IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,888

THE STATE OF FLORIDA,

Appellant/Petitioner,

vs.

MARIO ALBO LARA,

Appellee/Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

REPLY/ANSWER BRIEF OF APPELLANT/CROSS-APPELLEE

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INTRODUCTION

Appellant/Cross-Appellee, **the State of Florida,** was the Respondent in the 3.850 proceeding below and Appellee/Cross-Appellant, **Mario Albo Lara**, was the petitioner. For simplicity, the parties will be referred to as the State and the defendant. The symbol "R" will refer to the 1883 page record in the instant 3.850 appeal, and "T.R." to the original trial transcript from the direct appeal, Fla.S.Ct. Case No. 62,691. All emphasis is as in original unless otherwise specified.

STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in its original brief.

STATEMENT OF THE FACTS

The State adopts the Statement of the facts contained in its original brief, which summarizes the testimony from the evidentiary hearing on the defendant's 3.850 motion. The State also offers the following summary of the facts of the double murder, reprinted verbatim from the defendant's brief on direct appeal, Fla.S.Ct. case no. 62, 691, at p.1-4, as well as a lengthy overview of trial counsel's performance pretrial and during the guilt phase.

On July 16, 1981, a Miami police officer was dispatched to an address in Miami where he met Francisco Rizo and, through Rizo, gained access to a dwelling in which Rizo had, earlier, discovered the dead body of his girl friend Grisel Fumero. (T. 523-541). Fumero had been shot 4 times and was lying in the kitchen of a downstairs apartment in the multi-family dwelling. During the course of the crime scene search, an upstairs tenant discovered and reported to police the presence of another body between the beds of an upstairs bedroom. This decedent, Olga Elviro, had been gagged, bound wrist-to-ankle and wrist-to-ankle, her pants and underpants had been cut or ripped open, and she had been stabbed three times. (T. 1280, 1282-3, 1289-90, 1307-9, 1331-2; 1398, 1407; R.185, 186, 197, 200).

The medical examiner testified that Elviro had died from a stab wound in the chest, and that Fumero had died from multiple gunshot wounds. (T. 1400, 1418). A medical technician testified that he found evidence of seminal fluid and sperm from swabs taken from Elviro's vaginal canal. (T. 182-8). A handgun found on the premises was determined to be the weapon that fired at least one of the bullets into Fumero. A serrated edge knife was tentatively established as the weapon that may have made the wound in Elviro's neck. (T. 1510-15; 1458-62; 1398-1400). However, no fingerprints, or blood, hair, saliva, or bodily secretion specimens taken from the defendant and the victims tied the defendant to the rape or to either of the homicides.

The state's evidence established that, at the time of the homicides, the defendant was awaiting trial on charges of voluntary and involuntary sexual battery against a 13 year old girl who was allegedly Fumero's sister. A charge of robbery was also pending against the defendant. It was unclear from the proofs whether the rape victim was also the victim of the robbery. Francisco Rizo was a fugitive at the time of the homicide trial. He may have, at one

time, been working for the police. Rizo who apparently had fled shortly after the homicides, had information concerning the rape case, and although this too is unclear, may have been charged, with the defendant, for the rape, or the robbery, or for both offenses. (T. 1534-5, 1541-2, 1546-51).

The decedent Fumero had given a deposition in the rape case and was apparently to be a witness in that case against the defendant. The record does not reveal whether Fumero was a crucial witness, whether or how she had implicated the defendant, or the nature of what she could relate or prove. (T. 1535-41). It was the state's theory of the case that the defendant had killed Fumero to silence her as a witness.

The state's key, and only eyewitness to either of the homicides, Tomas Barcelo, testified that prior to July 16, 1981, the defendant and Rizo had embarked upon a scheme to convince Fumero that Rizo loved her and wished to marry her, and that she would stay with Rizo in the defendant's home. It was apparently believed by Rizo and the defendant that if this occurred, Fumero could be convinced not to testify in the rape case against the defendant. Approximately 4 days prior to the homicides Fumero, in fact, came to stay in the defendant's house where she was visited by Rizo. (T. 1557-60, 1680-85, 1693).

At or about this time, in a way that is not clear from the record, the defendant's girl friend, Elviro, learned from somebody, possibly Elviro's sister-in-law, Martinez, who was a witness for the state, of the rape charges against the defendant and expressed her intention of leaving him. This enraged the defendant who on July 16, 1981, displayed some guns and threatened to kill both his girl friend and Martinez. (T. 1566-68, 1570-73). Martinez, who had a weak heart fainted as a result of the defendant's threats, and was taken to the hospital by the defendant and Elviro. The defendant and Elviro subsequently left the hospital

and returned to the defendant's house. (T. 1573-77).

When the defendant and Elviro arrived at the defendant's house, the defendant aroused a sleeping Tomas Barcelo, and told him that he wished to use the bedroom. Barcelo went outside in the yard and within a half-hour observed the defendant exit the door from the upstairs apartment and knock loudly on the door of the downstairs apartment. (T. 1701-5).

Barcelo stated that the defendant was admitted to the downstairs apartment by Fumero. Angry or loud words were apparently exchanged between the defendant and, possibly, Fumero, as the defendant strode through the kitchen to his brother's bedroom. The defendant then returned to the kitchen where Fumero, Barcelo, and the defendant's brother, Arsenio Lara, were standing. The defendant stood staring at Fumero with his hands behind his back and his leg twitching. Saying, "It's your fault that I have lost everything", or "Because of you I've lost everything", the defendant quickly pulled his brother's gun from behind his back and fired five times at Fumero, calling her a "son of a bitch." (T. 1705-15). The defendant continued to pull the trigger after the gun was empty. Arsenio started screaming and crying. He asked his brother if he was crazy and told his brother that he was, in fact, "crazy". Barcelo also believed that the defendant had "gone crazy". Both Arsenio and Barcelo told the defendant that he was a murderer. The defendant laughing, retorted, "So I am a murderer, am I" and threatened to kill Arsenio. When the defendant started reloading his gun, Arsenio told Barcelo to run - that his brother would kill him too since Barcelo had also called the defendant a murderer. (T. 1713-17, 1761).

The parties quickly dispersed. Barcelo ran out and, eluding the defendant who he believed was looking for him, made his way to New York where he was located by the the State Attorney's Office in June, 1982. Arsenio, who was

found with a blood spattered watch in his possession, was originally charged with murder, but was given immunity and the charges against him were dismissed. (T. 1775-8). He was rearrested as a material witness to the homicides but refused to give any testimony incriminating his brother, and was jailed for contempt. Either Rizo or Arsenio called the police and Rizo, who became a fugitive himself, returned to the premises to meet the Miami police officer who was dispatched to the scene. (T.1608-9). The defendant made his way to Union City, New Jersey, where he was arrested by the Union City police department on July 21, 1981. (T. 1717-18, 1720-21, 1665-67).

The defendant waived extradition from New Jersey and was returned to Florida on July 23, 1981. In a three count indictment filed on November 18, 1981, the defendant was charged with the premeditated killing of Grisel Fumero with a pistol, contrary to §§782.04 and 775.087 Fla. Stat., the premeditated killing of Olga Elviro with a knife, contrary to §§782.04 and 775.087 Fla.Stat., and the involuntary sexual battery of Elviro using a deadly weapon, contrary to §794.011(3) Fla.Stat. (R.1).

Through witness cross-examination, and argument to the jury, the defendant presented the defense at trial that Rizo, his brother, Arsenio, and possibly others were the actual murderers. He relied heavily on Rizo's fugitive status, the fact that his brother's gun was the murder weapon and the brother was found with a blood stained watch, and investigatory lapses or omissions by the state. The defendant did not take the stand.

On July 15, 1982, the defendant was convicted of first degree murder in the death of Fumero, but was convicted of second degree murder in the death of Elviro. The defendant was convicted as charged for the sexual battery of Elviro. (R. 253-57). The jury returned an advisory recommendation of death with which the court concurred. On July 22,

1982, the defendant was sentenced to death for the murder of Fumero, and 99 years on each of the other two convictions. (R. 256-61). The defendant's motion for a new trial was denied and this appeal and the State's cross-appeal, followed. (R. 356, 362).

DEFENSE COUNSEL'S GUILT PHASE PERFORMANCE

In his brief the defendant makes much of the fact that defense counsel, Stuart Adelstein, testified at the hearing that he was "scared, upset, very worried, confused" during the trial (R.1699), which Adelstein stated was due to the devastating blow the defense was dealt on the "eve" of the trial, when the State located eyewitness Tomas Barcelo. Prior to Barcelo's arrival (who like eyewitness Francisco Rizo had left Florida after the murder), the only other available eyewitness was the defendant's brother Arsenio (who had originally been charged with the murders), whom Adelstein was certain would refuse to testify. According to Adelstein, the State had a weak, circumstantial case without Tomas Barcelo. When Barcelo was apprehended in New York on a material witness warrant and then transported to Miami *three weeks* prior to trial, Adelstein experienced a "mass panic" (R.1684). Barcelo devastated their "I didn't do it" defense, which Adelstein and the defendant had chosen, and which was supported by the defendant's uniform denials of involvement to Adelstein. (R.1682-88).

The defendant's brief seeks to portray Adelstein's performance, "post Barcelo," as though Adelstein had deteriorated into a bowl of jello, or commenced to dart aimlessly about the courtroom yelling "the sky is falling." The defendant claims he was left with virtually no counsel whatever during the guilt phase. The following facts demonstrate otherwise.

The instant case was set for trial the week of March 22nd, 1982. On that date a lengthy evidentiary hearing was held on the defendant's motion for discharge (T.R. 368-518), after which the trial court denied the motion. (T.R. 518, 519). The trial court then inquired if the parties were ready for trial, and Adelstein asked for a continuance charged to the State, due to late receipt of discovery regarding fingerprints, serology results, and other matters. (T.R. 520-524). The trial court responded it was not going to grant a continuance, to which Adelstein replied that he was not ready, and that it would be impossible to proceed to trial at this time (T.R. 5525), as he had not yet taken numerous key depositions (T.R. 527). Adelstein noted that the State had been granted a continuance of the original January 21st trial date. (T.R. 529). Adelstein then stated he couldn't complete the depositions because of his full-time work on preparing for the motion to discharge. (T.R. 530). The prosecutor stated he had no objection to a defense continuance and the court, noting the defense was not ready, granted a defense continuance. (T.R. 532).

The trial court and the parties then conducted a lengthy discussion on a new trial date. The trial court suggested May 10th, but Adelstein stated that this would force him to try this case immediately after another trial, which would not be fair to his client. (T.R. 537). Adelstein suggested a June date, and the trial court responded "This case is getting too old". (T.R. 538). The court then decided on May 24th, 1982.

