IN THE SUPREME COURT OF FLORIDA

PEDRO HERNANDEZ-ALBERTO,

Appellant,

v. Case No. SC02-1617

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KIMBERLY NOLEN HOPKINS
Assistant Attorney General
Florida Bar ID#: 0986682
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
Fax (813) 281-5501

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural background

On January 13, 1999, the Defendant was indicted for two counts of first degree murder for the murder of his two stepdaughters, Donna Berezovsky and Isela Gonzalez on January 3, 1999. (I/19-20). Trial was held August 21 through 24, 2001, after which the jury returned a verdict of guilty as charged on both counts. (II/317-318). The penalty phase was conducted on November 29, 2001, resulting in an advisory sentence of death for both counts by a vote of 10 to 2. (III/353).

Following a Spencer hearing held on April 30, 2002, the trial judge issued a Sentencing Order on May 28, 2002, sentencing Defendant to death on both counts of first degree murder. (III/396-411). With respect to the murder of Donna Berezovsky, the trial court found the following aggravators: the prior violent felony for the murder of Isela Gonzalez, the fact that Donna Berezovsky was under the age of twelve, and that Donna Berezovsky was particularly vulnerable because the Defendant stood in a position of familial or custodial authority over her. With respect to the murder of Isela Gonzalez, the aggravators included: the prior violent felony for the murder Donna Berezovsky and that the crime was committed in a cold and calculated and premeditated manner and without any pretense of

moral or legal justification. (III/398-400).

In regard to statutory mitigation, the trial court gave some weight to the fact that Defendant had no significant prior criminal history. (III/401). In nonstatutory mitigation, the trial court gave some weight to the fact that Defendant suffered beatings by his father and that he confessed to the crimes charged. Little weight was given to the fact that the Defendant had brain damage, the Defendant lost his mother at a young age, suffered beatings by a neighbor, trained and worked as an auxiliary policeman in Mexico City in his youth, was capable of loving relationships and had borderline intelligence.

The trial court gave no weight to the statutory mitigators that Defendant committed the murders while under the influence of extreme mental or emotional disturbance, that the capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired or to the Defendant's age at the time of the crime. The trial court also gave no weight to the nonstatutory mitigation that Defendant grew up in extreme poverty. (III/401-409).

This appeal ensued.

Competency proceedings

Initially, on April 19, 1999, the trial court issued an

Order for Competency and Sanity Evaluation and Psychiatric Evaluation seeking a determination from Drs. Michael Maher and Alfonso Saa as to whether the Defendant was competent to stand trial. (I/27-31). Dr. Maher's evaluation, dated May 7, 1999, concluded that the Defendant was not competent to stand trial. While the Defendant was somewhat uncooperative and his presentation and history were somewhat contradictory, Dr. Maher recommended evaluation and treatment in a secure forensic psychiatric hospital. Dr. Maher expected such treatment to restore Defendant to a level of competence within three to six months. (I/32-36).

Dr. Saa issued a report on May 3, 1999, also concluding that Defendant was not competent to stand trial. However, Dr. Saa questioned whether Defendant's current clinical presentation was a reflection of the stress he was facing or possible malingering. Dr. Saa further concluded that involuntary hospitalization and further psychiatric treatment would help treat Defendant's condition, as well as ascertain whether he was malingering. (I/40-43).

On May 18, 1999, relying on the evaluations of Drs. Maher and Saa, the trial court issued an Order Adjudging Defendant Incompetent to Stand Trial committing Defendant to the Department of Children and Families to be placed in a mental

health facility. (I/37-39). Subsequently, on June 17, 1999, the South Florida Evaluation and Treatment Center issued a competency evaluation finding Defendant had no major mental disorder, was competent to proceed, was capable of assisting his attorney and acting appropriately in court. (I/44-45, 50-54). Letters dated June 24, 1999, from the treatment center confirmed the conclusion that Defendant was malingering, had no major mental illness and was competent to proceed. (I/46-47, 48-49).

After receiving the report of the treatment center finding Defendant to be a malingerer, on July 12, 1999, the trial court issued an Order of Transport returning Defendant to the custody of the Hillsborough County Sheriff's Office. (I/57-58). On July 13, 1999, the trial court issued a second Order for Competency and Sanity Evaluation and Psychiatric Evaluation Return, seeking further examination of the Defendant by Drs. Maher and Saa. (I/59-62).

On July 22, 1999, Dr. Saa submitted his evaluation to the trial court. (I/68-71). Dr. Saa's clinical impression was that Defendant's presentation was more compatible with malingering rather than a clear mental infirmity, defect or disease. (I/70). However, Dr. Saa concluded that Defendant was not competent to stand trial based on legal criteria, while noting that his conclusions were colored by Defendant's likely

malingering. (I/71).

On August 6, 1999, Dr. Maher concluded that Defendant was competent to stand trial. (I/64-67). According to Dr. Maher,

> The Defendant is engage [sic] in an ongoing systematic pattern of deception in order to appear mentally impaired and incompetent. This pattern of behavior limits the opportunities to perform a thorough psychiatric assessment regarding more subtle or underlying impairments or limitations. However, his presentation, history and demeanor are sufficient to strongly support a conclusion of competency to proceed.

(I/64). Notably, Dr. Maher also opined that, "...while [Defendant's] pattern of malingering [was] likely to continue, he [would], in all likelihood, remain competent throughout his legal proceedings." (I/67).

A competency hearing was conducted on November 9, 1999. (XII/1285-1341). The trial court heard testimony from Drs. Maher and Saa, as well as Dr. Balzer from the treatment center where Defendant had been placed for five weeks.

Dr. Saa confirmed his conclusions that Defendant was incompetent. However, he also noted that Defendant's clinical condition was not consistent with a mental illness. And, if he had the conditions he was alleging to have, the Defendant would be very much impaired. Thus, Dr. Saa had concerns that Defendant was malingering. (XII/1299).

Dr. Maher also confirmed the conclusions stated in his

previous evaluations of Defendant. While he initially found Defendant incompetent, following his second evaluation, Dr. Maher concluded that Defendant was competent to stand trial. (XII/1306). According to Dr. Maher, Defendant was systematically and willfully evading and presenting a picture of himself that was not genuine for the purpose of avoiding legal circumstances. (XII/1306-1307).

Next, the trial court heard from Dr. Balzer from the treatment center who had observed Defendant for five weeks. (XII/1321). Upon observation, the first indications of Defendant's malingering were his claimed memory problems. His memory deficits were selective and self-serving. (XII/1322). Dr. Balzer and the treatment team ultimately concluded that Defendant was competent to stand trial and was malingering. (XII/1322-1323). Further, Defendant suffered from no major psychiatric problems. (XII/1324).

Relying on the testimony of the three experts, along with their written evaluations, the trial court found the Defendant competent to stand trial. (XII/1338-1340). Trial preparation then proceeded accordingly.

Later, in response to a request from defense counsel for appointment of a medical doctor to examine Defendant, (I/94-96), the trial court appointed Dr. Arlene Martinez to evaluate and

treat Defendant. (I/97). On September 22, 2000, Dr. Martinez issued a report finding Defendant paranoid and psychotic and ordering medication as treatment. (I/38-102). However, Dr. Martinez's report noted that she had absolutely no background information on the Defendant nor did she have any past medical history information. (I/38).

Again, after defense counsel sought another competency determination to determine the Defendant's most immediate status, (Supp. 2/189-197), on August 9, 2001, the trial court issued an Order for Competency and Sanity Evaluation and Psychiatric Evaluation Return, seeking a third examination of the Defendant by Drs. Maher and Saa. (I/123-127). On August 13, 2001, Dr. Saa reported to the trial court that Defendant's failure to cooperate prevented him from rendering an opinion about Defendant's competence to stand trial. (II/279). However, this report also noted the findings of the in-house psychiatrist, Dr. Stoll, who also determined that Defendant was malingering. (II/279). On August 15, 2001, Dr. Maher reported that Defendant was competent to stand trial. (II/280-283).

On August 20, 2001, a competency hearing was held. Dr. Maher testified regarding his conclusions from the three evaluations he conducted on Defendant. In the first evaluation, Dr. Maher found Defendant to be incompetent. However, he was

not able to do a full-scale mental health evaluation because Defendant was unwilling to participate. Even at that time, Dr. Maher had some reservations that Defendant might have been malingering. (IV/35).

As a result of the evaluations done by Drs. Maher and Saa, Defendant was hospitalized for five weeks. The psychiatric staff at the hospital concluded Defendant was malingering to frustrate the trial process and was competent to stand trial. (IV/36).

After Defendant's return to Hillsborough County, Dr. Maher did a second evaluation. This time Dr. Maher found Defendant to be competent. (IV/37). This change in opinion was partially based on the observations made at the hospital that Defendant functioned well and did not behave consistent with any major mental health problems. (IV/37-38). Finally, in his third evaluation, Dr. Maher also concluded that Defendant was competent to stand trial. (IV/39).

Dr. Maher also testified to his observations of Defendant's courtroom behavior on the date of the hearing. According to Dr. Maher, Defendant's behavior supported a finding of competence. Moreover, Defendant showed no signs of psychotic thought patterns. (IV/40-42, 58). Dr. Maher believed that Defendant was still engaged in a pattern of deception. (IV/42, 59).

Additionally, the possibility that Defendant might have a brain injury would be irrelevant to Dr. Maher's opinion of his competency to proceed. (IV/75-76).

Next, Dr. Saa testified regarding his findings. He first found Defendant to be incompetent to stand trial with a diagnosis of psychosis. (IV/80). However, like Dr. Maher, Dr. Saa had concerns, even at that time, that Defendant was malingering. (IV/80-81). In his second evaluation, Dr. Saa also found Defendant incompetent. (IV/81). Again, however, Dr. Saa noted in that second report that, "My clinical impression is that the defendant's current clinical presentation is more compatible with malingering rather than a clear mental infirmity, disease or defect." (IV/82). At the third evaluation, the Defendant refused to talk to Dr. Saa. Therefore, he stated that he could not render an opinion as to Defendant's competency. (IV/84).

The defense then called Dr. Robert Berland, a forensic psychologist hired by the defense to assist in preparation for the penalty phase. (IV/87-88). Dr. Berland tried to see the Defendant twice. On both occasions, the Defendant refused to cooperate with any evaluation or discussion with Dr. Berland. (IV/88-89). Moreover, after reviewing the police reports, witness statements, medical records, an interview with the Texas

authorities who arrested Defendant, and speaking with Dr. Martinez and Defendant's cell mate, Dr. Berland could not form an opinion he could swear to with substantial psychological certainty. (IV/89-91). Rather, he offered his opinion, not a well-founded conclusion, that some secondary evidence was consistent with a brain injury resulting in delusional paranoid thinking. (IV/92-93). He admitted his opinion did not rise to the level of a diagnosis of mental illness. (IV/104).

Ultimately, the trial court ruled that Defendant was competent to proceed. (IV/126).

