IN THE SUPREME COURT OF FLORIDA

JULIO MORA,

Appellant,

vs. Case No. 94,421

STATE OF FLORIDA,

Appellee.
__________________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JULIO MORA, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s). Reference to Appellant's brief will be by the symbols "AB."

STATEMENT OF THE CASE AND FACTS

Appellant was suing his former employer, who worked for AARP and Appellant was representing himself in the suit against Dr. Rudolph and AARP. (T 1282, 1466-1467). Rudolph was the project director of SCSEP, which was a division of AARP. (T 1252). During his tenure, he would assist people 55 years old and older in getting jobs. (T 1250). Rudolph eventually got Appellant, who was 68 years old, various jobs and at one point, Appellant began to work for the agency itself teaching computer courses. (T 1253, 1254). Appellant worked diligently and received certificates of appreciation as well as a raise to the maximum level that the agency paid. (T 1255-1256). A problem arose, however, when Dr. Rudolph insisted that Appellant teach more people. (T 1257). Rudolph set out an aggressive schedule that was grueling. (T 1280-1282). Appellant argued with Dr. Rudolph about the schedule and their relationship deteriorated. (T 1258-1259). Appellant left AARP and filed for unemployment compensation-alleging that Dr. Rudolph physically abused him. (T 1261-1262).

During his time at SCSEP Appellant became friendly with Dr. Rudolph's secretary, Dorothy McCleary. (T 1257). She spent Thanksgiving with him at his apartment, which she said looked very nice. (T 1257, 1259-1260, 1269). After Appellant left SCSEP, he told McCleary that he was going to make Dr. Rudolph pay and that he was going to get Dr. Rudolph. (T 1254).

On the Friday morning before the labor day weekend, May 27, 1994, Dr. Rudolph's deposition was set, after two unsuccessful attempts two days earlier. (T 1399-1402). At about 9:45, Karen Starr Marx arrived for the deposition on AARP's behalf. (T 1403). Mrs. Marx told the court reporter, Patty Charelton, that she was standing in for someone else that day. (T 1404). A short while later, Dr. Rudolph and his attorney, Maurice Hall, entered the room. Mr. Hall arranged the seating so that his client would be as far away from Appellant as possible. (T 1405, 1472). Everybody was seated at the table when Appellant arrived.(T 1405). He protested as to the arrangement because he wanted to be closer to Dr. Rudolph, but Mr. Hall insisted that the seating arrangement stay the way it was. (T 1472). As soon as everyone was seated, the court reporter closed the door, sat down at her machine and turned on a tape recorder because she was afraid that she would not be able to understand everything Appellant said due to his accent. (T 1408-1409).

Throughout the deposition, Appellant asked questions and had disagreements with Mr. Hall as to how things were going to proceed. Eventually, whenever a problem came up, Appellant would "certify the question" and the deposition continued. (T 1473). Although the deposition proceeded relatively normally, the tension was evident. (R 1078, State's Ex. 72, T 1410). Approximately 20 minutes into the deposition, Appellant said he had only one more question. Surprised, Ms. Grant looked up, saw Appellant stand up with a gun in his hand and begin shooting. (T 1410). Appellant shot

Dr. Rudolph first, then Mr. Hall, then Karen Marx, before he went back and shot them again. (T 1411). Realizing that Appellant was not going to shoot her, Ms. Grant fled the room. When she looked back, she saw Appellant lean over the table shoot Karen Marx as she lay on the floor. (T 1413). Mrs. Marx was shot four times: twice in her chest, once through the abdomen and once through the hand.

Mrs. Marx was transported to the Broward General Medical Center, and treated by Dr. Constantini. He testified that Mrs. Marx was bleeding profusely when he encountered her and immediately transported her to the operating room. (T 1201). Her entire abdomen was full of blood, both lobes of her liver had been injured and one lobe was totally destroyed. (T 1202-1203). Dr. Constantini began operating on Mrs. Marx at 11:30 a.m., but by 12:17 p.m. he had pronounced her dead. (T 1204). He also testified that from his experience, if a person was moaning, he or she would probably be conscious. (T 1204). On cross-examination, he explained that it was unlikely that involuntary spasms could have caused the moaning sound because Mrs. Marx's lung was perforated on the lateral side, which is a major airway. (T 1206). He admitted on cross-examination that the automatic breathing process could possibly have caused a sound, which could appear to be moaning. (T 1206).

Dr. Nelson, the medical examiner testified that he examined two bodies. (T 1213). In examining Karen Marx, he observed a total of four gunshot wounds: 1) A graze wound on the back part of her left hand, which went through and through causing

numerous fractures to the underlying hand bones. (T 1216-1217); 2) A wound to the front part of the left chest, which went through her body and exited on the back part of the same shoulder. This wound went through her left lung and probably occurred as she lay on the ground. (T 1218, 1221, 1238); 3) A wound, which entered on the right abdomen and exited through the right posterior abdomen. The projectile went through a portion of Karen Marx's pregnant uterus. (T 1221); 4) A wound to the back of the abdomen on the right side. Dr. Nelson first saw Dr. Rudolph's dead body lying face down on the floor of the conference room. (T 1228). In examining Dr. Rudolph, he found four gunshot wounds: once in the back of the head, once in the heart, through the legs and in the hand. (T 1228-1232). Maurice Hall survived his two gunshot wounds to his abdomen and shoulder. He escaped the conference room and hid behind a door, holding the door shut. (T 1477). After shooting ten shots, Appellant found Hall and tried to push the door open. Hall let the door go and struggled with Appellant for the gun. (T 1477-1478). When Hall got the gun away, he pointed it at him and Appellant began to back out of the doorway, down the hall. (T 1478). Hall called 911. (T 1478). The owner of the court reporting agency, Brett Tannenbaum, restrained Appellant until the police arrived at the scene. The entire episode was recorded on the audio cassette tape that Patty Charelton was going to use to assist her in transcribing the deposition testimony. (R 1078, State's Ex. 72).

The state charged Appellant with two counts of first degree premeditated murder and one count of attempted first degree premeditated murder. (R 14-15). But before the case actually went to trial, Appellant discharged the Special Public Defender and two other court-appointed attorneys. (R 105, 109-111, 533-535, 588-589, 609, 619,). Eventually, Attorneys Colleran and Malnik were appointed to represent Appellant. (742, 748, 750). Prior to trial, the defense filed a motion to declare Appellant incompetent to proceed to trial. (R 828-829). Four experts conducted competency evaluations and on March 20, 1997 court a hearing. (T 1-152).

All of the experts agreed that Appellant understood the nature of the charges against him. Dr. Ceros-Livingston opined that Appellant was not competent to stand trial, but admitted on cross examination that he knew what he was charged with and understood that his liberty was at stake. (T 41, 42-43). She also admitted that Appellant understood the adversarial nature of the proceedings, and that he had represented himself in several lawsuits. (T 43). She acknowledged that Appellant knew all of the parties' roles and that he has a lawyer who represented his interests. (T 44, 45). In addition, Appellant she agreed that could disclose to his attorney facts relevant to the proceedings. (T 45). Dr. Livingston did not believe that Appellant could manifest the appropriate courtroom behavior, but acknowledged that he had done so before. She reviewed files of Appellant's 1984 attempted murder trial for the shooting of his wife. During that trial, which ended with his acquittal, Appellant was able to sit

through it to conclusion. She also acknowledged that during the 1984 trial Appellant's symptoms were "pretty consistent" with the symptoms that he exhibited in the instant case. (T 47, 52). And at that trial, as in his current case, Appellant had many disputes with his lawyers about how to proceed and insisted that he wanted to proceed in self-defense. (T 47-48). Finally, she admitted that Appellant was very manipulative. (T 50).

Dr. Trudy Block-Garfield testified that Appellant was competent to stand trial and that he was manipulative. (T 69). In her report she indicated that "[Appellant] knows the system extremely well and knows what the results of his actions are likely to be." (T 68). She believed the only reason Appellant cooperated with her was because he was hoping to get a new attorney. (T 69). The third expert to testify, Dr. Spencer, also believed that Appellant was competent and could manifest appropriate courtroom behavior. Dr. Macaluso, testified that he did not believe Appellant was competent to stand trial because Appellant could not cooperate with counsel (to choose a defense strategy) and could not testify without incriminating himself. (T 122). Dr. Macaluso believed that Appellant was mentally ill, but acknowledged that clinical mental illness does not necessarily mean that an individual is incompetent. (T 122-123). And on cross-examination, he admitted that his concerns regarding Appellant's perceived persecution actually go toward his mental illness as opposed to the competency issue. (T 125). Dr. Macaluso was concerned about what Appellant would actually testify to when he took the stand in his own defense. (T 129). After this

hearing, the trial court determined that Appellant was competent to stand trial. (R 881-886).

At trial, Appellant's defense strategy was that he acted in self-defense because he believed that Dr. Rudolph's Black-Chinese hit man (Wong Chung) tried to kill him. During the jury trial, in addition to the witnesses discussed above, the jury heard the audio cassette tape, which recorded the entire episode. (R 1078, State's Ex. 72). The tape reveals that Appellant was becoming increasingly angry with Dr. Rudolph's refusal to answer Appellant's questions. The tension was evident. (R 1078, T 1410). Then, Appellant pulled out his gun-the court reporter screams, "No, No, No, Dr. Mora, No" whereupon Appellant began shooting. He fired several shots in succession and in listening to the tape, you can hear shell casings drop onto the conference table. In the background people are screaming, but closer to the recorder a female voice says softly "are you okay?" At that point another shot rings out. Karen Marx cries out, "Help me, Help me, Help me." She lets out a deep groan before you hear the last bang as Appellant fired the final shot into her body. (R 1078, State's Ex. 72).

Appellant testified on his own behalf, explaining that Dr. Rudolph had been harassing him-gassing him and threatening to kill him. (T 2115-2156). To counter the gases he equipped his apartment with fans and an air purifier. He sectioned off his bed and had an air purifier. On the morning of the shooting, Appellant claimed he had not slept and had taken various drugs. (T 2122). Armed with his gun, he took a taxi to the

Cumberland Building. (T 2122, 2129). He told the driver that someone was following him and trying to kill him, although he admitted that he did not see Dr. Rudolph following him. (T 2128-2129, 2203). At the court reporter's office, Appellant said Dr. Rudolph threatened to kill him and assaulted him in the bathroom before the deposition began, but he did not scream or tell anyone. (T 2133, 2211). Although he was afraid, Appellant continued the deposition. He kept his loaded gun in his pocket with the safety off. (T 2140, 2205). At some point during the deposition, Appellant testified that a masked man (Wong Chung) opened the door slightly and pointed the barrel of a gun at him. (T 2145-2146). Appellant began shooting. (T 2146). He said that he saw Karen Marx try to get a gun, so he shot her and then he lost consciousness. (T 2147). Appellant admitted that Karen Marx told him she represented AARP. (T 2277). He knew that bullets from his gun hit her, but he testified that he did not realize he was shooting Karen Marx, Dr. Rudolph or anyone else. (T 2277, 2283).

On June 23, 1995 Appellant's counsel filed a "Motion to Grant Defendant the Concluding Argument to the Jury." (R 406-410). A similar motion was filed on Appellant's behalf on April 1, 1997. (R 894-898). Then, before closing arguments, Appellant twice told the court that he wanted to make a closing argument after defense counsel finished. (2557, 2689). Although the court warned him of the dangers of self-representation, it allowed him to address the jury. Appellant asked the jury to be patient with him and explained why he felt compelled to address them. "I feel

compelled to tell you several things that I don't think that anyone addressed or maybe addressed them properly." (T 2706-2707). In the end, he thanked the jury for listening to him and asked them to forgive him. (T 2735).

The jury found Appellant guilty as charged and the penalty phase was set for a later date. (T 2830, 2836). Before the penalty phase began, defense counsel moved to declare Appellant incompetent. (T 2892). In preparing for this phase of the trial, counsel explained that he was concerned because his strategy diverged from Appellant's strategy. (T 2892-2896). The court denied the defense motion, finding that it presented no new evidence to change its initial competency determination. (T 2900-2903). At that time, defense counsel also told the court that Appellant would fire him if counsel contacted Appellant's family. (T 2947-2947). Appellant insisted that it was a waste of time and money to contact his elderly siblings because they did not know him, had nothing relevant to add and because he did not want to cause them stress by telling them that he is facing the death penalty. (T 2949-2950). Because counsel insisted that he was ethically required to investigate this possible mitigation, the court ordered counsel to contact them. (T 2950-2960). In response, Appellant told the court that he waived any mitigation and asked the court to impose death. Throughout this entire hearing, the court explained waiver procedures and the pitfalls inherent in self-representation. (T 2962-2994). Despite these warnings, Appellant fired defense counsel specifically because he insisted on contacting Appellant's siblings.

Appellant asked that a new lawyer be appointed. (T 2960-2961, 2966). The court refused to appoint new counsel and told Appellant that he either represent himself with stand by counsel or keep current counsel. Eventually, Appellant decided to represent himself. (2990-2996).

Before the penalty phase began, Appellant allowed stand by counsel to present expert testimony challenging Appellant's competency again. (T 3038). The court denied Appellant's motion, finding that the expert's testimony only established that Appellant was competent to proceed. (T 3058). Thereafter, Appellant gave a brief opening argument to the jury, in which he mentioned the power to forgive and offered a Latin prayer. (T 3074). Defense counsel again challenged Appellant's competency because of his statement in Latin, but the court noted that it was a blessing of the jury and the attorneys and denied the motion. (T 3078). Defense counsel said it was a "Roman Catholic forgiveness." (T 3078-3079). Thereafter, Appellant refused to present any evidence, insisting that he did not have time to prepare and refused to allow stand by counsel to go forward. (T 3079-3081, 3094-3095). Defense counsel went through the witnesses he would have called and what mitigation each witnesses would have addressed. (T 3081-3091).

In its argument, the state urged the jury to impose death based upon two aggravating circumstances-HAC and contemporaneous capital felony. (T 3073, 3112-3124). The court instructed the jury on these two aggravating circumstances and

several statutory and nonstatutory mitigating circumstances-age, character, environment, mentality, life and background, extenuating circumstances, extreme mental or emotional disturbance, victim was a participant in the defendant's conduct, capacity of defendant to appreciate the criminality of his conduct. (T 3128-3131). Thereafter, the jury recommended death by a vote of 8 to 4 for the murders of Dr. Rudolph and Karen Marx. (T 3139).

At the Spencer hearing, stand by counsel presented several witnesses and seven depositions from Appellant's European relatives in mitigation. Ultimately, the court followed the jury's recommendation and imposed death on both counts I and II. (R 3184-3211). This appeal followed.

SUMMARY OF ARGUMENT

Issue I - Karen Marx's death was not instantaneous. In addition, by witnessing the shooting of Dr. Rudolph and Mr. Hall, Ms. Marx was subjected to further agony over the prospect that her death was soon to occur. This agony could have only risen exponentially when, while pleading for help, Appellant loomed over her, aimed his gun at her and fired into her body, where she lay helplessly paralyzed and unable to protect herself and her unborn child.

Issue II - There is no reason to disturb the court's rejection of this statutory mitigator especially where it accorded the mental mitigation some weight as a nonstatutory mitigator. The court resolved the conflicts in the evidence against Appellant, finding the state's expert witnesses more credible and compelling.

Issue III - The court properly considered and weighed all of the evidence finding the state's expert witnesses more credible and compelling. There is no reason to disturb the court's rejection of this mitigator where Appellant's activities and demeanor during the course of the day that the crimes were committed demonstrated that Appellant appreciated the criminality of his conduct and that he could conform his conduct to the requirements of the law.

Issue IV - The record reveals that Appellant was an extremely violent person who admitted to committing significant prior criminal activities. Thus, in rejecting this mitigator, the trial court could have relied upon this evidence. Even if error, however,

it is harmless in light of the extremely weighty nature of the aggravators found-HAC and contemporaneous capital felony and relatively little mitigation established.

Issue V - The trial court properly rejected Appellant's age as a mitigator where there was no evidence demonstrating that his emotional maturity level was impacted by his age or that was he senile deserving special consideration.

Issue VI - Appellant's death sentence is proportionate to those sentences of other defendants who committed similar murders under similar circumstances.

