IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,756

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

MARIO ALBO LARA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE ELEVENTH
JUDICIAL CIRCUIT COURT, IN AND
FOR DADE COUNTY, STATE OF FLORIDA

ANSWER/INITIAL BRIEF OF APPELLEE/CROSS-APPELLANT

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PRELIMINARY STATEMENT

Circuit Judge Smith, who originally presided over the trial of this case and sentenced Mr. Lara to death, presided over the evidentiary hearing in this capital Rule 3.850 action. At the conclusion of the four-day hearing, after considering a wealth of testimonial and documentary evidence, and after resolving the factual disputes, Judge Smith found that Mr. Lara's former trial counsel's performance at the penalty phase was deficient and that Mr. Lara was prejudiced under the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). The State has appealed the grant of relief. Although conceding the issue of prejudice, the State argues that trial counsel's performance was not deficient, contrary to the lower court's factual findings. In this regard, Mr. Lara is in the posture of the appellee, and shall discuss herein why the trial judge's resolution of the penalty phase ineffective assistance of counsel claim--a resolution based on a wealth of supporting competent substantial evidence in the record and on Judge Smith's resolution of factual disputes--should not be disturbed. See State v. Michael, 530 So.2d 929, 930 (Fla. 1988); State v. Sireci, 536 So.2d 231, 233 (Fla. 1988).

The Circuit Court denied relief with respect to the claims presented challenging the capital conviction and to certain other challenges to the death sentence presented by Mr. Lara. In this regard, Mr. Lara has taken a cross-appeal, and in the posture of a cross-appellant discusses herein why the Circuit Court's resolution was based on errors of law, and why relief is

appropriate on the basis of these claims. See Fla. R. App. P. 9.110(g); 9.210(c).

Citations in this brief shall be as follows: The record on appeal concerning the original trial and sentencing proceedings shall be referred to as "T. ___" followed by the appropriate page number. The record on appeal of the proceedings concerning the Motion to Vacate Judgment and Sentence shall be referred to as "R. ____." All other references shall be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Lara lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Lara through counsel accordingly urges that the Court permit oral argument.

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INTRODUCTION

This case comes to this Court on the State's appeal from the trial court's order finding that trial defense counsel was prejudicially ineffective at the penalty phase of these capital proceedings under the standards of Strickland v. Washington and accordingly vacating Mr. Lara's death sentence. See Preliminary Statement, supra. Circuit Judge Smith, the original trial and sentencing judge, presided over the four-day evidentiary hearing, considered a wealth of documentary and testimonial evidence, resolved factual disputes, made findings of fact as to counsel's deficient performance and as to the resulting prejudice to Mr. Lara, and granted relief. The State appealed. On appeal, the State concedes that Judge Smith was correct in her findings as to prejudice, but argues that Judge Smith should not have found deficient performance, contrary to Judge Smith's resolution of the factual disputes and her express findings of fact. Judge Smith's factual resolution and findings of ineffective assistance of counsel are founded on a wealth of competent substantial evidence in the record, and on the application of appropriate legal standards, e.g., Strickland v. Washington, and should not be disturbed. State v. Michael, 530 So.2d 929, 930 (Fla. 1988); State v. Sireci, 536 So.2d 231, 233 (Fla. 1988); Stewart v. State, 481 So.2d 1210 (Fla. 1985). This case, as much as (if not more than) any other previously reviewed by this Court, "is a classic illustration of a case in which the appellate court should not substitute its judgment for that of the trial judge who has personally heard the pertinent testimony." Sireci, 536 So.2d at 233. This standard is quite appropriate where, as here, the post-

conviction judge who grants relief is also the judge who presided over the original trial and sentencing. See Francis v. State, 529 So.2d 670, 673 (Fla. 1988)(noting that findings of fact made by the original trial judge in a 3.850 action as to ineffective assistance of counsel are entitled to "considerable weight").

The record amply demonstrates Mr. Lara's entitlement to the sentencing relief which Judge Smith granted. However, Judge Smith made certain fundamental legal errors in denying Mr. Lara's Rule 3.850 motion as to the conviction and as to certain other sentencing claims. The record supports Mr. Lara's entitlement to relief on these issues, while Judge Smith made no findings of fact thereon adverse to Mr. Lara. Mr. Lara has taken a cross-appeal as to these issues.

As the State appropriately concedes, no fair analysis of the substantial expert and lay testimonial and documentary evidence presented at the Rule 3.850 evidentiary hearing can leave any doubt that Mr. Lara is seriously mentally ill.[1] Mr. Lara has never been well. He was born ill, with severe swelling in his head (R. 1100, 1473). His deep-rooted and long-standing psychological disorders stem in large part from an incredibly impoverished and bizarrely brutal upbringing at the hands of his father (R. 966, 1175, 1358-59). Since childhood he has had delusions and hallucinations (R.

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[1]Counsel provide at this juncture a brief summary of some of the relevant facts concerning Mr. Lara adduced at the evidentiary hearing. Although the State concedes that there is more than sufficient evidence to establish "prejudice," this summary will assist the Court in reviewing the issues discussed in this brief, and in resolving the issues before the Court. Other facts relevant to specific issues before the Court are detailed in the body of the brief.

952). Those with whom he came into close contact uniformly recognized that he was mentally ill (R. 1110, Carmelina Lara; R. 1474, Heriberto Reyes Lemos; R. 1497, Carmen Bal Albo; R. 1532, Dr. Franciso Amigo; R. 1570, Rene Lara; R. 1583, Ameo Lollazo). Since childhood he has acted bizarrely (Id.).

Mr. Lara's history reveals a childhood of abuse which can only be described as torture at the hands of his father--a man consistently described as a monster by each of the many witnesses who testified at the evidentiary hearing. Dr. Carbonell, an eminently qualified clinical and neuro-psychologist and a tenured professor of psychology at Florida State University, described the abuse that Mr. Lara endured as "chronic, severe, and beyond comprehension" (R. 962); as "absolutely bizarre" (R. 963); and noted that "it [the abuse] in some ways defies description" (Id.). Dr. Simon Miranda, a psychologist who specializes in child abuse and neglect, was also appalled by the amount and kind of abuse that Mr. Lara suffered throughout his childhood (R. 1169). As Dr. Miranda described, Mr. Lara "endured perhaps one of the most severe, extreme set of experiences of physical and emotional abuse known to me, and I hasten to say that I have evaluated maybe 2,000 children for alleged victims of physical abuse over the past eight years" (R. 1169).

Although every member of Mr. Lara's family suffered abuse from his father, Mr. Lara was most often the focus of his father's torturous behavior (R. 1542). Ironically, Mr. Lara's mental illness and his resultant bizarre behavior brought the wrath of his father's cruelty and savagery upon him (R. 963). Instead of receiving compassion, kindness, and understanding from his father

to overcome his obvious mental disorder, Mr. Lara received brutality. The abuse was unending. His father would constantly assign him tasks he knew the boy could not complete and then beat him unmercifully when the boy failed (R. 1476-78). The examples of Mr. Lara's father's cruelty are so numerous that an exhaustive list is not possible. His father would tie him up and leave him in the fields overnight (R. 1546). Mr. Lara's father tied him up and hung him upside down over a well (R. 962). During one attack, Mr. Lara lost part of his thumb when his father threw a machete at him (R. 1550). On another occasion, his father threatened to set him on fire with gasoline and matches leaving his son in absolute terror (R. 1102, 962). The severe and constant beatings Mr. Lara received are too numerous to list. He was beaten with ropes and branches and during many of these beatings young Mr. Lara would be tied to a tree (R. 1474, 1579, 1102). One time he was beaten while tied to a donkey that he had allegedly mistreated (R. 1557). On several occasions, the beatings were so severe that they required hospitalization (R. 962). The beatings, reaching a level which can only be described as torture, lasted throughout Mr. Lara's formative years and into his teens. Mr. Lara, slow, dull, and mentally ill, had no way to deal with this constant torture. He has a history of suicide attempts and self-mutilation, consistent with that inability.

Dr. Carbonell testified that there was no way that a child will develop normally under such conditions. She emphasized: "It is just not going to happen. It is simply not going to happen" (R. 967). Dr. Miranda agreed, as did the psychiatrist, Dr. Cava.

Dr. Miranda explained that much of Mr. Lara's psychopathology and intellectual underdevelopment are due to his abusive upbringing (R. 1175).

Nevertheless, there is also a genetic component to Mr. Lara's mental illness (R. 949). His family has a long history of mental illness. His mother, two brothers, a sister, and an uncle have all been treated and/or hospitalized for psychiatric problems (R. 959-60). His mother, like Mr. Lara himself, has experienced hallucinations, attempted suicide, and was diagnosed as suffering from "involution neurosis," a kind of neurosis bordering on psychosis (R. 959).

Mr. Lara's family members observed that throughout his life he was "very moody," not "a normal child, but very strange" and would experience sudden behavior changes (R. 1101, 1474, 1497, 1560). One of his teachers explained that Mr. Lara always suffered from "a madness" (R. 953). He would act "normally" and then suddenly turn into a "madman" (R. 953, 1488, 1497, 1532, 1567-68). This alternately normal and then bizarre behavior has occurred since Mr. Lara was a child (id.) and continued up to the time of the offense at issue herein (R. 1531, 1497). Since childhood, Mr. Lara has been severely mentally ill, was so at the time of the offense, and remains so to this day. Since childhood, he has heard voices and would talk about the voice of "Bermudez," the devil that controlled him (R. 1560, 1527). Moreover, Mr. Lara has a history of self-abusive behavior, self-mutilation, and suicide attempts (R. 967, 1549). He would cut himself intentionally (R. 1483, 1549). The instances of self-abuse were usually at the command of the voice (R. 952). When Mr. Lara was

approximately 10 years old the voice ordered him to jump out of a tree (R. 951). Mr. Lara jumped and broke his arm (Id.). Mr. Lara's uncle, Rene Lara, explained that Mr. Lara as a young boy would call to this devil, "Bermudez," at night, telling him to "come out, come out." Mr. Lara would go to the lagoon at night and scream for "Bermudez" (R. 1560). As a result of this bizarre behavior, people were afraid of Mr. Lara; all believed him to be mentally ill (R. 1563, 1568).

Mr. Lara's mental illness continued to plague him as an adult. He was drafted into the Cuban army at age eighteen. After four months on active duty, he once left his place of duty and went to his wife's home. He was arrested for this and sentenced to five years incarceration. During his incarceration he was hospitalized in the Mazorra Psychiatric Hospital for six months (R. 533). While hospitalized he received psychiatric treatment and medication (Id.). Dr. Amigo, who was then a Cuban political prisoner incarcerated with Mr. Lara, explained that Mr. Lara's behavior in prison was "very strange" and that he would always stay by himself. While in prison Mr. Lara would talk about having "a pact with the devil" (R. 1527).

Mr. Lara began abusing drugs and alcohol at an early age while in Cuba (R. 1106, 1480) which all the mental health experts agree only compounded his already serious mental health problems (R. 969, 1190, 1362). Upon his arrival in this country his abuse of drugs and alcohol worsened (R. 1503). As Dr. Cava testified, Mr. Lara had been abusing drugs consistently "since his arrival in the United States" (R. 1362). The effects of this great amount of

drugs weakened his already limited capacity to cope--and to adapt: it interfered with his logical thought processes and his ability to deal with reality (R. 1362). As Dr. Cava described, Mr. Lara was in "a downwardly spiraling adjustment practically from his arrival. His capacity to function was simply deteriorating continuously. And he was not stable when he arrived" (R. 1363), thereafter only becoming worse.

The three mental health experts who have evaluated Mr. Lara are in complete agreement that Mr. Lara is severely mentally ill, that he has been so throughout his life, and that his mental illness significantly affected his behavior at the time of the offense (R. 945, 1163, 1411). All of the experts agree that although there is no question that Mr. Lara was and is seriously mentally disturbed, a specific mental condition is difficult to diagnose--as Dr. Cava put it, Mr. Lara's is a "grab-bag" of mental illness. He suffers from many and various disturbances affecting him singularly and in combination. Although Mr. Lara tries hard to appear normal (R. 946, 1170, 1445), his mental deficiencies are not subject to dispute.

Because of the extent of Mr. Lara's mental disorders, Dr. Miranda explained:

> In Mr. Lara's case there is so much psychopathology and so diverse, there is so much wrong with this person, that I would say if we got a panel of twelve well-seasoned mental health professionals, psychiatrists and/or psychologists, that chances are high that there would be some divergence in the final diagnosis but that in every instance the diagnosis would take or recognize the existence of severe psychopathology.

(R. 1178-79). Dr. Cava similarly noted that Mr. Lara has very complex, multiple psychiatric syndromes, which, as noted above, he

described as a "grab bag" of psychopathology (R. 1410). Dr. Carbonell also observed the complexity and severity of Mr. Lara's mental illness (R. 947).

Although the experts had difficulty making a specific diagnosis, they were in complete agreement as to their overall findings which are summarized here.[2] Mr. Lara exhibits very serious signs of schizophrenia. He has had chronic auditory hallucinations since he was a child. Although Mr. Lara does have periods of non-psychotic behavior, he experiences dissociative reactions typical of children who have been seriously abused. Mr. Lara's mental disorders hover perpetually at the borderline of psychosis and often he exhibits serious psychotic symptoms. He has developed an alternative reality which is psychotic. He experiences auditory hallucinations in which "Bermudez," the devil, orders him to act. These hallucinations are called "command hallucinations" and are common among schizophrenics.

His condition can be best described as "shizophreniform," a disorder falling in between schizophrenia and a borderline personality disorder. There is no doubt that he is essentially psychotic; the psychotic episodes come and go. He does have more

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[2]The following is a summary of Mr. Lara's mental health problems which were discussed at length by all three experts during their testimony at the evidentiary hearing and in their written evaluations. Dr. Carbonell's testimony appears at R. 924-1059. Her report appears at R. 307-23. Dr. Miranda's testimony appears at R. 1147-1295. His report appears at R. 518-31. The testimony of Dr. Cava appears at R. 1355-1451. His original report done in May, 1982, appears at R. 532-36. Dr. Carbonell and Dr. Miranda are psychologists, and each conducted extensive testing of Mr. Lara. Dr. Cava is a psychiatrist, and he evaluated Mr. Lara at the time of the original proceedings and saw him again at the time of the 3.850 proceedings. Each expert examined and tested Mr. Lara using Spanish.

frequent psychotic episodes than one would typically see in individuals with a traditional borderline personality disorder. Mr. Lara would experience psychotic breaks, throughout his life, often when the "voice" spoke to him, and often under conditions of stress.

Mr. Lara has been hearing the "voice" since his childhood. He calls the voice "Bermudez." Bermudez is a legendary devil-like figure that Mr. Lara believes haunts a lake near the family's home in Cuba. Throughout his life he has told his family about hearing this voice. "Bermudez," to Mr. Lara, became his ally, protector, and mentor, and was part of his coping mechanism for the abuse he received from his father.

The voice has two psychological aspects: one hallucinatory, the other delusional. The hallucinatory aspect involves the perceptual experiences that Mr. Lara has had--hearing the voice talking to him and telling him things. The delusional aspect involves the sense of the belief system where he accepts the voice and acts according to the voice's commands. When the voice commands, Mr. Lara has no control: he must follow through with the action. He is driven by uncontrollable impulses at those points.