Apparently May 24th did not work out because the next transcript is of the Thursday, July 1st, 1982, pre-trial status conference, with trial set for the following Tuesday, July 6th. At the status conference Adelstein argued numerous nonevidentiary motions, and the court ruled thereon, with the Court deferring ruling on the motion to sequester the jurors. (T.R. 553, 547-564). At the conclusion of the conference Adelstein stated he felt it was his duty to inquire if the prosecutor or trial court would extend a plea offer, which both declined to do. (T.R. 564, 65).

The status conference reconvened the following day, Friday, July 2nd. Tomas Barcelo was the main topic of discussion. The prosecutor states that Barcelo will arrive with the Detectives from New York, at 4:00 p.m. that day, and will be available for deposition at that time. (T.R. 569). Adelstein then states that the prosecutor first informed him of the apprehension of Barcelo during father's day weekend (3rd Sunday in June). Adelstein notes that Barcelo is allegedly an

eyewitness, and orally requests a continuance, to which the trial court is not at all receptive, though it stresses that Barcelo will be deposed prior to jury selection. (T.R. 569, 570). At this juncture Adelstein implores the court for time to digest and act upon the testimony of Barcelo. (T.R. 570-574):

> I will be allowed time to have him deposed and be able to digest it prior to Jury selection?
>
> **THE COURT:** Tell me how that would affect your rights in Jury selection.
>
> **MR. ADELSTEIN:** It will preclude me from doing the investigation of the work that I may need to do while I am spending the time in the courtroom as opposed to doing some leg work on whoever this particular witness is as to the background and strategy.
>
> **THE COURT:** If you feel that you need some time to do further investigation -- do you mean before or after you take his deposition?
>
> **MR. ADELSTEIN:** Obviously, I have been provided his name so it has nothing to do with his date of birth or where he lives. I understand the reasons for some of that. However, I would be attempting to get some background information because I intend to run a thorough background check and do some leg work on it.
>
> **THE COURT:** I will not postpone Jury selection, but I will give you an opportunity to depose him before opening statements.
>
> **MR. ADELSTEIN:** Because of the lateness and because of the fact that he has been sought out as an eyewitness to at least one of the homicides I will be asking for a continuance.
>
> **THE COURT:** I will deny it.

MR. KAHN: If I could respond before Your Honor rules.

I don't think Counsel could advise this Court in good faith they did not know of the existence of the witness. The surprise of the Defense is that we found this particular witness. I don't feel there is any prejudice to the Defendant.

THE COURT: Will you expand on that? I don't know what kind of pre-trial discovery has been conducted.

MR. KAHN: I believe Counsel was aware of the existence of this witness from the beginning of the case.

The State did not know of his existence although Counsel did. The surprise or the lateness of the discovery was because the Defense never thought we would find this person.

We did find him and provided discovery, provided this name to him at least two weeks ago, even before I had him physically in town for the purpose of the Defendant to depose him.

THE COURT: What basis do you have to know that the Defense knew of this person?

MR. KAHN: His partner gave me his name when I advised him --

MR. ADELSTEIN: I don't know if that sequence went down exactly the way it did.

MR. KAHN: The Court can inquire when he knew this person.

MR. ADELSTEIN: I cannot divulge the confidence of my client. I have no obligation to notify the State, but obviously because of this new late development which according to my recollection; I could be a day off, the name of the witness came into my office on July [sic] 7th. And a statement came to my office last week.

THE COURT: I am going to deny the request for continuance but I will allow you an opportunity to depose him.

The other possibility is he may not arrive at all.

MR. ADELSTEIN: The only thing is not only is the Court requiring me to take this witness, but because the Chief of Police, who I believe is an essential witness for the State on my motion to suppress any statements, will preclude me from taking this deposition not provided by him. He was never listed at that time when I was in New York. Because of the situation of no plea offer from the Court or the State, I don't believe I am given a fair opportunity to, at this late point, I have to step back and re-evaluate my entire case as Mr. Kahn knows.

I have to re-evaluate my entire defense based on the late development and new development not only the Chief of Police who is essential on the motion to suppress any statements, but Mr. Tomas Barcelo.

THE COURT: I am denying any request for continuance.

Prior to the convening of court on July 6th, 1982, Adelstein had filed a written motion for continuance. (T.R. 171-172a). The motion relates the State's recent discovery of Tomas Barcelo, that Barcelo could not be deposed until July 3rd, and that according to his deposition he is an eyewitness. Adelstein closes by stating he has not had any opportunity to investigate either Barcelo or the information he provided at deposition, and that the defendant therefore needed a continuance.

At the outset of the proceedings on July 6th, Adelstein raised his motion for continuance:

> Judge, Stuart Adelstein, appearing on behalf of Mario Lara.
>
> The first motion we address is my motion for continuance, which I have just filed with the Court, and basically it sets forth that after numerous attempts of attempting to take Tomas Barcelo's deposition on both Thursday and Friday, and on other occasions, although Mr. Kahn advised me he was not going to be available, that we had to take his deposition on Saturday morning and I have yet to receive that deposition, nor have I had an opportunity to investigate anything about Mr. Barcelo or any of the items which he has said, and --
>
> **THE COURT:** Did you order an expedited transcript?
>
> **MR. KAHN:** She indicated, Judge, it would be done at the latest Wednesday morning.
>
> I'll not call that witness prior to that time, and I'll make sure that the defense attorney has had ample time to review the deposition prior to his testifying.
>
> **MR. ADELSTEIN:** Reviewing the deposition and having ample time to sit down and digest that deposition, and to go out and investigate, based upon the posture of this particular case in that Mr. Lara was arraigned back in November and the original discovery was, I think, December 4th of 1981, and then to come back approximately three weeks -- two weeks to three weeks before trial and produce an eye witness, and then to set a guideline as to exactly when this witness--
>
> **THE COURT:** Mr. Adelstein, did you personally take the deposition of the witness?
>
> **MR. ADELSTEIN:** Saturday morning.

THE COURT: I'm going to deny your motion for continuance on this basis.

(T.R. 589, 590).

The defendant's motions to suppress were then addressed. The defendant's motion to suppress tape recorded statements of the defendant conversing with an informant was held moot, as the State announced it would not seek to introduce the tapes. (T.R. 592). The court then conducted a lengthy evidentiary hearing on the defendant's motions to suppress statements made following the defendant's arrest in New Jersey, and to suppress physical evidence seized from the defendant's apartment. (T.R. 151-168a, 573-712). Both motions were denied. Adelstein then addressed his motion to receive daily transcripts of the trial, and the court ruled it was his responsibility to obtain them. (T.R. 712, 713).

The State respectfully asserts that during the suppression hearings, as well as the hearing on the motion for discharge, Adelstein's performance was organized and vigorous throughout.

Adelstein testified at the 3.850 evidentiary hearing that the arrival of Barcelo caused him to concentrate exclusively on the guilt phase. (R.1686). At this point he briefly considered an insanity defense, but rejected the idea. (R.1688). Rita Suarez, the court interpreter for the defendant both prior to and during trial, testified that prior to trial Adelstein and the

defendant discussed the insanity defense, but that they decided to use another defense. (R.1650). She also confirmed that the defendant denied committing the murders to Adelstein (Id), as he had denied them to Dr. Cava prior to trial. (R.1428). Finally, Adelstein, whose practice entailed solely criminal law. (R.1678), worked exclusively on the defendant's case for four-six weeks prior to trial. (R.1762).

Adelstein's performance during jury selection will be reviewed in conjunction with defendant's claim that Adelstein was ineffective during that phase.

Adelstein outlined his defensive strategy during opening statement; that when the bodies were discovered, the police treated the crime as a "who done it," that they had no idea who or how many persons were involved. All the evidence pointed to the defendant's brother, Arsenio, including his possession of a watch stained with one victim's blood. Based on all the evidence they had uncovered, the police arrested Arsenio for the murders. That the police also suspected Francisco Rizo, the boyfriend of victim Grisel Fumero, and that Rizo fled after the murders, and is still a fugitive with warrants out for his arrest. That the supposedly innocent eyewitness Tomas Barcelo, also initially a suspect, fled to New York where he remained in hiding for a year, and from where he was in contact with key State witness Margarita Martinez. That next door neighbor Consuelo Paine told police she did not see the defendant nor his car that evening, and that she

had seen Arsenio carrying a big black gun, which fit the description of the murder weapon. That there was another man living upstairs who the police never even questioned or investigated. That there is no physical evidence linking the defendant to the murders, and that the shoes the defendant was seen wearing that night had no blood on them. What physical evidence there is points to the other above named suspects. And finally, that key witness Margarita Martinez has lied under oath, changed her story several times, and cannot be believed. The defendant's chair should be occupied by some or all of the above suspects, but not by the defendant, who is innocent. (T.R. 1239-1245).

During trial defense counsel conducted vigorous cross-examination of State witnesses, including the two key State witnesses, Margarita Martinez and Tomas Barcelo. Turning first to Martinez, defense counsel successfully objected on direct to damaging testimony about the defendant's pending rape case, and discussions between victims Olga Elvera and Grisel Fumero. (T.R. 1557-1563). In cross-examination, Adelstein first established that Martinez was longtime friends with both Francisco Rizo and Tomas Barcelo. (T.R. 1596). He then questioned Martinez about her sworn statement to the police eight days after the murder. Martinez did *not* tell the police the defendant had threatened her and Olga with a gun only hours before the murders. She said she didn't tell the police because she was nervous and scared. (T.R. 1601, 02). At the conclusion of the statement she deliberately

lied when she said she didn't know anything else about the murders. (T.1604).

Adelstein then asked Martinez about a telephone conversation she had with the defendant shortly after his arrest. The defendant had said he left Olga with Tomas Barcelo that night, and that the person who Martinez should ask about the murders is Francisco Rizo. (T.R. 1605). Martinez had pointed out to the police the shoes the defendant was wearing the night of the murders, which the police then confiscated. (T.R. 1606, 02). Adelstein later introduced the bloodless shoes. (T.R. 1846, 47). Martinez admitted to speaking with Tomas Barcelo by telephone several times since the murders, though she denied talking about the murders with him. (T.R. 1607).

Martinez was with Francisco Rizo when they discovered the bodies. Rizo held Grisel's body and said "*They* have killed what I love the most." (T.R. 1611).

After the direct examination of Tomas Barcelo was completed, Adelstein asked the court for a recess while the second deposition of Barcelo, which he had taken only hours before, was being transcribed (T.T. 1723), which request was denied. (T.R. 1726).

On cross-examination, Barcelo admitted he had known Margarita Martinez and Francisco Rizo their whole lives. (T.R.

