IN THE SUPREME COURT OF FLORIDA

PEDRO MEDINA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

CASE NO. #90085
DEATH WARRANT

ON APPEAL FROM THE CIRCUIT COURT
OF BRADFORD COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

Pedro Medina contends that he is not competent to be executed. On February 10, 1997, this Honorable Court directed the trial court to hold an evidentiary hearing on the issue of Medina's competency for execution. The lower court was to hear "such evidence as the court deems relevant to the issues, including but not limited to the reports of expert witnesses." Medina v. State, 22 FLW S75, 77 (Fla. February 10, 1997). Any finding that Medina is incompetent to be executed "is to be by clear and convincing evidence." Id. On February 24, 1997, the Honorable Richard F. Conrad, Circuit Judge for the Ninth Judicial Circuit in and for Orange County, Florida, held an evidentiary hearing in this case.

Medina presented the testimony of 22 witnesses, two videotapes of interviews conducted by mental health experts, and assorted exhibits. (R 680-689). The State presented the testimony of 13 witnesses and three exhibits. At the conclusion of the presentation of the evidence, a brief closing argument was permitted. (R 948-985). Four days after the hearing, Judge Conrad issued a sixteen page opinion wherein he detailed his finding that Medina is competent to be executed and the basis for it.

Medina began the hearing complaining that CCR did not receive a copy of the materials the State had provided to the court's experts.[1] The court responded: "[I]t was filed on time, it was

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[1] The court's order directing the filing of any materials either side wanted considered by the court's experts specified a deadline and did **not** require that either side serve a copy of those materials on the

there, it was available . . . and you knew when it was going to be filed, and you knew that there could well have been some sanctions if none of the materials were filed on time. So it was there for your review." (R 6-7) The court permitted Medina's counsel to examine the court's copy of the State's submission. (R 7).

Next, Medina challenged this Court's ruling that it was his burden to prove incompetency for execution by clear and convincing evidence. (R 10-11). The trial court overruled the objection. (R 12).

Medina's case included the following:

Medina presented the testimony of seven present or former Capital Collateral Representative [hereinafter "CCR"] attorneys and two investigators. The conversations these attorneys and investigators had with Medina were in English.[2] (R 45, 81, 138, 424).

Medina's three present CCR attorneys testified to contacts they have had with Medina since November 12, 1996.[3] (R 20, 67,

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other. However, either side could have obtained the other side's submissions from the Clerk of the Court in Bradford County.

[2] Mr. Schardl said that he and Medina occasionally spoke briefly in German, and Mr. Nolas and Ms. Rocamora said they conversed with Medina in both English and Spanish. (R 79-80, 138-139, 493).

[3] At the hearing, CCR Counsel Schardl testified that his first contact with Medina was November 13th; however, his testimony on cross was that he executed an affidavit which summarized his contact with Medina which began on November 12th. (*Compare* R 67 *with* 82).

82, 119-120). On November 14, 1996, Medina told Attorneys McClain and Schardl that he wanted them to submit affidavits of persons who said that Medina did not speak English well.[4] (R 22). Mr. McClain told Medina that he did not "think the affidavits were going to go anywhere," and Medina "seemed to be sort of a bit dazed" by that. (R 22, 23). Counsel told Medina that they "wanted to try and talk to jurors", "and was going to be doing a motion to interview jurors." (R 22). Mr. McClain also discussed the need to make a will and funeral arrangements "if there is an execution." (R 23). Medina opposed Mr. McClain's suggestion that Susan Cary handle those matters, and so, Mr. McClain told him Teresa Farley Walsh of their office would handle it. (R 23-24). Mr. McClain told Medina that his execution might well be carried out. (R 47-48). Mr. McClain was aware that prior counsel had raised mental health issues, and his initial meeting "did not dissuade me of the notion that there were mental problems." (R 25). As a result, he contacted mental health experts and asked them to meet with, and evaluate, Medina's mental health. (R 29).

On January 20, 1997, Medina's three present CCR attorneys met with him in the holding cell during a break in the trial court hearing. (R 34). The subject Rule 3.850 motion had not been verified, and the attorneys had been asked by the court to obtain his verification. (R 34, 35). Medina's counsel returned without a verification. (R 57). Reading from notes he had prepared, Mr.

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[4] On cross, Mr. McClain said that Medina was referring to his English speaking ability at the time of his trial. (R 46, 47).

McClain related several topics which Medina brought up.[5] (R 36-39). At that time, Medina claimed not to "remember anybody by the name of Dorothy James, who was the victim in this case." (R 38). In regard to two other persons involved in Medina's motion, Joseph Daniels and Billy Andrews, Medina asked if Daniels had killed Bill Cosby's son and said Andrews was "a blonde who carries a 38." (R 39). Mr. McClain said that Medina "indicated he wouldn't swear to those things because he was unfamiliar with those people." (R 43). When Mr. McClain asked him to sign the verification, Medina replied "he would only write in German with his pen." (R 43) Ultimately, Medina refused to sign the verification. (R 57).

Mr. Schardl testified that Medina told him he had been "studying German." (R 67). He claimed to have received instruction on German grammar from Anne Frank. (R 68). Medina had written phrases he wanted to learn on pieces of paper and posted them on his cell wall so he could review them. (R 68). Medina also told Mr. Schardl that he believed that some of the jurors at his trial had been influenced by impermissible prejudice. (R 70). He indicated that he had spoken to at least three other deceased persons, James Bush, Abraham Lincoln, and his victim, Dorothy

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[5] According to the testimony, Medina asked if Judge Conrad was a farmer and said he and Anne Frank had been picking tomatoes. He claimed that the only United States trial he was aware of was O. J. Simpson's. He indicated he'd talked to his mother the night before, and claimed that "Bill Cosby was his uncle." He also said that his brother had been in his cell but the guard could not see him. Medina also related a tale where "he doo-dooed on the floor" and made the guard "very upset." (R 38, 39, 41).

James. (R 70, 71). Although Mr. Schardl had spoken to Medina almost daily from November 15th, he terminated that contact on December 5th. (R 67, 77). In January, Mr. Schardl phoned Medina and informed him that the governor had lifted the stay and rescheduled his execution. (R 77). Thereafter, he called Medina and informed him of the Florida Supreme Court's stay. (R 78).

Mr. Schardl testified that sometimes Medina spoke to him in English and sometimes in German.[6] (R 81). Sometimes Medina's responses were appropriate, and sometimes they were not. (R 81). Approximately one-third of the conversations with Medina involved discussion of the legal issues in his case. (R 84-85). With one exception, Medina always took Mr. Schardl's calls, and at least twice in early January, he had the prison personnel call Mr. Schardl for him. (R 83-84).

Attorney Corey was assigned to Medina's case on November 12, 1996, and she spoke to him by phone "no more than twice." (R 119). On January 20, 1997, when she spoke with Medina in the holding cell, he referred to her as a person he "went to school with" named "Pateka." (R 120-121). When the court's experts examined Medina on February 19, 1997, Medina also called Ms. Corey "Pateka." (R 121).

CCR investigator Paul Mann testified that he spoke with Medina at the prison on November 19, 1996. (R 87). He asked Medina for

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[6] A favorite topic Medina liked to discuss with him was "what he was reading." (R 85).

information on Billy Andrews and Michael White. (R 87). Medina told Mr. Mann that he had "only met Mr. Andrews one time," but explained an "incident that took place" regarding Mr. White. (R 87-88). He made it clear to Mr. Mann that he "was more interested in some other issues." (R 88). Medina wanted Mr. Mann to investigate some "Hispanic or Cuban drug dealers that he thought had some relevance to the case."[7] (R 88). On November 26, 1996, Mr. Mann again spoke with Medina about his case. (R 91). Medina told Mr. Mann he wanted him to talk to his jurors because he suspected that "seven were unduly influenced by Michael White's testimony." (R 92). Mr. Mann affirmed that Medina was able to, and did, propose litigation strategy to him. (R 112).

Former CCR Counsel Billy Nolas represented Medina "from 1988 until 1990." (R 126). He "actually did conduct the evidentiary hearing in the case, . . . it was 1988 . . .."[8] (R 127). Mr. Nolas attempted to develop mental health evidence in regard thereto. (R 128-129). He arranged for doctors Carbonell, Marina, and Teich to evaluate Medina. (R 129). Mr. Nolas presented these doctors' conclusions regarding Medina's mental health, as well as "affidavit and testimonial evidence about Mr. Medina's history of

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[7] Indeed, Medina told Mr. Mann to go to a certain grocery store on a certain street in Orlando and inquire about these persons. (R 89). The two spent "half-hour, 40 minutes" discussing this topic. (R 90).

[8] The referenced hearing was in regard to Medina's prior Rule 3.850 motion. (R 127-128).

mental health impairment," at the 1988 hearing. (R 129, 134, 140). The court denied Rule 3.850 relief. (R 140).

Mr. Nolas also said that he met with Medina "several times." (R 130). Over the State's objection, he testified that Medina "was delusional," "hallucinated," and "did not have a grasp of the proceedings" in 1988. (R 130, 132).

Former CCR attorney Judith Dougherty testified that she began to have contact with Medina in 1988. (R 198). At first, Medina was "very silly," he grinned constantly, laughed, and acted childish. (R 197). However, "as time went on, he started to, I felt, develop some trust with me." (R 197). Ms. Dougherty conceded that she may have been the one to obtain Medina's sworn verification on his first Rule 3.850 motion. (R 214). She was to assist Mr. Nolas at the evidentiary hearing by maintaining "a relationship with Mr. Medina." (R 198). To do so, she claimed that "throughout the hearing," they "talked about soap operas, imaginary people, his life in Cuba, anything but what was going on in the courtroom." (R 200). Indeed, "when he did relate to what was happening in the courtroom, he would start speaking loudly and becoming agitated . . .." (R 200). She also said Medina "never permitted me to talk to him about it." (R 210). When the court ruled against Medina, Ms. Dougherty laid the opinion on the table" and explained that he had lost. (R 210). Medina reacted by recoiling from the table and told her to take the opinion with her. (R 210).

Ms. Dougherty said that Medina once accused her of being "one

of the ones trying to kill me." (R 206). She related that when she told Medina to "calm down," he did so. (R 208). She also said that in regard to a later federal court petition, he wanted to know why CCR had not "presented witnesses that he could not speak English at the time that he was arrested." (R 211-212). Indeed, he sent her affidavits from persons regarding his English speaking ability, and insisted that she call them. (R 212). When she utterly refused, "he eventually fired me for that reason." (R 212).

CCR attorney Gail Anderson testified that she was assigned to Medina's case in "May of 1992 or 1993." (R 419). She worked on the appeal of the denial of his federal habeas corpus petition. (R 419). She visited with Medina "around a half dozen times" between her assignment and "late 1994, or early 1995." (R 420). Medina told her he wanted her to present his inability to speak English issue to the court. (R 420). Medina eventually filed a lawsuit against her, Ms. Dougherty and another CCR attorney in the federal court. (R 422-423). He alleged that Ms. Anderson called him a "Nigger." (R 423).

Former CCR investigator Donna Harris met Medina in 1988. (R 432-433). She was investigating with regard to Medina's first Rule 3.850 motion. (R 433). Medina was "cooperative," although his responses "tended to be unfocused." (R 434). Regarding his background in Cuba, Medina "provided some information, but most of the information was implausible, and he seemed to embellish a lot of his background . . .." (R 436). At the 1988 evidentiary

hearing, Ms. Harris was assigned "to sit with Pedro and to keep him calm" after Ms. Dougherty took over as lead counsel from Mr. Nolas. (R 438). She testified that Ms. Dougherty told her "to answer any questions that Pedro had, to explain what was going on in the hearing." (R 438).

Ms. Harris discussed Medina's "favorite television show," "Knot's Landing," in detail with him, and he asked her to dance for him. (R 439, 442). However, at points in the trial, especially when Ms. Harris asked him questions about the case, Medina would state: "I'm innocent." (R 440, 444). Ms. Harris claimed that she and Medina talked so much that she "was hoarse at the end of the day." (R 443).

One of Medina's trial attorneys, Ana Tangel-Rodriguez, testified that she "was appointed . . . for this specific purpose of aiding Mr. Medina in understanding the litigation." (R 446). She said there were "a number of instances where he would come and talk to me about things that were not related to the trial at all." (R 447).

Former CCR attorney, Jane Rocamora, testified that she represented Medina in 1987. (R 490). She "was writing and trying to investigate his original 3.850," and she saw him between ten and twenty times. (R 490, 499). She said that Medina refused to verify his first Rule 3.850 motion "because he was innocent . . .." (R 494-495). Eventually, she obtained his signature on the verification. (R 495).

