GERARDO MANSO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

CONSTITUTIONS, STATUTES & RULES

TREATISES & ARTICLES

INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, entered following a jury trial before the Honorable Leslie Rothenberg of the Eleventh Judicial Circuit in and for Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R. ," the transcript of the proceedings as "T., " and the supplemental record as "S . R. "

STATEMENT OF THE CASE AND FACTS

Appellant Gerardo Manso was indicted on November 3, 1993 for the first-degree murder of Miguel Roque and for the attempted first-degree murder of Ray Cruz, Douglas Zamora, Jorge Sanchez, and Jorge Moussa. (R. 1-2) After the Public Defender's Office certified a conflict of interest, Arthur W. Carter, Jr. was appointed on May 20, 1994 to represent Mr. Manso. (T. 45; R. 15) The trial began on January 9, 1995. (T. 109). On January 13, 1995, Mr. Manso was convicted, as charged, on all five counts of the indictment. (T. 898-99) The penalty phase of the trial commenced on February 2, 1995, and on February 3, the jury recommended by a vote of 10 to 2 that Mr. Manso be sentenced to death for the murder of Miguel Roque. (T. 1157-58; R. 1143) On February 27, 1995, the trial judge sentenced Mr. Manso to death. (T. 1186-1222; R. 1166-1193)

Guilt/Innocence Phase

The charges in this case arose from a shooting that occurred shortly after 9 p.m. on October 14, 1993 at Aircraft Modular Products, a small manufacturing firm. (T. 355, 637) Mr. Manso was the night shift supervisor of the machine shop. (T. 5 13) The victims, Miguel Roque, Jorge Sanchez, Jorge Moussa, Ray Cruz, and Douglas Zamora, were also employees of Aircraft Modular Products. Moussa was vice-president of manufacturing (T. 512); Sanchez was the day shift machine shop supervisor and was indirectly Manso's boss (T. 451-53, 513); Roque was a mechanical engineer who had recently been promoted to manager of the computer numerical

control ("CNC") department (T. 470, 514-15); Cruz ran the CNC milling machine (T. 482-84, 514); and Zamora was "lead man" for the day shift in the CNC department, with duties essentially the sarne as Manso's. (T. 494-95, 513).

On October 14th, 1993, Moussa, Sanchez, Roque, Cruz and Zamora drove to a computer training class in Mr. Sanchez' two-door Ford Bronco and returned to the parking lot at Aircraft Modular Products a few minutes after 9 p.m. (T. 456, 485-86, 496, 516) Sanchez was driving, Zamora was seated in the front passenger seat, Roque behind Mr. Sanchez, Moussa in the middle of the rear seat, and Cruz on the far right side, behind the front passenger seat. (T. 456, 486, 497)

Sanchez got out of the Bronco and was walking behind the truck toward the building when he heard a shot and ducked behind the truck. (T. 457) Zamora exited the Bronco at approximately the same time as Sanchez, followed by Cruz. (T. 497-98) Cruz was hit, and Sanchez pulled him toward the Bronco's tire and held him there. (T. 457) Zamora was shot and briefly lost consciousness. (T. 498-99) When he came to, he heard more shots and ran for cover toward the open garage door. (T. 499-500, 526) Moussa and Roque were inside the Bronco, moving toward the passenger side door when the shooting started. (T. 520-21) Roque leaned across Moussa, to look out the window, when he was shot. (T. 521-22) Moussa heard more shots and saw bullet holes in the windshield; he pulled his own gun and fired out the window, until his gun jammed. (T. 523, 525-26) When the shooting stopped, Moussa got out of the Bronco and ran toward the building, (T. 526-27) Zamora also ran into the building at this point. (T. 526, 529) Sanchez and Cruz were still outside next to the Bronco when the ambulance arrived. (T. 531)

Sanchez and a police officer opened the back of the Bronco and found Roque lying face down, breathing heavily. (T. 539, 460) Roque was transported to Jackson Memorial Hospital, where he died from a shotgun wound to the chest. (T. 539, 622) Zamora was wounded in the lung, intestines, forearm bone and spine. (T. 502) Cruz was wounded in the leg, hip, stomach, chest, and arm. (T. 488,490) Moussa and Sanchez were not injured.

Another employee, Chris McCascin, testified that Manso had declined to go to Kentucky-Fried chicken that evening at the 8-8:30 p.m. "lunch" break. (T. 472-73) About 10-15 minutes after returning from lunch, McCascin looked for Manso throughout the plant and was unable to find him. (T. 474-75) McCascin was in the CNC shop when he heard gunshots. (T. 476, 478) After about three seconds and a series of shots, most of the employees, including McCascin, ran to the back of the shop where they remained until about five minutes after the shooting stopped. (T. 476-78) McCascin slipped and broke his elbow and leg when he tried to climb down from his hiding place at the back of the shop. (T. 478) He first saw Manso about five minutes after the shooting had stopped, when Manso came to help him, (T. 475, 481) Moussa testified that he had been looking for Manso but did not see him until about five minutes after the shooting stopped. (T. 532) Although Manso said he had been in the bathroom, Moussa thought he had come from the other side of the building. (T. 532)

Metro-Dade homicide Detective Juan Sanchez interviewed Manso at the warehouse late on the evening of October 14. (T. 658) Manso told Detective Sanchez that he was in the rear of the building operating the machines when he heard a series of shots. (T. 659) Manso said he saw other employees run past him, and he also ran to the rear of the warehouse. (T. 659) Manso also told Detective Sanchez that shortly before the dinner break the previous Friday, a white Cadillac with tinted windows drove into the courtyard area near the bay door, and a passenger with a

Colombian accent asked for Jorge Sanchez. (T. 660-61) Manso said he had seen the same car just before the dinner break, at 8 p.m., on the day of shooting, and the same passenger again asked for Jorge Sanchez, saying something to the effect that they were tired of Sanchez giving them the runaround. (T. 661-62)

Early in the morning of October 15, Magala Lyuis found a shotgun under a tree in her backyard, which abuts Aircraft Modular Products. (T. 435) Ms. Lyuis called 911, the police responded, took photos of the gun and took it away. (T. 359-60, 418-19, 436) The shotgun recovered from Ms. Lyuis' yard was a 12-gauge Remington pump shotgun (T. 556) The barrel of the shotgun had been cut off; the stock was cut off, and there was a shiny area on the side of the barrel where someone had used a tool to remove the manufacturer's marking and serial number. (T. 559)

Metro-Dade Firearms examiner Ray Freeman testified that he restored the serial number by applying acid to the surface of the gun. (T. 561-63) Freeman identified the five shotgun shells found at the crime scene as Remington 12-gauge ought buck shells. (T. 565-66) He testified that, in his expert opinion, the shells recovered from the scene were fired by this shotgun. (T. 568) He concluded that lead pellets removed from Miguel Roque's body were consistent with double ought buck pellets and with having been fired from the shells recovered at the crime scene. (T. 571-72)

The serial number Freeman recovered from the shot gun matched a Bureau of Alcohol, Tobacco and Firearms ("ATF") form 4473 retained by a Sports Authority store in Miami. (T. 642, 644-45, 646-47) A handwriting analyst concluded that the signature on the ATF form matched Mr. Manso's signature on employment records maintained by Aircraft Modular Products. (T. 585, 654)

Mr. Manso had agreed to come to police headquarters on October 21, 1993 for further interviews. (T. 665) During an initial interview, Manso denied being the man on the roof and denied owning a shotgun. (T. 681) During a subsequent interview with Detectives George Plasencia and Nicholas Fabriguez, Manso initially denied owning a shotgun. (T. 687) Upon being shown the ATF form, Manso said he had purchased the gun for a friend who took it to Costa Rica. (T. 687-88) Upon being told of the shotgun's recovery from the scene of the shooting, Manso admitted his involvement in the homicide. (T. 688)

Detective Plasencia first recounted appellant's oral statement, (T. 689-92), then he and the prosecutor read appellant's formal, transcribed statement to the jury, (T. 702-27). In his statements to police, Manso acknowledged that he had intended to kill Jorge Sanchez and Jorge Moussa, but not Miguel Roque, who was his friend.' (T. 689, 708, 720-21) Manso said Moussa and Sanchez were his supervisors at work, and they were making Manso's job impossible. (T. 689) Manso began to cry when Plasencia asked if there was a reason he wanted to kill these people. (R. 61-62; T.727) Although there was no evidence presented that Manso's job was in jeopardy, Manso became convinced, two days before the shooting, that he was going to be fired and that Sanchez was responsible. (T. 724) He said that Sanchez, who is Colombian, did not like Cubans. (T. 724) Manso also said that, although Sanchez had been in jail for drug trafficking and had less seniority, he was promoted over Manso. (T. 723-24) Manso believed that Sanchez was telling the other supervisor, Moussa, that Manso was ignorant. (T. 724) While Manso had

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'Detective Plasencia testified at one point that appellant said in his oral statement that he intended to kill Sanchez, Moussa and Zamora. (T. 689) This is apparently a misstatement, as it is inconsistent both with appellant's transcribed statement, (T. 718, 725), and with Detective Fabriguez' account of the oral statement at the suppression hearing did not include any statement by Manso that he intended to kill Douglas Zamora. (S.R. 34)

trained everybody, including Zamora, it was Zamora who was promoted. (T. 725) Manso also believed that he had been admonished unfairly for his work performance. (T. 726)

Appellant further confessed that the day before the shooting, he was feeling very tormented and was considering suicide. (T. 722) Although he took sleeping pills, he couldn't sleep, and paced the house. (T. 722) The next morning, Manso got his .12 caliber shotgun -- which he had purchased four years earlier from Sports Authority -- and put it in his car. (T. 708, 711, 723) Manso always kept a .45 pistol in his car for protection but also brought the shotgun with him: he knew "they were planning to fire me from my job unfairly" and was "undecided whether I was going to commit suicide or carry on what I was going to do." (T. 706-08) Manso said he had been thinking about shooting the four co-workers when they arrived, but had no intention of hurting Roque, who was a very close friend, (T. 708) Manso retrieved the shotgun and a box of cartridges from his car about 8:25-8:30 p.m., shortly before he expected the group to return from their class. (T.690, 708-10) Manso used a saw in the machine shop to cut off the stock of the gun and used the grinders to remove the serial number so nobody would know it was his weapon; he had sawed off the barrel years before for hunting. (T. 711-12) He finished at about a quarter to nine, loaded the gun with five cartridges, and climbed the ladder to the roof. (T. 690, 714-16)

Manso knew that the group would be driving in Sanchez' Bronco. (T. 689, 709-10) He was walking on the roof when the Bronco pulled up. (T. 716-17) He was directly in front and above the vehicle but could not see where the people inside it were seated. (T. 717) Zamora got out first, from the front passenger side. (T. 690, 717-18) Manso intended to scare Zamora, not to kill him, so he shot Zamora once below the waist. (T. 690, 718, 725) Manso fired a second shot at Cruz' lower body, also intending to wound him but not to kill him. (T. 691, 718-19) One person, whom he thought was Roque, got out from the left rear and went to the back of the

Bronco. (T. 719) Manso thought the person remaining in the back seat was Moussa, so he shot through the roof of the car. (T. 691,720) Manso intended to kill Moussa but fired only one shot. (T. 720) He thought Sanchez was also still inside, in the driver's seat, and shot twice through the left windshield. (T. 691, 720) Manso said he intended to kill Sanchez, because Sanchez was making his life impossible and drove him almost crazy. (T. 720-21) When Manso ran out of ammunition, he threw the shotgun aside. (T. 691-92, 721) He climbed down the ladder and went back into the building; he wanted to return to his car to retrieve his .45 and kill himself, but was thwarted by the arrival of the police. (T. 721-22)

After presenting appellant's confession, the state rested its case, and defense counsel moved for judgments of acquittal on the attempted first degree murder counts as to Zamora and Cruz, on the ground that appellant did not intend to kill them. (T. 758-59)

Mr. Manso testified for the defense that his confession had been fed to him by the police and that he had agreed to it only after the police threatened to deport him and his wife and to turn his children over to the state. (T. 768, 790) On cross-examination, Manso denied making a phone call to Aircraft Modular Products after his arrest and telling a co-worker that his only regret was not killing Jorge Sanchez. (T. 793)

In rebuttal, the prosecution called Detectives Fabriguez and Plasencia, who denied making any threats to Manso or suggesting answers to the questions, (T. 797-98, 803); and the interpreter and court reporter, who said Manso was not threatened and was not reading from a script or papers when he answered the officers' questions. (T. 808, 816).

The prosecution then called Raul Somarriba, who testified that appellant called him at Aircraft Modular Products one week after his arrest and said he just wanted to say goodbye. (T. 829-30) Somarriba asked Manso why he had done it and Manso responded, "I had to do it, and

don't ask me." (T. 830) Somarriba remained quiet and Manso said "What I'm sorry for is I did not hit George Sanchez." (T. 831)

The state again rested its case, and defense counsel renewed his prior motions. (T. 832-33) The jury found Mr. Manso guilty as charged on all counts. (T. 898-99) The penalty phase was scheduled to begin three weeks later, on February 2, 1995.

Penalty Phase

The state also filed a motion in limine to preclude the defense from presenting various types of evidence at sentencing, including "[e]vidence of the character or health of the defendant's family members unless shown to have contributed to the defendant's actions." (R. 1081) The motion was granted, without defense objection. (T. 917)

The penalty phase of the trial began on February 2, 1995. The state first presented testimony from two Metro-Dade police officers regarding Manso's second degree murder conviction for the 1991 killing of Luis Gutierrez. Officer John King testified that Gutierrez' body was found in the front seat of his Jeep Cherokee near the Palmetto Expressway and that Gutierrez died of a shotgun wound to the head. (T. 930-31, 933)

Detective Nick Fabriguez then testified that Mr. Manso had confessed to the Gutierrez murder during the interrogation on the Aircraft Modular Products shooting. (T. 938) After summarizing Manso's oral statement, (T. 942-46), Detective Fabriguez and the prosecutor read his transcribed statement to the jury:* Mr. Manso had learned that his wife was having an affair with Gutierrez, who was employed at the Publix warehouse where Mrs. Manso worked.[3] (T. 943)

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[2]Copies of the statement were also distributed to the jurors. (T. 948)

[3]Appellant had once used the "star 69" feature on the telephone to return a call his wife had just received and spoke to Gutierrez. (T. 942-43, 959) Manso told Gutierrez to leave Mrs.

On August 16, 1991, Manso went to the warehouse at about 9:30 p.m., waited for Gutierrez, and followed him onto the Palmetto Expressway. (T. 943, 952-53) When traffic backed up because of an accident, Mr. Manso got out of his car, approached Gutierrez and told him to leave Mrs. Manso alone. Gutierrez remarked that men with unfaithful wives had no right to speak, called Mrs. Manso a whore, and drove away. (T. 943-44, 953-54) Manso followed Gutierrez to a gas station, where he saw Mrs. Manso get into Gutierrez' truck and drive off. (T. 944, 954-55) Manso lost the truck in traffic and decided to wait in the parking lot. (T. 944, 955) Gutierrez and Mrs. Manso returned at 11:30 p.m. (T. 944-45, 955) After Mrs. Manso left without seeing her husband, Manso approached Gutierrez' car and told Gutierrez that he was ruining Manso's life, his wife and his family; Manso warned Gutierrez to stay away from his wife and threatened to kill Gutierrez if he touched her again. (T. 945, 955-56, 960) Gutierrez responded that Manso should tell his wife to stay away from him, then opened his door, striking Manso with it, and drove away, "squish[ing] the tires as he left." (T. 945, 956) Wanting to continue the conversation, Manso followed Gutierrez, pulled alongside him, reached to the floorboard and picked up the shotgun, which he regularly carried in his car at that time, and fired once, through the open passenger side window. (T. 946, 956-57, 959-60) The gun was the Remington .l gauge Manso had purchased at the Sports Authority. (T. 958, 960)

The state also called Roger Koch, the president of Aircraft Modular, and Kenya Roque, Miguel Roque's widow, to provide victim impact testimony. Mr. Koch testified that he had known Miguel Roque, for three months and described him as a quiet and "intelligent man" and a "valuable employee." (T. 964-65)

Manso alone, and Gutierrez told him that Mrs. Manso had initiated the relationship. (T. 943, 959)

Kenya Roque testified that she met and married Miguel Roque in Havana (T. 967), and that they came to the United States in 1991 . (T. 968-69) Mrs. Roque testified that her husband had been a good father to their young daughter and was a hard worker. (T. 97 1-73)

Mr. Manso's sister, Marta, and his brothers Orlando and Ricardo testified to the following: Their family left Cuba to come to the United States in 1969, seeking help for their mother: a psychiatrist in Cuba had diagnosed her as schizophrenic, and electric shock treatments administered there had failed to cure her. (T. 974-76, 984) Mr. Manso was left behind, because he was 15 and nearly of military age. (T. 979-80, 984-85)

He had been tortured in the military: soldiers would wake him up at 3 in the morning, throw cold water on him and make him walk naked in the fields. (T. 985) He would be left in the woods on survival training, and made to steal food. (T. 979) Sometimes he was deprived of food; at other times, soldiers would kick his plate off the table and make him eat off the ground. (T. 986) He had received psychiatric treatment, including electric shock treatments, in the Cuban military but had stopped seeing a psychiatrist because he didn't want to believe he had a problem. (T. 976-78, 985, 989-90)

When Mr. Manso arrived in the United States, Marta and Ricardo Manso, his younger siblings, found him to be no longer the cheerful, energetic person described to them; he was depressed and very quiet. (T. 985) Furthermore, his mother was institutionalized, and his parents in the process of getting a divorce. (T. 982) His mother believed her husband was the devil. (T. 983) Defense counsel asked Marta how many times their mother had been hospitalized; the prosecutor objected to this line of inquiry as "irrelevant" and in violation of the motion in limine, and the objection was sustained, (T. 975)

Marta testified that, when Mr. Manso was living at home, he "just wasn't all there." (T. 978) Orlando testified that he stopped hunting with Mr. Manso because he was "loose [in] his mind" and easily disoriented, getting lost on trails they had used for years. (T. 993) All three siblings testified that their mother's anti-psychotic medication was often missing, and they discovered that Mr. Manso had been consuming it. (T. 978-79, 986, 992)

Marta introduced Mr. Manso to his wife, Maria. (T. 980-81) Orlando testified that when Mr. Manso was first married, he became cheerful and happy. (T. 987) He was a good father and worked extra hours and on weekends to give his family everything they needed. (T. 981) Mr. Manso began to suspect his wife was having an affair, however, when she started acting differently toward him, was abusive to their children, and arrived home at odd hours of the night. (T. 981, 987) At this point, Mr. Manso became depressed, because his wife and children were the most important thing in his life. (T. 987, 992) Appellant was separated on and off from his wife and lived with his mother during those periods. (T. 981)

Appellant complained to both Orlando and Ricardo about his job; he said he was told he would become the day manager if he worked the night shift but was never given the position, and that his coworkers made fun of him behind his back. (T. 988, 994) He began to keep to himself and to get angry if his family questioned him about his worsening depression. (T. 994)

Mr. Manso testified that he was born in Havana, the oldest of seven children. (T. 1005-06) His family left Cuba when he was 15. (T. 1005-06) He lived with a cousin but was badly mistreated by her husband. (T. 1006) About two weeks after his family left, appellant attempted to shoot himself, but his cousin found him with the shotgun and took it away. (T. 1007) He worked in the fields and attended school until he was drafted at age 16. (T. 1006) He was twice placed in a psychiatric hospital where he was given electric shock, injections and pills. (T. 1007-

08) He was never told what was wrong with him, and the treatments made him feel worse. (T. 1008) He was discharged from the military after his second hospitalization, and went to work in a sugar refinery. (T. 1008-09) His parents came back to visit him ten years after they had left him in Cuba. A week after their departure, he again tried to commit suicide, this time by throwing himself in front of a bus and was run over. (T. 1009-10)

Mr. Manso said he had been hearing voices since his parents first left him in Cuba but didn't tell anyone for fear of being ridiculed. (T. 1010) The voices told him that his parents left him because they didn't love him. (T. 1012) When he arrived in the United States, his mother was in the hospital. (T. 1010) Appellant took his mother's medication because he was afraid that he was like her, and that he would be locked up like she had been. (T. 1011) He said that he still hears voices. (T. 1011-12)

Mr. Manso was placed on suicide watch at the jail. (T. 1012-13, 1028) He thought often about killing himself, but refrained because he knew what it was like to be without parents. (T. 1013) He expressed remorse for killing both Luis Gutierrez and Miguel Roque. (T. 1012) He told the jury that he had no right to live because he had taken the lives of two people -- one of whom was his best friend -- and had left their children without a father. (T. 1013) Appellant asked to be given the electric chair, and said "everybody is going to be happy and that's it." (T. 1013-14) He said he did not think he was crazy and continued, "Who knew they're sitting there -- everybody there and they're the people above them and now they make themselves be good, and they think about one thing, in what way have they put me there in order be able to kill five people. Yeah, that is all and I don't want to keep talking. I already asked for the electric chair so everyone would be happy, What else do they want? . . . And that way I'm going to a place where no one can bother me and I can be calm." (T. 1014)

When the prosecutor began to cross-examine Mr. Manso, he said, "Tell the fat lady I don't want to answer any of her questions," and threw the microphone at her. (T. 1014) The courtroom was cleared, and the jury excused. (T. 1014) Mr. Manso was screaming and afraid to be touched, (T. 1045) He was on the floor for five minutes until correction officers could coax him into standing up. (T. 1045) He shook violently as corrections transported him to the clinic. (T. 1047)

Competency to Proceed

Defense counsel requested a competency evaluation, and the trial court appointed two experts to examine appellant -- Dr. Merry Haber and Dr. Lazaro Garcia, who had been retained, respectively, by the defense and the prosecution to testify at the penalty phase. (T. 1016) The psychologists interviewed Mr. Manso jointly in the jury room shortly thereafter, and the trial judge immediately held a competency hearing.

