IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1446

ANA MARIA CARDONA,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

REPLY BRIEF OF CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

The State relies on the statement of case and fact presented in its amended answer brief of appellant/initial brief of cross-appellant, with the following additions:

In its written response to Defendant's motion to exclude Dr. Suarez, the State noted that Dr. Toomer had testified during deposition that Defendant suffered from "entrenched depression," which was a result of the trauma she allegedly suffered during childhood, and that this depression was ongoing and affected all of Defendant's actions. (R69/10809-14) It noted that Dr. Suarez would testify that he found no signs of depression during his evaluation of Defendant and that he conducted testing of Defendant that showed that she was malingering. *Id.* It averred that since Dr. Toomer was relying exclusively on statements made to him by Defendant, the fact that she was malingering would also be proper rebuttal to Dr. Toomer's testimony. *Id.*

During the hearing on the State's motion to allow its expert to evaluate Defendant, the State noted that Dr. Toomer had indicated that he was prepared to offer an opinion based exclusively on his conversations with Defendant and that it should be able to have an expert evaluate Defendant to level the playing field. (R168/5-7) The trial court stated that it was concerned about allowing the State to have Defendant evaluated

based on its concern about protecting Defendant's constitutional rights. (R168/8) It also averred that it was concerned about whether having an evaluation by a State expert would level the playing field based on whether the evaluation by the State's expert would duplicate the evaluation by Dr. Toomer and concern the exact same diagnosis. (R168/11-13)

During the penalty phase, Defendant indicated that she had received discovery regarding the State intent to use a statement that she had given to the police that had been suppressed but found voluntary in rebuttal. (R138/270-71) The State averred that it had provided the discovery because Defendant had made statements about her upbringing that were inconsistent with statements that she had made to Dr. Toomer and that it would seek to present the inconsistent statements as rebuttal if Dr. Toomer's testimony made it relevant. (R138/271-76) The State later argued since Dr. Toomer would be testifying entirely based on statements that Defendant had made to her, it should be able to impeach Defendant's hearsay statements just as if Defendant had testified herself and pointed out that Defendant had claimed to have a wonderful relationship with her mother that would rebut the statements she had made to Dr. Toomer. (R140/617-20) In arguing about the use of inconsistent statements from Defendant to impeach the statements she had made to Dr. Toomer,

the State noted that it had wanted to call Dr. Suarez to testify that Defendant had made inconsistent statements to him and that the statement to the police contained further inconsistent statements. (R140/642-43) The trial court indicated that it believed that Defendant's statements to Dr. Toomer could be admitted for their truth as statements made for the purpose of medical diagnosis and that the law permitted the State to impeach these statements. (R140/637-43) It acknowledged that there were inconsistencies between Defendant's statements to Dr. Toomer and her statements to others but averred that an expert could be able to harmonize the inconsistencies so it ruled that the State could not present the inconsistency statements. (R140/643-45)

Before Dr. Toomer testified, the trial court noted that it had already severely limited what testimony Dr. Suarez would be able to provide. (R139/580) Immediately before Dr. Toomer testified, Defendant noted that Dr. Suarez and Dr. Capp were present in the courtroom and objected to their presence. (R140/648) The trial court overruled the objection but indicated that it might consider their testimony inadmissibly cumulative if they had heard Dr. Toomer's testimony. (R140/648-49)

The State asked the trial court to address that issue

before Dr. Toomer's testimony began so that it could make a decision regarding how to use its experts. (R140/650-51) When the trial court agreed to do so, the State noted that the trial court had already ruled that Dr. Suarez could not testify about any interaction with Defendant based on constitutional concerns and that it believed that Dr. Suarez's testimony would be relevant to the jury's evaluation of the statements Defendant had made to Dr. Toomer. (R140/650-51) The trial court responded that it had refused to allow Dr. Suarez to provide any testimony regarding his interaction with Defendant because he had been appointed to evaluate Defendant for retardation. (R140/651) Instead, it had indicated that it might allow Dr. Suarez to testify to whether Dr. Toomer's method of evaluation was proper in the abstract. (R140/651)