Medina called Department of Corrections Sergeant Joe Gorden.

(R 449). Sergeant Gorden explained the phases death-row inmates go through from the point of the signing of their death warrants until execution or stay. (R 449-450). Phase One starts with the signing of the death warrant, and during it the inmate is separated from all other death-row inmates except those for whom a death warrant is also pending. (R 449, 455). A sergeant monitors those inmates on an hourly basis. (R 449-450). Phase Two begins seven days prior to the execution date. (R 450). An officer monitors the inmate 24 hours a day, sitting at a desk in front of the inmate's cell. (R 450). The officer makes notes of the inmate's activities every fifteen minutes. (R 450). The sergeant also checks on the inmate during Phase Two. (R 450). To do so, he must pass through a steel door which can be heard through. (R 450). Phase Three "is like Phase One."[9] (R 451).

Sergeant Gorden began Phase Three monitoring of Medina on February 6, 1997. (R 456). On direct, the sergeant testified that approaching the door, but before going through it, he would be able to hear Medina if he was saying anything. (R 453). The following exchange occurred:

Mr. McClain: Have you, on occasion, heard

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[9] Apparently Phase Three was instituted in response to the new perpetual death warrants. When a stay is entered, the warrant is not dissolved, but held in abeyance. The inmate is removed from Phase Two and held in a manner similar to Phase One. The stage of confinement is given a different name to denote that there is a pending death warrant for that inmate's execution. The Phase Three inmates are housed in the same wing as the Phase One inmates, but on a different side of the wing. (R 451).

him talking through the door?

> Sergeant Gorden: No. Until I unlock, put the key in it. Then he begins to start talking. Before that, I never heard him."
>
> Mr. McClain: And does that key make a noise so that it would wake someone up or let them know someone is coming?
>
> Sergeant Gorden: Yes.

(R 453). This speech is loud enough that the sergeant would have been able to hear it on the other side of the door. (R 453).

Sergeant Gorden testified that Medina always follows his commands or instructions. (R 456). He has "never had to use force" to get Medina to do what was required of him. (R 456).

Medina called six death-row inmates all of whom had had contact with him prior to the signing of his death warrant in October, 1996, but not thereafter. Juan Melendez and Barry Hoffman testified that Medina kept chicken bones to ward off evil spirits which he thought were after him, and he talked to himself. (R 279, 288). Hoffman added that Medina would put feces on the bars, but when the guards told him to remove it, he did.[10] (R 289). Ronald Heath and Jason Walton said that Medina often looked "like he was expecting somebody to maybe sneak up behind him or something." (R 299, 318). Walton opined, over objection, that Medina was acting "paranoid" or "nuts." (R 318). Heath testified that he conversed

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[10] Later, Hoffman tried to change his testimony, first saying that "most times [the guards] had to take it down themselves," and then saying that cleaning off the feces "[m]ay have been a joint effort." (R 294).

with Medina in English. (R 304). Hoffman, Pope, and Walton said that Medina is regarded as "a bug" which means "someone who seems a little crazy." (R 287, 308, 323). Walton admitted that the six inmates had referred to Medina as "a bug" on the way to the court that morning. (R 323). All of the death-row inmates wanted Medina (and everyone else) to beat the execution in his case.[11] (R 284-285, 296, 305, 312, 325, 340).

Medina's psychology expert, Ruth Latterner, evaluated Medina during an interview at the prison on November 22, 1996. (R 344). She said that although Medina spoke about persons such as Abraham Lincoln, Martin Luther King, and an executed inmate, he also had periods where he was "lucid and able to cooperate . . .." (R 345, 356). In evaluating Medina on November 22nd, she relied upon data which she had already reviewed from three other defense doctors, Marina, Carbonell, and Teich. (R 346). Dr. Latterner concluded that Medina "is not mentally retarded,"[12] but he has "an organic psychotic disorder." (R 347, 357). She testified that an effect of that disorder is difficulty in stopping or interrupting the afflicted person's behavior. (R 347-348). She claimed Medina "is unable to stop behaviors, much like an old record player when the needle was stuck . . .." (R 348). Based on her diagnosis that

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[11] Heath said that discussion of the death penalty is a common topic among death row inmates. (R 303).

[12] Medina's own evidence introduced below was that he "is bright." (R 781).

Medina suffers from that disorder, she concluded that he is not competent to be executed. (R 353).

On cross examination, Dr. Latterner conceded that "further studies, further observations of this individual might reveal new data" which could change her opinion that Medina is not competent to be executed. (R 358). However, she claimed that none of the following new data would change that opinion:

1) Medina expressed a desire that his body be returned to Cuba after his execution;

2) He gave directions for the disposition of his personal property after his death;

3) He inquired if a new execution date had been set;

4) He provided important information to be used in completing his death certificate;

5) He asked a corrections officer to have his church pray for him;

6) He told a corrections officer: "'I kill[ed] a person, now the State wants to kill me; everyone dies, why don't they get this over with[?]'"

(R 359-361). On redirect, she said that the reason none of the new data set-out above would change her opinion is: "I don't think he has a real grasp of whether he is alive or whether he is dead . . ." (R 361-362).

Medina then presented psychology expert Dorita Marina. (R 365). She evaluated Medina in 1986 and concluded that he "was out of touch with reality, that he was schizophrenic, and that his type

of personality was paranoid." (R 368-369). She next evaluated him in December, 1996. (R 369). She reviewed the conclusions of Dr. Latterner, Dr. Teich, and Dr. Carbonell, and spoke to some family members. (R 369-370, 371, 391, 392, 404). She also reviewed Dr. Mings' and Dr. Gutman's reports and "watched the video tapes." (R 392-393). She administered numerous tests, with which Medina cooperated. (R 370). She concluded that he is "paranoid schizophrenia, secondary to organicity." (R 375). Dr. Marina admitted that the "secondary to organicity" part of her diagnosis was based on Dr. Latterner's conclusion.[13] (R 391).

On cross, Dr. Marina said that Medina's Cuban Spanish is "poor" because he is from a poor "socioeconomic status." (R 393). She claimed that" [h]e leaves out endings of words, and at times, also beginnings of words." (R 393). She said when Medina responded "Mucho Gusto Patti" to Dr. Gutman's "much pleasure in meeting you," "he was being sociable and polite" and not sarcastic. (R 395). State witness, Raul Gonzalez, a Cuban from a poor socioeconomic status, testified that he saw the videotape, and the interpretation given by the prison interpretor was correct, Medina did, in fact, say in a derogatory manner that the pleasure was Dr. Gutman's.[14] (R 692).

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[13] Later, she wavered in her diagnosis, stating that the schizophrenia was "probably" secondary to organicity. (R 392).

[14] He also adamantly denied that Cubans from a poor socioeconomic background drop letters from either the beginning or endings of their words. (R 691).

On cross, Dr. Marina admitted that although the test she gave Medina in December, 1996 showed him to be mentally retarded she did "not believe they were valid results. I think they were spuriously low." [15] (R 398). Indeed, she admitted that the discrepancy in the earlier test and the later one might well be explained by malingering. (R 398). She said that schizophrenia is a form of psychosis and a psychotic person can be competent to do certain things. (R 400). She also conceded that a psychotic person can malinger specific symptoms to make himself look more psychotic than he is. (R 400).

Dr. Marina further admitted that statements, such as an expression that he wanted his body sent back to Cuba, might affect her opinion of incompetence depending on "how, and when, and the context." (R 410). Cross examination concluded with the following exchange:

> Q . . . If Mr. Medina was asked to take a particular psychological test by a practitioner, and his response was "I'll take it if it is in German", how would you describe that interaction?
>
> A. . . . It sounds like it's an imposition on the practitioner, but . . . it's very hard to know why anyone says anything that he says.

(R 415).

Medina's psychiatric expert, Steven Teich, who testified in Medina's prior Rule 3.850 hearing in 1988, re-evaluated Medina in

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[15] In fact, Medina introduced evidence at the hearing showing that he "is bright and very assertive." (R 781).

December, 1996. (R 588, 591, 592). Dr. Teich testified that "at the time that I saw him, Mr. Medina was not competent to be executed." (R 596). Dr. Teich admitted that he relied to a degree on Dr. Marina's work and conclusions, and agreed that if there were deficiencies or defects in her work, it would affect the validity of her conclusions and of his own determination. (R 660-661).

Dr. Teich defined "malingering" as "a conscious fabrication of a mental illness or mental symptoms or psychiatric symptoms in order to have some secondary gain in reality." (R 597). He also allowed that even in the presence of some mental illness, one "can be rational on certain things and . . . that varies depending upon the degree of mental illness and . . . upon the particular circumstances that are going on at the time." (R 606).

Dr. Teich admitted that Medina's symptomatology "covered so many, the manifestations covered so many syndromes . . ." that there was no real diagnosis. (R 601).

On cross, Dr. Teich said that Medina "meets the criteria for at least four diagnoses" of mental illness. (R 655). He acknowledged that Medina presents "a very severe degree of symptoms." (R 667). He also conceded that the "presentation of very severe symptoms of psychological pathology is also consistent with malingering." (R 667). Indeed, the doctor agreed that "when an individual is presenting multiple symptoms of many different kinds of psychological pathologies that are all mixed up together, that's also consistent with malingering." (R 668).

Dr. Teich agreed that knowing one's name is a fairly simple

thing and acknowledged that in his December interview with Medina, Medina said "'that is not my name'" in response to being called "Pedro Medina." (R 662). Likewise, Medina indicated he did not even know where he was, what an attorney or lawyer was, or who his attorney or lawyer was. (R 662-663). Dr. Teich agreed that these responses suggest severe memory impairment and could be consistent with malingering.[16] (R 664). The doctor also acknowledged that repeatedly during the interview, Medina's first response to a question he was asked was to repeat that question. (R 664). Dr. Teich admitted that such behavior has the effect of buying time for Medina to think of how he wanted to respond and is "consistent with malingering." (R 664). Dr. Teich agreed that unusual behavior in front of authority figures with little or none at other times, coherent requests to certain officers, inquiring about a new execution date, expressing wishes regarding his body after execution, giving information for completion of his death certificate, and working up a will can be consistent with malingering. (R 665-667).

Finally, on redirect Medina's counsel, referring to

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[16] Court appointed expert, Dr. Eric Mings, testified that in his vast experience "schizophrenics who cannot answer a simple, basic question would have to have severe disorder thought processes, and intentional processes, and typically wouldn't be able to answer more elaborate questions, either." (R 724). The testimony of the State's witnesses, *infra*, makes it clear that Medina can, and has, answered much more elaborate questions. Further, the transcript of the Mings/Gutman videotape shows that Medina asked the doctors a rather sophisticated question, i.e., "Why would I fake mental illness?" (R 239).

questioning on cross, asked "[i]n terms of his behavior before the interview and the behavior after the interview" whether that indicated malingering.[17] (R 669). Dr. Teich reviewed the prison log sheets and admitted that he saw "none of the things that I would flag as unusual behavior" before or after the interview.[18] (R 670).

Also on redirect, Medina's counsel showed Dr. Teich the affidavit of Corrections Officer Charles Padgett wherein he stated that Medina told him he killed someone and now the State wants to kill him. (R 672). Dr. Teich said that that affidavit is "problematic" to his opinion of Medina's competency for execution, "and does it create issues and the need to think hard, yes, it does. But is it necessarily inconsistent, no. It might be. But it's not necessarily so." (R 674).

Medina called Alfredo Martinez-Garcia who said that he met Medina in the early 80's. (R 582). He met Medina through his sister, Regla, who was living in an apartment in Orlando. (R 576). He would see Medina "once or twice a week . . . at Regla's house." (R 577). The witness described Medina as a "young, healthy, . . . black male" who "was not there," "was blank," or "would not

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[17] On cross, Dr. Teich testified: "I have to tell you what my impression is at this point. It was that I was not impressed with anything particular going on around the specific time of the date of my interview, out of the ordinary." (R 651).

[18] He specifically rejected the notation of "standing at cell door" and "sitting on the floor" as being unusual behavior. (R 670).

respond" when he tried to talk to him. (R 579). He claimed to have observed "unusual behavior" in Medina. (R 580). When asked to describe it, he said that Medina talked to himself while walking down the street and "was in another world" until he forced him to listen to what he had to say. (R 580). The witness had not seen Medina since 1981 or 1982. (R 582).

Medina rested his case in chief. (R 681).

