IN THE SUPREME COURT OF FLORIDA

NO. 77634

PEDRO MEDINA,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Mr. Medina's case is one of the most egregious examples of the trial and sentencing of an entirely incompetent man ever presented to this Court. During his first appearance before the court, Mr. Medina kneeled when he was sworn in. Subsequently, defense counsel repeatedly informed the trial court that their client suffered from a serious mental disorder which made it impossible for them to communicate with him. They presented evidence that jail personnel characterized Mr. Medina as a "signal 20," i.e. a mentally ill prisoner. They asked the court to review jail records which revealed that Mr. Medina tried to kill himself, was urinating on the floor, beating on the walls, exposing himself, laughing hysterically, cursing, filthy, hallucinating that his mother was in his cell, singing in an unknown language "to keep his head together," clapping his hands, and sometimes only able to respond by groaning. This behavior alternated with periods of lucidity when Mr. Medina was friendly, polite and cooperative. Jail personnel had to keep him on suicide watch, gave him psychotropic medication and placed him in a strait jacket to control his behavior.

During the trial, Mr. Medina had a mental break which required three jailers to physically subdue him and place him in restraints in order to bring him to the courthouse. The jailers told the judge that this was not unusual with Mr. Medina and

occurred at least every two weeks. After a few hours in restraints he would usually be able to recover his control. Clearly, the jailers believed his behavior was involuntary. They gave no indication that Mr. Medina was a security risk or would deliberately try to harm anyone. In fact, they informed the court that "An hour from now, thirty minutes from now, you may be able to bring him down and have no problem."

As the trial progressed, Mr. Medina's mental illness made it virtually impossible to proceed. The court had to stop the trial many times because Mr. Medina was speaking so loudly that the witnesses could not be heard. He gestured frequently even after he was shackled and handcuffed. He interrupted the testimony with questions and remarks. He had no understanding of the procedures which the court and his attorneys tried to explain. He repeatedly apologized for his behavior and promised to try to do better.

In addition to the incompetency issue presented in this petition, Mr. Medina has also documented a blatant and shocking violation of the right to remain silent which is clearly contrary to the principles set forth in Edwards v. Arizona. Mr. Medina clearly and repeatedly evoked his right to remain silent. He advised the trooper at the scene of the arrest that he did not want to talk. When police reinitiated questioning a few hours later at the jail he again said he did not want to talk. The

next day when the police yet again reinitiated further questioning, he again said he did not want to talk. This invocation of the right to silence was tape recorded and a transcript provided to this Court. At trial, the circuit court suppressed the statements obtained on April **8, 1982,** because the police failed to honor Mr. Medina's invocation of his right to silence. Yet the circuit court concluded that the results of a police initiated interrogation on April **9, 1982,** the next day, was admissible. This was a classic violation of Edwards v. Arizona.

The detective testified that on April **9, 1982,** he proceeded to question Mr. Medina anyway because although Mr. Medina said he did not want to make a statment, the detective "wasn't sure what 'no' meant." Inexplicably, the court suppressed the first two statements because Mr. Medina had invoked the right to silence but admitted the third statement. It is hard to conceive of a more evident Edwards violation. Yet this Court on direct appeal said that the circuit court's finding of a waiver carried a presumption of correctness that would not be reversed. This was fundamental error.

11. PROCEDURAL HISTORY

Mr. Medina has previously filed a motion for post-conviction relief which was denied by this Court. Medina v. State, ___ so.

2d ___, 15 F.L.W. 609 (Fla. Nov. 21, 1990). This is his first petition for a writ of habeas corpus.

Mr. Medina was charged by information with grand theft, second degree, of a motor vehicle on May 13, 1982, and indicted for first-degree murder on June 14, 1982, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County (SR. 125; R. 1518). Mr. Medina entered a plea of not guilty on both charges. On March 18, 1983, after a four-day trial, the jury returned guilty verdicts and judgments of conviction were entered (R. 1850-52). The sentencing jury, by a 10-2 vote, returned an advisory sentence of death on April 1, 1983, and Mr. Medina was sentenced to death on April 11, 1983 (R. 1875; 1877-79).

Mr. Medina testified at both the guilt-innocence and penalty proceedings and gave a rambling, lengthy address to the court prior to sentencing. On the second day of trial he had to be forcibly subdued and brought to court. After a hearing by the court at which jailers described his inappropriate and erratic behavior, defense counsel requested a competency evaluation which was denied.

Mr. Medina appealed from the judgment of conviction and imposition of the death penalty. His conviction and sentence were affirmed on January 31, 1985. Medina v. State, 466 So. 2d 1046 (Fla. 1985). The conviction and sentence became final on June 5, 1985.

In the instant petition, references to the record of these proceedings will be **"R"** and references to the supplemental record on appeal will be **"SR."** All other references are self-explanatory or otherwise explained.

III. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Medina's capital conviction and sentence of death.

Jurisdiction in this action lies in this Court, **see**, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein involved the appellate review process. Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett V. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Johnson v. Wainwright, 392 So. 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Medina to raise the claims presented herein. **See**, e.g., Downs V. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley V. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson Downs; Rilev. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Medina's capital conviction and sentence of death, and of this Court's appellate review. Mr. Medina's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dusser, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d

DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwrisht; Johnson v. Wainwright. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Medina's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Medina's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Medina's claims, Knight V. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson; Johnson. This Court and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett V. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross V. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis V. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed,

290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baaaett, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Medina will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Medina's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

IV FOR HA CORPUS RE

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Medina's case, substantial and fundamental errors occurred in the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. MEDINA WAS INCOMPETENT AND WAS CONVICTED AND SENTENCED IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN THE COURT REFUSED TO CONDUCT A COMPETENCY HEARING DURING TRIAL, REFUSED TO APPOINT A MENTAL HEALTH EXPERT, AND ACCEPTED PROFESSIONALLY INADEQUATE MENTAL EVALUATIONS OVER THE OBJECTION OF COUNSEL.

Mr. Medina exhibited bizarre behavior throughout the trial, laughing during the voir dire (R. 28), being unable to understand that he could not talk to the judge during court proceedings (R. 3-6), speaking in a loud voice during open court (R. 3; 111), and being disruptive during court (R. 66-74). Mr. Medina was ignorant of the role his attorneys were to play on his behalf and totally at a loss as to what was happening around him (R. 114-15).

On the second day of trial, Mr. Medina's behavior was so inappropriate that he had to be forcibly subdued and brought to court. The trial court heard statements relative to whether Mr. Medina's behavior was so uncontrolled that he would have to be shackled (R. 227-31). The court heard jail personnel explain that Mr. Medina was very unpredictable and hyper and that he could change from being calm to being very, very agitated at the drop of a hat for no apparent reason. Although his behavior was disruptive, it is obvious from the record that it was not Mr. Medina's intent to deliberately disrupt the proceedings and on

the contrary he did his best to behave appropriately and cooperate with the court.

Mr. Medina's mental condition decompensated seriously under the stress of the trial proceedings. His inability to understand what was happening was obvious from the outset:

> MR. MEDINA: Talk to me in Spanish so I can understand because I got to talk to them in English. You confuse me. You understand. I can't talk two language at the same time. You understand. Okay. But if you talk to me in English after she talk to me in Spanish -- you understand.
>
> MR. EDWARDS: Your Honor, may I approach the bench?
>
> MR. MEDINA: I'm not talking about that one. I'm talking about this one right here.
>
> THE COURT: Mr. Medina, you're going to have to be quiet now while we are conducting court, okay. So if you need to talk to your lawyers please do so in a very low voice.
>
> MR. MEDINA: I will try.

(R. 3). Despite almost constant admonitions by the court and his attorneys, Mr. Medina did not understand courtroom procedure, could not learn it, and could not effectively assist himself.

All during voir dire, Mr. Medina exhibited bizarre behavior, especially for a defendant on trial for his life. The following is but one example:

> MR. SHARPE: Now, this is the case that involves the trial of the Defendant, Pedro Medina here, who is a black Cuban male. Is there anything about that fact that will cause anybody any problems during the course

> of the trial in sitting as a fair and objective juror in deciding the evidence and the guilt or innocence of Mr. Medina? That is, that he is a black male and that he is a Cuban male.
>
> (Whereupon: The Defendant laughed, after which the following proceedings were had:)

(R. 28).

The trial judge gave a lengthy explanation of the voir dire proceedings to Mr. Medina. Mr. Medina obviously had no understanding of what the judge was saying:

> MR. MEDINA: Well, I understand, you know. But what I don't understand, respectfully, that, you know, I get to talk to them.
>
> THE COURT: No, sir. All of your talking must be through your lawyers. You may not examine them or talk to the jurors. You will have an opportunity in your part of the case to take the stand and be sworn and placed under oath and give testimony to the jury. That will be the only time you will be allowed to speak.
>
> MR. MEDINA: So I get to talk to them, right? After they're selected, is that what you're saying?
>
> THE COURT: Yes, sir. In the fashion I just told you. It will come at the end of the case.
>
> MR. MEDINA: Okay. And what will he, what will he saying to the jury anyway?
>
> THE COURT: Who?
>
> MR. MEDINA: Him. Whatever the Japanese, right there.

THE COURT: When he was asking questions?

MR. MEDINA: Well, what he was saying about innocent that I couldn't understand that part.

THE COURT: Your lawyers can explain that to you.

Now, what I want you to do, what I want you to tell me is, are you satisfied with this?

MR. MEDINA: Excuse me, Your Honor. This is not a laughing matter. Let me tell you this.

THE COURT: Nobody's laughing, Mr. Medina. Do you see anybody laughing.

MR. MEDINA: He doing it. Don't you see?

MR. EDWARDS: The part he was going into was -- all right, we'll explain that to you.

THE COURT: Mr. Medina, do you understand this process of how we are going to select this jury?

MR. MEDINA: I understand. But I wanted it to be fair because, see, like I say, these people were talking about what they saw in the newspaper, and what they saw on TV, and saw in the newspaper, and saw on TV.

THE COURT: We're going to let your lawyer ask them some more questions. If they're not fair jurors I'm going to excuse them. I have already excused two friends of the victim.

MR. MEDINA: I want, because I want a fair jury and a fair trial too.

THE COURT: That's what you're going to get. I guarantee you.

MR. MEDINA: I hope so.

THE COURT: Now, do you understand how we're going to select this jury, generally?

MR. MEDINA: I think so.

THE COURT: Now, you understand that when the lawyers exercise their challenges up here at the bench you will not be up here with us. You understand that?

MR. MEDINA: So I wouldn't know what's going on.

THE COURT: Yes, sir. You will know because your lawyer will come back down and tell you before we finally select the jury, and give the opportunity to tell him anything you want to about the jury. You understand that?

MR. MEDINA: Okay.

THE COURT: Is that satisfactory with you?

MR. MEDINA: Okay. That's the way. It okay. It can't be any other way.

THE COURT: The only other way it can be is for your lawyer to write the names of ten jurors that you don't want on a piece of paper and give them to me, and I will take those ten right off there, right off the top. You have to tell me which method you want.

MR. MEDINA: Well, I want, I got to tell you which one I want and which one I don't want?

THE COURT: Yes, sir. Which of the -- no. There is only two ways we're going to do this. Your lawyer is going to come up here and he's going to tell me which ones he wants you to excuse, or you're going to have to

write them on a piece of paper and give it to me. See?

MR. EDWARDS: Your Honor, if I might.

THE COURT: Now, let me settle this. Is it all right with you if your lawyer comes up here and Mr. Sharpe comes up here, they excuse the jurors, and then I give you an opportunity to see the twelve and two alternates, see who they are, and let you tell your lawyer before they're finally sworn? Do you understand that?

MR. MEDINA: How many of them going to be left over, left?

THE COURT: I don't have any idea.

MR. MEDINA: I said how many. I say amount. I didn't say. . .

THE COURT: (Interposing) I don't know. I don't know who the lawyers are going to excuse yet. You see what I'm getting at? Do you have any problem with your lawyer coming up here and Mr. Sharpe coming up here and you sitting where you are, they excuse jurors and your lawyer come back and tells you how many of the ten you have left, and if you want anybody. . .

MR. MEDINA: (Interposing) I'm not talking about that. What I'm trying to tell you is like this here. See, I got this motion -- I don't know. . .

THE COURT: (Interposing) I'm going to give you an opportunity to hear your -- your lawyer can pursue this motion later. Right now we need to recess. We'll do that later. We need a recess right now.

(R. **59-64**). At this point, Mr. Medina's attention inexplicably jumped from his concern with picking his own jury to his frustration with having to be at trial at all:

MR. MEDINA: I'm not in a lie. I have been in here a year now. I have been in here a year now.

THE COURT: We're not hurrying this case. There is some of us need. . .

MR. MEDINA: (Interposing) The jury doesn't know that, do they?

THE COURT: Not unless your lawyer tells them.

MR. MEDINA: They should. They should. The lady said yesterday that everything that should be said in the court should be nothing but the truth. But you should not be trying to hide that too.

MR. EDWARDS: We have got a whole week, Pedro.

THE COURT: We have got a whole week. We're going to take as long as necessary to try this case. Right now we're going to take five minutes.

(R. 64).

Again, inexplicably and without warning, Mr. Medina's attention turned to food:

MR. MEDINA: If you're going to say it I would like to say something too. I would like to have something to eat.

THE COURT: You're going to have something to eat when all the rest of us have something to eat.

MR. MEDINA: Meaning that you are going to eat. I'm not going, right?

THE COURT: NO, sir. We're going to come back in here and the lawyer is going to

talk to the jury. Then when we recess at noon. . .

MR. MEDINA: (Interposing) Excuse me. Respectfully, I don't mean no harm to you. That's the way I go. That's the way I talk, you know. I'm not a lawyer. I would like to say beautiful words to you, you know. Because I can't because I don't know any.

THE COURT: That's why I gave you two good lawyers.

