IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,856

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PEDRO MEDINA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
COURT, IN AND FOR ORANGE COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Medina's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied the majority of Mr. Medina's claims, but granted an evidentiary hearing on a few limited issues, and then limited those issues even further.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___." The record on appeal from the denial of the Rule 3.850 motion shall be referred to as "H. ___." All other references shall be self-explanatory or otherwise explained herein.

## REQUEST FOR ORAL ARGUMENT

Mr. Medina has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. The opportunity to air the issues through oral argument would also be appropriate in this case, and Mr. Medina through counsel accordingly urges that the Court permit oral argument.

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## PROCEDURAL HISTORY AND INTRODUCTION

Pedro Medina filed below a motion to vacate pursuant to Fla. R. Crim. P. 3.850, and an amendment to the motion. The circuit court allowed a very limited evidentiary hearing, involving only two of the issues presented, and then limited that hearing even further -- both in terms of the scope of the issues it would hear and in terms of the evidence that it would hear on the issues. At the evidentiary hearing the lower court limited Appellant's presentation, repeatedly interrupted counsel, interposed the court's own objections and ruled on them, and propounded alternate grounds for the objections that the prosecutor did raise. As a result, a hearing that began as less than the full and fair hearing contemplated by this Court when the files and records do not conclusively show that the petitioner is not entitled to relief, rapidly deteriorated even further.

In its Order denying relief, the lower court committed a number of errors and erred in its ultimate disposal of the claims. A full, fair, and complete hearing is still required in this case.

On April 4, 1982, Dorothy James was found stabbed to death in her Orlando, Florida, apartment. On April 8, 1982, Pedro Medina was found, by a Highway Patrolman, asleep in the driver's seat of Ms. James' car. Mr. Medina was arrested and, incident to a search of the car, the police found a knife underneath a hubcap on the floor of the back seat. That knife was later introduced at trial and characterized as the murder weapon. Another knife, found in the victim's residence, was given to the Medical Examiner for inspection but was never presented to the jury or judge, nor disclosed to the defense.

There was no direct evidence linking Mr. Medina to Ms. James' death. Mr. Medina and Ms. James were friends. The victim's daughters, who knew Mr. Medina, were willing to testify about his qualities and to ask that he not be executed.

No one called them to the stand at sentencing.

Shortly before trial, the public defender who had been appointed to represent Mr. Medina moved to withdraw -- that office had previously represented one of the State's witnesses. Warren Edwards and Anna Tangel-Rodriguez, private attorneys, were appointed to represent Mr. Medina. A new trial date was set. During opening statements, the State mentioned evidence it would be presenting concerning Mr. Medina's alleged attempt at flight from a transportation bus (R. 135). An escape charge had not been consolidated with the indictment's murder charge. The last witness called by the State was Michael White. Despite the court's initial ruling to the contrary, White testified that Mr. Medina had stabbed him with a knife. A motion for mistrial was denied (R. 647-48).

Before the defense case was presented, a note was delivered from the jury room. One of the jurors felt unable to remain impartial unless Mr. Medina specifically rebutted Michael White's testimony. The trial court excused this juror and replaced him with an alternate, again denying the motion for mistrial (R. 661-64), and refusing to inquire as to how the other jurors may have been affected (R. 665-68). The jury convicted and then recommended death. The court found that the murder was heinous, atrocious or cruel, and that it was committed for pecuniary gain. In mitigation, the court found that Mr. Medina lacked a prior significant criminal history (R. 1877-79). The court imposed a death sentence,

This Court affirmed on appeal. Medina v. State, 466 So. 2d 1046 (Fla. 1985). The instant Rule 3.850 motion was thereafter filed and amended. The circuit court held a limited evidentiary hearing and denied relief on February 6, 1989. The court also denied a Motion for Rehearing on or about February 16, 1989. This appeal follows.

## ARGUMENT

### (I)

**BECAUSE OF THE STATE'S WITHHOLDING OF EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND ITS PROGENY AND/OR BECAUSE OF DEFENSE COUNSEL'S UNREASONABLE AND PREJUDICIAL FAILURE TO INVESTIGATE, IMPORTANT MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE WAS NOT HEARD AT PEDRO MEDINA'S TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

**A. THERE WAS A SECOND KNIFE SUSPECTED OF BEING THE ACTUAL MURDER WEAPON, A KNIFE NOT LINKED TO MR. MEDINA, AND A KNIFE WHICH THE JURY NEVER LEARNED ABOUT AT TRIAL**

The evidence linking Mr. Medina to the murder of Dorothy James was far from strong. This was a wholly circumstantial case. As the trial prosecutor acknowledged at the 3.850 evidentiary hearing, this was a weak case for the State (H. 368). The State's argument at trial necessarily focused on the two real facts that the State had: Mr. Medina was arrested in Ms. James' car; a knife was also found in the car. The knife became central to the State's presentation. The knife was in fact touted time and again as the murder weapon.

> Now, the State's going to call several witnesses, the first of which is that young lady you saw in here a few minutes ago. That lady is Arnita James. She is one of Ms. James' daughters. And Arnita James will come in and tell you . . . that at a point in time she and her boy friend, Ernest Arnold, the young black fellow, went over to her mother's apartment, and then when they went to her mother's apartment something was amiss. The first thing amiss was the mother's Cadillac was missing, which was rather unusual. And that on entering the apartment with the key that she had they found Ms. James alongside the bed with this gag in her mouth and with several wounds, and the house was as it was.

(R. 128)(State's opening).

> We'll also call a couple of highway patrolmen . . . And they're going to tell you that in that car was that Defendant, Pedro Medina, underneath the wheel of that car up there at 1-10. Thev will also tell vou about things that thev found in that car. one of, one particular Piece of evidence being a knife.

(R. 131-32)(emphasis added).

> And then there will be the testimony of Mr. Michael White. Mr. White will tell you that Mr. Medina offered their car for sale to him on the 4th of April, the next day, the first day after Ms. James was last seen alive. That Mr. Medina was offering this car for sale to him. And that over a period of days, on the 6th of April, they

finally agreed on a price. And he paid Mr. Medina the price for the car. And that at some point in time he saw Mr. Medina with a knife.

(R. 132-33)(emphasis added).

There will be some evidence, some testimony from the people at the crime lab up in Sanford about processing of this knife, and what efforts they made, and what conclusions they can give you about what was on or isn't on the knife; about some cigarette buts.

(R. 134)(emphasis added).

During the trial, there was testimony presented concerning the laboratory test performed on the knife. James McNamara testified:

Q. All right, sir. Did you run some tests after you or before you disassembled that knife to determine whether or not there was a possibility of the presence of blood on the knife?

A. Yes, I did.

Q. All right, sir. And from your testing did you get a positive or negative result?

A. Well, the only area according to my notes where I saw anything that could have been blood was a small stained area where the blade and handle met. I did a presumptive test because this was a very faint stained area, very small, smeared, and was not a drop, for example, of blood, or anything where very much examination could have been done. The first test we often do is screening tests or presumptive tests for blood. It's a color test. It indicates the, merely indicates the presence of blood staining and need for further tests. That is to identity blood as positively being there, whether or not it is human or animal. And grouping tests are done if there is enough blood. In this case that presumptive test or screening test was positive in that area. However, none of those other tests was positive in that area. However, none of those others tests I just mentioned, because of that limited amount of stained area, was done. There was no blood found when I disassembled the knife and looked down in the cracks of the handle, and had taken it apart. I thoroughly swabbed those areas and no blood was identified in those areas.

Q. Am I correct in saying that because of the minimal amount of the sample that you had to test you were unable to confirm one way or the other whether or not the first indication was in fact blood?

A. That's correct.

Q. All right. On the presumptive test you got a positive?

A. That is correct.

(R. 584-85). Michael White then testified that he had seen Mr. Medina with a knife (R. *646).* (Mr. White's testimony is discussed in section B, infra.)

When defense counsel moved for a directed verdict at the close of the State's case, the knife found in Ms. James' car played a critical part in the Court's denial of the motion:

> MR. EDWARDS: Your Honor, there has been no proof as far as the object used to effect the death of the victim, Dorothy James. The State has alleged in their indictment it's a knife. There has been no proof so far that would substantiate a knife or in fact the knife as presented by the State to the Court.
>
> THE COURT: Well, medical examiner testified that the wounds could have been made by a knife or other sharp cutting instrument. That's sufficient to go to the jury, and be a question for them to find as to whether or not it was inflicted by stabbing with a knife.
>
> There is also evidence the Defendant was found in possession of a knife. It's not conclusive whether or not. . .
>
> MR. MEDINA: (Interposing) That's not the knife.
>
> THE COURT: Be quiet, Mr. Medina. It was found in the car, which the Defendant was shown to have been driving. There is some evidence the jury can consider on that issue. The Court finds the evidence sufficient on the issue to take that issue to the jury.

(R. *658).*

In closing arguments, the State again focused on the knife:

> [W]e don't know what he did with the knife. We simply have shown you that he had a knife and he had the opportunity.

(R. 792). Since the State had placed so much emphasis on the inculpatory nature of the knife found in the car with Mr. Medina, defense counsel was forced to address it himself in closing argument:

> I believe Trooper Wilson was the one who stopped Mr. Medina in the rest area at Lake City. He was the one that found the knife. I believe he indicated to you that he did not find anv blood on the knife. The knife was lying underneath the hub cap.
>
> Now, the implication is there that if it's lying underneath the hub cap on the rear of the floor that somebodv's trying to hide that knife. Well, if somebodv was trying to hide that knife thev'd have used that knife in a crime, Ditched it out the window going down the Interstate or some other place. Putting a knife under a hub cap in a car you're still in is not reallv hiding a knife.

(R. 773)(emphasis added). Mr. McNamara's testimony about the possible presence of blood on the knife also had to be discussed:

> And that [Mr. McNamara] examined the knife that was found, that the State has made such a big to-do about in this case.
>
> I would suggest to you that the lack of a sample doesn't mean it's really there. But you can't see it. The State has said, and the evidence has shown, that there was a stain on the knife. Now, this is a threshold test. It's a color test to see if there is a possibility that something is on that knife.
>
> Now, detective, or rather doctor, excuse me, James McNamara said that with regard to that stain he could not tell if it was human blood. He could not tell if it was animal blood. In fact, he could not tell if it was blood at all. He also said that the substance, too, there could have been a vegetable matter.
>
> The State said, here's positive proof there is blood on this knife. Ladies and gentlemen, positive proof is not positive proof when you could have been cutting a cucumber and that could be cucumber juice or some other vegetable matter. That does not make it positive proof. You cannot say, here's a stain on something and it's positive as to the possibility of it being there, so it must be there, whether or not we can prove it's there or not.
>
> I would suggest to you one interesting point about the examination of the knife. Had that knife been used to stab someone ten times as deeply and viciously as Dorothy James was stabbed there would have been some blood in the locking mechanism of that knife. That knife was taken apart by Mr. McNamara, was examined by him. He didn't find a stain in the locking mechanism. If you think about a pocketknife, there are areas in a pocketknife that are pretty darn hard to clean. That area was examined and taken apart. And no proof whatsoever of any blood in that area.
>
> I like you to think if someone is going to be stabbed ten times it's probably going to put a little blood around. I just ask that you think about that.

(R. 776-77).

There is no question about the importance of the knife introduced at this trial, a trial involving circumstantial evidence. The State argued that it was the murder weapon, the defense tried to rebut that argument, and the jury was obviously concerned with it. But there was a great deal more that the jury should have heard.

During post-conviction investigation, it was discovered that a second knife had been presented to and examined by the same medical examiner who testified at the trial, Dr. Sashi Gore, in connection with Ms. James' murder. At the evidentiary hearing, Dr. Gore testified that in the course of his original investigation he catalogued photographic slides (taken by himself or his technician), of what was inspected. The slides were then filed according to the case numbers (H. *735).* One of the slides in this case was of a serrated, fixed handle knife (H. *736;* Def. Exh. 9).[1]

Dr. Gore testified that the serrated knife was brought to him at the end of the autopsy he performed on Ms. James:

> Q. Do you remember what the purpose was in bringing the knife to you?
>
> A. The purpose probably was that if the police thought at that time this could have been a suspicious knife which might have been used, then they might have brought it in for my evaluation.

(H. *743).*

Dr. Gore further testified at the evidentiary hearing that either the serrated knife (Defense Exh. *9)* or the buck knife found in the car (Defense Exh. 11) could have caused the wounds suffered by Ms. James (H. *745).* Although it could have been the murder weapon (H. 745), the serrated knife had no connection whatsoever to Mr. Medina. Dr. Gore additionally testified concerning a diagram found in his autopsy files (Def. Ex. 8):

> Well, I don't remember who drew this, but this, what is in the diagram, it shows serrations on one side. And on the other side it is a straight, slightly bent knife.

(H. *741).* Serrations are not consistent with the knife found in the car -- it is not serrated. Neither was there evidence that it was bent.

William Sharpe, the trial prosecutor, testified that he did not know about

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[1] The knife that the State had "identified" as the murder weapon was a "locking blade pocket knife . . . similar to a buck knife" (Testimony of Trooper Robert Wilson, H. *729).* It was not serrated.

the second, serrated knife (H. 315), and that he disclosed parts of the medical examiner's file to the defense:

> Q Now, did you, as part of the discovery process under Florida Criminal Rules and also under Brady versus Maryland, disclose any of his notes or his entire file or his set of slides that you obtained to the defense lawyer?
>
> A At that time there was a preliminary, what we use to call a body sheet. I'm sure that they've got that there, would be the final autopsy report. I'm sure they got that. Photographs, slides. I don't know that we disclosed those. We made those available. I remember that Mr. Edwards took Doctor Gore's deposition and during the course of the period of the deposition looked at all the slides.
>
> Q Now, isn't it a fact that at that deposition, Doctor Gore did not bring all of his photographs?
>
> A You'd to have ask Doctor Gore that. I don't know.
>
> Q Would the record be the best evidence of whether or not that's a fact?
>
> A I don't know whether the record would be the best evidence or not. Doctor Gore is in a better position to answer that than I am.
>
> Q If, in fact, during the deposition, and I believe you were present at that deposition, if, during that deposition, he stated that he did not bring all his photographs, then would you have any way to -- [is] that contrary to your memory in any way?
>
> A I don't have any memory one way or another. I know that there were slides shown during the course of that -- not during the course of the deposition, but probably at the end of the deposition. Whether that was all of them or not, I don't know.

(H. 312-13). In his deposition, Dr. Gore had stated:

> Q. Okay. Do you have those photographs with you?
>
> A. Yes, sir. (Pause) Well, these are not all, but some of these. Yeah, here -- here's the scene investigation on the right side.

(R. 1252).

It was also discovered during post-conviction investigation that the second, serrated knife was apparently taken from the victim's residence.[2]

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[2]The State had filed this evidence in the files of David Johnston, not Pedro Medina. Mr. Johnston is another Florida capital inmate. His case is unrelated to Mr. Medina's. The evidence was uncovered by CCR counsel during (continued...)

> Then at this time I would like to move into evidence a document which, when Donna Harris went over to the state attorney's office to review the files in another case, David Johnston, she found notes relating to the case of Pedro Medina in the Johnston file.
>
> There is a note here that says, "Cora seems to think that Nazarchuk brought the knife in from her..." and then it's eot a little V apostrophe S, which I assume stands for victim's residence.
>
> At this time I would like to move that document -- have it marked first for identification.
>
> You're going to want to argue; right.

(H. 767-68)(emphasis added). In the process of arguing that the note should not be allowed into evidence, the 3.850 hearing prosecutor argued that it just represented a continuing investigation by his office based on the allegations raised in the 3.850 motion (H. 770). Defense counsel responded:

> MS. DOUGHERTY: Well, Judge, I would offer it to show that the state attorney did an investigation and that the results of that investigation were that Dr. Gore's assistant stated that she thought that the knife had been brought from the victim's residence by the chief detective on the case, Detective Nazarchuk.

Id. Dr. Gore testified that "Cora" was his office's secretary (H. 741-42). Nonetheless, the circuit court did not allow the note to be admitted. Further, when counsel attempted to call Mr. Ashton (the prosecutor below) to the witness stand to authenticate and discuss the note, which was found in his file, the court ordered her to call her next witness and not "labor any further on the point. . . . So your proffer is denied" (H. 772).[3]

Also called to testify at the evidentiary hearing was Austin Maslanik, an experienced defense attorney with the Tenth Judicial Circuit's Public Defender's office, who was qualified as an expert in the defense of capital cases (H. 86).

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[2](...continued)
investigation of Mr. Johnston's case, as it was not in Mr. Medina's files. Donna Harris, referred to immed ately be ow, is an nvestigator with the CCR office.

[3]These limiting rulings, as well as a number of others discussed in subsequent portions of this brief, were erroneous. But it was in the context of such rulings that Appellant attempted to present his case below.

Dr. Gore had testified that the defense had "access" to his files (H. 742), although he had not brought them all to his deposition (See supra). Mr. Maslanik testified:

> **Q** Why would reasonably competent counsel investigate the medical examiner, the medical examiner's evaluation?
>
> **A** Well, because the medical examiner is often a critical witness in a homicide case and, additionally in a death penalty case, because often the medical examiner is the witness that provides perhaps some of the most important testimony regarding aggravating factors and also cause of death. . . . And in particular as it gets to a weapon, it has extreme significance because, assuming perhaps that you have two possible weapons, the discovery of a second weapon and the comparison with the weapon to the injuries that the deceased sustained in this case would be particularly helpful to the defense.
>
> Particularly since Mr. Medina was denying committing the crime and since there was one knife that was found in his car, the existence of a second knife would assist the defense in creating reasonable doubt.

**(H. 587-90).**

Finally, Anna **Tangel-Rodriguez,**[4] one of the **two** defense attorneys at trial, testified that she was unaware of the serrated knife's existence:

> **No. I** had no information about the second knife. **I** did not. **I** cannot state whether Warren ever did, but **I** can state that Warren never explained or told me about **it,** and that did not come up in any discussions.
>
> * * *
>
> **BY** MR. NOLAS: Q Would YOU have investinated that further?
>
> **A** Certainly.
>
> * * *
>
> **Q** When you say **it** would have been investigated, can you relate to us what that means?
>
> **A** Well, we would have looked into where **it** came from, what **it** was, if there was any evidence still on **it** that could have been used, prints or blood or whatever. **I** mean, **it** opens a whole gamut of things.
>
> * * *

[4] The other defense attorney, Warren Edwards, died prior to the evidentiary hearing.

Q Based on your discussions with Mr. Edwards, did he ever indicate to you that information regarding a second knife had been disclosed to him?

A No, none.

Q And none of that was disclosed to you?

A None, none, absolutely.

(H. 548-50)(emphasis added).

Q If the second knife that Mr. Ashton was referring to in the house had been sent to the medical examiner to be examined by the state --

A Mm-hmm.

Q -- which would make it much more --

MR. ASHTON: Objection. That assumes a fact that is not in evidence.

THE COURT: Well, he's asking if. All right. Go ahead and state your question fully, Counsel.

BY MR. NOLAS:

Q Would that have made it a more relevant issue than simply a knife in the cutlery?

A Well, as I said, I think to both of you, certainly the knife would have been investigated if it had been picked up as evidence by the police in any way. Whether or not it could have been admitted in trial is something that the Court would have decided. Whether it had been taken to the medical examiner's office and examined. certainly that is something that we would have investigated.

(H. 571)(emphasis added). Prior to the evidentiary hearing, Ms. Rodriguez executed an affidavit, which she reaffirmed as true and correct at the evidentiary hearing (H. 509). In that affidavit, which was offered into evidence but refused by the circuit court, Ms. Rodriguez stated, consistent with her testimony at the hearing:

11. Prior to the trial, we requested all discoverable material in this case. Last Saturday, I saw the photograph of a knife which I understand was found in the medical examiner's file of this case and which was a suspicious murder weapon. To the best of my recollection I have not seen or heard of this knife before, and I am certain that if Warren had seen it, he would have told me about it. We would have also introduced it at trial. As a former state attorney, I consider

> this knife to be Brady material to which the defense was clearly entitled. I believe that had we used it. the second knife would have affected the outcome Pedro's trial. As the record shows, the state introduced a knife found where Pedro was arrested. Another suspicious knife not tied to Pedro would have been a critical piece of evidence.

