceeded with an evidentiary hearing, with testimony adduced by both experts. (T. 1018-39).

Dr. Haber expressed the conclusion that the defendant had suffered a psychotic break and that he needed to be hospitalized, medicated and restored to competency. (T. 1023). She based this

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[11] The defense expert, Dr. Haber, had been appointed prior to the guilt-phase proceedings. (R. 119). The prosecution's expert, Dr. Garcia, had been appointed prior to the penalty phase proceedings, pursuant to the State's motion to compel a mental health examination of the defendant, who had already stated his intent to present mental health mitigating evidence at the penalty phase. (R. 1088; T. 915-18).

conclusion on the defendant's lack of responsiveness to questions, his inability to recognize Dr. Haber, whom he had previously been interviewed by, his inability to complete sentences, his assertions regarding voices and auditory hallucinations, and his impaired memory. (T. 1022-23).

Dr. Garcia had a strong suspicion that the defendant was malingering. (T. 1022-23). His conclusion was clear and unambiguous: "I conclude that he is quite competent." (T. 1024). The defendant's responses during the evaluation were perceived by Garcia as being self-serving. (T. 1022-23). While the defendant indicated an inability to remember various things, he would then give responses which were self-serving: He did not remember his name, age, date or place of birth and claimed a complete absence of memory regarding family, education, work and marital history, yet he could remember his psychiatric background where "he had been" in a place where "people say you are crazy" and give you "currents", referring to electric shock; he denied killing anyone, but asserted that he tried to kill himself; he also reported visual and auditory command hallucinations, in addition to people lifting him from place to place.[12] (T. 1022-23). Dr, Garcia conclusively asserted that the defendant was not under a psychotic break. (T. 1024). A psychotic break was defined by Garcia as a reality break, which ensues from psychotic disorder; the defendant, however, did not have any psychotic disorder; he had only a case of depression. (T. 1026). While depression can coexist with a psychotic disorder, it did not do so with the defendant. (T. 1026). Furthermore, depression alone cannot cause a psychotic break. (T. 1027). Similarly, while the stress of facing a potential death penalty, for a person with a major psychotic disorder, could cause a psychotic break, such stress would be unlikely to do so. (T. 1027).

Dr. Garcia had previously spoken to the defendant on January 28th and 29th, and thus had

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[12] The latter sensation reported by the defendant is not a psychiatric symptom; it came from a movie seen by Dr. Garcia, yet defendant affirmatively responded as having experienced this. (T. 1122).

good recent bases for comparison. (T. 1028). On those prior occasions, the defendant had denied taking any current medications. (T. 1028). While the Appellant's brief herein implies that the defendant, at that time, may have been taking medication, Dr. Garcia reviewed the medical reports included in the jail records and observed that the references to medications were in 1993 and early 1994; there was no indication of any medication after March, 1994. (T. 1029-30). Furthermore, the jail records, while referring to a suicide watch, indicated that the defendant was alert; the records did not reflect any psychiatric symptoms and there was no mention of any psychosis. (T. 1028).

While Dr. Garcia advised that it would be prudent to hospitalize the defendant for observation (T. 1025), that recommendation did not in any way qualify his conclusion that the defendant was competent. In conjunction with that recommendation, Dr. Garcia unambiguously reiterated that the defendant was competent. (T. 1025). The purpose of hospitalization and observation would have been only to corroborate the findings of competency and malingering, as it would be difficult for the defendant to keep up the malingering for a few days, and the hospitalization would "ferret it out." (T. 1025). While the defendant was competent, Dr. Garcia anticipated that he would not be cooperative at this time. (T. 1025). Consistent with Dr. Garcia's conclusion regarding competency and malingering, it should further be noted that Dr. Haber's own prior report regarding the defendant had also noted a tendency on his part to "exaggerate" and "magnify" illness.. (T. 1035-36).

The court then heard from the court interpreter, who observed that the defendant had uttered comments about people in the "back," saying that they were making fun of him, and "that if they want to give him the electric chair what else would they want." (T. 1037-38). He further indicated that he did not want to answer any more questions and then picked up the microphone, swung back, and threw its base towards the prosecution's side of the courtroom. (T. 1038).

The court then recessed for the day (T. 1039), resuming proceedings the following morning, at 8:30 a.m. (T. 1042). At that time, the court heard from corrections officers who had contact with the defendant while he left the courtroom the prior day and in the aftermath of that departure. Officer Castro observed that the defendant was distraught and screaming after he was taken from the courtroom. (T. 1044). He was brought a chair, the officers sat him down, and he was calmed down; he said that he was being portrayed as a killer. (T. 1044).

Corporal Holt observed that the defendant was shaking badly. (T. 1047). He was taken to the clinic where he was asked if there was anything wrong with him, and he responded negatively, that the only thing was a sore hand. (T. 1047). The clinic nurse asked him similar questions and he responded, showing his hand and asserting that there was no pain. (T. 1047-48). During the course of this, the defendant, upon being asked, gave his name to the nurse. (T. 1048).

At the conclusion of the evidentiary presentation, the prosecutor observed that a similar disruptive incident had occurred during the pretrial suppression hearing, during which the defendant became agitated and promptly thereafter was competent to proceed. (T. 1049). Defense counsel then sought to have the defendant hospitalized. (T. 1050). Neither at that time, nor at any time before or after, did defense counsel assert that the competency determination could not be made due to the absence of written reports from the experts.

The judge then proceeded to conclude that the defendant was competent to proceed, in detailed, oral findings. (T. 1050-59). The judge's conclusions were based upon a summary of the evidence which the court had heard, in addition to the judge's own observations of the defendant during the extensive trial court proceedings. (T. 1054).[13] The judge also emphasized the prior

[13] The judge stated, in part: "The Court also has considered the many times that the defendant has been before this Court. I had an opportunity to observe him in court, to hear him

incident, at a pretrial hearing, when the defendant became violent towards the prosecutor, during his own testimony, while subsequently getting under control at that time. (T. 1054). The judge emphasized the jail medical records, as well as the defendant's assertions, that he did not want to be questioned any more, as further indicia of a self-interested lack of cooperation, as opposed to a lack of competency, (T. 1055-56). The judge further concurred with Dr. Garcia that it was unlikely that the defendant could recall shock treatment in Cuba and prior suicide attempts, while not being able to recall his name, age, date of birth or his wife's name. (T. 1057). On the basis of Dr. Garcia's testimony, the judge rejected the contention that the defendant had suffered a psychotic break. (T. 1057-58). Similarly, the defendant's ability to give his name, at the clinic, shortly after the outburst in court, was further evidence to refute his professed inability to give his name during the evaluation. (T. 1058).

Thus, the court concluded that the defendant was competent to proceed and recessed the proceedings until 1:00 p.m. on the same date. (T. 1058). Immediately prior to the recess, the judge addressed the defendant, advising him to tell the court, upon the return at 1:00 p.m., whether he

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testify, to observe his demeanor, to actually speak to him, to ask him questions concerning procedures, and to see him react to different situations.

• • •

The Court also finds that the defendant has always presented himself in court with the same blank, inexpressive face that Dr. Merry Haber commented on yesterday.

One of the factors she considered when she interviewed him was his very blank face, that he was unresponsive, that he had no real facial expression.

Well, I noticed the same type of demeanor every single time that he's been in court. I noticed it even through the testimony of witnesses in trial. Even when his own family members testified, and it was quite emotional, he still sat and totally had no reaction to the testimony, The only reactions that I have observed are the two times he erupted in violence in this courtroom." (T. 1052-54).

The verbal findings also summarized the nature of the defendant's confessions and prior in-court testimony, with the utter inconsistencies and lack of candor therein. (T. 1053).

intended to answer the prosecutor's questions on cross-examination, (T. 1058-59). The judge admonished him as to the potential consequences of a refusal to answer the questions. (T. 1058-59). When the proceedings resumed at 1:00 p.m., the judge inquired of the defendant as to his willingness to answer the questions, and he nodded affirmatively. (T. 1061). Cross-examination of the defendant then proceeded (T. 1061-65), and the defendant responded to each and every question, cogently, responsively and articulately+ Id.

B. Failure To Continue Proceedings

The Appellant's initial contention is that the trial court erred in failing to continue the proceedings for the purpose of hospitalizing the defendant for further observations prior to rendering a decision as to competency. This claim is predicated upon the Appellant's contention that both experts had recommended this course of action. As detailed above, however, Dr. Garcia clearly and unambiguously asserted that the defendant was clearly competent to proceed. The sole purpose for such further hospitalization, according to Dr. Garcia, would have been to ferret out the malingering which Garcia believed to exist. The recommendation of Garcia, to proceed prudently, with such hospitalization, did not in any way limit, qualify or detract from his conclusively asserted opinion that the defendant was competent to proceed. The recommendation was therefore not a necessity, and it did not detract from the court's conclusion that the defendant was competent to proceed; a conclusion which is fully supported by the evidence and observations of the defendant.

As the trial court conducted a full inquiry into the defendant's competency, after hearing from the experts and other relevant witnesses, and as one expert asserted, without qualification, that the defendant was competent to proceed, the trial court did not abuse its discretion in declaring that the defendant was competent and in not continuing the proceedings for further evaluation. See, Carter v. State, 576 So. 2d 129 1 (Fla. 1989) (no abuse of discretion in declaring defendant competent

and proceeding with trial where three experts opined that defendant was competent, including two who deemed temporary hospitalization and observation necessary for a complete determination of competency, while one expert concluded that defendant was not competent).

Cases relied upon by the Appellant do not compel any contrary conclusion, as all present clearly distinguishable facts. For example, in Marshall v. State, 440 So. 2d 638 (Fla. 1st DCA 1983), defense counsel requested a competency hearing and continuance where two experts stated that they could not make a determination of competency without further observation of the defendant. Due to the uniform agreement of all experts in Marshall that further observations were needed, and due to the inability of any of those experts to render an opinion at the time of the inquiry, the denial of a continuance and the determination of competence was improper. By contrast, in the instant case, not only did Dr. Garcia conclusively assert that the defendant was competent, based upon the evaluation which had just been completed, but, the defense expert, Dr. Haber, was able to reach her own conclusion of incompetency based on the evaluation which she had just completed. Neither doctor in the instant case was unable to reach a conclusive opinion. The hospitalization, for Dr. Haber, was to restore the defendant to the competency which she had already concluded was lacking. For Dr. Garcia, it was to corroborate the conclusion which he was already able to assert without qualification. Likewise, in Lane v. State, 388 So. 2d 1022 (Fla. 1980), as "none of the three medical experts who testified at the continuance hearing were able to say that the appellant was competent to stand trial," id. at 1025, the trial court erred in concluding that the defendant was competent and in denying the necessary continuance. For the same reasons asserted in the discussion of Marshall, Pridgen v. State, 531 So. 2d 951 (Fla. 1988), is also inapplicable. When the defendant, against counsel's advice, declined to present mitigating evidence and then made his own rambling statement, defense

counsel had one of the pretrial psychiatrists reexamine the defendant for competency, during the penalty phase proceedings of a capital case. That doctor believed that the verdict of guilt may have pushed the defendant "over the edge" to incompetency, whereas, prior to the guilty phase, the defendant had been deemed competent but borderline. The doctor found that the defendant was "probably incompetent," but an opinion with any degree of medical certainty would necessitate a few weeks of hospitalization, observation and treatment. The judge denied the request to proceed as recommended by the doctor, and, without the benefit of any other evaluations or medical opinions, resumed the trial. 53 1 So. 2d at 952-54. Once again, this case too lacks the certainty of opinions expressed by both Drs. Garcia and Haber.

Other cases relied upon by the Appellant similarly fail to support the Appellant's position herein. See. e.g., Tingle v. State, 536 So. 2d 202 (Fla. 1988) (trial court refused to appoint experts to determine competency where facts warranted inquiry, and court further deemed defendant competent based solely on his own "independent investigation" of county mental health file on defendant); Livingston v. State, 415 So. 2d 872 (Fla. 2d DCA 1982) (experts' reports on competency deemed inadequate, with no facts given in opinion as to nature of alleged inadequacy); Boggs v. State, 575 So. 2d 1274 (Fla. 1991) (where expert's written report deemed defendant incompetent, trial court erred in failing to conduct formal competency proceeding and deeming defendant competent based solely on court's conversation with defendant); Callowav v. State, 65 1 So. 2d 752 (Fla. 1 st DCA 1995) (notwithstanding factual basis warranting competency evaluation, trial court refused to appoint expert, based solely on court's own in-court observations of defendant).

While it is true that, in the face of facts warranting a competency determination, the trial court may not rely solely on its own observations for the purpose of determining competency, see, Calloway. supra: Boggs, supra, the court's own observations, in conjunction with testimony from

qualified experts and other witnesses, are relevant to the ultimate determination. See, e.g., United States v. Nichols, 56 F. 3d 403,411 (2d Cir. 1995); Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed. 2d 103 (1975) (evidence relevant to competency includes defendant's "demeanor at trial").