MR. MEDINA: I say anything wrong to you you got to excuse me. Unh-unh. I not a professional speaker.

THE COURT: You -- okay. All right.

(R. **64-65**).

At one point during voir dire, the court found Mr. Medina's behavior so disruptive that he was threatened with expulsion:

(Whereupon: Court recessed at **11:25** a.m., and court opened at 11:33 a.m., after which the following proceedings were had in the presence of the venire panel as follows:)

MR. MEDINA: They put a handcuff on me and everything like I was a dog.

MR. SHARPE: Your Honor, can we approach the bench, please?

THE COURT: All right. First, Mr. Medina, you will have to remain silent at this time, please, sir. Speak quietly with Ms. Rodriguez.

MR. MEDINA: I want to speak to you.

THE COURT: No, sir. You must speak very quietly with Ms. Rodriguez. Mr. Medina, Court will again ask you, please, sir, to talk very quietly with your lawyer.

MR. MEDINA: I'm trying to say something. You don't give me no time to talk. I have been waiting to talk for a year. I have been in here a year in jail.

THE COURT: Members of the panel, I'm going to have to ask you all to step out in the hall, if you will do so at this time. But don't get far out of pocket.

MR. MEDINA: I have been here for a year. For a year. They got to know that too. Because they only know what they saw in the newspaper and what they saw on TV. They don't know what's they tried to put a murder case on me. I'm not innocent. They got to know that too. I got to talk. I got to talk and explain the way I feel. You understand. Because it not right what you trying to do to me. You understand.

THE COURT: All right. Let's. . .

MR. MEDINA: (Interposing) You understand. Trying to put a murder case on me. That's not right. You understand.

(Whereupon: The venire panel was leaving the courtroom during this discussion, after which the Defendant was handcuffed, and the proceedings were as follows:)

MR. EDWARDS: Your Honor, I have a motion to make.

THE COURT: All right, sir. Make your motion.

MR. EDWARDS: At this time I would move for a mistrial.

MR. MEDINA: You want a truth? That's the truth. You're trying to put a murder case on me. That's what you want. I tell you the truth.

THE COURT: Mr. Medina. . .

MR. MEDINA: (Interposing) You understand? I didn't do it. I didn't kill her. You understand? That's the truth. And you got it? You got it? You got that? You got it?

THE COURT: Mr. Medina, remain quiet one moment.

MR. MEDINA: I'm trying to be quiet. I have been waiting for a year whereas you have been on the street, or wherever you been, wherever you have been, and you, and all of you. I have been in jail for a year. You understand?

THE COURT: I understand.

MR. MEDINA: Carrying a burden that is not mine. You understand? I didn't kill her. You understand?

THE COURT: I understand.

MR. MEDINA: You don't understand. If you understand wouldn't make me in here. You understand? You know that you're doing wrong.

THE COURT: Mr. Medina.

MR. MEDINA: If you know you're doing wrong how you continue to do it?

THE COURT: Mr. Medina, now, please be quiet just a minute. You lawyer wants to make a motion to the Court, to the Court (sic). All right. Then I have something I want to say to you.

MR. EDWARDS: At this time the Defense would move for a mistrial. The actions of the Defendant while they in and of itself would not be grounds for the mistrial, even though the jury has heard a good number of Defendant's comments, the Defendant's comments are brought about by actions, the Defendant's actions and comments, and the

jury are brought about, due to the inadvertent actions of the bailiffs in this case. I specifically asked they not handcuff my client in front of the jury panel.

THE COURT: Mr. Edwards, the panel had just about exited. And there were a couple of panel members going out the back door when they placed the restraints on your client. Let's not misconstrue what happened.

MR. EDWARDS: I'm in favor of that. I'm not talking about placing the cuffs on him right now. I'm talking about you recessed for five minutes and placed them on him to go to the bathroom.

MR. MEDINA: Let me know when you get through.

MR. EDWARDS: All right. The incident I'm talking about is not what you referred to. It's the incident when the Court recessed for five minutes. You left the courtroom. I asked the bailiff if she would make sure there were no jurors outside in the hallway so Mr. Medina could be taken up to the fourth floor to go to the bathroom. I specifically requested the jurors not see Mr. Medina put in handcuffs in order to have him moved out the courtroom. I do not feel it's fair for the Defendant to be placed in the posture of having restraints placed upon him with bailiffs around him for the jurors to see that.

In selection of this trial what happened, the jurors were more or less herded down to the other end of the hallway.

THE COURT: Mr. Edwards, there is a fundamental point of law, whatever you say here is not fact. Make your motions, state your ground, and let the Court rule, and let's move along.

MR. EDWARDS: I would as part of my motion call the bailiff.

THE COURT: Make your motion.

MR. EDWARDS: The motion is the jurors saw my client being handcuffed. That's the reason he's upset at this point. The jurors came back into the courtroom. At least five or six of them witnessed the Defendant being handcuffed as he was led out of the courtroom.

THE COURT: I'm going to deny your motion.

Mr. Medina, let me tell you this. We're going to lay down certain guidelines for this trial right here and now. First of all, the only time you shall speak while you're in open court here is to talk quietly with your lawyers.

Secondly, you will not address me unless I address you first, as I did earlier. I don't think there are going to be more than a few times I will address you first so you can speak directly with me. Everything must be said through your lawyer.

Now, thirdly, there must be no further outbursts of this kind. Now if you violate the rules that I have told you I'm going to have you secluded from this trial and let you remain upstairs while the case proceeds. Do you understand what I told you?

MR. MEDINA: I understand the way you said it, but are you -- is that a threat?

THE COURT: It is not a threat. I simply told you these are rules by which every trial, not just yours, all trials are conducted.

First, the Defendant must be quiet and talk quietly with his lawyers. Second, the Defendant must not address the Judge unless the Judge first addresses him. And third,

the Defendant must not act as you did and make the, cause problems in the trial.

MR. MEDINA: What you need an apology?

THE COURT: No, sir. All I'm saying is I'm going to ask you a question: Do you think when we start the trial again that you can sit quietly and obey the three rules? Because if you do not I'm going to have to have you taken upstairs to jail. And we will try the case without you.

MR. MEDINA: But you cannot do that. If you do that it will be doing it illegally. You understand. Because any prosecutor -- let me tell you this: Any prosecution upon me I must be present.

THE COURT: If you behave yourself and obey the three rules I have mentioned you may be present. That is your right.

MR. MEDINA: It shall be done anyway. If you want to do it like that illegally you can do it, you know.

THE COURT: Mr. Medina, I must ask you, sir. . .

MR. MEDINA: (Interposing) I'm sorry, sir.

THE COURT: I'm not taking offense at what you say. I must ask you: Do you think you can obey the three rules the Court has mentioned?

MR. MEDINA: Yeah. I think I can behave myself, Your Honor.

THE COURT: Can you? All right. Now, with that assurance I'm going to let you remain in the courtroom. But if there is another outburst or violation of one of the three rules then I'm going to have the bailiff take you upstairs and you will remain until such time as you will give me your

promise that you can behave yourself. At that time I will bring you back to the trial. But I cannot have the trial being interrupted because of your conduct, you see.

MR. MEDINA: Yes, sir.

THE COURT: Do you understand that?

MR. MEDINA: Yes, sir.

THE COURT: All right. Do I have your assurance and your promise that you will behave yourself?

MR. MEDINA: Yes, sir.

THE COURT: All right. Let's remove the handcuffs. Place him back at the Defendant's table.

SPECTATOR: May I speak to him a couple of minutes?

THE COURT: You may talk to his lawyers at the recess.

MR. MEDINA: Excuse me. That's why I got angry. You understand? Because -- hey, I don't know if you understand what I'm trying to say. But, you know, it don't look too good.

THE COURT: Hold your anger now.

MR. MEDINA: I might. I might do that, Your Honor.

THE COURT: Sir, will you hold back your anger and not let it come forth again like that?

MR. MEDINA: Well, you know, if you would have been in my position you would know how I feel, you know. What would you say then? I try.

THE COURT: All right. Let's see how we get along.

MR. MEDINA: Yeah. You know, you know, I got this man I used to work for him. That he usually, he used what he say, he just look like you, you know. But you know, I ain't got nothing against you, you know.

THE COURT: Mr. Medina. . .

MR. MEDINA: (Interposing) I don't mean no harm. Like I told you. . .

THE COURT: (Interposing) It's now time for rule two. Speak only through your lawyer.

Bring the panel back in.

MR. EDWARDS: While the panel is still out, I believe the Court indicated it would hear Mr. Medina on the motion to sever.

THE COURT: Let me do it during the lunch hour, if you don't mind. We'll recess for lunch and I will hear Mr. Medina on a motion to sever, perhaps through you or testimony you want to present, if any.

(Whereupon: The venire panel returned to the courtroom at 11:42 a.m., after which the following proceedings were had:)

THE COURT: All right. Members of the panel, just before your last recess the Court and the Defendant had a small misunderstanding. We have now solved that. And you are not to hold any such misunderstanding against the Defendant. You may proceed now, Mr. Edwards.

MR. EDWARDS: Thank you, Your Honor.

(R. 66-74).

Although Mr. Medina sincerely tried to cooperate with the court, he was unable to control his behavior:

[During the Seating of the Jury]

(Whereupon: The Defendant was speaking loudly with his attorney, after which the following proceedings were had:)

THE COURT: Number four, Charles Finch. I'm sorry. I made a mistake. Sit down, Mr. Finch. Number four is Jerry Innes. Number five, William Durham. Number six, William Murken.

MR. MEDINA: I want this twenty-three. I want twenty-three.

THE COURT: Number seven, Douglas Cody.

MR. MEDINA: But you tell me. . . (Inaudible)

THE COURT: Number eight, Virginia Hurst. Number nine, Carolyn Rabun. Number ten, Edward Fleming. Number twelve, Ted Tatum. Alternate number one, Robert Vogel. Alternate number two, Alan Willard. . .

(R. 111).

MR. MEDINA: He down there already. So what you done?

THE COURT: Excuse me, Mr. Medina. Mr. Medina is going to have to keep his voice a little lower.

All right. I think we got everybody now.

MR. MEDINA: Excuse me, Your Honor. Go ahead.

THE COURT: Hold on just a minute. All right. You all want to rearrange the chairs there?

(R. 112).

After the jury had been empanelled and Mr. Medina had received a detailed explanation of the procedure from the judge, he still did not understand what had transpired:

[During Recess After Jury
Was Excused for Lunch]

(Whereupon: The jury left the courtroom at 12:47 p.m., after which the following proceedings were had:)

THE COURT: How would you like, you folks like some lunch before we conduct any further business? I thought what we'd do is we'd go to lunch. Mr. Medina, we'll come back at a quarter to two before the jury gets back. We'll have fifteen minutes to conduct any further business.

MR. MEDINA: Excuse me, Your Honor. Can I talk now?

THE COURT: I thought you might like to have some lunch and I'd like to have some lunch. And I know everybody else would.

MR. MEDINA: Can I tell you something now before I take a legal recess for lunch? Can I talk to you now?

THE COURT: Just briefly, sir. If you would, be as brief as you can.

MR. MEDINA: Okay. Do I have a right to pick the jury?

THE COURT: No, sir.

MR. MEDINA: I don't?

THE COURT: You have only a right to excuse ten people without a legal reason.

MR. MEDINA: But I haven't.

THE COURT: Sir?

MR. MEDINA: I haven't excused no one yet.

THE COURT: Well, sir, through your lawyer ten people have been excused. So the jury has now been selected.

MR. MEDINA: How come? Because I didn't excuse anyone. How you done that?

THE COURT: Mr. Medina, let's all go get some lunch. We'll come back.

MR. MEDINA: I want to excuse my ten people. Okay?

THE COURT: No, sir. That request will be denied.

MR. MEDINA: Oh.

THE COURT: Let's go get some lunch.

MR. MEDINA: Oh. I can see now.

(R. 114-15).

As the dialogue above between the judge and Mr. Medina so amply demonstrates, he was ignorant of the role his attorneys were to play on his behalf and totally at a loss as to what was occurring around him.

Later, during trial, the court held hearings on defense counsel's motions to suppress. Mr. Medina testified, and his testimony illustrated his inability to do so relevantly and in a consistent coherent manner:

[Mr. Medina Answering a Question on Direct Examination During Motion to Suppress]

Q All right, Mr. Medina. Directing your attention to the 9th day of April, 1982, you were in the Lake City Jail at Columbia County. Is that correct?

A That's correct.

Q All right. You were interviewed by Detective Nazarchuck and Detective Payne of the Orange County Sheriff's Department. Is that correct?

A What's his name? Say his name again.

Q Detective Nazarchuck and Detective Payne.

A Daniel.

Q The individual who just testified here today, were you interviewed by him?

A I was interviewed by him. But he told me his name was Daniel.

(R. 213).

Q Okay. At some point during that interview did you tell Detective Nazarchuck that you did not wish to talk to him at that time?

A Well, I said I find -- I recall I told him that I didn't want to talk to him.

Q Did he continue to question you?

A Yeah. He continued to say, you have to say yes or not. You have to say yes or not. And there was another person in that room that say we don't mean no harm. You got to talk to all. I didn't know really if he was a police officer. I don't know what he

was. They were wearing, you know, outside clothes.

Q They did not have uniforms on?

A They did not have uniforms on.

Q Were you aware they were police officers?

A I wasn't. I remember they had something to do with the law, but the law include doctors, lawyers, you know. Not specific policemen, you understand. I saw -- I thought I was going to talk to a person that had some knowledge, you understand. And at the time he said to me that I shouldn't say that I had the car because I was going to get in trouble. That I should have said that I didn't have the car. And I should have said that I didn't know that that was Dorothy James' car. And I had to say to the police already that I had the car because this paper right here wouldn't tell no, no lies. If I lying this paper wouldn't lie because that's the paper that the police did. And that's what the paper said, that I had said to the police that I had the car. I had got it from my wife.