Issue VII - Based upon expert testimony, the trial court properly found Appellant competent to stand trial.

Issue VIII - Appellant filed two motions requesting an opportunity to address the jury. Thus, error, if any, was invited. Nevertheless, the trial court did not abuse its discretion in allowing Appellant to address the jury after his defense attorney gave his complete closing argument.

Issue IX - Appellant waived presentation of mitigating evidence and precluded presentation of mitigating evidence by firing his penalty phase counsel. Appellant's actions constituted an unequivocal request to represent himself and the trial court properly determined that Appellant was competent to do so.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY FOUND THE HAC AGGRAVATOR WHERE THE VICTIM DID NOT DIE INSTANTANEOUSLY, SUFFERED MULTIPLE INCAPACITATING GUNSHOT WOUNDS, OBSERVED APPELLANT SHOOTING OTHER PEOPLE BEFORE HE SHOT HER, AND WHERE AN AUDIO CASSETTE TAPE SHOWS THAT THE VICTIM PLEADED FOR HELP BEFORE APPELLANT FIRED THE FINAL SHOT INTO HER BODY. (RESTATED).

Appellant argues the trial court erred in finding that the murder of Karen Marx's was heinous, atrocious, and cruel (HAC) under section 921.141(5)(h). Specifically, he claims that the trial court improperly focused on a 31 second lapse in time from the firing of several gunshots until Appellant fired his final shot into Karen Marx's abdomen. Appellant's argument, however, has failed to take into account the sheer and utter terror that the victim endured from the moment the shooting began until Appellant fired that last shot into her abdomen and it went through her pregnant uterus. (T 1221).

In State v. Dixon, 283 So.2d 1 (1973), this Court defined the heinous, atrocious and cruel aggravator as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such

> additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9. Stated another way, the heinous, atrocious or cruel aggravator "is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla.1990). At the same time, however, although this Court also has held that the HAC aggravator does not usually apply to most instantaneous deaths or fairly quick deaths, this Court has recognized that the fear, emotional strain, and terror experienced by the victim during the events leading up to his or her murder may make an otherwise quick death especially heinous, atrocious, or cruel. See James v. State, 695 So.2d 1229, 1235 (Fla. 1997); Wyatt v. State, 641 So.2d 1336 (Fla.1994); Preston v. State, 607 So.2d 404 (Fla.1992).

In support of his argument, Appellant relies on Hartly v. State, 686 So.2d 1316 (Fla. 1996) and Ferrell v. State, 686 So.2d 1324 (Fla.1996). In these cases, this Court held that a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law, not heinous, atrocious or cruel. Incredibly, Appellant contends that the shooting death of the victim in this case was ordinary in the sense that it was not accompanied by any additional acts that

would set it apart from the norm of premeditated murders. And he asserts that contrary to the trial court's factual findings, the record is devoid of any indication that the victim suffered. "There is no evidence of that (sic) Dr. Mora deliberately shot Mrs. Marx in a manner causing her unnecessary suffering apart from the shooting itself and the shooting was carried out relatively quickly. The court's focus on Dr. Mora's standing idly by for 31 seconds while Mrs. Marx cried for help is misplaced." (AB 67).

Despite Appellant's assertions, the record in this case, particularly the audio cassette tape, reveals that Karen Marx's death was not instantaneous and that she suffered extreme fear. What is more, this was not an execution style killing, although Dr. Rudolph did suffer a shot to the back of his head as he lay on the floor. Unlike those cases where this Court has rejected HAC as an aggravator (execution style killing), the record in the instant case is filled with other evidence, which offers insight into the tremendous physical and mental torture that the victim endured. There is no question that Mrs. Marx was aware of her impending, witnessed another murder and an attempted murder, and cried out for help.

Again in James v. State, 695 So.2d 1229 (Fla. 1997), this Court held that the fear, emotional strain, and terror of the victim during the events leading up to the murder may be considered in determining whether this aggravator is satisfied, even where the victim's death was almost instantaneous. See also Preston v. State, 607 So.2d 404, 409-10 (Fla.1992); Rivera v. State, 561 So.2d 536, 540 (Fla.1990); Adams

v. State, 412 So.2d 850, 857 (Fla.1982). Moreover, the victim's mental state may be evaluated for purposes of this determination in accordance with a common-sense inference from the circumstances. Swafford v. State, 533 So.2d 270, 277 (Fla.1988); Pooler v. State, (Fla. 1997) 704 So.2d 1375, 1378. Furthermore, this Court has upheld the application of the HAC aggravator where victims have been murdered by gunshot and have died instantaneously on several occasions in factual scenarios not that much unlike the case at bar. See e.g. Smith v. State, 424 So.2d 726 (Fla.1982); Griffin v. State, 414 So.2d 1025, 1029 (Fla.1982)("the finding that the murder of Kirchaine was especially heinous, atrocious, or cruel is supported by the evidence that the victim was abducted from the store and shot several times over his pleas for mercy"); Steinhorst v. State, 412 So.2d 332 (Fla.1982)(The finding of heinousness based on infliction of mental anguish is also proper."); White v. State, 403 So.2d 331 (Fla.1981)("the victims in this case were required to submit to a protracted ordeal during which time they undoubtedly agonized over the prospect of being murdered."); Knight v. State, 338 So.2d 201 (Fla.1976). The common element in these cases is that, before the instantaneous death occurred, the victims were subjected to agony over the prospect that death was soon to occur, which is precisely what the record reveals here.

It is clear that Karen Marx's death was not instantaneous. She did not receive a blow to the head, which rendered her unconscious. In addition, by witnessing the shooting of Dr. Rudolph and Mr. Hall, Karen Marx was, without question, subjected

to further agony over the prospect that her death was soon to occur. This agony could have only risen exponentially when, while pleading for help, Appellant loomed over her, aimed his gun at her and fired into her body, where she lay helplessly paralyzed and unable to protect herself and her unborn child.

The trial court's findings of fact recognized the tremendous suffering Karen Marx endured.

> The evidence presented at trial revealed that on May 27, 1994 the Defendant was in the process of conducting a pro se deposition of Dr. Clarence Rudolph, his former employer, in connection with a lawsuit the Defendant had filed against Dr. Rudolph and the AARP. Attorney Maurice Hall represented Dr. Rudolph at the deposition and Attorney Karen Starr Marx was present, representing AARP. Also present was court reporter Patricia Grant, who recorded the deposition both stenographically and by tape recorder. The entire deposition and the ensuing events were captured on Ms. Grant's tape recorder.
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> The evidence presented at trial indicates that the approximate sequence of events unfolded as follows: The deposition itself took place in a large conference room on the sixth (6th) floor of the Cumberland Building in Fort Lauderdale and lasted for approximately thirty (30) minutes, during which time the Defendant posed numerous questions to Dr. Rudolph. At the apparent conclusion of the deposition, the Defendant announced that he had one more question to ask. At that moment, the Defendant rose from his seat at the end of the conference table, raised a firearm and began to fire.
>
> The Defendant fired a total of ten shots during a period of approximately forty eight (48) seconds. Ms. Patricia Grant testified that she witnessed the Defendant initially fire six (6) shots: The Defendant shot each of the three (3) victims once in turn, then shot each victim a second

time. Ms. Grant stated that after the sixth (6th) shot was fire, she was able to reach the door of the conference room, open it and escape without physical injury. Mr. Hall, having been shot twice, also exited the room and fled to a nearby kitchen/storage area. As Mr. Hall fled the room, the Defendant fired the seventh (7th) shot, which went through the now open door and lodged into the door jamb. The Defendant then turned again towards Ms. Marx, who having already been shot, was lying on the floor and proceeded to fire shots eight (8) and nine (9) at her. Approximately thirty one (31) seconds then passed without any shots being fired. After these thirty one (31) seconds, the Defendant fired the tenth (10th) and final shot. Upon firing the tenth shot, the firearm shell casing normally ejected from Defendant's firearm after every shot, became jammed or blocked. The Defendant then proceeded to follow Mr. Hall into the kitchen/storage area where a struggle ensued. Mr. Hall testified that he wrenched the jammed firearm away from the Defendant and pointed it towards him. The Defendant fled the room and Mr. Hall then attempted to call 911 for assistance. The Defendant was apprehended and detained by another individual in the office.

Maurice Hall testified that he was shot two (2) times: Once in the right shoulder and once in the abdomen. The testimony of Chief Medical Examiner Dr. Stephen Nelson, established that Karen Starr Marx had the following four gunshot wounds on her body: A gunshot wound that was a graze of the left hand, a gunshot wound which entered the front part of the left chest and exited the back of the same shoulder, a gunshot wound which entered the right abdomen and exited the posterior abdomen, and a gunshot wound which entered the back of the right abdomen and remained in the abdomen. Dr. Nelson testified that Clarence Rudolph had the following four (4) gunshot wounds: A gunshot wound which entered the top right back of his head and exited the left side of his nose, a gunshot wound which entered the front of the same wrist, a gunshot wound on the left thigh, with an entrance and exit on the medial surface of the left thigh and then a reentrance on the right thigh, which

exits on the right thigh and a gunshot wound which enters on the left side of the abdomen and remains in the body. Medical testimony revealed that Clarence Rudolph died at the scene. Karen Starr Marx survived for two more hours, and subsequently died at Broward General Medical Center in Fort Lauderdale.

* * *

The evidence is clear that Ms. Marx did not receive the four (4) wounds in rapid succession, a factor characteristic of traditional "execution style" shootings. Rather, the Defendant systematically shot Ms. Marx and each other victim once in turn, then again aimed at each victim for a second shot, then turned yet again to fire two (2) more shots at Ms. Marx. The physical agony and mental anguish that Ms. Marx endured during this time can be heard on the audio tape as she moaned, and cried, "help me, help me," while the Defendant stood by in silence for thirty one (31) seconds before firing the final shot. The testimony of Dr. John Constantini established that these moaning sounds and the cries for help emitted by Ms. Marx would reflect that she was conscious during the course of the shooting.

Taking into consideration the entire sequence of these events, it is clear that Ms. Marx undoubtedly suffered great fear and terror prior to her ultimate death. The evidence indicates that Ms. Marx was conscious and indeed had the opportunity to apprehend her own impending death while she lay wounded on the floor, while witnessing the Defendant shoot the other victims. Ms. Marx thus did not succumb to an instantaneous death, but rather endured immense physical pain and mental and emotional torture during these moments. The evidence is clear that the Defendant acted with utter indifference to the suffering of this victim: After firing the initial shots into Ms. Marx's body, the Defendant turned and shot towards the door as Maurice Hall fled the room. He then turned back around toward Ms. Marx and systematically shot her two more times. For the next thirty one (31) seconds, Ms. Marx lay

> on the floor, wounded and conscious, moaning and pleading for help. During these moments the Defendant lingered with apparent composure and deliberation, listening to Ms. Marx's cries, utterly impervious to the fact that she was still alive, conscious, and in obvious agony and terror. This murder was extremely wicked and vile and inflicted a high degree of pain and suffering upon this victim. This pain and suffering was the result of the pitiless and unnecessarily torturous act by the Defendant. Since these facts are fully supported by the evidence, the aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond and to the exclusion of every reasonable doubt.

(R 3189-3192).

For purposes of this aggravator, a common sense inference about the victim's mental state may be gleaned from the circumstances. See Swafford v. State, 533 So.2d 270, 277 (Fla 1988). In addition to this logical inference, however, the instant record contains absolute proof in the chilling form of the victim's own words, supporting the trial court's conclusion. The audio cassette tape, which recorded Appellant's shooting rampage, removes any temptation to speculate about the agony and terror Karen Marx endured prior to her death. (R 1078, State's Ex. 72). It bears repeating that this time period during which Mrs. Marx suffered includes not only the 31 seconds of her pleas for help, but also the time from the beginning of the shooting, when Appellant first pulled out his gun. On the tape, it is obvious that Appellant became increasingly angry with Dr. Rudolph's refusal to answer Appellant's questions. The tension was evident. (R 1078, T 1410). Then, Appellant pulled out his gun-the court reporter screams, "No,

No, No, Dr. Mora, No" whereupon Appellant began his shooting rampage. He fired several shots in succession and in listening to the tape, you can hear shell casings drop onto the conference table. In the background people are screaming. In a brief moment of silence a weak female voice calls out, "are you okay?" At this point in time, Karen Marx is the only female in the room. Immediately another shot rings out, after which Mrs. Marx cries out in a strained voice, "Help me, Help me, Help me." She lets out a deep groan before you hear the last bang as Appellant fired the final shot into her body.

Despite the relatively quick succession in which Appellant systematically shot his victims, Karen Marx was not the first victim to be shot, nor was she shot only once. According to Patricia Grant, Appellant shot Dr. Rudolph first, then Mr. Hall, then Karen Marx, before he went back and started shooting them again. (T 1411). After escaping the room, Ms. Grant looked back only to see Appellant leaning over the table shooting Karen Marx as she lay on the floor. (T 1413). Thus, there is no question that Karen Marx anticipated her impending death from the moment the shooting began to the end. In addition, the medical examiner, Dr. Nelson, testified that upon examining Karen Marx, he observed a total of four gunshot wounds: 1) A graze wound on the back part of her left hand, which went through and through causing numerous fractures to the underlying hand bones. (T 1216-1217); 2) A wound to the front part of the left chest, which went through her body and exited on the back part of the same shoulder.

This wound went through her left lung and probably occurred as she lay on the ground. (T 1218, 1221, 1238); 3) A wound, which entered on the right abdomen and exited through the right posterior abdomen. The projectile went through a portion of Karen Marx's pregnant uterus. (T 1221); 4) A wound to the back of the abdomen on the right side. The projectile causing this wound was recovered loose within her abdomen after having "tracked through both portions of liver and spleen." (T 1223). The medical examiner opined that the cause of Karen Marx's death was multiple gunshot wounds and that the manner of her death was homicide. (T 1224).

It is important to note that although the shooting lasted for almost a minute, the audio cassette tape recording indicated that the victim was alive and conscious of her helplessness during the attack. See Clark v. State, 443 So.2d 973 (Fla. 1984)(holding that helpless anticipation of impending death may serve as basis for HAC finding). What is more, Appellant's act of looming over her before shooting her was also indicative of his cruelty and utter indifference to her suffering. "[T]he HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." See Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998); see also Kearse v. State, 662 So.2d 677 (Fla.1995); Cheshire v. State, 568 So.2d 908 (Fla.1990).

Because the record demonstrates Appellant's sheer indifference to the victim's suffering as well as the victim's foreknowledge of her impending death, the HAC

finding was clearly warranted and appropriate in this case. See James v. State, 695 So.2d 1229 (Fla. 1997)(finding HAC proper where, even though victim died quickly, evidence showed she was aware of her impending death).

Finally, this Court has upheld HAC findings where the evidence demonstrated that the defendant's act was "extremely wicked or shockingly evil." For example, in Hargrave v. State, 366 So.2d 1 (Fla. 1978), this Court upheld the trial court's HAC finding, which was based upon the defendant's act of deliberately shooting the victim in the head after he had already rendered him helpless by shooting him twice in the chest. See id. at 5; see also Alford v. State, 307 So.2d 433, 444 (Fla.1975); State v. Dixon, 283 So.2d 1 (Fla. 1983). Similarly, in this case, Appellant rendered Karen Marx helpless, shooting her in the chest, before returning 31 seconds later, and after she pleaded for help, to fire another shot into her abdomen. Thus, Appellant's acts were extremely wicked and shockingly evil, warranting the trial court's HAC finding. Accordingly, the trial court's legal conclusion that this murder was especially heinous, atrocious, or cruel must be affirmed.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING THE EXTREME EMOTIONAL OR MENTAL DISTURBANCE MITIGATOR. (RESTATED).

Appellant argues that the trial court improperly rejected the extreme emotional or mental disturbance mitigator for two reasons. First, he argues that the trial court was obligated to find this mitigator because there was evidence in the record to support it. And second, he argues that the court applied an incorrect standard (insanity) to this mitigator, which led it to reach an incorrect conclusion. Both of Appellant's arguments are without merit. The trial court properly exercised its discretion and determined that the non-statutory mitigation had been established. In addition, the trial court's order specifically referenced the appropriate standard and there is no evidence suggesting that the court ignored its own pronouncement.

