IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,~~213~~ 346

JUDY A. BUENOANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Ms. Buenoano's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. ***3.850.*** The circuit court summarily denied Ms. Buenoano's claims, without an evidentiary hearing.

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

REQUEST FOR ORAL ARGUMENT

An oral argument has already been scheduled by this Court in this action. Ms. Buenoano's counsel appreciate this Honorable Court's scheduling of oral argument.

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PROCEDURAL HISTORY

A motion to vacate was filed in Ms. Buenoano's case pursuant to Rule 3.851, Fla. R. Crim. P. Twenty-two claims for relief were presented to the circuit court, and an evidentiary hearing was requested on many of those claims, which included claims of ineffective assistance of counsel and conflict of interest on the part of former defense counsel. The circuit court, however, summarily denied relief, without an evidentiary hearing. The files and records do not conclusively show that Ms. Buenoano is entitled to no relief, and the circuit court erred in declining to conduct an evidentiary hearing. The record amply demonstrates Ms. Buenoano's entitlement to relief, or at the very least the need for evidentiary resolution.

James G. Goodyear, Ms. Buenoano's husband, died on September 16, 1971. The cause of death was listed as renal failure and pulmonary vascular collapse.

In March of 1984, Mr. Goodyear's body was exhumed and a new autopsy was performed (R. 502). The State's case was that arsenic was found, for the first time, in the body of the decedent (R. 344). At Ms. Buenoano's murder trial the State went to great lengths to present evidence concerning other purported "victims" of Ms. Buenoano (some of these "acts" did not involve prior convictions). Ms. Buenoano was convicted on November 1, 1985.

In the jury sentencing phase, other act evidence again became the feature of the State's case for death. For example, two prosecutors testified at length about the evidence they had presented in previous trials against Ms. Buenoano.

The jury recommended death on November 26, 1985, and the court imposed a death sentence on that same day.

Ms. Buenoano was represented on direct appeal by the same attorney who represented her at trial, James Johnston. This Court affirmed the conviction and sentence. Buenoano v. State, 527 So. 2d 194 (Fla. 1988). Ms. Buenoano's application for clemency was denied on November 9, 1989, by the signing of a death warrant.

Because of the death warrant, Ms. Buenoano's motion to vacate, which was originally due on July 26, 1990, became due in December, 1989. A motion to vacate was filed in the circuit court and a petition for extraordinary relief and for a writ of habeas corpus was filed in this Court. As of this date, the State has not responded to the habeas corpus petition.

On January 17, 1990, the State filed a response in the trial court. Defense counsel filed an Application for Stay of Execution, Motion for Evidentiary Hearing, and Proffer in Support of Motion for Evidentiary Hearing, Application for Stay of Execution and Motion for Fla. R. Crim. P. 3.850 Relief. A telephonic conference was held on January 18, 1990. On January 21, 1990, the Circuit Court summarily denied the Rule 3.850 motion. Appeal was taken to this Court. On January 24, 1990, this Court entered an Order staying the execution of Ms. Buenoano, which was scheduled for January 25, 1990.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN SUMMARILY DENYING MS. BUENOANO'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING.

Under this Court's well-settled precedents, a Rule **3.850** movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. **3.850;** Lemon v. State, **498** So. 2d **923** (Fla. **1986);** State v. Crews, **477** So. 2d **984** (Fla. **1985);** O'Callaghan v. State, **461** So. 2d 1354 (Fla. **1984);** State v. Sireci, 502 So. 2d 1221 (Fla. **1987);** Mason v. State, **489** So. 2d **734** (Fla. **1986);** Squires v. State, **513** So. 2d **138** (Fla. **1987);** Gorham v. State, 521 So. 2d **1067** (Fla. **1988).** Ms. Buenoano alleged facts below which, if proven, would entitle her to relief. The files and records do not "conclusively show that [she] is entitled to no relief," and the trial court's summary denial of the motion, without an evidentiary hearing, was therefore erroneous.

An evidentiary hearing is plainly required in this case, as the submissions to the trial court and the discussion presented in subsequent portions of this brief reflect. The trial court erred in denying relief without affording the petitioner full and fair evidentiary resolution. The trial court merely signed a slightly modified version of the State's proposed order. But the order did not have any files and reccords attached that conclusively showed that Ms. Buenoano was entitled to no relief. Nor could it -- there are no records rebutting Ms. Buenoano's claims in this case. An evidentiary hearing is required.

ARGUMENT II

JUDY BUENOANO WAS DENIED THE EFFECTIVE REPRESENTATION OF COUNSEL DURING HER CAPITAL PROCEEDINGS BECAUSE DEFENSE COUNSEL WAS ENGAGED IN A CONFLICT OF INTEREST INVOLVING A BOOK AND MOVIE RIGHTS CONTRACT CONCERNING MS. BUENOANO, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Ms. Buenoano's counsel state at the outset that they are constrained by direct instructions from the Florida Bar in disclosing facts supporting this claim (**see** Motion to Vacate, Appendix 4, Petition in this regard filed in the Florida Supreme Court). Because of the constraints, Ms. Buenoano cannot be effectively represented -- her counsel cannot plead the relevant facts, because the Bar has instructed that the facts cannot be disclosed.[1]

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[1] The book/movie contract resulted in proceedings before the Bar. Before the Rule 3.850 motion was filed, Ms. Buenoano's counsel requested that this Court order disclosure of information concerning this issue from the Bar. That request was summarily denied, presumably under this Court's construction that matters involved in Rule 3.850 actions should be initially presented to the trial court. **See** Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). A similar request was also made of the trial court, and the trial court rejected the request. The Bar has opposed any disclosure, and has instructed Ms. Buenoano's counsel not to disclose what counsel have learned about the Bar proceedings. This petitioner is now in a difficult **"Catch-22"**, and requests herein that this Honorable Court direct disclosure, now that the matter is properly before this Court. Cf. Spalding v. Dugger, supra.

In this regard, Appellant's counsel additionally note that in the February 1, 1990, issue of the Florida Bar News (Vol. 17, No. 3, p. 1), there is an article that is directly relevant to the Florida Bar's refusal to disclose material and to the Bar's admonition to counsel not to disclose information. The article concerns John Doe v. Supreme Court of Florida, No. 88-8477-Civ (U.S. Dist. Ct., S.D. Fla.), wherein District Judge Stanley Marcus found the confidentiality portions of Rule 3-7.1 unconstitutional and ordered the Florida Bar not to enforce the confidentiality portions of that rule.

(footnote continued on following page)

An order from this Court directing disclosure from the Bar so that this claim (along with others which cannot be detailed because of the Bar's instructions) is accordingly respectfully prayed for at the outset. Counsel herein pleads what they are allowed to disclose, as this information has been learned from sources other than the Florida Bar.[2]

(footnote continued from previous page)

> Imposing an enforced silence on all aspects of Bar disciplinary matters - including investigations, probable cause hearings, and final dispositions - is more likely in our view to engender resentment, suspicion and contempt for the Florida Bar and its legal institutions than to promote integrity, confidence and respect.
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> * * *
>
> Assuming that the rule protects the reputation of the Bar at all, we can see no reason to continue the rule's prohibition on speech [in a private reprimand] once a grievance is found to be meritorious. The idea that suppression of truthful criticism of lawyers would somehow enhance or protect the reputation of the Bar is not persuasive.

Ms. Buenoano also has asserted that her rights to due process of law, to full and fair Rule 3.850 proceedings, and to the effective assistance of counsel have outweighed any right the Florida Bar may have to keep its proceedings secret. Judge Marcus' ruling applies to this case, and the Florida Bar should be directed to disclose all material relevant to former defense counsel's misconduct. Undersigned counsel have not yet been able to obtain a copy of Judge Marcus' opinion, and thus cite to the Florida Bar News.

The same article indicates that this Court has pending before it a petition by the Florida Bar to open up its grievance process. Appellant again urges that the Bar be directed to disclose all information concerning former trial counsel's actions in this case, in conjunction with the request for an evidentiary hearing on the claim of conflict of interest.

'Former defense counsel has admitted to some misconduct in the Bar proceedings. Despite the Florida Bar's refusal to provide details of this admission to undersigned counsel, this

(footnote continued on following page)

In her capital trial, sentencing, and subsequent appeal, Ms. Bueonano was represented by Mr. James Johnston and his wife. The trial began on October 21, **1985**. Ms. Buenoano was convicted of first degree murder. During the course of the proceedings, at the outset of the penalty phase, counsel asked that his client enter into a contract with him encompassing "any and all books, articles, television movies, other movies or any publication whatsoever . . ." (Motion to Vacate, App. 1), arising from these proceedings.

This, of course, was a conflict of interest. Even without disclosure from the Bar, it is clear from the contract itself that a conflict of interest existed in this case, that the conflict is sufficient to warrant relief under the applicable standards, and that, at a minimum, an evidentiary hearing is warranted. The book/movie rights contract/conflict had an effect on counsel's representation. As pled below, because of this contract, substantial avenues of mitigation (e.g., mental health mitigation) were not pursued, and guilt-innocence defenses which may have resulted in a conviction on less than first degree murder were also not pursued. With the contract, this case was tried on an "all-or-nothing" theory -- lesser included offenses

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admission is directly relevant to the instant proceeding. Counsel's admission is in regards to his representation of the defendant in this action, and should not be kept confidential. This Court should order disclosure of this matter, and allow an evidentiary hearing where the facts surrounding former counsel's ineffectiveness may be brought to light (**see** Motion to Vacate, Apps. 17, **18, 19).**

were not pursued, the client was not informed that they could have been pursued, little effort was made to develop and present mitigation, and no effort was made to develop **any** mental health mitigation, although such evidence was certainly available.

The 1985 Code of Professional Responsibility, DR5-104 (1983), of the Florida Bar included as misconduct:

> (B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

The United States Supreme Court has held:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuvler v. Sullivan, supra, at 346, 64 L.Ed.2d 333, 100 S.Ct. 1708. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68-69, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527.

Strickland v. Washinston, 466 U.S. 668, 688 (1984). In Cuvler v. Sullivan, 446 U.S. 335, 349-50 (1980), the Supreme Court also noted:

> Glasser [v. United States, 315 U.S. 60 (1942),] established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76, 62 S.Ct., at 467. Thus, a defendant who shows that a

> conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, 435 U.S., at 487-491, 98 S.Ct., at 1180-1182. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See Glasser, supra, 315 U.S., at 72-75, 62 S.Ct., at 465-467.

Ms. Buenoano has pled quite a substantial "actual conflict": that counsel's interest in pursuing the book/movie rights contract was a "conflicting interest" with his duties in the client's representation.

Cuyler v. Sullivan involved a multiple representation conflict of interest. However, the Sullivan test fully applies in the context of a defense attorney's book contract conflict of interest. "Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests. These differences are immaterial. We consider the rules laid down in Sullivan to be directly applicable to the present case, and they should govern on remand." United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980).

Hearst involved a motion filed pursuant to 28 U.S.C. Section 2255, the federal post-conviction rule after which Rule 3.850, Fla. R. Crim. P., is patterned. Under the requirements of Section 2255, like under Rule 3.850, "'[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon.'" Hearst, 638 F.2d at 1194. An evidentiary hearing was ordered in the Hearst case, 638 F.2d at 1195, because:

> In this case, the district court could not

properly rely on the apparent regularity of the record and of Bailey's "tactical" decisions, 466 F. Supp. at 1075, 1083, to "conclusively show" that Hearst was entitled to no relief, because her motion was based on a circumstance, not appearing on the record, that allegedly affected Bailey's judgment. See Sanders v. United States, 373 U.S. 1, 19-20, 83 s. Ct. 1968, 1079, 10 L. Ed. 2d 148 (1963) (hearing must be granted on Section 2255 claim that apparently regular guilty plea was invalid under influence of narcotics). Bailey's potential conflict of interest is virtually admitted, and Hearst has alleged an actual conflict and adverse effect in sufficient and not implausible detail.