(Defense Exhibit for Identification I)(emphasis added). The court below did not allow defense counsel to ask about a number of the matters which Ms. Rodriguez had discussed in her affidavit (See, e.g., H. 548-50).

There can be little dispute that evidence concerning the second knife would have been critically important to a full and fair jury resolution at Mr. Medina's trial. The jury, however, learned nothing about it. It is clear that the State knew about it -- Dr. Gore, his staff, and the investigating detectives and/or police officers who brought the knife to Dr. Gore certainly knew about it. This evidence was never disclosed to the defense, notwithstanding the requirements of Rule 3.220. If defense counsel had a duty to investigate beyond reliance on discovery demands and motions and depositions, ineffective assistance has been shown because that was not done -- the defense relied on what the State disclosed. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), subsequent history, 799 F.2d 1442 (11th Cir. 1986). The fact remains, however, that evidence of the second, serrated knife was not disclosed to the defense. This violated Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. This deprived Mr. Medina of a fair trial.

Brady requires disclosure of evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." This Court has not hesitated to apply this holding. See, e.g., Roman v. State, 528 So. 2d 1169 (Fla. 1985); Arango v. State, 467 So. 2d 692 (Fla. 1985), affirmed after remand, 497 So. 2d 1161 (Fla. 1986); Anderson v. State, 241 So. 2d 390 (Fla. 1970); State v. Crawford, 257 So. 2d 898 (Fla. 1972). The evidence here at issue certainly meets that test. Just as significantly, disclosure of the evidence was required under (discovery) Rule

3.220, and the failure to abide by the rule enhances the error -- under the rule, the State had a clear duty to disclose. See Roman, supra. This was a circumstantial case, and the knife presented by the State was quite significant to its theory of prosecution. The State's failure to disclose evidence concerning the second, serrated knife which was not linked to Mr. Medina in any way and which was suspected as being the murder weapon (at least to the extent that it was sent to the medical examiner for examination) rendered this trial fundamentally unfair. Bradv v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Araneo v. State, 497 So. 2d 1161 (Fla. 1986). Given the nature of the State's presentation at the trial, there can be little question that confidence in the results of the guilt-innocence and sentencing determinations has been undermined. Indeed, the resulting unreliability of a guilt and sentencing determination derived from proceedings such as those in Mr. Medina's case also violates the eighth amendment requirement of heightened scrutiny for fundamental fairness in capital cases. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); cf. Chanev v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Bradv, 373 U.S. at 87 (reversing death sentence although the undisclosed evidence was not deemed sufficiently important to the conviction, because it was relevant to the death verdict).

Here, defense counsel made repeated requests for impeachment and exculpatory material information pretrial (R. 1526; 1597; 1666; 1680; 1798-99). As we now know, whatever the reasons may have been, the evidence was not provided. In this almost completely circumstantial case, the facts that the victim was stabbed and Mr. Medina was found with a knife were very important to the State's prosecution theory. Knowledge by the defense and jury of the existence of a second knife unconnected to Mr. Medina would have made a difference. It would have been very important to the defense, as defense

counsel acknowledged. But it was never disclosed.

B. THE "WILLIAMS" RULE "STABBING" INCIDENT INVOLVING STATE WITNESS MICHAEL WHITE

In a pretrial motions hearing, the defense moved to exclude the testimony of State witness Michael White because it was irrelevant under the "Williams Rule," and because it was going to be used as "bad act" evidence to show that Mr. Medina "is capable of the act of stabbing . . ." (R. 925). The prosecutor argued that the stabbing was relevant:

> MR. SHARPE: Your Honor, the victim's car was in the possession of the defendant. Michael White, a witness in this case, would testify on the 4th of April, 1982, and I ought to make note of this for the Court, the medical examiner said this woman died between midnight on the 3rd of April and 8:00 o'clock on the 4th of April, 1982.
>
> Sometime on the 4th of April, 1982, in Tampa, Hillsborough County, Florida, Michael White had contact with the defendant who offered to sell him a Cadillac automobile, which happens to be the automobile of the victim. Thereafter, there were discussions about the price of the automobile that resulted in a payment by Michael White to the defendant, of an amount of money that they had agreed on, on the 6th of April, 1982, and Mr. White and Medina were in each other's company in that car on that date.
>
> During the course of the discussions and discussion the tender of the car and delivery of the proper documents and all, Medina stabbed White, took his money and the car and left with it.
>
> The death in this case, as well as that, is a stabbing. A stabbing death together with the fact that the car is the focal point of the incident in Hillsborough County makes it relevant in this case as to intent, state of mind, design or the method in which the homicide was carried out, in that it was two days later, he is stabbing another person in Hillsborough County over this car. What I am trying to show is that the method he used was to stab this person.

(R. 923-24)(emphasis added).

The court took the issue under advisement (R. 926-27). Later, and prior to White's testifying, the Court granted defense counsel's motion in limine, ordering the trial prosecutor not to elicit testimony relative to the alleged stabbing incident (R. 641). The court's order permitted Mr. White to testify that Mr. Medina had a knife and had the car.

Despite the prosecutor's assurance that he reminded White not to mention the alleged stabbing (R. 641), White testified to the stabbing incident three times (See R. 646). A motion for mistrial was denied (R. 648). Defense counsel was not allowed to cross-examine White on the alleged stabbing (R. 651).[5]

What was not known at that time by defense counsel, the court or the jury was that Mr. White had not been prosecuted for his own offenses, and had a motive for seeking favor from the State. What was also not known was that the incident involved marijuana. The State's analysis that "a stabbing death together with the fact that the car is the focal point of the [White] incident makes it relevant" was simply wrong. This Court did not have any of this information when it affirmed on direct appeal.

At the evidentiary hearing, and despite persistent efforts by the lower court to limit the hearing and hinder counsel in the presentation of evidence, it became clear that Michael White was, at the time of the alleged stabbing, in possession of $127.00 and five bags of marijuana. Mr. White had submitted a claim for compensation for medical expenses as a result of the "stabbing". That request was denied because Mr. White was engaged in an unlawful activity at the time, i.e., possession of marijuana (Def. Exh. 14). The records also show that Mr. White was on probation at the time of the "stabbing" but, despite the fact that he was found in possession of marijuana, his probation was never revoked (Def. Exh. 5).

The trial prosecutor, William Sharpe, testified that he did not know anything about White's background, and that he did not know about White's possession of marijuana on the night Mr. Medina allegedly stabbed him. However, he did have the Tampa police reports (Def. Exh. 16), and he testified that it

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[5]The court interrupted defense counsel when he began cross-examination about the stabbing, and informed him that if he persisted, the court would deem him to have waived any error, and that the court would allow the State to go back into the matter (R. 651).

would have been "customary" to disclose those records to the defense (H. 318).

Mr. Sharpe also testified:

> Q Would it be customary when employing a witness who is a person of Michael White's cultural situation or social situation to check and see if possibly he had prior offenses that might become an issue in his credibility as a witness?
>
> A If defense counsel made a motion for disclosure of records of prior convictions, we probably ran it. I don't remember whether independently we ran it when there wasn't a request, I don't remember.
>
> * * *
>
> Q But if counsel had asked you for the prior record of Michael White, you would have disclosed it?
>
> A They made a motion and we checked it. We checked it to determine whether or not there were convictions that would serve as a basis for impeachment.
>
> Q Now, in your investigation of your case and your preparation of this witness, did you determine that he was, in fact, on probation at that time?
>
> A I didn't have any idea what the status of Mr. White's situation was. I only met Mr. White one time before he testified.
>
> Q But in any case, that was evidence that the defense attorney could have obtained and had you known, you would have been glad to disclose to them?
>
> A Evidence of what?
>
> Q Evidence regarding his credibility as a witness?
>
> A Well, you asked me whether or not I knew he was on probation. I don't know whether he was on probation or not and if that would have been relevant, that's, I assume that it would have been relevant if he had been on Drobation.

(H. 319-21)(emphasis added).

Defense Exhibit 14 is comprised of the Victim Crime Compensation Records concerning Michael White, which were brought to the evidentiary hearing by the Custodian of those records (H. 392). On page 14 of those records is a Document Control sheet. That document includes a list of "additional Information Needed," and in that list, "Notice State Attorney" is checked, thus indicating that the State Attorney was notified. Just as significant is the prosecutor's

testimony that if the defense had asked for the records they would have had to have been turned over. Here, defense counsel did file a motion for the State to disclose Mr. White's prior record (R. 1798-99), and even though the trial court was initially inclined to grant the motion, the same prosecutor, Mr. Sharpe, then adamantly refused to comply:

> THE COURT: That is a possibility. I forgot about the NCIC computer. Are you willing to run these names and see what comes up?
>
> MR. SHARPE: No. sir. It is not our job or province to search out for the Defense arrest and conviction records of witnesses. These people responded at deposition. If he feel there was some sort of conviction, he should have pursued it.

(R. 920-21)(emphasis added). The record also reflects that Mr. Edwards made repeated attempts to depose Mr. White, but was unable to until the week prior to trial because of White's and the State's recalcitrance (See, e.g., R. 916; 1684; see also Motion for Sanctions, based on White's refusal to appear for deposition, or to discuss the case without "his" lawyer, referring to an Assistant State Attorney, being present, R. 1757-58). White did not disclose the information herein at issue in his deposition. The defense attorneys' trial files do not include this information.'

There can be no doubt that White's record was not disclosed to the defense, nor was the fact that he was at that time on probation, and thus that he had every reason to seek to please the State. These are classic impeachment/cross-examination issues, issues that the jury learned nothing about. And this jury was obviously quite concerned with White's testimony.' Mr. Maslanik explained

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'Again, as in section A, Appellant respectfully submits that if there is a duty on defense counsel to investigate beyond making (more than once) express discovery demands and motions, attempting to set the matter for deposition, requesting sanctions, and relying on the State's duty to disclose under Bradv and Rule 3.220, then the defense attorneys here were prejudicially deficient in failing to meet that duty.

[7]Mr. White's importance in the prosecution cannot be overstated. As noted on direct appeal, one of the jurors was excused because he could no longer presume Mr. Medina innocent after hearing White's testimony. The trial court (continued...)

the importance of such information, coupled with the fact that Mr. White was found in possession of a controlled substance, and how such information could have been used to impeach this critical witness:

> Q With regard to Mr. White, Mr. Maslanik, you again have had an opportunity to review the trial record?
>
> A That's correct.
>
> Q Was Mr. White an important witness for the state in this case?
>
> MR. ASHTON: Objection; opinion. It's not in his expertise.
>
> *THE* COURT: The objection will be overruled.
>
> *THE* WITNESS: I reviewed Mr. White's testimony along with the rest of the testimony at trial. He is an important witness in the sense that he tied Mr. Medina to the car and also to a knife.
>
> BY MR. NOLAS:
>
> Q Given his importance as you've just related it to us, what steps would a reasonably competent attorney have taken in order to develop impeachment evidence, in order to investigate this witness in 1983?
>
> A Well, other than taking his deposition, it would have been appropriate and consistent with what reasonably competent counsel would do to investigate his criminal history and discover as much information as possible about that, not only just judgments and convictions, but also affidavits for violation of probation, the circumstances of prior offenses, which may or may not be admissible, but may in some instances be admissible depending upon the circumstances of the prior convictions.
>
> In this particular case, as I feel, Mr. White -- it would have been more appropriate to look into the circumstances because of the incident in Tampa about the altercation between Mr. Medina and Mr. White and the fact that apparently Mr. White was never really prosecuted for possession of marijuana or for a violation of probation where there were circumstances that might have supported such a prosecution, and that that information would have been highly relevant for impeachment matters.
>
> Q And how would a reasonably competent attorney in 1983 have used that information with regard to witness White?

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[7](...continued)
refused to permit inquiry into the effect White's testimony had on the remainder of the jury. Medina v. State, *466* So. 2d 1046, 1048 (Fla. 1985).

A Well, the information could have been used to impeach him for prior criminal convictions, as well as motive that he might have for testifying falsely in the circumstances of this case.

In particular in this case the circumstances surrounding the altercation and his violation of probation, the fact that he was on probation, the fact that he could have been prosecuted for some acts that occurred in and around the time of the altercation would have gone to impeach his reliability as a witness to show that he had an interest in the outcome of the case.

Q Is that something reasonably effective counsel would have done in 1983?

A Yes.

Q With a witness such as Mr. White?

A Yes.

Q Was that effectively done in Mr. Medina's case?

A No.

(H. 581-84)(emphasis added). It was not effectively done because the State did not disclose the information.

The suppressed information was material for a number of reasons. These include:

a. After the stabbing incident purportedly occurred, no charges were made against Mr. Medina. This demonstrates the lack of credibility of White's account, It was only after the State determined that it would present "Williams Rule" evidence in the capital case that Mr. Medina was charged with the stabbing.

b. Mr. White did not have his probation revoked, and he was not charged with possession of marijuana with intent to sell. Both should have occurred, on his own admission. The jury should have been allowed to know that at the time Michael White was on the stand he had a potential probation violation hanging over his head which, given his serious prior record, would have resulted in a prison term. This certainly would have been important impeachment. This certainly would have shown a motive for White to testify favorably for the

State, and a bias to testify unfavorably to Mr. Medina.

c. The true facts of the incident reveal that whatever similarity the State purported it may have had to the offense herein at issue, in fact, there was no similarity. A reasonable juror would more than likely have believed that the true incident with White was an incident between street people involving marijuana. It had no resemblance to the homicide at issue. The true facts also had little resemblance to the strange story recited by White. However, all the jury learned was White's version of the alleged stabbing, and the admission of this testimony was grossly prejudicial.

White's testimony was devastating to Mr. Medina. According to a note submitted by a juror during deliberations:

> I have heard the Defendant accused of the stabbing of the last witness. Up until this point in the trial I had not considered him capable of or incapable of committing violence with a knife. I had formed no opinion. Now a shadow of suspicion has been cast. I for one would like to give the Defense a chance to rebut this accusal. If this cannot be allowed I must examine my own ability to disregard this accusal in reaching a verdict and act upon my findings.

(R. 1844).

The information about the alleged stabbing incident was quite material. It should have been disclosed. See Roman: Brady; Bagley; Rule 3.220. White did not testify truthfully, and his testimony could have been substantially undermined. The fact that the jury never learned this undermines confidence in the outcome of the trial and sentencing.[8]

As the United States Supreme Court explained in addressing a similar circumstance:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within [the] general rule [of Brady].

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[8] Indeed, the aggravating effects of White's propensity testimony, heard without impeachment, leaves little doubt that the jury's verdict as to sentence was plainly suspect. Cf. Douaan v. State, 470 So. 2d 697, 701 (Fla. 1985).

Giglio v. United States, 405 U.S. 150, 153-54 (1972). See also United States v. Anurs, 427 U.S. 97, 104-05 (1976)("[W]here the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution" disclosure is required).

Specific pretrial requests for White's record were made and repeated in this case. But the information was not disclosed to the defense. The materiality standard has been met here:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence. falls within the Bradp rule. . . . Such evidence is "evidence favorable to an accused," . . . so, that, if disclosed and used effectively. it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

United States v. Banlep, 105 S. Ct. 3375, 3400 (1985)(emphasis added)(some citations omitted). Accord. Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwrinht, 785 F.2d 1457 (11th Cir. 1986). "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such subtle factors as the possible interest of a defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). The jurors at Mr. Medina's trial were never allowed to hear critical information regarding what was a critical component of the government's case. Here, as in Roman v. State, 528 So. 2d 1169, 1171 (Fla. 1988), the circumstantial nature of the State's case makes the constitutional violation even more significant. And here, as in Roman, relief is warranted.

C. CONCLUSION

The constitutional errors discussed above cannot be viewed in isolation from each other. It is the cumulative nature of the discovery/Brady violations

that is also a central issue. See Chanev v. Brown, 730 F.2d 1334 (10th Cir. 1984). Individually or collectively, the errors herein discussed warrant Rule 3.850 relief.

(II)

MR. MEDINA WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE OF COUNSEL'S UNREASONABLE FAILURES TO INVESTIGATE, AND THE RESULTING FAILURE TO PRESENT COMPELLING AND AVAILABLE MITIGATING EVIDENCE DENIED MR. MEDINA HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Defense counsel must discharge very significant responsibilities at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die . . ." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In Gregg and its companion cases, the Supreme Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

This Court and the federal courts have expressly and repeatedly held that in the context of capital sentencing, an attorney has a duty to investigate and prepare mitigating evidence for the sentencers' consideration. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); State v. Michael, 530 So. 2d 929 (Fla. 1988); Bassett v. State, 541 So. 2d 596 (Fla. 1989); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986). Reasonable investigation does not commence on the night before the penalty phase is to begin. The penalty phase of a capital trial is a stage of undeniable significance. Reasonably effective counsel undertakes investigation of evidence in mitigation prior to the trial, Harris v. Dunner, 874 F.2d 756 (11th Cir. 1989), makes reasonable decisions concerning the evidence to be presented, Stevens v. State, 552 So. 2d 1082 (Fla. 1989), and then acts reasonably at the sentencing proceeding. Douglas v. Wainwrinht, 714 F.2d 1532 (11th Cir. 1983),

adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1207 (1985). Trial counsel here did not meet these constitutional requirements.[9]

This Court and the federal courts have repeatedly recognized the importance of uncovering, investigating, and presenting "humanizing" mitigating evidence to a capital sentencing jury. See, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Douglas v. Wainwright, supra. When the jury is deprived of available mitigation because of the failures of defense counsel, the jury

> cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 743 (citations omitted). See also Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986). In a capital case, a defense attorney must, at a minimum, investigate the defendant's background and history. When counsel does not do so, and mitigation is thus not heard, confidence in the outcome of the proceedings is undermined. Substantial mitigating evidence regarding Mr. Medina's background, a background involving mental and physical abuse, as well as mental health difficulties, was ignored by defense counsel here. Neither did counsel consider substantial mitigating evidence that could have been testified to by the victim's own daughters, who were: 1) listed on the State's witness list; 2) mentioned by the State in opening; 3) knew Mr. Medina and could have provided compelling mitigating facts about him; and 4) did not want Mr. Medina to die, because of what they knew about him, and would have asked the jury to spare his life.[10] Nothing, however, was done about this.

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[9]Even with the unwarranted limitations imposed by the Rule 3.850 trial court, the record establishes that relief is warranted here. The record that this Court would have before it had a full and fair hearing been allowed would have made Mr. Medina's entitlement to relief undeniable.

[10]In Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), the Court held that not allowing the jury to properly consider the mitigating effects of such testimony from a defendant's sister violated the eighth amendment. Certainly, a jury being deprived of such testimony from the victim's daughters because of (continued...)

Trial counsel failed to discuss mitigating factors, either statutory or nonstatutory, with the mental health experts who evaluated Mr. Medina for competency to stand trial and sanity. Cf. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). In fact, trial counsel did not develop or present any of the substantial mental health mitigating evidence which could have been presented in this case. Pedro Medina, mentally ill, was dispatched to this country from Castro's Cuba. His life here was pathetic. His life in Cuba had been a nightmare, even as a child. Trial counsel did virtually nothing to investigate his background here, and did absolutely nothing to investigate his background in Cuba.

Ms. Rodriguez testified below that she was responsible for the penalty phase (H. 507), and that she was also needed to assist in the case because she spoke Spanish and Mr. Edwards did not. Even though she spoke Spanish, her husband was from Cuba, and she knew that there were ways to communicate with people there, Ms. Rodriguez did nothing to investigate Mr. Medina's background in Cuba: no efforts were made to contact Mr. Medina's family, or to do anything else. Neither did counsel reasonably pursue the witnesses available in this country who knew Mr. Medina, felt sorry for him, and who had learned to like him, notwithstanding the pathetic existence that he had and the pathetic and afflicted being that he was. These witnesses included the two daughters of the victim, both of whom had substantial contact with Mr. Medina before their mother's death, and both of whom could have provided valuable insights to mental health experts and judge and jury alike. No effort was made to contact them. In short, counsel failed to prepare and then to act reasonably, and as a result deprived Mr. Medina of his rights to an individualized and reliable sentencing

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[10](...continued)
counsels' neglect cannot be found to be in accord with the sixth and eighth amendments.

determination.