Dr. Haber, a clinical psychologist, testified that she had used a general forensic competency evaluation and found Mr. Manso to be not responsive and not oriented to person. (T. 1019-20) He didn't know his last name, his age or where he was born and didn't recognize where he was or know the date. (T. 1019-20) Mr. Manso stared straight ahead and said people were punishing him, laughing at him and making fun of him. (T. 1020-21) He was unable to name his wife or children or give any history, including of his time in the Cuban military, although he was able to say that he cut sugar cane once and that the people there tried to hit him. (T. 1020) He began to cry and said the voices sometimes told him to cry; they also told him to kill himself because no one loved him. (T. 1020-21) He said he had tried to kill himself in the past, but could not say where or when. (T. 1021) Mr. Manso said he could sometimes see the voices but could not smell them; he felt the voices controlled him. (T. 1021)

Mr. Manso didn't recognize Dr. Haber though she had spent four hours with him over the last three days. (T. 1020) He could barely complete a sentence and kept saying "they" were trying to punish him, but could not identify "they." (T. 1020-21) Dr. Haber found that Mr. Manso's memory was impaired and that he did not understand the charges against him or why he had a lawyer. (T. 1021) Dr. Haber concluded that Mr. Manso was not competent to proceed, that he had had a psychotic break, and should be hospitalized and medicated until restored to competency. (T. 1020-21)

In response to questioning by the judge, Dr. Haber explained that she believed Mr. Manso had a longstanding psychological problem that began when he was 15, that it had escalated to a depressive disorder, and that he had decompensated to a thought disorder. (T. 1032) Dr. Haber's tests from two days earlier suggested that Mr. Manso had psychotic thought processes, which she could not rule out because both Mr. Manso's mother and uncle were schizophrenic. (T. 1032) Dr. Haber testified that Mr. Manso had been emotionally disturbed most of his life and had had prior psychotic episodes, triggered by his belief that people are laughing at him, mocking him, and persecuting him. (T. 1032) She concluded that Mr. Manso's behavior in court was consistent with this pattern. (T. 1032)

Dr. Haber also concluded that appellant had not merely had an angry outburst, but that he was experiencing auditory hallucinations, a form of psychosis, which was consistent with his staring, crying, and suspicious behavior. (T. 1033) She noted that people who are extremely paranoid, like Manso, often strike out at others -- real or imaginary -- who are trying to harm them. (T. 1033) She also explained that, although Manso's family had not reported prior violent behavior, "everyone" in his family, including himself, was afraid he was like his mother, a violent schizophrenic. (T. 1033) These fears had kept him from seeking psychiatric help and

had kept his family from telling him to see a doctor. (T. 1033) Mr. Manso had previously told Dr. Haber that he had heard voices since age 15 but he had never told anyone else, because he knew his mother had heard voices, and because he was afraid he'd be taken back to the hospital for shock treatments. (T. 1034) The personality test Dr. Haber administered indicated some form of schizophrenia. Even accounting for a response pattern that tended to exaggerate his illness, the test report concluded that Mr. Manso has a severe mental disorder. (T. 1035)

Dr. Garcia, the state's expert, testified that he had a "strong suspicion" that Manso was malingering[4], based on the fact that while Mr. Manso claimed to remember little, he responded relevantly to self-serving questions. For example, he said he had been in a place where people hit him, said he was crazy, and gave him electric shocks. (T. 1022-23) Voices would sometimes hold him down and take him to other places. (T. 1023) He denied killing anyone but admitted trying to kill himself. (T. 1023) Although Dr. Garcia did not believe that Mr. Manso had had a psychotic break, and believed that he was competent, he agreed with Dr. Haber that Manso should be hospitalized for observation before a fmal determination of competency was made, in order to test his hypothesis that Manso was malingering. (T. 1022, 1024-25)

Manso's medical records from the Dade County Jail revealed that he had been on suicide watch, (T. 1028), that he suffered from a "gross thinking disorder," (T. 1028) and that he had been administered elavil, an antidepressant, and "penztropine" (sic) through December 25, 1993, as well as "prilicon" (sic), benadryl for sleep, and vistaril for anxiety, until March or April 1994. (T. 1030-31)

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[4]Dr Garcia later conceded that Manso has a paranoid personality disorder and a depressive disorder from which he had suffered for most of his life. (T. 111 l-l 113) Garcia also admitted that Manso had mentioned his suicidal ideation and electric shock treatments during earlier examinations, (T. 1023-24)

After Doctors Haber and Garcia testified, the judge questioned the court interpreter, who stated that Mr. Manso referred to people in the back of the courtroom "making fun of him and he also mentioned that if they want to give him the electric chair what else would they want" -- it was "all right with him. So what more do they want." (T. 1037-38, 1039) The corrections officers testified to Manso's agitated and distraught condition; he was screaming and afraid to be touched. (T. 1045) He was on the floor and it took the officers about five minutes to coax him into standing up. (T. 1045) He was shaking "real bad" and continued to shake all the way to the clinic. (T. 1047) He was able to give the nurse his name when asked, but he was shaking throughout the entire clinic visit. (T. 1047-48)

At the conclusion of the hearing, defense counsel asked that Mr. Manso be hospitalized for observation as both doctors had recommended. (T. 1050) The trial judge refused the request and made a lengthy oral ruling, finding Mr. Manso competent to proceed. (T. 1050-58)

These findings, set forth in detail in Issue II, were essentially that: neither expert had found Mr. Manso to be suffering from a major psychiatric disorder other than depression; there was no verification of Mr. Manso's mental health history other than from Mr. Manso or people he had known since his incarceration; and the only strange behavior his family observed was depression. (T. 1052) Referring to her observations of Mr. Manso in court, the judge stated that Mr. Manso had repeatedly made untruthful statements under oath and had shown no emotion, other than his angry outbursts. (T. 1053-54) Citing appellant's behavior after his crimes, the judge concluded that appellant was able to present the image he wants. (T. 1054-55) After the trial judge entered her order, defense counsel asked that she reconsider and appoint a third expert to evaluate Mr. Manso; the trial judge denied the request. (T. 1059)

Resumption of the Sentencing Hearing

The sentencing hearing resumed, approximately 24 hours after Mr. Manso's outburst. Responding with brief, mostly "yes" or "no," answers, Mr. Manso acknowledged that he had previously denied killing Roque and Gutierrez; that he had awaited the men's return from computer class; and that he had "pretended" to assist Doug Zamora. He denied telling his friends that he regretted not killing Jorge Sanchez, and denied that he purposely misled the police. (T. 1062-64)

The defense then called Dr. Haber as a witness. In accordance with Florida Rule of Criminal Procedure 3.21 l(e), Dr. Haber did not refer to the competency evaluation in her testimony. Rather, her testimony was based on three interviews with appellant, on January 24, 27, and 31, on interviews with appellant's father and brothers, and on the results of the Millon Clinical Multiaxial Inventory ("MCMI") III, an objective psychological test she administered to appellant on January 31. (T. 1066-67, 1074, 1077-78) Dr. Haber first related the social history she had gathered from Mr. Manso and his family regarding his early life in Cuba, and his abandonment at age 15 due to his mother's emigration to this country for psychiatric treatment. (T. 1067)

At that time, he became preoccupied with suicide and twice attempted suicide in Cuba. (T. 1074, 1077) Shortly after he was drafted, Mr. Manso began to feel that people were laughing at him and mocking him. (T. 1068) He started to fight with people. (T. 1068) In an incident that appellant likened to being possessed by a demon, he started hitting people with a stick. (T. 1068, 1074-75) He was tied down and told he was "loco" and was taken to a psychiatric hospital where he was given shock treatments and injections, (T. 1068) He returned to the military for about five months but was hospitalized again and released before his term was up. (T. 1068)

Appellant's memories of the army continued to haunt him and were at times overwhelming. (T. 1075)

When Mr. Manso came to the United States, his parents were getting divorced, which shattered his dream of a happy reunion with his family. (T. 1069, 1076) It was Mr. Manso's fear that he was paranoid schizophrenic like his mother because he felt he couldn't control himself and couldn't deal with reality. (T. 1069) Dr. Haber confirmed with Mr. Manso's family that his mother took anti-psychotic medication in pill form for several years until it became necessary to switch to injections. (T. 1076) Mr. Manso also had an uncle who had died in a mental hospital, and this contributed to his fear of psychiatric treatment. (T. 1076-77)

Appellant frequently told his brother Orlando that people were laughing at him. (T. 1081-82) Both the brothers and father thought there was something strange about Mr. Manso but couldn't describe it. (T. 1082) When asked why they didn't make Mr. Manso go to a psychiatrist, both brothers practically cried and said they were afraid to find out he was like their mother. (T. 1082)

Mr. Manso was unhappy and felt he wasn't normal. (T. 1069) When he met his wife, however, he fell in love and had the happiest five years of his life, until he discovered she was having an affair. (T. 1069-70) Mr. Manso couldn't believe it until he spoke to Gutierrez on the phone; Manso felt that Gutierrez was mocking and laughing at him. (T. 1070) Mr. Manso admitted killing Gutierrez but told Dr. Haber he hadn't planned to do it. (T. 1070) Although he was eventually reunited with his wife after Gutierrez' death, she did not, as Manso had hoped, fall in love with him again. (T. 1070) They separated again and reconciled about a month and a half before the shooting at Aircraft Modular, but the marriage was not going well. (T. 1071) Mr. Manso believed his wife would be happier with him if she could stop working, but instead,

there were more financial tensions, and Mr. Manso was afraid he could not support his family. (T. 1075-76)

During the two years after the Gutierrez murder, Manso deteriorated; he struggled to control himself by taking his mother's medication, but the mockery at work continued. (T. 1075) He described feeling worse in the period before the Aircraft Modular shooting than he had ever felt before. (T. 1077) He felt he had to shoot his co-workers and had intended to shoot himself, but there were no bullets left. (T. 1077)

Dr. Haber then testified about the results of the MCMI-III test which showed that he had a severe mental disorder, either a schizophrenia (which is known to run in families) or post-traumatic stress disorder, a major depression (which was to be expected from his incarceration), and a delusional disorder. (T. 1079, 1083) In addition, he had a depressive disorder, probably of life-long duration, and a dependent and passive/aggressive personality disorder. (T. 1079, 1082) Based on these results, Dr. Haber testified that appellant is a solitary, depressed person who decompensates under pressure; the thought disorder or schizophrenia gets worse, and his behavior becomes bizarre, (T. 1080) Dr. Haber stated that appellant is also paranoid and thinks people are laughing at him and trying to harm him, which makes him dangerous, because paranoid individuals will strike out at those they perceive as threatening. (T. 1080)

Mr. Manso had at first denied hearing voices or seeing things, (T. 1073), but when Dr. Haber questioned him further during her third visit, he disclosed that he had heard voices since his parents left Cuba but did not tell anyone because he was afraid people would think he was crazy and take him to the hospital and give him shock treatments again. (T. 1080-81) He said he sometimes couldn't concentrate because of the voices and would pace or play the car radio to try to make them go away. (T. 1081)

Dr. Haber concluded that Mr. Manso is mentally disturbed and likely has been all of his life; that he has personality disorders and depression -- probably of lifelong duration -- and that he decompensatcs under stress. (T. 1082-83) Based on her testing and examinations of appellant, Dr. Haber believed he could have schizophrenia, or a thought disorder, but did not have sufficient information to make a conclusive diagnosis between the two. (T. 1083) Dr. Haber believed that appellant's ability to appreciate the criminality of his conduct was severely impaired and that he was under severe emotional disturbance at the time of the crime. (T. 1083)

On cross-examination, Dr. Haber stated that although she could not give an exact diagnosis of Mr. Manso's emotional disturbance at the time he killed Miguel Roque, she believed he was in a dccompensated mental condition, caused by marital stress, financial stress, and his delusional belief that people were ridiculing him. (T. 1083-84) Dr. Haber disagreed that Mr. Manso had deliberately tried to make himself look bad on the MCMI-III. (T. 1087) Rather, his elevated score on the debasement scale showed a tendency to see himself in a negative light, which caused his profile to be exaggerated. (T. 1087)

In rebuttal, the state called Roger Koch, the President of Aircraft Modular Products, who testified that Mr. Manso had been employed there for approximately six years and worked his way up from an entry level machinist to night shift supervisor of the machine shop just two months prior to the shooting. (T. 1091-92) Mr. Koch testified that appellant had significant responsibilities and that his job required skill and precision, that he never came to Mr. Koch with any problems, and that Mr. Koch did not observe him to be mentally ill or deficient. (T. 1093-95, 1096-97) Mr. Koch never indicated that Mr. Manso was about to be fired or had ever been admonished about his work.

The prosecution next re-called Jorge Sanchez, who testified that he attends the same church as Mr. Manso. (T. 1097) Sanchez stated that the Sunday after the shooting, he gave testimony in church, thanking God that he was not harmed, and that Mr. Manso then stood up and said he also had testimony to give. (T. 1098) Defense counsel objected that no such statement had been disclosed in discovery. (T. 1098) In response to the trial court's inquiry, the prosecutor said she did not realize she needed the statement until Manso testified to his remorse. (T. 1099) Defense counsel argued that the state had been on notice since Dr. Haber's deposition -- before Manso testified -- of Mr. Manso's remorse. (T. 1099) The trial judge ruled there had been no discovery violation, because the statement did not become relevant and admissible until Manso had testified, and terminated ***the Richardson*** hearing. (T. 1099)

Mr. Sanchez then testified that Mr. Manso stood up and told the congregation that he was grateful to God that nothing had happened to him because 30 seconds before the shooting he was checking the parking lot of the company. (T. 1100-01) After a recess, defense counsel moved for a mistrial, arguing that the trial court had applied the wrong standard in finding no discovery violation. (T. 1101-02) The motion was denied, (T. 1102)

As its last witness, the state called Dr. Garcia who testified that he had examined Mr. Manso on January 28 and 29 and on February 2. (T. 110344) His psychosocial history was consistent with Dr. Haber's. (T. 1104-05) Dr. Garcia conducted a mental status exam to determine whether appellant was out of touch with reality and found his responses to be appropriate. (T. 1105-06) Dr. Garcia also administered the Wechsler Adult Intelligence Scale ("WAIS") test, the thematic apperception test ("TAT"), and the Bender Visual Test. (T. 1106-07, 1111)

On the bases of his examination, Dr. Garcia concluded that Manso is depressed and has probably suffered from dysthymia -- a depressive disorder -- for much of his life with superimposed severe depression at times. (T. 1111-12) He also diagnosed Manso as suffering from paranoid personality disorder, (T. 1112-13) Dr. Garcia agreed with Dr. Haber that appellant is very suspicious, tends to feel that people are trying to harm him and make fun of him, and is likely to misinterpret events around him. (T. 1113-15)

Dr. Garcia felt that the scores on the WAIS were somewhat low, based on his contact with Mr. Manso, and opined that Mr. Manso could have been faking or trying not to give his best performance.' (T. 1108) Dr. Garcia believed Mr. Manso had the mental capacity to understand right from wrong and to understand the consequences of his behavior. (T. 1108-09)

Dr. Garcia found Mr. Manso's responses on the TAT to be logical, coherent, goal-oriented and not psychotic (T. 1110) Dr. Garcia described one of Manso's responses, in which he said that the person pictured was incarcerated and crying because he had been sentenced to the electric chair. (T. 1110-11) Manso also felt that people were making fun of the man in the picture. (T. 1110) Dr. Garcia opined that Manso's performance on the Bender Visual Test was somewhat slow, consistent with either an attempt to perform slowly, or with an underlying depression. (T. 1111) Dr. Garcia concluded that Mr. Manso was not suffering from organic brain damage or any major mental disease. (T. 1111-12) He also testified that Mr. Manso's mental disorders

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[5]Dr. Garcia translated the instructions and questions on the WAIS into Spanish but had to eliminate the vocabulary portion. (T. 1107) He acknowledged that the WAIS is geared to English speakers and therefore works slightly against anyone taking the test in Spanish. (T. 1107)

would not "compel" him to commit the crime at Aircraft Modular and that he did not believe that Manso was suffering from schizophrenia.[6]

State's Use of Competency Evaluation

The prosecutor then elicited detailed testimony from Dr. Garcia regarding the competency evaluation. She inquired whether Dr. Garcia had examined Manso the previous day and for what purpose. (T. 1118) Dr. Garcia explained that he and Dr. Haber had examined him to determine his competency to proceed, and while Dr. Haber had concluded Manso "was likely insane, that he had a psychotic break," Dr. Garcia "concluded that [he] was competent and likely malingering. " (T. 1118-19) Dr. Garcia believed that Manso was "trying to give the appearance of suffering from a psychotic or a major psychiatric disorder," because "[w]hat happened yesterday was rather opportunistic. " (T. 1119-20) Dr. Garcia testified that appellant "basically did not remember anything according to him. He gave me his first name, but he didn't remember his age, his birth date, his place of birth, last name, social history," but "when questions were asked that would elicit psychopathology, then he was able to respond." (T. 1120) Dr. Garcia said he had asked Manso about different types of hallucinations, and Manso "has all of them," which Dr. Garcia thought unlikely. (T. 1122) Dr. Garcia also asked Manso whether he ever feels that he is being levitated, which is not a psychiatric symptom, and appellant responded

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[6]Dr. Garcia agreed with the prosecutor's suggestion that it would be unusual for schizophrenia to manifest as late as 42, that schizophrenics generally do not marry or hold down highly technical jobs and, even when functioning, will appear unusual to others; and they experience psychotic breaks, requiring hospitalization, even when taking medication. (T. 1116- 17, 1127)

In fact, Mr. Manso's mother, who was undisputedly schizophrenic, had been married (T. 1011, 1033); and Mr. Manso's family members feared he was like his mother. (T. 1033). Mr. Manso reported first hearing voices at 15, and had been hospitalized for psychiatric care in Cuba. (T. 1007-08)

affirmatively. (T. 1122) Dr. Garcia explained that, in his view, Manso's ability to relate his symptoms and to remember certain aspects of his psychiatric history while not being able to remember his last name and work history was "self-serving" and inconsistent with the ordinary process of decompensation. (T. 1120-22)

On cross-examination, Dr. Garcia disagreed that Mr. Manso's ability to appreciate the criminality of his acts was impaired. (T. 1127) He conceded that although Mr. Manso suffered from a depressive disorder and a paranoid personality disorder at the time of the crime, the actions he took to protect himself, such as eliminating the serial number from the gun, were goal-oriented and not the behavior of a schizophrenic person. (T. 1112-13, 1127-28)

On re-direct, the prosecutor asked Dr. Garcia to define competence, and asked whether appellant's ability to take the witness stand and answer questions appropriately would indicate competency. (T. 1129) Dr. Garcia agreed that it would, and the state rested. (T. 1129)

In closing argument, the prosecutor emphasized Dr. Garcia's testimony regarding the competency hearing to rebut mental mitigation. The prosecutor asserted that Manso was a malingerer, and had convinced Dr. Haber, after his outburst in the courtroom, that he was incompetent, while Dr. Garcia found him to be competent. (T. 1140-41) The prosecutor concluded that Manso:

> "is not under the influence of extreme mental or emotional disturbance. He may conform his conduct to the requirements of law when he chooses to, He has that capacity. That's what Dr. Garcia told you and we know that what Dr. Garcia says is true because it has been confirmed before your very eyes. And we know that Dr. Haber has been misled because you've seen it before your very eyes." (T. 1140-41)

In his closing, defense counsel attempted to argue that appellant could "receive more than life in prison" and would "never see the outside again." (T. 1151) The prosecutor objected, and

the trial court at first sustained, then overruled, the objection. (T. 1151) When defense counsel resumed his argument, stating that "[b]ecause of the way that he can be sentenced," the jury should not be "afraid" that appellant would be "coming out, " the prosecutor objected again, and the objection was sustained. (T. 1151-52) Later, at the sentencing hearing before the judge, the same prosecutor pressed for four consecutive guidelines' departure sentences of life imprisonment for the attempted murder convictions, in addition to the death penalty. (T. 1174)

The jury was instructed on three aggravating circumstances: (1) the defendant was previously convicted of another felony involving the use or threat of violence;[7] (2) the defendant knowingly created a great risk of death to many persons;[8] and (3) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.[9] (T. 1153-54) And on the statutory mitigating circumstances: (1) that the defendant was under extreme mental or emotional disturbance;[10] (2) that the defendant's capacity to conform his conduct to the requirements of law substantially impaired;" and (3) the catch-all mitigator of any other aspect of the defendant's character or record or circumstances of the offense. (T. 1154)

The jury recommended death by a vote of 10 to 2. (T. 1157-58; R. 1143)

On February 27, 1995, the trial judge followed the jury's recommendation and sentenced Mr. Manso to death. The trial judge found the following aggravating circumstances: (1) the

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[7] §921. 141(5)(b), Fla. Stat. (1993).