Okay. At that time I didn't know what wife mean. What wife mean. I don't know what wife mean, but a person that you love.

(R. 214-16).

By the beginning of the second day of trial, Mr. Medina's behavior had decompensated so severely that the court ordered that he be shackled. It was necessary to shackle Mr. Medina solely because of his inability to control his behavior:

THE COURT: All right. Good morning, gentlemen. Who do we have here this morning from the jail?

MR. SHARPE: Lieutenant Mead and Sergeant Whitted.

THE COURT: You want to tell me -- it's been brought to the Court's attention there is a little bit of a problem with Mr. Medina this morning.

MR. MEAD: Yes, sir.

THE COURT: What I'd like to do is place you gentlemen under oath to tell me in your own words what the problem is, the extent of it, what the present status of Mr. Medina is. So each of you raise your right hand and place you under oath.

(Whereupon: Lieutenant Mead and Sergeant Whitted were duly sworn, after which the following proceedings were had:)

THE COURT: All right, Lieutenant, why don't you tell me what happened when you first arrived, what you observed, and what you saw when you left at that time in your own words, and tell me. . .

MR. MEAD: (Interposing) I arrived on the fifth floor, EO side over by processing. We have a holding cell over there for Mr. Medina. He was awaiting the bailiffs. The bailiffs arrived to transport him to court. There was some loud banging on the wall, hollering. Sergeant Whitted and myself, and another officer went over there to see what the problem was, opened the door. Mr. Medina tore the light fixture out of the ceiling of the holding cell. He was very loud, boisterous, and hostile. We attempted to calm the man down verbally. That was to no avail. He was still very hostile. We had to place him in handcuffs, remove him from that holding cell, and place him into another cell. And it became necessary to put leg irons on the man because he was kicking and just raising sand in general.

At this point he was in custody of two bailiffs on the sixth floor. He is still very hostile.

THE COURT: All right, sir. How many officers did it take to restrain him, get him into leg cuffs?

MR. MEAD: Three of us, sir.

THE COURT: You had an opportunity to observe Mr. Medina over the past several months?

MR. MEAD: Yes, sir, I have.

THE COURT: That he's been in jail? What is you opinion as to whether or not he would calm down if brought to court, or whether he would create a further disturbance if we brought him down here?

MR. MEAD: Mr. Medina is very unpredictable. He's been that way. Over the past months I have had many occasions to talk to this sentleman. At times he's very calm and would talk just like you and I would be talking tosether. At the drop of a hat he will become very, very agitated, hostile. He's been in several fights. We have had to move him. He's been in nearly every cell in the Oranse County Jail. And has been a problem in each cell. It's become necessary to keep him isolated from the rest of the population.

THE COURT: Does this irritate him to be in the, where he's handcuffed with the belt and to be in leg shackles? Does that seem to set him off or after a while will he remain quiet that way?

MR. MEAD: No, sir. It doesn't seem to matter. Mr. Medina can have full freedom and still become hostile just at almost nothing. We have had him chained up on several occasions, and he will calm down. We removed the shackles. He will stay calm for two or

three days and then something very minor will set him off and he becomes hostile towards other inmates and officers, and becomes necessary to return him to the chains.

THE COURT: Sergeant Whitted, did you want to add anything to what the lieutenant said?

MR. WHITTED: No. I think the lieutenant covered all of it. But like he said, Medina have been moved around several times. And he's real hyper and hostile inmate. No matter what you do to him he still won't calm down. Handcuff or leg irons, it still won't set his attention. For a while it would while you had him chained up. But he goes and come [sic] all the time.

. . .

MR. MEAD: No, not increased. On the contrary. Because of his agitated condition he does seem to calm down. I don't think any time we left him in shackles or been necessary to leave him in shackles for more than an hour, and then he calms down and they are removed, and there would be no problem. He's gone as much as two weeks without any problem. We had him in school and he did relatively well in school.

MR. EDWARDS: Does he so off on these tansents for no apparent reason?

MR. MEAD: Least little thins agitates him. He appears to me -- Im no psychologist. It appears to me the man has a very violent temper. And the least little thing sets him off and he becomes violent.

(R. 227-31)(emphasis added). Defense counsel then asked that a determination as to Mr. Medina's competency be made by the Court. His request was flatly, and erroneously, rejected:

MR. EDWARDS [to Officer Mead]: Based on your observations and experience do you have any opinion as to his mental health?

THE COURT: We're not going to get into mental health. Whether or not his disturbance or misconduct is going to make a voluntary waiver before the trial, that's the only question.

MR. EDWARDS: I would move for additional psychiatric exam.

THE COURT: That will be denied.

Mr. Sharpe, you want to ask any questions of Lieutenant Mead or Sergeant Whitted?

MR. SHARPE: Lieutenant, is it in your opinion that in his present state he would, could not be in a courtroom without creating a particular disturbance?

MR. MEAD: At this particular time he would create a disturbance. An hour from now, thirty minutes from now you may be able to bring him down and have no problem. This particular time he would be a problem.

MR. SHARPE: Thank you, gentlemen, Y'all are excused.

MR. MEAD: Thank you, sir.

(R. 231-32)(emphasis added).

Even when a defendant is competent at the beginning of their trial, the trial court has a continuing duty to assess the accused's behavior when he or she becomes irrational or uncontrollable. **See** Drope V. Missouri, 420 U.S. 162 (1975); Fla. R. Crim. P. 3.210. Based on what the trial judge personally observed during the first day and a half, and afterward, he

should have suspended the proceedings for purposes of allowing an examination of and holding a hearing on Mr. Medina's continued competency to stand trial. Id. At the very least he should have granted counsel's motion for an expert evaluation. The court's failure to do so violated Mr. Medina's right to a fair trial, and his right to a fair and accurate determination of his competency. A bona fide, real and substantial doubt as to competency was raised.

Mr. Medina continued to exhibit inappropriate behavior throughout the trial even after the incidents described above:

> [During Direct Examination of Witness Holt]
>
> Q Did you have occasion to respond to Apartment 211 of the Indies House Apartments in Orange County?
>
> A Yes, we did.
>
> Q All right. When you arrived was Paramedic Holt there or did you arrive with him?
>
> A We arrived in the same unit with Paramedic Holt.
>
> Q All right. And besides Mr. Holt were there other people present at that apartment?
>
> A At that time it was me and him. . .
>
> THE COURT: (Interposing) Excuse me. Ms. Rodrisuez. you all are going to have to converse more quietly so we can hear the witness testify.

MR. MEDINA: Yes, sir.

(R. 269)(emphasis added).

[During Direct Examination
of Witness Taylor]

A Yes, sir, I did. I took exterior photographs of the entrances to the apartment, the apartment building, and then some interior photographs of the apartment.

Q All right, sir.

THE COURT: Excuse me just a minute. Let me see counsel at the bench a moment.

(Whereupon: There was a brief sidebar conference at the bench, out of the presence of the jury, as follows:)

THE COURT: Now, look, Mr. Edwards, I want you to go back there and tell Ms. Rodriguez to tell your client in Spanish or otherwise that it's to his benefit he keep his hands down under the bench, not talk loudly, not misbehave. Because the jury is not missing a bit of that. And if the jury draws any adverse inference against him it's going to be his own fault.

MR. EDWARDS: We have advised our client that. It's not gone unnoticed by the Defense. As to the jury's inferences, I believe we were specific on our position to that earlier to the Court. We will so inform our Defendant again.

THE COURT: That goes for his loud talking too. I have admonished him several times to keep his tone of voice down when he's conferring with counsel.

MR. EDWARDS: I understand that.

THE COURT: I'm going to let him sit there. If he misbehaves himself that's

his own fault. I have admonished him. You have admonished him. That's the way it is. Okay?

MR. EDWARDS: Yes, sir.

THE BAILIFF: Your Honor, I believe he has tightened the handcuffs to the point he's complaining they're hurting his wrist. If we could take the jury out so we can lock them so he can't tighten them like that.

THE COURT: Members of the jury, we're going to take about a ten-minute recess at this point. Go on with the bailiff. Remain in the area of the jury room. We'll crank up in about ten minutes.

(Whereupon: Court recessed at 11:37 a.m., and court opened at 11:45 a.m., after which the following proceedings were had out of the presence of the jury:)

THE COURT: Before we bring the jury in, Mr. Medina, I want to tell you two things. First, it would be to your advantage to not play with the handcuffs and keep your hands down behind the bench.

MR. MEDINA: How can I when I got to write down what the witnesses say?

THE COURT: If you want to write please do so quietly and not play with the handcuffs.

Secondly, I have admonished you several times to keep Your voice down as you talk to your lawyer. I will ask you to whisper when you're talking and the witnesses are talking. We can't hear what the witnesses are saying. I assume you want to hear what the witnesses say about you.

MR. MEDINA: Can you cut loose my right hand so I can write?

THE COURT: No, sir.

MR. MEDINA: I can do nothing with one hand. I don't mean to do anything, just to be, just take a note of it.

THE COURT: No, sir. I'm sorry.

MR. MEDINA: Okay.

THE COURT: Bring the jury in.

(R. 280-82)(emphasis added).

On the last day of trial Mr. Medina insisted on testifying over the advice of his trial counsel. When he testified, his answers were rambling and often unresponsive (R. 669-723). At one point, the prosecutor became so frustrated during his cross-examination of Mr. Medina, he simply gave up trying to get answers to the questions he asked:

Q But you didn't get a plane to go to New Jersey. You drove that car, didn't you? You went to Ocala in that car.

A Hold up. Hold up. Let me. . .

MR. EDWARDS: (Interposing) I ask the prosecutor to allow the witness to answer the questions.

BY MR. SHARPE:

A That's not the way it goes. That's not the way it goes. Did I get to New Jersey?

THE COURT: I sustain. . .

BY MR. SHARPE:

Q (Interposing) Okay. I don't care.

THE COURT: He wants to tell the

story in chronological fashion. Let him go on and proceed.

MR. SHARPE: Just so I get to ask specific questions at some point.

(R. **695-96**).

Mr. Medina's case gives real meaning to the requirement that an expert consider and evaluate a defendant's capacity to "manifest appropriate courtroom behavior." Fla. R. Crim. P. 3.211(2)(v). There is no indication that the experts ever considered this issue. Trial counsel specifically objected to the expert's failure to consider the competency criteria (R. **956**). During the trial Mr. Medina gestured continually even after he was handcuffed, he spoke loudly and at one point insisted on informing the jury that he had been in jail for over a year (R. **66; 68-69; 280-81**). Even the judge noted for the record how prejudicial this inappropriate behavior in the presence of the jury was for Mr. Medina. During the trial testimony, the court interrupted the witness and called the attorneys to the bench:

THE COURT: Now, look, Mr. Edwards, I want you to go back there and tell Ms. Rodriguez to tell your client in Spanish or otherwise that it's to his benefit he keep his hands down under the bench, not talk loudly, not misbehave. Because the jury is not missing a bit of that. And if the jury draws any adverse inference against him it's going to be his own fault.

MR. EDWARDS: We have advised our client that. It's not going unnoticed by the

Defense. As to the jury's inferences, I believe we were specific on our position to that earlier to the Court. We will so inform our Defendant again.

THE COURT: That goes for his loud talking too. I have admonished him several times to keep his tone of voice down when he's conferring with counsel.

MR. EDWARDS: I understand that.

THE COURT: Im going to let him sit there. If he misbehaves himself that's his own fault. I have admonished him. You have admonished him. That's the way it is. Okay?

MR. EDWARDS: Yes, sir.

(R. 280-81)(emphasis added). According to the court, Mr. Medina was speaking so loudly no one could hear the witnesses (R. 282).

The trial judge's repeated refusals to suspend the proceedings against Mr. Medina in order to make a determination as to Mr. Medina's continued competency to stand trial constituted a violation of his eighth and fourteenth amendment rights. In addition, Mr. Medina was clearly so incompetent that he was unable to understand or comply with the advise of counsel thereby violating his sixth amendment right to counsel. Even if Mr. Medina had been competent at the beginning of his trial, the trial court had a continuing duty to assess the accused's behavior.

Several months before the trial commenced, defense counsel requested a pretrial competency evaluation on the following grounds:

1. Defendant appears to suffer from mental infirmity to the extent it's difficult to prepare a defense.

2. That it is believed that the Defendant has had a history of mental problems.

3. That the Defendant speaks virtually no English and request that the psychiatrist appointed be Spanish-speaking.

(R. 1668). Two experts conducted a joint evaluation on January 14, 1983, two months prior to the trial, in which they found Mr. Medina to be competent although one doctor noted that "He claims not to know what the state attorney has as evidence against him, but believes his innocence will come out"; "His fund of general information is moderately impaired"; and "He did talk of God sitting next to him on the bunk telling him encouraging things" (R. 1751-52).

At the pretrial motions hearing four days before trial, counsel advised the court that Mr. Medina was not competent to consult with his attorney and requested a third evaluation (R. 914). At the competency hearing conducted two days prior to trial, defense counsel strongly expressed his opinion that Mr. Medina was in fact incompetent and again requested a third evaluation (R. 944, 955). Counsel presented testimony in which Mr. Medina described an apparent seizure when he was five years old which he recalled as being "asleeped," and psychiatric hospitalizations when he was 16, 17 and 18 years of age (R. 946-

49). Counsel also presented jail records to the court which documented hallucinations, self mutilation, suicide attempts, treatment with psychotropic medication, memory lapses, and a report that the Cuban government had taken Mr. Medina directly from the mental hospital and placed him on a boat to Miami.[1]

Most importantly, the jail records documented a severe decompensation between the time Mr. Medina was evaluated by the experts on January 14, 1983, and the time of trial on March 15, 1983. The jail reported quiet pleasant behavior alternating with loud, disruptive behavior. Mr. Medina was observed clapping his hands loudly; laughing out loud; talking dirty; singing loudly stating, "Got to keep my head together"; laughing at intervals; almost hysterical when laughing stating "I will be alright"; drawing pictures on the wall; rubbing the walls with towels stating he was "cleaning them"; lying on the floor with his head covered with a blanket; exposing himself; in a dirty cell with garbage piled up; only able to groan when spoken to; banging on the walls: talking to the walls; with strong body order; cursing the floor correctional officer loudly; having a towel wrapped around his head; being placed in restraints; and reporting that he saw his mother in his cell. Despite counsel's presentation of

[1]The jail records appear in the ROA as Defense Exhibit 1.

this additional information, the court continued to refuse to order a third evaluation.