Even after the jury verdict of guilt, the trial court, once again, ordered a competency evaluation, on September 5, 2001. (II/322-326). On November 19, 2001, the trial court heard testimony from the defense expert, Dr. Berland. Relying solely on an interview with Defendant's ex-wife, the mother of the two victims in this case, Dr. Berland opined that Defendant was incompetent. According to information he obtained from Defendant's ex-wife, not from any additional testing of or interviews of the Defendant, Defendant was psychotic with paranoid delusional thinking. (XII/1401-1405).

After hearing from Dr. Berland, the trial court reiterated the history of Defendant's competency determinations. Additionally, the trial court noted that Dr. Maher had an

opportunity to observe Defendant's behavior in the courtroom and, based upon these observations, felt that Defendant was competent. Further, the trial judge himself observed Defendant behaving appropriately in court and conducting an adequate defense of himself. Based upon this information, the trial court found Defendant remained competent and could proceed to the penalty phase. (XII/1407-1409).

Proceedings relevant to self-representation and continuance issues.

Defendant was first permitted to discharge the public defenders initially appointed to represent him after a Nelson hearing on January 24, 2000. (Supp. 1/62-94). Subsequently, on numerous occasions, the Defendant voiced his displeasure with his new attorneys, Messrs. Traina and Hernandez. (Supp. 2/117-150, 182-202). While the trial court was concerned with how Defendant's competency impacted his desire to fire his attorneys (Supp. 2/148-150), Defendant was, ultimately, found competent to stand trial.

Therefore, when the Defendant again told the court that he wanted to fire his attorneys, the trial court conducted the proper Faretta inquiry. (VII/488-516). Following the lengthy colloquy between the court and the Defendant, the Defendant was permitted to represent himself. During this exchange, the trial

court made it abundantly clear to the Defendant that he would not grant him a continuance simply because he was going to assume his own representation. Despite the trial court's admonitions concerning the danger of representing himself, the Defendant proceeded through the guilt phase representing himself and with his attorneys merely acting as standby counsel. However, at the close of the evidence, the Defendant asked that his counsel be reappointed, and the trial court complied with his request. (IX/846-847). Thereafter, Attorney Traina made the relevant motions (IX/848-849), and the closing argument for the defense.

Although the Defendant later asked that Attorney Hernandez be fired and replaced with a new attorney, the trial court refused that request. (Supp III/224-235). Subsequently, the Defendant proceeded through the penalty phase, Spencer hearing and sentencing hearing represented by Attorneys Traina and Hernandez.

Guilt phase

On the morning of January 3, 1999, the Defendant's ex-wife, Carmen Gonzalez, told him she no longer wanted him to live in the house. (VII/557). After an argument, she left to go to work at the family restaurant she owned. (VII/552, 559). When she left the home, the Defendant was present with her daughter

from a prior marriage, eleven year old Donna Berezovsky, and Gabriella, the daughter of Carmen and the Defendant. Carmen's adult son from a third marriage, Salvador Gonzalez, was also in the home.[1] (VII/559, 606).

Eventually, Salvador left to run errands, leaving Donna and Gabriella with the Defendant. (VII/607). After 35 to 40 minutes, Salvador returned home and found the front door locked with a chain. The Defendant's car was gone. (VII/608-610). When he finally got in the house, Salvador found Donna in the back family room on the ground. She was not breathing. (VII/612-613). After 911 was called, law enforcement arrived, and found Donna dead from one gunshot wound to the middle of her back. (VII/615, 621-622). According to an FDLE firearms expert, the bullet found at the scene was fired from Defendant's gun to the exclusion of all other firearms in the world. (VIII/766).

Shortly after killing Donna, Defendant drove to the family restaurant. Defendant was seen by numerous people, including Carmen, entering the restaurant. (VII/562, 583). The Defendant then went to the restroom and stayed inside for a few minutes.

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[1]Carmen Gonzalez had a total of four children - Isela and Salvador Gonzalez, Donna Berezovsky, and Gabriella Hernandez. At the time of the murders, Isela was 29 years old, Salvador was 27 years old, Donna was 11 years old, and Gabriella was 2 years old. (VII/549-551).

(VII/584-585). When he exited the restroom, the Defendant came into the kitchen, walked up behind Isela Gonzalez, and fired two shots into her back. She fell to the floor and he fired another shot into her neck. (VII/565, 570, 585-586, 596, 675). Isela died as a result of the three bullet wounds. (VIII/674-675). A bullet found at the scene of Isela's murder also came from the Defendant's gun to the exclusion of all other pistols in the world. (VIII/765).

The Defendant then left the restaurant with a gun in his hand, (VII/587-588), got in his car and started driving towards Mexico. (VIII/720). The Defendant was apprehended just outside of Houston, Texas. (VIII/692-696). The Defendant had the weapon used in the two homicides in his possession at the time of the arrest. (VIII/696-698).

After receiving his Miranda rights, the Defendant confessed to killing Donna and Isela. (VIII/712-732). The Defendant said that he blamed the children for the break up of his marriage. (VIII/722-723). The Defendant explained he asked Donna to pick up a toy and when she refused, he struck Donna on the head, knocking her to the ground. The Defendant then took out his gun, stood at Donna's feet and shot her once in the back. (VIII/725-726). (The medical examiner's testimony confirmed that Donna had contusions to the right ear consistent with the

Defendant striking her and the path of the bullet was consistent with her being shot while she lay on the ground face down. (VIII/668-669, 671).) The Defendant also stated that prior to shooting Donna he took Gabriella and placed her in another room of the house. (VIII/727). The Defendant then drove to the restaurant, stayed in the bathroom a few minutes, then came out and shot Isela three times in the back. (VIII/728-730).

At the conclusion of the State's case, the trial court ruled that the State had met its burden in proving a prima facie case of two counts of first degree murder against the Defendant. (VIII/785). The Defendant then testified in his own behalf. (VIII/786-811).

Penalty Phase

The relevant testimony from the penalty phase is set forth in the trial court's discussion of the aggravating and mitigating circumstances discussed in the Sentencing Order as follows:

> **AGGRAVATING CIRCUMSTANCES**
> **AS TO THE MURDER OF DONNA BEREZOVSKY**
>
> **1. The defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person.**
>
> It has been established beyond and to the exclusion of a reasonable doubt that the defendant committed multiple homicides. The defendant shot and killed eleven-year-old

Donna Berezovsky and then drove to the Apollo Beach Family Restaurant where he then shot and killed Isela Gonzalez. These facts were considered by the jury and reflected in their verdicts. This Court gives this aggravating circumstances great weight.

2. <u>The victim of the capital felony was a person less than twelve (12) years of age.</u>

The evidence proved beyond a reasonable doubt that Donna Berezovsky was eleven (11) years old at the time of her murder. This aggravating circumstance has been proven beyond a reasonable doubt, and this Court gives it great weight.

3. <u>The victim of the capital felony was particularly vulnerable due to advanced age or disability or because the defendant stood in a position of familial or custodial authority over the victim.</u>

The evidence established that the defendant Pedro Hernandez-Alberto and the mother of Donna Berezovsky, Maria Gonzalez, were married. The evidence further established that Mr. Hernandez-Alberto, his wife and the minor children, Donna and Gabriella, all lived in the home owned by Maria Gonzalez. When Maria was away from the home, the defendant was charged with the sole care, custody and control of the minor children. As her stepfather, the defendant was in a position of familial or custodial authority over the victim, Donna Berezovsky. This aggravating circumstance was established beyond and to the exclusion of every reasonable doubt, and this Court gives this aggravating circumstance great weight.

<u>AGGRAVATING CIRCUMSTANCES</u>
<u>AS TO THE MURDER OF ISELA GONZALEZ</u>

1. **The defendant has been previously convicted of another capital felony or a felony involving the use of violence to some person.**

The evidence established beyond a reasonable doubt that after the shooting and killing of his stepdaughter, eleven-year-old Donna Berezovsky, the defendant then drove to the Apollo Beach Family Restaurant where he shot and killed Isela Gonzalez. This aggravating circumstance was established beyond and to the exclusion of every reasonable doubt, and this Court gives this aggravating circumstance great weight.

2. **The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense or moral or legal justification.**

After killing Donna Berezovsky in their family home, the defendant, Pedro Hernandez-Alberto, then carefully planned his next move. He drove to the family restaurant where he knew his wife and her adult daughter, Isela Gonzalez, were working. Upon entering the restaurant, the defendant went to the restroom, where he stayed for several minutes. He then came out of the restroom, walked up behind Isela and fired three shots into the back of her, ultimately killing her.

Clearly the defendant had sufficient time to reflect upon his prior action of shooting and killing Donna Berezovsky while en-route to his next crime scene. Once at the restaurant, the defendant spent eight to ten minutes in the restroom contemplating and planning his next course of action which was to walk up behind Isela Gonzalez, fire three shots into her back, and then flee in his car. Although the law does not fix a period of time that must pass between the

formation of the premeditated intent to kill and the act, Pedro Hernandez-Alberto took enough time to plan his second murder as well as his getaway. This aggravating circumstance was established beyond and to the exclusion of every reasonable doubt, and this Court gives this aggravating circumstance great weight.

STATUTORY MITIGATING CIRCUMSTANCES

1. The defendant has no significant history of prior criminal activity.

It was established that the defendant has no significant prior criminal history. The Court gives this circumstance some weight.

2. The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

Dr. Gerald Mussenden diagnosed the defendant with a paranoid personality disorder. He indicated that such a disorder could affect one's thought processes. When asked if such a disorder combined with brain damage could aggravate the situation of affecting one's thought processes, Dr. Mussenden indicated that it would, as a person might be susceptible to losing emotional control and cause a person to act out in unpredictable and unexpected ways. Dr. Mussenden did not specifically state whether the defendant was suffering from emotional disturbances at the time he committed the offenses. Furthermore, it should be noted that it has not been conclusively determined that the defendant suffers from brain damage.

Dr. Robert Berland is of the opinion that the defendant suffered from an extreme mental or emotional disturbance. Dr.

Berland's opinion, however, does not specifically cover the time at which the defendant committed these offenses. His opinion is based upon a long conversation he had with the defendant's ex-wife, Maria. She provided Dr. Berland with information regarding her observations of her ex-husband over the years. Maria agreed that she had regularly observed the defendant do things that were particularly indicative of, as Dr. Berland put it, delusional paranoid thinking. Based upon Maria's observation as relayed to Dr. Berland, he concluded that the defendant has suffered from extreme mental or emotional disturbances. Dr. Berland could not specifically address, however, whether the defendant suffered from extreme mental or emotional disturbance when he committed these offenses.

Dr. Sidney Merin opined that the defendant suffers from psychological problems, but he was not suffering from an emotional disturbance at the time of the offenses.

It could be assumed that the defendant does in fact suffer from a mental illness, but based upon the testimony of the doctors it cannot be assumed that the defendant was suffering from an extreme mental or emotional disturbance at the time of the homicides. Therefore, this Court gives this statutory factor no weight.