In view of the foregoing, it must be concluded that the trial court did not abuse its discretion in determining that the defendant was competent to proceed and in denying the request for hospitalization and observation prior to further proceedings. [14]

C. **Compliance With Rule 3.211**

The Appellant next asserts that the trial court failed to comply with the requirements of Rule 3.2 11 (a)(2) and 3.2 11 (d), Florida Rules of Criminal Procedure, by not obtaining a written report, by not addressing the specific criteria relevant to competency, and by not explaining the bases of their opinions.

With respect to the issue of the written reports, it should be noted that at no time did defense counsel ever object to the lack of a written report. Under such circumstances, this issue is not properly preserved for appellate review, as it does not constitute fundamental error, if, indeed, it constitutes any error at all. Errors occurring with respect to the procedures governing competency determinations have routinely been deemed to be of a non-fundamental nature, requiring preservation in the trial court. See. e.g., D'Oleo-Valdez v. State, 53 1 So. 2d 1347 (Fla. 1988) (failure to appoint the second expert required by Rule 3.2 10 for competency evaluation was not fundamental error and was not preserved in absence of objection); Green v. State, 598 So. 2d 3 13 (Fla. 2d DCA

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[14] Consistent with the foregoing analysis, it should also be noted that the defendant's in-court behavior when the penalty-phase proceedings resumed, was fully consistent with a determination of competency, as he testified, on cross-examination by the State, and was fully coherent, cogent, articulate and responsive.

1992) (same); Watts v. State, 593 So. 2d 198 (Fla. 1992) (defendant's entitlement to appointment of HRS diagnosis and evaluation team to determine extent of mental retardation and competency was waived where not asserted in trial court).

The State would further note that the suggestion that a written report is required is not supported by the applicable rules of procedure. Rule 3.2 11 (d), Florida Rules of Criminal Procedure, asserts that "[a]ny written report submitted by the experts shall" address the listed factors. The rule does not say that a written report "must' be submitted or "shall" be submitted; it simply says that any written report which is submitted must address the listed factors. Similarly, Rule 3.2 1 0(b)(4), asserts that "[t]he order appointing experts shall: . . . " specify the date by which the report should be submitted and to whom the report should be submitted." While it might anticipate that reports will typically be submitted in writing, it does not refer to a written report and does not preclude a verbal report, in the form of in-court testimony, under the circumstances of the instant case. Likewise, it should be noted that in the federal judiciary, written reports need only be "filed" when the court so directs the expert. 18 U.S.C. § 4241 (b) ("Prior to the date of the [competency] hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, , , . .").

Furthermore, this Court has previously held that in certain circumstances, a determination of competency may be made solely on the basis of written reports. See. e.g., Fowler v. State, 255 So. 2d 5 13, 5 15 (Fla. 1971). If written reports can serve as an acceptable basis for a competency determination, it must inevitably follow that a full evidentiary hearing, based upon complete evaluations of the defendant by the experts, with direct examination and cross-examination of the experts for the purpose of fully exploring their opinions and the bases for those opinions, is, at a minimum, a sufficient basis for determining competency in the absence of any objection to the lack

of written reports. The order appointing the experts designated the areas that they were to consider (R. 1126). Any attorney was free to explore any of those areas if the attorney had any reason to believe that those areas were not considered or evaluated by the expert. Similarly, it should also be noted that the United States Supreme Court, when addressing procedures needed to ensure adequate competency evaluations, has never held that constitutional due process mandates a written report as opposed to its functional equivalent in the form of in-court testimony, See generally, Drone, supra; Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966).

Thus, it must be concluded that the absence of a written report is not fundamental error and such a claim must be preserved for appellate review; and, alternatively, that a written report is not mandated by the rules, and in-court testimony from the experts, subject to cross-examination and additional examination by the court, can serve as the functional equivalent of a written report and may, under circumstances such as those of the instant case, fully satisfy the requirements of the rules.

The Appellant further claims that the experts failed to address the six factors listed in Rule 3.2 11 (a)(2), Florida Rules of Criminal Procedure. For the same reasons as detailed above, this claim was not preserved for appellate review as it was never raised in the trial court Insofar as the order appointing the doctors spelled out that they should consider these factors, there is no reason to presume that they did not. Had they been questioned about any such individual factor, it is reasonable to conclude that they presumably did so, and that further questioning would have elicited such an acknowledgment.

Lastly, as to the claim that the experts' in-court testimony failed to explain the bases of their opinions, that assertion is, once again, unpreserved for appellate review for the same reasons. Additionally, that assertion is belied by the record, as Dr. Garcia clearly set forth the basis for his conclusions. Not only was the defendant malingering, but, Dr. Haber's evaluation of a psychotic

breakdown was explicitly rejected, and the reasons for the rejection of that diagnosis were detailed. (T. 1022-30).

D. Trial Court's Order

The Appellant lastly attacks the trial court's findings, asserting that several of the findings made by the court were incorrect. Initially, the State would note that the controlling principle is that the trial court's finding of competency is valid as long as it is supported by the evidence and as long as there is no abuse of discretion. See. Carter, supra; Caso v. State, 524 So. 2d 422 (Fla. 1988) (trial court's ruling will be upheld, regardless of reasoning, where it is supported by the evidence). Under such a standard, as evidenced from the prior arguments herein, the lower court's decision regarding competency is fully supported by the evidence and the court's own observations of the defendant. The Appellant's argument regarding various findings by the trial court is thus irrelevant.

Nevertheless, a review of the Appellant's numerous claims compels the conclusion that the individual findings by the trial court were substantially accurate and were fully consistent with the ultimate conclusion regarding competency. First, the "longstanding psychotic problem" to which Dr. Haber and the Appellant refer, was, according to Dr. Haber's own testimony, nothing more than something which at times escalated to a "depressive disorder." (T. 1032). A depressive disorder is not a major mental illness; Dr. Haber's phrasing, "a longstanding psychotic problem," was therefore misleading at best, and refuted or minimized by her own acknowledgment that it was nothing more than the depressive disorder to which she herself was referring.

Second, the judge stated that "there's no verification of mental history." (T. 1052). The judge was entirely correct. None of the family members who testified had any personal knowledge of psychiatric or shock treatments received by the defendant in the Cuban military, Those family members were not even in the country at the time and did not even see the defendant between 1969

and 1979, some ten years after the fact. All of the family members admitted that this information came to them second hand, at best, either from the defendant or from other family members.

Third, the Appellant contests the judge's assertion that the only odd behavior observed by anyone was the defendant's depression. (T, 1052). While there were allegedly "fears" that the defendant would be like his schizophrenic mother, none of those "fears" were ever described in terms of concrete observations of anything other than depressed conduct on the part of the defendant.

Fourth, the Appellant attacks the judge's finding that the jail records did not show signs of psychological problems. This was supported by Dr, Garcia's review and interpretation of the jail records, which compelled his conclusion that the records did not reflect any psychiatric symptoms; they did not reflect any psychosis; and they did not reflect any use of prescription drugs since the spring of 1994, some 10 months prior to the trial. (T. 1028-30). Dr. Garcia indicated that he was aware of the suicide watch, but that did not alter his conclusions, Id.

Fifth, as to the defendant's inexpressive, blank face, the court simply observed that it was the same as it had been throughout the trial. (T. 1054-55). The court was under no compulsion to accept Dr. Haber's interpretation of the defendant's "staring" and nonresponsiveness. Since no one was asserting that the defendant had been incompetent for the first week of the trial, the constancy of the facial expressions was therefore properly noted by the trial judge to be fully consistent with the defendant's prior "competent" behavior in court.

Sixth, the Appellant alleges that the trial judge exaggerated the description of what transpired when the defendant engaged in a similar outburst during the pretrial suppression hearing. While the court reporter's transcription of the suppression hearing may not note the defendant's actions in their entirety, the trial judge was there herself, as were the trial attorneys. Defense counsel did not object to the court's characterization of the defendant's outburst, and thereby implicitly agreed with its

accuracy.

Lastly, both doctors asserted that the defendant, during the examination, was unable to recall his last name, as well as numerous other basic background questions, such as the names of his wife and children, his age, date of birth, place of birth, education, work and marital history. (T. 1019-23). When he went to the clinic immediately afterwards, he was described as giving his "name." (T. 1048). Whether he gave the first name or last name is irrelevant; not only did he give his name at that time, but he responded with other basic information when asked. Id.

In view of the foregoing, the Appellant's relentless assaults on the court's verbal findings have no merit; the court's findings were fully consistent with the evidence before the court, and the court's ultimate conclusion as to the defendant's competency is fully supported by the evidence.

III

THE STATE DID NOT IMPROPERLY USE THE COMPETENCY EXAMINATION TO REBUT MENTAL MITIGATION.

The Appellant claims that testimony from Dr. Garcia violated a confidentiality privilege and further violated rights under the Fifth and Sixth Amendments. These claims have not been preserved for appellate review. Secondly, all of the testimony at issue will be seen to have been necessitated by the defendant's own in-court behavior, in front of the jury, which required proper explanation lest the jury erroneously treat it as an example of his mental illness. Moreover, the defense expert opened the door to such testimony. Third, Dr. Garcia's testimony did not refer to any incriminating statements made by the defendant, and the Fifth Amendment is therefore not implicated. Fourth, there is no Sixth Amendment violation, as defense counsel requested and had notice of the evaluation at issue.

As previously noted in Argument II, as a result of the defendant's outburst at the

commencement of his cross-examination during the penalty phase proceedings, defense counsel sought and obtained a competency evaluation of the defendant. At commencement of the penalty phase, prior to the defendant's outburst, and at the time of the evaluation, the defense had argued to the jury that it intended to show that the murders were committed because defendant was mentally ill and was under the influence of an extreme mental disturbance. (T. 929). Both the defendant and his siblings had then, prior to the outburst, referred to his alleged psychiatric and/or shock treatment during his service in the Cuban military. They had all also emphasized that his mother was a schizophrenic requiring hospitalization, and that they were all afraid that defendant was like his mother. According to the defendant, his mother was "locked up", sometimes as often as once a week. (T. 1011). The defendant also added that he had heard voices since the age of 15, and that he had continued hearing voices even during his testimony. Id. After the outburst, the defense presented the testimony of Dr. Haber. Dr. Haber stated that she had found the defendant competent and able to understand what was going on during her initial interview (T. 1074), but that the defendant "decompensates" when he is under pressure or stress. (T. 1082). She also stated that the defendant's mother was schizophrenic, violent, and that the defendant took her medication because he could not control himself and could not deal with reality. (T. 1069). Dr. Haber also stated that based upon the family history and her psychological testing, the defendant could have schizophrenia, and when under pressure, he "decompensates", and "the thought disorder, the schizophrenia, whatever it is because we don't know exactly, gets worse". (T. 1079-80). Dr. Haber also testified that defendant, although initially denying any hallucinations, had subsequently admitted to visual and auditory hallucinations. (T. 1080-81). Schizophrenia is a major psychiatric illness, and such hallucinations are characteristic of the illness, (T. 1127-28).

As seen above, the defendant created a self-serving situation in which his own expert witness

would testify that he falls apart while under pressure, and could be schizophrenic, while the defendant gave a live, in-court demonstration of these opinions. The combination of these matters might reasonably be expected to cause the jurors to conclude that Dr. Haber's opinions were meritorious, as the defendant's in-court conduct exemplified her conclusions and opinions. In order to effectively respond to the defendant's claim of mental mitigating factors, the State was put in the position of having to explain not only why Dr. Haber's opinions were invalid, but why the defendant's in-court performance should not be construed by the jurors as an indication of the validity of Dr. Haber's opinions. The State thus presented rebuttal testimony from Dr. Garcia, which in large part related to his evaluations, testing and conclusions prior to the defendant's outburst. The State also elicited that Dr. Garcia's opinion of the outburst was different than that of Haber's; and, that the defendant's reports of hallucinations and the selective nature of his responses to routine background questions, were indicative of malingering rather than schizophrenia or other major mental illness.

A. Failure to Preserve

The Appellant herein has presented multiple claims regarding the alleged impropriety of Dr. Garcia's testimony as to the significance of the defendant's in-court outburst - i.e., that the use of the competency evaluation violates a confidentiality privilege; that it violates the defendant's Fifth Amendment privilege against self-incrimination; that it violates the defendant's Sixth Amendment right to counsel; and that it rendered the penalty phase proceedings fundamentally unfair. Not a single one of these claims was presented to the trial court. (T. 1118-22). Similarly, none of the prosecutorial comments, in closing argument, to which the Appellant refers, was the subject of any such claims. (T. 1140-41). Any such claims have therefore been waived and are not preserved for appellate review.