In rebuttal, Dr. Larry Capp, a psychologist, testified that he worked for both the State and defense equally. (R142/962-70, 972) He averred that a proper psychological assessment involved conducting a clinical interview, testing to corroborate the interview, reviewing records and interviewing people who knew the defendant, including doing so by phone if necessary. (R142/973-74, 985) He would never simply interview a person because interviews are general unreliable. (R142/974-75) He averred that the doctor should decide what test to give and

should not allow a lawyer to dictate the way an evaluation was conducted because he found it unethical. (R142/975-76) He would never agree to limit an evaluation to the first 18 years of a person life because the evaluation would be incomplete and he considered it unethical. (R142/976) Dr. Capp did not believe that an expert should take interview statements at face value. (R142/980)

At the beginning of the *Spencer* hearing, the State indicated that it intended to call Dr. Suarez in rebuttal of Dr. Haas's testimony to discuss the procedures Dr. Haas used in her evaluation. (R76/11905) The trial court responded that it would not allow Dr. Suarez to testify based on any interaction with Defendant. (R76/11905)

During her testimony, Dr. Haas stated that she had administered the Symptom Structured Response test (SIRS), which she described as a test of response style that showed the reliability but not validity of the information a person provided. (R76/11945) She averred that the results indicated that Defendant was being honest with her. (R76/11945) She also administered the Trauma Symptom Inventory (TSI). (R76/11945) She stated that this test had a validity scale and that while Defendant provided some atypical responses, her score was insufficient to invalidate the results. (R76/11947-48)

Dr. Haas also provided extensive testimony regarding information that she had gleaned from the reports of other experts that she claimed supported her opinion, including information she gleaned regarding Defendant's intelligence. (R76/11959-63, 11968-70, 11984-89, 11992-93, 12071-75) She averred that Defendant suffered from depression. (R76/11990)

When the State attempt to cross examine Dr. Haas regarding findings from the experts on whom she had allegedly relied, the trial court sustained objections, indicating that it would not permit the State to question the doctor about negative findings because it somehow implicated aggravation. (R76/12031-32) She further insisted during cross that a test could only be considered invalid if the person taking the test did not perform the tasks on the test. (R76/12038-40) She also admitted that she ignored some of the expert reports because she did not understand how they had reached their conclusion. (R76/12044-45) When confronted with inconsistent reports Defendant had given to experts regarding who was caring for LF at the time of his death, Dr. Haas insisted the she did not consider such inconsistencies because she "left it to the Court" to determine issues regarding guilt. (R76/12050-57)

After Dr. Haas finished testifying, Defendant had the trial court take judicial notice of the order denying the retardation

claims and admitted, over objection, Dr. Weinstein's prior post conviction testified. (R76/12087-92) She argued that this information was relevant to whether Defendant committed the murder while under the influence of extreme mental or emotional disturbance and whether her intellectual capacity was limited. (R76/12092)

After Defendant rested, the State indicated that it wanted to call Dr. Suarez. (R76/12095) The trial court requested a proffer. (R76/12095) The State responded that Dr. Suarez would testify regarding whether the reports of the prior experts and the test data underlying those reports supported the conclusions that Dr. Haas had drawn and to his opinion regarding the conclusions supported by the information. (R76/12095-96) When the trial court stated that it believed the State's cross examination of Dr. Haas covered these areas, the State averred that it had not, particularly as the trial court had refused to allow the State to ask questions regarding the negative information contained in the reports. (R76/12097) It also noted that Defendant had presented evidence regarding her intellectual functioning, particularly through the presentation of Dr. Weinstein's prior testimony, and that Dr. Suarez could testify about this issue. (R76/12098-99) However, the trial court still refused to allow the State to present Dr. Suarez's

testimony. (R76/12097, 12101)