3. <u>The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.</u>

Dr. Berland opined that the defendant was legally sane at the time of the commission of these murders. He went on to say that the defendant knew right from wrong, and he knew the consequences and the

wrongfulness of his actions at the time of the homicides. Any mental illness that the defendant may have had at the time of the offense, according to Dr. Berland, did not deprive him of having the specific intent to be able to commit first-degree murder.

Based upon the foregoing, this Court gives this statutory mitigating factor no weight.

4. <u>The age of the defendant at the time of the crime.</u>

The defendant was a grown man in his mid thirties at the time of the homicides. As such, this Court gives this statutory mitigating factor no weight.

5. <u>The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.</u>

The defendant's sister, grandmother, and uncle all testified that he was a noble young man growing up. He was a non-violent youth who never got into any fights while in school. They also testified that when he left his hometown to work in Mexico City, the defendant would send money home to help his family. After thirteen years, the defendant left Mexico City and came to the United States. He lost contact with this [sic] family, and his family knew nothing that would cast any type of aspersions on his character. For all they knew, the defendant was still a non-violent, likeable person.

The Court gives these factors some weight.

The defense has raised many other aspects of the defendant's background, including but not limited to the defendant's

home life, poverty, and borderline IQ, which are addressed under non-statutory mitigating factors within this Order.

NON-STATUTORY MITIGATING CIRCUMSTANCES

1. That the defendant suffers from a brain injury.

Three expert witnesses, Drs. Mussenden, Berland, and Merin, were called to testify regarding the possibility that the defendant Hernandez-Alberto suffers from a brain injury resulting from a 1994 car accident. None of the experts, however, could conclusively determine that the defendant suffers from a brain injury.

Dr. Gerald Mussenden, a clinical psychologist, gathered information on the defendant through three structured interviews he conducted on the defendant in 1999. The doctor observed that the defendant became less and less cooperative with each corresponding interview. Dr. Mussenden testified that he *suspects* that the defendant suffers from a brain injury. The doctor also noted that the defendant has always complained of migraine headaches from the 1994 auto accident, despite the fact that the defendant has never sought medical attention for any brain injuries.

The basis for Dr. Mussenden's suspicions that the defendant suffers a brain injury are, he feels, supported by "soft signs" of organic brain damage. As explained by Dr. Mussenden, soft signs of brain damage are indications that there may be brain damage, which affects certain skills. Specifically, the certain skills the brain damage would affect include the defendant's fine motor movements, and what he is visually perceiving. Also it would affect his immediate visual recall.

These soft signs are primarily deductions based on results from paper/pencil tests. Dr. Mussenden could not conclusively determine the source of the Defendant's brain damage, as the defendant has never been treated for brain injury, before or after the accident in 1994.

Dr. Mussenden attempted to conduct hard psychological tests to determine whether the defendant suffers from brain damage. The Defendant, however, refused to cooperate and take those tests, which could have provided more quantitative results. Dr. Mussenden concluded his testimony by stating that the failure to cooperate is not necessarily a by-product of brain damage.

Dr. Robert Berland, a forensic psychologist, also testified regarding the possibility that the defendant suffers from a brain injury. He is of the opinion that the defendant sustained a brain injury as a result of the 1994 auto accident. Dr. Berland interviewed family members of the defendant in order to learn more about the defendant. In particular, he had an extensive interview with the defendant's ex-wife, Maria, who indicated that she did not perceive any difference in the defendant's behavior or actions after the 1994 auto accident.

Dr. Sidney Merin, a clinical and neuropsychologist, also testified regarding any possible brain injuries the defendant may have sustained. Again, the defendant would not cooperate with Dr. Merin. Consequently, Dr. Merin reserved any expert opinions regarding the defendant. Instead, the doctor chose to offer a hypothesis regarding the possibility that the defendant suffers from brain damage. In forming his hypothesis, Dr. Merin extensively reviewed a number of mental health evaluations and reports conducted by a number of

psychologists and psychiatrists of the defendant. In sum, Dr. Merin concluded that he does not think that the defendant suffered a brain injury from the 1994 auto accident. Rather, the defendant may have suffered a concussion, which would no longer affect his mental status today.

The three experts could not affirmatively demonstrate that the defendant sustained a brain injury from the 1994 auto accident. While they may agree that the defendant suffers from a personality disorder, such as paranoia, they cannot conclude that the defendant's disorder is a result of any brain damage that he may have sustained. Additionally, the defendant's lack of cooperation has made it difficult, if not impossible, for anyone to delve into his personal life to allow a thorough review of his mental health history.

This Court observes that the defendant was treated at the hospital as a result of the auto accident, yet the treating physicians obviously did not observe or have reason to believe that the defendant sustained a brain injury since he was not treated for one. Instead, he was treated for neck and back injuries. This Court also observes that Dr. Berland's opinion that the defendant suffers from a brain injury is tenuous at best. Dr. Berland conducted no testing on the defendant. Instead, he reviewed materials which were also available to Drs. Mussenden and Merin. The only difference with Dr. Berland is that he interviewed some of the defendant's family members. As such, the Court cannot give much weight to his testimony concerning the possibility of the defendant's brain injury.

This Court endeavors to point out that it previously denied the defendant's request for a PET-scan test, whereas the defendant failed to show at that time a

"particularized" need for the test in reference to evaluating whether the defendant has brain damage. Robinson v. State, 761 So. 2d 269 (Fla. 1999). However, in an abundance of caution, this Court granted the defendant's original request for a PET-scan test subsequent to the penalty phase but before the Spencer hearing. The defendant did not undergo the PET-scan test as he again failed to cooperate. Even if the defendant had undergone a PET-scan test, Dr. Merin testified that a PET-scan test, in and of itself, would not have conclusively indicated brain damage, as other tests would have to be conducted and the results evaluated in conjunction with the results of the PET-scan test to positively identify a brain injury.

Based upon the foregoing, there is minimal evidence at best supporting a theory that the defendant suffers from a brain injury. Therefore the Court gives little weight to this non-statutory mitigating factor.

2. The defendant lost his mother at an early age.

The defendant's mother suffered from mental illness and was unable to care for her children. As a result, the defendant's younger sister testified that when she was around eight years old, she went to live with her grandmother, while the defendant, who was approximately ten or eleven years old, went to live with a neighbor. Shortly thereafter, the defendant's mother, because of her mental illness, wandered off from the family home, never to return.

Based upon the following [sic], the Court gives this non-statutory mitigating factor little weight.

3. The defendant suffered frequent

beatings by his father when the father was drinking.

The defendant's younger sister indicated that she never saw their father hit the defendant. The uncle, however, saw the father hit the children after he had been drinking. Additionally, the grandmother, observed the father hit and strike his wife and children. As such, the Court gives this non-statutory mitigating factor some weight.

4. The defendant suffered beatings and mistreatment at the hands of the neighbor who took him in after the father abandoned the defendant.

Dr. Berland testified that the defendant's sister witnessed the defendant being beaten by the neighbor who cared for him. Neighbors told Dr. Berland that the defendant was frequently beaten with sticks, typically on the head and shoulders, and he was made to work for his shelter, food, clothing and schooling. The Court notes, however, that the defendant's sister, grandmother, and uncle never mentioned these beatings of the defendant by the neighbor during their testimony. The Court gives this non-statutory mitigating factor little weight.

5. The defendant trained and worked as an auxiliary police officer in Mexico City.

During his teenage years, the defendant went to live with his uncle in Mexico City. There he had several jobs, one of which was that of an auxiliary police officer. The testimony indicated that prior to becoming an auxiliary police officer, the defendant was required to pass a course which qualified him for this type of work. The position of an auxiliary police officer tends to demonstrate that the defendant

possessed a law-abiding attitude at some point in his life. This Court gives this non-statutory mitigating factor little weight.

6. <u>The defendant was capable when young of maintaining loving and respectful relationships.</u>

The defendant's younger sister indicated that the defendant was a very calm person and did not like to fight. She went to school with him even though they were raised in different households. According to the sister, their family was very aggressive, but her brother was different. He was very calm.

According to the defendant's uncle, the defendant was a very noble young man growing up and he was respectful to his elders.

This Court gives this non-statutory mitigating factor little weight.

7. <u>The defendant lived in extreme poverty as a young child.</u>

The defendant was born in a small town of El Ciruelo, Mexico, a very primitive area. The town only has two telephones that are used for both incoming and outgoing calls. These telephones are situated in a building, which is similar to a small convenience store, except the building has no walls. Whenever a call comes in to anyone in the town, whoever answers the phone announces it on a PA system, which reverberates throughout the whole town. The calling party is then instructed to call back in fifteen or twenty minutes in order for the person called to be located and come to the phone.

No individuals own any vehicles in the town. The buildings in which the people

live are primitive. They burn coconut shells for fuel and firewood. Their food is in the open. There is no refrigeration or running water.

The fact that the defendant was raised in poverty should not and does not mitigate the fact that the defendant killed two human beings. As such, the Court gives no weight to this non-statutory mitigating factor.

8. <u>The defendant voluntarily provided a confession upon arrest.</u>

The defendant voluntarily confessed to committing these murders upon his arrest. This Court gives some weight to this non-statutory mitigator.

9. <u>The defendant was of borderline intelligence.</u>

It was Dr. Gerald Mussenden's opinion that the defendant intellectually functions in the borderline range of intelligence. According to the doctor, the defendant seemed to be borderline literate at best in terms of academic achievement tests. The tests conducted on the defendant included the Wechsler Adult Intelligence Scale in the Spanish translated and standardized version, the Bender-Gestalt Visual Motor Test, and the Memory for Design Vision and Motor Test. As explained by Dr. Mussenden, borderline intelligence is an IQ score of 70 to 80, while mild retardation is 70 or below. Dr. Mussenden also testified that a person with a borderline intelligence could hold a job. Additionally, a person with borderline intelligence would understand the consequences of aiming a firearm at a person and discharging it.

Dr. Berland was never able to administer any testing on the defendant. Instead most of the opinions he formed regarding the

defendant were based on interviews of a number of the defendant's relatives from Mexico. These relatives included his sister, grandmother and uncle in order to gather some history about the defendant's childhood, his schooling, his upbringing, and his family. Concerning the defendant's education, the defendant's grandmother and sister stated that the defendant did well in school, as most of his grades were above-average.

Based upon the foregoing, the Court gives little weight to this non-statutory mitigating factor.

CONCLUSION

The Court finds that the State has established, beyond and to the exclusion of every reasonable doubt, the existence of five aggravating circumstances or factors.

The Court gives some, little or no weight to the five statutory mitigating circumstances and nine non-statutory mitigating circumstances that have been offered by the defense.

