IN THE SUPREME COURT OF FLORIDA

NO. 75,961

ENRIQUE GARCIA,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA

REPLY 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 a limited evidentiary hearing. In this brief, the record on direct appeal is cited as "R. ____" with the appropriate page number following thereafter. The record on appeal of this Rule 3.850 proceeding is cited as "PC-R ____." Other references used in this brief are self-explanatory or are otherwise explained.

The State, in its Preliminary statement, contends that Mr. Garcia has abandoned a number of his claims. The State is in error. Mr. Garcia does still contend that the prosecutor erred in presenting and arguing improper matters at the penalty phase. Mr. Garcia does not rely on Booth v. Maryland, 482 U.S. 496 (1987), because the United States Supreme Court has receded from it. Payne v. Tennessee, 111 S. Ct. 2597 (1991). However, under well established Florida law the prosecutor's closing arguments were improper. Improper comments also occurred during the voir dire, the opening statement and the presentation of evidence. The prosecutor tried to inflame the jury by injecting racial bias into the proceedings, focusing on the racial disparity between Mr. Garcia and Willie and Martha West. The prosecutor tried to portray the Wests as hardworking whites and Mr. Garcia as a lazy, nonremorseful Mexican. However, Mr. Garcia's trial counsel failed to object to the prosecutor's conduct. Mr. Garcia has argued to this Court and the circuit court that counsel's failure to object was premised upon ignorance (deficient performance), and as a result, Mr. Garcia was prejudiced (error was allowed to occur). In his Rule 3.850, Mr. Garcia argued that Booth supported his claim. In his initial brief, Mr. Garcia still argued error on the basis of the same facts; he simply did not cite Booth (Initial Brief at 70-73). This was not an abandonment of his claim.

The State also argues that Mr. Garcia has abandoned his claim that "executing the mentally retarded violates the Constitution" (Answer Brief at 2). Again the State misunderstands Mr. Garcia's initial brief. At trial and

on direct appeal, the jury, the judge and this Court did not know that Mr. Garcia was mentally retarded (Initial Brief at 37, 39, 40, 42, 47). As a result, the claim that Florida or even federal law precluded Mr. Garcia's execution could not be presented. Counsel's failure to discover the mental retardation was deficient performance which prejudiced Mr. Garcia by permitting him to be sentenced to death. Mr. Garcia briefed this issue in the initial brief. He has not waived his claim that a death sentence would have been precluded by virtue of his mental retardation. He has simply tried to make it clear that the claim is cognizable in Rule 3.850 proceedings by virtue of trial counsel's ineffective assistance; he failed to present the evidence which would have established the mental retardation.

Finally, the State argues that Mr. Garcia has abandoned his claim that statements were obtained from him by virtue of violations of his Fifth and Sixth Amendment rights. However once again, the State ignores Mr. Garcia's initial brief. In his brief, Mr. Garcia argued that trial counsel inadequately investigated, developed and presented evidence establishing Fifth and Sixth Amendment violations when the State unconstitutionally extracted statements from Mr. Garcia (Initial Brief at 62). Counsel's performance was deficient, and as a result, Mr. Garcia was prejudiced by the introduction of his inadmissible statements. This claim has not been abandoned.

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REPLY TO STATEMENT OF THE CASE AND THE FACTS

Mr. Garcia continues to rely upon his Statement of the Case and of the Facts as set forth in his initial brief and upon the facts set forth throughout that brief. However, he must take issue with the many blatant misrepresentations set forth by the State. Here, he addresses several of those misrepresentations; he does not have the space or time to address them all.

The state noted in its brief that trial counsel, Mr. Bone, "had prior experience in a capital trial." (Answer Brief at 3). However, the State conveniently ignored Mr. Bone's testimony that his only prior capital trial experience was in 1975 in a military court in Germany (PC-R. 26).

