IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,529

GERARD0 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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In this reply brief, appellant's initial brief is cited as "Initial Br." and appellee's answer brief as "Answer Br. " Specific points raised in the initial brief but not addressed in the reply brief are not waived.

ARGUMENT

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

The State asserts in its answer that the physical evidence contradicts Mr. Manso's stated intention to strike Mr. Zamora and Mr. Cruz only in the lower body because each suffered some injury above the waist. Answer Br. at 31-33. The State also emphasizes that Mr. Manso used an imprecise weapon and fired under conditions of poor visibility. Answer Br. at 3 1-32. These arguments do not, however, contradict Mr. Manso's confession; they simply demonstrate that, despite his asserted lack of intent to kill, Mr. Manso acted with an "indifference to human life, " sufficient for attempted second degree murder but not for attempted first degree murder. Initial Br. at 32-33.

The State's contention that Mr. Manso fired twice at Mr. Cruz is erroneous. Mr. Manso fired only five shots (T. 855): the first at Zamora (T. 690); the second at Cruz (T. 691); the third towards the passenger seat where he thought Moussa was seated (T. 691); and the remaining two at the front driver's side windshield, where he thought Sanchez was seated. (T. 691) The reference to aiming "'below the wounds, " Answer Br, at 33, is a typographical error or misstatement by Detective Plasencia, which, in context, should be "waist." (T. 691) Similarly, as explained in the initial brief, at 31 n. 12, Detective Plasencia's testimony that Mr. Manso said

he intended to kill Sanchez, Moussa, and Zamora, (T. 689), appears to be erroneous, as it is inconsistent with Detective Fabriguez' testimony at the suppression hearing, (S.R. 33, 36); with Detective Plasencia's later testimony that Mr. Manso intended only to wound Zamora (T. 690); and with Mr. Manso's transcribed statement in which he stated repeatedly that he intended only to wound Zamora (T. 718, 725).

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

(a) Continuance

The State answers that the trial court did not abuse its discretion by denying a continuance to hospitalize Mr. Manso for further observation as both mental health experts had recommended, because Dr. Garcia, despite his recommendation, had determined "conclusively" that Mr. Manso was competent to proceed. " Answer Br. at 40. The State's argument is logically flawed. First, it is apparent from the record as a whole that Dr. Garcia's opinion that Mr. Manso was competent to proceed was *premised on* his "strong suspicion" that Mr. Manso was feigning mental illness. Dr. Garcia's recommendation that Mr. Manso be hospitalized to determine conclusively whether he ***was*** malingering therefore necessarily qualified his opinion regarding competency.

After the prosecutor established that Dr. Garcia had examined Mr. Manso "for purposes of determining if he's competent to proceed at trial, " she inquired about his findings, and Dr.

Garcia responded, ***"I have a strong suspicion that he is malingering"*** and explained at length the reasons for his suspicion. (T. 1022-1023)

Dr. Garcia addressed the ultimate question of Mr. Manso's competency in the following confusing exchange:

Q: The last couple of days have you had the opportunity to evaluate him?

A: That is correct.

Q: And at this time how many times have you evaluated him?

A: Twice, on the 28th and the 29th.

Q: ***And did you form an opinion as to his mental status after your examination of him?***

A: ***I conclude that he is quite competent.***

(T. 1023-24) It is not clear whether Dr. Garcia found Mr. Manso "quite competent" after his examination on January 28th and 29th or after the competency examination on February 2nd. The prosecutor attempted to clarify Dr. Garcia's conclusion only after defense counsel elicited his opinion that Mr. Manso should be hospitalized for observation:

Q: Do you feel he's competent right now?

A: ***My opinion is that he is competent, but he's not going to cooperate.***

Q: ***But you think hospitalization will ferret it out?***

A: ***That's correct,***

Q: And the fact that he's not cooperating, in your opinion, because he doesn't want to or is that a psychotic break?

A: ***I think the lack of cooperation is probably malingering.***

(T. 1025-26) Dr. Garcia thus believed that Mr. Manso, while actually competent, was willfully refusing to cooperate by feigning mental illness, Dr. Garcia elaborated on this theory in response

to the trial court's questioning, explaining that he did *not* agree with Dr. Haber that Mr. Manso had had a psychotic break but rather believed that Mr. Manso's outburst in court and answers during the competency examination were a self-serving attempt to feign mental illness. (T. 1027-28) Dr. Garcia's belief that Mr. Manso was competent cannot logically be separated from its premise -- that Mr. Manso was malingering. Dr. Garcia candidly acknowledged that to prove or disprove his premise, Mr. Manso should be hospitalized for further observation, (T. 1025) Dr. Garcia's opinion therefore cannot fairly be characterized as "conclusive."

The State's effort to distinguish the cases cited in the initial brief, Answer Br. at 41-42, is accordingly unavailing. One expert in this case concluded that Mr. Manso was incompetent while another believed that he was probably feigning incompetence. The two experts *agreed*, after discussion, that Mr. Manso should be hospitalized for further observation. (T. 1025) Consequently, "[t]he record is clear in this case that there was doubt concerning the appellant's present competency at the time of trial," and the trial court abused its discretion by failing to grant a continuance to allow "further examination." *Lane v. State, 388 So.* 2d 1022, 1026 (Fla. 1980).

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

Appellant does not dispute that trial counsel failed to object to the adequacy of the competency examination. In the unique circumstances of this case, however, the failure to comply with the requirements of Rule 3.21 1(a)(2) and (d), particularly combined with the failure to allow further observation of Mr. Manso, undermined the reliability of the competency determination and ultimately infected the entire penalty phase proceeding.

The State first answers that Rule 3.211 does not require written reports. Answer Br. at 44. As noted in the initial brief, however, this Court has interpreted Rule 3.211 to require written reports. Initial Br. at 39 (citing *Tingle v. State, 536 So.* 2d 202, 204 (Fla. 1988) (experts

appointed to evaluate a defendant's competency "are required to provide written reports to the court pursuant to Florida Rule of Criminal Procedure 3.211")). Even assuming, that an oral report could serve as the "functional equivalent" of a written report, Answer Br. at 45, Rule 3.21 1(a)(2) provides unequivocally that, "[i]n considering the issue of competence to proceed, the ***examining*** experts ***shall consider and include in their reports...*** " the six factors enumerated in the Rule. Fla.R.Crim.P. 3.211(a)(2) (emphasis added). The State does not dispute that the experts did not expressly address these criteria in their "oral reports" before the trial court but rather argues that "there is no reason to presume that they did not" consider them. Answer Br. at 45. To simply assume that the experts have considered the enumerated criteria defeats the purpose of Rule 3.21 l(a). The rule requires these factors be specifically addressed in order to ensure uniformity in competency evaluations. As the comments accompanying the Rule explain: "At least the requirement that these specific factors be addressed will give a common basis of understanding for the experts at the competency hearing, the trial judge, and the experts who will later receive a defendant who is found to be incompetent. " Fla. R.Crim.P. 3.211(a), Committee Note, 1980 Adoption

(c) Errors in Trial Court's Order

The State answers that any errors in the trial court's order regarding competency are irrelevant absent an abuse of discretion. Answer Br. at 46. The State misconceives Appellant's argument. The asserted abuse of discretion occurred when the trial judge not only failed to allow further observation of Mr. Manso, as both experts recommended but also proceeded to make a determination of competency without waiting for the experts to submit written reports addressing the factors set forth in Rule 3.21 1(a)(2) & (d). The fact that the trial court's order is riddled with factual errors simply demonstrates that the court's abuse of discretion with respect to the

competency determination undermined the validity of the court's ultimate conclusion, As set forth below, the State's answer does not cure the errors in the court's order.