[8] §921,141(5)(c), Fla. Stat. (1993).

[9] §921. 141(5)(I), Fla. Stat. (1993).

[10] §921. 141(6)(b), Fla. Stat. (1993).

[11] §921.141(6)(f), Fla. Stat. (1993).

defendant was previously convicted of another felony involving the use or threat of violence, (R. 1163); (2) the defendant knowingly created a great risk of death to many persons, (R. 1170) and (3) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R. 1174). With respect to statutory mitigating circumstances, the trial judge found that the mitigating circumstance of extreme mental or emotional disturbance was not supported by the evidence but "gave this mitigator some weight" (R. 1174-80); and rejected entirely the mitigating circumstance that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. 1181-87) With respect to nonstatutory mitigation, the trial judge gave "moderate weight" to the defendant's mistreatment while in the Cuban military, (R. 1188), and "minimal weight" to evidence that the defendant was a good parent and family man, (R. 1188), while rejecting cooperation with the police (R. 1188-89), remorse (R. 1189-91), and capacity for rehabilitation (R. 1191), as unsupported or contradicted by the evidence.

SUMMARY OF ARGUMENT

As addressed in issues II through VI, the fairness and reliability of the sentencing determination in this case was fundamentally undermined because the prosecution was permitted to transform a confidential competency examination into its most powerful rebuttal evidence. The error is all the more egregious because the competency determination was itself inadequate and unreliable. This error entangled the issue of mental mitigation with the issue of appellant's competency to proceed and overwhelmed the substantial uncontroverted record evidence in support of the mental mitigating circumstances. The error was compounded by the state's tactic of raising and rebutting mental mitigating factors that had not been relied on by the defense and by the trial court's improper restrictions on appellant's ability to present relevant mitigating evidence to the jury,

Guilt Phase

I. The trial court improperly denied appellant's motion for judgments of acquittal on the attempted first degree murder counts as to Douglas Zamora and Ray Cruz because the state's circumstantial evidence was not inconsistent with appellant's confession, which negated a specific intent to kill Cruz and Zamora. Appellant's convictions for these two counts should therefore be reduced to attempted second degree murder.

Penalty Phase

II. The trial court improperly entered an order finding appellant competent to proceed at the penalty phase without hospitalizing him for further observation, as both experts had recommended, and without complying with Florida Rule of Criminal Procedure 3.211, which requires the experts to submit written reports and to address specific criteria in evaluating

competency to proceed. The trial court's order is also replete with findings which are contradicted by the record, underscoring the inadequacy of the competency determination.

III. The prosecution thereafter presented detailed testimony regarding the competency examination to rebut mental mitigation, in clear violation of Rule 3.211(e) and appellant's privilege against self-incrimination and right to counsel. The improper testimony became a feature of the state's rebuttal case and was expressly relied on by the trial court to reject the mental mitigating circumstances, despite substantial uncontroverted evidence to support them.

IV. The state's expert also exceeded the proper scope of rebuttal by enumerating for the jury that appellant did not have low intelligence or organic brain damage when the defense had not relied on either of these factors in mitigation,

V. This case presents unique circumstances warranting a new sentencing hearing on grounds of ineffective assistance of counsel, in that defense counsel's deficient performance in failing to object to the testimony regarding the competency exaination, and the overwhelming prejudice that resulted, is apparent from the record, and defense counsel was suspended from the Florida Bar only three days after appellant was sentenced to death, further undermining confidence in the effectiveness of his representation.

VI. The trial court prevented the defense from eliciting constitutionally relevant mitigating evidence regarding appellant's family history of mental illness, in clear violation of the Eighth Amendment.

VII. The trial court improperly allowed a state witness to testify to a previously undisclosed oral statement by appellant after concluding erroneously that the prosecution does not have an obligation to disclose rebuttal evidence until it becomes relevant and admissible during the presentation of the defense case.

VIII. The trial court improperly prevented defense counsel from arguing to the jury that appellant could receive consecutive life without parole sentences for his attempted first degree murder convictions.

IX. The trial court erred in sentencing appellant to death by rejecting entirely or giving little weight to the statutory mental mitigators despite substantial uncontroverted evidence that appellant was severely depressed, paranoid, and suffering from persecutory delusions at the time of the crime; by finding the CCP aggravating circumstance when the evidence did not support the "coldness" element; and by finding the great risk aggravator when only three persons other than the homicide victim were in immediate and present danger.

X. The trial judge improperly considered appellant's future dangerousness as a nonstatutory aggravating circumstance as reflected in her sentencing order and remarks upon imposing sentence.

XI. The standard jury instructions misled the jury as to the significance of its verdict in violation of the Eighth Amendment.

XII. Florida's death penalty statute is unconstitutional because it improperly shifts the burden of proof and persuasion to the defense at the penalty phase, fails adequately to guide the jury's discretion, and fails to require written jury findings, thereby precluding adequate appellate review.

ARGUMENT

Guilt Phase

I.

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR JUDGMENTS OF ACQUITTAL ON THE CHARGES OF ATTEMPTED FIRST DEGREE MURDER AS TO RAY CRUZ AND DOUGLAS ZAMORA WHERE THE STATE FAILED TO ESTABLISH THAT APPELLANT POSSESSED A SPECIFIC INTENT TO KILL

In his statements to the police, Mr. Manso made clear that he did not intend to kill either Ray Cruz or Douglas Zamora, although he acknowledged that he shot at them deliberately and intended to wound them. Because the circumstantial evidence on which the state relied to establish a premeditated intent to kill is, in fact, equally consistent with appellant's statements, it is legally insufficient to sustain the convictions for attempted first degree murder. The trial court therefore erred in denying the motions for judgment of acquittal as to Zamora and Cruz. (T. 759, 833)

"The elements of attempted first degree murder include: (1) a premeditated design and specific intent to commit the underlying crime of murder, and (2) an overt act designed to effectuate that intent, carried beyond mere preparation, but falling short of executing the ultimate design." *Williams v. State,* 531 So. 2d 212, 216 (Fla. 1st DCA 1988). The underlying crime of premeditated first degree murder requires "that the accused have the specific intent to kill at the time of the offense." *Gurganus v. State,* 451 So. 2d 817, 822 (Fla. 1984).

This Court has explained that "[p]remeditation is the essential element which distinguishes first-degree murder from second-degree murder," and that premeditation "is more than a mere intent to kill; it is a fully formed conscious purpose to kill." *Wilson v. State, 493 So.* 2d 1019, 1021 (Fla. 1986); *accord Rogers v. State,* 660 So. 2d 237, 241 (Fla. 1995); *Hoeffert v. State,* 617

So. 2d 1046, 1048 (Fla. 1993). While the existence of a premeditated intent to kill may be proved by circumstantial evidence, that evidence must be sufficient for the jury to "exclude every reasonable hypothesis except that of guilt." *Mungin v. State,* 667 So. 2d 751, 754 (Fla. 1995); *accord Wilson, 493 So.* 2d at 1022; *Preston v. State,* 444 So. 2d 939, 944 (Fla. 1984); *Tien Wang v. State,* 426 So. 2d 1004, 1006 (Fla. 3d DCA), *review denied,* 434 So. 2d 889 (Fla.1983). Moreover, "the version of events related by the defendant must be believed if the circumstances do not show that version to be false." *McArthur v. State,* 351 So. 2d 972, 976 n.12 (Fla. 1977); *Mayo v. State,* 71 So. 2d 899, 903 (Fla. 1954).

In his confession, appellant told the police that he had no intention of killing Zamora and had aimed for the lower portion of Zamora's body, to teach him a lesson. (T. 690, 718, 725) Appellant said he also aimed to wound Cruz, not to kill him. (T. 691, 718-19) In contrast, appellant acknowledged his intention to kill Sanchez and Moussa, who were his supervisors, because he believed they intended to fire him. (T. 691, 720-21, 724-25) The prosecution presented no direct evidence to contradict appellant's confession. In closing argument, the prosecutor maintained that, because appellant loaded his gun with five shells, which corresponded to the number of people in the car, he must have intended to kill all of them.[12] (T. 855) The

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[12]The prosecutor also asserted in closing argument that appellant had stated in his confession that he intended to kill Zamora. (T. 854) The only support for this assertion appears in Detective Plasencia's initial summary of appellant's oral statement, in which he testified that appellant said that he intended to kill Sanchez, Moussa, and Zamora. (T. 689) This brief reference appears, however, to be a misstatement, as it is inconsistent with Detective Fabriguez' account of the oral statement at the suppression hearing. (S.R. 33, 36) Moreover, in his account, after referring to his notes, Plasencia testified that appellant stated "that he aimed to the lower portion of the body just to wound Douglas [Zamora] and teach him a lesson not to mess with him." (T. 690) The latter testimony is consistent with appellant's transcribed statement, in which he said repeatedly that he did not intend to kill Zamora but only to wound him. (T. 718, 725)

prosecutor also argued that the nature of Cruz' and Zamora's wounds demonstrated appellant's intent to kill, (T. 856)

Although premeditation "may be inferred" from circumstances, including "the manner in which the homicide was committed and the nature and manner of the wounds inflicted," *Sireci v. State, 399 So.* 2d 964, 967 (Fla. 1981), cert. *denied, 456* U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), neither the nature of the wounds nor the manner of the shooting in this case is inconsistent with appellant's confession. Appellant shot at Cruz and Zamora from the roof of a building, not at close range, and he shot at each of them only once. Their wounds were serious but not fatal. Appellant admitted that he intentionally shot Cruz and Zamora and that he intended to hurt them, but he also stated that he did not intend to kill them. Because the evidence presented to support premeditation "is also consistent" with appellant's statements to the police, which negated a specific intent to kill, the trial court erred in denying the judgments of acquittal on these two counts. *Mungin, 667 So.* 2d at 754.

The evidence supports at most convictions for attempted second degree murder, which requires not a specific intent to kill, but an "act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, " § 782.04(2), Fla. Stat. (1993). To prove "depraved-mind second degree murder, the state must show that the [defendant's] act: 1) was one a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, 2) was committed from ill will, hatred, spite or evil intent, and 3) itself indicated an indifference to human life. " *Ellison v. State,* 547 So. 2d 1003, 1005 (Fla.1st DCA 1989), *aff'd in pertinent part and quashed in part on other grounds,* 561 *So.* 2d *576* (Fla. 1990); ***accord Conyers v. State,***

569 So. 2d 1360, 1361 (Fla. 1st DCA. 1990); ***Marasa v. State, 394*** So. 2d 544, 546 (Fla. 5th DCA), ***review denied,*** 402 So. 2d 613 (Fla.1981).

Firing a shotgun at someone is obviously an act "imminently dangerous to another." ***Keltner v. State,*** 650 So. 2d 1066, 1067 (Fla. 2d DCA 1995) (pointing a loaded firearm in someone's direction and firing is consistent with depraved mind murder), And appellant acknowledged that, in doing so, he intended to inflict serious bodily injury on Cruz and Zamora. Appellant's stated intent to scare or wound Cruz and Zamora establishes the ill will required for second degree murder, and the severity of the wounds demonstrates that appellant acted with an "indifference to human life, " but neither establishes that appellant possessed the specific intent to kill required for attempted first degree murder. Appellant's convictions for the attempted first degree murder of Ray Cruz and Douglas Zamora should therefore be reduced to attempted second degree murder. § 924.34, Fla. Stat, (1995); Rogers, 660 So. 2d at 241; ***Wilson, 493 So.*** 2d at 1023.

Penalty Phase Issues

II

THE TRIAL COURT ERRED IN FINDING APPELLANT COMPETENT TO PROCEED AT THE PENALTY PHASE WITHOUT GRANTING A CONTINUANCE FOR FURTHER OBSERVATION AS BOTH EXPERTS RECOMMENDED AND WITHOUT HAVING ALL OF THE INFORMATION REQUIRED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.211, IN VIOLATION OF FLORIDA LAW AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV

As discussed below, appellant was examined for competency during the penalty phase, with one expert concluding he was incompetent and the other concluding he was probably malingering. Both experts, however, recommended that appellant be hospitalized for observation before a final determination of competency was made. Appellant submits that the trial court improperly entered an order finding him competent to proceed without allowing further evaluation, as both experts had recommended, and without complying with Rule 3.211, which requires the experts to submit written reports and to address specific criteria in evaluating competency. These errors not only undermined the reliability of the trial court's ruling on competency but, because the competency evaluation was subsequently used by the prosecution to rebut mental mitigation, also undermined the reliability of the sentencing proceeding as a whole.

A. Relevant Facts

At the penalty phase, unrebutted testimony by appellant's sister and brothers established the following: that appellant's mother was paranoid schizophrenic and was periodically hospitalized (T. 976, 982, 984); that appellant, while in the Cuban military, had received psychiatric treatment, was hospitalized and given electric shock treatments (T. 978, 986, 989-90); that appellant's siblings observed him to be depressed and thought he behaved strangely (T. 978,

988, 992-94); that appellant often expressed the belief that people were laughing at him and ridiculing him (T. 994); and that he had been taking his mother's anti-psychotic medication for a number of years to calm himself (T. 979, 986, 992).

After this testimony, appellant took the stand and acknowledged that he had heard voices since he was about 15 years old. (T. 1010-11) He also admitted that he had tried to commit suicide twice in Cuba -- the first time at age 15, when his family left him behind, and again at age 27, when his parents returned to the United States after visiting him. (T. 1007, 1009-10) However, he denied being "crazy. " (T. 1014) Appellant then admitted his guilt, said he did not deserve to live, and asked for the electric chair. (T. 1013-14) At the conclusion of his direct examination, appellant referred incoherently to people "sitting there -- everybody there and they're the people above them and now they make themselves to be good, and they think about one thing, in what way have they put me there in order be able to kill five people. " (T. 1014) Appellant then remarked, "Yeah, that is all and I don't want to keep talking. I already asked for the electric chair so everyone would be happy. What else do they want? , . , And that way I'm going to a place where no one can bother me and I can be calm." (T. 1014)

When the prosecutor began to cross-examine him, appellant said "Tell the fat lady I don't want to answer any of her questions" and threw the microphone at the prosecutor. (T. 1014) After the jury was removed, Mr. Manso was on the floor, screaming and shaking violently. (T. 1045, 1047)

Defense counsel moved for a competency examination, and the court appointed two experts to examine appellant -- Dr. Merry Haber and Dr. Lazaro Garcia, who had already been retained, respectively, by the defense and the prosecution to testify at the penalty phase. After the experts conducted a joint evaluation of appellant in the jury room, Dr. Haber testified that appellant was

not competent to proceed, that he had had a psychotic break, and should be hospitalized and medicated until restored to competency. (T. 1020-21) She found Mr. Manso to be not responsive and not oriented to person. (T. 1019-20) He did not know his last name, his age or where he was born; he did not recognize where he was or know the date. (T. 1019-20) He was unable to name his wife or children and could recall only fragments of his life history. (T. 1020) Appellant did not recognize Dr. Haber though she had spent four hours with him over the last three days. (T. 1020) He could barely complete a sentence and kept saying "they" were trying to punish him but could not identify "they, " (T. 1020-21) He said he heard voices telling him to kill himself because no one loved him. (T. 1021) Dr. Haber found that appellant's memory was impaired and that he did not understand the charges against him or why he had a lawyer. (T. 1021)

Dr. Garcia, on the other hand, had a "strong suspicion" that appellant was "malingering" because his "supposedly psychotic break [was] self-serving" and his responses during the examination were "self-serving." (T. 1022-24, 1027) Dr. Garcia said that although appellant could not remember personal information or his social history and was "evasive" about his psychiatric history, appellant remembered that he had been in a place where people hit him and said he was crazy and that he was given "currents, " meaning electric shock, (T. 1022-23, 1027) Appellant also denied killing anyone but said he had tried to kill himself and said he "hears voices that instruct him in certain ways"; that he sometimes sees these people; and that they hold him down and sometimes "take me from one place to another place." (T. 1023) For these reasons and because appellant "tends to be self-serving in nature, " Dr. Garcia did not believe appellant had had a psychotic break.[13] (T. 1024) Dr. Garcia elaborated that a psychotic break is a break

[13]Dr Garcia also indicated that appellant's nonresponsiveness to certain questions could be a simple 'refusal to cooperate. (T. 1025)

with reality, and that "if a person suffers from psychotic disorder at some point in time they're bound to have a psychotic break. Generally, [in] stressful situations . . . ." (T. 1026) Although Dr. Garcia believed appellant suffered from depression and acknowledged that "it's possible to be depressed and psychotic," he did not believe this to be true of appellant. (T. 1026) Dr. Garcia said it was unlikely, but possible, for the stress of facing the death penalty to trigger a psychotic break, even in the absence of an underlying major psychotic disorder. (T. 1027)

Regarding his recommendation, Dr. Garcia testified that he had "discussed this with Doctor Haber, and I think in the case of prudence that involuntary hospitalization is recommended." (T. 1024-25) Dr. Garcia explained that, although he believed appellant was competent, observation "over a period of days" would establish conclusively whether he was malingering. (T. 1025)

Referring to appellant's jail records, the experts noted that he had been placed on suicide watch after his arrest and had been prescribed anti-depressant and anti-anxiety medication and "penztropine" (sic - benztropine) and "'prilicon" (sic - Trilafon).[14] (T. 1029-31) Trilafon is an anti-psychotic drug and benztropine is the generic name for Cogentin, an anti-cholergenic agent prescribed to treat the side-effects of psychotropic medication. 2 **KAPLAN & SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY** 1919, 1989 (6th ed. 1995); **PHYSICIANS' DESK REFERENCE** 1417, 2172 (1994 ed.). Following the experts' testimony, the trial judge questioned

[14]There is no "penztropine" listed in the Physician's Desk Reference, but benztropine, as indicated above is the generic name for Cogentin. **PHYSICIANS' DESK REFERENCE** 1417 (1994 ed.). The court reporter notes that "prilicon" is a phonetic spelling. (T. 1030) There is, again, no such thing as "Prilicon," but "Trilafon" is an anti-psychotic medication *Id.* at 2172. If there is any dispute regarding this interpretation of the transcript, appellant is prepared to supplement the record, with leave of the Court, with the jail records to which the experts were referring to confirm this explanation.

the interpreter and the corrections officers who had taken appellant to the jail clinic following the incident in the courtroom. The interpreter said that appellant made other remarks, not recorded by the court reporter, about people in the back of the courtroom making fun of him and said something to the effect of "it's enough, that I cannot recall myself because of the commotion." (T. 1038) The corrections officers testified that, after the incident, appellant was cowering on the floor, screaming, and afraid to be touched, and was shaking violently as he was taken to the jail clinic, even after he had "calmed down." (T. 1045, 1047) At the clinic, appellant said little but gave the nurse his name when asked. (T. 1048)

While the state urged the court to find appellant competent without further delay, defense counsel asked the judge to hospitalize appellant for observation as the experts had both recommended, prior to making a final determination. (T. 1049-50) The trial court, however, declined to continue the proceedings and immediately issued an oral order finding appellant competent to proceed. (T. 1050-58)

B. Applicable Law

Both this Court and the United States Supreme Court have recognized repeatedly that "the criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma,* U.S. ___, 116 S.Ct. 1373, 1376, 134 L.Ed.2d 498 (1996) (quoting *Medina v. California, 505* U.S. *437,453,* 112 S.Ct. 2572, 2581, 120 L.Ed.2d *353* (1992)); *Hill v. State, 473 So.* 2d 1253, 1259 (Fla. 1985); Lane v. *State,* 388 So. 2d 1022, 1024-25 (Fla. 1980). The defendant must be competent not only at the outset of the trial, but throughout it. *Drope v. Missouri, 420* U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (due process violated where trial court refused to grant continuance midtrial to assess defendant's competence); *accord Pridgen v. State,* 531 So. 2d 951, 954 (Fla. 1988). Sentencing, and particularly a capital sentencing hearing, is a material stage of

a criminal proceeding to which the due process requirement of competence applies. *Pridgen,* 531 So. 2d at 954; *Calloway v. State,* 651 So. 2d 752, 753 (Fla. 1st DCA 1995); Fla.R.Crim.P. 3.210(a)(l).