After looking at the nature and quality of the aggravators and mitigators in this case, the Court finds that the aggravating circumstances far outweigh the mitigating circumstances. In cold blood, the defendant shot and killed his eleven-year-old stepdaughter in the family home. He then drove to the family-owned and operated restaurant, gathered his thoughts in the bathroom of the restaurant, and then walked up behind his grown stepdaughter and shot her three times, causing her death. After the killings, the defendant then attempted to flee this country for Mexico. The circumstances of the case, these aggravating circumstances, outweigh the relatively insignificant mitigating circumstances

established by this record. (III/398-410).

SUMMARY OF THE ARGUMENT

ISSUE I: After numerous competency hearings, the trial court properly found that the Defendant was competent to proceed to trial. At no time was a defense request for a competency determination denied by the trial court. Similarly, the trial court appropriately allowed the Defendant to proceed pro se during the presentation of evidence during the guilt phase of his trial. The trial court's decision on both issues was supported by the testimony of a number of psychological experts, as well as the trial court's direct observations of the Defendant.

ISSUE II: The trial court acted well within its discretion in denying Defendant's pro se motion for continuance. Defendant conspired throughout this litigation to hinder the exercise of justice, primarily by attempting to fake incompetence. His last minute request to represent himself constituted one of several attempts to avoid going to trial. As such, Defendant suffered no undue prejudice from the denial of his motion for continuance.

ISSUE III: The trial court's initial denial of Defendant's request for a PET scan was proper in view of Defendant's failure to establish a particularized need for the test. The only expert testimony offered in support of the request for a PET

scan indicated that the possibility of brain damage was entirely speculative. Moreover, the trial court later reversed its decision and permitted the Defendant to have a PET scan. However, the Defendant refused to cooperate and no PET scan was obtained. Thus, Defendant suffered no prejudice as a result of the trial court's rulings on this issue.

ISSUE IV: The motion for judgment of acquittal failed to preserve the issue now raised concerning sufficiency of evidence of premeditation for the murder of Donna. Substantively, the evidence, including direct evidence in the form of Defendant's confession, supported a finding that the Defendant possessed a fully formed conscious purpose to kill for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

ISSUE V: Both death sentences are proportional to other death sentences upheld by this Court. Moreover, the trial court properly weighed the aggravating and mitigating circumstances in this case.

ISSUE VI: This Court has consistently rejected the constitutional challenges to Florida's capital sentencing scheme based upon Ring v. Arizona. Apprendi arguments do not apply to Florida's death penalty statute because death is the statutory maximum for capital first degree murder. Moreover, the

aggravator related to a prior violent felony was present in both murders.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND DEFENDANT BOTH COMPETENT TO STAND TRIAL AND COMPETENT TO REPRESENT HIMSELF PRO SE. (AS RESTATED BY APPELLEE).

The Defendant argues that the trial court failed to conduct a proper determination of his competency to stand trial and failed to ensure that his waiver of counsel was knowing and intelligent. The trial court's rulings on the issue of competency and the Defendant's decision to represent himself must be upheld where no abuse of discretion has been demonstrated. See Evans v. State, 800 So. 2d 182, 188 (Fla. 2001)(the trial court's competency determination should be upheld absent an abuse of discretion); and Holland v. State, 773 So. 2d 1065, 1069 (Fla. 2000)(trial court's decision as to self-representation is reviewable for abuse of discretion), citing Visage v. State, 664 So. 2d 1101 (Fla. 1st DCA 1995).

Competency to stand trial.

Despite the fact that the trial court conducted three competency hearings prior to trial and one additional rehearing on the topic prior to the penalty phase, Defendant now argues the trial court erred in failing to conduct a competency determination following the evaluation completed by Dr. Martinez

on November 1, 2000. However, where the trial court applied the correct test, Defendant was properly found to be competent to stand trial. See Jones v. State, 740 So. 2d 520, 522 (Fla. 1999), citing Hill v. State, 473 So. 2d 1253, 1257 (Fla. 1985)("The test applied to determine competency to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him.'")(quoting Dusky v. United States, 362 U.S. 402 (1960)).

Initially, after the first evaluation completed by Drs. Saa and Maher, the Defendant was found incompetent and was committed to a mental health facility for treatment. (I/32-36, 37-39, 40-43). Notably, both doctors voiced concerns with possible malingering by the Defendant even at that time.

After five weeks of continual observation at the treatment center, the treatment team doctors concluded that Defendant was malingering and that he was competent to proceed. (I/44-54). Consequently, the Defendant was returned to the Department of Corrections. The trial court then ordered a second set of evaluations by Drs. Saa and Maher. At the second competency hearing, held November 9, 1999, Dr. Maher concluded that Defendant was malingering. (XII/1306-1307). Dr. Saa did not

change his opinion; however, he did note a likelihood that Defendant was malingering. (I/68-71).

Based upon the Defendant's refusal to cooperate with his attorneys, the defense team made the unusual request of seeking a medical doctor, outside of the prison system, to examine the Defendant. The trial court allowed Dr. Martinez to conduct an evaluation. While Dr. Martinez concluded Defendant was paranoid and psychotic, she also noted that she had absolutely no background information nor did she have any past medical history information. (I/38). Therefore, she was in the same position that Drs. Maher and Saa were during their first evaluations of the Defendant.

Given the additional information obtained from the five weeks the Defendant spent in the treatment center under constant supervision, Dr. Martinez's opinion cannot be afforded any substantial weight. Nor can her opinion outweigh the opinion of the numerous other doctors who concluded that Defendant was competent. In fact, the Defendant does not even appear to argue that the trial court should have accepted Dr. Martinez's opinion over any of the other doctors.

Rather, the Defendant only argues that the trial court should have conducted another competency hearing based upon Dr. Martinez's evaluation, despite the fact that no request for

another competency determination was made by the defense at that time. See Kilgore v. State, 688 So. 2d 895, 899 (Fla. 1996)(trial court did not err by not holding competency hearing where defense counsel did not request a hearing and defendant had previously been declared competent). However, no abuse of discretion has been demonstrated where a third competency hearing was conducted after Dr. Martinez's November 1, 2000 evaluation and prior to trial. See Lawrence v. State, 28 Fla. L. Weekly S 241 (Fla. March 20, 2003)(decision whether to hold additional competency hearing reviewed under abuse of discretion standard).

In August 2001, at the request of the defense, the trial court ordered Drs. Maher and Saa to evaluate the Defendant a third time. A competency hearing was then conducted on August 20, 2001, the day before jury selection began.

At this third competency determination, Drs. Saa and Maher again testified. Dr. Maher found Defendant to be competent, while Dr. Saa could not state an opinion because the Defendant had refused to talk to him in the third evaluation. Dr. Maher's testimony specifically addressed the legal criteria for competency, further relying on his observations of Defendant at the hearing. (IV/39-40). According to Dr. Maher, the Defendant understood the nature of the charges against him, the possible

penalties facing him, the adversary nature of the process and the roles of the defense, the prosecution and the trial court, and had the ability to communicate with his attorneys and to testify relevantly. (IV/47-48, 55-56, 61, 69, 71-72).

The defense presented Dr. Berland, a forensic psychologist retained to assist in preparation for the penalty phase. (IV/87-88). Dr. Berland could only offer his opinion, not a well-founded conclusion or a diagnosis, that some secondary evidence was consistent with the Defendant suffering a brain injury resulting in delusional paranoid thinking. (IV/92–93). Where the Defendant had completely refused to cooperate with Dr. Berland, the doctor admitted that he could not form an opinion to which he could swear with substantial psychological certainty. (IV/89-91). Dr. Berland also testified that Dr. Martinez was retained at his request, and that her interactions with the Defendant were also unsuccessful. (IV/90).

After the third competency hearing, the trial court found the Defendant competent to stand trial. Again, while the Defendant does not seem to challenge the determination that he was competent to stand trial, the State would note that the trial court properly resolved the factual dispute between the experts. See Mora v. State, 814 So. 2d 322, 327 (Fla. 2002)(citations omitted). And, where the evidence supported the

trial court's decision, no abuse of discretion has been shown. See Mora, 814 So. 2d 322, 327-328 (citations omitted).

Finally, Defendant erroneously claims that the trial court denied a motion to reconsider Defendant's competency filed after the guilt phase and prior to the penalty phase. In actuality, the trial court held a hearing as a result of the defense counsel's request to revisit the issue of Defendant's competency.

On November 19, 2001, the trial court heard testimony from the defense expert, Dr. Berland. Relying solely on an interview with Defendant's ex-wife, the mother of the two victims in this case, Dr. Berland opined that Defendant was incompetent. According to information he obtained from Defendant's ex-wife, not from any additional testing of or interviews of the Defendant, Defendant was psychotic with paranoid delusional thinking. (XII/1401-1405).

After hearing from Dr. Berland, the trial court reiterated the history of Defendant's competency determinations. Additionally, the trial court noted that Dr. Maher had an opportunity to observe Defendant's behavior in the courtroom and, based upon these observations, felt that Defendant was competent. Further, the trial judge himself observed Defendant behaving appropriately in court and conducting an adequate

defense of himself. Based upon this information, the trial court found Defendant remained competent and could proceed to the penalty phase. (XII/1407-1409).

As such, the trial court did hold an additional competency hearing as requested by the defense. However, the defense expert conducted no additional evaluations of the Defendant nor did he even have a conversation with the Defendant in the time since the Defendant was last evaluated by the court appointed experts. Consequently, no evidence was presented which might supersede the opinion of Dr. Maher. Thus, the trial court failed to abuse its discretion in finding the Defendant competent to proceed to the penalty phase. See Evans, 800 So. 2d 182, 188 (the trial court's competency determination should be upheld absent an abuse of discretion).

Competency to proceed pro se.

Next, Defendant asserts the trial court erred in finding him competent to represent himself at trial. While admitting that Godinez v. Moran, 509 U.S. 389 (1993), is controlling on the issue of the level of competence required to allow a defendant to proceed pro se, Defendant argues that the Godinez decision was wrongly decided.

In Godinez, 509 U.S. 389, 399, the United States Supreme Court stated that the competence that is required of a defendant

seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. Based on Godinez, the Florida Supreme Court has held:

> that once a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented. [citation omitted] The court may not inquire further into whether the defendant "could provide himself with a substantively qualitative defense," Bowen, 677 So. 2d at 864, for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

See State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997). This Court further explained that to require more than a knowing and intelligent waiver of counsel, such as a determination that the defendant was intellectually capable of conducting an effective defense, would be a difficult standard to apply and would substantially intrude on the right to self-representation. See Bowen, 698 So. 2d 248, 250. As such, Defendant's argument that Godinez was wrongly decided must fail.

The Defendant then argues that his waiver of the right to counsel was not knowing and voluntary. The factors relevant to determining whether a defendant made a knowing and voluntary waiver include:

> (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to

> trial; (3) the defendant's knowledge of the nature of the charges, the possible defenses, and the possible penalty; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercion; or (8) whether the defendant was trying to manipulate the events of the trial.