These facts raise four major issues: 1) the court erred in refusing to require an evaluation or conduct a competency hearing when the circumstances at trial raised reasonable grounds to believe Mr. Medina may have been incompetent; 2) the court erred in refusing to grant defense counsel's numerous requests for a third evaluation which were made before and during trial; 3) Mr. Medina was deprived of a competent mental health evaluation; and 4) Mr. Medina was convicted and sentenced when he was too incompetent to understand or assist in his defense and in fact actively hindered his defense by his inappropriate courtroom behavior. These issues were raised by trial counsel and by appellate counsel. To the extent that appellate counsel inadequately briefed these issues, he rendered ineffective assistance since they appear plainly on the face of the record. This Court committed fundamental error in affirming Mr. Medina's direct appeal.[2]

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[2]This Court's ruling on direct appeal was "the record discloses no abuse of discretion in the following matters: . . . 2) Failure to appoint a third psychiatrist after two experts had already found Medina competent." Medina, 466 So. 2d at 1048 n.2. This ruling was error as a matter of law. This Court's opinion on direct appeal was in error under Ake v. Oklahoma, 470 U.S. 68 (1985), an opinion rendered by the United States Supreme Court thirty days after the Medina opinion. It was also error under Lane v. State, 388 So. 2d 1022 (Fla. 1980), and its progeny which are premised upon Drope v. Missouri, 420 U.S. 162 (1975).

A. THE TRIAL COURT ERRED IN FAILING TO GRANT MR. MEDINA'S REQUEST FOR A COMPETENCY EVALUATION WHEN THERE WERE REASONABLE GROUNDS TO BELIEVE HE MAY HAVE BEEN INCOMPETENT DURING THE TRIAL PROCEEDINGS

The law regarding the necessity of a competency evaluation when there are reasonable grounds to think that a defendant may be incompetent is clear and well settled. This Court recently summarized the principal precepts of state and federal law in Nowitzke v. State:

> Under both Florida and federal law, it is well settled that due process prohibits a person accused of a crime from being proceeded against while incompetent. Lane v. State, 388 So. 2d 1022, 1024-25 (Fla. 1980) (and cases cited therein). Florida Rule of Criminal Procedure 3.210 unambiguously requires the trial court to order a competency examination and conduct a hearing when it "has reasonable ground to believe that the defendant is not mentally competent to proceed." This obligation is a continuing one.
>
> In Pridsen v. State, 531 So. 2d 951 (Fla. 1988), we quoted from Drope v. Missouri, 420 U.S. 162 (1975), wherein the United States Supreme Court recognized:
>
> > Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.
>
> Pridsen, 531 So. 2d at 954 (quoting Drope, 420 U.S. at 180-81). We then noted:
>
> > Florida courts have also held that the determination of the defendant's

> mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. Scott v. State, 420 So.2d 595 (Fla. 1982); Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986). See Lane v. State, 388 So.2d 1022 (Fla. 1989) (finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial).

Pridgen, 531 So. 2d at 954.

> Thus, a prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent. See also Lane, 388 So. 2d at 1022. In this case, defense counsel presented ample reasonable grounds to believe that Nowitzke might be incompetent. See Scott v. State, 420 So. 2d 595, 597 (Fla. 1982) (a finding of incompetency is based on "whether there is reasonable ground to believe the defendant may be incompetent, not whether he is incompetent").

572/1346

15 F.L.W. 645, 645-46 (Fla. Dec. 14, 1990). The basic principles are clear. When there are reasonable grounds to believe a defendant may be incompetent, the court must conduct a competency hearing. The fact that the defendant has been evaluated and found to be competent several months before trial, does not relieve the court of this duty. Where there are reasonable grounds but additional evaluations are requested and refused, relief as to conviction and sentence is appropriate. Bosss v. State, 16 F.L.W. 167 (Fla. Feb. 7, 1991). Although court appointed experts have expressed the opinion that a defendant is

competent, the defendant is still entitled to a third confidential expert when his counsel expresses good faith concerns that a defendant is not competent. Hall v. Haddock, 16 F.L.W. 177 (Fla. 1st DCA Jan. 11, 1991).

Under these principles, the inquiry becomes one of whether there were reasonable grounds to believe that Mr. Medina *may* have been incompetent. Many factors are considered in making this finding. A primary factor is the fact that trial counsel repeatedly took issue with the finding of competency and represented to the court that he did not believe his client was competent at the pretrial motions hearing on March 11, 1983, at the competency hearing on March 14, 1983, and during trial on March 16, 1983 (R. 231-32, 944). See Scott v. State, 420 So. 2d 594, 597 (Fla. 1982). Another critical factor is evidence of deteriorating mental condition. Pridgen v. State, 531 So. 2d 951 (Fla. 1988). One day before the trial, defense counsel pleaded with the court to consider Mr. Medina's dramatic decline into increasingly bizarre behavior including hallucinations, inappropriate laughter, singing loudly and talking to the walls. During the trial Mr. Medina's courtroom behavior became so inappropriate that he had to be placed in restraints. Mr. Medina talked loudly to the court, the jurors and his attorney; he gestured wildly even after he was handcuffed; he laughed inappropriately; and he was unable to understand the proceedings.

Jail personnel told the court that on the second day of trial Mr. Medina had torn out his light fixture and had to be forcibly restrained and transported to the courthouse. They also described him as becoming very, very agitated at the drop of a hat. Mr. Mead testified, "Least little thing agitates him. He appears to me -- I'm no psychologist" (R. 231).

Trial counsel immediately attempted to inquire about Mr. Medina's mental competence and moved for additional psychiatric evaluation. Trial counsel was not permitted to inquire and his request for additional psychiatric evaluation was summarily denied:

> MR. EDWARDS [to Officer Mead]: Based on your observations and experience do you have any opinion as to his mental health?
>
> THE COURT: We're not going to set into mental health. Whether or not his disturbance or misconduct is going to make a voluntary waiver before the trial, that's the only question.
>
> MR. EDWARDS: I would move for additional psychiatric exam.
>
> THE COURT: That will be denied.

(R. 232)(emphasis added).

In addition to deteriorating mental condition, it appears that Mr. Medina tried to conceal his symptoms. See Scott v. State. Even when he was singing loudly or laughing almost hysterically, he would assure the nurses that he was "all right." He repeatedly assured the court that he would try to behave.

Mr. Medina's rambling, incoherent forty minute address to the court at the time of his sentencing was the final evidence of his deterioration:

> THE COURT: Mr. Medina, I apologize for interrupting you, but you've been talking now about thirty-five, almost forty minutes.
>
> THE DEFENDANT: I know, but hey, I just want to read this.
>
> THE COURT: All right, sir.
>
> THE DEFENDANT: This is in the Bible, right? You want me to read the Bible to you? I'll read the Bible to you. "This is no wisdom, no understanding, nor counsel against the Lord. The horse is prepared against the day of battle, but safety is of the Lord." I don't know what it means. I can't explain it. But I want to get to a point.
>
> They say I got to the house in Tampa at 10:30, and it wasn't so. It wasn't so. When I got there at 10:30, I had been there before, at 5:00 o'clock a.m.. And I had no car. I got to the house walking on my feet. And she knows it. She knows it. I don't know why she lie. I don't know.
>
> I know what you did because I told you to do it, didn't I?
>
> MR. EDWARDS: (Nods.)
>
> THE DEFENDANT: I never had occasion to sell no car. I never had any intention to sell no car.
>
> THE COURT: Mr. Medina, I'm going to give you about five minutes to conclude your remarks here.
>
> THE DEFENDANT: That is the Chapter in the Bible, and everything is right there.

> And remember me. And my conclusion is quite simple, because in everything that I say I try to the honest. Everything I say, everything I do, I try to be honest. And my point was denied when you denied the retrial. And I know the jury didn't like me either. I could see that.
>
> I'm doing my best. I've been three years in this country, and I don't know how to explain myself that good. I guess today is like, you know, a person going to take a test. I really am not asking for mercy, but I'm really trying to make people understand, because I do love life, like everybody else. But I'm not concerned in this case about my life. I'm concerned in this case about my integrity, because integrity and dignity is worth more than life, because even God knows dignity. And if you ain't got morality, you're just a living dead.
>
> That's all I got to say.
>
> THE COURT: All right, sir. Thank you. Mr. Medina, you are advised that you have thirty days in which to appeal the Judgments in each of these cases and the sentence which the Court is about to pronounce in case number **82-2035** and **--**
>
> THE DEFENDANT: Excuse me, Your Honor.
>
> THE COURT: No, sir. And I'm going to find, based on the previous Affidavit of Insolvency in this file, that he remains insolvent, and I'll appoint the Public Defender of the Ninth Circuit to take the appeal in these two cases.

(R. **1053-55**). Mr. Medina was so incompetent that the trial judge actually had to resort to curtailing his last plea for his life because it was so incoherent and rambling.

B. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE MR. MEDINA'S REPEATED REQUESTS FOR A THIRD MENTAL HEALTH EXPERT

As his trial approached, Mr. Medina's mental condition deteriorated to the point that the jail had to keep him in continual isolation and to control him with restraints. On the second day of trial he had to be forcibly subdued and placed in restraints to be transported to the courthouse. At the time of sentencing, his break from reality became complete, precluding his ability to aid in his defense or have a rational understanding of the proceedings. Mr. Medina met the standard that there were reasonable grounds to believe that he may have been incompetent. His counsel moved for a competency evaluation on November 2, **1982.** On March **11, 1983,** defense counsel pleaded for a third evaluation.

> MR. EDWARDS: Your Honor, it's been my observation of the defendant, that there are some deep seated problems which I have observed over the last several months, and which my co-counsel, Mrs. Rodrigues, also has observed over the last several months.
>
> In addition. it appears that there are indications in the jail records and disciplinary records as contained in the Orange County jail records that the defendant has some severe emotional problem.
>
> I realize there have been two psychiatrists that have examined the defendant so far. Both of their findings are not conclusive as to his lack of sanity and, in fact, they are somewhat conclusive as to his being competent to stand trial and competent at the time the incident occurred.

> However, the Rules do allow for the examination by a third psychiatrist prior to trial. We would ask that be granted.

(R. 914). Again on March 14, 1983, defense counsel informed the court that he did not agree with the doctors' finding of competency and asked for a third expert. He argued that additional investigation was necessary and pointed out that the experts never addressed the criteria for competency as set out in the Rules. He again pleaded for a third expert as provided by the Rules (R. 944, 956).

Recently, the issue of a capital defendant's right to the confidential assistance of a mental health expert was addressed by the Ninth Circuit Court of Appeals. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). The court reviewed the constitutional right of indigents to the assistance of a mental health expert and concluded that the appointment of a nonconfidential court expert did not satisfy an indigent's right to the assistance of a confidential expert:

> If the only psychiatrist provided makes an evaluation which is damaging for a particular defense, an indigent, unlike a wealthy defendant, lacks the financial capacity to retain other psychiatrists. Competent counsel would want to refrain from introducing harmful testimony to the factfinder, but could still ask the court-appointed psychiatrist to consider other lines of analysis and to help prepare other forms of defense. Counsel might restrict the use of the psychiatrist to assistance in refuting other evidence bearing on mental capacity; or might choose not to present

testimony on certain forms of mental impairment at all. None of these options was available to Smith since the court gave explicit directions limiting the scope of his psychiatric evaluation, and since the report was forwarded directly to the court.

We further note that since defense counsel cannot predict the outcome of a psychiatric evaluation, to grant court-appointed psychiatric assistance only on condition of automatic full disclosure to the fact finder impermissibly compromises presentation of an effective defense, by depriving him of "'an adequate opportunity to present [his] claims fairly within the adversary system.'" 470 U.S. at 77, 105 S.Ct. at 1093 (quoting Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444-45, 41 L.Ed.2d 341 (1974)). Competent psychiatric assistance in preparing the defense is a "basic tool" that must be provided to the defense. Id. To impose such a condition as full disclosure takes away the efficacy of the tool. The Third Circuit addressed this problem squarely in United States v. Alvarez, 519 F.2d 1036, 1045-47 (3d Cir.1975):

> United States v. Kovel, 296 F.2d 918 (2d Cir.1961) holds that communications to an accountant, in confidence, for the purpose of obtaining legal advice from a lawyer are protected by the attorney-client privilege.... We see no distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry. The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting.
>
> ....

> ... The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.
>
> ... Thus we reject the contention that the assertion of insanity at the time of the offense waives the attorney-client privilege with respect to psychiatric consultations made in preparation for trial.

We agree with the Third Circuit that a defendant's communication with her psychiatrist is protected up to the point of testimonial use of that communication. See also United States v. Nobles, 422 U.S. 225, 240 n. 15, 95 S.Ct. 2160, 2171 n. 15, 45 L.Ed.2d 141 (1975) (order to disclose defense investigator's report "resulted from [defendant's] voluntary election to make testimonial use of [the] report"); United States v. Talley, 790 F.2d 1468, 1470-71 (9th Cir.1986) (recognizing "attorney-psychotherapist-client privilege" based in common law): United States Ex rel. Edney V. Smith, 425 F.Supp. 1038, 1054-55 (E.D.N.Y. 1976), (defendant waived protection against

> prosecution's use in rebuttal of one-time defense expert when defendant introduced testimony on mental state from different expert), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958, 97 S.Ct. 2683, 53 L.Ed.2d 276 (1977). Confidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases. In the case before us, even if Dr. Stratford had been acting as a defense psychiatrist, and had reached the same conclusion of no diminished capacity on the day of the crime, Smith's counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for mitigation. But Dr. Stratford's examination was restricted to a narrow field of inquiry prepared not for defense counsel, but for the court. As such, the process of psychiatric evaluation was inadequate.