In Hearst, the defense attorney allegedly negotiated a book contract and had the defendant, Patricia Hearst, sign a covenant two days after she was convicted. The federal court noted that defense counsel was in apparent violation of ABA Disciplinary Rule 5-104 (the same rule involved in Ms. Buenoano's case) because even though Ms. Hearst's trial was over defense counsel continued to represent his client through "a motion for new trial, a second motion for new trial, sentencing, a direct appeal to this Court, a petition for rehearing en banc, a petition for certiorari, a motion to vacate a concurrent sentence and a Rule 35 motion to reduce sentence." 638 F.2d at 1198. Of course in Ms. Buenoano's case, she was forced to enter into the book/movie rights contract at the time of her capital sentencing proceeding. The conflict pled in this action is thus much more troubling than the one at issue in Hearst. Without a hearing, and given the Bar's instructions, it is impossible to know when defense counsel conceived the idea of the contract, although we know that he was contacted by literary minded people well before the date of the contract.

Also, unlike Hearst, where the "conflict was not total, for surely the salability of Bailey's book would have been enhanced

had he gained an acquittal for Hearst," id. at 1193, the salability of a book/movie in this case surely was enhanced by the imposition of the death penalty, a sentence making Ms. Buenoano much more notorious as one of a small group of women on Florida's death row.

"The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). While Appellant need only to show that the conflict of interest actually affected the representation, not actual prejudice, Appellant here can show prejudice. There may be a great deal more to this, but Appellant's counsel have a direction not to disclose what the Bar proceedings may involve. All that counsel is permitted to say by the Bar is that such a showing "may" exist. However, it is certain that there was an actual conflict in this case. There was a book/movie rights contract. An additional conflict was also involved in trial counsel's representation of Ms. Buenoano's son, James, as well as Ms. Buenoano herself, the two of whom had been charged with the attempted murder of John Gentry.

As discussed later in this brief, defense counsel neglected to present any more than a perfunctory penalty phase. He contacted a noted University of Florida professor, Dr. Radelet, who has undertaken many professionally recognized studies of the death penalty in Florida. The professor emphatically suggested that counsel should investigate and develop Ms. Buenoano's life history and that he utilize mental health assistance, among other

things, and referred counsel to an experienced capital defense attorney. The advice was not followed up on.

> It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with the record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client.

Hollowav v. Arkansas, 435 U.S. at 490-91. An evidentiary hearing is required in Ms. Buenoano's case as well.

There are also numerous examples of counsel's failures on direct appeal,[3] as well as at trial and sentencing. This claim requires proper evidentiary resolution.

Conflict of interest claims are properly heard in an evidentiary forum in post-conviction proceedings, both Rule 3.850 proceedings, see Harich v. State, 542 So. 2d 980 (Fla. 1989), and federal habeas corpus proceedings, see Porter V. Wainwright, 805 F.2d 931 (11th Cir. 1986); Burden v. Zant, 871 F.2d 956 (11th Cir. 1989); Hearst, supra, because they typically involve facts that are not "of record." An evidentiary hearing is necessary

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[3] One such is suggested by a footnote in this Court's opinion:

> Although Buenoano also alleges it was error to allow the testimony of the attorney who prosecuted her in Escambia County for the attempted murder of John Gentry, this argument was not developed in her brief, and therefore we do not address it.

Buenoano v. State, 527 So. 2d 194, 198 n.2 (Fla. 1988). Another example of counsel's ineffectiveness on appeal is his failure to include the Santa Rosa record concerning the death of Michael Goodyear in the direct appeal record for this Court to consider in connection with the issues raised. Id. at 199. Other examples of counsel's failures are set forth in the Motion to Vacate Judgment and Sentence, the Petition for Habeas Corpus Relief, and this brief.

here because the files and records do not conclusively show that Ms. Buenoano is entitled to no relief. See Gorgman v. State, 549 So. 2d 686 (Fla. 1st DCA 1989); Lemon v. State, 498 So. 2d 923 (Fla. 1986). "As to [Ms. Buenoano's] contentions that [defense counsel] suffered from an actual conflict of interest that adversely affected his performance . . . the [lower] court's denial of the motion for relief [must be] VACATED and the case REMANDED for reconsideration of [Ms. Buenoano's] discovery request, and for a hearing." Hearst, 638 F.2d at 1199; see also Harich, supra.

An order to the Bar directing disclosure to current counsel, and an evidentiary hearing, are appropriate.

ARGUMENT III

JUDY BUENOANO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HER TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Under Strickland v. Washinston, 466 U.S. 668 (1984), a defendant must plead: 1) unreasonable attorney performance, and 2) prejudice. Ms. Buenoano sufficiently presented facts on each prong below, and the lower court erred in declining to conduct an evidentiary hearing.

Counsel has a duty to ensure that his or her client receives adequate mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as in the penalty phase of this case, the client's mental state is at issue. Mauldin; Blake; United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). After all, defense counsel must discharge very significant responsibilities

at the sentencing phase of a capital trial. In a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gress v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gresq and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989): Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Courts have therefore expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate available mitigating evidence before deciding whether or not such evidence should be presented. See Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dusser, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tvler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these standards, and Ms. Buenoano is entitled to an evidentiary hearing on this claim. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Heiney v. State, No. 74,099 (Fla. Feb. 1, 1990).

In cases such as O'Callaghan, 461 So. 2d at 1354-55, and Heiney, supra, this Court examined allegations that trial counsel

ineffectively failed to investigate, develop, and present mitigating evidence. The Court found that such allegations, if proven, were sufficient to warrant Rule **3.850** relief and remanded the cases for evidentiary resolution. The allegations presented herein similarly require an evidentiary hearing.

In this case, a wealth of significant evidence which was available and which should have been presented was either never presented at all or was inadequately presented. Counsel's lack of effort here may very likely be related to the book/movie contract/conflict under which he operated.[4] Here, the prejudice resulting from counsel's omissions is Ms. Buenoano's death sentence. See Harris v. Dugger, **874** F.2d 756 (11th Cir. **1989).**

Here, defense counsel failed to adequately investigate and prepare for the penalty phase of these capital proceedings. Counsel failed to investigate and use readily available evidence concerning Ms. Buenoano's impoverished and severely abusive background -- mitigating evidence without which no individualized sentencing determination could occur. Additionally, counsel failed to inquire into Ms. Buenoano's mental health, either for purposes of guilt-innocence or for purposes of penalty. His

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[4] As more fully set out above, former defense counsel was operating under a classic conflict of interest: he entered into a contract with Ms. Buenoano for the rights to books/movies. This contract affected his representation of Ms. Buenoano. Materials discovered by post-conviction counsel reflect that trial counsel was ineffective in several areas, primarily in areas of omission, and in these proceedings Ms. Buenoano has submitted that the deficiencies were, at least in part, the result of the contract/conflict. Counsel's failure to pursue available mental health and other mitigation is but a glaring example. Indeed, little penalty phase investigation was undertaken in this case.

failure in this area precluded any consideration of important statutory and nonstatutory mitigation, and of significant evidence which could have been used to rebut aggravating factors. In short, substantial mitigating evidence was not investigated, and confidence in the outcome of these proceedings is undermined. See State v. Michael, 530 So. 2d at 930.

A. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT EVIDENCE CONCERNING MS. BUENOANO'S HISTORY

Trial counsel had a wealth of information available to him, but failed to investigate, develop, or present it. He received advice on how to prepare for capital sentencing (Motion to Vacate, App. 5), but did not follow up on the advice, and seemingly completely ignored it. There was no tactical reason for any of this. Counsel's omissions constituted prejudicially deficient performance.

Counsel should have known that Judy Buenoano had been adopted when she was a child (Motion to Vacate, App. 2); he should have known that she was separated from her family at a young age and was bounced around from foster home to foster home while she was growing up, from family to family, from orphanage to orphanage, as well as from state to state (Motion to Vacate, App. 3). He also should have known that her mother had died in 1946-47 in a sanatorium (Id.). Further, he had contact with one of her brothers, Gerald Welty, but never developed or presented mitigating evidence that Mr. Welty could have provided at the penalty phase (Motion to Vacate, App. 14). In his affidavit, Gerald Welty states:

> I have spoken to James Johnston a couple of times. I had called him to find out what was going on with my

> sister and to find out if I could help her in any way. He told me that I was going to be subpoenaed and the last that I heard, that the Court [hearing] was postponed.

(Id).

Gerald Welty explains that defense counsel only spoke to him a couple of times in a perfunctory manner. Defense counsel made no inquiries about Judy, her background, or her history. He apparently was unaware of the significance of the defendant's life to a capital jury's penalty phase assessment. Trial counsel's file also contained a newspaper article which reflected facts about Ms. Buenoano's background (Motion to Vacate, App. 4). The starting points for proper investigation were there, but counsel did nothing about them. The relevant, important, and available mitigation was not investigated, developed, or presented to the sentencers in this case. Counsel had information upon which to begin an investigation. But since he never undertook any reasonable investigation at all, he never recognized the value of the information that he had.

Further, defense counsel had contact with Ms. Buenoano's children, for example, James, who he himself had represented. He had James' name and address on a witness list. But he did little to develop mitigating evidence beyond the listing of names (Motion to Vacate, App. 5). Ms. Buenoano's daughter, Kimberly, attended the penalty phase on her own and counsel did call her at that hearing. During Kimberly's testimony she was asked only questions aimed at refuting allegations of prior bad acts. Nothing was done to develop the wealth of available, positive, mitigation which could have been presented. For example, had

Gerald Welty been asked about Ms. Buenoano's background, he would have testified to the following, among other important mitigating facts:

> My name is Gerald D. Welty and I live in Oklahoma City, Oklahoma. Judy Buenoano is my sister. I am the next to the youngest. I am two years older than Judy. When Judy was born, she was named Anna Lou Welty.
>
> The best that I can recall about my childhood is that my mother was in bed sick most of the time. None of my brothers and sister grew up together nor where we ever together as a family. Since before Anna was born, my father was never around and my mom was sick.
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> My father, Jessie Otto Welty, was injured in World War 11. Even when he got back to the states, he was in the hospital and could not be with his family. His injuries had crippled him.
>
> My mother, Mary Welty, finally died from tuberculous in **1946** or **47**. Our family was broken up and we were sent to different places. Anna went to our grandparents, Wayne, my oldest brother, went in the military. J.W. and I had to go to an orphanage because there weren't any relatives that could take us in. The courts decided that our father could not take care of us. That was the last time I saw Anna for about four years and over the next ten years, I barely ever saw my father.
>
> Anna grew up without love or compassion. No one in our family ever saw love. At most, we would get hugs. When our grandparents took on the task of raising Anna, they had already raised their own family and were not ready to raise another infant. They did the best they could, but they were not able to do family things together. They didn't go on picnics or go the park together.
>
> I would hear about Anna from different people over the years. She was moved around quite a bit to live with different people. I heard that she had lived with the Pursley's for awhile and finally ended up living with dad when he remarried in Roswell, New Mexico.
>
> I heard that when Anna lived with dad and Willma that conditions were not great for her. Dad still could not work because of his injuries and Willma had two or three of her own kids living there. There was never much money and they lived in a poor, run down trailer.

We were never a close knit family. We were never together enough to be a family. We grew up differently and each of us had different values.

Anna ended up having a child out of wedlock. She named him Michael and he turned out to be alot different then her other two children. He was never like a normal child. He slobbered alot, slurred his speech and didn't appear to be too bright. He would just run into walls or the couch because he couldn't figure out how not to. I thought that he had a severe learning disability. I was surprised to learn that Michael was accepted in the US Army.

I am aware of learning disabilities with children. I have five children and one of my daughters has a learning disability similar to Michael's.

I was shocked to hear about Anna being charged with killing Michael. All of her children were well behaved and minded adults when I would see them. It doesn't make sense that she would try to hurt them.

I have spoken to James Johnston a couple of times. I had called him to find out what was going on with my sister and to find out if I could help her in any way. He told me that I was going to be subpoenaed and the last that I heard, that the court was postponed.

The only questions Mr. Johnston asked me about my sister were the names of her immediate family. He never asked about her background or anything else about her growing up. I would have told him everything he wanted to know and testified if he needed me.

If the court needs me now, I would do what I could to help my sister.

(Motion to Vacate, App. **14,** Affidavit of Gerald D. Welty).

