IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1375

VICTOR CARABALLO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF CROSS-APPELLANT

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STATEMENT OF CASE AND FACTS

The State relies on its Statement of Case and Facts from its Answer Brief/Initial Brief of Cross Appellant.

SUMMARY OF THE ARGUMENT

The sentencing order is an appealable order and this Court properly has jurisdiction over the State's cross-appeal as the trial court's rejection of CCP involves a ruling on a question of law.

The proper standard of review of the State's cross appeal is whether the trial court applied the correct law and whether the record contains competent, substantial evidence to support its finding. Here, the trial court did not apply the correct rules of law in rejecting the CCP aggravating factor or finding the lack of significant prior criminal history mitigation. Likewise, the rejection of CCP and finding of lack of a significant criminal history are not supported by competent, substantial evidence.

The trial court's findings in this regard should be reversed.

ARGUMENT

X THE TRIAL COURT'S SENTENCING ORDER IS APPEALABLE AND THE TRIAL COURT ERRED IN REJECTING CCP

Defendant asserts that the trial court's sentencing order is not appealable. In support, Defendant argues that the order makes correct legal statements, and therefore, cannot be appealed. This argument is wholly without merit as cross appeals are not precluded merely because the order in question makes accurate statements regarding the law.

Florida Statute section 924.07(d) states that "the state may appeal from: . . . A ruling on a question of law when the defendant is convicted and appeals from the judgment." *See also* Fla. R. App. P. 9.140(c)(1)(K) (2008). The State's filing of such cross-appeal is jurisdictional, as the issue of law would be foreclosed from review without the filing of a cross-appeal. *Pope v. State*, 884 So. 2d 328, 330 (Fla. 2d DCA 2004). To obtain jurisdiction, the trial court's ruling being cross-appealed must be one "on a question of law," or a finding by the lower court that requires making a legal judgment. *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987). For example, in *Ramos*, this Court determined that the state could appeal a ruling by the trial court on a motion for judgment of acquittal or reduction of judgment as those rulings would be made *as matters of law* based on the evidence presented. *Id.* at 420-21.

Here, the trial court made a ruling as a matter of law based on the evidence presented: it rejected CCP based on a finding that Defendant was not the person who killed Ana and that the murder occurred during the commission of other felonies. (R. 2749-50) Rulings regarding whether to impose CCP are rulings of law based on the evidence presented to support the finding of that aggravator. *Willacy v. State*, 696 So. 2d 693, 695-96 (Fla. 1997); *Lewis v. State*, 398 So. 2d 432 (Fla. 1981); *cf. Rimmer v. State*, 825 So. 2d 304, 327-28 (Fla. 2002) (heinous, atrocious and cruel aggravator as "matter of law"). As such, the State properly requested and obtained appellate jurisdiction to review the trial court's rejection of CCP. *Ramos*, 505 So. 2d at 421.

The ability to appeal is not contingent upon the State's ability to prevail, as Defendant apparently suggests. Indeed, if the requirement was that the question of law had been improperly decided, then the State would necessarily always prevail. Clearly, that is not the case. *White v. State*, 974 So. 2d 1184, 1184 (Fla. 5th DCA 2008) (denying State's cross-appeal of deletion of 15 year consecutive sentence even though court believed appeal had merit). The ability to appeal an order and obtain jurisdiction depends only upon this Defendant having appealed and the trial court having made a ruling that

presented a question of law. § 924.07(d), Fla. Stat.; Fla. R. App. P. 9.140(c)(1)(K). Both requirements have been met here. As such, Defendant's argument that the trial court's order is not appealable because it made correct statements of law should be rejected.

Defendant next argues that the trial court did not err in rejecting CCP because Defendant's mental health mitigators negated CCP, despite the fact that the trial court did not rely on mental health mitigation in rejecting CCP. This position is without merit as it ignores the standard of review applicable to the trial court's findings.

This Court has previously stated the applicable standard of review:

> [Defendant] argues that the court erred in finding several aggravating circumstances. He asserts inter alia [sic] that the State failed to prove each beyond a reasonable doubt. We note, however, that it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Rather, our task on appeal is to review the record to 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.

Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); *accord Aguirre-Jarquin v. State*, 34 Fla. L. Weekly S299 (Fla. Mar. 26, 2009); *Reynolds v. State*, 934 So. 2d 1128, 1152-53 (Fla. 2006). As clearly stated by this Court, the standard is not a re-

weighing of the evidence to determine whether CCP was proven beyond a reasonable doubt. *Willacy*, 696 So. 2d at 695.

Here, the trial court did not apply the right rule of law in that the trial court's sentencing order indicates that CCP was rejected because Defendant was not the triggerman and the crime was committed during the course of another felony. (R. 2749-50) Rejecting CCP on these bases is erroneous under the law, as CCP is properly applied even where the defendant in question did not physically commit the murder, *Lugo v. State*, 845 So. 2d 74, 113-14 (Fla. 2003); *San Martin v. State*, 705 So. 2d 1337, 1349 (Fla. 1997), and where the murder was committed during the course of the commission of another felony. *Wickham v. State*, 593 So. 2d 191, 193-94 (Fla. 1991); *San Martin*, 705 So. 2d at 1349.

Defendant's position is what this Court clearly rejected in *Willacy*: that the evidence should be re-evaluated because it demonstrates that CCP was properly rejected. Defendant ignores the proper standard of review in an attempt to justify the trial court's finding by asking this Court to ignore that there is no competent, substantial evidence in the record to support the trial court's rejection of CCP. Rather, Defendant seeks to have this Court re-evaluate whether the State proved CCP by virtue of the finding of mental health mitigation. Such analysis is

inappropriate. *Willacy*, 696 So. 2d at 695. This Court should reverse the trial court's rejection of CCP because the trial court failed to apply the correct law.

Furthermore, Defendant's argument is meritless. The same facts that prove the "calm and cool reflection" – the "cold" portion of CCP - may likewise support the rejection of the extreme emotional disturbance mitigator. *Conde v. State*, 860 So. 2d 930, 956 (Fla. 2003). However, the converse is not true, as Defendant recognizes, because the facts that support a finding of CCP may not always be tied to the facts that support or negate a finding of extreme emotional disturbance. *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000).

Defendant's reliance on *Spencer v. State*, 645 So. 2d 377 (Fla. 1994) is, therefore, misplaced and misleading. There, the evidence established that while the defendant had previously contemplated killing his wife, the killing did not occur as Defendant suggests. *Id.* at 379-80. The case involved a on-going domestic dispute between the defendant and his wife after the wife told the defendant to move out of their house. The violence initiated during a dispute regarding the wife's later withdrawal of funds from their mutual business, which resulted in the defendant's choking her and threatening to "finish the job." Thereafter, the defendant attacked his wife and her

teenage son on one occasion and then returned another time, which attack resulted in the wife's death. Because the evidence established that the defendant had been in a prior relationship wherein his wife had left him and taken his money, that the same circumstances were occurring to the defendant again, and that, due to defendant's resultant stress-induced paranoia and chronic alcoholism, the cold element of CCP could not be supported. *Id.* at 384. In *Spencer*, the facts that would have supported CCP – the repeated violence against the wife – were negated because those facts were a result of the defendant's emotional disturbance vis-a-vis his paranoia. *Id.*

What occurred in *Spencer* has no relation to what occurred here. The evidence relied upon by the trial court to find the extreme mental or emotional disturbance mitigator did not relate to the circumstances of the murder. (R. 2751-52) In *Spencer*, the mental mitigation directly related to the circumstances of the murder and showed that the murder was not committed upon cool and calm reflection. Here, there was no domestic dispute as in *Spencer;* there was no relationship between Defendant and Ana that could provided a basis for finding that this crime was a result of a mental state induced by their relationship and resultant paranoya. As in *Sexton*, the mental or emotional disturbance mitigator had no relation to CCP. Accordingly, even

if this Court could re-weigh the evidence, Defendant's position is without merit and should be rejected.