See Porter v. State, 788 So. 2d 917, 927 (Fla. 2001), citing United States v. Fant, 890 F.2d 408, 409-410 (11th Cir. 1989), (quoting Strozier v. Newsome, 871 F.2d 995, 998 (11th Cir. 1989)). Where, as in Porter, the trial court's inquiries covered all of the areas discussed in Fant, (VII/488-518), the record demonstrates that Defendant's waiver of counsel was knowing and intelligent.

The trial court's inquiry was further aided by the numerous mental health evaluations conducted by the various professionals who examined the Defendant. First and foremost, the majority of the mental health doctors testified that the Defendant was malingering in order to avoid legal consequences. As such, any analysis of the knowing and intelligent nature of his waiver of counsel, must take into account the Defendant's repeated attempts to manipulate the system to avoid prosecution.

Additionally, the trial court inquired of Defendant's past and present defense team regarding their pretrial preparation and Defendant's involvement therein. Attorneys Traina and

Hernandez also sat through the guilt phase as stand by counsel. Notably, these attorneys conducted jury selection, and following the guilt phase evidence, were reappointed to represent Defendant in closing arguments in the guilt phase, as well as throughout the penalty phase, Spencer hearing and sentencing hearing.

The Defendant does not discuss the factors set forth in Fant relevant to a determination of whether a waiver of counsel is knowing and intelligent. Instead, Defendant reiterates that the trial court erred in finding Defendant competent to proceed pro se. Defendant argues that the trial court lacked evidence that he had knowledge of the charges and potential penalties, the present ability to communicate with counsel and a rational understanding of the proceedings. However, Dr. Maher testified specifically regarding these legal criteria for competency. According to Dr. Maher, the Defendant understood the nature of the charges against him, the possible penalties facing him, the adversary nature of the process and the roles of the defense, the prosecution and the trial court, and had the ability to communicate with his attorneys and to testify relevantly. (IV/47-48, 55-56, 61, 69, 71-72). Under these circumstances, the trial court properly found that Defendant was competent to stand trial and that his waiver of counsel was knowing and

intelligent.

ISSUE II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S PRO SE MOTION FOR CONTINUANCE. (AS RESTATED BY APPELLEE).

Defendant argues reversible error resulted from the trial court's denial of his motion for continuance made just after the jury was selected and Defendant decided to discharge his attorneys and represent himself. The granting of a continuance is within the trial court's discretion, and the court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown. See Israel v. State, 837 So. 2d 381, 388 (Fla. 2002) (citations omitted). Here, Defendant had engaged in a pattern of behavior intended to hinder and disrupt the orderly judicial process. Therefore, the trial court properly exercised its discretion in denying the motion for continuance, resulting in no undue prejudice to the Defendant. See Israel, 837 So. 2d 381, 388.

In this case, the Defendant first faked incompetency in order to avoid the legal consequences of his actions. When that tactic eventually failed, Defendant successfully fired his first set of attorneys. (Supp. 1/62-94). Then, while continuing to malinger on the issue of competency, Defendant repeatedly tried to fire his second set of attorneys, but always stopped short of requesting self-representation. (Supp. 2/117-150, 182-202).

However, when the trial court ultimately refused to appoint a third set of new attorneys, the Defendant changed tactics and sought to represent himself. Defendant's request to proceed pro se was made, for the first time, during trial. (VII/474-476). In furtherance of his attempts to delay the proceedings, the Defendant lied to the court about his level of participation in trial preparation, as evidenced by the testimony of the first defense team.[2] (VII/503-508). Consequently, the trial court's decision to deny Defendant's motion for continuance was well within the court's discretion.

Defendant has found some cases from other jurisdictions wherein error was found after a pro se defendant was denied a continuance on the day of trial. However, each of these cases is readily distinguishable from the instant case.

In the cases urged by Defendant in support of his claim of reversible error, no evidence of dilatory tactics on the part of the defendants was found. See Armant v. Marquez, 772 So. 2d 552, 556 (9th Cir. 1985)("nowhere in the record is there even a suggestion that Armant made this request for the purpose of

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[2]Defendant argues the trial court departed from its proper position of neutrality by soliciting testimony from the first defense team. However, the trial court's decision to take testimony on the issue of Defendant's participation in trial preparation was entirely appropriate. See e.g., Knight v. State, 770 So. 2d 663, 666-667 (Fla. 2000).

delay"); People v. Wilkins, 225 Cal. App. 3d 299, 306, 275 Cal. Rptr. 74 (1990)(defendant moved for continuance upon first opportunity to do so; therefore, request for continuance must be considered timely); U.S. v. Royal, 43 Fed. Appx. 42, 44 (9th Cir. Ore. 2002)(defendant had unsuccessfully moved to appear pro se earlier in year, prior to trial, which hindered his ability to prepare for trial or control his own defense)[3]; and Ohio v. Brown, 2002 WL 1163760 (Ohio App. 10th Dist. June 4, 2002)("no finding that defendant's request for a continuance was contrived or otherwise improper").

Defendant further argues that the complexity of a capital case warranted a continuance. However, the general rule leaving the decision whether to grant a continuance in the discretion of the trial court applies equally to death penalty cases. "While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." See Israel, 837 So. 2d at 388, citing Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976); see also Hunter v. State, 660 So. 2d 244, 249 (Fla. 1995).

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[3]The State would note that the Royal decision is unpublished, and, therefore, is of little or no precedential value.

As in Israel, the trial court did not abuse its discretion in denying Defendant's motion for a continuance. The trial court was fully aware of the various dilatory tactics Defendant had employed to avoid going to trial in this case. Moreover, the trial court heard from the first defense team concerning Defendant's actual involvement in the trial preparation which contradicted Defendant's statements. Finally, it was not until the trial was going forward that Defendant unequivocally requested self-representation. Therefore, because the trial court's informed ruling did not result in undue prejudice to Defendant, the trial court did not abuse its discretion, and relief should be denied on this claim.

Lastly, even if the trial court abused its discretion in denying the motion for continuance, any error must be deemed harmless. See Barnhill v. State, 834 So. 2d 836, 847 (Fla. 2002) (citation omitted). Defendant only represented himself during the testimony provided during the guilt phase. He was represented throughout jury selection, and counsel was reappointed to conduct closing arguments in the guilt phase. The evidence against Defendant was overwhelming. Not only did he shoot the second victim in front of numerous eyewitnesses, he confessed to both murders, his gun was matched conclusively to both murders and the medical evidence substantiated his story of

how both murders occurred. Consequently, Defendant's decision to represent himself could not have affected the outcome of the proceedings.

ISSUE III

NO ERROR OCCURRED WITH RESPECT TO THE TRIAL COURT'S RULINGS ON DEFENDANT'S MOTION FOR A PET SCAN. (AS RESTATED BY APPELLEE).

While the trial court initially denied Defendant's Motion for PET Scan, the judge later, in an abundance of caution, reversed himself and granted Defendant access to a PET scan prior to the Spencer hearing. (Supp. 3/273-274). However, the Defendant refused to cooperate and a PET scan was never done. Despite the trial court's decision to allow a PET scan, Defendant now claims reversible error resulted from the initial denial. This claim must fail where the trial court failed to abuse its discretion in initially denying the motion for PET scan. See Bottoson v. State, 813 So. 2d 31, 34 (Fla. 2002).

In evaluating whether the trial court abused its discretion in denying Defendant's motion for a PET scan, this Court must consider 1) whether the Defendant established a particularized need for the test; and 2) whether the Defendant was prejudiced by the trial court's denial of the motion requesting a PET scan. See Rogers v. State, 783 So. 2d 980, 998-999 (Fla. 2001)(citations omitted). Neither of these factors can be resolved in the Defendant's favor.

Here, the trial court found that the Defendant had not shown a "particularized" need for a PET scan in reference to whether

the Defendant had brain damage. (III/406). The defense expert, Dr. Berland, provided an affidavit in support of the motion for PET scan which provided as follows:

> 3. I am recommending that a PET scan be conducted on this defendant as part of the preparation for his trial. This affidavit summarizes the reasons for that recommendation.
>
> 4. This defendant has consistently refused to cooperate with, or even talk to his present attorneys since their appointment to his case in January 2000. His past history included difficulties with his prior attorneys, outbursts in court, and consideration of his trial competency. Although he endorsed psychotic symptoms, a question of malingering was also raised in these evaluations. The case has been stalemated in this posture since that time.
>
> 5. As a confidential expert, I made an attempt to speak with the defendant and begin an evaluation, and was unsuccessful in doing so. We then sought the assistance of a court ordered, confidential psychiatrist in an attempt to have the defendant evaluated and medicated, reasoning that if, as we thought, he were genuinely psychotic (over and above any attempts to manipulate the outcome of his trial competency evaluations), he would respond to the medication and become more amenable to working with us. Unfortunately, this psychiatrist was also unsuccessful in getting him to talk to her, or work with her. However, based on her brief contact with the defendant, she did offer the opinion that he was genuinely psychotic and, particularly, suffering from delusional paranoid thinking.
>
> 6. While we have now shifted to a

strategy of attempting to obtain information about both statutory and nonstatutory mitigators without the defendant's input, through other sources, one, central, nonstatutory mitigator that has been repeatedly referred to in Florida Supreme Court rulings, cannot adequately be addressed without some direct reference to the defendant himself. This is the issue of brain injury. Preliminary evidence suggests that brain injury may not only be important in its own right, as a nonstatutory mitigator, but also as an aid to understanding the factors which may have contributed to an ongoing psychotic disturbance in the defendant.

7. Customarily, even in cases where there is uncertainty about whether brain injury exists, there is either psychological testing of the defendant suggesting brain injury, and/or a history from the defendant of incidents which might have contributed to brain injury, with symptoms of brain injury being reported as following those incidents. These data, of course, require the cooperation of the defendant, which we have not had in this case. There are, however, some limited pieces of information which raise a question of brain injury in this defendant with enough substance to justify pursuing medical testing which would definitively rule in, or rule out the existence of brain injury.

8. To begin with, the defendant has complained to a number of people that he was in an automobile accident four or five years before his arrest in which he hurt his head. An investigator assisting his prior attorneys reported in a memo that he persistently raised this issue whenever they saw him. There is a police report corroborating the occurrence of this accident. The defendant made a left-hand turn and was hit broad side by an oncoming

sheriff's car traveling at 55 mph which the defendant did not see until it came around and passed another vehicle. There are medical records of long-term treatment from October 1995 through July 1996 for back and neck injuries sustained in this accident. While the clinic involved did not diagnose a brain injury, they do report persistent complaints, right from the beginning, by the defendant, which are consistent with a brain injury, over and above his other injuries. These complaints were made well before the occurrence of the shootings for which he is charged, and before he would have had a reason to fake problems he did not really have.

9. These complaints are symptoms which routinely occur in people who have suffered a brain injury. The clinic reported complaints by the defendant of severe occipital headaches throughout the time they had contact with him. He also reportedly complained of initial dizziness after the accident as well. There were complaints of sleep problems, personality changes, loss of concentration, feelings of nervousness, and fatigue since the accident. The fact that a skull x-ray at the time showed no evidence of a skull fracture does not preclude the possibility of a significant brain injury.