1727). He also knew and was friends in Cuba with Arsenio Lara, but was not friends with Mario Lara (T.R. 1728, 29). Barcelo was in prison in Cuba and was released to leave in the mariel boatlift. (T.R. 1730). He was very fond of Grisel Fumero. Barcelo did not tell the police about the crime for over a year after it occurred, when the police summoned him from New York. He did not come forward until after he found out the police were after him. (T.R. 1744). After the murder, instead of going to the police, he went to Silvio Lugo, the defendant's cousin, to seek protection from Mario. (T.R. 1745, 46). The day after the murder he met with Margarita Martinez, and they discussed the murders (T.R. 1747) (which conflicts with Martinez' testimony that they did not discuss the murders, see above). They discussed how they needed to hide from Mario, because they were the only witnesses. Barcelo did not go to the police because the police already knew the defendant committed the murders. (T.R. 1747). Arsenio smokes Vantage cigarettes, a bloody package of which was depicted in a crime scene photo from the upstairs murder scene. (T.R. 1752). Three or four days after the murder he met Francisco Rizo in a bar, and shortly thereafter Barcelo decided to move to New York. He does not know where his friend Rizo decided to move to. (T.R. 1753).

ADELSTEIN'S CLOSING ARGUMENT

Adelstein closing argument was a logical extension of his opening statement and cross-examinations.

Adelstein began the initial segment of his closing by emphasizing the reasonable doubt standard. (T.R. 1924). He then examined, in chronological fashion, the testimony of each State witness to assess whether it implicated the defendant. Officer Diazolait, the first officer at the scene, and Officer Roman, who took photos and made sketches, provide no links to the defendant. Technician Badali recovered 26 latent prints of value, including four from the murder weapon (handgun) and two from a note allegedly written to the defendant by Olga Elviro. None of the prints matched the defendant. (T.R. 1026, 27). Dr. Ludwig did the autopsies, and he found a bite mark on Olga. Dr. Ludwig testified that bitemarks can be matched like fingerprints. Adelstein then had the defendant display his full set of teeth, and asked the jury, in essence "Where is the State's bite mark comparison?" (T.R. 1928). Tech. Zahn, the firearms examiner, testified he found a spent projectile at the scene which was not fired by the gun which killed Grisel Fumero, as well as a spent casing which likewise was from a different gun. This supports the defendant's assertion that a group of individuals, specifically Arsenio, Rizo, and Barcelo, committed the murders. (T.R.1929, 30).

Adelstein then asked the jurors to put the next two witnesses aside for a moment, Martinez and Barcelo, while he wrapped up the police investigation. When Detective Albuerne ordered Arsenio Lara to empty his pockets after the murders,

Arsenio was carrying a watch stained with the blood of Olga Elviro. (T.T. 1930). That blood was there because Arsenio killed Olga. At this point Adelstein reiterated the importance of reasonable doubt. (T.R. 1931).

Adelstein next addressed the testimony of Union City police officer Garcia. When the defendant was arrested in Union City, New Jersey, five days after the murders, Garcia asked the defendant what he did with the gun. The defendant had replied "I left it on the table," or words to that effect. Adelstein emphasized the fact that Officer Garcia had not written a police report, and had lost her notes of her discussions with the defendant. Adelstein wisely did not attempt to discredit her motives, stating she clearly was testifying in good faith, however she could not possibly remember exactly what the defendant said a year later. The defendant obviously told Garcia that "he", meaning the killer, had left the gun on the table, or something similar. (T.R. 1931). Garcia's memory is obviously less than perfect, as she recalls the defendant saying he returned to the apartment after the murders, which is contrary to the undisputed evidence that he left immediately, without returning. (T.R. 1931, 32).

Adelstein next examined serologist Rhodes' testimony. Rhodes took foreign hair specimens off the body of Olga. Where is the evidence of a match to the defendant? No evidence, because there was no match. Rhodes seized the shoes the

defendant was wearing that night. Those shoes had no blood on them. (T.R. 1932, 33). Again no physical evidence tying the defendant to the crime.

Adelstein then turned to Tomas Barcelo and Margarita Martinez, who are the State's whole case. Although Olga was Martinez' best friend, "like a sister", she did not contact the police for over a week after the murders. She then gave a sworn statement, which she tells us at trial was a lie, even though made under oath. Adelstein then refers to the jury instruction stating that one of the factors in weighing a witness' testimony is whether the witness has given prior inconsistant statements. Martinez denied discussing the murders with Tomas Barcelo, or even seeing Barcelo since coming to America (Barcelo admitted their meeting and discussions after the murders). What is she trying to hide? (T.R. 1934, 35).

Which brings us to Tomas Barcelo, the "good samaritan", who doesn't tell the police what happened until they find him and haul him down from New York a year after the murders. The State's entire case rests on Tomas Barcelo, who is fingering the defendant in order to keep himself out of his rightful place in the defendant's chair. (T.R. 1935, 36).

The prosecutor then conducted his closing argument, during which he had to concede the centrel premise of Adelstein's argument: If you don't believe Tomas Barcelo, walk the defendant out the door. (T.T. 1955).

In the rebuttal portion of his closing, Adelstein stressed to the jurors that the court would instruct them that reasonable doubt can stem not only from the evidence presented, but from a lack thereof. There is *no* physical evidence, no fingerprints, no bite marks, no blood, nothing to corroborate the accusations of Tomas Barcelo. (T.R. 1977, 78). The State harps on the flight of the defendant, but what about the flight of Rizo and Barcelo? (T.R.1981).

Tomas Barcelo came forward finally, a year late, and accused the defendant to cover his own guilty tracks. (T.R. 1982). The prosecutor was forced to admit that its whole case was Barcelo, and the prosecutor was also correct in stating that Adelstein had failed to dent Barcelo's story. Barcelo sure was a tough nut to crack, because he had a whole year to get his story down pat. (T.R. 1983, 84).

Adelstein stressed again that there was no physical evidence suggesting the defendant committed the murders, and what physical evidence there was pointed to Arsenio. Adelstein told the jurors to give special attention to the instruction on reasonable doubt, and that the State carried the entire burden of proof. Adelstein concluded by imploring the jurors not to convict the defendant on the basis of a single witness' testimony, Tomas Barcelo. (T.R. 1986, 87).

The jury retired at 5:15 p.m., July 14th, 1982. They sent a note requesting the exact date that Margarita Martinez gave her initial statement to the police (a statement she admitted at trial was a lie, see above). (T.R. 2026-2029). The jurors stopped deliberating at 7:00 p.m. Adelstein reminded the Court to give the "don't read about case, etc." instruction, and the court, as it did repeatedly throughout jury selection and the trial, instructed the jurors it was "very important" they not read or listen to accounts of the case or discuss the case with anyone. (T.R. 2035-2037).

The jurors reconvened deliberating at 9:40 a.m. the following day, and at 5:00 p.m. they announced their verdict. (T.R. 2043). There was no break in deliberations during lunch, at least not as indicated by the record. In total, the jurors deliberated some nine hours on the three count Indictment. They found the defendant guilty of the first degree murder of Grisel Fumero, but only second-degree murder as to Olga Elviro, despite finding the defendant guilty of sexual battery upon her. (T.R. 2044). Given the prosecutor's arguments and the court's instructions on felony murder, the jury's note and the length of deliberations, it seems extremely reasonable to conclude that Adelstein succeeded in raising some doubt in the minds of one or more jurors, and that the second degree verdict was a compromise.

A final note on Adelstein's performance relates to the testimony of Dennis Seigel, the prosecutor in the defendant's

sexual battery case, in which Grisel Fumero was a witness. His testimony of the existence of the charge, and that it was set for trial the week of the murders, was admitted as Williams Rule Evidence to show motive. In his brief the defendant claims Adelstein did not request the standard limiting instruction relative to Williams Rule Evidence. Adelstein did in fact insist on this limiting instruction (T.R. 1529, 30), and it was given at the outset of Siegel's testimony (T.R. 1534), as well as in the final instructions. (T.R. 2013). It is also noteworthy that during Siegel's testimony, Adelstein successfully objected to questions concerning the content of Grisel Fumero's testimony in the rape case, and its importance to the prosecution of that case. (T.R. 1536, 37).

The above factual recitation of Adelstein's performance during the pretrial and guilt phase portions of the proceeding, is intended to guide this Honorable Court in assessing the defendant's claim, made repeatedly throughout his brief, that he had in effect no counsel at all "post-Barcelo", having been encumbered and cursed with the star player in the Eleventh Judicial Circuit's 1982 production of *ZOMBIES MEET THE SIXTH AMENDMENT*.

ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO REASONABLE PROBABILITY THAT THE DEFENDANT WAS INCOMPETENT TO STAND TRIAL.

III.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE DURING THE GUILT PHASE.

IV.

WHETHER THE JURY WAS "MISLED AND MISINFORMED" AS TO THE ALTERNATIVE TO A SENTENCE OF DEATH, AND WHETHER THIS CLAIM IS PROCEDURALLY BARRED.

V.

WHETHER THE PENALTY PHASE INSTRUCTIONS OR THE TRIAL COURT'S ORDER IMPERMISSIBLY SHIFTED THE BURDEN AT RESENTENCING, AND WHETHER THIS CLAIM IS PROCEDURALLY BARRED.

SUMMARY OF ARGUMENT

As to the State's appeal of the trial court's grant of a new sentencing based on ineffective assistance of counsel at the penalty phase, the State will essentially rely on its initial brief. Contrary to the defendant's assertion, the trial court did not make express findings of availability, obviously because that would have required it to find that Adelstein lied concerning several key areas, which would be inconsistent with its express reliance on other portions of his testimony. The trial court rightfully found the jury should have heard this important mitigating evidence. However the court's refusal to make express credibility determinations on availability (i.e., Adelstein's "the relatives refused to help," vs. the relatives "Adelstein didn't want our help") combined with its reliance on Adelstein's credibility in other areas, demonstrates that the court simply bypassed the crucial question of why Adelstein did not present this evidence, and rather focused on the bottom line: This is the type of evidence the sentencing jury should have heard. Had the relatives been as helpful and supportive in 1982, shortly after the defendant murdered two young woman, as they were in 1988, when he faced execution, two jurors may well have voted the other way. Adelstein wanted their help in 1982 and he didn't get it. If this Court holds, as the defendant argues, that the trial court's order carries an implicit finding that Adelstein was lying in this regard, further analysis is unnecessary.

The defendant's claim that he was incompetent to stand trial is without merit. Dr. Cava, who examined the defendant prior to trial, found that the defendant was competent at that time. All three experts agreed the defendant was of average intelligence (Dr. Carbonell found a full scale I.Q. of 110), and that his mental illness, i.e., schizophrenia, was transitory in nature. There is no viable evidence of the defendant's incompetence, but rather a wealth of data indicating he was competent, including the defendant's testimony at three evidentiary hearings the week before trial. The testimony of Adelstein and court interpreter Rita Suarez demonstrate the defendant was in full control of his facilities, participated in jury selection and other strategy decisions, and conferred regularly with Adelstein prior to and during trial. Dr. Miranda, the only expert who opined that the defendant was incompetent, based his decision in large part on the defendant's alleged "tuning out" of the proceeding after hearing the adverse testimony of "liars," which caused the defendant to believe he was being "railroaded" as he was in Cuba. The overwhelming weight of evidence shows the defendant had the capacity and ability to consult with counsel and aid in his defense, and hence the instant claim should be rejected.