For purposes of this brief, Appellant shall discuss these issues as they were identified in the lower court's order:

A. THE MITIGATING TESTIMONY OF THE VICTIM'S TWO DAUGHTERS

Lindi James, one of the victim's daughters, testified at the evidentiary hearing. She has a college degree in business administration (H. 371). She knew Pedro Medina and had spent a considerable amount of time with him. She found him to be a quiet and non-violent person. She had insights into his functioning that a mental health expert (and the jury) should have learned about. She had first-hand experience with Mr. Medina, and could have testified to compelling mitigation that the jury should have been allowed to hear. Because of what she knew, she would have asked the jury that Mr. Medina's life be spared:

Q Did you know Pedro Medina?

A Yes.

Q And is that Mr. Medina that's seated at the table?

A Yes.

Q All right, how did you get to know him?

A He used to live in the same apartment complex that we lived in and he would come over and visit. We used to play chess together and just sit around basically.

Q And did you ever see him do anything violent or scary or dangerous?

A No, never.

Q Did he ever act abusively toward your mother?

A No, never. He was real quiet. He didn't really speak English so he never really said very much, but he used to just sit and smile and we'd play chess and he'd just speak when spoken to basically.

Q And was he good to you too? I mean, neither you or your mother had ever had a problem with him?

A No, he was very nice to both of us.

Q Were you surprised when you found out that he had been arrested for killing your mother?

A Yes, I was very surprised.

Q And did that seem out of character to you?

A Yes, it seemed very out of character. I couldn't believe what they were saying.

(H. *373-74*). She also observed that her mother would befriend persons who had no other friends, persons who were odd, and that Pedro seemed to be that kind of a person:

Q Was Pedro one of these kinds of people that she would befriend?

A I think so because he didn't have any other friends. I know he hadn't been -- I don't know how long he had been in the area or whatever, but hadn't been that long and he really didn't have other friends that he was around or anything. He seemed to be basically sort of like a loner and just all alone. And she just kind of took him in and just real hospitable, and always tried to make sure that he was comfortable when he was around.

Q Did he seem to be the kind of person who needed that kind of help or comfort?

A Yeah, he did. Like I said, he would come over and never really would say a whole lot. But he was real content just sitting there and if we played chess, we were happy playing chess. I like to play chess and he was content with that. And we'd watch t.v. or whatever, and that was like no major deal when he came over that we had go out of our way to do anything. He was content just to be there in the atmosphere.

(H. *383-84*). She testified that her mother knew Pedro better than she did, as her mother had spent time trying to understand him:

Q Did she know him better than you did, for instance?

A Well --

Q Did she spend more time?

A I think she probably spent more time trying to understand. To me sitting and playing chess and smiling at somebody was enough. I was comfortable doing that and I never wanted to -- I never tried to make him have a conversation with me because if he wanted to say something, he would but she used to go out of her way to talk with him and to find out things about him.

(H. 380). Although he did not speak English well, Lindi learned to like him (H. 381). And although Lindi James was not an expert and thus could not diagnose mental illness as such, she did testify that her mother, who knew Pedro much better than she did, treated him as if he were a child:

> Q Lindi, when you talk about that your mother treated him like a child, can you give any explanation or tell us what you're talking about when you say that?
>
> A Well, if she were to ask him anything, she'd ask him in a tone that was more like, do you want some water? Can I get you some water or do you want this or can I do this or just as if it were a little kid, you were talking to a little kid and --
>
> Q Was the tone of voice the tone of voice --
>
> A Her mannerisms were completely different than if she were to ask me

(H. 382).

Finally, had she been asked at the time of sentencing, Lindi James would have testified that Pedro Medina's life should be spared. She would have so testified because of her knowledge of who Mr. Medina was, as well as because of her doubts as to his guilt. Specifically as to the latter, Ms. James testified that her mother's boyfriend, Billy Andrews, had been very physically abusive to her mother and that her mother was apparently strangled with the belt of a bathrobe that Billy used to wear. (Andrews is discussed in subsequent portions of this brief.) The bathrobe was never used by any one else and was kept in the back of the closet; and her knowledge of Andrews and Mr. Medina left her with doubts about Mr. Medina's guilt (H. 372-73). As to the former, Lindi explained that even if she had been sure that Mr. Medina was guilty, she would still have asked the jury to spare his life:

> [ASSISTANT STATE ATTORNEY ASHTON]: Q Listen carefully, now, ma'am. Is your opinion that Pedro should not be executed the opinion you hold now and opinion you say you held back in April of '83, is that based on the fact that you don't think Pedro did it or is it based on the fact that you don't think anybody who killed your mother should die?
>
> BY THE WITNESS: A I feel like it has a little bit to do with

both. Personally, to me it has -- I've always been the type of person that, prove it to me. I'm going to draw the evidence that I can out of anything. I think I should have been a lawyer, honestly, but I will take all the facts that are presented to me and make my own judgment. I won't let anybody sway me, and unless something is beyond a reasonable doubt to me, then I'm going to hold what I believe.

And to me there are too many unanswered questions with the whole case, um, especially with how I know Pedro and how I knew my mother knew him too. There's just too many unanswered questions. Even if it were laid out to me. that, well, we know he did it. I just still can't -- I can't see justifying killing him of it. That's just --

Q So are YOU saying that even if YOU were convinced beyond any question in your mind that Pedro murdered your mother. YOU still would come forward and say he should not be executed: is that -- am I correctly Paraphrasing YOU?

A Paraphrasing. yes.

(H. 391-92)(cross-examination) (emphasis supplied).[11]

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[11]In her affidavit, Lindi James had attested:

I am the daughter of Dorothy James who was killed in Orlando, Florida in April, 1982.

I graduated from University of South Carolina in 1985. For almost three years now, I have worked as a supervisor for United Parcel Service in Englewood, New Jersey.

I lived with my mother until I left Orlando to go to college in Columbia, South Carolina. I know Billy Andrews whom she started dating before we moved to the Indies Apartments on Oakridge Road in 1978. My mother and Billy had a serious relationship before I went away to college, but after I started school in 1980, Billy moved in with her.

I know that my mother had a beige bathrobe that belonged to her father and which used to hang in her closet. She never wore it, but I know that that Billy used to wear it around the apartment all the time.

I knew Pedro Medina, and I liked him. I know that he and my mother were friends. I used to play chess with Pedro, and I know that they had a good relationship. I always knew Pedro to be a gentle person. He never lost his temper, and was always kind to both me and my mother.

After I found out that Pedro had been arrested for killing my mother, I was shocked. I could never believe that he could stab my mother. I told this to both my sister and friends.

My mother and I had a very close relationship. She was always a very strong person and did everything she could for my sister, Arnita, and me. I never knew her to have any enemies, and, in fact, usually anyone who met her immediately liked her.

I never liked Billy Andrews, and I never liked the way he treated my mother. I saw how mean he was to her, and he never treated her

(continued...)

Lindi James was never even deposed by defense counsel. She was listed as a State's witness. She obviously possessed important knowledge. No one bothered to talk to her.

Arnita James, Lindi's sister, was deposed. She was not, however, ever asked anything concerning her feelings about the death penalty for Pedro Medina. Post-conviction counsel asked her. She executed an affidavit, after sentencing, indicating that she would have asked that Pedro be spared, based on her knowledge of him, had she been asked:

> I am the daughter of Dorothy James who was killed in Orlando, Florida in April, 1982. At the time of her death and until now, I have continuously resided in Orlando.
>
> Before my mother had her green and white cadillac, she owned a red and white-Thunderbird which she used to loan out to Billy all the time.
>
> Billy Andrews used to live with my mother. After he moved out of the apartment, I know that my mother and Billy still saw each other and that their relationship had not ended at the time she was killed. I know that one night, after Billy moved out of my mother's house, she

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[11](...continued)
with the love that she deserved. My mother knew how I felt, but for her sake I always tried to get along with him.

During the months before she died, I know that my mother was scared and nervous. It was very unlike her to be like that because i had never known her to be afraid before. She had always been a very strong person. I never found out from her why she was feeling this way. When I used to ask her about it, she would shrug it off because she did not want me to worry.

My mother's death deeply upset me. After my initial shock of coming to grips with it, I thought a lot about what she would want me to do. I know that my mother was not a vindictive person. She had always been a very forgiving person. I know that she would never have wanted anybody to be executed for killing her. I know that I want whoever killed her to be punished, but I never wanted that person to be executed.

I also know that I never believed that Pedro killed my mother. I never felt that justice had been done when Pedro was convicted, and I never wanted him to be executed for her murder.

I would have told anyone who had asked, including Pedro's lawyer, what I knew about my mother, Billy Andrews, and Pedro Medina. I never talked to Pedro's lawyer until I testified at trial. If anyone had asked me, I would have told them and testified to what I thought and knew about my mother, Billy Andrews, and Pedro.

(H. 1385-87).

called Ernest Arnold and me from the Quarterback Club one weekend. She was in tears and very upset about something that Billy had done to her. Ernest, who is now my husband, had to go pick her up at the Club and take her home.

When my sister, Lindi James, learned that Pedro Medina had been arrested for killing my mother, she was shocked and told me that she did not think that Pedro could have done it.

During the years that my mother was involved with Billy Andrews, I never liked the way he treated her. He was mean and his temper was, to me, frightening and unpredictable. I also know that he took a lot of my mother's money.

Although I expected him to, Billy Andrews did not attend my mother's funeral. In fact, Billy has never contacted me or anyone else in the family since the day my mother died. This always struck me as very strange since he saw so much of my mother before she was killed,

When my mother died, I wanted desperately for the person who had killed her to be punished. My mother was a very kind and gentle woman, and I loved her very much. She was also very forgiving. I know that she would never have wanted the person who had killed her to be executed for it.

I knew Pedro Medina as a very quiet person. I remember that he used to play chess with my sister. When he talked, it was hard for me to understand him because he did not speak English well at all. My mother seemed to understand. She was quite fond of him and tried to help him.

When Pedro was charged with killing my mother I was surprised because in my heart, I really didn't think he could do something like that. I never wanted him to be executed for her murder.

If anyone had asked me, I would have told them what I knew. I would have also testified to it in court.

**(H. 1381-82).**

As noted above, Ms. Rodriguez was the lead defense attorney for the penalty phase. She had never conducted a capital trial as a defense attorney (H. 509), much less so a penalty phase. She testified at the post-conviction evidentiary hearing that the actual preparation for the penalty phase of Mr. Medina's trial was not begun until "after the end of the guilt/innocence phase, the trial" (H. 516).

She gave the following answers to questions about Lindi and Arnita James:

Q Did you, yourself, have any opportunity to speak to them

about their feelings about Pedro or what they knew about him, that kind of stuff?

A No, I did not.

Q Did you attempt to talk to them?

A I believe Warren may have spoken to them. I did not.

Q Were you aware of what their account was, is? One of them testified at this proceeding.

A Account of what?

Q Regarding Pedro, regarding his relationship with their mother and so on and so forth?

A I specifically can't recall. I know Warren had taken some depositions. I know that we had discussed it, but I frankly don't recall exactly what came of that.

Q Did you ever consider calling them to testify at the penalty phase?

A No, I did not.

Q Did you investigate that issue at all, what the account was of the two victim's daughters?

A I guess I'm not understanding your question, what their account was. What do you mean?

Q What they had to say, what -- by "account" I mean what they had to say about Mr. Medina, his relationship with their mother, what they thought of him, that kind of information.

A Well, I assumed they didn't think too much of him because of the allegations. But whether I investigated that or not, no. I did not.

(H. 537-38)(emphasis added). Ms. Rodriguez was responsible for the penalty phase. Even by the time of the 3.850 evidentiary hearing, however, she had no clue about what Lindi and Arnita could have testified to. There was absolutely no investigation here, and truly compelling mitigation was lost because of counsel's failures. The failure was obviously not reasonable. Indeed, having conducted no investigation, counsel acted out of rank ignorance ("I assumed they didn't think too much of him because of the allegations"). Arnita's testimony and deposition were, however, devoid of any indication that she wanted Mr.

Medina's death. Counsel never knew what Lindi's feelings were because their only contact with her was when she was called to testify as a State's witness at the trial. Lindi's and Arnita's testimony at the penalty phase undoubtedly would have been powerful mitigation evidence. Confidence in the jury's verdict is plainly undermined. Moreover, given the unique nature of what Lindi and Arnita could have testified to, had defense counsel investigated and effectively used this evidence in discussions with the State, there exists an obvious substantial and reasonable probability that the State Attorney would not have sought death, and a penalty proceeding would never have occurred.

Mr. Maslanik explained that Lindi and Arnita James' testimony constituted important evidence which should have been discovered and presented by reasonably effective counsel:

> Q . . . Is that type of information, the type of information provided by Lindi and Arnita James, the type of information that reasonably competent counsel would have investigated, developed and presented in 1983 in the penalty phase of a capital trial?
>
> A Well, certainly it would be something that you would investigate to see if that type of testimony would be available. My experience is that it is not often available, but that if it is, it would certainly be something that you would want to investigate.
>
> As far as the second -- third part of your question about developing the testimony and presenting it, I think that really depends upon the overall facts and circumstances of the case. I don't think that it would necessarily be something that you would present in every case, but in a case such as this, I think it would have been -- reasonably competent counsel would have attempted to present it to further humanize Mr. Medina, because the testimony not only goes to show her feelings about Mr. Medina in terms of punishment, but also to develop further the relationship between Mr. Medina and the victim and the feelings that the daughter, Lindi James, had toward Mr. Medina, characterizing him as being a quite and nice person, someone who she had a good relationship with, more limited than her mother.
>
> I think that that testimony certainly would have been helpful to the defense in the penalty phase in further humanizing Mr. Medina and perhaps giving additional reasons for mitigation.
>
> Now, you also asked me about Arnita James. I reviewed the affidavit of Ms. James.
>
> * * *

THE WITNESS: As far as Ms. James goes, from the affidavit I read that I had read before, essentially her testimony is along the same lines in terms of mitigation, developing the relationship and presenting humanizing type of information about Mr. Medina, which may have been helpful in the penalty phase.

In answering both of those questions, I have not taken into consideration any of the statements about Billy Andrews, so I don't know if that was supposed to be in the context of your question or not.

BY MR. NOLAS: Q Now, you indicated that this type of information is not often available in a capital case?

A That's correct.

Q Based on your experience with capital juries, would this type of information have been something that would have been relevant to their determination?

* * *

THE WITNESS: Answering your question, I would say it would be relevant for mitigation under the recognized mitigation of mercy. That has always been something that sentencing juries and sentencing courts have taken into consideration, both before the 1972 statute and also post-1972.

So I think that it would be relevant in terms of mitigation for mercy.

Q And mercy in terms of the humanization that you just mentioned?

A That's correct.

(H. 598-99; 600).

BY MR. NOLAS: Q If defense counsel indicated this morning that she never considered this issue regarding Arnita and Lindi James, this testimony, could such a defense attorney form any reasonable, tactical decision?

A If I understand your question, you're saying if the attorney did not investigate the issue, could they then make a competent tactical decision about whether or not to use such testimony.

Q Right.

A The answer would be no.

Q Even a step before that, she said she never even considered it. Can you formulate any reasonable tactic based on that?

A No.

Q Can you weigh alternatives competently, effectively, based on that

A No.

Q And does an attorney who fails to consider, slash, investigate this type of information, does that attorney's performance fall below standards for reasonably effective assistance attendant to capital cases in 19831

A Yes.

(H. 616-17).

The evidence that Lindi James could have provided went to the heart of the sentencing process. Her plea for Mr. Medina's life based on her personal knowledge of him as an individual would have been dramatic and powerful evidence in mitigation. Such evidence is rare in capital cases, as Mr. Maslanik explained. Such evidence is very, very important for the consideration of a capital sentencing jury, as even common sense demonstrates. Lindi and Arnita were available to the defense and willing to testify. There is no possible strategy that could justify the failure to investigate and present this type of evidence at the penalty phase.

The circuit court, however, employed a unique analysis to decline relief, an analysis not grounded on the facts of this case, but on the circuit court's unique reading of this Court's opinion in Jackson v. State, 498 So. 2d 406 (Fla. 1986) -- the lower court apparently believed that testimony from a victim's relative cannot ever be admitted at the penalty phase even when it is in the defendant's favor (H. 2291). This ruling is flatly incorrect, for a number of reasons. First, as a matter of law, Jackson v. State does not hold that testimony by a victim's family member that he or she does not support the death penalty is inadmissible at a sentencing hearing. Rather, this Court held in Jackson that since the trial judge, who is the ultimate sentencer, heard the proffer of the testimony, the requirements of Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), were basically met, despite

the fact that the jury did not hear the testimony. Jackson, 498 So. 2d at 414.[12] This Court's concern in Jackson seemed to be that such testimony could be rebutted by other family members with different views. Such a concern is inapplicable in Mr. Medina's case -- both daughters opposed Mr. Medina receiving the death penalty.

Second, the lower court's ruling ignores the fact that Lindi and Arnita knew Pedro Medina, probably better than almost anyone in the United States at that time, since he was a recent immigrant. Their testimony was certainly relevant to who Pedro was as a person. It was precisely the type of mitigating, humanizing information that a capital jury should be allowed to hear, and that cannot be limited at a capital sentencing hearing. See Hitchcock v. Dugger, 481 U.S. 393 (1987). Certainly a jury cannot be foreclosed from considering such testimony from a defendant's daughters or sisters. See Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989). Here, the victim's daughters could have presented a plea for life, supported by specific mitigating facts, because they know who Pedro Medina was. This is compelling mitigation indeed, and the lower court's ruling that its presentation is foreclosed as a matter of law is plainly erroneous. This Court has in fact acknowledged that the victim's family's opposition to the death penalty is nonstatutory mitigation. Flovd v. State, 497 So. 2d 1211, 1213-15 (Fla. 1986).

The circuit court's ruling is simply wrong, as a matter of law, and should be corrected. This case involves two aggravating factors and one statutory

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[12]Although not of great significance to the disposition of this claim (as discussed below, Lindi and Arnita were not presenting a blanket view on capital punishment, but would have testified that Mr. Medina should be spared because of what thev knew of him), it is respectfully submitted that the strict holding of Jackson (that the error was harmless because the judge ultimately sentences) does not withstand post-Hitchcock scrutiny in light of this Court's holdings in Riley v. Wainwrijzht, 517 So. 2d 656 (Fla. 1987), and Hallv. State, 541 So. 2d 1125 (Fla. 1989). It is the jury, after all, that should first be allowed to hear the mitigation. Hall: Riley.

mitigating factor (lack of criminal history) which the trial court found. The trial prosecutor acknowledged at the evidentiary hearing that the State's circumstantial case was weak. Lindi and Arnita's testimony was certainly admissible. Yet, the jury never heard it. Deficient performance and prejudice are plainly established in this case.

B. TRIAL COUNSEL'S FAILURE TO PRESENT MITIGATING EVIDENCE CONCERNING MR. MEDINA'S BACKGROUND IN CUBA AND IN MIS COUNTRY[13]

Although Ms. Rodriguez' husband was originally from Cuba, and she knew there were ways to communication with people in Cuba, "[y]ou could write letters, or you could call on the phone" (H. 563), Ms. Rodriguez did not make any efforts to obtain information about Pedro Medina from Cuba (H. 543). This was despite the fact that Mr. Medina had only been in this country for a short period of time. Ms. Rodriguez also testified that she did not begin her penalty phase preparations until the jury returned a verdict of guilty (H. 516). Obviously, by that time, it was too late to conduct any meaningful investigation.

Mr. Maslanik explained the importance of contacting family members, whether or not live testimony from such witnesses could be produced at the penalty phase, and that the first thing to do would be to write letters, as Ms. Rodriguez herself noted. Ms. Rodriguez never did even this. Mr. Maslanik explained that this was deficient performance. Reasonably effective counsel would at least first ask that family members and others who knew the defendant abroad (in Cuba) get any available records and "mail it to me." Further:

> Write me letters that would give me information that I could give to an expert, even if I couldn't produce the witness to assist the expert, if I found from *my* communication or if an attorney in 1983 who was reasonably competent found from their communications that there were witnesses in Cuba that would be relevant and important witnesses for presentation in penalty phase itself, in addition to presenting it

[13]Evidence regarding Mr. Medina's life in the United States, and his deteriorating mental health (for example, Mr. Garcia's testimony) is generally discussed in section C, infra.

to the expert.

* * *

BY MR. NOLAS: Q Now, putting aside for a moment the question of getting the actual witness, would letters, affidavits, that type of information be useful in obtaining that type --

A It would be useful even if it was just for the basis of an expert's opinion.

Q And why -- what's the use there? What's the importance of that information in that regard?