XI THE TRIAL COURT ERRED IN FINDING THE NO SIGNIFICANT CRIMINAL HISTORY MITIGATOR

Defendant asserts that the trial court did not err finding no significant criminal history. Defendant once again seeks to avoid the error committed by the trial court by having this Court apply an incorrect standard of review. As the trial court ignored uncontroverted evidence that Defendant had a significant history of prior criminal activity and the trial court did not apply the correct law to those facts, this mitigation should be reversed.

The standard of review requires this Court to determine whether the trial court applied the correct legal standard in making its finding and whether the finding is supported by competent and substantial evidence. *Willacy*, 696 So. 2d at 695. Once again, Defendant wants this court to reweigh the evidence presented, instead of conducting a proper review of whether the trial court applied the correct law and whether the trial court's finding are supported by competent, substantial evidence.

Here, the trial court clearly misunderstood or did not apply the correct law when it found that Defendant did not have a significant prior criminal history if one ignored the

contemporaneous crimes and convictions. (R. 2751-52) Such a finding indicates that the trial court did not believe that any prior criminal activity qualified as criminal history for purposes of deciding whether to apply the mitigator. *Dennis v. State*, 817 So. 2d 741, 763-64 (Fla. 2002); *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988). This misunderstanding regarding the law is clear upon review of the record wherein the trial court was misinformed regarding what type of criminal activity that can be considered and not considered.

Defendant asserts that the State's interpretation of the record is misleading. However, he cannot avoid the fact that he did not seek this mitigation and misinformed the trial court regarding the proof necessary to obtain this mitigation. (T. 2084, SR. 27-30) The exchange regarding Defendant's objection to the no significant history of prior criminal activity instruction, in its entirety, was as follows:

> THE COURT: Okay. Any objection to number one, I guess we are on to mitigators. Take your time.
>
> [DEFENSE COUNSEL]: Again, just. Okay. I'm not sure why the second paragraph is there because it says on page, well under [921.141]. Paren 6 in paren, right before the number one, Your Honor.
>
> THE COURT: One moment.
>
> [DEFENSE COUNSEL]: Are you with me?

THE COURT: No, sir, one minute, please.

[DEFENSE COUNSEL]: It's right after should you find sufficient aggravating circumstances.

THE COURT: Let me get there, Mr. Rosenberg, I'm sorry. Okay.

[DEFENSE COUNSEL]: No, problem. Then it says, the first one, defendant, Victor Caraballo has no significant history of prior criminal activity.

THE COURT: Yes.

[DEFENSE COUNSEL]: Then it says the defendant offers evidence on the circumstance, the State and the rebuttal [sic], we did not offer evidence under that circumstance. We did not put on evidence saying he had no, significant history prior –

[THE PROSECUTOR]: If you don't want it, it's out. We were trying to fashion something that made sense.

THE COURT: So you don't want it, Mr. Rosenberg? Just the first paragraph, you just don't want the second?

[THE PROSECUTOR]: You are saying he didn't offer evidence of significant prior criminal history and he wants the instruction anyway, but the State doesn't get the other half where they say that conviction that they know about should only be used in rebuttal.

THE COURT: In other words, I guess what I understand the instruction to say, and maybe I'm incorrect, is that the fact

that he has no significant history of prior criminal activity.

[DEFENSE COUNSEL]: Okay.

THE COURT: But you can consider the convictions in this case, as –

[DEFENSE COUNSEL]: It says in the reading –

THE COURT: Conviction of the crime –

[DEFENSE COUNSEL]: *Those mitigating circumstances for which evidence has been presented. Okay, Your Honor? Nowhere. Nowhere has there been any evidence presented, and it would have to be presented by through the State of Florida, prior convictions about significant history of prior criminal activities.*

THE COURT: I'm taLking [sic] about the second paragraph –

[THE PROSECUTOR]: Your Honor, let's go up a little bit.

THE COURT: For now.

[THE PROSECUTOR]: The issue then becomes, yes, the sentence right before says you don't give any mitigator unless there has been evidence presented. There's no way that all of us sitting in this room can believe that the evidence, that there was evidence presented, that this defendant does not have a significant prior criminal history. In fact the evidence we heard from the witness stand, and I know they are not certified convictions but family members, doctors said here's what they

know. He has a sentence in Puerto Rico six years, served three-and-a-half years in prison. Convicted of an auto theft charge in Alaska. He was involved in some other drug deal and car thefts that caused him to flee from Puerto Rico to the mainland United States. None of those are coming in to prove an aggravator, they are coming in to rebut a mitigator that is unproven. I think I am entitled to argue that, and I'm entitled to –

THE COURT: What is considered significant criminal history?