Hargrave v State, 427 So. 2d 713 (Fla. 1983), presents a similar situation in which any error was deemed unpreserved for appellate review. A court-appointed expert, pursuant to defense counsel's request, had conducted a competency evaluation, without giving Miranda warnings. 427 So. 2d at 713. During the penalty phase of the trial, the defense had presented, as a mitigating factor, the claim that Hargrave was under the domination of another person. 427 So. 2d at 714, n. 4. The State then called the aforesaid court-appointed expert who had conducted the competency evaluation, in order to negate this mitigating factor. Id. This Court expressly concluded that the Fifth Amendment claim was waived, in the absence of any objection at trial, and, furthermore, that the claim was not a matter of fundamental error. Id. at 7 15. The Court stated: "While invoking the death penalty requires that aggravating and mitigating circumstances be weighed, the failure to object to testimony which might result in the failure to find a mitigating circumstance is not fundamental error." Id.[15]

This Court, in Long v. State, 610 So. 2d 1268, 1275 (Fla. 1992), again found a similar claim to be unpreserved for review. A prosecution mental health expert was presenting rebuttal evidence as to the defendant's mental mitigation in the penalty phase of a capital trial. The State's expert, who had been appointed to conduct both a competency and insanity evaluation, referred to the fact that the defendant had stated that he killed the victim in order "to eliminate a witness." Viewing this reference as violative of Parkin v. State, 238 So. 2d 8 17 (Fla. 1970), since admissions about the facts of the offense, elicited in a compulsory examination, should not be utilized during subsequent in-

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[15] This point was contrasted with the situation, arising in Texas cases, relied upon by the Appellant, where the evidence relates to an aggravating factor which must be established in order to sustain the death penalty: "When the finding of an aggravating circumstance is an absolute requirement, as in Texas, the unobjected-to evidence might rise to the level of fundamental error." Id.

court testimony, this Court concluded that the issue was not preserved for appellate review. Another virtually identical issue arose in Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA), rev. denied, 576 So. 2d 286 (Fla. 1990), where a court-appointed psychiatrist, testifying as to the defendant's mental condition at trial, disclosed certain factual admissions which the defendant made, regarding the criminal offenses, during the psychiatric examination. After noting that such evidence may not be elicited without violating the Fifth Amendment, unless the defendant has opened the door to it, the Court concluded that any such claim had not been preserved for appellate review. 565 So. 2d at 328, n. 4. See also, Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (alleged Fifth Amendment violation regarding admission of confession not preserved for appellate review); Glendening v. State, 536 So. 2d 212,221 (Fla. 1988) (error in permitting expert mental health witness to testify that it was her opinion that child victim's father was person who committed sexual offense was not preserved for appellate review and was not fundamental).

B. Confidentiality and Rule 3.211(e)

During the State's rebuttal case, Dr. Garcia testified that he had interviewed the defendant after the prior day's incident, to determine whether the defendant was competent and whether he was "acting out, malingering, you know, putting on a show or did he go crazy." (T. 1118). He then referred to the mental status exam which he conducted with Dr. Haber, adding that he concluded the defendant was "competent and likely malingering," while Haber concluded that the defendant was "likely insane" and that he had had a psychotic break. (T. 1118-19). Dr. Garcia then explained why he concluded that the defendant had not suffered from a psychotic break and reiterated his belief that the defendant was malingering, based upon the inconsistencies and selective nature of the things which the defendant professed an inability to recall. (T. 1119-21). Not once during Dr. Garcia's testimony about the competency evaluation did he refer to any form of incriminating admissions

made by the defendant or any substantive statements of the defendant with respect to either the offenses committed or to any background history which the defendant was advancing as the basis for alleged mitigating circumstances.

As previously noted, this claim is not preserved for appellate review, Hargrave, supra; Long, supra; Erickson, supra. However, should this Court reach the merits of the claim, it must be concluded that (a) it was waived, by virtue of the issues interjected into the proceedings by the defense; and (b) that the policies of Rule 3.2 11 (e)(2)' s confidentiality have not been violated in the instant case,

The use of mental health evidence by the State frequently arises in situations where the defense initially raises issues which, in turn, permit the State to utilize testimony which would not otherwise be admissible. For example, in Long, supra, 610 So. 2d at 1275, it was held that the State was properly permitted to present rebuttal evidence, consisting of the testimony of an expert who evaluated the defendant for competency and sanity, after the defendant presented mental health experts in the penalty phase. This Court emphasized the direct correlation between the rebuttal evidence and the evidence which had been adduced by the defense. See also, Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed. 2d 336 (1987). So, too, in the instant case, Dr. Garcia's testimony negated the inferences which would otherwise be drawn by the jury from the defendant's outburst in front of the jury, So, too, Dr. Garcia's testimony emphasized that the defendant's problems were not a psychosis, did not constitute a serious mental illness, and were thus minimal in nature.[16] See also, Hargrave v. State, 427 So. 2d 713 (Fla. 1983) (defendant who initiated

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[16] The Appellant attempts to dispose of Long by asserting that in the instant case, the court's order appointing Dr. Garcia extended solely to competency, whereas the order of appointment in Long was for both competency and sanity at the time of the offense. That distinction, however, is not valid. The defendant, in Long, did not engage in conduct in front of the

psychiatric examination and then introduced psychiatric evidence was deemed precluded from objecting to State's use of the competency psychiatrist regarding mitigating circumstances); Preston v. State, 528 So. 2d 896 (Fla. 1988).

In yet another context, arising during penalty phase proceedings, it has routinely been held that the defense can open the door to otherwise inadmissible evidence by virtue of its own use of a mental health expert's testimony; all bases of the defense expert's opinions become the proper subject matter of testimony, even if those matters could not otherwise be elicited. See. e.g.. Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970); Hildwin v. State, 53 1 So. 2d 124, 127 (Fla, 1988); Parker v. State, 476 So. 2d 134 (Fla. 1985); Valle v. State, 581 So. 2d 40 (Fla. 1991). Moreover, matters which are normally deemed privileged are often waived by virtue of decisions made by the defense during trial proceedings. See. e.g., Morgan v. State, 639 So. 2d 6 (Fla .1994) (defendant waived confidentiality privilege as to statements made while under hypnosis to court-appointed psychiatrist by providing results of examination to defense expert and calling that expert as a witness); Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994) (". . . the state cannot elicit specific facts about a crime learned by a confidential expert through an examination of a defendant unless the defendant waives the attorney/client privilege by calling the expert to testify and opens the inquiry to collateral issues."). See also, Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed. 2d 336 (1987) (rejecting defendant's Fifth and Sixth Amendment claims where testimony regarding mental health evaluation, for commitment purposes, and its significance was introduced into evidence after

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jury which reasonably necessitated a response from the prosecution lest the jury be unjustifiably influenced by that conduct, Thus, consistent with Long, Dr. Garcia's testimony in the instant case was in direct rebuttal to an issue interjected by the defendant himself. See also, Buchanan, supra.

defendant attempted to establish a mental-status defense to charge of murder).[17] Thus, the defendant's and/or defense's actions effectively constituted a waiver to the State's use of Dr. Garcia's testimony.

Furthermore, a careful consideration of the policy served by Rule 3.211 (e) compels the conclusion that the limitation which it, as a general rule, imposes on the use of competency evaluations, is inapplicable in the instant case. In Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970), this Court stated that a court "should prohibit [a] nsychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination." (emphasis added). This Court, in Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994), embellished upon this:

> The Court [in Parkin] held that such examinations could be compelled, but also stated that courts "should prohibit the psychiatrist from testifying directly as to the facts surrounding the crime, where such facts have been elicited from the defendant during the course of a compulsory mental examination" although, "if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense." [citing Par-kin].

Similarly, Erickson, supra, observed that, as a general rule, absent a waiver, the psychiatric witness "may not disclose incriminating statements made to him by the defendant, or directly divulge facts about the crime that he may have elicited from the defendant in the course of an examination. . . ." 565 So. 2d at 33 1. Thus, the concern with confidentiality is directed towards preventing disclosure of incriminating statements which relate to the commission of the offense at issue."

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[17] Buchanan is addressed in greater detail in the ensuing sections of this argument dealing with the Fifth and Sixth Amendment claims.

[18] As will be seen in the ensuing section addressing the Fifth Amendment aspect of this claim, the same principles pertaining to the determination of the applicability of the Fifth Amendment - i.e., the focus on the use or non-use of incriminating statements - preclude the existence of any Fifth Amendment claim herein. The cases supporting the conclusion that the Fifth

When an expert testifies regarding the mental health evaluation, without disclosing any incriminating statements as to the offense, the policy behind the confidentiality provisions of Rule 3.2 11 (e) is simply not implicated.

C. **Fifth Amendment Claim**

As noted previously, the Fifth Amendment claim regarding Dr. Garcia's rebuttal testimony is not preserved for appellate review, Hargrave, supra; Long, supra; Glendening, supra. Additionally, the claim has no merit for two distinct reasons: first, the defense waived any such claim by interjecting the mental health issues into the penalty phase proceedings; and second, Dr. Garcia never testified as to any substantive statements made by the defendant during the competency evaluation, and the Fifth Amendment was therefore not implicated.

Fifth Amendment analysis of this claim must start with Estelle v. Smith, 45 1 US. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981). In Smith, a psychiatrist had been appointed to determine the competency of Smith without any notice to defense counsel. During the capital trial, the defense did not interject any mental health issues, either in the guilt phase or penalty phase, The prosecution, in the penalty phase, in an effort to establish the aggravating factor of future dangerousness, presented testimony from the psychiatrist who had conducted the pretrial competency proceeding. 451 U.S. at 456-59. The psychiatrist who testified based his conclusions largely on Smith's account of the crime, and the "prognosis as to future dangerousness rested on statements [Smith] made, and remarks he omitted, in reciting the details of the crime." 45 1 U.S. at 464-65. In finding that the use of such testimony violated the Fifth Amendment, where the psychiatrist did not administer Miranda warnings prior to the psychiatric interview, the Supreme Court emphasized that the defendant had

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Amendment is inapplicable should also negate the applicability of any confidentiality claim under Rule 3.21 l(e).

neither initiated the psychiatric evaluation nor attempted to introduce any psychiatric evidence. 45 1 U.S. at 468. The Court specifically observed that different situations existed in which the Fifth Amendment claim might not be valid: "In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." 45 1 U.S. at 472.

The fact-specific nature of Smith was emphasized in Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed. 2d 336 (1987). At trial, Buchanan attempted to establish the affirmative defense of "extreme emotional disturbance," He called a social worker as a witness, and that witness read from several reports and letters dealing with evaluations of Buchanan's mental condition. The prosecutor, on cross-examination, had the witness read from a psychological evaluation report prepared by yet another doctor. This evaluation had been ordered for a determination of whether the defendant should have been involuntarily hospitalized for psychiatric treatment, while in custody. The edited version of the report, which the witness was permitted to read from, omitted references to Buchanan's competency to stand trial, but included a wide-range of psychological observations, ranging from IQ to the lack of hallucinations or delusions, and levels of anxiety. 483 U.S. at 408-13, and notes 8-12.

In finding Smith to be inapplicable, the Court emphasized that the psychological evaluation of Buchanan had been requested by defense counsel; that the defense was seeking to establish the "mental status" defense; and that the report related "general observations about the mental state of petitioner but had not described any statements by petitioner dealing with the crimes for which he was charged." 483 U.S. at 423. Thus, "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the

prosecution." 483 U.S. at 422-23. The use of the report "for this limited rebuttal purpose does not constitute a Fifth Amendment violation." 483 U.S. at 423-24.

The same types of distinctions acknowledged in Buchanan are applicable in the instant case. The examination was requested by defense counsel, in the midst of the penalty phase, after the defendant's outburst in court. The defense had already decided to claim mental mitigating factors at trial, had so advised the jury in opening arguments in the penalty phase, and had started presenting pertinent evidence through the defendant's relatives and his own testimony regarding shock treatments in the Cuban military and a family history of schizophrenia. Prior to any testimony by Dr. Garcia, the defendant also presented Dr. Haber, who opined that the defendant could suffer from schizophrenia, that he had hallucinations whereby voices compelled him to do things, and, that he "decompensated" into acting "very inappropriately" when under stress.

The waiver of the Fifth Amendment claim through such factors becomes even more apparent through the discussion in Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed. 2d 551 (1989). There, two doctors performed psychological evaluations, regarding competency and sanity at the time of the offense. The evaluations were conducted without notice to defense counsel, and the defendant was not advised of his right to remain silent by the examining doctors. 492 U.S. at 68 1-82. The prosecution then used testimony from these doctors, over defense objection, to prove the aggravating factor of future dangerousness. Id. The defense had previously introduced psychiatric evidence of insanity. 492 U.S. at 683, The Court then discussed the waiver doctrine, in the context of Fifth Amendment claims where the defense has previously adduced some form of a mental health claim:

> In that case [Battie v. Estelle, 655 F. 2d 692 (5th Cir. 1981)] the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut

> the defense notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination. Id., at 700-702. In such circumstances. the defendant's use of nsvchiatric testimonv might constitute a waiver of the Fifth Amendment privilege. iust as the privilege would be waived if the defendant himself took the stand. Id., at 701-702, and n 22.
> . .
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> Language contained in Smith and in our later decision in Buchanan v. Kentucky . . . provides some support for the Fifth Circuit's discussion of waiver. . .