First, the State, like the trial judge, erroneously trivializes Dr. Haber's testimony, asserting that she diagnosed Mr. Manso as having "nothing more than" a "depressive disorder," which "is not a major mental illness. "[1] Answer Br. at 46. In fact, Dr. Haber testified that Mr. Manso's depression at times "decompensated into a thought disorder" and that her testing "as of two days ago . . . suggests , . , a psychotic process operating." (T. 1032) Dr. Haber emphasized that she could not rule out psychosis given Mr. Manso's family history of schizophrenia. (T. 1032) The State's contention that Dr. Haber's reference to "a longstanding psychotic problem" was "misleading" is therefore not true, Dr. Haber made clear that she believed Mr. Manso had been "emotionally disturbed most of his life and various times he's been psychotic." (T. 1032)

Second, the State answers that the trial judge was correct in stating that there was no verification of Mr. Manso's psychiatric history. Answer Br. at 46-47. What Appellant takes issue with, however, is the implication of recent fabrication, based on the judge's erroneous assertion that the only corroboration of Mr. Manso's mental health history was from "people he had known since his incarceration. " (T. 1052) As emphasized in the initial brief, while Mr. Manso's family members had no independent knowledge of his psychiatric history in Cuba, he had disclosed to them ***well before his incarceration,*** and well before any motive to fabricate would

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'The term "major mental illness" is not defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)-IV, but is generally understood to refer to those disorders "that were until recently known as psychoses," including "schizophrenia, major depression, and bipolar disorder," which "meet the traditional medical model of illness" in that they appear to "have a biological or organic etiology and respond to medical treatment. " Bruce J. Winick, ***Ambiguities in the Legal Meaning and Significance of Mental Illness*** 1 PSYCHOL. PUB. POL'Y & L. ***534,*** 558-59 (1995).

have arisen, that he had been hospitalized and given electric shock treatments in Cuba. Initial Br. at 45.

Third, the State answers that the trial judge properly disregarded the fears of Mr. Manso's family that he was schizophrenic like his mother because these fears were not described in sufficiently concrete terms. Answer Br. at 47. As noted in the initial brief at 86 n.62, Mr. Manso's family described him as "loose in the mind," (T. 993), "just wasn't all there," (T. 978), and "definitely" having "mental problems," (T. 989). The State's own expert, Dr. Garcia, could be no more specific than to explain that "[l]ay people who come into contact with schizophrenics tend to see them as unusual. Often the family members, friends think someone was peculiar, unusual. Even though they are still functioning, those people show some peculiarities . , ." (T. 1117) Thus, while the observations of Mr. Manso's family may have been unartful, they were just as precise as Dr. Garcia's own description.

Fourth, even if Mr. Manso had not been receiving prescription medication for the ten months prior to trial, Answer Br. at 47, the fact that he had been taking anti-psychotic medication within a year of trial was surely relevant to a determination of his competency and particularly to whether further observation was warranted. Fifth, while it may have been proper for the trial judge to note "the constancy" of Mr. Manso's facial expressions, Answer Br. at 47, the judge was simply wrong in the psychological significance she attached to her observation. Initial Br. at 45-46. Finally, contrary to the implication in the State's answer, Answer Br. at 48, the "other basic information" Mr. Manso supposedly provided consisted only of showing the nurse his hand and responding "no" to the question whether he was in pain. (T. 1047-48)

III.

THE STATE IMPROPERLY USED THE COMPETENCY EXAMINATION TO REBUT MENTAL MITIGATION, IN VIOLATION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.21 l(e), THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII, AND XIV

The State answers, first, that trial counsel failed to preserve any objection to the prosecution's use of the competency examination to rebut mental mitigation. Appellant does not dispute that trial counsel failed to object to the prosecution's misuse of the competency examination but rather asserts that the error is fundamental in nature and, further, that counsel's failure to object constitutes ineffective assistance of counsel on the face of the record. The State further maintains that Mr. Manso waived both (1) the confidentiality provision of Rule 3.21 l(e) and (2) his fifth amendment privilege by requesting the competency examination and putting his mental state in issue at the penalty phase; (3) Dr. Garcia's testimony did not violate Mr. Manso's sixth amendment rights because defense counsel should have known that the State would use the results of the competency examination to rebut mental mitigation in violation of Rule 3.21 l(e); and (4) reversal on these grounds would be unfair to the State because it would allow Mr. Manso to perpetrate a fraud on the sentencing court.

(a) Rule 3.211(e)

According to the plain language of Rule 3.21 l(e), there is only one way for a defendant to waive the confidentiality of a competency evaluation: by first "us[ing] the report, or portions thereof, in any proceeding for any other purpose, " Fla.R.Crim.P. 3.211(e)(2). The defense in this case did not use the reports on competency in the sentencing proceeding, and the State does not contend otherwise. Instead, the State ignores the plain language of the Rule and claims vaguely that "the defendant's and/or defense's actions effectively constituted a waiver" of Rule

3.21 l(e), which entitled the prosecution to use the otherwise inadmissible evidence regarding the competency examination to rebut mental mitigation. Answer Br. at 54-55.

First, relying on *Long v. State,* 610 So. 2d 1268, 1275 (Fla. 1992), *cert. denied,* 510 U.S. 832, 114 S.Ct. 104, 126 L.Ed.2d 70 (1993), the State claims that the prosecution was entitled to use the competency evaluation to rebut mental mitigation presented by the defense. Rule 3.21 l(e) does not contain any exception, however, for cases in which the defendant puts his mental state in issue; nor did *Long* engraft such an exception onto the Rule. Rather, as noted in the initial brief, this Court emphasized in *Long* that the expert "was appointed to determine *both* Long's competency to stand trial under Rule 3.211 and his sanity at the time of the offense," and "the trial court's order appointing [the expert] specifically stated that [he] was to determine whether Long was sane at the time of the offense, " *Id.* The fact that the examination at issue in *Long* was not limited to competency is critical to the Court's further point -- on which the State relies -- that the expert was allowed to testify only in rebuttal to the mental health testimony presented by the defense. Because Rule 3.21 l(e)(l) applies only "insofar as the report relates solely to the issues of competency to proceed and commitment, " there is no dispute that the State may use *other* types of compelled mental examinations to rebut expert testimony presented by the defense; it simply cannot use a *competency* examination for such a purpose. In this case, as emphasized in the initial brief, at 49, the evaluation occurred pursuant to an order which stated specifically that it was to be for competency only. (R. 1126)

Alternatively, the State claims the defense "open[ed] the door to otherwise inadmissible evidence" by presenting its own expert testimony, making "all bases of the defense expert's opinions" the "proper subject matter of testimony." Answer Br. at 54. Dr. Haber did not, however, refer once to the competency examination, to her own conclusions based on that

examination, to the defendant's behavior or statements during the examination, or to the behavior that prompted the examination. Thus, the competency examination was not a basis for Dr. Haber's opinions.