Adelstein was not ineffective in failing to request sequestration during deliberations. Such was not the regular practice nor even a rare practice at the time, and additionally

the defendant has shown no prejudice whatever. Counsel was not ineffective for failing to move for a change of venue, and indeed only ten of fifty-five jurors had ever heard of the instant case. Adelstein was not ineffective during voir dire nor at argument on his motions for continuance. He also was not ineffective for failing to employ an insanity defense, and additionally the expert testimony on which the defendant relies does not make out a valid insanity defense to the murder of Grisel Fumero, and provides no defense whatever to the murder and rape of Olga Elviro.

The trial court's limitation of closing argument to one hour could and should have been raised on direct appeal. As for counsel's failure to challenge the Williams Rule evidence of the pending rape charge, this evidence was clearly admissable as to motive, and defense counsel should be lauded for not wasting time litigating the issue. Adelstein was not ineffective in litigating the motion to suppress statements, nor in failing to request a mistrial or curative instruction after his objection to a prosecutorial comment was sustained.

Finally, the issue of the trial court's "failure" to instruct that the sentences for the two murders could be consecutive, could and should have been raised on direct appeal, and is frivolous, and the same is true of the defendant's burden-shifting claim at sentencing.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE.

The State will rely on its argument in its initial brief, i.e., that Adelstein's performance at the penalty phase was not deficient because his hands were tied by the refusal of all but one relative, Carmelina Lara, to provide him with the defendant's background information prior to trial or to testify at the penalty phase concerning his background. See Cave v. State, 529 So.2d 293 (Fla. 1988). The testimony of Adelstein, the credibility of which was expressly relied upon by the trial court in its order (R.832), was that he very much wanted Rene Lara (who by far gave the most detailed and poignant testimony about the defendant's abused upbringing and mental problems in Cuba), Carmen Bal Albo, and the other family members to testify, and they all refused (Rene Lara because he had a pending criminal charge), with the exception of Carmelina Lara, who testified, and Dr. Amigo, who the defendant did not want to testify. (R.1794-1796). Adelstein specifically asked Carmen to testify, and explained the concept of mitigating evidence and the importance of testimony concerning the defendant's background. (R.1800-1809).

Rene Lara agreed that he was present at the meeting held at Adelstein's office after the defendant was convicted,[1] but says that although he described the same abusive childhood and mental problems to Adelstein that evening, *Adelstein never asked him to testify*. (R.1572-75). Carmen Bal Albo testified that not only was she present at the meeting, but that she specifically told Adelstein she wanted to testify, but was never asked to do so (R.1502, 03), even though she, like Rene Lara, told Adelstein all the details of his background to which she testified at the hearing.

In short, there was a crucial and irreconcilable conflict in the testimony between Adelstein and the relatives. Contrary to the defendant's claim in his brief, the trial court made no express factual findings regarding this conflict. It is also abundantly clear, from the trial court's reliance on other portions of Adelstein's testimony, that the trial court did not make any implied resolution of this critical testimonial conflict in favor of the relatives. What the trial court did is ignore and or bypass the critical issue of the witnesses' willingness to testify, and did so because it was extremely impressed with the

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[1] After the guilty verdicts were returned, the trial court stated that the sentencing phase would commence the next afternoon. The court asked Adelstein what witnesses he intended to call, and Adelstein stated he planned to meet with potential witnesses at his office that evening, and that he would then consult with the defendant and decide which witnesses to call. (T.R. 2047-50).

substance of the witnesses' testimony concerning the defendant's abusive background and mental problems in Cuba.

The trial court believed, and the State agrees, that this is precisely the type of evidence which a jury should hear, and that it was totally unfair that the jury did not hear it, especially the testimony of Rene Lara, during which the interpreter was so affected by the descriptions of abuse that she was unable to continue. The State respectfully asserts, however, that such unfairness was not the fault of Stuart Adelstein. The trial court ignored the factual conflict because it could not, in good conscious, find that Adelstein lied. Why would Adelstein call a meeting to obtain background witnesses, listen to horrid tales of abuse, then not even ask those with the most compelling story to testify? The trial court allowed the potential impact of the background information to cloud the initial issue of its availability, and therein the court erred.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO REASONABLE PROBABILITY THAT THE DEFENDANT WAS INCOMPETENT TO STAND TRIAL.

The issue of the defendant's competence was not raised at trial by Adelstein, or on direct appeal. Thus the defendant's argument is that Adelstein, and the expert he retained to examine the defendant prior to trial, provided ineffective assistance in not raising the issue of incompetency at the time of trial. Had the issue been properly raised, the defendant argues, there exists a reasonable probability the defendant would have been found incompetent. The defendant relies on Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989), which holds that under a Sixth Amendment ineffectiveness analysis, a habeas petitioner will prevail if he demonstrates a reasonable probability that, had counsel raised the issue of incompetency at trial, he would have been found incompetent. The Futch reasonable probability test, a product of Strickland v. Washington, 466 U.S. 668 (1984), seems to parallel the preponderance of the evidence standard for incompetency stated in Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988):

> As set forth above, the district court, after a limited remand from this Court, conducted an evidentiary hearing and concluded that Bundy was competent to stand trial. *Bundy v. Dugger*, 675 F.Supp. 622 (M.D.Fla.1987). We begin our analysis by setting forth the applicable legal standards central to our review of the district court's conclusion. First, "[t]he legal test for mental competency is whether, at the time of trial and

> sentencing, the petitioner had 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and whether he had 'a rational as well as factual understanding of the proceedings against him.'" *Adams v. Wainwright*, 764 F.2d 1356, 1359-60 (11th Cir.1985) (quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960)), cert. denied, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986). Second, Bundy had the burden of proof on remand: "At the ensuing district court hearing, petitioner [the defendant] bears the burden of proving the fact of incompetency by a preponderance of the evidence." *Price v. Wainwright*, 759 F.2d 1549, 1553 (11th Cir. 1985) (citing *Zapata v. Estelle*, 585 F.2d 750, 752 (5th Cir. 1978) (en banc)).
>
> (emphasis added) Id. at 1407.

In Bush v. Wainwright, 505 So.2d 409 (Fla. 1987), this court faced a similar triad of competency claims as are raised herein; the defendant was incompetent in-fact, the retained expert was ineffective for not diagnosing the defendant as incompetent, and trial counsel was ineffective for not raising the issue of competency at trial. This court rejected the incompetency in fact claim as not being supported by the record, stating the evidence failed to "sufficiently raise a valid question as to Bush's competency to stand trial," Id. at 411. In addressing defense counsel's failure to raise the competency issue, this court stated:

> The claimed errors of counsel involve either strategies which would have been unsupported by the record, such as the mental incompetency claim disposed of above, or actions pursued following sound strategies of the defense.

(Emphasis added) Id.

It appears this latter emphasized language refers to the defendant's failure to show prejudice, i.e., a reasonable probability that the defendant was in fact incompetent. The State suggests that the only real issue, pursuant to Dusky v. United States, 362 U.S. 402 (1960), is whether the defendant was in fact incompetent. If he was, he is entitled to a new trial. The fact that, in order to defeat state procedural bar, the defendant couches his claim in terms of ineffective assistance does not alter the underlying issue of whether the defendant was in fact competent. The only question is what standard of proof should be utilized. The State has no quarrel with reasonable probability or preponderance of the evidence, which the State submits are identical, i.e., is there a 50.0001% chance the defendant was incompetent. The phrase "sufficiently raise a valid question as to Bush's competency" is compatible with both reasonable probability and preponderance of evidence. Perhaps this Court will use this occasion to clarify and define the precise standard for competency claims raised via rule 3.850. However under any standard, the defendant's claim herein is clearly deficient.

Before addressing the facts relevant to the defendant's competency, the trial court's order must be briefly addressed. The court made no specific findings on this issue. During its granting of relief as to claim I, ineffectiveness at the penalty phase, the trial court stated:

> Likewise, although at trial defense counsel failed to present testimony of mental health experts regarding the defendant's diminished mental capacity (no such witnesses testified before the jury, and only one, Dr. Cava, testified at the original sentencing hearing before the Court), during the present Rule 3.850 proceedings, such experts testified convincingly that the defendant had an extreme emotional disturbance and an impaired capacity to conform his conduct to the requirements of the law. Although the Court finds that this expert testimony is not sufficient to grant relief on the ground that the defendant was incompetent to stand trial or had a valid insanity defense, 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 of the trial,
>
> (Emphasis added) (R.831, 32)

In addressing all the defendant's remaining claims, the court stated:

> The court has considered the defendant's remaining challenges based on ineffective assistance of counsel at the guilty-innocence phase of the trial and other arguments that the trial was fundamentally unfair and finds them without merit. The motion to vacate the judgments is therefore denied.
>
> Id.

In his brief the defendant repeatedly alleges that the trial court applied the wrong standard in rejecting his competency claim. It is clear, however, that the court found the defendant's evidence of incompetency in fact to be legally insufficient, and that to the extent incompetency was alleged via

ineffectiveness of counsel, the claim was without merit. The defendant fails to articulate what improper standard the court was applying, but in any event the order properly rejects the defendant's claim of incompetence in fact as being insufficiently supported by the evidence, a finding which is both thoroughly reviewable by this Court, and eminently supported by the record as well.

In opening its analysis of the identical claims in Bush, this Court looked first to the facts known at the time of trial, and to the trial record. This Court's finding therein apply with equal vigor to the instant case:

> We find no error under the circumstances of this case. Absolutely no evidence existed at the time of trial that Bush lacked "sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding." *Ferguson v. State*, 417 So.2d 631, 634 (Fla.1982). A review of the original record reflects no evidence that Bush was incompetent to stand trial.
>
> Id. at 410.

