IN THE SUPREME COURT OF FLORIDA

CASE NO. 86528 ~~81,584~~

MICHAEL T. RIVERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Rivera's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on instant 3.850 appeal to this Court;

"Supp. PC-R." -- supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Rivera has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Rivera, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF TEE CASE

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, entered the judgments of conviction and sentence. Mr. Rivera was charged by indictment on August 6, 1986, with first degree murder (R. 2164). Mr. Rivera was adjudicated guilty on April 16, 1987, and on April 17, 1987, the jury recommended a death sentence (R. 2296, 2307). On May 1, 1987, the trial court imposed a death sentence (R. 2308-13). On direct appeal, this Court affirmed Mr. Rivera's conviction and sentence but reversed the finding that the offense was cold, calculated and premeditated. Rivera v. State, 561 So. 2d 536 (Fla. 1990).

On October 31, 1991, Mr. Rivera filed a Rule 3.850 motion and subsequently filed two amended Rule 3.850 motions. Along with his Rule 3.850 motion, Mr. Rivera filed a motion to disqualify the trial court judge (PC-R. 739-49). Mr. Rivera subsequently filed two additional motions to disqualify the judge (PC-R. 1024-40, 1604-18). The motions were all denied (PC-R. 783, 1143). The circuit court initially ordered an evidentiary hearing on Claim II F, J and K, and Claim XIX (PC-R. 1205-06). At the evidentiary hearing, when the State began attempting to present evidence on Claims XX and XXI, upon which no hearing had been granted, the court ordered a hearing on those claims as well and set a later date for that hearing (PC-R. 190-99). The court summarily denied the remainder of the claims without attaching any files and records demonstrating that the claims were conclusively refuted by the record (PC-R. 1205-06). The circuit

court subsequently denied all relief (PC-R. 1717-21). Mr. Rivera timely filed notice of appeal (PC-R. 1760), and this appeal followed. The facts will be discussed in the body of this brief as they relate to individual claims.

SUMMARY OF ARGUMENT

1. Mr. Rivera was denied a full and fair hearing on his Rule 3.850 motion. The lower court erroneously denied Mr. Rivera's motions to disqualify the judge, who had previously stated he was "inalterably opposed" to any reduction in Mr. Rivera's death sentence and hoped that sentence would be carried out as soon as possible. Just as in Suarez v. Dugger, the judge's statements reasonably caused Mr. Rivera to believe he could not receive an impartial hearing by the judge. The lower court also erred in summarily denying numerous claims without attaching any files or records conclusively showing Mr. Rivera was entitled to no relief. The lower court ruled that several claims were procedurally barred although those claims were properly raised as ineffective assistance of counsel. For these and other reasons, this case should be remanded for reconsideration by an impartial judge.

2. The State's case at trial was based on a particular timing of the offense. However, an alibi witness showing Mr. Rivera could not have committed the offense was not presented at trial. This witness testified at the evidentiary hearing. Under either an ineffective assistance of counsel, Brady v. Maryland or

newly discovered evidence analysis, Mr. Rivera is entitled to relief.

3. The State delayed indicting Mr. Rivera for six months after he was arrested and identified by the State as the suspect. This preindictment delay prejudiced Mr. Rivera's ability to defend against the charges because important alibi witnesses establishing Mr. Rivera could not have committed the offense could not be located. Trial counsel was ineffective in failing to raise the preindictment delay issue.

4. Mr. Rivera did not receive effective assistance of counsel at the penalty phase. counsel failed to investigate and thus failed to present evidence supporting numerous mitigating factors. The lower court ruled this claim was procedurally barred, even though the State urged the court to address the claim on the merits. The lower court did not attach any files and records showing this claim was conclusively rebutted. An evidentiary hearing and relief are warranted.

5. Trial counsel was ineffective in failing to investigate a voluntary intoxication defense.

6. Mr. Rivera's sentencers relied on his prior conviction of four charges in imposing death. Two of those convictions have now been vacated. Resentencing is appropriate.

7. This Court did not conduct an adequate harmless error analysis on direct appeal after striking an aggravating factor.

8. Mr. Rivera was deprived of his right to a fair and impartial jury.

9. The trial court's erroneous rulings cumulatively denied Mr. Rivera a fair trial.

10. Mr. Rivera was deprived of the effective assistance of counsel at the guilt-innocence phase.

11. Mr. Rivera's jury was misinformed and misled as to the significance of its sentencing decision.

12. The trial court and this Court unconstitutionally ignored mitigating factors established by the evidence.

13. The jury was erroneously instructed that Mr. Rivera had to show that mitigating factors outweighed aggravating factors in order to establish the propriety of a life sentence.