The State's contention that Mr. Manso's court room conduct independently opened the door to "rebuttal" by the prosecution is even more absurd. Answer Br. at 53 & n.16. The defense never argued and Dr. Haber never testified to the jury that Mr. Manso's outburst was a manifestation of his mental illness. As noted in the initial brief, at 40 n. 15, Mr. Manso's behavior was far more prejudicial than helpful to his case. Indeed, the strongest reason for questioning his competency was the patently self-destructive nature of his behavior in front of the jury. *Cf. Drope v. Missouri,* 420 U.S. 162, 178-79, 95 S.Ct. 896, 907, 43 L.Ed.2d 103 (1975) (where defendant's "fate depended in large measure on the indulgence of his wife," defendant's attack on her "hardly could be regarded as rational conduct.")

The State argues finally that the prosecution's use of the competency examination in this case did not defeat "the policy served by" the confidentiality provision of Rule 3.21 l(e), which it *construes* to be coextensive with *Parkin v. State,* 238 So. 2d 817 (Fla. 1970), *cert. denied,* 401 U.S. 974, 91 S.Ct. 1189, 28 L.Ed.2d 322 (1971), "preventing the disclosure of incriminating statements which relate to the commission of the offense at issue." Answer Br. at 55. While the cases cited in *the* State's answer analogize to *Parkin*, they do not, as the State suggests, hold that Rule 3.211(e) is limited to *Parkin*'s parameters.[2]

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[2]The State cites *Lovette v. State,* 636 So. 2d 1304 (Fla. 1994), and *Erickson v. State, 565* So. 2d 328 (Fla. 4th DCA 1990), *review denied,* 576 So. 2d 286 (Fla.1991), to support this proposition, but neither case rested expressly on Rule 3.21 l(e).

Rule 3.211(e) prohibits disclosure of any ***"information*** contained . . . in any report of experts filed under this rule" -- not merely of "statements" or "admissions" by the defendant -- for any purpose other than determining the defendant's competency, Fla.R.Crim.P. 3.211(e) (emphasis added). A competency examination is properly afforded broader confidentiality than a sanity examination because, contrary to the State's argument, a competency evaluation serves an entirely different policy goal. Whereas insanity is an affirmative defense that may be raised at a defendant's discretion, a defendant's competency is a prerequisite for a valid criminal proceeding. Initial Br. at 5 1-52. Consequently, the competency rules protect not only individual defendants' rights but society's independent interest in the integrity of criminal proceedings. Christopher Slobogin, ***Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation,*** 31 **EMORY** L.J. 71, 88 (1982); Gerald Bennett, ***A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53*** **GEO. WASH. L. REV.** 375, 384 (1985). As noted in the initial brief at 51-52, this policy is of such overriding importance that a competency examination may be ordered, against the defendant's will, by the court ***sua sponte*** or at the request of the State. Fla.R.Crim P. 3.210(b); ABA STANDARDS FOR CRIMINAL JUSTICE (hereinafter "ABA **STANDARDS")** Standard 7-4.6 (2d ed. 1986); Bennett, ***supra,*** at 389. ABA Standards provide that defense counsel similarly bears responsibility as an officer of the court to raise the issue of the defendant's possible incompetence, ***even against the defendant's express wishes.*** Bennett, ***supra,*** at 385. The State's premise that defense counsel could have avoided the use of the competency examination to rebut mental mitigation by simply not requesting the exam is therefore erroneous, Unlike a custodial interrogation, or even a mental examination in response to an insanity plea where the defense can be struck if the defendant does not cooperate, a competency examination is fundamentally involuntary. The broad confidentiality afforded

competency exams are a "quid pro quo" for the defendant's compelled cooperation. ABA STANDARD 7-4.6, Comment.

(b) Fifth Amendment

Relying primarily on ***Buchanan v. Kentucky, 483*** U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), the State further claims that, because the defense requested the competency examination and had already put Mr. Manso's mental state in issue at the penalty phase, Mr. Manso waived his Fifth Amendment privilege against self incrimination as well as Rule 3.21 l(e)'s confidentiality provision. As the State acknowledges, Answer Br. at 57, the examination at issue in ***Buchanan*** was not for competency to stand trial -- though the doctor had expressed an opinion regarding the defendant's competence. ***483*** U.S. at 411 n. 11. ***Buchanan*** therefore does not specifically address, except in ***dicta,*** the unique policy considerations, discussed above, regarding the confidentiality of a competency evaluation.[3]

Because defense counsel is ethically obligated to request a competency examination when he has reason to doubt his client's competence, even if such an evaluation is against his client's wishes, a request for a competency evaluation -- unlike a request for other types of exams --

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[3]The ***Buchanan*** majority suggested in ***dicta*** that a competency examination would not be treated differently than other mental examinations in that a defendant could simply decide, after being given ***Miranda*** warnings, whether to cooperate with the examination. ***Buchanan, 483*** U.S. at 423 n.21. This reasoning is inconsistent, however, with the Court's observation in ***Pate v. Robinson,*** 383 U.S. 375,384, 86 S.Ct. 836,841, 15 L.Ed.2d 815 (1966), that "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. " In ***Estelle v. Smith, 451 U.S. 454, 468,*** 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359 (1981), the Court similarly indicated that competency could not be waived, noting that a defendant could be compelled to submit to a competency examination ***if*** the use of the exam were restricted solely to determining competency.

Justice Marshall's dissent in ***Buchanan*** sharply criticized the majority for failing to consider the "limited purposes" of a competency examination which, he argued, precluded the use of such an exam to rebut a mental status defense. 483 U.S. at 433 & n.6.

cannot be construed as a voluntary waiver of the defendant's privilege against self-incrimination The fact that the defendant has put his mental state in issue by relying on mental mitigating circumstances similarly does not alter the fundamentally involuntary nature of a competency examination. Moreover, the equitable rationale for implying a waiver -- that "it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony" -- is notapplicableinthis case. ***Powell v. Texas, 492 U.S. 680, 685, 109*** S.Ct. 3146, 3150, 106 L.Ed.2d 551 (1989). Dr. Garcia had already examined Mr. Manso twice before the competency exam. Restricting the State's use of the competency examination would not, therefore, deprive the State of its ability to rebut the defendant's mental health evidence or otherwise place the State at an unfair disadvantage. It is, to the contrary, the State that has achieved an unfair advantage by blatantly violating Rule 3.2 1 1(e).[4]