Judy's father, Jessie Otto Welty, who was contacted by an agent from Alcohol, Tobacco and Firearms, but not by Ms. Buenoano's defense attorney, would have been able to provide even more insight into Judy's life. Mr. Welty, now **81** years old, remembers his daughter's early life:

My name is Jessie Otto Welty. I am 81 years old and I am Judy Buenoano's father. She was born on April **4, 1943,** and was named Anna Lou Welty.

Anna has always had a hard life. She was the

fourth of four children and was born right before I went to Germany with the US Army. In Germany I was seriously injured from a German artillery shell. A shell hit near me and I had shrapnel in my back and legs. A piece of shrapnel punctured my lungs and has caused me a lot of trouble throughout my life.

I was not able to help my wife, Mary, raise our four children. Even when Mary started having health problems, I was not able to be there to help with raising the children. Mary was sick in bed most of the time. I do not know what happened with the children after I left for Germany and Mary was sick all the time. In 1946, Mary, died from tuberculosis. I still could not tend to my four children after their mother died.

Mary's brother, Albert Northam, went to the courts and had my children taken away from me. My oldest son, Wayne, went into the service. J.W. and Gerald went into an orphanage and Anna went to her grandparents house. Her grandparents had already raised a family and were in their 60s. There wasn't any other choice besides the orphanage.

For awhile, a family named Pursley took Anna in. One of them died after a month and Anna had to go back to her grandmother's.

When Anna was about nine, one of her grandparents died and Anna came to live with me. By then I was remarried and lived in Roswell, New Mexico. It was rough for us. I wasn't able to work and my wife, Willma, worked at Woolworth's. She had a couple of children from her previous marriage living with her. We lived in a small trailer and just tried to make ends meet. We did the best we could with what we had.

I had problems with my nerves and had a condition where they had to operate on my head and clip off a couple of nerves. I have lost all feeling on one side of my face.

In the past twenty five years, I have seen Anna only twice. We have never been a close family. Mary was sick all the time, so Anna never knew love from her mother. I think the war and both her mom and I having medical conditions didn't give her much of a chance to be close to anyone.

I think that this made Anna have some of her own problems. She would make her own situation sound better than it was. We knew that Mike was in a mental hospital, but Anna would say that he was in the military. She told everyone that she was going to be

an attorney, but no one believed her.

I never spoke to Anna's trial attorney about her. The only person that I have ever spoke to before was an agent from Alcohol, Tobacco and Firearms had asked me about Anna's background at the time that she was on trial. I answered all of his questions. Just as I would have answered any question that Anna's attorney had for me. If it would have helped, I would have come to Florida and talked to the courts when she got in trouble.

(Motion to Vacate, App. 15, Affidavit of Jessie Otto Welty).

Also, Jessie's wife could also have provided valuable information:

My name is Billie Jean Welty. I have been married to Judy Buenoano's father, Jessie Otto Welty, for twenty-five years. Her family calls her Anna Lou.

I have seen Anna off-and-on over the years. She has had the hardest life of any person that I know. Her father and brothers have talked about her alot and how hard a life she has had.

Anna never had a chance for anything good to happen in her life. Instead of love and caring from her mother, Anna was born to a mother who was more often sick than not. After a long illness, Anna's mother, Mary, died in 1946.

Her father was disabled from the war and could not take care of Anna or her older brothers. After a long illness, Annals mother, Mary, died in 1946. Her family was split up then because there wasn't anyone to care for the children. Anna went to her grandparent's and her brothers went to an orphanage.

Anna spent her whole life going from one family to another. Never long enough for her to feel that she belonged to a family. Anna has never been able to have any close ties to anyone while she was growing up.

You can see in her that the way she was brought up has effected her view of life and caused her problems. Anna would talk about her life, and everyone knew that she would say things and make them sound better than they were. I remember her talking about her son, Michael. She would say that Michael was away in school, but we all knew that he was in a mental hospital. She would even say that Michael had a high IQ. It was obvious that Michael was slow, and had mental problems.

> No one has ever before asked me about Anna. I would have cooperated in anyway that I could to help Anna.

(Motion to Vacate, App. 16, Affidavit of Billy Jean Welty).

Once the family was split apart, Anna lived with a series of families. Anna has memories of staying with the Reverend Cross family in Temple, Texas, and was told that they paid her father $500 to have her live with them. She has memories of wetting the bed and being beaten by a rubber hose while staying with the Cross' (Motion to Vacate, App. 6, Psychological Report).

It is unclear how it came about that Anna went to live with the Pursley family. Mr. Welty just recalls that Anna lived with the Pursley's for a short time. Ms. Buenoano recalls that this placement was a legal adoption since she was renamed Judias Anna Pursley (Motion to Vacate, App. 6, Psychological Report). Here, Anna, now Judy, was subjected to bizarre abuse from the adoptive mother. The adoptive mother had Judy nurse at her breast when Judy was four to five years old. She sexually abused Judy and threatened to leave her in the dark woods alone to be "eaten" by the "devil" (Motion to Vacate, App. 6, Psychological Report).

Judy was removed from this home and went through a series of foster placements, most of which were abusive. Sexual abuse is reported in at least two of these homes (Motion to Vacate, App. 6, Psychological Report).

She then went to live with an aunt and uncle on her mother's side of the family, Betty and Karl Northam. "This was the most pleasurable and safe period of her life" (Motion to Vacate, App. 6, Psychological Report). When her Uncle Karl died, however, she

was returned to live with her maternal grandparents and lived with them until she was about ten years old.

At this time her father reclaimed her and took her to live with his new wife and her children. Ms. Buenoano recalls this as another horrible experience (Motion to Vacate, App. **6,** Psychological Report). The family was very poor and lived in a trailer on the poor section of town in Roswell, New Mexico. She was forced to steal food to help provide for the family. She would be beaten by her stepmother if she didn't bring home any food (Motion to Vacate, App. **6,** Psychological Report). Her stepmother would punish her by not allowing her to eat. Her father ignored the situation and ultimately Ms. Buenoano had to run away.

At her court appearance over the runaway charge, the judge gave her the option of going to the girls' home in Albuquerque, New Mexico, or going to the grandparents' home. She chose the girls' home. It is a telling statement of Ms. Buenoano's early life that she fondly remembers this home, because finally she was fed and clothed.

After high school, she was employed as a nurse's aide at Eastern Medical Center in Roswell, New Mexico. It was during this time that she became pregnant with Michael. Michael had serious problems and was institutionalized the majority of his life. He was born in **1961,** when Ms. Buenoano was just eighteen. Little more than a child herself, Ms. Buenoano was now faced with raising a handicapped child alone. Nevertheless, she accepted her responsibility.

Ms. Buenoano's life had not been an easy one. She never

knew love and compassion from her mother, or from anyone else. Such information is mitigating in its own right. When assessed by a mental health professional, the mitigating aspects of Ms. Buenoano's life become significant indeed.

The information was readily available through records, witnesses, and Ms. Buenoano herself. Defense counsel, however, did virtually nothing to investigate and develop these facts. As a result of this failure, neither the judge nor the jury had this information before them to consider in making their sentencing decision.

B. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT MENTAL HEALTH INFORMATION

Failing to present evidence of Ms. Buenoano's emotionally and physically impoverished background was one of counsel's primary failures at the penalty phase. This was a first degree murder case. Ms. Buenoano was on trial for her life, and defense counsel acknowledged his understanding that if she were convicted, she would "probably get the death penalty" (Motion to Vacate, App. 7; Proffer in Support of Motion for Evidentiary Hearing, App. 12).

Despite the fact that defense counsel's file is loaded with red flags which would have signalled effective counsel to the fact that a mental he lth evaluation of Ms. Buenoano would have been significant, defense counsel did nothing. Among the numerous indications that were ignored by defense counsel that Ms. Buenoano was not functioning on a normal level was a letter received in 1984 from Circuit Judge Lowrey explaining that he had received a letter from an acquaintance of Ms. Buenoano's

regarding Judy Buenoano. This letter explains that the writer is "very much inclined to believe Mrs. Buenoano is a paranoid schizophrenic" (Proffer, App. 6). The letter goes on to detail the witness' reasoning. Counsel did nothing with such information.

The file also contains a note presumably written by defense counsel, that "[w]e need a witness to explain that Judy tends to exaggeate [sic] things 'Her income' 'Her credentials' 'Mike is a dead man' etc." (Proffer, App. 7). But nothing was done. The file also contains many of these exaggerations: Ms. Buenoano told an insurance adjuster that she had a doctor's degree in nursing, a B.S. in anatomy and sociology as well as an M.S. degree, and was working on her M.D. degree (Proffer, App. 8). She told someone with the Army that she held a Ph.D in psychology (Proffer, App. 9). She represented herself as a clinical doctor in a nursing home (Proffer, App. 10). She repeatedly held herself out as an individual who was independently wealthy, and did not need to work (Proffer, App. 11), although she was not. This was all grandiose, and reflective of Ms. Buenoano's bizarre thoughts and representations. Counsel knew it. But nothing was done about it.

These types of stories are classic symptoms of the grandiosity of a person suffering from psychological disturbances, and reasonably effective defense counsel would have recognized this. However, no mental health mitigating evidence was developed or presented, although such evidence was available, and no mental health evidence was used to rebut the aggravating

factors urged by the State.

Dr. Pat Fleming, whose report is appended to the Motion to Vacate at App. 6, evaluated Ms. Buenoano. Her report reflects the type of mental health mitigation which was available at the time of Ms. Buenoano's capital sentencing proceedings, but which defense counsel failed to obtain. In her report, Dr. Fleming finds that Ms. Buenoano suffers from significant psychological problems:

> Judy Buenoano was evaluated for a total of seven and a half hours. Her hair is in a braid to her waist and was clean. Grooming was adequate. Motor activity was significant, characterized by excessive restlessness and physical agitation. She had difficulty sitting still during the examination, and continually moved her leg. She had skin lesions on both arms and band aids to cover other sores. She picked at these when she became agitated. Eye contact was adequate but she would look away frequently. Speech was significant with accelerated rate. Her speech was not difficult to understand, although rambling, but she went into minute detail about every happening. She remembered dates but had problems with relating the sequence of events. Ms. Buenoano became agitated when she was failing on the testing. She would put forth greater effort and become disorganized and confused. She did not give up easily and was never resistive, stubborn or negative. Generally this client was anxious and depressed, but tended to deny feelings of hopelessness.
>
> Test Results
>
> Ms. Buenoano was oriented and understood time and date. She understood the legal process and the consequences of the sentences imposed. Attention span was poor with impairment of ability to maintain attention and stay on the topic of conversation. Her memory for details was better than her ability to sequence events and historical information was confused. Her fund of general knowledge was adequate. Thought processes were fragmented, disjointed and vague. Her mood swings were frequent, ranging from crying to laughter. She attempted to control her emotions however, and denied delusions or hallucinations. Periodically the affect became inappropriate to the discussion.

This Defendant reports difficulty sleeping. She fidgeted frequently throughout testing. She reports and demonstrated difficulty concentrating. Speech was pressured with frequent flight of ideas. No recurrent panic attacks were reported nor irrational fears. She does have recurrent and intrusive recollections of the abuse as a child.

The Wechsler Adult Intelligence Scale - Revised (WAIS-R) administered **1-6-89** placed her in the average range of intellectual functioning. (Full Scale IQ **98)**. The Verbal IQ was **101** and the Performance IQ was **93**. There was a significant difference between those tests that call for a high degree of concentration or which were timed. The second WAIS-R administered **6-6-89** also placed this Defendant in the average range of mental ability. Considerable scatter on both the Verbal and Performance tasks was also noted.

Ms. Buenoano performed in the brain damaged range on tests used to diagnose brain damage. On the Halstead-Reitan neuropsychological test battery she received an Impairment Index of .8, indicating severe impairment. Generally, her pattern of test scores indicates right hemisphere impairment consistent with the split in her verbal and performance IQ scores. In addition, she showed a deficit in grip strength on the left side, once again indicating right hemisphere damage. On the TPT indicators of right hemisphere problems were also apparent, as there was not adequate improvement from her right hand to her left.

