

SUPREME COURT OF FLORIDA
CASE NO.: 94,421

JULIO MORA,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee/ Plaintiff.

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this brief is prepared in 12 point courier type.

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FACTS

It appears that Dr. Mora and the State are at odds over what some of the essential facts of this case are.

Foremost, and this cannot be overemphasized, there is no evidence that Dr. Mora fired the last bullet into Mrs. Marx. The case was not prosecuted or argued by the State on that theory in the court below, (TR. 2567 [closing argument]; R. 1820-1821 [sentencing recommendation]) and the trial judge made no such express finding in his Sentencing Order. (R. 3191-3192). What Judge Backman did find was that Mrs. Marx was shot four times, twice in the first two rounds of three shots, in which each victim was shot twice, and then she was shot twice more before she moaned and before the 31-second period preceding the last shot began. The court expressly accounted for each of Mrs. Marx's wounds, none of which occurred after the beginning of the 31-second interval. The Sentencing Order, from which the State quotes liberally in its Answer Brief (AB 19-20), states:

The defendant fired a total of ten shots during a period of approximately forty-eight (48) seconds Ms. Patricia Grant, testified that she witnessed the Defendant initially fire six (6) shots: The defendant shot each the three (3) victims once in turn, then shot each victim a second time. Ms. Grant stated that after the sixth (6th) shot was fired, she was able to reach the door of the conference room, open and escape without physical injury. Mr. Hall, having been shot twice, also exited the room and fled to a nearby kitchen/storage area. As Mr. Hall fled the room, the defendant fired the seventh (7th) shot, which went through the now open door and lodged into the door jamb. The Defendant then turned again toward Ms. Marx, who having already been shot, was lying on the floor and proceeded to fire shots eight (8) and nine (9) at her. Approximately thirty-one (31) seconds then passed without any shots being fired. After these thirty-one (31) seconds, the tenth (10th) final shot.

Upon firing the tenth shot, the firearm . . . became jammed. (R.3189-3190).

White, the crime scene technician, testified that he heard nine or ten shots on the audio tape. (Tr. 1285-1312). The medical examiner saw four entry wounds in Mrs. Marks. (Tr. 1216-1233, 1237).

Dr. Mora did not as the State argues, protest the seating arrangement in the deposition room "because he wanted to be closer to Dr. Rudolph." (AB at 2). The court did not make that finding. Ms. Grant, the court reporter, did not recall any dispute over seating. (Tr. 1406). Mr. Hall never addressed Dr. Mora's motives for wanting to sit where he did. Dr. Mora stated that as he had hired the court reporter, he thought that he should be the one to decide where everyone sat, and that he felt that he needed to be close to the door to escape in case Dr. Rudolph attacked him. Both Dr. Mora and Mr. Hall agreed that Dr. Mora moved away from Dr. Rudolph at Mr. Hall's request. (Tr. 1472, 2138).

Dr. Mora did not as the State asserts file pretrial motions requesting permission from the court to personally address the jury. (AB at 9, 69,76). Rather, those motions sought to avoid Fla. R. Crim. P.3.250 so that Dr. Mora could present testimony other than his own and still have the final closing argument. (R. 406-410, 894-896).

Dr. Mora first requested permission to personally address after he was appointed cocounsel. The court ruled that this request was premature. (See Tr. 2414-2415 [appointment]; 2557

[first request]). Dr. Mora made his second request to personally address the jury after Mr. Colleran had presented his closing argument. The court thought that it had to grant the request because Dr. Mora was cocounsel.

THE DEFENDANT: I want to address the jury.

MR. DONNELLY: I object.

THE COURT: He is acting as cocounsel . . . I appointed him yesterday morning when he wanted to address the court . . .

THE COURT: I think that an individual who wishes to be co-counsel certainly has the right to address the jury. (Tr. 2689-2690; 2697).

The State's description of the status of trial counsel (AB 5-6) is incorrect. Of the counsel trying the case, only Mr. Malnik was appointed. (R. 750). Mr. Colleran was privately retained and substituted into the case for appointed counsel Llorente. (R. 746-748, Tr. 1904, 1909, 1915, 1922). Mr. Colleran filed a general appearance. (R. 746). Nothing in the record limits Mr. Colleran's appearance to the guilt phase, except perhaps the court's gratuitous comment to Mr. Malnik that: "Mr. Colleran isn't his penalty phase lawyer, you are," and Mr. Colleran's intimation, rejected outright by Dr. Mora, that his [Mr. Colleran's] responsibility to his client ended with the guilty verdict.