The constitutional standard for competence to stand trial, articulated in *Dusky v. United States,* 362 U.S. 402,402, SO S.Ct. 788, 789, 4 L.Ed.2d 824 (1960), and implemented through Florida Rule of Criminal Procedure 3.2 11 (a)(1) is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings, " Pursuant to Rule 3.2 10, the court, on its own motion or on the motion of counsel for the defense or the state, may order the defendant to be examined for competency to stand trial by "no more than three nor fewer than two experts. " The experts "are required to provide written reports to the court pursuant to" Rule 3.211. *Tingle* v. *State,* 536 So. 2d 202, 204 (Fla. 1988); *accord Marshall v. State,* 440 So. 2d 638, 639 (Fla. 1st DCA 1983). In order to standardize competency evaluations, Rule 3.211(a)(2) requires the experts' reports to address six specific factors:

> (A) the defendant's capacity to:
> (I) appreciate the charges or allegations against the defendant;
> (ii) appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant;
> (iii) understand the adversary nature of the legal process;
> (iv) disclose to counsel fact[s] pertinent to the proceedings at issue;
> (v) manifest appropriate courtroom behavior;
> (vi) testify relevantly; and
> (B) any other factors deemed relevant by the experts.

Rule 3.21 l(d) provides further that the experts' written reports must describe the evaluative procedures used and the purposes of each, the experts' "clinical observations, findings, and

opinions on each issue referred for evaluation" and the sources of information and the factual bases for the expert's fmdings.

Although it is the trial court's responsibility in a competency proceeding to resolve disputed factual issues, it is also the trial court's duty to consider ***all*** the evidence and to follow the requirements of Rule 3.211, which are intended to ensure that the trial court has sufficient evidence on which to make the competency determination. ***See Livingston v. State,*** 415 So. 2d 872, 872-73 (Fla. 2d DCA 1982). In this case, the evidence on which the trial court relied was insufficient for two independent reasons.

1. Failure to Continue the Proceedings for Further Evaluation

First, the experts agreed in this case that further evaluation was necessary to make a conclusive determination of appellant's competency. Dr. Haber believed that appellant had had a psychotic break, was incompetent, and should be hospitalized and medicated until restored to competency. While Dr. Garcia expressed the opinion that appellant was competent, his opinion depended entirely on his "strong suspicion" that appellant was feigning symptoms of psychosis -- a "suspicion" which Dr. Garcia acknowledged could be confirmed only by further observation.[15] To be "pruden[t]" -- an appropriate concern in determining a defendant's competence to stand trial

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[15]This "suspicion" was also based almost entirely on Dr. Garcia's conclusory assertions that appellant's conduct was "self-serving . " That appellant's outburst in the courtroom was a self-serving act, designed to avoid criminal responsibility, is inconsistent with appellant's desire, expressed during his direct examination, to be given the electric chair. (T. 1013-14) Throwing the microphone at the prosecutor, in full view of the jurors, was more consistent with appellant's apparent death wish than with an attempt to avoid responsibility. See *Drope, 420* U.S. at 178-79 (in concluding that defendant was not incompetent but only seeking to avoid trial, trial court gave"[t]oo little weight . . . to the testimony of petitioner's wife that on the Sunday prior to trial he tried to choke her to death. For a man whose fate depended in large measure on the indulgence of his wife, who had hesitated about pressing the prosecution, this hardly could be regarded as rational conduct. ")

in a capital murder case -- Dr. Garcia therefore joined with Dr. Haber in recommending that appellant be hospitalized for observation. Defense counsel requested that appellant be hospitalized as both experts had recommended, but the trial court refused to postpone the competency determination, relying instead on the experts' necessarily inconclusive testimony, the testimony of courtroom personnel, and the judge's own observations of appellant during the trial.[16]

A trial court's refusal to grant a continuance "in the face of evidence that the court-appointed experts required more information and further observation of [the defendant] to determine competency" is an abuse of discretion. ***Marshall, 440 So.*** 2d at 639; see also ***Pridgen,*** 531 So. 2d at 953, 955 (trial court erred in refusing to continue penalty phase proceedings for further evaluation of defendant's competency as expert recommended); ***Lane,*** 388 So. 2d at 1025-26 (trial court erred in fmding defendant competent when experts indicated they needed more time to observe defendant in order to determine his competency). The trial judge's own observations or independent investigation cannot substitute for the informed expert opinions required by Rules 3.210 and 3.211. ***See Boggs v. State,*** 575 So. 2d 1274, 1275 (Fla. 1991) (trial judge's interview with defendant could not substitute for appointing experts and conducting formal competency hearing); ***Tingle,*** 536 So. 2d at 203 (trial court's independent review of mental health file and ***ex parte*** interviews of emergency response personnel who examined defendant after he attempted to stab himself with a ballpoint pen was "not sufficient to ensure that [the defendant] was not

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[16] After the judge issued her order, defense counsel also moved, unsuccessfully, for the court to reconsider its ruling after hearing from a third expert, (T. 1059-60) The trial court denied the motion, indicating that she had relied on the testimony of lay witnesses and her own observations to resolve the conflicting opinions of Dr. Haber and Dr. Garcia. (T. 1060) Although not required by Rule 3.210, appointment of a third expert would have been particularly appropriate in this case because the two experts appointed had already been retained by the opposing parties and, while they disagreed on the critical question whether appellant was malingering, they agreed on the need for further evaluation.

deprived of his due process right of not being tried while mentally incompetent. **"); *Galloway,*** 651 So. 2d at 754 (trial court erred in relying on testimony of lay witnesses and own observations in lieu of expert examinations). The trial court's refusal in this case to postpone the proceedings to allow further evaluation, as ***both*** experts recommended, therefore undermined the reliability of the competency determination and was reversible error. ***Pridgen,*** 531 So. 2d at 955; ***Lane,*** 388 ***So.*** 2d at 1025-26; ***Marshall, 440 So.*** 2d at ***639; cf. Carter v. State, 576*** So. 2d 1291, 1292 (Fla. 1989) (trial court did not err in denying defendant's motion for hospitalization and more in-depth examination when three experts who examined defendant all agreed he was competent), cert. ***denied,*** 502 U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991).

2. Failure to Comply with Rule 3.211(a)(2) & (d)

The evidence on which the trial court relied in fmding appellant competent to proceed was insufficient not only because the experts had not been given the opportunity for further evaluation as they had requested, but also because the trial court failed to comply with Rule 3.211 , which requires the experts to submit written reports, to address six specific criteria relevant to competency, Fla.R.Crim.P. 3.211(a)(2), and to explain the bases of their opinions, Fla.R.Crim.P. 3.21 l(d). Although the trial court ordered the experts to submit written reports,[17] as required by Rule 3.211, there is no indication that the trial judge actually received or considered such reports prior to finding appellant competent, to proceed.[18] To the contrary, the trial judge stated only that

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[17]The written order appointing the experts directed them to submit written reports the next day, February 3, (R. 1126), but the judge orally advised them that she would like the written reports to be filed that evening so that she could notify the jurors whether they would be needed the next day. (T. 1018)

"Although a cover page for Dr. Haber's report is appended to a bill approved by the court twelve days after the hearing (R. 1163), the full report is not in the record. There is no written report or bill from Dr. Garcia in the record, and the trial judge does not refer in her ruling to any

she considered **the experts' *testimony*** (T. 1050), which did not fully address the criteria set out in Rule 3.21 l(a)(2).

Dr. Haber's testimony that appellant did not understand the charges against him or why he had a lawyer, that his memory was impaired, that he could barely complete a sentence, and could not identify the "they" who were trying to punish him (T. 1020-21) addressed appellant's inability to "appreciate the charges or allegations" and suggested that he could not "testify relevantly, " "understand the adversary nature of the legal process" or "disclose to counsel fact[s] pertinent to the proceedings at issue, " Fla.R.Crim.P. 3.211(a)(2)(I), (iii), (iv) & (vi), but did not expressly address his ability to understand the possible penalties or to manifest appropriate courtroom behavior, ***id.*** 3.211(a)(2)(ii) & (v). Dr. Garcia's testimony did not address ***any*** of the criteria set out in the rule. He simply expressed the opinion that appellant was "competent," based on his suspicion that appellant was feigning psychosis. (T. 1024, 1025)

Thus, although the experts testified to their ultimate conclusions (a conditional one, in Dr. Garcia's case) and to some of their clinical observations, the trial court did not have before it all of the information that Rule 3.211 requires to be considered before making a finding of competency. The failure to follow these requirements is, independently, reversible error. ***Livingston v. State,*** 415 So. 2d 872, 872-73 (Fla. 2d DCA 1982) (experts failed to address criteria set forth in Rule 3.211); ***Marshall,*** 440 So. 2d at 639 (trial court erred in finding defendant competent when experts indicated they needed further time to evaluate defendant and had not submitted written reports complying with Rule 3.211).[19] The error is particularly egregious in

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written reports. (T. 1050-58)

[19]Unlike the defendant in ***Muhammad v. State,*** 494 So. 2d 969 (Fla. 1986), ***cert. denied,*** 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987), appellant did not refuse to be examined.

this case because the trial judge ultimately relied on Dr. Garcia's testimony that appellant was probably malingering, even though she had refused to permit the additional observation he believed necessary to confirm his suspicions, and even though Dr. Garcia had never submitted a written report addressing the criteria for competency as required by Rule 3.211. See ***Marshall,*** 440 So. 2d at 639

3. The Trial Court's Order

After questioning the corrections officers and hearing brief argument by counsel on the morning of February 3, the judge immediately delivered a lengthy oral order, suggesting that the order had been prepared in advance. (T. 1049-50) Even so, the order is replete with errors which further underscore the inadequacy of the competency determination:

1) The judge stated that neither expert had found appellant to be suffering from a major psychiatric disorder other than depression; that a psychotic break could not be caused by depression itself; and that appellant would have to have a severe psychiatric disorder to have a psychotic break. (T. 1052, 1057)

In fact, Dr. Haber hod testified that she believed appellant "has had a longstanding psychotic problem, " that her prior testing of Mr. Mr. Manso indicated that he had psychotic thought processes,[20] and she had discerned a pattern of violent psychotic episodes resulting from persecutory delusions which was consistent with Mr. Manso's courtroom outburst. (T. 1032-33) She emphasized that she could not rule out psychosis given the family history of schizophrenia and the fact that appellant's mother, who was paranoid schizophrenic, was violent.[21] (T. 1032) Dr. Garcia had acknowledged that

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Moreover, as set forth above, the "deficiencies" in the procedures followed by the trial court "substantially undermined] the sufficiency of evidence supporting competency. " ***Id.*** at 973-74.

[20]Dr. Haber acknowledged that the report for the psychological test she administered to Mr. Manso said that the results could be exaggerated due to Mr. Manso's extremely negative self-image, but stressed that the report concluded that, even taking this into account, he has a severe mental disorder. (T. 1035)

[21]It is now well-established that first-degree relatives of schizophrenic persons are 5 to 10 times more likely to develop schizophrenia than others and that "genetic factors play a major role in the familial transmission of schizophrenia. " 1 Kaplan & Sadock, ***supra,*** at 944-45. Other

depression could be accompanied by psychosis and that a psychotic break could occur in circumstances of extreme stress, even in the absence of an underlying psychotic disorder. (T. 1026-27)

2) The judge also stated that there was no evidence of the defendant's psychiatric history except for the defendant himself and "people he had known since his incarceration. " (T. 1052)

In fact, Mr. Manso's family members testified that he had disclosed to them his psychiatric history, including his hospitalization and electric shock treatments in Cuba. (T. 978, 986, ***989-90) Moreover, they were aware, well before the instant crime, that appellant had been taking their mother's anti-psychotic medication.*** (T. 979, 986, 992)

3) The judge asserted that the only odd behavior appellant's family observed was depression. (T. 1052)

Dr. Haber had testified, however, based on interviews with appellant's family, that "everyone in the family was afraid," based on their observations of both appellant and their mother, that appellant "was like [his] mother" -- a paranoid schizophrenic. (T. 1033) Dr. Haber also stressed that these fears and appellant's own fears had deterred the family from confronting his mental problems. (T. 1033)

4) The judge also stated that appellant's jail records did not contain any signs of psychological problems, other than receiving medication for anxiety and depression. (T. 1055)

In fact, appellant had been on suicide watch, (T. 1012-13, 1028), and was also prescribed the anti-psychotic medication, Trilafon, and benztropine, a medication to control the side effects of anti-psychotic medication, while incarcerated. (T. 1030)

Stating that she was relying on her observations of appellant in court, the judge described at length her opinion that appellant was cold, manipulative and deceitful: (T. 1053-55)

5) The trial judge discounted Dr. Haber's testimony that appellant had a flat affect during the examination, because appellant had shown little emotion throughout the trial. (T. 1053-

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studies indicate an increased liability among relatives of schizophrenics not only for schizophrenia but also for "schizophrenia spectrum, defined as schizotypal or paranoid personality disorder," ***id.*** at 948, and nonschizophrenic psychotic illnesses, including delusional disorder and atypical psychoses, ***id.*** at 949. In addition, mood-disordered (e.g., depressed) patients with a family history of schizophrenia are "more than twice as likely to become psychotic" as other mood-disordered patients . ***Id.***

54) The judge equated this with a lack of remorse, citing appellant's conduct after committing the crimes. (T. 1054-S)

Both Dr. Haber and Dr. Garcia agreed that appellant was depressed. A flat affect is symptomatic of depression and, when more severe, of schizophrenia; "it is not always easy to distinguish schizophrenic and depressive flatness." 1 KAPLAN & SADOCK, ***supra,*** at ***661-62. The trial judge's lay observations were not, therefore, inconsistent with Dr. Haber's conclusions.***

6) The trial judge also stated in her order that appellant had a similar outburst during the suppression hearing, when appellant "jumped out of his seat and ran across the courtroom to attack the prosecutor," and that this indicated that appellant had simply lost his temper. (T. 1054, 1057-58)

In argument during the competency hearing the prosecutor made no reference to a prior attack against her and simply noted that appellant had become "agitated" during the suppression hearing. (T. 1049) The record of the suppression hearing indicates that appellant was admonished for rising from his seat to interject "That is not true" in response to Detective Plasencia's testimony. (S. R. 63-64) There is no indication that appellant attempted to attack the prosecutor. Moreover, there is no indication that the earlier incident was accompanied by incoherent ramblings and suicidal and paranoid statements as was the penalty phase incident.

7) Finally, the judge added that appellant's inability to give his name to Dr. Haber was inconsistent with his having done so to the jail nurse a short time before. (T. 1058)

However, Dr. Haber said only that appellant could not remember his last name, and the corrections officer never specified whether appellant gave his full name or only his first name to the nurse. (T. 1020, 1048)

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The trial court's finding of competency was, therefore, premised not only on inadequate information but also on mischaracterizations of the evidence that was presented at the competency hearing.= Moreover, the errors asserted above were not harmful solely with respect to the trial

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[22]Although appellant resumed the witness stand 24 hours after his violent outburst in court and completed his cross examination, this does not establish that he was fully competent to proceed under ***Dusky, supra.*** In the four pages of appellant's cross-examination, he responded to the prosecutor's questions with "yes" or "no" or other very brief answers, (T. 1061-65) While appellant arguably was capable of testifying relevantly 24 hours after his breakdown, this is only one of the factors to be considered under Rule 3,211(a)(2), and does not establish that

court's finding that appellant was competent to proceed. Rather, the inadequacy of the competency determination infected the entire penalty phase because Dr. Garcia subsequently testified before the jury -- in violation of Rule 3.211(e) -- that appellant had attempted to feign incompetence. As discussed in the following section, this was argued to the jury, and relied on by the trial court, as grounds to reject mental mitigating circumstances. Further evaluation, even if it had ultimately resulted in a finding of competency, could have confirmed that appellant had a psychotic episode, as Dr. Haber testified, and was not malingering during his initial evaluation.[23]

III.

THE STATE IMPROPERLY USED THE COMPETENCY EXAMINATION TO REBUT MENTAL MITIGATION, IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.2 11 (e), THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII, AND XIV.

Once appellant was found competent to proceed, the penalty phase continued, and the defense called Dr. Haber to testify regarding mental mitigating circumstances. Although Dr. Haber did not refer to the competency evaluation in her testimony, the prosecution elicited

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appellant had a "rational, as well as factual, understanding" of the proceedings or that he had the ability to consult with counsel. Fla.R.Crim.P. 3.211(a)(l) & (2). As explained in note 23, *infra,* appellant could have been partially, but not fully, recovered from a brief psychotic episode.

[23]Appellant's behavior, for example, was consistent with a brief reactive psychosis, which is triggered by a psychosocial stressor and to which persons with a preexisting psychopathology such as paranoid personality disorder, which Dr. Garcia diagnosed appellant as having (T. 1123), are particularly vulnerable. KAPLAN & SADOCK, *supra,* at 1029. By definition, the duration of brief reactive psychosis is short, and the patient may begin to return to a baseline level of functioning within a day. Dr. Garcia conceded that it was possible for the severity of the penalty to trigger such a brief psychotic break, even in the absence of an underlying major psychotic disorder. (T. 1027) Given the timing of appellant's breakdown, immediately after asking for the electric chair, this possibility cannot be discounted.

detailed testimony from Dr. Garcia on rebuttal, comprising nearly a quarter of his direct examination, regarding the competency evaluation. (T. 1118-22) The use of the competency examination to rebut mental mitigation was in clear violation of Rule 3.21 l(e) and of appellant's Fifth and Sixth Amendment rights, and it permeated the balancing of aggravating and mitigating circumstances in this case. Notwithstanding Dr. Garcia's earlier acknowledgment that further observation was necessary to confum his "strong suspicion" that appellant was malingering, Dr. Garcia testified unequivocally before the jury that Mr. Manso had attempted deliberately to feign incompetence and had fooled Dr. Haber into believing he had had a psychotic break. This testimony was emphasized in the prosecutor's closing argument, and relied on by the trial court, as grounds to reject the mental mitigating circumstances and to support the CCP aggravating circumstance.

A. Use of the Competency Examination to Rebut Mental Mitigation Violated Florida Rule of Criminal Procedure 3.211(e)

Florida Rule of Criminal Procedure 3.2 11 (e)(1) provides expressly that " [t] he information contained . . , in any report of experts filed under this rule insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed[24] or commitment held pursuant to this rule, ***shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.***" Fla.R.Crim.P. 3.211(e)(l) (emphasis added). A defendant waives this restriction on the use of information obtained during a competency examination only if he "us[es] the report, or portions thereof, in any proceeding for any other purpose," Fla.R.Crim.P. 3.21 l(e)(2). Rule

[24]In this case, the experts' reports were presented orally in testimony at the competency hearing ,

3.2 11 (e) therefore precludes the use of a competency evaluation for any purpose, including the rebuttal of mental mitigation, other than to determine the defendant's competence to stand trial, unless the defendant himself first uses the evaluation for such other purpose.