The State observed that "Bone stated that he had received the statement of Grover Yancy" (Answer Brief at 3). However, Mr. Bone also noted that Grover Yancy's statement to the police occurred in March, 1983, but it was not provided to the defense until six months later, near the end of October, 1983, less than a month before Mr. Garcia's trial (PC-R. 36). Moreover, Mr. Bone noted that Grover Yancy's statement was favorable to Mr. Garcia (PC-R. 35). Mr. Bone did not present the evidence that Mr. Garcia's co-defendant had made a statement indicating Mr. Garcia was not the triggerman solely because he believed it was hearsay and was inadmissible at the penalty phase (PC-R. 62).

The State notes that Mr. Bone testified that Garcia confessed that he was the triggerman (Answer Brief at 4). However, the State conveniently ignores Mr. Bone's testimony that he did not believe Mr. Garcia; he thought Mr. Garcia was trying to appear tough (PC-R. 119, 141). Mr. Bone did not believe Mr. Garcia was in fact the triggerman.[1]

The State also asserts that counsel "learned he could not use Garcia as a witness" (PC-R. 76-77)(Answer Brief at 4). Mr. Bone did not make such a statement. Counsel testified that he believed Mr. Garcia's statements to the

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[1]The State in its brief stated "Bone was aware of the ethical dilemma in presenting evidence he knew to be perjured" (Answer Brief at 4). However, Mr. Bone specifically testified that dilemma was not at issue here because he did not believe Mr. Garcia's statement to him. The State's efforts to distort and misrepresent the record are blatantly improper.

police were inconsistent, and as a result, he could argue to the jury not to believe any of them.

The State contends that Mr. Bone testified that the testimony Hewitt gave at trial was consistent with the information Garcia had given to Mr. Bone (Answer Brief at 6). The State's contention is misleading since there were numerous inconsistent statements from Mr. Garcia. The State ignores the fact that Mr. Bone was asked, "So you had no reason to disbelieve his [Hewitt's] statement?" Bone responded, "Well, that's not necessarily true. There was a television in the jail cell and there was a lot of news forecasts [sic] going on. And Johnny Hewitt could well have seen television story of it and got it from that area" (PC-R. 139).

The State notes that Mr. Bone sought the assistance of a mental health expert who counsel talked to both prior to and subsequent to the mental health evaluation (Answer Brief at 4). However, the request for an expert was not made until two weeks before trial. As a result, there was insufficient time to conduct a full evaluation (PC-R. 573). Moreover counsel failed to provide Dr. Ritt with necessary background information which according to Dr. Ritt in this case "does give you, you know, a different kind of picture" (PC-R. 580). Dr. Ritt was also unable to test Mr. Garcia's intellectual functioning due to the lack of time afforded him before trial (PC-R. 606). Thus, Mr. Bone's tactical decisions were made without the benefit of a full and adequate evaluation by Dr. Ritt. Counsel's decisions were made without knowing that Mr. Garcia's verbal IQ has been tested at 69.

Dr. Ritt in his Rule 3.850 testimony was asked about Mr. Garcia's tough talk during his evaluation. Dr. Ritt acknowledged that Mr. Garcia sounded pretty tough. However, he was uncertain whether Mr. Garcia's claims were protective braggadocio or not (PC-R. 601). The background information of which he was unaware at trial and the subsequent IQ testing certainly gave a reasonable basis for concluding that Mr. Garcia was woefully insecure and, as a result, inclined to false braggadocio (PC-R. 604). Specifically, Dr. Ritt noted that the background information gave him "a different kind of picture"

of Mr. Garcia than he obtained during his rushed and very limited pretrial evaluation (PC-R. 579).[2] The prostitution that Mr. Garcia's mother engaged in was very significant mitigating evidence necessary to an understanding of Mr. Garcia (PC-R. 600). Yet Dr. Ritt did not have this information. In fact the information led Dr. Ritt to describe Mr. Garcia as "insecure but very, very well defended. I might use words like, you know, I guess in a layman sense I might describe him as being, you know, insecure and very thin skinned" (PC-R. 602).