14. The trial court unconstitutionally relied upon nonrecord facts in imposing death.

15. The trial court imposed an erroneous burden of proof regarding mitigating factors and thereby failed to consider mitigation.

16. The jury received unconstitutionally vague instructions regarding aggravating factors, and no adequate sentencing calculus has been performed in Mr. Rivera's case.

17. The State failed to disclose material exculpatory evidence.

18. The system for funding counsel and experts for indigent defendants in Broward County creates a conflict of interest.

19. Two of the four convictions relating to the Williams Rule evidence presented at Mr. Rivera's trial have been vacated.

20. Cumulative error deprived Mr. Rivera of due process.

ARGUMENT

ARGUMENT I
MR. RIVERA WAS DENIED DUE PROCESS, A FULL AND FAIR HEARING AND AN IMPARTIAL TRIBUNAL ON BIB MOTION TO VACATE.

A. THE CIRCUIT COURT ERRONEOUSLY DENIED THE MOTIONS TO DISQUALIFY THE JUDGE

On October 31, 1991, along with his Rule 3.850 motion, Mr. Rivera filed a Motion to Disqualify Judge maintaining that Judge Ferris had exhibited bias against Mr. Rivera and prejudgment of issues in statements to the press and to the Florida Parole Commission, that Judge Ferris had relied on facts from a previous case involving Mr. Rivera although those facts were not part of the record in the capital case, and that Judge Ferris was a material witness regarding several claims presented in Mr. Rivera's post-conviction proceedings (See PC-R. 739-49). This motion was subsequently denied (PC-R. 783). After additional facts came to light, Mr. Rivera filed a second and third Motion to Disqualify Judge, maintaining that Judge Ferris was prejudiced against him and was a material witness regarding numerous claims in his post-conviction proceedings (PC-R. 1024-36, 1604-18). Those motions were also denied (PC-R. 1143, 1202). Denial of the motions to disqualify was erroneous, and this case should be remanded for reconsideration by an impartial tribunal.

1. Bias And Prejudgment Of Issues

Judge Ferris has exhibited bias against Mr. Rivera and a predisposition to rule against him throughout the proceeding in this case. Five months before Mr. Rivera's trial, on November

21, 1986, the Court was quoted in the Ft. Lauderdale Sun Sentinel:

> I believe this man has committed crimes many times in the past, and I believe he has resisted many attempts at rehabilitation, Ferris said. I don't think society should permit him to visit this conduct on anyone else.

In a letter to the Florida Parole Commission concerning consideration of executive clemency, Judge Ferris stated:

> I am inalterably opposed to any consideration for Executive Clemency and I believe the sentence of the court should be carried out as soon as possible.

(PC-R. 741, 1046).

As in Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), Judge Ferris's expression of his strong desire that Mr. Rivera be executed as soon as possible is indicative of such bias and interest that Mr. Rivera could not believe that he would obtain a full, fair and unbiased hearing on his motion to vacate from Judge Ferris. This letter evidences a prejudgment by Judge Ferris that the sentence of death was appropriate, a prejudgment which precluded his presiding over the Rule 3.850 proceedings.

In Suarez, this Court held that the circuit court judge should have disqualified himself based on the judge's statement to the press that the judge "does not believe this case merits postponements." 527 So. 2d at 192 and n.1. Here, Judge Ferris has stated he is "inalterably opposed" to any reduction in Mr. Rivera's sentence and believes the sentence "should be carried out as soon as possible." One who is "inalterably opposed" to a

reduction of a death sentence cannot fairly and impartially adjudicate claims such as those in Mr. Rivera's Rule 3.850 motion, which seek to vacate his conviction and death sentence. As in Suarez, "these statements are sufficient to warrant fear on [Mr. Rivera's] part that he would not receive a fair hearing by the assigned judge." 527 So. 2d at 192. As in Suarez, the court should reverse the denial of Rule 3.850 relief and remand this case for a new proceeding before an impartial judge. Id.

2. **Prejudgment Of Issues/Judge** As Witness

Mr. Rivera's motions to disqualify also contended that Judge Ferris had prejudged certain issues and would be a material witness as to numerous claims raised in the Rule 3.850 motion.