492 U.S. at 684,

Consistent with the foregoing, the following facts compel the conclusion that the Fifth Amendment privilege was waived: The defense requested the competency evaluation. The defense had already commenced its mental mitigation presentation. The defendant's in-court conduct, which triggered the competency evaluation, was, in and of itself, a form of psychological evidence for the jury's consideration, requiring an appropriate response from the prosecution. Regardless of the title of the evaluation to be performed pursuant to defense counsel's request, defense counsel, having been present during the defendant's outburst, was obviously aware that the State would have a legitimate need to address that outburst, to explain it to the jury, for reasons detailed above; and that the basis for addressing it could come, in part, from the mid-trial competency evaluation. Additionally, defense counsel had, prior to Dr. Garcia's evidence, presented testimony from Dr. Haber, in which she interjected the defendant's competency into the penalty phase proceedings, by pointing out that in her pretrial evaluation of the defendant, she had found that he was competent. (T. 1074). Furthermore, Dr. Haber raised the fact that in her initial interview with the defendant he had denied hearing any hallucinations; but that thereafter the defendant had stated that he heard voices. (T. 1073, 1080-81). Thus, Dr. Garcia's testimony that the defendant, during the penalty phase competency interview, related having hallucinations (T. 112 1-22), was a matter interjected

into the penalty phase proceedings by Dr. Haber, as was the defendant's competency.

Additionally, as noted above, Dr. Garcia's description of matters derived from this mid-trial competency evaluation was extremely limited and did not divulge any substantive statements by the defendant." Dr. Garcia explained that during the competency interview, he concluded that the defendant was competent and "likely malingering" and that Dr. Haber had concluded that the defendant was incompetent and had suffered a psychotic break. (T. 1118- 19). Garcia testified that he rejected that opinion because of the nature of the defendant's responses - his selective ability to recall basic data; and his orientation and responses, which, by their nature, were self-serving and not illogical. (T. 1119-20). The defendant also reported the existence of hallucinations and levitation to Dr. Garcia at this interview. (T. 1 121-22).[20]

Buchanan, as noted above, rejected a Fifth Amendment claim while observing that the report at issue "had set forth . . . general observations about the mental state of the petitioner but had not described *any* statements by the petitioner dealing with the crimes for which he was charged." 483 US. at 423-24. In Smith., however, the Fifth Amendment claim had been based on the relation of substantive responses from the defendant: the doctor based his opinions on the defendant's account of the offense, including the opinion as to future dangerousness. 45 1 U.S. at 464. By contrast, Dr.

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[19] It must be noted that Dr. Garcia had been appointed, prior to the penalty phase, to enable the State to respond to the assertions of mental mitigation by the defense. (R. 1088; T. 915-18). Thus, most of Dr. Garcia's testimony was based on the pre-penalty phase interviews; that testimony is not at issue in this claim.

[20] On the basis of the foregoing facts, Holland v. State, 636 So, 2d 1289 (Fla. 1994), does not compel a different conclusion. There, a jail psychiatrist had evaluated the defendant, without notice to defense counsel and prior to any notice that the defense intended to rely on the defense of insanity. 636 So, 2d at 129 1-92. The interviews were also conducted in violation of a court order prohibiting law enforcement interviews outside the presence of counsel. Thus, as of the time of the evaluations, there had been no waiver of any rights. By contrast, in the instant case, the appointment of Dr. Garcia was clearly after the defense had interjected mental health issues into the penalty phase, with notice to defense counsel, and a waiver clearly ensues.

Garcia's testimony regarding the mid-trial competency evaluation was limited, did not disclose any substantive statements related by the defendant, and the conclusions were based on the nature of the responses, the selective ability to recall; not on the substance of the statements. Under such circumstances, the nature of the testimony related by Dr. Garcia did not implicate the Fifth Amendment.

Lastly, any error regarding this testimony must be deemed harmless. The essence of Dr. Garcia's conclusions and testimony derives from his pre-penalty phase evaluation of the defendant; not from the mid-trial competency evaluation. The testimony regarding the competency evaluation was extremely limited, and did not divulge any substantive statements by the defendant. Several of the matters - competency and hallucinations had already been testified to by Dr. Haber. Moreover, as this Court noted in Hargrave, the testimony related to negating a proffered mitigating factor, not to establishing an aggravating factor, 427 So. 2d at 715. It is also evident from the trial court's sentencing order (R. 1174-87), that this aspect of Dr. Garcia's testimony was not of significant importance to the trial court's findings on the mental mitigating factors, and that the same weight would have been accorded those factors absent this limited portion of Dr. Garcia's testimony,

D. Sixth Amendment Claim

As with the preceding claims, this one, is also unpreserved for appellate review. Alternatively, this claim is devoid of merit, The focus of a Sixth Amendment claim is the absence of notice to defense counsel of the fact that a psychological evaluation is going to be conducted and the nature of that examination. Smith. supra, 451 U.S. at 470-71; Buchanan, supra, 483 U.S. at 424-25. In Smith, as previously noted, defense counsel was unaware that the evaluation was being conducted or that it would be used as evidence of future dangerousness in the capital trial, where the defense did not interject any mental health issue into the trial. Thus, a Sixth Amendment violation

was found in Smith, 45 1 U.S. at 470-71, By contrast, no Sixth Amendment violation was found in Buchanan, because the evaluation had been requested by defense counsel under circumstances where it could be assumed that defense counsel had the ability to consult with the client. 483 U.S. at 424.

Based on such distinctions, this Court, in Hargrave, had concluded that a Sixth Amendment violation did not exist, In Hargrave, the pretrial competency evaluation had been conducted pursuant to defense counsel's request. 427 So. 2d at 716. Furthermore, just as in the instant case, the State had introduced psychological evidence solely to negate a defense claim regarding a mental mitigating circumstance, 427 So. 2d at 714, n. 4. Under such circumstances, this Court concluded that there was no Sixth Amendment violation.

The facts of the instant case present an even more compelling basis for rejecting the Sixth Amendment claim. Not only did defense counsel request the competency evaluation; not only did defense counsel have the opportunity to consult with his client; not only did the defense present mental mitigation prior to the State's presentation of Dr. Garcia; but, defense counsel, having seen his client's outburst before the jury, would reasonably be expected to conclude that the State would need to respond to that outburst, to prevent the jury from being misled as to its significance. Thus, defense counsel could reasonably infer, that regardless of the title given to the examination, it would also serve as the basis for either party, the State or defense, to use pertinent observations therefrom, either in support of or in negation of mitigating factors; and to show that the defendant's outburst either supported, or did not support, the claimed mitigating factors.

The Appellant's reliance on Holland v. State, 636 So. 2d 1289 (Fla. 1994), for purposes of the Sixth Amendment claim is misplaced, for the simple fact that, consistent with the foregoing analysis, the psychiatrist who testified for the State, had evaluated the defendant, in two initial interviews, without any notice to defense counsel. 636 So. 2d at 1291. Thus, the heart of the Sixth

Amendment claim - notice to defense counsel - was violated in Holland.

Lastly, for the reasons noted in the previous subsection, due to the limited nature of the questioning, the facts already elicited from Dr. Haber, and the nature of the trial court's findings regarding the mental mitigating factors, any error herein must be deemed harmless.[21]

E. Fairness of Sentencing Proceeding

The Appellant lastly claims that Dr. Garcia's testimony regarding the in-court outburst and the related competency evaluation rendered the sentencing proceedings fundamentally unfair and infected the entire balancing process. Besides being unpreserved for appellate review, this argument is fully negated by the preceding arguments, which demonstrate that the evidence was properly relied on.

It is axiomatic that any evidence which is properly adduced is also the proper subject of comment or argument and is also a proper basis upon which a judge or jury may predicate a decision. See. e.g., White v. State, 377 So. 2d 1149 (Fla, 1979). The only "unfairness" in the sentencing proceedings herein would be the result of the scenario which the Appellant is proposing herein: a manipulative, in-court, virtuoso performance by the defendant, which serves to highlight the propriety of his own expert's psychological evaluations, and which the State is precluded from addressing through relevant evidence.

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[21] Although Satterwihite v Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed. 2d 284 (1988), rejected harmless error analysis on the facts of that case with respect to a similar Sixth Amendment claim, the Court did acknowledge that such claims are subject to harmless error analysis. As with other harmless error arguments, it is an analysis which focuses on the unique facts of the individual case. 486 U.S. at 258-60.

IV

DR GARCIA'S TESTIMONY DID NOT EXCEED THE PROPER SCOPE OF REBUTTAL, AND, ALTERNATIVELY, THIS CLAIM HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW.

Dr. Garcia, during the course of his rebuttal testimony, referred to an IQ test which he administered to the defendant and the lack of organic brain damage. While it will be shown herein that both of those subjects were within the scope of rebuttal testimony, it must first be noted that neither claim was preserved for appellate review, as defense counsel never objected to the introduction of any such testimony on rebuttal. (T. 1106-11). Questions regarding the proper-scope of examination of a witness must be objected to in order to preserve such claims for appellate review. See, e.g., Kiraly v. State, 212 So. 2d 311, 313 (Fla. 3d DCA 1968); Wyatt v. State, 641 So. 2d 355,358 (Fla. 1994).

In any event, the questioning herein was within the proper scope of rebuttal. The purpose of rebuttal evidence is to explain or rebut evidence offered by an opponent, and a trial judge has broad discretion in determining whether to permit such rebuttal. See, e.g., United States v. Teiada, 956 So. 2d 1256, 1266-67 (2d Cir. 1992); Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979); Dixon v. State, 592 So. 2d 1241 (Fla, 3d DCA 1992). The evidence at issue herein properly rebutted subjects opened up by both Dr. Haber's testimony on behalf of the defendant, as well as the defendant's own in-court demonstration which purported to show the jury that he was crazy.

First, Dr. Haber, based in part upon her tests, expressed the opinions that defendant suffered from a "severe mental disorder," suggestive of schizophrenia, along with major depression, a delusional disorder, a passive aggressive disorder and decompensation under pressure. (T. 1079-83). Yet, while expressing all of these opinions, she further asserted that she could not give an exact diagnosis. (T. 1083). Dr. Garcia's comments regarding the IQ test were a part of his explanation for

his conclusion that the defendant was not trying to do his best. (T. 1109). This conclusion was instrumental to an assessment of Dr. Haber's conclusions, since Dr. Haber had likewise administered several tests to the defendant, and some of those tests were contingent upon the degree of cooperation by the defendant; a person who intentionally failed to perform at one's best abilities could affect the results of the testing. (T. 1085-88). Thus, even Dr. Haber admitted that the defendant's performance on tests which she administered reflected a tendency to magnify illness. (T. 1087-88). This tendency was fully corroborated by Dr. Garcia's testimony regarding the IQ test, which led him to conclude that the defendant was attempting to alter the results by not trying to do his best. (T. 1109). Such conclusions regarding the defendant's test-taking techniques clearly served to cast even further doubt on the validity and significance of Dr. Haber's tests.

Second, Dr. Garcia's testimony regarding the lack of organic damage was in conjunction with the administration of the Bender Visual test, where the defendant has to draw figures after observing the doctor draw them. Visual perception is affected by organic problems. On this test, the defendant's performance was slow. The slowness of the performance again correlated either to an intentional effort of the defendant to perform slowly, or, to the effect of an underlying depression. (T. 1111). In either event, the test which Dr. Garcia administered and described was relevant to, a) Dr. Haber's opinion of a major mental illness which had no specific diagnosis and "could have" been schizophrenia, b) her discussion of depression, and c) the same above-described manipulative efforts of the defendant to affect the outcome of his own tests by deliberate obfuscatory tactics. The reference to the lack of organic damage was not interjected for the purpose of raising a nonexistent issue; it was referred to for the purpose of comprehensively explaining the nature and purpose of the administered test, which results were clearly relevant to several aspects of the case previously raised by both Dr. Haber and the defendant.

In view of the foregoing, it must be concluded that even if this issue is deemed preserved for appellate review, the admission of the foregoing testimony rested within the discretion of the trial court.

Lastly, the State would assert that any error regarding the foregoing testimony must be deemed harmless. The sole case upon which the Appellant relies, Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), did not find reversible error on the basis of the prosecutor's introduction of rebuttal evidence regarding the lack of organic brain damage, where that had not previously been at issue. Rather, reversal in Nowitzke ensued from a multitude of prosecutorial errors which, in that case, amounted to a strategy of discrediting "the whole notion of psychiatry in general and the insanity defense specifically." 572 So. 2d at 1355. Comparable circumstances most clearly do not exist in the instant case.[22]

V

THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IS NOT COGNIZABLE ON DIRECT APPEAL AND IS OTHERWISE WITHOUT MERIT.