914 F.2d at 1159-60 (emphasis added). Florida law also provides for the appointment of a confidential expert and the courts are not free to refuse such a request:

> Clearly, a solvent defendant would have the option to hire an expert to address concerns of competence to stand trial and testify at hearing even where court-appointed experts expressed the opinion that he is competent. See Fla.R.Crim.P. 3.212(a). The essence of respondents' position is that the defense is bound by the opinions of the court's experts on the issue of competence to stand trial. Although in many cases the defense may not choose to contradict the court's experts on this issue, we believe that it may and if the defendant is insolvent he is entitled to appointment of an expert in accordance with Rule 3.216(a).

Hall v. Haddock, 16 F.L.W. at 178. The Rules specifically provide for the appointment of three experts. Under the

circumstances of this case, it was a violation of state law as well as state and federal due process to deny Mr. Medina the services of a third expert to perform a professionally competent evaluation.

It was error for the court to rely on evaluations conducted two months prior to trial and to refuse trial counsel's repeated requests for a competency hearing at the time of the trial. Abundant evidence of Mr. Medina's deteriorating condition in the jail and his decompensation during trial and sentencing was presented to the court. It was unreasonable for the court to refuse to conduct a competency examination and hearing as required by state and federal law.

C. THE MENTAL HEALTH ASSISTANCE ACTUALLY RENDERED PRE-TRIAL AND AT TRIAL AND SENTENCING WAS PROFESSIONALLY INADEQUATE

The experts who evaluated Mr. Medina did not perform a professionally adequate evaluation. Not only did they not acquire any background material, they did not address the criteria required by Florida law. Defense counsel objected to the findings of competency precisely on these grounds:

> MR. EDWARDS: Your Honor, at this time the Defense would renew its motion to have an additional psychiatrist appointed to examine Mr. Medina. There is some unanswered questions with regard to his ability to understand what is going on with regard to the charges against him. There is some

> unanswered questions regarding to this Court making a finding he's competent to stand trial. I would submit to the Court that there is need of additional investigation as to whether or not he does in fact meet the criteria specified for in Florida Statutes, and that the reports supplied to the Court by the psychiatrists do not in any detail so into what that criteria. how that criteria is **met**.
>
> I would submit to the Court there is insufficient evidence for the Court to base the finding that this individual is competent to stand trial.

(R. 955-96) (emphasis added).

It is most unfortunate that the court appointed mental health experts never reviewed Mr. Medina's jail records. Dr. Gonzalez observed that Mr. Medina did talk of God sitting next to him on the bunk telling him encouraging things, however, the doctor dismissed this as **"more** of a religious or pseudo-religious experience in the time of trouble than a hallucination or delusion" (R. **1752).** The doctor was unaware of Mr. Medina's report of seeing his mother in his cell and of his subsequent deterioration into bizarre behavior as the time of the trial approached. The doctor thought that Mr. Medina only had one daytime commitment to a hospital instead of three successive commitments, two of which required **24** hour supervision. Finally, the doctors were not even aware that Mr. Medina had been taken directly from a mental hospital in Cuba and placed on a boat to the United States. The so-called competency evaluations were

inadequate, pro forma conclusions which failed to even address the competency criteria.

The numerous "red flags" of incompetency contained in the record were not considered by the pretrial mental health experts. In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court reversed and ordered a new competency determination because "this evidence [i.e. red flags] was not considered by the evaluating psychiatrists." 489 So. 2d at 736. In Ensle v. Dusser, 3-76 so. 2d 96, 16 F.L.W. 123, 125 (Fla. Jan. 15, 1991), this Court acknowledged that reversal was required where red flag indicators "had been overlooked."

Dr. Wilder and Dr. Gonzalez were ignorant of the crucial "red flags" necessary to a competency determination. In Mason, the unconsidered "red flags" were "an extensive history of mental retardation, drug abuse and psychotic behavior." 489 So. 2d at 736. This Court held in Mason that such evidence in fact does need to be considered in a competency determination. The "red flags" present here which were unknown by the mental health experts are of exactly the same ilk as those in Mason.

The experts here reached conclusions without the necessary information just as the experts in Mason v. State. Crucial evidence necessary for a reliable competency evaluation was not considered. This Court erred in not reversing on direct appeal.

D. MR. MEDINA'S RIGHTS PURSUANT TO STATE LAW AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN HE WAS TRIED AND SENTENCED WHILE INCOMPETENT

Not only did the trial court err in failing to appoint a third expert or to conduct a competency hearing during trial, but Mr. Medina's state and federal rights were violated when this mentally ill man was tried and sentenced while he was incompetent.

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. It is simply unfair to try someone when that person has no ability to meaningfully participate in the proceedings which will subject him to a loss of liberty or, as here, life. Mr. Medina was evaluated for competency prior to trial. However, during trial his behavior became more and more bizarre, inappropriate and unpredictable. Defense counsel asked that another evaluation be done. This motion was denied (R. 231). By the time of sentencing, Mr. Medina's functioning had almost completely deteriorated.

E. CONCLUSION

The trial court clearly misunderstood the standards to be applied in a competency finding or in consideration of the request for a third expert. The court believed that a third expert or an additional competency evaluation was only necessary

if there was a split of opinion between the two court-appointed experts:

> THE COURT: Let me say this. If there had been a split of opinion between the psychiatrists, one would say one way and one saying the other, I would appoint a third one to resolve it or see which way he would go. To answer that, I am not inclined to grant that Motion.

(R. 914). As far as the court was concerned the issue was closed. When defense counsel raised concerns about mental health during the trial, the court curtailed the inquiry stating, "We're not going to get into mental health." (R. 232).

The court erred in denying defense counsel's right to a third expert where there were reasonable grounds; erred in refusing to consider the evidence of the deterioration of Mr. Medina's mental state since his evaluation; erred in accepting expert opinions which made no reference to the criteria for competency; erred in refusing to conduct a competency hearing during the trial when Mr. Medina's courtroom behavior became so inappropriate that he constantly interrupted the proceedings; and applied an incorrect legal standard to the mental health issues before the court.

The record before this Court is rife with indicia of incompetency, including Mr. Medina's background and history which reflects a clear pattern and diagnosis of mental illness, Mr. Medina's bizarre and inappropriate behavior both in and out of

court and the observation of Mr. Medina by his attorneys who believed he was incompetent.

The evidence which has been presented in this claim was all of record at the time of the direct appeal. Yet, appellate counsel addressed the issue of competency in a page and a half claim.

Surely the phrase that the issue "leaped out upon a casual reading of the record" could have no more dramatic example than the wealth of evidence in this record. Mr. Medina's rights under Florida law and the fifth, eighth, and fourteenth amendments of the federal constitution were violated and habeas relief is warranted.

Fundamental error occurred on direct appeal when this Court failed to reverse the trial court's refusal to conduct further competency proceedings. Habeas relief is warranted now.

CLAIM II

MR. MEDINA WAS DENIED DUE PROCESS WHEN "RED FLAG" INDICATORS OF INCOMPETENCY WERE NOT EVALUATED BY ANY MENTAL HEALTH EXPERTS IN VIOLATION OF MASON V. STATE AND IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MOREOVER, AKE V. OKLAHOMA IMPLICITLY OVERRULED THIS COURT'S DECISION ON DIRECT APPEAL.

The record in Mr. Medina's case reflects a wealth of critical evidence of a prior history of mental disease or defect,

suicide attempts, bizarre behavior, self-mutilation, and hallucinations. None of this was provided to the experts. Consequently, their opinion was based only on a joint interview of Mr. Medina.[3]

Mr. Medina never had the complete mental health evaluation to which he was clearly entitled. Had he received that assistance, there is a substantial probability that the court would have found him insane at the time of the offense, incompetent to stand trial, and that substantial factors would have been proven which would have precluded imposition of a sentence of death. Several factors interacted to prevent Mr. Medina from receiving constitutionally adequate mental health assistance before and during his trial. However, the result violated due process.

Dr. Wilder and Dr. Gonzalez were ignorant of the crucial "red flags" necessary to a competency determination. In Mason, the unconsidered "red flags" were "an extensive history of mental retardation, drug abuse and psychotic behavior." 489 So. 2d at 736. This Court held in Mason that such evidence in fact does need to be considered in a competency determination. The "red flags" present here which were unknown by the mental health

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[3]The reports of the mental health experts were introduced into the record as State's Exhibit #1 - report from A. G. Gonzalez and State's Exhibit #2 - report from J. Lloyd Wilder.

experts are of exactly the same ilk as those in Mason.

The numerous "red flags" of incompetency contained in the record were not considered by the pretrial mental health experts. In Mason, this Court reversed and ordered a new competency determination because "this evidence [i.e. red flags] was not considered by the evaluating psychiatrists." 489 So. 2d at 736. In Engle V. Dugger, 576 So. 2d 696, 16 F.L.W. 123, 125 (Fla. Jan. 15, 1991), this Court acknowledged that reversal was required where red flag indicators "had been overlooked."

The experts here reached conclusions without the necessary information just as the experts in Mason V. State. Crucial evidence necessary for a reliable competency evaluation was not considered. This Court erred in not reversing on direct appeal.

In the previous claim, a wealth of information has been cited from the trial record which established that defense counsel was aware of an overwhelming set of critically important facts which were never communicated to the mental health experts. The experts were never told that Mr. Medina could not aid his attorneys in his defense or understand courtroom procedures. They were never told that jail personnel had noted suicide attempts, psychoative medication, inappropriate laughter, sudden extreme mood swings, exposure, singing, beating on walls, hallucinations that his mother was in his cell, to name only some of the many strange behaviors. In addition, counsel knew that he

had three prior hospitalizations in Cuba, there was evidence of seizures, and that he had been taken directly from a mental hospital in Cuba and put on a boat to Miami. None of this critical information was provided to the experts.

Mr. Medina's attorneys were aware that he had serious mental disabilities which interfered with their attorney-client relationship:

> MR. EDWARDS: Your Honor, it's been my observation of the defendant, that there are some deep seated problems which I have observed over the last several months, and which my co-counsel, Mrs. Rodrigues [sic], also has observed over the last several months.
>
> In addition, it appears that there are indications in the jail records and disciplinary records as contained in the Orange County jail records that the defendant has some severe emotional problem.

(R. 914). However, this information was never provided to the experts. Trial counsel were aware that Mr. Medina had received prior psychological testing yet they failed to obtain those results or request testing be conducted. Two months after the evaluations, trial counsel watched as Mr. Medina's behavior in the courtroom deteriorated.

The doctors failed to make any inquiry as to the family history of schizophrenia, Mr. Medina's history of head injuries, problems at birth, child abuse, or his history of childhood seizures (**See** Reports of Dr. Gonzalez and Dr. Wilder). These are

standard areas of inquiry when a competent mental health evaluation is performed.

Although Mr. Medina was asked about prior hospitalizations, the experts did not inquire in enough detail to understand that he had three prior hospitalizations at ages **16, 17,** and **18,** and was actually taken from a mental hospital and put on a boat to Miami (R. **945-51;** Jail records).

Given the severity of Mr. Medina's bizarre behavior, it was unreasonable for the experts not to perform *any* testing which could have revealed the severity and nature of his mental deficiencies. **No** effort was made to diagnose Mr. Medina's illness. No explanation was presented to the judge and jury for his bizarre behavior. Mr. Medina had received such testing before (R. **951).** All the indicia of severe mental illness were present, and it is inexplicable that no testing or other attempts were made to reach a diagnosis of the mental illness which had required three prior hospitalizations, psychological testing, and had been recognized by the jail personnel who characterized him as a "signal **21"** indicating that he had significant mental illness (R. **945-51;** jail records). Had reasonably effective counsel provided competent mental health experts with proper information, and had mental health experts provided competent evaluations, there is a reasonable probability that the result in this case would have been different.

Mr. Medina had the right to competent mental health assistance and effective counsel pre-trial, trial, and at sentencing.

The issue is whether Mr. Medina's due process right to a professionally competent, court-funded evaluation of his mental status at the time of the offense, his mental status at the time he waived his Miranda rights, his mental status at trial, and whether mitigating circumstances existed, was violated. Mr. Medina is entitled to court-funded evaluations that are professionally competent, reliable, and valid. The two evaluations made of his mental status in **1983** prior to trial failed to take into account testing, which can reveal mental deficits such as organic brain damage, and an accurate medical and social history. Further, had this information been taken into account, the pre-trial evaluations would have been able to reach a diagnosis and would have reached significantly different conclusions favorable to his defense in both phases of trial. Unaccountably, the experts never considered the criteria for competency set forth in the criminal rules.

The due process clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, **470** U.S. **68 (1985).** As the Court explained in **Ake**, the provision of competent psychiatric expertise to a

defendant assures the defendant "a fair opportunity to present his defense," Id. at 77, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them."