In Claim VIII Mr. Rivera alleged that Judge Ferris based the sentence in the present case on nonrecord information gained while presiding over other proceedings against Mr. Rivera. Judge Ferris will be a necessary and material witness as to this claim.

Judge Ferris presided over the jury trial of this capital case and ultimately imposed death. However, prior to this trial, Judge Ferris had also presided over Mr. Rivera's trial in an unrelated case which resulted in Mr. Rivera's convictions of attempted first degree murder, kidnapping, aggravated child abuse and aggravated battery.' Over Mr. Rivera's objection, Judge Ferris admitted some testimony regarding the earlier case. However, Judge Ferris was aware of and actually considered

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'The convictions of aggravated child abuse and aggravated battery have since been reversed on appeal. Rivera v. State, 547 so. 2d 140 (Fla. 4th DCA 1989).

evidence presented during the previous trial which was not presented in the capital trial. In a letter written to Carolyn Tibbets in regard to the issue of clemency, Judge Ferris referred to the testimony of the previous trial as a reason he believed Mr. Rivera should die. At the time of trial Judge Ferris could not expunge from his mind his knowledge of other facts from the previous trial which had not been introduced in this case, nor can he do so now. In addition to being prejudiced by facts from a previous trial, Judge Ferris is now also a material witness in the postconviction proceedings.

Other claims also required Judge Ferris to be a witness. For example, in Claim II of the Rule 3.850 motion, Mr. Rivera alleged that Judge Ferris improperly permitted juror Thornton to sit on the jury when Thornton was a known supporter of Sheriff Nick Navarro and when Judge Ferris had previously represented Thornton. Judge Ferris will be a necessary witness as to whether Judge Ferris knew juror Thornton and was aware that the juror was a Sheriff Navarro supporter.

At the time of trial, there was considerable debate regarding Sheriff Navarro's handling of the Jazvac investigation. Mr. Rivera contended that the investigation was prematurely closed although other similar murders continued to occur after Mr. Rivera was in custody. In addition, Sheriff Navarro and the State inexplicably delayed indicting Mr. Rivera until six months after Mr. Rivera's statements and arrest, even though Sheriff Navarro advised the media at the time of the arrest that he had

plenty of evidence for an indictment. Due to the delay, Mr. Rivera was unable to conduct a meaningful investigation particularly with regard to his alibi, These issues were raised in the Rule 3.850 motion. Judge Ferris's close personal relationship with Sheriff Navarro prevented an impartial judgment on Mr. Rivera's claims.

Judge Ferris had at the very least a business relationship with jury foreman Thornton. Judge Ferris also had a close relationship with Sheriff Navarro.[2] Judge Ferris refused to grant a mistrial or withdraw juror Thornton from the panel, once Mr. Thornton's close connections with the sheriff became known. Judge Ferris not only cannot be fair and unbiased in regard to this issue, but he is also a necessary, material witness.

In Claims II and IV, Mr. Rivera alleged that Judge Ferris improperly allowed the courtroom to be packed with school children the same approximate age of the victim, while John Walsh, of the Adam Walsh foundation, sat in their midst comforting the victim's mother, and that the prosecutor deliberately staged a courtroom atmosphere and made improper closing arguments calculated to produce a "lynch mob" mentality in the jury, Judge Ferris will be a material witness regarding these claims.

Further, during the trial, Judge Ferris attempted to create a record regarding competency of counsel by complimenting Mr.

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[2]Sheriff Navarro sponsored a retirement party for Judge Ferris after the trial.

Rivera's trial counsel on the quality of his representation (R. 2141-42, 2162). Whether trial counsel rendered effective assistance to Mr. Rivera was one of the primary issues raised in the motion to vacate. Judge Ferris has already stated a clear opinion regarding the quality of trial counsel's performance at trial which deprived Mr. Rivera of a full, fair, and unbiased consideration of the issue of counsel's effective representation.

Mr. Rivera's motions to disqualify also maintained that budgeting procedures and allocation of funds for special public defenders and expert witnesses created a conflict of interest between indigent defendants, such as Michael Rivera, and the Broward County Circuit judges (See PC-R. 1113-42, 1604-18). Mr. Rivera maintained that the county fund from which Special Assistant Public Defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements, that many Broward Circuit judges, including Judge Ferris, engage in the practice of negotiating lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes, and that Special Assistant Public Defenders appointed to capital cases are also expected to "shop for the best deal" before the Court will approve an expert.