Most significantly, all of the mental health experts found that Mr. Lara's serious mental illness substantially affected his behavior at the time of the offense. At the time of the murders, Mr. Lara was acting under a "command hallucination." He was suffering from psychotic breaks; he was under great stress; he was out of touch with reality; and he had no conscious control over his actions. During that period of time, Mr. Lara could not understand the nature and consequences of his actions; his

capacity to conform his conduct to the requirements of the law was substantially impaired; he suffered from an extreme mental disturbance. Additionally, this psychotic break was intensified by Mr. Lara's use of mind altering drugs prior to the murders.

The mental health experts found no signs of malingering. Their findings were supported by the historical data and observations supplied by Mr. Lara's family and friends. The extensive psychological testing conducted confirms the experts' conclusions and evidenced no signs of malingering. Finally, Mr. Lara's descriptions of the voice were consistent with psychotic breaks, and consistent with the accounts of what those who knew him throughout his life have said about him. His descriptions were not over done, as one would tend to find in a malingerer. The hallucinations were auditory but not visual and Mr. Lara did not report chronically bizarre symptoms. Nor did he use this voice consistently as an excuse for inappropriate behavior. All the evidence points to a man who suffers from life-long and severe psychopathology. And, like many mentally ill people, Mr. Lara tries to appear to be normal.[3]

Mr. Lara's trial counsel knew little of this very significant information about his client. As he testified, as the record and

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[3]As this Court noted in Mason v. State, 489 So.2d 734 (Fla. 1986), the mental health professions recognize that mentally ill individuals try to mask their symptoms--like Mr. Lara, truly mentally ill non-malingering individuals often try to appear to be normal. That is why the mental health professions require that practitioners not rely solely on the patient's self-report, but also that practitioners consider testing results and background/ historical information about the patient. Mason, supra. Here, the history and testing overwhelmingly confirm Mr. Lara's mental illness.

the abundance of testimony presented at the evidentiary hearing confirms, and as Judge Smith expressly found, counsel was--as he put it--panicked, confused, and impaired during the proceedings, and especially by the time of the penalty phase. He "did not investigate in any detail the defendant's background," State v. Lara, No. 81-26182 (11th Jud. Cir., Feb. 1989)(Order on Defendant's Motion to Vacate Judgments and Sentences)(Smith, J.), at p. 2 (hereinafter Circuit Court Order). He "did not properly utilize expert witnesses regarding defendant's psychological state." Id. at 2. And, as Judge Smith expressly and cogently noted, summarizing her findings of fact: "In short, the court finds that Mr. Adelstein virtually ignored the penalty phase of the trial." Id. Counsel's unreasonable failure to investigate his client's pathetic background and substantial mental health problems prevented him from effectively representing Mr. Lara at each and every step of the proceedings.

(I)

THE CIRCUIT COURT'S RULING THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT THE SENTENCING PHASE OF MR. LARA'S CAPITAL PROCEEDINGS AND ITS FINDINGS IN SUPPORT OF THAT RULING ARE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE, ARE NOT ERRONEOUS AS A MATTER OF FACT OR LAW, AND ARE ENTITLED TO THIS COURT'S DEFERENCE.

The trial court found, as a matter of fact, that trial counsel failed to investigate reasonably and properly and thus failed to present "significant and compelling" mitigating evidence (R. 830)(Circuit Court Order). The court found that had counsel not failed to present evidence of Mr. Lara's brutal upbringing and history of bizarre behavior and mental illness, "there is a reasonable probability that the jury's recommendation and therefore

the sentence imposed by the Court would have been different" (R. 830-31, Circuit Court Order at 1-2, citing Strickland v. Washington, 466 U.S. 668 (1984); Combs v. State, 525 So.2d 853 (Fla. 1988); Tedder v. State, 322 So.2d 908 (Fla. 1975)). Moreover, the trial court found that counsel failed to investigate, prepare, and present mental health evidence regarding Mr. Lara's diminished mental capacity (R. 832, citing State v. Michael, 530 So.2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988)) and that, "had such evidence been presented the jury might well have recommended a penalty other than death" (R. 832).

As the Circuit Court explained, the findings were issued after the court carefully considered the entire record and the parties' extensive pleadings and memoranda. The trial court judge, Judge Fredricka G. Smith, conducted an extensive four-day evidentiary hearing, heard the testimony, considered the extensive documentary and testimonial evidence presented, observed the witnesses' demeanor, and reviewed carefully all of the evidence before resolving factual disputes and rendering findings of fact. The State was provided with every opportunity to prove its case below through evidence and argument. Mr. Lara proved his claim; the State did not rebut it. After carefully sifting through the evidence regarding counsel's ineffective assistance at the penalty phase, and resolving the factual disputes, the trial court applied appropriate legal standards to the facts it had found (see R. 830 [Circuit Court Order] [applying Strickland v. Washington]; see also R. 832 [Circuit Court Order] [applying State v. Michael and Middleton v. Dugger]), and concluded that Mr. Lara was entitled to relief (R. 832). The Circuit Court's findings are grounded on a

plethora of competent substantial evidence in the record, and should not be disturbed. See Michael, 530 So.2d at 929; Sireci, 536 So.2d at 233. It was the Circuit Court's duty to resolve disputed issues of fact, such as those presented by the State on this appeal, and the Circuit Court did so, in Mr. Lara's favor. The Circuit Court (Judge Smith) expressly found that counsel's performance was deficient under Strickland v. Washington, 466 U.S. 668 (1984), and that Mr. Lara was substantially prejudiced, on the basis of the facts of this case, and therefore granted relief.

Judge Smith not only presided over the evidentiary hearing, but she was also the judge who presided over Mr. Lara's capital trial and sentencing. As this Court has held, who, better than the judge at the original trial and sentencing, could determine whether the evidence presented at a post-conviction evidentiary hearing was sufficient to meet the Strickland v. Washington test. See Francis v. State, 529 So.2d 670, 673 (Fla. 1988)(emphasizing that Rule 3.850 motions are not abstract exercises to be conducted in a vacuum, and that post-conviction findings made by the original trial judge are entitled to "considerable weight"). This standard is particularly appropriate in a case in which the original trial judge grants relief because of the facts of the particular case as adduced at the evidentiary hearing.

This Court has traditionally deferred to express findings of fact and rulings based thereon of Rule 3.850 trial courts such as those rendered by Judge Smith herein, particularly in cases involving claims of ineffective assistance of counsel; this Court does not lightly disturb trial court rulings granting Rule 3.850

relief on the basis of the facts. See State v. Michael, 530 So.2d 929 (Fla. 1988)(deferring to circuit court's findings of fact that trial counsel's performance was deficient); cf. State v. Sireci, 536 So.2d 231 (Fla. 1988); Smith v. State, 457 So.2d 1380 (Fla. 1984)(deferring to circuit court's findings that trial counsel's performance was not deficient). The federal courts of appeal similarly defer to the factual findings of federal trial (district) courts granting relief on such issues. See, e.g., Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). In a case such as Mr. Lara's, involving issues of fact, the trial judge, after all, is in a much better position to properly evaluate the evidence: ". . . we pay great deference to the trial judge's findings because [s]he was in a position to observe the [declarants'] demeanor and credibility, unlike we as a reviewing court." Valle v. State, 474 So.2d 796, 804 (Fla. 1985); see also Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986)(same). Here, Judge Smith's findings of fact on Mr. Lara's claim of ineffective assistance of counsel are richly supported by the competent and very substantial record evidence which she considered at the evidentiary hearing.

As is obvious from any reasoned review of the Rule 3.850 evidentiary hearing record and Judge Smith's cogent order, Judge Smith based her order on the competent, substantial evidence introduced at the hearing and applied the proper standard, i.e., Strickland v. Washington, 466 U.S. 668 (1984), to her factual findings that 1) counsel's performance was deficient, on the facts of this case, and 2) Mr. Lara was prejudiced--i.e., a reasonable probability was established that the outcome of the proceedings

would have been different absent counsel's errors. Since the proper standard was applied, and since Judge Smith's findings of fact are founded on a great deal of substantial, competent evidence, Judge Smith's order should not be disturbed. See Michael, supra.[4]

The State properly concedes that Mr. Lara has more than met his burden in establishing the prejudice prong under Strickland v. Washington:

> The State does not dispute that portion of the trial court's order finding that the background and mental health testimony presented at the 3.850 hearing was quantitatively and qualitatively superior to that presented by counsel at the penalty phase, and that had it been presented, the sentencing outcome may well have been affected.

(State's Initial Brief, p. 42). The State appropriately

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[4]Indeed, fact-based issues such as the instant involve precisely the type of circuit court ruling which should not be disturbed on appeal. Judge Smith presided originally, then studied the original record in its entirety, reviewed the pleadings, heard every witness presented at the evidentiary hearing, assessed the witnesses' credibility, made credibility determinations, considered the documentary and testimonial evidence, and, after carefully sifting through the evidence, rendered proper findings of fact. The findings of Judge Smith's Order are in fact a model of how a decision should be made on a claim of ineffective assistance of counsel at sentencing once the petitioner establishes the claim through the introduction of evidentiary proof at a hearing. However, as even a cursory review of the State's brief shows, the State has taken this appeal simply because it disagrees with Judge Smith's findings of fact. The State cannot succeed on appeal simply because it disagrees with Judge Smith's factual determinations. Michael, 530 So.2d at 930; Sireci, 536 So.2d at 233. "This" case, like Sireci, "is a classic illustration of a case in which the appellate court should not substitute its judgment for that of the trial judge who has personally heard the pertinent testimony," Sireci, 536 So.2d at 233, even if this Court could disagree with Judge Smith. And, we submit, on the basis of this record, no reasonable review would allow for a disagreement with Judge Smith's ruling. A disagreement with Judge Smith's findings of fact, however, is basically all that the State's brief presents.

acknowledges that it was "indeed unfortunate" that the compelling mitigation evidence heard at the evidentiary hearing was not presented at Mr. Lara's penalty phase (Id. at 44). Nevertheless, the State disagrees with the trial court's factual findings that this compelling evidence was not presented to the jury because of trial counsel's deficient performance.

The State argues, contrary to Judge Smith's express findings, that counsel was not deficient; that the failure to present mitigating evidence was based on the defendant's lack of cooperation[5] and on certain witnesses' reluctance to cooperate and

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[5]Judge Smith's findings of fact are to the contrary, and are amply supported by the record. Even if the State's argument was correct, however, the appropriate legal analysis attendant to claims of ineffective assistance of counsel does not support what the State argues:

> Respondent argues that trial counsel was excused from investigating Eutzy's background because Eutzy allegedly instructed counsel that he did not want his mother--and perhaps other family members--involved. Even if the court were to accept the proposition that Eutzy restricted counsel's investigation for mitigating evidence (the record tends to refute such a proposition), Eleventh Circuit caselaw rejects the notion that a lawyer may "blindly follow" the commands of the client. . . . Although a client's wishes and directions may limit the scope of an attorney's investigation, they will not excuse a lawyer's failure to conduct any investigation of a defendant's background for potential mitigating evidence. [Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986)] at 1451; Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), . . . At a minimum, a lawyer must evaluate the potential avenues of investigation and then advise the client of their merit. Trial counsel in this case neglected to perform his duty to investigate and to discuss with his client the merits of alternative courses of action. Such neglect--albeit because counsel expected a different result--fell below an objective standard of reasonableness, and, as a result, trial counsel's representation fell outside the range of competent assistance.

(footnote continued on following page)

testify;[6] and that the trial court's order failed to address whether the information revealed at the hearing was available to defense counsel.[7] The State's argument, however, is nothing more than a statement of the State's disagreement with Judge Smith's findings of fact, is contrary to a plain reading of Judge Smith's cogent order, and is contrary to the competent, substantial evidence in the record supporting Judge Smith's findings.

First, the trial court made specific findings of fact concerning trial counsel's deficient performance. Despite the State's argument to the contrary, Judge Smith's Order did address whether the information presented at the evidentiary hearing was available to defense counsel. Judge Smith found that this information was available had counsel reasonably investigated and prepared for the penalty phase. The court's Order makes clear its finding on this issue:

> At the evidentiary hearing, the defendant's trial attorney, Stuart Adelstein, testified--and the court finds--that he was overwhelmed and panicked in handling his first capital case, spent ninety percent of his time working on the guilt-innocence phase of the trial, did not investigate in any detail the defendant's

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(footnote continued from previous page)

Eutzy v. Dugger, TCA-89-40058-WS (N.D. Fla. 1989)(Stafford, C.J.), affirmed, ___ F.2d ___, No. 89-4014 (11th Cir. 1990). Here, counsel never properly investigated, as Judge Smith found, and the advice he provided to Mr. Lara was woefully inadequate.

[6]In this regard as well, Judge Smith's credibility determinations and findings of fact are expressly to the contrary and, as shall be discussed below, are also supported by competent substantial evidence in the record.

[7]In this regard as well, Judge Smith's findings of fact are directly to the contrary, and are supported by substantial and competent evidence in the record.

> background, and did not properly utilize expert witnesses regarding defendant's psychological state. In short, the court finds that Mr. Adelstein virtually ignored the penalty phase of the trial.

(R. 831)(Circuit Court Order, p. 2)(emphasis added).

The Circuit Court expressly found that the "significant and compelling mitigating evidence" was not presented to Mr. Lara's jury at sentencing because trial counsel "virtually ignored the penalty phase of the trial." Having found that counsel "virtually ignored the penalty phase," it is axiomatic that the court concluded that had counsel not ignored the penalty phase and had he adequately investigated and prepared a penalty phase case, he would have found the significant and compelling mitigating evidence that this case involves, and thus that the evidence was available. The court's findings cannot be read to mean otherwise.

Indeed, each of the witnesses who testified at the evidentiary hearing about Mr. Lara and his background stated that they were available originally, that they were willing to testify as they did at the evidentiary hearing, that they were willing to cooperate with counsel had he asked, and that counsel failed to inquire about what they knew. Judge Smith, as her order demonstrates, obviously made the credibility determination in Mr. Lara's favor--i.e., she credited the testimony of these witnesses. And Judge Smith, who heard these witnesses and trial counsel testify in open court, was obviously in a better position than anyone else to make the credibility determination. On the issue before this Court--is Judge Smith's Order supported by competent substantial evidence?--there is no question that an abundance of competent substantial evidence exists to support Judge Smith's findings. Contrary to the

State's argument on this appeal, it was Judge Smith's province to weigh the evidence and make the credibility determinations, as she did. "It is not within this [appellate] Court's province to reweigh or reevaluate the evidence . . ." Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); see also Sireci, supra.

Indeed, the State's argument overlooks the Circuit Court's findings that counsel "ignored the penalty phase"; "did not investigate in any detail the defendant's background"; "did not properly utilize expert witnesses regarding defendant's psychological state"; and that "it is clear that the defendant's trial counsel should have investigated and prepared these areas for presentation to the jury as evidence in mitigation at the penalty phase . . ." (R. 831-32)(Circuit Court Order). These are express, specific findings concerning counsel's deficient performance: they are findings which reject the contentions the State makes on appeal, and they are amply supported by competent substantial evidence and Judge Smith's credibility determinations.