On April 17th, 1982, two and half months prior to trial, Dr. Cava examined the defendant for the purpose of uncovering mental health mitigating evidence for the penalty phase. In his report of that evaluation, Dr. Cava begins by observing:

> The defendant was seen at the Dade County Jail for psychiatric interview on April 17, 1982. He was interviewed in Spanish. He is a tense but rather handsome and presentable and superficially cooperative young adult Hispanic male who seems

> pleased when he discovers the undersigned can communicate with him in Spanish. He is otherwise serious and visibly concerned during the interview.
>
> He is composed and deliberate throughout the interview - at no time displaying bizarreness or inappropriateness of affect or behavior. He has many dot tattoos on his left hand and upper eyelids. He is tattooed as well on his chest and upper arms where they are covered by his shirt and barely show. He says these were drawn on him by fellow inmates while imprisoned in Cuba and some he did himself. He attributes to them no particular meaning. He is slender to medium build, athletic and muscular in appearance. He smiles with amusement (perhaps slightly defensively) when volunteering his having been arrested twice before his present term.
>
> (R.532)

The defendant then related a lengthy chronological history that was detailed, coherent and rational throughout. (R.532-534). The defendant stated he was arrested for the instant crimes in August 1981 (actually July 21st, 1981) while in New Jersey. He had been arrested twice, the first time serving three months and eighteen days. The second time (the rape case) the defendant had been released on bond, then rearrested two months later (on the instant charges). When asked what the charges were for the first two arrests, the defendant became evasive, and finally said his lawyer told him not to discuss his case with anyone. The defendant said "I have been charged with a pile of things - I have not yet been to trial." The defendant said he knew what all the charges were, but he did not want Dr. Cava to write them down. He stated his latest charge is fleeing justice:" It's a phenomenon - one leaves communism - comes among

the Americans and one continues being mistreated - its a phenomenon --- there Fidel was killing me by starvation - here they're killing me with suffering." (R.534).

The defendant stated that what you say can be held against you, and that you can get in serious trouble by talking. Dr. Cava asked if the defendant was nervous during the crimes he was charged with, and the defendant responded "I didn't do anything." The defendant denied hearing voices since coming to America. He feels depressed, but considers that inevitable under the circumstances, especially when he thinks of his wife, children and mother in Cuba. The defendant stated he is quite worried about how his case will come out, and that he is frustrated at being locked up. He was malnourished in Cuba, but his health is much better now.

While in prison in Cuba the defendant had visual and auditory hallucinations, which he attributed to the horrors he saw inside the prison. After he was released from jail he took valium for his nerves. As for his experiences since coming to America, and in particular the instant charges, the report states:

> He denies repeatedly having been particularly upset nor nervous since being in the United States - except when he would speak with his family in Cuba: "I am accused of these things - which I didn't commit - I didn't commit them while nervous, I didn't commit them while not nervous - I have never done anything bad - I was nervous in Cuba but I was peaceful..."

(R.535).

Dr. Cava evaluated the defendant's present mental state as follows:

> The defendant was interviewed for at least two hours. His history was reviewed rather meticulously and his deportment, style of communication, affective displays, and his present mental condition were specifically observed during the time of the interview. At no time did he show any gross deviations of speech or affectivity nor did he show gross elations, depressions, or other deviations of mood. He was generally well composed and seemed appropriately guarded. He had apparently been instructed by his attorney (or at least he so believes) not to discuss any of the circumstances surrounding the crimes with which he is charged so that whenever this period of his experience was approached he calmly but firmly either avoided or simply explicitly refused to give information.
>
> (R.535, 36).

At the close of the interview Dr. Cava asked the defendant what would happen if he was found guilty, and the defendant stated he would then be ". . . as helpless as a baby - they could even give me the electric chair." (R.536).

Turning to the trial itself, a trial presided over by the same judge which conducted the instant proceeding, the record shows the defendant testified at three separate evidentiary hearings prior to trial. He first testified at the motion to discharge based on speedy trial grounds. The defendant had alleged in his motion that the New Jersey police placed him under

arrest for the two murders (T.R. 74, 75) on July 21st, 1981, and that the 180 day period had thus expired. The defendant testified, in rational, coherent, goal-directed fashion, in support of his motion. (T.R. 435-444). He testified that the New Jersey Officers told him he was under arrest for the instant rape and murder charges. (T.R. 436). The following day Officer Guzman of the Miami Police Department (who the defendant recognized as one of the officers who had just testified) likewise told the defendant he was under arrest for the rape and murders, and that it would be best for Arsenio and himself if he came back to Miami immediately. Ofc. Guzman, along with another Miami officer, were present at the (extradiction) hearing the following day. (T.R. 437). When originally arrested for the murders by the New Jersey police, they asked the defendant questions about the murders. (T.R. 438). On cross-examination the defendant's answers were uniformly rational, responsible, and goal directed, as evidenced by the following exchange:

> **Q.** Now, when Officer Guzman from Miami spoke to you at the jail, he told you that he was here to take you back to Miami?
>
> **A.** Yes.
>
> **Q.** And he told you that the court issued warrants for you, didn't he?
>
> **A.** He didn't talk to me about that.
>
> **Q.** Didn't one of the Miami police officers, specifically the one that spoke Spanish, tell you that on your assault and rape case the court issued a warrant for your arrest?
>
> **A.** He did not mention the court.

Q. But he told you there was a warrant for your arrest?

A. Yes.

Q. He didn't tell you there was an arrest warrant for homicide, did he?

A. Yes.

Q. He told you that there was an outstanding warrant for homicide is that your testimony today?

A. No, not outstanding at the moment.

Q. So, he told you there was an existent warrant for your arrest for the murder?

A. For which I was arrested. Also, for the rape.

Q. Also the robbery?

A. Yes.

Q. And that is Officer Guzman that told you that? Is that your testimony?

A. Yes.

(T.R. 442, 443).

The defendant testified again at the July 6th, 1982 (the day before trial) hearing on his motion to suppress physical evidence. (T.R. 165-166a). At issue was whether Francisco Rizo had authority to give the police permission to search the defendant's apartment. The defendant's testimony (T.R. 595, 635-640), is once again rational and goal directed. The defendant payed rent at the apartment. (T.R. 595). When the officer testified that Francisco Rizo had some clothes in the apartment, he was wrong, because all the clothes in the apartment were the defendant's. (T.R. 635). On cross-examination the defendant

insisted that Rizo did not live in the house, he was just a guest there because his wife had thrown him out a few days earlier. Rizo's girlfriend, the one who was killed, had also been staying there for several days. Rizo did not have his own key, but rather would have to be let in by either Arsenio or the defendant. (R.636-640).

Also on July 6th, 1982, the defendant testified in support of his motion to suppress statements made to the New Jersey police the day of his arrest. (T.R. 99, 100). At issue was whether the defendant had invoked his right to counsel before being questioned by Ofc. Garcia. The defendant again testified (T.R. 697-709) in a rational, goal oriented manner. As soon as he was read his rights, he told them he had an attorney in Miami, and did not wish to say anything else. (T.R. 699). The defendant had an excellent memory of events and the exact sequence. He understood all the rights the police gave him. (T.R. 700-703). On cross-examination he denied telling Ofc. Garcia that he had left the gun on the table (when asked what he did with the gun). (T.R. 703, 704). The defendant's answers were completely responsive and organized throughout.

Prior to and during trial, the two persons who interacted continually with the defendant were his interpreter, Rita Suarez, and of course Adelstein, his attorney. Suarez testified that during trial, the defendant never indicated any confusion or difficulty in following the proceedings. (R.1622). She spent

some thirty hours at the jail with the defendant and Adelstein, during which Adelstein would explain the process of the trial to the defendant. At the conclusion of each day of trial, Adelstein and the defendant would discuss what had occurred, and the defendant never appeared confused during these discussions. (R.1622-26). Prior to trial the defendant and Adelstein discussed the witnesses, their testimony, jury selection, and the various stages of the trial. (R.1627). The defendant was not a big talker, but he did tell Adelstein that his brother could provide certain information, and that Adelstein should call Carmen[2] as a witness. The defendant always seemed to be paying attention and understanding what was going on. During certain testimony he would smirk and say "they're lying." (R.1630, 31).

Adelstein sometimes met the defendant at the jail on Saturdays, as there was considerable preparation and discussion for this case. Adelstein did most of the talking, explaining the defense's strategy to the defendant. (R.1633-1637). Adelstein and the defendant would confer during recesses in the trial. The defendant had a very intense look during trial. During jury selection the defendant told Adelstein to strike a certain woman because of the way she looked at him. (R.1644). When Adelstein asked the defendant questions, the defendant gave responsive answers which displayed no confusion or misunderstanding. The

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[2] Carmen, the defendant's sister-in-law, is one of the witnesses who Adelstein testified was unwilling to testify. Carmen maintained Adelstein never asked her to testify though she specifically told Adelstein she was willing to do so.

defendant and Adelstein discussed the insanity defense but decided to use a different defense. (R.1648-50). Prior to the sentencing phase, the defendant and Adelstein discussed which witnesses to call concerning his abused background, a background which the defendant himself never discussed. Adelstein explained to the defendant he had an absolute right to testify, it was his decision, but that Adelstein advised against it, and the defendant agreed. Adelstein explained the role of the prosecutor and judge, and the defendant seemed to understand. Adelstein and the defendant appeared to get along very well. In her opinion, the defendant was not very concerned about the trial because he was certain he would be convicted. (R.1653-55).

Adelstein told the defendant they had a certain number of strikes during voir dire, and to tell Adelstein if he did not like a particular juror. (R.1656). Suarez was present at a conference, at Adelstein's office prior to the sentencing phase, between Adelstein and the defendant's family members. The topic of discussion was who would testify at the penalty phase. She does not remember Adelstein rejecting any willing candidates. (R.1658). The defendant himself never talked of his background. The defendant tried to help Adelstein defend him, and was very cooperative. (R.1662, 63). Adelstein visited the defendant three times after the sentencing. (R.1666).

Adelstein testified that the defendant's verbal responses to Adelstein's questions were responsive, and indicated the

defendant understood what Adelstein was talking about. (R.1722). The defendant told Adelstein not to worry about Arsenio, because the defendant knew Arsenio would refuse to testify (which is precisely what Arsenio did). (R.1773). Adelstein had a good and trusting relationship with the defendant. (R.1781). The defendant admitted the murder of Grisel Fumero (there is no testimony that, even to this day, the defendant has admitted raping and murdering his girlfriend, Olga Elvero) during the testimony of Tomas Barcelo. (R.1701, 02). The defendant did not say anything about hearing a voice at the time of that murder. (R.1784). The defendant seemed to understand Adelstein's explanations of the trial process, and Adelstein did not consider the defendant's conduct during the trial to be unusual. The defendant appeared to understand the strengths and weaknesses of his case. (R.1786-92). The defendant would usually accept Adelstein's advice, except in matters relating to the defendant's family and background. (R.1801). Adelstein discussed an insanity defense with the defendant, but the defendant would not consider it because he said he did not commit the murders, and was not crazy. (R.1809).

The above were Adelstein's observations at the time of trial. Looking back on it, he has some doubts about whether the defendant understood what was going on, and he should have asked for another evaluation. (R.1728-30). This is because a) the defendant sometimes took on a cold stare (R.1718), b) The defendant fixated on a minor point of Barcelo's testimony,

whether the downstairs light was on or off (R.1703, 04) (which Adelstein later stated was not an unusual phenomenon in criminal trials, R.1788-92), c) The defendant seemed more concerned with his rape and robbery cases, and was offended by the rape charge because he felt he was unjustly charged (R.1712), d) The brutal nature of the murder should have caused Adelstein to be more sensitive to the defendant's mental health (R.1728), e) He was not aware, during trial, of the extent of the cruelty the defendant had suffered in Cuba. (R.1695).