A Well, even if you were unable to present the witnesses, you could present the expert to testify about his opinion as to nonstatutory mental mitigating factors based on communications, letters, affidavits, sworn statements, tape recordings, whatever, from people in a location which you're unable to present to the witness or present to the Court and experts could testify about that in regard to their opinion.

(H. 593-99)(emphasis added). Here, not only was there no effort to produce live witnesses at the time of sentencing, there was **no** effort at all -- not one letter was written; not even the first basic step was taken.

Post-conviction counsel contacted Mr. Medina's mother in Cuba. With the help of an interpreter, she executed an affidavit, which is set out in the record as Def. Exh. S. Among other things, she related that Pedro watched his father beat his mother unmercifully, to the point of knocking her teeth out. Later, he saw his mother engaging in sex with many different men who she brought home. Trial counsel would have found extreme poverty, abuse, neglect, hunger, and head injury. The family lived in one room. Pedro almost died at birth from being strangled by the umbilical cord. He suffered severe head injuries. He was a very sick, weak child. There was evidence of destructive parenting behavior. Pedro's father hated him and denied that Pedro was his son. He beat Pedro unmercifully, throughout his formative years. Trial counsel would have found symptoms of mental illness. Pedro had seizures, convulsions, nightmares and hallucinations. Despite this he tried to please others and was respectful to older people. When he was 12 he was sent to the Mulgado Boys Institution

where he was abused mentally and physically. Mental illness runs in the family and Pedro's great grandfather died in a mental institution, his grandmother has delusions, and his sister has been institutionalized several times for mental problems. Trial counsel found none of this because they did not investigate. They did not even write one letter.[14]

Ms. Rodriguez' only "reason" for not investigating this wealth of information was a reference to anti-Cuban sentiment in the community (H. 572). However, this after-the-fact reasoning admittedly did not hold up:

> Q. In terms -- you did argue Mr. Medina's Cuban background. You did present evidence in that regard?
>
> A. I did; I did.

(H. 574). The circuit court did not rely on the after-the-fact justification. Rather, the lower court rejected the claim because of its belief that the compelling facts of Mr. Medina's childhood would not have "made a difference in the ultimate outcome of the penalty phase trial or sentencing . . ." (H. 2292). Further, the court found that no other persons, such as Mr. Medina's sister, could be found. The holdings overlook the fact that counsel did nothing to try to get the information -- and thus could not have found that which was never even pursued. The holding also is strikingly similar to the one issued by the trial court in Hall v. State, 541 So. 2d 1125 (Fla. 1989), a holding grounded on the judge's personal view of the mitigation, not on what a reasonable juror may have thought. Abuse, neglect, mental illness, hospitalizations, and poverty all mitigate, notwithstanding the lower court's view. These things do make a

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[14]It should be noted that Mr. Medina pled a much broader issue in his Motion and Amended Motion to Vacate. The circuit court's limited hearing did not allow Mr. Medina to present all of the family background information that competent counsel should have obtained and presented to Mr. Medina's capital jury, including information from his sister who lived in Tampa, Florida. Mr. Medina reasserts his entitlement to a full and fair evidentiary hearing. However, even on the basis of what was presented at the limited evidentiary hearing below, relief is appropriate.

difference to a capital sentencing jury. The lower court erred.

C. INEFFECTIVE ASSISTANCE CONCERNING MENTAL HEALTH AND RELATED ISSUES

Trial counsel is entitled to request that three psychiatrists examine a defendant regarding competency to stand trial pursuant to Rule 3.210, Florida Rules of Criminal Procedure. Further, defense counsel is entitled to a confidential mental health evaluation pursuant to Rule 3.216, Florida Rules of Criminal Procedure. Mr. Medina's trial counsel only requested two "competency" evaluations,[15] never requested a confidential evaluation (H. 519), and never requested that the experts address nonstatutory mental health mitigating circumstances to be used at the penalty phase (H. 522).

Ms. Rodriguez, lead counsel for the penalty phase, never even talked to the two mental health experts that did evaluate Mr. Medina:

> BY MR. NOLAS: Q Ms. Rodriguez, you were primarily responsible for the penalty phase?
>
> A Yes.
>
> Q And you were primarily responsible for preparing the penalty phase; fair?
>
> A With a lot of help from Warren.
>
> Q Right.
>
> A We really did work this together.
>
> Q Right. But the primary responsibility for that phase was yours, developing, investigating, that type of thing?
>
> A All right. Yes.
>
> Q Did you, in that regard, consider, prior to the guilty verdict now, requesting that the Court appoint an expert with regard to the penalty phase, with regard to penalty phase issues?
>
> A No.

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[15] These evaluations were conducted jointly by Drs. Wilder and Gonzales, the latter being the only one of the two to speak Spanish. Their reports do not make any reference to nonstatutory mental health mitigation. The experts apparently were not in agreement on their assessment of Mr. Medina's sanity at the time of the offense.

Q Okay. After the guilty verdict, did you consider requesting the Court appoint [an expert] with regard to penalty phase issues?

A No, we did not. We decided not to do that.

Q Okay.

A We did not do that, no.

Q And you indicated you didn't consider it, or you decided not to do that, which?

A I franklv don't remember if we considered it or not.

(H. 523-24)(emphasis added).

Ms. Rodriguez testified that the only person she spoke to regarding the penalty phase was a Mr. Cassady "from the jail" (H. 513). Mr. Cassady is an unlicensed jail psychologist (H. 515), who told Ms. Rodriguez that Mr. Medina was "psychotic" (Def. Exh. for Identification I; see also H. 513-14). Ms. Rodriguez decided on the basis of this conversation with Ms. Cassidy that she should not pursue mental health mitigation.

Ms. Rodriguez did not discuss mitigation with the two experts that evaluated Mr. Medina pretrial for competency and sanity, but despite the fact that she never discussed the penalty phase with them, she believed they would be of no help (H. 513). She also never asked for the appointment of a psychologist for use at the penalty phase, nor did she ever ask that any psychological testing be done (H. 527). Mental health mitigation was simply not developed in this case, although it was available. It was never reasonably investigated, and thus no reasonable decision was made as to whether it should be presented.

Mr. Maslanik discussed the importance of developing and presenting mental health information at the penalty phase:

> I think reasonably competent counsel in 1982 to 1983 could have and should have obtained additional mental health experts, either psychiatric or psychological or neuropsychological to evaluate Mr. Medina, to be presented with whatever life history they could with whatever information they could obtain from witnesses directly in the United States or witnesses that they obtained information from in other localities, that that could have been presented and should have been presented to an additional expert, because the two experts that

evaluated Mr. Medina were not even directed to explore the possibility of nonstatutory mental health mitigating evidence.

And from reading their reports, their primary evaluation was for competency because that's what they were directed to do. And the Court added the inquiry of the statutory mitigating factors, but there's no indications that they were directed to anything else, so, therefore, counsel could not rely upon the fact that they had done that evaluation.

And reasonably competent counsel would have and should have, based on the standards of 1982, 1983 asked for additional experts. And not just one expert. I think reasonable competent counsel would have asked that a minimum for a psychologist to do psychological testing. None of that was done by these experts.

An independent psychiatrist or more, probably in this case a neuropsychologist, given the information that Mr. Medina had symptoms of some sort of brain damage from his childhood and his teenage years. And from things that were known about his behavior at that time, and the fact that he was being given significant amounts of an antidepressant type of medication so that, yes, reasonably competent counsel should have done that.

(H. 610-11).

At the evidentiary hearing, Mr. Medina presented the testimony of three highly qualified mental health experts to illustrate the type of mental health mitigation which was available at the time of sentencing. Had counsel reasonably pursued a proper evaluation regarding penalty phase mitigation, and had counsel provided sufficient background information to the expert to enable him or her to render a competent and reliable evaluation, a wealth of highly significant evidence would have been available.

Dr. Dorita Marina, Dr. Stephen Teich, and Dr. Joyce Carbonell all testified to a history of serious mental illness beginning in Mr. Medina's childhood and extending up to the time of their examination.[16] Specifically, they found that Mr. Medina is a person of low average intelligence who suffers from brain damage and psychotic behavior. Their evaluations were corroborated by jail records

[16]Dr. Marina is an experienced and respected psychologist. Dr. Teich is a psychiatrist with impeccable credentials. Dr. Carbonell is an eminently qualified psychologist, neuropsychologist, and professor, and the director of the Florida State University Psychology Clinic.

from the time of the original proceedings (which defense counsel never provided to an expert) and which describe Mr. Medina as schizoid and suicidal and document many instances of bizarre behavior. The records were obviously available at the time of Mr. Medina's trial. The combination of mental health problems, brain damage, and cultural difficulties resulted in a person whose functioning was and is clearly impaired. These deficits may or may not affect a defendant's competency to stand trial, but these deficits are undeniably mitigating factors which a jury can rely upon to reasonably vote for life at sentencing. Hall. supra; cf. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Dr. Marina testified that the results of the psychological test battery she provided showed that Mr. Medina is paranoid, schizophrenic, brain-damaged, and suffers from a history of serious depression. In her examination and testing, Dr. Marina noted that Mr. Medina exhibited feelings of dependency, grandiosity, inferiority and a need for mothering. He also squarely fit the psycholonical profile of someone who has been physically abused as a child (H. 421-22). Dr. Marina described Mr. Medina as a person brain-damaged since birth:

> What I was saying is, that given the protocol, given all the test results and all of the things that I engaged in, I would say that from childhood on, this is a child who has been abused, when has been -- who has thought of himself as inferior, who has been depressed, who has felt himself caught between mother and father in their fights, and perhaps each one pulling one way or the other.
>
> I see him as having had a very disturbed childhood, as having been a very anxious depressed child, very isolated, very withdrawn and hating himself, thinking extremely poor of himself, hating his identity,
>
> For example, one of the things I know is that he did not want to speak Spanish with me and I am from Cuba. I prefer to speak Spanish when I'm talking with someone that has recently come from Cuba. I feel more comfortable, which I think is natural. It was my first language and he really did not want to do that. Time and time and time again, he responded to me in English or refused to answer me in Spanish and this indicates to me that since 1980, he came to this country, his effort has been to wipe out his identity, to wipe out his language, to wipe out who he is.
>
> He has made comments that his family included, and he gave me a long list of names and one of them was Martin Luther King. Now, the

importance of that is his denial of who he is, of his own identity. He doesn't want to be who he has been since he was one years old, two years old. So the kind of stresses, the kinds of mental conflicts that I experienced and perceived in this person are very long standing. The brain dysfunctions that I picked up in the testing again have been of long standing.

They are not the kind of protocols which are of an accident that took place six months ago. The signs are new, different. The vocabulary, for example, soon after damage in a car accident say or any kind of sudden trauma to the brain, what happens is vocabularly tests goes down. It drops, but then by the time a year after the accident has taken place, the vocabulary tests comes up to where it was, present trauma or very nearly, and what we see in this is that he brain damage that I'm finding is not one that has taken place now, but I would much more likely connect it and relate it to congenital brain damage from birth.

(H. ***424-25).***

All of the experts agreed that a lay person would not have the training to recognize the symptoms of mental illness but might describe a mentally ill person like Mr. Medina as child-like, withdrawn, solitary, untruthful, jealous, or violent, without realizing that these characteristics are in fact symptoms of mental illness (H. ***427-29).*** What Lindi observed -- that her mother had to treat Pedro as a child -- was perfectly consistent with what a lay person would observe. Pedro Medina functioned at a child's level. Dr. Marina explained that Mr. Medina's bizarre behavior in court during the trial itself was a symptom of his psychotic condition. The jurors saw the bizarre behavior. They never learned that the defendant before them was very seriously mentally ill.

Dr. Carbonell described her assessment of Mr. Medina's organic brain damage and psychosis:

He exhibits on the test signs of brain damage and on tests looking at his thought processes, he appears psychotic. This is congruent with behavioral observations that I made of him during the six hours that I spent with him and information elicited during the interviews. It's also consistent with his history.

(H. **256).**

Q Doctor, how are the results of the testing and of your evaluation congruent with the records that you've been describing, if they are congruent?

A Okay, my interviewing and evaluation is congruent with the testing in the sense that, for example, when I interviewed him, his thought processes were very, very inconsistent. At times they were incoherent, illogical. At times coherent. They were psychotic. These are the same descriptors that you find in his records, for example, in the jail, his thought processes [are] changing. Again he's very concrete.

Also find example of that in his testimony, prior statements that he made at the time. The fact that he is brain damaged has been alluded to before by people who knew him as a child. There's evidence that incidents could have happened that could have caused that. His behavior is congruent with the descriptions of the people that saw him at that time. I spoke to people. I read a number of depositions, some of whom described him --

MR. ASHTON: Objection, testifying as to matters not in evidence.

THE COURT: All right, it's sufficient that your reviewed certain depositions, I assume filed in this case, okay. You don't have to tell us what the deponent said.

BY THE WITNESS: A Okay, it's consistent with descriptions of his behavior that occurred at the time of his arrest, at prior times in the jail, at times before he was ever in the jail, at times after the jail. In other words, the behavior that I saw, the behavior that was elicited by the testing, excuse me, the symptoms or mental health problems elicited by the testing have been consistently present throughout the variety of records, personal recollections of people and statements of people during that time.

* * *

BY MR. NOLAS: Q Could you describe for us Mr. Medina's level of functioning throughout his life?

A I would say that level of functioning throughout his life has been impaired.

Q And can you tell us why?

A It's been impaired because he is psychotic. It appears to be a life long problem. There are indicators that he's brain damaged. Being psychotic interferes with your ability to plan, think logically, think coherently, behave appropriately, abstract, generalize.

He also appears to be brain damaged. That will give you problems with impulse control and also the same issues in terms of being able to plan and function well, although his IQ is, like I said, the testing I did in prior testing appears to fall borderline intelligence range. We could assume that he probably, were he tested in his own culture, he would function in the low average range. But his functioning in this culture is impaired for a variety of reasons. If you combine the cultural problems, the mental health problems, the brain damage problems, his functioning is going to be clearly

impaired.

(H. 263-66).

Dr. Teich testified that Mr. Medina's family memories were so painful to him that he answered questions in terms of chessboard terms and how one would feel if countries like Greece and Switzerland disappeared. He included Fred Sanford and Martin Luther King in his family. He described symptoms of seizures and paranoid ideation. In responses to questions from the court as to whether Mr. Medina might have been malingering, Dr. Teich responded:

> No, I didn't see that in my interview, and I always look for that in circumstances of anybody in the courtroom before the law. One has to be well aware of that, and certainly under the present circumstances that would be something I would be very concerned about.
>
> If anything, I think he made an attempt with me to look very together. And he talked about -- for instance, on the following thing he particularly talked about his English and how hard he had studied English and how he tried and how he was trying to organize things, get his life together. And he talked about himself in a very positive way.
>
> In some ways he even became, I thought, exaggerated. For instance, he described that he had been an architect in Cuba. He described that in coming here he had -- though he was on Mariel, he had chosen to, and they didn't make him pay any money to come here. He described that his idea in coming here was that he wanted to be a computer scientist.
>
> When you begin looking at this in terms of some of the other information I have here that he didn't complete high school, that he didn't get into the schools he wanted in Cuba, that he had become very depressed. This appeared much more like an attempt to look good to me. If there was any change in the positions --
>
> THE COURT: Well, that's what I was getting at.
>
> THE WITNESS: No, he wanted to look healthy to me.
>
> THE COURT: Do you think he truthfully believed these expressions of grandiosity, or do you think he was pulling your leg, so [to] speak?
>
> THE WITNESS: No, no. I think that's his attempt to bolster himself, because he really has a terrible opinion of himself. He's very depressed, and I think that his depression threatens him with continual thoughts of suicide and despondency, and that in order to alleviate that -- and that's been going on really for a long time -- he tries to create in his own mind ideas of how good things can be for him, and that's really a psychological defense and not a false image

presented.

> I think he is very afraid, to be honest, of being mentally ill, as many people are. They are much more afraid of that often than they are of death.

(H. 792-93). Dr. Teich explained that Mr. Medina had been mentally ill throughout his life. This is consistent with the results of all the testing. (No psychological or neuropsychological testing was requested or conducted at the time of the original proceedings. Mr. Medina was first tested by Drs. Marina and Carbonell.) Mr. Medina's mental illness, and its life-long nature, are also consistent with the accounts of the individuals who had come into contact with him as well as with the pretrial records of the jail.

Dr. Teich described a particular set of circumstances leading to Mr. Medina's psychotic condition at the time of the offense. Mr. Medina came to America with a dream of freedom and making his life work. When he came to Florida to live with his sister, he found racial discrimination and he was unable to secure a job. When his sister left he was living on the streets. He was then wrongfully arrested and held in jail. During his time in jail, approximately eight months before the offense, he stated that he believed Castro sent him to the United States to start a revolution (H. 801-09). Dr. Teich testified that the cumulative effect of these severe stressors precipitated another major depressive episode like the one that resulted in Mr. Medina's being hospitalized in Cuba as a teenager (H. 814). Dr. Teich also discussed Mr. Medina's denial regarding his mother and his identification with his father was a result of his illness:

> In order to do that, he had to make a choice between his parents who were -- at least were close to at war with each other. The father beat the mother, accused her of having sex with other men. At some point she admits that, in fact, she did, he did.
>
> It was a very disruptive family by that description, and he had to choose between one of his parents and the other. And rather than accept the father saying, "You are not my son," he chose to alienate his mother and say, "She is not my mother, but he is really my father," which is a rejection and attempt to identify with the

father

There is a real psychological basis in that, and that is not a conscious decision that a child makes.

THE COURT: I see what you're saying.

THE WITNESS: It is often called an attempt to identify with the aggressor.

(H. 827-28). Finally, Dr. Teich agreed with Drs. Marina and Carbonell that Mr. Medina's disruptive courtroom behavior was due to his mental illness (See, e.g., H. 834). Again, the jury saw the behavior, but never learned why.

During the course of the evidentiary hearing, Mr. Medina also presented the account of numerous lay witnesses who were available at the time of trial and who could have provided important background information for the jury, court, and to an expert. David Allen, a former assistant public defender, stated that he was unable to communicate with Mr. Medina and described seeing Mr. Medina bowing and mumbling in court at his arraignment (H. 757). Public defender investigator Barbara Pizzaroz testified that based on her interview with Mr. Medina shortly after the offense she believed that he had mental problems and that something was "very, very wrong" (H. 713-14, 721). Trooper Wilson testified that at the time he arrested Mr. Medina that Mr. Medina was sleeping slumped over the wheel with the car running, and that he appeared "kind of incoherent" and "not totally knowledgeable about what was happening" (H. 723, 726-27). Rubin Garcia, who ministered at the jail, described Pedro Medina as being ". . . sad and uncomfortable, afraid of everything. And then wasn't understanding it. Pedro, really, mentally, he wasn't right. That's what I thought in my opinion by that time" (H. 39). Much of this information was itself mitigating. It was readily available to defense counsel. It could have been provided to an expert. (The original experts relied solely on this mentally ill man's self-report.) Defense counsel did nothing about it.

Had Mr. Medina had the benefit of an adequate mental health evaluation

addressing mitigation, he could have presented substantial evidence of both statutory and nonstatutory mitigation to the jury.[17] Mr. Maslanik emphasized that this type of evidence is particularly effective in humanizing a defendant and often results in a jury recommendation of life (H. 675). He further testified that mental health evidence was also particularly important in this case to explain to the jury and judge that Mr. Medina's courtroom behavior and outbursts were due to his mental illness (H. 657, 664, 675).

The circuit court's denial of this claim was based on the judge's belief that the mental health evidence presented below was actually "derogatory and would have had, if anything, an adverse effect on the jury. . . ." (H. 2293). Further, although the circuit court found that the mental health evidence presented at the post-conviction hearing would have been admissible at the penalty phase, the court believed that this mental health information would have strengthened the jury's resolve to recommend death (H. 2294). The lower court's ruling was plainly wrong as a matter of law. Indeed, the lower court's view of how juries would have considered this evidence comports with neither this Court's, Hall; Michael; O'Callaghan; Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Huddleston v. State, 475 So. 2d 204 (Fla. 1985), nor the Eleventh Circuit's, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), nor the United States Supreme Court's, Ake v. Oklahoma, 470 U.S. 68 (1985), understanding of the applicable sixth and eighth amendment principles of law.