The State finally appears to contend tbat any Fifth Amendment violation that did occur was harmless, claiming that Dr. Garcia's testimony regarding the competency examination was "extremely limited," "did not divulge any substantive statements by the defendant," and had no impact on the sentencing. Answer Br. at 60- 61. First, Dr. Garcia's testimony regarding the

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[4]The State's contention that Dr. Haber "interjected the defendant's competency into the penalty phase proceedings" is erroneous. Answer Br. at 59. First, the State is factually mistaken in suggesting that Dr. Haber's testimony that Mr. Manso's acknowledged having auditory hallucinations after first denying them was a reference to the competency exam. Dr. Haber explained during her testimony at the competency hearing that Mr. Manso had, during her third examination of him (to administer the Millon Clinical Multiaxial Inventory), also acknowledged hearing voices. (T. 1034) The portion of Dr. Haber's testimony cited in the State's answer is clearly describing the third examination, which was prior to and entirely separate from the competency evaluation. (Compare T. 1034 ***and*** T. 1080-81)

Second, the fact that Dr. Haber stated, at the conclusion of a lengthy description of her first examination of Mr. Manso, (T. 1067-74), "I found him to be competent and to understand what was going on at that time," (T. 1074), cannot fairly be considered to raise the issue of Mr. Manso's competency, Dr. Haber did nothing more than use the word "competent" in passing; she did not explain the concept of competency or otherwise elaborate on the subject.

competency examination was not "extremely limited" in either length or substance. It accounts for five of the twenty pages of his direct testimony, and it describes the competency examination in great detail. (T. 1118-22) Dr. Garcia began by explaining to the jury that the purpose of the examination was to determine whether the defendant was "putting on a show" or "did he go crazy, " (T. 1118); he then described his own and Dr. Haber's conclusions (T. 1118-19); and elaborated on his belief that Mr. Manso was malingering, including specific descriptions of Mr. Manso's responses to questions during the examination. (T. 1120-22) While these responses concerned Mr. Manso's symptoms rather than the facts of the underlying crime, they clearly were "substantive" and testimonial in nature -- not merely observations of behavior or demeanor. See ***Pennsylvania v. Muniz, 496*** U.S. 582, 597, 110 S.Ct. 2638, 2648, 110 L.Ed.2d 528 (1990); Slobogin, *supra,* at 80-86.

Moreover, contrary to the State's assertion, this testimony had a devastating effect on the sentencing. Initial Br. at 54-60. As emphasized in the initial brief at 59, Dr. Garcia's opinion that Mr. Manso was malingering was based almost entirely on the competency examination; the prosecutor seized on this testimony in closing argument to attack Dr. Haber's credibility and urge the jury to reject her conclusions, (T. 1140-41); and the trial judge relied expressly on the competency examination to conclude that Mr. Manso had "manipulat[ed] Dr. Haber" and misled her to "completely misdiagnose[ ]" his mental condition. (R. 1182) Since the defense relied on Dr. Haber's testimony to establish the existence of both of the mental mitigators and to negate the CCP aggravator, the discrediting of her testimony based on the competency examination was critical to the sentencing process.

(c) Sixth Amendment

Appellant acknowledged in the initial brief, at 53-54, that defense counsel requested the competency evaluation and obviously had notice of it. Contrary to the State's answer, at 61-62, this does not establish that Mr. Manso's Sixth Amendment rights were not violated. The Supreme Court has made clear that ***consultation*** with counsel (not bare notice, as the State contends) is the key to a Sixth Amendment claim, and for "[s]uch consultation to be effective," defense counsel must be aware "of the possible uses to which [the defendant's] statements in the proceeding could be put." ***Buchanan, 483*** U.S. at 424.

The State argues that defense counsel should have expected that, "regardless of the title given to the examination," it could be used to rebut mental mitigation Answer Br. at 62. It is the State's position, in other words, that defense counsel should have assumed that the prosecution would violate Rule 3.21 l(e), which unambiguously prohibits the use of information obtained in a competency examination for any purpose other than determining competency. That position cannot be reconciled with either this Court's decision in ***Holland v. State, 636 So.*** 2d 1289, I292 (Fla.), ***cert. denied,*** U.S. ___, 115 S.Ct. 351, 130 L.Ed.2d 306 (1994), or the Supreme Court's decision in ***Powell,*** *supra*. While this Court emphasized in ***Holland*** that defense counsel had not received ***any*** notice of his client's examination, it also emphasized that the Supreme Court found a sixth amendment violation in ***Powell*** because defense counsel "had notice that his client would be examined for competency and sanity, but he did not have notice that the exam would encompass the issue of future dangerousness." *Holland,* 636 So. 2d at 1292 (citing ***Powell, 492*** U.S. at 682) .[5] Here, defense counsel clearly had notice that Mr. Manso would be examined for

[5]Appellant submits that, to the extent that ***Hargrave v. State, 427 So.*** 2d 713, 715-16 (Fla. 1983), which was decided before ***Powell*** and ***Holland,*** suggests otherwise, it was wrongly

competency. Just as clearly, however, counsel not only was not informed that the examination could be used to rebut mental mitigation but was affirmatively informed, by Rule 3.211 (e), that it could *not* be. Under these circumstances, the State's violation of Rule 3.211(e) also violated Mr. Manso's Sixth Amendment rights.

(d) Denial of a Fundamentally Fair Sentencing Hearing

The State lastly contends that it would be unfair to prohibit use of the competency examination to rebut Mr. Manso's "manipulative, in-court virtuoso performance" in the trial court. Answer Br. at 63. As noted previously, the State's contention that Mr. Manso's courtroom outburst was a deliberate attempt to bolster the testimony of the defense expert is absurd. Not only was the outburst profoundly self-destructive, but the defense never attempted to explain, let alone exploit it, to the jury.[6]

IV.

DR. GARCIA'S TESTIMONY EXCEEDED THE PROPER SCOPE OF REBUTTAL IN VIOLATION OF SECTION 921,141, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV

The State answers, first, that this issue was not preserved for review. Appellant does not dispute that trial counsel failed to object to Dr. Garcia's testimony but rather claims that the cumulative effect of this and other improper evidence was to deny Mr. Manso a fair and reliable sentencing .

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decided.

[6]The State's vigorous assertions that Mr, Manso was feigning mental illness in an effort to perpetrate a fraud on this Court and the sentencing court are of dubious good faith in light of the State's opposition to Appellant's motion for this Court to take judicial notice of Mr. Manso's subsequent involuntary commitment to the Corrections Mental Health Institution in Chatahoochie.