This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Because Mr. Rivera was tried in Broward County, was represented by a Special Assistant Public Defender, and was allowed to consult

with court-appointed experts, this situation is clearly relevant to Mr. Rivera's case and was raised as Claim XXI of the Rule 3.850 motion. As Judge Ferris would of necessity be a witness regarding this conflict of interest issue, he should have disqualified himself from presiding over Mr. Rivera's pending postconviction action.

These incidents are certainly "sufficient to warrant fear on [Mr. Rivera]'s part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 190, 191, 192 (Fla. 1988) ; Livingston v. State, 441 So. 2d 1083 (Fla. 1983). A fair hearing before an impartial tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). Absent a fair and impartial tribunal, there is no full and fair hearing. Even the appearance of partiality or prejudgment is sufficient to warrant disqualification, as is the fact that Judge Ferris is a material witness regarding several claims raised by Mr. Rivera.

This case should be remanded to the circuit court for new post-conviction proceedings before a new trial judge.

B. THE LOWER COURT ERRED IN SUMMARILY DENYING MANY MERITORIOUS CLAIMS

Although the lower court granted an evidentiary hearing limited to parts F, J and K of Claim II and Claims XIX, XX and XXI, the court summarily denied the remainder of Mr. Rivera's claims, The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State,

498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

The lower court summarily denied Claims II (parts G, H and I), III, IV, VIII, and XVIII, ruling that these claims were procedurally barred (PC-R, 1205). However, these claims all alleged ineffective assistance of counsel, an allegation which is properly raised in a Rule 3.850 motion. Blanco v. Wainwrisht, 507 so. 2d 1377, 1384 (Fla. 1987). For example, Claim II alleged that trial counsel was ineffective in failing to investigate for the penalty phase, a claim consistently recognized as properly presented in a Rule 3.850 motion and as requiring an evidentiary hearing. Heinev v. State, 558 So. 2d 398 (Fla. 1990).

Other claims, such as Claim XVIII, alleged that trial counsel failed to raised proper objections and thereby failed to preserve significant issues. Ineffective assistance of counsel claims based on a failure to object are properly raised in post-conviction. Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). Since the only way a criminal defendant can assert his rights is through counsel, counsel has the duty, inter alia, to know the law, to make proper objections, to assure that jury instructions are correct, to examine witnesses adequately, to present evidence, and to file motions raising relevant issues. In Kimmelman, counsel's performance was found deficient for failing to file a suppression motion, thus defaulting the suppression issue. Counsel have been found ineffective for failing to object to jury instructions on aggravating factors, Starr v. Lockhart,

23 F.3d 1280, 1284-86 (8th Cir. 1994), for failing to know the law, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Garcia v. State, 622 So. 2d 1325 (Fla. 1993), and for failing to raise proper objections to evidence or argument and argue issues effectively. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Turner v. Dusser, 614 So. 2d 1075 (Fla. 1992).

Moreover, a trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (Fla. 4th DCA 1992). A trial court may not summarily deny without "attach[ing] to its order the portion or portions of the record conclusively showing that relief is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). Rodriquez v. State, 592 So. 2d 1261 (Fla. 2nd DCA 1992). See also Bell v. State, 595 So. 2d 1018 (Fla. 2nd DCA 1992) ; Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992). "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Rivera] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069

(Fla. 1988). The files and records in this case do not conclusively rebut Mr. Rivera's allegations.

The trial court's denial in this case is contrary to law. The trial court attached nothing from the record or files in this case to its order to conclusively show that Mr. Rivera is not entitled to relief. The order denying relief ignores the express requirements of Rule 3.850 and this Court's case law. As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 so. 2d at 450, and order a full and complete evidentiary hearing on Mr. Rivera's 3.850 claims.

ARGUMENT II[3]

DUE PROCESS WAS VIOLATED WHEN TEE JURY FAILED TO HEAR THE CRITICAL EVIDENCE WHICH WOULD HAVE RAISED A REASONABLE DOUBT OF GUILT.

As this Court recognized on direct appeal, at trial the State established that the victim left home on her bicycle at about 5:30 p.m. on January 30, 1986, and was seen by a store cashier between 6:30 and 7:00 p.m. Rivera, 561 So. 2d at 537. Before 7:30 p.m., a deputy sheriff had found her abandoned bicycle. Id. Mr. Rivera's jury never heard the evidence of alibi witnesses who stated that he was with them at the time of the offense. This evidence would have raised a reasonable doubt about Mr. Rivera's guilt.