In fact, the argument made by the State on appeal was made directly to Judge Smith at the hearing and in the State's post-hearing memorandum, which Judge Smith "carefully considered" prior to the issuance of her order (R. 830). Surely Judge Smith rejected the State's argument, after "carefully consider[ing]" it, as she noted. Then, in its motion for rehearing, the State again made the identical argument to Judge Smith that it presents before this Court--arguing that Judge Smith misconstrued the Strickland standard and overlooked evidence presented at the hearing (R. 833-36). Judge Smith's denial of the motion for rehearing further establishes that the court did not misconstrue the law or overlook

the facts (R. 840). She was asked expressly, more than once, to rule on this same factual issue by the State below. And she did so--in Mr. Lara's favor.

The trial court's order sets forth amply sufficient factual findings supporting the granting of relief and applies to those findings the proper legal standards on this issue. The Circuit Court did not misconstrue the law and did not overlook facts. A review of the record establishes that the court's findings were founded on substantial, competent evidence and should not be disturbed. Michael, supra. The standards applied were those of Strickland v. Washington, Michael, and Middleton v. Dugger--each of which Judge Smith expressly cited. What the Eleventh Circuit noted a trial court should do in evaluating a claim of ineffective assistance of counsel, see Middleton, 849 F.2d 491, 493 (11th Cir. 1988), is precisely what Judge Smith did in this case, as her Order and her citation to Middleton made clear. What the United States Supreme Court held in Strickland v. Washington and this Court held in Michael should be done when a claim of ineffective assistance of counsel is under consideration is also what Judge Smith did in this case--as her Order and her express citation to these precedents, and discussion and application to the facts found of the standards they established make abundantly clear.

Further, the testimony of former trial counsel, Mr. Adelstein, at the evidentiary hearing clearly supports the trial court's factual findings. Mr. Lara's case was counsel's first capital case (R. 1679). Counsel admitted that his main focus of pretrial investigation concerned the guilt-innocence phase of Mr. Lara's

trial (R. 1680), devoting at least ninety percent of his time to the first phase (R. 1681). Although counsel did have an investigator working with him, he did not have the investigator work on the penalty phase of the trial (R. 1681).

Counsel indicated he talked with members of Mr. Lara's family prior to trial, however, he admitted that he did not adequately investigate Mr. Lara's background:

> I think personally I failed in pursuing what I learned later as to the history of Mr. Mario Lara, his upbringing, his experiences in the Cuban prisons.

(R. 1694). Counsel admitted that he never spent adequate time with Mr. Lara's family members to discuss their testimony and prepare them to testify on Mr. Lara's behalf prior to trial (R. 1682). Counsel indicated that he did not adequately prepare for the penalty phase and failed to pursue background information about Mr. Lara (R. 1780). He acknowledged that prior to trial he had "very little as far as Mario's background" (R. 1692), and "did put very little, in fact, nothing on in the penalty phase" (R. 1802).[8]

Unquestionably, there is competent, substantial evidence, Michael; Sireci, which supports the trial court's finding that counsel "virtually ignored the penalty phase." Counsel not only failed to adequately investigate and prepare for the penalty phase of Mr. Lara's trial, but was overwhelmed and panicked as the trial

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[8]At the penalty phase before the jury, Mr. Adelstein presented the testimony of Ms. Carmen Lara, Mr. Lara's aunt. Ms. Lara's testimony was very general in nature and is reported in seven pages of the trial transcript (T. 2088-95). After the jury recommended death by a vote of 8 to 4, Mr. Adelstein presented the testimony of Dr. Cava and a friend of Mr. Lara's, Dr. Amigo, later to the Court. Both presentations were very general in nature and very brief (T. 2137-46, Dr. Cava's testimony; T. 2149-51, Dr. Amigo's testimony).

date approached and the State came forward with an eyewitness, Mr. Barcelo. Counsel testified that he went into "mass panic" just prior to trial (R. 1684) and that he was "confused" and "shocked" (R. 1686). Counsel emphasized that this sudden development required him to continue his focus on the guilt-innocence phase and that he did not consider the penalty phase until after the guilty verdict (R. 1684). He described his mental state prior to and during trial as: "Scared. Upset. Very worried. Confused. A little of all that" (R. 1699). Mr. Adelstein explained that he experienced a loss of appetite and sleep during this period. He was floundering, not sure how to proceed. He acknowledged that his ability to try the case was affected by his mental state (R. 1776-77). As a result, counsel requested a continuance, but because of his confusion and panic failed to express to the court his true mental state and just how critically he needed a continuance (R. 1687). His inadequate request for continuance was denied.

All of this competent and substantial evidence, and more, was before the trial court. The State in arguing that the court's finding is wrong ignores this compelling evidence. Instead, the State relies upon several statements of counsel in isolation to argue that it was Mr. Lara and his family that prevented counsel from presenting the "significant and compelling" mitigating evidence. But the question before this Court is straightforward: Is there competent substantial evidence in the record in support of Judge Smith's ruling? There certainly is.

In support of its argument, the State first points to counsel's statement that he wanted to call family members present at a post-guilty verdict meeting. This meeting occurred

immediately after the jury's verdict on the eve of the penalty phase (R. 1743). Prior to this meeting, counsel knew he was not prepared for the penalty phase and asked the court for a continuance once the jury had returned with a verdict of guilty (R. 1745). Counsel had not prepared ahead of time and testified that his ability to function was impaired. According to counsel's testimony, everyone at this meeting was "very upset" including himself and "the majority of that time was spent trying to calm everyone down, including myself" (R. 1743). Counsel emphasized that at that point he had insufficient time to develop mitigating evidence for the penalty phase (R. 1745), and had not prepared anyone to testify (R. 1682).

Counsel testified that at this meeting only Carmelina Lara and Dr. Amigo asked to testify, and that "as far as the others, my recollection is they did not wish to testify or were afraid of testifying" (R. 1784). This testimony, however, did not go unchallenged. The State ignores the evidence that was presented to the trial court and which directly contradicts this testimony. The State also ignores the fact that this is a classic question of credibility and that the trial court judge--who observed trial counsel and the other witnesses and heard their testimony at the evidentiary hearing, and who also observed trial counsel, his performance, and his mental state originally--has already made the credibility determination against the State's position, and in Mr. Lara's favor. Such factually-based findings should not be disturbed.

Ms. Carmelina Lara, the defendant's cousin, testified that

she met with counsel only that one time on the eve of the penalty phase. She indicated that she provided counsel with the information that he asked for and that she was willing to tell counsel and the court all that she knew about Mr. Lara, but only provided counsel with the information he asked for (R. 1114). When asked on cross-examination why she did not volunteer additional information, she candidly stated that she "only answered what I was asked," and that "one does not just speak out" in court (R. 1119). On redirect, Ms. Carmelina Lara provided additional testimony further indicating that counsel's lack of preparation, and not the witnesses' lack of cooperation, was the reason that mitigating evidence did not get to the jury:

> Q Now, with regard to telling Mr. Adelstein about Mario's mental illness, were you a little embarrassed maybe to volunteer that?
>
> A Truthfully, it is a shameful thing. But he just asked me and then said, "That's enough."
>
> Q Had you known that it was important to tell about Mario's mental state, would you have done so? Would you have told Mr. Adelstein?
>
> A Well, yes. He was told that he was not a normal person; that he was not at his senses.
>
> Q Would you have told that to the Court and the jury had you been asked?
>
> A Yes. Yes.

(R. 1121-22). The State ignores the substantial competent evidence in the record supporting Judge Smith's ruling.

Ms. Carmen Bal Albo was also at the meeting in counsel's office on the eve of the penalty phase. She was present throughout Mr. Lara's trial. Ms. Albo testified that prior to that meeting, counsel never asked her about Mr. Lara's background

or mental health problems (R. 1502). Despite frequent contact with counsel prior to trial, he never asked her about Mr. Lara's background, about other witnesses who could provide background information about Mr. Lara or about obtaining information from Cuba concerning Mr. Lara. She indicated that she would have assisted had she been asked (R. 1504).

Ms. Albo related that at the meeting, the witnesses told counsel about Mr. Lara's background and mental history (R. 1503). Ms. Albo acted as the translator for counsel at the meeting. They told counsel about Mr. Lara's abusive upbringing, his history of drug abuse, and his longstanding mental health problems (R. 1503). As Ms. Albo explained, everyone at the meeting was willing to testify. Although she was willing, counsel never asked her to testify. Again, the credibility issue was determined by the Circuit Court against the State's position, in favor of the testimony of these witnesses, and in Mr. Lara's favor.

After Mr. Adelstein testified, Ms. Albo was recalled as a witness. At that time she provided the following testimony:

> Q You heard the testimony of Mr. Adelstein regarding the night before the penalty phase.
>
> A Yes.
>
> Q Can you please tell us what happened at that meeting?
>
> A Okay. What happened, he told me--and when we got out of court, he told me to go by and pick up Rene and Carmelina. He didn't ask me for any other friends or family. He asked me to go get them two.
>
> When we went to the office, he explained that he needed somebody--after we got over the verdict of the trial and everything--we discussed that a little while and what happened and so forth. He asked me to explain to them that he needed someone, anybody, to talk good about Mario. He just wanted to hear good things about Mario;

anyone who could talk about the things in his past.

Q Did he ever explain to you anything about other types of mitigating evidence such as diminished capacity?

A No.

Q Such as drug use?

A No.

Q Or intoxication?

A No.

Q Did you or Rene tell Mr. Adelstein that you would not be willing to testify?

A I did not tell him I would not testify. Rene, as far as I can remember, he did not say he would not testify. It was Adelstein's opinion that Rene should not testify.

THE COURT: Why?

THE WITNESS: He said he had some pending police matter or something. I don't know. He said he would rather have Carmelina testify because they would be testifying to the same thing basically.

(R. 1853-54).

Mr. Rene Lara also testified at the evidentiary hearing. His testimony about his contacts with counsel was also not as counsel related them to be. According to Mr. Rene Lara, he went to counsel's office shortly after Mr. Lara's arrest (R. 1575). Counsel asked Rene about Mr. Lara and Rene told him about Mr. Lara's abusive childhood and that Mr. Lara was "not well" (R. 1572). Rene's answers were written down and when the interview was over he signed the paper his answers were on (R. 1573). Rene told counsel he was willing to testify on Mr. Lara's behalf (R. 1570). Counsel never explained to Rene how important this background information was to Mr. Lara's case (R. 1575).

After that initial meeting counsel never contacted him again

before trial (R. 1572). Rene attended Mr. Lara's entire trial on his own accord: counsel never notified him of the trial date (R. 1574). Rene attended the meeting on the eve of the penalty phase. He was not asked to testify, and he never refused to testify on behalf of Mr. Lara (R. 1571).

A review of the record establishes that there is more than ample competent, substantial evidence supporting the trial court's findings. Judge Smith obviously rejected that portion of trial counsel's testimony that the State now relies upon, crediting instead the testimony from the family members and trial counsel's other testimony (for example, that he was not properly prepared and could not properly prepare the witnesses because of the condition he was in). The State merely disagrees with Judge Smith's credibility determinations and findings of fact: findings which are supported by competent substantial evidence. This, however, is not a proper reason to reverse Judge Smith's factually-based rulings. See Michael, supra; Sireci, supra.

In support of its argument, the State relies upon Cave v. State, 529 So.2d 293 (Fla. 1988). Under a reasoned reading of Cave, however, the State loses. In Cave, the trial court, like the trial court here, was presented with testimony from the trial attorney and family members of the defendant which was contradictory. This Court noted that "we have no way of resolving this conflict in testimony, but the burden of proof at this stage rests upon the petitioner." Id. at 297. The trial court had ruled in the State's favor. In Mr. Lara's case, it is the State that has the burden now, as Judge Smith's factual findings are in

Mr. Lara's favor; nevertheless, the State offers merely a disagreement with the trial court's credibility determinations and findings of fact. The State has failed to meet its burden.

Moreover, the State relies upon Cave for the proposition that where counsel's failure to present certain mitigating evidence is based on the defendant's and witnesses' lack of cooperation, counsel is not ineffective. Cave can be factually distinguished from this case. In Cave, trial counsel testified that Cave's mother adamantly refused to testify, to provide names of other possible witnesses, or to be involved in the defense. Trial counsel also testified that she knew the importance of such character witnesses and directed an investigator to find such witnesses. Mr. Cave's witnesses at the evidentiary hearing indicated they would have testified had they been asked. This Court after noting that the trial court had obviously made a credibility finding in favor of the State (i.e., of trial counsel's testimony) emphasized that the record contained facts supporting that finding: that Cave's mother did not attend the trial, which certainly suggests either a lack of interest or a desire not to be linked to Cave; that the sister also did not attend the trial and did not know that a change of venue had been granted or where the trial was held; and that the mother and sister never discussed the trial as it took place. Id. at 297-98.

In this case, no such facts exist, while, unlike in Cave, the facts found by the trial court and credibility determinations made by Judge Smith are all in Mr. Lara's favor. Here, counsel admitted that he did little to prepare for the penalty phase; that he did not ask his investigator to conduct a background

investigation of Mr. Lara, or to investigate at all for the penalty phase; and here, counsel never testified that Mr. Lara's family refused to cooperate, only that they did not volunteer details about the abuse. There was no evidence that counsel explained the importance of such details or spent any time in developing the details from the family members. Also, counsel acknowledged that he did not adequately investigate and prepare for Mr. Lara's penalty phase and was in a state of panic while preparing Mr. Lara's case for trial and during the proceedings. Moreover, there is substantial, competent evidence to support Judge Smith's credibility finding in favor of the family members in Mr. Lara's case. This case is quite unlike the situation in Cave. The objective facts in this record establish that the witnesses were very supportive of Mr. Lara and cooperative with Mr. Adelstein. They visited Mr. Lara regularly at the jail while he awaited trial; they were in contact with counsel; they attended the trial, without counsel's invitation; and they obviously rallied in support of Mr. Lara as a family. In short, Cave from both a legal and factual perspective, requires that this Court affirm Judge Smith's order.[9]

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[9]The State's reliance upon Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985), and Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), is similarly misplaced. In both Messer and Mitchell, the records clearly supported the lower court's findings that the trial attorneys had conducted sufficient investigation concerning the penalty phase of trial. In this case, the record shows that Mr. Adelstein did not conduct a sufficient investigation; he in fact admitted so; and, Judge Smith so found. Moreover, the Eleventh Circuit in both Messer and Mitchell found that even assuming the petitioners could meet the deficient performance prong of Strickland, they could not meet the prejudice prong. Mr. Lara's case is again distinguishable both legally and factually.

The State also fails to address the substantial competent evidence that trial counsel during the clemency process was able to obtain much of the information presented at the evidentiary hearing from both the family witnesses and Mr. Lara (R. 848, 908, 931, 959). In light of counsel's testimony that he spent little time investigating and preparing for the penalty phase and that he was overwhelmed and panicked prior to the trial, the fact that after trial he was able to readily obtain this information clearly speaks more to counsel's inadequate investigation and preparation pretrial than to any purported lack of cooperation on the part of Mr. Lara or his family. This evidence also supports the trial court's finding that counsel failed to investigate "in any detail the defendant's background" (R. 831). Again, Judge Smith made the factual and credibility determinations in Mr. Lara's favor, and competent substantial evidence supports her findings.