The State further asserts that Dr. Garcia's testimony was proper to rebut "subjects opened up by both Dr. Haber's testimony on behalf of the defendant, as well as the defendant's own in-court demonstration which purported to show the jury that he was crazy." Answer Br. at 64. Mr. Manso's courtroom outburst did not "purport" to be a demonstration of his mental illness. As already noted, the defense never even tried to explain Mr. Manso's self-destructive outburst to the jury. Only the prosecution did so, claiming that Mr. Manso was attempting deliberately to fool Dr. Haber, the court and the jury into believing that he was mentally ill. (T. 1118, 1140-41)

The State's effort to defend Dr. Garcia's testimony as proper rebuttal of Dr. Haber's testimony is creative but unpersuasive. The State maintains that Dr. Garcia's testimony that Mr. Manso did not do his best on an IQ test and performed slowly on the Bender Visual Test called into question the validity of Dr. Haber's test results. Answer Br. at 64-65. The only test Dr. Haber administered was an objective psychological inventory -- the Millon Clinical Multiaxial Inventory ("MCMI") - III, which is designed specifically to detect and take into account the patient's response patterns. (T. 1077-79) Dr. Haber testified that Mr. Manso's scores were exaggerated because of his poor self image, and that response pattern was taken into account in the results, (T. 1078-79, 1087)

Dr. Garcia never testified that Mr. Manso's performance on the IQ or Bender tests was relevant to the validity of the MCMI-III results. Indeed, Dr. Garcia, who was presumably qualified to review the results of the MCMI-III, never questioned their validity.[7] Dr. Garcia's disagreement with Dr. Haber's diagnoses was based only on the thematic apperception test, which

[7]Dr Garcia testified only that, although the MCMI showed signs of schizophrenia, he had observed none in his examinations of Mr. Manso. (T. 1116-17).

is intended to detect psychosis. (T. 1110-11) Since the defense never claimed that Mr. Manso was of less than average intelligence or suffered organic brain damage, there was no legitimate reason for the State to present evidence that Mr. Manso did not suffer from those disorders.

Donaldson v. State, 369 So.2d 691, 695 (Fla.1st DCA 1979), on which the State relies, makes clear that although the trial judge has discretion with respect to rebuttal evidence, a party may not "rebut" undisputed facts, as the State did here. The State attempts to distinguish ***Nowitzke v. State,*** 572 So. 2d 1346 (Fla. 1990), claiming that the prosecution must have wider latitude to rebut penalty-phase mental mitigating evidence than a guilt-phase insanity defense.' Answer Br. at 66 n.22. It cites no authority, however, for the proposition that traditional limitations on rebuttal evidence do not apply at the penalty phase and ignores entirely ***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), and its progeny, cited in the initial brief at 60-61, which hold expressly that the prosecution may not present evidence at the penalty phase to "rebut" mitigating circumstances the defendant does not claim to exist.

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[8]The State's suggestion that Dr. Garcia's testimony was somehow relevant to rebut Dr. Haber's testimony regarding Mr. Manso's psychosocial history, Answer Br. at 66 n.22, is particularly specious since Dr. Garcia testified expressly that he had no disagreement with that aspect of Dr. Haber's testimony. (T. 1104-05)

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

Despite asserting lack of preservation as the primary defense to appellant's claims regarding the competency examination, the State argues that trial counsel's failure to object did not constitute ineffective assistance of counsel.[9] Answer Br. at 50-52, 53, 56, 61, 63, 67-69. The State also answers that such a claim must be addressed in the trial court in the first instance, pursuant to a relinquishment of jurisdiction. Answer Br. at 67.

Appellant has not moved for a relinquishment of jurisdiction because, contrary to the State's contention, the prejudice to Mr. Manso is apparent from the record." In these circumstances, it is not necessary for the trial court to first address the issue of prejudice. See Initial Br. at 64, 66-67. Moreover, the judge's explanation of "why [she] would, or would not, have imposed the death penalty" absent Dr. Garcia's improper testimony is not the relevant inquiry. Answer Br. at 68. In Florida's trifurcated sentencing procedure, as this Court has explained, "[i]t is of no significance that the trial judge stated that he would have imposed the

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[9]Lack of preservation is also the State's primary answer to issues II, IV, VI, VIII, X, XI, and XII,

[10]Undersigned counsel believes there are numerous other grounds for an ineffective assistance of counsel claim in this case, which would require further investigation and preparation. Consequently, if this Court concludes that the claims presented herein cannot be addressed on direct appeal, counsel believes they would be more properly deferred to a Rule 3.85 1 proceeding to be considered along with additional ineffectiveness and other claims.

death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation. " ***Hall v. State,*** 541 ***So.*** 2d 1125, 1128 (Fla. 1989). For ineffective assistance of counsel claims the relevant question is therefore whether there is a reasonable probability that, without the improperly admitted evidence, the jury would have recommended life and whether such a recommendation would have a reasonable basis, precluding a judicial override. ***See Phillips v. State, 608 So.*** 2d 778, 783 (Fla. 1992), ***cert. denied, 509*** U.S. ***908,*** 113 S.Ct. ***3005,*** 125 L.Ed.2d ***697*** (1993); ***Bassett v. State,*** 541 So. 2d 596, 597 (Fla. 1989). This Court is fully able to make that determination on appeal.

With respect to prejudice, the State contends that, even apart from his testimony regarding the competency examination, "Dr. Garcia's testimony had otherwise thoroughly negated the assertions of Dr. Haber," Answer Br. at 69. The State also claims that Dr. Haber "destroy[ed] any credibility she had" when she admitted that she could not provide an exact diagnosis and that "the underlying factors she relied upon were not a major mental illness." First, as discussed in the initial brief at 58-60, there were substantial areas of agreement between Dr. Garcia and Dr. Haber which supported the existence of both of the statutory mental mitigating circumstances and would have negated the CCP aggravating circumstance. As this Court has emphasized, "severe mental disturbance is a mitigating factor of the most weighty order," which can fundamentally alter the sentencing calculus. ***Rose v. State,*** 675 So. 2d 567, 573 (Fla. 1996). The prosecution relied to devastating effect on Dr. Garcia's improper testimony to persuade the jury that it should not credit any of the mental health evidence. Initial Br. at 54-60. Without Dr. Garcia's improper testimony, there is a reasonable probability that the jury would have properly found both statutory mental mitigating circumstances and rejected the CCP aggravator, resulting in a life recommendation Initial Br. at 54-60, 66-67.

Second, the State's attack on Dr. Haber's credibility is unfounded. Dr. Haber explained that her testing detected psychotic thought processes -- possibly schizophrenia -- but that she did not have sufficient information to make a definitive diagnosis. (T. 1079-80, 1083) She therefore testified honestly and ethically that, although she believed Mr. Manso "was in a decompensated mental condition" at the time of the crime, she was unable to provide an "exact diagnosis." (T. 1083) Her unwillingness to express a more definite opinion without more information makes her testimony more, rather than less, credible.

The State's claim that Dr. Haber's testimony was insignificant because she did not diagnose Mr. Manso with a "major mental illness" is both legally and factually erroneous." The statutory mental mitigators are ***not*** restricted to so-called major mental illnesses. This Court has properly recognized that personality disorders can result in extreme emotional disturbance and substantial impairment of a defendant's ability to conform his conduct to the requirements of law. ***E.g., Spencer v. State, 645 So.*** 2d 377, 384 (Fla. 1994) (paranoid personality disorder); ***Downs v. State,*** 574 So. 2d 1095, 1099 (Fla. 1991) (schizoid personality disorder); ***Campbell v. State,*** 571 So. 2d 415, 418 (Fla. 1990) (borderline personality disorder). Moreover, Dr. Garcia and Dr.