In her sentencing memo, Defendant argued that the trial court should find that HAC did not apply based on Dr. Haas's testimony regarding what other experts had found and the assertion that Dr. Haas's testimony was unrebutted and supported by testing. (V81/12799-12873) She also argued that the no significant criminal history mitigator had been proven by a lack of evidence. *Id.* She relied on testimony from Dr. Haas and Dr. Weinstein as proving the extreme mental or emotional disturbance mitigator and averred that it was uncontroverted, noted that Dr. Haas had personally evaluated Defendant and pointed to Dr. Haas's testimony about what other experts had found and the results of their tests as corroborative of Dr. Haas's opinion. *Id.* She asserted that testimony from Dr. Haas, Dr. Toomer and Dr. Weinstein showed that her capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired, in part because of alleged deficits in her intellectual functioning. *Id.* She relied on testimony from Dr. Toomer and Dr. Haas, including testimony regarding the alleged findings of prior experts, to assert that her parents' alleged lack of involvement in her life and alleged childhood trauma was mitigating. *Id.* She argued that she suffered from depression and was a battered

women based on Dr. Haas's testimony, which she averred was strengthen by her reliance on reports from State experts. *Id.* She also averred that she suffered from dependent personality disorder based on Dr. Haas's testimony about the findings of a state expert and that she had limited intellectual functioning. *Id.*

In its sentencing memo, the State objected to Defendant being allowed to rely on the testimony from Dr. Haas, Dr. Toomer and Dr. Weinstein because the trial court had precluded the State from presenting rebuttal evidence. It specifically noted that it had wanted to have Dr. Suarez testify about statements Defendant had made to him regarding her childhood that were inconsistent with statements Defendant made to Dr. Toomer, that he could have explained information from the reports of the prior experts and that Dr. Suarez could have rebutted Dr. Weinstein's testimony about Defendant's intellectual functioning. (R81/12787-88)

SUMMARY OF THE ARGUMENT

Given the actual scope of mitigating evidence Defendant presented, the actual scope of the proffers the State made and the reason why the trial court excluded Dr. Suarez's testimony, the assertions that the State did not sufficiently proffer Dr. Suarez's testimony and that the testimony was not proper rebuttal are meritless. The trial court also abused its discretion in instructing the jury on the no significant criminal history mitigator because Defendant presented no evidence to support this mitigator and was relying on the lack of evidence to support the prior violent felony aggravator. Moreover, the trial court's finding of the mitigator was based on an incorrect legal standard and a failure to consider all of the evidence regarding it.

ARGUMENT

XI. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT DR. SUAREZ'S TESTIMONY.

Defendant contends that the State failed to preserve any issue regarding the exclusion of Dr. Suarez's testimony because it allegedly failed to proffer the substance of Dr. Suarez's testimony. She further contends that the trial court did not abuse its discretion in excluding Dr. Suarez's testimony because it would not have served as proper rebuttal. However, a review of the record as a whole shows that the State did adequately proffer what evidence it wanted to elicit from Dr. Suarez and that presentation of this evidence would have been proper rebuttal to all of the evidence that Defendant presented regarding her mental state.

In making her arguments, Defendant relies on only a single quotation made by the State at the time that the issue of whether Dr. Suarez could be present during Dr. Toomer's testimony and still testify was being litigated and acts as if it was the only proffer that the State made and that the State only attempted to present Dr. Suarez in rebuttal of Dr. Toomer's opinion. However, in doing so, Defendant simply misrepresents the record regarding the nature of the State's proffers, the number of times the State sought to present Dr. Suarez's

testimony and the extent of evidence regarding her mental state that she presented.