Turning now to expert testimony, Dr. Cava, who like Drs. Miranda and Carbonel were called by the defendant, testified that in 1982, the defendant was competent. Dr. Cava believed it at the time and has not changed his opinion despite being provided with additonal materials by C.C.R., which merely confirmed what he already knew. In 1982 the defendant had positive interactions with his counsel, had no gross logical deficiencies, was alert, acclimated, and understood the nature of the charges and legal proceedings. (R.1424-27).

Dr. Joyce Carbonel stated that because she did not examine the defendant in 1982, but rather did so in 1988, she could not render an expert opinion on competency at trial, however because of the defendant's cultural, language, and mental disorders, it is "really questionable" whether the defendant was competent. (R.990-996). On cross-examination Dr. Carbonel stated the defendant has a full scale I.Q. of 110, the Bender-Gestalt

test was within normal limits, and there was no evidence of brain damage. (R.1027-29, 1059). The defendant was not under medication during trial. (R.1058).

The only testimony that the defendant was incompetent to stand trial came from Dr. Simon Miranda. He measured the defendant's full scale I.Q. at 99. The defendant's level of functioning is normal for rural Cuba, but only borderline functioning in American culture, though with potential for greater intellectual development. (R.1155-57). The defendant has a severe schizophrenic disorder, characterized by violent, explosive behaviors. His disorder is a direct product of his violently abusive upbringing. (R.1163-1175). However, the defendant does have periods of normal functioning, especially when in a stable environment. (R.1178).

As to competency, in his first interview of the defendant in 1987, he thought the defendant was probably competent, though he had not gone into the specific competency criterion in detail at that time. (R.1933). Dr. Miranda utilized the McNaughten competency criteria in his subsequent evaluation, which he admitted under questioning by the court, is designed for pretrial use and is inappropriate for retrospective evaluations. (R.1279).

Dr. Miranda believes the defendant was incompetent because he was "psychologically absent" from much of the proceedings. This resulted from his unfamiliarity with our legal

system, his "borderline" intellectual functioning, the "language barrier," and feelings of futility. When the defendant heard adverse testimony which he considered lies, he thought he was being railroaded like in Cuba, and he lost interest in the trial. (R.1226-1227). On cross-examination Dr. Miranda admitted the defendant may have made a conscious decision to tune out after hearing damaging testimony. (R.1267). This occurred during the testimony of Tomas Barcelo, the only eyewitness. The defendant certainly appreciated the significance of Barcelo's testimony. (R.1268). Although the defendant claimed not to understand what happened at trial, he never explained what parts he didn't understand, stating only "I could not follow the thread of these proceedings." The defendant initially was interested in the trial, but tuned out when he heard damaging testimony. (R.1268-73).

To briefly sum up the above evidence relative to competency, the State suggests that the above quoted language from Bush is so intensely applicable to the instant cause as to require further study:

> We find no error under the circumstances of this case. Absolutely no evidence existed at the time of trial that Busch lacked "sufficient present ability to consult with and aid his attorney in the preparation of a defense with a reasonable degree of understanding." *Ferguson v. State,* 417 So.2d 631, 634 (Fla.1982). A review of the original record reflects no evidence that Bush was incompetent to stand trial.
>
> Id. at 410.

III.

THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE.

A). TRIAL COUNSEL'S FAILURE TO REQUEST SEQUESTRATION DURING DELIBERATIONS.

In Livingston v. State, 458 So.2d 235 (Fla. 1984), this Court held that where counsel requests sequestration during deliberations in a capital case, it is error for the trial court not to grant counsel's request. This Court has never granted relief where counsel did not request sequestration. See Engle v. State, 438 So.2d 803 (Fla. 1983); Brookings v. State, 495 So.2d 135 (Fla. 1986); Rose v. State, 508 So.2d 321 (Fla. 1987), and, in the case which is completely dispositive of the instant claim, Pope v. State, 15 FLW S533 (Fla. October 11th, 1990). There this Court emphasized that failure to sequester during deliberations is not fundamental error, that if trial counsel fails to object to sequestration the issue is waived, and that even if failure to object is considered deficient performance (and the State will shortly argue it was not in this case), the defendant must show actual prejudice under Strickland v. Washington, supra, i.e., that allowing the jurors to retire overnight probably adversely affected the outcome at trial.

The State submits initially that counsel's failure to object was not deficient performance. Adelstein had moved for

sequestration of jurors during trial, and the trial court reserved ruling pending jury selection. Of the 55 jurors questioned, only ten (10) had ever heard of the case. (T.R. 741, 745, 837, 839, 928, 930, 931, 937, 1008, 1010). For the vast majority of these ten, the only knowledge of the case was from a Miami Herald article the day before. (T.R. 741, 745, 837, 931, 937, 1008, 1010). This was definitely not the high profile case the defendant attempts to portray in his brief.

During voir dire the trial court repeatedly instructed the jurors not to discuss the case with anyone or read or listen to any news accounts of the case. (T.R. 747, 748, 830, 895, 897). As soon as a panel was selected the court immediately instructed the jury *not to watch or listen to any news broadcasts whatever*, because you never know when something about the case might come on. The court further instructed the jury not to read about or discuss the case with anyone. (T.R. 1201). In its preliminary instructions, the court told the jurors not to discuss the case with anyone, and that if someone attempts to discuss it with them to immediately leave that person's presence. The court reminded the jurors of the prior instructions on publicity, and reiterated the need to follow that instruction. (T.R. 1214).

At the conclusion of this first day of trial (Friday, 7/9/82), the trial court stated:

> Now, before we break for the weekend, I want to remind you again, and it's very important that you follow this instruction, that you are not to discuss this case with anyone. Now, I am permitting you to go home to your families and carry on your personal lives, but it is only with the understanding and commitment from each of you that you are not to discuss this case with anyone; you're not to look at any newspaper accounts that may exist about this case, or listen to anything on the television or radio about the case, should there be any.
>
> So, with that understanding that you're going to follow those instructions, ill excuse you until 1:00 p.m. on Monday.
>
> (T.R. 1423, 24).

The trial reconvened Monday, 7/12/82. At the close of the day's proceedings, the trial court again instructed the jurors not to discuss the case or read or listen to any reports of the case. (T.R. 1614). At the close of the proceedings on 7/13/82, the court instructed the jurors:

> Please report upstairs to the jury pool room and again I remind you not to discuss the case with anyone and not to listen to any reports about the case, not to watch the television news at all.
>
> You missed the six o'clock news, not to watch the eleven o'clock news.
>
> As you know, the TV cameras were in the courtroom today and I'm telling you now not to watch it, not watch the news or listen to the radio news at all.
>
> (T.R. 1815).

On 7/14/82 the jury heard closing argument, received final instructions, and retired at 5:15 p.m. The court advised the attorneys it would keep the jury deliberating until 7:00 p.m. (T.R. 2028, 29). Adelstein's first concern was that the jury not be made to feel they should rush their verdict. He suggested they be instructed appropriately and sent home. (T.R. 2032). The Court stated it would advise the jurors that no arrangements had been made for dinner, and hence would be continuing deliberations in the morning. Again, Adelstein's primary concern was that the jurors not be rushed in their deliberations. (T.R. 2033). The jurors then sent a note asking about dinner, and whether they had to reach a verdict that evening. (T.R. 2034, 35). The trial court immediately stated it was recessing and sending the jurors home until 9:30 the following morning. At this point Adelstein asked that the court give the "no media or newspapers" instruction, and the court responded that it would (T.R. 2035). The court then advised the jury:

> Let me remind you again, it's very important, you're in the middle of your deliberations, you're not to read any newspaper articles about this case or listen to any television or radio broadcasts about the case.
>
> You're not to discuss it with anybody else. Obviously, I'm sure that should be clear to you by now.
>
> (T.R. 2037).

The jury continued deliberations at 9:40 a.m., 7/15/82, and did not reach a verdict until 5:00 p.m., almost 7 1/2 hours later, finding the defendant guilty of the lesser included offense of second degree murder as to Olga Elviro, despite finding the defendant guilty of sexual battery upon her. (T.R. 2043, 44).

In his 3.850 motion, in his evidentiary presentation at the 3.850 hearing, in his post-hearing memorandum, and in his brief, the defendant presents not even the barest allegation that any juror failed to obey the trial court's repeated, firm, and unambiguous instructions not to read, watch or listen to news accounts or discuss the case with anyone. In Pope, supra, the defendant alleged that a juror was carrying a newspaper when she returned to court after the overnight break. This Court held this allegation insufficient to establish prejudice under Strickland, supra, but at least it was something. Here the defendant has zero, zilch, nada. Thus the defendant's claim should be rejected out of hand.

The State further asserts that Adelstein was not deficient. It was not the common or even uncommon practice of attorneys, in 1982, to request sequestration in criminal cases, capital or otherwise (Adelstein, T.R. 1826, Roy Kahn, T.R. 1842-1845, Art Koch, T.R. 1322-24, 30). Adelstein had learned during voir dire that this was not a well known case, and had heard the

strong admonishments by the court regarding publicity. Adelstein had no reason to request sequestration, and the fact that he reminded the court to again instruct the jury, regarding news accounts, is a clear indication he believed such instructions would be sufficient, as they surely were. His main concern was not rushing the jurors into a hasty verdict, and allowing them to return home certainly served that purpose, as they deliberated another 7 1/2 hours upon their return. It is true that at the evidentiary hearing, Adelstein stated he did not remember any reason for not requesting sequestration. He had, indeed, no specific memory of what he said to the court prior to the jury being released for the night. (T.R. 1731-1736). It is clear from the trial record, however, that his reliance on the court's instructions was reasonable, and that his failure to request sequestration, under the facts of this case, in July 1982, was not deficient performance.

B). FAILURE TO REQUEST CHANGE OF VENUE

As related above under claim A), only 10 of 55 members of the panel had heard of the instant case, and eight of these knew of the case only from a single Miami Herald article the day before. There was absolutely no grounds for a change of venue, hence counsel was not deficient for failing to waste his efforts litigating the issue. There was also no prejudice, as there is no reasonable probability or indeed remote possibility that such

a request would have been granted. There is also no reasonable probability that trying the case in Miami had an adverse effect on the outcome. See Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987). In terms of Adelstein's performance during voir dire, that it discussed directly below. Additionally, whether or not to move for change of venue is a tactical decision not generally subject to collateral attack. Buford v. State, 492 So.2d 355, 359 (Fla. 1986) and Tafero v. Wainwright, 796 F.2d 1314, 1316 (11th Cir. 1986).