The State has failed to meet its burden of showing that Judge Smith's order is not supported by competent and substantial evidence, or that she improperly applied the law (the State appropriately does not argue this), as to trial counsel's failure to investigate Mr. Lara's background, or to prepare for sentencing. The State's argument concerning trial counsel's failure to investigate and prepare mental health mitigating evidence is also without merit. The State's argument concerning the issue of mental health mitigating evidence is predicated upon the very same argument that the family and the defendant prevented counsel from learning about Mr. Lara's background. As demonstrated above, counsel failed to adequately investigate Mr. Lara's background, and Judge Smith so found. Indeed, counsel

admitted that had he known about Mr. Lara's extremely abusive upbringing and his history of mental illness he would have pursued mental health mitigating evidence further (R. 964). In sum, the informational basis for the experts' findings was available to counsel had he not "ignored the penalty phase"; had he not unreasonably failed to "investigate in any detail the defendant's background"; and had he not unreasonably failed to "properly utilize expert witnesses regarding defendant's psychological state" (R. 831, Judge Smith's Order). The Circuit Court's findings are due the deference of this Court in this case, as they were in Michael. Here, the Circuit Court, like the Circuit Court in Michael (which Judge Smith cited), granted relief because the statutory mental health mitigating factors were available to counsel, had he investigated and prepared properly. Because he "virtually ignored the penalty phase of trial" and "did not properly utilize expert witnesses regarding defendant's psychological state" (Circuit Court Order, p. 2), counsel never developed and presented the evidence. As the Circuit Court's Order demonstrates, this was prejudicially ineffective assistance.

Moreover, prior to trial, counsel obtained the services of a psychiatrist, Dr. Edmund Cava, to evaluate Mr. Lara. Counsel's motion to appoint an expert merely indicated that the services of a mental health expert were needed to: "assist in the preparation and investigation of these charges" (T. 59-60). Dr. Cava was provided with no background information concerning Mr. Lara by defense counsel. He was forced to rely upon only the self-report of Mr. Lara, a mentally ill defendant. He received absolutely no

guidance from trial counsel concerning what was expected from him, and was never asked specifically about the statutory mental health mitigating factors.

A review of Dr. Cava's written evaluation of Mr. Lara stands in stark contrast to the State's contention and to Mr. Adelstein's testimony that Mr. Lara refused to discuss his background prior to trial (Compare R. 532-37, Dr. Cava's report, with State's Initial Brief at p. 45 and R. 848, 907, testimony of Mr. Adelstein). Again, Judge Smith, after considering the documentary and testimonial evidence (including the testimony of Dr. Cava, Dr. Miranda, Dr. Carbonell, the family, and Mr. Adelstein), made the credibility determination in Mr. Lara's favor. Dr. Cava's report documents some of Mr. Lara's life history. Dr. Cava testified at the evidentiary hearing and gave no indication that Mr. Lara refused to discuss his background during his evaluation of Mr. Lara in 1982. All of this information, of course, directly contradicts Mr. Adelstein's testimony that the defendant would not discuss his background (R. 848, 907). This is yet another reasonable basis, and another item of competent substantial evidence supporting Judge Smith's factual findings which the State ignores.

Dr. Cava's original report makes clear that, although he was conducting a confidential evaluation, he was prevented from obtaining any useful information concerning Mr. Lara's mental state close to and at the time of the offenses, by trial defense counsel, not by Mr. Lara:

> He had apparently been instructed by his attorney (or at least so he believes) not to discuss any of the circumstances surrounding the crimes with which he is

charged so that whenever this period of his experiences was approached he calmly but firmly either avoided or simply explicitly refused to give information.

(R. 535-36). At the evidentiary hearing, Dr. Cava explained the frustration he felt concerning this impossible situation and the limitations put on him by defense counsel:

A . . . I was put in a rather, I would say, ambiguous position because his attorney hired me to examine him and at the same time told him to greatly limit the amount of information that he was to reveal to me.

Q What specifically when you say, "greatly limit the amount of information"? What were the instructions that were given?

A Well, I related to that in my report of May, 1982, that every time we approached the time period when he was accused of having committed the crimes for which he was on trial, he would just simply bring down the curtain and refuse to talk about it, either just by being evasive or just simply stating he did not want to talk about it because his attorney had instructed him not to.

Q When that occurred, could you relate to us what difficulties that caused in terms of your evaluation?

A Well, it is like perhaps the most relevant and most important part of my evaluation which would avail to the circumstances surrounding the incident. I was not privy to any of his experience, any of the history that he could relate to me.

Q Did the attorney also indicate to you directly that he was not going to allow Mr. Lara to speak to you?

A I have a couple of letters from his attorney. They were a bit ambiguous. The relevant sentence in the letter that I received from Mr. Adelstein, who was his attorney at that time, was ---

THE COURT: What was the date of that letter?

THE WITNESS: The letter was dated April 13, 1982.

THE COURT: Thank you. Go ahead.

THE WITNESS: The relevant sentence was, "As I

informed you, I have instructed my client not to discuss any matters without first getting my permission."

BY MR. NOLAS:

Q During the course of your interview with Mr. Lara, that instruction was followed up on.

A It appeared that he was adhering to his attorney's restraints, constraints, very scrupulously.

Q In terms of forming an opinion as to Mr. Lara's mental state at the time of the offense, would it be fair to say that that instruction made it virtually impossible for you to do this?

A It was impossible to even begin to explore his mental condition at the time surrounding the incident. It gave him authority just simply to cut off questioning whenever anything got very close to anything that he felt might be connected with the crime.

Q Now, he also declined to discuss that period of time; it was not just the offense itself but the period of time surrounding the offense, surrounding his status in the United States, that kind of thing.

A He gave me a great deal of that information, but it appeared the closer he got to the time of the crime, the more he got vague and ambiguous and defensive, so that he only described his circumstance and his behavior in the broadest generalities as he moved along closer to the time the crime was alleged to have taken place.

(R. 1355-58). Mr. Adelstein admitted at the evidentiary hearing that he had told Mr. Lara not to discuss the facts of the case with Dr. Cava (R. 842). Because of these restrictions imposed upon Dr. Cava he was prevented from assisting counsel in the preparation of Mr. Lara's case. As he concluded in his original report:

Unfortunately, as a result of my examination and also due to his unwillingness (or prohibition) against discussing his charges in details, no psychiatric material could be obtained that would serve as exonerating or extenuating factors in his defense. Regrettably, although this man is characterologically ill I was not able to find any clear cut manifestations

> of mental illness of such a nature or severity as to mitigate his legal circumstances.

(R. 536)(emphasis added). As Judge Smith factually found, defense counsel "did not properly utilize expert witnesses regarding defendant's psychological state" (Circuit Court Order, p. 2). As the record demonstrates, and as Judge Smith found, counsel's utilization of the confidential expert appointed was not reasonable on the facts of this case--counsel's performance was deficient. As the evidence introduced at the evidentiary hearing makes manifest, had counsel acted reasonably a wealth of mental health mitigation, including substantial evidence establishing the statutory mental health mitigating factors, would have been available. The substantial competent evidence amply supports Judge Smith's express findings of fact.

Although counsel had an expert--Dr. Cava--he unreasonably failed to provide the expert with any background information regarding Mr. Lara. Cf. Mason v. State, 489 So.2d 734, 735-37 (Fla. 1986); see also Sireci; Michael, supra. Although Dr. Cava had been retained as a confidential defense expert, counsel strangely and unreasonably ordered Mr. Lara not to discuss "the case" with Dr. Cava, and similarly instructed the doctor not to discuss the offense with Mr. Lara. Counsel never requested that testing be conducted.[10] That the few opinions Dr. Cava could provide in 1982-83 would be professionally inadequate and flawed was therefore also a foregone conclusion, given the limitations

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[10]It is also noteworthy that Mr. Lara's family testified at the evidentiary hearing that they would have provided funds for additional mental health experts if counsel had only asked.

placed on the doctor's efforts by counsel. Judge Smith, based on all of this evidence, found that counsel "did not properly utilize expert witnesses," a finding of fact which, in the context of this case, was eminently reasonable. It is not subject to reversal because the State disagrees. Michael.

The unreasonableness of counsel's actions became even more egregious when the State produced Tomas Barcelo, an eyewitness. Once Tomas Barcelo showed up, the chances increased that the case would go into the penalty phase. Counsel had no theory of defense. Mr. Adelstein explained at the Rule 3.850 hearing that from this point, and then throughout the course of the guilt-innocence and penalty phases, he was panicked, confused, overwhelmed, and simply did not know what to do. The adversarial testing process simply failed at Mr. Lara's trial.[11]

Mr. Adelstein testified that even after Mr. Barcelo appeared, he failed to consider having Mr. Lara re-evaluated. Counsel failed to effectively represent his client by not having Mr. Lara properly evaluated on the mental health mitigating factors, at the least after Mr. Barcelo came forward. He should have allowed Mr. Lara to discuss the circumstances of the offenses with Dr. Cava.

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[11]Counsel did, however, request a continuance, although, ineffectively, he failed to fully and adequately state his grounds to the Court. The Court denied the request. As Mr. Lara pointed out in his post-hearing memorandum to Judge Smith, had Mr. Adelstein explained his confusion, vexation, and panic with the clarity with which he discussed these issues at the evidentiary hearing, the Circuit Court would have granted a continuance. An attorney who is not emotionally or intellectually functioning right is the equivalent of no attorney at all. However, counsel at the time ineffectively failed to fully state his grounds. The adversarial testing process broke down from the very outset of Mr. Lara's trial. See Strickland v. Washington, 466 U.S. 668 (1984).

Counsel acted unreasonably: he talked to Dr. Cava on the morning before the penalty phase commenced (R. 1814); counsel's mental state was such that he would not even have been able to ask the right questions. Overwhelmed, confused, and panicked, counsel simply fell apart. As a result, compelling and overwhelming mental health mitigating evidence never reached Mr. Lara's jury.[12] As the Circuit Court found, "had such evidence been presented, the jury might well have recommended a penalty other than death" (R. 832). Moreover, as Judge Smith noted, "clearly defense counsel's actions were not based on any tactical decisions or strategy, despite the State's contrary suggestion" (R. 832).

In sum, Judge Smith based her "decision on competent substantial evidence, and the state has presented nothing . . . to disturb the [trial] court's findings." Michael, 530 So.2d at 930. The trial court in Mr. Lara's case heard the evidence, observed the demeanor of the witnesses, made credibility determinations, and rendered factual and legal findings which were eminently proper. "[I]t is clear that the defendant's trial counsel should have investigated and prepared these areas [mental health] for presentation to the jury as evidence in mitigation at the penalty phase of the trial . . ." (Circuit Court Order, p. 3, citing State v. Michael and Middleton v. Dugger). The State's appeal here is

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[12]All three mental health experts (including Dr. Cava) testified to the presence of two mental health statutory mitigating factors: one, that at the time of the offense, Mr. Lara's capacity to conform his conduct to the requirements of the law was substantially impaired (R. 971, 1187, 1419); two, that at the time of the offense, Mr. Lara was suffering from an extreme mental and emotional disturbance (R. 971, 1187, 1420).

as unfounded as was the appeal in Michael. Judge Smith's well-reasoned and amply supportable grant of relief should be affirmed.

(II)

MR. LARA WAS FORCED TO STAND TRIAL WHILE LEGALLY INCOMPETENT, IN NO SMALL PART BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT EVALUATION AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court found that counsel was ineffective in not adequately and reasonably pursuing, investigating and presenting mental health evidence concerning Mr. Lara (R. 831). The lower court credited the mental health evidence presented by Mr. Lara at the evidentiary hearing, but denied relief on the competency issue through the application of an erroneous legal standard to the facts presented. In its ruling on the question of the prejudice arising from counsel's deficient performance, the Court found that Mr. Lara was prejudiced as to mental health issues, but stated, as to competency, that the Court thought the mental health evidence presented not sufficient "to grant relief on the ground that the defendant was incompetent to stand trial (R. 831-32)(emphasis added). This, of course, is the wrong legal standard.

The standard governing an analysis of competency issues such as those raised by Mr. Lara is well-settled: reasonable standards for defense attorney performance require that counsel investigate the client's competency or lack thereof. See Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989). Counsel's performance is deficient under recognized standards if counsel fails "to make reasonable investigation into" the client's competency or fails "to make a reasonable decision that such investigation was

unnecessary." Id. at 1487 (emphasis added). Counsel here neither made a reasonable investigation into the competency of Mr. Lara, nor made a "reasonable" decision not to investigate the issue. He never asked the mental health expert to evaluate Mr. Lara's competency. Counsel's unreasonable failure to do so was clearly prejudicial, indeed, the proof presented by Mr. Lara at the hearing certainly meets the proper test for prejudice:

> In order to demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists "at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial."

Futch, 874 F.2d at 1487 (citations omitted). Here, Mr. Lara made the requisite showing: at the evidentiary hearing he presented a wealth of substantial and competent evidence that had a proper mental health evaluation been conducted at the time of the original proceedings, there exists "at least a reasonable probability," Futch, 874 F.2d at 1487, that such an evaluation would have revealed that Mr. Lara was in fact not competent. The Circuit Court, however, did not apply the appropriate legal standards for evaluating a post-conviction petitioner's competency claim. The signs were there in this case, and a reasonable investigation would have revealed evidence demonstrating Mr. Lara's lack of competency. No such investigation, however, was conducted.

Mr. Lara has established a compelling claim. A defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S.Ct. 1087 (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 an indigent whose mental capacity is at issue at all stages of a capital proceeding, Mr. Lara was entitled to competent psychiatric and/or psychological assistance. Mr. Lara did not receive such assistance, and as a result was forced to stand trial while incompetent. Based on the unrebutted evidence adduced below, the court should grant relief. See Hill v. State, 473 So.2d 1253 (Fla. 1985). Alternatively, the case should be remanded for a proper ruling on the issue by the trial court. See Blake v. Kemp, supra, 758 F.2d at 525; Mason v. State, 489 So.2d 734 (Fla. 1986).

Mr. Lara is severely mentally ill; he has been throughout his life. That three mental health experts confirmed this is no surprise to those who have known Mr. Lara. Those who knew Mr. Lara in Cuba (R. 1110, 1474, 1527, 1560) and after his arrival here in the United States (R. 1497, 1531-32, 1567-68) knew he was mentally ill. Mr. Lara was suffering from his debilitating mental illness at the time of the offenses and at the time of his trial. Unfortunately, his trial counsel and the mental health expert then appointed did not render appropriate assistance to Mr. Lara on the issue of competency.

Although counsel obtained the assistance of Dr. Cava, he did nothing to ensure that a proper and adequate mental health evaluation was conducted. See Deutscher v. Whitley, 884 F.2d 1152, 1160 (9th Cir. 1989)(emphasizing the critical role counsel has in pursuing mental health evidence). Counsel's failure to provide information concerning Mr. Lara to Dr. Cava (particularly information about Mr. Lara's background) and counsel's incomprehensible direction that Mr. Lara not discuss the offenses

with Dr. Cava, make it abundantly clear that counsel's conduct was unreasonable and contributed to the inadequacy of the evaluation. Counsel obtained no records. Counsel provided no assistance or background information to Dr. Cava. Even after receiving Dr. Cava's report, counsel failed to rectify the obvious problem concerning Mr. Lara's need to discuss the offenses and the relevant time period with Dr. Cava.

Dr. Cava contributed to the problem by not seeking out additional background materials concerning Mr. Lara's background, and by not having Mr. Lara tested--although he recognized that Mr. Lara was mentally ill. Dr. Cava relied solely upon Mr. Lara's self-report, although he learned that Mr. Lara was instructed not to talk about the offense. This Court has previously emphasized the problem with mental health evaluations which rely on the self-report of the subject particularly where the subject is mentally disturbed:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively or almost exclusively, on clinical interviews with the subject involved .... In light of the patients' inability to convey accurate information about his history and the general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C. The Role of Mental Health Professionals in the Criminal Process; The Case For Informed Speculation, 66 Da. L. Rev. 427, 508-10, 1980.