The State's evidence included the following:

Raul Gonzalez, a thirteen-year Orange County Sheriff's Office deputy, testified that he was born in Havana, Cuba, lived there the first fourteen years of his life, came from a low, working socioeconomic level, and speaks Spanish. (R 690-691). He said that it is **not** a practice of his people to drop off the front and back of their words when speaking in Spanish. (R 691). As part of his duties, he was assigned to the courtroom in which Medina's subject evidentiary hearing was being held. (R 691). He heard Medina speaking Spanish when the videotape of the court expert's interview was played. (R 691). Deputy Gonzalez testified that Medina was **not** cutting off the fronts and backs of his words when he spoke Spanish on the videotape. (R 691).

Further, Deputy Gonzalez heard Dr. Gutman say "Mucho Gusto" to Medina at the close of the interview. (R 692). He recalled Medina's response to that phrase and repeated it, in Spanish, for the court. (R 692). Thereafter, he explained to the court that it means: "The pleasure is for you." (R 692). When asked to interpret the meaning of Medina's response, Deputy Gonzalez said:

"[H]e was making fun of the doctor." (R 692).

Further, Medina initiated conversation with Deputy Gonzalez in Spanish on two occasions during the evidentiary hearing. (R 692). On Monday, at 5:00 pm, at the elevator, Medina "read my name tag. He pronounced my last name, Gonzalez. He asked me if I speak Spanish. I nodded my head. And then he went ahead and said, in Spanish, 'It's an honor meeting you.' All this was in Spanish." (R 693). The second conversation was on Wednesday at 5:00 pm, again in the elevator. (R 693). Medina "asked me to ask the correctional officers to check his handcuffs. They were closing on him." (R 693). He made the request in Spanish, and Deputy Gonzalez "translated for him." (R 693-694).

Court expert witness in the field of psychology, Dr. Eric Mings, testified that he interviewed Medina at Florida State Prison on February 19, 1997.[19] (R 696). The purpose of his evaluation was to determine whether Medina "was competent to proceed with the execution." (R 696). In making his determination, Dr. Mings interviewed three correctional officers who had recent contact with Medina, reviewed prison medical records, interviewed the Superintendent of the prison, interviewed Medina, spent many hours examining two large boxes of documents Medina's attorneys gave him,[20] and reviewed a binder full of documents provided by the

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[19] The doctor's primary areas of concentration in his many years of experience are "neuropsychological and forensic work." (R 732).

[20] The doctor testified that he spent approximately 13 hours reviewing

State. (R 698-700). Of particular significance to Dr. Mings were

> some affidavits from correctional officers, . . . medical records of Mr. Medina throughout his time in the incarceration . . .[,] records regarding his behavior at different points in time . . .[,] numerous handwritten requests and complaints, and other matters by Mr. Medina . . .[,] a report provided by the three psychiatrists who had evaluated him at the request of Governor Chiles . . .[, and] a report by a psychologist, and a psychiatrist, retained by CCR . . ..

(R 700). Dr. Mings concluded "that Mr. Medina has the capacity to appreciate his pending execution and the reason for it." (R 697).

The most significant factors to his determination that Medina is competent to proceed to execution included:

(1) "[T]he behavior that I observed during the course of our interview." (R 701). The doctor explained:

> [B]ased upon my experience evaluating many, many, many schizophrenics within the forensic setting, as well as within regular clinical practice, I didn't see his behavior to be consistent with what I had seen before in schizophrenics. In addition, I had some specific concerns about individual things that led me to be thinking about malingering.

(R 701).

(2) "[T]he consistency of the behavior that I observed with the prison records . . .."

(3) "[T]he issue of timing in terms of the changes in behavior that were documented . . .."

(4) "[A] variety of other things.

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the documents the attorneys gave him at the prison when he interviewed Medina. (R 699).

(R 701). Dr. Mings explained that he is "familiar with medical records from DOC" and is "familiar with the problems that mental health has . . . differentiating true mental health problems from secondary gain issues."[21] (R 702). As a result, he looks "at a sequence of events," starting with the most recent behavior. (R 702).

In reviewing the huge volume of documents he was given, Dr. Mings determined that "[t]here seemed to be an abrupt change in his behavior . . . which occurred shortly after December 2, . . . which was when he was in what's called Phase Two." (R 702). Further, the documents revealed that "apart from the bizarre behavior that was being exhibited, . . . he could answer questions appropriately . . . ." (R 703). Further, one officer heard a conversation Medina had "with another prisoner on death row that was a coherent conversation during that period of time" (R 703).

The doctor pointed out that the records show that "over many years . . . Medina understood the fact of his incarceration, and how to work within the system." (R 703). Dr. Mings specifically mentioned "numerous requests" Medina made, "complaints about the

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[21] The doctor has a contract which requires him "to go in with a team of people to review the adequacy of the health care being provided to inmates, based upon the standard that the State sets forth. (R 702). A common secondary gain seen by the doctor in his review of the prisons "is that the inmates will feign various types of mental health symptoms in order to get out of their current housing." "Whether it was a death warrant or . . . an appeals process, or . . . a dissatisfaction with current housing, there are many different things it could be." (R 720).

quality of various services," and the completion and submission of a form seeking the opportunity for "him to speak with a Spanish-speaking law clerk in order to . . . draft some sort of documents." (R 702, 703).

Addressing the issue of secondary gains, Dr. Mings pointed out that the records showed episodes of unusual behavior in 1983 and "a series of them that occurred, beginning in late 1987, and through 1988."[22] (R 703). "Typically, it would be eviden[ce] bizarre behavior, be admitted, begin to show more normal behavior, be released." (R 703). The doctor noted that in 1987, there was "some sort of appeal process going on at that time . . .." (R 703-704). Dr. Mings concluded: "My observations and interpretation of his history was that the behavior that I saw was malingering." (R 704). Dr. Mings' report was admitted into evidence. (R 704).

Dr. Mings reviewed, and testified regarding inadequacies in, some of the testing conducted by Dr. Marina.[23] (R 706). The Million test contained 175 total questions, but Medina had answered only 41 of them. (R 707, 708). Dr. Mings testified that it was not valid to rely upon such a test under those circumstances.[24] (R

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[22] Medina's trial was in 1983, and his first Rule 3.850 motion was filed in 1987 and an evidentiary hearing was held thereon in 1988.

[23] The State, pursuant to court order issued during the subject hearing, received copies of Dr. Marina's testing protocols after her return to her office subsequent to testifying. (R 632).

[24] Medina's counsel objected on the basis that "[t]his is an area I was not allowed to go into with my experts, reviewing other

708). The doctor also reviewed "the W.A.I.S. R. answer sheets." (R 708-709). Thereon, Medina indicated that "he was unable to answer some very simple questions, such as the color of the American Flag . . .. (R 709). "Based upon some of the simple things that could not be answered," Dr. Mings felt that Dr. Marina's test indicated that Medina was malingering when he took it. (R 709). He testified that the test done by Dr. Marina was consistent with his opinion that Medina is, in fact, malingering. (R 709).

On cross, CCR attorney McClain asked: "In your conclusion, your first statement . . . is 'although this is the most uncomfortable opinion I have had to render in my career.' What are you saying there?" (R 711). Dr. Mings replied: "That is in reference to my own personal beliefs regarding the death penalty, and the mixed feelings that I have about it, and my role in the process." (R 711).

On cross, Dr. Mings identified several things he considers when resolving whether someone is malingering:

1) The observed behavior of the individual at issue;

2) "the consistency of that behavior based upon my clinical experience dealing with people;"

3) "the results of any testing" - recent or prior;

4) whether the current behavior is consistent with that

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expert's findings or whatever, and critiquing them." (R 705). The judge overruled the objection, explaining: What I was prohibiting was the testimony of one physician criticizing the conclusion of another. . . . Not about factual findings." (R 705).

person's behavior over time; and

5) whether the current behavior is consistent with that of persons having "the supposed mental illness."

(R 712-713). He added that malingering "can be a complete fabrication of symptoms, or it can be an exaggeration of symptoms . . .." (R 714).

Mr. McClain asked the doctor about the significance of the feces incidents. (R 721). Dr. Mings agreed that "[i]t's unusual," but added: "I've seen people who have had pre-occupation with feces in forensic settings, meaning in jail, some of which were psychotic and others of which were very angry, manipulative, pissed off people." (R 721). Regarding an incident of Medina throwing feces at another inmate, Dr. Mings testified that it "doesn't have to be malingering. Doesn't have to be psychosis. Could be anger, could be anything." (R 729). Likewise, the courtroom feces incident could be either. (R 729).

The doctor also made it clear that his "role was not to determine whether he has any mental illness whatsoever, but to determine his current condition and relevance to what I was asked to assess." (R 714). He reiterated: "The issue to me is whether he comprehends his impending execution and the reason for it." (R 715). "I'm comfortable that what I saw in conjunction with the records that I reviewed, and everything else that supports my opinion." (R 730).

The State then called Prison Chaplain Supervisor Donald Spence. (R 734). The chaplain testified that Medina answers to

either "Pedro" or "Medina." (R 735). He said he met with Medina "six to eight times" for "from fifteen minutes to forty-five minutes." (R 736). They conversed primarily in English, although occasionally they spoke a few phrases in German. (R 736-737). Medina's answers to any questions he asked were always relevant, and at no time did he ever display any strange behavior to the chaplain. (R 737).

Sergeant Robby Self testified that Medina responds to his name and calls him "Sergeant Self."[25] (R 738). Sergeant Self was a "grill gate monitor from four to midnight" when Medina's warrant was signed. (R 739). He "was with him five days a week" from that point.[26] (R 739). Medina's behavior was normal for the first three weeks or so.[27] (R 739, 745).

Sergeant Self overheard conversations between Medina and Inmate Mills. "[A]bout two weeks into the Phase One," Medina discussed "constructing a will with Mills." (R 740). He also

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[25] Medina and the sergeant knew each other from contact some four or five years previous to the instant death warrant. (R 739).

[26] Sergeant Self described the physical layout of the area where Medina was then confined as follows: "We're bottom floor of "Q" Wing. Has got three cells on one side. You have a grill gate monitor that's ten to twelve feet away from the first cell. . . . Medina was in the first cell, and Mills was in the third cell, about eight, ten feet apart." (R 740). The sergeant is at the grill gate throughout Phase One and Phase Two. (R 746).

[27] The sergeant was not certain of the length of time of the normal behavior, but testified that any unusual behavior would have been reflected in his grill gate log. (R 739, 745, 748).

heard them discussing CCR. (R 742). Medina

> was very excited and angry, and was discussing who the true criminals were. He was saying they are more criminals than he is. . . . Speaking of CCR as a whole. . . . He was saying how they will not represent him, he is fixing to die.

(R 742).

Sergeant Self also reported that he escorted Medina to the interview with court experts, Doctors Mings and Gutman. (R 742). He said that Medina was housed on "Q" Wing "about a quarter mile away" from the interview room. (R 742). Medina "followed all directions up until right before we got near the courtroom." (R 743). Then, his behavior began to change: "He began to cry very, I mean, he really cried a lot for about five or ten minutes once we got around the superintendent, the assistant superintendent, right outside of the courtroom. Then . . . he subsided." (R 743).

Court-appointed medical doctor and psychiatrist, Michael Gutman was accepted "as an expert in the field of psychiatry." (R 750). The doctor related his instruction from the court to be: "To determine whether the inmate knew, or knows the meaning of a[n] execution, and for which it is being done." (R 751). The doctor followed the legal standard set out within the court's order. (R 751). Dr. Gutman's report of his evaluation of Medina was admitted into evidence without objection. (R 752).

Dr. Gutman explained that he had concluded that Medina "does have the mental capacity to understand the fact of the pending execution, and the reason for it." (R 752). The doctor based his

opinion on:

> [R]eview of a multitude of records dating back to his arrest and sentencing, and trial and sentence, and time in Florida State Prison on death row, and my mental status examination, and reports of other physicians, and psychologists, and just the multiple records that I have reviewed.

(R 752-753). The doctor had spent "twenty, twenty-two hours" reviewing the materials submitted in preparation for reaching his conclusion and writing his report. (R 758).

On cross, Dr. Gutman was asked if behavior regarding feces which apparently was indicated on a document dated 8-3-88 and shown to the doctor, was "consistent with something other than malingering." He responded: "Yes. . . . It could be violence, it could be bizarre behavior of a psychotic person, it could be somebody doing it playfully, as in a fraternity house, picking up feces from the toilet, throwing it at a fraternity brother, which I have seen. So it could be several things."[28] (R 762). The doctor also testified that the incident in the courtroom regarding Medina and feces had no effect on his opinion that Medina is competent for execution. (R 800).