C). PERFORMANCE DURING VOIR DIRE

The methods and strategies employed during voir dire are likewise not generally subject to collateral attack. Muhammed v. State, 426 So.2d 533, 537 (Fla. 1982), Maywood v. Smith, 791 F.2d 1438, 14445 (11th Cir. 1986).

Adelstein was by no means deficient in his handling of voir dire. During voir dire, four groups of 18, 14, 18 and 5 jurors were separately questioned. The bulk of the questioning was conducted by the trial court. It conducted an initial inquiry concerning knowledge of the case and views on the death penalty, allowed each attorney to follow-up in these two areas, heard challenges for cause based on these two areas, then questioned the survivors of each group as to their backgrounds, after which each attorney asked follow-up background questions, and covered whatever other areas they desired to explore.

Of the first group of 18 jurors, Bourbakas (R. 741) and Worms (R.745) stated they had read an article about the case the prior day, although worms had stopped reading as soon as he realized it was set for trial, and thus he might end up on the jury. Adelstein asked for and was granted individual voir dire as to each juror who had any knowledge of the case. (T.R. 798). After this individual voir dire, Adelstein moved to strike Bourbakas for cause, which was denied. (T.R. 799-812).

The second panel of 14 had two jurors who had heard of the case, Wright (T.R. 837) and Holmes (T.R. 839). Holmes stated she had formed an opinion, and was immediately stricken for cause. (T.R. 841). Adelstein then conducted individual voir dire of Wright (R.899), after which he successfully moved to strike her for cause. (T.R. 904).

The third panel of 18 included four jurors who had heard of the case, Alexander (T.R. 928), Amoro (T.R. 930), Deas (T.R. 9331), and Kirwin (T.R. 937). Juror Alexander was stricken for her views on the death penalty (T.R. 994), as was juror Kirwin. (T.R. 995). At this point Adelstein received permission for individual voir dire of Amoro and Deas as soon as this 3rd panel returned. (T.R. 996, 997).

The fourth panel of five jurors contained two, Young (T.R. 1008) and Stewart (T.R. 1010), who had heard of the case. Adelstein received permission to conduct individual voir dire of Young and Stewart. Young stated he remembered the defendant was out on bond at the time of the offense, and Adelstein moved to strike for cause on this basis. (T.R. 1024-26). The trial court denied the request. Adelstein then questioned Stewart, who stated he thought the defendant had a record in Cuba. (T.R. 1028, 29). The trial court then questioned Stewart, and thereafter initially denied Adelstein's challenge for cause. (T.R. 1031). The court then reversed itself and granted the challenge as to Stewart, stating it wanted to be extremely careful that no inflammatory materials reached the jury. (T.R. 1038, 39).

Adelstein conducted individual voir dire of Deas (T.R. 1031) and Amoro. (T.R. 1034). Amoro was stricken because of English deficiencies, and Adelstein's motion to strike Deas for cause was denied. (T.R. 1033).

The trial court then seated the first 18 survivors. It asked various background questions. (T.R. 1040-1083), the prosecutor asked several follow-up questions (T.R. 1085-1097), and Adelstein did the same (T.R. 1097-1104). Adelstein asked the jurors whether the defendant's status as an immigrant from the mariel boatlift would trouble anyone, and whether the defendant's indigency and need for an interpreter would effect them in any way. (T.R. 1098).

Prior to beginning the peremptory striking, the defendant obtained a lengthy recess to consult with the defendant. (T.R. 1104, 05). He then obtained another recess to consult with the defendant. (T.R. 1109). The trial court then called in six replacements, who were questioned in the same manner by both the court, prosecutor, and Adelstein. (Adelstein at 1133-38). Adelstein again consulted with the defendant. (T.R. 1144). Eight more replacements were summoned, and the process was repeated (Adelstein, T.R. 1190).

In reviewing Adelstein's performance as a whole, it is abundantly clear that counsel pursued a reasonable strategy after full consultation with the defendant. As for juror Paez, when his name was called Adelstein stopped and consulted with the defendant before announcing he would accept Paez. (T.R. 1144). At the hearing Adelstein stated he remembers trying to strike Paez for cause, and that Paez was definitely not his type of juror. Although he does not specifically remember discussing Paez with the defendant (R.1758, 59), the trial record speaks for itself (T.R. 1144). At the hearing Adelstein confirmed the defendant's input during jury selection (R.1758, 59, 1803), which included several other conferences, as described above.

Based on the above, it is clear that Adelstein was not deficient in not peremptorily striking Paez. The defendant has

also not shown any prejudice, as there is definitely nothing in Paez' answers (T.R. 863-866, 874-876, 1121-23) to show that his inclusion on the jury probably affected the outcome, or that he failed in any way to follow the court's instructions on the law. In sum, the defendant's ineffectiveness claim relative to voir dire is without merit.

D). MOTION FOR CONTINUANCE.

The defendant's claim that Adelstein was ineffective in arguing his motion for continuance is devoid of merit. As the factual recitation above (infra p. 9-13) conclusively demonstrates, Adelstein forcefully argued his need for a continuance. He informed the court that the State had produced their first and only eyewitness on the eve of the trial. Adelstein needed time to investigate Barcelo and to reevaluate the defense strategy in light of whatever testimony he would provide. He has not had a fair opportunity to prepare for or challenge Barcelo's tesitmony. He needs to reassess his entire defense in light of Barcelo. (T.R. 570-574, 7/2/82). On July 6th Adelstein again pleaded with the court to allow him more time to investigate and prepare for the testimony of Barcelo, and that it was totally unfair for the State to produce Barcelo the weekend before the trial, and then expect the defendant to proceed immediately to trial. (T.R. 589, 90).

Adelstein made a logical, competent argument for continuance. The defendant now alleges that Adelstein should "have explained to the court his confusion, vexation, and panic with the clarity with which he discussed these issues at the evidentiary hearing" (defendant's brief at p. 71). Apparently the defendant believes Adelstein should have abandoned professional standards of decorum by pleading temporary witness-shock, or some other form of post-Barcelo malady. The State submits that Adelstein did what any dignified professional would have done: he appraised the court in honest and open fashion of the dilemma he faced, appealed to the court's sense of fairness, and then after his motion was denied, he came back four days later and gave it another shot. That the trial court was totally unreceptive to Adelstein's pleas is not Adelstein's fault.

E). FAILURE TO PURSUE INSANITY DEFENSE

None of the defendant's experts testified the defendant was insane, under the McNaughten test, when he murdered Grisel Fumero. Rather, they offered no opinion whatever on whether the defendant had the ability to distinguish right from wrong at the time of her murder. What is even more interesting is that none of them testified at all concerning the defendant's mental state when he raped and killed his girlfriend, Olga Elvero. The defendant was charged with both murders, the former having occurred after the latter. Indeed, the gruesome nature of Olga's

murder, preceded by a sexual battery during which she was hogtied and gagged, was certainly the defendant's biggest problem at trial. The experts accepted the defendant's denial of the murder of Olga at face value. Apparently, the defendant is asking this Court to believe that Adelstein should have pursued an "I didn't do it" defense as to the upstairs murder (Olga), and an insanity defense as to the downstairs murder. Given that Margarita Martinez testified the defendant threatened to kill Olga earlier that evening because she wanted to leave him, and that Tomas Barcelo testified that the defendant, with a frightened Olga in tow, had gone into the upstairs bedroom and were there a half-hour, after which the defendant came downstairs and shot Grisel while stating "It is your fault I have lost everything," such a strategy would have been perhaps the most ridiculous defense ever conceived.

There are several other major problems with the instant claim, not the least of which is the fact there is not even an allegation the defendant would have agreed to an insanity defense, rather there is overwhelming evidence that he would not, including the fact that he refused to consider an insanity defense prior to trial because he insisted he was innocent and that he was not crazy. There are numerous other problems with the instant claim, however the expert's failure to address the McNaughten test will first be addressed.

Irresistible impulse is not a defense in Florida, as it is under the Model Penal Code § 4.01. See Wheeler v. State, 344 So.2d 244 (Fla. 1977). In Gurganus v. State, 451 So.2d 817 (Fla. 1984), this Court faced a scenario, in terms of the substance of the experts' testimony on insanity, which could hardly be more similar to that herein:

> It is well established in Florida that the test for insanity, when used as a defense to a criminal charge is the McNaughton Rule. Under McNaughton the only issues are: 1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed. *Brown v. State*, 245 So.2d 68 (Fla. 1971), *vacated on other grounds*, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972); *Campbell v. State*, 227 So.2d 873 (Fla. 1969), *cert. dismissed*, 400 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970); *Zamora v. State*, 361 So.2d 776 (Fla. 3d DCA 1978), *cert. denied*, 372 so.2d 472 (Fla. 1979); *Evans v. State*, 140 So.2d 348 (Fla. 2d DCA 1962). Evidence which does not go toward proving or disproving an individual's ability to distinguish right from wrong at the time of an incident is irrelevant under the McNaughton Rule, including evidence of irresistable impulsive behavior, *Wheeler v. State*, 344 So.2d 244, 246 (Fla. 1977); *Campbell*, 227 So.2d at 877, evidence of diminished mental capacity, *Brown*, 245 So.2d at 71, or evidence of psychological abnormality short of an inability to distinguish right from wrong, *Evans*, 140 So.2d at 349.
>
> The proffered testimony of the two psychologists shows that their opinions, based upon personal examination of Gurganus and hypothetical scenario of Gurganus previously ingesting twenty-nine Fiorinal tablets and quantity of alcohol, were that Gurganus "was not in effective

> control of his behavior," that he had "a mental defect," and that his judgment "would have been seriously impaired." When asked specifically about Gurganus' ability to distinguish right from wrong at the time of the offense, neither psychologist was able to state within a reasonable degree of certainty that Gurganus did or did not have that ability. The testimony of both was that there were equal probabilities of Gurganu' sanity and insanity under the McNaughten Rule. In effect, neither psychologist was able to form an opinion on the issue. We find this testimony to be of no evidentiary value because it did no more to prove Gurganus' case than it did to prove the state's case. Since it did not tend to prove or disprove the legal insanity of Gurganus, we agree with the trial court's decision to exclude the testimony on this issue as being irrelevant.
>
> (Emphasis added) Id. at 420, 421.

Taking each expert in turn, Dr. Carbonel testified the defendant was insane because his will was overborne by the command of Bermudez to kill. (R. 972, 73). The defendant reported he found himself at the top of the stairs with his brother's gun (Barcelo testified the defendant retrieved the gun from Arsenio's bedroom after descending the stairs). Bermudez ordered him to shoot the first person he saw. The defendant denied killing Olga, saying he loved her and could not kill her. (R.973-75). The defendant believes he must obey Bermudez. It is not a question of whether the defendant knows right from wrong: he has no choice but to obey. (R.987).