Further, as this Court has held numerous times:

> It is well settled that evidence of family background and personal history may be considered in mitigation. Brown v. State, 526 So.2d 903, 908 (Fla.), cert.denied, 109 S.Ct. 371 (1988). See also Holsworth v. State, 522 So.2d at 354 (childhood trauma is a mitigating factor).

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[17]The 3.850 court limited the issue solely to nonstatutory mitigating mental health information.

Stevens v. Florida, 522 So. 2d 1082 (Fla. 1989). In Stevens, this Court held that counsel's purported "tactical" decision not to present mitigation was not controlling, because it was not reasonable. Likewise, Ms. Rodriguez's explanations are also not controlling, for they were not reasonable: she relied on Mr. Cassidy's statement that Mr. Medina was "psychotic" in deciding not to pursue mental health evidence;[18] she failed to even talk to the appointed mental health experts concerning mitigation; penalty phase preparations began only after the guilt verdict, overnight; no testing was ever requested; in a case involving a client in whom almost everyone observed symptoms of mental illness, no meaningful steps were taken to develop mental health mitigation. Counsel's actions cannot be deemed reasonable. Stevens, supra. Indeed, the 3.850 court did not rely upon them, but denied this claim on the basis of its misunderstanding of the significance of mental health mitigating evidence for the consideration of a capital sentencing jury. The lower court erred as a matter of law. Relief is warranted here as a matter of law and fact. Counsel did not act reasonably, did not reasonably prepare, did not reasonably investigate. As a result, a wealth of significant mitigating information was never heard by the jury charged with deciding whether Pedro Medina should live or die. Confidence in the sentencing result in this case has been undermined and Rule 3.850 relief is proper.

(III)

MR. MEDINA'S RIGHT TO A FULL AND FAIR HEARING ON HIS RULE 3.850 MOTION WAS VIOLATED BY THE CIRCUIT COURT'S INITIAL ORDER LIMITING THE EVIDENTIARY HEARING AND BY ITS SUBSEQUENT ACTIONS AT THE HEARING WHICH FURTHER LIMITED MR. MEDINA'S ABILITY TO PRESENT HIS CASE.

A post-conviction petitioner, particularly in a capital case, is entitled to a full and fair evidentiary hearing on the claims raised in his or her motion unless the files and records conclusively show that he or she will lose. In

[18]As noted, Mr. Cassidy is an unlicensed jail employee.

such a case, the judge must attach "a copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850. This Court has not hesitated to remand 3.850 cases for evidentiary hearings. See, e.g., Zeigler v. Dugger, 452 So. 2d 537 (Fla. 1984); Vaught v. State, 442 So. 2d 217 (Fla. 1983); Smith v. State, 461 So. 2d 1354 (Fla. 1985); Morgan v. State, 461 So. 2d 1534 (Fla. 1985); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranao v. State, 437 So. 2d 1099 (Fla. 1983). Neither has the Court hesitated to demand the petitioners be treated fairly in such hearings, or that they be allowed to be fully heard. Rule 3.850 proceedings are, after all, governed by the principles of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987).

By Order dated September 24, 1987, the circuit court disposed of the majority of Mr. Medina's Rule 3.850 claims for relief -- without evidentiary hearing. These included claims alleging ineffective assistance of counsel, claims that cannot be denied on the trial record precisely because they allege the trial defense attorney's failure or omission, which does not, by definition, appear on the record. Mr. Medina contends that it was error to summarily deny these claims without an evidentiary hearing.

The circuit court did grant an evidentiary hearing on two claims: Bradv and certain aspects of the penalty phase ineffective assistance of counsel claim. Even with regard to these two claims, the circuit court so severely limited the presentation of evidence that the hearing was rendered far from full and fair. The circuit judge injected his own objections during the proceedings, supplied the grounds for objections made by the State, dictated the order of proof, continuously interrupted post-conviction counsel during their presentation, advised the State on how to proceed, and disallowed the presentation of evidence by the defense. For example, the first witness called

by the defense at the evidentiary hearing was Dr. Joyce Carbonell. After post-conviction counsel questioned Dr. Carbonell about her qualifications, the assistant state attorney questioned her. One of his questions concerned clients that she had been confidentially retained by CCR to evaluate, where she had not found anything of benefit to the defense. Dr. Carbonell responded that there were several clients who she had evaluated, submitted findings, and then had never been called to testify, so she assumed she was not helpful (H. 24). The assistant state attorney then asked her to name one of these clients. Post-conviction counsel objected:

> MR. NOLAS: Objection, Your Honor.
>
> THE COURT: Grounds, counsel.
>
> MR. NOLAS: Yes, Your Honor, Doctor Carbonell, along with other -- with the office of the Capital Collateral Representative are, on occasion, retained to do a confidential psychiatric/psychological evaluation of our clients. That role is the role of an expert advisor. If we allow the state at this point to get into the clients that the doctor comes back tells me or Ms. Dougherty or other attorneys at CCR this person is fine, there's nothing wrong with this person, no mitigation in this case, it would violate the very right of confidentiality that we have with our clients. We promise our clients when somebody like Doctor Carbonell goes and sees them that --
>
> THE COURT: I'm going to overrule the objection to this extent. I think that she can be allowed to testify as to the identity of the clients, but any communications between her and the client or your office and herself would then be confidential.
>
> MR. NOLAS: I --
>
> THE COURT: Now look, that's my ruling and I'm not going to hear any further arguments.
>
> MR. NOLAS: May I make one brief point, sir?
>
> THE COURT: No, sir.
>
> THE WITNESS: Your Honor, may I --
>
> THE COURT: No, ma'am.
>
> THE WITNESS: You want to restate the question?
>
> MS. ASHTON: Could we have the court reporter reread it?
>
> MR. NOLAS: Let me indicate, for the record, Mr. Richard --

THE COURT: Counsel, look, let me shortcut you a bit. I appreciate your position but all these statements for the record that I can anticipate you'll want to be making throughout these two days are going to do nothing but bog us down, so could I ask you to refrain from making any statements for the record unless you get my permission to do so?

And at the time we're going to break for recess, then if you want to make your statement for the record and the court reporter is not so tired, she will stay here, receive it, put it down, why, we'll do it that way. If it's not a motion or objection, it's a waste of time in my opinion, so let's proceed.

(H. 25-27). This is how the hearing started. All that counsel was asking was to be heard. The initial exchange set the parameters for much of the hearing, Indeed, on a number of occasions during the hearing, the court would not even allow counsel to state his full objection on the record.

Because of the court's initial ruling, defense counsel had to withdraw Dr. Carbonell as a witness in order to protect the rights of other clients in whose cases the doctor had been retained by CCR, but in whose cases her views would have been devastating to the defense. After the next witness testified, the following occurred:

It's five minutes till noon. I suggest we break for lunch. We'll be in recess until 1:00 o'clock.

MR. NOLAS: If I may, regarding Doctor Carbonell, you may --

THE COURT: Now, I'm going to ask the court reporter to wait that five minutes and let you place on the record any proffer that you would have made.

MR. NOLAS: May I --

THE COURT: Now, in the nature of the Court's ruling and your decisions as to what alternative you wanted to proceed, I don't find it necessary for me to listen to the proffer. Do you think it's necessary for me to listen to the proffer?

MR. NOLAS: I think it is.

THE COURT: I disagree with you. I don't think it is so I'm not going to listen to it, but you may put it on the record.

MR. NOLAS: Two other things. I think, with all due respect, it's necessary for Your Honor to listen to myself stating my grounds.

THE COURT: Counsel, let me tell you something. You and I are going to get along very nicely if you do not try to reargue my rulings. Those are matters for the appeals courts.

MR. NOLAS: May I put those on the record, Your Honor?

THE COURT: What's that?

MR. NOLAS: My grounds for making that choice.

THE COURT: Whatever you want to put on the record. The court reporter I'll ask to stay five minutes. Surely you can do it in five minutes.

MR. NOLAS: Will Your Honor reconsider --

THE COURT: No, I will not because of the nature of my ruling as an alternative to proceed or not proceed. I held it was not, the answer to that question would not violate any confidential privilege, period. I might be right. I might be wrong. That was my ruling. I don't find it necessary to hear her position, why she thinks it's confidential, because I'm not going to go back into it.

MR. NOLAS: Her position would be --

THE COURT: Counsel, the answer is no. I'm not going to hear it. I don't find it necessary for me to hear it. Anything else before we recess?

MR. NOLAS: May she place her grounds on the record, Your Honor?

THE COURT: I guess there's no harm in that, as long as the court reporter gets some relief here, gets to take a recess too. Anything else?

MR. ASHTON: I just wanted to know, the Court is not extending the proceedings? I'm not going to remain.

THE COURT: I'm not going to remain.

MR. NOLAS: I don't think it's necessary for you to remain either.

THE COURT: Okay, fine, anything else? There being nothing else, we'll be in recess until 1:00 o'clock. Everybody be back promptly ready to go. We'll have Mr. Medina back at 1:00 o'clock.

THE COURT DEPUTY: Yes, Your Honor.

(Whereupon, the Court recessed at 11:55 a.m., Thursday, October 6th, 1988)

* * *

(Whereupon, a Proffer was made by Mr. Nolas out of the presence of the Court, Mr. Ashton, Assistant State Attorney)

(H. 64-67).

The following day, Dr. Carbonell was recalled as a witness, and defense counsel reaffirmed that he would not let her disclose a client for whom she had not provided testimony in court. The judge then acknowledged this and allowed her to testify (H. 226):

> MR. NOLAS: Yes, Your Honor. One matter Your Honor indicated --
>
> THE COURT: Mr. Nolas, please, let's get on with the case.
>
> MR. NOLAS: Judge, please. I do want the record to be clear. Just one thing in that regard. Your Honor indicated that the doctor would refuse to answer the question. Technically and in reality, I am refusing to allow the doctor to answer that question.
>
> THE COURT: Fine. I'11 hold you in contempt when we get through with this thing. Let's get on with the questioning.

(H. 230).

The court's refusal to allow defense counsel to properly argue did not end there:

> MR. NOLAS: Yes, Your Honor. First, with the Court's permission, if I may reopen my motion to present Lou Lorincz. And I have one additional matter to cite in that regard. I had already indicated, I'11 put a proffer in the record, but namely, Your Honor, the idea --
>
> THE COURT: Counsel, I ruled on that matter of Lou Lorincz and I don't want to go back into it, okay. What else do you have?
>
> MR. NOLAS; I wanted to be heard on that one more time with regards --
>
> THE COURT: No, sir, I heard you yesterday.
>
> MR. NOLAS: Yes, sir.

(H. 225-26).

During the testimony of Austin Maslanik, who was qualified as an expert attorney, the court decided that Mr. Maslanik should be excused and called back after other witnesses testified (H. 210-120).

The court continuously interrupted the defense's presentation:

> THE COURT: Counsel, let me observe that we know or will learn in the course of this hearing what records were available in 1982, '83.

She has already testified as to what she did evaluate which included some records that were not available in '82, '83: to wit, the Florida State Prison Records, that all of that occurred after he was sentenced.

Doctor Marina's report occurred after he was sentenced, et cetera. I think the question was maybe it was not accurately stated, you know.

This is the last time I'm noinn to intervene in your interronation of a witness, but ma'am, I think the question was, what sorts of information would a mental health expert have looked to in '82,'83 in evaluating the nonstatutory mental health mitigating factors? Wasn't that your question, counsel?

MR. NOLAS: Sure.

THE COURT: Well, make it a little sharper if you would so we don't get bogged down.

Okay, ma'am, would YOU answer *my* question then. I'm going to refrain from intervening in counsel's examination, okay.

(H. 240)(emphasis added). But this was far from the last time the court would interfere with a witness. Just moments later,

THE COURT: Mr. Nolas. I have hinted in a direction that I think properly your course of examination ought to take. Now, we, you know, we got certain records in. We may thrash out this objection to the other half of them and get them too, then we know from the date of those records when they were in existence, you see. And from that we can determine what was available to an expert back in '82, '83. That's not a hard thing to prove up.

MR. NOLAS: That's true, but that's not *my* question. My question is, what would an expert have done within '82, '83. I need an expert to present that evidence to the Court. That doesn't come from the face of the record.

THE COURT: I'm noinn to assume YOU are noinn to follow the course of the examination I iust outlined to YOU.

MR. NOLAS: My preference is to discuss the records first before I get into the testing.

THE COURT: Counsel, your preference and the Court's preference is liable to be two different things. I don't want to unduly intervene in your examination, but you're making it very difficult for me to follow your evidence that you're trying to persuade me with.

MR. NOLAS: Let me follow Your Honor's suggestion.

THE COURT: Thank you.

BY MR. NOLAS: Q Doctor, in terms of your evaluation as a whole,

can you relate to us how the testing fits in with your actual interview evaluation of Mr. Medina?

A Okay, when I say my evaluation as a whole, I mean I'm referring to the testing, the interview and all the records that I reviewed on Mr. Medina. It fits, in fact, quite well with his history, with descriptions of his behavior. And like I said with his past behavior.

If you look at his jail records, in fact, he's described as schizoid in those jail records. He is sent to a psychologist a number of times. He's at times suicidal. He has many, many bizarre incidents that are described in terms of what his behavior is like in the jail. He has to be restrained a number of times for his own good. He has a history of being in mental hospitals. When he was in Cuba, he was sent away to Mulgavo Center for Re-education.

MR. ASHTON: Objection, attesting to matters which are not proven, not in evidence.

THE COURT: I'll sustain that. She's answered the question, I think, counsel.

MR. NOLAS: From my perspective, excuse me, Mr. Ashton, from my perspective, she hasn't completed her answer. Secondly, Your Honor --

THE COURT: Counsel.

MR. NOLAS: Judge.

THE COURT: You asked her how her testing fit in with all the other information. She said it was consistent with the -- with his history, with his descriptions of past behavior found in the jail records, with her interviews with other persons who knew him at that time. She's answered that question and that seems to me to be repetitious of one asked earlier on which we took the same answer.

MR. NOLAS: But Your Honor, only the question --

THE COURT: But Mr. Nolas --

MR. NOLAS: Judge, I need --

THE COURT: Please ask your next question. I'm going to sustain the objection.

MR. NOLAS: Your Honor, I just merely --

THE COURT: Please ask the next question. I sustained the objection.

MR. NOLAS: Then I respectively object to Your Honor --

THE COURT: Please ask your next question.

MR. NOLAS: I have an objection to make, Your Honor.

THE COURT: Now, Mr. Nolas, I told you to ask your next question, okay.

MR. NOLAS: Okay, Your Honor. I will under the Court's direction.

THE COURT: Fine.

MR. NOLAS: Respectfully, I object.

THE COURT: I can cancel your ticket, you understand. I let you come in here not a member of the Florida Bar, okay.

MR. NOLAS: Your Honor, I mean --

THE COURT: I can revoke that if you like and if you do not -- if you do not follow the directives of the Court. I'll do just that. Let's keep that in mind, okay.

MR. NOLAS: And Your Honor, I mean absolutely no disrespect to the Court.

THE COURT: I understand that. I don't take it that way but you follow my orders, okay.

MR. NOLAS: I'm doing that, Your Honor.

THE COURT: And if I am in error, I am certain that there are folks who are going to review that in Tallahassee, okay.

MR. NOLAS: And it's only to that end that I'd like to place objections on the record with no disrespect.

THE COURT: Fine. Ask your next question.

MR. NOLAS: Yes, sir.

BY MR. NOLAS: Q Let me skip ahead, doctor. Based on your evaluation as a whole, as you've described it to a reasonable degree of psychological certainty, what type of nonstatutory mental health mitigating evidence does that evaluation --

THE COURT: Counsel, I just sustained an objection to that. Ask your next question on the next point.

MR. NOLAS: I'm sorry, Your Honor, that is the --

THE COURT: You do not have a good memory. You are not willing to follow my directives. I don't know which one it is, but I direct you now to ask your next question and let's move along here.

MR. NOLAS: Yes, Your Honor. That is, I won't argue, but that is the issue that this expert needs to testify about because that's the issue that we're here on.

THE COURT: Mr. Nolas.

MR. **NOLAS:** Yes, sir, Your Honor.

THE COURT: Would you like me to recess these proceedings and you and I have a chat with the court reporter back there? Is that going to be necessary? Ask your next question, please, sir.

MR. **NOLAS:** I hope that won't be necessary.

THE COURT: Fine.

(H. 259-63)(emphasis added).

It was virtually impossible for the defense to present witness testimony in a coherent manner, given the court's insistence on how questions should be asked, what questions should be asked, and in what order they should be asked, and given the court's interruptions and refusals to listen to counsel's explanations concerning the reasons why the evidence was being presented.

BY MR. **NOLAS:** Q Other than the general type of mental health information you've provided, is there anything -- withdraw that. Does Mr. Medina's childhood, from what you know about it, conform to the opinions you've provided with regard to his mental health state?

A Yes, from what I know about it, yes, it does.

Q Can you tell us why?

THE COURT: That's sufficient. It's consistent with the mental health -- with the picture that she painted of him. If you ask her why she's going to relate what his childhood was and we're getting all that from a hearsay affidavit from his mother, I would assume, you see, it is open to counsel to show the types of history that examining counsel -- types of things that a witness relies on to give an expert opinion. It is not always to open to examining counsel to bring out inadmissible hearsay through the testimony of an expert witness. That's what Mr. Ashton is objecting to.

MR. **NOLAS:** But --

THE COURT: Counsel, that's a short course in evidence here. I think she's sufficiently answered the question, his history as she obtained it from whatever sources is consistent with the picture that she paints of him at the time that she examined him and made her conclusions.

MR. **NOLAS:** But the issue, Your Honor, is Doctor Carbonell has provided her opinions.

THE COURT: Yes, sir.

MR. **NOLAS:** In terms of mental health information that was

available.

THE COURT: Yes. sir.

MR. NOLAS: The opinions in a vacuum are not as compelling as the opinions tied to what the doctor knows. For example, Your Honor --

THE COURT: Counsel. Counsel, again I say maybe you didn't understand what I just said or maybe you understand it and just don't want to follow my directions. I don't know which it is, not going to make a judgment on it. Move on to your next point with this witness.

MR. NOLAS: May I make a brief Proffer. Your Honor?

THE COURT: No. sir.

Not as to that last question please. Go on to the next question.

MR. NOLAS: Given Your Honor's rulings, I will stop at this point.

(H. 276-78)(emphasis added).

The court then began dictating which witnesses would be called in what order (H. 309).

Mr. Nolas, I think the Court has the authority to vary counsel's order of proof, although I'm extremely hesitant to do so. But I would like now to ask you to call Mr. Ray Sharpe, who is a deputy chief -- Deputy District Attorney for a county next to Denver in Colorado. He's come all these miles to testify in this matter. It's Friday. It's going close to noon now. He would like to get back. He has pressing matters. He would like not to come back later on. Could you call him now?

MS. DOUGHERTY: Judge, as you're aware, I had Doctor Gore --

THE COURT: Doctor Gore is local. He can wait around.

MS. DOUGHERTY: I just wanted the Court to understand he's under subpoena in another Court.

THE COURT: That's fine. No problem. We'llwork him back and forth. We always have,

MS. DOUGHERTY: I just wanted you to know.

THE COURT: That's fine. We'll work with him. Now, are YOU going to call Mr. Sharpe, and if YOU are. do so now. If you are not, then state for the record that you do not intend to call Mr. Sharpe.

MR. NOLAS: Your Honor, let me -- yes, we will call Mr. Sharpe now as per Your Honor's suggestion. Let me indicate that I have another a psychiatrist from New York who is also here at great

expense.

THE COURT: We'll hear that psychiatrist from New York. We'11 hear him if you fellows move out a little faster.

(H. 309-10)(emphasis added).

The examples can go on and on. The trial judge interposed his own objections (H. 431, 464, 45, 466, 531, 568-69, 620-21, 798, 829), raised alternative basis for the prosecutor's objections (H. 490, 552), and rephrased questions for counsel (H. 512, 538-40) and answers for witnesses (H. 352).

The court was apparently not always even aware whether there was an objection pending or not. At one point, the circuit judge overruled an objection that he had raised himself (H. 531-33).

