IN THE SUPREME COURT OF FLORIDA

NO. 75,961

ENRIQUE GARCIA,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE TWELFTH JUDICIAL CIRCUIT COURT,
IN AND FOR MANATEE 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 Mr. Garcia's motion for post-conviction relief. The circuit court denied Mr. Garcia's claims following an evidentiary hearing.

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" -- Record on Direct Appeal to this Court;

"PC-R. ___" -- Record on Appeal from denial of the Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Garcia lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be entirely appropriate in this case given the seriousness of the claims and the issues raised here. Mr. Garcia, through counsel, respectfully urges the Court to permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

On October 8, 1982, Benito Torres, age 30, and three younger men entered the Farm Market, a convenience store operated by Willie and Martha West (R. 1401, 2005-14). The other men were Luis Pina, age 20, Enrique Garcia, age 20, and Urbano ("Junior") Ribas, age 17 (R. 1527; PC-R. 1006).[1] During the ensuing robbery, Willie and Martha West were shot and killed. Hazel Welch, the cashier, was shot and wounded (R. 2027). The question of who actually shot and killed the Wests became the focal point of Enrique Garcia's capital trial.[2]

Mr. Garcia was arrested on October 8, 1982 and charged on October 19, 1982, by indictment with conspiracy to commit armed robbery with a firearm, two counts of murder in the first degree, attempted first-degree murder and three counts of armed robbery with a firearm (R. 2531). The Public Defender was initially appointed to represent Mr. Garcia. On October 20, 1982, the Public Defender filed a motion to withdraw but it was not until December 15, 1982, that private counsel, Roger Bone, was appointed to represent Mr. Garcia (R. 2555-2556). Mr. Bone had no prior experience in the preparation of a penalty phase in a capital case (PC-R. 26).

During the week before Thanksgiving, 1982, Mr. Garcia was placed in the same cell with Johnny Huewitt (R. 1770). Huewitt had been incarcerated since September 23, 1982, when he was arrested and charged with one count of grand theft and one count of accessory after the fact to grand theft (PC-R. 912). Huewitt was represented by David Turner Matthews, the same attorney who also represented Mr. Garcia's co-defendant, Benito Torres (PC-R. 50). According to Huewitt's testimony at trial, in the presence of Huewitt, Alonzo Arline, Clarence Gissendanner and James Mayes, Mr. Garcia purportedly made braggadocio statements about his role in the murders of the Wests (R. 1791). Johnny Huewitt's claims were disputed by the other

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[1]Although the jury specifically requested information as to the age of Benito Torres, they were never told. Nor were they told that Mr. Garcia had a verbal IQ of 69 (PC-R. 154).

[2]The jury did not hear the testimony of Grover Yancy who claimed Torres had confessed to him. Yancy reported Torres shot the cashier and the seventeen year old, Urbano Ribas, shot the Wests (PC-R. 957).

inmates.[3]

Undisclosed notes in the State Attorney's file indicated that "Torres [was] shooter-leader" (PC-R. 945). Shortly before the shootings, all four men stopped at the nearby home of Benny Torres' uncle. The uncle described Benny Torres as acting like the leader and openly displaying a gun. In Mr. Garcia's statement to the police, he identified Benny Torres as the leader and "Perez" as the shooter of the Wests. At trial the State argued that "Perez" was a fictitious name Mr. Garcia used to describe himself. In fact, the State was in possession of an undisclosed statement by Lisa Smith that the seventeen year old, Urbana Ribas was known as "Perez" (PC-R. 997-1017).

Benito Torres made a statement while in jail to Grover Yancy that the youngest of the four participants, the 17-year-old, killed the Wests (PC-R. 957). Trial counsel was aware of this evidence prior to trial. The youngest co-defendant (Urbano Ribas aka Joe Perez) was 17. At the penalty phase, trial counsel did not call Yancy to testify to the statement made to him by Torres identifying who actually killed the Wests because counsel believed hearsay was inadmissible at the penalty phase (PC-R. 61-62).[4]

On or about October 31, 1983, Mr. Bone was notified that Mr. Garcia's capital trial would occur on November 16, 1983 (PC-R. 67, 150). Counsel had expected either Torres or Pina to go to trial in November of 1983 before Garcia (PC-R. 67). Although counsel had obtained an order authorizing funds for an investigator in January 1983, counsel waited until October 31, 1983, two weeks prior to trial, to

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[3]At his deposition, Huewitt stated that Clarence Gissendanner was present when Mr. Garcia made the incriminating statements and that everyone in the cell participated in the discussion and heard Mr. Garcia (PC-R. 838-39, 847). Clarence Gissendanner testified, however, that he never heard the alleged confession (R. 2059). The State failed to disclose to the defense a statement by Alonzo Arline that Garcia never said who shot the Wests, corroborating Gissendanner's testimony and refuting Huewitt's testimony that Garcia had been specific about who shot the Wests (PC-R. 1030). Arline's testimony was never heard by the jury.

[4]Even without Torres' confession identifying the triggerman as Torres and Ribas, Justice McDonald said "there is real doubt [Garcia killed anyone]." Garcia v. State, 492 So. 2d 360, 369 (Fla. 1986)(McDonald, J, dissenting in part).

obtain the services of an investigator (PC-R. 193-94).[5] On November 2, 1983, just prior to trial, counsel first sought an order appointing a mental health expert to assist the defense (PC-R. 93).[6] Working within the limited time constraints imposed by counsel, the mental health expert examined Mr. Garcia and provided trial counsel with a verbal report prior to trial. The expert acknowledged that due to a lack of time and background information that he did no testing of intellectual level, was unaware of critical factors such as Mr. Garcia's mother's prostitution, and did not know of Mr. Garcia's serious history of alcohol and drug abuse. Further, he was unable to determine whether or not Mr. Garcia's comments regarding the offenses were protective braggadocio (PC-R. 560-607). Counsel decided not to call Dr. Ritt after concluding that the benefit of his testimony was insufficient.

Of the four defendants, Garcia was tried first. Trial before a Manatee County jury commenced on November 16, 1983. The jury returned the following verdict forms as to the two first degree murder counts:

VERDICT

COUNT II [III as well]

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF (PREMEDITATED) FIRST DEGREE MURDER AS CHARGED

__X__ WE, THE JURY, FIND DEFENDANT GUILTY OF THE OFFENSE OF (FELONY) FIRST DEGREE MURDER

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF SECOND DEGREE MURDER WITH A FIREARM

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF SECOND DEGREE MURDER

_____ WE, THE JURY FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF MANSLAUGHTER WITH A FIREARM

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF MANSLAUGHTER

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[5]The investigator felt that the time given him to investigate was insufficient (PC-R. 196). Moreover, he was not advised of the concept of mitigating circumstances (PC-R. 200).

[6]The mental health expert was unaware that an investigator had been employed and trial counsel failed to provide the expert with the limited history and background material concerning Mr. Garcia which the investigator had time to develop. Similarly, the investigator was unaware of the mental health expert (PC-R. 200).

_____ WE, THE JURY, FIND DEFENDANT NOT GUILTY

(CHECK ONE OF THE ABOVE)

SO SAY WE ALL

(R. 2792-93).

The prosecution argued that Mr. Garcia should be convicted of premeditated murder as charged and not of the lesser offenses (R. 2099-2100, 2159, 2160). The defense argued premeditation had not been proven beyond a reasonable doubt (R. 2140). The jury was instructed to check "the highest degree of the offense of which [it] found the defendant guilty" (R. 2188). The jury's verdict skipped over premeditated murder, and thereby, under the instructions and argument, acquitted Mr. Garcia of the highest degree of murder, premeditated. The jury concluded that the evidence did not establish that Mr. Garcia had specific intent to kill.

On November 25, 1983, the penalty phase of Mr. Garcia's jury trial was held. The jury was instructed on two aggravating factors: 1) the homicide occurred in the course of a robbery, and 2) the homicide was for the purpose of avoiding arrest (R. 2259). The jury was instructed on four mitigating circumstances (R. 2259-60). A death recommendation was returned (R. 2271).

On December 14, 1983, sentencing occurred. The judge precluded the presentation of additional mitigating evidence (R. 2512). The State conceded that the verdict was an acquittal of premeditated murder and a conviction of felony murder (R. 2519). The State argued the death penalty was appropriate solely because Mr. Garcia was "indifferen[t] to human life" (R. 2523). "How easy it would have been to leave Benito Torres outside, where he couldn't have been seen, or to put on a mask" (R. 2523). The court imposed sentences of death on the murder convictions, fifteen years on the conspiracy conviction and a consecutive life sentence on one of the robbery convictions. Of the four co-defendants, only Mr. Garcia was sentenced to death, although neither the judge nor the jury knew this at the time they considered Mr. Garcia's fate.

Mr. Garcia took a direct appeal from his convictions and sentences. The case was initially remanded to the sentencing judge because of the failure to make factual findings in support of the aggravating factors found to be present. No oral

pronouncement had been made regarding the aggravators at the time of sentencing (R. 2259). The judgment also failed to do more than list three aggravators. On remand, the sentencing judge amended the judgment by reciting some additional factors eleven months after sentencing (R. 3081). Defense counsel was given absolutely no notice that the judge was considering aggravating factors over and above those the jury had been instructed upon. The State had waived "heinous, atrocious or cruel," and did not argue its presence at the sentencing. Yet, in imposing a death sentence the judge found the homicides to be "heinous, atrocious or cruel." This Court affirmed the convictions and death sentences. Garcia v. State, 492 So. 2d 360 (Fla. 1986).

On December 15, 1988, Mr. Garcia filed his Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850 (PC-R. 656-795). On February 14, 1989, Mr. Garcia filed a Supplement to Motion to Vacate Judgment and Sentence (PC-R. 1037-1079). Mr. Garcia's claims included among others ineffective assistance of counsel and Brady.

On November 29, 30 and December 1, 1989, a limited hearing was held before Judge Paul E. Logan. During the hearing the judge severely curtailed Mr. Garcia's counsel's ability to ask questions. The judge frequently interrupted questioning and inquired if counsel knew the answer to the question just asked but not yet answered. If counsel responded with either "no" or "I am not sure," the judge would strike the question. An example of the judge's unusual limitations occurred when Mr. Garcia's post-conviction counsel was examining the first witness, Mr. Garcia's trial counsel. Collateral counsel attempted to ask trial counsel whether he had been provided any information concerning another uncharged co-defendant. The questioning was sua sponte stopped by the judge who demanded to know what collateral counsel was "getting at" (PC-R. 86-87):

> MR. McCLAIN: What I'm getting at is that -- I believe Mr. Gardner [the prosecuting attorney at trial] is here. Mr. Gardner will be called to talk in terms of what information he had of Mr. Torres' uncle who was involved, when he got the information in terms of possible Brady information that should have been presented to Mr. Bone.
>
> THE COURT: When?
>
> MR. GILNER: My objection to that at this point right now is, there's been no foundation laid for Mr. Bone to be asked these questions.

Perhaps he can step down, Mr. Gardner can establish when that is.

It's the State's position that this information came to Mr. Gardner's information some months after Mr. Bone was done representing Mr. Garcia, and it was after Mr. Garcia's trial. Mr. Bone certainly couldn't have acted upon any of that information.

THE COURT: See, I don't know how to evaluate the evidence, Mr. McClain, because it's fuzzy as to -- I don't know what you're talking about.

Are you talking about from between December 15th, '82 and December of '83 when Mr. Garcia was sentenced; or are you talking about December 15th, '82 through the period of time Mr. Bone just described with the break in it and so forth?

What are you talking about? What period of time are you talking about?

MR. McCLAIN: What I'm trying to do for Your Honor is establish the facts, and the facts cover the time period that he represented him. The facts are also going to come from Mr. Gardner as to when he obtained that information.

THE COURT: Which is?

MR. McCLAIN: Which is that the uncle, Mr. Torres' uncle, was involved in the planning of the robbery.

THE COURT: Well --

MR. McCLAIN: If Mr. Gardner says that --

THE COURT: You don't know what he's going to say?

MR. McCLAIN: I do not know what he's going to say.

MR. GILNER: That's why I make my objection. There's no foundation.

THE COURT: I'll sustain it on that basis.

(PC-R. 87-88). Thus even though exculpatory material was contained in the State Attorney's file, collateral counsel could not pursue it because he did not know what the trial prosecutor would say as to when it got there.

Later, counsel was again stopped from inquiring if exculpatory evidence was disclosed after trial but prior to the final sentencing order over a year later:

THE COURT: You've been arguing the rule, now.

I'm telling you, you don't have any case law under the rule. The rule doesn't support your arguments, so I'm going to have to find the objection is proper based upon your rule.

Do you have anything else to argue?

MR. McCLAIN: Your Honor, all I can say is, there's no authority going in the State's favor, either. There is no authority that I know

of one way or the other on this position.

THE COURT: What you're trying to tell me, Mr. McClain, is -- what you want me to find at the end is that if we take all of Mr. Bone's representation from the time he began until the case was finally finished, that means when it came back and all that, that during the period of time, if I understand your argument, if this information was available to the State, that under 220 [sic] the State had to give it to Mr. Bone?

You're wrong, and I'm ruling right now that that's wrong under the rule. You don't have the case law to support it; so on your rule argument, you're incorrect.

Now, do you have any further argument on that other than the rule, or Florida case law?

MR. McCLAIN: My argument is based on Brady itself.

THE COURT: Which is?

MR. McCLAIN: Brady versus Maryland. It's from the United States Supreme Court.

THE COURT: I know all that, Mr. McClain. What's your argument?

MR. McCLAIN: My argument is that it is exculpatory information that either negates guilt or negates the proper sentence that goes to the sentencing.

THE COURT: What were the facts in Brady?

MR. McCLAIN: Off the top of my head, I don't remember.

THE COURT: Well, see, you've got to be prepared on this stuff because it is the kind of thing that I ask during these hearings. What I want to do is, I want to recess until 1:30.

I suggest in the interim, you bone up on -- no pun intended -- you look at Brady and be able to argue it.

(PC-R. 95-96). After the recess, the judge did not permit Mr. Garcia to pursue his Brady claim. Throughout the proceedings, the judge limited Mr. Garcia's ability to present evidence. As a result, many questions of witnesses necessary to the Brady and ineffective assistance of counsel claims were left unanswered.

To the extent that evidence was received, Mr. Garcia established that the trial date was advanced to his counsel's surprise. As a result, counsel had two weeks' notice of a capital trial which he handled without co-counsel. However, counsel was ignorant of death penalty law which caused him to fail to present mitigating evidence.

Pursuant to stipulation, on December 21, 1989, the parties deposed Dr. Lawrence Ritt and the transcript of said deposition was considered by the circuit

court (PC-R. 560-655). On March 19, 1990, the trial court denied Mr. Garcia's Motion to Vacate Judgment and Sentence (PC-R. 1136-1139). On April 2, 1990, Mr. Garcia filed a Motion for Rehearing (PC-R. 1141-1147), which was denied on April 4, 1990 (PC R. 1148-1149). Mr. Garcia has appealed the decision of the trial court.

SUMMARY OF ARGUMENT

I. Whether the circuit court erred in the manner in which it conducted the evidentiary hearing and this case should be remanded for a full and fair evidentiary hearing.

II. Whether Mr. Garcia was denied the effective assistance of counsel during the penalty phase of trial. Counsel failed to present the testimony of Grover Yancy that co-defendant Torres had stated that it was the 17 year old co-defendant (Ribas/Perez) who murdered the victims, not Mr. Garcia, solely because counsel erroneously believed that the law prohibited hearsay evidence during the penalty phase. Lack of knowledge of the law was prejudicially deficient performance of counsel. Counsel also failed to timely engage the services of an investigator and a mental health expert until the eve of trial. Counsel's procrastination in engaging the experts prevented them from adequately performing their functions and adversely impacted on the quality of the investigation and the mental health evaluation of Mr. Garcia. Counsel failed to coordinate these experts or even inform them of the kind of relevant mitigation evidence to be developed. However, having obtained a mental health evaluation, however inadequate, counsel then failed altogether to present to the jury the available, albeit limited, mental health mitigation which was developed during the time made available by counsel. Mr. Garcia was denied a fair adversarial testing of the prosecution's case. The lower court erred in denying these claims.

III. Whether Mr. Garcia was denied an adequate and competent mental health evaluation prior to trial due to the failure of the mental health expert and counsel to obtain the available background information and records necessary for a competent evaluation. The lower court erred in denying these claims.

IV. Whether the State intentionally withheld significant material information from the defense in violation of Brady and the State's rules of discovery, information which the defense would have presented to bolster the defense

and to impeach key state witnesses. Garcia was denied a fair adversarial testing of the prosecution's case. The lower court erred in denying these claims.

V. Whether the State presented false and misleading evidence and argument to the jury while in possession of undisclosed facts to the contrary. Garcia was denied a fair adversarial testing of the prosecution's case. The lower court erred in denying these claims.

VI. Whether Mr. Garcia was denied the effective assistance of counsel during the guilt/innocence phase of trial due to counsel's failure to adequate investigate and prepare Mr. Garcia's defense.

VII. Whether Mr. Garcia was denied a fair trial in violation of the fifth, sixth, eighth, and fourteenth amendments when the trial court denied his request for additional peremptory challenges.

VIII. Whether Mr. Garcia was denied his right to a trial by a fair and impartial jury in violation of his fifth, sixth, and fourteenth amendment rights, by improper juror conduct, and by the trial court's failure to adequately inquire and ensure that a fair and impartial jury was guaranteed to Mr. Garcia.

IX. Whether the preclusion of cross-examination of the state's witness, Santos Garcia, violated Mr. Garcia's fifth, sixth, eighth and fourteenth amendment rights. Counsel's failure to ensure cross-examination of the witness constituted ineffective assistance.

X. Whether Mr. Garcia was denied his rights to due process and a fair trial by improper prosecutorial comments during the voir dire, the opening, the trial and closing arguments in both the guilt and penalty phases. Trial counsel's failure to object and combat prosecutorial overreaching was ineffective assistance of counsel.

XI. Whether Mr. Garcia was denied his eighth and fourteenth amendment rights by an improper and misleading instruction as to the elements of attempted murder.

XII. Whether Mr. Garcia's sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing in violation of the eighth and fourteenth amendments. Counsel was ineffective for failing to litigate this issue.

XIII. Whether the shifting of the burden of proof in the jury instructions at

sentencing deprived Mr. Garcia of his rights to due process and equal protection of law, as well as his rights under the eighth and fourteenth amendments.

XIV. Whether during the course of voir dire examination and penalty phase argument, the prosecution improperly asserted that sympathy towards Mr. Garcia was an improper consideration, contrary to the eighth and fourteenth amendments.

XV. Whether Mr. Garcia's death sentence rests upon an unconstitutional automatic aggravating circumstance, in violation of Maynard v. Cartwright, Lowenfield v. Phelps and Hitchcock v. Dugger contrary to the eighth and fourteenth amendments.

XVI. Whether Mr. Garcia's sentence of death is unconstitutionally disproportionate, constitutes cruel and unusual punishment, and violates the eighth and fourteenth amendments under Enmund v. Florida and Tison v. Arizona, because it cannot be established that he killed, attempted to kill, or intended that killing take place or that lethal force would be employed.