Dr. Gutman said that in his opinion, Medina was malingering. (R 753). He identified several factors indicating malingering in his written report and discussed four of those at the hearing, to-

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[28] Later, the doctor added another possibility to the list of "could be's," i.e., "[f]ascination with feces." (R 766). The doctor also indicated that such behavior could occur in one with an "anti-social personality." (R 775).

wit:

(1)"[I]nconsistent channels of communication displayed by the inmate during the interview;"[29]

(2) "Overacting;"[30]

(3) "Inconsistencies as observed in his behavior . . . by FSP staff;" and,

(4) Medina's exhibited behavior is inconsistent with any known mental illness.[31]

(R 753-755).

Dr. Gutman then described in some detail another factor which he felt revealed Medina's malingering, evidence of Ganzer's

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[29] The doctor explained that "channels of communication" are eye, hand, voice, gestures, demeanor, total manner, anything that is communicated and observed by the senses . . .. And an example of that would be the change of tone that will occur in certain of his communication. Some of his communications were quite irrational . . . he will mumble, he would grunt[, b]ut he would listen to each question, and answer each question. That will be a strong departure from the irrational, illogical, inconsistent behavior, to one of listening." (R 753-754).

[30] "He came in, initially, with many grunts, groans, and gestures, and coughing sounds. As the interview progressed, they diminished. . . . On a couple of occasions, he would stop and stare at the . . . ceiling, as if in a trans (sic) type of reaction. (R 754).

[31] Dr. Teich opined that "malingering is . . . a finding one makes after you have explored to see whether the same symptoms can be better explained, or explained first by a mental illness. . . . You have to look for the mental illness. If you don't find it, then you can consider this is malingering." (R 645).

Syndrome.[32] (R 755). With Ganzer's Syndrome, a person "goes into almost an automatic pilot . . . in which their whole specter of behavior is that of feigning mental illness. And the thing that gives it away is the approximate answers." (R 755). Many of Medina's answers were "approximate type responses."[33] (R 755-756). "But there was a peripheral response in many of his answers that showed a knowledge of what was being asked, and then a little . . . deviation from it, but with a strong reference that appeared to himself." (R 756). Ganzer's Syndrome is not a mental illness. (R 756, 787-788).

Other factors supporting malingering included "three psychiatrists observed malingering,"[34] the dramatic change in behavior from Phase One to Phase Two,[35] the "mock eating of a candy

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[32] "Ganzer's Syndrome . . . is related to malingering and a conscious awareness of the question and the answer and wanting to give a peripheral answer." (R 787).

[33] Dr. Gutman gave several examples of approximate answers given by Medina. (R 756). One was, "when asked for the date, he said 2-19-79. And it was 2-19-97. So he got everything right but the year, and the year is a focus year of his that he keeps going back to." (R 756).

[34] The State did **not** provide this information to the court appointed experts; however CCR included the full report of those psychiatrists in the information it gave the doctors. (R 689).

[35] Dr. Gutman explained that when Medina "[s]tarted moving from Phase One to Phase Two. That that was a cue to go into a more colorful, and lurid display of psychosis." (R 791). Indeed, Defense expert, Teich, conceded that "[i]t's easier to, if you are trying to

bar, and eating feces wrapped in a paper towel," and "[p]aper eating in the courtroom." (R 756-757). The doctor noted that paper eating "is seldom seen,"[36] and it "has a theatrical, dramatic tone to it." (R 757). A final factor indicating malingering was "[t]he offguard . . . statements that would be made, and the on-cue statements and behaviors that appeared." (R 757). Dr. Gutman summed up Medina's behavior as "quite bizarre, and a characature (sic) of anything that might be close to what we would see in a psychotic person." (R 757). He said: "I'm not ruling out organic factors playing a role. I'm only saying that there is malingered behavior, and feigned behavior, and that can be, on top of a lot of things." (R 787).

Officer William Hall testified that since Medina's first death warrant, he has had contact with him. (R 809). Officer Hall explained that "each inmate, death row inmate . . . gets to draw canteen, different food items, cosmetic items . . . once a week." (R 809). Twice, Medina placed a canteen order with Officer Hall. (R 811). Medina ordered "12 eatable items . . . there was two or three sodas, couple of ice cream sandwiches . . . [t]wo or three honey buns and some candies and there were several cosmetic items." (R 811). Officer Hall described the process for obtaining that order:

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malinger, to do it for a short period of time than for a long period of time." (R 629).

[36] In 33 years as a psychiatrist, Dr. Gutman had "never seen it." (R 749, 757).

> One of the canteen sheets . . . has several bar codes on each item. I hand that sheet to Inmate Medina -- that day I handed it to him and I told him I would be back in about ten minutes, go ahead and fill it out what you need and I left and I came back ten minutes later and he wasn't done. He was still tabulating each item.
>
> He knows how much he can have and how much money he's allowed to spend at each draw and he was still calculating all the prices and the items on each of the papers. He finished up his canteen order and gave it to me and his inmate card, I.D. card.
>
> I brought it upstairs and I had the canteen inmate scan it, . . . and two hours later they brought his canteen back in a bag.
>
> I brought it downstairs, I took each item, put it on his cell bar and handed Inmate Medina the receipt and he looked at the receipt and he counted each item that was on the bars that was on the sheet and I asked him if everything was straight and he said yes.

(R 812-813). A canteen order sheet was introduced into evidence, over objection. (R 813). In recounting the other time that Medina ordered canteen items through him, Officer Hall noted that Medina counted "the items to make sure that everything he was charged for is on the receipt that was on the bars." (R 814).

Tim Geibeig testified that he is a Captain who has been employed at Florida State Prison for "eighteen years and eight months." (R 822). Captain Giebieg knew Medina when "he first got on death row." (R 822). He had regular contact with him over the years and since the death warrant was signed on October 31, 1996. (R 822, 825). The first time Medina saw the captain after he was transported to Florida State Prison after the death warrant was

signed, ". . . was the first time he had saw me since I had made captain and he commented on the fact that I see you made captain now and I said yeah, I made captain while you were gone to U.C.I." (R 824). Medina told Captain Giebieg that he did not know whether he could fight the execution in his case. (R 824). The captain witnessed one incident where Medina put his pants on his head and began yelling and defecating on the bunk and his food. (R 829).

Correctional Assistant Superintendent II Lee Johnson testified that on January 27, 1997, he visited Medina in his cell and they carried on a conversation in English. (R 832). Neither had any problem understanding the other. (R 832). The purpose of the visit was to obtain information from which to prepare Medina's death certificate, insure that his property, including his monies, was handled according to his wishes, and to make funeral arrangements. (R 833). Assistant Superintendent Johnson testified:

> I spent probably 15, 20, 30 minutes with him and we went over his property, death certificate, any special questions he might have, any property he wished for someone special to get, those type of things, and he was very helpful and knowledgeable and understood exactly why I was there, and I left.

(R 834). Medina told him that an attorney at CCR was handling his funeral arrangements, he wanted "his property mailed to a lady who lives in New Jersey," he wanted his money to go to her as well, and he gave specific information needed to complete his death certificate. (R 834-836). Medina said he had not been in the

military, cleared up some confusion about his birthdate, explained that his biological mother is deceased, and the woman identified in his records as his mother is his stepmother, and he confirmed his stepmother's name. (R 836, 849-840). Medina responded appropriately to all questions he was asked. (R 839).

Sergeant Michael Nevitt testified that he had "the key to the grill gate," and so, he escorted Superintendent McAndrew to Medina's cell on February 17, 1997. (R 842, 843). He stood by while the superintendent talked to Medina. (R 840). Both Medina and Superintendent McAndrew spoke in English. (R 843). McAndrew asked Medina if he was getting the health and comfort items he needed, and Medina said he was. (R 843-844). Then, Medina asked whether there had been a new date set for his execution. (R 844). The superintendent told him that when one is set, he would probably learn of it before the superintendent because his attorney would most likely know first and would call him. (R 844).

Sergeant Nevitt stated that inmates throwing feces occurs sometimes as often as once a week, other times about once a month. (R 844). He said they do it "[f]or a cell change probably more than anything."[37] (R 844). He added that it is the practice to move an inmate who has thrown feces in their cell. (R 845). In twelve years of service, the sergeant had seen inmates playing with feces three or four times, had seen them eat feces twice, and had

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[37] The sergeant explained that sometimes an inmate will be threatened by another inmate and want to be moved away from the person who has threatened them. (R 844-845).

seen them smear feces on themselves twice. (R 847).

Officer George A. McCormick, Jr. testified that he was a cell front monitor when Medina went on Phase Two death watch the first time. (R 849). He referred to Medina by his name, and Medina always responded to that name. Medina called him "Officer McCormick." (R 849). He and Medina carried on many conversations all in English. (R 849, 851). Officer McCormick described Medina's behavior as follows:

> For the first couple of days that I was assigned as a cell front monitor his behavior was normal. After that he began to act abnormally. He would talk to himself. He would make grunting noises. He would act like he was flying in an airplane.
>
> At one point and (sic) time I believe he took all of his clothes off and wrapped a towel around his head and just sat in the middle of his cell for a couple of hours, but after a couple of days of that he basically just -- he would either sit on his bunk and read or sleep.[38]

(R 850). Officer McCormick remembered a specific conversation Medina had with former inmate John Mills. (R 850). During that conversation, "Medina was discussing points of his original trial with Inmate Mills. It had something to do with Inmate Medina was claiming that one of the jurors had been tampered with and that the judge should have kicked the juror off and he did not." (R 850-851). These inmates also talked about what was going on currently in their respective cases and "several times" they asked each other

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[38] Dr. Gutman testified that going into "a more colorful, and lurid display of psychosis . . . [d]oes take energy." (R 791).

"how their motions were going with the courts." (R 851). The conversations between the two inmates were intelligent and coherent. (R 851).

Medina's responses to whatever Officer McCormick said to him were always appropriate (R 851-852). The officer testified that sometimes Medina and Mills conversed in a foreign language. (R 852). It appeared to the officer that they did so for the specific purpose of keeping him from understanding what they were saying. (R 852).

Medina had many conversations with Officer McCormick. (R 853). The topics of conversation included:

> . . . Medina would discuss sports with me. I remember specifically one of the first nights I was down there he watched an Orlando Magic basketball game and conversed with me about the things that were going on with the Orlando Magic, Shaquille O'Neal leaving and Penny Hardaway being injured and the problems they were having due to that. . . .
>
> . . . We discussed local sports teams, Florida Gators, Florida State, college football. Basically we would just talk about sports until he would either start reading or go to sleep.

(R 853). The events they discussed were current and Medina was knowledgeable and accurate about them. (R 853-854, 857).

Medina also made canteen requests of Officer McCormick. (R 854). Officer McCormick explained that during Phase Two the inmate has only his bed linen and basic health and comfort items in his cell. (R 855). "Everything else is stored outside the cell and he has to request it be given to him." (R 855). Medina had items of

property which were kept outside his cell, and when he wanted something, he would specifically request that item. (R 855). Officer McCormick testified that Medina knew the nature and extent of his property which was kept outside his cell. (R 855).

Officer McCormick also testified that once Medina started his abnormal behavior, he noticed that it only occurred when someone else came onto the wing. He testified:

> As long as it was just myself down there Inmate Medina would act in a normal manner. When somebody, a lieutenant, captain, or anybody else would come, Inmate Medina would start acting abnormally again. . . . When they left he would just sit back down on his bunk and wouldn't say anything or would go back to like it was prior to their being there.

(R 856).

Officer Archie G. Luke was a cell front monitor on the midnight to 8:00 a.m. shift in December, 1996. (R 859). He observed Medina "approximately from the middle of December until the 27th of January," which was "the day of the second stay." (R 859). Officer Luke testified that he observed Medina's behavior before and after the grill gate opened; he said:

> When it was just myself and him there he was very normal. We had no problems. I would come on shift and he would either be watching T.V. or reading. He would do that for approximately 30 minutes to two hours, depending -- and then he would go to sleep for most of the remainder of the night. . . . When a white shirt[39] would come down to visit or some other higher ranking figures, his

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[39] A "white shirt" is a lieutenant or a captain. (R 860).

behavior would change drastically.

(R 860). When the "white shirts" showed up, Medina would begin doing such things as barking and crawling around in his cell. (R 861). He would also talk to himself, and do things such as "airplane spins in the middle of the cell."[40] (R 861).

Officer Luke said that during that six weeks, he "often talked" with Medina, and they spoke in English. (R 861). Medina "absolutely" understood what Officer Luke said to him. He added: "When he wanted something from his bag of canteen items, he would ask [for] it in a very normal manner and speak exactly what he wanted. He knew exactly what he had in the cooler for his drinks and in the bag for his other eatable items. (R 861-862). Medina never requested an item that he did not possess. (R 862).