Recently, the issue of a capital defendant's right to the confidential assistance of a mental health expert was addressed by the Ninth Circuit Court of Appeals. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). The court reviewed the constitutional right of indigents to the assistance of a mental health expert and concluded that the appointment of a nonconfidential court expert did not satisfy an indigent's right to the assistance of a confidential expert:

> If the only psychiatrist provided makes an evaluation which is damaging for a particular defense, an indigent, unlike a wealthy defendant, lacks the financial capacity to retain other psychiatrists. Competent counsel would want to refrain from introducing harmful testimony to the factfinder, but could still ask the court-appointed psychiatrist to consider other lines of analysis and to help prepare other forms of defense. Counsel might restrict the use of the psychiatrist to assistance in refuting other evidence bearing on mental capacity; or might choose not to present testimony on certain forms of mental impairment at all. None of these options was available to Smith since the court gave explicit directions limiting the scope of his psychiatric evaluation, and since the report was forwarded directly to the court.
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appointed psychiatric assistance only on condition of automatic full disclosure to the fact finder impermissibly compromises presentation of an effective defense, by depriving him of "'an adequate opportunity to present [his] claims fairly within the adversary system.'" 470 U.S. at 77, 105 S.Ct. at 1093 (quoting Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct. 2437, 2444-45, 41 L.Ed.2d 341 (1974)). Competent psychiatric assistance in preparing the defense is a "basic tool" that must be provided to the defense. Id. To impose such a condition as full disclosure takes away the efficacy of the tool. The Third Circuit addressed this problem squarely in United States v. Alvarez, 519 F.2d 1036, 1045-47 (3d Cir.1975):

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> cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.
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> ... Thus we reject the contention that the assertion of insanity at the time of the offense waives the attorney-client privilege with respect to psychiatric consultations made in preparation for trial.

We agree with the Third Circuit that a defendant's communication with her psychiatrist is protected up to the point of testimonial use of that communication. See also United States v. Nobles, 422 U.S. 225, 240 n. 15, 95 S.Ct. 2160, 2171 n. 15, 45 L.Ed.2d 141 (1975) (order to disclose defense investigator's report "resulted from [defendant's] voluntary election to make testimonial use of [the] report"); United States v. Talley, 790 F.2d 1468, 1470-71 (9th Cir.1986) (recognizing "attorney-psychotherapist-client privilege" based in common law); United States Ex rel. Edney v. Smith, 425 F.Supp. 1038, 1054-55 (E.D.N.Y. 1976), (defendant waived protection against prosecution's use in rebuttal of one-time defense expert when defendant introduced testimony on mental state from different expert), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958, 97 S.Ct. 2683, 53 L.Ed.2d 276 (1977). Confidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases. In the case before us, even if Dr. Stratford had been acting as a defense psychiatrist, and had

> reached the same conclusion of no diminished capacity on the day of the crime, Smith's counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for mitigation. But Dr. Stratford's examination was restricted to a narrow field of inquiry prepared not for defense counsel, but for the court. As such, the process of psychiatric evaluation was inadequate.

914 F.2d at 1159-60 (emphasis added). Florida law also provides for the appointment of a confidential expert and the courts are not free to refuse such a request:

> Clearly, a solvent defendant would have the option to hire an expert to address concerns of competence to stand trial and testify at hearing even where court-appointed experts expressed the opinion that he is competent. See Fla.R.Crim.P. 3.212(a). The essence of respondents' position is that the defense is bound by the opinions of the court's experts on the issue of competence to stand trial. Although in many cases the defense may not choose to contradict the court's experts on this issue, we believe that it may and if the defendant is insolvent he is entitled to appointment of an expert in accordance with Rule 3.216(a).

Hall v. Haddock, 16 F.L.W. at 178. The Rules specifically provide for the appointment of three experts. Under the circumstances of this case, it was a violation of state law as well as state and federal due process to deny Mr. Medina the services of a third expert to perform a professionally competent evaluation.

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process clause. In Florida, a criminal defendant is entitled to evaluation of his or her mental status upon request unless the trial judge is "clearly convinced that an examination is unnecessary. . . ." Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978); Mason v. State, 489 So. 2d 734 (Fla. 1986). Florida law, therefore, mandates evaluation of mental status upon the existence of specified factual predicates. When such an interest is created by state law, it is protected by the due process clause. See Hewitt v. Helms, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest"); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979) (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual"). Since the function of the due process clause in this context is "to insure that the state-created right is not arbitrarily abrogated," Wolfe v. McDonnell, 418 U.S. 539, 557 (1974), it protects a Florida defendant against professionally incompetent and invalid evaluation of his or her mental status. Because such evaluations would be the functional equivalent of no evaluation

at all, the State must be required to provide professionally competent and valid evaluation in order to effectuate the right it has created.

Accordingly, the due process clause requires that appointed psychiatrists render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In psychiatry, as in other medical specialities, the standard of care is the national standard of care recognized among similar specialists rather than a local, community-based standard.

Dr. Wilder's and Dr. Gonzalez's pre-trial evaluations, which were submitted to the court were not predicated upon competent procedures, and violated due process. A competent evaluation, based on proper tests, records and background information, would have substantially benefited Mr. Medina.

An accurate medical and social history of the individual must be obtained and reviewed as part of any competent mental health evaluation. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub and F. Black, Orsanic Brain Syndromes 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an

accurate **diagnosis."** H. Kaplan and B. Saddock, Comprehensive Textbook of Psychiatry, at 837 (4th ed. 1985).

Medical and social history, in order to be accurate, must be obtained not only from the patient, but from sources independent of the patient. It is well-recognized that the patient is often an unreliable data source for his own medical and social history. "the past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family **members."** Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American

Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. *Am.* Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98.

For an expert to make a competent mental health evaluation, appropriate diagnostic studies must be undertaken. The psychiatric profession recognizes that psychological tests, CAT scans, electroencephalograms and other diagnostic procedures may be critical to determining the presence or absence of organic brain damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan and Sadock at 547-48.

At the hearing to determine Mr. Medina's competency to stand trial only Mr. Medina testified; the reports, not the testimony, of Dr. Wilder and Dr. Gonzalez were considered; and Mr. Medina submitted his Orange County Jail medical records (R. 940-60; Defense Exhibit #1). No testimony was elicited from either psychiatric expert. Despite counsel's representation that Mr. Medina was unable to consult with his attorneys, the court found Mr. Medina competent to stand trial and refused to appoint a third expert (R. 957-58).

Dr. Gonzalez and Dr. Wilder jointly interviewed Mr. Medina for two hours. They conducted no tests, and their reports reflect no consideration of information other than what Mr. Medina told them (State Exhibits #1 and #2).

Although Dr. Wilder mentioned the possibility of Mr. Medina's experiencing hallucinations or delusions, he concluded, "I am inclined to think that this was more of a religious or pseudo-religious experience." Had the experts reviewed the jail records, they would have known that Mr. Medina also had hallucinations that his mother was in his cell as well as many other bizarre behaviors. The court's determination that Mr. Medina was competent to stand trial was erroneous due to Dr. Gonzalez's and Dr. Wilder's inadequate evaluations.

Had the experts performed competently, there is a reasonable probability that the result in this case would have been different. Their failures violated Mr. Medina's sixth, eighth, and fourteenth amendment rights.

Attorney observations are important in assessing the incompetency question. See Jones v. State, 478 So. 2d 346 (Fla. 1985). See also Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir. 1979), cert. denied, 444 U.S. 983 (1979). Defense counsel's suggestion that a defendant "had difficulty understanding the proceedings against him or that . . . [the defendant] . . . lacked the ability to cooperate or consult with him rationally," is

persuasive evidence of competence, Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir. 1979), cert. denied, 444 U.S. 943 (1979), and vice versa. See also Scott v. State, 420 So. 2d 594, 597 (Fla. 1982). Mr. Medina's attorneys believed he was incompetent and made repeated requests for an additional evaluation of his competence. Yet no adequate evaluation occurred.

CLAIM III

MR. MEDINA WAS DENIED A MEANINGFUL AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE OF THE COURT'S RULING THAT A DEFENSE EXPERT WOULD NOT BE APPOINTED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Medina has established that counsel had a abundance of mitigating evidence which was never presented to the jury and was never argued to the court. The jury never knew that Mr. Medina was hallucinating that God and his mother were in his cell. They never knew that even the jail personnel believed Mr. Medina to be mentally ill, that he was self-mutilating, that he was so ill he had to be placed in restraints, that his behavior fluctuated wildly between quiet and polite to laughing hysterically and beating on the walls. They never knew that given his history of severe behavioral disturbance, that his courtroom demeanor was beyond his ability to control.

Trial counsel were well aware of Mr. Medina's mental illness:

> MR. EDWARDS: Your Honor, it's been my observation of the defendant, that there are some deep seated problems which I have observed over the last several months, and which my co-counsel, Mrs. Rodrigues [sic], also has observed over the last several months.
>
> In addition, it appears that there are indications in the jail records and disciplinary records as contained in the Orange County jail records that the defendant has some severe emotional problem.

(R. **914).**

The trial court's refusal to grant the defense an expert violated Ake v. Oklahoma; a decision rendered following this Court's affirmance on direct appeal. As a result, state habeas relief must be accorded now.

CLAIM IV

> MR. MEDINA'S RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE STATE INTRODUCED HIS PURPORTED STATEMENTS OF APRIL **9, 1982,** INTO EVIDENCE.

Mr. Medina is a Cuban refugee who was removed from a mental hospital and sent to the United States during the "Freedom Flotilla" sometime between April and May, **1980.** Upon entry into the United States, he was warehoused at Fort Chaffee, Arkansas. Some months later he was "sponsored" by a couple from Cape May, New Jersey, with whom he lived during the next several months. In the spring or summer of **1981,** he left New Jersey to live with

his half-sister who then resided in Orlando, Florida (R. **968-74).**

When Mr. Medina arrived in the United States he did not speak English. It is, at best, unclear whether Mr. Medina ever received any formal education in Cuba or whether he was even literate in his native language (R. **990).** It is manifestly clear, however, that he was not literate in English. He could neither read nor write it at the time of his arrest on April **8, 1982,** or during the months that followed **(See,** e.g., R. **1086).**

Mr. Medina's English-language speaking ability during this time was poor. Many people, including State witnesses at his trial, the prosecutor, the police officers who arrested him, and the court personnel who dealt with him prior to trial documented both his inability to understand the English spoken to him and the difficulty of understanding the English spoken by him. The record is full of examples (R. **1323; 327; 349).**

The trial attorneys requested a Spanish speaking mental health expert and the judge noted this in his letter to the doctors:

> Mrs. Tangle-Rodriguez contacted Dr. Gonzalez who agreed to this appointment because Medina's native tongue is Spanish and Dr. Gonzalez speaks fluent Spanish. Counsel suggested that the two of you might wish to conduct a joint examination of the defendant, confer together but reach your own separate opinions. May I suggest that you discuss this by telephone and make your arrangements from there.

(R. **1696).** During his trial a year later, the court advised counsel to speak to Mr. Medina in Spanish so he would understand what was being said:

> THE COURT: Now, look, Mr. Edwards, I want you to go back there and tell Ms. Rodriguez to tell your client in Spanish or otherwise that it's to his benefit he keep his hands down under the bench, not talk loudly, not misbehave. Because the jury is not missing a bit of that. And if the jury draws any adverse inference against him it's going to be his own fault.

(R. **280).**

At the time of trial, Mr. Medina had been studying English for almost a year and he still did not have a good understanding of the language. At the time of his arrest, he had only a rudimentary understanding of English. Words which were used to advise him of his rights such as "waive," "evidence," "entitled," "attorney," "hereafter," "remain," "threatened," "coerced," "enduce," "encourage," **"statement,"** "present," "afford," "appointed," "desire," **"consult,"** and **"interview"** were far above his simple knowledge of the language. Mr. Medina did not even understand such words as **"wife"** (R. **215).**

Mr. Medina often hesitated and paused in attempting to speak English and yet no translator was ever offered (R. **205).** Mr. Medina testified that he was unable to understand everything that was said to him and was confused by some of the terms the

detective used (R. **214-15).** Further, Mr. Medina stated he did not understand that the Detective was a policeman:

> Q. You had a long conversation. And before the tape was turned on did you tell him you didn't want to talk to him?
>
> A. Yes, I did. I did say that I didn't want to talk to him. I wanted to know who he was by, you know. He went around the bush, you know. He never told me who he was.
>
> Q. Didn't he tell you who he was at the very beginning of that tape?
>
> A. At the very beginning -- well, if he was, if he said it I didn't understood, understand.
>
> Q. You didn't understand that he was a policeman?
>
> A. Well, not because -- you are a policeman?
>
> Q. I asked the question. You didn't understand that he was a policeman?
>
> A. I didn't.
>
> Q. Just because he wasn't in a police uniform?
>
> A. Well, how, how other way could I understand that he was a policeman?
>
> Q. Didn't he identify himself to you as a detective from the Sheriff's Department?
>
> A. I told you I didn't understand English at that time as well as I do now.

(R. 217-18). Mr. Medina testified that at the time of his previous arrests, it had been necessary to read the Miranda warnings to him in Spanish:

Q. On either one of those occasions when you were arrested didn't the police read you those same warnings again, telling you about the right to remain silent and the right to a lawyer and all that?

A. That I had to, they didn't have to read the sign to me that written, because there we had somebody to read to me in Spanish.

Q. So it's your contention then that what Detective Nazarchuck told you in Lake City, that you did not understand it?

A. I wasn't sure that he was understanding what I was saying.

Q. What was it about it that you didn't understand?

A. Well, right now I probably -- I could give you some explanation, but depends what kind of question you asking me. Because you got to point to, you know, something, you know, a word or, you know, I don't know what you're saying. We have a long conversation anyway, so -- but let me tell you this. When I listen to the English language I listen to sounds. You understand? But I have to go to my mind and translate it in Spanish, you know, to understand what I'm saying and to understand what people saying to me. It take time. That's what you, you know, what you did right now. You look at, you look at your watch.

(R. 219).

Not only did Mr. Medina have only a rudimentary understanding of English but he did not understand the American justice system:

Q. Did you have any problems understanding this culture and the system here?

A. You mean the customs?

Q. Did you have any confusion about the legal system and the police?

A. Well, I didn't know anything about the system. I still don't know.

Q. Pedro, did you feel that you had any problems with the language when you came here?

A. Oh, yeah.

Q. Have you been studying English?

A. Well, like my mother was telling right here, she helped me out when she took me to school every week just like that there. One thing I want to make clear, a person that is like me, you know, I have been trying so hard to learn how to speak the American language, and you understand, I have to have some kind of of outlook about my life, you know. I have been trying to learn and am still trying to learn because I want to communicate to people, understand. I want to go to them and be friendly to them. Do you understand? And, you know, I want to get ahead and help other people, you understand, because I am willing to work. When I came to this country, I came because I am a healthy person and I can work.