The Appellant claims that trial counsel was per se ineffective based upon his failure to object to the testimony elicited from Dr. Garcia (which testimony is addressed herein in claim III supra), and based upon trial counsel's subsequent suspension from the Florida Bar. Neither of these claims is properly before this Court, As a general rule, claims of ineffective assistance of counsel are not

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[22] Additionally, it must be noted that Nowitzke involved a guilt-phase issue, where the defense had raised an insanity defense. Rebuttal of a guilt-phase insanity defense is typically going to be considerably more limited than rebuttal of penalty-phase mental mitigating evidence, since penalty-phase mental mitigation is typically very broad-based. By way of example, one need only review Dr. Haber's narrative of the defendant's family, social, personal and mental history. The background for her penalty phase testimony literally encompasses virtually every conceivable aspect of the defendant's life. Rebuttal to such broad-based testimony must necessarily be viewed differently than the more limited mental health issues which arise during the guilt phase.

cognizable on direct appeal, but must be presented first to the trial court, through relinquishment of jurisdiction and presentation of a motion for post-conviction relief, See, Combs v. State, 403 So. 2d 418,422 (Fla. 1981) (""If appellate counsel in a criminal proceeding honestly believes there is an issue of reasonably effective assistance of counsel in either the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellate court that has jurisdiction of the proceeding so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceedings."); see also, Kelly v. State, 486 So. 2d 578, 585 (Fla. 1986); Loren v. State, 601 So. 2d 271 (Fla. 1st DCA 1992). The obvious reason for such a requirement is that ineffectiveness claims often entail factual questions which cannot be answered from the limited record of the trial proceedings. Neither of the asserted claims in this Court is properly before this Court at this time,

A. ,Testimonv of Dr. Garcia

As detailed in Issue III of this Brief of Appellee, Dr. Garcia's testimony, in the State's rebuttal case, properly responded to matters interjected into the proceedings by both the defendant and Dr. Haber. The questioning of Dr. Garcia by the prosecutor was therefore proper, without any violation of either the Rules of Criminal Procedure or the Fifth and Sixth Amendment rights of the defendant. Under such circumstances, it is obvious that any failure of defense counsel to object could hardly form the basis for a claim of ineffective assistance of counsel, since it must reasonably be concluded that any such objection would have been denied by the trial court, and that any such denial would have been proper.

Apart from the foregoing, however, it must further be noted that reasons exist why this claim should nevertheless be first explored at the trial court level before review in this Court. While several grounds already exist, from the trial record, to demonstrate that such questioning was proper,

other grounds could be demonstrated as well, were this issue to be considered first by the trial court. For example, it has routinely been held that the prosecution may examine all bases of a defense mental health expert's opinions. See, Valle v. State, 581 So. 2d 40 (Fla. 1991); Parker v. State, 476 So. 2d 134 (Fla. 1985). Were this issue to be litigated initially in the trial court, the State would likely establish that Dr. Haber did, in fact, base all of her opinions not merely on her pretrial evaluations of the defendant, but on the mid-penalty-phase competency evaluation as well. Dr. Haber saw the defendant on several occasions. It is difficult to imagine that an examining psychologist could reasonably assert that her opinions and evaluations ensue solely from the first four interviews, but not from the final, mid-trial interview. They are all part and parcel of an entire evaluation, not severable, distinct, unrelated entities. Were such to be established in a trial court evidentiary proceeding, it would therefore ensue that the matters occurring during the competency evaluation would have been both a proper basis for cross-examining Dr. Haber and for questioning Dr. Garcia.

Similarly, although it could be concluded on the basis of the instant record, that even if counsel were deemed deficient, any such deficiency did not prejudice the defendant, since it is clear from the trial court's findings regarding aggravating and mitigating circumstances that the death penalty would nevertheless have been imposed, the presentation of this issue in the trial court, as a court of first impression, would provide the trial judge with the opportunity to state why the judge would, or would not, have imposed the death penalty in the absence of such testimony from Dr. Garcia.

Lastly, should this issue be addressed on the merits herein, it must clearly be concluded that the Appellant has failed to demonstrate any prejudice. The testimony in question did not have any effect on the substantial aggravating factors which were found to exist, Moreover, apart from Dr.

Garcia's observations regarding the defendant's malingering during the competency evaluation, Dr. Garcia's testimony had otherwise thoroughly negated the assertions of Dr. Haber, based upon the facts of the crimes and Garcia's prior evaluation of the defendant Furthermore, even before Dr. Garcia negated Dr. Haber's testimony, Dr. Haber herself had suffered self-inflicted wounds destroying any credibility she had, when she admitted that (a) she could not provide an exact diagnosis; and (b) the underlying factors she relied upon were not a major mental illness. (T. 1083, 1089).

B. Defense Counsel's Susaension from the Bar

The Appellant further asserts that this Court's entry of two orders approving the suspension of defense counsel from the Florida Bar, in March, 1995, shortly after the imposition of the death penalty herein, constitutes per se ineffective assistance. Once again, this claim must be presented to the trial court as a court of first impression. The orders of suspension, as publicly reported, arc summary orders which do not set forth any grounds for suspension. It cannot be determined from those summary orders whether there is any remote basis for correlating the conduct resulting in the suspension to the attorney's performance during the course of the trial court proceedings in this case. See, The Florida Bar v. Carter, 652 So. 2d 818 (Fla. 1995); The Florida Bar v. Carter, 654 So. 2d **920** (Fla. 1995).

The United States Court of Appeals for the Third Circuit has addressed a similar factual issue, and, in the process of concluding that professional disciplinary sanctions do not result in per se ineffective assistance as to recently completed criminal trials, the Court engaged in an extensive and thorough analysis of the issue. Vance v. Lehman, 64 F. 3d 119 (3d Cir. 1995). Shortly after the conviction of Vance, his attorney's license to practice law was revoked because he had made material misrepresentations of fact on his original bar application. In rejecting Vance's claim of per

se ineffective assistance of counsel, the federal appellate court stated:

> . . . These were serious breaches of professional ethics. They cannot be, and have not been, condoned. At the same time, experience has taught that lawyers, like other human beings, occasionally fall from grace. This is an unfortunate fact of life and is, of course, one of the principal reasons why the legal profession has disciplinary systems. Our courts have traditionally relied upon these systems to adjudicate and evaluate alleged professional defalcations. As a result, where breaches of professional responsibility are unrelated to the representation of the defendant, courts have not regarded the imposition of sanctions as relevant to the adequacy of an attorney's representation and have not given disbarment orders retroactive effect for Sixth Amendment purposes. United States v. Mouzin, 785 F. 2d 682,698 (9th Cir.), cert. denied, 479 U.S. 985,107 S.Ct. 574, 93 L.Ed. 2d 577 (1986) In those instances where lawyers have been sanctioned or disbarred for conduct predating but unrelated to a criminal representation, the risk to the defendant has not been considered sufficient to warrant application of the per se rule. Waterhouse v. Rodriguez, 848 F. 2d 375, 383 (2d Cir. 1988) (disbarment of defendant's counsel during pretrial suppression hearing did not result in denial of defendant's Sixth Amendment right to effective assistance of counsel where attorney was member of bar when hearing began and ceased representation immediately after learning of disbarment); Mouzin, 785 F. 2d at 698 (disbarment from court of appeals for conduct unrelated to ongoing representation in district court does not render such representation ineffective); Roach v. Martin, 757 F. 2d 1463, 1479 (4th Cir.) cert. denied, 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed. 2d 154 (1985) (state bar authorities' investigation of lead counsel during trial did not warrant presumption of prejudice); Hoffman, 733 F. 2d at 602 (attorney's suspension from practice by his home state bar during federal district court trial not cause for per se finding of ineffectiveness); United States v. Sielaff, 542 F. 2d 377, 380 (7th Cir. 1976) (subsequent disbarment of petitioner's counsel "was irrelevant to his performance at petitioner's trial"). . . .

64 F. 3d at 123-24. Courts of this State have adopted the same approach. For example, in O'Callaghan v. State, 542 So, 2d 1324 (Fla. 1989), while a direct appeal was pending, the defendant became aware that his trial counsel had been the subject of bar disciplinary proceedings related primarily to his inability to practice law due to an alcohol problem. 542 So. 2d at 1325. This Court remanded the case to the trial court so that that claim could be explored by the trial court, as a court of first impression. Id. Ultimately, the claim of ineffective assistance of counsel was rejected, by both the trial court and this Court, obviously and implicitly rejecting the Appellant's claim herein that such proceedings mandate a finding of per se ineffectiveness. See also, Dortley v. State, 556

So. 2d 500,501 at n. 2 (Fla. 1 st DCA 1990) ("Appellant notes in his motion that his trial counsel was suspended from the practice of law because of inappropriate handling of trust account funds. Appellant does not appear to argue that the suspension is proof of ineffective assistance; however, if such an argument was made, it would not have proved meritorious for there was no demonstrated nexus between appellant's trial and counsel's trust account procedures."); Kieser v. People of the State of New York, 56 F. 3d 16 (2d Cir. 1995) (attorney suspended from bar, for failure to pay dues, prior to criminal trial, and thereafter paid dues, but neglected to move for admittance pro hac vice; held not to constitute per se ineffective assistance); Carvaial v, United States, 978 F. 2d 714 (9th Cir. 1992) (rejecting per se ineffectiveness claim where counsel had been disbarred mid-trial and trial judge permitted counsel to conclude trial); United States v. Mouzin, 785 F. 2d 682 (9th Cir.), cert. denied sub nom. **Carvaial,** v, United States, 479 U.S. 985 (1986) (disbarment of defense counsel during trial, for conduct unrelated to defendant's trial, was not per se ineffective assistance). In view of the foregoing, the claim of per se ineffective assistance lacks merit and the claim is one which must first be presented to the trial court. Combs, supra.

VI

THE TRIAL COURT DID NOT IMPROPERLY LIMIT THE DEFENDANT'S ABILITY TO ELICIT TESTIMONY REGARDING HIS MOTHER'S MENTAL ILLNESS.

During the penalty phase proceedings, the defense established, through the testimony of the defendant, two brothers, one sister, and Dr. Haber, that the defendant's mother had been schizophrenic for over 25 years. The brothers and sister all established that the family left Cuba in 1969, as a result of the mother's schizophrenia, so that she could receive treatment in the United States. (T. 975,984). The defendant, himself, testified that his mother was schizophrenic, that she had been hospitalized in Jackson Memorial Hospital, and that he had periodically taken her

medication. (T. 1010-11). Dr. Haber similarly related that the defendant lived with the mother upon arriving in the United States, that the mother had violent episodes in which she was taken to Jackson Memorial Hospital, and that the defendant periodically took her medications. (T. 1068-69, 1071, 1076). The State would note that the defendant himself testified without any objection, that his mother was "locked up," "sometimes once a week". (T. 1011). The only question which the State objected to and which the sister was precluded from answering, was the number of times that the mother had been hospitalized. (T. 975). Defense counsel never proffered what the answer to this question would have been,

Initially, the State would note that this issue has not been properly preserved for appellate review. When evidence has been excluded, it is incumbent upon the aggrieved party to proffer what the excluded evidence would have shown. The failure to do so precludes the appellate court from determining relevancy and/or prejudice, and thus results in a failure to preserve the issue for appellate review. See, e.g., Lucas v. State, 568 So. 2d 18 (Fla. 1990) (proffer is necessary to preserve claim of erroneous refusal to allow defendant to introduce testimony). In the instant case, the State, prior to the penalty phase, had filed a motion in limine, requesting that the defense make no mention of: "any evidence which does not bear on the defendant's character, prior record or the circumstances of the offense," "without first obtaining permission from the court outside the presence and/or hearing of the jury." (R. 1081). During the penalty phase the State then objected to defense counsel's question to the defendant's sister as to how many times their mother had been hospitalized, on the grounds that it was "irrelevant," and subject to the motion in limine. (R. 975). Despite adequate opportunity, defense counsel never sought to proffer the answer or demonstrate to the court how the answer was relevant. This issue is thus procedurally barred.

Alternatively, it is evident from the foregoing summary that the defense was allowed to

present extensive evidence regarding the nature of the mother's mental illness; the only question disallowed was the number of times the mother was hospitalized. Not only was the testimony regarding the mother's illness fully presented, but, it should be noted that no witness ever asserted that the mother's hospitalizations had any effect on the defendant's criminal behavior. In cases where a parent's mental illness has been deemed to have mitigating value, it has typically been the case that the parent's mental illness was related to the parent's physical or emotional abuse of the defendant during childhood. See. e.g., Patten v. State, 467 So. 2d 975,977 (Fla. 1985); Hall v. State, 541 So. 2d 1125, 1127 (Fla. 1989). No such linkage has ever been asserted in the instant case, even though the defendant was permitted to adduce extensive evidence of the mother's mental illness. More significantly, to whatever extent the illness of the mother had any relevance, not only was it reasonably presented through the evidence, but, the exclusion as to the number of separate hospitalizations was never shown to have any relevance in and of itself. Consistent with the foregoing, it should further be noted that the defense never asserted the mother's mental illness as a mitigating factor, statutory or non-statutory. No such reference to her mental illness appears in defense counsel's sentencing memorandum. (T. 1155, et seq.). The only effort at linkage in defense counsel's closing argument to the jury was the assertion that the mother was schizophrenic and that the defendant thought he was the same. (T. 1146).