The State claims Bone "used investigator Chuck Chambers to get in touch with family members" (Answer Brief at 4). However, counsel never explained to the investigator why statements from family members were being obtained (PC-R. 195). Moreover, Mr. Chambers testified not only was he given no guidance as to what to look for, he was given woefully inadequate time to investigate (PC-R. 196). As a result, little of the now known and very important background information was discovered before or during the penalty phase proceedings.

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.

In his initial brief, Mr. Garcia sets forth the facts upon which this argument is based, pp. 5-7.[3] The record reflects that the court improperly precluded Mr. Garcia's post-conviction counsel from eliciting from trial

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[2]The State's claim that "Much of what has been furnished to [Dr. Ritt] by CCR is cumulative" (Answer Brief at 7) again is blatantly misleading. The material within itself was repetitious, but it was information that Dr. Ritt did not previously have and which gave a "different kind of picture" of Mr. Garcia (PC-R. 579). Dr. Ritt specifically testified that he was not told of Mr. Garcia's mother's prostitution (PC-R. 600). This information was available, but trial counsel never investigated and presented it to the expert. This information according to Dr. Ritt "Certainly adds to the mitigation picture" (PC-R. 600).

[3]The State in its Answer Brief stated "Appellant is not kind enough to inform us where in the record there is support for the baseless claim that he was not provided a full and complete evidentiary hearing" (Answer Brief at 11). However, Mr. Garcia quoted several long passages in his initial brief from the evidentiary hearing where the circuit court limited collateral counsel's ability to present evidence. See Initial Brief at 5-7 quoting PC-R. 86-87, 87-88, 95-96. Obviously, once again the State misrepresents the record.

counsel whether he had received disclosure of certain information by the state. The court foreclosed any avenue of establishing either a Brady claim concerning the information contained in the State Attorney's files or an ineffective assistance claim if the material had been disclosed but not utilized by trial counsel. To lay a predicate for a Brady claim, it was necessary to establish through trial counsel whether the State's information had been disclosed to him and whether counsel could have used it in support of the defense during the trial. If trial counsel had acknowledged a timely disclosure of this information, then inquiry could be made into trial counsel's failure to utilize the information. At the outset, the lower court precluded inquiry into the matters because post-conviction counsel could not, in advance, represent to the court what the witnesses' answers on the subject were likely to be. Counsel was, in point of fact, in the process of laying the necessary foundation when the trial court terminated the inquiry (PC-R. 86-87). The court's ruling was erroneous and denied Mr. Garcia a full and fair hearing on the issues (PC-R. 88). The court ruling was that collateral counsel cannot plead in the alternative: material exculpatory evidence was not presented to the jury either because the State failed to disclose or trial counsel failed to utilize the exculpatory evidence. It is significant to note that the court thereafter denied Mr. Garcia's claims after denying him a fair and full opportunity to present the evidence supporting the claims. Moreover, the State in its brief argued that collateral counsel's failure to pursue the matters the circuit court ruled could not be pursued constituted a waiver of the claim (Answer Brief at 27).

The lower court also ruled that under 3.220, Fla. R. Crim. P., and Brady v. Maryland, 373 U.S. 83 (1963), the State is under no obligation to disclose to the defense exculpatory or favorable evidence relating to sentencing which arises during the interval between trial and entry of the final sentencing order (in this case over a year later). As a result, collateral counsel was not permitted to pursue evidentiary development of the State's failure to disclose exculpatory evidence discovered by the State after the guilt phase

but before the sentencing. That ruling was also erroneous.[4] Monroe v. Butler, 690 F.Supp. (E.D. La. 1988); Monroe v. Butler, 883 F.2d 331 (5th Cir. 1988). So long as there remains any issue pending before the trial court, the duty to disclose evidence continues. The circuit court's ruling was wrong.