Officer Luke testified that in-cell activity such as "singing, chanting, and talking" is "not abnormal for an inmate.[41] They often do things like that to entertain themselves." (R 867).

Housing Officer Milton Brinson testified that he has known Medina since his death warrant was signed. (R 869). Initially, Medina's behavior was normal as compared to other inmate's

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[40] Normally, a "white shirt" would visit once per shift. Usually the cell front monitor would note the visit on the log, but sometimes it did not get noted if the monitor was "in the bathroom or break or something . . .." (R 863).

[41] Dr. Gutman testified that talking to oneself can be normal behavior. Certainly, it is not necessarily indicative of mental disease or disturbance. (R 800).

behavior. (R 874). However, once Medina went on Phase Three, he began having much more contact with him. (R 870). He began to act "strangely, especially when a psychiatrist or a lieutenant or captain or colonel or somebody like that would come see him." (R 870). When he was alone with Medina, there was no unusual behavior. (R 870). In fact, one time, Medina asked Officer Brinson to get him a clean shirt because he had a "call-out" to see a psychiatrist or his attorney. (R 871). Medina and the officer spoke to each other in English, and Medina always responded appropriately to his commands and questions. (R 870, 871). The officer testified: "He would do anything we would ask him to do." (R 870).

Food Director II Charles Cobb testified that he met with Medina twice; the first time was before he received the stay on the initial warrant, and the second was on January 27, 1997. (R 875-876). He visited Medina, introduced himself and told him he was there "to get his last meal request."[42] (R 876, 877). Medina responded "[n]ormally," and said he wanted "a steak well-done," and he added "he would like to have fried potatoes and a 2-liter Pepsi and butter pecan ice cream." (R 877-878). He also requested ketchup and asked for more than a pint of ice cream.[43] (R 878).

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[42] The Food Director specifically used the term "last meal" when discussing the menu with Medina. (R 878).

[43] "[A]bout 45 minutes later," Sergeant Johnson saw Superintendent McAndrew, who "handed me a note that said Medina told him that he would like to have some strawberry preserves syrup to go on his ice

Officer Charles Padgett, Jr. testified that he worked third shift, from 4:00 p.m. to midnight at the prison during January, 1997. He had "off and on" contact with Medina since January 1994, and regular contact with him since his death warrant was signed. (R 880, 881). Whenever he had contact with Medina, they spoke to each other in English. (R 880-881). When Officer Padgett first met him, Medina "played checkers with the other inmates on the wing, and he would call his move and they would call their moves and he would play cards, talked to other inmates, basically the same as any other inmate." (R 881).

Medina made canteen requests of Officer Padgett, which included completing a form that required math calculations. (R 882). When a captain or lieutenant approached Medina and directly asked him a question, Medina would break off the foreign language in which he had been talking to himself and respond appropriately in English. (R 882-883). Then, he would "go back to speaking in a different language to himself." (R 883).

One evening after Medina returned from a court appearance in Orlando in January, 1997, Officer Padgett, who was cell front monitor, observed him

> pacing in his cell that evening. He was very upset, mad behavior. At that time he stated to me I killed a person now the State wants to kill me, let's go ahead and get it over with.

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cream." (R 878).

(R 883).[44] On cross, Officer Padgett said Medina made the above statement to him at "approximately" "between ten and 10:30 that night." (R 891). The officer was asked: "When you saw him did he have any kind of cut or abrasion on his head?" (R 892). The officer replied: "Not that I noticed." (R 892).

Officer Padgett stated that Medina always responded to his name and responded appropriately to any commands he gave him. (R 884). He said that after Medina got the stay in January, 1997, his behavior changed a bit:

> That whenever [a] lieutenant or a captain came around he didn't act as -- he wouldn't talk to himself as much. He would sit there and answer the questions directly and he stopped talking to himself in the foreign language.

(R 884). Officer Padgett also said that he does not consider someone talking to themself to be unusual behavior. (R 894). He opined that "[e]veryone talks to themselves [at] one point or another." (R 894). He added: "I've seen other people and other inmates talking to themselves." (R 894).

Sergeant David Zook testified that he was "very familiar with [Medina] for the last three months." (R 896). Sergeant Zook was responsible for the transportation of Medina to and from Florida

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[44] On cross, Officer Padgett said he did not note or report Medina's statements at the time. (R 892). On redirect, he explained that "if you put down every time an inmate admits to killing someone . . . that's all I would do." (R 894). He added that he knew that Medina had already been convicted of murder, and he did not realize that it might be relevant at the time. (R 894).

State Prison each day of the four-day evidentiary hearing.[45] (R 897). The trip is three and one-half hours one-way, for a total of seven hours of travel time. (R 897). Sergeant Zook testified that during that entire time, seven hours each day, Medina said "nothing, absolutely nothing." (R 897). He said that in connection with the hearing he had given Medina specific instructions many times, and Medina always followed them. (R 897-898). He and Medina conversed in English. (R 898).

Sergeant Zook also testified that during his seven plus years at Florida State Prison, he had observed inmates who had been the victim of a violent physical assault while incarcerated.[46] (R 898-899). He described their behavior: "They are very conscious of their surroundings. They don't allow nobody to get real close to them no more. They stay off from other inmates . . .." (R 899). "They try to alienate themselves from other people." (R 903).

On cross, Sergeant Zook described Medina's courtroom behavior as "talking to himself." (R 899). When asked by Defense Counsel whether Medina had been doing something that struck him as unusual, Sergeant Zook replied: "His whole behavior in court is unusual to me. Of course, it does not correspond in the way he acts in the van. His whole actions here are unusual to me." (R 901).

Sergeant Zook explained an incident involving Medina and feces

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[45] He also sat in court near Medina throughout the entire hearing. (R 900).

[46] Medina was stabbed and seriously injured while in prison.

which had caused a brief recess in the hearing the previous day. (R 903-905). He said:

> There was actually no visible feces in the napkin. . . . [W]e observed this inmate later and clipped his fingernails and actually underneath his fingernails. So when he was over there eating the papers and licking his fingers he must have made the feces wet and getting on his hands and that's when we notified the bailiff that we needed to leave.

(R 905).

Sergeant Kilgore testified that in January, 1997, after Medina went on Phase Two the second time, he walked up to Medina's cell and "asked him how he was doing." (R 906). He replied: "Okay," and then began telling the sergeant "about reading in *Hebrews*, said it was giving him strength." (R 906). He then "talked to me about me being a Christian. He said that reading the Word had really helped him and it was making him strong. . . . He asked me if I would have the church that I go to pray for him." (R 906). He also told Sergeant Kilgore "that he had been a Moslem (sic) and now he had changed to Presbyterian . . .."[47] (R 906-907).

Later after the most recent stay, after Medina went on Phase Three, Sergeant Kilgore talked with Medina again. (R 907). He "asked him how he was doing." (R 907). Medina replied: "I'm doing

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[47] The sergeant had had regular contact with Medina, five days a week, for "about 27 months" when he was on S-Wing in the mid 80's. (R 912). After that, Medina was transferred to Union Correctional, and the sergeant did not see him again until he was transferred back to Florida State Prison when his death warrant was signed on October 31, 1996. (R 912).

a whole lot better now . . . ." (R 907).

Still later, on Sunday, February 16, 1997, Sergeant Kilgore went to talk to Medina. (R 907). The following occurred:

> I asked him, I said, how you doing; he said doing bad. I said what do you mean; he said the Supreme Court has turned me down. He said it's over for me.[48] We talked a while.
>
> The Daytona 500 came on, we watched part of it. I talked to him and he told me he just wished that there was some way that they could send his body back to Cuba.[49] . . .
>
> We talked throughout the day. All through the Daytona 500. . . . [W]e talked about reading in *Revelations*.[50]
>
> He told me that he was learning to speak German, told me that the hardest language to speak is English . . . .. We talked about several things during the day.

(R 908). When asked if Medina talked about his conviction that day, the sergeant replied: "Um, at one point he talked about that he was innocent and he didn't elaborate on it." (R 908).

The sergeant added that they conversed about the race itself, what was going on, and the people involved. (R 908). "He stated to me that he didn't know anything about a race, that he had never

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[48] Medina told the sergeant that "his lawyer called him and told him that." (R 914).

[49] At that point, Sergeant Kilgore was asked: "Was that reference in regard to his pending execution?" He answered: "Yes." (907).

[50] That same day, Medina also told the sergeant that "he had met this Presbyterian preacher that had a church in Gainesville and that he was coming and visiting with him." (R 910).

been to a race before and when they had a caution he would want to know what was going on and I explained to him . . . ." (R 908-909).

Sergeant Kilgore testified that all of his conversations with Medina were in English. (R 909). He said that Medina "was talking normal," and he talked about his life in Cuba and "things that happened over there." (R 913). Medina also told him that his family had sent his sister and brother to the United States by boat as he had come. (R 913).

At one point that day, Medina's behavior suddenly changed. Sergeant Kilgore explained:

> The captain came down and asked me how I was doing and walked on in and started talking with the inmate and he talked for a few minutes with him. The captain asked him what he was on death row for and he says Well I did not do it, I'm innocent and dropped it at that and in about ten seconds, probably, he started talking about people, I assume, that was in Cuba, because I didn't know any of the names. He says yeah you know so and so and he named them and he says yeah you know them, like I had been with him all his life.

(R 910). When the captain "exited through the grill gate," Medina returned to the normal behaviors he had exhibited throughout the earlier part of the day. (R 910).

Sergeant Kilgore also related the circumstances of his most recent contact with Medina. It occurred the Sunday before the start of the subject evidentiary hearing on Monday. (R 910).

> . . . I was assigned the Q Wing, I was supervisor, I was down talking with Inmate Medina and Officer Brinson came down and said the captain is on his way back up, so we had been talking and I started exiting. I told him [Medina] I've got to go upstairs, the

captain is coming to talk to me.

> . . . I went on upstairs. . . . We heard some noise, Officer Brinson walked down to the edge of the steps there and said I want you to listen at him down there and he was just talking, I guess to himself, because there wasn't anybody there.

(R 911). The captain visited Sergeant Kilgore and left. "Very shortly after that we never heard anything else out of him." (R 911).

Florida State Prison Superintendent Ronald D. McAndrew testified that it is his job to "oversee the entire execution process." (R 916). The superintendent said that inmates throwing fecal matter is a common occurrence at the prison. (R 916). He explained:

> Oftentimes, as far as fecal matter itself is concerned, it most normally involve inmates who are confined to a single cell and it may involve cell extraction. Inmates are required to be removed from cells on a daily basis for various a[nd] sundry reasons, medical treatment, psychological examinations, to go out for job assignments, all sorts of things. Inmates oftentimes refuse to leave their cells. This involves the use of either chemical, electrical or physical force to remove the inmates from the cell. Inmates will very oftentimes rub fecal matter over their bodies and challenge those trying to remove him from the cell.

(R 916-917).

Superintendent McAndrew testified that he had had personal contact with Medina "[f]or approximately the past three months." (R 917). The superintendent testified that Medina's "mental health classification at the Department of Corrections" is "S-1." (R

918). He explained: "[W]hich means that if he were not on death row, . . . he would be subject to almost any job assignment unless he had a physical health impairment." (R 918).

Regarding the content of the logs which the corrections officers are require to keep on death row inmates, the superintendent said: "They are specifically required to note breaches of security, . . . security checks, . , , anything highly unusual that would be considered an incident." (R 918). Superintendent McAndrew said that Captain Tim Giebieg was sent on a special assignment to Tallahassee in "the early part of December," 1996 'to address a highly complex problem." (R 919, 925). As a result, he was released from his normal duties for "as much time as he could dedicate during the months of December and January." (R 920).

The superintendent described the key used to permit personnel to see Medina while he was on Phase Two. "The key is approximately seven and one half to 8 inches lonk (sic), solid brass, heavy, it's a Folger Adams key and usually, if it's on a chain with several other keys it tends to make a lot of noise in the sense of banging, clanging." (R 920). Superintendent McAndrew then described the following events regarding Medina:

> On at least two occasions . . . I arrived at the . . . lower deck of Q Wing where this (sic) a grill cage, and a sergeant is normally inside of this cage if an inmate is on death watch, and I've had the sergeant motion to me with his finger and whisper to me if you will be quiet you can (demonstrating - 'a shushing motion") . . , I was told if I would be quiet I could hear Medina in his normal state. . . .

> Normal conversation between Mr. Medina and the officer working front cell.