10. The PET scan provides an advantage in the assessment of brain injury which is often unavailable with CT scans or MRIs, no less with the even last [sic] sensitive skull x-ray taken in this case. For most brain injuries, even those resulting from a severe blow to the head, there is little or no change in the physical shape, or structure of the brain tissue. This is because of the soft, resilient nature of brain tissue. The nature of the functioning of the brain tissue at the site of the injury may be affected, however, even if the shape of the tissue is unchanged. The CT

scan and the MRI each produce results which depict the physical shape, or structure of the brain tissue. Therefore, in many cases, neither of these tests will show evidence of a brain injury when the existence of one can be determined by other means.

11. This is where the PET scan has become helpful in criminal court testimony in recent years. The PET scan measures the level of activity (i.e. how slowly or rapidly radioactive sugar is being metabolized) in various location throughout the brain. Sequential slices through the brain are produced, in a fashion similar to a CT scan, which depict the differing levels of metabolic activity with different colors in the visible light spectrum. Comparisons are then customarily made between the same locations in the left and right hemispheres, and between an individual, potentially deviant PET scan and a sample of normal PET scans. The PET scan, of course, measures only one of a number of different aspects of brain functioning which may be adversely affected by a brain injury. The PET scan enables one to identify parts of the brain which are functioning at a significantly higher, or lower level of activity than they should be.

12. Therefore, a PET scan may contribute critical and otherwise unavailable information about the presence of injured brain tissue which which [sic] may have been caused by the auto accident described above, or in other, unknown incidents in the defendant's history. Whether there ends up being clear information about incidents which may have contributed to brain injury or not, the PET scan findings will stand on their own in showing the existence of that damage. (I/106-110).

Given the purely speculative possibility that Defendant

might have brain damage, the defense was unable to demonstrate the requisite particularized need for a PET scan. This is especially true where the State's expert, Dr. Merin, testified in the penalty phase that a PET scan alone, without additional neuropsychological examinations, would not provide any information about the actual behavior of a person. (XI/1174-1175).

Similarly, in Bottoson, the trial court's denial of a motion for a PET scan was upheld by this Court due to the speculative nature of Bottoson's claim of brain damage. Bottoson's defense experts testified as follows:

> ...Dr. Bill E. Mosman recommended that Bottoson receive a SPECT/PET scan, stating:
>
> > It is not clinically possible within a reasonable degree of clinical certainty for me to render a precise and definitive opinion regarding brain damage or to differentiate between several competing diagnostic and functional possibilities which would be associated with specific types of brain injury impairments versus non-injury impairments unless neuro imaging studies are done.
>
> In his affidavit, Dr. Dee stated that his examination of Bottoson revealed symptoms of cerebral disease. Dr. Dee recommended that Bottoson receive a SPECT/PET scan stating:
>
> > There is a history of two cerebral traumas, a long history of inadequate intellectual and social functioning, as well as emotional disturbance, that by

> now seem quite well documented . . . . Only further exploration can settle this and therefore give a true and accurate understanding of his mental state at the time of the crime.

See Bottoson, at 34, n.4.

In view of Defendant's total lack of cooperation with any testing attempted by the various experts who examined him, the possibility of brain damage is even more speculative than the conjecture at issue in Bottoson. As such, the trial court properly determined that Defendant had failed to sufficiently establish a particularized need for a PET scan where he "...merely want[ed] it to establish if he has brain damage." See Bottoson, at 34. On that basis alone, the motion for PET scan was appropriately denied.

However, even if the Defendant could show a particularized need for a PET scan, he would still need to demonstrate that he was prejudiced by the trial court's denial of the motion requesting a PET scan. No such prejudice can be demonstrated where the defense experts were able to testify to the "soft signs" which they believed indicated Defendant had a brain injury. (X/1041-1042, 1052-1054, 1060, 1089, 1092-1093). Moreover, Dr. Berland's affidavit explained that the PET scan would only be helpful with respect to the nonstatutory mitigation relating to brain damage. Thus, where the trial

court found the fact of brain injury to be nonstatutory mitigation, albeit giving it little weight, Defendant was not prejudiced by the denial of the PET scan. See Rogers v. State, 783 So. 2d 980, 1000 (Fla. 2001) (Because the defense was able to provide substantial evidence of Rogers' mental health by means other than a PET-Scan, including his prior brain injuries, psychological disturbances, and seizure disorder, and because the trial court found mitigating circumstances related to his mental condition, Rogers was not prejudiced by the denial of the PET-Scan.).

Additionally, even if the results of the PET scan might have strengthened the nonstatutory mitigation of brain damage, Defendant would suffer no prejudice. The statutory aggravators far outweighed any of the statutory and nonstatutory mitigation.

Finally, the trial court actually gave Defendant an opportunity to have a PET scan prior to the Spencer hearing. Consistent with his refusal to cooperate with any of the mental health experts hired to help him throughout this entire proceeding, the Defendant would not allow the PET scan to be taken. Had Defendant simply taken advantage of the trial court's decision to allow the PET scan, the trial court would have had the results prior to sentencing. As such, Defendant cannot argue that he suffered any prejudice from the original

denial of the PET scan.

ISSUE IV

THE STATE PRESENTED SUFFICIENT EVIDENCE OF PREMEDITATION WITH RESPECT TO DEFENDANT'S MURDER OF DONNA BEREZOVSKY. (AS RESTATED BY DEFENDANT).

Defendant also challenges the sufficiency of the State's evidence of premeditation with respect to the murder of Donna. Initially, this issue has not been preserved for appellate review. According to Fla. R. Crim. P. 3.380(b), a motion for judgment of acquittal "must fully set forth the grounds on which it is based." Here, counsel was reappointed prior to closing arguments and was able to move for judgment of acquittal. However, the motion merely argued generally that the elements of first degree murder had not been established. (IX/848-849). As such, the specific issue regarding the sufficiency of evidence of premeditation was not preserved for review. See Vargas v. State, 845 So. 2d 220, 221 (Fla. 2d DCA 2003)(where counsel did not argue the specific ground raised on appeal, appellate court could not reach merits of whether State provided sufficient evidence of premeditated murder rather than a murder committed in a fit of rage), citing Archer v. State, 613 So. 2d 446, 448 (Fla. 1993); and Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

As to the merits, where the State submitted direct evidence, the trial court's denial of a motion for judgment of acquittal

will be affirmed if the record contains competent and substantial evidence in support of the ruling. See Conde v. State, SC00-789 (Fla. September 4, 2003), citing LaMarca v. State, 785 So. 2d 1209, 1215 (Fla. 2001). Because the State presented direct evidence in the form of Defendant's confession, this Court need not apply the special standard of review applicable to circumstantial evidence cases. See Conde, SC00-789, citing Pagan v. State, 830 So. 2d 792, 803-04 (Fla. 2002). Premeditation is defined as a "fully formed conscious purpose to kill," which "may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act." See Conde, SC00-789, citing Woods v. State, 733 So. 2d 980, 985 (Fla. 1999) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)). As in Conde, Defendant's confession detailed the events of the Donna's murder. Those details, discussed below, indicate that the Defendant had the time to reflect upon his actions but nonetheless continued to take the steps necessary to murder Donna. Accordingly, the State presented sufficient evidence of premeditation with respect to Donna's murder.

The circumstances of Donna's death were related by the Defendant as follows. After receiving his Miranda rights, the

Defendant confessed to killing Donna and Isela. (VIII/712-732). The Defendant said that he blamed the children for the break up of his marriage. (VIII/722-723). The Defendant explained he asked Donna to pick up a toy and when she refused, he struck Donna on the head, knocking her to the ground. The Defendant then took out his gun, stood at Donna's feet and shot her once in the back. (VIII/725-726). (The medical examiner's testimony confirmed that Donna had contusions to the right ear consistent with the Defendant striking her and the path of the bullet was consistent with her being shot while she lay on the ground face down.(VIII/668-669, 671).) The Defendant also stated that prior to shooting Donna he took Gabriella, the Defendant's only natural child who was a toddler at the time, and placed her in another room of the house. (VIII/727). Under such circumstances, even though the victim suffered only a single gunshot wound, the evidence supported a finding of premeditation. See e.g., Peterka v. State, 640 So. 2d 59 (Fla. 1994).

Defendant argues that the evidence related above was just as consistent with an impetuous attack as with a calculated plan to take a life. However, Norton v. State, 709 So. 2d 87 (Fla. 1998), the sole case offered by Defendant in support of this claim, is readily distinguishable from this case.

In Norton v. State, 709 So. 2d 87, 92, this Court reversed a conviction for first degree murder because of the total lack of evidence surrounding the circumstances of the shooting of the victim. The victim was found face down in a field with a gunshot wound to the back of her head. There were no signs of struggle and no defensive wounds. The victim had been last seen alive with Norton. However, Norton never confessed to doing any harm to the victim, claiming he last saw her alive walking away from his car. Further evidence against Norton included a shell casing found in his car which was matched to the bullet in the victim's skull as the same caliber firearm and the same manufacturer. The actual murder weapon was never found. See Norton, 709 So. 2d at 91.

While this Court found sufficient evidence that Norton had committed an unlawful killing, the evidence did not support a finding of premeditation. The factors relevant to this finding of inadequate evidence of premeditation included lack of motive, no witnesses to the shooting, no evidence of continuing attack, no evidence suggesting Norton intended to kill the victim, and no evidence that Norton procured a murder weapon in advance of the homicide. See Norton at 92. Thus, Norton's conviction for first degree murder was reduced to manslaughter.

The facts surrounding Defendant's murder of Donna stand in

stark contrast to those in Norton. Here, the Defendant provided evidence of motive in his explanation that he blamed the children he murdered for the break up of his marriage. (VIII/722-723). This motive is further bolstered by the timing of the murders which occurred the very morning that his wife, the victims' mother, told him she wanted him out of the house. (VII/557).

While there were no witnesses to Donna's murder, both the Defendant's own statement, as well as the medical examiner's testimony, established a continuing, albeit brief, attack on the child. (VIII/668-671, 725-726). The Defendant struck Donna on the head with such force that it knocked her to the ground.

Finally, and most importantly, the evidence of Defendant's intent to kill is strong. First, prior to attacking Donna, Defendant removed his own daughter Gabriella from the room, placing her in a bedroom. (VIII/727). Then, the Defendant had to retrieve the gun from his fanny pack prior to shooting Donna. (VIII/726).

Under these circumstances, the State's circumstantial evidence sufficiently excluded all reasonable hypotheses that the murder occurred other than by premeditated design. As such, the first degree murder conviction for the murder of Donna must

be affirmed.

ISSUE V

DEFENDANT WAS PROPERLY SENTENCED TO DEATH ON BOTH COUNTS OF FIRST DEGREE MURDER. (AS RESTATED BY APPELLEE).