Collateral counsel's announcement that he had no more evidence to present occurred subsequent to the court's actions cutting off the presentation of relevant evidence on the issues. It was not a waiver or abandonment of the prior rulings. It would, in light of the trial court's rulings, be entirely futile to try to present further evidence on the issues the court had ruled could not be presented.

The lower court failed to accord Mr. Garcia a full and fair hearing on all of his post-conviction motion claims.

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.

The State relies on a quotation from the record, (PC-R. 67-68), for the proposition that trial counsel was prepared for the penalty phase. In context, this testimony plainly concerned his preparation for the guilt/innocence phase of trial, not to preparation for the penalty phase. Counsel had not investigated or prepared for the penalty phase. A capital defense attorney has an affirmative obligation to investigate mitigation. "[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 attention of the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). Failure to present mitigating evidence is ineffective assistance where the failure results from inadequate preparation and investigation. Kenley v. Armontrout, 937 F.2d 1298

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[4]In fact the judge stated "You're wrong, and I'm ruling right now that that's wrong under the rule" (PC-R. 95). "[T]he Court's going to continue to sustain the objection" (PC-R. 98). As a result collateral counsel was not allowed to ask trial counsel about mitigating evidence the prosecution discovered after the trial but before sentencing which the State did not disclose.

(8th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). A client's mental problems create the likelihood of mitigation that needs to be investigated and presented. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Preparation and investigation needs to occur pretrial because of debilitating effect of a guilty verdict. Blanco v. Singletary.

In Brewer, an experienced defense attorney was faced with a client who had a dysfunctional family background and extensive mental health history. In Brewer, as with Mr. Garcia, the problem was compounded by a trial court's refusal to allow adequate time for admittedly late penalty phase preparation. However, the Seventh Circuit found ineffective assistance which warranted a new sentencing proceeding:

> In Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989), cert. denied sub nom., Kubat v. Greer, ___ U.S. ___, 110 S. Ct. 206, 107 L.Ed.2d 159 (1989), we held that:
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> > "Viewing the performance of counsel solely from the perspective of strategic competence, we hold that defense 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 attention of the jury on any mitigating factors. Mitigating factors brought out at trial might be emphasized, a coherent plea for mercy might be given, or new evidence in mitigation might be presented. But counsel may not treat the sentencing phase as nothing more than a mere postscript to the trial. While the Strickland threshold of professional competence is admittedly low, the defendant's life hangs in the balance at a capital sentencing hearing. Indeed, in some cases, this may be the stage of the proceedings where counsel can do his or her client the most good."
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> (Emphasis added). In our opinion, defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he did not "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 attention of the jury on any mitigating factors."

935 F.2d at 857. Unlike Mr. Garcia's situation, a pre-sentence investigation in Brewer brought out much of this mitigation and it was considered, though rejected, by the trial court.[5] The Seventh Circuit held "[w]e are unpersuaded that the sentencing judge's consideration of the mitigating

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[5]Brewer was tried in Indiana, a state which follows Tedder and permits jury overrides.

factors precludes prejudice to the defendant," 935 F.2d at 858, and granted relief:

> We hold that defense counsel's almost complete lack of investigation into Brewer's mental and family history and thus lack of knowledge regarding it as well as his failure to argue mitigating factors to the jury constitute ineffective assistance of counsel sufficient to undermine our confidence in the outcome of the jury's death penalty recommendation.

935 F.2d at 860 (emphasis added). Similarly, Mr. Garcia's trial counsel's performance was deficient. As a result Enrique Garcia was denied an individualized sentencing proceeding.

(a) Failure to present Grover Yancy's Testimony at the Penalty Phase.