[THE PROSECUTOR]: For them to decide, that's the whole point.

THE COURT: Go ahead, Mr. Rosenberg.

[DEFENSE COUNSEL]: *The State has put in an aggravator and their aggravator is that [Defendant] has one prior, the Court's aware of that, one prior that's all they can argue. They cannot argue to this jury that [Defendant] has been arrested for anything else. As far as I'm concerned, we can take out the whole, the whole line about no significant history.*

THE COURT: So take out one completely?

[DEFENSE COUNSEL]: *Take it out completely. Because what I'm telling the Court is it's my understanding, the State cannot argue anything aggravating, anything to this jury.*

THE COURT: What was alleged?

[DEFENSE COUNSEL]: *Or proven, which is that Nelson*

Porobanco, attempted first degree murder, attempted first degree felony.

THE COURT: For now, all I want to know is, for now, do you want number one in?

[DEFENSE COUNSEL]: I want it out for now unless there's a change in what occurs –

THE COURT: And if I understood you correctly, you said if the defense doesn't want it then take it out. Okay. Thank you.

(T. 2081-84 (emphasis added))

This explanation misstated the law. Qualifying prior criminal activity does not require that the prior activity resulted in formal charges or convictions. *Dennis*, 817 So. 2d at 763-64; *Perry*, 522 So. 2d at 821. Defendant essentially wanted to have it both ways by simultaneously preventing the State from making an argument that Defendant had a significant prior criminal history based on the evidence Defendant himself presented and preventing the State from arguing anything but the single prior crime in support of aggravation. (T. 2081-82) Clearly, the State's intention was to argue that there was significant prior criminal history by pointing out the evidence presented that Defendant committed other crimes in Puerto Rico and Alaska, as testified to by Defendant's experts. (T. 2083) However, because Defendant misinformed the trial court regarding the proof required to obtain the lack of significant criminal

history mitigation, the trial court did not apply the correct law and found that the mitigation applied as there was no qualifying prior criminal activity if it ignored the contemporaneous convictions. (R. 2751-52, 2756)

Furthermore, the record demonstrates that the trial court's finding is not supported by competent, substantial evidence. Contrary to Defendant's present assertions, the record clearly shows that Defendant had a significant prior criminal history, as testified to by Dr. Alvarez, Dr. Hughes and Defendant's family. Defendant had previously served at least three years in prison, had a prior conviction for armed burglary, sold drugs, made a career of committing robberies and burglaries and was involved in a scam where he sold a car, stolen it and then re-sold it, and previously stole a car in Alaska. (T. 1771, 1847, 1912, 1914, 1948-50, TR. 186, 191, 194, 229-30) All of this prior criminal activity should have been considered by the trial court as competent, substantial evidence to reject the mitigating circumstances. *Nibert*, 574 So. 2d at 1062; *Walls*, 641 So. 2d at 390. The trial court clearly ignored this evidence when it found that "[t]here was no evidence to suggest that [Defendant] has a significant history of prior criminal activity[.]" (R. 2756)

As seen above, the trial court simply ignored evidence.

Contrary to Defendant's argument, the trial court did not decide whether Defendant's criminal history was significant as it simply did not consider Defendant's criminal history because Defendant led the trial court to believe that qualifying criminal history meant that the State was required to prove prior convictions. As such, its finding should be reversed since it is not supported by competent, substantial evidence.

It is clear that the trial court did not apply the correct rule of law in accepting this mitigation and ignored the evidence presented regarding this mitigation. Its finding should be reversed.

CONCLUSION

For the foregoing reasons, the rejection of CCP and finding of no significant criminal history should be reversed.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF CROSS-APPELLANT was furnished by U.S. mail to Andrew Stanton, Assistant Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, FL 33125, this 1st day of May, 2009.

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

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