Defendant argues that his death sentence is not appropriate because it was: A) not proportional; B) premised on inapplicable aggravating factors; and C) premised on the improper disregard of critical mitigating factors. Each of these challenges to the death sentence imposed is without merit.

A. Death is proportionate.

Defendant erroneously claims that both death sentences he received for the murders of Donna Berezovsky and Isela Gonzalez are not proportionate. With death penalty cases, this Court must engage in a proportionality review "... to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." See Lukehart v. State, 776 So. 2d 906, 926 (Fla. 2000)(citation omitted). Although the Defendant argues that uncontroverted, substantial mitigation can remove the case from death penalty consideration, the mitigation in this case was not uncontroverted. Contrast Nibert v. State, 574 So. 2d 1059 (Fla. 1990)(trial court erred in not finding statutory mitigators where defense expert testimony establishing two statutory mitigators was

uncontroverted). A review of both death sentences imposed upon the Defendant reveals no lack of proportionality with other capital cases.

First, for the murder of Donna Berezovsky, the trial court found three aggravators: 1) Donna was under twelve years of age; 2) Donna was particularly vulnerable because the Defendant was in familial or custodial authority over her; and 3) the previous conviction of another capital felony. (III/398-399). For the second murder of Isela Gonzalez, the trial court found two aggravators: 1) the previous conviction of another capital felony; and 2) CCP. (III/399-400).

In mitigation, the only statutory mitigator found was that Defendant had no significant prior criminal history. Nonstatutory mitigation included Defendant's brain injury (given little weight), that the Defendant lost his mother at an early age (given little weight), that the Defendant suffered beatings from his father (given some weight), and beatings from a neighbor (given little weight), that the Defendant trained and worked as an auxiliary police officer (given little weight), that the Defendant was capable of loving relationships (given little weight), that the Defendant confessed (given some weight), and that Defendant has borderline intelligence (given little weight).

In other capital cases before this Court, the finding of two to three aggravators such as prior conviction for another capital felony and CCP, when balanced against the sole statutory mitigator of no significant criminal history and other nonstatutory mitigation, has been sufficient to withstand a proportionality challenge. See e.g., Lynch v. State, 841 So. 2d 362, 377 (Fla. 2003)(in view of double murder, no prior criminal history given little weight; and CCP one of the most serious aggravators).

Additionally, in Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), the death sentence was found to be proportionate where the defendant killed his ex-girlfriend's young boy in order to get revenge. The trial court found three aggravators: HAC, CCP, and death during the kidnapping of a child. In mitigation, the trial court found that Arbelaez had no significant history of prior criminal activity and the nonstatutory mitigating circumstance of remorse. See also Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998)(death proportionate for murder of defendant's wife and two young children where trial court found three aggravators: previous capital felony (contemporaneous murders), CCP, and HAC versus two statutory mitigators (extreme disturbance and no prior criminal history) and a number of nonstatutory mitigators); Adams v. State, 412 So. 2d 850 (Fla.),

cert. denied, 459 U.S. 882 (1982) (death sentence upheld for murder of young child where the Court found the aggravating circumstances that the murder was HAC, was committed during the course of a felony, and was committed to avoid arrest and the three mitigating circumstances of no significant prior criminal history, defendant acted under extreme mental or emotional disturbance, and the defendant's age); see also Mann v. State, 603 So. 2d 1141 (Fla. 1992), cert. denied, 113 S. Ct. 1063, 122 L. Ed. 2d 368 (1993) (death sentence upheld for murder of young child where the Court found the aggravating circumstances of prior violent felony, murder during the commission of a felony, and the murder was HAC and several nonstatutory mitigating circumstances, including remorse). Based upon these cases, Defendant's death sentences are proportionate.

B. No improper aggravating factors were found in this case.

Defendant claims that the CCP aggravator was not supported by the evidence; that it was improper to find Defendant had previously been convicted of a capital felony based on contemporaneous capital offenses; and that the trial court improperly considered evidence of flight as an aggravating circumstance. Each of these claims will be addressed below.

1. CCP

Here, the trial court found the CCP aggravator applicable

only to the murder of Isela Gonzalez. Defendant challenges this finding, claiming that CCP is not supported by the evidence. On appeal, this Court must determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. See Philmore v. State, 820 So. 2d 919, 934 (Fla. 2002), citing Gore v. State, 784 So. 2d 418, 431 (Fla. 2001).

In Philmore, 820 So. 2d 919, 934, this Court set forth the standard for establishing CCP as follows:

> the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

> Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted); accord Walls v. State, 641 So. 2d 381 (Fla. 1994). While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." Walls, 641 So. 2d at 388. The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). However, CCP can be indicated by the circumstances if they

> point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. See Bell v. State, 699 So. 2d 674, 677 (Fla. 1997).

Here, the facts demonstrate that CCP was appropriately found to apply to the murder of Isela Gonzalez. Shortly after killing his first victim, Donna, Defendant drove to the family restaurant. Defendant was seen by numerous people, including his ex-wife and the mother of Donna and Isela, Carmen, entering the restaurant. (VII/562, 583). The Defendant then went to the restroom and stayed inside for a few minutes. (VII/584-585). When he exited the restroom, the Defendant came into the kitchen, walked up behind Isela Gonzalez, and fired two shots into her back. She fell to the floor and he fired another shot into her neck. (VII/565, 570, 585-586, 596, 675). Isela died as a result of the three bullet wounds. (VIII/674-675).

Ignoring this evidence of CCP, Defendant argues that because the murders arguably took place as part of a domestic dispute, CCP is inapplicable because heated passions are inconsistent with cold deliberation. However, in this instance, no history of passionate, domestic violence existed nor was there any evidence of passion in the manner in which Defendant killed Isela. Moreover, the mere fact that the victim had a relationship with the Defendant does not mean that CCP cannot

apply. See e.g., Arbelaez v. State, 626 So. 2d 169, 177 (Fla. 1993)(CCP found where defendant killed ex-girlfriend's son as an act of revenge after argument with her). See also Diaz v. State, 2003 Fla. LEXIS 1536 (Fla. September 11, 2003).

In finding that CCP was established in this case, the trial court explained in its detailed sentencing order:

> Clearly, the Defendant had sufficient time to reflect upon his prior action of shooting and killing Donna Berezovsky while en-route to his next crime scene. Once at the restaurant, the Defendant spent eight to ten minutes in the restroom contemplating and planning his next course of action which was to walk up behind Isela Gonzalez, fire three shots into her back, and then flee in his car. Although the law does not fix a period of time that must pass between the formation of the premeditated intent to kill and the act, Pedro Hernandez-Alberto took enough time to plan his second murder as well as his getaway. This aggravating circumstances was established beyond and to the exclusion of every reasonable doubt, and this Court gives this aggravating circumstance great weight. (III/400).

No pretense of moral or legal justification for this killing can be found. The cold, calculated, and premeditated nature of it was shown by the actions of the Defendant in traveling to a secondary crime scene, giving himself substantial time for reflection, then calmly approaching Isela without any provocation and shooting her at virtually point blank range three times. The premeditation in this case is far greater than

necessary for a conviction for the crime of First Degree Murder and is of the heightened nature required for the establishment of the CCP aggravator. This aggravating circumstance was proved beyond a reasonable doubt.

The sequence of events leading up to Isela's murder demonstrates the calm reflection and planning necessary to establish the heightened premeditation required to find CCP, and that there is no evidence of any moral or legal justification for the murder. Moreoever, there is no evidence to indicate that Defendant was in a rage or panic at the time of Isela's murder. Additionally, the trial court rejected Defendant's claim that he suffered from any mental infirmity. Yet, even if the trial court erred in this regard, this Court has held "[a] defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." See Philmore, 820 So. 2d 919, 934, citing Evans v. State, 800 So. 2d 182, 193 (Fla. 2001); see also Connor v. State, 803 So. 2d 598, 611 (Fla. 2001)(upholding the trial court's finding of CCP where there was an elapse of time between kidnapping and murder allowing defendant to contemplate his actions, and defendant's mental illness was not so severe as to refute

finding of CCP). Given these facts, the trial court applied the right rule of law, and its determination is supported by competent substantial evidence in the record.

2. Prior conviction.

Defendant argues that a contemporaneous conviction for a capital felony should not be considered an aggravating factor. This claim is simply without merit. See Knowles v. State, 632 So. 2d 62, 66 (Fla. 1993)(We find no merit to Knowles' contention that a contemporaneous conviction of murder cannot be used to establish the aggravating factor of prior conviction of a violent felony under section 921.141(5)(b), Florida Statutes (1991)). See Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (contemporaneous conviction of violent felony may qualify as aggravating factor under section 921.141(5)(b) if the two crimes involved multiple victims or separate episodes), cert. denied, 111 S. Ct. 2043, 114 L. Ed. 2d 127 (1991); Correll v. State, 523 So. 2d 562, 568 (Fla. 1988)(where defendant was convicted of four capital felonies, the aggravating factor of prior conviction of capital felony was properly applied to each of the murders).

3. Flight after the killings.

Defendant claims that the trial court improperly considered evidence of his flight after the murders as a nonstatutory

aggravator. However, the portion of the sentencing order quoted by Defendant in support of this argument merely summarizes the facts of the case at the conclusion of the order. (III/410). See Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003)(claimed nonstatutory aggravation merely facts of case); Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)(circumstances of murder do not constitute nonstatutory aggravation); and Parker v. State, 641 So. 2d 369 (Fla. 1994)(facts of crime mentioned in narrative are not nonstatutory aggravators). In the discussion of the aggravating factors found to apply by the trial court, it is obvious that the trial court relied only upon appropriate statutory aggravators. (III/398-400). Cf. Drake v. State, 441 So. 2d 1073, 1082 (Fla. 1983)(sentencing order actually listed an improper aggravating circumstance). As such, no error occurred.

C. THE TRIAL COURT PROPERLY GAVE NO WEIGHT TO THE PROPOSED STATUTORY MITIGATORS RELATED TO DEFENDANT'S MENTAL HEALTH.

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

Defendant maintains that the trial court erroneously rejected the statutory mitigator dealing with whether he was under the influence of extreme mental or emotional disturbance during commission of the murders. Whether a mitigator has been

established and the appropriate weight to be given to that mitigator are matters within the discretion of the trial judge based upon the evidence presented. See Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000), citing Bonifay v. State, 680 So. 2d 413, 416 (Fla. 1996); Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). Moreover, whether a mitigator has been established is a question of fact, and a court's findings are presumed correct and will be upheld if supported by the record. See Lucas v. State, 613 So. 2d 408, 410 (Fla. 1992), citing Campbell, 571 So. 2d 415. The trial court's finding is not subject to reversal merely because the appellant reaches a different conclusion. See Blackwood, 777 So. 2d 399, 409, citing James v. State, 695 So. 2d 1229, 1237 (Fla. 1997). As such, Defendant has failed to demonstrate reversible error where the evidence presented supported the rejection of this mitigator by the trial court.