XVII. Whether the heinous, atrocious or cruel aggravating circumstance was applied to Mr. Garcia's case in violation of the eighth and fourteenth amendments.

XVIII. Whether the sentencing court's refusal to find the mitigating circumstances clearly set out in the record violated the eighth amendment and demonstrates that the jury's consideration was similarly constrained.

XIX. Whether the jury was denied the right to hear important testimony regarding the age of the co-defendants contrary to constitutional guarantees of due process pursuant to the sixth, eighth and fourteenth amendments.

XX. Whether Mr. Garcia's death sentence must be vacated because the court failed to provide a factual basis in support of the penalty.

XXI. Whether the introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Garcia's trial that it resulted in the arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution.

XXII. Whether the prosecutor improperly injected racial, ethnic and national origin prejudice into Mr. Garcia's trial by repeatedly noting the fact that Mr. Garcia was mexican, focusing the jury's and the judge's attention on the racial

aspect of the case, in violation of the eighth and fourteenth amendments.

XXIII. Whether Mr. Garcia was sentenced to death in violation of the eighth and fourteenth amendments because the trial court improperly found the existence of the aggravating factor that the crime was committed to avoid a lawful arrest.

ARGUMENT I

THE CIRCUIT COURT ERRED IN THE MANNER IN WHICH IT CONDUCTED THE EVIDENTIARY HEARING AND THIS CASE SHOULD BE REMANDED FOR A FULL AND FAIR EVIDENTIARY HEARING.

Mr. Garcia presented to the Rule 3.850 trial court claims for relief which required an evidentiary hearing for their proper resolution. The issues presented included claims of ineffective assistance of counsel at the capital trial and sentencing, violations of Brady v. Maryland and its progeny, and other factual claims for relief. The claims presented specifically pled allegations of fact, including matters that are not of-record, while nothing in the files and records rebutted the allegations. This case thus involved classic Rule 3.850 evidentiary issues which have been traditionally resolved through evidentiary hearings in Florida capital cases. An evidentiary hearing was required in this case. Indeed, an evidentiary hearing was ordered. The circuit court, however, refused to allow Mr. Garcia to fully present and examine witnesses. The court repeatedly ruled that whole areas of inquiry could not be pursued unless Mr. Garcia's collateral counsel could recite the answer every witness would give on each element of the claim. The circuit court's action was tantamount to a summary denial. The error in denying an evidentiary hearing is manifest in light of the fact that valid, factual prima facie claims for relief were presented, claims which were not rebutted by the files and records, and which therefore required an evidentiary hearing for proper resolution.

Where, as here, the motion for post-conviction relief presents valid prima facie claims and the record does not conclusively show that relief is not appropriate, a capital defendant is entitled to an evidentiary hearing. Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). The granting of an evidentiary hearing is required when the defendant presents claims demonstrating "that he might be entitled to relief under rule 3.850." State ex rel. Russell v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). Mr. Garcia made that showing. A Rule

3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and 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); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). Mr. Garcia's verified Rule 3.850 motion alleged prima facie claims for relief based on non-record facts and supported those claims with factual allegations. No files and records conclusively rebutted the claims and no such records were attached to any circuit court order. The claims could only be resolved at a full and fair evidentiary hearing. Obviously, for example, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a classic example of a claim requiring an evidentiary hearing for its proper resolution. See Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); O'Callaghan; Lemon; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Garcia's claims involving violations of Brady and its progeny are also classic evidentiary claims requiring a full and fair hearing for their proper resolution. See Lightbourne v. Dugger, 549 So. 2d 1304 (Fla. 1989); Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

Here, the State conceded that an evidentiary hearing was needed on a number of the claims presented; as to other claims, the State contested the factual claims pled. The forum in which to resolve such contests is in a full and fair evidentiary hearing. A hearing is required to resolve contested factual claims where, as here, the facts which need to be considered in order for the claims to be resolved are not "of record." See O'Callaghan; Heiney; Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). The motion in this case alleged sufficient facts to show that Mr. Garcia may be entitled to relief, O'Callaghan; the files and records do not conclusively demonstrate that Mr. Garcia is entitled to no relief, Lemon; no such files and records were attached to the order denying relief, Hoffman. A full and fair evidentiary hearing is proper in this case. The trial court erred in denying a full and fair evidentiary hearing.

ARGUMENT II

MR. GARCIA WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATION EVIDENCE.

Mr. Garcia's trial counsel, trial investigator, and trial mental health expert all testified at the 3.850 proceeding that they had insufficient time to adequately prepare a penalty phase. Trial counsel, Roger Bone, testified that he was taken by surprise when the court announced Mr. Garcia would go to trial in two weeks on November 16th. He had not done any penalty phase preparation and contacted an investigator at that time:

> Q Do you recall precisely when you actually got in touch with him?
>
> A Probably the time that the Court indicated that, contrary to expectation Mr. Garcia would go first, whenever that was. Again, that would be the last couple of days of October or the first day or two of November.

(PC-R. 67). The investigator was so concerned about the fact he could not do an adequate investigation in the time permitted that he wrote a letter to Mr. Bone to that effect and required him to sign it:

> Q Did you inform Mr. Bone that you felt you didn't have time enough to investigate all the issues in the case?
>
> A Yes, sir. That was one of the main purposes of having Mr. Bone actually sign the letter that I had submitted to him.
>
> I indicated in this letter there was very, very little time compared to the amount of work that had to be done, and I wanted to make sure that Mr. Bone's signature was on that so there was no misunderstandings about what the fruits of this 13-day investigation was going to show.

(PC-R. 196). Finally, the mental health expert noted that his findings were affected by the lack of time:

> Q Do you recall receiving any written material in terms of what the law was on what constitutes mitigation or anything like that?
>
> A No I didn't. Much of that was related to the timeframe I think we were operating under.
>
> Q Tell me about the timeframe?
>
> A My understanding was that I was seeing him on the 8th and, as I recall, the trial was to start on the, I say the 14th, so, you know, the timeframe was very, very tight.
>
> That given, you know, given less constriction of time, things like, you know, even with the construction of time, all the background material being available and certainly having the statutes at

hand is something I routinely ask for so that I understand what the legal, and not just the mental health, criteria are.

(PC-R. 605).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980). Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). Court has also recognized that reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). "[D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Moreover, counsel has the duty to ensure that his or her client receives appropriate mental health assistance, State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, and when the client cannot fend for himself. See United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). Defense counsel's failure to investigate any available mitigation constitutes deficient performance. State v. Lara, 16 FLW S306 (Fla. 1991).

Mr. Garcia's trial counsel failed his capital client. Mr. Garcia's trial was set two weeks in advance of the commencement of trial. At that point, counsel's penalty phase investigation was initiated. Counsel did not inform the investigator as to the mitigating factors in a capital case and never told him that a mental

health expert had been obtained. As a result, the wealth of significant mitigating evidence which was available and which should have been presented was not presented. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Cunningham; Harris; Middleton. Mr. Garcia's sentence of death is the resulting prejudice:

> The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing the particularized characteristics of the defendant. Armstrong, 833 F.2d at 1433 (citing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 875, 72 L.Ed.2d 1 (1982)). By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudiced Cunningham's ability to receive and individualized sentence. See Stephens, 846 F.2d at 653-55; Armstrong, 833 F.2d at 1433-34.

Cunningham, 928 F.2d at 1016.

Proper investigation and preparation would have resulted in evidence establishing a compelling case for life on behalf of Mr. Garcia. A wealth of mitigating information was available to trial counsel in this case. Mr. Garcia, however, was sentenced to death by a jury that did not have the benefit of the fruits of a thorough investigation. This was far from an individualized capital sentencing proceeding.

A. Counsel Failed to Present Testimony of Grover Yancy During the Penalty Phase.

On March 30, 1983, Grover Yancy gave a statement to law enforcement (PC-R. 954-962) which was disclosed to defense counsel on October 14, 1983 (PC-R. 952). According to Yancy, he was a cellmate with Benito Torres, the eldest of the four co-defendants in this case. Torres talked about the offense at least ten times in Yancy's presence (PC-R. 956). According to Yancy, Torres said, the "17 year old kid," shot the Wests (PC-R. 957).[7] Torres also told him that they rode around before the incident and, "They got high. Drunk . . .," (PC-R. 959). Trial counsel at the hearing testified that he did not offer Yancy's testimony concerning Torres's statements at the penalty phase because of his belief that hearsay evidence was inadmissible (PC-R. 59, 61).

Grover Yancy's testimony would have been critical evidence in that it corroborated Mr. Garcia's statement to the police that "Perez" (the seventeen year

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[7]Only Urbanos Ribas, aka Joe Perez, was 17 at the time of the offense.

old Ribas) shot the Wests. Instead the State was able to argue strenuously that there was no "Perez" and that Mr. Garcia must have been referring to himself as Perez. Counsel did nothing to rebut this bogus argument.

Trial counsel considered Yancy's statement significant, but withheld Yancy's testimony at the penalty phase solely because of his perception of the hearsay problem. Counsel simply did not know that the statement was admissible in the penalty phase. See § 941.141(a), Fla. Stats.; Perri v. State, 441 So. 2d 606, 608 (Fla. 1983); Alvord v. State, 322 So. 2d 533, 539 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Counsel's decision, based upon ignorance of the law, was substandard assistance, Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Harris v. Reed, 894 F.2d 871 (9th Cir. 1990). Where, as the result of substandard performance, counsel withholds significant mitigating evidence on the key issue of the identity of the actual triggerman from the jury in the penalty phase, prejudice resulted.

B. Counsel Failed to Adequately Investigate, Prepare and Present Available Mitigation Evidence During the Penalty Phase.

Despite the recognized importance of mitigating evidence, Mr. Garcia's counsel conducted a wholly inadequate penalty phase investigation -- he conducted no timely and adequate investigation. Trial counsel testified during the hearing of the 3.850 motion that he was appointed in December 1982 to represent Mr. Garcia (PC-R. 25). He successfully petitioned for funds for an investigator in January 1983 (PC-R. 194, R. 2632). Notwithstanding, Mr. Garcia's trial counsel waited until October 31, 1983 (PC-R. 194), just two weeks before the commencement of trial, to engage an investigator, Charles Chambers, to investigate the case. Counsel did not file his Motion for a mental health expert until November 3, 1983 (R. 2733-34).

At the 3.850 hearing, counsel, Roger Bone, testified:

Q Now, at some point in time, you had a mental health expert appointed?

A Yes, sir.

Q. And was that Doctor Ritt?

A Yes, sir.

Q Do you recall when that appointment took place?

A Not exactly. I would think possibly October, somewhere in that phase, of 1983.

Q If the court file indicated that the actual motion and the Order I think are both dated November 3rd, 1983, would that be about right?

A That could well be. It was about the time I think that the Court finally established an order of trial.

Q Now, do you recall that the trial in fact in Mr. Garcia's case started on November 16th?

A I remember about two weeks before Thanksgiving, so that would be approximately right; yes, sir.

(PC-R. 63)

Q And in conjunction with the mental health expert who I'll come back to in a bit, do you recall that you did get an investigator to assist you in the preparation for the trial?

A Yes, sir. Mr. Chambers was primarily for witness coordination and also to speak with the witnesses on extenuation of mitigation phase of the hearing, if it was necessary.

Q Do you recall precisely when you actually got in touch with him?

A Probably the time that the Court indicated that, contrary to expectation, Mr. Garcia would go first, whenever that was. Again, that would be the last couple of days of October or the first day or two of November.

Q October 31st would sound reasonable?

A It sounds in the right frame; yes, sir.

Q In terms of preparing the case, then, you basically had a little over two weeks notice that you were going?

A Yes, sir. We had already taken depositions in the case.

Q Right.

A And I felt that we were essentially prepared in that area. But as far as witnesses coordination and tying up as to the extenuation of mitigation into Ricky's background, I wanted to have the witnesses coordinated through Mr. Chambers, take some pictures of his background and present that, and Doctor Ritt's, also, evaluations.

Q Did you have another attorney to assist you?

A No, sir.

Q It was just you?

A Yes, sir.

Q And so you were faced with preparing both the guilt and the penalty phase?

A Yes, sir.

(PC R. 67-68).

Q To the extent that you're relying on Mr. Chambers in conducting the interviews, what do you recall about explaining the process of the penalty phase? You know, what kind of information you were looking for?

A I do not recall my instructions to him specifically. I again explained that I felt that the case in chief had been developed fully at that point and that I was trying to find out what would look best and what would be best for Mr. Garcia in the sentencing phase.

Q I guess what I'm asking is: Did you go over like mitigating circumstances --

A I don't recall exactly what I told him. Maybe the generally overall, but I don't remember one way or the other whether I sat down with him, pulled out the statutes and said yays or nays, that is what we should consider.

I do not recall doing that.

(PC-R. 72-73).

The investigator testified at the 3.850 hearing:

Q Could you state your name for the record?

A Charles Chambers.

Q And your profession, sir?

A I'm a private investigator here in Bradenton.

Q In 1983, were you a private investigator?

A Yes, sir; I was.

Q Were you ever contacted by Roger Bone concerning Enrique Garcia's case?

A Yes, sir; I was.

Q And do you recall when you were contacted by him?

A That was approximately the end of October.

* * *

Q I'm showing you what has been tabbed as number 19 in the Defendant's appendix to the motion.

Looking at that, would that refresh your recollection as to when you were first contacted by Mr. Bone?

A Yes, sir. This is a letter I'm holding that was forwarded to Mr. Bone. Our original conference on this case was October the 31st of 1983.

* * *

Q When you were initially contacted Mr. Bone, were you asked to take on the investigation of the Garcia case?

A Yes, sir; I was.

Q And was there any particular area that he asked you to investigate?

A At that time, no, sir, there wasn't.

Q Were to asked to investigate issues for the penalty phase of Mr. Garcia's capital trial?

A Yes, sir. I was asked to investigate certain portions of that.

Q And what portions were they, sir?

A I was instructed to obtain statements from the family members of Mr. Garcia's family, and also to check in the neighborhood where Mr. Garcia resided to ascertain if anyone there knew him that would be willing to give us a statement regarding his background.

Q Did Mr. Bone ever explain to you the workings of the capital penalty phase?

A Not exactly. The only thing he advised me at the time that I went to take the statements was that they would be important later on, to have those statements. He didn't tell me why we were doing it.

Q What type of information did he want you to develop concerning Mr. Garcia from these family members?

A He wanted me to find out if in fact Mr. Garcia had been a happy child or disturbed child. He wanted to know if the family members could testify to when Mr. Garcia quit school and had to go to work to help the family.

Q Did he ever ask you to determine if Mr. Garcia had a history of drug and alcohol abuse?

A No, sir.

Q Did you investigate in that area at all?

A No, sir; I had little time.

* * *

Q Did you inform Mr. Bone that you felt that you didn't have time enough to investigate all the issues in the case?

A Yes, sir. That was one of the main purposes of having Mr. Bone actually sign the letter that I had submitted to him.

I indicated in this letter there was very, very little time compared to the amount of work that had to be done, and I wanted to make sure that Mr. Bone's signature was on that so there was no misunderstandings about what the fruits of this 13-day investigation was going to show.

* * *

Q Did Mr. Bone ever ask you to obtain the records from his education from kindergarten through middle school?

A Oh, no, sir.

Q And did you do that?

A No, sir; there wouldn't have been time to do all that.

Q Did you question any of the family members about Mr. Garcia's reading abilities?

A No, sir; I didn't.

Q Did Mr. Bone ever ask you to investigate as to whether Mr. Garcia had any past history of mental problems?

A No, sir.

Q Did Mr. Bone ever ask you to prepare a composite of material that could be turned over to someone that would give a picture of Mr. Garcia's life, basically?

A No, sir. The only thing that he asked me to do was to have the tapes transcribed. Actually, he had not even requested it in a written report. However, I did submit a written report.

Q And in this 13 days of investigation, were you asked to have witnesses taken to and from their homes to the courthouse and to places of deposition?

A Yes, sir; I was.

Q So was part of your time, a good part of your time spent doing that?

A Yes, sir. There was a lot of time spent doing that because the family members had transportation problems during that period of time, and they resided in Rubonia and so we were always shuttling them back and forth.

* * *

Q Were you aware prior to Mr. Garcia's trial or through Mr. Garcia's trial that there was a mental health expert on the Defense's team?

A No. sir. That had never been addressed to me.

Q Did Mr. Bone ever explain to you the statutory mitigating circumstances that are involved in a penalty phase?

A No, sir.

* * *

Q Thank you. When you were interviewing the family members that you did interview, was there any particular questions that Mr. Bone wanted you to ask those family members?

A No, sir; there wasn't any special questions that he requested. The way he explained it to me is that he explained to me what he was looking for out of the statements was what kind of a childhood did Enrique Garcia have - - did he have to quit school and go to work early, for instance -- and get statements from the family members to determine basically what that childhood was like.

(PC-R. 193-201).

Had counsel performed a timely and adequate investigation, compelling information was readily available in mitigation, which was never presented to the jury. The judge and jury never knew that Mr. Garcia had a history of drug and alcohol abuse. They never knew that he had a verbal IQ of 69. The jury never knew that Mr. Garcia's mother was a prostitute who physically abused Mr. Garcia or that both she and Mr. Garcia's father tried to commit suicide in front of him. The jury never knew that not only was Mr. Garcia was only 20 years old when the offense occurred but he had a mental age of 12 to 13 years. They were never told that due to the poverty, neglect, abuse and low IQ, Mr. Garcia's insight and judgment were poor.

At the 3.850 hearing, Concepcion Gaona, one of Enrique's sisters, testified:

Q When did you start working?

A When I -- as far as I know, when I was eight years old, we started working.

Q Why did you start working at such an early age?

A Cause we need to help out the family. My mom and my dad had problems, and we needed to help out.

Q How about Enrique, what time -- when did he start working?

A Well, he was more younger than what I was so, you know -- he's one year more younger, so he probably started when he was seven years old.

Q Didn't you all go to school?

A Sometimes yes, sometimes no because sometimes we had to drop out of school when we were young and help out in the family.

Q What kind of work did you do?

A Fields.

Q What do you mean by that?

A We were picking cucumbers, picking tomatoes, picking cherries, apples -- you name it, squash, we did it.

Q Did Enrique also do this kind of work?

A Yeah, he did.

Q You said you picked cherries. What did that entail? What did you have to do?

A We had to climb trees, pick up cherries, put them in the bucket. Sometimes we had to carry big bags and carry them, try to fill them all up and then go down the ladder with the bags and had to be very

careful that we didn't fall down with the bag because they were big ladders we had to climb.

Q How about when you picked squash or cucumbers, what did that entail?

A We had to all day be bending down, carrying the big buckets, being in the hot sun or in the cold weather, whatever, and it's hard. Hard work.

* * *

Q Where did you do your field work?

A Different states, different houses, houses broke down; bathrooms, we had to use bathrooms outside. I mean, it was awful. It was real awful.

Q How were you paid?