Mason v. State, 489 So.2d 734, 737 (Fla. 1986). Moreover, Dr. Cava concluded his evaluation without ordering further testing or assessment procedures. This is extremely troubling in light of the fact that despite an inadequate evaluation, Dr. Cava did recognize that Mr. Lara was quite mentally ill.

Not only was the evaluation of Mr. Lara professionally inadequate, counsel never even asked Dr. Cava to examine him to determine whether he was competent to stand trial. In fact, Mr. Adelstein now realizes that he should have asked for a competency evaluation (R. 881). Initially, the bizarre nature of the crimes made counsel suspicious of Mr. Lara's competency (R. 873). Based upon all that he has now learned about Mr. Lara's horrendous background, and his interactions with Mr. Lara during the pretrial and trial process, Mr. Adelstein has serious doubts about Mr. Lara's competency at the time of trial (R. 879).

Originally, Dr. Cava was never asked to do a competency evaluation (R. 1424). The doctor acknowledged that he did not evaluate Mr. Lara for competency in 1982. Although Dr. Cava had the impression that Mr. Lara was competent, he qualified that impression by emphasizing that he "did not investigate that issue in depth" (R. 1425), and noted that any evaluation of competency was hindered because of counsel's instructions that Mr. Lara not discuss anything relating to the offense with Dr. Cava (R. 1424). Cf. Fla. R. Crim. P. 3.211 (1982)(relating factors, including defendant's capacity to challenge witnesses, assist counsel, testify relevantly, etc.). In fact, Dr. Cava's impression that Mr. Lara was competent was based almost exclusively upon Mr. Lara's refusal to discuss the offenses with him (R. 1424). This, according to Dr. Cava, showed he could interact positively with his counsel (R. 1424). When asked if Dr. Cava would have reached a different opinion as to Mr. Lara's competency had he done a full competency evaluation, learned of Mr. Lara's background, and been able to discuss the offenses with Mr. Lara, he responded:

> I cannot say what I would have found if I had gone into that in much more detail. I could not address that at this point.

(R. 1426). Cf. Mason, supra (if a competency evaluation cannot retrospectively be conducted in a manner that comports with due process, the defendant must be granted relief). See also Hill, infra (same). Dr. Cava thus could not resolve this critical issue.

Dr. Cava's observation that Mr. Lara interacted positively with his counsel, Mr. Adelstein, however, was not supported by Mr. Adelstein's own testimony. Mr. Adelstein testified that Mr. Lara said, concerning the offenses, that he had no knowledge of what occurred (R. 1715). In fact, when asked if Mr. Lara was able to assist him in preparing for trial, Mr. Adelstein indicated that Mr. Lara's assistance was that of denial of knowledge. At the time, counsel thought that Mr. Lara understood what he discussed with him. Of course, all the discussions were through an interpreter. Now cognizant of Mr. Lara's mental illness, Mr. Adelstein has substantial doubts about whether Mr. Lara really understood what was going on (R. 1728). Mr. Adelstein recalled that all of their conversations during the trial were initiated by Mr. Adelstein, not by Mr. Lara. Counsel also recognized that at times the language problems between himself and Mr. Lara seriously inhibited their ability to communicate (R. 1781). Additionally, counsel noticed on several occasions during his representation of Mr. Lara that Mr. Lara would get a "cold stare" which was strange and frightening (R. 1718-19). In fact, this occurred twice during the trial itself. Counsel, now informed and atuned to the serious mental health problems of his client, seriously questions his

client's competency to stand trial. Counsel, however, panicked and confused, did not render effective assistance when he failed to request a competency evaluation and hearing for Mr. Lara. He acknowledged at the hearing that he should have done so. And Mr. Lara, as the Circuit Court found, was and is very, very seriously mentally disturbed.

Mr. Lara established his substantial mental deficits and the fact that there is a reasonable probability that he was not competent to stand trial. He certainly established substantial doubts about his competency, and that a hearing on the issue was therefore appropriate. Based upon the combined effects of Mr. Lara's severe mental illness, his limited intellectual capabilities and the serious language and cultural barriers, there "exists at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial." Futch v. Dugger, 874 F.2d at 1487. The Circuit Court, however, did not apply the proper legal analysis to the facts which Mr. Lara established.

Dr. Carbonell testified at the evidentiary hearing that although retrospective competency decisions are difficult, it is "really questionable" whether Mr. Lara was competent to stand trial (R. 996). Dr. Carbonell's opinion was based on her evaluation and testing of Mr. Lara, on Mr. Adelstein's and Dr. Cava's accounts (she discussed Mr. Lara with both), on Mr. Lara's testimony, Mr. Lara's recollections of the trial process, the substantial records she reviewed, and Mr. Lara's behavior--i.e., his willingness to pretend that he understands when he does not (R. 996).

Dr. Carbonell summarized these problems as they relate to Mr.

Lara's competence to stand trial:

> The question remains of course as to how these factors would have related to his behavior at the time of the offense and at the time of the trial. In terms of competency to stand trial, Mr. Lara faced the initial problem of a language barrier. Court proceedings are complex and move quickly and Mr. Lara reports that he did not understand much of what went on. As was noted earlier he will often state that he understood what has been asked or stated but frequently does not. His prison records bear this out. When questioned about his physical health, for example, the records indicate that Mr. Lara answered affirmatively to questions regarding his need for a hearing aid, a back brace, and the presence of a stutter or stammer. None of these are problems that Mr. Lara suffers from, yet it appears that his lack of understanding and inability or unwillingness to admit to this results in misunderstandings. In addition to the language barrier, Mr. Lara came from a culture in which the legal system is considerably different. So, not only was he faced with a language barrier and the problems engendered by his mental illness, but he was also faced with a foreign system of justice. In addition his mental health problems are such that he would have problems in processing incoming information as schizophrenics are vulnerable to "an overwhelming onslaught of stimuli from without and within" (Kaplan & Sadock, 1981). Mr. Lara does report that he is greatly disturbed by the "noise of crowds, loud T.V. or a person talking constantly."
>
> Mr. Adelstein, Mr. Lara's trial lawyer reported to me that Mr. Lara was no help to him during the trial. He reports that Mr. Lara was more concerned that he had been charged with rape than with murder and that he could not get Mr. Lara to focus on the murder case. He also reports that Mr. Lara would become disturbed by details that were basically irrelevant (such as whether or not there was a light on when he entered the house). Mr. Lara at one point was insisting that he be allowed to testify, in order to tell the jury that there was no light on in the house. According to Mr. Adelstein, Mr. Lara's desire for self-preservation was questionable. While Mr. Lara understood the charges against him, his motivation to help himself in the legal process was questionable. While he at times appeared to relate to his attorney, his own attorney described that at times Mr. Lara was frightening and eerie and he felt that even though Mr. Lara was in the room with him, he was simply looking right through him. He did not assist his attorney, nor was he capable of assisting his attorney in planning a defense. Although he believed that witnesses were lying he seemed unable to take any

> appropriate action and became involved in details tangential to the main thrust of the testimony. Although in a factual sense he knew he was charged with a murder, he was more concerned with having been charged with a rape and seemed not to understand the gravity of the situation with which he was faced.

(R. 320-22).

Dr. Miranda also considered the question of Mr. Lara's competency. During his evaluation, he went through the Spanish version of the McNaughten Competency Test, which comports and expands on Rule 3.311, with Mr. Lara. Dr. Miranda testified that in his professional opinion Mr. Lara was not competent to stand trial (R. 1226). As Dr. Miranda explained, Mr. Lara did not meet at least six of the eleven criteria required for competence to stand trial (R. 531). As Dr. Miranda reported: Mr. Lara indicated that his lack of knowledge of the American criminal system added to the rapid pace of the proceedings and the necessity of following the proceedings through an interpreter left him with fragments of a bewildering process which then led him to disengage himself mentally from the proceedings; Mr. Lara's tendency was to tell the interpreter, "just let me know when it's over." Mr. Lara's experience with the criminal justice system in Cuba, where conviction was always a foregone conclusion, added to his paranoid ideation and to his view that the prosecution used a witness who offered fabricated information. He had the belief that he had no way to defend himself because of this and his psychological impairments, impairments which produced frustration and psychological withdrawal from the proceedings. As Dr. Miranda explained, these factors and others mean that, psychologically, Mr. Lara was absent from the proceedings a significant proportion

of the time. Given his true level of diminished intellectual functioning, his severe psychopathology, and the structural limitations of the process of communication, Mr. Lara's statements of disengagement are totally acceptable (R. 530-31).

As noted, the lower court found that Mr. Lara was seriously psychologically disturbed and impaired. The evidence established, at a minimum, substantial doubts about Mr. Lara's competency. No competency evaluation, however, was undertaken at the time of the original proceedings and no hearing on the issue was conducted. Under Mason and Hill, the question is whether substantial doubts about competency exist--the evidence overwhelmingly establishes that they do. Under Mason and Hill, the question then becomes whether a retrospective competency evaluation can be properly undertaken--if not, relief is appropriate. Here, the Circuit Court found that Mr. Lara was mentally ill. The difficulty of a retrospective evaluation although substantial doubts exist (Dr. Carbonell), the impossibility of the original expert's undertaking it (Dr. Cava), and the fact that Mr. Lara was likely not competent (Dr. Miranda), well demonstrated that on the facts of this case a retrospective conclusion that Mr. Lara was competent could not be made in a manner comporting with due process of law. Mason; Hill. Under the appropriate legal standards, therefore, relief on the competency issue was appropriate. The trial court, however, erred in failing to apply those standards to the fact adduced, and thus erred as a matter of law in its disposition of this claim.

The overwhelming evidence clearly supports Mr. Lara's claim that there is a reasonable probability that he was incompetent to stand trial. The trial court, however, did not make findings in

this regard. All of the mental health experts agreed that Mr. Lara suffers from a deep-rooted and longstanding serious mental illness, and the trial court so found. All of the lay and expert evidence was in agreement on this. Moreover, Mr. Lara's level of intellectual functioning is in the borderline range. In addition, Mr. Lara was further addled by language and cultural barriers. The combination of these serious disabilities leave substantial doubts about Mr. Lara's competency to stand trial.

"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 there are substantial doubts concerning whether that person has the ability to meaningfully participate in the proceedings which will subject him to a loss of liberty or, as here, life. See Hill v. State, 473 So.2d 1253 (Fla. 1988). This fundamental unfairness is prohibited by the United States Constitution, and by parallel Florida constitutional provisions.

The constitutional test, see Dusky v. United States, 362 U.S. 402 (1960); Drope v. Mississippi, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956), was not applied by the trial court to the facts heard. Hill, Mason, Robinson, and Drope were never applied to the substantial facts heard by the trial court. This Court's opinions reflect an especially vigilant application of these standards. See Jones v. State, 478 So.2d 346 (Fla. 1985); Hill v. State, 473 So.2d 1253 (Fla. 1985); Gibson v. State, 474 So.2d 1183 (Fla. 1985); Christopher v. State, 416 So.2d 450 (Fla. 1982); Lane v.

State, 388 So.2d 1022 (Fla. 1980); Mason v. State, 489 So.2d 734 (Fla. 1986). The application of these standards to the facts of this case show that relief on the competency question is appropriate.

Here, the record abundantly demonstrates that the appropriate result is to "vacate the conviction and sentence and remand with directions that the State may proceed to re-prosecute the defendant after it has been determined that he is competent to stand trial." Hill, 473 So.2d at 1260. Mr. Lara was never afforded the requisite competency evaluation or hearing at the time of the original proceedings. His counsel wholly failed to investigate the issue, notwithstanding the many red flags that should have notified counsel to investigate and to seek a proper and thorough mental health evaluation. Mr. Lara has shown that if an evaluation of and hearing on the issue had been requested, there exists "at least a reasonable probability" that a "psychological evaluation would have revealed that he was incompetent to stand trial." Futch, 874 F.2d at 1487. See also Hill v. State, supra. He more than met his burden. The lower court, however, did not apply a proper standard of review to the overwhelming facts supporting this claim. Relief is appropriate under the proper legal standards, Mason; Futch; Hill, standards which the trial court failed to apply. This Court should vacate both Mr. Lara's judgment and sentence. Alternatively, this Court should remand with instructions that Judge Smith analyze the issue under Mason, Futch, and Hill.

(III)

MR. LARA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, at trial, and at the penalty phase, Mr. Lara's court-appointed defense counsel failed to provide the effective assistance mandated by the sixth amendment to the United States Constitution. Counsel's many unreasonable and ineffective acts and omissions severely prejudiced Mr. Lara. They directly resulted in fundamentally unreliable convictions and an unreliable sentence of death. The results of these errors undermine confidence in the outcome of Mr. Lara's trial and sentencing.

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). See also Middleton, supra; Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Moreover, counsel has a duty to ensure that his or her client receives appropriate mental assistance, Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); Deutscher v. Whitley, 884 F.2d 1152

(9th Cir. 1989), especially when, as here, the client's level of mental functioning is at issue.

Here, counsel failed to adequately investigate, research, and prepare for any phase of these capital proceedings. As the lower court found, counsel was panicked, did not function appropriately, and failed to appropriately utilize mental health expert evidence. Counsel then provided ineffective assistance in court.

The claims discussed below establish that Mr. Lara was denied the effective assistance of counsel. Individually and in their combination, they present a compelling case of ineffectiveness, demonstrating that relief as to the conviction is appropriate. Counsel's failures were not tactical, and the trial court rendered no adverse findings on these issues.

A. MR. LARA WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED THE JURORS TO RETURN HOME OVERNIGHT ONCE DELIBERATIONS HAD BEGUN AND TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE JURORS' SEPARATION DURING DELIBERATIONS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

There was a great deal of adverse pretrial publicity at the time of Mr. Lara's trial. The atmosphere at the time of the trial was in fact very heated. See section B, infra, and (R. 386) (Defense Exhibit F). After beginning their deliberations, Mr. Lara's jurors were nevertheless allowed to separate, leave the jury room, and go to their homes for an overnight recess.[13]

Although he had earlier moved the court to sequester the jury

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[13]Mr. Lara never consented, on or off the record, to this separation. See infra (discussing, inter alia, Francis v. State, 413 So.2d 1175 (Fla. 1982)). The lack of consent is important, and is a factor not discussed by the Court in its recent opinion in Pope v. State.

(T. 128-28A), and requested again that the jury be sequestered during the course of the proceedings (T. 140-41), counsel failed to object or to move for a mistrial when the jury was allowed to separate at this, the most critical stage of the capital guilt-innocence trial. Mr. Lara submits that allowing the jury to so separate, in a case in which the pretrial and during-trial publicity was so great (a factor not at issue in the recently decided case of Pope v. State), in which the defendant never consents to the separation (also a factor apparently not at issue in Pope v. State), and in which counsel himself had initially requested that the jury be sequestered--orally and by written motion (a factor also not involved in Pope v. State)--was inherently prejudicial fundamental constitutional error. See Raines v. State, 65 So.2d 558 (Fla. 1953); Livingston v. State, 458 So.2d 235 (1984); Johnson v. Wainwright, 498 So.2d 938 (Fla. 1987). The initial question presented in this action is whether counsel rendered ineffective assistance in failing to properly urge again that the jury should be sequestered and in failing to object, because he was panicked and confused during the proceedings, and not because of any tactical consideration. Counsel himself desired that the jury be sequestered, and there was no tactical reason behind counsel's failure--as he testified, his inaction resulted from his confused and panicked state. Cf. Pope v. State, No. 74,614 (Fla. Oct. 11, 1990), slip op. at p. 6 ("[T]here may be occasions when for tactical or other reasons defense counsel may prefer that the jury be allowed to separate . . ."). There were no "tactical or other reasons," id., here--counsel moved for sequestration, he wanted it, but he then failed

to object, because of his panicked state.