MR. COLLERAN: You honor, the defendant has indicated to me and on the record today that he's not happy with my representation. It had been my habit to stay on through the penalty phase to aid and support Mr. Malnik in any way I can, although he is the penalty phase attorney. I just want to get on the record whether or not Dr. Mora wishes me to still continue and aid in helping Mr. Malnik in preparation of his case, or whether or not he feels

that I'm so detrimental that he does not want me to be on his defense team any more.

THE DEFENDANT: I think that your participation have been detrimental from the very first day when you agreed to conduct the trial in a different way. You failed me. You agree to come and to learn the trial. You failed me. As a matter of fact that you have been totally inefficient with this past, but it doesn't mean that I don't want you here, because it's your responsibility to be here today and for the trial because you have been paid for. (Tr. 2883). (Emphasis supplied, grammatical mistakes in original).

So, on this record, Dr. Mora never terminated Mr. Colleran's services and, after the guilt phase verdict, Dr. Mora insisted, despite Mr. Colleran's seeming contrary view, that Mr. Colleran continue to participate as counsel in all phases of the case. (Tr. 2844). Mr. Colleran is shown in the transcript to be present but silent in court on Friday, May 23, 1997, when much of the discussion about the firing and unfiring of Mr. Malnik occurred. (Tr. 2889-3009). The record reflects Mr. Colleran's absence from court on the following Tuesday, May 27, 1997, when more of the discussion about Mr. Malnik's representation ensued; when Dr. Stock testified that Dr. Mora was incompetent to proceed with the sentencing phase jury trial; when Mr. Malnik was successively reappointed and released as penalty phase counsel; and, when the penalty phase jury proceedings were held. (Tr. 3010-3148). He was present on October 20, 1998 when competency and other matters were heard and he was in court on October 21, 1998 when the death sentences were pronounced (Tr. 3149-3225). Mr. Colleran was also present at the Spencer hearing, at least as a witness. (SR. 93).

SUMMARY OF ARGUMENT

Mrs. Marx's killing was not especially heinous, atrocious or cruel. The actual commission of the capital felony was not accompanied by such additional unnecessarily torturous acts as to set the crime apart from the norm of capital felonies.

Dr. Mora presented a sufficient quantum of evidence to establish the mitigating circumstance that the offense was committed while he was under the influence of extreme emotional or mental distress pursuant to §921.141(6)(b) Fla. Stat. Once he did that, the court was required to find that the mitigator existed and to weigh it. The reliance by the court on Dr. Spencer's guilt phase testimony on the issue of insanity to reject the §921.141(6)(b) mental mitigator deprived Dr. Mora of his rights to confrontation and to due process of law. The contradictions in the sentencing order render it deficient.

Dr. Mora presented a sufficient quantum of evidence to establish the mitigating circumstance that Dr. Mora's capacity to appreciate the criminality of his conduct or to conform his or her conduct to the requirements of law was substantially impaired pursuant to §921.141(6)(f) Fla. Stat. Once he did that, the court was required to find that the mitigator existed and weigh it. The reliance by the court on Dr. Spencer's guilt phase testimony on the issue of insanity to reject the §921.141(6)(f) mental mitigator deprived Dr. Mora of his rights to confrontation and to due process of law. The contradictions in the sentencing order render it deficient.

The rejection of the §921.141(6)(a) no significant history of

prior criminal activity mitigator was error. An acquittal of criminal charges is not a "significant history of prior criminal activity." The use of the PSI to establish prior criminal activity deprived Dr. Mora of due process of law and did not constitute direct evidence that Dr. Mora had engaged in prior criminal activity.

There was enough evidence in this record to put the age mitigator into play and the court erroneously failed to find Dr. Mora's age as a mitigator and accord it weight. Dr. Mora's age coupled with his substantially impaired ability to appreciate criminality of his conduct and his chronic mental and emotional instability made Dr. Mora's age a mitigator.

The numerous sentencing errors require reversal of the death sentence. Death in this case is disproportionate. This case is comparable to cases where the defendant's mental or emotional disturbance controlled the outcome.

The trial court abused its discretion by not finding Dr. Mora to be incompetent before the trial, and on the several motions later made by trial counsel. There was a bona fide doubt about Dr. Mora's competency that appears on the face of this record and the court was obligated to appoint experts and to hold a competency hearing on each application. The failure of the court to do that requires reversal. Dr. Mora proved his incapacity in each instance by a preponderance of the evidence. He was not required to do more and the trial court was required to find that Dr. Mora was incompetent based on the overwhelming evidence presented. Dr.