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[11]The State's argument is also based on a continued obfuscation of standard psychological diagnostic methods. The State cites to Dr. Haber's testimony that, with respect to the MCMI-III test, only the Axis Two diagnosis can definitely be said to apply in the past and thus to the time of the crime. (T. 1089) As Appellant attempted to explain in the initial brief at 82-83, the Axis Two diagnosis can be projected into the past precisely ***because*** it measures ***only*** personality disorders. All of the so-called "major mental illnesses" are mental or mood disorders, included on Axis One, which "tend to be more acute, florid, and responsive to treatment than personality disorders (Axis II), which are more chronic, consistent, developmental, and resistant to treatment." See JERROLD S. MAXMEN & NICHOLAS G. WARD, ESSENTIAL PSYCHOPATHOLOGY AND ITS TREATMENT 13-14 (2d ed. 1995). While it is true that a patient's Axis One diagnosis today would not ***necessarily*** have been applicable 13 months earlier, a clinician can hypothesize as Dr. Haber did, based on other evidence, whether the patient was suffering from a mental disorder at a particular point in the past.

Haber agreed that Mr. Manso suffered from dysthymia -- an Axis I mood disorder -- and periodically from major depression, which is a major mental illness. (T. 1079, 1123) AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS *26,* 339, 345 (4th ed.1994); Winick, ***supra,*** at 558-59. Dr. Haber also believed that Mr. Manso suffered from some type of psychotic disorder, which would also constitute a major mental illness. (T. 1079-80, 1083) See Winick, ***supra,*** at 558-59.

Appellant does not dispute that an attorney's subjection to Bar discipline does not constitute ineffective assistance of counsel per se. Appellant also does not dispute that Mr. Carter was disciplined for financial improprieties that are not necessarily related directly to this case.[12] The fact remains, however, that Mr. Carter was facing imminent suspension from the Bar throughout Mr. Manso's capital murder trial, and his deficient performance is patent on the record. Appellant therefore urges this Court to exercise its supervisory powers, in the unique circumstances of this case, to grant Mr. Manso a new trial in the interests of justice and judicial economy.

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[12]The nature of Mr. Carter's difficulties with The Florida Bar, though not mentioned in the suspension orders, are a matter of public record. The ***Miami Herald*** reported on December 20, 1994 that "after an exhaustive investigation by prosecutors and the Bar," Mr. Carter had "admitted that he over-billed the county in cases representing poor defendants" and had been reprimanded by The Florida Bar. Don Van Natta, Jr., ***Over-Billing Gets Lawyer a Reprimand,*** MIAMI HERALD, Dec. 20, 1994, at 1B. The fact that Mr. Carter was apparently under criminal investigation during the pendency of this case may well be grounds for a separate conflict of interest claim, but that is beyond the scope of the issue presented in this direct appeal.

The Herald noted that Mr. Carter "who continues to represent poor defendants for public money in Dade, has more serious problems ahead of him" because the Bar had also charged him with giving a false name to a hospital in Philadelphia to receive medical care at a discount. ***Id.*** Mr. Manso's capital murder trial began less than one month after the ***Herald*** article, with these matters still pending.

This Court recently promulgated a rule of judicial administration requiring trial judges to attend training seminars before hearing a capital case. *In Re: Amendment to the Florida Rule of Judicial Administration 2.050(b)(10)*, ___ So. 2d ___, 22 Fla. L. Weekly S64 (Fla. Feb.7, 1997). Justice Anstead, joined by Chief Justice Kogan, concurred separately to urge that similar standards be adopted for defense counsel in capital cases. Justice Anstead observed that "[t]oo many times this Court has reviewed records where the incompetence of counsel is patent and the attendant consequences to the particular case and the justice system are disastrous." *Id.* Appellant submits that this is such a case. The spectacle of a capital defendant being represented by an attorney who is facing imminent suspension from the Bar, who fails to make more than a perfunctory effort at investigating and presenting mitigation,[13] and who fails in the most elementary aspects of record preservation is precisely the type of "'horror story" collected in Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 YALE L. J. 1835 1994), cited in *In Re: Rule 2.050(b)(10)*, 22 Fla. L. Weekly at S64 (Anstead, J., concurring). Such cases compromise the integrity of the capital sentencing process. See ABA Resolution (Feb. 3, 1997) (calling for moratorium on capital punishment due in part to failure of most jurisdictions to adopt acceptable standards for defense counsel in capital cases). Where, as here, both counsel's deficiency and the resulting prejudice to the defendant are apparent from the record on direct appeal, it is appropriate for this Court to reverse for a new trial rather than defer

[13]Mr. Carter did not, for example, request the appointment of a mitigation specialist or other expert to help him locate records and witnesses in Cuba. The trial judge subsequently cited the lack of evidence corroborating Mr. Manso's own account of his abuse in the military and psychiatric history, all of which was located in Cuba, as one of the grounds for rejecting the mental mitigation. (R. 1175)

consideration of counsel's ineffectiveness to collateral proceedings. ***See 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).

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

Appellant acknowledges that trial counsel failed to proffer the anticipated testimony of Mr. Manso's sister but submits that this issue, when considered with others in the case, establishes cumulative, fundamental error warranting reversal. The State does not seriously contend that the number of times Mr. Manso's mother had been hospitalized for her schizophrenia was "irrelevant" as the trial court ruled. Rather, the State argues that any error was harmless because Mr. Manso himself testified that his mother was frequently hospitalized. Answer Br. at 72. This answer, however, is disingenuous since the trial court rejected Mr. Manso's own testimony as unreliable, unless corroborated by other family members. (T. 1028, 1052; R. 1175, 1184-85) The State's argument that the excluded evidence would not have had particularly strong mitigating value because no witnesses testified about the impact of Mrs. Manso's mental illness on Appellant and his family is similarly insidious. Answer Br. at 73. The prosecution's grossly over broad motion in limine excluded precisely such evidence, Initial Br. at 70-71, but is immune from appellate review, the State now contends, because defense counsel failed adequately to contest it.

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

The State answers that the prosecution was not obligated to disclose, prior to Mr. Manso's own testimony expressing remorse, a statement he made to his church congregation giving thanks for not being injured in the shooting. The State's first argument, that the statement had no apparent relevance to this case, is disingenuous. Contrary to the State's assertion, Mr. Manso's statement plainly concerned the shooting and constituted an implicit denial of his own involvement. Answer Br. at 75. As such, it was clearly relevant to rebut expressions of remorse.