Judge Smith ruled on the merits of this claim, summarily denying relief. This question, however, must be answered in the affirmative. Counsel testified at the evidentiary hearing that there was no tactical or strategic reason underlying his failure to object (R. 1732). Cf. Pope, supra. This case involved extensive adverse pretrial publicity and publicity during the trial itself (See section B, infra). Counsel was obviously aware of the highly detrimental public sentiment surrounding the trial and his client, a Cuban Mariel refugee, as evidenced by his own motion to sequester the jury (T. 128).

Counsel was aware of the legal standards establishing that allowing the jury to separate during deliberations was improper; he did not want the jury to be allowed to separate; and he in fact had himself moved for sequestration. His testimony on this issue reflected the following:

> Q Were you aware of case law supporting an objection to the jury being separated?
>
> A Well, again, I thought that because of the pre-trial publicity and some of the cases I have read concerning pre-trial publicity and the amount of publicity, adverse publicity, concerning Mr. Lara's case, that is why I thought I had filed motions on that particular point.
>
> . . .
>
> Q Were you aware of the fact that based upon specific case law regarding that issue, you could have objected to the jury being separated?
>
> A I'm under--specific case law? Again, I had reviewed some cases in which there was an objection, I believe, made that the Court sustained because, again, of pre-trial publicity. As to a specific style of case, no.

Q Was there any reason for allowing the jury, from your perspective, to be separated? Was there anything favorable, anything to be gained by that?

A Quite to the contrary. I would think that it would be adverse.

(R. 1733-34).

Counsel, however, ineffectively did not argue the issue when the jurors were separated. And he had no tactical or strategic reason for not objecting: at the evidentiary hearing, defense counsel testified that "it was an oversight on my part."

Q Is there any tactical reason that you could provide us with for not objecting at the point.

A None.

Q Is there any strategic reason you can provide us with for not objecting at that point?

A None other than it being an oversight on my part.

(R. 1732).

That counsel would overlook such an important issue that he himself had been litigating and was obviously aware of is not surprising in this case. Counsel was under great personal stress during the trial which contributed to his inability to render effective assistance. Counsel's life had been threatened, and he had relocated his children for a period of time because of his representation of Mr. Lara, who had been portrayed by the press as epitomizing the "brutal immigrant" who had invaded South Florida. More importantly, counsel was irrecoverably shocked by the sudden appearance the weekend before trial of a crucial State's eyewitness.

He experienced loss of appetite and sleep. His ability to try the case was impaired. He stated that he was erratic during

trial. Counsel's erratic nature during trial is evidenced by his failure to object to the jury separation even though he knew that in a case of this magnitude, with this type of adverse pretrial and during-trial publicity, with threats against counsel and his family, it was "exceedingly detrimental" to allow the jury to go home for fifteen hours during the course of its deliberations. Counsel's state, however, was one of "mass panic." This confusion and panic stayed with counsel throughout the trial, and his failure to object to the jury separation was a result of this confusion. He himself had filed pre-trial motions on the issue. He was fully aware of the dangers of jury separation on the facts of this case, yet his mass panic and concern about his family spurred him on to anxiously leave the court that evening without objection over the issue that he himself had raised earlier. He never consulted with Mr. Lara about the separation. Counsel wanted the jury to be sequestered, would have objected under normal circumstances, believed that the issue had been preserved, but failed to urge it again--because of his confused state. These facts distinguish Mr. Lara's case from Pope.

Moreover, the trial court made a finding of fact that Mr. Adelstein was overwhelmed by his first capital case:

> At the evidentiary hearing, the defendant's trial attorney, Stuart Adelstein, testified--and the court finds--that he was overwhelmed and panicked in handling his first capital case, . . .

(R. 831).

Mr. Adelstein believed that he had preserved the sequestration issue--he had filed and argued a motion for sequestration. He wanted the jury sequestered because of the

specific facts of this case:

> . . . I think on a case of this magnitude it is exceedingly detrimental to allow that jury to go home and go on their merry way.

(R. 1828). But he later failed to object.[14]

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[14]In addition to the testimony from Mr. Adelstein himself that he should have objected to allowing the jury to separate during deliberations, Mr. Lara presented testimony from Mr. Art Koch, an experienced Assistant Public Defender in Miami (R. 1304-36). Mr. Koch testified as an expert witness regarding the standards of adequate representation in capital cases (R. 1309). Mr. Koch testified that the legal basis for a request that the jury not be allowed to separate existed since the Florida Supreme Court's decision in Raines v. State, 65 So.2d 558 (Fla. 1953) (R. 1310; 1335-36). Mr. Koch testified that it was deficient performance for a defense attorney, in a capital case such as this in 1982-83, to fail to request sequestration during jury deliberations (R. 1314). Mr. Koch explained:

> And the key is, whether you accept or reject the inherent danger talked about by the Florida Supreme Court, that inherent danger is precisely that, it is inherent, it is insidious, and it is something that frequently cannot be documented or established by the defendant. So you simply do not allow that to occur. You do not place your defendant in that kind of situation.

(R. 1334).

Mr. Koch testified that in 1982 the normal practice was to ensure that sequestration occurred during deliberations (R. 1323). During cross-examination, Mr. Koch was asked if he ever failed to ensure that the jury was sequestered during deliberations. He stated:

> No. I can tell you this, in every capital case I have tried I have always asked for sequestration and, frankly, without objection from the State. I can tell you categorically that in every capital case I have tried, be it in 1982 or before, I asked for sequestration after the jury began deliberation.

(R. 1326-27). Mr. Koch testified that during this time the normal practice was that juries were sequestered during deliberations. Mr. Koch emphatically stated that it was deficient performance for defense counsel in 1982 to fail to object to jury separation during deliberations, especially in a capital case such as this, involving extensive pretrial publicity (R. 1335).

The record is clear that defense counsel should have objected. Defense counsel testified that he should have objected. From his pre-trial motion, it is obvious the defense was aware of the dangers of the jury being separated during deliberations in this case. His failure to object when the jury was released was clear ineffectiveness. Defense counsel was not ignorant of the law regarding sequestration. His actions, however, were based on his confusion and panic, unlike those of the attorney in Pope, and these facts distinguish this case from Pope.

In Livingston v. State, 458 So.2d 235, 239 (Fla. 1984) (emphasis added), this Court explained:

> [I]n a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so.

In Livingston, as in Mr. Lara's case, there was an immense amount of adverse pre-trial and trial publicity. As this Court noted in Livingston, even if the jury is subject to admonitions before the break in deliberations, and then subject to voir dire after the recess, it does not change the fact that the jurors are highly susceptible to improper influences while they are unsupervised. In Livingston, this Court cited and relied upon Raines (decided in 1953), and explained that "some situations carry such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated on or affected the jury." Mr. Lara's case is exactly the kind of situation which carried with it these dangers of improper influence, given the massive publicity involved that was aggravated by community

prejudice against Cuban refugees. Massive adverse pretrial publicity did not exist in Pope.

As Judge Smith found, defense counsel was under great personal stress during the proceedings which contributed to his inability to render effective assistance. He was panicked and confused. The adversarial testing process failed during these proceedings. See United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). Pope did not involve such a break-down of the adversarial system; it did not involve a defense attorney who was found by the trial court to be "overwhelmed and panicked in handling his first capital case . . ." (Circuit Court Order, p. 2)(R. 831).

Because the adversarial testing process broke down, Mr. Lara need not show prejudice. See Cronic, supra. However, prejudice in this case is plain, for this case, unlike Pope, involved massive adverse and hostile pretrial and during-trial publicity and great community outrage. Moreover, given the nature of the interests discussed in Raines, Livingston, and Johnson, prejudice is inherent in the constitutional error itself. As these cases make clear, it is the possibility of undue influence on the jury that the constitutional standards discussed in Livingston and Raines seek to protect against. Counsel's failure to object deprived Mr. Lara of a fundamental right. The deficiency requires relief here as did counsel's failure to litigate a crucial issue in Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). And here, counsel wanted the issue to be presented--he wanted the jury to be

sequestered.[15]

Mr. Lara has undeniably established that his trial attorney's performance in this regard was ineffective. Relief is appropriate.

Moreover, Mr. Lara submits that counsel preserved the sequestration issue by bringing it to the Court's attention, thus making this case one in which the jury separation issue involves "per se reversible error." Pope, slip op. at 4-5, citing Livingston, Raines, and Johnson. Here, counsel affirmatively litigated the issue before the trial court, filed a written motion in this regard, and made it clear that he wanted the jury to be sequestered. As Mr. Adelstein testified:

> I thought I had objected to that, and I thought that I had filed motions to that effect requesting sequestration, not only during jury selection but throughout the trial. . . .

(R. 1736). Counsel did bring the issue to the Court's attention, thus distinguishing this case from Pope, and making this case akin to Johnson and Livingston. The per se rule of reversal is applicable, Pope; Johnson, particularly in light of the substantial adverse pretrial publicity in this case.[16]

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[15]Mr. Adelstein, of course, never stipulated to the separation and, as he testified, never wanted Mr. Lara's jurors to separate: he wanted them sequestered. However, ineffectively, he failed to think, and failed to act in his client's best interest, at the point at which the trial court allowed them to separate. Counsel, without a tactic or strategy, simply failed Mr. Lara in this regard.

[16]In Mr. Lara's case, as in Livingston and Johnson, and unlike in Pope, there was a great deal of adverse pretrial publicity. Moreover, here defense counsel never advised his client and never allowed his client the opportunity to accept or

(footnote continued on following page)

The error should now be corrected. Relief is appropriate.

B. FAILURE TO REQUEST CHANGE OF VENUE

Counsel note at the outset that this issue should not be considered in isolation from the sequestration issue discussed in previous portions of this brief.

Pre-trial and trial publicity regarding this trial was both pervasive and inflammatory (R. 386-414). The community attitude toward Mariel refugees at the time of Mr. Lara's trial was one of bias, prejudice, suspicion and hatred (R. 329-85, 1086-93).

Aware of this attitude, trial counsel filed Motions to Sequester the jury during voir dire and during trial (T. 128, 140). The failure to request a change of venue was thus not a tactical or considered decision between attorney and client. Also, during voir dire, counsel failed to adequately inquire into the anti-"Marielito" sentiment of the potential jurors.

Trial counsel was ineffective in not moving the Court for a change of venue based upon the pervasive pre-trial publicity concerning the defendant, as well as Mariel refugees in general. If any single principle could be said to characterize the American adversarial system of justice, it is that an accused is entitled to a fair and impartial trial. The cornerstone of a fair and impartial trial is, without question, the impanelment of a fair

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(footnote continued from previous page)

reject these critical actions involving the client's trial jury. Cf. Francis v. State, 413 So.2d 1175, 1178 (Fla. 1983)("Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of premptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived his right or that he acquiesced in his counsel's actions . . .").

and impartial jury. The concept of an impartial jury can be distilled into one very simple proposition: a juror is impartial who bases his or her verdict solely upon the evidence adduced at trial. If the verdict may be based upon anything other than the evidence, the defendant's right to a fair and impartial trial is violated.

There are several extra-judicial and impermissible reasons why any juror would cast a vote based on something other than evidence adduced at trial. These reasons include personal malice or hatred of the defendant, prejudice toward his ethnic background, sympathy for the victim, or outrage at the particular type of crime. Another more frequent reason, one very much applicable to the present case, exists where a juror bases his decision on a pre-conceived belief in the guilt or innocence of the accused, such belief having arisen from the juror's exposure to pre-trial media reports and descriptions of the crime. The possibility of this occurring depends upon the media coverage involved, which, in this case, was inflammatory, massive, and highly prejudicial. Any attorney would have sought a change of venue under such circumstances, in light of the quantity and prejudicial quality of the media coverage involved in this case. This extensive and prejudicial coverage concerned the defendant himself and the Mariel exodus and "Mariel crime wave" the community believed had ensued. The media coverage effectively destroyed the impartiality of the community from which the jurors were to be selected. Here, however, counsel ineffectively failed to make a request for a change of venue.

The present case involved massive pre-trial publicity which

was extremely unfavorable to the defendant. This publicity was so pervasive and prejudicial that it prevented a fair and impartial trial. For approximately one year prior to the trial of Mr. Lara, numerous articles concerning the murders at issue made headline news (R. 386-414). This news presented Mr. Lara as the prime example of the crime wave that was supposedly destroying the community in Miami due to the Mariel boat lift. Numerous newspaper accounts repeatedly and consistently served to implicate the defendant in this particular case and further implicate the defendant as an example of the "type" of individual that came over on the "Mariel boat lift." These articles contained inadmissible and highly inflammatory and prejudicial information. Such pervasive media exposure resulted in an atmosphere of suspicion and hatred in the community towards individuals that "invaded" the community through the Mariel boat lift. The massive pre-trial publicity was both adverse and extremely unfavorable. Under these circumstances, Mr. Lara simply could not receive a fair trial. Yet, the issue was not presented to the Court.

Examples of the inflammatory and pervasive nature of the media attention to this particular case which warranted a change of venue include the following:

a. Miami Herald Article dated July 14, 1982.

Headline: "WITNESS: HE LAUGHED AS HE KILLED."

This article stated that a witness "watched Lara slaughter a pretty teenager, oblivious to her cries, laughing as he emptied his .38 caliber revolver, pulling the trigger until the hammer clicked uselessly on spent casings" (Defendant's Exhibit F, R.

386).

b. This case began with a headline attacking the Judge for releasing a murderer and a rapist on bond, causing numerous editorials against the trial judge and inflaming the community about what standards are used to prevent the release of these "mariel animals" (Id.).

c. Miami Herald Article dated July 17, 1981 (Id.).

Headline: "SET FREE, HE LEAVES TRAIL OF CRIME."

d. Miami Herald Article dated July 7, 1982 "INTRODUCED GUN, KNIFE IN DOUBLE SLAYING" This article implied that Mr. Lara was an example of the "escoria" or "scum" that invaded this community and referred to the general community attitude toward Mariel refugees at the time: "the crimes shocked Miami at a time when revelations about the percentage of criminals included in the Mariel boat lift were first being made." The newspaper indicated that Mr. Lara, a Mariel refugee, had "tattoos on his eyelids, signs of prior criminal activity in the Cuban prison underworld," and that Mario "had been a prisoner and mental patient in his native land" (Id.).