(R 922). At that time, thesuperintendent "could hear normal conversation coming from the inmate in the cell." (R 925). Thereafter, the superintendent entered:

> which would involve the clanging of these large Folger Adams keys and tumbler locks and as the noise of my coming through these two large gates would reach that area, I would began hearing Mr. Medina flying an airplane or acting out in some sort.

(R 922).

Superintendent McAndrew related two specific conversations he had recently had with Medina. On January 27, 1997:

> . . . I talked to him and asked him if everything was all right and he indicated that it was. I asked if the Food Service Director had had the opportunity to talk to him yet and he said the Food Service Director had come to see him and that he had given his request for his last meal.[51]

(R 922). As the superintendent began to leave, Medina said:

> There's just one thing about my last meal; he says I forgot to ask for strawberry syrup and I told him that we could take care of that, that I would handle it; that I would make sure that he got a strawberry topping for his ice cream and he very specifically said to me I don't want that topping stuff, I want the sweet syrup and I said we will take care of that.[52]

(R 923).

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[51] Medina specifically used the term 'last meal." (R 922).

[52] The superintendent did, indeed, give written instructions to the Food Service Director regarding the strawberry topping. (R 878).

Another conversation testified to occurred on February 17, The superintendent went to see Medina and "asked him about his human needs , , .." (R 923). Medina "indicated that he was getting everything he needed in terms of food, medical care and writing paper that sort of thing, his mail . . .." (R 923). He then asked Superintendent McAndrew 'if a new execution date had been set for him." (R 923). The superintendent replied: "[N]ot as far as I was aware of, that normally information of this nature would reach him first through his own attorneys . . .."[53] (R 923).

At the conclusion of Superintendent McAndrew's testimony, the State rested its case in chief. (R 926-927).

Medina called his attorney, Tim Schardl, as a rebuttal witness. (R 927). Mr. Schardl attempted to testify that Medina told him during a telephone conversation on October 16, 1996 that he "had a bump or bruise or something on his head and that he thought he got it from a guard that he had been in a fight, or something happened with a guard" or "that it might have happened while he was picking tomatoes." (R 929). The State objected, and Medina's counsel tried to justify the testimony claiming that it rebutted a corrections officer's testimony "that Medina confessed to the murder to him shortly after 10:30 at night, when Medina **was**

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The videotape shows that at the interview with doctors Mings and Gutman, Medina asked Dr. Gutman whether a new execution date had been set for him. (R 242).

"in the clinic being treated for a head injury and the officer said he never saw a head injury." (R 930).

As the State pointed out, "there's nothing in evidence that Mr. Medina was in the clinic." (R 930). Further, the corrections officer who testified to "a confession" at approximately 10:30 p.m. was Officer Padgett. He testified that the incident occurred in January, not October. (R 883). Also, as the trial judge pointed out, Officer Padgett did not deny that Medina had an injury, he simply said he did not notice one if he had one. (R 931). Further, there was no attempt to introduce properly authenticated prison clinic records,[54] rather, Medina wanted to establish that Medina had been in the clinic at the relevant time with the double hearsay of the defendant and his attorney even though his attorney admitted: "I have the records custodian under subpoena . . .." (R 931, 932, 935). The trial judge sustained the State's objection "as to Mr. Schardl's testimony as we reach this point." (R 934). After a recess, the trial judge ruled: "[T]here is no evidentiary predicate to allow rebuttal along those lines at all, and that's the reason it's being denied in its entirety." (R 940).

Two videotapes were played in the trial court. One was the February 19, 1997 interviews of Doctors Mings and Gutman. The other was the December, 1996 interview of Dr. Teich. The court reporters recorded as much as they could of the English spoken on

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[54] As the State asserted, Mr. Schardl was "not the custodian of those records." (R 932).

the videotapes. However, the full import of the content of those tapes can only be comprehended by viewing them. Nonetheless, the State references several statements and/or topics which appear in the transcripts of the videotaped presentations.

(1) Medina acknowledged that he talks with the correctional officers in English, and he agreed that he was able to talk to Doctors Mings and Gutman in English. (R 224).

(2) Medina's response to Dr. Gutman's question as to the date, "19th of February, 1979." (R 234-235).

(3) The trial judge addresses Medina: "Pedro, I appreciate your singing, but you need to be quiet." (R 235).

(4) The Doctor states: "You are acting loco and crazy. Medina responds: "Yeah." (R 238).

(5) Dr. Gutman tells Medina he has been a psychiatrist for 33 year and that he has 'seen many people and examined many people and some people fake mental illness." Medina replies: "What -- Why would I fake mental illness?" (R 239).

(6) Dr. Gutman asks: "You know you are being executed, that there will be an execution if the stay is removed?" Medina responds: "When that happen?" Dr. Gutman replies: "I don't know." Medina asks: 'When that happen?" (R 242).

(7) Dr. Gutman asks Medina to turn around and look at the lady behind him, and then to look over his other shoulder and look at the gentleman, and he does both. (R 243).

(8) Medina suggests that "the execution" is "like in the concentration camp . , .." (R 246).

(9) Dr. Gutman tells Medina he thinks he understands more than he is willing to talk about and he's faking in order to avoid the execution. Medina responds: 'Yeah." (R 246).

(10) Dr. Gutman asks Medina is he knows "about the offense? Did somebody die?" Medina responds: *Yeah. Yeah." Then, he starts talking about a "blue shirt." (R 274).

(11) Dr. Mings asks Medina whether he has trouble concentrating. He then said he wanted 'to see how good your concentration and your memory is." He proceeded to explain a simple test which Medina would not cooperate with. (R 249-252).

(12) Dr. Gutman tells Medina: "I don't think you're crazy, I think you are very smart, and I think you are very sane. I'll tell you that and I will." Medina responds: "Thank you. You're very smart." Dr. Gutman says: "Thank you." Medina rejoins: "And we compliment each other we might go and get married, you know?" (R 252-253).

(13) Dr. Gutman suggests: ". . . it's only been in the last month that you've started to act this way." Medina replies: "No, that's, urn ---" (R 257).

(14) After Dr. Gutman told Medina he was Dr. Gutman and then telling him he was Dr. Sepae, Medina says: "You lying, man. You lie, man. . . . Dr. Gutman points out: . . . Now, you said it's a lie. You knew the difference between the truth and a lie." (R 259).

(15) One of the doctors asked Medina to "read what it says on this sheet." Medina refuses, saying: "I want to read German.

That's what I want to read." The doctor prods: "Do me a favor and try and read this." Medina replies: "I want to -- if its in German, I'll read it." (R 265-266).

SUMMARY OF THE ARGUMENT

The trial court properly found that Medina does not satisfy the Rule 3.812 criteria for insanity for execution. The decision of the trial court is based upon that Court's consideration of all of the evidence relative to insanity, and, because it is not an abuse of discretion, should be affirmed in all respects. That decision is supported by competent, substantial evidence, and should not be disturbed.

Medina's claim that Cooper v. ***Oklahoma,*** applies to the Rule 3.812 proceeding was decided adversely to Medina by this Court in its February IO, 1997, opinion. There is no reason to revisit that issue at this time. Cooper applies to the issue of competence to stand trial, which is not the same concept as sanity for execution. Alternatively and secondarily, regardless of the quantum of proof required to establish insanity for purposes of execution, Medina cannot prevail on his claim because the evidence against him is overwhelming. Even if there is error associated with the application of the clear and convincing standard to this **case,** any such error is harmless beyond a reasonable doubt.

Medina's March 11, 1997 'Motion for Rehearing" was properly denied by the trial court because Rule 3.812 does not allow the filing of a motion for rehearing; because the motion attempts to

discuss ‘evidence" that was not presented at the evidentiary hearing; seeks to introduce evidence for which no predicate has been established; seeks to introduce evidence that could and should have been introduced, if at all, at the evidentiary hearing; and seeks to introduce evidence which has nothing to do with the issue, or the case, before the Court.

The trial court properly refused to allow one of Medina's attorneys to testify as a "rebuttal" witness because the evidence which Medina sought to introduce was not proper rebuttal evidence in the first place. Moreover, the trial court did not abuse its discretion in refusing to allow the "rebuttal" evidence because the foundation for admission of the documentary evidence at issue had not been, nor could it be, established through the testimony of the only witness involved.

ARGUMENT[55]

THE TRIAL COURT'S DECISION THAT MEDINA IS COMPETENT FOR EXECUTION IS SUPPORTED BY THE RECORD

The principal issue contained in Medina's brief is his argument that the Circuit court erred in finding that he understands the fact that his execution is imminent and the reason for the pending execution. For the reasons set out below, the trial court's ruling should be affirmed in all respects.

On February 10, 1997, this Court remanded this case to the Circuit Court for a hearing pursuant to Florida *Rule of Criminal Procedure 3.812.* In accord with the provisions of Rule 3.812(c)(2), the trial court appointed two disinterested mental health experts, Michael Gutman, M.D., and Eric Mings, Ph.D., to examine Medina with respect to the criteria for insanity for execution.[56] The doctors' evaluation was conducted on February 19, 1997, at Florida State Prison. In addition to interviewing Medina directly, Dr. Gutman and Dr. Mings interviewed Superintendent Ron McAndrew, Officer George McCormick, Officer Woodall, and Sergeant Joe Gorden. (R 3991).

Dr. Gutman and Dr. Mings submitted written reports to the Court on February 21, 1997. Dr. Gutman's reported concluded:

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[55] The argument section of the State's brief is anticipatory in nature because the briefs of the parties are being filed simultaneously.

[56] The parties were afforded the opportunity to submit such materials to the doctors as were deemed appropriate. Both parties did so. (R 3991).

> Inmate, Pedro Medina, is malingering mental illness. There is significant evidence from historical data, medical and correctional records, observations by observing individuals, the mental status examination (videotaped and available) and opinions by three other psychiatrists (FN) that Mr. Medina does know, or should know the meaning of an execution, and knows and understands why he is to be executed. He does not lack a mental capacity to understand the fact of the pending execution and the reason for it.

(R 3992). In the footnote, the Court noted that "Defendant's counsel acknowledged that they had been the party responsible for supplying Dr. Gutman and Dr. Mings with the report of the three psychiatrists commissioned by the Governor who opined that Defendant understands the nature and effect of the death penalty and why it is to be imposed upon him." (R 3992).[57] Dr. Gutman testified that, based upon his experience, the behavior displayed by Medina is inconsistent with any known mental illness.[58] (R753-55). See also Pages 27-31, above.

Dr. Mings summarized his conclusions as follows:

Although this is the most uncomfortable opinion I have

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[57] That report made reference to an affidavit stating that the affiant had heard Medina state to Johns Mills that his lawyers had told him to "act crazy". That affidavit, and whether or not it was withdrawn from consideration, was the subject of much discussion in this Court's prior decision. See, e.g., ***Medina*** v. ***State,*** 22 Fla. L. Weekly at S77, 80 and n. 10. It is, at least, ironic that Medina's attorneys placed the document about which they previously complained so loudly before the newest mental health experts.

[58] This testimony is contradictory to the testimony of Drs. Latterner and Teich, who opined that Medina suffers from "organicity" and "at least four [unspecified] diagnoses" of mental illness, respectively. (R 357; 655).

> had to render in my career, it is the opinion of this evaluator that Pedro Medina has the capacity to appreciate his pending execution and the reason for it. His records clearly indicate an understanding of his incarceration over many years and how to interact with the system. Although he does have some history of episodes of unusual behavior in the past, these have been transient and did not appear to involve the level of loss of reality contact which his current behaviors would indicate. It is my opinion that the behaviors which I observed were inconsistent with psychosis, and consistent with malingering.

(R 3992). Dr. Mings testified that, based upon his experience with patients suffering from schizophrenia, the "symptoms" exhibited by Medina are inconsistent with schizophrenia.[59] (R701)

In accordance with the order of this Court, the Circuit Court conducted an evidentiary hearing on Medina's competence for execution pursuant to *Florida Rule of Criminal Procedure 3.812.* At the conclusion of that hearing the trial court made the following findings of fact:

> (1) Defendant does not meet the criteria for insanity at time of execution.
> (2) Defendant does not lack the mental capacity to understand the fact of the pending execution.
> (3) Defendant does not lack the mental capacity to understand the reason for the pending execution.
> (4) Defendant understands that his execution is imminent, and he understands why he is to be executed.

(R 4004). Those findings, which were made after ore *tenus* testimony, are supported by competent, substantial evidence, are not an abuse of discretion, and should be affirmed in all respects.