There is no question that a trial judge has control over his courtroom. There is also no question that judges are human, and like all human beings can be irritable. But here the trial court's persistent interference with the proof made it unreasonably difficult for Mr. Medina to be fairly heard. It could be that the court was disinclined to hear this case, having sentenced Mr. Medina originally. Whatever the reason, Mr. Medina was not fully and fairly heard at the evidentiary hearing. The limitations imposed by the court -- both as to the issues that would be heard and as to the actual presentation -- affected adversely counsel's efforts below. This matter should be remanded for a full and proper hearing, and for proper findings.

(IV)

MR. MEDINA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF COUNSEL'S FAILURE TO INVESTIGATE CRITICALLY IMPORTANT EVIDENCE ABOUT SUSPECT BILLY ANDREWS, AND/OR THE STATE FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE CONCERNING THIS SUBJECT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE LOWER COURT ERRED IN DECLINING TO ALLOW EVIDENTIARY RESOLUTION.

Effective assistance of counsel at a criminal trial includes pretrial investigation of matters relevant to guilt-innocence and to sentencing. Evidence cannot be effectively presented at trial without the knowledge gained

through an independent investigation. That is why courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979).

Defense counsel here knew that Billy Andrews was significant. He in fact tried to defend Mr. Medina by arguing that the culprit in this case was Billy Andrews. Mr. Edwards was right in his belief; Andrews was the more likely culprit. Counsel sought to bring evidence of Andrews' culpability before the jury through the cross-examination of State witnesses (R. 147-48; 252; 253-54; 164; 554-55). A number of rulings by the court (hearsay, etc.) limited this presentation. Defense counsel maintained that Billy Andrews should have been investigated by the police as a possible murder suspect in this case, but that for some inexplicable reason he was not. Counsel presented no information other than that attempted through cross-examination.

The circuit court denied this claim without an evidentiary hearing. Had a hearing been held, much would have been disclosed about Billy Andrews' violent and brutalizing personality, and the fact that he was indeed the more likely culprit. When post-conviction counsel attempted to present this at the limited evidentiary hearing that was held, the court stopped them. Post-conviction counsel were foreclosed altogether from presenting the testimony of Gayle Andrews, Billy Andrews' ex-wife (H. 464 et seq.) and of Ernest Arnold (H. 468-69). Proffers were made as to what each of these witnesses would have testified, and their affidavits were admitted also in proffer (H. 466; 468). These affidavits are found in the record at pages H. 1377-79 (Ernest Arnold) and 1390-1395 (Gayle Andrews).

Ernest Arnold would have provided testimony that he observed both Billy Andrews and the victim, and that he never liked the way Billy treated her. On one occasion, Dorothy called him hysterically because Billy had done something

to her Ernest always suspected Billy of being the person who killed Dorothy; Ernest also knew Pedro Medina, and he was surprised that Pedro was charged with the crime.

Gayle Andrews would also have testified about Billy's violent temperment with herself and with other women, and the beatings she had received from him. Still other witnesses would have testified also, such as Juliana Wilson, who dated Billy Andrews. Lindi James and Arnita James could also have provided valuable information about Billy Andrews.

At the evidentiary hearing, Lindi James was only allowed to testify that Billy used to wear a particular brown bathrobe around her mother's house, and no one else wore it. Evidence at trial showed that a brown belt from that bathrobe was found tied around Dorothy when she was killed (H. 373) Much more could be presented, as set out more fully in the Amended 3.850, if a full and fair evidentiary hearing had been granted. It was alleged below that defense counsel did not reasonably investigate this information, and thus could not present an effective defense for Mr. Medina on the defense theory he himself was arguing. It was also alleged below that the State had this information, but did not disclose it to the defense. An evidentiary hearing should have been allowed on these issues in order to resolve them.

While the police collected some evidence about Billy Andrews, such as the belt to the bathrobe, and a photograph of a hole in the victim's apartment made by him, these leads were never developed by the defense.

Mr. Medina's trial counsel, the jury, and the court never learned about Billy Andrews' violent, and even psychotic reputation in the community. They never knew he had almost killed many other women with whom he was involved. They never learned that the victim, just days before she was killed, believed that "Billy" was going to kill her. They did not know that Andrews' robe was on the floor of the apartment when the murder scene was investigated. They did not

know that it was his fist that caused the hole in the wall. The State knew some of this material information, but failed to disclose it. Trial counsel's failure to investigate independently both Billy Andrews' reputation and the victim's state of mind and fears of him were unreasonable.

Mr. Medina's trial counsel never asked Deputy Taylor about the photographs he took at the victim's apartment. The record reflects that the deputy was deposed in March, just prior to trial, but he was never questioned about these photographs. That deposition was never transcribed. Trial counsel also failed to depose Lindi James. The cumulative result of these omissions was that trial counsel never knew the significance of the brown bathrobe. They never knew that Lindi James could tell them that it was worn only by Billy Andrews when it was worn at all -- that it was Andrews' robe.

Additionally, trial counsel, because of their omissions, never knew about the hole that Billy Andrews had made in the wall of the victim's apartment. They therefore failed to cross-examine Detective Nazarchuck effectively about his decision not to investigate, or even talk to, Billy Andrews.

Counsel cannot tactically decide not to present evidence of which they are unaware. Investigation must be done. Counsel ineffectively did not do this here. Alternatively, it was pled below that there was information that the State did not disclose. This claim was summarily denied by the circuit court. *An* evidentiary hearing on this claim was proper. The 3.850 court erred in failing to allow one.

(V)

MR. MEDINA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO COMPETENT MENTAL HEALTH EXPERT ASSISTANCE BECAUSE OF HIS ATTORNEYS' UNREASONABLE FAILURES TO INVESTIGATE, AND BECAUSE THE MENTAL HEALTH ASSISTANCE ACTUALLY RENDERED PRE-TRIAL WAS INCOMPETENTLY SOUGHT AND PROVIDED, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A defendant is entitled to an independent competent mental health expert evaluation when the state makes his or her mental state relevant to "his criminal culpability and to the punishment he might suffer." Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 1095 (1985). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). As important as this right is to a defendant facing the ultimate punishment, the right alone -- as with any right -- is useless without "the guiding hand of counsel" to enforce and implement it. See Powell v. Alabama, 287 U.S. 45, 69 (1932). There is, after all, a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the defendant's "background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, ____ (1989). See also Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). Here, because of unreasonable omissions on the part of counsel, and grossly deficient evaluations on the part of the experts appointed at trial, Mr. Medina did not receive the competent psychiatric/psychological examination that was necessary for a "just result" and "fair trial." See Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989); Evans v. Lewis, supra, 855 F.2d 631 (where counsel does not timely and reasonably employ expert assistance in a case in which mental health is or should be at issue, no "tactic" can be ascribed to any decision counsel may make regarding mental health issues).

A. A SUBSTANTIAL BODY OF MEDICAL AND SOCIAL HISTORY ABOUT MR. MEDINA INDICATED HE WAS SEVERELY MENTALLY ILL, AND THAT THIS ILLNESS WAS LEGALLY RELEVANT, BUT NONE OF THIS EVIDENCE WAS SOUGHT BY OR PROVIDED TO THE MENTAL HEALTH EXPERTS ORIGINALLY APPOINTED

A competent investigation into Mr. Medina's background would have revealed classic signs of severe mental illness. Trial counsel unreasonably failed to obtain the available information, and the pre-trial experts failed to request it. As this Court has acknowledged, consistent with all recognized writings in the mental health profession, background information about the patient gained from sources independent of the patient is necessary for a proper mental health evaluation, particularly when mentally ill clients are involved. See Mason v. State, *489* So. 2d *734* (Fla. *1986).* Mentally ill patients learn to mask the symptoms of their illness, and thus self-report is often sorely lacking. Id. Self-report, however, was all that the two experts (only one of whom spoke Spanish) who saw Mr. Medina briefly, together, pretrial relied upon in this case. No testing was conducted. No background information was provided to or obtained by the experts. The failure of the experts to learn crucial and readily learnable information relates to counsels' failures to investigate as well as to the experts' deficiencies.

Mr. Medina was an abused child. He grew up in abject poverty. He suffered severely from the abuse of his mother and father. His mother provided an affidavit detailing how she and her husband abused Pedro. Such information would have been vitally important in forming an accurate diagnosis:

> 2. Pedro's father was a very jealous and violent man who beat me and the children without mercy. He beat me because he said I was having sex with other men. At first, he was wrong, but later in our marriage I had several affairs with different men. He too had sex with different women. It makes me cry to admit it, but I am ashamed to say the children, including Pedro, saw me have sex with many different men in our home. I know now how much that hurt them but then I was not thinking of the children watching. I was thinking only of *my* needs.
>
> * * *
>
> *5.* Pedro was very ill throughout his infancy, like all *my*

children. They were all very weak, but he was the weakest. He had great difficulty in breathing and cried all the time. He had many allergies, bronchial asthma, digestion problems, and sleeping problems. It was very hard on my nerves to have such a sick, weak child and not have enough money to care for him or the other children. I cried all the time and was very depressed. It is hard to remember those days; they were so painful. Talking about it brings all the pain of my many mistakes back.

6. It was painful for Pedro too. When I had to breastfeed him, I would cry and cry out loud. The tears would not stop. He would become very upset and cry too. One reason I was so upset was that Pedro's father hated and despised him and always swore that Pedro was not his son. From the time Pedro was in my womb until the time Pedro left Cuba, his father said Pedro was not his son. I know it hurt Pedro but I was powerless to change the situation. I had only a little education and no way to provide for the children alone.

7. Pedro's father never recognized him from the moment of birth. As Pedro grew older, his father began to beat him. Pedro would do almost anything to please his father, but it never made a difference. His father would beat him so hard it would leave marks and bruises all over his body. When his father got tired of beating him, he would beat me, one time knocking my teeth out. All the children saw these beatings, but Pedro was more affected by them because he was so vulnerable. He, of all my children, had the least ability to overcome his home life.

* * *

10. I did not know how to help Pedro with all his problems and he was sent away to Mulgabo Center for Reeducation when he was only twelve (12) years old. His father did not want him and had always rejected him. I was too confused to know what else to do. They took him away, and he never really got better despite how hard he tried. Even though he knew who his parents were, he felt rejected by them; he was really an orphan. The Reeducation Center was horrible for Pedro. They were very mean to him, and the other boys would fight and hurt him. He changed physically while he was there. He was dirty and unkempt and disoriented.

(H. 1353-57).

Pedro exhibited signs of mental illness and brain damage during his childhood and young adulthood. In fact, there is an apparent history of mental illness in his family, a matter that is particularly relevant for a proper diagnosis of schizophrenia:

8. All during the time he was growing up, his life was difficult. He had seizures and convulsions that would last almost 15 minutes. After the seizures, he would be completely exhausted. He was moody and depressed for no reason at all. He would get a stare and hold it for a long time as if he didn't know what was happening

around him. He had strange hallucinations and fantasies about things that did not exist. He had difficulty in sleeping and had many nightmares. He walked in his sleep and made troubled noises. I would wake him up and try to calm him, but it didn't help him. When he was awake, he was forgetful and at times did not understand what was being said to him. I remember he used his left hand all the time, and I would try to make him use his right hand. He began to have difficulty speaking and stuttered. Everyone knew he was different, but he tried hard to get other people to like him and was always respectful to the older people.

9. I worried that Pedro might be like his grandparents who were very seriously mentally ill. Pedro exhibited many mental problems that reminded me of other family members. His great grandfather died in a mental institution and lost all his reason before his death. His grandmother, still living here, has delusions and believes she can make things happen that she knows nothing about. People say that craziness is in our family, and I know that my Pedro has mental problems. His problems became worse because of his upbringing. His sister Hilda is also mentally ill. She had to be institutionalized several times, and she tried to commit suicide once.

(H. 1355-56).

Pedro's birth was traumatic, and left him damaged for life. His mother was malnourished when she was pregnant, and the subsequent labor and delivery had their effects on the child:

4. His birth in 1957 was very complicated, and we both almost died. My pregnancy with Pedro was a horrible one for me. Many times I was so hungry and malnourished I passed out from weakness. When labor began, I tried to get to the hospital, but it was almost impossible to get transportation in those years. I was very frightened and could tell something was going wrong with the delivery I finally got to the hospital right before Pedro was born. Pedro was born with the umbilical cord wrapped around his neck and almost strangled to death. At the moment of birth, he fell to the floor on his head and almost died. His life was saved only because a doctor was passing by.

(H. 1354).

Psychological terror was in store for this damaged, but sensitive and easily led child who constantly searched for the family love that always alluded him:

3. Our home was not much of a home. We had only one room for all of us to live in and little or no money. I was always very poor and could not provide even the basic things my children needed. I had only a little schooling and no training for jobs. I was too immature and their father was too mean even to give Pedro the attention and love he needed. Of all the children, Pedro suffered the most.

* * *

> **11.** After he was released from the Reeducation Center, he got jobs working in construction and some kind of refrigeration work. We let him stay in the living room, but I still didn't know how to help him, and his father would only beat him. He would do anything his friends asked him to do. It reminded me of how hard he had tried to please his father when he was a student by studying his subjects. Despite all his mental problems Pedro wanted very much to be loved. At one time he raised pigeons up on the roof and cared for them like they were babies. A neighbor complained, and I had to take the birds away from him.

(H. 1353-54; 1357).

Mr. Medina was psychiatrically hospitalized in Cuba. After he left Cuba, via a state-run mental health hospital, he soon was in contact with Regla, his stepsister. Regla had a history of manipulating Pedro to his detriment:

> **12.** I am very concerned for my son and love him deeply. But when he was a baby and child, I did not know how to care for him. He needed special attention because of his mental and physical problems. Instead of helping him, though, his father beat and rejected him. His stepsisters and brothers abused him. His friends took advantage of him. His stepsister Regla was especially mean to Pedro. She always hated and resented us, especially after her mother died of tuberculosis. To get back at me, she would manipulate Pedro. She could get him to do anything. Later, when I heard that she had convinced Pedro to leave the home in New Jersey where he was doing well and move in with her, I was not surprised. She always convinced him to do things that helped her and hurt him.

(H. 1357-58).

Jail records readily available to counsel revealed that this mentally ill person required special attention. Hillsborough County Jail records reveal that he exhibited irrational and odd behavior. On March 10, 1982, for example, the Inmate Disciplinary Committee observed that he was mentally ill ("a signal 21"), that he should be seen by a doctor, and that he was on medication (H. 1367-8).

Similar instances of irrational, bizarre and inexplicable behavior were also documented during his incarceration in Orange County Jail. On January 15, 1983, Pedro's cell was "found to be filthy. Inmate had urinated all over the floor. . ." (H. 1370). On May 28, 1982, the jail noted that he had a

self-inflicted wound (H. 1373). He attempted to kill himself. He was medicated, and the records reflect his strange and odd functioning. None of this was provided to the experts originally.

B. TRIAL COUNSEL, EVEN WITHOUT CONDUCTING A BACKGROUND INVESTIGATION, HAD SPECIAL KNOWLEDGE OF MR. MEDINA'S PROBLEMS, BUT FAILED TO ADEQUATELY PROVIDE THE KNOWLEDGE TO THE EXPERTS OR THE COURT

Ms. Rodriguez testified at the evidentiary hearing that she never spoke to the court-appointed experts at all. Defense counsel should have told the experts (who were evaluating competency) about the problems they observed in Mr. Medina, about the problems that the public defender's attorneys observed before they withdrew, about the observations of the public defender's investigator (who conducted the initial interview), about the observations of all those who had come into prolonged contact with this troubled and disturbed man. The attorneys, however, did not even provide the jail records to the experts, records which reflect serious mental disturbance, and deteriorating functioning.

Mr. Medina's attorneys could not help but notice that he had serious mental disabilities. At times, those disabilities interferred with their attorney-client relationship. Ms. Rodriguez believed Mr. Medina was seriously mentally ill, as she described in her affidavit:

> 6. . . . However, I was and am convinced that he was seriously mentally ill and was, among other things, incompetent to stand trial. My opinion did not change despite a court-ordered evaluation that purportedly found him to be competent.
>
> 7. During discussions with Pedro pre-trial, it was clear that Pedro was confused and/or seldom lucid. His answers to my questions, even when he and I talked in Spanish together, were often totally non-responsive to both the question asked and the subject under discussion. He would mumble instead of speaking, and often he simply would not talk to us. This was not a conscious attempt on his part to impede our work, to trick us, or to be coy. Pedro was simply sick.
>
> 8. Pedro's verbal communication was odd for Spanish-speaking individuals. First, when Warran and I met with him, Pedro would sometimes insist on speaking in his broken English. At other times he would speak in Spanish. His choice of which language to speak was not necessarily dependent on my being present. Secondly, when he chose to speak in English, Pedro used language in bizarre manner. Before I represented Pedro, I had represented several other Cuban nationals,

and we either spoke in Spanish or in English, depending on which language *my* client felt most comfortable using. Sometimes, if *my* client spoke to me in English and could not find the correct word or phrase, he or she would insert Spanish or visa versa. Using two languages in this manner is normal. I am from Argentina and my husband and his family are from Cuba. I am therefore very familiar with people who are bilingual and with this kind of switching from English to Spanish. But Pedro did not talk in this manner when he used English. When he could not express himself adequately in English, he would never resort to Spanish as I would have expected him to do. It appeared to me to limit his ability to express himself and made him more difficult to understand. Additionally, Pedro's English was definitely not learned in a classroom. His English was what is known as "Black English".

9. Pedro told Warren and me about being institutionalized at Massora Hospital (I am not certain of the spelling) in Cuba which, I know from *my* husband, is a hospital for the severely mentally ill in Cuba. Pedro told us that he was there shortly before he left Cuba for the United States. From my contact with Pedro, it is not surprising that he was institutionalized in Cuba. He was forced to come to the United States directly from the hospital.

(H. 1230-32).

After the trial began, Ms. Rodriquez noticed new signs of bizarre behavior which increased in intensity as the trial progressed:

10. During the trial, we gave Pedro a legal pad. He would draw bizarre pictures on it. I am familiar with santeria which is a kind of voodoo practiced by some Cubans. I know that during the trial, these drawings meant that Pedro was attempting to influence the proceedings by practicing voodoo on the judge and the prosecutor. As the trial progressed, this action by Pedro increased.

(H. 1232).

She, as well as the others in the courtroom, also watched as Mr. Medina's behavior in the courtroom deteriorated. Counsel made no attempt to bring their own special knowledge to the attention of mental health experts or the court. As Mr. Medina's actions became more and more bizarre, counsel had the duty to bring this legally relevant fact to the attention of the court. For example, while Mr. Medina's own testimony, as disjointed and incoherent as it was, produced, in and of itself, question marks regarding his mental health, defense counsel had special knowledge that revealed just how bizarre the testimony was:

13. When Pedro insisted on testifying at guilt/innocence, both Warren and I were absolutely surprised at what he said. His testimony

> contradicted what he had told Warren and I during the months before the trial, and was inconsistent with the evidence. I really did not believe the story that Pedro told on the stand. I also do not believe that he intentionally lied, but that he was simply sick.

(H. 1233). As Mr. Medina became more and more incompetent, counsel had the affirmative duty to seek assistance. No such action was taken, which was an unreasonable and prejudicial omission. The information should have been provided to experts and the court, but it unreasonably was not. The facts alleged below were plainly sufficient to require an evidentiary hearing on the question of whether Mr. Medina's mental state was such that he was competent by the time of the trial, and later sentencing, and whether defense counsel effectively litigated the issue. The 3.850 court erred in declining to allow an evidentiary hearing.

### C. A PROPERLY TAKEN AND PRESENTED BACKGROUND HISTORY, COUPLED WITH A COMPETENT MENTAL HEALTH EVALUATION, REVEALS THAT THE INEFFECTIVENESS OF COUNSEL AND THE INADEQUACIES OF THE EXPERTS UNDERMINE CONFIDENCE IN THE PROCEEDINGS' RESULTS

Dr. Dorita R. Marina is a clinicial psychologist. She is Executive Director of Miami Psychological Services and has substantial experience treating Mariel Cubans. She interviewed and tested Mr. Medina on June 2, 1987, during a period of four and one-half hours. Dr. Marina testified at the limited evidentiary hearing in this case, but was allowed to testify only as to nonstatutory mental health mitigation. She was not allowed to testify about Mr. Medina's lack of competence to stand trial. She did evaluate him for competency, however, and had a lot to say on this issue. Her account, like that of the other experts, and the supporting lay and documentary evidence should have been heard.