Stock's pre-penalty phase testimony about Dr. Mora's incompetency was un rebutted. The failure of the court to hold a competency hearing prior to sentencing and after it had appointed experts and had received their reports was error. That competency hearing could not be waived on Dr. Mora's assertion that he was competent. Dr. Mora had a substantive right not to be subjected to trial while he was incompetent. That substantive right is undermined by this court's use of an abuse of discretion review standard to review the lower court's competency rulings.

It was error to permit Dr. Mora to be his own guilt phase cocounsel and it was error to allow him to address the jury in that capacity at the conclusion of Mr. Colleran's closing argument. There is no constitutional right to hybrid representation. No compelling reason for permitting the hybrid representation is presented in this record.

The court abused its discretion when it permitted Dr. Mora to address the jury. Dr. Mora was represented by counsel. There was ample evidence that Dr. Mora would, if given the opportunity, deny his illness and he would use the courtroom as a forum to present his delusional view of things, which is what he did.

It was error for the court to remove Mr. Malnik as Dr. Mora's penalty phase attorney. Dr. Mora had not requested this relief and the court took this action without holding a Faretta hearing.

ARGUMENT

POINT I

**THE KILLING OF MRS. MARX WAS NOT HEINOUS,
ATROCIOUS OR CRUEL.**

The State's argument is bottomed on its assertion that Dr. Mora waited 31 seconds to "fire[] his final shot into Karen Marx's abdomen." The murder was HAC, the State's argument goes, because of the "sheer and utter terror that the victim endured from the moment the shooting began until Appellant fired that last shot into her abdomen and it went through her pregnant uterus." (AB 15).

Factually, as Dr. Mora has already demonstrated, these assertions by the State are not what the record reflects occurred; they are not what the State argued below; and, they are inconsistent with the trial court's findings.

Legally, the State's argument misconceives what HAC is. The State's focus is on Mrs. Marx and what it assumes she suffered. But surmising about what a victim may have felt cannot substitute for hard evidence establishing HAC, **Knight v. State**, 721 So.2d 287 (Fla. 1998), an aggravator that at its core focuses on the defendant's special acts of cruelty. The suffering of the victim, while certainly nothing for this writer to derogate, results from, rather than defines, the aggravating conduct.

The HAC aggravator applies only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Kearse v. State, 662 So.2d 677 (Fla.1995); Cheshire v. State, 568 So.2d 908 (Fla.1990). The crime must be conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla.1992); Hartley v. State, 686 So.2d 1316 (Fla.1996). **Guzman, v. State**, 721 So.2d 1155, 1159 (Fla. 1998). (Emphasis added).

As then Chief Justice Harding has explained:

In order for the HAC aggravating circumstance to apply, the murder must be both conscienceless or pitiless and unnecessarily torturous to the victim. *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992). While I agree with the trial court that "common sense" tells us that almost anyone faced with a loaded weapon would experience uncertainty, confusion, and fear, these normal responses are not enough to support the HAC aggravator nor do they rise to the level of "unnecessarily torturous to the victim," without additional acts that set the crime apart from the norm of capital felonies. ***Knight v. State, supra.*** 721 So.2d at 300-301(Harding, C.J., concurring).

To sum up, this case is closer to ***Kearse v. State***, 662 So.2d 677, 686 (Fla. 1995) than the cases cited by the State. In ***Kearse***, the court stated:

We also agree with *Kearse* that the heinous, atrocious, or cruel aggravating circumstance was improperly applied in this case (issue 5). A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *Cheshire v. State*, 568 So.2d 908, 912 (Fla.1990). However, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." *Lewis v. State*, 398 So.2d 432, 438 (Fla.1981); see also *McKinney v. State*, 579 So.2d 80 (Fla.1991) (HAC not shown where semiconscious victim suffered seven gunshot wounds on right side of body and two acute lacerations on head). While the victim in this case sustained extensive injuries from the numerous gunshot wounds, there is no evidence that *Kearse* 'intended to cause the victim unnecessary and prolonged suffering.' *Bonifay v. State*, 626 So.2d 1310, 1313 (Fla.1993). The medical examiner could not offer any information about the sequence of the wounds and stated both that the victim could have remained conscious for a short time or rapidly gone into shock. In fact, the taxi driver who arrived at the scene as the shooter sped away could not get a response from the victim and described him as "dead or dying." Thus, we cannot find beyond a reasonable doubt that this murder was heinous, atrocious, or cruel. (Emphasis added).