Codefendant Torres confessed to Grover Yancy that Enrique Garcia was not the triggerman. However, Mr. Bone considered Torres' statement to Yancy to be hearsay. He never considered trying to introduce it within an exception to the hearsay rule or as admissible under the Sixth Amendment (PC-R. 61). But even if the evidence had not been admitted in the guilt/innocence phase, without question, the evidence was admissible in the penalty phase. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).[6] Evidence derived from codefendant Torres that Mr. Garcia did not actually shoot the Wests, an issue which was the prime focus of this trial, would have changed the outcome of the penalty phase of this trial. Moreover, evidence, albeit hearsay, to show that Mr. Garcia did not actually shoot the victims implicates the heightened evidence required under Tison and Enmund before the death penalty can be constitutionally imposed.[7] In fact this Court has reversed a death sentence where it found "insufficient evidence to establish that [the defendant's] state of mind was culpable enough to rise to the level of reckless

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[6]In Green v. Georgia, 442 U.S. 95 (1979), the United States Supreme Court reversed a death sentence where evidence of a co-defendant's statement exculpating Green in the actual killing was excluded from Green's penalty phase. The Supreme Court held Lockett v. Ohio, 438 U.S. 586 (1978), required that the evidence be admitted. The situation here is identical. Had counsel sought to admit this evidence at Mr. Garcia's penalty phase proceedings, the Eighth Amendment required that the evidence be allowed to be considered. Clearly, Mr. Garcia was prejudiced by counsel's failure to know the law.

[7]On this issue without benefit of Torres' statement indicating Mr. Garcia was not a shooter, this Court on direct appeal was split 4-3.

indifference to human life such as to warrant the death penalty for felony murder." Jackson v. State, 575 So. 2d 181, 193 (Fla. 1991). This conclusion was reached in Jackson because the evidence "does not show beyond every reasonable doubt that [Jackson's] state of mind was any more culpable than any other armed robbery whose murder conviction rests solely upon the theory of felony murder." 575 So. 2d at 192.

However counsel failed to present available and admissible evidence that Mr. Garcia had not shot anybody. Counsel's failure was solely because of his ignorance of the law. This was deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Brewer v. Aiken. Confidence is undermined in the result of the penalty phase and this Court's affirmance or direct appeal. But for counsel's failure a life sentence would have resulted. As it was three justices dissented from the affirmance of the death sentence in this case. Garcia v. State, 492 So. 2d 360, 369 (Fla. 1986).

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

An examination of Santos Garcia's testimony during the evidentiary hearing demonstrates that it was not merely cumulative to that presented during the penalty phase -- she revealed the true scope and horror of the circumstances under which she and Mr. Garcia were raised and the influences it had upon him as well as herself. She brought forth evidence of the mother's prostitution in the home and other significant matters which the mother and other family members, at penalty phase, did not reveal. Santos was able to escape from the Garcia family through marriage at the age of 15. Enrique Garcia could not escape.

Despite counsel's misgivings or concerns that Santos could reveal damaging testimony regarding the offense itself, it is patently clear that, had counsel taken any time to prepare the witness, her testimony at the penalty phase could have been limited solely to the circumstances of their upbringing, just as she testified at the evidentiary hearing. Given this, the state could not properly develop subject matters on cross-examination exceeding the scope of direct.

Moreover, the failure to adequately investigate and prepare testimony from other witnesses was deficient performance. Counsel failed to ask the necessary questions to obtain the wealth of available mitigation. His performance was deficient. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991).[8]

A deprived upbringing has been clearly recognized as a non-statutory mitigating factor in Florida. Moreover, it is in the face of evidence of this desperately deprived upbringing that other evidence showing that Mr. Garcia, nonetheless, was able to show love, concern and affection for his family could have brought into true perspective for the jury the reasons why Mr. Garcia should not be sentenced to death. Counsel's failure to investigative deprived Mr. Garcia of an individualized sentencing.

(c) Failure to Utilize Dr. Ritt.