Mark Peters was one of the prospective alibi witnesses at trial who never appeared. Peters was the owner of the vehicle

[3]Claim IIJ of Rule 3.850 motion.

that Mr. Rivera borrowed and that was alleged to have been the vehicle he used during the abduction and murder of Staci Jazvac.

At the evidentiary hearing, Peters testified that on January 30, 1986, he loaned Mr. Rivera his van at 8:00 a.m. (PC-R. 500-01). Mr. Rivera took Peters to work in the morning and picked Peters up between 6:00 and 6:30 p.m. (PC-R, 501, 508, 510). Peters got off work at 5:00 p.m. (PC-R. 501), and was mad about being picked up so late and having to wait one to one and a half hours for Mr. Rivera (PC-R. 506-07). Peters dropped Mr. Rivera off at home, and then went home himself (PC-R. 502). From the time Mr. Rivera picked Peters up at work, the two were together for about the next thirty to thirty-five minutes (Id.).

Peters spent "many hours" talking to police about Mr. Rivera (PC-R. 503). Peters told police that Mr. Rivera picked him up from work between 5:00 and 6:oo p.m., but closer to 6:00 p.m. (PC-R. 512). The police impounded his van and kept it for a couple of months (PC-R. 503-04).

Peters left Ft. Lauderdale and moved to Orlando because he got tired of the constant police questioning and felt the police were looking at him as a suspect (PC-R. 504). Peters had a job in Orlando (Id.). Peters did not notify the police or Mr. Rivera's counsel that he was moving to Orlando (PC-R. 508).

Trial counsel Edward Malavenda testified at the evidentiary hearing that he "tried as hard as I could" to develop the alibi but he was not able to locate the witnesses (PC-R. 550). Most of the alibi witnesses were carnival workers who had disappeared

(Id.). Counsel "felt strongly about [the alibi witnesses], real strong," but was unable to locate them (PC-R. 551-52). Since "every time I tried to find somebody, that person would disappear," counsel thought "somebody was making them disappear" (Id.).

Peters' testimony that he was with Mr. Rivera during the precise time period when the State contended he was committing this offense was unrebutted. Under either an ineffective assistance of counsel, Brady v. Maryland or newly discovered evidence analysis, Mr. Rivera is entitled to relief. State v. Gunsby, 21 Fla. L. Weekly S20, S21 (Fla. Jan. 11, 1996).

ARGUMENT III[4]

MR. RIVERA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS CAPITAL TRIAL DUE TO COUNSEL'S FAILURE TO RAISE THE DUE PROCESS ISSUE OF PREJUDICIAL PRE-INDICTMENT DELAY.

As explained in Argument I, this claim was summarily denied, contrary to this Court's established precedent. The lower court ruled that the claim was procedurally barred (PC-R. 1205), and attached no files or records establishing that the claim was conclusively rebutted by the record. An evidentiary hearing and relief are warranted.

In a motion for rehearing filed after the lower court issued its final order denying relief, the State urged the court to reconsider its ruling on this claim (PC-R. 1722-23). The State pointed out that its response to Mr. Rivera's Rule 3.850 motion argued the claim should be heard on the merits and could be addressed at the evidentiary hearing (PC-R. 1579 n.6). Attached to the State's rehearing motion was a "Proposed Amended Order" which addressed this claim on the merits and which relied upon the evidentiary hearing to deny relief (PC-R. 1738-39).

As the State has implicitly conceded, an evidentiary hearing on this claim is required. The lower court summarily denied the claim, and the evidentiary hearing which was held was limited to specific claims, not including this one.

According to a booking slip dated 8/13/86 contained in the circuit court file, Mr. Rivera was arrested on the charge of

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[4]Claim XVIII of Rule 3.850 motion.

first degree murder on February 13, 1986 at 2300 hours. On February 19, 1986, Nick Navarro, the Broward County sheriff, announced to the press that "[w]e don't have any suspects. We've zeroed in on him [Mr. Rivera]." Navarro also stated that "[h]e's not going anywhere. We could have gotten a warrant for him today, but rather than rush it let's do it right." See Jazvac Slaying Suspect a Sex Offender, Fort Lauderdale News, February 19, 1986. At trial, Navarro testified that a warrant was not obtained then because Mr. Rivera was in custody (R. 833). Navarro also testified that the case was presented to the State Attorney's Office in March, 1986 (R. 834).