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[59] Dr. Mings' testimony directly contradicts the testimony of Medina's expert, Dr. Marina, who opined that Medina is paranoid schizophrenic,

Under settled Florida law, expert testimony concerning a defendant's competence to stand trial is not binding on the Court, and may be rejected if controverted by, or inconsistent with, the other evidence. ***See, e.g., Hunter v. State,*** 660 So.2d 244 (Fla. **1995).** In ***Hunter,*** this Court emphasized:

> The reports of experts are "merely advisory to the [trial court], which itself retains the responsibility of the decision." ***Muhammad v. State,*** 494 So.2d 969, 973 (Fla. 1986) (quoting ***Brown v. State,*** 245 So.2d 68, 70 (Fla. 1971), ***vacated in part on other grounds, 408*** U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972)), ***cert. denied, 479 U.S. 1101,*** 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). And, even when the experts' reports conflict, it is the function of the trial court to resolve such factual disputes. *Fowler* ***v. State, 255*** So.2d 513, 514 (Fla. 1971). The trial court must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion. ***Carter v. State, 576*** So.2d 1291, 1292 (Fla. 1989), ***cert. denied, 502*** U.S. 879, 112 S.Ct. 225, 116 L.Ed.2d 182 (1991).

Hunter v. State, 660 So.2d at 247. That settled proposition of law is equally applicable in the sanity for execution context.

In this case, as in ***Hunter,*** the trial court considered a wide variety of lay and expert evidence in determining that Medina meets the criteria for competence for execution. Although there was conflicting evidence, it **was** within the sound discretion of the court to resolve the factual dispute. After considering all of the evidence, and observing Medina's behavior in court during three separate proceedings, the Court found that Medina understands the fact of his impending **execution and the reason** for it. The evidence supports that factual determination, and the trial court did not abuse its discretion in resolving the facts against Medina. The order of the trial court should be affirmed in all respects. See,

e.g., Hunter, supra, at 248.

Medina argues that even though the trial court stated that Medina "probably" suffers from some 'mental pathology", the court found that the State's evidence precluded a finding that Medina had shown, by clear and convincing evidence, that he is incompetent to be executed. That argument suffers from several deficiencies, which are separately addressed below.

First, and most significantly, Medina constructs his entire argument on a false premise. Contrary to Medina's assertions, the issue is not "whether Mr. Medina is psychotic [or crazy] or whether he is malingering." (R 4010). The issue is whether Medina has the mental capacity to understand the fact of his pending execution and the reason for it. *Fla. R. Crim. P.* 3.812(b) (R 3990). Medina's attempts to change the issue to suit his purposes are a disingenuous attempt to frame the issue as one that superficially appears to be controlled by the *Cooper v. Oklahoma, 116* S.Ct. 1373 (1996), decision.[60]

In an extensive order, the trial court set out the testimony of various witnesses which, in the words of the Court, was "particularly compelling and helpful to the Court during the course of the difficult process of reaching a decision on this matter." (R 3996).[61] As discussed below, the trial court's decision is not an

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[60] The reasons that *Cooper v. Oklahoma* does not apply to this case are discussed at pages 69-72, below.

[61] The evidence is set out, in its entirety, in the Statement of the

abuse of discretion because the evidence overwhelmingly establishes that Medina is competent for execution.

Dr. Eric Mings, a psychologist appointed by the Court pursuant to Rule 3.812(c)(2), reached the opinion that Medina has the capacity to appreciate his pending execution and the reason for it.[62] During cross-examination by Medina's counsel, Dr. Mings was asked to explain the meaning of the statement in his report that "this is the most uncomfortable opinion that I have had to render in my career." Dr. Mings responded that that statement was contained in the report because of his personal feelings about the death penalty and his role in that process. The court found, "Dr. Mings' testimony gained an added weight of credibility at that point because it became clear to the Court that although Dr. Mings is not personally in favor of the death penalty, it is his professional opinion that Defendant does not meet the criteria for insanity for execution." (R 3996).

Assistant Superintendent Lee R. Johnson testified that he met with Medina on January 27, 1997, for the purpose of determining Medina's wishes regarding his funeral arrangements and the disposition of his personal property. Medina identified a specific person who was to receive his personal property, and identified another person who was responsible for his funeral arrangements. Mr. Johnson also testified that Medina assisted in the completion

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Facts.

[62] Dr. Mings' testimony is set out in detail at pages 20-25, above.

of his death certificate in a helpful and courteous manner, providing the correct year of his birth, and stating that he had never served in the United States military. (R 3996).

Food Director Charles Cobb testified that he met with Medina to discuss his last meal request. Medina made specific requests for his last meal, and specifically requested that he be permitted to have more than one pint of butter pecan ice cream. (R 3996-7).

Superintendent Ron McAndrew testified that he visited Medina in his cell and inquired whether the food service director had spoken with him regarding his last meal request. Medina told Superintendent McAndrew that he had forgotten to tell the food service director about the "sweet strawberry syrup" which he wanted for his ice cream. Superintendent McAndrew told Medina that he would make sure that "strawberry topping" was obtained for defendant's butter pecan ice cream. Medina corrected Superintendent McAndrew stating that he did not want "strawberry topping"; he wanted 'sweet strawberry syrup". (R 3997).

Department of Corrections Sergeant Michael Nevitt testified that he and Superintendent McAndrew spoke with Medina at his cell, and, during that conversation, Medina asked Superintendent McAndrew if a new execution date had been set for him. Department of Corrections Sergeant Robert Self testified that he overheard Medina and death row inmate John Mills discussing the process of making a will. Sergeant Self also testified that he overheard Medina and Mills engaging in coherent conversations and that, at times, the two inmates would converse in another language. Sergeant Self is

of the opinion that Medina and Mills occasionally conversed in a foreign language so that he would be unable to understand them. (R 3997-8).

Department of Corrections Officer William Hall testified regarding two "canteen orders" Medina had placed during the two weeks immediately preceding the hearing in Bradford County Circuit court. Officer Hall testified that Medina carefully selected the items from the canteen list and calculated the total cost of those items before turning in the order form. When the items were delivered to the defendant, Medina checked those items to make sure that everything he ordered had been delivered to him, as well as checking his receipts to insure that the proper amount of money had been deducted from his inmate account.[63] (R 812-14; R 3998).

Department of Corrections Officer George McCormick testified that he has engaged in conversations with Medina regarding the Orlando Magic, the Florida Gators, and the Florida State Seminoles. The topics regarding these teams were current, and McCormick testified that Medina seemed to be knowledgeable about the subjects they discussed. Moreover, Officer McCormick and Officer Archie Luke both testified that while Medina was on Phase II of deathwatch, he was not allowed to retain personal property in his cell.[64] While on Phase II, Medina is required to request a specific

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[63] Death Row inmates are allowed to make one canteen order per week. (R 809).

[64] Phase II of deathwatch begins one week prior to the scheduled

item of personal property that he wants to use, and, when finished with the item, is required to return it to the officers. McCormick and Luke both testified that while Medina was on Phase II deathwatch, he would make specific requests for his personal possessions. Further, both officers testified that Medina was aware of the nature and extent of his property, and never requested an item which he did not own. (R 3999).

Department of Corrections Officer Delbert Kilgore testified that he and Medina watched the Daytona 500 together and that, during the course of the race, Medina asked specific questions regarding events during the race, such as the purpose and meaning of a caution flag. During that conversation, Medina asked Kilgore if he would have his church pray for him, and expressed a desire to have his body returned to Cuba. (R 3999-4000).

Captain Tim Giebieg testified that soon after he was promoted to Captain from Lieutenant, Medina recognized that fact and commented to Captain Giebieg on his promotion. Captain Giebieg's testimony indicates that Medina is aware of the varying ranks of the officers working within the institution, and is able to discern the rank held by a particular officer by merely looking at the color of the shirt the officer is wearing.[65] Captain Giebieg also

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execution date. (R 450). Removal of all personal property is standard procedure during Phase II. (R 854-5).

[65] Officers with the rank of Lieutenant or higher wear white shirts, rather than the tan (or brown) shirts worn by lower ranking officers.

testified that, on at least one occasion, while Medina **was** engaging in bizarre behavior and talking to himself, Medina stopped talking to himself and carried on a logical conversation with Captain Giebieg. During that conversation, Medina's responses to questions asked of him were appropriate. (R 4000).

Several correctional officers testified that Medina's behavior changes dramatically when "white shirts" enter his immediate area. When Medina sees a "white shirt" or hears the sound of a key unlocking the door to his cell area, his behavior abruptly changes and he begins to engage in bizarre behavior. (R 453). However, that behavior ends when "white shirts" are no longer in the area. (R 870). Further, several officers testified that Medina did not begin to engage in these episodes of bizarre behavior until after his death warrant was signed and he was placed on Phase II of deathwatch. (See, e.g., R 739; 745). Throughout the episodes of bizarre behavior, Medina consistently responded appropriately to questions put to him. (R 4000-4001).

Sergeant David Zook was one of the correctional officers who transported Medina to and from the courthouse each day for the hearing. Sergeant Zook testified that approximately three and one-half hours were required to make the trip from Starke to Orlando. Sergeant Zook spent roughly seven hours each day in a vehicle with Medina. (R 897). During the trips to and from the courthouse, Sergeant Zook testified that Medina said absolutely nothing. (R 897). As the court noted, "[t]his is a marked contrast in behavior from the almost incessant low volume mumbling which

defendant engages in throughout the course of court proceedings." Sergeant Zook also testified that Medina follows directions given to him and responds appropriately to questions. (R 897-8; R 4001).

Orange County Deputy Sheriff Raul Gonzalez, who was born in Cuba, testified that on the first day of the hearing, and at approximately 5:00 p.m., he engaged in a conversation with Medina while riding in the elevator with him in the course of escorting Medina from the courthouse back to the vehicle which would return him to Florida State Prison. Medina read Gonzalez' nameplate and asked if he spoke Spanish. When Deputy Gonzalez answered affirmative, Medina replied, in a fairly sophisticated manner, that it was an honor to meet Deputy Gonzalez. On the second day of the hearing, Deputy Gonzalez was again in the elevator with Medina and, at some point in time during that encounter, Medina told Gonzalez that there was a problem with his handcuffs. The correctional officers corrected the problem. (R 4002-3).

Moreover, as the court pointed out, Medina has been present in court for three separate proceedings. Medina's behavior during those hearings indicates that he is able to recognize authority figures, and that he is able to quickly modify or change his behavior to conform with orders given to him by those in authority. Those observations are consistent with the fact that there is no evidence that Medina has been a disciplinary problem while incarcerated in the Florida Department of Corrections, despite the fact that he has had several episodes or problems with other inmates. The evidence establishes that Medina follows directions

given to him, and that it has not been necessary to use force to compel his compliance. (R 456; R 4002-3).

The evidence set out in the Court's order establishes that Medina understands the fact of his pending execution and the reason for it. While it is true that the expert testimony was conflicting, it is also true that the evidence summarized in the Court's order (as well as the other evidence presented in the State's case in chief) was uncontradicted.[66] The State's lay evidence, in contrast to that presented by Medina, was highly specific and directly established that Medina understands the fact of his pending execution and the reason for it. That evidence included statements by Medina such as "I killed someone and now the State wants to kill me" (R 883), as well as other evidence that directly established that Medina fully comprehends his current situation.[67] The Court's duty was to resolve the conflicts in the evidence and decide the matter at issue--the resolution of that claim is not an abuse of discretion because the Court's decision is supported by competent,

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[66] In any event, "Insanity *vel* non is not simply ascertained by a head count of the experts...". *Hutchins v. Woodard, 730* F.2d 953, 955 (4th Cir. 1984).

[67] Medina is certainly more aware of his impending death than the defendant in *Garrett v. Collins,* 951 F.2d 57, 59 (5th Cir. 1992) ("We are persuaded that the state habeas court was entitled to find as a matter of fact that despite the hope of being saved by his aunt, Garrett was not so incompetent that the state could not execute him.") Garrett was executed on February *11, 1992. Death Row, U.S.A.*

substantial evidence that directly establishes that Medina does not satisfy the criteria for insanity for execution. See, Hunter, ***supra.***

The trial court had the opportunity to observe the demeanor of the witnesses **as** they testified, and is best situated to make the necessary credibility determinations. To the extent that the testimony conflicted, resolution of that conflict is the province of the finder of fact.