The trial court applied the wrong standard in assessing the HAC aggravator.

POINT II

THE §921.141 (6)(b) MENTAL MITIGATOR WAS ERRONEOUSLY REJECTED.

The State misses much of Dr. Mora's argument. Because Dr. Spencer testified only on competency and sanity matters, the court could not extrapolate Dr. Spencer's conclusions to other areas governed by a standard other than competency or sanity. In addition to using the wrong standard, the court expanded Dr. Stock's description about how Dr. Mora internalized Wong Chung beyond anything Dr. Stock possibly could have meant.

Last, after the Initial Brief was filed, the court in Trease v. State, 25 Florida L. Weekly S 622 (Fla. 2000) receded from aspects of Campbell v. State, 571 So. 2d 415 (Fla. 1990) which Dr. Mora relied on in his Initial Brief. Under Trease, a found mitigating factor may be given no weight "for additional reasons and circumstances unique to that case." In this case, the trial court has not found "additional reasons and circumstances unique to [this] case" that would justify giving no weight to a mitigating factor. In Beasley v. State, 25 Florida L. Weekly S 915, __ (2000), a case decided after Trease the court stated:

In Zack, 753 So. 2d at 19, this Court, quoting Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), stated that the trial court cannot refuse to consider relevant mitigating factors:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its sentencing order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a

mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . .

Dr. Mora contends that the mitigator has been established by the greater weight of the evidence and it should have been weighed.

POINT III

THE §921.141 (6)(f) MENTAL MITIGATOR WAS ERRONEOUSLY REJECTED.

As argued in the initial brief and in POINT II above, the court applied the wrong standard in rejecting and not weighing this mitigator which was reasonably established by the greater weight of the evidence.

POINT IV

THE REFUSAL TO FIND THE "NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY" MITIGATOR WAS ERROR.

The only basis for the trial court's rejection of this mitigator was Dr. Mora's 1984 acquittal of the 1983 attempted murder charges. Rather than undertake the Orwellian task of justifying the trial court's inverted logic, the best the State can do is point to Dr. Mora's imaginary gun duels with the Rudolph cabal as evidence of his prior criminality. The sentencing judge found, contrary to the State's assertion, that Dr. Mora "for quite some time prior to the commission of this crime . . . was able to exist with this disorder and conform his conduct to the requirements of the law." (R. 3199-3200). Furthermore, one would expect that if those crimes really occurred that a police report

would have been made and witnesses would have been produced.

POINT V

THE REFUSAL TO FIND THE DEFENDANT'S AGE TO BE A MITIGATOR WAS ERROR.

The State depicts Dr. Mora as a person who engages in running gun battles for the purpose of its POINT IV argument but who is just fine for the purpose of its POINT V presentation. The historical evidence, the medical opinions, including the grudging concession of Dr. Spencer, and the video tape of Dr. Mora's apartment (Tr. 1552, Def. Ex. 1) reveal an illness at work. Dr. Mora's rambling, incoherent pleadings, his bizarre courtroom behavior, the characterization of him by Judge Andrews and the audio taped deposition of Dr. Rudolph, which, as the court can hear, focused on where Dr. Rudolph parked his car; Dr. Rudolph's address; Dr. Rudolph's status as a psychologist; and, whether Dr. Rudolph owned P.I.E., were hardly the makings of the "cogent" self-representation that the State imagines. Everything Dr. Mora asked Dr. Rudolph at the deposition focused on issues central to Dr. Mora's paranoia rather than on any concrete aspect of the harassment case: Dr. Mora saw significance in Dr. Rudolph using a post office box, Dr. Mora believed that Dr. Rudolph used his status as a psychologist to brainwash him and the "psychology" in P.I.E. established those credentials.

As argued in the Initial Brief, competent, serious and sufficient evidence of an old man in a state of physical and mental decline was presented to the circuit court. That evidence could be neither summarily ignored nor summarily dismissed.

POINT VI

THE DEATH PENALTY IS NOT PROPORTIONATE

Here, Dr. Mora rests on his Initial Brief and this court's independent review of the proportionality of a sentence of death that it undertakes in every case, except Dr. Mora, as related above, strongly objects to State's distortion of the facts as they relate to the shooting of Karen Marx.