As seen above, the State repeatedly proffer that it wanted to present Dr. Suarez's testimony that Defendant had made statements to him about her childhood that were inconsistent with statements that she had made to Dr. Toomer and that Defendant was a malingerer in rebuttal. (R69/10809-14, R140/642-43, R81/12787-88) It also proffered that Dr. Suarez would testify that Defendant was not depressed, which was contrary to an opinion Dr. Toomer had offered at deposition and Dr. Haas's opinion at the *Spencer* hearing. (R69/10809-14, R76/11990) After Dr. Haas's testimony and the presentation of Dr. Weinstein's testimony that Defendant was retarded, the State proffered that Dr. Suarez would testify regarding the conclusions that could properly be drawn from the prior experts' reports and testing and regarding Defendant's level of intellectual functioning. (R76/12095-96) Given the actual proffers in the record and the fact that the trial court excluded the evidence because it believed that any evidence about Dr. Suarez's interactions with Defendant would violate her Fifth Amendment Rights, the proffers were sufficient and

Defendant's claim they were not is meritless.[1] *Seeba v. Bowen*, 86 So. 2d 432, 434 (Fla. 1956); *O'Shea v. O'Shea*, 585 So. 2d 405, 407-08 (Fla. 1st DCA 1991).

Further, Defendant's claim that the evidence that the State proffered it wanted to present was not within the scope of proper rebuttal is meritless. As this Court has long recognized, expert opinion evidence can be rejected based merely on the fact that it is inconsistent with other evidence. *Walls v. State*, 641 So. 2d 381, 390-91 (Fla. 1994). During his testimony, Dr. Toomer opined, based exclusively on Defendant's statements to him, that her mental state was permanently impaired based on matters she had experienced during her childhood. Thus, showing that Defendant had made inconsistent statements about her childhood would have allowed the jury to determine whether Dr. Toomer's opinion was consistent with the fact and would be proper rebuttal. *See Gonzalez-Valdes v. State*, 834 So. 2d 933, 935 (Fla. 3d DCA 2003). While the trial court stated that it believed that an expert could have harmonized the

[1] Moreover, Defendant's complaint that the State did not renew its proffer after Dr. Toomer testified is also meritless. Since the 2003 amendment to §90.104, Fla. Stat., renewal of an objection is not necessary to preserve an issue for appeal. Here, as is evident for the trial court's comments on the record, it had made a definitive ruling that Dr. Suarez could not testify regarding his interaction with Defendant based on its mistaken belief that such testimony would violate the Fifth Amendment before the penalty phase began. (R139/580, R140/651, R76/11905)

inconsistencies between Defendant's prior statements about her mother and her statements to Dr. Toomer and the conclusions he drew based on them, this Court has already held that this is not a valid basis to exclude evidence. *Wuornos v. State*, 644 So. 2d 1000, 1009-10 (Fla. 1994); *see also Davis v. State*, 121 So. 3d 462, 492-93 (Fla. 2013); *Snelgrove v. State*, 107 So. 3d 242, 254 (Fla. 2012). Thus, the assertion that Dr. Suarez's testimony was not proper rebuttal does not show that the trial court did not abuse its discretion in excluding Dr. Suarez's testimony.

This is all the more true, as the trial court permitted Defendant to rely on her statements to Dr. Toomer for their truth as statements made for the purpose of medical diagnosis. Thus, pursuant to §90.806(1), Fla. Stat., evidence that Defendant had made inconsistent statement was admissible. *See Reaves v. State*, 639 So. 2d 1, 3-4 (Fla. 1994). Having Dr. Suarez testify to inconsistent statements made by Defendant would also be proper rebuttal.

Dr. Suarez's testimony regarding malingering was also proper rebuttal. Dr. Toomer admitted during cross examination that tests for malingering and personality functioning would provide information relevant to issues about the credibility of Defendant's statements, which were the only information he relied upon to formulate his opinion. (V140/710-11) Thus,

presenting evidence regarding what such tests would be proper rebuttal. Defendant's tacit suggestion that such results would not be proper rebuttal simply because Dr. Toomer had not performed such tests himself is meritless. *See Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 378 (Fla. 4th DCA 1991)(fact that expert did not consider issue in formulating opinion did not render evidence about issue inadmissible when issue was relevant); *see also Shaffer v. State*, 710 So. 2d 79, 80-81 (Fla. 4th DCA 1998).