The Sensory-Perceptual exam reveals no gross deficits, and she performed normally in tactile tests and finger-tip number writing. She performed within normal limits on the verbal portions of the Aphasia screening test, with the exception of some mild dysarthria. Ms. Buenoano's drawings are also characteristic of persons with right hemisphere cerebral damage. The deficit in visual-spatial relationships was demonstrated most clearly on the Aphasia screening test in the drawing of the cross, but she also made errors in drawing the square and triangle by overshooting lines and compensating as she proceeded to close the figure.

Although the right hemisphere seems to be more impaired there are also indicators of diffuse brain damage. Her poor performance on the Categories test of the Halstead Reitan and her performance on the Wisconsin Card Sorting Test are indicative of general cortical dysfunction. She is unable to abstract, plan, or learn from experience. She is organically impaired.

SUMMARY

These results reflect a number of deficits that would be expected to influence Ms. Buenoano's level of functioning and actions. In addition, her history suggests that emotional and psychological factors interact with the deficits to result in a poorer overall adjustment than would be predicted on the basis of the neuropsychological test results alone.

In addition, Ms. Buenoano's history indicates serious emotional disorder. Her hospital records reflect a hysterical conversion reaction. This is congruent with the MMPI that was administered in 1989. In addition, she has been diagnosed in the past as having a "schizoid" personality disorder. According to the diagnostic criteria in DSM IIIR for schizoid personality disorder, Ms. Buenoano's behavior fits this pattern. The criteria notes a "pervasive pattern of indifference to social relationship and a restricted range of emotional experience and expression, beginning by early adulthood and present in a variety of contexts." (DSM III R) As substantiated by previous behavior and in other psychological evaluations, this defendant has a long history of difficulty in maintaining close relationships. She shows a constricted affect and seems indifferent to the praise and criticism of others. Ms. Buenoano has consistent difficulty perceiving or understanding the emotions of others. There is a continued lack of pleasure derived from interpersonal relationships since early childhood. The history of abuse appears to have impaired her ability for attachment. Characteristic of the schizoid-paranoid personality disorder is a history of inadequate or unreliable mothering, leading to a sense of isolation and fear of being overwhelmed by others. The social isolation is often accompanied in this personality disorder by suspiciousness or eccentricity in behavior or speech. The schizoid personality disorders are also often accompanied by other personality disorders as is true in the case of Ms. Buenoano. Her Rorschach responses were described as having a "vague and yet pervasive quality that is characteristic of schizoids." It was noted that she may be suffering from the effects of "crippling emotional turmoil." Her present behavior is supportive of this history.

She has voiced delusions concerning her past employment and has noted that she owned 35 beauty parlors and told people she was a doctor. She has also reported to people that she is the great-granddaughter of Geronimo. Other records indicate that "she is not facing reality much of the time." Family members have also noted that she frequently held exaggerated ideas

or beliefs in accomplishments that they knew were not true.

Ms. Buenoano has suspected seizure activity, another indication of cerebral dysfunction. Both her scores on the Halstead-Reitan and her history are supportive of brain damage. She had an abnormal EEG in **1988** and has previously been reported to have had seizures as early as **1971.** A seizure is also noted in her prison medical records.

Ms. Buenoano had an abusive childhood that set the stage for a number of psychological problems, lack of trust, fragmentation, lack of boundaries, and inability to establish appropriate interpersonal relationships.

Ms. Buenoano conducts herself appropriately in routine everyday situations provided that emotional factors do not interfere. She lacks good basic conceptual skills. She has difficulty integrating and rationally dealing with information that requires planning, organizing, and decision making. Her problem solving skills are variable and she is perseverative in her thinking. She has difficulty following prescribed sequential procedures with efficiency and does not do well on tasks that require close attention to fine details over an extended period of time. She probably made more concentration related errors in her previous life activities since she had difficulty in the test situation.

Ms. Buenoano communicates well enough for routine social discussion. She has trouble staying on track and concentrating enough to draw adequate conclusions.

In conclusion, Ms. Buenoano has sufficient cerebral dysfunction to significantly disrupt her thought processes. Combined with the significant psychological problems she is rendered quite incapable of making adequate judgments.

Ms. Buenoano is clear in her denial of involvement with the deaths with which she is charged. She believes that she is sacrificing herself for her children.

Diagnostic Impressions

Ms. Buenoano meets the criteria for Organic Personality Syndrome as outlined in the Diagnostic and Statistical Manual of Mental Disorders - Revised (DSM III R). According to this criteria the essential feature of this syndrome is a persistent personality disturbance, either lifelong or representing a change or accentuation of a previous characteristic trait that

is due to an organic factor. Affective instability, recurrent outbursts of aggression or rage, markedly impaired social judgment, marked apathy and indifference, or suspiciousness or paranoid ideation are common. Ms. Buenoano's past history and present test results indicate the instability, outbursts of aggression, impaired social judgment and suspiciousness. Other impairments that indicate an organic basis for her behavior include impaired judgment, constructional difficulty, inability to deal with interpersonal, family and job-related problems and issues.

Generalized Anxiety Disorder

Evidenced by motor tension, autonomic hyperactivity, vigilance and scanning.

Personality Disorders

Ms. Buenoano's schizoid personality disorder has been noted above. She also suffers from a paranoid personality disorder, as evidenced by her expectations of being exploited or harmed by others, her questioning the loyalty or trustworthiness of friends or associates, her perceptions of insult or slights, reluctance to confide in others because of unwarranted fear that the information will be used against her, and the fact that she is easily slighted and quick to react with anger.

Aggravating and Mitigating Circumstances

Ms. Buenoano has been under the influence of extreme mental and emotional disturbance most of her life. She has a long and detailed history of mental illness. Her erratic behavior, impulsive decision making, periodic manic behavior, and paranoia significantly interfered with her cognition and functioning. Her brain damage certainly affected her behavior. She intellectually knows the requirements of the law, but is unable to utilize this knowledge on a consistent basis. She frequently becomes disorganized and erratic. She would be able to compartmentalize her actions and deny the existence or be cognizant of the consequences.

Ms. Buenoano's natural mother died and she was abandoned by her father for extended periods of time. She was exposed to physical, psychological, and sexual abuse for extended periods of time. All of these events significantly affected her capacity to form relationships with those about her. During her formative years she had to be consistently on guard for impending danger and abuse. The poverty and lack of

essentials for survival had significant impact on her fear of deprivation. When she became close to deprivation of basic needs (in her view) she became frantic and near manic and was not able to function in a logical manner.

The presence of seizures and neurological impairment, as well as her diminished psychological make-up, should have been but never were examined methodically or carefully at the time of her trial.

Ms. Buenoano believes that she is innocent and her only stability is the thought that she is saving her children from harm. Previous examiners who saw Ms. Buenoano while incarcerated noted her impairments and recommended medication and other assistance. But Ms. Buenoano was not provided with assistance at the time of her trial, or at other times during her life when she was in need of such intervention. Her deficits are longstanding in nature, and existed at the time of the offense. The presence of seizure and psychological impairment should have been assessed. No effort was made to understand the etiology nor adequately assess mitigating circumstances relating to her mental health.

The availability of mental health mitigating factors in this case is not confirmed solely by Dr. Fleming's report. Unlike other capital inmates, evaluations prepared by the State's own employees at the Broward Correctional Institution confirm Ms. Buenoano's mental health impairments (See Motion to Vacate, App. 1). Her prior history and records, uninvestigated at the time of the original proceedings, are also consistent and reflect her impairments.

Dr. Fleming's account is also confirmed by Dr. Robert Phillips, an eminently qualified and credentialed forensic psychiatrist, who has also conducted an evaluation of Ms. Buenoano.

Dr. Phillips' account was presented below. Dr. Phillips explains that Ms. Buenoano is a woman of normal to low-normal intellectual functioning, who possesses concurrent deficits in

adaptive functioning that frequently render her less effective in meeting the standards expected for her age, in areas such as social skills and responsibilities, communication, daily living skills, personal independence, and self sufficiency. In Dr. Phillips' professional medical judgment, the etiology of this severe social dysfunction may in part be attributed to a tumultuous childhood replete with physical and sexual abuse spanning six or more placements in foster or adoptive homes in three different states. The consequences of her unfortunate developmental history are clinically manifested on examination by a personality organization that is inflexible and maladaptive to stress; disabling in her capacity to work and deal with affection; exacerbated by interpersonal conflict and predisposing her to immature and regressive behavior. In addition, on his examination, Dr. Phillips noted that Ms. Buenoano presented psychological and educational evidence of cognitive dysfunction that may have profoundly impacted and contributed to her aberrant behavior. Further, Dr. Phillips explained that there is substantial historical and other evidence that Ms. Buenoano suffers from an organic brain syndrome secondary to significant alcohol and drug abuse. Concurrently, Dr. Phillips noted that there is further evidence of brain damage as documented by her abnormal findings on psychometric testing (e.g., Dr. Fleming's testing; the testing conducted by the mental health staff at the Broward Correctional facility, etc.) which raises questions of possible severe head trauma amidst her prior history of physical abuse and further compounding the diagnosis of organic brain syndrome. Ms. Buenoano also suffers from a significant

psychiatric disturbance of mood consistent with a diagnosis of bipolar disorder, or more commonly referred to in layman's language as manic/depression. This psychiatric disturbance has been known to be sufficiently severe as to cause marked impairment in functioning or social activities or relationships with others, or even to require hospitalization to prevent harm to self or others. Ms. Buenoano clearly suffers from the additional severe complicating disability of unfortunate life circumstances, having been raised in a socio-cultural environment that was disruptive and chaotic and that further compounded and detracted from her impaired mental capacity. She also features schizoid personality traits. Dr. Phillips further explains that when an individual has serious mental impairment such as brain damage as a result of head trauma, personality disorder as a result of significant developmental deprivation, and organic brain syndrome as a result of longstanding alcohol and drug abuse, and a psychiatric disorder, expectations of normative behavior vis-a-vis the general population pales as a result of a diminished mental capacity. Any of these clinical conditions, in and of themselves, show that Ms. Buenoano has been impaired and has a diminished mental capacity. Dr. Phillips explains that the clinical evidence of Ms. Buenoano's impairments is overwhelming. Dr. Phillips concluded that in his professional medical opinion as a physician licensed to practice medicine and specializing in the field of forensic psychiatry, he has found that Ms. Buenoano has a diminished mental capacity which would be considered a significant deviation from the capacity held by a person of

normal-average mental ability and character organization. Additionally, Dr. Phillips has noted within a reasonable degree of medical certainty, that the capacity of the defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of law was substantially impaired due to her diminished mental capacity. Ms. Buenoano, Dr. Phillips explained, has also suffered from extreme mental and emotional deficits, and that these deficits affected her functioning during her life and at the time of the offense.

Substantial mitigation, both statutory and nonstatutory, was available, and should have been presented. However, due to the ineffectiveness of counsel, it did not reach the jury and judge.

C. OTHER OMISSIONS AND FAILURES

Counsel attempted to present the testimony of Michael L. Radelet, Assoc. Professor of Sociology at the University of Florida. Professor Radelet recounted his interaction with counsel in an affidavit (See Motion to Vacate, App. **5**). He relays that he was contacted by Mr. Johnston on or about November **14, 1985.**

> . . . Mr. Johnston's questions indicated that he needed some quick training in how to conduct a penalty phase. I stressed the importance of documenting good behavior while incarcerated, doing a complete life history, and developing as much as possible any mental health issues or character traits that might be sued as mitigating factors, among other things. I also indicated my willingness to help with these tasks (but was never asked for assistance). Realizing how badly he needed help, I gave him the name of an experienced capital litigator, and assumed that that was the end of my involvement in the case.
>
> On Friday, November 22, I received another call from Mr. Johnston. He asked me to go to Orlando the following Monday to testify in the penalty phase of Ms. Buenoano's trial. Our conversation at that time was

very brief. However, we agreed to meet in Gainesville two days thereafter -- sunday -- as he passed through town on his way to Orlando from his home in Pensacola. That meeting would give us the opportunity to discuss the Innocents Project so he could be familiar with it and be prepared to discuss problems with admissibility.

But that meeting never took place. On Sunday, November 24, 1985, I received a call from Mr. Johnston's wife, saying that he would be unable to stop while passing through Gainesville. Instead, she asked if I could meet them over lunch the next day in Orlando.