(R. 1991-92). Finally, Mr. Medina's perception of reality was limited not only by his lack of English language skills but also by his severe lifelong mental and emotional illness.

Mr. Medina was arrested, at gunpoint, while asleep in Dorothy James' car, in the early morning hours of April **8, 1982**

(R. 320-27). He was initially questioned at the scene of the arrest by Trooper Wilson (R. **327).** This statement was subsequently suppressed because Mr. Medina told the trooper he did not want to talk to him (R. **345).** Despite his statement that he did not want to talk, he was taken to the Columbia County Jail and interrogated. As required by Fla. **R.** Crim. P. **3.130,** Mr. Medina should have been brought before a judicial officer within twenty-four hours of his arrest. He was not, and he was thereby deprived of receiving an independent, translated, judicial explanation of his constitutional rights in a non-coercive, non-adversarial setting. From April **8, 1982,** until April **15, 1982,** when for the first time he gained access to the court, Mr. Medina was held incommunicado (RS. **123).**

On April **9, 1982,** at **12:20** p.m., Mr. Medina was again interrogated by two detectives from Orange County who spoke no Spanish, but who knew that Mr. Medina was a recent emigre' **(R. 205).** Half of this interview was tape recorded **(R. 198-202).**

Prior to trial, defense counsel moved to suppress the statements elicited from Mr. Medina on April **8, 1982,** and the tape-recorded statements made on April **9, 1982.** In the former motion, counsel also sought to suppress the evidence taken from Ms. James' car as the product of an illegal search (R. **1806-1807, 1810-11).**

At the beginning of trial, the judge conducted hearings on defense counsel's two motions to suppress. The trial court first heard and denied the motion to suppress Mr. Medina's April 9, 1982, taped statements, those given during his interrogation by Detectives Nazarchuck and Payne (R. 196-226; 307-09). After a hearing on the motion to suppress the statements and evidence seized on April 8, 1982, the motion was granted as to the statements, but denied as to the tangible evidence (R. 309-55). This statement was suppressed because Mr. Medina invoked his Miranda rights.

Mr. Medina's subsequent statements of April 9, 1982, were not suppressed even though these statements resulted from police-initiated contact. By the time Detectives Nazarchuck and Payne interrogated Mr. Medina concerning Ms. James' car, his sixth amendment right to counsel had already attached, Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), and their interrogation under these circumstances constituted a violation of that right. If Mr. Medina had been brought before a judicial officer within twenty-four hours of his arrest, as required, counsel would have been appointed to represent him. See Coleman v. Alabama, 399 U.S. 1 (1970); Fla. R. Crim. P. 3.130; Williams v. State, 296 So. 2d 878 (Fla. 1st DCA 1974). It is difficult to imagine a defendant more in need of counsel than this mentally

ill man with only a rudimentary understanding of the English language and no understanding of the American system of justice.

If Mr. Medina had received appointment of counsel, he would not have given a statement on April 9, 1982. When Mr. Medina was first advised of his rights by a uniformed trooper, he told the trooper he did not wish to give a statement (R. 345).[4] On April 9, 1982, Mr. Medina again stated he did not want to give a statement (R. 840). Mr. Medina later testified that he only proceeded to give a statement to the Orange County detectives because they were not in uniform and he did not understand that they were police, he was confused, and his language skills were too poor to understand his rights (R. 217-19; 1991-92).

When asked if he understood his rights, Mr. Medina did not reply:

---

[4] It is very significant in weighing the credibility of the State witnesses to note that on direct examination the prosecutor elicited testimony from Trooper Wilson that Mr. Medina never indicated that he did not want to talk:

> Q. All right. Before making that statement did he make any indication to you that he didn't want to talk?
>
> A. No, sir.

(R. 329). This testimony was in direct conflict with an earlier sworn deposition given by the trooper. Only after being confronted with his deposition to the contrary, did the trooper admit that Mr. Medina said he did **not** want to talk. As a result, the trial court suppressed this statement. However, the subsequent police-initiated interrogation by Detective Nazarchuck was held to be admissible.

DET. NAZARCHUK: Okay. Now, all these rights I read to you, do you understand them?

P. MEDINA: (No audible response).

DET. NAZARCHUK: You'll have to say yes or no because -- for the tape recorder. Did you understand all the rights I read to you, Pedro?

P. MEDINA: (Indiscernible words).

DET. NAZARCHUK: Yes?

P. MEDINA: (No audible response).

(R. 839). Furthermore, although Mr. Medina indicated he did not want to talk, the detective continued to question him:

DET. NAZARCHUK: Okay. Do you wish to talk to us at this time?

P. MEDINA: Huh?

DET. NAZARCHUK: Do you wish to talk to us at this time?

P. MEDINA: No.

DET. NAZARCHUK: You don't want to talk to us or you do want to talk to us?

P. MEDINA: Okay, let me tell you what Im think.

DET. NAZARCHUK: Sure.

P. MEDINA: I don't do no -- I don't know nothing about -- nothing about what's she -- what she saying what she want to know, all right?

DET. NAZARCHUK: Okay. Okay. The reason for us to talk to you, okay, you're in jail and the reason you're in jail is because you were in Dorothy's car, right? You were in a Cadillac?

P. MEDINA: (No audible response).

DET. NAZARCHUK: Okay. Now we talked to you a few minutes ago and you said that two white dudes picked you up and you got in a Cadillac, and you did not know that the car belonged to this girl, Dorothy James.

P. MEDINA: Yeah, but that's no -- that was not the car.

DET. NAZARCHUK: This Cadillac was not the car?

P. MEDINA: No, no it wasn't.

DET. NAZARCHUK: Okay. Okay. Now, I don't understand you. You've got me confused. Did they pick you up in a different car?

P. MEDINA: Yeah.

DET. NAZARCHUK: Okay. They picked you up in a different car. Then why -- then how -- how did you get into the Cadillac. The Highway Patrol Trooper saw you in a Cadillac.

P. MEDINA: They was -- I wasn't in the Cadillac.

DET. NAZARCHUK: You was not in the Cadillac?

P. MEDINA: I wasn't in the Cadillac, not in that car.

DET. NAZARCHUK: Okay. Earlier, maybe I misunderstood you, you said you were -- you were in the car but you didn't know the car belonged to Dorothy.

P. MEDINA: Yeah, but that's -- that was not the car.

DET. NAZARCHUK: Okay, okay. I'm talking about the Cadillac. You say you were not in the Cadillac?

P. MEDINA: No, I wasn't in the Cadillac.

DET. NAZARCHUK: Okay. When the Florida Highway Patrol picked you up, what car were you in?

P. MEDINA: I was in no car.

DET. NAZARCHUK: You was in no car?

P. MEDINA: No car.

(R. 840-41). Detective Nazurchuk's explanation of his continued interrogation was that he "wasn't too sure what he meant by no":

Q. Was there a time when you questioned him about whether or not he wanted to make a statement, and you were uncertain as to what his position was?

A. During our taped conversation after explaining to him his rights and questioned him if he wanted to talk at this time. His verbal response was, no. I wasn't too sure what he meant by no. I asked him to clarify it. At this point he says, well, I want to tell you something. And then the conversation continued.

Q. Okay. And you have the tape recording here as well?

A. Yes, sir.

(R. 201)(emphasis added). The record makes things very obvious -- Mr. Medina never indicated that he understood his rights, Mr. Medina said he did **not** wish to talk, and Mr. Medina was very confused.

Detective Nazarchuk testified that Mr. Medina refused to sign the rights form because he did not read English **(R. 200)**. Finally, the detective stated that Mr. Medina also refused to sign the typed statement **(R. 207)**.

Mr. Medina's April **8, 1982,** statements were also coerced: they were elicited by police officers at Columbia County Jail after he had refused to sign a waiver form **(R. 333),** after he had refused to answer the arresting officer's question concerning his willingness to talk **(R. 342-43),** and after Mr. Medina, having been repeatedly subjected to what were, to him, incomprehensible questions, finally said **"I** don't want to talk to you. I don't want to do anything like that" **(R. 343-45).**

Moreover, Mr. Medina was held incommunicado, with access only to his jailers during the thirty-six and a half hours after his arrest and commencement of his second interrogation on April **9, 1982,** at **12:30** p.m. It is unclear that Mr. Medina even understood why he had been detained **(R. 1357-59; 349; 1232).**

When Detective Nazarchuck interrogated Mr. Medina on April **9, 1982,** he read him the standard Miranda warnings and asked him the standard Miranda questions **(R. 198).** While Mr. Medina actually responded to the other Miranda questions, the record shows that he never actually responded to the question, **"do** you understand these rights." Mr. Medina testified that he did **not** understand his rights:

Q. You have some difficulty with the English language?

A. I still have.

Q. All right. But you understand everything that Detective Nazarchuck told you with regard to your right to silent [sic] and your right to have a lawyer there?

A. When.

Q. On the 9th of April, 1982. Did you understand everything he said?

A. Not everything.

Q. Okay. At some point during that interview did you tell Detective Nazarchuck that you did not wish to talk to him at that time?

A. Well, I said I find -- I recall I told him that I didn't want to talk to him.

Q. Did he continue to question you?

A. Yeah. He continued to say, you have to say yes or not [sic]. And there was another person in that room that say we don't mean no harm. You got to talk to all. I didn't know really if he was a police officer. I don't know what he was. They were wearing, you know, outside clothes.

(R. 214).

The court relied on Detective Nazarchuck's opinion that Mr. Medina understood his rights (R. 1146, 200, 1225, 520, 833). Just like the previous evening, Mr. Medina told his interrogators unequivocally that he did not want to talk to them, but they continued the interrogation (R. 840), thereafter eliciting invalid statements.

Inexplicably, the court suppressed one statement because Mr. Medina indicated he did not want to talk but admitted another statement under the identical circumstances. The court's action was arbitrary and capricious and makes no sense. Moreover, it violated the principle of Edwards v. Arizona, 451 U.S. 477 (1981).

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). This ruling was reaffirmed in Edwards, 451 U.S. at 482.

Recently, this Court explained:

> [A] suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. See Lons v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 108 S. Ct. 1754 (1988), and cases cited therein; and Martin, where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of Miranda rights, the court held that the continued questioning was reversible error under Miranda. Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant

> to continue his statement. Such error is not, however, per se reversible but before it can be found to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. State, 386 U.S. 18, 24 (1967); Martin v. Wainwright. Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt. Even though there was corroborating evidence, Owen's statements were the essence of the case against him. We accordingly reverse Owen's convictions on the basis of the inadmissible statements given after the response, "I'd rather not talk about it."

Owen v. State, 560 So. 2d 207, 211 (Fla.), cert. denied, 111 S. Ct. 152 (1990). This Court committed fundamental error in affirming the admission of the April 9, 1982, statement taken in violation of Edwards v. Arizona.

Mr. Medina's statement was also made involuntarily in violation of Jackson v. Denno, 378 U.S. 368 (1964), and the fourteenth amendment (R. 309). Based on the facts as enumerated above, Mr. Medina's statements were involuntary, and he requests that this Court reconsider the issue.

If Mr. Medina's April 9, 1982, statements had been suppressed, as they properly should have, then the information that the State received during that interrogation is the fruit of an illegal interrogation, and should have been suppressed. Evidence introduced at trial, including the statements and testimony of Grace Moore, Donald Potter, Michael White, and Margaret Moore, were obtained by Nazarchuck as a direct result of

the illegal interrogation of April 9, 1982. Detective Nazarchuck never had a reason to go to Tampa until after his interrogation of Mr. Medina. This evidence constituted an important part of the State's case against Mr. Medina. The admission of this evidence was not harmless. Habeas relief is warranted.

CLAIM V

APPELLATE COUNSEL INEFFECTIVELY AND UNREASONABLY FAILED TO RAISE IMPORTANT FEDERAL AND STATE LAW CONSTITUTIONAL VIOLATIONS CONCERNING MR. MEDINA'S EXCLUSION FROM A CRITICAL STAGE OF THE PROCEEDINGS; RESTRICTION OF CROSS-EXAMINATION; IMPROPER PROSECUTORIAL CONDUCT; AND JURY INSTRUCTIONS WHICH IMPROPERLY INFORMED THE JURY OF THEIR ROLE AT SENTENCING.

Although the bases for several important constitutional violations were obvious on the face of the record, appellate counsel unreasonably and ineffectively failed to raise these claims for Mr. Medina.

A. MR. MEDINA'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS INVOLUNTARILY EXCLUDED FROM THE COURTROOM DURING THE HEARING CONCERNING WHETHER HE SHOULD BE SHACKLED

At the beginning of the second day of trial, two jailers, Lieutenant Mead and Sergeant Witted, reported to the trial court judge that Mr. Medina had exhibited wild, bizarre and hostile behavior in his holding cell, while waiting to be escorted to the

courtroom (R. 227). Upon receiving this information, Ms. Rodriquez left the courtroom to talk to him.

While co-counsel and Mr. Medina were outside the courtroom, a hearing was conducted for the purpose of determining whether Mr. Medina should be shackled at trial (R. 227-40). In the process of this hearing, the two jailers were placed under oath by the judge, who questioned them about Mr. Medina's behavior (R. 227-30).

The trial court then offered Mr. Edwards, defense counsel, an opportunity to examine the jailers. Mr. Edwards did so, but failed to rebut their opinions that Mr. Medina's behavior was unreasonable under the circumstances that prompted it (R. 230-32). The trial court judge also offered the state attorney an opportunity to examine the jailers, and he did (R. 232). Mr. Medina was absent from the courtroom during the entire proceeding (R. 227-40).