Additionally, while Defendant has chosen to ignore the *Spencer* hearing and the trial court's continued exclusion of Dr. Suarez, his testimony was proper rebuttal then too. Dr. Haas testified that Defendant was depressed, that her intellectual functioning was impaired and that prior evaluations of Defendant supported certain conclusions. Moreover, Dr. Weinstein's testimony concerned retardation. Dr. Suarez's testimony regarding the diagnosis of depression, intellectual functioning deficits and retardation would be direct rebuttal. Further, testimony regarding whether the prior reports actually supported the conclusions Dr. Haas drew from them would also be direct rebuttal. *See Knight v. State*, 746 So. 2d 423, 433 (Fla. 1998).

Defendant's reliance on *Buchanan v. Kentucky*, 483 U.S. 402 (1987), and *Kansas v. Cheever*, 134 S. Ct. 596 (2013), does not

compel a different result. In *Buchanan*, the defendant had been evaluated by an expert prior to trial to determine whether he should be involuntarily hospitalized and treated prior to trial. *Id.* at 410-11 & n.11. The expert had issued a report that considered both the need for hospitalization and treatment and the defendant's competency to stand trial. *Id.* at 411 n.11. At trial, the defendant presented a mental state defense based on reports from other experts. *Id.* at 408-09. When the State attempted to present the first expert's report, the defendant objected that the report was not proper rebuttal because the evaluation had concerned competency and that its introduction would violate his constitutional rights. *Id.* at 411. After editing out the portion of the report concerning competency, the trial court admitted the report. *Id.* at 412 & n.12. The Court upheld the admission of the report, finding no violation of the defendant's constitutional rights and that report was proper rebuttal because it also concerned the defendant's mental state. *Id.* at 421-25.

Here, Dr. Toomer testified that Defendant's mental functioning was permanently impaired based on events in her childhood based exclusively on statements she made to him. He admitted that evidence from testing could provide information relevant to the credibility of those statements. As such,

testimony from Dr. Suarez regarding inconsistent statements Defendant had made to him about her childhood and tests suggesting she was malingering would have been proper rebuttal regarding whether Dr. Toomer's opinion had a proper basis. *See Parker v. State*, 476 So. 2d 134, 139 (Fla. 1985). Moreover, Dr. Suarez's testimony regarding depression, intellectual functioning and the proper conclusions to be drawn from the reports of the prior experts would have been proper rebuttal to the testimony of Dr. Haas and Dr. Weinstein. Thus, *Buchanan* does not support Defendant's argument.

Cheever provides even less support for Defendant's position. While the Court did noted that the rebuttal evidence had to be proper rebuttal, it did not attempt to determine whether the evidence in question was inadmissible as improper rebuttal. *Id.* at 603. Moreover, in the course of making note of the issue, the Court explained that what it meant by "limited rebuttal" in *Buchanan* was that the exclusion of the opinion on competency to stand trial was proper because it was a different issue than the defendant's mental state. *Id.* It also discussed its opinion in *Powell v. Texas*, 492 U.S. 680 (1989). *Id.* In *Powell*, the Court has found that the defense presentation of an insanity defense in the guilt phase of a capital trial did not permit the state to use mental state evidence to carry its

burden of proof about an aggravator in the penalty phase. *Powell*, 492 U.S. at 683. Further, the Court had already stressed that the ability to present rebuttal mental health evidence did not depend on the nature or duration of the alleged mental state the defendant was claiming in defense. *Id.* at 602.