POINT VII

DR. MORA WAS INCOMPETENT TO STAND TRIAL

It is not at all "clear" on this record as the State asserts at AB 58 that appellant had a "shrewd ability to pinpoint the issues and an ability to relate his perspectives to his attorneys as well as the trial court." As Dr. Mora argues in his Initial Brief, events have proved otherwise. All Dr. Mora could "shrewdly" communicate to his disbelieving lawyers was that the gunplay in the deposition room was originated by an invisible man who drew down on Dr. Mora and shot at him first, and that he was being gassed, shot at, followed and physically attacked and brainwashed by an evil Dr. Rudolph and his henchmen.

State's expert Dr. Block-Garfield testified that "Mr. Mora may very well have a paranoid personality," and that a delusional

"individual will be able to confer with his attorney on all matters, with the exception of one specific isolated part, namely, the issue that involves the theme of the delusion." (Tr. 63, 66-67). This aspect of Dr. Block-Garfield's testimony dovetails more with that of the defense experts than with Dr. Spencer.

POINT VIII

**IT WAS ERROR TO PERMIT DR. MORA TO BE GUILT PHASE
COCOUNSEL AND IT WAS ERROR TO ALLOW HIM TO ADDRESS THE
JURY.**

As stated above, the two defense motions to which the State refers do not ask for the right for Dr. Mora to personally address the jury. Those motions simply sought to avoid the effect of Fla. R. Crim. P. 3.250 by giving the defense the right to present testimony other than that of the defendant and still have the final say with the jury.

At the time Dr. Mora was appointed cocounsel the court was aware from its earlier inquiries that Dr. Mora was equivocal in his desire to fire Mr. Colleran and the court had rejected Dr. Mora's last try at firing Mr. Colleran for that reason. (Tr.1976-1977, 1980-1996). The court was also aware that Dr. Mora's difference with Mr. Colleran was, as it was with all his other attorneys,¹

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Mr. Colleran, according to Dr. Mora, had promised to conduct the trial according to Dr. Mora's "point of view. "My point of view at the time was only self defense." (Tr. 1931). Mr. Colleran believed the defense was to be insanity (Tr. 1926) but, in Dr. Mora's words: "I am not crazy, that's my feeling." (Tr. 1924). The court understood Dr. Mora's "desire to go exclusively with the self defense," (Tr. 1971).

over the insanity defense. (Tr. 1990). So, up to the time of his request to be appointed as his own cocounsel, there was in this record no finding of a knowing and voluntary waiver by Dr. Mora of his right to be represented by guilt phase counsel.

At that earlier Faretta inquiry, Dr. Mora accused Mr. Colleran of lying to him, of suppressing documents, and of lying to Dr. Stock. He accused Dr. Stock of lying. He accused the State Attorney's office of lying and suppressing documents. He claimed that Judge Backman and former defense counsel Llorente were involved in a conspiracy against him. He claimed that his pet was poisoned by the gas and the evidence of that was stolen and he claimed that people who gave exculpatory affidavits had died. (Tr. 1908, 1921, 1922-1924, 1931-1939, 1940, 1943-1944-1946). The court also knew from the prior hearing and from Dr. Mora's testimony that Dr. Mora wanted to emphasize everything that his lawyers thought was irrational: the armed Wong Chung firing from the doorway; the armed Dr. Rudolph threatening Dr. Mora before the deposition; the road attacks on Dr. Mora by Dr. Rudolph and his crew; and, the gassing of Dr. Mora's apartment. This is the defense that the State refers to as "capable" and "cogent." (AB at 76).

There is no invited error here. The denial of assistance of counsel "is legally presumed to result in prejudice." Penson v. Ohio, 488 U.S. 75, 109 S. Ct. 346, 354, 102 L.Ed. 2d 300 (1988).

Our decision in United States v. Cronin, likewise, makes clear that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is

unfair if the accused is denied counsel at a critical stage of his trial.' 466 U.S., at 659 (footnote omitted). Similarly, Chapman recognizes that the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" 386 U.S., at 23, and n. 8. Id.

State v. Young, 626 So. 2d 655, 657 (Fla. 1993); Lewis v. State, 766 So.2d 288 (Fla. 4th DCA 2000).

The defendant is supposed to bring deficiencies in representation to the court's attention. As the fourth district has recently said in a slightly different context: "...if the claim is that the appointed lawyer is not doing the lawyer's job, one might wonder how that failure would ever come to light and be appropriately remedied if the person who is suffering from this inadequacy is not allowed to do so." Lewis v. State, supra., 766 So.2d at 289.