Medina's mental state experts displayed significant bias in favor of Medina. For example, each of those experts refused to acknowledge that any of the evidence indicating that Medina understands the fact of his pending execution and the reason for it would have any effect whatsoever on their opinion that Medina is insane. Specifically, Dr. Marina testified that statements such **as** Medina's desire for his body to be returned to Cuba might affect her opinion, depending on "how, and when, and the context". (R 410). She also testified that "its very hard to know why **anyone** says anything that he says." (R 415). Dr. Latterner testified that none of the evidence of sanity mattered because "I don't think he has a real grasp of whether he is alive or whether he is dead." (R 361-2). Finally, Dr. Teich testified that "a very severe degree of symptoms", but he is not able to make a diagnosis. (R 667).[68] In view of the significant bias exhibited by these mental

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[68] Dr. Teich did testify that 'presentation of very severe symptoms of psychological pathology is also consistent with malingering." (R 667).

state witnesses, the trial court properly refused to credit their testimony. In fact, each of Medina's mental state experts testified that Medina's statement that "I killed someone, now the state wants to kill me. Everyone dies. Why don't they just get this over.", would have no effect whatsoever on their opinion that Medina meets the criteria for insanity for execution. (R 361; 410). None of the expert witnesses was able to offer a plausible or reasonable explanation for their refusal to consider that statement (or any of the other evidence) as evidence of competence, (R 361; 415;667) and, for that reason alone, their bias renders their testimony in support of insanity unworthy of belief.

Former Assistant CCR Judith Dougherty testified that her responsibility during Medina's 3.850 hearing was to "maintain a relationship with" him. (R 198). That testimony conflicts with the instructions that she gave to her investigator when she assumed the role of lead counsel in that proceeding. While Ms. Dougherty may have been instructed to 'relate" to Medina, she obviously did not believe that to be necessary because she instructed her investigator 'to answer any questions that Pedro had, to explain what was going on in the hearing." (R 438). The internal inconsistency of the witness's testimony establishes her bias in favor of the defendant. Insofar as the other death row inmates are concerned, the bias exhibited by those individuals is so obvious that it does not need elaboration. The trial court's decision is not an abuse of discretion, is fully supported by competent, substantial evidence, and should be affirmed in all respects.

THE *COOPER V. OKLAHOMA* ISSUE

Medina's argument that Cooper v. ***Oklahoma, 116*** S.Ct. 1373 (1996), applies to this case was rejected by this Court in its February 10, 1997, opinion. In deciding the issue adversely to Medina, this Court held:

> We find that Cooper does not apply to a rule 3.812 proceeding. In Cooper, the issue involved the standard of proof in determining whether a defendant was incompetent to stand trial, which is clearly different from a determination of sanity to be executed. In respect to competence to stand trial, the United States Supreme Court found that in weighing the interest of the defendant against the interest of the State, the defendant's interest was substantial and the State's interest was modest. However in ***Ford v. Wainwright, 477 U.S. 399*** (1986), Justices Powell and O'Connor specifically found that in competency determinations for purposes of execution made while the execution is pending, the interests of the State were substantial. We specifically note the following from Justice Powell's concurring opinion:
>
> > First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not whether, but when, his execution may take place. This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all. It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings do not apply in this context.
>
> 477 U.S. at 425 (Powell, J., concurring) (footnote omitted) (citations omitted), and from Justice O'Connor's concurring opinion:
>
> > The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands

> of due process are reduced accordingly. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can *never* be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process Clause imposes few requirements on the States in this context.

Medina v. State, 22 Fla. L. Weekly at S77. This Court's analysis of the *Cooper* issue was correct, and there is no need to revisit it at this time.

In deciding the sanity issue against Medina, the trial court found that Medina had not established that he met the criteria for insanity at the time of execution. As this Court recognized, competence for execution is not the same thing as competence to stand trial--Medina's comparison **across** legal concepts fails because the concepts themselves are not comparable. In fact, in Ford, Justice Powell pointed out that:

> . . . petitioner does not make his claim of insanity against a neutral background. On the contrary, in order to [477 U.S. 4261 **have** been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise **a** serious question for the trial court. **The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, (FN6) and may require a substantial threshold** showing of **insanity merely to trigger the hearing process. Cf.** *Ake v. Oklahoma, 470* U.S. 68,

82-83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985).

Ford v. Wainwright, 106 S.Ct. at 2610 [footnote omitted] (emphasis added). Sanity for execution and competence to stand trial are not the same, and Medina's attempt to argue around that fact is an attempt to put a square peg in a round hole. *Cooper* does not affect the outcome of this case because it does not apply to the competence matter at issue. This Court should not retreat from its prior disposition of this component of Medina's competence issue.

To the extent that Medina argues that, because the Court found that Medina "probably . . . suffers from some form of mental pathology or mental illness", therefore the Court found that Medina was not malingering, that claim is based upon a misrepresentation of the Court's order as well as a distortion of the evidence. Medina's hand-picked expert, Dr. Marina, testified that even a seriously mentally ill person can engage in malingering. (R 400). In other words, malingering is not mutually exclusive of mental illness. Moreover, as the Court stated in the omitted portion of the order, the Court was not charged with determining what, if any, mental pathologies or infirmities Medina suffers from. (R 4003-4). Instead, the issue to be decided by the Court was whether Medina understands the fact of his impending execution and the reason for it. That is what the Court decided, and its decision that Medina is competent for execution should be affirmed in all respects.

Alternatively and secondarily, the required quantum of proof does not matter because, under any view of the evidence, Medina cannot prevail. Even if Medina is only required to carry the burden

of proof by a preponderance of the evidence, he fails because the evidence that he understands the fact of his impending execution and the reason for it is overwhelming. Because Medina cannot prevail regardless of the quantum of proof required, he cannot have suffered any prejudice. For that reason, if there was error associated with the application of the clear and convincing standard, that error was harmless beyond a reasonable doubt.

THE MOTION FOR REHEARING WAS **PROPERLY DENIED**

On March 11, 1997, Medina filed a document entitled "Motion for Rehearing", in which he purported to "address several matters that warrant clarification." (R 4009). The trial court denied that motion on March 11, 1997, in a five-page order. To the extent that Medina may argue that the motion for rehearing should have been granted, the State responds as follows.

As pointed out by the trial court, Rule 3.812 contains no provision allowing the filing of a motion for rehearing. For that reason, the motion was unauthorized. Moreover, it is well-settled that the proper function of a motion for rehearing (when such is authorized) is to call the Court's attention to some point which the Court overlooked, failed to consider, or misapprehended. See, *Mann v. State, 182 So. 198* (Fla. 1938); see *also, Sag Harbour Marine, Inc. v. Fickett,* 484 So.2d 1250 (Fla. 1st DCA 1986); *Whipple v. State,* 431 So.2d 1011 (Fla. 2d DCA 1983). At no point in the 'motion for rehearing" does Medina indicate which portions of the Court's order need clarification. Instead, as the trial court found, the motion is an attempt to:

> 1)distort the issue that was before the Court for consideration; 2)discuss 'evidence" that was never introduced at the hearing; 3)introduce evidence for which no predicate establishing the admissibility thereof was shown at the hearing; 4)introduce evidence which Defendant's counsel either failed to introduce or decided not to introduce at the hearing; and 5)introduce evidence which has absolutely nothing to do with the issue before the Court, or for that matter, with this case.

(R 4293).

The issue before the Court is set out in Florida Rule of Criminal Procedure 3.812(b), which states: "[a]t the hearing **the issue shall be whether the prisoner presently meets the criteria for insanity at the time of** execution, **that is whether the prisoner lacks the mental capacity to understand the fact of the pending execution and the** reason **for it."** The issue is established by the Rule, and Medina cannot change that fact by arguing that the trial court was required to determine "whether Medina is psychotic or whether he is malingering."

Medina's claim that "correctional officers place troublesome inmates next to Pedro as punishment because he is so noisy and disruptive" is created from thin air. No evidence to support this claim was presented at the hearing, and the trial court properly found that this claim should not have been included in the motion for rehearing. (R 4294).

Medina has improperly used the "motion for rehearing'! as a device to place various clinic records before this Court when he did not attempt to introduce those at trial records until his

rebuttal case.[69] Even then, Medina attempted to introduce those records improperly, seeking to introduce the exhibit through the testimony of one of his attorneys, who could not, as a matter of law, establish the evidentiary predicate. During the hearing, Medina introduced no evidence at all that he suffered cuts and bruises to his head--the only mention of such injuries came from Medina's counsel. To the extent that Medina claims that he attempted to impeach Officer Padgett with those records that claim, as the trial court found, is 'an outright untruth". (R 4295). When Medina's counsel asked Officer Padgett if he had observed any cuts or bruises on Medina's head, the Officer responded that he did not recall. (R 892) Medina asked no follow-up question, and did not attempt to use the records to impeach the Officer's testimony.

Medina has also used the unauthorized motion for rehearing as a vehicle to attempt to introduce evidence that was available, but was never mentioned at the hearing. Specifically, Medina has used the motion to make a belated attack on his "S-1" mental health classification through two reports of the Correctional Medical Authority which are dated April 2, 1996, and October 1, 1996. Those reports were available at the time of the evidentiary hearing, and could have been used at that time. It is improper to attempt to use a motion for rehearing as a vehicle to introduce evidence that was available at the time of the hearing but was never presented.

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[69] As set out below, the records were not proper rebuttal because there was no evidence from the State's case for them to rebut.

Likewise, Medina has used the motion as a device to attempt to introduce the affidavit of Arturo Gonzalez, M.D. That affidavit was executed on February 22, 1997, two days prior to the commencement of the evidentiary hearing. Medina's counsel could have sought to use that affidavit at the hearing, but did not. Medina's belated attempt to introduce evidence which was available to him before the hearing is improper. (R 4295-96).

Medina also attempted to use the motion for rehearing as a means to introduce the June 3, 1987 testimony of Dr. Umesh Mhatre given in the Volusia County case of State v. Antonio Carter. As the trial court found, that testimony has no relevance whatsoever to this case or to the issue before the court. (R 4296). In any event, that testimony was available to Medina long before the hearing in this case. Denial of the motion for rehearing was proper.

EVIDENTIARY MATTERS

To the extent that Medina may argue that the trial court erred in not allowing Timothy Schardl to testify as a rebuttal witness, the circumstances of that "rebuttal" testimony establish that the trial court did not abuse its discretion in disallowing the testimony.

The evidence that Medina sought to introduce in "rebuttal" consisted of certain records which, according to Medina, demonstrate that he had received a head injury during the time of the evidentiary hearing. However, as the trial court correctly found, Medina never attempted to introduce evidence that he had

received any cuts or bruises to his head. (R 4294-5). As the trial court also found, Medina attempted to cross-examine Correctional Officer Padgett about this issue by asking the officer if he had observed any cuts or bruises to Medina's head. Officer Padgett's response was that he did not recall. (R 4294-5). Medina did not attempt to impeach Officer Padgett with the records, and did not attempt to introduce the records until his rebuttal case, when he attempted to lay the predicate for introduction of the records through Assistant CCR Tim Schardl.

The trial court's ruling was correct for two independently adequate reasons. First of all, the records at issue did not rebut any evidence presented by the State. Because the records rebutted nothing, it was not an abuse of discretion to exclude them from evidence. See, e.g., *Lockwood v. Baptist Regional Health Services, Inc.*, *541* So.2d 731, 733 (Fla., 1st DCA 1989) ("Considering the numerous reasons supporting exclusion of the video, we conclude that the lower court did not abuse its discretion in denying the video's admission into evidence.").

The second reason that the trial court did not abuse its discretion in refusing to allow the 'rebuttal" evidence is because the foundation for admission of the records had not been established. Further, Assistant CCR Schardl could not, under any circumstances, provide the testimony necessary to establish the requisite foundation for introduction of the records. Because the evidentiary predicate was not established, and because the records at issue did not rebut any State's evidence in the first place, the

trial court did not abuse its discretion in refusing to allow the rebuttal testimony.

To the extent that Medina may argue that the time constraints of a death warrant do not allow him enough time to "marshal1 clear and convincing evidence" of his insanity for execution, that claim is disingenuous, at best. Medina invoked the provisions of 5922.07 on December 2, 1996. *Medina* v. State, 22 Fla. L. Weekly at S76. The evidentiary hearing pursuant to Florida *Rule **of** Criminal Procedure* 3.812 did not begin until February 24, 1997, some three months after Medina first asserted his insanity for execution.[70] Medina should not be heard to complain that he has not had enough time to prepare his case.

Respectfully submitted,

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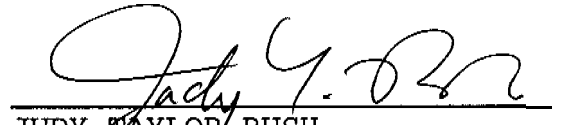

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[70] Presumably, Medina had evidence to support his claim of insanity at the time he invoked the statutory procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Hand Delivery to Martin J. Mcclain, Office of Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, FL 32314-5498, on this 14th day of March, 1997.

Of counsel