Neither the mental health expert nor the investigator were instructed by counsel on what constitutes mitigation in order to adequately direct their efforts in its development. Moveover, the very limited time allowed by counsel to the expert and the investigator prevented them from fully and adequately performing their responsibilities in a professional manner. Both expressed to counsel their concerns of the limitations imposed upon them in this regard. Consequently, as the record at the evidentiary hearing clearly showed, significant and available information concerning Mr. Garcia was never developed nor considered by the mental health expert in the formulation of his impressions and was never presented to the jury. Although some evidence of Mr. Garcia's background and upbringing was presented during the penalty phase, it was but a mere shadow of what was available. As an example, no evidence was presented regarding his history of substance abuse or his intoxication. As an example, no evidence was presented regarding his history of substance abuse or his intoxication. The full picture was never adequately

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[8]The State complains about the use of Carmen Barajas' affidavit. However, it was considered and relied upon by the mental health experts. And it is in the record and was offered as evidence. Moreover, as hearsay it could have been presented to Mr. Garcia's jury.

investigated, prepared and presented to the mental health expert, to the jury and the sentencing judge although counsel could have done so. Had this been done, the outcome would have been different. Certainly confidence is undermined in the death sentence which was obtained without an individualized sentencing.

Trial counsel did not have valid tactical reasons for not presenting Dr. Ritt's testimony to the jury. The decision was made on less than adequate investigation. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). Counsel failed to call upon Dr. Ritt as the expert to assist him in the structuring, preparation and presentation of Mr. Garcia's background through other witnesses, and in particular development of other expert testimony through a social worker concerning the nature and impact Mr. Garcia's migrant lifestyle (PC-R. 580-582).[9] Counsel's performance was deficient and deprived Mr. Garcia of an individualized sentencing. A new sentencing must be ordered.

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.

The State asserts "Garcia did not assert the issue of the denial of an Eighth Amendment right to the effective assistance of mental health experts anywhere in his twenty-three issue, one hundred and thirty-eight (138) page motion for post-conviction relief or his forty-five (45) Supplement to Motion to Vacate" (Answer Brief at 20). Again the State misrepresents the record. In Mr. Garcia's Supplement to Motion to Vacate Judgment and Sentence, the following appears:

ARGUMENT IX

ENRIQUE GARICA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND ADEQUATE MENTAL HEALTH ASSISTANCE AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

(PC-R. 1066)(emphasis added).

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[9]In fact Dr. Ritt testified that he was very familiar with the plight of migrant workers and could have provided trial counsel with names of people who could have explained it from sociological point of view.

At the evidentiary hearing, Mr. Garcia presented the testimony of Dr. Krop and Dr. Ritt without objection. Collateral counsel argued in his closing argument that counsel's deficient performance cost Mr. Garcia his right to an adequate mental health evaluation (PC-R. 486-88). The State's contention that this issue was not litigated below is simply ludicrous.

The State ignores in its argument the host of decisions which have established that a defendant is entitled to a professionally adequate mental health evaluation. E.g., Mason v. State, 489 So. 2d 738 (Fla. 1986); State v. Sireci, 520 So. 2d 1221 (Fla. 1987); State v. Sireci, 536 So. 2d 321 (Fla. 1988); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991). Professional adequate mental health assistance is provided only when the expert has been provided by counsel, or himself has gathered and considered a sufficient array of collateral information concerning the defendant's background to validate and formulate his evaluation. Both counsel and the expert himself have the duty to obtain such information; basing an evaluation solely or substantially on a self-report does not meet the required standards of professional care required.

Through the course of the evidentiary hearing, evidence was presented concerning significant information regarding Mr. Garcia which Dr. Ritt never learned, e.g., the extensive history of the mother's prostitution and Mr. Garcia's long term alcohol and substance abuse. Again any decision made, based on less than complete investigation, is not a valid strategic decision. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989).

As Dr. Ritt clearly stated, he was adversely affected by the lack of sufficient time in conducting his evaluation (PC-R. 573). He clearly was convinced that given adequate time, he could have conducted a far more adequate evaluation of Mr. Garcia (PC-R. 597). Despite having evaluated Mr. Garcia after the events, Dr. Krop's testimony, based upon an adequately developed background and history and adequate time, shows what kind of evaluation Dr. Ritt could have done had he had the time and the available records in terms of his own evaluation. Given an adequately developed

background history and adequate time to conduct his evaluation (both of which were denied to him), Dr. Ritt could have provided the kind of expert assistance to which Mr. Garcia was entitled. Brewer v. Aiken. This, however, was never done. An individualized sentencing did not occur. As a result, a new sentencing must be ordered so that available mental health mitigation can be presented.