David Casey, a spokesman for the State Attorney's Office, represented to the press on March 3, 1986, "It looks like it will go to the grand jury in the next week or two." He also stated, "[t]here hasn't been an urgency to get the case to a grand jury because the suspect the sheriff's department feels is a key person is in custody and not going anywhere." State Attorney to Send Jazvac Case to Grand Jury in 2 Weeks, Sun-Tattler, March 3, 1986.

Mr. Rivera was indicted for first degree murder on August 6, 1986 (R. 2164). Between February 13, 1986, and the date of the indictment, Mr. Rivera was continuously held in the Broward County Jail. Between February 13, 1986, and August 14, 1986, when counsel was appointed to represent Mr. Rivera in this case, Mr. Rivera was not represented by counsel in this case and did not have at his disposal the kind of legal or investigative

assistance necessary to gather and preserve evidence for use of the defense during a subsequent trial. Mr. Rivera was prejudiced by the State's delay in obtaining an indictment.

The victim, Staci Jazvac, disappeared between approximately 5:30 p.m. on Thursday, January 30, 1986, when she left home for a nearby mall on her bicycle, and sometime shortly before 7:30 p.m., when her bicycle was found in a field near the mall (R. 761).[5] Mr. Rivera's counsel filed a Notice of Alibi on January 22, 1987, identifying, among others, Anthony Wade and Mark Peters as alibi witnesses.[6]

In a recorded statement to the Broward County Sheriff's Department made under oath on February 16, 1986, Anthony Wade identified a photograph of Michael Rivera presented in a photo lineup and stated that he saw this person, who he knew as Mike, at a carnival at St. Helen's Church in Lauderdale Lakes at Oakland Park Boulevard on Thursday night at approximately 7:30 p.m. He stated that this was <u>after</u> opening the carnival and that the carnival had opened at <u>6:00 p.m.</u> Wade stated that at that time he had gone to his trailer at the carnival to get some wrenches and Mike was already present there with Julius Minery, a worker at the carnival, and another person, whose name was

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[5]Kenneth Payton testified that he took a flashlight from Staci's abandoned bicycle between 7:00 and 7:30 p.m. on the day in question (R. 779). Deputy John Stock testified that he first observed the bicycle in the field a little before 7:30 p.m. (R. 761).

[6]This document was not included in the record certified by the Clerk to this Court on direct appeal.

unknown to Wade, who he described as "5'8, 5'9, kind of heavy set, dark short hair, glasses and a thin mustache." Mr. Rivera's counsel attempted to locate and depose Anthony Wade prior to trial, but was unsuccessful in locating Anthony Wade either for a deposition or to compel his attendance at trial.

Mark Joseph Peters, in his recorded statement to the Broward County Sheriff's Department on February 13, 1986, stated that on Thursday, January 30, 1986, between 6:15 pm. and 7:00 p.m., he was on his way home from work and that he had dropped Mr. Rivera off at his home. He stated that Mr. Rivera had been using his truck (van) that day and Mr. Rivera arrived at his work to pick him up. He stated that Mr. Rivera arrived at his work place between 5 and 6, but closest to 6:00 p.m.

In a further recorded statement made under oath to Detective Amabile on May 22, 1986, Mark Peters stated that he owned a blue '71 Ford Econoline 200 van which he had loaned to Mr. Rivera on a number of occasions. He stated that on January 30, 1986, he had lent it to Mr. Rivera. Mr. Rivera picked it up at 8 o'clock in the morning when Peters rode into work, then brought it back between 5:00 and 6:00 p.m. when Peters got off work.

Minery testified that the carnival arrived on Monday and began to set up on Tuesday. At 11:20 a.m., he met Rivera on Tuesday and they smoked some rock [cocaine] (R. 1120-21). He stated that he saw Rivera on Wednesday around 6:00 p.m. and they sat around drinking (R. 1121-22). Minery testified that Wade was there, and Mike and his brother Peter were there about half an

hour. Minery stated the next time he saw Rivera was on Thursday, between 4:30 and 5:00, before the carnival opened, with a blue van (R. 1124, 1126). However, Wade had told police he saw Rivera--with Minery--after the carnival had opened. Minery testified that the carnival opened on Thursday at 6:00 (R. 1127).[7] Minery testified that he remembered Mike was there on Thursday just before opening because Minery was cleaning the rides preparing for the carnival to open (R. 1129). In a statement to the police, however, Minery had said this was between 6:00-7:00 p.m. Minery was deposed on January 29, 1987, one year after events, He said that he had seen Mike at the carnival on Thursday, January 30, 1986, between 4:30 and 5:00 p.m. and that Mike was alone. He testified he was "confused" earlier when he said he saw Mike at 6 to 7 p.m.