The trial court's order stated specifically that the examination was to be for competency only.[25] (R. 1126) Because Dr. Haber did not refer in her testimony to the competency examination, to her conclusions based on that examination, or to any information obtained or elicited during the examination or hearing, the defense did not waive the confidentiality provisions of Rule 3.21 l(e)(2).

During Dr. Garcia's direct examination, however, the prosecutor inquired whether he was "aware that there was an incident that occurred yesterday involving the defendant?" and then asked whether Dr. Garcia had examined appellant the previous day and for what purpose. (T. 1 118) Dr. Garcia responded that " [t]here was a question as to whether or not he [appellant] was competent. In other words, the question that this Court was trying to ascertain was is this person acting out, malingering, you know, putting on a show or did he go crazy." (T. 1118) Dr. Garcia explained that he and Dr. Haber had given appellant a mental status exam and reviewed his social history, and Dr. Garcia "concluded that [appellant] was competent and likely malingering. " (T. 1118) In contrast, Dr, Haber had concluded appellant "was likely insane, that he had a psychotic break. " (T. 1119)

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[25]This case is therefore distinguishable from ***Long v. State,*** 610 So. 2d 1268, 1275 (Fla. 1992), ***cert. denied,*** ___ U.S. ___, 114 S.Ct. 104, 126 L.Ed.2d 70 (1993), in which this Court held that the confidentiality provisions of Rule 3.21 l(e) had not been violated by the testimony, to rebut mental mitigation, of an expert who had been appointed to examine the defendant for both competency ***and*** sanity. The expert in ***Long*** also did not, apparently, testify to the substance of his ***competency*** evaluation of the defendant, ***id,*** at 1272, whereas the most damaging portions of Dr. Garcia's testimony were based exclusively on the competency examination.

Dr. Garcia then opined that appellant was "trying to give the appearance of suffering from a psychotic or a major psychiatric disorder," because "[w]hat happened yesterday was rather opportunistic." (T. 1119) Dr. Garcia elaborated on appellant's responses during the competency examination: "He basically did not remember anything according to him. He gave me his first name, but he didn't remember his age, his birth date, his place of birth, last name, [or] social history," but "when questions were asked that would elicit psychopathology, then he was able to respond to those questions." (T. 1120) For example, Dr. Garcia had asked appellant about different types of hallucinations, and appellant "has all of them," which Dr. Garcia thought unlikely. (T. 1122) Dr. Garcia also asked appellant whether he ever feels that he is being levitated, which is not a psychiatric symptom, and appellant responded affirmatively.[26] (T. 1122) Dr. Garcia explained that, in his view, appellant's ability to relate his symptoms and to remember certain aspects of his psychiatric history (that he had been given electric shock in Cuba) while not being able to remember his last name and work history was "self-serving" and inconsistent with the ordinary process of decompensation. (T. 1120-21)

Dr. Garcia's testimony regarding the competency evaluation, including the information he had obtained during it, Dr. Haber's opinion that appellant had had a psychotic break, and Dr. Garcia's contrary conclusion that appellant was feigning psychosis in order to be found incompetent, was in patent violation of Rule 3.21 l(e)(2). The use of the competency evaluation to rebut mental mitigation in violation of Rule 3.211(e)(2) also violated appellant's privilege against self-incrimination and his right to counsel.

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[26]Dr. Garcia previously testified that appellant said he sometimes felt like he was being moved from one place to another; it was not clear from this testimony that appellant subscribed to the "levitation" description. (T. 1023)

B. Use of the Competency Examination to Rebut Mental Mitigation Violated Appellant's Fifth Amendment Privilege Against Self-Incrimination

Rule 3.211 (e), which is substantially similar to Standard 7-4.6 of the American Bar Association's Standards for Criminal Justice,[27] corresponds to the proper scope of the privilege against self-incrimination in the context of a competency evaluation. Unlike an insanity defense or the presentation of mental mitigation, competence to stand trial cannot be waived. See ***Pate*** v. ***Robinson,*** 383 U.S. 375, 384, 86 S.Ct. 836, 841, 15 L.Ed.2d 815 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet intelligently 'waive' his right to have the court determine his capacity to stand trial"). Because proceedings against an incompetent defendant are null and void, ***Thompson v. Crawford, 479 So.*** 2d 169, 186 (Fla. 3d DCA 1985), the duty to ensure the defendant's competence to proceed is not limited to defense counsel; rather, the state may request a competency evaluation, and the trial court must order an examination ***sua sponte,*** if there is reason to believe, at any time before or during the proceedings, that the

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[27] Standard 7-4.6 provides in pertinent part:

> Any information or testimony elicited from the defendant at any hearing or examination on competence or contained in any motion filed by the defendant or any information furnished by the defendant to the court or to any person evaluating or providing mental health or mental retardation services, and any information derived therefrom and any testimony of experts or others based on information elicited from the defendant, should be considered privileged information and should be used only in a proceeding to determine the defendant's competence to stand trial and related treatment or habilitation issues. The defendant may waive use of information contained in a report evaluating competence to stand trial by using the report or parts thereof for any other purpose. The defendant's use of the evaluation report for a purpose other than the determination of competence to stand trial should be considered a waiver of any privilege of nondisclosure, and the prosecutor should be permitted to use the report or any part of the report, subject only to the applicable rules of evidence.

defendant is incompetent, *Drope, 420* U.S. at 181; *Pate, 383* U.S. at 385; *Gibson v. State, 474* So. 2d 1183, 1184 (Fla. 1985); Fla. R. Crim. P. 3.210(b).

Because competence to stand trial cannot be waived, a competency evaluation is involuntary in a way that a compelled examination to rebut insanity or mental mitigation is not. See ABA STANDARDS FOR CRIMINAL JUSTICE (hereinafter "ABA STANDARDS") Standard 7-4.6, Comment (2d ed. 1986) (Standard 7-4.6 "rests on the premise that, because trial of incompetent defendants denies due process of law, courts are obligated to determine defendant competency to ensure the constitutional validity of ensuing criminal proceedings. "); Christopher Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation, 3* 1 EMORY L.J. 71, 89-92 (1982) (because obligation to raise competency is not limited to defense, competency determination is further from accusatorial model than issues of either sanity or mental mitigation).[28] A competency evaluation is therefore more analogous to testimony compelled under a grant of immunity than to a confession obtained in violation of the prophylactic rules of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and is accordingly not admissible against the defendant for any purpose, including rebuttal or impeachment.[29] Gerald

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[28]Professor Slobogin emphasizes that this analysis is not altered if the defense rather than the state or the court requests the competency evaluation, Slobogin, *supra,* at 91.

[29]Indeed, in *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), the Supreme Court noted that, if the defendant had declined to waive his right to remain silent with regard to a broader examination, "the validly ordered competency evaluation nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. " *Id.* at 468. Thus, *Smith* itself suggests that an evaluation of a defendant's competence to stand trial could never be conditioned on, or deemed to be, a waiver of the defendant's Fifth Amendment right to remain silent. Significantly, in *Buchanan v. Kentucky, 483* U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), in which the Court held that a compelled psychological examination could be used to rebut a mental status defense, it went to lengths to clarify that the report used by the prosecution in rebuttal was not from a competency evaluation. *Id.* at 411 n. 11 & 413.

Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 **GEO. WASH. L. REV.** 375, 404 (1985); ABA **STANDARDS,** Standard 7-4.6, Comment, nn. 14 & 15 (citing ***Kastigar v. United States,*** 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) and ***New Jersey v. Portash, 440*** U.S. 450, 91 S.Ct. 643, 28 L.Ed.2d 1 (1979)); Slobogin, ***supra,*** at 94 n.97 (rejecting analogy to ***Harris v. New York,*** 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), because disclosures during a competency evaluation cannot be considered "voluntary"). Thus, Rule 3.211(e) properly protects defendants' Fifth Amendment rights by precluding the use of competency evaluations for ***any*** purpose other than determining competence to stand trial, unless the defense does so first. Slobogin, ***supra,*** at n.98 (citing Fla.R.Crim.P. 3.21 l(e) as "an example of the type of protection required" by the Fifth Amendment). The prosecution's use of appellant's competency evaluation in violation of Rule 3.21 l(e) therefore violated his Fifth Amendment rights as well.

C. **Use of the Competency Examination to Rebut Mental Mitigation Violated Appellant's Sixth Amendment Right to Counsel**

Even if this Court were to find that appellant waived his Fifth Amendment rights by putting his mental status in issue at the penalty phase, "the introduction of psychiatric evidence to support" mental mitigating circumstances "does not waive [the defendant's] Sixth Amendment right to consult with counsel. " ***Holland v. State,*** 636 So. 2d 1289, 1292 (Fla.), ***cert. denied, ___ U.S. ___,*** 115 S.Ct. 351, 130 L.Ed.2d ***306*** (1994); ***accord Powell v. Texas, 492*** U.S. 680, 683, 109 S.Ct. 3146, 3149, 106 L.Ed.2d 551 (1989). "Such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding" and "on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. " *Buchanan,* 483 U.S. at 424. Here, although defense counsel requested the examination

and was obviously informed of it beforehand, he did not have notice that the state would use the evaluation to rebut mental mitigation.[30] To the contrary, counsel was entitled to assume that the uses of the competency examination would be strictly limited as required by Rule 3.211(e).[31] The state's use of the evaluation to rebut mental mitigation, in violation of Rule 3.211(e), was therefore also in violation of appellant's right to counsel.

D. The Improper Use of the Competency Examination Infected the Entire Balancing Process and Denied Appellant a Fundamentally Fair and Reliable Capital Sentencing Proceeding

Although defense counsel failed to object to Dr. Garcia's improper testimony, appellant submits that the improper use of the competency examination so thoroughly permeated both the jury's and the trial court's weighing of aggravating and mitigating circumstances that it undermines the validity of the sentence of death and therefore constitutes fundamental error.[32]

In her closing argument, the prosecutor expressly told the jury that it should reject the statutory mental mitigating circumstances based on Dr. Garcia's testimony about the competency evaluation, which she used to depict appellant as a calculating and manipulative liar and to discredit *all* of Dr. Haber's findings:

> *. . . Yesterday he [appellant] wanted to and he tried to make Dr. Haber believe that he was incompetent.*

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[30]If counsel had been so informed, he could at least have exercised his right to attend the examination. See, e.g., Fla.R.Crim.P. 3.202(d).

[31]This case is therefore distinguishable from *Buchanan* in which the Court reasoned that, because of the Court's decision in *Smith, supra,* defense counsel should have anticipated that the prosecution would use the results of a psychological examination requested jointly by the defense and the state to rebut the defendant's mental status defense. *Buchanan, 483* U.S. at 425.

[32]Appellant also asserts separately below that, in the unique circumstances of this case, defense counsel's failure to object to Dr. Garcia's testimony constitutes ineffective assistance of counsel on the face of the record and therefore should not preclude review of this error on appeal.

> You heard my questions to Dr. Garcia. ***Yesterday after the outburst in the courtroom, the defendant was examined. Dr. Merry Haber found him to be incompetent. Dr. Garcia found him to be competent. What that means is that Dr. Haber was saying based on her observations, he did not have the capacity to testify. He did not have the capacity to even be here.*** We know that isn't true because this afternoon the defendant sat here and answered my questions.
>
> ***Dr. Garcia came in and told you that based on his examination of the defendant, he found the defendant to be something called malingering, meaning that the defendant is making up, distorting his symptoms so as to gain favor.***
>
> . . . .
>
> He [appellant] has the ability to control himself. He has the ability to act properly. ***He is not under the influence of extreme mental or emotional disturbance. He may conform his conduct to the requirements of law when he chooses to.*** He has that capacity.
>
> That's what Dr. Garcia told you and we know that what Dr. Garcia says is true because it has been confirmed before your very eyes. And we know that Dr. Haber has been misled because you've seen it before your very eyes.

(T. 1 140-41)[33]

The trial judge also relied explicitly on the competency examination in her sentencing order. The trial judge reasoned that the experts' disagreement regarding appellant's competency to proceed and appellant's subsequent ability to complete his cross-examination, "shows . . . that the Defendant was able to mislead Dr. Haber and that Dr. Haber had completely mis-diagnosed ***[sic]*** the Defendnat's ***[sic]*** mental condition." (R. 1182) The trial judge therefore rejected entirely the statutory mitigating circumstance that the defendant's ability to conform his conduct to the requirements of law was substantially impaired, (R. 1182-87), and concluded that the evidence did not support the statutory mitigating circumstance that the defendant was under extreme mental or emotional disturbance, although she gave this mitigator "some weight." (R.

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[33]The prosecutor's equation of competency to proceed with the absence of mental mitigation is an independent violation of the Eighth Amendment and Article I, Section 17 of the Florida Constitution.

1180) The trial judge relied in turn on the purported absence of emotional disturbance to find the coldness element of the CCP aggravator. (R. 1172-73)

If the improper evidence is excluded from the sentencing analysis, however, there is substantial record support for the existence of both of the statutory mental mitigating circumstances, Apart from the disagreement over appellant's competency, both Dr. Haber and Dr. Garcia found that appellant suffered from life-long depression, which was at times severe, and that he was paranoid, They disagreed primarily on whether appellant also had a thought disorder or psychosis to which he decompensated in response to stress.

Based on her interviews with appellant's family and examinations of appellant conducted prior to the competency hearing, including the MCMI-III, an objective psychological test, (T. 1076, 1078),[34] Dr. Haber found that appellant suffered from depression, probably of life-long duration, and had features of a dependent and passive/aggressive personality disorder; she also found that appellant had some form of thought disorder -- possibly schizophrenia -- and a delusional disorder to which he decompensates under stress. (T. 1079-80, 1082-83) Dr. Haber testified that appellant is paranoid and thinks people are laughing at him and trying to harm him. (T. 1080) While Dr. Haber could not render a precise diagnosis of appellant's mental condition at the time of the crime, she concluded that, as a result of his depression and delusional thinking,

[34]Dr. Haber noted that appellant's response pattern on the MCMI-III -- his high scores on the disclosure and debasement scales -- indicated that his scores were likely to be somewhat exaggerated because of his tendency to see himself in a negative light, but that even taking this into account, the report indicated that appellant had a severe mental disorder. (T. 1079, 1087)

appellant was under extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of law was substantially impaired.[35] (T. 1083)

This conclusion is, moreover, supported by other evidence in the record: Appellant's confession and the testimony of his family members indicate that he brooded over perceived slights at work that had little or no grounding in reality, building up resentment and anger that was at first internalized in feelings of despair and thoughts of suicide. Appellant reported to family members, prior to the crime, that he felt people at work were ridiculing him behind his back. (T. 994) In his confession, appellant stated that Sanchez was conspiring against him in the workplace, that Sanchez and Moussa had made his life unbearable, and that two days before the crime he had learned that he was about to be fired and believed that Sanchez was responsible. (T. 724) However, none of the victims reported ever having had a disagreement with appellant; nor was any evidence presented that appellant was, in fact, about to be fired. Appellant had been promoted recently to foreman of the night shift. (T. 1092)

Appellant told Dr. Haber he felt worse before the crime than he ever had before and that he struggled to control himself by taking his mother's medication, but the mockery and harassment at work continued until he felt he had to shoot his co-workers and to kill himself. (T. 1075, 1077) In his confession, appellant repeatedly described feeling "anguished" and "tormented" before the crime. (T. 706-08) He was suicidal but also began to consider harming Sanchez and Moussa. (T. 722-25) Appellant stated that he intended to kill himself after shooting at his co-workers but abandoned his plan because the police arrived almost immediately. (T. 721-

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[35]The evidence in this case, and Dr. Haber's testimony, is consistent with descriptions in the forensic psychiatric literature of the relationship between psychotic depression and homicide. See CARL P. MALMQUIST, HOMICIDE: A PSYCHIATRIC PERSPECTIVE 223-50 (1996).

22) While appellant initially denied the crime, he confessed rapidly when confronted with incriminating evidence. He was placed on suicide watch following his arrest. (T. 1012-13, 1028) Similarly, while he initially denied the crimes at trial, appellant ultimately took the stand at the penalty phase, admitted the crimes, told the jury he did not deserve to live, and asked to be executed, noting that his execution would make those who were laughing at him happy.

Apart from his testimony regarding the competency examination, Dr. Garcia's testimony did not substantially rebut the existence of mental mitigating circumstances. While Dr. Garcia believed that appellant's goal-oriented behavior of removing the serial number from his gun and denying the crime was inconsistent with an inability to appreciate the criminality of his acts (T. 1127), such behavior is *not* necessarily inconsistent with substantial impairment of the ability to conform one's conduct to the requirements of law.[36] See § 921.141(6)(f), Fla. Stat. (1993). Dr. Garcia did not disagree that appellant was under extreme emotional disturbance at the time of the crime.[37] (T. 1128)

Consistent with Dr. Haber's findings, Dr. Garcia concluded from his examination of appellant prior to the competency evaluation, that appellant had likely suffered from life-long depression (dysthymia), with periods of superimposed major depression, and from paranoid

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[36]Dr. Garcia also testified that appellant's mental problems would not "compel" him to commit the crimes, (T. 1114-15), but this conflates the test for insanity with the standard for statutory mitigation, which requires only that the defendant's ability "to conform his conduct to the requirements of law was ***substantially impaired.***" §921.141(6)(f), Fla. Stat. (1993) (emphasis added).

[37]In response to defense counsel's question whether appellant had acted under emotional or mental distress, Dr. Garcia acknowledged that appellant was depressed, (T. 1127), but went on to state that (in his opinion) appellant's conduct was inconsistent with schizophrenia, which the courts accept as an "excuse" because the defendant is responding to something internal that has nothing to do with reality. (T. 1127-28) This again conflated the test for insanity with the standard for mental mitigation.

personality disorder. (T. 1112-13, 1123) He testified that appellant is likely to misinterpret events around him and that he tends to feel that people are trying to harm him and make fun of him. (T. 1113-14) Dr. Garcia did not believe that appellant had a psychotic disorder because his responses on the Thematic Appcrception Test ("TAT") were logical, coherent and goal-oriented. (T. 1110) Appellant's responses also reflected, however, his belief that people were laughing at him. (T. 1111) Moreover, "psychotic decompensations . . . can occur in the course of paranoid personality disorder, " which Dr. Garcia diagnosed appellant as having. 1 KAPLAN & SADOCK, *supra*, at 1436. Similarly, severe depression can be accompanied by pcrsecutory delusions (such as the patient's persistent belief that people are conspiring against and ridiculing him), which reinforce the patient's sense of worthlessness or guilt. Id. at 1046, 1137. As noted above, psychotic features are twice as likely to occur in depressed patients with a family history of schizophrenia. Note 21, *supra*.

Dr. Garcia's opinion that appellant was malingering was based almost exclusively on'the competency evaluation. Otherwise, Dr. Garcia testified only that it appeared that appellant "was not doing his best" on some portions of the I.Q. test, (T. 1108-09), and that his performance on the Bender Visual Test was somewhat slow.[38] (T. 1111) Dr. Garcia acknowledged, however, that appellant's lethargic performance was consistent with an underlying depression. (T. 1111)

* * *

The defense presented compelling evidence, consistent with appellant's confession, that he committed this crime under the intensifying pressure of his pcrsecutory delusions. Dr. Garcia agreed that appellant was depressed and paranoid and that this affected his perceptions of reality.

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[38]As discussed in section IV below, the testimony regarding the I.Q. test and the Bender Visual Test exceeded the proper scope of rebuttal and should not have been admitted.

The substantial, uncontroverted evidence of mental mitigation was obscured completely, however, by Dr. Garcia's improper testimony regarding the competency evaluation, which was of dubious reliability given his far more equivocal testimony at the competency hearing and his recommendation that appellant be hospitalized for observation, The prosecutor exploited this testimony in closing argument to portray appellant as a cunning manipulator and to undermine the credibility of all of Dr. Haber's findings. The devastating effect of the improper evidence is apparent from the trial judge's sentencing order, which relies on the competency examination to reject the mental mitigating circumstances and to support the CCP aggravator, resulting in a sentence of death.

IV.

DR. GARCIA'S TESTIMONY EXCEEDED THE PROPER SCOPE OF REBUTTAL IN VIOLATION OF SECTION 92 1,141, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

As noted above, Dr. Garcia's "rebuttal" testimony included his opinions regarding appellant's **I.Q**. and the absence of organic brain damage, notwithstanding that the defense never contended that appellant was of less than average intelligence or that he suffered organic brain damage. Dr. Garcia's testimony therefore exceeded the proper scope of rebuttal and improperly diminished the weight of the mental mitigation that was presented by itemizing for the jury other mental impairments that appellant did *not* suffer.