Dr. Marina was provided and consulted independent sources of information concerning Mr. Medina's social and medical background, and she reviewed information from his biological mother, jail records, trial and other transcripts, and previous psychiatric records. Dr. Marina, like Dr. Carbonell

and Dr. Teich, reviewed the records because that is a basic step an expert first takes in order to render a professionally appropriate diagnosis. Dr. Marina also tested Mr. Medina, as did Dr. Carbonell. Dr. Marina's report was proffered in the 3.850 motion in support of the request for an evidentiary hearing. Her account shall therefore be the focus of this discussion. (The Court is, however, respectfully referred to the discussion presented in section II, supra, for it also sheds a significant light on this claim.

Based on the records and her independent testing, Dr. Marina concluded that Mr. Medina suffered from brain damage, central nervous system impairment, and schizophrenia, paranoid type:

> Mr. Medina functions in the low average intellectual range and suffers perceptual difficulties which caused academic difficulties during his childhood. This dysfunction may be related to the congenital asphyxiation that occurred with lack of oxygen during birth, repeated blows to his head by his father, or other causes. Test results indicate central nervous system impairment and organic brain damage.
>
> His personality structure is psychotic and characterized by a high level of anxiety, ideas of reference, impulsivity, difficulty relating to others, and high aspirations -- which he attempts to accomplish in fantasy. He maintains a capacity for suicide.
>
> Diagnostic Impression:
>
> 295.3 Schizophrenia, Paranoid Type

(H. 1347-48).

Dr. Marina's clinical observations were:

> Pedro Medina was interviewed in prison. His general appearance was good, and grooming and dress were appropriate. There was no bad hygiene presented. Motor activity was appropriate. Autonomic activity was appropriate.
>
> Perception appeared adequate for most of the time, but Mr. Medina was afraid to allow this psychologist to stand behind him to test his hearing. Speech was disorganized at times, and there was evidence of delusional thinking.
>
> At one point in the interview, Mr. Medina, disturbed by noises from outside the interview room, asked to be moved to another room. Later in the interview, he explained that these noises are part of the plot against him.

At another point in the interview, Mr. Medina picked up a dictionary to read and kept switching to English. It was emotionally difficult for him to speak Spanish, and when he used his second language, English, he appeared to distance himself from his feelings.

Good rapport was established and maintained. He was cooperative throughout the interview, attempting to answer all questions even though he was frequently unable to give coherent answers.

He appeared oriented to self, time, and place. Affect was depressed throughout the session, but Mr. Medina denied it. Insight into his problems and capacity for judgment are both very poor. He says he is in jail because the Orlando police do not like him and that he was placed in a cell with "crazy guys" and stripped of his clothes to make him crazy.

The results of the present evaluation are to be considered valid and reliable estimates of his present functioning. Because of his multiple impairments, a clinical interview alone would be an inadequate basis for determining his mental status.

(H. 1343-44). Dr. Marina further noted:

Psychological Treatment History

As I was questioning Mr. Medina about previous psychiatric treatment, he interrupted me to say that he had seen me before, but was unable to explain when or where. Later, he reported he had not been hospitalized and denied any psychological symptoms.

He also denies hearing voices but reports sounds that come either from outside or inside (although made to appear as if from outside) his cell. He perceives that different methods are employed, including the noises, to confuse him so that he can be made insane. When asked who made the noises, he responded the judge may have ordered them and then assigned others to carry out the instructions.

He complained that physical torture had been used and accused police officers of twisting his legs. He was stripped of his clothes and placed in a cell with "crazy guys." By doing all this, they "expect to submit him into slavery, and admit his culpability in the crime," which he has always denied.

Visual hallucinations were denied by Mr. Medina, but his mother reports he suffered from hallucinations, seizures and convulsions in his adolescence. The family was unable financially to provide mental health treatment.

Jail and medical records report bizarre behavior preceding and during his 1983 trial, and jail officials in Orange County placed him on suicide watch. There is also evidence of bizarre behavior in records from the jail in Hillsborough County, where he was incarcerated for a brief time in 1982.

(H. 1341-42).

Based on her testing and the information provided her, Dr. Marina described:

Competency to Stand Trial

It appears that though this individual had a factual understanding of the charges against him, he lacked a rational ability to aid counsel in his defense. His paranoid ideation prevents him from trusting even the persons responsible for his right to appeal. He cannot trust anybody, and he cannot participate in his own defense. Even though he has denied suicidal ideation, such thinking is reflected in his protocol, and he therefore fulfills the criteria for involuntary hospitalization. There is a substantial probability that this individual was incompetent to stand trial at the time his trial was held.

His long-standing psychotic and delusional thought processes seriously interfered with his capacity to disclose to counsel pertinent facts surrounding the offense. He lacked the ability to relate appropriately with counsel. His major mental disorder precluded his assisting counsel in planning a defense and in realistically challenging prosecution witnesses. Although he seriously attempts to control his conduct, he lacks the ability to act appropriately in a courtroom. The trial transcript reflects several incidents where his conduct was bizarre and confused. His trial testimony similarly reflects his incoherence and disordered thought processes. His test results and jail medical records document his inability to cope with the stress of incarceration, pre-trial and otherwise. In my professional opinion, Mr. Medina was and is incompetent to stand trial under the criteria of Fla. R. Crim. Proc. 3.211.

Sanity at the Time of the Offense

Given the major illness from which Mr. Medina suffers and the special situation with the victim, Mr. Medina, as a result of his mental disease or defect, was unable to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Similarly, one result of his infirmity is his inability to plan or design an act and carry through with it.

Mitinatinn Factors

At the time of the offense, Mr. Medina suffered from a long-standing and seriously debilitating mental disease and defect. He was and continues to be schizophrenic-paranoid type. His disability is exacerbated by his psychotic thought processes. His early years of psychological and physical abuse by both parents undoubtedly contributed to and aggravated his emotional disorders. Additionally, his tests results clearly indicate the presence of organic brain dysfunction. Mr. Medina was under the influence of extreme mental and emotional disturbance at the time of the offense. Likewise, his mental illness made it impossible for him to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(H. 1348-49)(emphasis added). (Dr. Marina's entire report is found at H. 1337-1349). Had reasonably effective counsel provided competent mental health evaluators with proper (any) information, and had the pretrial mental health experts provided testing and professionally appropriate evaluations, there is a reasonable probability that the result in this case would have been different.

When counsel unreasonably fails to properly investigate incompetency, Speedy v. Wyrick, 702 F.2d 723 (8th Cir. 1983); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974), insanity and diminished capacity, Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981); Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), or mental circumstances relevant to sentencing, State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), ineffective assistance is demonstrated. Counsel failed in this case, and ineffective assistance has been demonstrated. When a mental health expert fails to perform professionally, confidence in the result is again undermined.

As the Court explained in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985), the provision of competent psychiatric/psychological expertise to a defendant assures the defendant "a fair opportunity to present his defense," Id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." Id. at 1096. The Ake court noted that the due process clause protects indigent defendants against incompetent evaluation by appointed psychiatrists. See also Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 502 So. 2d 1221 (Fla. 1987). Accordingly, the due process clause requires that appointed mental health professionals render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983).

Here, Dr. Wilder's and Dr. Gonzalez's pre-trial evaluations were simply not predicated upon competent procedures, and the results reached were far from accurate. A competent evaluation, based on proper tests, and on the consideration of records and background information, would have substantially benefitted Mr. Medina.

Today there can be no question that an accurate medical and social history (or, particularly in this case, even some independent history) of the individual must be obtained and reviewed for a mental health evaluation to be conducted in a professionally appropriate manner. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub and F. Black, Organic Brain Syndromes 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." H. Kaplan and B. Saddock, Comprehensive Textbook of Psychiatry, at 837 (4th ed. 1985).

Medical and social history, in order to be accurate, must be obtained not only from the patient, but from sources independent of the patient. It is well-recognized that the patient is often an unreliable data source for his own medical and social history. Kaplan and Sadock at 488. Accordingly,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task

Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965).

For an expert to make a competent mental health evaluation, appropriate testing must be undertaken. See Kaplan and Sadock at 347-48. This is particularly so in cases such as the instant, where indicators exist that the patient may have suffered from an organic impairment. Here, as in Sireci, supra, without any background about the patient, the pretrial experts overlooked plain signs of brain damage. Indeed, as noted by Dr. Marina, "because of [Mr. Medina's] multiple impairments, a clinical interview alone would be an inadequate basis for determining his mental status." The pre-trial evaluations were, for this obvious reason, incompentently performed.

Pretrial, the court held a hearing to determine Mr. Medina's competency to stand trial (See R. 940-60). At the competency hearing, Mr. Medina testified, and the reports (not the testimony) of Dr. W[redacted]der and Dr. Gonzalez, the court-appointed psychiatrists, were considered. Supp. App. L. The court found Mr. Medina competent to stand trial (R. 957-58).

Dr. Gonzalez and Dr. Wilder had jointly interviewed Mr. Medina for two hours. They conducted no tests, and their reports reflect no consideration of information other than what Mr. Medina told them (Supp. App. L).

Although Dr. Wilder mentioned Mr. Medina's experiencing hallucinations or delusions, he concluded, "I am inclined to think that this was more of a religious or pseudo-religious experience" (Supp. App. L). In the end, both doctors concluded that Mr. Medina was competent to stand trial (Supp. App. L). The court's determination that Mr. Medina was competent to stand trial was erroneous because the decision was based on Dr. Gonzalez's and Dr. Wilder's

inadequate evaluations.[19] The doctors' diagnoses were incompetently derived because the doctors were never provided, and never sought, an accurate medical and social history of Mr. Medina, and undertook no testing whatsoever. Importantly, without requesting any appropriate psychological, neurological, or neuropsychological testing, the doctors could not determine whether Mr. Medina suffered from organic brain damage.

Confidence in the result of these proceedings has been undermined by counsels' and the experts' failures to perform competently. Their failures violated Mr. Medina's sixth, eighth, and fourteenth amendment rights. *An* evidentiary hearing is proper.

**E.** TRIAL **COUNSEL WAS GROSSLY UNFAMILIAR WITH MENTAL HEALTH LAW**

Mr. Medina was entitled to an independent, confidential evaluation of his mental health under Rule 3.216, Florida Rules of Criminal Procedure. Trial counsel unreasonably did not know or effect this, but instead sought non-confidential evaluations under Rule 3.210.

Under Rule 3.210, Mr. Medina was entitled to not less that two nor more than three experts. Two were appointed to examine him, they conducted the examination together, and one found him to be sane at the time of the offense while the other one could not say. Counsel requested to be provided the third expert, but did not note and assert the difference in the first two experts opinions as a justification for obtaining the third. This was an unreasonable omission, which was prejudicial.

**F. CONCLUSION**

Mr. Medina has shown that because of the ineffectiveness of his trial counsel his case was prejudiced at virtually every stage of the proceedings.

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[19]As noted above, Mr. Medina's functioning deteriorated during the trial proceedings, and defense counsel should have requested a further evaluation by the time of sentencing. See Drope v. Missouri, 420 U.S. 162 (1975).

Without any understanding of Mr. Medina's mental health problems, and without any of the requisite investigation, the attorneys took actions which were devastating to Mr. Medina's case. Mr. Medina has also presented sufficient allegations concerning the deficiencies of the original examiners. An evidentiary hearing was warranted. The errors discussed above undermine confidence in the outcome. The lower court erred in declining to allow evidentiary resolution.

**(VI)**

**THE CIRCUMSTANCES PRETRIAL *AND* AT TRIAL RAISED A BONA FIDE DOUBT REGARDING MR. MEDINA'S COMPETENCY TO STAND TRIAL, *AND* THE TRIAL COURT'S FAILURE TO INQUIRE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.**

Mr. Medina exhibited bizarre behavior throughout the trial, for example, laughing during the voir dire (R. 28), not being able to understand that he could not talk to the judge during court proceedings (R. 3-6), speaking in a loud voice during open court (R. 3; 111), and being disruptive during court (R. 66-74). Mr. Medina was distrustful of his own lawyers, ignorant of the role they were to play on his behalf, and totally at a loss as to what was happening around him (R. 114-5).

On the second day of trial, the trial court heard opinions and hearsay statements relative to whether Mr. Medina should be shackled (R. 227-31). The court heard that Mr. Medina was loud, boisterous and hostile, that he was generally very unpredictable and hyper and that he could change from being calm to being very, very agitated at the drop of a hat, for no apparent reason. When defense counsel then asked that a determination of competency be made, the following happened:

> **MR. EDWARDS** [to Officer Mead]: Based on your observations and experience do you have any opinion as to his mental health?
>
> **THE COURT:** We're not going to get into mental health. Whether or not his disturbance or misconduct is going to make a voluntary waiver before the trial, that's the only question.

MR. EDWARDS: I would move for additional psychiatric exam.

THE COURT: That will be denied.

(R. 231).

Even when a defendant is competent at the beginning of his or her trial, the trial court has a continuing duty to assess the accused's behavior when he or she becomes irrational and/or uncontrollable. See Drope v. Missouri, 420 U.S. 162 (1975); Fla. R. Crim. P. 3.210. Based on what the trial judge personally observed, even during the first day and a half, and then afterward, he should have suspended the proceedings for purposes of allowing an examination of and a hearing on Mr. Medina's continued competency to stand trial. Id. The court's failure to do so violated Mr. Medina's right to a fair trial, and his right to a fair and accurate determination of his competency. A bona fide, real and substantial doubt as to competency was raised.

Mr. Medina's behavior did not improve throughout the rest of his trial. To the contrary, it deteriorated further. Yet his competency was never re-evaluated. The circuit court denied an evidentiary hearing on this claim. Had an evidentiary hearing been held, it would have been shown that while Mr. Medina

> had a factual understanding of the charges against him, he lacked a rational ability to aid counsel in his defense. His paranoid ideation prevents him from trusting even the persons responsible for his right to appeal. He cannot trust anybody, and he cannot participate in his own defense. Even though he has denied suicidal ideation, such thinking is reflected in his protocol, and he therefore fulfills the criteria for involuntary hospitalization. There is a substantial probability that this individual was incompetent to stand trial at the time his trial was held.
>
> His long-standing psychotic and delusional thought processes seriously interfered with his capacity to disclose to counsel pertinent facts surrounding the offense. He lacked the ability to relate appropriately with counsel. His major mental disorder precluded his assisting counsel in planning a defense and in realistically challenging prosecution witnesses. Although he seriously attempts to control his conduct, he lacks the ability to act appropriately in a courtroom. The trial transcript reflects several incidents where his conduct was bizarre and confused. His trial testimony similarly reflects his incoherence and disordered thought

processes. His test results and jail medical records documents his inability to cope with the stress of incarceration, pre-trial and otherwise. In my professional opinion, Mr. Medina was and is incompetent to stand trial under the criteria of Fla. R. Crim. Proc. 3.211.

(Report of Dr. Dorita R. Marina). This and a great deal more would have been presented. It is obvious that "[s]tress will . . . make psychotic behavior more likely" (Testimony of Dr. Marina, H. 437). Mr. Medina was in a very stressful situation, a trial for his very life. He was exhibiting such bizarre and erratic behavior that the court resorted to shackling. Yet, the court refused to allow a re-evaluation for competency.

*An* evidentiary hearing should be held on this claim, and, thereafter, Rule 3.850 relief should be granted.

(VII)

MR. MEDINA WAS INCOMPETENT AT SENTENCING, AND HIS CONVICTION AND SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. It is simply unfair to try someone when that person has no ability to meaningfully participate in the proceedings which will subject him to a loss of liberty or, as here, life. Mr. Medina was evaluated for competency prior to trial. However, during trial his behavior became more and more bizarre, inappropriate and unpredictable. Defense counsel asked that another evaluation be done. This motion was denied (R. 231). By the time of sentencing, Mr. Medina's functioning had almost completely deteriorated.

The record before this Court is rife with indicia of incompetency, including Mr. Medina's background and history which reflects a clear pattern and diagnosis of mental illness, Mr. Medina's bizarre and inappropriate behavior both in and out of court with defense counsel and jail personnel, the observations of Mr. Medina by his attorneys who believed he was incompetent and

finally, the results of the evaluations concerning Mr. Medina submitted below.

The circuit court summarily denied this claim. The lower court erred. An evidentiary hearing is appropriate.

(VIII)

MR. MEDINA'S RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE STATE INTRODUCED HIS PURPORTED STATEMENTS OF APRIL 9, 1982, INTO EVIDENCE.

Mr. Medina is a Cuban refugee who arrived in the United States during the "Freedom Flotilla" sometime between April and May, 1980. Upon entry into the United States, he was warehoused at Fort Chaffee, Arkansas. Some months later he was "sponsored" by a couple from Cape May, New Jersey, with whom he lived during the next several months. In the spring or summer of 1981, he left New Jersey to live with his half-sister who then resided in Orlando, Florida (R. 968-974).

When Mr. Medina arrived in the United States he did not speak English. It is, at best, unclear whether Mr. Medina ever received any formal education in Cuba or whether he was even literate in his native language (R. 990). It is manifestly clear, however, that he was not literate in English. He could neither read nor write it at the time of his arrest on April 8, 1982, or during the months that followed (See, e.g., R. 1086).

Mr. Medina's English-language speaking ability during this time was quite poor. Many people, including State witnesses at his trial, the prosecutor, the police officers who arrested him, and the court personnel who dealt with him prior to trial documented both his inability to understand the English spoken to him and the difficulty of understanding the English spoken by him. The record is full of examples (R. 1323; 327; 349).

Prosecutor Sharpe, referring to Mr. Medina in May, 1982, noted in his files that "[he] speaks poor English, kneeled when he was sworn in . . ." (H. 1098). Arturo Gonzalez, referring to Mr. Medina during his psychiatric evaluation on

January 14, 1983, also reported certain language problems (H. 1100).

Mr. Medina was arrested, at gunpoint, while asleep in Dorothy James' car, in the early morning hours of April 8, 1982 (R. 320-27). He was taken to the Columbia County Jail and interrogated. As required by Fla. R. Crim. P. 3.130, Mr. Medina should have been brought before a judicial officer within twenty-four hours of his arrest. He was not, and he was thereby deprived of receiving an independent, translated, judicial explanation of his constitutional rights in a non-coercive, non-adversarial setting. From April 8, 1982, until April 15, 1982, when for the first time he gained access to the court (R. Supp. 123), Mr. Medina was held virtually incommunicado.

On April 9, 1982, at 12:20 p.m., Mr. Medina was interrogated for almost two hours, by two detectives who spoke no Spanish, but who knew that Mr. Medina was a recent emigre (R. 205). Half of this interview was tape recorded (R. 198-202).

Prior to trial, defense counsel moved to suppress the statements elicited from Mr. Medina on April 8, 1982, and the tape-recorded statements made on April 9, 1982. In the former motion, counsel also sought to suppress the evidence taken from Ms. James' car as the product of an illegal search (R. 1806-1807, 1810-11).

During the first two days of trial, the judge conducted hearings on defense counsel's two motions to suppress. The trial court first heard the motion to suppress Mr. Medina's April 9, 1982, taped statements, those given during his interrogation by Detectives Nazarchuck and Payne (R. 196-226). The following day, on March 16, the trial judge denied the motion concerning these statements (R. 307-309). Immediately following this decision, the hearing on the motion to suppress the statements and evidence seized on April 8, 1982, was heard. This motion was granted as to the statements, but denied as to the tangible evidence (R. 309-355).

During the first suppression hearing, defense counsel unreasonably failed to show that Mr. Medina's statements of April 9, 1982, were taken in violation of his sixth amendment rights. Specifically, he failed to argue that by the time Detectives Nazarchuck and Payne interrogated Mr. Medina concerning Ms. James' car, his sixth amendment right to counsel had already attached, Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), and that their interrogation, under the circumstances, constituted a violation of that right. Additionally, defense counsel failed to argue that if Mr. Medina had been brought before a judicial officer within twenty-four hours of his arrest, as required, counsel would have been appointed to represent him. See Coleman v. Alabama, 399 U.S. 1 (1970); Fla. R. Crim. P. 3.130; Williams v. State, 296 So. 2d 878 (Fla. 1st DCA 1974). And, if Mr. Medina had received appointment of counsel, he would not have waived his rights on April 9, 1982.

Defense counsel also unreasonably failed to show that the April 9, 1982, taped statement was the fruit of an illegal and subsequently suppressed interrogation that occurred on April 8, 1982, the taint of which was never overcome under the circumstances of the April 9, 1982, interrogation. Oregan v. Elstad, 105 S. Ct. 1285 (1985); Westover v. United States, 384 U.S. at 494 (1966); Wong v. United States, 371U.S. 471 (1963).