A Paid -- the pay was no good. They would normally pay my mother and father weekly. Sometimes, they didn't even get paid at all.
Sometimes we would go to a state that you -- you know, it was like something to do like a contract that if we didn't stay there all season, they wouldn't pay us, you know. And sometimes we couldn't stay the whole season because the work wasn't good, you know.
There was just barely enough for us to eat, you know. So sometimes, you know, my dad or my mom would say, "Well, we got to get out of here," you know. So we would go to another place and, you know, we would leave that money there.

Q Where did you say when you sent to other states to work?

A Where?

Q Where did you live when you were in other states working?

A We would stay at home, go to school, go back to work. And we go to different states like Michigan, Ohio, Indiana -- lots of places, Washington.

Q Did your boss provide a place to live while you were working out of state?

A Like I said, yes. But those houses, if you would call it a house -- I wouldn't call it myself a house.

Q Well, could you describe --

A The house? Broken windows, the floors would -- I mean, the floors were real, real weak. They wouldn't have no sink inside.
We would have to go to the bathroom -- they would have a bathroom outside. The toilet would be outside. To take a bath, what I remember, you have to use a bucket; warm up the water and take a bath inside.
It wasn't a good life. It wasn't.

Q Did each one of you have an apartment?

A No, no. The ones I remember, the apartments, it was just like this (indicating). It was small and we all would live in the living room. The kitchen was in the living room. Just awful.

Q Does that include, Enrique would live there with you?

A Yes, he would be there with us, too. He would suffer everything what we were all suffering.

Q Are you married?

A Yes, I am.

Q When did you marry?

A I got married when I was 15 years old.

Q Why did you marry at such an early age?

A Cause I said to myself, I said, "I don't want this life for me", and I know I was going to get married and I don't want this life for my children. I said, "No."
I wanted -- I wanted them -- I want them to have a good life. A life that I never had.

Q When you say you wanted them to have a good life, do you mean a different kind of work?

A Different kind of work, for sure. I want to make sure they go to school and do what I never did.

Q How about at home, how were the conditions at home?

A When I was at the house?

Q Yes?

A Oh, God, please, it was awful. My mom, there was [sic] days that she wasn't even there. It was only me and my brother Ricky and Steve and Maria.
And she would -- you know, days that she would go to the bar and just end up there three, four days. We would be there by ourself.

* * *

Q Before we took the break, you were about to tell us about the problems that you and Enrique faced when you were children in your home. You can continue.

A Well, when we were living at the house, we had lots of problems. Like I said, my mom -- I love my mom a lot, you know; she's my mom. But she did go to the bars a lot, didn't pay attention that much to us.
It was hard. It's hard growing up like that. It's real hard.
So you know, Ricky, my brother, did have a hard time living like that cause he was real -- you know, he took mostly all, you know -- everything he felt, you know, he just -- he never said anything. He never said anything even though he wanted, you know, to try to tell my mom, you know, to keep an eye on us, you know. But even though we say something to our mom, you know, she would never pay attention to us. So you know it was wrong.

Q Did Enrique have a lot of friends when he was a little, when he was young?

A No, we never had any friends, not even him, not even me

because, like I said, we would go up north, stay there for a couple of months; go to another state, stay there for a couple of months; go to another state. You know, we never had that much friends, never.

Q When your mother went to the bars, would she always come back on her own?

A No -- well, sometimes mens would come and drop her off to the house. Sometimes my sister -- my other sisters would go looking for her. You know, we were afraid that something had happened to her. You know, somebody might have killed her or something like this, so they would go and look for her.

Q Was that when she was gone for a short time or --

A No, that was when she was gone for three, four days.

Q You mean, uninterrupted; three or four days in a row?

A Yeah. She would never come back, you know.

Q Was there any time that she brought any men home with her?

A Oh, yeah, several times.

Q And could you describe what happened?

A Well, she would take them to the house and they would start drinking and they would have loud music. All I would do is just go in my room and stay in there because I didn't -- you know, I didn't want to know anything about that.

And my brothers, they would do the same thing, you know. They would just go in their room and just stay there.

Q Did you know what was going on?

A Well, in my mind, I knew, yes. But, you know, I just -- I just didn't want to think about it. You know, I knew.

Q What is it that you knew? What did you know?

A I know my mom was drinking; you know, she would sell herself for money to try to help support us and take the mens home, drink, take them to her room -- you know, have sex, all that stuff.

Q Was your mom drinking all the time?

A Yes, all the time. All the time.

Q Would she start -- when would she start?

A She would drink every day, every night; go on to the next day and drink.

She would hardly eat anything, you know. She would take us food with the money that the mens would give her so we would have food. But she wouldn't eat anything or anything like that, you know.

All she had in her mind, to drink and I guess have a good time. That's what I would think. I don't know.

Q Well, what did your father do about this?

A Well, as far as I know, when I was 11 years old, 10 years,

old my dad left my mom. That's when she started drinking hard.

Q When your father was at home with your mother, how was their relationship?

A It wasn't -- I wouldn't call it a relationship. You know, they were just on and off getting into fights a lot. My dad would go his way; and then come back and then, you know, they would live together again. Then they would get into fights again; he would go somewhere else.
It was hard. It was hard.

Q When you say "fights", can you describe the fights?

A My dad would beat her up, you know. You see blood. You know, we would all get scared when they would do that.

Q How did Enrique act while this was going on?

A We were all scared. He was real scared. You know, how most kids are. You know, my mom would do what he would do.
But my brother, he was mostly the one who was real attached to my mom. You know, it hurted him like it hurts me. It hurted him a lot.

Q Did you ever feel embarrassed?

A Yeah.

Q Did the attorney, Bone, did he ever get to ask you these questions?

A No, he never talked to me.

Q Did he ever ask you to testify on behalf of Enrique?

A No, he never did.

* * *

Q Among the brothers and the sisters, who took your mother's problems the hardest?

A My brother, Ricky, he did a lot. He really did.

(PC-R. 257-272). The testimony of this witness was never heard by the judge and jury.

Maria Garcia, Enrique's sister, testified at the 3.850 hearing that she was never asked about Mr. Garcia's alcohol abuse, mental ability, or relationship with Benito Torres:

Q Did Mr. Chambers ever ask you about Mr. Garcia's mental ability?

A No.

Q Did he ever ask you about Mr. Garcia's use of alcohol and drugs?

A No.

Q Did Mr. Chambers ever ask you about Mr. Garcia's relationship with Benito Torres?

A Not that I recall.

(PC-R. 234).

She testified that her father, her mother, Enrique and she all suffered from a problem with alcohol (PC-R. 234-35). She also describeed Benito Torres' domination over Enrique:

Q Did you see Enrique with Benito Torres ever?

A Yes.

Q When Enrique and Mr. Torres would go do anything while you were there and they were making a decision about it while you were there, who made the decision?

A Torres.

Q Do you think there was any particular reason that Mr. Torres, who is ten years older than Mr. Garcia, hung around with Mr. Garcia?

A Mostly because of the vehicle. He always needed a car, a ride to go places.

Q So would he make -- or would he have your brother, Enrique, give him rides to do personal errands?

A Yes. Yes.

(PC-R. 235). She also observed that Enrique was mentally slow:

Q Do you know how Enrique did in school?

A Not too good. We weren't really too good in school. We had a lot of problems.

Q Did Enrique miss a lot of school?

A Yes.

Q And when he did go to school, did he ever get good grades?

A No.

Q When you were growing up and until Enrique was charged with this crime, did you consider Enrique a smart person?

A No.

Q How would you characterize Enrique's mental abilities?

A Slow learner.

Q Could Enrique figure things out very quickly?

A No.

Q Could you tell him something and he would understand immediately?

A No, he wouldn't.

Q Did he appear to understand things?

A No.

(PC-R. 236).

Enrique's sister, Maria described the racism and taunting by the other children:

Q Did you feel that -- at times, did you feel that you were different, an outcast to the other children in school?

A Yep. Yes.

Q And were you and your brothers and sisters the victims of racism from the other children in the school?

A Yes. Yes, because of the color, I guess, or because we were dark; or they thought that we were Mexicans, we were from Mexico.

Q Did they ever call you names?

A Yes, a lot of them.

Q Did that upset Enrique?

A Yes.

(PC-R. 233-248).

Steve Garcia, Enrique's brother described suicide attempts by both parents when the children were present:

Q Have you lived with Ricky all your lives? Have you spent your time in the same family?

A Yes.

Q And during that time that you were growing up as children, did your family have a lot of problems?

A Yes.

Q And with these problems -- what kind of problems was your family having?

A One of the problems was my mom drinking; and after she left my dad, he -- she started drinking, and then bringing other men to the houses.

Q Now, your mother's drinking problem, were there ever any suicide attempts that you were aware of?

A Yes.

Q How? What happened?

A One time, she tried to commit suicide by cutting her wrist. The other time was when she tried to overdose on pills.

Q Were the kids there when those things happened?

A I was.

Q Was that pretty upsetting?

A Yes.

Q Was there anything like that ever happened with your father?

A My dad also tried it one time. When we got home, we found him passed out in the living room and they had called the fire -- rescue squad. And I didn't get to see much, but I got to see them draining his stomach out with some kind of liquid they gave him.

(PC-R. 250-51). Brother Steve described the effect on Mr. Garcia:

Q Did all of these problems in your family have an effect on Ricky?

A Yes.

Q And how did he react to all this? What was he like?

A He was quiet, sad, not the type of person who would always open up to everybody.

(PC-R. 252). Finally, he described Mr. Garcia's relationships with the co-defendants Torres and Pina:

Q Were you around when he started hanging around with Benny Torres and Louis Pina?

A Yes.

Q Was he drinking at that time?

A At first when he didn't know him, no, he wasn't. But then when he started hanging around them, he started getting different and different all the time.

Q Were they drinking together?

A Yes. And also a couple of times, I caught them sniffing spray cans.

Q What kind of spray can was that they were sniffing?

A Well, one time I found an empty can of Crystal Clear, and there was a plastic bag filled with paint outside of it.

Q Were they using marijuana?

A Also a couple of -- yeah. I've seen.

Q How old were you about this time?

A I was ten.

Q And how much older than you is Ricky?

A Seven or eight years.

Q When Ricky was around Louis Pina and Benny Torres, when the three of them were together who was the boss?

A Usually, it was Benny because everything -- if Benny would say jump, he would jump. If he say walk, he would walk.

Sometimes Benny and -- Benny and Louis would hang around, he would always be a different person.

Q Could you understand why he would let them tell him what to do like that?

A No.

Q What kind of a brother was Ricky to you? How did he treat you?

A He was the kind of a brother that I would -- that I looked up to. But then all of a sudden, he started hanging around the wrong people and like I just didn't start knowing him anymore.

Q Before he started hanging around those people, was he good to you?

A He was good to me, but he was also a quiet type of person.

Q Pretty withdrawn?

A Yes.

Q Now, if the lawyers had asked you to come to Ricky's trial and explain all these things to the jury, would you have been willing to do that?

A Yes. But I was never told, so I never -- never even got involved in it.

(PC-R. 253-54).

Santos Garcia, another sister, also testified at the 3.850 hearing. Although she was a state witness, she was never interviewed by defense counsel:

Q Did you speak with anyone that represented your brother before the trial in 1983?

A No.

Q You gave a deposition, though; didn't you?

A Yes.

Q Did you speak with any lawyers or anyone before that?

A No.

Q Did you speak with any lawyers or any investigators or anyone after that?

A No.

(PC-R. 273-74).

Counsel could have presented Santos Garcia's testimony that Enrique Garcia was not in the same room while the others were planning the robbery, that he did not want to participate in the robbery, that it was Torres who wanted to do the robbery in order to get money to pay for Torres' car, and that it was Torres who insisted that Mr. Garcia go along:

> They started coming out the door but Enrique did not want to go with them. Enrique gave Benito the keys to the car and told him he could take the car. Benito threw the keys back at Enrique and told him that it was Enrique's car and he had to go too.

(PC-R. 992). Such evidence is a mitigating circumstance of the offense which would suggest life is the more appropriate sentence had this testimony been part of the weighing process.

Carmen Barajas, Louis Pina's mother, described the effect on Mr. Garcia:

> Fina [Enrique's mother] was jealous of my relationship with Ricky. She would curse at Ricky, screaming at him like a mad woman. She was always drunk. I could tell Ricky suffered because of his mother's problems. He talked to me about his problems and told me how he felt embarrassed and unloved. When he would ask me why couldn't his mother be more like me it would just break my heart. Ricky needed someone who he could talk to. He could not talk to his mother about anything at all.
>
> Fina has a reputation known all over town. People used to call her the panther. She even had sex for money with at least one of my sons. Fina would tell me she did not care for her children at all, that as far as she was concerned they could all die. You could see Ricky's family break up under all the problems. One of Ricky's sisters also started going out with men for money, when she was still just a child.

(PC-R. 638).

Counsel failed to conduct a reasonable and timely investigation in preparation for the penalty phase. The situation here is virtually identical to that in Brewer v. Aiken; counsel's failure to timely investigate mitigating evidence was deficient performance. As a result there was no true adversarial testing of whether Enrique Garcia should live or die. The presentation of this evidence to the jury and sentencer would have provided mitigation which, when weighed against aggravating circumstances, reasonably would have outweighed them, resulting in a recommendation

and sentence of life.

Counsel failed to adequately direct and coordinate his investigative and mental health resources to achieve the needed results. Counsel did not inform the investigator that there was a mental health expert in the case (PC-R. 200), nor did he inform the mental health expert there was an investigator who could assist him in obtaining critical records and information for use in his evaluation (PC-R. 579). Further, counsel failed to discuss and explain to the investigator mitigation in a capital case (PC-R. 73, 200) and the workings of the capital penalty phase (PC-R. 195), although the investigator testified he was requested by counsel to obtain mitigation evidence. The investigator's testimony reveals that even now he does not have a clear understanding of what is relevant mitigating evidence in a capital case. Counsel had a duty to ensure that his investigator knew what is relevant mitigation evidence. Without this knowledge, the investigator could not adequately investigate sources of mitigation for use by counsel or the mental health expert.[8] In short, trial counsel failed to adequately inform, guide and direct his investigator, once he belatedly employed him, to obtain a complete and adequate background history of his client for mitigation purposes and for use by the mental health expert.

Substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was ignored or inadequately investigated and prepared. As a result of trial counsel's unreasonable omissions, Mr. Garcia was sentenced to death by a judge and jury which heard little of the available mitigation which would have allowed an individualized capital sentencing determination. Kubat v. Thieret. See Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). Here, as in Jones v. Thigpen, "[d]efense counsel neglected [and] ignored critical matters of mitigation at the point when the jury was to decide whether to sentence [Enrique Garcia] to death,"

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[8]Counsel, for example, did not advise him regarding the potential mitigating factors. He did not direct him to develop a history regarding reading abilities (PC-R. 199), alcohol/drug abuse (PC-R. 195) or mental problems (PC-R. 199), other relevant mitigation, or to prepare a composite of Garcia's life history and records which could be given to a mental health or other expert (PC-R. 199).

788 F.2d 1101, 1103 (5th Cir. 1986).

C. Counsel Failed to Present Available Expert Evidence of Mental Health Mitigation During the Penalty Phase.

Dr. Ritt, a clinical psychologist, was engaged by trial counsel only 12 days prior to trial. Prior to making his evaluation, Dr. Ritt received some background information from trial counsel orally, but did not recall receiving any written information (PC-R. 567).

Dr. Ritt testified:

> Q Great. Do you recall approximately when you became involved?
>
> A Yes. I saw Mr. Garcia on the 8th of November, 1983.
>
> Q And is that about the time when you would have gotten a call indicating that you had been appointed?
>
> A Yes. I don't know that I was ever appointed. I actually got the call to become involved -- let me see if I can find the first date here, if you will bear with me just a minute.
>
> Q Okay.
>
> A On the 2nd of November, '83.

(PC-R. 563). Although the trial was November 16th, Dr. Ritt didn't send out a written report until December 26th when Mr. Bone requested a "report to protect himself on appeal":

> Q One follow-up in terms of the written report. In looking at your files, can you actually tell from the cover letter on your report when Mr. Bone was provided with a copy of the written report?
>
> A Yes. It went out on the 26th of December. This letter accompanied the report that he received.
>
> Q And so he would not have gotten a copy of the written report, at least, until after December 26th, 1983?

(PC-R. 565). Dr. Ritt's knowledge of Mr. Garcia's background was limited by the short time available for evaluation:

> Q In terms of, say, family members or other people who had known Mr. Garcia previously, did you have any information from them as to what they would say?
>
> A No, I did not.
>
> Q Did you have any information about what the co-defendants had to say?
>
> A Other than whatever Mr. Bone might have told me, I didn't. I didn't have any firsthand information and I don't recall any written information I reviewed.

Q Also to clarify the record, I have provided you with some material before this deposition?

A That's correct.

* * *

Q (By Mr. McClain) In reviewing these, one of the items that was contained, I believe -- its, Appendix 20 of the Motion or the Supplement Motion to Vacate -- was a statement from Grover Yancy which was a statement regarding statements made to him by Benny Torres, who was one of the co-defendants.

What I specifically wanted to ask you, do you recall that kind of information, that if that statement had been provided to you at the time you were interviewing Mr. Garcia?

A I don't recall that it was. I frankly just don't remember.

My recollection was I don't think I reviewed a great deal of material and I normally would keep a list of what I had reviewed and I didn't.

Q Then you don't have a copy of it, like in your file?

A I don't have a copy.

One thing I would routinely do if there was material in the file I thought was going to be helpful during my evaluation, it is material I probably would have asked for a copy of.

(PC-R. 566-69).

Q. . . . One question, in terms of, if you had had more time, is this the type of case where you may have actually wanted to be able to interview some of the family people yourself?

A You know, when you do this type of evaluation on a forensic case, it's really the more data that you have at hand, the better, that, you know, that they were accessible, might very well have wanted to take to someone on the family, you know, who might seems to be a good informant. Mother or, you know, one of the siblings or whomever.

Even more than that, the things that are helpful are as much as the kind of snapshots of somebody's prior life if you can grab hold of. Things like school records and teacher comments, either employer, you know, employer comments. You know, if there's, you know, a public investigator who's done a work-up, that material, all of that sort of thing.

I frankly don't recall whether I saw a, whether there was a publicly [sic] investigator, where there was an investigator's reports in there or not. I'm pretty sure I didn't have any opportunity to review any of the school material or school records or teacher comments and those things and that's always helpful. It does give you, you know, a different kind of picture.

(PC-R. 579).

Although Dr. Ritt had no experience in testifying in the penalty phase of a capital case, he was not provided with any information regarding statutory or nonstatutory mitigation:

Q Have you ever testified at a penalty phase, doctor?

A Yes, I have.

Q And in a capital case?

A Not -- I don't believe I have in a capital case.
Certainly not in a case that's at the point in time that this case is at and I have testified at the penalty state in some, you know, serious criminal cases but I don't know that any of those were capital cases.

Q And were those to the judge as opposed to having a jury present?

A I have done both.

Q In terms of a capital case, there's mitigating and aggravating circumstances. Are you sort of aware of those concepts?

A Somewhat aware. I may need to [sic] you do some definitions for me.