Dr. Carbonel then explained that she did not believe the defendant had a motive to kill Grisel, the witness in his rape case, because the defendant believed he would be found innocent of the rape. (R.1030). Dr. Carbonel is aware the defendant threatened to kill Olga earlier that evening, but she emphasized that the defendant steadfastly denied killing Olga. (R.1034-1037). Apparently, she did not consider the possibility the defendant was lying about Olga or about anything else.

Dr. Simon Miranda testified that Bermudez was a coping mechanism, which enabled the defendant to cast responsibility for his actions on an outside power, and gives him the "strength" to do things he otherwise would not do. (R.1184). The defendant told Miranda that he was at the top of the stairs when Bermudez told him "the first person that you meet, the first person that you encounter, is the one that did this." (Id).[3] Dr. Miranda believes the defendant is insane because the defendant had to obey Bermudez. (R.1185, 86). Dr. Miranda does not know if the defendant knew right from wrong, however, he does note the defendant knew he would be punished for killing Grisel. (R.1186).

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[3] The Court will note that Bermudez here is now giving a reason to kill the first person that the defendant sees, i.e., that person killed Olga. This certainly adds a new wrinkle to the proposed theory of defense: The defendant did not kill Olga, he did kill Grisel, but he was insane because Bermudez told him Grisel killed Olga and thus Grisel must be killed. Of course, in order for Bermudez to know Olga was dead, he would have to have been in the upstairs bedroom...

At this point in Miranda's testimony, the trial court interrupted to inquire when the defendant first told anyone about Bermudez. Dr. Miranda stated he was the first person (in 1977) who learned of Bermudez' role in the murder. The defendant specifically told Miranda that he never told defense counsel about Bermudez. (R.1203, 04). Dr. Miranda also stated that the defendant's denial of guilt as to Olga's murder might be an indication, assuming he did commit the murder, that the defendant knew committing the murder was wrong. (R.1207). The defendant absolutely refuses to admit being mentally ill or crazy. (R.1217).

On cross-examination Dr. Miranda stated he did not consider whether the defendant had a rational reason for killing Olga, because the defendant denied killing Olga. (R.1261). Dr. Miranda doesn't attach any significance to the fact that Grisel was a witness against the defendant in his pending rape case, because the defendant told him he never worried about the rape case.[4]

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[4] Apparently, Dr. Carbonel never considered the testimony of Barcelo, that the defendant and Rizo engaged in an elaborate scheme to convince Grisel that Rizo loved and wanted to marry her, to then have her and Rizo move into the defendant's house, and finally, to have her refuse to testify against the defendant out of a desire to please Rizo and her new landlord. (T.R. 1683-1694).

The final expert to testify was Dr. Cava. The defendant told Dr. Cava a very interesting story. According to the defendant, he spent the entire evening doing drugs with friends; cocaine, alcohol and marijuana. He took a last snort with a friend in Hialeah, went home, and found Olga murdered in the upstairs bedroom. (R.1411-1415). Dr. Cava relied on this account to produce his "toxic psychotic state" diagnosis.[5]

According to the defendant, after he discovered Olga's body, Bermudez told him that the first person he saw did this to you. The defendant went into an altered state (not to mention an altered story), either going down the stairs or floating out the window. He found himself with a gun in his hand, with a dead woman in front of him. His brother told him he had disgraced himself, so the defendant realized he must have shot the woman. (Id). *Dr. Cava does not know if the defendant knew right from wrong at the time of the offense*. (R.1416). He was being driven by an *uncontrollable impulse*.

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5 Perhaps Dr. Cava would be interested in the trial testimony of Margarita Martinez, who testified the defendant arrived at her home that night in a white dinner jacket expecting Olga to go out with him, that Olga refused, and that the defendant proceeded to threaten both Olga and Martinez, which caused Martinez to collapse, whereupon the defendant and Olga took Martinez to the hospital, and were there when she regained her faculties. (T.R. 1567-76). Perhaps Dr. Cava would also be interested in the testimony of Tomas Barcelo, that when the defendant ejected Barcelo from the upstairs bedroom so that he and Olga could be alone, the defendant was wearing the same white jacket, and told Barcelo to wait outside, because he would take Barcelo to the hospital to visit Martinez, who had had a heart attack. (R.1701).

On cross-examination, Dr. Cava acknowledged that the defendant had denied the murders in 1982 and denied hearing voices since coming to America. The first time the defendant told anyone about Bermudez' role was in 1987. (R.1428). Dr. Cava admitted that the only evidence of the defendant's drug use that evening was the defendant's story to him, and that the defendant's version of events is grossly inconsistant with the testimony of Tomas Barcelo, who stated the defendant was in the upstairs bedroom with Olga for a half-hour prior to the defendant coming downstairs and shooting Grisel. Dr. Cava agrees the defendant might simply be lying, or it could be "retrospective falsification" (certainly sounds better than lying) or confusion. (R.1436, 37).

Based on all of the above, three points are beyond dispute. First, the experts' testimony does not make out an insanity defense, under the McNaughton test, to the murder of Grisel Fumero. Second, such testimony as they did provide was based solely on information from the defendant, information that was grossly contrary to the testimony of the State's witnesses. And finally, the experts provide *no defense* to the murder of Olga Fumero, which was a far more brutal crime than the murder of Grisel.

As stated earlier, the defendant has not even alleged that he would have agreed to an insanity defense. In 1982, when Adelstein discussed this defense, the defendant refused to consider it because he denied committing the crimes or that he was crazy. The defendant denied the crimes to Dr. Cava as well. Even when he admitted shooting Grisel during Barcelo's testimony, he denied hearing voices. Dr. Miranda stated there is no way the defendant will concede he is crazy. The State submits that the defendant has utterly failed to allege or prove that the defendant would have gone along with an insanity defense.

A final point is that the defendant has failed to demonstrate that a reasonably competent attorney would have used an insanity defense, rather than the defense employed by Adelstein. Adelstein was able to get the prosecutor to agree that the whole case hinged on the credibility of Barcelo. Adelstein was able to generate some doubts as to the defendant's guilt, as evidenced by the lengthy deliberations and second degree verdict as to Olga, despite a conviction for sexual battery upon her. An insanity defense, ever popular with jurors to begin with, would not have given the defendant the same chance for a lesser included verdict, because the defendant would be admitting factual guilt at the outset. No reasonably competent counsel would elect the insanity defense proffered by the defendant's experts, rather than the defense employed by Adelstein. Had the former been employed, the State readily

concedes the outcome would have been different: the defendant would have two convictions for first degree murder and two death sentences instead of the one he currently has.

A final note on the two strategies. By denying any guilt and attacking Barcelo as a liar and the actual killer, the defendant could dispute having committed several nasty deeds prior to the murder, to which only Barcelo testified and which are totally inconsistent with insanity. Earlier that day Rizo's real girlfriend, Maitey, came to the house and attacked Grisel, claiming she was trying to steal Rizo. Maitey told Grisel that Rizo was just using her so she would help Mario in his (rape) case. (R.1690, 91). Mario heard this and became enraged at Maitey. He pushed her and was about to hit her when Barcelo intervened. The defendant took Maitey aside and told her to cool it until after the trial, after which Rizo would dump Grisel and marry Maitey, because Rizo would do whatever the defendant ordered. (R.1692-93). When Grisel greeted the defendant upon his reentering the house, he pushed her as well. (R.1694). Grisel told Barcelo she was frightened of the defendant the day of the murders. (R.1700). Just before the defendant shot her, Grisel had again told Barcelo of her fear. (R.1705).

The State would also add the obvious: you don't need to bind and especially gag a rape victim unless you're concerned about getting caught.

F). TRIAL COURT'S RESTRICTION OF CLOSING ARGUMENT TO ONE HOUR.

Adelstein objected to this restriction, and hence this is absolutely an issue which could and should have been raised on direct appeal.

G). FAILURE TO LITIGATE WILLIMS RULE ISSUE.

Adelstein did not bother to challenge evidence of the pending rape charge because it was clearly relevant to the defendant's motive to kill Grisel Fumero, a state witness in that rape case. As stated above, infra. at 23. Adelstein asked for the limiting instruction, and it was given at the outset of Seigel's testimony and again in the final instructions.

H). INEFFECTIVENESS AT MOTION TO SUPPRESS STATEMENTS.

The defendnat has not alleged that Victoria Mature was available to testify, or proffered what her testimony would be, or even that there is a reasonable probability that had she testified, the trial court would have credited her testimony over the police officers, who testified the defendant did not invoke his right to counsel. Additionally, the defendant has not alleged or demonstrated that had the single inculpatory statement

as to the gun (when asked what happened to the gun, the defendant said he left it on the table) been suppressed, the outcome at trial would have been different. The State would also note that the sole source of the claim that Victoria Mature was present, when he said he wanted his lawyer, was the defendant himself. (T.R. 702).

I). FAILURE TO ASK FOR CURATIVE INSTRUCTION OR MISTRIAL DURING PROSECUTORS PENALTY PHASE CLOSING.

Adelstein's objection was sustained, and whether to seek further remedy is a matter of tactical choice not subject to second-guessing via rule 3.850. Anderson v. State, 467 So.2d 781, 784-788 (Fla. 3d DCA 1985). Furthermore, the comment, even if improper, cannot be said to probably have caused material prejudice to the defendant. See Mann v. State, 482 So.2d 1360, 1361 (Fla. 1986), and Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984).

IV.

WHETHER THE JURORS WERE MISLED OR MISINFORMED AS TO THE ALTERNATIVES TO A SENTENCE OF DEATH.

This issue is one which could and should have been raised on direct appeal. Additionally, the jurors could hardly have been instructed that the defendant could receive consecutive 25 year minimum mandatories, since the defendant was convicted of only one count of first degree murder. The bottom line on the merits is that the decision of consecutive vs. concurrent is solely within the province of the trial court.

V.

NEITHER THE JURY INSTRUCTIONS NOR THE TRIAL COURT'S SENTENCING ORDER CREATED IMPERMISSIBLE BURDEN-SHIFTING.

The claim could and should have been raised on direct appeal. The identical challenge to the standard instructions has been repeatedly rejected by this Court as well as the Eleventh Circuit, see Bertollotti v. Dugger, 883 F.2d 1503, 1524, 1525 (11th Cir. 1989).

CONCLUSION

The trial court's grant of a new sentencing is erroneous and should be reversed. The trial court's denial of relief as to the convictions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLANT/CROSS-APPELLEE** was furnished by mail to **BILLY NOLAS**, OFFICE OF C.C.R., 1533 South Monroe Street, Tallahassee, Florida 32301 on this 26th day of December, 1990.

RALPH BARREIRA
Assistant Attorney General

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