The press continued on numerous occasions to indicate to the community and to the members of the future jury that Mr. Lara had been a prisoner and mental patient in Cuba and said that Mr. Lara was responsible for other unsolved crimes in the community. For the media, Mr. Lara was the "stereotypical" Mariel criminal. The entire crime problem in Miami was laid directly on Mario Lara's shoulders. In essence, the publicity made Mr. Lara the proverbial scapegoat in the war between the community of Miami and the "Marielitos". Given such pervasive prejudicial pre-trial

publicity, any jurors to be selected from the community were supposed to be soldiers in the war against individuals from Mariel accused of crimes (e.g., Mr. Lara). Mr. Lara became the symbol of the Mariel invasion that destroyed the peace and serenity of the community. Furthermore, the pre-trial publicity introduced to the community, which was abhorrent of the Mariel boat lift in general, explained vehemently that "atrocities" were being committed by individuals from Mariel.

The media presented untrue, inadmissible, inaccurate, and inflammatory accounts of Mr. Lara's "past". The media focused on his tattoos as signs that he had a prior criminal record. See, e.g., Miami News, July 17, 1981, "Tatooed man sought in slaying of two women"; Miami Herald, July 16, 1982, "Jury convicts tatooed refugee in double murder of teenagers." The media's publicity improperly emphasized to the community: 1) that Mr. Lara came on the Mariel boat lift; 2) that he was a symbol of the pervasive invasion of Cuban refugees destroying Miami; 3) that he was a member of the underworld in Cuba (he was not) and a mental patient; and 4) that he had committed at least one murder in Cuba prior to coming to Miami (he did not). He was portrayed as the stereotypical "Marielito" criminal "scum." None of this was true. All of it was prejudicial. All of it violated Mr. Lara's right to an unbiased jury.

The pervasive nature of media coverage and editorializing caused the community of Miami to believe that any individual from Mariel was a dangerous criminal and instilled prejudice and fear. The belief was that it was necessary to bar one's doors and not to

be within a hundred yards of a "Marielito" for fear of one's life. And who was the worst of the Mariels? The press made it out to be Mr. Lara. This was the pervasive publicity that occurred pre-trial and during trial. The nature of the media's attention during the trial and the court's failure to sequester jurors substantially impaired Mr. Lara's right to a fair and impartial jury trial.

The right to a fair and impartial trial is guaranteed by the sixth amendment to the United States Constitution, made applicable to the states through the due process clause of the fourteenth amendment, as well as applicable through the Florida State Constitution in Article I, Section 16. Singer v. United States, 380 U.S. 24, 36 (1965).[17]

Although the seating of an impartial jury was highly suspect, at best, the issue never got before the Court because defense counsel unreasonably failed to seek a change of venue, and thus failed to protect his client's rights to a fair and impartial jury. Defense counsel was on notice of the pre-trial publicity relating to this case. He knew or should have known about the media attention to the "Mariel invasion" and problems which besieged the community generally as a result. Circumstances warranted a change of venue, but counsel failed to pursue the issue. Moreover, the failure to seek a change of venue in this

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[17]The right to a fair and impartial trial is in fact a fundamental ingredient of due process. In re: Murchison, 349 U.S. 133, 136 (1955). The most essential requirement for a fair and impartial trial is the impanelment of a fair and impartial jury. See Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Irvin v. Dowd, 366 U.S. 717, 722 (1961).

case was not based on a considered decision between attorney and client. An effective attorney under the circumstances would have moved the court for a change of venue. Under the case law, a change of venue was in order. The omissions of counsel denied Mr. Lara his rights to a fair trial. The convictions and death sentence were virtually pre-ordained.

Furthermore, as discussed in previous sections of this brief, although counsel moved for jury sequestration pretrial, and although he knew of the adverse print and television/radio media coverage during the proceedings, counsel failed to object (without a tactic or strategy) when the jury was in fact separated. The two issues (change of venue and sequestration) should not be considered in isolation from each other.

Moreover, counsel was deficient in failing adequately to voir dire the jury about pre-trial publicity or anti-Mariel sentiment. A fair and impartial jury was not selected, because counsel conducted a wholly ineffective voir dire--as demonstrated by the transcript of the voir dire proceeding. Counsel seated biased jurors; his questions failed to disclose bias. He failed to adequately question the jurors as to the effect of pre-trial publicity upon them concerning the Mariel boat lift and the specific nature of the publicity as to his client. Although counsel indicated to the entire jury panel, even those who indicated they had not seen the papers or reports, that his client was a Mariel boat lift refugee, he failed to question the jurors properly about their sentiments in this regard. Panicked, counsel's functioning was impaired.

C. INEFFECTIVE VOIR DIRE

As demonstrated by the entirety of the voir dire transcript, counsel wholly failed to conduct any effective voir dire. This resulted in the seating of jurors with substantial prejudice and bias against Mr. Lara. In fact, counsel failed to challenge jurors who he himself had requested the Court to excuse for cause. Moreover, the very questions asked, and the statements made by counsel during voir dire, biased the potential jurors against Mr. Lara. A fair and impartial jury was not selected, because counsel was acting ineffectively.

Counsel informed the jury panel that his client was from Mariel. Counsel unwittingly and unnecessarily introduced prejudice and bias against his client and failed to fully inquire whether such prejudice or bias would affect the triers of fact. He also unnecessarily informed the panel that his client was indigent and that he had been appointed to represent him. The implication of such disclosure was that Mario Lara was not a client he had picked himself but one that he was forced to represent.

At the beginning of questioning the panel of potential jurors, defense counsel introduced himself. The questions were:

> My first question and I'll try to ask it as a group, so we're not here until the wee early morning hours, but does it bother you that because my client is indigent that the State of Florida and the County is paying me to represent him? (Thereupon all the prospective jurors nodded in the negative)
>
> Mr. Adelstein: Does the fact that he's a Mariel refugee bother any of you?
>
> Does the fact that he needs an interpreter bother any of you?

* * *

> Good evening, I want to direct my questions to the last row, so that maybe we can all get out of here. Does the fact my client is sitting there with an interpreter and doesn't understand any English, does that bother anybody? Does the fact that he's a Mariel refugee, in any way, does anyone attach any significance to that fact, in and of itself, which would preclude you from sitting as a fair and impartial juror? (Thereupon all prospective jurors located in the back row nodded in the negative)

* * *

> Good evening, ladies and gentlemen. You heard most of the questions probably three (3) or four (4) times. So I'm just going to briefly go over what I consider the important points. That is, is there anything about the fact that my client is a Mariel refugee, that would prevent you from sitting as a fair and impartial juror?

* * *

> May I presume the fact that my client doesn't speak English doesn't bother anybody? Okay. And some of you that are County employees or paid by the County, it doesn't bother you that the county is also paying me to represent him since he's indigent or cannot afford an attorney?

* * *

> You have heard the questions that I asked before. You understand that we don't have to do anything, just sit there and behave ourselves. Like you have been sitting there, listening to the questions. That's basically all we have to do. Is there anything about the fact that my client is a Mariel refugee that would affect your . . .

In the near two volumes of questioning, the above was the extent of defense counsel's inquiry into community bias and prejudice toward Mariel refugees. The disclosures of Mr. Lara's indigent and immigrant status were both unnecessary and done without the consent of Mr. Lara. The failure then to fully inquire about the existence of prejudice in the minds of the

jurors towards Mariel refugees rendered counsel's assistance ineffective and denied Mr. Lara the most precious constitutional guarantee: the right to a fair and impartial jury trial.

At the evidentiary hearing, Mr. Lara presented the testimony of Dr. Juan Clark, a sociologist specializing in Cuban studies. Dr. Clark testified concerning the perception of "Marielitos" in the area at the time. As explained by Dr. Clark, the Marielitos were the subject of intense discrimination by other Cuban immigrants and the general population (R. 1075-77). Moreover, the Marielitos were wrongly blamed for the rise of the crime rate in south Florida (R. 1081-82; see also R. 329-85).

Trial counsel was also ineffective in his voir dire of prospective juror number 14, Mr. Paez, a former lawyer and Judge from Cuba who had arraigned criminal matters and worked on "mental cases," federal cases and misdemeanors in that country. Mr. Paez admitted that the different approach to criminal matters in Cuba might influence his decision. He further advised that in Cuba a defendant had to prove his innocence. Defense counsel moved to excuse this juror for cause, based on these answers as well as his admitted memory lapses, but the Court denied the motion. Then, ineffectively, trial counsel failed to use his peremptory challenges to challenge this individual, who ended up sitting on the jury.

At the evidentiary hearing, counsel testified that he wanted the juror removed and that he should have challenged the juror peremptorily (R. 1758). Counsel also provided that he had no tactical or strategic reason for allowing this biased juror to sit at Mr. Lara's trial (Id.). Counsel could provide no explanation

for his omission, and was puzzled by his conduct in this regard (Id.). This was deficient performance.

Prejudice is also apparent. The right to a trial before a fair and impartial jury is one of paramount importance. This Court has therefore found prejudice inherent in trial courts' refusals to allow defense counsel to freely exercise peremptory challenges. See Rivers v. State, 458 So.2d 762 (Fla. 1984); Jackson v. State, 464 So.2d 1181, 1183 (Fla. 1985); Jones v. State, 332 So.2d 615 (Fla. 1976). Counsel here similarly violated Mr. Lara's rights to exercise a peremptory challenge against a juror who counsel himself acknowledged should have been struck. Here, the right discussed in Rivers, Jackson, and Jones, supra, was denied to Mr. Lara not because of a trial court ruling refusing to allow counsel to exercise peremptory challenges, but because counsel--whose Rule 3.850 testimony was that he was overwhelmed, panicked, and confused at Mr. Lara's trial--failed to think and act. Counsel's performance was prejudicially ineffective.

D. DENIAL OF CONTINUANCE

On Friday, July 2, 1982, the State advised the Court that an eye witness had reappeared (after almost one year's absence) and that the State had tried to provide him for deposition the previous week when defense counsel was involved in a federal trial. Although defense counsel moved for a continuance based on his inability to depose this witness until that time, and also based on his need to step back and reevaluate his entire defense based on the witness's reappearance, the trial court would not

postpone jury selection (T. 569-574). On Saturday, July 3, counsel deposed Tomas Barcelo.

On Tuesday, July 6, the date set for trial, and the date defense counsel was presenting evidence relative to a motion to suppress statements, defense counsel filed with the court a Motion for Continuance, laying out the basis for the request (T. 171-172a). Although the Court allowed the defense attorney time to review the deposition when typed, she disallowed a continuance (T. 589-591).

At trial it was obvious that defense counsel's attempted cross-examination of Barcelo was woefully ineffective and wholly deficient. In fact, in closing argument the State Attorney drew to the attention of the jury the fact of the weakness of the cross-examination (T. 1958).

Counsel had no theory of defense. He explained at the evidentiary hearing that from this point, and then throughout the course of the guilt-innocence and penalty phases, he was panicked, confused, overwhelmed, and simply did not know what to do. The adversarial testing process simply failed at Mr. Lara's trial.

Although counsel did request a continuance, he failed to fully and adequately state his grounds to the court. If, in 1983, Mr. Adelstein would have explained his confusion, vexation, and panic with the clarity with which he discussed these issues at the evidentiary hearing, the trial court would have granted a continuance. An attorney who is not emotionally or intellectually functioning right is the equivalent of no attorney at all. However, counsel at the time ineffectively failed to properly state his grounds. As a result, the adversarial testing process

broke down from the very outset of Mr. Lara's trial.

Prejudice was also established at the evidentiary hearing. Counsel's testimony at the hearing demonstrated that he was literally lost throughout the course of Mr. Lara's capital trial and sentencing proceedings. Substantial guilt-innocence and penalty phase defenses, also established at the evidentiary hearing, were therefore ineffectively uninvestigated, undeveloped, and unpresented.

Effective counsel would have fully stated his grounds for a continuance, and would have had at least some alternative defense theories, just as effective counsel would have prepared for the penalty phase in advance. Overwhelmed, confused, and panicked, counsel simply fell apart, and the adversarial testing process failed in this case.

E. FAILURE TO ADEQUATELY AND PROPERLY INVESTIGATE, DEVELOP, PREPARE, AND PRESENT SUBSTANTIAL VIABLE MENTAL HEALTH DEFENSES AT THE TRIAL

The trial court found that Mr. Lara was prejudiced by counsel's ineffectiveness at the penalty phase for failing to present evidence of Mr. Lara's diminished mental capacity (R. 831-32). Mr. Lara also presented substantial and competent evidence proving that he was prejudiced at trial for counsel's failure to present compelling mental health defenses at the guilt-innocence trial.

Mario Lara was insane at the time of the offense. His insanity could have been proven. It would have affected the results of these proceedings. Yet, trial counsel failed to develop this substantial and viable defense.

Mario Lara suffered from longstanding mental infirmities, diseases, and defects. As a result, he did not know what he was doing or its consequences, and he could not distinguish right from wrong. Under any legal definition, Mr. Lara was insane, and competent counsel could have and should have investigated and presented this viable, substantial defense.

The evidence indicates that at times of stress Mr. Lara was unable to control himself. He would then have no memory of his behavior. He rarely fought back in his own defense, but was known to fight in defense of others. Mario was always plagued by nightmares and bedwetting. As a child, because of the bedwetting, he was forced to sleep on the floor. Because his back was frequently lacerated and bruised, as a result of his father's constant, daily beating, Mr. Lara slept face down, a habit he continues to this day: he is still mentally tormented by the brutality of his childhood.

The severity of his mental and physical torture is and was such that he has attempted to take his own life. He was suicidal. He was chronically depressed. Because Mr. Lara could not physically escape from mental or physical brutality, he developed ways of escaping by either breaking with reality or dissociating so that his own sense of reality was lost or changed. He suffered and suffers from substantial dissociative disorders which have plagued him throughout his life. He fades in and out of psychosis; he has always suffered from hallucinations and delusions. And he was insane at the time of the offense--his emotional, psychological, and mental burdens have been with him throughout his life.

At the time of the offense, Mr. Lara was suffering severe stress and mental trauma from a number of sources: he feared the loss of his girlfriend, his sponsor in the United States was hospitalized, and he was abusing alcohol, cocaine, and marijuana. Faced with these and other stressors, Mr. Lara's longstanding mental illness--an illness in large part resulting from genetics, and from the abuse described above--left him with only two ways of responding: 1) his contact with reality would have been lost; 2) he dissociated from his surroundings, having a "temporary alteration in the normally integrative functions of consciousness, identity, or motor behavior" (DSM III, 1980 ed., p. 253). In such instances, "customary feelings of one's own reality may be lost" (Id.). These profound problems, exacerbated by stress, rendered Mr. Lara insane. Counsel, however, did not investigate or develop the issue at all.

All three of the mental health experts agreed that at the time of the offense Mr. Lara suffered from his mental illness (R. 971, 1185, 1416). He was experiencing an active psychotic episode during which the voice of "Bermudez" directed his actions, as it had done during bizarre episodes in the past. This psychotic episode was greatly enhanced by Mr. Lara's use of drugs prior to the offenses.

Indeed, given the use of intoxicants, quite a viable defense of voluntary intoxication was available in this case. See Gurganus v. State, 451 So.2d 817 (Fla. 1984). The trial court, however, made absolutely no findings on counsel's failure to pursue this issue. In this regard, it would not be inappropriate

for this Court to remand for proper initial findings on the issue by the Circuit Court. The intoxicants heightened the effects of the hallucinatory and delusional impairments from which Mr. Lara suffered. As all the experts noted, it was not a simple question of whether Mr. Lara knew right from wrong, he simply had no choice in his mind but to obey the voice (R. 987, 1186, 1416). As Dr. Cava explained, during these psychotic episodes "issues like understanding and moral consideration were not in his awareness" (R. 1416). The overwhelming and completely uncontradicted evidence presented at the evidentiary hearing, including the accounts from three qualified mental health experts, provided that Mr. Lara was not functioning normally at the time of the offense (R. 972-73, 1185-86, 1408).