Q To the extent that you can recall, this case was a capital case and Mr. Bone was asking you to look into it and maybe provide him some guidance, I assume, and you're nodding your head on that?

* * *

Q In terms of mitigating circumstances, did you understand, for example, that economic deprivation, a history of economic deprivation or a childhood filed with either emotional or physical abuse, those kind of things were mitigating circumstances that could be presented to a penalty phase jury.

A Yes, I was aware of that.
I say somewhat aware. I didn't very often, again, you know, given that I have time to do it, I'll ask to see the statute on, you know, exactly what the legal criteria are. I did not see the statute in this case.

Q Do you recall receiving any written material in terms of what the law was on what constitutes mitigation and anything like that?

A No I didn't. Much of that was related to the timeframe I think we were operating under.

Q Tell me about the timeframe?

A My understanding was that I was seeing him on the 8th and, as I recall, the trial was to start on the, I say the 14th, so, you know, the timeframe was very, very tight.
That given, you know, given less constriction of time, things like, you know, even with the construction [sic] of time, all the background material being available and certainly having the statutes at hand is something I routinely ask for so that I understand what the legal, and not just the mental health, criteria are.

(PC-R. 571, 573)(emphasis added). Dr. Ritt could have testified that the circumstances of Mr. Garcia's childhood could have helped make his personality and actions understandable (PC-R. 577). Dr. Ritt could have suggested expert witnesses to explain the plight of migrant workers:

Q To the extent that the Florida Supreme Court, for example, has indicated that economically deprived childhood is a mitigating circumstance, would you -- did you have sources or suggestions for Mr. Bone, say, if he had wanted to present an expert to talk about the life of migrant workers or some source of information that you could have shared with him that would have been perhaps useful in explaining that lifestyle to the jury?

A Are you talking about if he wanted a witness who could come in and talk to the jury about what it's like to be a migrant, to live within a my grants [sic] community?

Q. Right.

A Yes, I could have. Even as you're asking there are certainly, you know the lead nurse at the health department who deals with that kind of issue is in the migrant homes all the time and could probably very easily have done that.

That would have been one of my initial suggestions or, you know, taking a look at what kind of research had been done, if I could find me [sic], a researcher to come in and talk about that.

(PC-R. 581-82). Dr. Ritt was available as a confidential expert to assist Mr. Bone in the development of significant mitigating evidence:

Q Did you view yourself as a confidential expert?

A Yes, I did.

Q And that is sort of a term of art but in your minds is that, does that mean that your job is to assist the attorney, sort of in helping him see things and helping him figure out what to do and how to proceed?

A Yes.

Q Sort of part of the defense team?

A That's correct.

Q Okay. To the extent that you had some information in terms of Mr. Garcia's family history and background that may be mitigating, if Mr. Bone had asked you to ideas of how, other than your testimony, how to convey that to the jury through other people's testimony, won't you have pointed in different directions?

A I frankly don't remember how much, what -- the specifics of what we talked about at that point, but I certainly would have seen that as part of what my job was.

Q What kind of things would you have told him to look at in terms of how to convey this sad history to the jury.

A I would like to think that I would have thought of what you suggested earlier. I'm not sure if I would have, but certainly the idea of bringing in an expert on migrant lifestyle, perhaps bringing in video tapes of, you know, migrant kind of environment and so on, that sort of thing. Perhaps bringing that in.

You know, the -- if there were obviously people such as employers or teachers who could talk to the positive side of Ricky, you know, the --

you know that I don't have the sense -- I have the sense of him being quiet, withdrawn and a kind of don't-mess-with-me kid in class or I'll bite your head off but I don't have the sense of him as someone who was surly, obnoxious, picking fights with teachers and so I think that kind of thing in terms of presenting that kind of background of someone who did, apparently work at struggling with schooling and so on.

You know, the reports of family members who would certainly have talked in terms of his attempts to support the family.

Q First in terms of school records, I don't think we have much in the way of school records --

A No, there's not much in there.

Q In there but there was one document that looked like it was about the 9th grade or something like that, or had a phrase in there indicating the Ricky was eager to please; is that the kind of information?

A To the extent that that material, you could have gotten hold of that material or the teachers, certainly that type of material. Talked more to his positive kinds of traits.

Q And eager to please would be a positive kind of trait?

A Certainly a positive.

* * *

If I was planning the, you know, thinking in terms of juries and what kind of material might make some kind of impact on juries, you know, I'm not sure. I don't know that it would have been -- I certainly wouldn't have felt it would be harmful to bring family members forth.

You know, my experience is very often, you know, that family members will say he was a good boy, you know. What I think might have been more persuasive, perhaps, were people who were not, you know, family members. One of the things that was in there was, in the materials you provided, was some of the material from, I think it was Louie Pina's mother.

Q Right.

A Who Ricky certainly reported as being a kind of surrogate mother, substitute mother, somebody he felt kindly about and, as I recall, that, you know, some of the situations at home, though she obviously had a very strong bias -- kind of pro-Ricky, anti-mother kind of bias -- but I think, you know, was someone who could also address some of those issues.

Q For the record, was that Carmen Barajas?

A That's correct.

(PC-R. 596-99). Due to the lack of time, Dr. Ritt never conducted any I.Q. testing:

Q One final question. I believe in your report, as we noted or I pointed this out to you the other day, at one point in time you say Mr. Garcia had at least low level intellectual functioning.

When you say that, your impression was that he was at least better than retarded, I mean in a sort of a, below average range, is that the proper

terminology?

A I wasn't using that in any kind of clinical sense. I think what I was trying to say is here's somebody who has a, you know, at least a 6th grade level of reading ability and from his vocabulary, his responses, his ways of interacting, I'd almost turn it around into a null type process. I didn't feel that he was -- there was any significant intellectual deficits.

Q And you didn't do any testing in terms of the intellect?

A I did not.

(PC-R. 595-606).[9] The judge and jury never knew that Mr. Garcia had an I.Q. of 69.

Although Dr. Ritt noted some mental health mitigation during his rushed evaluation, he was never given the time necessary to fully and properly evaluate the statutory and non-statutory mental health issues in this case. There was no tactical or strategic reason for not presenting mental health mitigation to Mr. Garcia's jury. Brewer v. Aiken. Counsel failed to make a timely, adequate investigation therefore no tactical motive can be ascribed for failure to present any mental health mitigation. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). In addition to the mental health expert, counsel failed to interview family members for penalty phase purposes. Dr. Ritt and the investigator both testified they needed more time. They needed more time because counsel prejudicially waited until the eleventh hour before preparing for the penalty phase. Waiting until the last minute to prepare for a capital sentencing proceedings is plainly not reasonable attorney performance. Strickland v. Washington. Not only was the time to prepare insufficient, but both the expert and the investigator were never advised as to what constitutes statutory and nonstatutory mitigation in a capital case. It was counsel's first preparation for a penalty phase. He had insufficient time and simply did not know what to do. This is a case of prejudicially deficient performance. Because of the failure to prepare in advance, to give the investigator and mental health expert sufficient time to do their jobs properly, or to advise them as to the law regarding mitigating circumstances prejudicially ineffective assistance has been established in this case. Blake v. Kemp, 758 F.2d 523 (11th

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[9]Collateral counsel had Dr. Harry Krop examine Mr. Garcia. Dr. Krop, with additional time, found a wealth of mitigation including a verbal IQ of 69 and an emotional age of 12-13 years. See Argument III, infra.

Cir. 1985). See also State v. Lara, 16 F.L.W. S306 (Fla. 1991).

Mr. Garcia is entitled to a new sentencing proceeding because no reliable adversarial testing occurred. Strickland v. Washington, United States v. Cronic, 466 U.S. 654 (1984); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Due to counsel's failure to conduct any investigation prior to two weeks before trial, due to inadequate time and direction of the investigator and due to the failure to give adequate time or background information to the expert, virtually no evidence was presented at the penalty phase. The entire testimony consisted of less than eleven pages of transcript. The judge and jury never knew that Mr. Garcia's verbal IQ was 69, they never knew that his mother refused welfare and engaged in prostitution. They never knew that he had a serious drug and alcohol abuse problem beginning at age nine. They never knew that every day Enrique Garcia drank and used drugs; that he used hash, marijuana, mushrooms, and sniffed glue, gas and spray can paint (PC-R. 213-252). They never knew that not only was he only 20 years old at the time of the offense but he had an emotional age of 12 to 13 years. They never knew that he was constantly taunted by the other children. They never knew he had witnessed two suicide attempts by his mother and one by his father. They never knew that he was impulsive and his judgment was poor. They never knew that there was evidence that he was drinking and high at the time of the offense. Due to counsel's deficient performance no mental health evidence was presented to the jury. Only a tiny fraction of what was available reached the judge and jury.

Due to counsel's deficient performance the jury never knew that Benito Torres had confessed to Grover Yancy that he had shot the cashier and that the 17 year old (Ribas/Perez) had shot the Wests. This corroborated Enrique Garcia's statement to the police that Perez shot the Wests. This additional evidence would have made the difference between life or death.[10]

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[10]As Justice McDonald observed:

> I concur in the affirmance of Garcia's conviction. I dissent in the imposition of the death penalty.
>
> This young immigrant migrant worker has no prior record. It is not clear to me that his involvement was greater than that of his comrades who received a lesser sentence. Garcia had told his accomplices that he wouldn't kill anyone; there is real doubt that he
>
> (continued...)

The trial court found three statutory aggravators, however, one of those was the underlying robbery. The court found a statutory mitigating factor of no significant prior record. Mr. Garcia has presented evidence of the additional statutory mitigation that he was chronologically 20 but had an verbal IQ of 69 and an emotional age of 12 to 13. Mr. Garcia has presented substantial evidence of his domination by Benito Torres upon which a jury could have found that he was an accomplice in a capital felony committed by another person and that his participation was relatively minor. In addition Mr. Garcia has produced substantial evidence of reduced mental capacity upon which the jury could have found the statutory mitigators of extreme mental or emotional disturbance and substantially impaired mental capacity. The jury specifically requested information as to Mr. Torres' age. Obviously, they were concerned as to whether Mr. Garcia was under the domination of another person. Due to counsel's ineffectiveness they never knew that Torres was ten years older, they never heard the evidence that Torres dominated Mr. Garcia and they never knew that Mr. Garcia had an emotional age of 12 to 13 years. Finally, there was a wealth of nonstatutory mitigation that the jury never heard.

Counsel's deficient performance deprived Mr. Garcia of substantial evidence of five additional statutory mitigating factors. The prejudice is manifest.

Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. Stewart v. State, 558 So. 2d 416 (Fla. 1990). Where the evidence shows that a defendant had a substantial mental conditions such as retardation; history of serious substance abuse and severe emotional deprivation resulting in an emotional age of 12 to 13, it is error to reject mental status as a mitigating factor. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Campbell v. State, 571 So. 2d 415 (Fla. 1990); Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988); Mines v. State, 390 So. 2d 332 (Fla. 1980).

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[10](...continued)
did. In any event, Garcia's involvement, while egregious, does not rise to the level of singling him out for the imposition of the death penalty.

I would direct the reduction of the death penalties to life imprisonment. I concur with the rest of the opinion dealing with sentencing.

492 So. 2d at 369.

Where counsel's failure to develop significant mitigating evidence is due to a failure to adequately prepare, a new sentencing is required. In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985) a new sentencing was required because counsel "went into the sentencing phase without any idea whether there was or was not mitigating evidence available." Here as in Blake, defense counsel unreasonably waited until the last minute. See also State v. Lara, 16 F.L.W. S306 (Fla. 1991) (affirming the trial court's ruling that counsel's performance was deficient, in part, because of his focus on the guilt phase at the expense of the sentencing phase). In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the Eleventh Circuit held that because there was no "informed judgment" to forego penalty phase investigation and preparation, ineffective assistance of counsel was established. Similarly, in Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit explained that the question is whether the failure to uncover mitigation was the product of "a tactical choice by trial counsel." 849 F.2d at 493 (emphasis in original). In State v. Michael, 530 So. 2d 929 (Fla. 1988), this Court found ineffective assistance in the failure to obtain a mental health expert's opinion regarding available mitigation.

In Mr. Garcia's case, despite available information that Mr. Garcia was "slow", and school records which documented his poor performance despite the fact that he was "eager to please," nothing was done to obtain an expert opinion as to his intellectual level. No opinion was obtained, because there was not enough time, because counsel failed to ask the proper questions of the expert, and because counsel failed to seek and provide background information. Unfortunately, the trial court refused to grant counsel sufficient time. However, counsel should not have waited until it was necessary to ask for a continuance. Counsel erred in not preparing ahead of time. Brewer v. Aiken. This is what reasonably effective assistance requires. Under Blake, Harris, Middleton, Lara, and Michael, counsel's performance was deficient in Mr. Garcia's case. Given what this case involves, there is more than a reasonable probability that introduction of such evidence would have affected the result, and confidence in the outcome at sentencing is undermined. Strickland v. Washington; State v. Michael. There was no strategy or tactic behind

counsel's failure to present this evidence. As a result of counsel's deficient performance, Mr. Garcia was denied the individualized and reliable sentencing determination which the eighth amendment requires. As the Eleventh Circuit held in Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985):

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 535 (emphasis added).

Defense counsel failed to develop significant mental health mitigation. In Harris, the Eleventh Circuit noted:

> [T]he prejudice component in Strickland requires close scrutiny. It is critical to the reliability of a capital sentencing proceeding that the jury render an individualized decision. Gregg v. Georgia, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir.1987). Thus, the jury's attention should be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg, 428 U.S. at 206, 96 S.Ct. at 2940. In this case, the sentencing jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant.

Harris, 874 F.2d at 763.

Counsel's neglect deprived the jury of substantial evidence regarding Mr. Garcia's deprived background and impaired mental health. Here, as in Harris and Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987), there was mental health mitigation which counsel, without a tactic, simply failed to timely investigate, develop and present. Here, as in Armstrong, "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement." Id., 833 F.2d at 1434, citing Strickland v. Washington. Confidence in the outcome at

sentencing is undermined and this sentence of death is not sufficiently reliable to satisfy the eighth amendment.

The decision of the lower court, denying Mr. Garcia's claim of ineffective assistance of counsel during the penalty phase, is not supported by findings of fact on the issues, but is merely a conclusion of law. Conclusions of law are subject to de novo review by this Court based upon an independent review of the record to determine whether the judgment is supported by the evidence. The evidence in the record of counsel's substandard performance, and the resulting prejudice, during the penalty phase of trial supports a conclusion of ineffective assistance of counsel, and does not support the lower court's judgment to the contrary. The lower court erred in denying Mr. Garcia's claim of ineffective assistance of counsel, and that decision should be reversed by this court and the judgment and sentence vacated.

ARGUMENT III

MR. GARCIA WAS DENIED ADEQUATE MENTAL HEALTH ASSISTANCE CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS; AND THE LOWER COURT ERRED IN DENYING THE CLAIM.

Dr. Ritt was given insufficient time to conduct an adequate mental health evaluation. A single interview and an evaluation based solely on what little was gleaned from that interview is all the mental health "assistance" that Mr. Garcia received. Dr. Ritt had no time to do more. This was not enough, Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986), and falls short of what the law requires. What is required is an "adequate . . . evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). See Cowley v. Stricklin, 929 F.2d 640, 645 (11th Cir. 1991)(reversal because "limited aid by [expert] was not sufficient substitute for the provision of an adequate defense psychiatrist").

Mr. Garcia has since been evaluated by Dr. Krop. Dr. Krop's evaluation shows the existence of substantial mitigation which was never presented to the jury due to counsel's failure to obtain adequate mental health assistance. Dr. Krop was provided with background information which indicated that the family members believed Mr. Garcia to be "slow" and with school records which indicated that he did poorly despite the observation that he was "eager to please." Dr. Krop conducted intellectual function testing which indicated that Mr. Garcia had a verbal IQ of 69.

He also gave his expert opinion that Mr. Garcia's emotional age was that of a 12 to 13 year old.

Dr. Krop was also provided with sworn affidavits which documented a serious history of drug and alcohol abuse beginning at age nine. Trial counsel did no investigation of drug or alcohol abuse. The trial expert did not request and did not receive any background information regarding Mr. Garcia's history of substance abuse.

Dr. Ritt was the expert at the time of trial. Other than a brief summary over the phone, he never obtained or was provided with any written records, never interviewed family members, received no affidavits and had no school records. Due to the insufficient time, he did not request or receive background material and legal statutes which he would routinely have asked for (PC-R. 573). Consequently, no testing was conducted to determine Mr. Garcia's level of intellectual or emotional functioning. The judge and jury never knew that Mr. Garcia was a retarded, emotionally immature person who was easily victimized by Benito Torres.

Dr. Krop testified at the 3.850 hearing:

> Q On the intelligence testing, what did you find?
>
> A He came out with a verbal I.Q. of 69, which is in the lowest one or two percent of the population, basically.
>
> In terms of classifying it, it would be in the mild range of mental retardation. It's in the higher end of the mild range of mental retardation. And I have to say that I was somewhat surprised because he tries to give the appearance, when talking to him, of being a more sophisticated individual. Yet, in terms of the intellectual testing, he came out much lower.
>
> I looked at his past educational records and although I do not have access to all the records because Mr. Garcia, both from his report as well as some of the other records, seemed to move around, go from school to school because of his migrant work. so we only had records from two years, I believe, of his elementary education and little later, I believe first year of high school.
>
> And those grades were fairly consistent, particularly his secondary school grades were consistent with a much lower I.Q.
>
> Q What did you find in terms of Mr. Garcia's childhood and background which would be significant in understanding who he is and how he got where he is?
>
> A Well, I think it's clear in terms of the various family members and so forth that were interviewed, including Mr. Garcia's own self-report, that he had a very deprived background; that he was neglected, in my opinion, by his mother and father.

His father left at an early age. I think Mr. Garcia was probably about eight or nine years old at the time.

There was physical abuse involved in terms of both the mother as well as Mr. Garcia, on the part of the father, and then later the stepfather. Excuse me, the stepfather or -- I don't think the mother was married. I think the individual came in and lived with the Garcia family for a couple of years. And it was primarily physical abuse of the mother. I believe that the physical abuse of Mr. Garcia was the natural father.

And then there was more neglect on the part of the mother. The mother would often leave the home because she was a heavy drinker and she would go to bars. There were reports of a significant promiscuity on the part of the mother in terms of selling sex for money.

There were reports that she would spend a great deal of time drinking both inside and outside the home. She was also a very unstable individual, apparently tried to commit suicide, and has a psychiatric history. There is [sic] also reports in terms of her being battered by her first husband as well, and Mr. Garcia observed this as well as the battering by the second individual she was involved with.

There seems to be certainly consistency in the various family members' report that Mr. Garcia was often even left in charge of some of the other siblings when the mother would be gone, either working or out socially.

So on the one hand, he was put in a responsible position. But on the other hand, it seemed like all of the kids were pretty much neglected and emotionally abused by their parents.

* * *

He never had the authority, the positive role model in his life in terms of being able to interact with authority in an appropriate way because, again, of the mother and father that he was raised.