Mr. Rivera's mother told police that Michael and Peter came home together at about 10:00 p.m. after being out driving around in Peter's vehicle. She remembered this because she reminded Michael to call his doctor on Friday, the following morning, to cancel his Monday appointment. Allan Krassner told police Mr. Rivera pawned coins in his shop at approximately 5:30 p.m. on Thursday, January 30, 1986.

At trial, the State used Minery's and Krassner's testimony to argue that Mr. Rivera was in the area where the victim was found at a time consistent with Mr. Rivera having committed the

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[7] A police report confirmed that the carnival opened at 6:00 p.m. on January 30, 1986.

offense (R. 1789-92, 1858). Defense counsel presented a police officer to testify that he had taken a statement from Mark Peters on February 13, 1986, regarding where Mr. Rivera was between 5 and 7 p.m. on January 30, 1986 (R. 1700-01). The officer testified he did not know where Peters was now (R. 1700). Counsel was not permitted to elicit testimony regarding what Peters said or whether Peters had been with Mr. Rivera (R. 1701). The officer also testified that he took a statement from Anthony Wade, a carnival worker, on February 21, 1986 (R. 1701), and asked Wade if he had been with Mr. Rivera the night of January 30, 1986 (R. 1702). Counsel was not permitted to elicit testimony regarding who Wade said he was with that night (R. 1703). The officer also testified that Minery had told police he saw Mr. Rivera between 6:30 and 7:00 p.m. on January 30, 1986, or between 6:00 and 7:00 p.m., and that he did not see Mr. Rivera before the carnival opened (R. 1705). Defense counsel also presented the testimony of Mr. Rivera's brother Peter, who testified that he thought Mr. Rivera was with him between 5:00 and 7:00 p.m. on Thursday, January 30, 1986, and that he and Mr. Rivera went from Krassner's pawn shop to a convenience store and then to the carnival (R. 1732-33). Peter was not sure of the day (R. 1733) and admitted on cross he had earlier said he and Mr. Rivera were together on Wednesday, not Thursday (R. 1739-40). In closing, defense counsel argued that Minery accounted for Mr. Rivera's whereabouts on January 30, 1986, and talked about the

fact that potential witnesses Peters and Wade could not be found (R. 1840-41).

In view of the conflict between the testimony and the witnesses' prior statements, Anthony Wade's and Mark Peters' confirmation of the day and time were all important to establish the alibi. It was also important to show that by the time of trial, due to the passage of time, the prior statements of witnesses to the police were probably the more accurate and would support the alibi. However, Wade and Peters could not be found for trial, due to the passage of time resulting from the State's delay in obtaining an indictment.

In Rogers v. State, 511 So. 2d 526 (Fla. 1987), this Court approved the test applied by the First District Court of Appeals in Howell v. State, 418 So. 2d 1164 (Fla. 1st DCA 1982), which had adopted the principles set forth in United States v. Townlv, 665 F.2d 579 (5th Cir.). In approving this test, this Court stated in Rogers:

> When a defendant asserts a due process violation based on preindictment delay, he bears the initial burden of showing actual prejudice. . . . If the defendant meets this initial burden, the court then must balance the gravity of the particular prejudice on a case-by-case basis. The outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play embodied in the Bill of Rights and fourteenth amendment. See Townlev, 665 F.2d at 581-82.

Rogers, 511 So. 2d at 531 (citation omitted).

In Scott v. State, 581 So. 2d 887 (Fla. 1991), the Court, addressing a case of pre-indictment delay of seven years and

seven months, considered the prejudicial effects pre-indictment delay had upon Scott's inability to corroborate his alibi due to the unavailability of alibi witnesses and evidence at the time of trial. Like Scott, Mr. Rivera was no longer able to corroborate his alibi defense due to the pre-indictment delay because he was unable to present certain witnesses, namely Mark Peters and Anthony Wade, to support that defense.[8] The inability of Mr. Rivera to corroborate his alibi defense through Wade and Peters became all that more prejudicial at trial because other alibi witnesses, testifying more than a year after the fact, receded sufficiently from their initial sworn statements, which accounted for Mr. Rivera's whereabouts on the day and time of the victim's disappearance, to leave Mr. Rivera exposed during the critical time period as to his whereabouts.