Lastly, in view of the substantial presentation of evidence of the mother's mental illness, the absence of any demonstration that there was any link between the number of hospitalizations and the defendant's behavior and/or mental health, the limited nature of the sole question to which an objection was sustained, and, the defendant's own testimony as to the frequency of her "lock-up," any error must be deemed harmless.

VII

THE FAILURE TO DISCLOSE THE ORAL STATEMENT OF THE DEFENDANT DID NOT CONSTITUTE A DISCOVERY VIOLATION.

The defendant, during his penalty phase case, asserted that he felt badly about the killing of Roque. (T. 1012, 1062). The State, in its rebuttal case, introduced evidence, through victim Sanchez, that the defendant, in a testimonial at a church service, the Sunday after the shootings, told the congregation "'that he was grateful to God that nothing happened to him because 30 seconds before the shooting, he was checking the parking lot of the company and that nothing happened to him." (T. 1100-01). The State introduced this statement to rebut the defendant's professed remorse regarding the murder of Roque. Defense counsel asserted that the failure to disclose this statement in pretrial discovery constituted a discovery violation. (T. 1098-99). The prosecution responded that the statement was coming in solely as rebuttal, and that there was no reasonable basis for knowing that there would be an assertion of remorse, which would require rebuttal, until the defendant actually took the stand and asserted his professed remorse. (T. 1098-99). The court, after what was announced to be a Richardson inquiry, concluded that there was "no discovery violation since the first time this even became relevant was after your client testified, which was only yesterday." (T. 1099-1100).

The Appellant's initial claim is that Rule 3.220(b)(1)(C), Florida Rules of Criminal Procedure, requires that the prosecution disclose the "substance of any oral statements made by the accused," and that that provision pertains to the statement herein. That, however, is an oversimplification of the State's obligations under the discovery rules, "The scope of discovery . . . includes any relevant matter or information that appears reasonably calculated to lead to the discovery of admissible evidence." Ivester v. State, 398 So. 2d 926,930 (Fla. 1 st DCA 1981). See

also, Evanco v. State, 350 So. 2d 780,781 (Fla. 1st DCA 1977), reversed on other grounds, 352 So. 2d 147 (Fla. 1977). By way of hypothetical example, the State, in a case such as the instant one, may have learned that the defendant gave a speech, a week after the murder, discussing the merits of the various candidates in an upcoming municipal election. It may be an "oral statement"; it may be known to the State; it may have been "made by the accused." Notwithstanding the foregoing, the nondisclosure of such a statement would obviously not constitute a discovery violation, as it would not be reasonably calculated to lead to the discovery of admissible evidence.

The same principle applies in the instant case, The statement does not discuss the offenses; it does not constitute an admission regarding the offenses; it does not constitute a denial as to the offenses; it does not relate eyewitness observations about the offenses; it does not relate alleged second-hand statements heard by the defendant about the offenses. It is, in short, an utter irrelevancy unless and until the defendant takes the stand and professes remorse regarding the murder. Under such circumstances, Rule 3.220(b)(1)(C) is inapplicable. See also, Gibson v. State, 475 So. 2d 1346, 1347 (Fla. 1 st DCA 1985) (nondisclosed oral statement of defendant did not result in Richardson violation where "[t]he alleged statements did not directly relate to the crimes charged and the defendant was not prejudiced.").

The significant fact herein is that the statement made to the congregation could not reasonably have been anticipated to have any significance unless and until the defendant asserted remorse during the penalty phase, at which time, and for the first time, the statement acquired relevancy solely with respect to the State's rebuttal case. This Court has held, in conjunction with evidence adduced by the State in its rebuttal case, "that when the State asserts that it is excused from compliance with discovery because it could not have anticipated defense evidence, the question whether it could reasonably have anticipated evidence should be resolved in a Richardson hearing."

Elledge v. State, 613 So. 2d 434,436 (Fla. 1993), approving Ratcliff v. State, 561 So, 2d 1276, 1277 (Fla. 2d DCA 1990). That is precisely what the lower court did in the instant case, as the arguments in the inquiry focused on when the State reasonably could have or should have known that the statement in question would be used as rebuttal evidence.

The Appellant has responded to this contention by asserting that the State could reasonably have anticipated, prior to the penalty phase, that the defense would have asserted remorse as a mitigating factor, thereby triggering the need for the rebuttal evidence. The Appellant refers, in part, to Dr. Haber's pretrial deposition, which, it is asserted, refers to the defendant's remorse. While Dr. Haber's deposition is not a part of the record herein, and her pretrial statements are thus not established, even if she had referred to the defendant's remorse, that would not impose on the State a burden to assume that remorse would be asserted at the penalty phase. Remorse may not be established through self-serving statements to an expert; it typically requires in-court testimony, subject to cross-examination from the defendant. See, Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994) (no error in precluding defendant from presenting hearsay testimony regarding his own self-serving statements of remorse). Thus, until the defendant actually takes the stand and testifies as to remorse, there is no reason for the State to engage in any assumptions and it is not a matter which may reasonably be anticipated,

Indeed, from the pre-penalty phase perspective of the prosecution, compelling reasons would exist for the State to anticipate that the defendant would not take the stand and would not express remorse. During the guilt phase, the defendant took the stand and expressly denied committing any offenses. To take the stand during the penalty phase proceedings and express remorse would thus require the defendant to expressly acknowledge that he had lied during the guilt phase, and thus had no credibility as a witness. Furthermore, in anticipating whether the defendant would assert remorse,

the State would also have been aware of the following additional factors: The defendant initially denied committing any offenses when confronted by the police. He also made a statement, shortly after having been arrested, to a co-employee, in which he asserted that the only thing that he was sorry about was that he did not kill Sanchez as well. He once again denied committing any offenses at trial. He then demonstrated his sense of remorse by violently attacking the prosecutor in court. To anticipate, given the foregoing, that the defense would assert remorse, would require the prosecution to have extra-legal skills akin to a crystal ball. There was, however, prior to the defendant's in-court testimony, no reasonable basis for anticipating that remorse would be asserted. Thus, once again, it must be concluded that there was no discovery violation.

Lastly, even if a discovery violation is found, any such violation must be deemed harmless beyond a reasonable doubt, pursuant to the analysis set forth in State v. Schopp, 653 So. 2d 1016 (Fla. 1995). The principal question in assessing the question of prejudice to the defendant, as part of the harmless error analysis, is whether any discovery violation procedurally prejudiced the defendant. That entails a consideration of whether the defendant's trial preparation would have been materially different but for the violation. 653 So. 2d at 1020. In the context of the instant case, the question therefore boils down to a determination of whether defense counsel would still have asserted remorse as a mitigating factor had the defense known of this statement prior to the penalty phase proceedings. The answer to that question should be obvious. The defense had already chosen to assert remorse as a mitigating factor notwithstanding the above-described factors, all of which were previously known, and all of which rendered the assertion of minimal credibility and value at best. One more fact negating the claim of remorse would not have been likely to alter the defense's choice on this matter. Similarly, even if defense counsel had found evidence to question the accuracy of the related statement, it is clear from the trial court's findings on remorse that that would

not have made a difference, as remorse was found to be nonexistent for a multitude of other independent reasons, including the defendant's constantly changing denials of having committed the crimes. (T. 1216-17; R, 11 89-91).[23] Thus, even if any error existed, it must be deemed harmless.

VIII.

THE TRIAL COURT DID NOT ERR IN SUSTAINING AN OBJECTION TO DEFENSE COUNSEL'S CLOSING ARGUMENT.

The Appellant contends that he was deprived of the right to argue non capital sentencing alternatives in his penalty phase closing argument. According to the Appellant, defense counsel was prevented from arguing that the trial judge could impose consecutive life sentences on the Appellant's attempted first degree murder convictions. This claim is unpreserved, and without merit as it is refuted by the record.

During closing argument, the trial judge overruled the State's objection, and defense counsel argued:

> This is not the kind of crime for which the death penalty was intended for, it's life in prison. As a matter of fact, he'll receive more than life in prison because there are other factors for which life in prison is there, also. He will never see the outside again. That's for sure.

(T. 1151).

Defense counsel then continued:

> Because of the way that he can be sentenced because of the -- if you were inclined to find him guilty because if you are afraid that he's coming out and it won't happen.

(T. 1151-52).

The trial court sustained the State's objection at this juncture. (T. 1152). Defense counsel did not

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[23] In a similar vein, it should be noted that in the several week interlude between the jury's recommendation and the final sentencing proceedings before the judge, defense counsel had the ability to explore this matter further and present any further evidence, but no such evidence was presented,

try to justify or amend his baseless assertion that the jury had found the defendant "guilty" because they were "afraid", as to which the objection was sustained. There was no proffer or argument that the defense was attempting to argue the possible alternative sentencing options of "true life sentences" or minimum mandatories, as now argued on appeal. See brief of Appellant at pp. 77-79. This issue is thus procedurally barred, Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) (appellate court will not consider an issue which is not presented to the lower court).

In any event, as noted by the Appellant, this Court has repeatedly held that there is no error in precluding argument as to possible sentences for non capital offenses, which are not within the province of the jury to decide. Marquard v. State, 641 So. 2d 54, 57 (Fla. 1994); Campbell v. State, 12 Fla. L. Weekly S287, S288 (Fla. June 27, 1996); See also Gorby v. State, 630 So, 2d 544, 548 (Fla. 1993); Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990); See also Simmons v. South Carolina, 1512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 133, 145 (1994)(precluding the defendant, over objection, from any mention of the true meaning of the non-death sentencing alternative before the jury, under state law - i.e., life without parole, was error, especially where the prosecution argued that Simons posed a threat to society if he were not executed. However, the Court also acknowledged that, "[i]n a state in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second guess a decision whether or not to inform a jury of information regarding parole.").[24]

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[24] The Appellant's reliance upon Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), and the argument that Marquard should be reconsidered as it is irreconcilable with Jones, is unwarranted. Unlike Marquard and the instant case, Jones did not involve argument and speculation as to non-capital offenses and sentences thereon. Rather, Jones, involved a double capital homicide, where the defendant was subject to two (2) minimum mandatory twenty-five year prison terms on the capital charges. Jones thus clearly involved capital sentencing minimum mandatory options, which are within the province of the jury's consideration.

Finally, as seen in the afore-cited portion of the closing argument, the defense was in fact allowed to argue that the defendant would receive "more than life in prison", and that, "[H]e will never see the outside again. That's for sure". (T. 1 151).[25] Any error is thus harmless beyond a reasonable doubt.

IX

THE LOWER COURT PROPERLY IMPOSED THE DEATH SENTENCE.

A. Weight Given Emotional Disturbance Mitigator

In the first of several claims regarding the propriety of the death sentence, the Appellant asserts that the trial court improperly gave minimal weight to this mitigating factor because there was uncontroverted evidence that the defendant suffered from "depression and paranoia." Brief of Appellant at p. 81. Initially, it is well established that the weight to be given to any mitigating circumstance which has been established rests within the discretion of the trial court. See, e.g., Ferrell v. State, 653 So. 2d 367 (Fla. 1995). Moreover, expert opinion testimony is "not necessarily binding even if uncontroverted." Walls v. State, 641 So. 2d 381,390 (Fla. 1994). "A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve." Id.

In the instant case, the trial judge, after extensive analysis of the defendant's background, with respect to traumatic events and illnesses (R. 1174-76), addressed the mental health expert testimony. Her conclusions, with respect to the extreme mental and emotional disturbance factor, in part, were as follows:

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[25] The defense had also previously argued that life in prison for the capital charge meant "no possibility of parole for at least 25 years", that the defendant had already received a sentence for the Gutierrez murder, and, that the jury could "see what his punishment was in this file here". (T. 1150). The sentence as to the Gutierrez murder, referred to by defense counsel, is included in the record on appeal and reflects a sentence of life imprisonment. (R. 1101).

There was competent and credible evidence presented that the Defendant suffers from chronic depression. Both Dr. Merry Haber and Dr. Lazaro Garcia agreed with that finding and the behavior witnessed by the Defendant's siblings support their conclusions. Both doctors also concurred that while the Defendant suffers from depression, he does not suffer from any major mental illness.

Dr. Merry Haber, testifying on behalf of the Defendant, found the Defendant to be suffering from depression and a delusional disorder, and that when under stress, his condition worsens, Dr. Haber stated that she believed the Defendant showed signs of a "severe mental disorder" but when asked what disorder she believed he had, she could not identify it, In fact, when questioned in cross examination, Dr. Haber testified that her evaluation of the Defendant showed that he has a "personality disorder" as opposed to a mental illness and that six to seven per cent of the population suffers from these personality disorders and they function normally in society.

It is important to note that Dr. Haber based her findings on the tests she had the Defendant perform and on her interviews with the Defendant. The reason this is important is that, as Dr. Haber admitted, she would get a false profile if the Defendant was not answering her questions truthfully or was purposely trying to skew the test results. Dr. Haber concluded that the Defendant's scores were not accurate as he did not appear to by [sic] "trying very well" and that he also appeared to be exaggerating his symptoms. Dr. Haber candidly admitted that her evaluation of the Defendant could only measure the Defendant as he presented himself to her now, not his mental state at the time of the killing and that he was not being totally honest in his presentations. She also admitted that much of the Defendant's depression and inner turmoil would be due to his incarceration and the serious penalties he is facing.