It is well established that a trial court's findings in mitigation will not be disturbed absent an abuse of discretion:

> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 518 (1987). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. See Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994), cert. denied, ---U.S.---, 115 S.Ct. 1705, 131 L.Ed.2d 566 (1995). As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.

Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986).

It is clear from the court's order that it expressly evaluated Appellant's proposed mitigation and determined if it was supported by the evidence.

> The Standard to establish that this mitigating factor exists is less than insanity but more than the emotions of an average man, however inflamed. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The mental disturbance must be one which ". . . interferes with but does not obviate the Defendant's knowledge of right and wrong." Duncan v. State, 619 So.2d 279 (Fla. 1993). In this regard, the Court has given lengthy consideration to each of the factors which constitute the underlying factual basis for the Defendant's argument regarding the applicability of this mitigating circumstance. The defense presented the following testimony regarding the Defendant's mental condition at the time of the crime, in order to establish the existence of this mitigating factor.
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> During the Spencer hearing, special standby counsel Ken Malnick, presented perpetuated testimony of Dr. Harley Stock, a Forensic Psychologist who also testified at trial that he met with the Defendant on four occasions; once in 1994, 1995, 1996 and 1997, for a total of twelve hours. Dr. Stock testified that the Defendant suffered from a delusional disorder of a persecutory type and concluded that this mental illness caused him to be in an "emotional state that affected his behavior" at the time of the crime. In support of this opinion, Dr. Stock relied upon the conversation that transpired between the Defendant and the taxi driver, Michael Viscount, who transported him to the deposition on the day of the murders. Though the trial testimony of said taxi driver differed slightly from the statement he previously gave to the police, the testimony was consistent with regard to the fact that Defendant did at some point discuss that someone had been following him and trying to kill him. The taxi driver was also consistent in his statement that during the ride to the deposition, the Defendant appeared calm and not nervous, and behaved, in fact, like a "perfect gentleman." The Court is not reasonably convinced that

these facts establish that the Defendant was operating under an *extreme* mental or emotional disturbance which obviated the Defendant's knowledge of right and wrong.

Dr. Stock did testify at trial that the Defendant did not know that his actions were wrong because Defendant was under the delusional impression that he was being threatened. However it is significant to note that Dr. Stock also testified that in his expert opinion, the Defendant was "embellishing" or lying when he claimed that there was armed, masked assailant whose sudden entrance sparked the chain of events that led to the murders. Thus, although Dr. Stock opined that the Defendant did not know the wrongfulness of his action because he believe he was defending himself, he also acknowledged that one such significant threat was in fact no a delusion, <u>but rather a fabrication intended to bolster the Defendant's claim that his actions were not wrong because they were acts of self-defense.</u>

Additionally, the Defense presented the testimony of psychiatrist Thomas Macaluso, who interviewed the Defendant once in 1995, and once in 1997, for a total of four and one half hours. Dr. Macaluso diagnosed the Defendant as suffering from paranoid delusional disorder, and specifically found that the Defendant did not suffer from schizophrenic illness. Dr. Macaluso testified that he reviewed material dating back several years which indicated that the Defendant had lived for some time with the on and off belief that people were attempting to harm of kill him. He also testified that on the day of the murder the Defendant knew what he was doing and although he felt legally justified, knew what he was doing was morally wrong.

Defense witness, Dr. Patsy Ceros-Livingston, A Forensic Psychologist, examined the Defendant on four (4) occasions; three (3) times in 1995, and once in 1997, for a total of approximately six (6) hours. She was the only expert to diagnose the Defendant with paranoid schizophrenia. Based upon the testimony of the three other experts who unanimously refuted the suggestion that the Defendant suffered from any form of schizophrenic illness,

the Court is unconvinced by this particular expert's diagnosis. However, Dr. Ceros-Livingston also Administered the Minnesota Multiphasic Personalty Inventory - II test, (MMPI-II) and concluded both from this test and interviews, that the Defendant was an extremely manipulative person, and consistent with the other experts, found that he suffered from paranoid delusions.

State witness Dr. John Spencer, a clinical forensic psychologist, testified that he interviewed the defendant once in 1995, and once in 1997, for a total of six hours. Dr. Spencer stated that the Defendant did not suffer from a mental illness, found the Defendant to be quite manipulative, and conceded that the Defendant did appear to suffer from some paranoid personality disorder. Dr. Spencer opined however that this disorder did not obviate the Defendant's ability to know right from wrong, or interfere with his ability to appreciate the consequences of his actions. Dr. Spencer also stated that as part of his analysis he listened to the audio tape of the deposition, and found the Defendant's demeanor just moments prior to the commission of the crime to be inconsistent with that of someone operating under an extreme mental or emotional disturbance. Specifically, the Court notes that the Defendant testified that he had, just minutes before the deposition, been physically attacked and verbally threatened by Clarence Rudolph in the rest room. However his comportment during the course of the deposition was not that of someone who had just been beaten up by his deponent. On the contrary, the audio tape reveals that the Defendant appears to be self assured and quite unruffled.

The four (4) experts differed somewhat in their diagnoses of Defendant's mental condition, but all agreed that the Defendant suffered from some form of paranoid delusional disorder. Additionally, all of the experts concurred that the Defendant is highly intelligent and two (2) specifically found him to be highly manipulative. All agreed that despite the Defendant's paranoia, he knew what he was doing at the time of the crime. Dr. Spencer state that he Defendant knew that what he did was wrong, while Dr.

> Macaluso testified that the Defendant knew what he was doing was morally wrong, but not legally wrong because he believed that he acted justifiably in self defense. Similarly, Dr. Ceros-Livingston and Stock stated that the Defendant did not know that his actions were wrong because he believed them to be justifiable acts of self defense. Yet, Dr. Stock, a defense witness, testified that one major threat on the day of the crime, the threat which the Defendant himself claimed prompted him to begin firing his weapon, was fabricated by the Defendant in order to bolster his claim of self defense. Finally, the Defendant himself testified that he knew that what he did was morally wrong. The evidence also reflected the fact that during the hours leading up to the crime, Defendant appeared to be quite composed. The audio tape of the deposition itself revealed Defendant's demeanor to be deliberate, authoritative, and calm.
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> The Court is not reasonably convinced that either the totality of the facts, or any expert or non-expert opinion, support a finding of this statutory mitigating circumstance. Although the expert testimony indicated that the Defendant does in fact suffer from some paranoid delusional disorder, none of the testimony has established to this Court that at the time the Defendant himself testified that he knew when he committed the crime, that it was morally wrong. The evidence regarding the Defendant's activities and demeanor during the course of the day that the crimes were committed, ranging from his taxi ride to the Broward Sheriff's office and subsequent taxi ride to the deposition, to the composed and deliberate manner in which he conducted the deposition, demonstrate nothing less than an individual enacting a deliberate plan of action absent any trace of extreme mental or emotional disturbance. The Court finds that it has not been established by the greater weight of the evidence that the Defendant was under the influence of an extreme mental or emotional disturbance at the time he committed the crime and that this statutory mitigating circumstance does not exist.

(R 3193-3197).

Despite the trial court's detailed findings and rationale, Appellant essentially argues that he is entitled to reversal *per se* because the doctors in general agreed that he suffers from some type of mental disorder. Reversal, however, is not warranted simply because an appellant's conclusion or interpretation of the testimony differs from the trial court's conclusion. Sireci v. State, 587 So.2d 450 (Fla.1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890 (Fla.1984), cert. denied, 471 U.S. 1111 (1985). What is more, the trial court did not ignore the evidence before it as Appellant contends. Despite its hesitation to find as a statutory mitigator that Appellant was operating under an extreme emotional or mental disturbance, the trial court did find that Appellant committed this crime while he was under the influence of a mental or emotional disturbance. As a non-statutory mitigating circumstance, the trial court accorded it some weight. (R 3203).

This Court has upheld trial court findings in situations similar to those present here. For example, in James v. State, 695 So.2d 1229 (Fla. 1997), this Court upheld the trial court's rejection of the substantial impairment statutory mitigator, despite the fact that there was some evidence that the defendant ingested LSD on the night in question. Instead, the trial court concluded that "the defendant was under the influence of moderate mental or emotional disturbance" and accorded this non-statutory mitigating circumstance "significant weight." Notably, this Court pointed out that the trial court did not abuse its discretion in light of the weight assigned, which was on an

equal par with the "substantial impairment" statutory mental mitigator found to be present. Id. at 1237. Likewise, in Whitfield v. State, 706 So.2d 1 (Fla. 1997), the defendant asserted that the trial judge erroneously concluded that the expert's unrebutted testimony was not credible and that, at a minimum, it should have been considered as nonstatutory mitigation. This Court disagreed with the defendant's assertion, refusing to find error. "As reflected by the judge's findings, the conclusion he reached was that the evidence provided was primarily hearsay evidence that, even if true, would not rise to the level of statutory mitigation. Moreover, the judge specifically stated that he did find and apply this evidence as nonstatutory mitigation." Id. at 6; see also Knight v. State, 721 So.2d 287 (Fla. 1998)(holding that even uncontroverted expert testimony does not require extreme mental or emotional disturbance finding, especially when it is hard to reconcile finding with other evidence in case).

Although there was evidence presented at trial that Appellant may have suffered some mental disturbance, after culling the record, the court found that Appellant's activities and demeanor during the course of the day that the crimes were committed did not demonstrate that Appellant suffered from an extreme emotional or mental disturbance. There is no reason to disturb the court's rejection of this statutory mitigator especially where it accorded the mental mitigation some weight as a nonstatutory mitigator. The court resolved the conflicts in the evidence against

Appellant, finding the state's expert witnesses more credible and compelling, particularly in light of the other supporting evidence of Appellant's demeanor on the day of the murders. Thus, this Court must affirm Appellant's death sentences for the murder of Dr. Clarence Rudolph and Karen Starr Marx.

ISSUE III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO FIND THAT APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW UNDER SECTION 921.141(6)(f) WAS SUBSTANTIALLY IMPAIRED. (RESTATED).

Here Appellant contends that the trial court improperly rejected the substantial impairment mitigator for several reasons. Specifically, Appellant asserts 1) that the trial court improperly rejected the statutory mental mitigators based on an incorrect standard; 2) that Appellant presented sufficient evidence to support this mitigator; 3) that this mitigator's existence was established by the greater weight of the evidence; 4) that the trial court's findings rejecting this mitigator were not supported by substantial evidence; 5) that the trial court could not rely on Dr. Spencer's guilt phase testimony on the issue of insanity to reject the mental mitigator; and 6) that the factual contradictions in the sentencing order render it deficient. (AB 79). These arguments

are without merit. Although the trial court was presented with some conflicting evidence, it nevertheless appropriately reviewed the totality of the circumstances and properly resolved conflicts in the expert testimony in reaching its conclusion. And a review of the record not only reveals that the trial court's findings are supported by competent substantial evidence, but also that the trial court utilized the appropriate standard in rejecting the statutory mental mitigators.

In rejecting both statutory mental mitigators, the trial court prefaced its entire discussion by addressing the correct standard of review as discussed in State v. Dixon, 283 So.2d 1 (Fla. 1973). (R 3193). Now under the guise of attacking the court's use of an incorrect standard, Appellant is essentially asking this Court to re-weigh the trial court's consideration of these mitigators, despite repeated holdings that such a re-weighing is improper. See Sochor v. State, 619 So.2d 285, 292 (Fla. 1993); Windom v. State, 656 So.2d 432 (1995), rehearing denied, certiorari denied 516 U.S. 1012 (holding that in capital sentencing proceeding, relative weight given to each mitigating factor is within judgment of sentencing court).

In refusing to find that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the trial court made the following detailed finding:

> During the guilt phase of the trial, counsel for the Defendant presented evidence intended to support a finding that the Defendant was insane at the time of the crime. In

presenting this evidence, the Defense relied upon the experts Dr. Macaluso, Dr. Ceros-Livingston and Dr. Stock, who all opined that the Defendant was insane at the time of the offense.

Doctor Stock testified that the defendant knew what he was doing, and understood the consequences of his actions. His conclusion that the defendant was insane at the time he committed the crime was based upon his opinion that the defendant did not know his actions were wrong, because of his belief that he acted purely in self-defense. However, as previously noted, the Court finds that this opinion that the defendant did not know the wrongful nature of his actions because he truly believed that he was acting in self-defense is diminished by doctors finding that the defendant fabricated information in order to make his claim of self-defense more credible.

Defense witness Dr. Thomas Macaluso, testified that the defendant knew what he was doing, and knew that what he was doing was morally wrong. Dr. Macaluso also opined similar to Dr. Stock, that because the defendant claimed that he acts in self-defense, he felt that his actions were justified and thus not legally wrong. Based upon the opinion that the defendant did not know his actions were legally wrong, Dr. Macaluso found that the defendant was insane at the time of the crime.

Dr. Ceros-Livingston testified that the defendant knew what he was doing at the time of the crime, but in terms of the law, did not know the difference between right and wrong, and was insane at the time of the crime because he did not understand the consequences of his actions.

State witness Dr. John Spencer, stated that the defendant did not suffer from a mental illness, and was sane at the time of the crime. He testified that although the defendant does have paranoid personality characteristics, this did not obviate the defendant's ability to know right from wrong, nor did it interfere with his ability to appreciate the consequences of his actions.

During the Spencer hearing, the defendant presented the testimony of Doctor Howard Ollick, a forensic

toxicologist, in order to establish that the Defendant was intoxicated at the time of the crime, and therefore unable to appreciate the criminality of his action. This Court notes that Dr. Ollick's credentials are now significantly in dispute. The Court, however, in taking Dr. Ollick's testimony regarding the effects of medications to be true, and in careful consideration of the totality of the circumstances, finds that the facts as presented to the Court clearly do not support said testimony. Dr. Ollick testified that the Defendant supplied him with a list of medications which Defendant alleged that he took on the morning of, and just moments prior to the crime. Dr. Ollick testified to the effects of these medications, and explained how the Defendant would have appeared had he taken them. The testimony revealed however that the description of Defendant *should* have appeared under the influence of these drugs was completely inconsistent with the actual demeanor and behavior of the Defendant as evidence by the audio tape. It must be additionally noted that at the time of the Defendant's arrest, no medications were found on Defendant's person, in his brief case or nylon bag present at the crime scene, in his car, or in his home. Other than the Defendant's own testimony, the record is totally devoid of evidence establishing that the Defendant had ingested any of these or any drugs, prior to committing the offense. This Court specially finds that any expert forensic toxicologist presenting testimony on the effect of the drugs mentioned in this case would result in the same conclusion based on the total lack of substantiation in the record other than the testimony of the Defendant himself.

This Court is not reasonably convinced that either the totality of the facts, or any expert or non-expert opinion support a finding of this statutory mitigating circumstance. Although the evidence reveals that the Defendant does in fact have a history of paranoid delusional disorder, it is apparent that for quite some time prior to the commission of the crime, Defendant was able to exist with this disorder and still conform his conduct to the requirements of the law. Furthermore, the evidence indicates that the Defendant knew what he was doing at the time of the crime, and knew that it

> was morally wrong. Having considered each of the factors presented in support of this circumstance, the Court finds that it has not been established by the greater weight of the evidence that the capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, was substantially impaired at the time he committed the crime, and that his statutory mitigating circumstance does not exist.

(R 3197-3200). To reiterate, a trial court's findings in mitigation will not be disturbed absent an abuse of discretion. Preston v. State, 607 So.2d 404 (Fla. 1992), cert. denied, 507 U.S. 999(1987). And as long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986).

In Provenzano, this Court rejected the defendant's similar contention that the trial court abused its discretion in failing to find that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. There, of the five psychiatrists who testified, three stated that the defendant knew right from wrong on the day of the shootout. In addition, the defendant admitted on cross-examination that he knew it was a crime to carry concealed weapons. What is more, the defendant's actions on the day of the shootout supported a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired. The fact that he hid the weapons indicated that he knew it was unlawful, and only minutes before the shootout, the defendant put change

in the parking meter so he would not get a ticket. Furthermore, instead of allowing his knapsack to be searched, he removed his knapsack from his car, to prevent discovery of the fact that he illegally possessed weapons. Id. at 1184.