On November 25, 1985, I did go to Orlando, and ate with Mr. and Mrs. Johnston during the lunch break. The lunch break was late, about 1:30, and both were quite tired. We talked briefly about the Innocents Project, and I urged him to be prepared in case there were questions about admissibility. He asked me if there were other areas on which I could testify, and I told him that in the past I had testified on a wide range of death penalty issues, including deterrence and future nondangerousness.

I was the first witness called after the lunch break, at approximately 2:45. After I gave my credentials, the prosecutor objected to the testimony that I was about to give, and the judge ruled that I could not testify about the Innocents Project. However, I did testify on the issue of future nondangerousness. Since Ms. Buenoano is a female, older than most convicted murderers, and had been convicting of killing family members rather than strangers (among other things), she has a very low probability of future dangerous behavior compared to others convicted of murder. In fact, my reading of the literature on recidivism indicates that she is the type who in all probability could adjust very satisfactorily to prison life.

Nonetheless, I felt very unprepared to buttress these claims the way that they should have been. Had Mr. Johnston and I prepared this testimony, I would have been able to show the court that concerns about future dangerousness are a major -- if not the primary -- reason why jurors vote for death over long imprisonment. I also could have cited specific studies in the literature that substantiated the fact that the probability of future dangerousness by Ms. Buenoano, given incarceration, was near to zero and lower than almost all others convicted of first-degree murder. I also could have reviewed records that would help make such predictions more accurate (e.g., records of prior arrests, mental hospitalizations, alcohol or drug

abuse, if any). As it was, the only specific information I had about Ms. Buenoano came to me from Mr. Johnston over lunch.

Prior to this case, I had testified in five capital cases. In the only two in which it was attempted, I was able to testify in front of a jury about the Innocents Project.

After I left the courtroom, I was so concerned about the lack of preparation in this case that within a few days I wrote a note to my file about my participation. I had not been adequately prepared to testify. Given that we know that jurors consider future dangerousness as a major reason to vote for condemnation, I was disturbed because I felt that had I been better prepared, it could have affected the sentence. Had the jury been better informed about the facts of this specific case as they relate to future nondangerousness, I believe there is a strong possibility they would have voted for life imprisonment.

I have now testified in 25 capital cases, and never again have I felt or been so unprepared. In only one other of these cases was I as concerned about the effectiveness of the attorney's representation as I was in the Buenoano case.

The errors and omissions of counsel at issue in this case can only be properly addressed at an evidentiary hearing. See Heiney, supra; O'Callaghan, supra. However, the circuit court denied any type of evidentiary hearing.

It is averred that these errors and omissions were not the product of a tactic or strategy, and involved a lack of investigation and preparation. The failures to object to the various constitutional and other errors discussed in the motion to vacate and herein, and the failures to properly and fully litigate many of the constitutional issues involved in this action were also averred as grounds in support of this claim. An evidentiary hearing is appropriate.

ARGUMENT IV

MS. BUENOANO WAS DENIED HER FUNDAMENTAL FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER INCLUDED OFFENSES OF PREMEDITATED MURDER, AND DEFENSE COUNSEL'S AND THE COURT'S FAILURE TO GIVE MS. BUENOANO A CHOICE BETWEEN WAIVING THE EXPIRED STATUTE OF LIMITATIONS AND HAVING THE BENEFIT OF THE LESSER INCLUDED OFFENSE INSTRUCTIONS OR ASSERTING THE STATUTE OF LIMITATIONS ON THE LESSER INCLUDED OFFENSES RENDERED THESE PROCEEDINGS FUNDAMENTALLY UNFAIR AND UNRELIABLE.

The jury in this case was never instructed on the lesser included offenses of premeditated murder. Ms. Buenoano did not personally waive the statute of limitations on the lesser included offenses. Neither the trial court nor defense counsel gave Ms. Buenoano the choice of waiving the statute of limitations and receiving the benefit of the lesser included offenses or asserting the statute of limitations. In this regard, counsel's performance was prejudicially deficient, and an evidentiary hearing is required on the question of ineffective assistance of counsel. Counsel's failure in this regard may well have been the result of the contract/conflict discussed earlier, for an all-or-nothing capital case involving a female defendant surely makes a book/movie more attractive than a case in which the defendant is convicted of a lesser, non-capital offense.

A capital defendant is constitutionally entitled to lesser included offense instructions. See Beck v. Alabama, 447 U.S. 625 (1980); Keeble v. United States, 412 U.S. 205 (1973). In Beck, the Supreme Court held that a death sentence may not be constitutionally imposed after a jury verdict of guilt of a capital offense if the jury was not permitted to consider a verdict of guilt on a lesser included offense:

> [The lesser included offense] safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments . . .
>
> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

In Spaziano v. Florida, 468 U.S. 447 (1984), the Supreme Court held that a defendant must be given the choice whether to waive a statute of limitations and receive the benefit of lesser included offense instructions or assert the statute of limitations:

> The Court in Beck recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In Beck, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. Id., at 643, 100 S.Ct., at 2392. . . .
>
> We reaffirm our commitment to the demands of reliability in decisions involving death and to the defendant's right to the benefit of a lesser included offense instruction that may reduce the risk of unwarranted capital convictions. But we are unwilling to close our eyes to the social cost of petitioner's

proposed rule. Beck does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if in reality there is no choice. Such a rule not only would undermine the public's confidence in the criminal justice system, but it also would do a serious disservice to the goal of rationality on which the Beck rule is based.

If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether Beck requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

. . . In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so.[6] Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

In footnote 6 the Supreme Court wrote:

There is no doubt about petitioner's understanding of the implications of his refusal to waive the statute of limitations. The following colloquy occurred in open court:

"THE COURT: Do you understand that while the statute of limitations has run on the Court submitting to the jury lesser included verdicts representing the charges of second-degree murder and third-degree murder, manslaughter, that you who has the benefit of the statute of limitations can waive that benefit and, of course--and then have the Court submit the case to the jury on the first-degree, second-degree, third-degree and manslaughter.

"If you don't waive the statute of limitations, then the Court would submit to the jury only on the one charge, the main charge, which is murder in the first degree, and the sentencing alternatives are as [defense counsel] stated them. Do you understand that?

"MR. SPAZIANO: Yes, your Honor.

"THE COURT: Are you sure?

"MR. SPAZIANO: I understand what I'm waiving. I was brought here on first-degree murder, and I figure if I'm guilty of this, I should be killed." Tr. 753-754.

No such procedure was followed in this case. Neither the trial court, on the record, nor defense counsel, on or off the record, ever gave Ms. Buenoano the option. An evidentiary hearing is more than proper.

In Harris v. State, 438 So.2d 787 (Fla. 1983), this Court held that the right to waive or not waive is personal to the defendant. The record here is devoid of any evidence that Ms. Buenoano was given these constitutionally mandated options. There are thus no "files and records" conclusively showing that Ms. Buenoano was given the option, and thus that she is entitled to no relief. An evidentiary hearing is required, Lemon v. State, 498 So. 2d 923 (Fla. 1986); Harich v. State, 542 So. 2d 980 (Fla. 1989), for the claim is by no means rebutted and the failure to give Ms. Buenoano the option renders her conviction and sentence of death unreliable.

This Court, in Harris, supra, set forth the standard pursuant to which the right to jury instructions on lesser included offenses can be waived or not waived by a capital defendant. However, this Court there held that the waiver must be expressly made by the capital defendant himself or herself -- it is a personal right of the defendant, one which cannot be ascribed to counsel:

> But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the

defendant, and the record must reflect that it was knowingly and intelligently made.

Id. at 797. Here, the record reflects absolutely no waiver.

The record does not reflect that Ms. Buenoano knowingly and intelligently waived the statute of limitations or the lesser included offense instructions. In Spaziano, the Court held that the capital defendant must make a knowing waiver of the statute of limitations, and relied on the defendant's on-the-record waiver. Ms. Buenoano was entitled to have the jury instructed on the lesser included offenses of premeditated murder. The record includes evidence which would support a jury conviction on a lesser included offense. For example, there was no direct evidence that Ms. Buenoano premeditated the murder. The record is devoid of any confession that the murder was premeditated. The State did produce two witnesses who alleged that Ms. Buenoano told them she had killed her husband. Neither of these two witnesses testified that she had planned the murder, only that the victim died. The jury very well could have found this evidence sufficient to find her guilty of second degree murder or manslaughter as opposed to premeditated murder. The jury could have found that this evidence fit squarely under the second degree murder instruction:

MURDER - SECOND DEGREE
F.S. 782.04(2)

Before you can find the defendant guilty of Second Degree Murder, the State must prove the following three elements beyond a reasonable doubt:

Elements

1. (Victim) is dead.
2. The death was caused by the criminal act or agency of (defendant).

3. There was an unlawful killing of (victim) by an act imminently dangerous to another and evincing a depraved mind regardless of human life.

Definition

An act is one "imminently dangerous to another and evincing a depraved mind regardless of human life" if it is an act or series of facts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and

2. is done from ill will, hatred, spite or an evil intent, and

3. is of such a nature that the act itself indicates an indifference to human life.

In order to convict of Second Degree Murder, it is not necessary for the State to prove the defendant had a premeditated intent to cause death.

(Pattern Jury Instructions)

The jury could have reasonably found that Ms. Buenoano was unhappy with her marriage and administered the poison only with the intent to make Goodyear sick, but not die. Five experts testified to the level of arsenic found in the body of James Goodyear and how much arsenic was required to cause death. The testimony was clearly in conflict. The jury very well could have believed that Goodyear was not given enough poison to cause death. The jury was instructed that they could believe or disbelieve all or any part of an expert's testimony (R. 1459). This Court noted that no expert stated with reasonable certainty that Goodyear's death was caused by arsenic poisoning. Buenoano v. State, 527 So. 2d 194 (Fla. 1988). The jury could have found that the poisoning contributed to his death, but still declined

to convict Ms. Buenoano of first degree murder.

During closing argument the State felt compelled to argue the credibility of its "intent" witnesses. Defense counsel attacked the credibility of the State's "intent" witnesses. This was not an "open and shut" case. The State relied heavily on "Williams Rule" evidence. The majority of the evidence was circumstantial in nature. The expert testimony was conflicting. The witnesses' ability to recall events of fourteen years past was clearly in question. There was no evidence that Ms. Buenoano purchased or possessed arsenic in 1971. There was no evidence that Ms. Buenoano took out insurance policies on Mr. Goodyear.

It is obvious the jury did not find this to be an "open and shut" case. The jury deliberated for more than ten hours before rendering a verdict. It cannot be said beyond a reasonable doubt that the jury could not have found Ms. Buenoano guilty of a lesser included offense. For instance, the State presented evidence that Ms. Buenoano and Mr. Goodyear were not a happily married couple, and as noted there is no evidence that Ms. Buenoano attempted to take out insurance on Mr. Goodyear. Ms. Buenoano could have convinced the jury through evidence and argument that even if the jury believed she administered poison to Mr. Goodyear that she only wanted to hurt him in retaliation for their marital problems, as this is evidence of a mental state less than that required for premeditated murder.

It is common practice in this state for attorneys in capital cases to prepare and argue cases with the goal of obtaining a conviction on a lesser included offense as opposed to attempting

to obtain an acquittal on everything. Indeed, in this case, counsel himself noted -- both on and off the record (see Motion to Vacate, App. 7) -- the difficulty of a full acquittal once the court rendered its ruling on the "Williams Rule" evidence.

Ms. Buenoano was forced to litigate her case on an "all or nothing" basis. Counsel was ineffective in failing to give his client a choice, and the court was remiss in not making an on-the-record inquiry of the defendant. This case involves the very situation which the Supreme Court held unconstitutional in Beck v. Alabama, 447 U.S. 625 (1980). Ms. Buenoano was never given the choice of whether to waive the statute of limitations or not, as mandated by Spaziano v. Florida and Harris v. State. The record is devoid of any personal intelligent and knowing waiver by Ms. Buenoano of the lesser included offense instructions, see Harris v. State, supra, while the record does contain evidence upon which a conviction of a lesser included offense could have been based. The denial of Ms. Buenoano's constitutional right to have the jury instructed on lesser included offenses, and the possibility of a lesser offense conviction, is the prejudice.