Dr. Lazaro Garcia, testifying on behalf of the State, also tested the Defendant and found that the Defendant's low scores appeared to have been due to the Defendant's poor effort in performing them. Defendant to know right from wrong, to be very coherent and logical. Dr. Garcia concluded that the Defendant appeared to be frustrated and full of self pity. He determined as did Dr. Haber that while the Defendant suffered from no major mental illness, he did suffer from depression and a personality disorder. This personality disorder involves the way the Defendant deals with the world and how he interprets, or actually mis-interprets situations. The Defendant believes people are making fun of him. He is paranoid. Dr. Garcia explained, that while these disorders would cause the Defendant to mis-interpret situations, they would not compel him to commit crimes. While his interpretations would make him unhappy, he still had options on how to deal with his unhappiness, Dr. Garcia testified that faced with these choices, the Defendant clearly knew right from wrong and consciously made the choices he made.

...

> While it is reasonable to believe that the Defendant was depressed and under stress when he killed Miguel Roque and tried to kill his other co-workers, this Court finds that this stress and depression do not rise to the level of a severe mental or emotional disturbance. Extreme mental or emotional disturbance as used in Section 921.1141(6)(b) [sic] is interpreted as "less that [sic] insanity but more than the emotions of an average man, however inflamed". State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 US. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). There was no evidence presented that the defendant, Gerardo Manso, just "went nuts" in a fit of rage prior to the shooting. His actions showed, on the contrary, deliberation, careful planning and clear thinking both prior to the shooting and moments after the shooting. All throughout, the Defendant remained calm. Just moments after the shooting, when the police arrived and began asking questions, the Defendant quickly fabricated a story to divert any suspicion away from him. He told the police he had seen three Colombians in a white Cadillac just minutes before the shooting and they had been asking for Jorge Sanchez, a convicted trafficker, These actions contradict and refute that the Defendant was acting under a severe emotional disturbance. While the Defendant was having difficulties with his wife, they were still living together as man and wife, and while he was apparently unhappy that his co-workers were being trained for advanced positions in the company, the Defendant had recently been promoted to night-shift foreman and had been elevated in the company during his six years of employment.
>
> This Court finds that the emotions and frustrations the Defendant felt were no greater than that of many Americans. The Defendants actions prior to, and after the shooting do not support the conclusion that he was acting under a severe mental or emotional disturbance. While this Court does not believe this mitigating circumstance is supported by the evidence, the Court did not reject it entirely and gave this mitigator some weight.

(R. 1176-80).

The Appellant has first faulted the above analysis on the grounds that it contained factual errors with respect to the trial court's characterization of Dr. Haber's testimony that: Appellant was not trying well on the psychological tests; exaggerated his symptoms; was not totally honest in his presentations; and that much of the depression noted was due to the defendant's incarceration. There were no factual errors. Dr. Haber testified that, "[t]he way he [defendant] took this test his scores were exaggerated, his symptomatology, and he paints things as worse than they might be. So everything was a little bit exaggerated on this test." (T. 1078). Furthermore, when the prosecutor,

on cross-examination, inquired whether it was fair to say that "the defendant is trying to make himself to look bad," Dr. Haber responded, "Not exactly. It's close. , . ." (T. 1087). As to the court's reference to "honesty" in the defendant's presentations, Dr. Haber had testified that she asked the defendant "why he lied in court" when he testified during the guilt phase that he had not committed the crimes herein. (T. 1080-81). Lastly, Dr. Haber did in fact testify that the "Axis One" disorders diagnosed through her testing reflected disorders existing at the time of testing and not present at the time of the crimes. (T. 1088-89).[26] According to Haber, "a major depression" was part of this "Axis One" diagnosis, and "one expects [depression] when you're looking at the death penalty." (T. 1079). The defendant had been convicted of the murder herein at the time of testing. (T. 1086). The trial court's analysis thus does not contain any factual errors.

The Appellant has also asserted that the trial court improperly applied the standard for insanity, because she recounted Dr. Garcia's testimony that, a) the defendant's disorders did not "compel" him to commit the crimes, and, that appellant knew "right from wrong." Appellant's Brief at p. 84. The Appellant has also found fault with the trial court's reference to the fact that there was no evidence of any "fit of rage" prior to the shooting. Id. As seen from the entirety of the trial court's extensive analysis set forth above, the Appellant has taken the complained of references entirely out of context.

As is clearly reflected above, the trial court relied upon Dr. Garcia's testimony that appellant did not suffer any major mental illness, and his personality disorders caused him to misinterpret situations, making him "unhappy," but that, "he still had options on how to deal with his unhappiness." (R. 1178). The trial court had properly relied upon Dr. Garcia's answer, in response

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[26] The other Axis, Two, referred to by Haber, measures underlying disorders that have been present throughout the defendant's life. (T. 1079).

to whether, in light of the factual circumstances of the crimes, the defendant's various disorders "compel" him to commit crimes:

> **A. [Dr. Garcia]:** No. What it [personality disorder] does is basically he misinterprets the world, everybody is out to harm him, to cause him grief. And he is depressed because he perceives the world in this manner and there's certain things in his social history that support this in his own mind.
>
> Once you reach that you have options available to you, and many people with personality disorders function without trouble, you know, and they run into friction with the coworkers, spouses, et cetera, but they do not kill.
>
> All that personality disorder is dysthymia. It does make him a very unhappy individual. Once he reached that, how he solves that problem, how he deals with that, is something that he decides.

(T. 1115). The trial court, having relied upon the above testimony, then concluded that the defendant's depression and stress did not rise to the level of a "severe" mental or emotional disturbance because the factor is interpreted as, "less than insanity but more than the emotions of an average man, however inflamed." (R. 1179). The trial court thus clearly did not utilize improper evidence or the standards for sanity. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

Likewise, the trial court's references to lack of any evidence of "a fit of rage prior to the shooting," was not error and did not demonstrate utilizing improper standards. It should be noted that the trial court, in her prior discussion of the "cold" element of the CCP aggravator, had rejected the defendant's argument that he was under severe emotional disturbance, and, correctly noted that said element requires that the killing be "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." (R. 1172-73). The trial judge had then stated that she would address the requirements of this element, "in detail in this Court's analysis of the mitigating circumstances presented." (R. 1173). In this context, the trial court then made the complained of reference to the lack of any evidence as to fits of rage, and, immediately detailed the

defendant's actions prior to and after the shooting, which reflected "clear thinking" and that the defendant had remained "calm" throughout. (R. 1189).

Finally, the Appellant has faulted the trial judge for not mentioning the Appellant's confession, in which he "described feeling suicidal, anguished and tormented," Brief of Appellant at p. 85. The Appellant has neglected to mention that the defendant, testified at trial, and expressly disavowed making any statements as to suicide, anguish or torment. (T. 786-88). He stated that, if such statements appeared in his confession, it was because the police had suggested these to him! Id. The defendant then denied any work related frustrations. Id. It should be additionally noted that the defendant's complaints in his statements to the police consisted of having heard a "rumor" that he was about to be fired, and that he was resentful of other employees promotions and raises. (T. 689). There was thus no "delusional" thinking, and the trial court properly concluded that the emotions and frustrations felt by this defendant were no greater than that of many Americans." (R. 1180).

In sum, the trial court's sentencing order reflects the utmost degree of care, accuracy and attention to both the details of the evidence presented and the applicable legal standards. The Appellee respectfully submits that the trial court's exemplary evaluation in the instant case is rare, and, if anything, should be deemed the ideal model which other judges should strive to attain in capital cases.

B. The Trial Court Did Not Err In Rejecting the Substantial Impairment Statutory Mitigating Circumstance

The Appellant argues that the trial court's rejection of the substantial impairment mitigating circumstance is not supported by competent substantial evidence and was an abuse of discretion, because the "uncontradicted evidence" demonstrated depression, paranoia, and persecutor-y

delusions, Brief of Appellant, at pp. 85-87. Once again, the Appellant has entirely ignored the totality of the trial judge's extensive seven page analysis of this factor. (R. 1181-87). The trial court, after detailing all of the expert testimony, the court's own observations of the defendant's behavior throughout these proceedings, the defendant's and his family members' testimony (R. 1181-86), chose to rely upon Dr. Garcia's testimony and the factual circumstances of the crimes:

> Dr. Garcia found that the Defendant not only knew right from wrong, he was capable of appreciating the criminality of his conduct and of conforming his conduct to the requirements of the law. He explained that while the Defendant's personality disorder would cause him to mis-interpret situations, this disorder would not and did not, according to Dr. Garcia, compel him to commit the crimes. The Defendant was simply faced with options in how to deal with these situations and he chose to deal with his unhappiness by committing murder.
>
> This Court finds that the Defendant most definitely understood the criminality of his conduct. He spent some fifteen minutes grinding off the serial numbers and altering the gun so it couldn't be traced to him. He waited until dark, so he wouldn't be seen. He fabricated a story to confuse the police. He fabricated another story to feed to the jury. He has tried to protect himself by pretending to have gone insane during the sentencing phase and to have forgotten everything including his name. There is no doubt that the defendant's ability to appreciate the criminality of his conduct was not and is not substantially impaired and he clearly knew right from wrong. This Court therefore rejects this mitigating circumstance and gives it no weight.

(R. 1186-87).

As noted in section A herein, the trial court's characterization of Dr. Garcia's testimony as to lack of serious mental illness was accurate. Dr. Garcia had also expressly testified that the defendant's ability to appreciate the criminality of his acts was not impaired, and that the defendant "was well aware of the consequences of his behavior and the actions he took to protect himself seem to corroborate that very strongly." (T, 1127). Dr. Garcia had also added that the defendant's goal oriented behavior at the time of the crimes demonstrated that he, although depressed, was not acting under emotional or mental disturbance. (T. 1127-28).

C. The Trial Court Properly Found That The Murder Was Committed In A Cold, Calculated And Premeditated Manner.

The trial court's extensive order detailing the facts in support of the CCP aggravating factor: is set forth at R. 1170-74.

The Appellant contends that the "cold" element of this aggravator has not been established. The Appellant argues that the court, a) erroneously rejected the mental mitigation factors; and, b) that the defendant had, in his confession, stated that, "he became suicidal because of his erroneous belief that he was about to be fired at Sanchez's instigation," which is inconsistent with the "cold" element. Brief of Appellant, pp. 87-88. The proper rejection of the mental mitigating factors has been addressed in above sections A and B of this claim. As noted previously, both the defense expert Haber and Dr. Garcia agreed that the defendant did not suffer from mental illness; personality disorders do not constitute mental illness. Dr. Garcia testified that the defendant's disorders do not cause any criminal behavior, that the population suffering from these disorders can function normally, and, that the defendant was simply faced with different options as to how to deal with his stress and unhappiness, and chose to kill.

The "cold" element, as noted by the Appellant, requires a showing that the killing was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Jackson, 648 So. 2d at 89. "The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts, though perhaps also supported by expert opinion." Walls, 641 So. 2d at 386, Appellant's reliance upon Spencer v. State, 645 So. 2d 384 (Fla. 1995); Cannady v. State, 620 So. 2d 165 (Fla. 1993), and Maulden v. State, 617 So. 2d 290 (Fla. 1993), is unwarranted, as all of said cases involved killings

in a domestic dispute context. The State's theory, which prevails herein,[27] reflects that, a) the defendant contemplated shooting his co-workers, who had been promoted over him, the day before the crimes; b) he placed a shot gun in his car the day of the crimes; c) he retrieved the shotgun during the dinner break, and then used a saw to cut the barrel, and a grinding machine to remove the weapon's serial numbers and identification marks, to avoid detection; d) he then went to the roof top with a plastic cover to protect against the rain and detection; e) he waited for the co-workers to arrive; f) he then calmly took aim and shot towards all of the co-workers as they exited or were in the process of exiting their car; g) he came down after exhausting all of his ammunition and disposing his weapon, and pretended to join in the commotion with the other employees inside the warehouse, and, h) he had a ready story for the police, who arrived within minutes, not only as to his own whereabouts, but also to divert suspicion to victim Sanchez, by fabricating a Columbian/drug connection motive,

There was thus ample evidence of "cool and calm reflection," as noted by the trial judge. (R. 1172-73, 1189). The Appellant's reliance upon the defendant's third explanation to the police, that he was suicidal as a result of Sanchez's perceived attempts to get him fired is unwarranted. First, this explanation is inconsistent with the defendant's actions. Despite ample opportunity and possession of a firearm, the defendant did not inflict any harm upon himself; instead, he disposed of the shotgun and his plastic covering, went down, and pretended to be part of the melee inside the warehouse, while waiting for the police to arrive. Second, the suicidal explanation was inconsistent with the defendant's first two accounts to the police, which denied any involvement. Third, the defendant testified at trial, and expressly stated that he had "never said" he was suicidal, or that he had been having any work-related problems with Sanchez, or that he was

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[27] See, Wuornos, 644 So.2 d at 1008.