This Court has made clear that:

> Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist. Furthermore, the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the State nor the defendant

> should be allowed to argue to the jury the existence or the nonexistence of such mitigating circumstance.

Maggard v. State, 399 So. 2d 973, 978 (Fla.), ***cert. denied, 454*** U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d ***598*** (1981); ***accord Geralds v. State,*** 601 So. 2d 1157, 1162 (Fla. 1992); ***Fitzpatrick v. Wainwright,*** 490 So. 2d 938, 939-40 (Fla. 1986). In so holding, this Court recognized that the presentation of evidence to "rebut" mitigating circumstances not submitted by the defense "in effect allow[s] the state to present improper nonstatutory circumstances in aggravation." ***Fitzpatrick,*** 490 So. 2d at 940. That is, by emphasizing the ***absence*** of certain types of mitigation, on which the defense never relied, the prosecution unfairly diminishes the mitigation that ***does*** exist, thereby tilting the scales in favor of death.

The rationale of ***Maggard*** and its progeny applies with equal force to specific categories of mental mitigation. This Court has held expressly that the prosecution may not "rebut" a defendant's insanity defense, based on his asserted schizophrenia and active psychosis, by presenting evidence that the defendant does not suffer from organic brain damage. ***Nowitzke v. State,*** 572 So. 2d 1346, 1355 (Fla. 1990). While ***Nowitzke*** involved guilt-phase error and is premised on basic principles regarding the proper scope of rebuttal evidence, its holding is reinforced by the Eighth Amendment concerns emphasized in ***Maggard, 399 So.*** 2d at 978.

In this case, the defense expert, Dr. Haber, testified that appellant was under extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of law was substantially impaired as a result of his severe depression and paranoid delusions. She never suggested appellant was of less than average intelligence or that he had organic brain damage. Rather, these issues were raised ***and*** refuted by the state on rebuttal. Dr. Garcia testified that he had administered tests to detect organic brain damage and found none. (T. 1111)

More elaborately, he testified that although appellant performed poorly on the I.Q. test (achieving a full-scale IQ of 74, in the borderline range), appellant's level of functioning indicates he is of average intelligence and therefore he must have been malingering,[39] but even if the results were accurate, it would not affect appellant's ability to distinguish right from wrong. (T. 1108-09)

The prosecution therefore improperly bolstered its case by setting up and knocking down straw men, in the form of mitigating factors that were never relied on by the defense. *Cf.* Lane *v. State,* 459 So. 2d 1145, 1146 (Fla. 3d DCA 1984) (prosecution may not raise and rebut issue of alibi); *Bayshore v. State,* 437 So. 2d 198, 199 (Fla. 3d DCA 1983) (same). Such tactics are plainly forbidden by *Maggard* and *Nowitzke*. Although defense counsel failed to object to Dr. Garcia's improper testimony, appellant submits that, particularly when considered together with the improper use of the competency evaluation to rebut mental mitigation, section III, *supra,* the cumulative effect of these errors deprived appellant of a fundamentally fair and reliable sentencing determination.

V.

IN THE UNIQUE CIRCUMSTANCES OF THIS CASE, WHERE TRIAL COUNSEL'S INEFFECTIVENESS IS APPARENT FROM THE RECORD AND COUNSEL WAS SUSPENDED FROM THE FLORIDA BAR THREE DAYS AFTER APPELLANT WAS SENTENCED TO DEATH, APPELLANT WAS DENIED HIS RIGHT TO COUNSEL AND TO A FUNDAMENTALLY FAIR SENTENCING HEARING, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 16 AND 17.

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[39]The reliability of this test is somewhat dubious since Dr. Garcia indicated that, rather than using a Spanish-language version of the test, he personally translated the instructions for appellant and dispensed with the vocabulary portion, which could not be accurately translated, and therefore had to prorate his verbal score. (T. 1107-08)

Although claims of ineffective assistance of counsel are disfavored on direct appeal, this case presents unique circumstances warranting reversal for a new sentencing, because counsel's deficient performance and the resulting prejudice to the defense are apparent from the record on direct appeal, and counsel's subsequent suspension from the Florida Bar, which was imminent throughout appellant's penalty phase trial, further undermines confidence in counsel's constitutional effectiveness.

A. Defense Counsel's Failure to Object to Dr. Garcia's Patently Improper Testimony Constitutes Ineffective Assistance of Counsel on the Face of the Record.

Although Dr. Garcia's testimony regarding the competency evaluation was in clear violation of Rule 3.211(e) and devastating to the defense, counsel failed to object. Appellant submits that this omission fell so clearly below the standards of competent assistance of counsel and was so overwhelmingly prejudicial that it constitutes ineffective assistance of counsel on the face of the record.[40]

To establish that defense counsel was ineffective in violation of the Sixth Amendment right to counsel appellant must show (1) that his attorney's representation was deficient -- *i.e.*, that it "fell below an objective standard of reasonableness," *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), and (2) that counsel's errors were prejudicial -- *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Although ineffective assistance of counsel is generally considered to be a collateral matter, such a claim may be raised on direct

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[40]If this Court disagrees that defense counsel's ineffectiveness is apparent from the face of the record, appellant requests that the finding be without prejudice to his ability to raise the claim in a subsequent motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *See Gregory v. State,* 588 So. 2d 676 (Fla. 3d DCA 1991)

appeal when "the facts giving rise to such a claim are apparent on the face of the record, or conflict of interest or prejudice to the Defendant is shown." *Gordon v. State,* 469 So. 2d 795, 797 (4th DCA), *review denied,* 480 So. 2d 1296 (Fla.1985); *accord Owen v. State,* 560 So. 2d 207, 212 (Fla.), *cert. denied,* 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990); *Stewart v. State,* 420 So. 2d 862, 864 n.4 (Fla.1982), *cert. denied,* 460 U.S. 1103, 103 S.Ct. 802, 76 L.Ed.2d 366 (1983); *Gregory,* 588 So. 2d at 676; *cf. Grubbs v. Singletary,* 900 F. Supp. 425, 427 (M.D. Fla. 1995) (where ineffectiveness of trial counsel is apparent from face of record, appellate counsel has duty to raise issue either on direct appeal or by Rule 3.850 motion).

In this case, both defense counsel's deficient performance and the resulting prejudice to appellant are apparent from the face of the record. The language of Rule 3.211(e) could not be clearer. It plainly prohibits the use of a competency evaluation for *any* purpose other than determining the defendant's competence to stand trial, unless the defendant first uses the report for another purpose. Moreover, as set forth above, the use of the competency evaluation to rebut mental mitigation also violated appellant's Fifth and Sixth Amendment rights. Dr. Haber never mentioned the competency evaluation and therefore did not open the door to rebuttal testimony by Dr. Garcia. Nevertheless, defense counsel failed to object when the prosecutor asked Dr. Garcia about the examination. Instead, Dr. Garcia proceeded unhindered into plainly forbidden territory, explaining to the jury that "[t]here was a question as to whether or not he [appellant] was competent. In other words, the question that this Court was trying to ascertain was is this person acting out, malingering, you know, putting on a show or did he go crazy."[41] (T. 1118)

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[41]This testimony was objectionable for the additional reason that Dr. Garcia suggested to the jury that the trial judge had personally expressed concern that appellant was "putting on a show" and had asked the psychologists to determine if he was faking mental illness.

Defense counsel remained mute as the prosecutor elicited detailed testimony about the evaluation, including Dr. Garcia's opinion that appellant had been feigning psychosis and had successfully duped Dr. Haber into believing he was incompetent. He also failed to object when the prosecutor relied on this testimony in closing argument to persuade the jury to reject all evidence of mental mitigation.[42]

It is therefore "clear from the record that counsel's failure to act resulted in the jury's hearing damaging evidence and rendered his representation 'outside the wide range of professionally competent assistance.'" *Williams v. State,* 515 So. 2d 1042, 1043 (Fla. 3d DCA 1987) (quoting *Washington,* 466 U.S. at 690) (failure to object to inadmissible hearsay).[43] There

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[42]Defense counsel made no effort to repair the damage. On cross-examination, he merely asked whether Dr. Garcia and Dr. Haber had reached different conclusions based on the same information. (T. 1124) He never confronted Dr. Garcia with his own recommendation of the prior day that it would be "prudent" to hospitalize appellant to determine conclusively whether he was malingering; nor did defense counsel re-call Dr. Haber to allow her to explain her own conclusions regarding appellant's competency and why she believed he was *not* malingering.

[43] *See also Chatom v. White,* 858 F.2d 1479, 1486-87 (11th Cir. 1988) (defense counsel's failure to object to lack of predicate for atomic absorption test, which precluded review of issue on direct appeal, "fell below standards of reasonable performance"), *cert. denied,* 489 U.S. 1054, 109 S.Ct. 1316, 103 L.Ed.2d 585 (1989); *State v. Sanders,* 648 So. 2d 1272, 1291-92 (La. 1994) (trial attorney's failure to object to inadmissible hearsay at penalty phase, failure to make closing argument and inadequate preparation at penalty phase constituted ineffective assistance of counsel), *cert. denied,* ___ U.S. ___, 64 USLW 3821 (1996); *Jolly v. State,* 443 S.E.2d 566, 568-69 (S.C. 1994) (failure to object to inadmissible hearsay); *Iron Shell v. State,* 503 N.W.2d 868, 871 (S.D. 1993) (failure to object to *Bruton* violation); *State v. Stacey,* 482 So. 2d 1350, 1351 (Fla. 1985) (failure of trial and appellate counsel to research and raise *ex post facto* violation was ineffective); *People v. Flewellen,* 652 N.E.2d 1316, 1321 (Ill.App. 1995) (failure to object to hearsay); *Vento v. State,* 621 So. 2d 493, 495 (Fla. 4th DCA 1993) (allegation that defense counsel failed to object to prosecutor's improper voir dire and to improper identification presented facially sufficient claim of ineffective assistance of counsel); *Johnson v. State,* 611 So. 2d 88, 89 (Fla. 2d DCA) (allegation that defense counsel failed to object to improper evidence of defendant's prior criminal history was facially sufficient), *review denied,* 621 So. 2d 432 (Fla.1993); *Winn v. State,* 871 S.W.2d 756, 765 (Tex.App. 1993) (failure to preserve error, failure to object to inadmissible evidence, inadequate voir dire, failure to investigate); *Hancock v. State,* 437 S.E.2d 610, 616 (Ga. App. 1993) (Pope, C.J., concurring) (finding claims regarding improper cross

is no conceivable strategic justification for failing to object to "the admission of [such] prejudicial and clearly inadmissible evidence." *Lyons v. McCotter,* 770 F.2d 529, 534 (5th Cir. 1985); *see also United States v. Wolf,* 787 F.2d 1094, 1099 (7th Cir.) (failure to object to prosecutor's improper cross-examination could not have been tactical decision, because policy of never objecting would be "forensic suicide"), *cert. denied,* 474 U.S. 1073, 106 S.Ct. 833, 88 L.Ed.2d 804 (1986). To the contrary, counsel abandoned his client's rights in a manner that "could have no effect *but* to prejudice the outcome of [his client's] sentencing." *Blanco v. Singletary,* 943 F.2d 1477, 1504 & n.129 (11th Cir. 1991) (emphasis added), *cert. denied,* 504 U.S. 943, 112 S.Ct. 2282, 119 L.Ed.2d 207 (1992).

Where, as here, the prejudice is apparent from the face of the record, relief on direct appeal is appropriate. *See State v. Salley,* 601 So. 2d 309, 310 n.1 (Fla. 4th DCA 1992) (if defense counsel's failure to submit written order stating reasons for downward departure from sentencing guidelines was grounds to reverse and remand for sentence within guidelines "we could not think of a clearer case where ineffective assistance of counsel would be so apparent on the face of the record as to give relief on direct appeal rather than in collateral proceedings"); *Gordon v. State,* 469 So. 2d 795, 797-98 (Fla. 4th DCA 1985) (trial counsel's ineffectiveness was grounds for reversal on direct appeal where counsel failed to timely file list of alibi witnesses, resulting

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examination of defendant waived on direct appeal but that relief should be granted because defense counsel's failure to object was ineffective assistance of counsel); *Rhue v. State,* 603 So. 2d 613, 615 (Fla. 2d DCA 1992) (trial counsel's failure to preserve potentially meritorious claims for appellate review can constitute ineffective assistance of counsel); *Hardman v. State,* 584 So. 2d 649, 650 (Fla. 1st DCA 1991) (failure to set forth grounds for motion of judgment of acquittal facially sufficient allegation of ineffective assistance of counsel); *Arencibia v. State,* 539 So. 2d 531, 532 (Fla. 3d DCA 1989) (failure to object to competency of child witness); *Norris v. State,* 525 So. 2d 998, 999 (Fla. 5th DCA 1988) (failure to object to improper testimony); *Martin v. State,* 501 So. 2d 1313, 1315 (Fla. 1st DCA 1987) (failure to object to comments on defendant's silence).

in defense being stricken, failed to remove biased juror, and failed to object to repeated improper questions or comments by the prosecutor), *review denied,* 480 So. 2d 1296 (Fla.1985). As set out in the preceding section, Dr. Garcia's improper testimony regarding the competency evaluation was critical to the prosecution's rebuttal of mental mitigating circumstances; it was used in closing argument to depict appellant as a cunning manipulator, the defense expert as a dupe, and the mental mitigation as a fraud. The jury recommended death by a vote of 10 to 2, and the trial judge relied expressly on the improperly admitted evidence to reject the mental mitigators and to support her finding of the CCP aggravator, resulting in a sentence of death. Absent the improper testimony, however, there was substantial record evidence from which the jury could have found the existence of both statutory mental mitigators, rejected CCP, and returned a recommendation of life. Thus, there is at least a reasonable probability that if not for counsel's errors the outcome of the sentencing proceeding would have been different.

B. In Light of Counsel's Omissions at Trial and His Suspension from the Florida Bar Only Three Days after Appellant Was Sentenced to Death, this Court Should Remand for a New Sentencing Hearing in the Interests of Justice.

This case presents additional, unique, circumstances that militate in favor of granting a new sentencing hearing on grounds of ineffective assistance of counsel. This Court issued an order suspending appellant's trial attorney from the practice of law exactly three days after appellant was sentenced to death. *The Florida Bar v. Carter,* 652 So. 2d 818 (Fla. Mar. 2, 1995) (TFB no. 94-70,977(11M)). A second suspension order in an unrelated matter was entered three

weeks later. *The Florida Bar v. Carter,* 654 So. 2d 920 (Fla. Mar. 27, 1995) (TFB no. 95-90,011) These disciplinary matters were pending throughout appellant's capital murder trial.[44]

In *People v. Williams,* 444 N.E.2d 136 (Ill. 1982), , *cert. denied,* 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984), the Illinois Supreme Court held in a similar case, where the defendant's trial counsel was disbarred during the pendency of the direct appeal, that "the interests of justice" required that the defendant be granted a new trial. The court had originally affirmed Williams' conviction and sentence of death on direct appeal, rejecting his claim of ineffective assistance of counsel. While the petition for rehearing was pending, the Illinois Supreme Court heard the disciplinary case involving Williams' trial counsel and, as a result, reconsidered its prior ruling. *Id.* at 136-37. The court concluded that the disciplinary proceedings, which were pending during Williams' trial, "may well have had an effect on counsel's ability to represent his client in the trial of this capital case" and thus "we can no longer say, with any degree of assurance, that Williams received the effective assistance of counsel guaranteed by the Constitution." *Id.* at 142. In particular, although the court had originally rejected Williams' claims of plain (*i.e.*, fundamental) error, it held that it could no longer assume that counsel's omissions were "professional misjudgments made with full knowledge of the applicable law and the facts." *Id.* at 143.

Appellant submits that the disciplinary proceedings against Mr. Carter, and the prospect of his imminent suspension, may similarly have affected his ability to represent Mr. Manso

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[44]Although a second attorney, Charles Everett, was appointed to assist Mr. Carter, and was apparently present during the trial, the record indicates that his participation was extremely limited. His bill reflects a total of 71.7 hours devoted to both this case *and* the Gutierrez murder trial, of which 52 hours were for attendance in court. (R. 1206) Mr. Everett addressed the court on only one occasion, when he argued the defendant's memorandum in support of a life sentence during the sentencing hearing before the judge. (T. 1175)

effectively at the sentencing proceeding in this case. These unique circumstances, and the independent evidence of ineffective assistance of counsel apparent on the face of the penalty phase record, preclude a finding "with any degree of assurance," that Mr. Manso "received the effective assistance of counsel guaranteed by the Constitution." *Id.* at 142.

VI.

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S ABILITY TO ELICIT TESTIMONY REGARDING HIS FAMILY HISTORY OF MENTAL ILLNESS IN VIOLATION OF THE UNITED STATES CONSTITUTION AMENDMENT VIII AND XIV AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17

Prior to the penalty phase, the state filed a motion in limine to preclude the defense from presenting various types of evidence at sentencing, including "[e]vidence of the character or health of the defendant's family members unless shown to have contributed to the defendant's actions." (R. 1081) The motion was granted, without defense objection. (T. 917) During the penalty phase, defense counsel asked appellant's sister how many times their mother had been hospitalized as a result of her schizophrenia. (T. 975) The prosecution objected that the evidence was "irrelevant" and in violation of the motion in limine, and the objection was sustained, thereby precluding further questions regarding the nature and severity of Mrs. Manso's schizophrenia and the impact of her illness on the family. (T. 975)

This restriction on the presentation of mitigating evidence, which exceeded the order in limine, was in clear violation of the Eighth Amendment. The Supreme Court has held repeatedly that, to ensure the individualized sentencing mandated by the Eighth Amendment, a capital defendant must be permitted to present, and the sentencer to consider, "*any* relevant mitigating evidence." *Hitchcock v. Dugger*, 481 U.S. 393, 394,107 S.Ct. 1821, 1822, 95 L.Ed.2d 347 (1987) (internal quotations omitted) (emphasis added). This includes any "evidence relevant to

the defendant's *background* or character or to the circumstances of the offense that mitigate[s] against imposing the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 318, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989) (emphasis added). Consistent with ordinary understandings of relevance, it is not necessary that a defendant establish a direct causal relationship between the proffered evidence and the commission of the crime, but only that the evidence have some explanatory or mitigating weight with regard to his moral culpability.

This Court has therefore properly rejected restrictive interpretations of relevance in the capital sentencing context, emphasizing that "[m]itigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant." *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock, supra*; *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *and Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)), *cert. denied,* 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). This Court has further noted that "it is well-established" that evidence about the defendant's "family background and personal history" is constitutionally relevant and "must be considered." *Brown,* 526 So. 2d at 908. Evidence about a parent's mental illness and its impact on the defendant and his family is plainly within the realm of constitutionally relevant "family background" evidence. *See Hall v. State*, 541 So. 2d 1125, 1127-28 (Fla. 1989) (nonstatutory mitigation included "substantial evidence" that defendant's mother was insane and that her delusions led her to abuse her children and to reinforce hallucinations that plagued defendant "throughout his life"); *Patten v. State,* 467 So. 2d 975, 977 (Fla. 1985) (mitigating evidence included fact that defendant's mother "had substantial mental problems, which resulted in her commitment" and had abused defendant when he was a child), *cert. denied,* 474 U.S. 876, 106 S.Ct. 198, 88 L.Ed.2d 167 (1985); *Thompson*

v. State, 456 So. 2d 444, 447 (Fla. 1984) (mitigating evidence supporting jury's life recommendation included testimony that defendant's father suffered from mental illness and died in an institution).

In this case, defense counsel was not even allowed to elicit from appellant's sister the number of times their mother had been committed to mental hospitals, although the frequency and circumstances of Mrs. Manso's hospitalizations were relevant to establish the severity of her illness and its impact on appellant and his family. For example, Dr. Haber mentioned during the competency hearing that she had learned from appellant's family that appellant's mother became violent when psychotic, and appellant and his siblings intimated that their mother had been hospitalized both in Cuba and in the United States. Whether appellant's mother had been hospitalized for violent psychotic behavior during the formative years of appellant's childhood would have been highly relevant mitigating evidence, but this line of questioning was foreclosed by the trial court's ruling. Evidence about Mrs. Manso's illness and hospitalizations was also relevant to help the jury understand appellant's fears of being like his mother, which had deterred him from voluntarily seeking psychiatric help, and his siblings' similar fears that appellant was like their mother. Finally, given the strong relationship between a family history of schizophrenia and other forms of psychotic illness, explaining the nature and severity of schizophrenia in appellant's family was relevant to assist the jury in evaluating the experts' testimony regarding appellant's psychological problems.