Similarly, in the instant case, three out of four doctors testified that Appellant knew right from wrong. And although Dr. Stock testified that Appellant did not know right from wrong, he based his belief on the fact that Appellant insisted he was acting in self-defense. (T 1759). But on cross-examination, Stock testified that Appellant knew what he was doing, knew that he had a gun and knew what the gun did. (T 1767-1768). In addition, Appellant admitted that he knew right from wrong and specifically indicated that he knew what he did was morally wrong. (T 2353). In fact, on the day of the shooting, Appellant testified that even when Dr. Rudolph allegedly attacked him in the bathroom, prior to the deposition, he was not able to shoot him because it "was a tremendous pain in myself to shoot a man." (T 2215). What is more, Appellant's actions that day supported a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired-he hid his gun in his briefcase and during the deposition itself, whenever Dr. Rudolph refused to answer a question, Appellant certified the question to be later addressed by a trial judge. Moreover, the trial court did not have to accept Appellant's self-serving statements regarding his motives or his claims that he had ingested various prescription drugs. See Pardo v. State, 563 So.2d 77, 80 (Fla. 1990)("As proof [of Pardo's ability to appreciate the

criminality of his conduct or that he was seriously impaired] the trial judge was supposed to have focused on Pardo's testimony that he did not consider drug dealers people and that killing them was justified. However, there was no testimony that Pardo's ability to conform his conduct was impaired or that he did not know that killing these victims was wrong. The court did not have to accept Pardo's self-serving statements regarding his motives.")

*In Chandler v. State, 702 So.2d 186 (Fla.1997), this Court reiterated the approved procedure by which trial courts must address such proffered evidence:

> The sentencing judge must expressly evaluate in his or her sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence.

Id. at 200 (quoting Ferrell v. State, 653 So.2d 367, 371 (Fla.1995)). Generally, if a trial court conducts the proper inquiry[1], it is within its power to determine whether mitigating circumstances have been established by a preponderance of the evidence. Foster v. State, 679 So.2d 747, 755 (Fla.1996). With respect to expert psychological

[1] See Walker v. State, 707 So.2d at 319 (directing trial courts to conduct "a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty").

evaluations of a defendant's mental health, "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Id. at 755; see also Walls, 641 So.2d at 390-91 (reasoning that opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking").

In this case the trial judge spent several pages evaluating Appellant's proffered mitigators and resolved the conflicts in the evidence regarding the statutory mental mitigators against Appellant, specifically finding the state's expert witnesses more credible and compelling. As a result of its thoughtful and comprehensive analysis, the court found that the statutory mental mitigators had not been established. Because it properly considered and weighed all of the evidence presented, the state submits that there is no error in the court's rejection of Appellant's proffered statutory mental mitigators. See Foster v. State, 679 So.2d 747, 755 (Fla. 1996); accord Gudinas v. State, 693 So.2d 953, 967 (Fla.)(affirming trial court's rejection of statutory mental mitigator where court concluded expert's opinion was "too heavily based upon unsupported facts"),cert. denied, 118 S.Ct. 345 (1997). Accordingly, this Court must affirm Appellant's sentence of death for both the murder of Dr. Clarence Rudolph and for Karen Starr Marx.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO FIND THAT APPELLANT HAD NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY. (RESTATED)

Appellant argues that the trial court improperly rejected his lack of criminal history as a statutory mitigator. In its order, the trial court rejected this mitigator based upon the fact that Appellant had committed prior violent criminal activity in that he was charged with the attempted murder of his wife and that he used a firearm in the commission of a felony. (R 3201). Although the court acknowledged that the jury ultimately found that the state had not proved beyond a reasonable doubt that Appellant attempted to kill his former wife, it felt that conviction was not necessary to support rejection of this mitigator. Apparently, the court focused upon the violent nature of Appellant's prior activity, rather than focusing upon the number, or lack thereof, of convictions.

If this Court finds that the court improperly refused to find this mitigator on this basis, the state submits that in culling the record this Court will find evidence that Appellant was an extremely violent person who admitted to committing significant prior criminal activities. During his direct examination, Appellant admitted that he fired his gun at a group of people. "I opened, eventually opened the glove compartment, I lowered the glass, the window glass and they were about maybe 15, 20 feet away and

I shot in the air." (T 1891). Apparently, these people ran, but Appellant admitted that he tried to shoot again. "I get, make another shot in there and they disappeared." (T 1891). Appellant also admitted that he carried his gun with him everywhere, including church. (T 1898). This admitted criminal activity was unfortunately a foreshadowing of things to come, revealing an obvious pattern of and propensity for violence, as well as a blatant disregard for the sanctity of human life[2]. In light of his admissions, the validity of Appellant's claimed lack of criminal history is extinguished, particularly where Appellant's actions were aimed at the same persons (Dr. Rudolph and AARP representatives) he subsequently murdered. See Warlick v. State, 722 N.E.2d 809 (Ind. 2000)(holding that defendant's lack of significant criminal history was not a mitigating factor, where he was convicted of murder same woman against whom he had committed misdemeanors). Thus, the state contends that the trial court's rejection of this mitigator was appropriate under the circumstances. See Caso v. State, 524 So.2d 422 (Fla. 1988).

In Washington v. State, 362 So.2d 658 (Fla. 1978), this Court upheld the trial court's rejection of the lack of significant prior criminal history, even though the defendant had no convictions in his past. There, the record revealed and the trial court recognized, that the defendant had carried on a course of burglaries and had stolen

[2] The policy behind this mitigator is to show that a criminal defendant's conduct for which he is on trial is an aberration. However, a review of the entire record in the instant case reveals that Appellant's actions cannot be considered aberrational.

property for a significant period of time. In addition, the defendant confessed that he had committed a series of burglaries throughout Dade County and sold the stolen merchandise to two of his victims. On appeal, the defendant argued that convictions were required to negate the statutory mitigator under section 921.141(6)(a), but this Court dismissed his argument and affirmed the trial court's rejection of the mitigator. Here, Appellant makes the identical argument that a conviction is required in order to reject this statutory mitigator. But the state submits that Appellant's own admission of his criminal conduct was sufficient to negate the lack of significant prior criminal history mitigator. And the trial court's rejection of this mitigating circumstance was therefore supported by the record.

Nevertheless, should this Court disagree with the state's contention that the trial court's rejection was right for the wrong reasons, the state submits that any error was harmless[3], in view of the two particularly weighty/strong aggravating circumstances-HAC and contemporaneous capital felony as discussed in Issues I and VI of this brief. See Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993)(finding "prior violent felony" constituted "weighty aggravating factor"). For example, in Miller v. State, the

[3] Both the United States Supreme Court and this Court have repeatedly conducted harmless error analyses in death cases. See, e.g., Hitchcock v. Dugger, 481 U.S. 393, 399 (1987); Bottoson v. State, 674 So.2d 621 (Fla.1996); Shere v. State, 742 So.2d 215, 224 (Fla. 1999).

trial court refused to find the appellant's proposed mitigator that he suffered from long term alcohol and substance abuse, despite uncontested evidence to the contrary. Although this Court found that the trial court abused its discretion in rejecting the proposed mitigation, given the weighty aggravating factors present, this Court found any error to be harmless. Id.; see also Pietri v. State, 644 So.2d 1347, 1354-55 (Fla. 1994)(applying harmless error analysis to trial court's erroneous inclusion of aggravating factor). As a result, this Court should affirm Appellant's sentences of death for the first degree murders of Karen Starr Marx and Dr. Clarence Rudolph.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REJECTED APPELLANT'S AGE AS A MITIGATOR. (RESTATED)

Appellant argues that the trial court erred in refusing to consider his age, 68, as a mitigating circumstance, particularly because of his mental disease. In essence, he urges that his mental illness is a characteristic, which when linked with his age, required the trial court to not only find this mitigator, but also to accord it significant weight. The state disagrees with this assessment. The fact that Appellant is advanced in years and claims that he suffers from a mental disorder does not require consideration of age as a mitigator.

There is no *per se* rule that pinpoints a particular age as an automatic factor in mitigation. In fact, this Court has observed that "age is simply a fact, every murderer has one." Echols v. State, 484 So.2d 568, 575 (Fla.1985), cert. denied, 479 U.S. 871 (1986). "How a defendant's age is viewed may differ from case to case." Mungin v. State, 689 So.2d 1026, 1031 (Fla. 1995). The propriety of a finding of this mitigator depends upon the evidence adduced at trial and at sentencing. See id. at 1031. But this Court has held that chronological age alone generally does not warrant a special instruction. "If age is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime, such as immaturity or senility." Mahn v. State, 714 So.2d 391, 400 (Fla. 1998),(citing Echols v. State, 484 So.2d 568, 575 (Fla. 1985)).

Specifically, this Court has held that age as a mitigating circumstance usually applies to those youthful in age because of society's responsibility for overseeing the welfare of the young. But "[s]ince society also has the responsibility of protecting those suffering from the infirmities of aging, see In re Byrne, 402 So.2d 383 (Fla.1981), appeal dismissed, 455 U.S. 1009 (1982), this mitigating circumstance may also be applied to older persons." Agan v. State, 445 So.2d 326, 328 (Fla. 1983). In cases where an individual is older, there are certain factors, which may be applicable and warrant special consideration. Among these factors are physical and mental deterioration (i.e. senility, dementia). Contrary to Appellant's assertions, however, the

state submits that Appellant's mental illness is not the type of special circumstance, which when linked with his age, warrants a finding that this mitigator exists. In other words, because Appellant's alleged mental disorder did not result from the aging process, nor did not it affect his maturity level, it was a wholly separate matter. Appellant's alleged mental disorder cannot serve to elevate or qualify Appellant's age as a mitigating circumstance, nor should he be allowed to cloak the age mitigator in the garment of a mental mitigator.

That being said, the trial court in this case rejected Appellant's claim that his age of 68 could serve as a mitigator, finding that there was no reliable evidence tending to link Appellant's chronological age to some other relevant characteristic of the Appellant or the crime.

> Age is a mitigating circumstance when it is relevant to the Defendant's mental and emotional maturity and his ability to take responsibility for his own actions. Eutzy v. State, 458 So. 2d 755 (Fla. 1984). Age by itself is insufficient to be a mitigating factor unless linked with some characteristic of the Defendant or the crime. If age is to be accorded weight as a mitigating circumstance, it should tend to establish either the Defendant's immaturity at the time of the crime, or Defendant's senility. Echols v. State, 484 So.2d 569 (Fla. 1985).
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> The Defendant was born on May 27, 1926, and on the exact date of the crime, had just turned sixty-eight (68) years of age. The evidence indicates that at the time of the crime, the Defendant was far from senile, and appeared to be in fact quite active. Defendant lived by himself in a residence for independent senior citizens, and there was no evidence that he had experienced difficulty living alone or otherwise

> caring for himself. The Defendant had recently been employed by the AARP as a computer instructor, was in the process of representing himself in a law suit, and was conducting his own deposition. The evidence is clear that the Defendant did not appear to be suffering from any significant infirmities of age that "substantially impaired his ability to provide for his own care and protection." In re Byrne, 402 So.2d 383, 385 (Fla. 1981). The Court finds that it has not been established by the greater weight of the evidence that Defendant's age serves as a statutory mitigating circumstance in this case, and does not exist.

(R 3200-3201). The record clearly supports the trial court's rejection of this mitigator. There is nothing with respect to Appellant's age, which would lessen his moral culpability. "Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt. And Appellant's age of 68 was not advanced to the point which required special consideration. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them." Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984); see also Barclay v. State, 343 So.2d 1266 (Fla.1977), cert. denied, 439 U.S. 892 (1978).

The trial court observed that Appellant was not senile, nor was he emotionally immature. In fact, it appears that he had his own apartment, which Dorothy McCleary, Dr. Rudolph's secretary, indicated "looked very nice." (T 1269). Appellant also had a job and was considered a valuable employee. According to Ms. McCleary, Appellant set up the computer system in their office and Dr. Rudolph awarded Appellant

certificates of appreciation for his work. (T 1255). Eventually, Appellant began working in the main office as a computer instructor and he got a raise in salary to the maximum amount. (T 1254-1255). Appellant instructed Ms. McCleary for a long time on the computer after work and she developed a friendship with him. (T 1256-1257). Initially a schedule was determined, where Appellant was instructing two people a day. (T 1257). Apparently Appellant had no problems until Dr. Rudolph made what Appellant thought were unreasonable demands. Ms. McCreary testified that Dr. Rudolph wanted Appellant to have four people a day but there was not enough time. (T 1257). On cross-examination, Ms. McCreary indicated that Dr. Rudolph was often times hard on the staff and made unreasonable requests. (T 1267). Quite simply, it was not Appellant's age or any related characteristic that exacerbated Appellant's ability to function in society requiring consideration as a mitigating circumstance. Rather, it was Appellant's increasing anger and frustration level. The fact is that Appellant knew what he did was morally wrong and his mental instability that he claims did not arise out of the aging process, nor was it exacerbated by it, therefore, there is no link between age and his mental condition. As such, age does not become a mitigator in this situation.

In summary, Appellant had a home and a job teaching others in a very technical and complex area (computer instruction). In addition, he was effectively representing himself, doing everything that would be expected of any competent attorney right up

to the point at which he murder two innocent people. Thus, it is apparent that Appellant's emotional maturity level was not impacted by his age, nor was he senile deserving special consideration. The state also submits that Appellant's argument is more appropriately addressed under the second issue, which discusses whether or not Appellant acted under the influence of extreme emotional or mental distress. Thus, the trial court's rejection of age as a mitigator in this case was not improper. Therefore, this Court must affirm Appellant's death sentences for the murders of Dr. Rudolph and Karen Starr Marx.

ISSUE VI

WHETHER THE DEATH SENTENCE AT BAR IS PROPORTIONATE.(RESTATED)

Here Appellant argues that death is a disproportionate sentence when compared with other cases involving, inter alia extensive mental mitigation[4]. He bases his

[4] Santos v. State, 591 So.2d 160 (Fla. 1991)(death disproportionate in a single aggravator case where unconverted mental mitigation, two statutory mitigating factors); Larkins v. State, 739 So.2d 90 (Fla. 1999)(death disproportionate where defendant had extensive brain impairment); Hawk v. State, 718 So.2d 159 (Fla. 1998)(death disproportionate where 19 year old deaf defendant was brain damaged and mentally ill); Deangelos v. State, 616 So.2d 440 (Fla. 1993)(death disproportionate where single aggravator, significant mental mitigation and there was a history of conflict between the defendant and his victim); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988)(death disproportionate where defendant's extensive brain damage, extreme emotional/mental disturbance, substantially impaired capacity to conform conduct to requirements of the law and low emotional age outweighed aggravators); Robertson v. State, 699 So.2d 1343 (Fla. 1997)(death disproportionate where two aggravating circumstances outweighed by

argument, however, on his contention that the trial court ignored or "underweighted" substantial mitigation. Even assuming that the trial court improperly rejected the no significant prior criminal history mitigator, Appellant's argument fails for several reasons. Most importantly, his argument fails because this Court's function is not to reweigh the mitigation.

In performing proportionality review, this Court's function is to "view each case in light of others to make sure the ultimate punishment is appropriate." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). It should not reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991), cert. denied, 116 L. Ed. 2d 102 (1992); Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). In fact, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So. 2d 466 (Fla. 1984). It is upon that basis that this Court determines whether the defendant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

In summary, the trial court found one aggravating factor raised for Count I for the death of Clarence Rudolph-contemporaneous felony and for Count II, the death of

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substantial mitigation, including history of mental illness, borderline intelligence, low age, impaired capacity at the time of the murder due to drug and alcohol use, abusive and deprived childhood).

Karen Starr Marx, the court found that both of the aggravating factors raised have been proved-contemporaneous felony and HAC. (R 3208). With respect to the mitigators, which were established and weighed, the court made the following findings:

1. The crime for which the Defendant is to be sentenced was committed while he was under the influence of mental or emotional disturbance - some weight. (R 3203).