He apparently was fairly close to a woman who had him over to his house a lot, and he I think referred to her as his second mother. He would often try and spend the night over there. And she indicated that he would do anything to avoid going home. I'm not sure whether it was because of fear of physical abuse or just because of the lack of love that he perceived in his home environment.

* * *

Q In terms of drug and/or alcohol abuse, what did you find?

A Well, you'd have to start with the family; and that is that the mother and father were both heavy drinkers, probably alcoholics according to all the other family members and various people that knew them.

The mother would spend a considerable amount of money, even money that Mr. Garcia earned by working in the fields, on alcohol. She apparently -- and I would say a positive factor was that she did not want to go on welfare, but as a result ended up spending much more time out of the house, either working or drinking or getting involved with other men.

Mr. Garcia indicated, and also this was supported by the various affidavits, that he started drinking actually at the age of 9 but not

heavily at that time. He said his parents always had it around and he began as a sipper at the age of 9.

He began drinking heavily at the age of 16, and he suggests primarily due to peer pressure. Subsequently, he describes himself as an off-and-on drinker drinking wine, beer, tequila and, to quote him, anything that's available.

He began using marijuana pretty much at the same time he began drinking heavily, around 16, and subsequently used speed, powder, cocaine, hash and various inhalants if there weren't drugs around. He would inhale something, either glue or other propellants.

He indicated that he never shot up anything and that the past year, I'd say prior to the offense, he was doing mostly marijuana and alcohol.

I need to point out that Mr. Garcia, in my evaluation and in my opinion, tended to probably minimize anything that would be construed as mental health or psychiatric problems. He was very resistant to having a mental health examination. He would not give me permission to contact family members and, therefore, I did not directly.

So he was very, very resistant to being evaluated, in general, in terms of mental health; and I think he tended to minimize some of his drinking problems.

* * *

[Q] In terms of maturity and how that would relate to the offense, what did you find?

A Well, I.Q.'s don't change, although it's affected by environment. And I would say in Mr. Garcia's case, I believe cultural deprivation was probably more a reason for his lower I.Q. I think he may have the basis for being more intelligent and I think there are certain areas that he is brighter.

But even today when I talked to him, or in December of '88, he's a very emotionally immature individual, both emotionally/socially. He has a mental age of about 12 or 13 years old, based on the intellectually functioning.[11]

So I think we have an individual here who has been immature basically throughout his life. And I think part of that is because, again, he did not have the kind of bonding with family members in terms of being able to become independent. He was able to function independently; obviously earn money and so forth. But in terms of emotional attachments, that's his biggest deficit.

Q In terms of mitigating circumstances, either statutory or non statutory, what do you see here? What would you be able to identify from your evaluation?

A Well, if we go chronologically, I would certainly say his history of neglect and abuse would have to be considered in his overall personality makeup.

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[11]This Court stated on direct appeal "the fact that a murder is twenty years of age, without more is not significant . . ." 492 So.2d at 367. Evidence of mental functioning at a level of 12 or 13 years would have been significant if such evidence had been presented.

That's coupled with the lack of history of male role models. Actually, role models in general; but primarily since he is a male, male role models.

I would say that his history of alcohol and drugs, substance abuse, would have to be considered in terms of influencing his daily actions as well as his motivation in terms of, again, maturity. We're talking about an individual who functions at a lower level both intellectually, socially and emotionally. As a result of that, he's going to be involved in situations in which his judgment is going to be basically more immediate rather than long term in terms of consequences.

So I would say those would be the primary, in my opinion, psychological factors that influence a person's behavior. I would say that one also has to look at how this person behaves when he is in a structured environment. That is, either a psychiatric hospital, which is not the case in Mr. Garcia's, or a prison system, which is obviously highly structured.

My review of his D.O.C. records and other records indicate that Mr. Garcia does well and is not a management problem in that type of situation. In fact, the various family members and people that knew him when he was younger indicated that Mr. Garcia was not a management problem. He was not a behavior problem. He was not suspended from school as far as I could tell from the school records.

So generally, if we look at a pattern, he apparently does better in a structured environment than he might in the community.

Q One of the items that you identified was maturity vis-a-vis age. Are you familiar with the statutory mitigating circumstance of age of the Defendant?

A Yes.

Q How would you relate to that statutory mitigating circumstance? Would you see it as being present, or do you have an opinion?

A Well, he was 20 years old chronologically, I believe, around that age at the time. But in terms of the way a person responds to situations, one has to actually look at his emotional age and his mental age.

And if you take person who's 20 years old with a lower I.Q. and a lower level of maturity, then you're really having him function at an age level of, as I calculated, at 12 or 13 years old.

So although certainly it's a legal determination as far as whether age should or should not be considered as mitigating, from a psychological point of view he was functioning at an age level of 12 or 13 at the time that this happened.

(PC-R. 154-174)(footnote added).

When the omission of critical mitigating evidence results from the failure to prepare or seek background information, there can be no tactical decision as to whether or not to present it to a jury. Cunningham; Harris; Middleton; Mason; Sireci. When there is substantial evidence of impairment of mental capacity and

extreme mental or emotional disturbance, it is error to not present it to the jury. Nibert; Campbell; Stewart; Mines. Due to the expert's failure to conduct a competent evaluation, counsel never knew that Mr. Garcia was mentally retarded and very emotionally immature.

The Eleventh Circuit has recently reaffirmed the necessity of competent expert assistance:

> The district court found that Dr. Habeeb was a "qualified," "independent psychiatrist." This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. Ake holds that psychiatric assistance must be made available for the defense. This assistance may include conducting "a professional examination on issues relevant to the defense," presenting testimony, and assisting "in preparing the cross-examination of a State's psychiatrist.[12]

Cowley, 929 F.2d at 646. Dr. Ritt's assistance was not competent in that he did no testing for intellectual functioning, he obtained virtually no background information, and he did not provide assistance to counsel as to other witnesses who could have testified as to mitigation.

An indigent criminal defendant must have access to adequate mental health assistance. Ake v. Oklahoma, 470 U.S. 68 (1985). Due to counsel's failure to timely obtain the appointment of Dr. Ritt, there was insufficient time for "adequate" assistance. Cowley. Mr. Garcia was denied the mental health assistance to which he was entitled contra to the eighth and fourteenth amendments. The lower court erred in denying this claim and this Court must grant him a new penalty proceedings.

ARGUMENT IV

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE, AND THE INTRODUCTION OF FALSE AND MISLEADING EVIDENCE OF A STAR STATE WITNESS, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; AND THE LOWER COURT ERRED IN DENYING THESE CLAIMS.

It is well settled that the State's suppression of material, exculpatory evidence violates due process. Brady v. Maryland, 373 U.S. 83 (1963); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). The State has an affirmative duty to reveal to the defense any and all information within its possession that is helpful to the defense, regardless of whether defense

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[12]Ake, 470 U.S. at 82, 105 S.Ct. at 1096.

counsel requests the specific information.[13] It is of no constitutional significance whether the prosecutor or law enforcement is responsible for the nondisclosure. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). The only question is whether the State possessed material exculpatory or favorable information which was not provided to the defense.

Mr. Garcia's counsel attempted to show during the hearing on the 3.850 motion that the State suppressed exculpatory and impeachment evidence material to his defense. The circuit court severely limited Mr. Garcia's ability to present the evidence.

The State failed to provide important impeachment evidence which could have been used to attack the credibility of jailhouse informant Johnny Huewitt. The trial attorney, Roger Bone, was not informed that a felony count against Huewitt was dismissed (PC-R. 46, 50). Counsel was also not given information in the Department of Corrections files (PC-R. 915) showing that Huewitt, while in prison, had been an informer in another case (PC-R. 52). Huewitt had expressly denied in his deposition previously testifying as an informant (PC-R. 861). Bone had never seen Huewitt's letter (PC-R. 915) until the day of the motion hearing (PC-R. 53). Bone testified that this information was inconsistent with Huewitt's testimony at trial and would have been valuable impeachment information (PC-R. 53).

Mr. Bone stated that Huewitt, in his deposition, admitted some felony convictions, but this was the extent of his knowledge regarding Huewitt's arrests (PC-R. 36). Huewitt denied any other prior arrests even though he had numerous arrests (PC-R. 36). In his deposition, Huewitt said he had been arrested for petty theft in his current case. The state did not correct Huewitt's statement and reveal that the actual charge was grand theft or that the charge of shoplifting was inaccurate (PC-R. 38, 129).

Among the documents in the State Attorney file that were not disclosed to Mr. Bone were: a "Manatee Felony Summary" concerning the disposition of the case against Huewitt (PC-R. 825); Huewitt's criminal rap sheet (PC-R. 903-07); documents

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[13]Nevertheless, the defense in this case explicitly requested disclosures (R. 2609-11, 2756, 2758, 2761).

concerning a gun acquired by Alvino DeLeon for co-defendant Ribas (Perez) (PC-R. 927-32); documents concerning repair of Torres' car (PC-R. 931-36); Torres' criminal rap sheet (PC-R. 938-39); police reports concerning Torres' wife beating charge (PC-R. 941-43); a document referencing Torres as a murder suspect in California (PC-R. 945); statement of Santos Garcia concerning Garcia not being present at planning of robbery (PC-R. 947-48); documents concerning a statement by Nancy Gaona indicating Garcia was in another room during planning of robbery (PC-R. 974-75, 995); a transcript of a statement of Lisa Smith regarding co-defendant Ribas's admissions of participation in the incident and Ribas' statements that he always carried a gun and used the name "Perez" (PC-R. 997-1017). There were also handwritten notes of an interview of Alonzo Arline on November 3, 1983 (PC-R. 1028-1034)[14].

A comparison of these documents with the State's responses to discovery[15] does not show disclosure of these documents by the State to defense counsel. The documents, and the information contained in these documents, were material to the defense in the guilt/innocence or penalty phase, or both, for impeachment of state witnesses, to show the relative degree of culpability of Garcia to the actual shootings, the violent nature of co-defendant Torres on his dominance and control of the substantially younger co-defendants.[16]

The State suppressed the fact that law enforcement officers threatened Geraldo Gaona with criminal charges and a 10 year sentence prior to his statement to the police. Geraldo Gaona testified at the 3.850 hearing that when he was questioned by the police, he was told that he might be charged and if he did not make a statement, he would get ten years (PC-R. 227). Concepcion Gaona, his wife, testified that

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[14]Arline's statement, if its existence had been known by counsel and presented at trial, would have corroborated Gissendanner's testimony that Garcia did not admit shooting the Wests and would have countered Huewitt's testimony of Garcia's admissions regarding the key issue of who was the triggerman and extent of Garcia's actual participation in the events.

[15]State Responses and Supplemental Responses to Discovery are found variously at R. 2558-98, 2600, 2603-23, 2650-54, 2656-57, 2659-60, 2666-2687, 2697-2705, 2708-09, 2725-30, 2745, 2752-53, 2767-68, 2771-73.

[16]Collateral counsel was limited in his ability to present evidence regarding these documents. Unless collateral counsel could say when these documents appeared in the State Attorney file, he was precluded from questioning witnesses regarding these documents.

after the police arrived, she overheard parts of the conversation between her husband and the police which occurred just outside the door (PC-R. 365). She overheard references to going to jail and that if Geraldo did not speak up, they were going to take him to jail (PC-R. 366).[17]

The State called Gaona to testify at trial. Mr. Gaona testified that Mr. Garcia made incriminating statements to him. The State did not reveal during the trial that the State had threatened Mr. Gaona with a ten-year prison term if he did not testify (PC-R. 987) or that a threat had been made to him to cite him for contempt if he did not testify. At trial the jury had Mr. Gaona's testimony read to them after they had retired to deliberate (PC-R. 55). It was essential that the defense be given any evidence which would have provided the means for attacking his credibility or motive for his testimony.

Johnny Huewitt was a key state witness and the State relied heavily on Huewitt's testimony.[18] Mr. Huewitt had been incarcerated on one count of grand theft and one count of accessory after the fact to grand theft. While Mr. Garcia was awaiting trial, Huewitt was placed in the same cell with Garcia just before Thanksgiving of 1982 (PC-R. 835-36) and was then moved again about three weeks later (PC-R. 836). Mr. Garcia allegedly made incriminating statements to Huewitt during this time. Id. Huewitt was then represented by David Turner Matthews on the grand theft and accessory charges against him (PC R. 890), the same attorney who also then represented Benito Torres, Garcia's codefendant.[19] On December 16, 1982, less than

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[17]James A. Garner, a prosecutor, testified that Gaona was in fact told if he did not appear pursuant to a subpoena, he could be held in contempt of court and would go to jail (PC-R. 351-52).

[18]Mr. Garcia had three codefendants: Torres, Ribas (Perez) and Pina. The State Attorney's file contains an analysis of the order in which the cases should be brought to trial and which was their strongest case. The State wrote that the problem with Mr. Garcia's case is that his "confession is equivocal except as to statements to Huewitt." They also wrote, "good case on him with Huewitt testimony" (PC-R. 827). Clearly, the State was cognizant of Huewitt's pivotal role in its case.

[19]The connection between Turner, Huewitt and codefendant Torres is significant because the confession Mr. Garcia allegedly gave Huewitt benefitted Mr. Matthews' other client, codefendant Benito Torres, and was ultimately used by the State to justify a life sentence for Torres (PC-R. 910). Huewitt testified during the trial that, "[h]e [Garcia] say that the (continued...)

a month after Mr. Garcia allegedly made the incriminating statements, Mr. Huewitt, with the assistance of Mr. Matthews, made an arrangement with the State to plead guilty to one count of grand theft and receive eleven and one-half months with credit for time served (PC-R. 893-94, 897-901).[20]

Huewitt testified at his pretrial deposition that Mr. Gissendanner and Alonzo Arline were present when Mr. Garcia allegedly made the incriminating statements (PC-R. 847). He also stated that everyone in the cell was involved in the discussion and they all heard Mr. Garcia (PC-R. 838-39). Mr. Gissendanner testified at trial that he never heard any of this alleged confession (R. 2059). However, a statement by Alonzo Arline to the State (PC R. 1028-34), which was never disclosed to the defense, also seriously conflicted in material aspects with Huewitt's testimony concerning whether Garcia admitted shooting the Wests. In his statement, Arline said that he had been in the cell with Enrique Garcia and Johnny Huewitt. Although he had heard Enrique discuss the robbery, he "never said who shot who" (PC R. 1030). This contradicted Huewitt's testimony that Enrique had been specific about

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[19](...continued)
older man (Torres) wouldn't shoot her, so he [Garcia] turned and drawed his pistol towards the older man and told him to shoot her again, and said the older man then turned his head and started shooting her" (R. 1779). The State Attorney relied on this testimony in not to seeking the death penalty for Mr. Matthews' client, Benito Torres. The prosecution later told the press: "That killer, Ricky Garcia, then held the gun on this defendant [Torres] and told this defendant to kill Mrs. Welch. All I can show is that Mr. Torres intended not to harm her and this is corroborated by what the psychiatrist have said ... that he then shot away from her, but he hit her twice" (PC-R. 910). In fact, Torres shot her five times.

[20]This was particularly lenient in light of the fact that the maximum possible sentence was five years and the State dropped the charge of accessory after the fact (PC-R. 895). The generosity of this plea bargain is better understood when Huewitt's criminal arrest record, which was never disclosed to the defense, is examined. His record shows: 05/11/76 - Larceny Petty; 06/17/76 - Petty Larceny; 11/17/76 - Shoplifting Petty, Assault and Battery - Misdemeanor; 11/22/76 - Petty Larceny; 07/11/77 - Grand Larceny, Receiving Stolen Property; 08/07/77 - Disorderly Conduct, Petty Larceny; 08/16/77 - Possession Stolen Property; 09/13/77 - Resisting Officer Without Violence, Shoplifting, Receiving Stolen Property; 10/28/77 - Petty Larceny; 01/04/78 - Petty Larceny; 02/02/78 - Petty Larceny; 02/08/78 - Grand Larceny; 04/04/79 - Burglary; 04/24/79 - Petty Larceny, Resisting Officer Without Violence, Failure to appear Driver License not carried; 07/03/79 - Resisting Officer Without Violence, Receiving Stolen Property, Failure to Appear - Petty Larceny, Driving with Suspended License; 07/28/80 - Possession of Stolen Property, Shoplifting; 10/24/80 - Grand Theft; 10/24/80 - Parole Revoked; 04/24/82 - Aggravated Assault (PC-R. 902-07).

personally committing certain acts. Had the statement in the possession of the State been disclosed to the defense, Arline would have been called to testify by the defense to corroborate Gissendanner's trial testimony that Garcia did not admit shooting the Wests and to impeach Huewitt's testimony regarding Garcia's admissions. Destroying Huewitt's credibility, considering the primacy of his role in the State's case, was of critical importance to the defense.

When Huewitt testified for the State, the State asked Huewitt what he had been charged with at the time Mr. Garcia allegedly made statements to him. Huewitt testified he had been charged with shoplifting (R. 1785). Actually, Huewitt had been charged with grand theft, and grand theft-accessory after the fact (PC-R. 912). The State allowed this false statement to stand uncorrected. It was the State who had charged Huewitt with grand theft and grand theft-accessory after the fact, and the State who subsequently released Huewitt early from his eleven and one-half month sentence. The State did nothing to correct this misinformation.

Additionally, during Huewitt's deposition, Mr. Garcia's attorney asked him if he had ever been arrested for anything other than shoplifting. Huewitt lied and answered "no" (PC-R. 853). Huewitt's criminal record, which was in the State Attorney's possession, but not revealed to the defense, listed assault and battery, aggravated battery, grand theft, receiving stolen property, resisting an officer without violence, burglary and other offenses (PC-R. 902-07). The State made no attempt to correct this patently false testimony. Counsel for Mr. Garcia was left an impression of a simple shoplifter instead of a man who was arrested at least nineteen times for at least thirty crimes over a five year period. Counsel was thus denied the opportunity to impeach this witness.

At his deposition, Huewitt was also asked by counsel if he had ever previously given testimony about statements made by other jailmates or cellmates. Huewitt answered "no" (PC-R. 861). However, while Huewitt was an inmate at Baker Correctional Institute in 1981, he wrote a letter to the Parole Board requesting that a parole interview be rescheduled because he was being held in the Pinellas County Jail as a State witness and wouldn't be able to make it to the interview (PC-R. 912). Mr. Huewitt deliberately concealed his past experience as a State witness,

a fact known to the State which the State did not disclose or correct. Counsel was again denied information which impeached this witness.

Before Huewitt appeared for his deposition, the State had him study his testimony at the State Attorney's office (PC-R. 865-66). Before trial the State was unsure whether or not Huewitt would testify in a way that would make their case. In order to ensure that Huewitt's testimony would be effective in convincing the court and jury that Mr. Garcia should be convicted of murder and sentenced to die, the State prepared a script with questions and answers (PC-R. 918-23). This script not only directed Huewitt what to tell the court and the jury, the script also indicated what should be withheld.[21] This script should have been revealed to the defense.

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[21]WHILE AN INMATE IN THAT CELL DID YOU HAVE OCCASION TO MEET RICK GARCIA?

A Yes.

WHEN?

A Several weeks October - November.

DID HE EVER TALK ABOUT WHY HE WAS IN JAIL?

A Yes.