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.

The issue raised in Argument I, supra, impacts the findings of the lower court on these issues. As discussed, the lower court denied Mr. Garcia a full and fair opportunity to establish the state's withholding of exculpatory and favorable information from the defense.[10]

The State's representation that Hewitt's nolle prosequi occurred several months before Hewitt ever met Garcia is patently incorrect. Hewitt was placed in a cell with Mr. Garcia just before Thanksgiving, 1982, the month before Hewitt's nolle prosequi on December 16, 1982 (PC-R. 835-36).

The State questions whether documents identified in the initial brief, pp. 48-49, were revealed by the State. Paul Harvill, an investigator at CCR, testified to locating and copying those documents in the State Attorney's files (PC-R. 282-300). Comparison of the documents with the State's various responses to discovery contained in the records on direct appeal (see n. 15, Initial Brief for citations), did not show these records were ever disclosed. However the circuit court ruled trial counsel could not be questioned about these matters. The exculpatory and otherwise favorable character of the information contained in these documents to the defense was self-evident.

Although Mr. Gardner testified he never heard about any threats to Mr.

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[10]In addressing this issue, the State argues that collateral counsel failed to pursue various points of this claim with trial counsel. Of course, the reason for that is set forth in Argument I: the circuit court precluded the questioning.

Gaona, Mr. Gardner was not present when the threats were made. Both Mr. Gaona and his wife testified that threats were made. Mrs. Gaona, who was estranged from her husband at the time of the hearing, confirmed hearing references by the police to jail at the time the statements were made. The defense was entitled to disclosure of, and to develop and present, any evidence which would cast doubt on Mr. Gaona's veracity, bias, interest or motive in testifying as he did at trial. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). It then would have been for the jury to weigh the value of the evidence accordingly. The jury was deprived of that opportunity due to the non-disclosure.

As to the conflict between Hewitt's testimony and that of Gissendanner concerning Garcia's purported admissions, the jury obviously did hear their testimony at trial. It is the non-disclosure of Arline's statement, which would have corroborated Gissendanner and impeached Hewitt, which was critical here. This evidence would have impeached Hewitt. It was thus material. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). A new trial must be ordered. Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991).

The purpose of discovery in a criminal case, much like discovery in a civil case, is not necessarily limited to admissible evidence, but extends as well to information which may lead to relevant evidence. Such is the notation in the State Attorney's file regarding Torres being a murder suspect in California. Through that information, had it been revealed, counsel could have pursued investigation of the matter, leading to evidence which he could introduce to show, among other things, that it was Torres, not Garcia, who was the dominant force during the occurrence of the offenses. However, hearsay evidence that Torres had committed another murder would itself have been admissible particularly in light of Torres' life sentence. This information would have changed the outcome of the penalty phase and direct appeal. Accordingly Rule 3.850 relief is required.

ARGUMENT V

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

Mr. Garcia presented evidence at the hearing through Mr. Harvill that the State Attorney's file contained a previously undisclosed statement by Liza Smith in which she stated that Urbano Ribas, the 17 year old co-defendant in this case, upon his arrest identified himself as "Perez." The State knew this was so and further knew this information had not been revealed to the defense. Nevertheless, the prosecution argued to the jury that references in Mr. Garcia's statement regarding the actions of "Perez" -- that "Perez" killed the Wests -- were falsifications and that Mr. Garcia was actually describing his own actions in killing the Wests.[11] The statement found in the State Attorney's file establishes that the prosecutor lied in his closing. There is constitutional violation when the State presents false evidence or argument. Napue v. Illinois, 360 U.S. 264 (1959).[12] Such conduct supports reversal of the convictions. The court erred in denying relief.