2. Defendant's employment history - some weight. (R 3204).

3. Defendant had a difficult, unstable childhood - very little weight. (R 3204).

4. Defendant has long standing emotional problems - very little weight. (R 3205).

5. Defendant has a history of mental illness in the family - little weight. (R 3206).

6. Defendant possesses specific good characteristics - little weight. (R 3206).

7. Defendant's contributions to society - some weight. (R 3207).

The evidence in this case established that Appellant arrived armed with a loaded gun to a deposition that he arranged for a civil case, which he instituted against AARP and Clarence Rudolph, individually. When Appellant arrived in the conference room, he attempted to rearrange the seating so that he would be close to Dr. Rudolph. But John Hall, Dr. Rudolph's attorney, also a victim in this case, thwarted Appellant's attempt by refusing to allow his client to sit by Appellant. Thereafter, the deposition proceeded relatively uneventfully, in a typical question and answer format. Toward the

end of the deposition, however, Appellant became angry, pulled out a gun and began systematically shooting the victims in this case. Dr. Rudolph suffered 4 gunshot wounds. One shot was a point blank shot to the back of his head, after he had already been incapacitated. In the course of this shooting spree, Appellant also mercilessly murdered Karen Marx-shooting her four times, including once in the chest and once in the abdomen. Appellant also attempted to murder John Hall. Mr. Hall testified that after he escaped the conference room with a gunshot wound to his abdomen, he hid in another room, with the door locked. Appellant pursued him, forcing the door open. At that point, Hall struggled with Appellant for the gun. Eventually, Hall got the gun away from Appellant.

The audio cassette tape, which captured the terrifying moments during Appellant's shooting rampage, provides gut wrenching insight into the atrocities the victims endured. In listening to this tape, it is obvious that Appellant was becoming increasingly angry with Dr. Rudolph's refusal to answer Appellant's questions. The tension was evident in Appellant's voice. (T 1410). He said he had only one more question and pulled out his gun-the court reporter screamed, "No, No, No, Dr. Mora, No" whereupon Appellant began exacting his revenge. He fired several shots in succession and in listening to the tape, you can hear shell casings drop onto the conference table. In the background people are screaming, but closer to the recorder Karen Marx cries out in a strained voice, "Help me, Help me, Help me." She lets out

a deep groan before you hear the last bang as Appellant fired the final shot into her abdomen.

Despite the relatively quick succession in which Appellant systematically shot his victims, Karen Marx was not the first victim to be shot, nor was she shot only once. According to Patricia Grant, Appellant shot Dr. Rudolph first, then Mr. Hall, then Karen Marx, before he went back and started shooting them again. (T 1411). After escaping the room, Ms. Grant looked back only to see Appellant leaning over the table shooting Karen Marx as she lay on the floor. (T 1413).

To mitigate these senseless murders, the jury received instruction on five statutory mitigators and several nonstatutory mitigating circumstance. (T 3130-3133). In addition to these instructions, during the guilt phase of the trial, defense counsel presented evidence to establish that Appellant had a history of mental illness and that Appellant believed he was morally justified in killing these people because he feared for his own life.

1. The murder of Dr. Clarence Rudolph

With respect to Appellant's death sentence for Count I, when deciding whether Appellant's sentence is proportionate to those of other defendant's under similar circumstances, this Court should compare Appellant's case to those where the court found a single weighty or serious aggravating circumstance and some mitigation.

While it is true that this Court has required there to be little or no mitigation for a case to withstand proportionality review with a single aggravator,[5] this Court has also stressed that it is the weight of the aggravators and mitigators that is of critical importance. See e.g., Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (finding in a single aggravator case that the number of aggravating and mitigating circumstances is not critical but rather the weight given them). Here, although the trial court found only one aggravator-that Appellant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence to a person under section 921.141(5)(b) in aggravation, it found this aggravator "significant and extremely strong." (R 3209). What is more, although the trial court rejected the statutory mitigators, it did find that Appellant established several non-statutory mitigation. To these non-statutory mitigators, however, the court assigned relatively little weight.

This Court has affirmed cases where the sole aggravator was especially weighty, in spite of the existence of some mitigating circumstances. In Ferrell v. State, 680 So.2d 390 (Fla. 1996), the defendant killed his live-in girlfriend and was previously convicted of a second-degree murder. This Court found Ferrell's lone aggravator "weighty." In mitigation, the trial court found that Ferrell "was impaired, was

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[5] See, e.g., Songer, 544 So. 2d at 1011 ("We have in the past affirmed death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation." (citation omitted)

disturbed, was under the influence of alcohol, was a good worker, was a good prisoner, and was remorseful." Id. at 392, n.2. In considering the evidence of mitigation, this Court observed that the trial court assigned little weight to each of these factors. Id. at 391. Ultimately, this Court found the defendant's sentence proportionate, citing to Duncan v. State, 619 So.2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993), King v. State, 436 So.2d 50 (Fla. 1983), cert. denied, 466 U.S. 909 (1984), Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985), and Harvard v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983). Accordingly, in comparison with other death cases, Appellant's sentence is proportionate.

2. The murder of Karen Starr Marx

With respect to Appellant's death sentence for Count II, when deciding whether Appellant's sentence is proportionate to those of other defendant's under similar circumstances, this Court should compare Appellant's case to those where the court found a two weighty or serious aggravating circumstance and some mitigation.

This Court has affirmed cases where there are two or more than aggravators and some mitigating circumstances. See, e.g., Cruse v. State, 588 So.2d 983, 994 (Fla. 1991)(affirming death sentence for shooting death of two victims where aggravators included contemporaneous felony conviction, great risk, CCP and avoid arrest and one statutory mitigator-extreme mental or emotional disturbance was assigned great weight); Provenzano v. State, 497 So.2d 1177 (Fla. 1986)(affirming death sentence

where three aggravators-great risk, avoid arrest, previously convicted of capital felony outweighed single mitigating circumstance-no significant prior criminal history); Heath v. State, 648 So.2d 660 (Fla.1994)(affirming death sentence for shooting death of victim where aggravators included commission during a robbery, and prior murder); King v. State, 436 So.2d 50 (Fla.1983) (affirming death sentence for shooting death of victim where aggravators included HAC and prior ax-slaying of another victim); Harvard v. State, 414 So.2d 1032 (Fla.1982)(affirming death sentence for shooting death of victim where aggravators included HAC and prior shooting of another victim); Davis v. State, 703 So. 2d 1055, 1061-62 (Fla. 1997)(Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty.); Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (finding the death penalty proportional with the existence of two aggravators (commission during a robbery and avoid arrest), two statutory mitigators (age and lack of criminal history), and a number of nonstatutory mitigators); Hayes v. State, 581 So. 2d 121, 126-27 (Fla. 1991) (upholding the death penalty where there were two aggravators (CCP and commission during a robbery), one statutory mitigator (age), and other nonstatutory mitigators); Pope v. State, 679 So.2d 710, 713, 716 (Fla.1996)(holding death penalty proportionate where there were two aggravating factors-the murder was committed for pecuniary gain and defendant had been convicted of a prior violent felony-and where there were two

statutory and three nonstatutory mitigating circumstances); Johnson v. State, 660 So.2d 637, 641, 648 (Fla.1995)(finding defendant's death sentence proportionate where there were three aggravating factors-prior violent felony, commission of murder for financial gain, and heinous, atrocious, or cruel murder-and fifteen mitigating factors).

Clearly, Appellant's mitigation paled in comparison to the aggravation. It simply is not compelling, particularly in light of the tragic and egregious nature of his crimes. Thus, this Court must conclude that the death sentences for both the murder of Dr. Rudolph and Karen Starr Marx is proportionate to other cases where the sentence has been imposed.

ISSUE VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT APPELLANT WAS COMPETENT TO STAND TRIAL. (RESTATED)

Appellant contends that the trial court abused its discretion in determining his competency because the weight of the evidence to the contrary was "irresistible." (AB 94). As further evidence of the trial court's abuse of its discretion, Appellant also asserts that the trial court did not conduct a competency hearing upon each application of incompetency as he insists it should have. Appellant's arguments is without merit.

Under Florida law, where competency has been challenged, "the test is whether a 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 factual understanding of the proceedings against him." Hill v. State, 473 So.2d 1253, 1257 (Fla. 1985) quoting Dusky v. United States, 362 U.S. 402 (1960). It is incumbent upon the trial court, as finder of fact in competency proceedings, to consider all the evidence presented and to render a decision based on that evidence. Carter v. State, 576 So.2d 1291 (Fla.1989), cert. denied, 112 S.Ct. 225 (1991); Ponticelli v. State, 593 So.2d 483 (Fla. 1991). Where there is conflicting expert testimony presented on the issue of competency, it is the trial court's responsibility, as finder of fact in such proceedings, to resolve the disputed factual issue. Fowler v. State, 255 So.2d 513, 514 (Fla. 1971); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980). Absent a showing of abuse of discretion, the decision of the trial court on such matters will be upheld. Carter v. State, 576 So.2d at 1292.

With respect to Appellant's claim that the trial court could not possibly have found him competent to stand trial, the record supports the trial court's ruling. One thing that is very clear throughout the entire record is that Appellant had a keen understanding of the proceedings and the parties' respective roles in the case, a shrewd ability to pinpoint issues and an ability to relate his perspectives to his attorneys as well as to the trial court. He was not shy about protecting his own interests.

After a lengthy competency hearing, the trial court detailed its findings in determining that Appellant was competent to stand trial.

> On March 20, 1997, this Court heard expert testimony from witnesses appointed by the Court to evaluate the Defendant in the above captioned case, with respect to the issue of Defendant's competency to stand trial, pursuant to Rules 3.211(a) and 3.212(a)(b), Florida Rules of Criminal Procedure. Counsel for the Defendant and the State stipulated to the qualifications of the experts, and both parties had opportunity to examine each witness. The Court appointed Drs. Livingston, Garfield, Spencer, and Macaluso, all of whom provided testimony during the Defendant's competency hearing.
>
> In making a finding of competency to stand trial, the Court must determine whether the Defendant possess sufficient present ability to consult with counsel with a reasonable degree of understanding, and a rational, as well as factual understanding of the proceedings against him. Section 916.13(1) Florida Statutes (1997); Dusky v. United States, 80 S.Ct. 789 (1960). The Court maintains broad discretion in making such findings, but in so doing, must also consider all relevant facts and circumstances. Rule 3.211(a)(2), Fla.R.Crim.P. specifies the factors to be evaluated in applying the long standing test for competency, (i. the defendant's capacity to appreciate the charges against him, ii. appreciate the range and nature of possible penalties, iii. understand the adversarial nature of the legal process, iv. disclose pertinent facts to counsel, v. manifest appropriate courtroom behavior, and vi. testify relevantly), and the Court may also include its own observations of the Defendant's demeanor and behavior.
>
> In the present case the Court appointed doctors each met with the Defendant and subsequently advised the Court as to each of the above stated five factors. Testimony revealed that the doctors are in general agreement regarding three out of the five factors.

In Defendant's capacity to understand the charges, the experts concur in that the Defendant's statements regarding the allegations reflect a precise and lucid understanding of the charges he presently faces. Specifically, Dr. Garfield testified that the Defendant's discussion of various legal defenses, and discussion of his preferred defense to the allegations, demonstrates an obvious understanding of the charges. Similarly, Dr. Macaluso testified that Defendant's ability to expound on the nature of charges and what series of events gave rise to them, also exhibits evidence of a rational understanding of the charges.

The testimony seemed also to reflect a general opinion that Defendant manifests a clear understanding of the range and nature of possible penalties in his case Dr. Macaluso testified that during his evaluation, the Defendant discussed what he believed to be the various penalties in his case, including life imprisonment, a death sentence, and commitment to a mental institution. Although Dr. Livingston expressed the opinion that Defendant may not fully appreciate the "real consequences," she did state that the Defendant made statements that exhibited his understanding that his "liberty at least is stake." Dr. Garfield testified that during a discussion with the Defendant regarding his present legal situation, Defendant referred to a possible death sentence by stating that he was "fighting for his life."

The expert testimony was unanimous in regard to the Defendant's comprehension of the adversarial nature of the proceedings. The experts noted that the Defendant differentiates between the adversarial roles of the individuals involved in prosecuting and defending his case. Dr. Garfield also advised the Court that the fact that the Defendant has written and filed various pro se motions reflects the Defendant's recognition of the adversarial nature of the legal proceedings.

The majority of the experts also found that Defendant is able to conduct himself appropriately in the courtroom. Dr. Livingston expressed concerns about Defendant's

"acting out" in the courtroom, however the other witnesses advised the Court that Defendant has shown both in court and during private examinations, that he is capable of manifesting appropriate behavior if he so chooses. The general consensus seemed to be that although the Defendant enjoys vocalizing his opinions, his outbursts are inoffensive, and additionally, that he knows the meaning of appropriate courtroom behavior, and is generally courteous and even charming and witty.

The Court heard conflicting evidence regarding Defendant's ability to disclose pertinent facts to counsel, and to testify relevantly. Dr. Garfield testified that during examination, Defendant had no difficulty whatsoever in relating facts relevant to his case, including his desires, needs and goals regarding his case. Additionally, Dr. Spencer testified that Defendant's discussion of various topics in chronologically correct detail showed that Defendant thus had the capability to relate the details and pertinent facts of his own case in a similarly organized fashion.

Dr. Livingston, however, testified that if Defendant was delusional, his ability to relay facts relevant to his case may be hindered. Dr. Macaluso additionally testified that Defendant's refusal to accept the advice of counsel and proceed under an insanity defense was evidence that the Defendant could not relate or communicate rationally with his attorney, and was thus incompetent. Florida case law however clearly holds that a defendant's disregard of his attorney's advice does not by itself even raise an initial question of incompetency, warranting a competency hearing. Agan v. State, 503 So.2d 1254, 1256 (Fla. 1987). Thus, Defendant in the case at hand cannot be deemed to be incompetent to stand trial merely because he disagrees with counsel on how to proceed with the case. Furthermore, a defendant's sanity at the time of the offense is not the proper standard by which competency must be evaluated. Muhammad v. State, 494 So.2d 969, 972 (Fla. 1986). Additionally, the Supreme Court of Florida found no abuse of discretion where the court found a defendant competent

to stand trial in the face of conflicting expert opinion regarding Defendant's delusional and schizophrenic disorders. Pressly v. State, 261 So.2d 522, 525 (Fla. 1972)(defendant competent to stand trial where one expert testified that delusions and schizophrenia would impair ability to communicate rationally with counsel, and another expert testified that defendant understood the nature of the charges and possible penalties and thus could assist counsel).

Furthermore, in the face of conflicting evidence from experts in regard to the issue of competency, it is within the sound discretion of the court, as the trier of fact to resolve the dispute. Hunter v. State, 660 So.2d 244, 248 (Fla. 1995). In so doing, the court must take into consideration all of the facts and circumstances relevant to the case, and may include the court's own observations. This Court has had numerous opportunities to observe the Defendant since 1996. The Defendant has consistently demonstrated, both through his courtroom behavior and his pro se motions, a shrewd understanding of the charges and possible penalties he faces, and a vigilant desire and ability to participate in the adversarial system and communicate his arguments and opinions. This Court notes that Defendant has displayed the ability to closely follow courtroom proceedings, takes lengthy notes, and often confers with his attorney during proceedings. Defendant occasionally interjects his arguments or opinions vocally during proceedings, however his outbursts though impudent, are not disruptive or overwhelmingly contrary to proper courtroom behavior.

In regard to Defendant's cooperation with the Court ordered competency examinations, testimony revealed Defendant occasionally refused to fully cooperate with the doctors, by refusing to speak without the presence of counsel. All of the witnesses ultimately had the opportunity to evaluate the Defendant, and testimony showed that such refusals did not hinder the experts in their evaluation of the Defendant. Furthermore, the Supreme Court of Florida has held that a Defendant's refusal to cooperate with

> competency examinations will not preclude a finding of competency.