Applications for hybrid representation are "disfavored," Brooks v. State, 703 So.2d 504, 505 (Fla. 1st DCA 1997) and should be granted only for "compelling reason." Burke v. State, 732 So. 2d 1194 (Fla. 4th DCA 1999). Because a request for hybrid representation is a waiver of the right to have certain "core" defense functions performed by constitutionally mandated competent counsel, the court must follow the procedures that accompany a waiver of counsel before a hybrid representation will be allowed. Brooks v. State, supra. ; Burke v. State, supra. There is a "strong presumption against waiver of the constitutional right to counsel." Von Moltke v. Gillies, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948). To discharge his duty "a judge must investigate as long

and as thoroughly as the circumstances of the case before him demand." Id.

The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Id. at 723-24, 68 S. Ct. at 323, 92 L. Ed. 309.

In this case, as the court can see from the transcript quoted below, the court treated Dr. Mora's request as something of little significance. Judge Backman offhandedly declared Dr. Mora to be cocounsel and then went on with the other business of the trial. There was no inquiry, discussion or evaluation of the request by the court and both Mr. Colleran and Mr. Malnik were silent. The whole of the event occupies a few sentences in a large record.

THE DEFENDANT: Your Honor, I know - - If I may say something about Clark.

****.

THE COURT: Dr. Mora, just sit there and please just behave. You're not going to start talking about witnesses. That's why you have a lawyer. I've asked you numerous times whether you want to act as co-counsel. You've rejected every one of my opportunities to either be your own lawyer - -.

THE DEFENDANT: I want to be co-counsel.

THE COURT: Now you want to be your own co-counsel?

THE DEFENDANT: Yes, sir, because the State are tricking.

THE COURT: Then I'm going to hold to the same rules of evidence and procedure that would hold the lawyers to.

THE DEFENDANT: Sir, I may act as co-counsel now?

THE COURT: If you want to be co-counsel now, you may be co-counsel. (Tr. 2414 -2415).

Once the trial court made Dr. Mora cocounsel, it felt it had no option other than to permit him to address the jury. (Tr. 2690). That view, of course, foreclosed the exercise of the court's discretion and favored instead discretion's polar opposite, a per se right in the accused to address the jury.

In this case the court could have and should have declined to allow Dr. Mora to go forward as cocounsel. There was no contemporaneous Faretta hearing following Dr. Mora's request and hybrid counsel issues were never explored. Furthermore, there was no finding of a waiver of counsel. And, the court knew exactly where Dr. Mora was going. Dr. Mora's agenda was no secret; it was only to advance the "invisible man" defense so there appears in this record no rational reason to permit the hybrid representation.

POINT IX

THE REMOVAL OF PENALTY PHASE COUNSEL WAS ERROR AND IT WAS ERROR TO ALLOW DR. MORA TO ADDRESS THE SENTENCING JURY.

In addition to what has been argued in the Initial Brief, Dr. Mora would remind the court that Mr. Colleran was never removed from the case and he was available to represent Dr. Mora during the penalty phase. Dr. Mora did not fire Mr. Colleran or ask for his removal and, as the record citations referred to above make quite

clear, Dr. Mora demanded Mr. Colleran's participation at the penalty phase. So, irrespective of whether the court was correct to allow Mr. Malnick's discharge, Mr. Colleran was still in the case and he was obligated to provide penalty phase assistance to Dr. Mora and the court should have recognized that. It was absolute error for the court to treat Mr. Colleran like an invisible person in all of this. It is one thing for Mr. Colleran not to be ready to take over the penalty phase, but that is addressable on a motion for a continuance. It is quite another for the court to completely ignore the existence of cocounsel in the case and require Dr. Mora to fight the penalty phase proceedings without any legal assistance.

CONCLUSION

For the reasons stated in this Reply and in the Initial Brief the conviction and penalties should be vacated and reversed.

The killing of Mrs. Marx was not heinous, atrocious or cruel.

The §921.141 (6)(b) mental mitigator was erroneously rejected.

The §921.141 (6)(f) mental mitigator was erroneously rejected.

The refusal to find the "no significant history of criminal activity mitigator" was error.

The death penalty is not proportionate.

Dr. Mora was incompetent to stand trial.

It was error to permit Dr. Mora to be guilt phase cocounsel and it was error to allow him to address the jury.

The removal of penalty phase counsel was error and it was error to allow Dr. Mora to address his sentencing jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor, West Palm Beach, Florida 33401, and by U.S. Mail to Dr. Julio Mora, C.D. #O-L11003, M.D.#A-1, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083-0221 this ____ day of December, 2000.

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