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.

On this appeal, Mr. Garcia replicated the actual form of the verdict rendered by the jury in his initial brief, pp. 3-4, 79; see also R. 2792-93. In many other case of this kind, the verdict forms provided to the juries do not indicate specifically whether the first degree murder verdict is

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[11]The precise alignment of Garcia's statement that 17 year old "Joe Perez" (Urbano Ribas) killed the Wests and Torres's statement to Yancey that the 17 year old killed the Wests is very troublesome considering that the critical issue in Mr. Garcia's trial was which of the four co-defendants actually pulled the trigger. This issue also had a critical bearing under Enmund and Tison on the propriety of the death sentence for felony first degree murder if Mr. Garcia did not actually kill the Wests. See Jackson v. State, 575 So. 2d 181 (Fla. 1991).

[12]It is shocking that the State in its Answer Brief argues that it is acceptable to knowingly present false argument (Answer Brief at 31).

predicated upon felony murder or premeditated murder. This verdict form, however, specifically provided the jury with a choice, and the jury was required to make a choice, between premeditated first degree murder and first degree felony murder. The prosecution stated to the jury in argument,

> However, the judge is required to instruct you on felony murder in the first degree, which is what you are concerned about whether or not there was premeditation, look for felony murder in the first degree.

(R. 2100). The jury specifically rendered a finding of guilt of felony first degree murder, but not premeditated murder. On direct appeal, this Court stated, "A verdict of felony murder does not constitute a finding that murder was not also premeditated." Garcia v. State, 492 So. 2d 360 (Fla. 1986). Such a conclusion may be true where the verdict form, such as those used in many other cases, did not specify whether the verdict on first degree murder was premeditated murder or felony murder. The record shows that this jury clearly indicated its verdict to be first degree felony murder. Consequently, the jury necessarily acquitted Mr. Garcia of first degree premeditated murder. It is appropriate that this Court revisit this issue in view of this record.

Moreover, the recent grant of certiorari review by the United States Supreme Court in Sochor v. Florida, 112 S.Ct. ___ (Nov. 18, 1991), is on this very issue: the adequacy of Florida jury instructions regarding aggravating factors.

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.

Mr. Garcia adopts and incorporates by reference the preceding argument regarding the form of the verdict in this case. This claim is also based upon new law, Jackson v. State, 575 So. 2d 181 (Fla. 1991), which was not available at the time of direct appeal in this case. Consequently, it is properly cognizable in this 3.850 proceedings. The lower court erred in summarily denying this claim without a hearing.

ARGUMENT XVII

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

This is not a question of whether Mr. Garcia knew the state was seeking the death penalty; it is a question of whether Mr. Garcia had adequate prior notice that the court would rely upon the heinous, atrocious and cruel aggravator during sentencing. Lankford v. Idaho, 111 S. Ct. 1723 (1991). The State had conceded that there was insufficient evidence to submit this issue to the jury and the court did not instruct the jury on this aggravating circumstance, finding as a matter of law that it did not apply. It only arose upon pronouncement of sentence when the judge sua sponte included this factor in support of the sentence. Mr. Garcia never had an opportunity to submit evidence or argument to rebut this aggravating circumstance. See also Sochor v. Florida, 112 S. Ct. ___ (cert. granted Nov. 18, 1991).

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.

The sentencing judge refused to permit Mr. Garcia to present additional mitigating evidence at sentencing. This error violated Hitchcock v. Dugger, 481 U.S. 383 (1987). See also, Creech v. Arave, 928 F.2d 1481 (9th Cir. 1991). It is therefore cognizible in post-conviction. Moreover, the sentencing judge's refusal to consider and weigh the evidence presented in mitigation requires a new sentencing proceeding. Dailey v. State, 16 F.L.W. 5741 (Fla. 1991).

CONCLUSION

Appellant, Enrique Garcia, 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 J. Landry, Assistant Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607, on November 25th, 1991.

_____
Attorney