Here, the State never suggested that it wished to call Dr. Suarez to testify regarding a mental condition that it did not believe that Defendant was presenting nor did the State seek to make offensive use of mental health evidence to prove its case. Instead, it consistently sought to present evidence that Defendant did not suffer from mental health conditions that Defendant's own experts had claimed she had and to present evidence showing that the bases of the defense experts' opinions were flawed. Thus, *Cheever* also does not show that excluding Dr. Suarez was proper.

Defendant's suggestion that the error in the exclusion of Dr. Suarez's testimony was harmless because the State was permitted to present Dr. Capp's testimony is meritless. The trial court limited Dr. Capp's testimony to his belief on how an evaluation should be conducted based on its belief that information regarding a defendant's mental state derived from an an evaluation of the defendant violated the Fifth Amendment. (R142/973-80, 985) This testimony was no substitute for

testimony that showed that there were reasons to question the credibility of the actual statements that Defendant had made to Dr. Toomer, which the trial court had been allowed to be admitted for their truth. Moreover, it did not even address the issues regarding the testimony of Dr. Hass and Dr. Weinstein. Further, it should be remembered that Defendant proceeded to argue that the evidence presented through her experts had to be accepted because it was unrebutted and uncontroverted. As this Court has recognized, arguments that rely on such a lack of proof where the lack of proof is the result of the party's exclusion of evidence compound the error in the exclusion of the evidence. *Garcia v. State*, 564 So. 2d 124, 128-29 (Fla. 1990).

XII. THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY ON THE NO SIGNIFICANT CRIMINAL HISTORY MITIGATOR AND THE TRIAL COURT ERRED IN FINDING THAT MITIGATOR.

In responding to the State's argument that the trial court abused its discretion in instructing the jury on the no significant criminal history mitigator, Defendant insists that the giving of the instruction was proper because the State did not prove that she had convictions for serious offenses and it did not proffer evidence to rebut the mitigator at the time it objected to the instruction. However, these arguments simply show a misunderstanding of the State's argument and the no significant criminal history mitigator and do not show that the trial court did not abuse its discretion in instructing the jury on the mitigator.

Here, the basis of the State's argument that it was an abuse of discretion to instruct the jury on the no significant criminal history mitigator was that **Defendant** had failed to present **any** evidence to support that mitigator at the time she requested the instruction. In fact, Defendant admitted that she had not presented evidence to support the mitigator at the time she requested the instruction. (R143/1037) Since the State's position that the instruction was improper was based on lack of evidence to support it, it had no reason to proffer rebuttal

evidence at that time. Thus, Defendant's suggestion that the instruction was proper based on a lack of evidence is an oxymoron.

Moreover, Defendant's position that the instruction was proper because the State had not presented evidence of convictions for serious crimes is based on a misunderstanding of what evidence was necessary to support this mitigator; a misunderstanding the trial court apparently share. While the prior violent felony aggravator must be based on proof of a conviction for a serious, life-threatening offense, the no significant criminal history mitigator concerns whether a defendant has a law abiding character. *Fitzpatrick v. State*, 437 So. 2d 1072, 1078 (Fla. 1983). As such, evidence of a conviction is not necessary for evidence of criminal activity to be relevant to whether the mitigator is established. *Washington v. State*, 362 So. 2d 658, 666-67 (Fla. 1978). Instead, evidence that a defendant engaged in criminal activity is relevant even if it never resulted in an arrest, prosecution or conviction or would be sufficient to sustain a conviction. *Davis v. State*, 2 So. 3d 952, 963-65 (Fla. 2009)(evidence of criminal conduct that did not result in arrest or conviction relevant); *Dennis v. State*, 817 So. 2d 741, 763-64 (Fla. 2002)(testimony regarding incidents of domestic violence including witness testimony and

defendant's statement relevant); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988)(fact underlying misdemeanor conviction relevant); *Fitzpatrick v. State*, 437 So. 2d at 1078 (juvenile record relevant); *Smith v. State*, 407 So. 2d 894, 900-01 (Fla. 1982)(defendant's confession to criminal activity unsupported by corpus delicti).