(R 881-886). This thorough analysis and detailed finding is supported by the record. Although Dr. Ceros-Livingston opined that Appellant was not competent to stand trial, she admitted on cross examination that Appellant knew what he was charged with and that he understood that his liberty was at stake. (T 41, 42-43). She also admitted that Appellant understood the adversary nature of the proceedings. In fact, she acknowledged that he had represented himself in several lawsuits. (T 43). The clear implication being that Appellant understood the concept of opposing sides in litigation. She also acknowledged that Appellant knew all of the parties. (T 45). He understood that there was a judge, a prosecutor and that he has a lawyer who represented his interests. (T 44, 45). In addition, she indicated that Appellant could disclose to his attorney facts relevant to the proceedings. (T 45). Although the doctor was loathe to admit that Appellant could manifest the appropriate courtroom behavior, which seemed to be her sticking point on Appellant's competency, she acknowledged that she reviewed files of Appellant's 1984 attempted murder trial for the shooting of his wife. During that trial, which ended with his acquittal, Appellant was able to sit through it to conclusion. And significantly she acknowledged that during that time Appellant's symptoms were "pretty consistent" with the symptoms that he exhibited in the instant case. (T 47, 52). At that trial as in his current case, Appellant had many disputes with

his lawyers about how to proceed and insisted that he wanted to proceed in self-defense, which he did successfully. (T 47-48). Dr. Livingston further testified that Appellant was able to relate what he read about the shooting: "Dr. Mora reads all transcripts. Dr. Mora reads all reports, as you know, Counselor, and he follows all of this very carefully. He is very vigilant." (T 50). Finally, Dr. Livingston admitted that Appellant was very manipulative. (T 50).

Unlike Dr. Livingston, Dr. Trudy Block-Garfield testified that her best conclusion was that Appellant was competent based upon the criteria. And she agreed with Dr. Livingston's concession that Appellant was manipulative. (T 69). In fact, in her report she indicated that "[Appellant] knows the system extremely well and knows what the results of his actions are likely to be." (T 68). She testified that she believed the only reason Appellant cooperated with her was because he was hoping to get a new attorney. (T 69).

The third expert to testify, Dr. Spencer, began his testimony by telling the court about an observation he made while Appellant was in court during an earlier hearing. Apparently there was a colloquy between the trial court and Appellant where Appellant made a joke: the judge said, "is there anything else that you would like?" Appellant smiled and said, "Yes, I would like to go home." (T 76). Dr. Spencer thought this interaction was significant because Appellant's response was appropriate and "consistent with the mind that is functioning well, categories are intact, appreciates the

irony of that statement, appreciates the humor of that statement, and he reacted to it. And, in fact, I think the judge appreciated the remark." (T 76-77). Dr. Spencer explained that someone who is mentally ill or schizophrenic has disorganized thinking and "the first thing that goes is the ability to appreciate or generate humor because categories break down." (T 75). In his opinion, Dr. Spencer felt that there was no question that Appellant appreciated the charges and that he appreciated the possible penalties. (T 77). Moreover, in his opinion, Dr. Spencer believed that not only did Appellant understand the adversary nature of the legal process, but he was also very interested in it. Appellant discussed the possibility of representing himself as opposed to having a court-appointed attorney because he felt he knew the issues well and understood the case the state was trying to make against him. (T 78). Appellant could disclose pertinent facts to his attorney and could testify relevantly. (T 78). Dr. Spencer also observed that Appellant's courtroom demeanor during the instant proceeding was appropriate. "I think the best example right now in terms of manifesting appropriate courtroom behavior is what you see right now. He's taking notes. He's making observations. He's listening. He is aware of what is going on, and he is writing down things that he thinks are relevant." (T 79). Dr. Spencer characterized Appellant as a charming individual with exquisite social skills. (T 79). And he summed up his direct examination by pointing out that on the two occasions that he has seen Appellant, Appellant has behaved appropriately and "very to the point." (T 83).

Finally, the court heard from Dr. Macaluso. He explained that Appellant's ability to cooperate with counsel (to choose a defense strategy) and to testify without incriminating himself were two areas that he failed. In his opinion, because Appellant failed in these respects, he believed that Appellant was incompetent to stand trial. (T 122). Dr. Macaluso believed that Appellant was mentally ill, but acknowledged that clinical mental illness does not necessarily mean that an individual is incompetent. (T 122-123). And on cross-examination, he admitted that his concerns regarding Appellant's perceived persecution actually go toward his mental illness as opposed to the competency issue. (T 125). Dr. Macaluso was concerned about what Appellant would actually testify to when he took the stand in his own defense. (T 129). But when pressed, he conceded that "if he's determined to be competent, I think I said before, then it might be an actual advantage to a defense strategy, particularly one of insanity, to let him go up there and tell the story he told me because it sounds crazy." (T 130).

The above testimony taken as a whole reveals relatively little contradiction about Appellant's competency to stand trial. By all accounts Appellant is an intelligent and capable individual who clearly understood the gravity of the proceedings. Nevertheless, even in the face of contradictory testimony, there was competent substantial evidence that Appellant passed the test for competency. And even if there is a conflict in expert testimony, a finding of incompetence is not required. For example, in Watts v. State, 593 So.2d 198 (Fla. 1992), this Court rejected the

defendant's challenge to the trial court's competency ruling, specifically pointing out that where there is a conflict in expert testimony, the responsibility to resolve the dispute rests with the trial court as fact finder. Id. at 202; see also Castro v. State, 744 So.2d 986, 989 (Fla. 1999)("although there was conflicting testimony regarding Castro's competency, it was the function of the trial court to resolve this dispute.") It is also important to point out that Appellant was not being treated for any mental illness. He was not being medicated, and his appearance and representations did not indicate that he was incompetent. See e.g. Kent v. State, 702 So.2d 265, 267 (Fla. 5th DCA 1997).

With respect to Appellant's claim that the trial court failed to conduct a new competency hearing because a bona fide doubt as to Appellant's competency arose, the record refutes this allegation as well. As the trial court pointed before the penalty phase proceedings began, "it doesn't appear that there is anything in here that's earth shattering that the doctors have already examined haven't evaluated and/or haven't been made aware of." (T 2897). In other words, the trial court was not presented with anything new, which would have required a new hearing. What is more, Appellant has failed to support his contention by pointing to any evidence of changed circumstances. "A presumption of competence attaches from a previous determination of competency to stand trial." Durocher v. Singletary, 623 So.2d 482, 484 (Fla..), cert. dismissed, 114 S.Ct. 23 (1993). Once a defendant is declared competent, the trial court is required to

revisit the competency issue only if bona fide doubt is raised as to a defendant's mental capacity. Hunter v. State, 660 So.2d 244, 248 (Fla. 1995). Here, upon each application of incompetency, the state argued and the court agreed, that Appellant had not presented anything new to cause the court to change its decision. (T 2892-2903, 3039). In another motion, also prior to the beginning of the penalty phase, Appellant allowed defense counsel, as stand-by counsel, to argue another motion to declare Appellant incompetent. (T 3038-3039). At that point, the defense presented expert testimony in an effort to convince the court that Appellant was incompetent to proceed with second phase of his trial, based upon developments arising over the weekend. These developments, however, only addressed the doctor's perceived opinion that Appellant did not understand the idea of mitigating evidence. (T 3044). But on cross-examination, Dr. Stock admitted that Appellant understood the nature of the charges, understood he faced a possible death sentence, knew all of the parties' respective roles in the proceedings, and that he knows his attorney's job is to assist him. (T 3046-3047). Dr. Stock admitted that defendant's don't always agree with their attorneys and that this is "clearly not indicative of mental illness." (T 3047). But he insisted that in this situation, Appellant could not reasonably and rationally act as his own defense counsel. (T 3047). The doctor indicated that if Appellant elected not to present any further evidence of mental mitigation, in his opinion, it was not a reasonable decision. (T 3049). And only begrudgingly acknowledged that Appellant could have very rational

reasons for not wanting to drag his family members into his case. (T 3948). In its argument, the state pointed out that Appellant met the criteria for competency and that contrary to the doctor's contentions, Appellant obviously understood the significance of the aggravators and the mitigators as was evidenced during an earlier discussion of the applicable aggravators and mitigators. In fact, Appellant convinced the trial court to strike the CCP aggravator. (T 3056). Ultimately, the court held that "[r]eality is, based upon the testimony of Dr. Stock that the defendant does meet the criteria for being competent, he's not incompetent." (T 3058).

Accordingly, the state submits that there has been no showing that the trial court abused its discretion in finding Appellant competent. Therefore, this Court must affirm the trial court's ruling in this regard.

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED APPELLANT TO ADDRESS THE JURY IN CLOSING ARGUMENT. (RESTATED)

Appellant argues that the trial court should not have allowed him to proceed as co-counsel and to address the jury during closing argument because Appellant only equivocally expressed a desire to represent himself. As Appellant admits, the issue here does not involve an unequivocal request to act as counsel under Faretta. But

Appellant has incorrectly interpreted the trial court's action as "thrusting" Appellant into a situation where he is forced to represent himself. Curiously, as early as June 23, 1995 defense counsel for Appellant filed a "Motion to Grant Defendant the Concluding Argument to the Jury." (R 406-410). A similar motion was filed on Appellant's behalf on April 1, 1997. (R 894-898). In addition, prior to closing arguments, Appellant informed the court on two occasions that he wanted to make a closing argument. (2557, 2689). Thus, this is clearly not a case where Appellant was suddenly "thrust" into representing himself as Appellant urges on appeal. And Appellant cannot now complain of error, where he himself invited the alleged error. "Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal." Goodwin v. State, 751 So.2d 537, 552 (Fla. 1999); see also Norton v. State, 709 So.2d 87, 94 (Fla. 1997); Terry v. State, 668 So.2d 954, 962 (Fla.1996); Czubak v. State, 570 So.2d 925, 928 (Fla.1990); Pope v. State, 441 So.2d 1073, 1076 (Fla.1983).

Notwithstanding the fact that Appellant invited the alleged error, contrary to his argument, the issue here focuses upon the trial court's decision, which was within its discretion, to allow Appellant to address the jury in light of Appellant's assertion that his attorney's closing argument was deficient.

At all times relevant to this issue, it is clear that Appellant was acting only as co-counsel. It is equally clear that Appellant's guilt phase attorney had finished his closing

argument. But the trial court allowed Appellant to address the jury over the state's objection. Before closing arguments began, defense counsel told the court that Appellant wanted to address the jury. (T 2555). And when asked by the court, Appellant said, "I want him to do my closing and I wanted to do my own closing too after that." (T 2555). After again warning Appellant of the dangers/pitfalls of addressing the jury, the court held off on answering Appellant's request. (T 2557).

Subsequently, defense counsel addressed the jury at length-one hour at 45 minutes. (T 2622-2689, 2704). Afterward, Appellant again informed the court that he wanted to address the jury. (T 2689). The state objected indicating that Appellant had only been appointed the night before to act as co-counsel "for the sake of the jury instructions." (T 2690). The court corrected the state, pointing out that Appellant was appointed the morning before to allow Appellant to address the court about a number of objections. In response, the state observed that "[t]o allow him to address the jury at this time would be like allowing him to give testimony again without cross-examination." (T 2690). Thereafter the following colloquy occurred:

> COURT: What is it that you have prepared that you want to say that would be proper for purposes of closing?
>
> APPELLANT: Well, I'm going to talk about the evidence submitted here, Your Honor.
>
> COURT: Your attorney has already done that.
>
> APPELLANT: No, he didn't cover all of the evidence.

COURT: What are you going to talk about that hasn't been covered, because you cannot talk about matters that have already been addressed.

* * *

APPELLANT: Number one, I want to talk about the existence of another gun in the room, that's number one. And I want to talk about what Dr. Spencer talked about the Internal Revenue Service, also about my wife, and that's mostly what I'm going to say.

COURT: And how long do you think you're going to take to do that?

APPELLANT: I don't know. And also, if possible about some of the evidence that was submitted here and the State Attorney have been trying to deceive the jury. And most importantly, the documents that were stolen from my home and from this scene that never surfaced here in this room, that never returned here, no? Exculpatory evidence that never show up here. And I have here three pieces of paper that I feel -- because remember, the State produce something about 1,000 pages last Tuesday night around nine o'clock. My attorney brought them to me at the jail, and I'm trying to fish through 1,000 pages of documents. It's not an easy task.

COURT: So what do you think you're going to tell this jury? You can't tell them anything about matters that haven't been brought out.

APPELLANT: Your Honor, I'm going to talk about the evidence that was submitted here.

COURT: You're talking about three pieces of paper. What three pieces of paper?

COURT: Tell me what exhibit number it is, please.

APPELLANT: It hasn't been introduced into evidence.

COURT: Then you cannot talk about it.

APPELLANT: I understand that. Then I'm going to talk about Exhibit 78. I'm going to talk about the shots in the door and I'm going to talk about the trail of blood.

COURT: You understand that you cannot give personal opinions, you cannot criticize the State Attorney

for what you believe to be their conspiratorial nature against you. You understand that you can't do that?

APPELLANT: Your Honor, but the State Attorney have been doing his personal opinions here.

COURT: No, he's giving his final summation based upon facts and his interpretation. You cannot accuse any other lawyer in this case or anyone else for that matter other than what may be part of the evidence in terms of what you think is happening.

APPELLANT: Yes, sir.

COURT: You cannot say that these charges are conspiratorial.

APPELLANT: Oh, of course not.

COURT: No, I hear you when you say of course not, but I also know you and that you are very prone to do that.

APPELLANT: Your Honor, I think you have a --

COURT: I know, I give you more credit than you're entitled to have, right?

APPELLANT: Whatever you say.

COURT: Now, I've taken you through a number of Faretta inquiries to determine whether or not you are competent to make the decision of knowingly and intelligently deciding to represent yourself in some respect.

APPELLANT: Just as you say you're trying to induce me to represent myself before, to tell me what you want to do or not, just that you say, yes, you can represent yourself. You told me that I practice law better that 95 percent of the lawyers practicing in your court. That's in the record. You are going to say that you deny that now?

COURT: I'm not taking away your right to represent yourself or to act as co-counsel. I have certainly found that you are able to make that decision.

APPELLANT: Thank you, Your Honor, I appreciate it.

COURT: As to whether or not you are exercising that right wisely or not is a decision which only you can make.

APPELLANT: All right. With all due respect, I think that I am entitled. I will try. I don't know how much time

can I go. I didn't have time to writ specifically. Everything is in my mind. If I can remember correctly, I don't know. I will try. Like I said, it's important to me for my case. I do believe that something, somebody had to object as to the speculation. No one did.

COURT: I'm going to tell you as I told you may times before that I don't thing you should get up, I don't think you should represent yourself. In my experience, even lawyers who are parties to matters that are going to be tried of this nature usually have lawyers that represent them.

There is an old saying, and I've said it to you many times during the course of your trial and prior, that he who represents himself has a fool for a client, and you're aware of that?

APPELLANT: Thank you, Your Honor.

COURT: The choice is yours. But I'm going to tell you that if I allow you to proceed and address this jury, that you are going to be held to the same rules of procedure, the same rules of conduct, the same rules of evidence that is in place. Your are held to the same requirement that a lawyer who has been trained to practice law and to give closing arguments. I'm going to tell the jury you're going to be acting as co-counsel for purposes of this proceeding, and I can tell you over and over again that I think you are making a mistake. I think that during the course of your closing you might have a tendency to become confused, frustrated.

I'm not going to interrupt this trial. It is not a license for you to disrupt the trial. You cannot on your own cause a mistrial. And if for any reason you fail to conduct yourself with the due respect for the laws and the rules governing this trial, or if you should become disruptive, it's possible that the permission which I will grant you to address this jury will be revoked and that you will no longer be able to address the jury. Do you understand what I'm telling you?

APPELLANT: Yes, Your Honor, I appreciate it.

(T 2690-2696). Finally, when asked if he had spoken to his attorneys about addressing the jury, Appellant said he had and he acknowledged that they advised against it. (T

2696-2697). Ultimately, the court explained to the jury that Appellant was exercising "his right to act as co-counsel for purposes of this closing and is going to address with the closing at this time." (T 2706).