HOW LONG AFTER HE WAS IN JAIL?

A 2 - 3 weeks.

WHERE IN THE CELL?

WHERE WAS HE?

WHO WAS PRESENT?

A Mayes - Arline.

WHERE DID HE COME FROM?

HOW DID CONVERSATION START?

A Someone asked him if it bothered him to kill the people.

WHAT WAS HIS ANSWER?

(Don't say anything about earlier argument with Arline)

A No. they should have been dead anyway.

(PC-R. 918-19)(emphasis added).

(continued...)

Not only did the State coach Johnny Huewitt and present his testimony to the jury, but it then improperly vouched for his credibility to the jury while knowing that another inmate, Alonzo Arline, had given a contrary statement which the State had never disclosed to defense counsel (PC-R. 1028-34). The State argued that all four of the codefendants had planned the robbery and murder (R. 2106, 2110). This was contrary to exculpatory statements obtained by the State, but not disclosed to the defense. Laura Garcia told the State that she was present just before the robbery when the plans were being made and that Ricky Garcia had remained in the front room with her while the others were planning the robbery in the back room (PC-R. 995). The State also had obtained a statement from Santos Garcia that Benito Torres was the one who said he would kill people (PC-R. 948). This statement also confirmed Laura Garcia's statement that Mr. Garica was in another room during the planning session. The State was also aware that Torres was ten years older than Ricky Garcia and had a serious prior criminal record (PC-R. 938). Despite all of this contrary information, the State argued that Ricky Garcia was the ringleader.

The question of who was the leader of the four codefendants and the issue of who was the triggerman were key issues in the jury's decision to recommend life or death.[22] By disregarding and suppressing contrary statements and facts, and by

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[21](...continued)
The significance of the argument between Garcia and Arline is that both apparently wanted to be the top dog in the cell and both were bragging about how bad they were (PC-R. 840). The context is important because it demonstrates that Mr. Garcia talked about his charges during a confrontation involving braggadocio by the contestants; therefore, there was a factual question for the jury to resolve as to whether Mr. Garcia's statement was in fact true or merely an attempt by Mr. Garcia to inflate his actual role in the events to look tougher than Arline. The context in which the statement was allegedly made was therefore critically important for the jury to know. The prosecution clearly did not want the statement to be examined by the jury in this light.

[22]This was not an easy decision for the sentencing jury. The jurors agonized over their recommendation. Based on statements by jurors to the press, it was reported:

> With a secret ballot, each juror knew only his or her own vote and most still keep their decisions to themselves. <u>But again and again the words "soul-searching" were used by jurors to describe the deliberation</u>.

(PC-R. 925)(emphasis added). Furthermore, as indicated by their verdict of
(continued...)

coaching the testimony of Johnny Huewitt, the State distorted the jury's and court's perception of the facts, resulting in a death sentence for Mr. Garcia while each of his codefendants got a life sentence. There is a reasonable probability that the result would have been different had the false and misleading testimony not been presented and argued by the State.

During both phases of the trial, the defense counsel's theory of the case was that Torres was the ringleader and that Ricky Garcia was a minor participant (R. 2249-50). The jury was very concerned about the relative roles of the codefendants as illustrated by the question from the jury requesting information about the relative ages of the codefendants, information which was withheld from the jury (R. 1427).

Other critical exculpatory evidence regarding the roles of the codefendants was withheld from the defense. The State had evidence in their possession that 17-year-old co-defendant Ribas (Perez) was the owner of a firearm. In an undisclosed statement to James Foy, chief investigator for the State Attorney, Alvino DeLeon stated that he had purchased a gun for Junior Ribas and produced a receipt for the purchase and a firearms transaction record (PC-R. 929). This evidence, establishing that Junior Ribas was the owner of one of the firearms, corroborated the defense theory that Mr. Garcia did not own any of the guns used in the killings and was not a ringleader. This evidence was never disclosed to counsel or to the jury. The State also failed to disclose to the defense the statement of Lisa Smith which confirmed that co-defendant Ribas used the name of "Perez"[23] and that he had stated

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[22](...continued)
felony murder and their subsequent statements, the jurors were very concerned about Mr. Garcia's role in the robbery/murders:

> Garcia's age was discussed, as well as his family -- a wife and a 2 year old son. Some said the evidence was not strong enough that he was a gunman in the crime.

(PC-R. 925)(emphasis added).

[23]Despite possessing undisclosed evidence to the contrary, the State then argued to the jury that Mr. Garcia's descriptions of the activities of "Joe Perez" contained in his statements to the police were references to a strawman, a purely fictitious person, and that Garcia actually was describing his own actions during the course of the events. (R. 2112-13).

he carried a gun.

It was also critical for the defense to know that at the time the robbery was planned and executed it was Torres who had the motive: he needed money so that he could pay $500 to get his car released from the repair shop. The State never disclosed to the defense a statement and receipt taken from Harry Robertson which confirmed that Torres needed a substantial amount of money to get his car back for the repair shop (PC-R. 936). This information, had it been known, would have supported the defense theory that Torres was the ringleader and the only codefendant with a motive for the robbery.[24]

It also would have been relevant for the jury to know that Torres was not only ten years older but had a serious prior criminal record under the name of Benito Contrerras dating from July 12, 1970, including contributing to the delinquency of a minor.[25] The State was in possession of reports showing that Torres had beaten his wife so badly on a public street that she was hospitalized. He later came to her hospital room and threatened to kill her (PC-R. 911-13). It would have been important to the defense to be able to tell the judge and jury that Torres had a prior history of violent and erratic behavior. It would have been important for the defense to know that the Sheriff's Office believed that Torres was the leader and shooter and had possession of some information that he had shot and killed someone in California (PC-R. 945). This evidence could have been used to discredit the State's theory that it was Mr. Garcia who planned and executed the murders.

The prosecutor's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific

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[24]Torres was also the only codefendant known by the Wests, and the only person with a reason to kill the persons who could have identified him.

[25]7/12/70 - Fugitive, contributing to delinquency of a minor, Michigan; 11/25/74 - Receiving stolen property, Wachulla, FL; 12/28/74 - Receiving stolen property, Bartow, FL; 3/27/79 - Burglary/theft, Independence, CA; 8/29/79 - Tampering with auto, Merced, CA; 5/9/80 - Wife beating, Merced, CA; 9/11/82 - Driving while license suspended; failure to appear, Bradenton, FL (PC R. 938-39).

information. The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as occurred here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue at trial. See United States v Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987, cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the result available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))(plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(in banc).

There can be little doubt that material evidence was withheld in Mr. Garcia's case. The undisclosed evidence was favorable to the defense. The only question under Stano is whether the evidence was material. Material evidence is evidence of a favorable character for the defense which may have affected the outcome of the guilt-innocence and/or capital sentencing trial. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). However, it is not

the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

Materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. Chaney v. Brown, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might not be sufficiently 'material' to justify a new trial or resentencing hearing"); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor").

Consideration must also be given to the impact on appellate review. Where the undisclosed evidence would have enhanced an appellate claim, reversal is required if there was "a reasonable chance of success" had the information been disclosed. Harrison v. Jones, 880 F.2d 1279, 1283 (11th Cir. 1989).

An analysis of Mr. Garcia's claim establishes that he is entitled to relief. First, the circuit court did not resolve any doubt about materiality of the evidence "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980). Second, given the nature of the undisclosed evidence (and witnesses) and its (their) clear relevance to what was at issue in Mr. Garcia's trial, the suppressed evidence was obviously material. The State argued vociferously that Mr. Garcia was "Perez" when they knew that codefendant Urbano Ribas was known as Joe Perez. Huewitt's testimony was central to the State's case; without it, there could be no conviction. Yet, Alonso Arline's statement rebutting Huewitt's testimony was never disclosed. Further, a wealth of impeachment evidence concerning Huewitt was not disclosed. Certainly, Mr. Garcia's case is similar to the circumstances in Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986)(reversal resulted because jury

did not hear impeachment of the State's star witness), and a reversal is required. Also undisclosed were the threats against Gaono, important impeachment evidence. Moreover, there was a wealth of undisclosed evidence that Garcia was not the triggerman. When the suppressed evidence is assessed on the basis of its cumulative effect, the fact that the error undermines confidence in the outcome is not subject to serious dispute. Third, the suppressed evidence is (1) relevant to a material issues at trial, (2) refutes a prosecution theory and impeaches several key prosecution witnesses, and (3) directly supports and theories advanced by Mr. Garcia's counsel at trial.

As this Court noted in Roman v. State, 528 So. 2d 1169 (Fla. 1988):

> The state claims that the defense impeached Reese's credibility with a prior inconsistent statement, and that further impeachment with the undisclosed statement would not have changed the trial's result. Although the defense impeached Reese, the state successfully rehabilitated the witness on redirect examination. Further, Reese's undisclosed statements were important not only for impeachment purposes, but for content as well.

528 So. 2d at 1171 (emphasis added). "Given this trial's circumstantial nature," Roman at 1171, relief is as warranted in Mr. Garcia's case as it was in Roman. And just as the "defense attorney testified that production [of the undisclosed evidence] would have affected his actions in Mr. Garcia's case. Material and favorable evidence was not in this case. As in Roman, the suppressed evidence was not only useful for impeachment, but went to content as well. A new trial at which Mr. Garcia can use, develop and present this evidence, as concerns of fundamental fairness counsel, is appropriate.

ARGUMENT V

THE STATE'S INTRODUCTION OF FALSE AND MISLEADING EVIDENCE OF A STATE WITNESS AND PRESENTATION OF FALSE AND MISLEADING ARGUMENT, VIOLATED THE MR. GARCIA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; AND THE LOWER COURT ERRED IN DENYING THE CLAIMS

The facts and argument of the preceding Argument are fully incorporated herein by reference. Inextricably linked to the State's failure to disclose material evidence to the defense is the State's use of testimony and argument at trial which undisclosed evidence now shows was patently false or misleading. This case involves more than a violation of Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court has clearly established the principle that a prosecutor's knowing use of false

evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The Fourteenth Amendment Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Mooney v. Holohan, but also the duty to correct the presentation of false state-witness testimony when it occurs, Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, the credibility of a State's witness, or interpretation and explanation of evidence, such State misconduct also violates due process when evidence is manipulated, Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97 (1976), at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153 (1972). Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, at 104. Accordingly, in cases involving the State's knowing use of false evidence, the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. Bagley, 473 U.S. at 678, quoting Agurs, 427 U.S. at 103. Here, there is much more than just a possibility -- as the record now demonstrates.

In Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986), the Eleventh Circuit held:

> The government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness. Haber v. Wainwright, 756 F.2d 1520 (11th Cir. 1985); Williams v. Brown, 609 F.2d 216, 221 (5th Cir. 1980); U.S. v. Tashman, 478 F.2d 129, 131 (5th Cir. 1973). The government, in this case, did not disclose. The government has a duty not to present or use false testimony. Giglio [v. U.S., 405 U.S. 150 (1972)]; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). It did use false testimony [testified to by the informants]. If false testimony surfaces during a trial and the government has knowledge of it, as occurred here, the government has a duty to step forward and disclose. Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony."). It did not step forward and disclose when [the informants] testified falsely. The government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false. See U.S. v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (defendant's conviction reversed because "The Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider").

Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown, at 1465.

This claim is based upon non-record evidence of prosecutorial misconduct through the knowing use of false or misleading evidence while material, exculpatory evidence to the contrary was concealed by the State from the defense. Enrique Garcia gave a statement to the police at the time of his arrest that "Perez" was the person who killed the Wests. At the time of trial, the State featured this statement in its closing argument by claiming that there was no "Perez" and that Mr. Garcia was referring to himself. In fact, the State was in possession of a statement by Lisa Smith that the 17 year old Urbano Ribas was also known as Joe Perez. This statement would have been critical evidence which would have corroborated Mr. Garcia's statement that Perez did the shooting and that he did not. Furthermore, at the sentencing phase, counsel could have introduced a hearsay statement by Benito Torres to Grover Yancy that the "17 year old" shot the Wests. The State not only suppressed the statement that Urbano Ribas was known as Joe Perez but they based their argument at both phases of the trial on the misrepresentation that there was no Perez and that Mr. Garcia was actually describing himself as the triggerman. It cannot be said that the proceedings resulting in Mr. Garcia's conviction and sentence of death satisfied fundamental due process, equal protection and eighth amendment requirements. Beck v. Alabama, 447 U.S. 625 (1980); Gardner v.

Florida, 430 U.S. 349 (1977). The lower court erred in denying Mr. Garcia's claim, and this Court should reverse that decision, and vacate the judgment and sentence in this case.

ARGUMENT VI

MR. GARCIA WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE INVESTIGATION, PREPARATION AND PRESENTATION OF THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL, CONTRARY TO THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS; AND THE LOWER COURT ERRED IN DENYING THESE CLAIMS

The analysis of claims of ineffective assistance of counsel proceeds along two distinct lines of inquiry. The first is the well established analysis under Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate objectively unreasonable attorney performance and resulting prejudice. The standard employed is this: "the defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case," id., at 693; rather "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id., at 694.

A separate analysis arises under United States v. Cronic, 466 U.S. 648 (1984), which focuses upon ineffective assistance of counsel resulting from external factors, acts of the State operating through the courts or prosecutorial conduct, which prevent counsel from adequately discharging his or her duties as counsel. Unlike the Strickland standard, Cronic ineffectiveness of counsel is not subject to a harmless analysis. Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989); Stone v. Dugger, 837 F.2d 1477, 1479 (11th Cir. 1988). More importantly, in Cronic, the Supreme "Court observed that the Sixth Amendment's necessary focus upon the reliability of the trial processes: 'the right to the effective assistance of counsel is recognized not for its own sake, but because the effect it has on the ability of the accused to receive a fair trial.'" McInerney v. Puckett, 919 F.2d 350, 352 (5th Cir. 1990) (quoting Cronic, at 658). Strickland, at 690, recognizes that "counsel's function . . . is to make the adversarial testing process work in the particular case."

Here counsel failed to adequately argue in support of his motions to suppress

Mr. Garcia's statements. Had counsel asserted all of the proper fifth and sixth amendment grounds, suppression would have resulted. An adversarial testing did not occur.

Counsel also failed to adequately investigate. A wealth of evidence was suppressed by the state as discussed in Argument IV, supra. To the extent counsel did not have this exculpatory evidence and present it to the jury, he was ineffective. A wealth of impeachment evidence of Huewitt and Gaona was never heard. Concepcion Gaona was never interviewed. Santos Garcia possessed exculpatory evidence but counsel failed to learn of it. Additional exculpatory evidence has been alleged to have been Brady material, undisclosed by the State. To the extent that the State argues that this evidence was disclosed to or discoverable by defense counsel, it was ineffective assistance not to present it to the jury. Counsel made no effort to present Grover Yancy's testimony at the guilt phase because counsel was unaware of Chambers v. Mississippi, 410 U.S. 284 (1973).

During Mr. Garcia's capital trial his defense counsel was repeatedly triple-teamed by the State Attorneys. Although counsel objected to the State's tactics, the trial court failed to control the State's actions. Consequently, trial counsel was rendered ineffective. See Cronic.

Counsel testified at the 3.850 hearing:

> Q I believe, Mr. Bone, I asked you a question about being the only attorney, the only defense attorney; you didn't have an assistant to help you out in the course of Mr. Garcia's trial?
>
> A That's correct.
>
> Q What can you tell me in terms of, did you want another attorney, would it have been helpful?
>
> A If felt that with the amount of time I spent on the cases in preparation of it, I was prepared for trial.
>
> In the trial, it would have been helpful if the State didn't have three attorneys argue. I was continuously triple-teamed during the trial, and especially at Bench conferences.
>
> I think the record -- probably there's objections all the way through it on the record. I would make an argument and one of the State Attorneys would make and argument and respond, another will make an argument, or they would -- it wasn't arguing with one attorney, one counsel. And it was difficult at times being triple-teamed.

(PC-R. 98-99).

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. (1982)("[a]t the heart of the effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).[26]

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 477 U.S. 363 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington, Kimmelman v. Morrison.

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[26]Counsel have been found to be prejudically ineffective for failing to impeach key State witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); for failing to raise objections, to move to strike, or to seek limiting instruction regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other related crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout, 907 F.2d at 828-30.

The errors committed by Mr. Garcia's counsel warranted Rule 3.850 relief. Each undermined confidence in the fundamental fairness of the guilt-innocence determination.

ARGUMENT VII

MR. GARCIA WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT DENIED HIS REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

An essential element of the accused's right to be tried by an impartial jury is his right to use peremptory challenges during the jury selection process. See State v. Francis, 413 So. 2d 1175 (Fla. 1982). Mr. Garcia's right to a fair and impartial jury was violated when the trial judge denied counsel's request for additional peremptory challenges. Trial counsel filed a pretrial motion requesting additional peremptory challenges. The court deferred ruling on this motion until the initiation of the jury selection process (R. 6). During the selection process the Court informed defense counsel that additional challenges would not be permitted (R. 551).

After counsel exercised his tenth and last peremptory challenge, he renewed his motion for additional challenges (R. 760-762). The motion was denied (R. 762). The rigid application of the rule limiting the defense to ten peremptory challenges was an abuse of discretion and denied Mr. Garcia's right to a fair and impartial jury.

The failure to grant additional peremptory challenges prevented defense counsel from excusing Mr. Anderson, a juror who expressed his opinion that the testimony of law enforcement officers was more credible than the testimony of lay witnesses (R. 742-43). Juror Anderson also expressed his tendency to sympathize with the victim demonstrating a clear alliance with the prosecution and a great likelihood to be predisposed towards conviction:

> I could make a decision that way, if I heard everything, to decide myself the severity of it all. And I tend to sympathize with the victim in any case; and I think in a lot of cases, they're always overlooked.

(R. 716-717). The defense was also prevented from excusing Mr. Brownfield who was a part-time police officer (R. 702, 706-707, 748-49). Counsel was also unable to excuse Mr. Pasco (who expressed strong feelings that death would be an appropriate

penalty merely because the defendant was convicted)(R. 780); Mrs. Hine (a juror who was strongly predisposed towards imposing the death penalty), (R. 802); Juror Hine (who had previously served as a juror on a rape case)(R. 795); and Juror Ware (who expressed the strong sentiment that the death penalty was appropriate in Mr. Garcia's case)(R. 816).

This Court has reaffirmed the importance of the right to exercise peremptory challenges, finding that it is inextricably linked to the defendant's sixth amendment right to fair trial:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. (1894); Lewis v. United States, 151 U.S. (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish it s purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as race, religion, nationality occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202 (1965).

State v. Francis, 413 So. 2d at 1178-1179 (emphasis added).

The right to seek additional peremptory challenges is preserved as long as counsel can articulate specific persons on the jury panel who would have been excused if additional challenges had been granted. Pentecost v. State, 545 So. 2d 861 (Fla. 1989). In view of the seriousness of the offenses that Mr. Garcia faced, counsel's request for additional challenges should not have been denied since counsel had a real articulable basis for his request. It was an abuse of discretion by the trial judge, rising to level of fundamental constitutional error, to deny the request. To the extent that trial counsel failed to articulate a proper foundation to support his request, this was ineffective assistance of counsel. Mr. Garcia's sentence of death was imposed contrary to the sixth, eighth, and fourteenth amendments. Mr. Garcia was entitled to an evidentiary hearing on this claim. This Court should reverse the summary denial and remand the case for an evidentiary hearing.