The trial court's ruling therefore withheld from the sentencing jury constitutionally relevant mitigating evidence in violation of the Eighth Amendment.

VII.

THE TRIAL COURT ERRED IN PERMITTING THE STATE'S REBUTTAL WITNESS TO TESTIFY TO A PREVIOUSLY UNDISCLOSED ORAL STATEMENT BY THE DEFENDANT WITHOUT CONDUCTING A FULL *RICHARDSON* HEARING AND IN DENYING DEFENSE COUNSEL'S SUBSEQUENT MOTION FOR MISTRIAL

Over defense objection, the trial court permitted the state's rebuttal witness, Jorge Sanchez, to testify that appellant had given thanks at church the Sunday after the shooting for not being injured himself. It was undisputed that the prosecution had failed to disclose this statement to the defense, but the trial court concluded erroneously that the prosecution had not committed a discovery violation and therefore never held a full *Richardson*[45] hearing to determine "whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, . . . it [had] on the ability of the defendant to properly prepare for trial." *Richardson,* 246 So. 2d at 775.

When the prosecution sought to elicit appellant's statement from Mr. Sanchez, defense counsel objected immediately that the state had not disclosed the existence or substance of the statement in discovery. (T. 1098) The prosecutor responded that there had been no discovery violation, because the state is not obligated "to disclose every single thing the defendant has said" and further, that the proffered statement was not a confession, and was coming in to rebut appellant's expressions of remorse. (T. 1098-99) The trial judge announced that she would conduct a *Richardson* hearing and asked when the state first decided that it needed the statement for rebuttal. (T. 1099) Although defense counsel pointed out that the prosecution was aware at least since taking Dr. Haber's deposition that appellant would express remorse, the prosecution

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[45]*Richardson v. State,* 246 So. 2d 771 (Fla. 1971).

maintained that they did not know they would need the statement until appellant testified at the penalty phase and further claimed that the disputed statement was not admissible until then. (T. 1099) Despite defense counsel's protestations that he knew "nothing at all" about this statement, the trial judge held there was no discovery violation because "the first time this even became relevant was after [appellant] testified" and terminated the *Richardson* hearing. (T. 1099-1100)

Sanchez then testified that appellant "stood up and said to 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) After Sanchez' testimony, defense counsel asked the court to clarify when the prosecution knew of the statement. (T. 1101) The prosecutor admitted that she had known about the statement but again asserted it was not relevant and admissible until appellant testified. (T. 1101) She also argued that the statement was not incriminating, that Sanchez had been listed as a witness and that defense counsel had an opportunity to depose him. (T. 1101-02) Defense counsel asserted that this was not the proper test and moved for a mistrial, which was denied. (T. 1102)

The trial court's conclusion that there was no discovery violation was manifestly erroneous. Contrary to the prosecutor's assertions, Rule 3.220(b)(1)(C) plainly requires the prosecution to disclose to the defense "the substance of *any* oral statements made by the accused." *Mason v. State,* 654 So. 2d 1225, 1226 (Fla. 2d DCA 1995); *Holmes v. State,* 642 So. 2d 1387, 1388 (Fla. 2d DCA 1994); *Brown v. State,* 640 So. 2d 106, 107 (Fla. 4th DCA 1994); *Blatch v. State,* 495 So. 2d 1203, 1204 (Fla. 4th DCA 1986); *Griffis v. State,* 472 So. 2d 834, 835 (Fla. 1st DCA 1985); *Donahue v. State,* 464 So. 2d 609, 610 (Fla. 4th DCA 1985). There is no exception for statements that the prosecution intends to use for rebuttal or impeachment. *Donahue,* 464 So. 2d at 611; *see also Griffis,* 472 So. 2d at 834. Moreover, failure to disclose

the defendant's statements is not cured by listing the witness who will testify to the statement. *Mason,* 654 So. 2d at 1227; *Brown,* 640 So. 2d at 107; *A.M. v. State,* 593 So. 2d 316, 317 (Fla. 4th DCA 1992); *Blatch,* 495 So. 2d at 1204; *McClellan v. State,* 359 So. 2d 869, 878 (Fla. 1st DCA 1978), *certiorari denied,* 364 So. 2d 892 (Fla.1978).

By inquiring when the prosecutor first realized she needed the statement for rebuttal, the trial court apparently sought to apply, by analogy, the standard that determines the prosecution's obligation to disclose rebuttal witnesses. Even under this standard, however, it is apparent that the prosecution committed a willful discovery violation. The prosecution is required to disclose any rebuttal witnesses it "can reasonably *anticipate*." *Lucas v. State*, 376 So. 2d 1149, 1151 (Fla. 1979) (emphasis added); *accord Pisegna v. State*, 488 So. 2d 624, 625 (Fla. 4th DCA 1986); *Hardison v. State*, 341 So. 2d 270 (Fla. 2d DCA), *cert. denied,* 348 So. 2d 953 (Fla. 1977); *Frazier v. State*, 336 So. 2d 435, 436 (Fla. 1st DCA 1976). The prosecutor did not dispute that she knew before appellant testified that the defense would rely on appellant's remorse as nonstatutory mitigation; she simply maintained that the statement did not become relevant and admissible in rebuttal until appellant testified. By this reasoning, which the trial judge embraced, the state would never be obligated to disclose rebuttal witnesses or evidence until the defense presented its case. As defense counsel correctly noted, this is not the law.

It is apparent from this record that the prosecutor could, and did, reasonably anticipate before appellant testified at the penalty phase that she would use the undisclosed statement in rebuttal.[46] *See Pisegna*, 488 So. 2d at 625 (prosecutor could have reasonably anticipated calling

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[46]Indeed, since appellant expressed remorse for the death of Miguel Roque in his confession to the crime, the state could have anticipated its need for rebuttal testimony well before the penalty phase began.

rebuttal witness because witness was involved in police surveillance relating to case). The trial court therefore erred in concluding there was no discovery violation and in dispensing with the remainder of the *Richardson* hearing. Although the trial court never reached the issue, the prosecutor's handling of another discovery violation during the guilt phase demonstrates the willfulness of the instant violation. In the first incident, the prosecutor promptly informed the defense, *before* appellant testified, of a recently discovered rebuttal witness and the substance of the oral statement by appellant to which he would testify. (T. 632-34) With regard to the second violation, the prosecutor acknowledged that she had known of the statement all along. Moreover, she made no attempt to disclose its existence, even after appellant testified, seeking instead to surprise the defense by eliciting the statement from Sanchez on rebuttal.

Pursuant to *State v. Schopp*, 653 So. 2d 1016 (Fla. 1995), the state must establish beyond a reasonable doubt that the defense was not procedurally prejudiced by the violation, and "if the record is insufficient for the appellate court to determine that the defense was not prejudiced by the discovery violation, the State has not met its burden and the error must be considered harmful." *Id.* at 1020; *accord McArthur v. State,* 671 So. 2d 867, 870 (Fla. 4th DCA 1996) (finding state's discovery violation harmful); *Tarrant v. State,* 668 So. 2d 223, 226 (Fla. 4th DCA 1996) (same); *Sears v. State,* 656 So. 2d 595, 596 (Fla. 1st DCA 1995) (same); *Mason,* 654 So. 2d at 1227 (same). The state made no attempt below to establish that the defense was not procedurally prejudiced. The prosecutor's assertion that the statement was not "incriminating" is disingenuous. The prosecution obviously considered appellant's exculpatory statement to his church congregation to be damning rebuttal evidence and the trial court relied on it to reject remorse as a nonstatutory mitigating circumstance. (R. 1190) Where, as here, the prosecution withholds rebuttal evidence until after the defense has presented its case, the procedural prejudice

to the defense is most severe, precisely because it cannot be remedied effectively. *See McArthur,* 671 So. 2d at 870 (prosecution first disclosed evidence contradicting defense theory after defense had made opening argument and built entire case around lab report contradicted by new evidence).[47]

VIII.

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO DEFENSE COUNSEL'S ARGUMENT REGARDING ALTERNATIVES TO THE DEATH PENALTY IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17.

During his closing, defense counsel attempted to argue that appellant could "receive more than life in prison" and would "never see the outside again." (T. 1151) The prosecutor objected, and the trial court at first sustained, then overruled, the objection. (T. 1151) As defense counsel resumed his argument, attempting to explain that, "[b]ecause of the way that he can be sentenced," the jury should not be "afraid" that appellant would be "coming out," the prosecutor again objected, and the objection was sustained. (T. 1151-52) Defense counsel concluded his argument immediately thereafter. (T. 1152)

At the subsequent sentencing hearing before the judge, the prosecutor, in addition to urging the court to follow the jury's recommendation of death, "implore[d]" the trial court "to give the defendant consecutive life sentences for these other attempted first degree murders based upon the fact that the capital conviction is not scored." (T. 1174) The trial judge complied with this request and, in addition to sentencing appellant to death for the murder of Miguel Roque,

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[47]The trial court essentially recognized as much when it emphasized that the earlier discovery violation did not procedurally prejudice the defense in part because the statement was disclosed before appellant testified. (T. 827)

imposed four consecutive life sentences for the four counts of attempted first degree murder. (R. 1194, 1200)

The eighth amendment "requires provision of 'accurate sentencing information,'" including the alternatives to the death penalty, "as 'an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons v. South Carolina,* ___ U.S. ___, 114 S.Ct. 2187, 2198, 129 L.Ed.2d 133 (1994) (Souter, J., joined by Stevens, J., concurring) (quoting *Gregg v. Georgia,* 428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976)). This Court has therefore properly recognized that the length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that defense counsel must be permitted to argue to the jury.[48] *Jones v. State,* 569 So. 2d 1234, 1239-40 (Fla. 1990) (defense counsel should have been allowed to argue defendant could receive consecutive life sentences and minimum mandatory sentences for double homicide); *accord Turner v. State,* 645 So. 2d 444, 448 (Fla. 1994) (jury's life recommendation could properly have been based in part on fact that alternative to death sentences would have been two life sentences with combined minimum mandatory of 50 years).

Consistent with these principles, defense counsel attempted to explain to the jury that, in addition to a life sentence with a 25-year minimum mandatory sentence for the murder, the trial court could impose consecutive life sentences for appellant's attempted first degree murder convictions. In so doing, defense counsel sought specifically to respond to jurors' concern that

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[48]Although such information may not "relate specifically to [the defendant's] culpability for the crime he committed," it nevertheless is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina,* 476 U.S. 1, 4-5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (quoting *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978))

appellant should be incapacitated permanently[49] -- a concern that was likely heightened by the double-edged nature of the mental mitigation presented in this case.[50] Moreover, defense counsel correctly anticipated that the prosecution would seek, and the trial judge would impose, consecutive life sentences for the other convictions. Because a guidelines life sentence is a true life sentence without possibility of parole, defense counsel's attempted argument that appellant, if so sentenced, would never be released was accurate.[51] *See Stewart v. State,* 549 So. 2d 171, 175 (Fla. 1989), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3294, 118 L.Ed.2d 313 (1990); *Dolan v. State,* 618 So. 2d 271, 272 (Fla. 2d DCA), *review denied,* 626 So. 2d 204 (Fla. 1993); *Gresham v. State,* 506 So. 2d 41 (Fla. 2d DCA), *cause dismissed,* 509 So. 2d 1117 (Fla. 1987).

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[49]The importance of incapacitation to capital jurors has been well documented. *See, e.g., Simmons,* 114 S.Ct. at 2191 (noting that 75 percent of respondents in South Carolina study indicated that length of time defendant "actually would have to spend in prison would be an 'extremely important' or 'very important' factor in choosing between life and death."); William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 L. & SOC. REV. 157, 169-70 (1993); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 CORNELL L. REV. 1, 7-8 (1993); J. Mark Lane, *"Is there Life without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence,* 26 LOY. L.A. L. REV. 327 (1993); William W. Hood III, Note, *The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing,* 75 VA. L. REV. 1605, 1620-25 (1989); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty,* 18 COLUM. HUM. RTS. L. REV. 211, 221-25 (1987); *cf. Waterhouse v. State,* 596 So. 2d 1008, 1015 (Fla. 1992) (jury inquired on resentencing whether time defendant had already served would be credited against his minimum mandatory); *Downs v. State,* 572 So. 2d 895, 900-01 (Fla. 1990) (same).

[50]In her effort to explain the relationship between appellant's mental illness and the homicide, Dr. Haber testified that appellant was paranoid and that "these are most dangerous mentally ill persons because they believe they are right and others are wrong." (T. 1080)

[51]Because of his first degree murder conviction, appellant also would not be eligible for control release. § 947.146(3)(I), Fla. Stat. (1993 & Supp. 1994).

Although this Court held in *Marquard v. State,* 641 So. 2d 54, 57 (Fla. 1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995),[52] that it was not error to prevent defense counsel from arguing to the jury that the defendant could be given lengthy sentences for his noncapital convictions, appellant submits that *Marquard* is irreconcilable with *Jones, supra,* and should be reconsidered.[53]

The New Mexico Supreme Court has held, for example, that "fundamental fairness, due process and eighth amendment rationales" require that a capital defendant be permitted to inform the sentencing jury of the sentences for his noncapital convictions, to ensure that the jury understands the alternative to the death penalty. *State v. Henderson,* 789 P.2d 603, 606-07 (N.M. 1990). The court emphasized the mitigating nature of this information, observing that, if the jury had been informed that Henderson would serve consecutive terms totaling 55 years before being eligible for parole, it would have "been more likely to impose a life sentence instead of a death sentence." *Id.* at 607.[54] This Court's decision in *Jones* is premised on precisely the same rationale

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[52]*See also Campbell v. State,* 21 Fla. L. Weekly S287, S288 (Fla. June 27, 1996) (no argument or instructions required regarding sentences for noncapital crimes); *Gorby v. State,* 630 So. 2d 544, 548 (Fla. 1993) (no instruction required), *cert. denied,* ___ U.S. ___, 115 S.Ct. 99, ___ L.Ed.2d ___ (1994); *Nixon v. State,* 572 So. 2d 1336, 1345 (Fla. 1990), *cert. denied,* 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991) (no instruction required).

[53]Moreover, while *Marquard* purports to follow *Nixon, supra,* this Court held in *Nixon* only that the defendant was not entitled to an *instruction* on the potential sentences for his noncapital convictions and noted specifically that counsel had been permitted to *argue* this point to the jury. *Nixon,* 572 So. 2d at 1345.

[54]The court also held that, although it was preferable for the defendant to be sentenced for the other convictions prior to the penalty phase, the refusal to do so would not be reversible error "*if* the jury is instructed on the range of sentences available and if the jury is allowed to consider that range as a mitigating circumstance." *Henderson,* 789 P.2d at 607. In *Clark v. Tansy,* 882 P.2d 527, 534 (N.M. 1994), the court receded from the latter holding and held that trial courts must, upon a defendant's request, impose sentence for noncapital convictions prior to jury deliberations on the death penalty.

as *Henderson*, and there is no logical reason to allow a defendant in a multiple homicide case to argue the possibility of consecutive sentences while precluding such argument when the defendant has been convicted, in the same case, before the same jury, of other serious but nonfatal felonies.[55]

IX.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17.

The trial court improperly rejected both of the statutory mental mitigating circumstances and erroneously found both the CCP and "great risk" aggravating circumstances. Moreover, although the sentencing order is lengthy and purports to be a detailed analysis of the evidence presented at trial, it contains numerous factual, as well as legal, errors which substantially undermine the reliability of the ultimate sentencing decision.

A. The Trial Court Erred in Giving Little Weight to the Extreme Emotional Disturbance Statutory Mitigating Circumstance

There was substantial uncontroverted evidence presented at trial that appellant suffers from depression and paranoia and that prior to the Aircraft Modular Shooting, he became convinced, without any apparent basis in reality, that his co-workers were ridiculing him and laughing at him

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[55]This underscores the flaw in *Nixon*'s interpretation of Rule 3.390(a). In *Nixon*, this Court noted that Rule 3.390(a) "has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment" and thus precludes instructions regarding sentences for "offenses in which the jury plays no role in sentencing." 572 So. 2d at 1345. The plain language of Rule 3.390(a) provides, however, that "*[e]xcept in capital cases*, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial." Thus, Rule 3.390(a), by its terms, does not preclude instructing the jury at the penalty phase in a capital case on the possible penalties for *all* convictions.

behind his back and that Sanchez and Moussa were conspiring against him and planning to fire him. Moreover, appellant described in his confession feeling anguished, tormented and suicidal in the period immediately preceding the crime.

The trial court nevertheless concluded that the extreme disturbance statutory mitigating circumstance was not supported by the evidence and gave it only "some weight." (R. 1180) "A trial court may reject a defendant's claim that a mitigating circumstance has been proved" only when "the record contains competent substantial evidence to support the trial court's rejection of these mitigating circumstances." *Nibert v. State,* 574 So. 2d 1059, 1062 (Fla. 1990). Even apart from the court's improper consideration of the competency examination, *see* section III, *supra,* which infected the court's evaluation of all of the mental mitigation, the legal and factual errors in the judge's evaluation of this mitigating circumstance demonstrate that her decision to give it little weight was *not* supported by competent substantial evidence and was an abuse of discretion.

1. The Grounds on which the Trial Court Relied in Rejecting the Defense Evidence are Contradicted by the Record.

First, virtually all of the grounds on which the trial court relied in rejecting Dr. Haber's testimony are contradicted by the record:[56]

a) The trial judge discredited Dr. Haber's test results based on her erroneous belief that Dr. Haber had conceded appellant was not "trying very well." (R. 1177)

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[56]The trial court made similar errors with respect to the testimony of the lay witnesses. The court suggested that appellant's "allegations" of abuse in the Cuban military were recently fabricated, stating that "he never mentioned any mistreatment by the military" to his family. (R. 1175) However, both Marta and Ricardo Manso testified that appellant had told family members about being abused in the military. (T. 979, 985-86, 989-90) The trial court also expressed skepticism that appellant could have been taking his mother's medication for fifteen years without anyone becoming alarmed. (R. 1176) Appellant's family was alarmed, but was afraid to confront the possible reality that appellant was, like their mother, seriously mentally ill. (T. 986, 1081-82)

Dr. Haber did not testify that appellant did not appear to be trying very hard on the tests she administered. Rather, *Dr. Garcia* testified that appellant did not seem to be trying his best on the WAIS IQ test and the Bender Visual Test.[57] (T. 1109, 1101) The trial judge therefore erroneously discounted Dr. Haber's testimony.

b) The trial judge erroneously stated that the results of Dr. Haber's testing were unreliable because appellant appeared to be exaggerating his symptoms and that Dr. Haber had acknowledged that appellant "was not being totally honest in his presentations." (R. 1177)

Dr. Haber explained that appellant's response pattern was taken into account in interpreting the test results. (T. 1079) She also made clear that appellant's elevated score on the debasement scale was *not* a reflection of dishonesty or a deliberate attempt to look bad but a reflection of appellant's extremely negative self-image, which is consistent with depression. (T. 1087)

c) The trial judge stated erroneously that Dr. Haber's tests measured only appellant's present mental state and that Dr. Haber had admitted that appellant's depression and inner turmoil could simply be the result of his incarceration and the serious penalties he is facing. (T. 1177)

The trial judge's assertion is premised on a misunderstanding of the distinction between Axis One and Axis Two diagnoses.[58] As Dr. Haber explained, Axis One contains mental disorders, which may vary in severity over time, while Axis Two contains only personality disorders, which are considered to establish permanent patterns of behavior. (T. 1078-79, 1089) While Dr. Haber quite logically acknowledged that a test administered in 1995 could not definitively establish the patient's mental state 18 months earlier, she expressly disagreed with

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[57]Dr. Garcia also acknowledged that appellant's lethargic performance was also consistent with depression. (T. 1101)

[58]This refers to the American Psychiatric Association's classification of disorders for diagnostic and treatment purposes. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 25-27 (4th ed.1994).

the prosecutor's suggestion that only the Axis Two diagnosis could properly be considered in assessing a patient's past mental state.[59] (T. 1088-89) For example, Dr. Haber concluded that appellant had a delusional disorder -- an Axis One mental disorder, (T. 1079), and noted that there was specific evidence that appellant suffered from this disorder at the time of the crime -- that he believed that people in his workplace were mocking and ridiculing him. (T. 1075, 1079, 1083-84) Similarly, although appellant's depression at the time of sentencing was exacerbated by his incarceration and the prospect of the death penalty, (T. 1088), it was undisputed that appellant's depression was of life-long duration and had been severe "throughout periods of his life." (T. 1082, 1123)

2. The Trial Court Improperly Applied the Standard for Insanity in Evaluating this Mitigating Circumstance

Although the trial court purported to recognize that this mitigating circumstance does not require a showing of mental or emotional disturbance rising to the level of insanity, she nevertheless found it inapplicable because appellant's mental problems did not "compel" him to commit the crimes and because appellant did not appear to be "in a fit of rage prior to the shooting." (R. 1179-80)

The trial court acknowledged that Dr. Garcia, like Dr. Haber, found that appellant suffered from depression and paranoia, and that his paranoid personality disorder caused appellant to misinterpret reality. (R. 1178) However, the court attached little or no mitigating significance to this testimony because Dr. Garcia had also stated that appellant's paranoid personality disorder

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[59]The trial judge's assertion that Dr. Haber had stated on cross-examination that appellant *only* had a personality disorder, "as opposed to a mental illness," (R. 1177), is based on the same confusion regarding Axis One and Axis Two disorders. Both Dr. Haber and Dr. Garcia testified unequivocally that appellant suffered from depression, which -- as Dr. Garcia explained -- is not a personality disorder. (T. 111-12)

would not "compel" appellant to commit crimes, and that appellant "clearly knew right from wrong." (R. 1178) These standards, however, relate to sanity and are not a proper basis on which to reject evidence of mental mitigation.[60] *See, e.g., Morgan v. State,* 639 So. 2d 6, 13 (Fla. 1994); *Campbell v. State,* 571 So. 2d 415, 418-19 (Fla. 1990); *Mines v. State,* 390 So. 2d 332, 335, 337 (Fla. 1980), *cert. denied,* 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 1308 (1981). Dr. Garcia never expressly stated that this statutory mitigating circumstance was not applicable.