It is well established that Faretta only applies when the defendant makes a clear and unequivocal request for self-representation. See Bell v. State, 699 So.2d 674, 676 (Fla.1997), cert. denied, 522 U.S. 1123 (1998). In Bell, the defendant asked the trial court to be allowed to assist his attorney because of complaints he had about counsel. The supreme court concluded that Bell never asked to represent himself, and therefore, the trial court did not err by not conducting a full Faretta hearing. Id. at 677; see also Baker v. State, 745 So.2d 1035, 1036 (Fla. 2 DCA 1999). It is clear that a defendant has no constitutional right to combine self-representation and the assistance of counsel. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Thus, there is no constitutional right for an accused represented by counsel to participate in his own defense as co-counsel. And whether such a request is granted or denied is of no constitutional moment. Granting this hybrid representation arrangement does not suddenly entitle an accused to constitutional protections to which he was not entitled in the first instance.

Inasmuch as this issue does not involve a Faretta inquiry, the question turns upon the trial court's discretion. Whether and to what extent a defendant who is represented by counsel is allowed to address the jury during his trial is a matter committed to the

sound discretion of the trial court. See State v. Tait, 387 So.2d 338, 339 (Fla.1980); see also McKaskle v. Wiggins, 465 U.S. 168 (1984); U.S. v. Mills, 704 F.2d 1553 (11th Cir.1983), cert. denied, 467 U.S. 1243 (1984). In an attempt to bolster his argument that the trial court abused this discretion, however, Appellant tries to resurrect his competency issue by pointing out that he suffered from a mental disorder. He further insists that "the court virtually invited [him] to be cocounsel" and the court knew that Appellant would not refuse this invitation. (AB 96). Implicit in this argument is the claim that the trial court set Appellant up to fail. From this record, however, it is clear that this is not the case. As early as 1995 Appellant planned on making his closing argument to the jury. (R 406-410, 894-898, T 2557, T 2689). The court did not invite Appellant to do anything. To the contrary, it appears that the trial court went to great lengths to insure Appellant not only received the effective assistance of counsel, but also that Appellant's right to determine the direction of his own defense was not violated.

Also contrary to Appellant's assertion, the trial court repeatedly found that Appellant was competent to stand trial, that he was highly intelligent and a very capable advocate. These findings were based not only on testimony from psychological professionals, but also upon the court's own observations. In sum, Appellant made a cogent argument to the jury and was allowed a second opportunity to address the jury, without being subject to cross examination. In the end, he thanked the jury for listening

to him and asked them to forgive him. (T 2735). Therefore, not only has Appellant failed to demonstrate that the trial court abused its discretion, but he has also failed to demonstrate that he was prejudiced by the trial court's granting of his request. Accordingly, this Court must affirm Appellant's conviction and sentence.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN REMOVING PENALTY PHASE COUNSEL. (RESTATED)

Appellant insists that he never made an unequivocal request for counsel and that the trial court failed to determine whether Appellant knowingly and voluntarily waived his right to counsel. Although Appellant has couched this issue in terms of a Faretta inquiry, the state submits that the real issues goes to whether Appellant knowingly and intelligently waived presentation of mitigation and the steps he took to insure that his family was not contacted.

1. Appellant's waiver of mitigation.

In Koon v. Dugger, 619 So.2d 246 (Fla. 1993), this Court established the procedure to be followed when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase. First, counsel must inform the court on the record of the defendant's decision. Second, counsel must indicate whether, based on his investigation, he reasonably believes there to be

mitigating evidence that could be presented and what that evidence would be. Third, the trial court should require the defendant to confirm on the record that his attorney has discussed these matters with him, and that in spite of counsel's recommendation to the contrary, he wishes to waive presentation of penalty phase evidence. Id. at 250. Each of these requirements has been met in this case.

Prior to the actual penalty phase presentation, defense counsel again moved the court to declare Appellant incompetent, primarily because Appellant insisted on calling several witnesses that defense counsel believed to be irrelevant for penalty purposes. (T 2902). Defense counsel also moved for funds so that the investigator could travel to Spain to interview witnesses for possible mitigation. (T 2891). Thereafter, Appellant explained that he had no interest in being declared incompetent and that there were two issues in mitigation, which his attorney had not pursued.

> My standard in this Court as co-counsel is to address two particular issues. One is the mitigator, the moral justification, and another one is intoxication.
>
> I think I have the right to present evidence to the Court about these two issues that have been totally forgotten by the counselor. And instead of doing this, they are chasing a group of geese to Spain looking for something that don't exist. That is totally ridiculous, Your Honor.
>
> From the very beginning, Mr. Malnick came to the jail after I was found to be guilty of these issues. The main purpose of his visit to jail have been again trying to get my family. Let me address the Court about my family, this issue.

(T 2906-2907). Before addressing the family issue, Appellant explained the areas, which he felt were important to address and the experts that he wanted to hire-a toxicologist and a handwriting expert. (T 2908). Appellant explained that the toxicologist would address whether or not Appellant was intoxicated because of the medication he took and because of the gases to which he was exposed. (T 2908). Appellant further explained why he wished to call various witnesses, with particular emphasis on moral justification. It is clear from the record that Appellant was angry with his attorneys for not hiring either of these experts, but Appellant insisted that he did not want to fire penalty phase counsel because, "I need him. He is a good man." (T 2922).

After much discussion, the court reached the defense motion to authorize the investigator to travel to Spain to interview witnesses. Defense counsel explained to the court that he believed childhood and early experiences or manifestations of mental illness "can be very material, very significant realms." (T 2944). Counsel continued explaining that his client was uncooperative with respect to any family information.

> Dr. Mora from the beginning I ask all clients, do you have relatives, can I speak to relatives, never gave me names or any concrete leads other than he had a brother and a sister.
>
> In the eight boxes of material that we got, we received some old addresses. Dr. Mora became very upset ultimately when we were able to find them through Spanish investigators and basically forbade me from speaking to them.

Otherwise, and Judge, because of the history of this case, he has fired two attorneys, and I did not want to disrupt that relationship. I respected his wishes and did not speak to them.

We know where the witnesses are. We have phone numbers. I know the obvious question is, well, why didn't you call them and why are you waiting, because basically I was threatened that I would be fired and I didn't think it was in his best interest. Without knowing the later scenario who he wanted me to call, I did not think it was in his best interest for me to bow out of the case, so I respected his wishes and did not call these witnesses.

Now, I haven't been able to verify where they are, and I believe in contrast to the theories that Dr. Mora has advocated that it is very relevant to speak to them.

I found a case on point out of Broward County where a defendant said don't talk to my family, I don't want you to speak to my family. This is Blanco v. Singletary, a Federal case. And later on the Court found counsel to be ineffective because they didn't investigate it.

And I realize in Koon--I realize in Koon that the defendant has a right to waive mitigation.

COURT: Once he knows what the mitigation is.

DEFENSE COUNSEL: Right. But the problem is, Judge, we don't know what the mitigation is.

Court: You should have had your investigator call them.

DEFENSE COUNSEL: Judge, the problem that I had is we would be fired. We were explicitly told we would be fired if we called them, I'm going to waive the jury and I'm going to ask for the death penalty.

COURT: It's his right.

* * *

DEFENSE COUNSEL: I apologize. I appreciate the Court coming back specifically for this purpose. I saw outside the Court has no docket.

The problem, Judge, that we have, and we will gladly contact these people, but if there is relevant information, Mr.

Devin's funds, basically my understanding from what he has told me, he has reached the limit.

I don't have the authority to send him to Spain. I have to go to the Court to ask for that to happen. Now maybe phone calls -- maybe we'll receive information that is potentially damaging. That's why I didn't list these people as witnesses. Maybe they will have nothing but negative things to say, but maybe they will have very relevant things to say. And unless it's reasonably investigated, we're going to be revisiting this issue I'm afraid years from now.

And the problem is, Judge, they are approximately 81 and 75. His sister is in a nursing home. They have to be spoken to.

Now, initially the doctor said he was going to fire me if I did it. I showed him the motion yesterday as I've showed him all motions, and I don't know what his position is going to be. I know he's going to vehemently object to this. He's going to say that he doesn't want me to do this, which I realize he can do if it's investigated. He clearly -- and I have to abide by the decision, although I can make a recommendation. I don't know what it is, and that's the problem.

Now, I'll gladly make a call today if I can get somebody to speak Spanish to call these people. It's probably not the best investigative technique to call out of the blue and say your relative has been convicted of first degree murder. You know, it would probably be advisable to have somebody go in person, but I realize, Judge, that time is of the essence.

This dilemma that I've had. This is why I'm probably the fourth attorney on this case is that Dr. Mora is extremely opinionated and is extremely bright and he has his own theories, but I just think I'm ineffective not to pursue this.

I've got witnesses going back to 1974, Judge. This is man (sic) who has lived in Europe, who has lived in Latin America, who has lived in Africa, who has lived in North America. I can go back to '74.

If I could get other witnesses to cover this time frame, then I would forego these people, but he's basically a ghost from 1926 to 1974. And presumably these people who are older than him, and which I think is significant, and I anticipate him giving a whole chronology of his life to the jury because Dr. Mora has definitely indicated he wants to address this jury, they could in some fashion possibly corroborate or show that some of what he's saying is delusional. I just don't know.

That's the difficulty. I'm not -- I needed direction from the Court. As I put in here, basically I had a dilemma. I called the Florida Bar, the ethics hotline. I've spoken to appellate attorneys. Everybody says that once you get the information, you have to investigate it.

APPELLANT: Your Honor, again, that is what I call chasing goose or geese. I don't know which is proper. Let me explain in the beginning what happened. Number one, these are not my biological brother and sister.

Number two, I didn't grow up with them. I grew up with them in the 80's when I moved to another country. I was in France and I was in Germany. When I was 7, there were 10 of us.

Then I went to the school, it was another province of Spain while away from me. They don't know me. They don't know what I'm doing. They never know or they never knew my activities. And during the second war, they had no idea. Then I moved to America. I had to move to America because Franco was after me as you know.

After they learned about my activities in the American intelligence of the second war, I have no choice, I have to leave Spain. They were going to execute me for doing this.

So I didn't contact them. I never even went back to Spain until '78 after Franco died. I couldn't set foot in Spain. So from 19-- they can tell about zero to 6 years old, then nothing else.

So the second aspect of this besides they don't have any information that is relevant to this case, is, Your Honor, that my sister is paralyzed having a stroke. She barely can't speak. She doesn't remember anything. It could be a death

sentence for her. I'm not going to have another murder or another death because of my conscience for this to save my life. It's ridiculous.

If necessary I say I would waive th jury and I ask you to give me the death penalty before.

COURT: Well, that still would require us to go through a penalty proceeding.

APPELLANT: Hugh?

COURT: That would still require us to go through aggravators and mitigators.

APPELLANT: Why? If I ask you to give me the death penalty, you don't have to go over everything. I have the right to.

COURT: There are still certain requirements that the law puts us through.

APPELLANT: But there is mitigating circumstances whether or not, I can't waive the mitigating circumstances at all, it's my right. It's my constitutional right to do this.

So if your decision is that they can't contact my family, I would ask you now to waive all of my rights and sentence me to death right here and waive all of the mitigating circumstances. I told him I don't know how many times.

They want me to push me to this. I don't know why. The information they have is totally irrelevant. These people can die if they know that I'm here. They are old people. They are very simple people. They're not like you and me are used to interface with many many persons in the world. They are not. They go to church and they go home. They don't know anything about. They so simple people. They cannot even absorb why I'm here. So it is totally ridiculous. It is inconsistent. They have no information whatsoever to provide here other than to cry, and I don't want people of that age to cry or to say anything else. And that is the most important.

Again, the Court feel that they have to go to Spain and contact my family. I will ask the Court at this particular moment to waive all of the mitigating circumstances and

sentence me to death, and let's forget about the whole thing and get it over with.

I'm not going to be responsible for someone's death, especially these people that they love me or they used to love me, and because they try to save my life. That is totally inconsistent. I'm not going to do this, Your Honor.

COURT: Let me tell you what the law is so that you have a clear understanding that it's just not the easy thing to say to this Court, I waive mitigation, I instruct my lawyer to present no mitigation, sentence me to death. That's not the way it works in the state of Florida.

If you have a determination in your mind that you want to waive mitigation, if you have a determination in your mind that you want to instruct your attorney not to present any mitigating evidence or any argument on your behalf, the law certainly gives you the right to do that.

However, the law still requires this Court to undertake a complete search of the entire record to determine what mitigators exist, what aggravators exist, and to make a determination as to whether or not life is appropriate or death is appropriate. You just can't ask for death and get it. It's not that easy.

APPELLANT: Your Honor, in that case, that particular mitigating circumstance that my family can be waived by me, right?

COURT: Providing that your attorney has had the opportunity to investigate to determine whether or not it exists.

APPELLANT: But that is totally out of the -- it's ridiculous, Your Honor.

COURT: I don't make the rules, that's what I keep trying to tell you.

APPELLANT: Let me say something. After he investigated the circumstances and I can't waive it, but after he investigated the circumstances, I cannot waive it.

COURT: Yes, you can.

APPELLANT: That's what I'm saying, I waive it now.

COURT: He hasn't investigated it yet.

APPELLANT: Hugh?

COURT: He hasn't had a chance to investigate it yet.

DEFENSE COUNSEL: In deference to these extreme feelings, Judge.

APPELLANT: That's what I am saying to you. I thing that you misunderstood me. The issue here is, well appear to be, that after he investigate this issue, I can't waive the presentation of the mitigating circumstances--

COURT: Yes, you can.

APPELLANT: -- but before he investigate it, I cannot waive it.

COURT: That's basically what the Supreme Court has said, you're correct.

APPELLANT: But this is totally ridiculous because I can't waive before, why you have to waste money and time investigating something that cannot be used no matter what?

COURT: Because Dr. Mora, death is different. The Supreme Court wants to make sure that every right you have constitutionally and statutorily is strictly adhered to so that you have the benefit of due process and equal protection.

APPELLANT: Your Honor, again, the issue is whether or not after he investigate the issue, I can't waive it, if I can't waive it at the end of the investigation. I think I can waive the beginning. It's the exactly the same altogether. We save money, we same time to the court. We save a lot of problems. We save the problem with my family have nothing to do with what I did. Whether I did right or wrong is not an issue.

COURT: Do you have the case?

DEFENSE COUNSEL: Yes, Judge, I do.

DEFENDANT: I don't know what you're giving to the judge.

COURT: This is a copy of Blanco versus Singletary, which is cited at 943 Fed 2d 1477, 11th Circuit, 1991.

DEFENSE COUNSEL: I think the relevant part is about 1500, Judge.

APPELLANT: Your Honor, with all due respect, I was handed this last night. I have no chance to see and to

> rebut this going to the law library. So I am here totally in defense.
>
> DEFENSE COUNSEL: Judge, as soon as that motion was done -- first of all, I anticipated a problem on Wednesday. As soon as it was done, Mr. Devin and I presented it. We faxed it to the Court. He got it probably within an hour of your J.A. getting it, so I provided it as quick as I can.
>
> APPELLANT: Again, the evidence or in this case, Koon versus Dugger or whatever it's called, the Court should then require the defendant and what it was after the counsel in front of the Court, he appeared to be the Court should then require the defendant or me to confirm on the record that his counsel has discussed this matter with him and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. We are talking about the particular evidence.

(T 2944-2960). Thereafter, the trial court directed counsel to contact Appellant's relatives and to report these findings. If following this report Appellant still refused to have them testify, then the court would not allow them to testify. In response, Appellant asked the court to strike every mitigator and to sentence him to death in an effort to "void the strategy of the attorney" because he did not want to present testimony from anyone, particularly from his family. (T 2960-2961). The court again repeated the procedures that must be undertaken in these circumstances and explained that sentencing could not take place until complete compliance with these procedures occurred. With that, Appellant told the court that his attorney was a traitor and that he wanted to fire him. "I don't want him to present the case to the Court whatsoever. I want him out of the case right now.

Either he follow my instructions or he's out of the case." (T 2966). Appellant also told the court that he wanted to proceed with his own strategy, right or wrong, and that his attorney tried to "force the Court to contact my family for this." (T 2967).

After a fifteen minute break, the court asked Appellant if he still wished to fire his attorney and if so why. (T 2969). Appellant said he wanted to discharge counsel for several reasons-all of which focused upon his attorney's refusal to follow Appellant's strategy. (T 2970). Appellant was particularly upset by his attorney's insistence that Appellant's family be contacted. (T 2971). The court, understanding Appellant's allegations as being those of incompetence, inquired of defense counsel as to the extent of his investigation. (T 2973).