The State's second argument, that the prosecution could not have anticipated the relevance of this statement as rebuttal "unless and until" the defendant actually took the stand and testified at the penalty phase is even more absurd. Answer Br. at 75-76. Whether such evidence is admissible only through the defendant's own testimony is immaterial. Answer Br. at 76, The relevant inquiry is not whether the evidence *is* admissible but whether the State can reasonably anticipate that it *will be*. Initial Br. at 74. Equating reasonable anticipation with present admissibility effectively relieves the State of any obligation to anticipate or disclose rebuttal evidence, in direct contravention of *Elledge v. State,* 613 So.2d 434, 436 (Fla. 1993). Moreover, while the State suggests on appeal that the prosecution would have required "a crystal ball" to anticipate that Mr. Manso would express remorse, Answer Br. at 77, the prosecutors never denied below that they had reason to expect, based on Dr. Haber's deposition (or Mr. Manso's statements to police), that he would do so. (T. 1099) They simply asserted that their discovery obligation was not triggered until Mr. Manso took the stand. (T. 1099)

Finally, the State contends that any error is harmless because there were "a multitude" of reasons to reject remorse as a mitigating circumstance, Answer Br. at 77-78. Sanchez' testimony was especially inflammatory and prejudicial, however, because it concerned statements Mr. Manso made before his church congregation. These statements were also made a feature of the prosecutor's closing argument, urging the jury to reject remorse as a nonstatutory mitigator:

> He had the capacity to go to church with one of the people that he wanted to kill and when that person stood up before God and the congregation and he praised Got [sic] that I am still alive. This defendant stood up and said, I am, too. I was in the parking lot, it could have been me. He had the nerve to stand before one of the people that he wanted to die and to say that.

(T. 1142) The State has not established that the prosecution's failure to disclose this critical rebuttal evidence in discovery was harmless beyond a reasonable doubt.

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

Appellant submits that, contrary to the State's answer, at 79, it is apparent from the context of defense counsel's argument that he was attempting to refer to consecutive life sentences being imposed for Mr. Manso's other convictions:

[MR. CARTER]: As a matter of fact, he'll receive more than life in prison because ***there are other factors for which life in prison is there, also.*** He will never see the outside again. That's for sure.

MS. VOGEL: I am going to object --

MR. CARTER: ***Followed by a life sentence.***

MS. VOGEL: -- I'm going to object to counsel recommending --

THE COURT: Sustained

MS. VOGEL: Objection

THE COURT: It's argument. Objection overruled,

MR. CARTER: ***Because of the way that he can be sentenced*** because of the -- if you were inclined to find him guilty [sic] because if you are afraid that he's coming out and it won't happen.

MS. VOGEL. Objection, Judge,

THE COURT: Sustained.

(T. 1151-52) Because the prosecutor's objection was sustained, defense counsel was not able to finish his explanation of "the way that" Mr. Manso could be sentenced -- ***i.e.,*** consecutive life sentences .

While the State contends that ***Marquard v. State,*** 641 So. 2d 54, 57 (Fla. 1994), cert. ***denied,*** U.S. ___, 115 S.Ct. 946, 130 L.Ed.2d 890 (1995), and ***Jones v. State, 569 So.*** 2d 1234, 1239-40 (Fla. 1990), are not inconsistent, Answer Br. at 79 n.24, Appellant submits that ***Marquard*** contradicts the basic premise of ***Jones*** -- that the length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence. Whether the defendant's lengthy sentence would be due to another capital conviction, as in a double homicide, or to contemporaneous felony convictions, makes no logical difference, particularly when the other convictions have been used as an aggravating circumstance. In both instances, the defendant should be permitted to lessen the weight of the aggravator by informing the jury of the punishment he could receive for his other convictions.

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

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

The State denies that the trial court's sentencing order contains any factual errors, even where the record clearly demonstrates otherwise.

In her sentencing order, the trial judge purported to quote Dr. Haber, asserting that she had testified that Mr. Manso "did not appear to by [*sic*] 'trying very well."' (R. 1177) It is apparent from the record that the trial judge erroneously attributed to Dr. Haber, Dr. Garcia's testimony that Mr. Manso "didn't look like he was trying to do the very best" and that his "performance was somewhat slow." (T. 1109, 1111)

As explained elsewhere in both this brief and the initial brief, Dr. Haber's testimony regarding Mr. Manso's performance on the MCMI-III manifestly ***does not*** support the trial judge's assertion that Dr. Haber's test results were invalid because Mr. Manso was not honest.[14] In the remainder of the answer quoted selectively by the State, Answer Br. at 83, Dr. Haber explained that Mr. Manso's elevated score on the debasement scale of the MCMI-III reflected "his tendency to put himself down, to see the negative in himself." (T. 1087) The fact that Mr. Manso's scores were exaggerated because -- consistent with his chronic depression -- he sees himself in a negative light is clearly different from "faking bad" on a test. Moreover, the State, like the trial judge, ignores the fact that Mr. Manso's response patterns were accounted for in the analysis of his

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[14]The State fails to explain in its answer, at 83, how the trial judge's reference to dishonesty in test-taking has anything whatever to do with Mr. Manso's assertions of innocence,

MCMI-III results and did ***not*** invalidate them, (T. 1078-79, 1087) See THEODORE MILLON, MILLON CLINICAL MULTIAXIAL INVENTORY - III MANUAL 46-47, 107-08 (1994).

As even the State's answer, at 83, makes apparent, Dr. Haber did ***not*** testify, as the trial judge asserted, that "much of" Mr. Manso's "depression and inner turmoil would be due to his incarceration and the serious penalties he is facing. " (R. 1177) Dr. Haber and Dr. Garcia ***both*** testified that Mr. Manso suffered from life-long depression, with periods of superimposed major depression.[15] (T. 1079, 1112, 1123) Dr. Haber also testified that Mr. Manso had a delusional disorder to which he decompensates under stress and that he was in a decompensated mental condition at the time of the shooting. (T. 1079-80, 1083-84)

Finally, Appellant submits that the trial court's conclusion that Mr. Manso's "emotions and frustrations" at the time of the crime "were no greater than that of many Americans" (R. 1189) simply cannot be reconciled with any fair reading of this record. As emphasized in the initial brief, at 58, Dr. Garcia never actually testified that this statutory mitigating circumstance did not exist. When defense counsel asked him whether Mr. Manso "was acting under emotional or mental disturbance," Dr. Garcia acknowledged that Mr. Manso was depressed, then went on evasively to explain why he believed Mr. Manso's behavior was not that "of a schizophrenic individual." (T. 1127-28) Dr. Garcia's testimony that Mr. Manso is paranoid; misinterprets the world, believing that people are trying to harm him and make fun of him; and suffers from a life-long depressive disorder, does not describe the "emotions or frustrations" of "many Americans." (T. 1112-13, 1127; R. 1180)

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[15]The State's continued confusion regarding the multiaxial diagnostic method is addressed in note 11, ***supra.***

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

The State does not dispute Appellant's assertion that, contrary to the trial court's order, (R. 1183, 1186), Dr. Garcia never testified that Mr. Manso's ability to conform his conduct to the requirements of law -- as opposed to his ability to appreciate the criminality of his conduct -- was not substantially impaired. Dr. Garcia testified only that Mr. Manso's mental problems would not "compel" him to commit the crimes, (T. 1114-15), a significantly higher standard.