Mr. Medina never waived his right to be present (R. 227-40). Proffitt V. Wainwright, 685 F.2d 1227 (11th Cir. 1982). The proceeding was a critical one, in that it resulted in Mr. Medina being shackled throughout the rest of the proceedings. He was provided no opportunity to rebut the incriminating testimony.

After the trial judge had conducted the "formal" hearing and while he awaited Ms. Rodriquez's return to the courtroom, additional evidence concerning Mr. Medina's behavior and

suggestions on how it should be handled was heard through the unsworn statements of Bailiff Huffman and jailer Mead (R. 232-38).

Based on these events and before Ms. Rodriquez returned, the judge had already decided to subject Mr. Medina to shackling.

> Like I say, I'm not -- I'm becomina less concerned, if I was. with this business of the juror's knowing that he's in custody. We'll hear what Ms. Rodriguez say and we'll go forward from there.
>
> . . .
>
> I don't think there is any question in my mind about the restraints, about the belly belt and jumpsuit. And one of ya'll come back and let me know how he likes that if he's all right.

(R. 238).

Upon her return, Ms. Rodriguez reported to the judge that Mr. Medina was **"agitated"** because the guards had "roughed him up," and because he had had to remain in isolation the previous night. She further reported that he had agreed to **"behave"** in the courtroom (R. 239). After hearing this report, and without further ado, the judge officially ordered that Mr. Medina be shackled and photographed (R. 239, 233-34, 247), and Mr. Medina remained shackled throughout the rest of trial.

A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, **see**, e.g., Drope

v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Fla. R. Crim. P. 3.180. A capital defendant has "the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. This right derives in part from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. Proffitt, 685 F.2d at 1256.

The federal constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationship to his ability to conduct his defense." Proffitt, 685 F.2d at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial. Proffitt, 685 F.2d at 1257. Florida courts similarly require that any waiver be knowing, intelligent and voluntary. If a defendant is involuntarily absent from any critical stage of the proceedings, relief is proper.

A hearing to determine whether a defendant will be shackled during trial constitutes a critical stage of the state's proceedings against them, and a defendant's absence from such a

proceeding is constitutional error. See Illinois v. Allen, 397 U.S. 337 (1970); Estelle v. Williams, 425 U.S. 501 (1976).

The prejudice to Mr. Medina was very real. Even the court observed that the jury was "not missing a bit of that" (R. 280). Due to Mr. Medina's inability to conceal the shackles, he became the focal point of the trial. See Proffitt v. Wainwright. The error was fundamental and prejudicial in nature.

B. MR. MEDINA WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM BY THE COURT'S LIMITATION OF CROSS-EXAMINATION OF STATE WITNESS LINDI JAMES IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

During the cross-examination of State witness Lindi James, a daughter of the victim, defense counsel attempted to question the witness about several important matters, including the fact that the victim was very fearful of Billy Andrews, a man whom she had dated, and who had a key to the victim's apartment (R. 252-56).

One of the key issues in this case was the inexplicable failure of law enforcement investigators to so much as contact Billy Andrews, the possible murderer of Dorothy James. It was important for the jury to know that Andrews' identity and history of violence towards the victim were known to the police. Defense counsel failed to get this across to the jury, owing to the court's improper restrictions of cross-examination. The court violated Mr. Medina's confrontation rights by its severe limitation of cross-examination.

C. THE STATE'S CLOSING ARGUMENT AT GUILT-INNOCENCE IMPERMISSIBLY RELIEVED THE STATE OF ITS BURDEN OF PROOF, IMPROPERLY INJECTED THE PROSECUTOR'S OWN OPINIONS AS TO THE QUALITY OF EVIDENCE AND CREDIBILITY OF WITNESSES, MISSTATED THE LAW, ARGUED FACTS NOT IN EVIDENCE, AND RESORTED TO INFLAMMATORY, IRRELEVANT MATTERS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The prosecutor, in his guilt closing argument engaged in numerous improper and unconstitutional arguments. He argued that the State's burden was only to prove a reasonable belief of guilt (R. **787-88**). He argued his own personal opinion as to the truth or falsity of testimony on the guilt of Mr. Medina **(790-91)**. He argued that Mr. Medina's testimony was not credible, characterizing Mr. Medina's testimony as **"a** bill of goods or some smoke screen story" (R. **789-90**). He identified himself with the jury by repeatedly using the pronoun **"we"** (R. **792; 799; 789**). He told the jury he had proved his case (R. **787**). The prosecutor also argued matters not in evidence (R. **791; 798; 790; 797**). Specifically he argued that the State had presented <u>everything</u> to the jury (R. **791**).

The prosecutor went on to misstate the law to the jury by misstating the burden of proof, and by characterizing the adversarial process as a battle of reasonableness wherein the party with the more **"reasonable"** case wins (R. **788**). Having set that up, the prosecutor then assailed the testimony of the defendant (R. **791**). The prosecutor thus argued an incorrect,

unconstitutional standard of proof, subjected the defendant's testimony to an improper standard, told the jury the testimony was **"incredible,"** and urged the jury to convict accordingly.

It still did not end there. The prosecutor also misstated the law on **"flight"** evidence **(R. 790)** even after the trial court had denied the State's special requested instruction on flight **(R. 1846).**

Finally, the prosecutor argued inflammatory, irrelevant material that had no probative value **(R. 796-97; 800).** The jury's duty was to determine Mr. Medina's guilt or innocence with respect to the charges against him. Characteristics of the victim, even if true or emotionally compelling, have absolutely nothing to do with that determination. The introduction of such factors in the jury's guilt-innocence calculus was improper and highly prejudicial. See Booth V. Maryland, **482** U.S. **496 (1987).** Ms. James' age, how many children she had, and how regularly she attended church were improperly argued by the State in closing.

D. THE PROSECUTOR AND TRIAL JUDGE UNDER FLORIDA'S BIFURCATED TRIAL PROCEDURE MISINFORMED THE JURY AND IMPERMISSIBLY DIMINISHED THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBILITY IN THE SENTENCING PHASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985)

This Court has indicated in the past that it does not believe that Caldwell v. Mississippi, 472 U.S. 320 (1985), applies in Florida and thus has not granted relief on the basis of Florida capital litigants Caldwell claims. Mr. Medina respectfully disagrees and urges that this Court reconsider. Here the jury was first told by the court:

> This advisory sentence is by majority vote of the jury. The Court then sentences the Defendant to life imprisonment or death. The Court not being bound to follow the advisory sentence of the jury.
>
> Thus, the jury does not impose punishment if a verdict of, verdict of murder in the first degree is rendered. The imposition of punishment is the function of the law and the Judge, and not the function of the jury.

(R. 11). The prosecutor then provided a further unconstitutional characterization of the jury's sentencing function:

> Now, that second phase, if a verdict of murder in the first degree, guilty, is reached that second phase is strictly advisory. It's a recommendation only. And the Court is not obligated to follow it. You need to know now in the event that you were to find a verdict of murder in the first degree, guilty of murder in the first degree, and you sat on the advisory sentence phase as

a juror on that and recommended imposition of a death sentence or a life sentence that in either event the Judse is not obligated to follow your recommendation. Although he has the same criteria established by the Florida Supreme Court that he has to meet in determining what sentence is appropriate.

What Im getting at is, is the Judse is the last person in this case to decide what sentence is appropriate. It's not up to you as jurors. If you are selected to determine what the sentence will in fact be you are not responsible for that. Does anybody here feel relieved in knowing that?

(R. 27-28). In closing argument, the prosecutor again emphasized to the jury that the "appropriate" sentence is for the judge to determine and not something for the jury to get "all hung up on."

This is a capital case. We'll determine in the event that this is a verdict of murder of the first degree at a later time what sentence you might want to recommend to the Court. And the judge will then determine after that what sentence he thinks is appropriate.

(R. 789).

Now, the penalty in this case is not your responsibility. So don't set back there and set all huns up on this.

(R. 792).

Before the jury retired, the court solidified the improper diminution of the jury's sentencing role:

Now, here's some general rules that apply to your discussion. You must follow them in order to arrive at lawful verdicts.

. . .

> Fifth, your duty is to determine if the Defendant is guilty or not guilty in accordance with the law. It's my job to determine what a proper sentence would be if the Defendant is found guilty.

(R. 821).

Before excusing the jury after the verdict was returned, the court depicted the upcoming penalty phase as a trivial proceeding:

> I might say in that connection we will start at nine-thirty. I would anticipate the case being submitted to you about noon. These things don't take long. Shouldn't take long in this case.

(R. 831-32).

The Court opened the penalty phase by reminding the jury, incorrectly, that sentencing "rests solely with the judge":

> The final decision as to what punishment shall be imposed rests solely with the Judge of this court.

(R. 965).

In his final instructions to the jury in the sentencing phase, the judge told the jury:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of me as the Judge of this court.

(R. 1024).

Mr. Medina's jury was thus provided with misinformation regarding its role under Florida's capital sentencing scheme, and was encouraged to place the responsibility for sentencing in a greater authority. This violated Caldwell v. Mississippi, 472 U.S. 320 (1985).

E. CONCLUSION

Each of these claims plainly appeared on the face of the record. Appellate counsel was ineffective for failing to raise the issue on appeal. The failure to raise these issues on direct appeal was not reasonable, the prejudice is clear and relief is warranted.

CLAIM VI

MR. MEDINA'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE BAILIFFS TWICE HANDCUFFED HIM IN FRONT OF THE JURORS ON THE FIRST DAY OF TRIAL. HIS RIGHTS WERE FURTHER VIOLATED WHEN THE TRIAL COURT FORCED HIM TO WEAR SHACKLES AND A LEG BRACE DURING TRIAL COMMENCING WITH THE SECOND DAY OF TRIAL.

The right to a fair trial is a fundamental liberty guaranteed by the fourteenth amendment, and the presumption of innocence is the mainstay of that right. Estelle v. Williams, 425 U.S. 501 (1976). Mr. Medina was forcibly handcuffed in the presence of some members of the venire panel, without prior discussion with his attorneys or prior authority of the judge

during the first day of trial (R. 66). Illinois v. Allen, 397 U.S. 337 (1970).

Another, similar incident occurred also during the first day of trial. During a court recess, Mr. Medina was paraded in front of all members of the venire panel, while shackled, in explicit disregard of his attorney's direction to the bailiff. Defense counsel objected and requested an evidentiary hearing on the matter. The trial court summarily denied the defense motion and denied the request for a mistrial:

> MR. EDWARDS: I'm in favor of that. I'm not talking about placing the cuffs on him right now. I'm talking about you recessed for five minutes and placed them on him to go to the bathroom.
>
> MR. MEDINA: Let me know when you get through.
>
> MR. EDWARDS: All right. The incident I'm talking about is not what you referred to. It's the incident when the Court recessed for five minutes. You left the courtroom. I asked the bailiff if she would make sure there were no jurors outside in the hallway so Mr. Medina could be taken up to the fourth floor to go to the bathroom. I specifically requested the jurors not see Mr. Medina put in handcuffs in order to have him moved out the courtroom. I do not feel it's fair for the Defendant to be placed in the posture of having restraints placed upon him with bailiffs around him for the jurors to see that.
>
> In selection of this trial what happened, the jurors were more or less herded down to the other end of the hallway.

THE COURT: Mr. Edwards, there is a fundamental point of law, whatever you say here is not fact. Make your motions, state your ground, and let the Court rule, and let's move along.

MR. EDWARDS: I would as part of my motion call the bailiff.

THE COURT: Make your motion.

MR. EDWARDS: The motion is the jurors saw my client being handcuffed. That's the reason he's upset at this point. The jurors came back into the courtroom. At least five or six of them witnessed the Defendant being handcuffed as he was led out of the courtroom.

THE COURT: I'm going to deny your motion.

(R. 68-69).

On the second day of trial, two jailers, Lieutenant Mead and Sergeant Whitted, reported to the trial court judge that Mr. Medina had exhibited wild and bizarre behavior in his jail cell which required that he be forcibly restrained. Even though the jailers testified that Mr. Medina would calm down and be all right in an hour, Mr. Medina was then shackled.

The trial judge failed to give a contemporaneous, curative instruction to the jury concerning Mr. Medina's shackles (R. 247-48). Not until the end of trial did the judge provide the jury with any instruction concerning the shackles (R. 817). By then, it was too late. By then even the court had commented on the

jury's fascination with Mr. Medina's behavior and the obvious shackling (R. 280).

The unreasonable and unnecessary shackling of Mr. Medina resulted in a denial of his right to a fair trial and presumption of innocence as guaranteed by the eighth and fourteenth amendments. Estelle v. Williams; Illinois v. Allen.

This issue was raised on direct appeal, and denied by this Court in a footnote, holding that Mr. Medina "has shown no impropriety or undue prejudice." Medina v. State, 466 So. 2d 1046, 1048 n.2 (Fla. 1985).

Mr. Medina respectfully urges this Court to review its earlier ruling and reexamine this issue.

CONCLUSION AND RELIEF SOUGHT

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a legal system governed by complex rules and procedures . . ." Lucey, 469 U.S. at 394 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 477 U.S. 365, 383 (1986);

United States v. Cronic, 466 U.S. 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "ineffective." Washinston v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwriaht, 474 So. 2d 1162, 1165 (Fla. 1985). "[T]he basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis added).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwriaht, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge meritorious claims for relief. Counsel ineffectively simply failed to urge them on direct appeal. As in Matire, Mr. Medina is entitled to relief. See also Wilson v. Wainwright; Johnson v. Wainwriaht. The "adversarial testing process" failed during Mr. Medina's direct appeal -- because counsel failed. Matire, 811 F.2d at 1438, citing Strickland v. Washinaton, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Medina must now show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson. As the foregoing discussion illustrates, he has done so.

The claims are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Medina's

capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. The relief sought herein should be granted.

WHEREFORE, Pedro Medina through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction and sentence of death.

Mr. Medina urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all the reasons set forth herein, and that the Court grant all other further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 22d day of March, 1991.

Attorney