Had Ms. Buenoano not been effectively precluded from the lesser included offense instructions her trial attorney could have conducted the trial much differently. Alternative theories of defense could have been pursued. Ms. Buenoano could have attempted to show that if in fact she did poison Mr. Goodyear, her motivation was only to hurt him, or that it was a mistake or accident, or that it was because he was an abusive husband or because her mental state was diminished. But she never even had the choice.

Ms. Buenoano's conviction for first degree murder was unconstitutionally obtained. The trial court should have given her the choice of intelligently and knowingly waiving the statute of limitations on the record. Trial counsel rendered ineffective assistance in not ensuring that Ms. Buenoano was given the choice. Ms. Buenoano would have waived the statute of limitations, and requested the instructions, but for counsel's prejudicially deficient performance. Trial counsel's ineffectiveness was compounded by his failure to raise the issue on direct appeal.

An evidentiary hearing is plainly warranted on this claim.

ARGUMENT V

THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MS. BUENOANO'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the judicial sentencing, which was conducted on November 26, 1985, the judge recited that Ms. Buenoano had previously been adjudicated guilty of first degree murder. He then stated "It is the sentence of the law and judgment of this Court that you, Judy A. Buenoano . . . be put to death by means of electrocution as provided by Florida Statute 922.10." No findings of fact were included in this recitation. The order entered on that date (R. 2231-33) was identical to what the judge had read into the record (R. 1744-46). Not until January 29, 1986, did the court enter an Order of Factual Finding Supporting the Imposition of the Death Penalty (R. 2342-48). This was clearly not the contemporaneous and independent weighing by the court that the applicable statutory and constitutional standards require.

Written findings of fact in support of a death sentence are required. Fla. Stat. section 921.141; Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Florida law requires the sentencing court to orally state specific reasons for the imposition of the death penalty on the record. The sentencing court, however, failed to properly state its specific reasons justifying the death sentence on the record. Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 22d 1257 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this Court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. The court has therefore consistently held that the trial judge must engage in an independent and reasoned contemporaneous (with the sentencing) process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case. Patterson v. State, 513 so. 2d 1257 (Fla. 1987).

In this case the trial court did not prepare findings until well after the sentencing proceeding was concluded. The sentencing had occurred less than three hours after the jury had been excused from the penalty phase (R. 1735) and presumably the judge's original sentencing order was prepared during that recess. In fact, the record here reflects that no

contemporaneous independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. The court made no mention of any aggravating or mitigating factors until some two months later when findings to support the death sentence were prepared. This was clearly not a "meaningful weighing" as required by Florida law.[5]

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the eighth

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[5]This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. **See** Nibert v. State, 508 So. 2d 1 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained the importance of there being a record upon which a reviewing court can conclude that the trial court's sentence was based on a "reasoned judgment" in light of the totality of the circumstances:

> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30. The Van Royal judge prepared his sentencing order months after sentencing, just as the trial court in Ms. Buenoano's case.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court was presented with a similar question. A resentencing was ordered there, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances.

amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georsia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson V. North Carolina, 428 U.S. 280 (1976).

The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon, 283 So. 2d 1 (1973). As this Court recently stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State V. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal, 497 So. 2d at 628. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors. Id.

Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989). This is consistent with the United States Supreme Court's recent holding in a case ruled to be retroactive on its face that the sentencer must make a "reasoned moral response" to the evidence when deciding whether to impose death. Penry v. Lvnauah, 109 S. Ct. 2934 (1989).

Here, the trial court made findings merely to "memorialize its decision." No findings were ever an integral part of the court's initial decision. Ms. Buenoano's sentencing was, as a

result, not individualized and reliable, for there was no contemporaneous independent weighing. Here, the sentencing court never made findings of fact to support the sentence at all until months later when it "memorialized" its decision through a writing that was not "timely filed" so as to show the "sentence was based on a well-reasoned application of the aggravating and mitigating factors." Rhodes, supra. A trial court cannot impose a death sentence without properly weighing aggravating and mitigating factors. Magwood V. Smith, **791** F.2d 1438, **1449** (11th Cir. **1986).**

This claim was denied by the circuit court on two bases. First, the circuit court held that the error was not objected to at trial, nor was it raised on appeal. Second, the circuit court asserted (at the State's invitation) that the Court "had given careful consideration to the aggravating and mitigating circumstances and had weighed the same in reaching a determination that BUENOANO should be sentenced to death" (Order, p. **13).** The second of these bases is, of course, based on non-record facts. Ms. Buenoano, however, was never allowed the benefit of an evidentiary hearing at which she could contest these facts. Even so, there is nothing here, even in the lower court's recent order, to indicate that a reasoned weighing of the applicable aggravating and mitigating factors took place, even today.

As to the first basis, it shows why an evidentiary hearing was required on Ms. Buenoano's claim of ineffective assistance of counsel. Trial and appellate counsel were one and the same. As alleged in these proceedings, counsel's performance was less than

effective in many respects. Counsel's failures to object, as well as his failures to urge the issue on appeal, were presented as specific instances of prejudicially deficient performance, for which there was no tactic or strategy. This is a claim which goes to the heart of the fundamental fairness of Ms. Buenoano's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. As the claim involves an allegation of prejudicially deficient performance by counsel, at the sentencing and on direct appeal, it requires an evidentiary hearing for proper resolution.

No tactical decision can be ascribed to counsel's failure to present the issue. An evidentiary hearing is required.

ARGUMENT VI

DURING THE COURSE OF MS. BUENOANO'S TRIAL AND SENTENCING PROCEEDINGS THE PROSECUTOR AND COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MS. BUENOANO WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The jury at Ms. Buenoano's trial was repeatedly admonished and instructed by the trial court that feelings of mercy or sympathy could play no part in their deliberations as to Ms. Buenoano's ultimate fate. Beginning with voir dire, the State also made it plain that considerations of mercy and sympathy were to have no part in the proceedings. The State specifically questioned the venire as to whether any of them would feel sympathetic for the defendant because she was a woman (R. 66-67).

The court then emphasized these notions by instructing the jury that feelings of sympathy were not to be discussed or to play a part in deliberations (R. 214). Other such comments were made at trial and sentencing. The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase. In fact, just prior to the guilt phase determination the court instructed:

> Eight, feelings of prejudice, bias, or sympathy are not legally reasonable doubts. They should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

(R. 1453).

In Wilson v. Kemp, 777 F.2d 621, **624** (11th Cir. **1985),** the court found that statements which may mislead the jury into believing personal feelings of mercy or sympathy for the defendant must be cast aside, violate the eighth amendment. Requesting the sentencers to dispel any sympathy they have had towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment, Eddings v. Oklahoma, **455** U.S. 104 **(1982);** Lockett v. Ohio, 438 U.S. **586 (1978),** and in doing so, they may not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense as mitigation. Id. An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown,

479 U.S. 538, 107 S. Ct. 837 (1987)(O'Connor, J., concurring).

> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understandins. and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand. and to relate to. the defendant in normal human terms. A long line of Supreme Court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.
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> * * *
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d 1545, 1554-57 (10th Cir. 1988)(in banc) (emphasis added).[6]

The Supreme Court also recently held in a case declared to be retroactive on its face that a capital sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry V. Lynaugh, 109 S. Ct. 2934, 2947 (1989). A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 109

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[6] In Parks, the Tenth Circuit cited numerous United States Supreme Court cases wherein that Court has discussed the capital defendant's constitutional right to an individualized appeal for compassion, or mercy. These cases include Gress v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Eddings V. Georgia, 455 U.S. 104 (1982); Caldwell v. Mississippi, 472 U.S. 320 (1985); and Skipper v. South Carolina, 476 U.S. 1 (1986). On April 25, 1989, the Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, 109 S. Ct. 1930 (1989). The United States Supreme Court's establishment of standards in Saffle will be very important in determining this claim.

S. Ct. at 2952. In Ms. Buenoano's case, however, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The net result is the same in this case as in Penry: the unacceptable risk that the jury's recommendation of death was the product of the jury's belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining its verdict. The resulting recommendation is therefore unreliable in Ms. Buenoano's case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra.

The circuit court's ruling that this issue is barred was erroneous. The retroactive opinion in Penry requires that this issue be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Moreover, Ms. Buenoano has asserted in these proceedings that counsel's failures to object at trial or litigate the issue on appeal were instances of prejudicially deficient performance, supported by no tactic or strategy. An evidentiary hearing was required on this aspect of the claim, and the lower court erred in failing to allow one.

ARGUMENT VII

MS. BUENOANO'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "HEINOUS, ATROCIOUS, OR CRUEL'' AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S ARGUMENT ON THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

Ms. Buenoano's sentencing jury was instructed that it could consider in aggravation whether the crime was "especially wicked, evil, atrocious or cruel." In Cartwrisht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed 108 S. Ct. 1853 (1988), the jury was given a more detailed instruction on the heinous, atrocious or cruel aggravating factor, yet the instruction was found constitutionally inadequate. In Maynard v. Cartwriaht, 108 S. Ct. 1853, 1858 (1988), the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty."[7]

The sentencing jury in Ms. Buenoano's case was not instructed on any of the limiting constructions applicable to this aggravator, despite the fundamental significance of the jury's sentencing role in a Florida capital sentencing proceeding. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied, 109 S. Ct. 1353 (1989).

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[7]This Court has also applied several limiting constructions to the heinous, atrocious or cruel aggravating factor. E.g., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)(cannot be based on actions after the death of the victim); Cochran v. State, 547 So. 2d 928, 931 (Fla. 1989)(cannot be based on single gunshot wound); State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973)(aggravator directed only at consciousless or pitiless crime which is unnecessarily torturous to victim).

Trial counsel objected to the instruction given, for the same reasons that the Oklahoma instruction was ruled unconstitutional in Cartwrisht -- that the instruction did not sufficiently limit the overbroad construction attendant to this aggravator (R. **1698**). However, the primary issue he raised on appeal was that there was insufficient evidence of suffering or of torture to justify the aggravator. Appellate counsel failed to argue the obvious instructional error, failed to draw this Court's attention to Cartwright, and thus rendered ineffective assistance of counsel. This claim, presented in Ms. Buenoano's habeas corpus petition, requires an evidentiary hearing on the question of counsel's performance.

ARGUMENT VIII

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MS. BUENOANO'S CASE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As noted in the preceding argument, Maynard v. Cartwrisht, **108 S.** Ct. **1853 (1988),** applies to overbroad applications of aggravating circumstances and holds them to be violative of the eighth amendment. As the record here in its totality reflects, the sentencing jury in Ms. Buenoano's case was never instructed to apply a limiting construction to the cold, calculated and premeditated aggravating circumstance, as required by Cartwrisht -- it was improperly instructed. The sentencing court also failed to apply the constitutionally mandated limiting construction.

The cold, calculated and premeditated aggravating circumstance has been applied virtually as a **"catch-all"**

aggravating circumstance. Even where this Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever. More importantly, however, the jury was not instructed in Ms. Buenoano's case as to what was required to establish this aggravator.[8]

Because the jury was not properly instructed on this aggravating circumstance, it had no principled way to apply this aggravating factor. The jury was left with the open-ended discretion found to be invalid in Furman V. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwrisht, supra.

The circuit court's holding that without this aggravator it would still impose death is of no importance. For purposes of eighth amendment analysis, the jury is deemed the sentencer in Florida. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Mann v. Dugger, supra. This error should be corrected. An evidentiary hearing on the allegation that counsel's failure to litigate this issue constituted prejudicially deficient performance is required.

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[8]This Court's decisions have recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [] require[s] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) (application of aggravating circumstance "error under the principles we recently enunciated in Rogers"). The record in this case does not support this aggravator, when properly limited.