The State's answer, at 86, mischaracterizes Dr. Garcia's testimony, referenced above, regarding Mr , Manso's "goal-oriented behavior. " Dr. Garcia did not testify that Mr. Manso's behavior was inconsistent with his acting under emotional or mental disturbance. He testified that it was "not the behavior of a schizophrenic individual." (T. 1128)

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

The State answers with the patently erroneous assertion that both Dr. Haber and Dr. Garcia "agreed that the defendant did not suffer from mental illness. " Answer Br. at 87. As previously discussed, both experts testified that Mr. Manso suffered from dysthymia and periodically from major depression. Dysthymia and major depression are mood disorders, reported on Axis One in the multiaxial diagnostic system, not personality disorders. DSM-IV 26, 339, 345. Major depression is a major mental illness. See Winick, *supra,* at 558-59. In addition, Dr. Haber testified that Mr. Manso had a delusional or thought disorder -- a form of psychosis -- which is definitely a "mental illness. " ***Id.*** Thus, contrary to the trial court's assertion, (R. 1177), Dr. Haber never testified that Mr. Manso had a personality disorder "as opposed to" a mental illness. She testified that he had both.

The distinction the trial court and the State attempt to make between personality disorders and "mental illnesses" is, in any event, misguided.[16] Personality disorders are psychopathological and are distinguished from "mental disorders" for therapeutic purposes. See MAXMEN & WARD, *supra,* at 14. This distinction does not render them irrelevant to the existence of the statutory mental mitigators, See cases cited in section V.A., *supra.* Finally, the State maintains that a defendant's paranoia, delusions and depression can negate the "coldness" element of CCP only in the context of a domestic dispute. Answer Br. at 87. There is no reason to conclude, however, that a defendant may not become just as irrationally inflamed as a result of persecutory delusions involving the workplace as the home.

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

In its answer, the State goes beyond the sentencing order, suggesting that Mr. Manso endangered "approximately a dozen employees who took cover inside the business" and Mr. Reyes who "went outside to retrieve his gun from the car." Answer Br. at 90. The employees inside the business were never in danger, however, and are therefore irrelevant. *Hallman v. State, 560 So.* 2d 223, 226 (Fla. 1990); *Bello* v. *State,* 547 So.2d 914, 917 (Fla.1989). Mr. Reyes similarly was never at risk. As Moussa was telling Reyes to get the gun from his car, but before Reyes had gone, Manso appeared in the building, and the shooting had stopped. (T. 531-32) The State claims that Sanchez was in danger because he was "in the back of the vehicle." Answer Br. at 92. Sanchez, however, was outside the vehicle, behind and under its *rear* end, while Manso was shooting from a roof in *front* of the car. (T. 457, 458-59)

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[16] The definition of "mental illness" and whether it includes personality disorders is a somewhat metaphysical question that has not been resolved in the law. See *generally,* Winick, *supra* .

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

Appellant does not dispute that trial counsel failed to object to the jury instructions in this case. Rather, appellant contends that the violation of *Caldwell v. Mississippi, 472* U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), constitutes fundamental error. In contending that this issue has no merit, the State relies on Combs v. *State,* 525 So. 2d 853, 857-58 (Fla. 1988), and its progeny. Although this Court has continued to rely on *Combs* since *Espinosa v. Florida, 505* U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), was decided," appellant submits that Combs cannot be reconciled with *Espinosa*.

In *Combs,* this Court rejected the contention that the standard instructions' emphasis on the "advisory" role of the sentencing jury in Florida is misleading and diminishes the jury's sense of responsibility. This Court reasoned that since the sentencing statute, section 921.141, Florida Statutes, describes the jury's role as "advisory," the use of that term is not misleading, despite the failure of the instructions to inform capital jurors that the judge must give their "advisory" verdict great weight and may override it only when the facts supporting a contrary result are "so clear and convincing that virtually no reasonable person could differ. " *Combs, 525 So.* 2d at 857 (quoting *Tedder v. State,* 322 So.2d 908, 910 (Fla.1975)).

This Court also emphasized that "[t]he United States Supreme Court, in describing the Florida death penalty process, has expressly characterized the jury's role in Florida to be

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[17] *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).

"advisory" in nature." ***Combs, 525*** So.2d at ***858*** (citing ***Spaziano v. Florida, 468*** U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)). In ***Espinosa,*** however, the Supreme Court rejected the State's argument, based on ***Smalley v. State,*** 546 So.2d 720, 722 (Fla. 1989), that the jury need not be given a limiting instruction on an otherwise unconstitutionally vague aggravating circumstance because "the jury is not 'the sentencer' [in Florida] for Eighth Amendment purposes." ***Espinosa,*** 505 U.S. at 1081. The Supreme Court emphasized that, although under the Florida statute, "the court must independently determine which aggravating and mitigating circumstances exist, and, after weighing the circumstances, enter a sentence '[n]otwithstanding the recommendation of a majority of the jury,' Fla.Stat. § 921.141(3)," ***Tedder*** requires the judge to defer to the jury's sentencing recommendation. ***Espinosa,*** 505 U.S. at 1082. Finding that Florida ***thus divides*** the sentencing authority between judge and jury and that the jury's consideration of an invalid aggravating circumstance necessarily affects the trial judge's sentencing decision, the Supreme Court rejected Smalley's reasoning as a matter of Eighth Amendment law. ***Id.*** The "indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor," and the result in both cases is error.

Combs, like ***Smalley***, rests on the erroneous rationale that "under our process, the court is the final decision-maker and the sentencer--not the jury." ***Combs,*** 525 So. 2d at 857, Just as the sentencing jury must be properly instructed on aggravating circumstances to ensure the validity of the "advisory" sentence which is, in turn weighed by the judge, the sentencing jury must be accurately instructed regarding the significance of their "recommendation." If the jury's sense of responsibility is diminished by the erroneous belief that the judge has complete discretion to accept or reject their "advisory" verdict (which the ordinary meaning of the word suggests), the

jury's verdict and the ultimate sentencing decision are tainted just as much as, if not more than, if the jurors had weighed an invalid aggravating circumstance.

Appellant accordingly submits that this Court must reexamine *Combs* and its progeny in light of *Espinosa*. Even if this Court finds that the error in this case was *not* fundamental, appellant submits that the standard instructions are misleading and should be revised.

CONCLUSION

For the foregoing reasons, and those stated in Appellant's initial brief, Appellant's convictions and sentences must be reversed and the case remanded for a new trial. Alternatively, 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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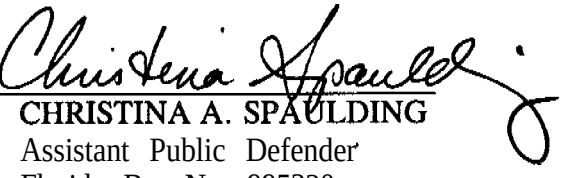
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by hand delivery to Assistant Attorney General FARIBA KOMEILY at the Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131, this 3rd day of April 1997.

Christina Spaulding

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