Similarly, although the judge concluded that "it is reasonable to believe that the Defendant was depressed and under stress" at the time of the shooting, she found "that this stress and depression do not rise to the level of a severe mental or emotional disturbance." (R. 1179) As support for her conclusion, the trial judge recited the standard that extreme mental or emotional disturbance is "less than insanity but more than the emotions of an average man, however inflamed." (R. 1179) (citing *State v. Dixon,* 283 So. 2d 1, 10 (Fla. 1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974)). She reasoned that appellant did not satisfy this standard because "[t]here was no evidence presented that the Defendant . . . just 'went nuts' in a fit of rage prior to the shooting." (R. 1180)

Dixon's reference to "inflamed" emotions was not intended, however, to limit this mitigator to fits of rage, to the exclusion of other forms of mental or emotional disturbance. To the contrary, this Court has held expressly that it applies where the defendant was "not in a heightened rage" at the time of the crime but was nevertheless extremely disturbed as a result of delusional or obsessive thinking. *Klocok v. State,* 589 So. 2d 219, 221-22 (Fla. 1991) (defendant

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[60]The Eighth Amendment prohibits a capital sentencer from refusing to consider mitigating evidence on the ground that it does not "support a legal excuse from criminal liability." *Eddings v. Oklahoma,* 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1980).

suffering from bipolar disorder with paranoid features plotted retaliation against estranged wife); *see also Spencer v. State,* 645 So. 2d 377, 385 (Fla. 1994) (trial court improperly refused to find mental mitigators where uncontroverted evidence established defendant with paranoid personality disorder believed his estranged wife was trying to steal business).

3. The Trial Court Failed to Consider Relevant, Uncontroverted Evidence in Support of this Mitigating Circumstance

The trial court also made no reference at all to appellant's confession, in which he repeatedly described feeling suicidal, anguished and tormented in the period leading up to the crime; nor did she mention appellant's erroneous belief that he was about to be fired, which had triggered the shooting. To the contrary, the judge asserted that appellant was merely resentful of his co-workers and, finding that appellant's "frustrations" were objectively unreasonable, concluded that "the emotions and frustrations the Defendant felt were no greater than that of many Americans." (R. 1180) The unreasonableness of appellant's frustrations and beliefs, however, underscores rather than contradicts the degree of his mental disturbance and supports the experts' testimony that appellant's paranoid and delusional thinking warped his perceptions of reality.

B. The Trial Court Erred in Rejecting the Substantial Impairment Statutory Mitigating Circumstance

As discussed in section III, *supra,* the trial court relied primarily on the improper evidence regarding the competency examination to reject this mitigating circumstance. (R. 1182-83, 1186-87) In addition, the sentencing order again contains errors that demonstrate 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.

First, the trial judge stated that Dr. Garcia found appellant fully able both to "appreciate the criminality of his actions" *and* to "conform his conduct to the requirements of the law" at the

time of the shooting. (R. 1183, 1186) Dr. Garcia did not expressly testify, however, that appellant's ability to conform his conduct to the requirements of law was *not* "substantially impaired." (T. 1127) Rather, he testified that appellant's psychological problems would not "compel" him to commit the crime -- a standard significantly higher than the statute imposes or the Eighth Amendment allows. (T. 1114)

The trial court also emphasized Dr. Garcia's testimony that appellant did not have schizophrenia. (R. 1181-82) Dr. Haber, however, had simply testified that her testing indicated appellant *could* have schizophrenia, and she could not rule this out based on the family history of schizophrenia and Mr. Manso's symptomology. (T. 1079, 1083) Thus, contrary to the court's intimation, there was not a substantial disagreement between Dr. Garcia and Dr. Haber on this issue.[61]

Finally, the trial judge asserted that appellant's siblings had never observed him to act strangely or violently. (R. 1184) In fact, they described him as "loose in the mind," (T. 993), "just wasn't all there," (T. 978), and "definitely" having "mental problems," (T. 989).[62] Orlando also testified that appellant believed people at work were laughing at him behind his back. (T. 994) And Dr. Haber testified that appellant's family feared that he was, like his mother, seriously mentally ill. (T. 1082; R. 1184)

As set out in section III, *supra,* the uncontradicted evidence was sufficient to establish that appellant's ability to conform his conduct to the requirements of law was substantially impaired

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[61]The trial judge also reiterated her earlier, erroneous statement that Dr. *Haber* believed appellant had deliberately performed poorly on the tests she administered. (R. 1186)

[62] While perhaps not artful, these attempts to describe appellant's peculiarities are just as precise, for example, as Dr.Garcia's observation that "[l]ay people,"including family members, would "tend to see" schizophrenics "as . . . peculiar, unusual." (T. 1117)

by his depression, paranoia, and persecutory delusions. The trial court therefore improperly rejected this mitigating circumstance.

C. The Trial Court Erred in Finding That the Murder Was Committed in a Cold, Calculated and Premeditated Manner

The trial judge found and gave "substantial weight" to the CCP aggravating circumstance, expressly basing her conclusion that the killing was "cold" on her rejection of the extreme mental or emotional disturbance mitigating circumstance. (R. 1172-73)

As the trial judge noted, this Court has defined the "coldness" element of CCP as a killing that is "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994) (citing *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla.1992)). As the trial court implicitly recognized, the presence of substantial mental mitigation will negate the "coldness" element of CCP. *See, e.g., Spencer,* 645 So. 2d at 384 (homicide not "cold" despite evidence of planning where defendant paranoid and emotionally unstable under stress); *Cannady v. State,* 620 So. 2d 165, 170 (Fla. 1993) (homicide not "cold" despite evidence of planning where defendant convinced victim had raped his wife and experienced mounting distress over two-month period); *Maulden v. State,* 617 So. 2d 298, 303 (Fla. 1993) (homicides not "cold" despite evidence of heightened premeditation where defendant experienced deepening depression, exacerbated by chronic schizophrenia, in period prior to killings).

For the reasons stated in section IX.A., *supra*, the trial judge erred in rejecting or giving little weight to substantial, uncontroverted evidence establishing both of the statutory mental mitigating circumstances and therefore erred as well in finding the "coldness" element of CCP, which was premised solely on her rejection of the mental mitigation. In particular, the evidence

of appellant's intensifying persecutory delusions and his explanation to the police that he became suicidal because of his erroneous belief that he was about to be fired at Sanchez' instigation, are utterly inconsistent with the trial court's conclusion that this homicide was "cold." *See Spencer,* 645 So. 2d at 384.

D. The Trial Court Erred in Finding That Appellant Knowingly Created a Great Risk of Death to Many Persons

In her sentencing order, the trial judge gave "great weight" to the aggravating circumstance that "[t]he defendant knowingly created a great risk of death to many people," § 921.141(5)(c), Fla. Stat., finding that appellant's actions created a great risk of death to *all* of the occupants of the Bronco. (R. 1169-70) In addition to emphasizing that Cruz and Zamora "were critically injured" in the shooting, the trial court found that "Moussa very easily could have been shot and could have died," and that "George Sanchez also could have been seriously injured or killed in the melee." (R. 1169) Appellant submits that this aggravating circumstance is not supported by the evidence in this case.

This Court has emphasized that the great risk aggravator is narrowly drawn and incorporates two significant limitations: First, it is limited to "many" people, which this Court has found to mean at least three people in addition to the victim of the homicide. *Bello v. State,* 547 So. 2d 914, 917 (Fla. 1989); *Lucas v. State,* 490 So. 2d 943, 946 (Fla.1986). Second, "'[g]reat risk' . . . means more than a mere possibility; it means a likelihood or high probability of death to many people." *Jackson v. State,* 599 So. 2d 103, 109 (Fla.), *cert. denied,* 5-6 U.S. 1004, 113 S.Ct. 612, 121 L.Ed.2d 546 (1992); *accord King v. State,* 514 So. 2d 354, 360 (Fla. 1987), *cert. denied,* 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 947 (1988); *Kampff v. State,* 371 So. 2d 1007, 1009 (Fla.1979). The risk to others must therefore be "immediate and present,"

Williams v. State, 574 So. 2d 136, 138 (Fla. 1991), and not based on "what *might* have occurred," *White v. State*, 403 So. 2d 331, 337 (Fla.1981) (emphasis added), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983).

In this case, appellant first shot at Cruz and Zamora, aiming specifically at each of them with the intent to wound. When appellant fired at Cruz and Zamora, Moussa and Roque were still in the truck, and Sanchez, whom appellant thought was Roque, was behind the Bronco. The shots fired at Cruz and Zamora therefore endangered only the intended victims of those shots. *See White,* 403 So. 2d at 337 (discrete gunshot blasts, fired individually at six victims, did not endanger those other than the intended victim); *accord Francois v. State,* 407 So. 2d 885, 891 (Fla. 1981) (same), *cert. denied,* 458 U.S. 1122, 102 S.Ct. 351, 73 L.Ed.2d 1384 (1982); *see also Williams,* 574 So. 2d at 138 (aggravator not supported by evidence where appellant intended to kill only bank guard and did not shoot indiscriminately at customers).

While appellant then fired three shots into the Bronco, there was only one person in the car other than the victim of the homicide, which does not constitute "many" people. Moreover, appellant never actually shot at Sanchez, who had taken cover behind the Bronco, because appellant mistook Sanchez for Roque, whom he did not intend to injure. Sanchez was therefore never in "immediate and present" danger. *Hallman,* 560 So. 2d at 226 (aggravator not supported by evidence where seven persons in bank took cover behind partitions and were not in line of fire); *Bello,* 547 So. 2d at 917 (persons not in line of fire were not at risk).

Consequently, even if all five shots are considered together, only a total of three persons, other than Roque, were placed in present and immediate risk of death because Sanchez was never in the line of fire. The trial court's speculation that "Sanchez also *could* have been seriously injured or killed in the melee," (R. 1169), is insufficient to support this aggravating circumstance.

White, 403 So. 2d at 337. This case is therefore indistinguishable from *Bello*, 547 So. 2d at 917, in which this Court *sua sponte* questioned the sufficiency of the evidence to support the great risk aggravator and concluded that it did not apply because the defendant's conduct created a high probability of death to at most only three people other than the victim, because the other people considered by the trial court to be in danger were not in the line of fire.

X.

THE TRIAL COURT IMPROPERLY RELIED ON THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS IN SENTENCING APPELLANT TO DEATH IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17.

In her sentencing order, in support of her decision to give little weight in mitigation to evidence of appellant's emotional or mentally disturbance, the trial judge asserted: "What is clear, is that the Defendant, as Dr. Merry Haber stated, is a very dangerous man." After reading her sentencing order in open court, the trial judge expressed sympathy for both families and stated "I hope this sentence does, in fact, protect the community and insure the fact that Mr. Manso does not murder again." (T. 1223)

This Court has admonished expressly that "the probability of recurring violent acts by the defendant if he is released on parole in the distant future" is not a proper aggravating circumstance in Florida. *Miller v. State,* 373 So. 2d 882, 886 (Fla. 1979); *Huckaby v. State,* 343 So. 2d 29, 33 (Fla.), *cert. denied,* 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977); *see also Norris v. State,* 429 So. 2d 688, 690 (Fla. 1983) (trial judge improperly considered possibility of parole in overriding jury's life recommendation); *White,* 403 So. 2d at 337 ("[t]he attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance"); *Barclay v. State,* 470

So. 2d 691, 694-95 (Fla. 1985) (same). Moreover, *Miller* makes clear that transforming mitigating evidence regarding a defendant's mental illness or "uncontrolled emotional state of mind" into an aggravating factor violates both the legislative purpose of Florida's capital sentencing statute and the Eighth Amendment. *Miller,* 373 So. 2d at 886.[63]

In this case, Dr. Haber attempted to explain *how* appellant's mental illness affected his behavior, emphasizing that appellant is paranoid and believes others are persecuting and trying to harm him. Because of his persecutory delusions, Dr. Haber explained, appellant may strike out at those he believes are threatening him -- which makes him "dangerous" but also establishes that he is emotionally and mentally disturbed. (T. 1080) Dr. Garcia also testified that appellant's paranoia leads him to misinterpret the world and to perceive threats and persecution where none exist. Appellant's statements to the police similarly reflected that his state of mind at the time of the shooting was "anguished" and "tormented" -- as a result of his belief that Sanchez and Moussa were attempting to fire him -- a belief that had no apparent grounding in reality.

The trial judge focused solely on the remark that appellant was "dangerous," which she used to *reject* the mitigating effect of the expert's testimony. This is precisely what *Miller* forbids. Moreover, although the trial judge did not expressly list "future dangerousness" as a separate aggravating circumstance, it is apparent from both the sentencing order and her remarks upon passing sentence that she improperly considered appellant's dangerousness as a factor in support of imposing the death penalty.

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[63]*See also Zant v. Stephens,* 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983) (state may not attach "'aggravating' label to factors . . . that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness") (citing *Miller*).

XI.

THE JURY WAS MISLED AS TO THE SIGNIFICANCE OF ITS VERDICT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AS HELD IN *CALDWELL V. MISSISSIPPI* AND THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17.

At the beginning of the penalty phase, the trial judge instructed the jury, pursuant to the standard penalty phase instructions:

> Ladies and gentlemen of the jury, you have found the defendant guilty of first degree murder. The punishment for this crime is death or life imprisonment without the possibility of parole for 25 years. *The final decision as to what punishment shall be imposed rests solely with the judge of the court which is me.*

(T. 926; R.) At the conclusion of the penalty phase the trial judge similarly instructed the jury:

> *As you have been told, the final decision as to what punishment should be imposed is the responsibility of the Judge*; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(T. 1152; R.) The standard instruction is an inaccurate and misleading characterization of Florida law, because nothing in the ordinary meaning of the words "advisory" or "recommendation" suggests that the advice or recommendation in question *must* be given "great weight." Rather, the common and ordinary meaning of these words would lead jurors to believe that, although the trial judge *may consider* their "advice" or "recommendation," the judge is free to disregard it. The trial judge, however, is not free to disregard the jury's recommendation "unless the facts suggesting a [contrary sentence are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); *see also Grossman v. State,* 525 So. 2d 833, 839 n.1 (Fla. 1988), *cert. denied,* 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

The repeated,[64] misleading characterization of the jury's verdict as only advisory or a recommendation has the concrete effect of diminishing jurors' sense of responsibility. Empirical studies of capital jurors have found that "most jurors tended to remember vividly the portions of the judge's instructions that indicated the jury's decision was only a 'recommendation'" and that jurors often seized on this aspect of the instructions during deliberations to alleviate their own sense of responsibility and to persuade other jurors to vote for the death penalty. Joseph L. Hoffman, *Where the Buck? -- Juror Misperceptions of Sentencing Responsibility in Death Penalty Cases* 70 IND. L.J. 1137, 1147, 1150 (1995). The standard instructions therefore improperly diminished the jury's sense of responsibility for its sentencing decision in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). *See Mann v. Dugger*, 844 F.2d 1446, 1458 (11th Cir. 1988) (en banc), *cert. denied,* 489 U.S. 1071, 109 S.Ct 1353, 103 L.Ed.2d 821 (1989).[65]

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[64]The words "advisory" and "recommend" or "recommendation" were used -- without elaboration -- to characterize the jury's verdict a total of 15 more times in the final instructions. (T. 1155-57)

[65]Although this Court has held repeatedly that the standard instructions do not violate *Caldwell*, appellant respectfully submits that those decisions should be reconsidered. *E.g., Johnson v. State,*660 So. 2d 637, 647 (Fla. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996); *Sochor v. State,* 619 So. 2d 285, 291 (Fla.), *cert. denied,* ___ U.S. ___, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993); *Combs v. State,* 525 So. 2d 853, 857-58 (Fla. 1988).

XII.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, AND DOES NOT REQUIRE WRITTEN FINDINGS REGARDING THE SENTENCING FACTORS THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

A. Burden-Shifting

Florida's capital sentencing statute requires both the sentencing jury and judge to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," § 921.141(2)(b), (3)(b), Fla. Stat. (1993), and therefore creates a presumption that, once one or more aggravating circumstances is established, death is the appropriate penalty. *See Dixon*, 283 So. 2d at 9. In *Jackson v. Dugger,* 837 F.2d 1469, 1473 (11th Cir.), *cert. denied,* 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988), the Eleventh Circuit held that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." The language in the standard instruction has precisely the same effect as the instruction invalidated in *Jackson*, which advised the jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances." 837 F.2d at 1473. The standard instructions place the ultimate burden of persuasion squarely on the defense, thus making death the presumptively appropriate sentence if aggravating and mitigating circumstances are in equipoise. The "burden-shifting" language in the standard instructions, like the instruction given in *Jackson*, therefore

"tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state" and improperly precludes the jury from giving effect to mitigating evidence. *Id.*[66]

B. Inadequate Guidance and Lack of Written Findings by the Jury

Florida's capital sentencing statute violates the Eighth Amendment because it does not provide adequate safeguards against its arbitrary application.[67] The statute does not state whether jurors must find individual sentencing factors unanimously, by majority, by plurality, or individually and therefore fails to give the jury adequate guidance in finding and weighing the aggravating and mitigating circumstances, thereby undermining the reliability of the jury's recommendation. *See McKoy v. North Carolina,* 494 U.S. 433, 440, 110 S.Ct. 1227, 1231-32, 108 L.Ed.2d 369 (1990); *Mills v. Maryland,* 486 U.S. 367, 375-77, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988). Because the trial judge is required to give "great weight" to the jury's recommendation under the *Tedder* standard, the constitutional flaws in the procedure by which the jury renders its "advisory" verdict also taint the ultimate decision of the trial judge. *Espinosa v. Florida,* ___ U.S. ___, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992); *Jackson,* 648 So. 2d at 88.

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[66]*Cf. Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982) ("burden-shifting" instruction might violate due process under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), but instructions *as a whole* properly instructed jury it could recommend death only "if the state showed the aggravating circumstances outweighed the mitigating circumstances"), *cert. denied*, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982).

[67]It is axiomatic that "[b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (citing *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

Moreover, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing "presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not." *Combs,* 525 So. 2d at 859 (Shaw, J., specially concurring); *cf. Parker v. Dugger,* 498 U.S. 308, 321, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings therefore impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

CONCLUSION

For the foregoing reasons, appellant's convictions for attempted first-degree murder must be reduced, and appellant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Post Office Box 013248, Miami, Florida 33101 this 10th day of July, 1996.

Christina Spaulding
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