"anguished." (T. 779-80, 786). The defendant testified that if such statements appeared in his confession, it was because the police "told him" to say so, in order to create a "good motive" for the crimes. Id. The self-serving and inconsistent "suicidal" explanation herein thus does not negate the "cold" element. Walls, 641 So. 2d at 386 (cold element established despite the fact that, "Walls himself claimed a loss of emotional control. However, judge and jury were within their discretion to reject this statement of opinion as self-serving or inconsistent with facts. . . ."); Wuornos, 644 So. 2d at 1008 (state's theory of "coldly and calmly planned" killing prevailed despite recognition that, "Wuornos own testimony was to the contrary. However, judge and jury were entitled to reject that testimony as self-serving, unbelievable in light of Wuornos' constantly changing confessions, contrary to the facts that could be inferred from the similar crimes evidence, or contrary to other facts adduced at trial.").

Finally, any error in the consideration of that factor was harmless beyond a reasonable doubt. The trial judge specifically concluded:

> This court unequivocally finds that even if the State had not proven that this murder was committed in a cold, calculated and premeditated manner, the aggravating circumstances would still have outweighed the mitigating circumstances. The defendant's offered mitigating circumstances pale when considered and weighed against the fact that the Defendant has previously committed murder and that on October 14, 1993, the Defendant executed Miguel Roque and seriously wounded Douglas Zamora and Ray Cruz and knowingly crated a great risk of death to Douglas Zamora, Ray Cruz, Jorge Sanchez and George Moussa . . . .

(R. 1102-1103); See, Rogers v. State, 511 So, 2d 526, 535 (Fla. 1987).

D. The trial court properly found that Appellant knowingly created a great risk of death to many persons

The above aggravating factor applies when the defendant puts at least four people, in addition to the victim of the homicide, in immediate and present risk of death by firing a gun in the area or direction of said people. See, Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983), habeas corpus granted on other grounds, 490 So. 2d 938 (Fla. 1986) (factor upheld when defendant engaged in a gun battle with two police officers, one of whom was the murder victim, in the presence of three hostages); Suarez v. State, 481 So. 2d 1201 (Fla. 1985) (firing a gun during the course of flight, in the area of four officers, defendant's accomplices, and a migrant labor camp, constitutes a great risk of death). See also, Bello v, State, 547 So. 2d 914, 917 (Fla. 1989); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Kampff v. State, 371 So. 2d 1007, 1009 (Fla, 1979); Williams v. State, 574 So. 2d 136, 138 (Fla. 1991).

The evidence in the instant case demonstrates that the defendant decided to shoot at a time when the second shift at his employer's place of business was in progress. There were approximately a dozen employees who took cover inside the business when the defendant commenced shooting into the parking lot from the roof top of the business,[28] apart from the five (5) victims as to whom the defendant had expressed an intent to kill or injure.

The defendant utilized a sawed off shotgun loaded with shotgun shells. Each shotgun shell had a "pellet cup," containing multiple (12) round .33 calibre lead pellets, which explodes when the shell is expelled. (T. 360, 566). Five such shells were fired by the defendant at and around the victims' vehicle. Pellet cups and components were recovered from both near the vehicle and from "all the way across the parking lot." (T. 360). There were seventeen (17) pellet projectile holes

[28] One of these employees, Mr. Reyes, then went outside to retrieve his gun from his car in the parking lot, for protection.

through the windshield of the victims' vehicle, in addition to more such holes in the rear roof of this vehicle. (T. 374-76).

The deceased victim, Roque, was killed by multiple pellets while in the rear seat of the above vehicle. Victim Moussa was seated next to Roque during the shooting; the only reason he escaped injury was because Roque had leaned over him during the shooting. (T. 521-23). Victims Zamora and Cruz were outside, on the passenger and driver sides of the vehicle respectively, when they were struck and critically wounded with multiple pellet wounds throughout their bodies. (T. 489, 502; R. 233-962).[29]

In light of the above circumstances, the Appellant apparently concedes that, "a total of three persons, other than Roque, were placed in present and immediate risk of death. . . ." Brief of Appellant at p. 89. The Appellant is, however, apparently arguing that the fourth victim apart from Roque, Sanchez, was in no danger. This argument is refuted by the record.

Victim Sanchez, whom the defendant expressly acknowledged he intended to kill, testified that as he exited his vehicle, he heard a shot and hid behind the above said vehicle, (T. 457). He then saw victim Cruz get shot and fall; Sanchez stated that he then pulled Cruz towards the vehicle, while the shooting was still in progress. Id. Moreover, while Sanchez and Cruz were behind the vehicle, the defendant was shooting at the rear seat passengers, in part through the rear roof of the vehicle. (T. 720,376). The multiple scattered pellets were actually penetrating the vehicle. The Appellant's

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[29] Although the defendant had initially stated that he had specifically aimed towards the lower body of these victims without any intent to kill, the defendant had subsequently stated that he shot "without seeing." (T. 1063). The location of the wounds on the upper and lower bodies of both victims further refuted the defendant's initial statement of intent. Moreover, the nature of the weapon and ammunition utilized herein, and, the defendant's position, 28 feet away and above the vehicle he was shooting at, preclude any realistic claim of aiming towards any specific location on anyone's body.

argument that Mr. Sanchez was not in the line of fire and in no immediate danger is thus entirely without merit, in light of the nature of the weapon and ammunition utilized, and, the evidence demonstrating Victim Sanchez' physical proximity to the repeated overhead explosions of numerous lead pellets, which had actually penetrated the vehicle he was hiding behind. The evidence herein is abundantly clear that four people, in addition to the homicide victim, were at immediate risk of death. Fitzpatrick, supra: Suarez. supra.

The Appellant 's reliance upon White v. State, 403 So, 2d 33 1,337 (Fla. 1981), Francois v.. State, 407 So. 2d 885,891 (Fla. 1981), Hallman v. State, 560 So. 2d 223,226 (Fla. 1990), and Bello, supra, is unwarranted, as none of these cases involved a sawed off shotgun and the ammunition utilized in the instant case, In the cases of codefendants White and Francois, the homicide victims had each been tied up and shot at close range, in the back of the head, inside a house. This Court found that these shots did not endanger two (2) other occupants of the house, and, rejected the trial court's speculation as to what would have happened if any other people had visited the house. Hallman, supra, involved the defendant shooting at a security guard when the latter fired at him while Hallman was in the process of sitting in his vehicle, parked outside a bank. This Court noted that the customers inside the bank were not at risk of being struck, as the doors to the bank were locked and the customers inside were behind partitions, away from doors and windows, and were thus not in the line of fire. Likewise, in Bello, this Court noted that the persons considered at risk by the trial court, were too far away, "separated by several walls" and thus not in the line of fire. In the instant case, the complained of victim, Sanchez, was in the back of the vehicle, while the defendant was shooting at and through the rear roof of this vehicle from above it. Moreover, Sanchez had emerged and assisted another victim, Cruz, while the shooting was in progress.

Finally, the State submits that any error in the consideration of this factor is harmless beyond

a reasonable doubt, in light of the weighty prior violent felonies (of murder and attempted murders) and CCP aggravators, and, the minimal weight accorded to the defendant's alleged mental disturbance, his being mistreated in the Cuban military, and his being a good parent and family man. The trial court, in the instant case, concluded that, "the aggravating circumstances clearly and remarkably outweigh the mitigating circumstances." (R. 1102). Rogers v. State, Supra.

X

THE TRIAL JUDGE DID NOT RELY UPON ANY NONSTATUTORY AGGRAVATING FACTORS.

The Appellant argues that the trial judge's reference in the sentencing order to the fact that the defendant is a very dangerous man, constitutes the application of a non statutory aggravating circumstance, in violation of Miller v. State, 373 So. 2d 882, 886 (Fla. 1979), and progeny. In Miller, at 373 So, 2d 885, the trial court had accepted that the defendant had an incurable mental illness, and stated that the mitigation was sufficient for the imposition of a life sentence. However, the judge imposed a death sentence because a life sentence, "doesn't mean life imprisonment and there is a substantial chance [defendant] could be released into society." Id. There is no comparable situation in the instant case. The Appellant's claim is refuted by the record and without merit.

First, the trial judge, in her sentencing order, specifically stated that she had relied only upon the statutory aggravators of prior violent felonies, that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, and, that the defendant created a great risk of death to the four (4) attempted murder victims. (R. 1174, 1191-92).

Second, The Appellant has taken the trial court's reference to the defendant's dangerousness out of context. The reference is contained in that section of the sentencing order which contains the

analysis of the mental mitigation and the defendant's mental health expert's testimony. Dr. Haber had testified that:

> You got someone that's kind of solitary, depressed, not thinking straight and under stress. He's going to get worse and do what they call decompensate and behave inappropriately, very inappropriately. And because he's a little paranoid and he thinks people are laughing at him and people are doing things to him, these are the most dangerously mental individuals because they believe that someone is after them and they are going to strike first. They believe that they are right and the other person is wrong and they are going to be hurt, So he is dangerous. That's a profile of a dangerous person, But they suggest that he is mentally ill,

(T. 1180). The above noted decompensation at the time of these crimes herein was, according to Haber, due to the stress of the 199 1 killing of Gutierrez, marital stess, financial stress, and delusional stress arising from the belief that people were mocking him. (T. 1184).

The trial judge rejected Dr. Haber's above noted decompensation and dangerousness due to mental illness theories, and stated:

> The Defendant argues that when he killed Miguel Roque and tried to kill his other co-workers he was operating under the stress of having murdered Luis Gutierrez, his wife's lover. He also was very despondent over the problems he was having at home with his wife, The evidence presented was that the Defendant murdered Luis Gutierrez on August 17, 1991. The defendant murdered Miguel Roque on October 14, 1993, over two years after the murder of Luis Gutierrez, a murder which the Defendant had gotten away with. The difficulties he was having with his wife were on-going for several years. While it is reasonable to believe that the Defendant wold have been under some stress due to his difficulties at home and at work, it is very unlikely that he was at all disturbed over the murder of Luis Gutierrez. If he was at all concerned about the first murder, he certainly would not have so methodically and carefully planned the murder of his co-workers. If the taking of his wife's lover's life was disturbing to him, he would not have decided to kill his co-workers - most of whom were young men who he had never had any disagreements or arguments with.
>
> What is clear, is that the Defendant, as Dr. Merry Haber stated, is a very dangerous man. Whenever things are not going as he would like them to go, he reacts with violence. When his wife no longer loved him and began seeing another man, he killed this man. When others were promoted over him as [sic] work, he tried to kill them. When the prosecutor asked questions he did not like, he lashed out violently towards her - once during the pre-trial motions, and again when she began

> questioning him during the sentencing phase. The Defendant simply attempts to eliminate the obstacles which he perceives block his way to whatever goals he has set for himself.

(R. 1178-79). As is abundantly clear from the above statements, the trial judge was not relying upon "future dangerousness" as a nonstatutory aggravator. She was merely citing the defendant's prior behavior in rejecting the defense contention that the defendant's dangerous behavior constituted a major mental illness.

XI

THE STANDARD JURY INSTRUCTIONS DID NOT VIOLATE CALDWELL V. MISSISSIPPI, OR THE FLORIDA CONSTITUTION.

Initially, the State would note that there were no objections to the standard jury instructions complained of herein. As such the Appellant's argument is unpreserved and procedurally barred. Wuornos, 644 So. 2d at 1010; see also, Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed. 2d 435 (1989). Moreover, the standard jury instructions, which refer to the jury's advisory sentence or recommendation, are a fully accurate statement of Florida law, and do not mislead the jury. See, e.g., Combs v. State, 525 So. 2d 853, 857-58 (Fla. 1988); Owen v. State, 560 So. 2d 207,212 (Fla. 1990); Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995). As such, there was no violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 23 1 (1985).

XII.

FLORIDA'S CAPITAL SENTENCING STATUTE IS NOT UNCONSTITUTIONAL.

The Appellant argues that Florida's capital sentencing statute is unconstitutional because: a) it improperly shifts the burden of proof and persuasion to the jury; b) it does not specify how individual factors must be considered, and, c) it does not require specific findings by the jury. Initially, the State would note that there were no objections based upon these grounds in the lower

court. As such the Appellant's argument on appeal is unpreserved and procedurally barred. Tillman, supra. Moreover, this Court has previously rejected these arguments. See, e.g., Robinson v. State, 574 So. 2d 108, 113, n.6 and n.7 (Fla. 1991); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Wuornos v. State, 644 So. 2d 1012, 1020, n.5 (Fla. 1994); Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed. 2d 728 (1989); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed. 2d 384 (1988).

CONCLUSION

Based on the foregoing, the Appellee respectfully submits that the conviction and sentence of death be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **Christina A. Spaulding,** Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N. W. 14th Street, Miami, Florida 33125, on this 21 day of October, 1996.

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