ARGUMENT VIII

MR. GARCIA WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY

IMPROPER JUROR CONDUCT, AND BY THE TRIAL COURT'S FAILURE TO ADEQUATELY INQUIRE AND ENSURE THAT A FAIR AND IMPARTIAL JURY WAS GUARANTEED TO MR. GARCIA.

During Mr. Garcia's trial, while the State was presenting its case in chief, a member of the jury gave the court a note which asked: "Could we at one point today hear the opening statement from the state, and also the ages of the four suspects involved before the day is over?" (R. 1427)(emphasis added). This note shows that the jury disregarded the court's earlier instructions to not discuss the case (R. 980). The court, State and defense were concerned that the jury be properly instructed (R. 1435). Both the State and defense agreed that the jury should again be instructed to not discuss the case among themselves until deliberation (R. 1435). The court agreed to give the instruction, but then failed to do so. The jury should have been re-instructed that they were not to deliberate this capital case before all evidence had been presented and the jury was instructed on the law.

After the end of the penalty phase, Jurors Leslie Pascoe, Eileen Ware, Al Brownfield and jury foreman Stewart Anderson, among others, spoke to Christopher Clarke, a reporter for the Bradenton Herald, about the factors that influenced their death sentence recommendation. Jurors stated to Mr. Clarke, "There was concern that with anything less than a death sentence the criminal justice system might put Garcia on the street too quickly" (PC-R. 925). As is apparent from Mr. Clarke's interview of the jurors, the jury, during its penalty deliberations, considered whether Mr. Garcia would be released too quickly unless given a death sentence. The jury deliberations were poisoned with erroneous and improper considerations which were not part of the evidence submitted to the jury and which directly contravened the court's instructions.[27] Moreover, the introduction of such an erroneous consideration into the deliberative process violated the sixth amendment rights, collectively known as the right to defend. Faretta v. California, 422 U.S. 806, 819-20 (1975). Mr. Garcia never had the opportunity to either have the jury receive a curative instruction or to present evidence to rebut the misconception that Mr. Garcia would be released quickly if given life sentence.

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[27]Mr. Garcia's counsel have been denied the opportunity to interview the jurors regarding this matter. This was reversible error. The matter should be remanded for further proceedings.

Additionally, Mr. Garcia submits that the error here is one of fundamental constitutional dimension. Claims involving fundamental error are cognizable on the merits at all stages, and can be corrected whenever presented to the courts -- whether at trial or in post-conviction proceedings. See O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975); Nova v. State, 439 So. 2d 255, 261 (Fla. 3d DCA 1983).

Here the jury considered the possibility of an early release of Mr. Garcia from prison, which Mr. Garcia never had a chance to rebut or explain, as an aggravating circumstance which was weighed against the mitigating circumstances submitted to the jury. The jury clearly considered information not presented by the evidence which was irrelevant and erroneous under Florida's capital sentencing scheme. This was clear error under Elledge v. State, 346 So. 2d 998 (Fla. 1977). This issue involves fundamental constitutional error which goes to the fairness of Mr. Garcia's death sentence.

This issue was properly before the circuit court; it involves evidence outside the record, known only after the rendition of the jury's recommendation, and involves a classic violation of longstanding principles of Florida law. To the extent that the Court believes that this issue should have been raised by trial counsel, an evidentiary hearing is required. Mr. Garcia's sentence of death was imposed in violation of the fifth, sixth, eighth and fourteenth amendments.

ARGUMENT IX

THE PRECLUSION OF CROSS-EXAMINATION OF THE STATE'S WITNESS, SANTOS GARCIA, VIOLATED MR. GARCIA'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. COUNSEL'S FAILURE TO ENSURE CROSS-EXAMINATION OF THE WITNESS CONSTITUTED INEFFECTIVE ASSISTANCE.

The defendant's right to confront and cross-examine the witnesses against him is a fundamental safeguard "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Garcia was denied his right to confront and cross-examine the witnesses against him when trial counsel was precluded from conducting any cross-examination of Santos Garcia. Santos Garcia was called as witness for the State (R. 1278) during its case in chief to recount the events immediately proceeding the homicide. During her direct testimony the witness became upset, and the State requested permission to excuse her from the stand (R. 1285). The State then called another witness before the defense had an opportunity

to cross-examine Santos Garcia. Santos Garcia was then recalled and resumed her direct testimony (R. 1291). The State attempted to elicit hearsay statements from the witness, but the Court ruled that there was an insufficient predicate for the admission of the out of court statements (R. 1292). The State again excused the witness without tendering her for cross-examination, promising to present a predicate for the admission of the hearsay statements through the testimony of other witnesses and then to recall Santos Garcia (R. 1293). Santos Garcia was recalled to the stand a third time (R. 1432). The State failed to tender the witness for cross-examination and again excused the witness, stating that her direct testimony would be completed later in the proceedings (R. 1435). However, Ms. Garcia was never recalled by the State to complete her direct examination and she was never subject to cross-examination by the defense.

It has been long recognized that:

> . . . denial of cross-examination [in such circumstances] would be constitutional error of the first magnitude and not amount of showing of want of prejudice would cure it.

Smith v. Illinois, 390 U.S. 129 (1968).

Under cross-examination, the defense would have shown that Santos Garcia was not a willing participant in the prosecution's case; that she loved her brother and believed that he was an unwilling participant in the criminal escapade. She had observed Mr. Garcia and Mr. Torres shortly before the robbery and had heard Mr. Garcia implore Torres to abandon his plan to rob the West's Farm Market. After Torres refused to abandon his criminal design, Enrique Garcia adamantly refused to participate in the crime. Mr. Garcia handed Torres the keys to his car stating -- "Leave me out of it -- take my car." Torres, however, refused to allow the defendant to abandon the plan and coerced him into participating in the crime. Instead, the jury was deprived of the information necessary to properly evaluate her testimony and place it in its true light.

Cross-examination of Santos Garcia was not merely limited but was entirely precluded. Without an opportunity to subject the testimony of Santos Garcia to cross-examination, Mr. Garcia was deprived of a fundamental constitutional right. As a result, the proceedings against Mr. Garcia were fundamentally flawed. To the

extent counsel failed to object, his performance was deficient, and Mr. Garcia was prejudiced. His conviction and sentence of death are unreliable and must be vacated.

ARGUMENT X

MR. GARCIA WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE VOIR DIRE, THE OPENING, THE TRIAL AND CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

During the proceedings against Mr. Garcia the prosecutors repeatedly breached their ethical and constitutional obligation to refrain from striking foul blows in their pursuit of victory. During voir dire, a juror expressed reservations about imposing a death sentence. She indicated she would follow the law, but also seemed to prefer not serving. The prosecutor then conducted stated:

> I think these questions, if you answer yes, are ones that will excuse you from serving on the jury.
>
> MR. BONE: I object to that, Your Honor.
>
> THE COURT: Sustained.
>
> Q (BY MR. GARDNER): If your answer to the question is yes, go ahead and tell me yes. I will ask you these questions.

(R. 404). Thereafter the prosecutor posed his questions and the prospective juror answered yes, knowing full well her answers would excuse her from the jury.

In opening argument, the prosecutor improperly argued his case to the jury. He vouched for the credibility of a witnesses; he specifically "testified" that no deal had been made with Huewitt for his testimony (R. 1002). The prosecutor in his opening argued that Mr. Garcia was a liar who "had little regard for life or death of other" (R. 1001). During the guilt phase of the proceedings, the prosecutor called Santos Garcia as a witness. She was never tendered for cross-examination and thus the defense was precluded from developing the positive things she could say. The State unsuccessfully tried to elicit from a police officer his opinion as to whether Mr. Garcia was the triggerman. When an objection to the question was sustained, the State, during closing, told the jury what the answer would have been (R. 1556, 2156). The State attempted to introduce a gun found at a co-defendant's house. However, because of the manner in which the evidence was presented, the jury

was informed that a gun was found there even though the court ruled the probative value of such evidence was outweighed by its prejudicial effect. The prosecutor repeatedly asserted that Mr. Garcia was a liar and that he felt no remorse (R. 1483, 2114-15, 2121). During his closing the prosecutor improperly told the jury that the judge instructed on excusable homicide, self-defense, and felony-murder because he had to, not because they were relevant.

During closing argument, the prosecutor made the identity of "Joe Perez" a central feature of his argument:

> And you heard, if we can now, some of the statements of the defendant, you heard him say he loaned the car to a friend named Joe Perez. Not true. Joe was driving the car and Benny was in the passenger side.
>
> Now, I argued to you in the beginning of this trial that there was a fictional Joe Perez, and you know now that that is true, but Ricky Garcia used Joe Perez as the strawman.
>
> I think that you can find that whenever anything bad was done in the statements, it was done by Joe Perez, and I think you can find by and large that Joe Perez is the defendant Garcia here.
>
> You heard the defendant say in the statement finished just before midnight on the day of the executions and the robberies, that at the store, Joe Perez and Benny were the ones who went in and said that there was a holdup; that is, the defendant would do that. It was Benny and the defendant who went in and said it was a holdup.
>
> You heard him say in that statement that Benny and not Louis Pina, but Joe Perez. So, Benny and Joe Perez did the shooting. Benny and Garcia did the shooting.

(R. 2112-13)(emphasis added).

It has now been shown that the State knew that codefendant Urbano Ribas, not Mr. Garcia, used the name of "Perez." In a statement taken from Lisa Smith by the Manatee Sheriff's Department on October 19, 1982, she described speaking with Ribas shortly after the murder.[28] She heard him give the name of "something Perez" to the arresting officers and saw him show them a birth registration in the name of Perez (PC-997-1017).[29] The prosecutor's argument to the jury that Garcia was

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[28]This statement had not been disclosed to the defense, but was found later in the State Attorney's file.

[29]The knowing use of false testimony is forbidden. "As long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. (continued...)

referring to a fictional "strawman" known as "Joe Perez" in his statement to the police was a knowingly false and misleading statement to the jury. The use of this deception to establish that Mr. Garcia was the triggerman was highly prejudicial.

The prosecutor compounded this fiction by arguing that Enrique Garcia cold-bloodedly planned to murder the victims and executed that plan as a heartless triggerman (R. 2236, 2240). In fact, the prosecutor was aware of substantial evidence to the contrary (PC-R. 995, 948, 974-75, 957, 938-39, 934-36, 927-32).

It was improper, and contrary to due process, for the prosecutor to identify Enrique Garcia as "Joe Perez" to the jury while the prosecution knew "Perez" was in fact codefendant Ribas and to then characterize Ricky Garcia as a liar and the ringleader based on this bogus misidentification. To the extent that trial counsel failed to contradict this erroneous assertion of the facts, he rendered ineffective assistance.

The prosecutor failed to comply with due process. United States v. Young, 470 U.S. 1 (1985). This error was further compounded by defense counsel's inaction to the extent that he knew or should have known of the misconduct. He did not object; he did not refute the prosecutor's misconduct. Under Kimmelman v. Morrison, 477 U.S. 363 (1986), this was ineffective assistance of counsel. However, to the extent that the error was hidden by the State and not discovered until now, the State itself must be held accountable. See Argument IV, supra.

Here the line was crossed. Mr. Garcia was denied his rights under the fifth, sixth, eighth, and fourteenth amendments of the United States Constitution. Given the fundamental violation of Mr. Garcia's constitutional rights, it simply cannot be said that the proceedings resulting in Mr. Garcia's conviction and sentence of death comport with fundamental due process, equal protection, and eighth amendment prerequisites. See, Beck v. Alabama, 447 U.S. 625 (1980), Gardner v. Florida , 430 U.S. 349 (1977). A full and fair evidentiary hearing was required because the files and records by no means show that Garcia is entitled to no relief on his claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986). The lower court erred in summarily

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[29](...continued)
United States, 405 U.S. 150 (1972). Likewise, a prosecutor cannot convey false argument to a jury in closing.

denying this claim, and this Court should reverse.

ARGUMENT XI

MR. GARCIA WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY AN IMPROPER AND MISLEADING INSTRUCTION AS TO THE ELEMENTS OF ATTEMPTED MURDER.

During deliberation in the guilt-innocence phase of the trial, the jury asked the following question by sending a written communication to the judge: "Can we use the felony first degree murder law in an attempted murder case, reference is to count number four" (R. 2197).[30] The trial court wrote "yes" on the written question and returned it to the jury (R. 2196).

The court's instruction was improper in that applying a presumption of premeditation to an attempted murder charge constitutes a conclusive presumption contrary to the eighth and fourteenth amendments. In Sandstrom v. Montana, 442 U.S. 510 (1979), the United States Supreme Court enunciated a clear and unequivocal rule of law; there shall be no conclusive presumptions.

The trial judge had the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982). It is apparent from the jury's question that the jury was not satisfied that the evidence established that Mr. Garcia had a conscious intent to murder Rosenna Welch. The Court allowed a conclusive presumption to preclude the jury from deciding the issue of intent. A clear and unequivocal rule of law was violated. Counsel's failure to litigate this issue was deficient performance resulting from ignorance of law. As a result, Mr. Garcia was denied his right to have a jury decide the question of intent; intent was removed as an element of the crime. This deprived Mr. Garcia of due process under both the eighth and fourteenth amendments to the United States Constitution. Relief should have been granted.

ARGUMENT XII

MR. GARCIA'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE FOR FAILING TO LITIGATE THIS ISSUE

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[30]Count number four was a charge of attempted murder of Rosenna Welch, the surviving victim.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a Florida capital habeas corpus petitioner presenting a claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Garcia's eighth amendment rights. Enrique Garcia is entitled to relief under Mann, for there is no discernable difference between the two cases. A contrary result would result in a totally arbitrary and freakish imposition of the death penalty in violation of the eighth amendment principles.

Throughout Mr. Garcia's trial, the court and prosecutor frequently made statements about the difference between the juror's responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 26, 184, 216, 311, 339, 486, 716, 772, 779, 780, 784, 2166, 2186, 2212-13, 2267, 2270).[31] In preliminary instructions to the jury in the penalty phase, the judge emphatically told the jury that the decision as to punishment was his alone (R. 2212-13). After closing arguments in the penalty phase, the judge reminded the jury of the instructions they had already received regarding their lack of responsibility for sentencing Mr. Garcia (R. 2186). After the jury retired to deliberate whether Mr. Garcia should live or die, the jury sent a note to the Court asking if Mr. Garcia was given two life terms, whether they would be served concurrently (R. 2267). Over objection of defense counsel, the Court only referred the jury to page one of the instructions which said: "The final decision as to what punishment shall be imposed is the responsibility of the judge." The Court's instruction only reinforced the jury's already diminished perception of its role and responsibility in sentencing.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme

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[31]The court's instructions to the jury before it retired to deliberate their verdict at the guilt phase was: "The penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict." (R. 2166)(emphasis added). Because the Court itself made statements at issue, the jury was even more likely to have minimized its role. Adams v. Wainwright, 804 F.2d 1526, 1531 (11th Cir. 1986).

Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in the law, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Garcia's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed. To the extent that counsel failed to know the law and litigate this issue, his performance was deficient, and Mr. Garcia was prejudiced. The Court must vacate Mr. Garcia's unconstitutional sentence of death.

ARGUMENT XIII

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. GARCIA OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Garcia's capital proceedings. To the contrary, the burden was shifted to Mr. Garcia on the question of whether he should live or die. In so instructing a capital sentencing jury, the court injected misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Mr. Garcia's jury was unconstitutionally instructed, as the record makes abundantly clear (see R. 2259). Mr. Garcia had the burden of proving that life was

the appropriate sentence. The prosecutor reiterated that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence (R. 129-30, R. 2235). Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in the law in this regard. Under Hitchcock and it progeny, an objection, in fact, was not required. Mr. Garcia's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Garcia. For each of the reason discussed above, the Court must vacate Mr. Garcia's unconstitutional sentence of death.

ARGUMENT XIV

DURING THE COURSE OF VOIR DIRE EXAMINATION AND PENALTY PHASE ARGUMENT, THE PROSECUTION IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. GARCIA WAS AN IMPROPER CONSIDERATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

During voir dire, the State repeatedly informed jurors that sympathy was an improper consideration. (R. 24-25, 214, 309, 481-82, 777-78, 783, 786-87). In the penalty phase closing, the prosecutor reaped the seeds planted during voir dire and reminded jurors of their promise not to consider sympathy for Mr. Garcia (R. 2232).

The prosecution's strategy was to convince the jurors that they were not free to be merciful. They were told that they could not consider any sympathy they may have for Mr. Garcia. They were told a higher body than they, the Court, dictated sentencing and the Court alone was responsible for the death sentence. At the guilt phase, the judge instructed the jury that sympathy was not to be considered (R. 2186). As explained and argued by the State, the jurors were left without a choice and had to recommend death, or violate their promise to be the conscience of the community.

The State misrepresented the law and committed fundamental error. In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate fifth amendment principles. Requesting the jury to reject any sympathy toward the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. The jury's 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).

The remarks by the prosecutor during the penalty phase, coupled with the prosecution's examination of eight of the jurors selected to sit on Mr. Garcia's jury and the court's instruction, constrained the jurors in their proper evaluation of mitigating factors, preventing them from allowing their natural tendencies of human sympathy to enter into their determination of whether any aspect of Mr. Garcia's character justified the imposition of a sentence other than death. This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing all of the mitigation presented by Mr. Garcia. Moreover, counsel's failure to object to the prosecutor's argument was ineffective assistance. Kimmelman v. Morrison, 477 U.S. 365 (1986). For each of the reasons discussed above, this Court should vacate Mr. Garcia's sentence of death.

ARGUMENT XV

MR. GARCIA'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS AND HITCHCOCK V. DUGGER CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

In this case, Mr. Garcia was convicted solely on the basis of felony murder. The State relied heavily on the felony charged, arguing that the victim was killed in the course of a robbery. The jury received instructions on both theories of first degree murder, however, returned a first degree felony murder verdict (R. 2202).

Because felony murder was the sole basis of Mr. Garcia's conviction of murder, the resultant death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated upon an automatic statutory aggravating circumstance -- the very felony which was the basis for conviction of murder was also applied as a statutory aggravator to impose the death sentence (R. 2926). The State conceded "Florida law does not allow us to double up." (R. 2519).

According to this Court, the aggravating circumstance of "in the course of a

felony" is not sufficient by itself to justify imposition of the death penalty. Every felony-murder in Florida will necessarily involve a statutory aggravating circumstance, Jackson v. State, 575 So. 2d 181 (Fla. 1991)[32], which violates the eighth amendment: an automatic aggravating circumstance is applied which does not inherently narrow the class of persons eligible for the death penalty.[33] But, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, since Mr. Garcia was convicted for felony murder predicated on robbery, a statutory aggravation was automatically established by the identical predicate. Moreover, the jury was instructed that once an aggravating circumstance is shown, a sentence of death is presumed. As actually applied here, Florida law did not provide a constitutionally adequate narrowing at either phase; both the conviction of felony murder and the statutory aggravating factor were predicated upon the identical circumstance, robbery.