Defense counsel specifically explained to the court what investigations he undertook and the witnesses with whom he had spoken. (T 2974-2975). He also pointed out that he felt Appellant fired him because he wanted to contact Appellant's family. "I believe and I'll always believe that there is relevant mitigating evidence and of such value that he's willing to fire me not to get that. Because candidly that's why I got fired. You've never heard any complaints about me until the issue of going to talk to the brother and sister were raised." (T 2976). Counsel further explained where and why his strategy differed from Appellant's strategy with respect to the 19 witnesses Appellant insisted on calling. He feared that these witnesses would "bury him. I think

they'll put him in the electric chair." (T 2977). Based upon counsel's representations, the court "found no reasonable cause to believe that counsel is rendering ineffective representation." (T 2978). The court also indicated that Appellant was not entitled to additional counsel under the circumstances.

> COURT: * * * Inasmuch as Mr. Malnik is court appointed for purposes of the penalty phase and the defendant has had prior court-appointed counsel, he is not by law entitled to additional counsel.
>
> As I have addressed with you on multiple occasions before, Dr. Mora, your discharge of Mr. Malnik effectively is an indication on your behalf that you wish to exercise your right to self-representation under the United States and Florida Constitution, is that correct?
>
> APPELLANT: Yes, sir.
>
> COURT: Do you understand that by exercising your right of self-representation as available to you under the United States and Florida Constitution, that you will effectively be acting as your own attorney in this case?
>
> APPELLANT: I have no choice, Your Honor.
>
> COURT: Well, you always have a choice. You do not have to discharge Mr. Malnik.
>
> APPELLANT: No, I don't have a choice. The issue of my family is predominantly much more important than my life. So if that has come to this, I have to surrender my life and my family settle whatever it can.
>
> You don't want to understand this. You don't want to do something about that, and I stop them from contacting them and giving news that I am on the border of getting the death penalty, and because of this I should render my life to you to do whatever you want.
>
> COURT: The mere fact that you don't want your attorneys to do something or you don't want your co-counsel to do something doesn't negate his responsibility under the law to determine whether mitigating evidence exists which ultimately could be presented to a fact finder

and might be very beneficial in a jury's determination as to whether or not there is sufficient mitigating factors that might weigh any aggravating factors found to exist in the record in determining whether life is an appropriate sentence versus death. Those are your issues. Those are your choices.

APPELLANT: Your Honor, I already waived this. I already specifically waived this releasing the responsibility and the Court's responsibility and that is relying on my shoulders only. I have the right to refuse to do this. Not because I don't want --

COURT: I'm sorry, you have a right to refuse what?

APPELLANT: No, not to refuse, I'm sorry.

DEFENSE COUNSEL: You mean waive.

APPELLANT: To waive that, Your Honor. To waive that they contact my family, to give my family that I'm facing the death penalty, that I am in jail for something that I did. This will kill them and I don't want to have the responsibility. My life is not that worth for me.

So, this is most important for me to preserve their life than mine. So that's one of the reasons. So if I have to defend myself, I will defend myself.

COURT: Well, based upon the Court's reading of Blanco versus Singletary, Koon versus Dugger, the American Bar Association rules and regulations with regard to penalty phase litigation, a lawyer has an absolute obligation and responsibility to determine all mitigation that exists for the benefit of the defendant irrespective of whether the defendant wishes it or not.

It's after that investigation has been fully completed when a lawyer can place upon the record those matters in mitigation that are available, that the defendant then has the opportunity to waive the presentation of that evidence.

The law at this juncture in the state of Florida seems clear that in advance of a determination of what mitigation factors a particular witness might have, is an insufficient basis to waive until that information can be ascertained.

So while I hear you and I'm listening very carefully to what you're saying, what I'm trying to tell you is that the

law in the state of Florida doesn't presently permit you the opportunity to do that. They can contact your family, come in and say they have nothing to offer, or that they're going to say of this which is beneficial to the defendant, and then you have the option to make an intelligent decision to tell them, no, I don't want them.

But to my understanding right now, and I have to go based upon my understanding of the law, if I permit you the opportunity to tell them not to investigate beyond this, then potentially that would have serious repercussions down the road with regard to any appellate rights you might have.

APPELLANT: Your Honor, with all due respect, Koon versus Dugger says different than you're trying to represent here. If I am reading correctly, the counsel's motion he reasonably believed that there may be mitigating evidence that could be presented, and the Court should interrogate me or the defendant whether or not I waive this. It's my right to do this, not his right, not the Court's right, my right, sir.

COURT: You're absolutely correct.

APPELLANT: So what I'm saying is, I waive this and should not contact my family. If this stand, I can't work with him, even with everything. If this stand, I have to defend myself and dismiss him. I have no choice.

COURT: Let me tell you what Koon says. There are four steps that have to be addressed. I'm going to tell you what the Supreme Court said and you don't have to agree with it.

First, the attorney has to inform the Court of a defendant's decision to waive a mitigator or mitigation. That's clearly been done.

Secondly, the attorney has to indicate whether mitigating evidence exists. Now, so far all Mr. Malnik can tell me is that --

APPELLANT: But he reasonably believes, it says counsel must indicate he doesn't believe, does exist or not exist, what he believe or doesn't believe.

COURT: I'll tell you what. When you sit on the Florida Supreme Court or you sit on the circuit bench, you can interpret the law as anyway that you wish.

* * *

Now, Mr. Malnik has indicated that he has found two individuals that may be available to supply mitigating evidence.

Thirdly, the attorney has to indicate what that mitigation evidence is. And thereafter the Court is required to have the defendant confirm that they do not wish or he does not wish in this case to have the evidence submitted.

Now, it's questionable. It's definite in my mind that one of the criteria cannot presently be met, and it's questionable as to whether or not another one has been established.

All Mr. Malnik can tell me is that he found two siblings in Spain, but without the opportunity to investigate and speak with these individuals, he is totally unable to address this Court as to whether or not there is any mitigating evidence that exists as a result of that, and what it might be if it does exist. If it doesn't exist at all, then this is all a moot exercise. But he's not going to know that until such time as somebody talks to him. That's my understanding of what Koon versus Dugger says.

You're certainly entitled to have a different opinion. The reality is that this is my understanding, this is my ruling. I am not going to permit you to waive a right which I believe in my own mind is premature and appropriate.

Now, if based upon that ruling you're hell bent on firing your lawyer, that's your choice, your right, and you can do that. I have found that your lawyer is providing you effective assistance of counsel in the preparation and investigation of this penalty phase, and if you chose to fire him, as I've indicated to you before when you have tried to fire your lawyers, I will not replace him. I have no obligation to replace him. He is court appointed. He is not the first court appointed lawyer and you will do this on your own.

> I've already taken you through numerous Faretta inquiries. I took you through one last week. I have reminded you again and I will continue to remind you that you should not be representing yourself in any respect in this penalty phase because you are not a trained lawyer in death penalty litigation which is probably the most complex area of law being litigated in the United States today.
>
> * * *
>
> But I have found that you are very well equipped, very intelligent and very able to make a decision as to whether or not you wish to waive and accept the responsibility of being your own attorney.

(T 2979-2987). Despite the court's repeated explanation and attempt to satisfy him, Appellant insisted that he did not want his family to be contacted. "I cannot permit going and to bring the family the shame that I represent." (T 2988). When the court told Appellant it was his choice, Appellant said that he was ill equipped to represent himself and asked that another attorney be appointed to represent him. (T 2989). At that point, the court treated Appellant's vacillation as an equivocal request to represent himself and refused to allow counsel to withdraw. (T 2989). But Appellant persisted and reiterated his desire to protect his family and thereby fire his attorney in order to prohibit any investigation. (T 2990). The court decided that counsel would stay on as standby counsel, available to assist Appellant. (T 2990-2991). And as soon as Appellant realized that counsel could not contact his family, but would still be able to advise him, Appellant said, "All right, let's go." (T 2991).

Although at first it appeared that Appellant was finally satisfied with the arrangement, the dispute did not end. In fact, Appellant continued to bully the court in an effort to place blame on the trial court, saying that this situation was not acceptable, but "it's the only way I can do it. Don't ask me if it's acceptable because you know my position. My position is to protect my family. My position is to avoid the harassment and the agony they are going to have and the shame they're going to have." (T 2991). Once again, the court asked if Appellant understood that by firing counsel he was effectively telling the court that he wanted to represent himself. (T 2991). Despite Appellant's actions to the contrary, he insisted that he was not asking to represent himself. At that point the court said it would not discharge counsel in light of Appellant's statements. (T 2991). Appellant continued arguing, but the court interrupted him. "If you're not going to state unequivocally that you want to be your own lawyer, he's your lawyer, and you'll be co-counsel with him as you've been." (T 2994). Appellant said, that he could not "venture in this phase of the case by myself." (T 2994). To which the court replied, "Then you couldn't be co-counsel, should you?" Appellant told the court that he had to do this to protect his family and said, "I will make that decision." (T 2994). Once Appellant made his decision to fire his attorney as lead counsel, which he knew full well constituted an unequivocal request to act as counsel, the court attempted to summarize the situation to this point in the proceedings.

> COURT: I think the record has been quite clearly made with regard to the determination of the defendant to protect his family as indicated, that if there is any contact as a result of the locating of his brother and sister in Spain, that he does not want his attorney any longer as his lawyer, that he has effectively indicated.
>
> If you believe, Mr. Malnik, that that is a requirement or responsibility as a lawyer licensed to practice law in the state of Florida, and your obligation in death penalty litigation to do, then he has made an unequivocal request to have you discharged as his primary counsel, and I will accept that.
>
> However, we are still going to proceed on Tuesday. The participation, the defendant has had more than ample opportunity to prepare, and he's been co-counsel during the entirety of this matter since at least before closings in the guilty phase, and it's subject to the same rules and regulations. However, I am going to appoint you as standby counsel.
>
> I'm also going to ask that the investigator who has been hired by the defense continue to assume that responsibility on behalf of Dr. Mora, to subpoena whatever individuals that he fees are necessary, to talk to any of those that he feels needs to be talked to , and we start 1:30 on Tuesday.

(T 2994-2998).

If anything, this tortured record demonstrates Appellant's unwavering desire to waive mitigation. So strong was his intent to preclude any contact with his family that Appellant resorted to firing his attorney and asking the court to impose the death penalty to prevent involving his elderly and sickly siblings. Furthermore, the record reflects that defense counsel informed the court of Appellant's refusal to cooperate with the investigation and with counsel in general if counsel contacted Appellant's family.

And as soon as the trial court realized precisely what Appellant was trying to accomplish, the court explained the requirements set forth in Koon v. Dugger, 619 So.2d 246 (Fla. 1993). It is clear that both the court and defense counsel were concerned with Appellant's knowing waiver of the evidence. It appears that their concerns emanated from their belief that until they knew precisely what Appellant's siblings had to say, Appellant's waiver would not be knowing. Their concerns were unfounded, however, because Appellant knew exactly what his European relatives had to say and therefore he knew what he was waiving. In fact, his statements that these relatives did not know him and had very little contact with him were supported by the subsequent testimony offered during the Spencer hearing and by the trial court's findings. In its order, the court acknowledged that Appellant's European relatives had relatively little to offer. "This Court finds that while these collective statements appear to relate tangentially to a very early period in the Defendant's life, the majority of these individuals did not maintain any semblance of contact with the Defendant during any recent period of his lifetime, in fact, during the last fifty (50) years. Some of the individuals in fact based their opinions upon impressions formed about the Defendant when they themselves were mere toddlers." (R 3205). nothing keenly pointed out that they had very little contact with him and had not known him growing up.

To that end, the record adequately reflects Appellant's waiver of his right to present any mitigating evidence, as well as the trial court's compliance with Koon. In

addition, the record reveals that defense counsel complied with his duties under Koon. Counsel investigated Appellant's background, and had witnesses ready to testify during the penalty phase. Counsel also adequately outlined the favorable evidence that the witnesses would have presented. Thus, it is clear that Appellant knowingly and voluntarily waived presentation of mitigating evidence.

Also notably, in this case Appellant (who insisted upon representing himself) conducted the penalty proceeding. In so doing, Appellant decided not to present mitigating evidence in keeping with his vehement demand that his strategy, not that of co-counsel, be followed. For this reason, the state submits that strict compliance with Koon was not necessary because Appellant represented himself as co-counsel. See Allen v. State, 662 So.2d 323 (Fla. 1995).

2. Appellant's demand that defense counsel be removed from the case.

Appellant asserts that the trial court should not have removed defense counsel from this case because he did not make an unequivocal request to act as his own attorney. Here again, the record refutes the allegation.

Under Florida law, when a defendant requests that the trial court discharge his court-appointed attorney for ineffective assistance, the court is obligated to determine whether adequate grounds exist for the attorney's discharge. See Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla.1988)(holding that a motion to discharge counsel for incompetence requires that the trial court inquire into the actual effectiveness of

counsel); Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). If the court finds that the defendant does not have a legitimate complaint, then the court is required to advise the defendant that if his request to discharge is granted, the court is not required to appoint substitute counsel and that the defendant would be exercising his right to represent himself. See Hardwick, 521 So.2d at 1074; see also Jones v. State, 449 So.2d 253, 258 (Fla. 1984)(holding that a defendant who, without good cause, refuses appointed counsel but does not provide his own counsel, is presumed to be exercising his right to self-representation). If the defendant still wishes to discharge his counsel, the court must determine whether the defendant is knowingly and intelligently waiving his right to court-appointed counsel. See Faretta v. California, 422 U.S. 806 (1975).

In this case Appellant burdened and delayed the court by his vacillation in not unequivocally choosing between court-appointed counsel or proceeding pro se. Instead, he persistently demanded that to which he was not entitled--counsel of his choice provided by the state. At that point, the trial court proceeded to a Faretta inquiry, repeatedly warning Appellant of the dangers of self-representation, particularly in death penalty litigation. (T 2986). And in any event, Appellant did not proceed completely alone. The court required that defense counsel stay on as stand by counsel.[6]

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[6] Faretta recognizes that the trial court may, over a defendant's objection, "appoint standby counsel to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." Faretta v. California, 422 U.S. at 835 n. 46.

Defense counsel did proceed during the Spencer hearing, presenting the court with seven videotaped statements of various relatives and acquaintances from the Canary Islands.

This Court has recognized the difficult position a trial court may sometimes find itself in. "A defendant's demand for self-representation places the trial court in a quandary, for the court must balance seemingly conflicting fundamental rights-i.e., the court must weigh the right of self-representation against the rights to counsel and to a fair trial. Because the court's ruling turns primarily on an assessment of demeanor and credibility, its decision is entitled to great weight and will be affirmed on review if supported by competent substantial evidence in the record." Potts v. State, 718 So.2d 757, 759 (Fla.1998).

Here, the trial court's ruling must be affirmed because it is supported by competent substantial evidence. Its inquiry was thorough and exhaustive. Moreover, the record clearly indicates that Appellant knew what he was doing, that his decision was taken with his eyes wide open, and that the trial court was thoroughly familiar with Appellant's capacity to understand and make this decision. The record also establishes that Appellant was extremely involved in his defense, so much so that he wished to be co-counsel solely to allow him more time in the law library. His interactions with the court and his pleadings of record demonstrate that he was educated and intelligent. Moreover, the record reflects that Appellant had drafted and argued numerous pro se

motions, wherein he cited and discussed cases, to the court. The record also establishes that Appellant was well aware of the law of his case, the full extent of the case against him, his possible defenses, and the law surrounding a waiver of counsel. He was familiar with the complexity of these particular criminal proceedings. Also, significantly, Appellant's manipulation of the proceedings indicated an obvious understanding of the process that should not be ignored.

In light of the record, the trial court did not abuse its discretion in finding Appellant's waiver of his right to counsel both knowing and voluntary. As a result, this Court must affirm Appellant's conviction and death sentences for the murders of Dr. Clarence Rudolph and Karen Starr Marx.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's conviction and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to GENE REIBMAN, at 600 Northeast Third Avenue, Ft. Lauderdale, FL 33304 on this 26th day of SEPTEMBER, 2000.

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MARRETT W. HANNA

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