The trial court discussed his findings with respect to this mitigator as follows:

> Dr. Gerald Mussenden diagnosed the defendant with a paranoid personality disorder. He indicated that such a disorder could affect one's thought processes. When asked if such a disorder combined with brain damage could aggravate the situation of affecting one's thought processes, Dr. Mussenden indicated that it would, as a person might be susceptible to losing emotional control and cause a person to act

out in unpredictable and unexpected ways. Dr. Mussenden did not specifically state whether the defendant was suffering from emotional disturbances at the time he committed the offenses. Furthermore, it should be noted that it has not been conclusively determined that the defendant suffers from brain damage.

Dr. Robert Berland is of the opinion that the defendant suffered from an extreme mental or emotional disturbance. Dr. Berland's opinion, however, does not specifically cover the time at which the defendant committed these offenses. His opinion is based upon a long conversation he had with the defendant's ex-wife, Maria. She provided Dr. Berland with information regarding her observations of her ex-husband over the years. Maria agreed that she had regularly observed the defendant do things that were particularly indicative of, as Dr. Berland put it, delusional paranoid thinking. Based upon Maria's observations as relayed to Dr. Berland, he concluded that the defendant has suffered from extreme mental or emotional disturbances. Dr. Berland could not specifically address, however, whether the defendant suffered from an extreme mental or emotional disturbance when he committed these offenses.

Dr. Sidney Merin opined that the defendant suffers from psychological problems, but he was not suffering from an emotional disturbance at the time of the offense.

It could be assumed that the defendant does in fact suffer from a mental illness, but based upon the testimony of the doctors it cannot be assumed that the defendant was suffering from an extreme mental or emotional disturbance at the time of the homicides. Therefore, this Court gives this statutory factor no weight. (III/401-402).

Defendant claims that the trial court's order, as quoted above, ignored opinion testimony from Dr. Berland concerning Defendant's mental state at the time of the offense. However, as noted in the Order, Dr. Berland's only source of information regarding this mitigator came from Defendant's ex-wife. Because the Defendant refused to cooperate with his own expert, the Defendant was never examined, tested or interviewed by Dr. Berland. (XI/1120-1122). Thus, Dr. Berland was forced to rely upon his interview with Defendant's ex-wife. But, notably, when asked whether Dr. Berland's interview of the ex-wife related to Defendant's behavior at the time that the homicide occurred, Dr. Berland replied, "...[N]o, I specifically did not address that specific time." (X/1082). As such, the trial court correctly concluded that Dr. Berland could provide no opinion regarding Defendant's mental state at the time of the homicides.

Even if Dr. Berland's testimony could be interpreted to apply to the actual time of the offense, the trial court was not bound to accept his opinion in view of Dr. Merin's contrary conclusions. A trial court may reject a defendant's claim that a mitigating circumstance has been proved provided that the record contains competent, substantial evidence to support the trial court's rejection of the mitigating circumstances. See Bates v. State, 750 So. 2d 6, 15-16 (Fla. 1999), citing Nibert

v. State, 574 So. 2d 1059, 1061 (Fla. 1990). Contrast Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993)(error in failure to find **uncontroverted** mitigating circumstances). Here, the shortcomings created by Defendant's failure to cooperate with his mental health experts, along with the conflicting testimony of the State's expert, Dr. Merin, supported the trial court's rejection of the statutory mitigator regarding the Defendant's extreme mental or emotional disturbance at the time of the murders. As such, no error occurred.

2. The capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirement of law was substantially impaired.

Defendant also challenges the trial court's rejection of this statutory mitigator. However, competent, substantial evidence supported the trial court's decision to give no weight to this mitigator. (III/402). According to the Defendant, Dr. Berland testified that the Defendant was unable to conform his conduct to the requirements of law because of a brain injury. (IB/42). However, even Dr. Berland qualified his testimony regarding Defendant's possible brain injury, stating on cross-examination that he did not have enough information to make a clearly decisive opinion. (XI/1134). Given the qualified nature of Dr. Berland's opinion on this mitigator, coupled with

Dr. Merin's testimony that this mitigator was not present in Defendant's case, (XI/1186), the trial court's rejection of this mitigator was supported by competent, substantial evidence. See Bates, 750 So. 2d 6, 15-16. As such, no abuse of discretion has been shown which would mandate reversal on this point.

3. **Impoverished childhood**.

Defendant argues that the trial court erred in giving no weight to this nonstatutory mitigator. The trial court's sentencing order discussed this mitigator as follows:

> The defendant was born in the small town of El Ciruelo, Mexico, a very primitive area. The town only has two telephones that are used for both incoming and outgoing calls. These two telephones are situated in a building, which is similar to a small a [sic] convenience store, except the building has no walls. Whenever a call comes in to anyone in the town, whoever answers the phone announces it on a PA system, which reverberates throughout the whole town. The calling party is then instructed to call back in fifteen or twenty minutes in order for the person called to be located and come to the phone.
>
> No individuals own any vehicles in the town. The buildings in which the people live are primitive. They burn coconut shells for fuel and firewood. Their food is in the open. There is no refrigeration or running water.
>
> The fact that the defendant was raised in poverty should not and does not mitigate the fact that the defendant killed two human beings. As such, the Court gives no weight

> to this nonstatutory mitigating factor. (III/408-409).

While Defendant finds error with the lack of weight assigned this mitigator, he does not point to any evidence ignored by the trial court in support of this mitigation. Neither does the Defendant complain that the trial court failed to properly evaluate the evidence presented regarding Defendant's impoverished childhood. Rather, Defendant simply disagrees with the weight assigned. Such a disagreement does not merit reversal.

> A trial court in its written order must evaluate each mitigating circumstance offered by the defendant and decide if it has been established and, in the case of a nonstatutory mitigating circumstance, if it is of a truly mitigating nature. See Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A trial 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." Id. (footnote omitted). However, a trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent, substantial evidence to support the rejection. See Mansfield v. State, 758 So. 2d 636, 646 (Fla. 2000); Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995). Whether a particular mitigating circumstance exists and the weight to be given to that mitigating circumstance are matters within the discretion of the sentencing court. Campbell, 571 So. 2d at 420. Furthermore, the trial court's conclusions as to the weight of mitigating circumstances will be sustained by this Court if the conclusions

> are supported by sufficient evidence in the record. Id. In Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000), this Court receded from Campbell to the extent that it disallowed trial courts from according no weight to a mitigating factor and held that trial courts, for reasons unique to a case, can decide not to accord weight to a mitigating circumstance that is supported by the record. Even though a mitigating circumstance is afforded no weight, it must be expressly considered in the sentencing order. See Rogers v. State, 783 So. 2d 980, 995 (Fla. 2001).

See Taylor v. State, 28 Fla. L. Weekly S 439 (Fla. June 5, 2003).

For this Court to meaningfully review a trial court's mitigation decisions, the trial court's sentencing order should expressly evaluate whether the mitigating circumstance is supported by the evidence and whether, in the case of nonstatutory mitigating factors, it is truly of a mitigating nature. See Taylor, 28 Fla. L. Weekly S 439, citing Campbell, 571 So. 2d at 419. Here, as in Taylor, because the trial court's order reflects that the evidence supporting this mitigation was considered, the trial court's rejection of the nonstatutory mitigation was not an abuse of discretion. See Taylor, 28 Fla. L. Weekly S 439, citing James v. State, 695 So. 2d 1229, 1237 (Fla. 1997) (finding that so long as the trial court considers all of the evidence, the trial court's subsequent determination of a lack of mitigating evidence will

stand “absent a palpable abuse of discretion”). In view of the generalized nature of this testimony which did not directly discuss the Defendant’s particular circumstances, the trial court acted well within its discretion in giving no weight to this nonstatutory mitigator.

Moreover, even if the trial court had erred and should have found or assigned some weight to the mitigating circumstances in question, any error was harmless. See Taylor, 28 Fla. L. Weekly S 439, n. 32. Notably, the trial court found the most serious nonstatutory mitigation that Defendant presented, which involved specific information about his difficult childhood and dysfunctional upbringing. The rejected mitigation was relatively much weaker. And, overall, the aggravators far outweighed any mitigation presented on behalf of Defendant.

ISSUE VI

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME VIOLATES RING V. ARIZONA. (AS RESTATED BY APPELLEE).

Defendant next contends that his death sentence is unconstitutional based upon the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584 (2002), applying the principles set forth in Apprendi v. New Jersey, 530 U.S. 227 (1999), to Arizona's capital sentencing scheme. However, this Court announced, in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), that Ring had no impact on Florida's death penalty statute.

Specifically, this Court ruled as follows:

> Linroy Bottoson, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus. He seeks relief pursuant to Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."
>
> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring. That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without

> mentioning Ring in the Bottoson order. The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.
>
> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.
>
> Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

See Bottoson, 833 So. 2d 693 (footnotes omitted). See also King v. Moore, 831 So. 2d 143 (Fla. 2002). As such, Defendant's constitutional challenge based on Ring must fail.

This Court has consistently rejected Defendant's argument that the Florida capital sentencing statute violates Apprendi by allowing a fact that increases the penalty for a crime beyond the prescribed statutory maximum to be found by the trial judge without submission to the jury and proof beyond a reasonable doubt. See Wright v. State, 28 Fla. L. Weekly S517 (Fla. July

3, 2003). Thus, where death is the statutory maximum for capital first degree murder, Florida's statute comports with the dictates of Apprendi and Ring.

While the decisions in Bottoson and King sufficiently dispose of the constitutional challenges stemming from the Ring opinion, the State would address those specific claims raised by Defendant for purposes of providing a complete response.

Defendant argues that Florida's capital sentencing scheme unconstitutionally provides: 1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; 2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; 3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and 4) the State is not required to prove the appropriateness of the death penalty beyond a reasonable doubt. (IB/99-100).

Each of these substantive arguments has been rejected by this Court. See Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003)(Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the

jury). See also Lynch v. State, 841 So. 2d 362, 378 (Fla. 2003)(failure to provide notice as to aggravating circumstances not unconstitutional where aggravators limited to those set out in section 921.141(5), Florida Statutes (1987)), citing Vining v. State, 637 So. 2d 921, 928 (Fla. 1994). Moreover, Ring does not apply to either of Defendant's death sentences where one of the aggravators found was the recidivist factor of a prior violent felony. See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(arguments that aggravating circumstances must be charged in indictment and that jury must make specific, unanimous findings of aggravating circumstances must fail where one of the aggravators involved prior violent felony based on contemporaneous murders).

CONCLUSION

WHEREFORE, for the foregoing reasons and based on the arguments and authorities cited, the judgments and sentences should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. mail to John C. Fisher, Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of September, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
KIMBERLY NOLEN HOPKINS
Assistant Attorney General
Florida Bar ID#: 0986682
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
Fax (813) 281-5501

COUNSEL FOR APPELLEE