ARGUMENT IX

THE DEATH PENALTY STATUTE, ENACTED AFTER THE CHARGED OFFENSE WAS COMMITTED, WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

At the time of the offense in this case, September 16, 1971, the Florida capital sentencing statute provided for the imposition of a death sentence after conviction of a capital felony, but the jury was allowed in its verdict to include a recommendation of mercy. Fla. Stat. Ann. section 775.082 (1971). The statutory aggravating circumstances in the present death penalty statute did not exist at that time. The present statute was not enacted until 1973. The application of the 1973 statute to an offense which was allegedly committed in 1971 constitutes an ex post facto application, in violation of Article I, Section 10 of the United States Constitution, of the fifth, sixth, eighth, and fourteenth amendments, of due process and equal protection of the law, and of the corresponding provisions of the Florida Constitution.

Under Miller v. Florida, 107 S. Ct. 2446 (1987), retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." 107 S. Ct. at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's potential punishment for the crime of which he or she has been convicted. Id.

In a similar case concerning the retroactive application of the "cold, calculated, premeditated" aggravator, which was added

to sec. 921.141 in 1979, to a defendant whose offense occurred before that circumstance was enacted, a federal district court in Florida expressly held that the statute was unconstitutional as applied to that defendant. Stano v. Dusser, No. 88-425-Civ.-Or.-19 (M.D. Fla. May 18, 1988)(Fawsett, J.), slip op. at 37-40.

Because the change in death penalty law changed the legal consequences at sentencing, it was unconstitutionally applied in this case. Further, aggravating factors are intended, in a sense, to provide notice of the type of conduct which will result in a sentence of death. Ms. Buenoano was given no such notice: the aggravators did not exist when the offense was alleged to have been committed. The change in the law clearly operates to the disadvantage of the capital defendant. Under the old statute, the jury could return a nonreviewable sentence of life simply on the basis of mercy; here, the jury was instructed that it could not even consider mercy in recommending a life sentence.

Defense counsel did argue this issue at trial. However, even though Miller v. Florida, supra, was decided before Ms. Buenoano's case was decided on direct appeal, defense counsel did not direct it to this Court's attention. This was ineffective assistance of counsel, supported by no tactic or strategy. At the very least, it was error to instruct the jury on the aggravating factor of "cold, calculated, premeditated," under section 921.141(5)(i), Fla. Stat., as this aggravator has already been found to violate the ex post facto clause when retrospectively applied to an offense taking place before its enactment. See Stano v. Dugger, supra.

The circuit court is incorrect in holding that Miller v.

Florida is not a change in the law since the time of trial, and in declining to conduct an evidentiary hearing on the question of ineffective assistance of counsel.

ARGUMENT X

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

At the penalty phase of Ms. Buenoano's capital trial, prosecutorial argument and judicial instructions informed the jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 1495, 1711-1712, 1726). Such shifting of the burden to the defendant conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So. 2d 1 (Fla. 1973). As set forth in Dixon, a capital sentencing jury is required to consider whether the State has proven that "the aggravating circumstances outweighed the mitigating circumstances." That straightforward standard was never applied in this case.

Such shifting of the burden to the defendant to prove that life is the appropriate sentence violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). Ms. Buenoano's capital sentencing proceeding was fundamentally unfair and unreliable. The jury's ability to fully assess the mitigation was restrained by this construction, and the sentence thus violates Penry v. Lynaugh,

109 S. Ct. 1935 (1989), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988).[9] In being instructed that mitigation must outweigh aggravation before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not fully consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Thus the jury was constrained in its consideration of the mitigating evidence, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon, supra, in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at sentencing or to "fully" consider mitigation, Penry v. Lynaugh, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Ms. Buenoano should live or die. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). Under Smith v. Murray, no procedural bars may be applied to such an issue.

Moreover, defense counsel failed to raise this issue at trial or on direct appeal, and thus rendered ineffective

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[9]The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985). A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Ms. Buenoano had the ultimate burden to prove that life was appropriate. This violates the eighth amendment. The United States Supreme Court currently has before it certiorari proceedings in cases presenting very similar questions. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California 109 S. Ct. 1447 (1989); Walton v. Arizona, 110 S. Ct. 49 (1989).

assistance. An evidentiary hearing on this aspect of the claim is required.

ARGUMENT XI

MS. BUENOANO'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "PECUNIARY GAIN" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF PEEK V. STATE, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Ms. Buenoano's capital trial was instructed on, and the trial court found, the aggravating circumstance that the homicide was committed for pecuniary gain. This aggravator was also affirmed by this Court on direct appeal. However, in this case this aggravator did not comport with the standards established by Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), and Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988) which require that "pecuniary gain" be the "primary motive" for the killing. The jury in this case was never instructed on this limiting construction, and the resulting overbroad application of this aggravating factor violates the eighth amendment. Mavnard v. Cartwrisht, 108 S. Ct. 1853 (1988). The resulting jury recommendation was rendered unreliable because this aggravator failed to genuinely narrow the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 877 (1983). The record does not support this aggravator when properly limited.

This is fundamental error, cognizable in these proceedings, and cannot be found harmless beyond a reasonable doubt. There was mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstance not been weighed against the mitigation. The jury was instructed

in a manner which deprived Ms. Buenoano of an individualized and reliable capital sentencing determination. This fundamental error should now be corrected. Relief is proper.

ARGUMENT XII

MS. BUENOANO'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE PRESENTED UNREBUTTABLE HEARSAY TESTIMONY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The penalty phase of Ms. Buenoano's capital trial was a combination of unconstitutional victim impact information, in violation of Booth v. Maryland, 482 U.S. 496 (1987), unrebuttable hearsay testimony in violation of Gardner v. Florida, 430 U.S. 349 (1977), and unreliable testimony in violation of Gardner and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). On direct appeal, before this Court had found Booth to be a retroactive change in law, the Court nevertheless noted that this was "the type of 'overkill' which this Court has repeatedly met with disapproval." Buenoano v. State, 527 So. 2d 194, 199 (Fla. 1988).

During the penalty phase, two prosecutors were called by the state to summarize the evidence they had presented in previous trials against Ms. Buenoano. Each prosecutor's testimony basically consisted of a summary closing argument of the State's views in their respective trials (Mr. Patterson, R. 1518, et seq; Mr. Edgar, R. 1551, et seq.). A defendant is entitled to due process in the sentencing phase of his or her capital trial. The State here merely needed to prove the existence of prior felonies. This they did by the introduction of the judgment and sentence in each of the two prior cases (R. 1519; 1553). There

was no need for the grossly improper "evidence" that the State introduced.

The information presented through the testimony of the prosecutors was not reliable. They testified only to the evidence favorable to the State, not to evidence in conflict therewith. For instance, the jury was not told that the jury that had heard all of the evidence in one of the prior cases recommended a life sentence for Ms. Buenoano. Further, the information presented was misleading. The jurors were not told that they were only hearing the evidence most favorable to the State. The deception of a court and jurors by the presentation of misleading evidence cannot be squared with constitutional requirements. Giglio v. United States, 405 U.S. 150 **(1972).**

The defense was never given a fair opportunity to rebut or cross-examine the evidence testified to by the prosecutors. Defense attorney Johnston had to rely on his memory of the prior trials during his cross-examination. Without transcripts of the prior trials, the defense attorney was unable to rebut the testimony when the prosecutor/witnesses could not remember whether certain testimony had come out in Ms. Buenoano's trial or her son's trial.

The result was that Ms. Buenoano was retried for the prior offenses, with only the evidence favoring the prosecution, in the penalty phase of her capital trial; this resulted in an unreliable death sentence. This issue was raised on direct appeal. However, the Court failed to consider the appropriate standard of review under federal constitutional (and eighth amendment) precedents.

Here, prejudice is obvious. The jury was lead to recommend the death penalty by the seemingly overwhelming evidence of prior bad acts presented during the penalty phase. It heard misleading hearsay evidence and victim impact evidence. Yet the previous jury, which heard the evidence presented by the defense as well as the prosecution, recommended life. This Court should now correct this fundamental error.

ARGUMENT XIII

MS. BUENOANO'S RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION WERE VIOLATED WHEN THE STATE URGED THAT SHE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Ms. Buenoano's capital trial and sentencing proceedings were permeated with impermissible victim impact evidence and argument in violation of Booth v. Maryland, **482** U.S. **496, 107** S. Ct. **2529 (1987),** and South Carolina v. Gathers, **109** S. Ct. **2207 (1989).** During the guilt phase of the proceedings approximately half of the evidence presented involved offenses other than the one for which Ms. Buenoano had been indicted. One of the victims from a prior offense testified as to his own suffering (R. **955).** During the penalty phase, this victim testified again about the extent of the injuries he had sustained, and the effect they had had on his life (R. **1497; 1501; 1503).** The mother of another victim testified that she had received a call explaining that her son was sick and would probably be dead before she could get to the hospital (R. **705-06).**

Also, in the penalty phase, still other victims became the

focus of the proceedings. Particularly, Ms. Buenoano's son was described in detail. He was continually referred to by the prosecutor as Ms. Buenoano's "crippled son" (R. **1555,** 1558; **1561-62).** The jury was told about special characteristics of this "crippled son", and given a glimpse of his life:

> Q What did that reveal, sir?
>
> A It revealed, first of all, Michael was an illegitimate child, number one. He was different from the other two children, not treated the same way. He spent a good bit of his growing up years in institutions, shut away and kept away from family. He was sent out of town, or he was sent up to camp, sent away from the home.
>
> He was, emotionally and intellectually, a borderline retarded child, but he was not a psychiatric problem or a violent child. He was different.
>
> He was a fearful child. He wore thick glasses. He slobbered. He wet the bed, even in his teen years. He had an emotional and had judgment problems. He was different and awkward. He wasn't as nice looking as James and he wasn't as athletic as James. He wasn't as pretty as the other children. He was treated differently.
>
> We interviewed the neighbors across the street from where the defendant had lived at the time of this drowning. They indicated this boy when he was in high school would spend an awful lot of time with some of the adult neighbors, just hanging around, nobody playing with him practically. They didn't want to be cruel or rude to the boy. They listened to him a lot, but he did make some sort of a nuisance by wanting somebody to be friends with.
>
> We presented the testimony of some of the high school coaches and counselors personnel. They indicated that he wasn't a behavior problem in school. He did attend normal high school, didn't make good grades. He tried and tried to participate in such things as helping with the girls basketball team as an equipment assistant, but he was awkward, uncoordinated. He didn't like to participate in group sports so much because he wasn't gifted that way.

(R. 1561-62).

This information was not relevant to any of the statutory

aggravating factors. Ms. Buenoano had admitted that she had been convicted of prior felonies, and a stipulation to that effect was read to the jury (R. 1343). Further, the prosecutor introduced the judgments and sentences in those cases (R. 1520; 1553). As noted, on direct appeal, this Court referred to the State's presentation in the penalty phase as "the type of 'overkill' which this Court has repeatedly met with disapproval." Buenoano v. State, 527 So. 2d 194, 199 (Fla. 1988). Today, in light of the retroactive change in law announced by Jackson v. Dugger, the issue should be revisited.

This case involves blatant Booth and Gathers error. The error was objected to at trial. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla 1989), Booth is a retroactive change in law, which makes this issue cognizible in these post-conviction proceedings.[10]

The circuit court denied this issue on the basis that defense counsel failed to object to this victim impact information at trial and failed to raise it on direct appeal. Defense counsel did object to the testimony presented on the basis that it was unrebuttable hearsay. To the extend he did not more particularly object on the basis of Booth and Gathers, he did not have the specific precedents available to him. In any event, an evidentiary hearing is warranted, since Ms. Buenoano has alternatively urged ineffective assistance of counsel. This

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[10]Petitioner/Appellant alternatively submits that counsel's failure to fully present the claim on direct appeal was prejudicially deficient performance, supported by no tactic or strategy.

issue should be examined on its merits. Relief is appropriate here, as it was in Jackson, supra.

ARGUMENT XIV

THE SENTENCING COURT'S FAILURE TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL'S FAILURE TO URGE THIS CLAIM ON DIRECT APPEAL CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

In a capital case, a reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at 1450.

Ms. Buenoano's sentencing judge declined to find any mitigating factors. This finding was improper. The record reveals that the court failed to consider mitigation that was presented at the penalty phase. Testimony was heard regarding Ms. Buenoanols conversion to Christianity while in jail and her subsequent assistance to other inmates during incarceration. Several people testified to this, including Roxanne Nordquist, a counselor at the Orange County Jail (R. 1679-80).