Moreover, the State may only present evidence in rebuttal of mitigation after the defendant has presented evidence of the mitigation. *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991)(error to allow the State to present evidence during its case-in-chief even though evidence would have been properly admitted during rebuttal). Thus, while evidence of criminal activity that did not result in a conviction that would satisfy the prior violent felony aggravator is relevant rebuttal, it can only be presented once a defendant presents evidence that she does not have a significant criminal history. *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989). As a result, this Court has found that it is improper for a defendant to use the fact that the State did not present evidence to support the prior violent felony aggravator as a basis for an argument regarding an alleged lack of a significant criminal history as mitigation because such a comment is based on facts not in evidence. *King v. State*, 130 So. 3d 676, 687-89 (Fla. 2013).

Here, just as in *King*, Defendant presented no evidence that she did not have a significant criminal history. Yet, she proceeded to request an instruction on the no significant criminal history mitigator based entirely on the fact that the State had not presented evidence to support the prior violent felony aggravator while admitting that she had not presented evidence of this mitigator. Since the fact that the State did not prove that Defendant had a prior violent felony conviction does not prove that she had no significant criminal history, the trial court abused its discretion in instructing the jury on this mitigator. *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990).

Defendant's reliance on *Robinson v. State*, 487 So. 2d 1040 (Fla. 1986), is misplaced. In that case, the State had presented the defendant's confession to the crimes in which the defendant had described his codefendant as the instigator of the crimes. *Id.* at 1041, 1042-43. Defendant had also presented evidence regarding his impaired capacity. *Id.* at 1043. Despite this evidence, the trial court refused to instruct the jury that the statutory mitigators that he was an accomplice whose role in the crimes was relatively minor and that his capacity to appreciate the criminality of his conduct was impaired. As this Court has long recognized, "Defendant is entitled to have the

jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions." *Hooper v. State*, 476 So. 2d 1253, 1256 (Fla. 1985). Because there was some evidence to support the mitigators, the trial court erred in refusing the instructions in *Robinson*. Here, in contrast, Defendant admitted that she had presented no evidence that she had no significant criminal history and was relying on the lack of evidence to rebut a mitigator that she had not presented such that the State was precluded from presenting rebuttal. As such, *Robinson* does not support Defendant's position.

Further, Defendant's suggestion that the trial court's finding of the mitigator was proper is also incorrect. Here, the trial court based its finding of this mitigator on the fact that the State had not presented evidence of convictions. (R86/13720-21) However, as noted above, evidence of criminal conduct that did not result in a conviction is relevant to the evaluation of this mitigator. *Davis*, 2 So. 3d at 963-65; *Dennis*, 817 So. 2d at 763-64; *Perry*, 522 So. 2d at 821; *Fitzpatrick*, 437 So. 2d at 1078; *Smith*, 407 So. 2d at 900-01. Thus, the trial court applied the wrong rule of law in evaluating this mitigator, which is an abuse of discretion. *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012). Moreover,

it refused to permit the State to present evidence of criminal conduct that did not result in a conviction based on the mistaken belief that criminal conduct was only relevant to the prior violent felony aggravator. (R76/12009-11) This Court has expressly held that it is error for a trial court not to evaluate all of the evidence presented regarding mitigation. *Deparvine v. State*, 995 So. 2d 351, 380-81 (Fla. 2008). Since the trial court both applied the wrong rule of law and refused to consider the evidence, the trial court erred in finding this mitigator.

CONCLUSION

For the foregoing reasons, the giving of a jury instruction on the no significant criminal history mitigator and the exclusion of Dr. Suarez's testimony were error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Reply Brief of Cross-Appellant** was furnished by email to Andrew Stanton, astanton@pdmiami.com, 1320 N.W. 14th Street, Miami, Florida 33125, this 20th day of January 2014.

\s\Sandra S. Jaggard
SANDRA S. JAGGARD
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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