The jury did not receive an instruction explaining the limitation contained in

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[32]This Court in Jackson v. State, 575 So.2d 181 (Fla. 1991), remanded that case for imposition of a life sentence, saying:

> Upon this record, we find insufficient evidence to establish that Jackson's state of mind was culpable enough to raise to the level of reckless indifference to human life such as to warrant the death penalty for felony murder. Accord White v. State, 532 So.2d 1207, 1221-22 (Miss. 1988) (Enmund and Tison are not satisfied in murder case with multiple defendants and no eyewitnesses where all evidence is circumstantial and the actual killer is not clearly identified). To give Jackson the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty. That would defeat the cautious admonition of Enmund and Tison, that the constitution requires proof of culpability great enough to render the death penalty proportional punishment, and it fails to 'genuinely narrow the class of persons eligible for the death penalty.' Zant v. Stephens, 462 U.S. 862, 877 (1983).

Jackson v. State (emphasis added).

[33]Accord, Rembert v. State, 445 So.2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that ever murder during the course of a burglary justifies the imposition of the death penalty").

Rembert and Proffitt. In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and its progeny, according to this Court, was a change in Florida law which excuses procedural default of penalty phase jury instructional error.

Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862, 856 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). A new sentencing is required.

ARGUMENT XVI

MR. GARCIA'S SENTENCE OF DEATH IS UNCONSTITUTIONALLY DISPROPORTIONATE, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS UNDER ENMUND V. FLORIDA AND TISON V. ARIZONA, BECAUSE IT CANNOT BE ESTABLISHED THAT HE KILLED, ATTEMPTED TO KILL, OR INTENDED THAT KILLING TAKE PLACE OR THAT LETHAL FORCE WOULD BE EMPLOYED.

The court provided the jury with a verdict form which distinguished premeditated murder from felony murder and instructed them to return "the highest degree of the offense of which [it] found the defendant guilty (R. 2188).

VERDICT

COUNT II [III as well]

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF (PREMEDITATED) FIRST DEGREE MURDER AS CHARGED

__X__ WE, THE JURY, FIND DEFENDANT GUILTY OF THE OFFENSE OF (FELONY) FIRST DEGREE MURDER

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF SECOND DEGREE MURDER WITH A FIREARM

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF SECOND DEGREE MURDER

_____ WE, THE JURY FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF MANSLAUGHTER WITH A FIREARM

_____ WE, THE JURY, FIND DEFENDANT GUILTY OF THE LESSER OFFENSE OF MANSLAUGHTER

_____ WE, THE JURY, FIND DEFENDANT NOT GUILTY

(CHECK ONE OF THE ABOVE)

SO SAY WE ALL

(R. 2792-93).

The jury verdict of felony murder (as opposed to premeditated murder) is a finding of fact by the jury that Mr. Garcia was not the triggerman and did not intend to kill. Mr. Garcia's participation in a robbery alone does not make him eligible for the death penalty. Jackson v. State, 575 So. 2d 181 (Fla. 1991). Even though he was convicted of robbery, he would not be eligible for capital punishment. The jury's finding of first degree felony-murder does not satisfy the findings required under Tison v. Arizona, 481 U.S. 137 (1987). Jackson v. State. The jury found that Mr. Garcia was not a triggerman. The trial court was not at liberty to disregard the jury's findings of fact. Moreover this Court on direct appeal did not consider or discuss the jury's verdict acquitting of premeditation. This Court failed to adequately review the record. Parker v. Dugger, 111 S. Ct. 731 (1991).

In Mr. Garcia's case, the trial court made no findings of fact meeting Tison. See, e.g., Jackson v. State. On direct appeal, this Court did not have the benefit of the Supreme Court's opinion in Tison. This Court, Tison and Jackson v. State, should vacate the death sentence in this case. Under Tison, Cabana and Jackson v. State, relief was proper here because no finding of reckless indifference to human life was made.

ARGUMENT XVII

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. GARCIA'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was raised on direct appeal, but this Court erred in denying relief. In Mr. Garcia's case, the sentencing court sua sponte found the "heinous, atrocious, or cruel" aggravator to exist during sentencing after the court had previously found, as the State had conceded, that there was insufficient evidence to submit this issue to the jury for consideration during the penalty phase. Because the State conceded this aggravator was not present, the court's sua sponte finding of this aggravating circumstance was a denial of due process and the Confrontation Clause because Mr. Garcia did not present, and could not have anticipated the need to present, evidence and argument directed to this specific issue. At sentencing, Mr. Garcia had no notice from the court that this aggravator would be applied during

sentencing after the trial court had found, as a matter of law, there was insufficient evidence to support this aggravator for submission to the jury. Lankford v. Idaho, 111 S. Ct. 1723 (1991).

Even though this Court has consistently held that in order to establish "heinous, atrocious, and cruel" something more than the norm must be shown, Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), this Court found that this aggravator was proper in Mr. Garcia's case. Garcia v. State, 492 So. 2d 360 (Fla. 1986). This Court, however, omitted the word "especially" from the definition of this aggravating circumstance in its opinion. This Court on direct appeal (like the Georgia Supreme Court in Godfrey v. Georgia, 446 U.S. 420 (1980)) did not cure the unlimited discretion exercised by the trial court by applying a limiting construction on review. See, Parker v. Dugger, 111 S.Ct. 731 (1991). Moreover no opportunity was ever given to the defense to rebut the presence of this aggravator.

The constitutionality of the Florida death penalty scheme is predicated upon adherence to a process which was reviewed and approved by the United States Supreme Court in Proffitt v. Florida. A substantial divergence from this process -- the trial court's failure, as well as this Court's failure, to apply the limiting construction, and the trial judge's finding an additional aggravator after the State had advised the defense that this aggravator was not at issue -- rendered the penalty phase constitutionally unfair and unreliable, i.e., arbitrary and capricious. The lower court erred in summarily denying this claim, and this Court must vacate this death penalty.

ARGUMENT XVIII

THE SENTENCING COURT'S REFUSAL TO PERMIT ADDITIONAL MITIGATING EVIDENCE AND TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AMENDMENT.

This issue was raise on direct appeal, but this Court erred in denying relief. On review of a death sentence, the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Mills v. Maryland, 108 S.Ct. 1860

(1988); cf. Parker v. Dugger, 111 S.Ct. 731 (1991). Where that finding is clearly erroneous, the defendant is entitled to new resentencing. Maqwood at 1450. The sentencing judge in Mr. Garcia's case found but one mitigating circumstances, "no significant history of prior criminal activity." The court found "no other mitigating circumstances" (R. 2927). Moreover, the court ruled that Mr. Garcia could not produce additional evidence at sentencing to prove the existence of mitigation (R. 2512). The court's refusal to consider other mitigation established in the record was error. The error was compounded by the sentencing court's refusal to permit the presentation of additional mitigating evidence. Other statutory and nonstatutory mitigating circumstances were set forth in the record, which the State did not controvert.[34]

This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988) (non-violent background is mitigating).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court held that the sentencer is entitled to determine the weight given a particular mitigating circumstance; but, the sentencer may not refuse to consider that circumstance as a mitigating factor. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Here, that is undeniably what occurred. The judge said no mitigating circumstances (except no significant prior criminal activities) were present and so were not considered. Moreover the court refused to permit the presentation of additional mitigating evidence.

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[34]To briefly summarize, the record clearly established that Mr. Garcia grew up in circumstances of extreme poverty. He was one of eight children born in eight years (R. 2215) The father deserted the family when Mr. Garcia was six years old and his mother supported her eight children by working in the fields as a migrant laborer (R. 2220-21). The Garcia family suffered greatly from severe poverty with nine people sleeping in one room often without refrigeration or even windows (R. 2222-23). As a child, Enrique Garcia was well behaved and tried to fulfill the role of a father in the family. He helped his mother with the other children and did not get into trouble (R. 2216, 2223-24). Due to the family's desperate financial circumstances, Mr. Garcia had to work part-time in the fields as a young child and had to leave school when he was 14 years old to work full-time to support the family (R. 2217-18). Mr. Garcia married when he was eighteen and was the father of a young son. He was good to his child and provided him with love and financial support (R. 2218-19).

Under Eddings and Magwood, the sentencing court's refusal to accept and find other mitigating circumstances, which had been established, was error. Mitigating circumstances that are clear and uncontroverted in the record must be recognized and weighed; otherwise, the sentencing is constitutionally unreliable. The lower court erred in summarily denying the claim.

ARGUMENT XIX

THE JURY WAS DENIED THE RIGHT TO HEAR IMPORTANT TESTIMONY REGARDING THE AGE OF THE CO-DEFENDANTS CONTRARY TO CONSTITUTIONAL GUARANTEES OF DUE PROCESS PURSUANT TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury sent a note to the judge during the State's presentation of evidence in the guilt-innocence phase of the trial requesting information regarding the relative ages of the defendants:

> The Court: I have a note from one of the jurors which was given to me this morning.
>
> It says: Could we at one point today hear the opening statement from the state, and also the ages of the four suspects involved before the day is over?
>
> I will tell them that they can't hear the statement; that it's not evidence, and they will have to go on their evidence that they have heard in the case.

(R. 1427).

The court then instructed the jurors as follows:

> So, if you feel that you have a very important question for something other than curiosity about something that wasn't testified to, or something of that nature, why, of course, you know you ask it, but I would caution you to be careful, because it can influence the trial and it can embarrass all of us to some degree.
>
> * * *
>
> Also, there was a question about the age of the four suspects that were involved, and, again, you will have to take that testimony from what you heard in the courtroom.

(R. 1437-38)(emphasis added).

In determining the respective roles of the various participants, it was obvious to the jurors early in the proceedings that it would be important to know their respective ages. The jury requested and was denied this critical information although the court had the dates of birth in the court records and could have taken judicial notice of the ages. Benny Torres was 30 at the time of the offense, while Enrique Garcia was 20, Luis Pina was 20, and Urbano Ribas (Joe Perez) was 17. This

information would have provided significant information regarding the respective roles of Benny Torres and Enrique Garcia, which became a central focus of the trial and penalty.[35]

The jury had a right to hear all evidence which was material and relevant to their decision making process by virtue of the sixth, eighth and fourteenth amendments. Lockett v. Ohio, 438 U.S. 586 (1978). Furthermore, given the fact that guilt-innocence and penalty hinged on the respective roles played by the participants in the robbery, it was fundamental reversible error for the court not to provide the information requested by the jury, and relief should be granted. Moreover, it was ineffective assistance for defense counsel not to ensure this obvious relevant and important information got to the jury. Certainly, confidence in the outcome is undermined and a new sentencing is required. The lower court erred in summarily denying this claim, and this court should reverse and remand for an evidentiary hearing.

ARGUMENT XX

MR. GARCIA'S DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY.

Florida statutes provide that for a death sentence to be lawfully imposed there must be specific written findings of fact in support of the penalty. The legislature has mandated that the imposition of the death penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but shall be supported by written findings of specific facts giving rise to the aggravating and mitigating circumstances. Fla. Stat. §921.141(3); see Van Royal v. State, 497 So. 2d 625, 628 (Fla. 1986). In the absence of written findings, the imposition of a life sentence is mandatory. Fla. Stat. §921.141(3). Specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Van Royal, at 628.

The judgment imposing the death sentence here failed to satisfy the statutory

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[35]In that counsel failed to ensure that this information was fully presented to the jury after its request for the information, counsel rendered ineffective assistance.

mandate of section 921.141(3). The trial court based the death sentence merely on a written recitation of the aggravating and mitigating factors it found to exist; however, the trial court failed to enunciate specific facts to support the existence of the factors in aggravation and mitigation (R. 2847-2848). The record of Mr. Garcia's death sentence, therefore, does not demonstrate reliance on a "well-reasoned application" of the statute. Van Royal, at 628. His death sentence was unlawfully imposed, must be vacated and a life sentence imposed in accordance with section 921.141(3).

The trial court could not determine after the fact the factual circumstances supporting its imposition of the death sentence once jurisdiction was relinquished on direct appeal and the record had been certified to this Court; it was then too late for that court to augment an inadequate record and then, after the fact, enter written findings in support of the death sentence. Van Royal. The record may not be supplemented through subsequent judicial acts of the trial court in this manner because the record "[was] inadequate and not merely incomplete." Van Royal, 497 So. 2d at 698.[36] The action taken in this case was in excess of the trial court's jurisdiction. The lower court erred in summarily denying this claim. Mr. Garcia's death sentences must be vacated and life sentences imposed.

ARGUMENT XXI

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. GARCIA'S TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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[36]Since its decision in Van Royal, this Court in Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989), announcing a prospective rule, ordered that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." In Stewart v. State, 549 So.2d 171, 176 (Fla. 1989), cert. denied, 110 S.Ct. 3294 (1990), this court held that "[s]hould a trial court fail to provide timely written findings in a sentence proceeding taking place after our decision in Grossman, we are compelled to remand for imposition of a life sentence." In Grossman, this Court distinguished Van Royal on the basis that the written findings in Grossman, although made after the notice of appeal was filed, were made prior to certification of the record to this court, noting that the trial court retained concurrent jurisdiction for preparing a complete record for filing in this Court, and thus affirmed the conviction and sentence. Mr. Garcia's case, however, is procedurally akin to Van Royal in that when the record was certified to this Court, it contained no legally adequate findings to support the imposition of the death penalty. Such findings were made only after this Court relinquished jurisdiction to the trial court for the purpose of preparation and entry of findings.

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. The limitation on the sentencer's ability to consider only aggravating circumstances specifically and narrowly defined is required by the eighth amendment.

> [O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988).

Here, the State argued that Mr. Garcia showed no remorse (R. 2159). The prosecutor continued to urge lack of remorse by arguing that Mr. Garcia had shown an indifference to human life (R. 2121-22). The prosecutor also argued that Mr. Garcia was liar (R. 2114-15).

During the penalty phase the prosecutor improperly urged that the death penalty was appropriate merely because Mr. Garcia had been convicted of the offense (R. 2231).

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Consideration of these nonstatutory aggravating circumstances resulted in that recommendation and violated Mr. Garcia's constitutional guarantee under the eighth and fourteenth amendments.

The prosecutor's introduction and use of, and the sentencers' reliance on, wholly improper and unconstitutional nonstatutory aggravating factors violated the eighth amendment. Counsel's failure to object was based on ignorance and constituted deficient performance which prejudiced Mr. Garcia. The death sentence should not be allowed to stand. The lower court erred in summarily denying this claim, and this Court should vacate the sentence.

ARGUMENT XXII

THE PROSECUTOR IMPROPERLY INJECTED RACIAL, ETHNIC AND NATIONAL ORIGIN PREJUDICE INTO MR. GARCIA'S TRIAL BY REPEATEDLY NOTING THE FACT THAT MR. GARCIA WAS MEXICAN, FOCUSING THE JURY'S AND THE JUDGE'S ATTENTION ON THE RACIAL ASPECT OF THE CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

At Mr. Garcia's trial the prosecution appealed to racial, ethnic and national origin bigotry in the factfinders. The prosecutor sought to use latent racial and

ethnic bigotry against Mr. Garcia. The prosecutor tried to inflame any prejudice present in the judge or jury in order to lessen his burden and ease the way to a prosecutorial victory.

Due process under the fourteenth amendment does not permit the State to use racial or ethnic bigotry against a criminal defendant. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 476 U.S. 79 (1986); Turner v. Murray, 476 U.S. 28 (1986). Here, the prosecutor's actions infected both the guilt-innocence and the penalty phases.

To the extent that trial counsel failed to object to the prosecutor's efforts to inflame racial or ethnic bigotry, counsel was ineffective under the sixth amendment. Mr. Garcia would have been entitled to a new trial had an objection been registered. Under Kimmelman v. Morrison, 477 U.S. 365 (1986), counsel was ineffective for failure to interpose objections. Mr. Garcia's conviction must now be reversed. It was fundamental error for racial or ethnic bigotry to be used by the prosecutor in order to secure a conviction and sentence of death.[37]

The prosecutor's arguments during the penalty phase impermissibly interjected irrelevant and prejudicial ethnicity and national origin into proceedings, factors unrelated to Mr. Garcia's character or the nature of the offense. Such factors have no legitimate place in our judicial system, especially in capital cases. The insertion of such factors by the State tainted the proceedings with prejudice in violation of the eighth and fourteenth amendments. The resulting convictions and death penalty are wholly unreliable and must be vacated.

ARGUMENT XXIII

MR. GARCIA WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT IMPROPERLY FOUND THE

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[37]Information drawn from the State Attorney's files also show that members of the State Attorney's office harbored personal feelings of prejudice towards Mr. Garcia and members of his ethnic group. Trial preparation notes from the state attorney's office reveal references to Mr. Garcia's case that contain terms that may only be characterized as racial or ethnic slurs. One page of the trial preparation notes is entitled "Beaners." This term of opprobrium is employed to describe Mr. Garcia and his co-defendants (PC 1019).

EXISTENCE OF THE AGGRAVATING FACTOR THAT THE CRIME WAS COMMITTED TO AVOID A LAWFUL ARREST.

For the constitutional imposition of a death sentence the sentencing body must make an individualized determination that death is the appropriate sentence. A defendant's criminal culpability must be limited to his participation in a crime, and his punishment must be tailored to his personal responsibility and moral guilt. Enmund v. Florida, 458 U.S. 782 (1982). Mr. Garcia was denied an individualized sentencing determination because the culpability of his co-defendant was imputed to Mr. Garcia in order to find the existence of the statutory aggravating circumstance of avoiding lawful arrest. The trial court's amended sentencing findings assert that the circumstance underlying the aggravating factor of avoiding lawful arrest is the fact that "one of the participants [in the offense] was known by the victims." (R. 3081). The prosecutor urged this theory to the jury at the penalty phase and to the court during sentencing.

The evidence adduced at trial clearly demonstrates that Mr. Garcia never knew the victims. His co-defendant, Benito Torres (who received a life sentence as part of a plea agreement with the State), was the only participant in the offense who was known by the victims. The aggravator of avoiding lawful arrest could only have been applied properly to Benito Torres. This factor was not applicable to Mr. Garcia. The finding of this aggravating circumstance in Mr. Garcia's case impermissibly and vicariously imputed the culpability of Benito Torres to Mr. Garcia. Omelus v. State, 16 F.L.W. 5444 (Fla. 1991). Moreover the jury instructions were inadequate and failed to advise them of the limitation on imputation of another co-defendant's culpability.

This error unconstitutionally deprived Mr. Garcia of an individualized and reliable sentencing determination and resulted in the unconstitutional imposition of the death sentence. The jury instructions were inadequate and thus violated Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Garcia's death sentence is unlawful and should be vacated.

CONCLUSION

Appellant, based on the foregoing, respectfully urges that the Court vacate his unconstitutional capital conviction and death sentence and grant all other

relief which the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail, first class, postage pre-paid, to Robert Landry, Esq., Assistant Attorney General, Department of Legal Affairs, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607, on September 3rd, 1991.

_____
Attorney