Mr. Medina's April 8, 1982, statements were also coerced: they were elicited by police officers at Columbia County Jail after he had refused to sign a waiver form (R. 333), after he had refused to answer the arresting officer's question concerning his willingness to talk (R. 342-43), and after Mr. Medina, having been repeatedly subjected to what were, to him, incomprehensible questions, finally siad "I don't want to talk to you. I don't want to do anything like that" (R. 343-45).

Moreover, Mr. Medina was held incommunicado, with access only to his jailers during the thirty-six and a half hours after his arrest and commencement

of his second interrogation on April 9, 1982, at 12:30 p.m. At least until that time, it is, at best, unclear that Mr. Medina even understood why he had been detained (R. 1357-59; 349; 1232).

When Detective Nazarchuck interrogated Mr. Medina on April 9 1982, he read him the standard Miranda warnings and asked him the standard Miranda questions (R. 198). While the record shows that Mr. Medina actually responded to the other Miranda questions, nowhere does the record show that he actually responded to the question, "do you understand these rights." Instead, the record merely reflects Detective Nazarchuck's opinion that Mr. Medina understood his rights (R. 1146, 200, 1225, 520, 833). And just like the previous evening, when Mr. Medina told his interrogators unequivocally that he did not want to talk to them, they, not he, continued the interrogation (R. 840), thereafter eliciting invalid statements.

In neither his written motion to suppress nor during the hearing on the motion to suppress the April 9 taped statement did defense counsel argue that the taped statement, later introduced at trial, was made involuntarily in violation of Jackson v. Denno, 378 U.S. 368 (1964), and the fourteenth amendment (R. 309). Based on the facts as enumerated above, Mr. Medina's statements were involuntary, and defense counsel's failure even to raise this issue was unreasonable. See Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986).

Defense counsel never moved to suppress the statements taken by Detectives Nazarchuck and Payne on April 9, during the thirty or forty-five minutes prior to the taped-interrogation (R. 196-204, 1810-11). This omission was unreasonable, see Kimmelman v. Morrison, supra, and the statements should have been suppressed.

If Mr. Medina's April 9, 1982, statements had been suppressed, as they properly should have, then the information that the State received during that interrogation is the fruit of an illegal interrogation, and should have been

suppressed. Evidence introduced at trial, including the statements and testimony of Grace Moore, Donald Potter, Michael White, and Margaret Moore, were obtained by Nazarchuck as a direct result of the illegal interrogation of April 9, 1982. Detective Nazarchuck never had a reason to go to Tampa until after his interrogation of Mr. Medina. This evidence constituted an important part of the State's case against Mr. Medina, and there is more than a reasonable probability that had it been suppressed the outcome of the trial would have been affected.

The introduction into evidence of all of Mr. Medina's April 9, 1982, statements was prejudicial under the standard set out in Strickland v. Washington, 466 U.S. 668 (1984). They were referred to in the State's opening remarks (R. 133), and the taped version of his statements, permeated with references to the untaped portion, was played in its entirety during the State's case-in-chief (R. 544, 868-87). Detective Nazarchuck's testimony was also replete with references to them (R. 507-64). The prosecutor used the statements to impeach Mr. Medina when he testified (see, e.g., R. 691-93, 702-03). There is a reasonable probability that the suppression of the statements would have affected and changed the outcome of the trial. An evidentiaxy hearing and Rule 3.850 relief are warranted.

## MR. MEDINA'S SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS INVOLUNTARILY EXCLUDED FROM THE COURTROOM DURING THE HEARING CONCERNING WHETHER HE SHOULD BE SHACKLED.

At the beginning of the second day of trial, two jailers, Lieutenant Mead and Sargeant Witted, reported to the trial court judge that Mr. Medina had exhibited wild, bizarre and hostile behavior in his holding cell, while waiting to be escorted to the courtroom (R. 227). Upon receiving this information, Ms. Rodriquez left the courtroom to talk to him.

While co-counsel and Mr. Medina were outside the courtroom, a hearing was conducted for the purpose of determining whether Mr. Medina should be shackled

at trial (R. 227-240). In the process of this hearing, the two jailers were placed under oath by the judge, who questioned them about Mr. Medina's behavior (R. 227-30).

The trial court then offered Mr. Edwards, defense counsel, an opportunity to examine the jailers. Mr. Edwards did so, but failed to rebut their opinions that Mr. Medina's behavior was unreasonable under the circumstances that prompted it (R. 230-232). The trial court judge also offered the state attorney an opportunity to examine the jailers, and he did (R. 232).

Defense counsel never consulted, or requested to consult with Mr. Medina, for the purpose of challenging the jailer's testimony -- Mr. Medina was absent from the courtroom during the entire Droceeding (R. 227-240).

Mr. Medina never waived his right to be present (R. 227-240), and defense counsel's failure to object to his absence was unreasonable. Proffitt v. Wainwriaht, 685 F.2d 1227 (11th Cir. 1982). The proceeding was a critical one, in that it resulted in Mr. Medina being shackled throughout the rest of the proceedings. He was provided no opportunity to rebut the incriminating testimony.

After the trial judge had conducted the "formal" hearing and while he awaited Ms. Rodriquez's return to the courtroom, additional evidence concerning Mr. Medina's behavior and suggestions on how it should be handled was heard through the unsworn statements of Bailiff Huffman and jailer Mead (R. 232-238).

Based on these events and before Ms. Rodriquez returned, the judge had already decided to subject Mr. Medina to shackling.

> Like I say. I'm not -- I'm becoming less concerned, if I was. with this business of the iuror's knowing that he's in custodv. We'll hear what Ms. Rodriguez say and we'll go forward from there.
>
> . . .
>
> I don't think there is any question in my mind about the restraints, about the belly belt and jumpsuit. And one of ya'll come back and let me know how he likes that if he's all right.

(R. 238).

Upon her return, Ms. Rodriguez reported to the judge that Mr. Medina was "agitated" because the guards had "roughed him up," and because he had had to remain in isolation the previous night. She further reported that he had agreed to "behave" in the courtroom (R. 239). After hearing this report, and without further ado, the judge officially ordered that Hr. Medina be shackled and photographed (R. 239, 233-234, 247), and Mr. Medina remained shackled throughout the rest of trial.

A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, see, e.g., Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure. A capital defendant has "the constitutional right be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis at 1177. This right derives in part from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. Proffitt at 1256.

The federal constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationsip to his ability to conduct his defense." Proffitt at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial. Proffitt at 1257. Florida courts similarly require that any waiver be knowing, intelligent and voluntary. If a defendant is involuntarily absent from any critical stage of the proceedings, relief is proper.

A hearing to determine whether a defendant will be shackled during trial

constitutes a critical stage of the state's proceedings against him or her, and a defendant's absence from such a proceeding is constitutional error. See Illinois v. Allen, 397 U.S. 337 (1970); Estelle v. Williams, 425 U.S. 501 (1976).

Defense counsel's failure to consult with Mr. Medina, his failure to consult even with co-counsel who had spoken to Mr. Medina and to require that Mr. Medina be present during the proceedings, and his failure to rebut the formal and informal testimony presented was unreasonable under the standards set out in Strickland v. Washinnton, 466 U.S. 668 (1984). See Proffitt v. Wainwright, supra. The error was fundamental and prejudicial in nature.

The circuit court, however, denied the claim without an evidentiary hearing. In this, the court erred. Since counsel ineffectively failed to object to Mr. Medina's absence, a hearing on the question of counsel's effectiveness was warranted.

**(X)**

**MR. MEDINA WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO PRESERVE MR. MEDINA'S ABSOLUTE RIGHT TO A MISTRIAL BY ACQUIESCING TO THE STATE'S DESIRE TO DISQUALIFY A SWORN JUROR, IN VIOLATION POF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND BY NOT RAISING DOUBLE JEOPARDY OBJECTIONS TO THE TRIAL COURT'S ACTIONS.**

On the last day of the guilt phase of Mr. Medina's trial, a note was delivered from one of the jurors to the judge. The note indicated that the juror, as a result of previous witnesses' testimony, could no longer remain unbiased and afford to Mr. Medina the presumption of innocence. Before the trial judge could suggest a remedy, the prosecutor interposed that the juror be removed from service. Defense counsel acquiesced in this demand, and then moved for a mistrial (R. 663-65).

Apparently, the State and court believed that had Mr. Cody remained on the jury, a mistrial would have been required. Before the court had even finished

announcing to counsel the problem arising from the juror's note to the judge, the prosecutor interposed, "Excuse him," adding, "I think that's the only thing that can be done." The court was quick to comply. By acquiescing to the prosecutor's suggestion to "excuse him," defense counsel deprived Mr. Medina of the mistrial to which he was entitled. Counsel's unreasonable, prejudicial error deprived Mr. Medina of his right to effective assistance of counsel in violation of the sixth, eighth, and fourteenth amendments. The action also allowed a violation of the proscription against double jeopardy.

The circuit court denied this claim, without evidentiary hearing, stating that it was not properly raised in a Rule 3.850 motion. Ineffective assistance of counsel claims are classic Rule 3.850 issues. Moreover, evidentiary development of ineffective assistance of counsel claims are necessary for proper resolution. An evidentiary hearing is warranted.

**(XI)**

**MR. MEDINA WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM BY THE COURT'S LIMITATION OF CROSS-EXAMINATION OF STATE WITNESS LINDI JAMES AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S LIMITATION OF CROSS-EXAMINATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

During the cross-examination of State witness Lindi James, a daughter of the victim, defense counsel attempted to question the witness about several important matters, including the fact that the victim was very fearful of Billy Andrews, a man whom she had dated, and who had a key to her apartment (R. 252-56). The circuit court's sustaining of hearsay objections and counsel's failing to effectively advocate for his client combined to deprive Mr. Medina of his right to confrontation.

Counsel also tried, ineffectively, to question Lindi James about what she had told the police about facts relevant to Andrews' possible involvement in the crime.

One of the key issues in this case was the inexplicable failure of law

enforcement investigators to so much as contact Billy Andrews, the possible murderer of Dorothy James. It was important for the jury to know that Andrews' identity and history of violence towards the victim were known to the police. Defense counsel failed to get this across to the jury, owing in part to the court's improper restrictions of cross-examination and in part to counsel's ineffectiveness. The court violated Mr. Medina's confrontation rights by its severe limitation of cross-examination. Counsel ineffectively litigated the issue. An evidentiary hearing is proper.

**(XII)**

**THE STATE'S CLOSING ARGUMENT AT GUILT-INNOCENCE IMPERMISSIBLY RELIEVED THE STATE OF ITS BURDEN OF PROOF, IMPROPERLY INJECTED THE PROSECUTOR'S OWN OPINIONS AS TO THE QUALITY OF EVIDENCE *AND* CREDIBILITY OF WITNESSES, MISSTATED THE LAW, ARGUED FACTS NOT IN EVIDENCE, *AND* RESORTED TO INFLAMMATORY, IRRELEVANT MATTERS, *AND* DEFENSE COUNSEL UNREASONABLY FAILED TO OBJECT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

The prosecutor, in his guilt closing argument engaged in numerous improper and unconstitutional arguments. He argued that the State's burden was only to prove a reasonable belief of guilt (R. 787-88). He argued his own personal opinion as to the truth or falsity of testimony on the guilt of Mr. Medina (790-91). He argued that Mr. Medina's testimony was not credible (R. 789-90). He identified himself with the jury by repeatedly using the pronoun "we" (R. 792; 799; 789). He told the jury he had proved his case (R. 787). The prosecutor also argued matters not in evidence (R. 791; 798; 790; 797). Specifically he argued that the State had presented everything to the jury (R. 791).

The prosectuor went on to misstate the law to the jury by misstating the burden of proof, and by characterizing the adversarial process as a battle of reasonableness wherein the party with the more "reasonable" case wins (R. 788). Having set that up, the prosecutor then assailed the testimony of the defendant (R. 791). The prosecutor thus argued an incorrect, unconstitutional standard of proof, subjected the defendant's testimony to an improper standard, told the

jury the testimony was "incredible," and urged the jury to convict accordingly.

It still did not end there. The prosecutor also misstated the law on "flight" evidence (R. 790) even after the trial court had denied the State's special requested instruction on flight (R. 1846).

Finally, the prosecutor argued inflammatory, irrelevant material that had no probative value (R. 796-97; 800). The jury's duty was to determine Mr. Medina's guilt or innocence with respect to the charges against him. Characteristics of the victim, even if true or emotionally compelling, have absolutely nothing to do with that determination. The introduction of such factors in the jury's guilt-innocence calculus was improper and highly prejudicial. See Booth v. Maryland, 482 U.S. 496 (1987). Ms. James' age, how many children she had, and how regularly she attended church were improperly argued by the State in closing.

This issue was denied by the circuit court as one that could have been, should have been or was raised on direct appeal. There was no objection to any of these improper comments by defense counsel. This constitutes ineffective assistance of counsel. Further, defense counsel at trial also handled the direct appeal. He was arguably unable to raise his own ineffectiveness, or at least, understandably reluctant to do so. This issue deserves review by this Court, and an evidentiary hearing is warranted.

(XIII)

MR. MEDINA'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE BAILIFFS TWICE HANDCUFFED HIM IN FRONT OF THE JURORS ON THE FIRST DAY OF TRIAL. HIS RIGHTS WERE FURTHER VIOLATED WHEN THE TRIAL COURT FORCED HIM TO WEAR SHACKLES AND A LEG BRACE DURING TRIAL COMMENCING WITH THE SECOND DAY OF TRIAL.

The right to a fair trial is a fundamental liberty guaranteed by the fourteenth amendment, and the presumption of innocence is the mainstay of that right. Estelle v. Williams, 425 U.S. 501 (1976). Mr. Medina was forcibly handcuffed in the presence of some members of the venire panel, without prior

discussion with his attorneys or prior authority of the judge during the first day of trial (R. 66). Defense counsel explicitly declined to object to the handcuffing and failed to request an instruction from the court and/or an inquiry into its prejudicial affect on potential jurors (R. 66-68). Defense counsel's failure to so object was unreasonable. Estelle v. Williams, supra; Illinois v. Allen, 397 U.S. 337 (1970).

Defense counsel's omissions were tantamount to a denial of counsel at a critical juncture in Mr. Medina's trial, United States v. Cronic, 104 S. Ct. 2039 (1984), and the trial judge refused to consider the matter seriously:

> THE COURT: Mr. Edwards, the panel had just about exited. And there were a couple of panel members going out the back door when they placed the restraints on your client. Let's not misconstrue what happened.

(R. 68). Defense counsel's unreasonable omissions also resulted in the trial court's failure to issue a contemporaneous, curative instruction to the venire panel when it returned to the courtroom.

Another, similar incident occurred also during the first day of trial. During a court recess, Mr. Medina was paraded in front of all members of the venire panel, while shackled, in explicit disregard of his attorney's direction to the bailiff (R. 68-69). Defense counsel objected and requested an evidentiary hearing on the matter which the trial court summarily denied. Id. His motion was denied as was his subsequent request for a mistrial.

On the second day of trial, two jailers, Lieutenant Mead and Sargeant Whitted, reported to the trial court judge that Mr. Medina had exhibited wild and bizarre behavior in the courthouse holding cell. Mr. Medina was then shackled.

The trial judge failed to give a contemporaneous, curative instruction to the jury concerning Mr. Medina's shackles (R. 247-48). Not until the end of trial did the judge provide the jury with any instruction concerning the

shackles (R. 817). By then, it was too late.

The unreasonable and unnecessary shackling of Mr. Medina resulted in a denial of his right to a fair trial and presumption of innocence as guaranteed by the eighth and fourteenth amendments. Estelle v. Williams, supra; Illinois v. Allen, supra.

This issue was raised on direct appeal, and denied by this Court in a footnote, holding that Mr. Medina "has shown no impropriety or undue prejudice." Medina v. State, 466 So. 2d 1046, 1048 n.2 (Fla. 1985).

This issue was also raised in Mr. Medina's Rule 3.850 petition, and denied because raised on direct appeal. Mr. Medina respectfully urges this Court to review its earlier ruling and reexamine this issue. Evidentiary resolution is proper.

**(XIV)**

**THE PROSECUTOR AND TRIAL JUDGE UNDER FLORIDA'S BIFURCATED TRIAL PROCEDURE MISINFORMED THE JURY AND IMPERMISSIBLY DIMINISHED THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CALDWELL V. MISSISSIPPI, 472 U.S. 320, 105 S. CT. 2633 (1985).**

This Court has indicated in the past that it does not believe that Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), applies in Florida and thus has not granted relief on the basis of Florida capital litigants Caldwell claims. Mr. Medina respectfully disagrees and urges that this Court reconsider. Here the jury was first told by the court:

> This advisory sentence is by majority vote of the jury. The Court then sentences the Defendant to life imprisonment or death. The Court not being bound to follow the advisory sentence of the jury.
>
> Thus, the jury does not impose punishment if a verdict of, verdict of murder in the first degree is rendered. The imposition of punishment is the function of the law and the Judge, and not the function of the jury.

(R. 11). The prosecutor then provided a further unconstitutional characterization of the jury's sentencing function:

Now, that second phase, if a verdict of murder in the first degree, guilty, is reached that second phase is strictly advisory. It's a recommendation only. And the Court is not obligated to follow it. You need to know now in the event that you were to find a verdict of murder in the first degree, guilty of murder in the first degree, and you sat on the advisory sentence phase as a juror on that and recommended imposition of a death sentence or a life sentence that in either event the Judne is not oblieated to follow your recommendation. Although he has the same criteria established by the Florida Supreme Court that he has to meet in determining what sentence is appropriate.

What I'm getting at is, is the Judee is the last person in this case to decide what sentence is appropriate. It's not UP to you as jurors. If you are selected to determine what the sentence will in fact be you are not responsible for that. Does anybody here feel relieved in knowing that?

(R. 27-28). In closing argument, the prosecutor again emphasized to the jury that the "appropriate" sentence is for the judge to determine and not something for the jury to get "all hung up on."

This is a capital case. We'll determine in the event that this is a verdict of murder of the first degree at a later time what sentence you might want to recommend to the Court. And the iudne will then determine after that what sentence he thinks is appropriate.

(R. 789).

Now, the Penalty in this case is not vour responsibility. So don't get back there and get all hung UP on this.

(R. 792).

Before the jury retired, the court solidified the improper diminution of the jury's sentencing role:

Now, here's some general rules that apply to your discussion. You must follow them in order to arrive at lawful verdicts.

. . .

Fifth, your duty is to determine if the Defendant is guilty or not guilty in accordance with the law. It's mv iob to determine what a proper sentence would be if the Defendant is found guilty.

(R. 821).

Before excusing the jury after the verdict was returned, the court depicted the upcoming penalty phase as a trivial proceeding:

I might say in that connection we will start at nine-thirty. I would anticipate the case being submitted to you about noon. These

things don't take long. Shouldn't take long in this case.

(R. 831-32).

The Court opened the penalty phase by reminding the jury, incorrectly, that sentencing "rests solely with the judge":

> The final decision as to what punishment shall be imposed rests solely with the Judge of this court.

(R. 965).

In his final instructions to the jury in the sentencing phase, the judge told the jury:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of me as the Judne of this court.

(R. 1024).

Mr. Medina's jury was thus provided with misinformation regarding its role under Florida's capital sentencing scheme, and was encouraged to place the responsibility for sentencing in a greater authority. This violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Defense counsel should have objected and litigated the issue, and rendered ineffective assistance in failing to do so.

## CONCLUSION

Mr. Medina was sentenced to the most irreversible penalty -- death. He was sentenced as a result of a jury proceeding at which virtually nothing was learned about him, his mental illness, or his horrid life. The daughters of the victim, who knew him, empathized and wanted him spared. This too the jury did not learn. The sentenincg result here simply cannot be relied upon.

Moreover, the separate threads holding together the fabric of his conviction are very weak indeed. The acts and omissions of both the prosecution and defense counsel deprived Mr. Medina of a fair trial. The circumstances surrounding the trial and sentencing seriously undermine confidence in the

jury's verdict.

Based on the foregoing, Mr. Medina respectfully requests that the Court vacate the judgment of conviction and set aside his death sentence; remand this action for the necessary further trial court proceedings; and provide such further relief as the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 15th day of May, 1990.

_____
Attorney