The sentencing court, however, refused to consider this testimony even though it is clearly mitigating. See Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669 (1986). The court further failed to consider other matters in mitigation such as the love Ms. Buenoano had for her two children, James and Kimberly (R. 1089, 1670). Kimberly Goodyear, Ms. Buenoano's daughter, testified about her mother's relationship with Michael, Kim's brother, and their grief over Michael's death (R. 1667-

1669). When asked about what kind of mother Ms. Buenoano was, Kim replied:

> Very good. She's the best mother in the world. If I ever had any kind of problems, she was right there for me. That's my hardest problem, I don't have her there to help me out. It's nice to have someone pick you up when you fall.

(R. 1670). Significantly, the prosecutor urged a construction to the jury which limited these factors by urging the jurors to view all nonstatutory mitigation as one mitigating factor, if at all. This construction, uncorrected by the court, violated Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Mills v. Maryland, 108 S. Ct. 1860 (1988).[11]

Despite the presence of clearly mitigating circumstances, the sentencing court stated that it "finds that there are no non-statutory mitigating factors present in this case" (R. 2348). The sentencing court did so erroneously. A court cannot simply choose to ignore unrebutted mitigation, such as evidence of Ms. Buenoano's adjustment to prison life, her conversion to Christianity and her good work while in prison. Skipper, supra. In fact, in Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this

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[11]The sentencing court could also have considered the question of guilt in mitigation. In fact, the defense argued that evidence of this should go to the jury (R. 1631-36), but the court denied that request and then refused to consider it in mitigation (R. 1646). Residual doubt, particularly in a circumstantial evidence case, is nonstatutory mitigation; however, the trial court would not even allow defense counsel to present testimony which would have stressed the seriousness of the jury's role, in the form of a study done by a University of Florida professor (R. 1647; Motion to Vacate, App. 5), in violation of Hitchcock v. Dugger, supra, and which would have allowed the jury to consider any doubts in this circumstantial evidence case.

Court remanded the case for resentencing on the basis of an almost identical issue where it was not clear that the trial court had considered the evidence presented in mitigation.

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

Lamb, 532 So. 2d at 1054. Since this Court was "not certain whether the trial court properly considered all mitigating evidence," id., the case was remanded for a new sentencing. See also Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry v. Lynaugh, 109 Ct. 2934 (1989). Consideration of evidence about a defendant's positive adjustment to incarceration and potential for non-violence when incarcerated must be considered by a capital sentencer. Skipper, supra. Counsel's failure to present the claim on appeal constitutes prejudicially deficient performance, notwithstanding this Court's independent review of the record, and an evidentiary hearing is required.

ARGUMENT XV

THE STATE INTRODUCED IRRELEVANT, PREJUDICIAL, AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND BAD CHARACTER, AND THE JURY WAS IMPROPERLY INSTRUCTED ON THESE MATTERS, AND THIS ERROR UNDERMINED THE RELIABILITY OF THE JURY'S DETERMINATION AS TO GUILT-INNOCENCE AND SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; THE FAILURE TO FULLY RAISE THIS ISSUE ON DIRECT APPEAL CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

The State in the guilt-innocence phase introduced evidence of two collateral bad acts under the guise that it was similar facts evidence sanctioned by Williams v. State, 110 So. 2d 654 (Fla. 1959). This evidence was improperly admitted. There was no clear and convincing evidence that the collateral crimes were

committed by Ms. Buenoano, Dibble v. State, 347 So. 2d 1096 (Fla. 1977); any probative value of the collateral crimes was far outweighed by its improper prejudicial impact, Straight v. State, 397 So. 2d 903 (Fla. 1981); the trial court never gave due consideration to the timeliness of the collateral crimes evidence, the time between the collateral crimes and the current offense being eleven years, cf. McGough v. State, 302 So. 2d 751 (Fla. 1974); the extraordinary amount of testimony presented on the collateral crimes improperly became a feature of the capital trial, Zeigler v. State, 404 So. 2d 861 (Fla. 1st DCA 1981); the jury was not properly instructed on how to evaluate this evidence at the time it was presented; the instruction eventually given to the jury was inadequate because it failed to limit the basis under which the jury could consider the "Williams Rule" evidence.

The jury was also never told that Ms. Buenoano was not on trial for the crimes not included in the indictment. This violated the sixth, eighth, and fourteenth amendments. The error spilled over into the sentencing proceeding. This Court failed to consider this last contention on direct appeal.

"Williams Rule" error requires a different analysis with regard to its effects in a capital penalty phase:

> . . . . Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase. What is harmless as to one is not necessarily harmless as to the other, particularly in light of the fact that a Williams rule error is presumed to infect the entire proceeding with unfair prejudice. Peek, 488 So.2d at 56; Straisht, 397 So.2d at 908.

Castro v. State, 547 So. 2d 111, 115 (Fla. 1989).

The circuit court denied this issue because it was partially raised on direct appeal and affirmed. This Court did not consider the ineffective assistance of counsel in failing to request that an instruction be given when the collateral crimes evidence was introduced, nor in failing to object to the inadequacies of the instruction finally given. Appellate counsel's failings in this regard must be addressed, and this issue revisited. An evidentiary hearing is necessary, and thereafter relief is appropriate.

ARGUMENT XVI

THE STATE'S ARGUMENTS AT GUILT-INNOCENCE AND SENTENCING WERE CONSTITUTIONALLY IMPROPER, UNDERMINED THE JURY'S ROLE, MISLED THE JURORS, RESTRICTED CONSIDERATION OF MITIGATION, AND LED TO A FUNDAMENTALLY UNFAIR AND UNRELIABLE SENTENCE OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

It is submitted that the State's arguments at trial and sentencing, and particularly in the latter regard, were classically unconstitutional and rendered Ms. Buenoano's capital conviction and death sentence fundamentally unfair and unreliable. The use of the Bible as a statement demanding Ms. Buenoano's death (notwithstanding the trial court's pre-argument cautions to counsel) was flatly improper. See, e.g., Caldwell V. Mississippi, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). The prosecutor also limited the jury's ability to fully and reliably assess nonstatutory mitigating evidence, by arguing that those factors were "one" mitigating circumstance. This uncorrected argument violated Penry v. Lynaush, 109 S. Ct. 2934 (1989), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Defense counsel's failure to object to these arguments

or to seek curative instructions constituted prejudicial ineffective assistance. An evidentiary hearing is necessary, and relief is proper.

ARGUMENT XVII

MS. BUENOANO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HER CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Strickland v. Washinston, 466 U.S. 668 (1984), requires a defendant to show: 1) unreasonable attorney performance, and 2) prejudice. Ms. Buenoano submitted allegations on each prong before the trial court. An evidentiary hearing was required, particularly in light of the other instances of prejudicially deficient performance discussed herein.

Trial counsel was surprised by the State's mid-trial disclosure of an additional expert witness. The court, after conducting a "Richardson inquiry," ruled the State's witness, Dr. Knapp, an entomologist, would be allowed to testify (R. 1275). Counsel stated on the record that he did not have sufficient time to prepare for this witness or find rebuttal witnesses (R. 1275). It is clear that trial counsel needed an expert in entomology to assist him in analyzing Dr. Knapp's conclusions and possibly testify to rebut Dr. Knapp's account.

Trial counsel rendered ineffective assistance in not arguing strenuously that this surprise witness should have been excluded under Fla. R. Crim. P. 3.220, and in not requesting a continuance in order to properly prepare for Dr. Knapp's testimony and to retain an expert to assist him in analyzing Dr. Knapp's conclusions.

Trial counsel rendered ineffective assistance of counsel in not objecting to the improper, inaccurate "Williams rule" instructions noted above.

Trial counsel was ineffective in that he did not object to the trial court's failure to instruct the jury on the lesser included offenses of first degree murder, and in not ensuring that Ms. Buenoano was afforded the personal right of waiving the statute of limitations on the lesser included offenses in order to gain the benefit of the lesser included offense jury instructions.

Trial counsel rendered ineffective assistance in not making a timely motion for mistrial and timely requesting a curative instruction when a State witness testified that Ms. Buenoano burned down her house to collect insurance money (R. 674). This testimony was irrelevant, inflammatory and constituted an attack on Ms. Buenoano's character. It was not supported by accurate facts, and was prejudicial at trial and sentencing. See Castro V. State, 547 So. 2d **111** (Fla. **1989).** Moreover, counsel rendered ineffective assistance in being unprepared to rebut and not asking for a continuance in order to rebut the state's "Williams rule" witnesses. Counsel rendered ineffective assistance **in not** fully and properly litigating the various legal issues discussed in this brief.

The circuit court denied this claim on its merits, without an evidentiary hearing (Order Denying, pp. **9-10).** **A** hearing is necessary, and should be granted, on this claim and the related claims of ineffective assistancce involved in this action.

ARGUMENT XVIII

MS. BUENOANO'S RIGHTS TO A FAIR TRIAL AND TO A FAIR AND RELIABLE CAPITAL SENTENCING PROCEEDING WERE ABRIDGED WHEN SHE STOOD TRIAL IN LEG IRONS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Ms. Buenoano stood trial while shackled with leg irons (R. 9-10). This was apparently due to prior difficulties unrelated to Ms. Buenoano. There was never any showing that Ms. Buenoano was a threat in any way. The procedure violated Estelle v. Williams, 425 U.S. 501, 504 (1976), and Holbrook v. Flynn, 475 U.S. 560 (1986).

The use of shackles is particularly prejudicial and offensive. "Due process requires that shackles be imposed only as a last resort." Spain v. Rushen, 883 F.2d 712, 728 (9th Cir. 1989). An evidentiary hearing on this issue is necessary, and the circuit court's ruling, which is based on non-record facts, simply demonstrates this necessity (Order, p. 10).

ARGUMENT XIX

MS. BUENOANO'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MS. BUENOANO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE.

Despite the critical importance of the jury's role at sentencing, see Tedder v. State, 322 So. 2d 908 (Fla. 1975), Ms. Buenoano's jury was repeatedly told by the prosecutor and by the judge himself that their role was minor, that the judge was not obligated to follow their recommendation, and that it was the judge's responsibility, not theirs, to sentence (R. 17-18, 43, 108, 1453, 1495, 1708, 1725-26). These comments and instructions

derogated the jury's sentencing role, contrary to the eighth amendment, by diminishing their "awesome sense of responsibility" for sentencing. See Caldwell v. Mississippi, 472 U.S. 32, 105 S. Ct. 2633 (1985).

Appellant acknowledges that this Court has held that Caldwell is inapplicable in Florida. See Kins v. Dugger, No. 73,360 (Fla. Jan. 4, 1990). Ms. Buenoano respectfully urges that the Court reconsider that view, and vacate her eighth amendment violative sentence of death.

ARGUMENT XX

MS. BUENOANO'S SENTENCE OF DEATH WAS BASED UPON UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS AND THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Ms. Buenoano has alleged that the prior convictions used to aggravate her death sentence were unconstitutionally obtained, and thus that her death sentence is unconstitutional. Since those convictions have not yet been found to be invalid, Appellant acknowledges that under this Court's precedents the claim is not yet ripe for review. Appellant, however, does not waive or abandon the issue.

ARGUMENT XXI

THE JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY WAS ERRONEOUS AND MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Ms. Buenoano's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of the Florida Supreme Court have made clear, the law of Florida is not that a majority vote is

necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, in these proceedings the jury was erroneously informed that, even to recommend a life sentence, its verdict must be by a majority vote (R. 257; 1728-29).

These erroneous instructions are the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Caldwell, at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the requirements of the eighth amendment, and resulted in an unreliable sentencing proceeding in violation of Mills v. Maryland, 108 S. Ct. 1860 (1988). It is respectfully submitted that this is fundamental error and that resentencing is warranted.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court and the claims and argument set forth in Ms. Buenoano's petition for a writ of habeas corpus, Petitioner/Appellant respectfully submits

that she is entitled to an evidentiary hearing, and respectfully urges that this Honorable Court set aside her unconstitutional capital conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~United States Mail~~ FASCIMILE TRANSMISSION AND BY BHN, first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 201 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 9th day of February, 1990.

BHN
Attorney