As the Circuit Court found, favorable mental health evidence was available upon proper investigation and preparation by trial counsel. Here, Mr. Lara notes that such evidence--in terms of a voluntary intoxication defense or on questions of insanity--was not developed at all, to Mr. Lara's substantial prejudice at the guilt-innocence trial. Indeed, counsel instructed Mr. Lara and Dr. Cava (who was a confidential expert) not to discuss the offense. As a result of counsel's deficiencies, significant and compelling mental heath defenses were not presented. Confidence in the outcome of Mr. Lara's trial is undermined. He should be granted a new trial.

F. COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S UNREASONABLE AND UNCONSTITUTIONAL RESTRICTION ON CLOSING ARGUMENT

In this capital case, involving numerous counts, two weeks of trial, numerous lay and expert witnesses, numerous physical and

documentary exhibits, extensive cross-examination, one and one-half days of jury deliberations, and the possibility of the death penalty, the trial judge unreasonably limited defense counsel's closing argument to one hour. Defense counsel requested additional time, which the court denied, and defense counsel objected. The limitation clearly constrained the argument of defense counsel, who continually checked his remaining time with the clerk throughout the summation. Counsel was simply rendered ineffective. He could neither marshal favorable evidence, challenge the State's evidence and theory, demonstrate why favorable reasonable doubts existed, nor explain defense theories, under that truly unreasonable time constraint.

The sixth and fourteenth amendments to the United States Constitution guarantee a criminal defendant the assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). The essence of the guarantee of the assistance of counsel is the assurance that the defendant will have the opportunity to participate fully in the adversary factfinding process, of which closing argument is a "basic element." Herring v. New York, 422 U.S. 852, 857-58 (1975). The assistance of counsel who presents partisan argument for a criminal defendant is essential to the goal of the adversary process:

> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshall the evidence for each side before submission of the case to judgment.

Id. at 862.

Florida law recognizes the fundamental importance of argument and the defendant's absolute right to present argument. Foster v. State, 464 So.2d 1214, 1215 (Fla. 3d DCA 1985); May v. State, 103 So. 115, 116 (Fla. 1925). Limitation of the time for argument is discretionary with the trial court, but such limitations must be reasonable. Id. What constitutes reasonable time depends upon the facts and circumstances of each case. Id. Unreasonably limiting the time for argument is an abuse of discretion requiring reversal and a new trial under state law, id., but also constituting sixth amendment, and in a capital case eighth amendment, error under the federal constitution. Because they render counsel ineffective, such restrictions warrant post-conviction relief.

"Florida courts have not hesitated to reverse criminal convictions where the trial court has unreasonably limited the time for defense counsel's final argument to the jury." Foster, 464 So.2d at 1215. In determining the reasonableness of a time limitation on argument, the courts consider factors such as the severity of the charge against the defendant, the severity of the possible penalty, the length of the trial, the number of witnesses and exhibits, the presence and complexity of disputed issues, and defense counsel's need for time. See, e.g., Foster, supra; Joseph v. State, 479 So.2d 870 (Fla. 5th DCA 1985); Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985); Stanley v. State, 453 So.2d 530 (Fla. 5th DCA 1984); Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984). See also Peede v. State, 474 So.2d 808 (Fla. 1985).

Guiding the decisions in all of these cases is "the court's

concern that where human liberty is at stake, as in a criminal case, considerable leeway must be given to defense counsel in arguing his case to the jury." Foster, supra. Neither the strength of the State's case nor the simplicity of the facts determines the reasonableness of a time limitation, for it is up to the jury to determine the strength of the case and to resolve the facts. Foster, supra, citing Herring and Neal.

The facts of this case surely demonstrate that the trial court's limiting the defense closing argument to one hour was an abuse of discretion under Florida law, and constitutional error under the sixth, eighth, and fourteenth amendments, which rendered counsel ineffective in this capital case. Mr. Lara was charged with two counts of first degree murder and faced the possibility of two death sentences. Jury selection lasted days and the presentation of evidence took another week. The State presented numerous witnesses. The State also entered numerous exhibits of documentary and physical evidence.

Defense counsel checked the time with the clerk throughout the argument, demonstrating his concern over the time and the necessity to curtail his argument. Significantly, the jury required one and one-half days for its deliberations, clearly indicating that it found the case and the resolution of the issues complex and difficult. Ultimately, the jury found Mr. Lara guilty of second degree murder on one of the charges, indicating that the evidence adduced was in dispute.

Counsel testified at the evidentiary hearing that he was definitely constrained by the trial court's limitations on his

closing argument (R. 1757). He desired and needed more time. Had the trial court allowed additional time, he could have brought additional matters before the jury (Id.).

Forcing Mr. Lara's defense counsel to summarize a complex capital case in one hour was a violation of the sixth, eighth, and fourteenth amendments, and of Florida law, requiring the judgment to be reversed and a new trial ordered. The trial court, as with other issues discussed herein, did not render findings of fact adverse to Mr. Lara on this issue. Relief is appropriate, or, alternatively, this case should be remanded for findings of fact from the trial court.

G. MR. LARA WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE OF TRIAL COUNSEL'S INEFFECTIVE FAILURE TO LITIGATE THE "WILLIAMS RULE" ISSUE

In large part, the case against Mr. Lara was based on highly prejudicial and inadmissible "collateral acts" evidence. The State used this evidence at trial and sentencing to urge the jury to convict and sentence Mr. Lara to death because of alleged collateral bad acts and crimes.

Defense counsel wholly failed to file any pretrial motions, and failed to in any other way litigate the "Williams Rule" issue. The evidence was not admissible. It should have been challenged and excluded, but was not because of counsel's ineffective omissions. Mr. Lara was substantially prejudiced: he was convicted and sentenced to death on the basis of inadmissible collateral crimes evidence. It is wholly unconstitutional to try a defendant on the basis of propensity evidence. Counsel should have litigated the issue.

Florida evidence law is and was at the time of trial precise with regard to the admissibility of evidence of the accused's criminal "character" or commission of criminal acts other than those charged:

> **(1) Character Evidence Generally.** Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:
>
> (a) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.
>
> * * *
>
> **(2) Other Crimes, Wrongs, or Acts.**
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> (b) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.
>
> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Sec. 90.404, Florida Evidence Code.

This is a statement of the rule of Williams v. State, 110 So.2d 654 (Fla. 1959). Before evidence of a defendant's extraneous bad or criminal acts may be introduced, the following

must occur:

a. There must be a demonstrated connection between the defendant and the collateral occurrences; and

b. The probative value of the evidence must be weighed against its prejudicial effect. Section 90.403. If the evidence is deemed admissible after this analysis, the jury should be given a cautionary instruction at the time the evidence is introduced, and in final jury instructions, if requested.

This procedure was not followed in this case because of counsel's omissions. Severely prejudicial and nonprobative evidence was introduced in the State's case in-chief without objection, without defense counsel requesting cautionary instructions, and without any court weighing of the "probative vs. prejudicial" question.

This Court has consistently reaffirmed the strength and validity of the Williams rule. See, e.g., Keen v. State, 504 So.2d 396 (Fla. 1987).

Mario Lara's fifth, sixth, eighth, and fourteenth amendment rights to due process and a fair trial were violated because counsel should have reacted but unreasonably sat silent. It cannot be said beyond a reasonable doubt that the impermissible evidence did not taint the verdict and sentence. Counsel's failure to urge the issue was prejudicial.

H. FAILURE TO FULLY INVESTIGATE ALL POSSIBLE GROUNDS FOR MOTION TO SUPPRESS

The issues boiled down to whether the Defendant had invoked his right to counsel prior to making incriminating statements and whether the Chief of the Union City Police Department had ordered

that no reports be made of the statement Mr. Lara allegedly made. Evidence was adduced at the hearing on the motion to suppress that a woman, Victoria Mature, in whose apartment Mr. Lara was arrested, was a witness to the fact that Mr. Lara advised police officials that he had an attorney in Miami and did not wish to make any statements. It should also be noted that Victoria Mature was listed on the State's original discovery response.

Defense counsel failed to make any effort to locate this witness, Victoria Mature. Nor did defense counsel contact the Chief of Police to attempt to impeach the Officer's testimony.

The incriminating statement allegedly made by Mr. Lara was a critical piece of evidence linking him to the crimes. Counsel failed to adequately investigate. These omissions of trial counsel were not matters of trial tactics. Armstrong v. State, 429 So.2d 287 (Fla. 1983); Harrell v. State, 443 So.2d 1080 (Fla. 2d DCA 1984); Williams v. State, 418 So.2d 1218 (Fla. 1st DCA 1982). They deprived Mr. Lara of his fifth, sixth, eighth, and fourteenth amendment rights.

I. FAILURE TO ASK FOR A CURATIVE INSTRUCTION OR A MISTRIAL DURING IMPROPER CLOSING ARGUMENT

During his closing argument at the penalty phase, the prosecutor stated:

> The crime is an aggravated-type crime above and beyond your--I hate to say this, but its true, your normal run of the mill murder.

(T. 2111).

Defense counsel's objection to this comment was sustained, but was neither followed with a request for curative instructions nor a motion for mistrial. The prosecutor's comment pointedly

implied that based on his professional expertise and superior experience and knowledge, that the defendant's crime was one particularly deserving of capital punishment.

Comments of this type have been repeatedly held to be reversible error where it has been preserved for appeal by objection followed by a motion for mistrial. However, in this case, this Court in its decision on direct appeal, 464 So.2d 1173, stated that since defense counsel's objection was followed by neither a request for curative instructions, nor a motion for mistrial, reversal was not warranted. Lara v. State, 464 So.2d 1173, 1189 (Fla. 1985).

Defense counsel's failure to request curative instructions and failure to seek a mistrial deprived Mr. Lara of a fundamentally reliable and fair capital sentencing hearing; the omission was not a matter of trial strategy.

As a result of the prosecutor's improper arguments, Petitioner:

A. Was denied his fifth, sixth, eighth, and fourteenth amendment rights to a fair trial by an impartial jury and due process of law in the penalty phase. Presnell v. Georgia, 439 U.S. 14 (1978).

B. Was denied his eighth and fourteenth amendment rights to have a sentencing determination based on the "relevant facts of the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280 (1976).

C. Was denied his due process right to be tried and

sentenced by a jury not inflamed by improper prosecutorial statements, and not misled and misinformed at the penalty phase of a capital trial.

SUMMARY

In sum, Mr. Lara has presented a compelling case of ineffective assistance of counsel. Counsel's numerous errors, singularly and combined, warrant relief. Mr. Lara should be granted a new trial.

(IV)

THE JURY WAS MISLED AND MISINFORMED AS TO THE ALTERNATIVE TO A SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Lara's jury was misled and misinformed. The sentencing court properly instructed the jury that the maximum penalty for the capital offenses for which Mr. Lara stood trial was death or the minimum was life with a mandatory minimum sentence of twenty-five (25) years. The sentencing court, however, improperly and unconstitutionally never instructed the jury that the life sentences (and their corresponding twenty-five year mandatory minimum) could have been imposed consecutively. A reasonable juror, given such instructions, could not but have been left with the erroneous and misleading impression that, in a case involving two "homicides" it had two alternatives: death or life with a twenty-five year minimum. The jury found Mr. Lara guilty of one capital and one non-capital murder. Yet, it was improperly led to believe that only one sentence would cover these two crimes.

Such instructions undeniably render a jury prone towards death. Nothing was told to the jury with regard to the third

option (consecutive life sentences). As the United States Supreme Court has held, failing to provide a capital jury with the information necessary to properly and fairly render a verdict, "inevitably enhance[s] the risk" of an unwarranted sentence of death. Beck v. Alabama, 447 U.S. 633, 637 (1980). The "risk" of an unwarranted death sentence under such circumstances is as intolerable as the risk of an unwarranted conviction which the Supreme Court discussed in Beck. Id. at 633.

The erroneous failure to instruct undeniably placed "artificial alternatives" before the jury, California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury. Caldwell v. Mississippi, 472 U.S. 320 (1985). Doubtless, the flawed instructions provided the jurors with misinformation of constitutional magnitude, a risk which, in a capital case, is not tolerable. Counsel failed to object to the instructions, litigate these matters, or bring the issues to the Court's attention. No tactical decision can be ascribed to this failing. Counsel, ineffectively, failed in his duties.

Accordingly, because Mr. Lara's sixth, eighth, and fourteenth amendment rights have been violated, he is entitled to relief.

(V)

MR. LARA'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS AND THE SENTENCING COURT'S OWN CONSTRUCTION SHIFTED THE BURDEN TO MR. LARA TO PROVE THAT DEATH WAS INAPPROPRIATE.

During the penalty phase of Mr. Lara's capital trial, the jury was exposed to prosecutorial argument and judicial instructions which impressed upon them that death was the

appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances." This shifted the burden to the defendant at the penalty phase. This shifting of the burden absolutely conflicts with the principals of Mullaney v. Wilber, 421 U.S. 684 (1975), and State v. Dixon, 283 So.2d 1 (Fla. 1973). Under Dixon, the capital sentencing jury is required to consider what the State must prove--whether the aggravating circumstances outweigh the mitigating circumstances. That straightforward standard was not applied in Mr. Lara's case.

It is a violation of the eighth and fourteenth amendments to shift to the defendant the burden of proving that life is an appropriate sentence. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This burden-shifting resulted in fundamental unfairness to Mr. Lara.

The jury was effectively told that once aggravating circumstances were established, it need not fully consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. A jury's ability to fully assess the mitigating factors must not be constrained, Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Mr. Lara's jury was not able to fully assess these factors. Thus, his sentence violates the principles of Penry v. Lynaugh, 109 S.Ct. 2934 (1989), Lockett v. Ohio, 438 U.S. 586 (1978), Mills v. Maryland, 108 S.Ct. 1860 (1988), and Hitchcock.

The jury must evaluate the totality of the circumstances to determine whether death is the appropriate punishment. Mr. Lara's jurors were inhibited from doing this by the trial court's instructions. When the burden was shifted to Mr. Lara, the jury

was obstructed from fully considering the mitigation evidence. This error perverted jury deliberations. The jury must be allowed to consider free from error the crucial question of whether the capital defendant should live or die.

Under Smith v. Murray, 106 S.Ct. 2661, 2668 (1986), it is essential that no procedural bars are applied to such an issue. Defense counsel failed to raise this issue, and thus rendered ineffective assistance.

CONCLUSION

The Circuit Court's grant of relief is supported by a wealth of substantial, competent evidence and is based on proper legal standards. That ruling is entitled to this Court's deference and should not be disturbed. The Circuit Court erred as a matter of law in its disposition of other issues, and those aspects of its Order should be reversed. Alternatively, this case should be remanded to the Circuit Court for initial findings on issues concerning which the Court applied inappropriate standards of review. Mr. Lara has established his entitlement to the relief sought in this action. The Circuit Court's grant of a resentencing was eminently reasonable, while it is absolutely appropriate in this case that a new trial also be ordered.

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 first class, U.S. Mail, postage prepaid, to Ralph Barreira, Assistant Attorney General, Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 12 day of October, 1990.

Billy H. Nolas / by JR
Attorney