In Scott, the Court also observed that the case against Scott was circumstantial and noted that the claim of prejudice for delay in filing the indictment and the insufficiency of the circumstantial evidence to convict were interrelated claims. The case against Mr. Rivera was also circumstantial.

Hair comparisons, which in Mr. Rivera's case involved comparison of a single hair with that of the victim, are, as a matter of law, inconclusive and do not constitute a basis for positive personal identification. Scott; Cox v. State, 555 So.

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[8]Mr. Rivera's inability to corroborate his alibi defense through Peters and Wade was further compounded by trial counsel's failure to establish on the record the unavailability of these witnesses and to offer their statements into evidence.

2d 352 (Fla. 1989). Similarly, the results of the forensic analysis of the victim's tissue to connect a can of lacquer thinner to the victim's death were inconclusive because the same chemical compounds were also shown to be contained in tissues of persons who died of natural causes as well as in the victim.

Because the State's case against Mr. Rivera was based upon circumstantial evidence, such evidence must be not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence, Scott. The circumstantial evidence presented by the State could only create a suspicion that Mr. Rivera committed this murder. Suspicion cannot be a basis for a criminal conviction. Scott.

Trial counsel failed to move for a dismissal of the indictment based upon prejudicial pre-indictment delay, delay which prejudiced Mr. Rivera in corroborating his critical alibi defense. Counsel, had he presented this motion to dismiss, could have shown actual prejudice to Mr. Rivera resulting from the pre-indictment delay. That same prejudice will now also satisfy the prejudice prong of the test for ineffective assistance of counsel under Strickland v. Washington.

Counsel's failure to move for a dismissal on these meritorious grounds unreasonably deprived Mr. Rivera of a critical defense to the charge in this capital trial and denied Mr. Rivera of the effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365 (1986). There was a reasonable probability that had counsel pursued this motion to dismiss on

due process grounds he would have been successful, thereby changing the outcome of the proceedings. Mr. Rivera is entitled, at a minimum, to a full and fair evidentiary hearing on this claim, Rule 3.850 relief is appropriate.

ARGUMENT IV

MR. RIVERA WAS DENIED AN ADVERSARIAL TESTING WREN CRITICAL EVIDENCE WAS NOT PRESENTED TO NOR CONSIDERED BY THE JUDGE AND JURY AT THE PENALTY AND SENTENCING PHASE OF THE CAPITAL PROCEEDINGS. TRIAL COUNSEL FAILED TO ADEQUATELY INVEBTIGATE AND PREPARE TO REFUTE AGGRAVATING FACTORS AND ESTABLISH MITIGATING FACTORS. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT MR. RIVERA'S SENTENCE OF DEATH IS UNRELIABLE.

As discussed in Argument I, this claim was summarily denied, contrary to this Court's established precedent. The circuit court ruled that the claim was procedurally barred (PC-R. 1205), and attached no files or records establishing that the claim was conclusively rebutted by the record. The State agreed that the claim should be addressed on the merits and that if the court was to summarily deny the claim, the court should attach portions of the record supporting the denial (PC-R. 1578-79 n.3). An evidentiary hearing and relief are proper.

Before the penalty phase, defense counsel was admittedly not prepared to proceed:

> THE COURT: When do we have the penalty?
>
> MR. HANCOCK: Judge, I would ask we start tomorrow morning.
>
> MR. MALAVENDA: Judge, I can't start that quick.

THE COURT: Oh, well I don't want to subject this jury any more than -- I was going to say this afternoon.

MR. MALAVENDA: Judge, I started yesterday trying to call people up on this. I've got a psychiatrist and I need Dr. Livingston.

THE COURT: Well, you should have been prepared for the possibility.

MR. MALAVENDA: Right. I know that.

(R. 1901-02). Counsel's request for more time in which to prepare was denied (R. 1903). The penalty phase began at 9:00 a.m. the following morning, allowing counsel less than one day to prepare. At that time counsel once again admitted the defense was not ready to go and requested a continuance (R. 1905). The request was denied (R. 1908). This was the first time counsel had ever proceeded to penalty phase in a capital case (R. 2089).

Defense counsel presented some mitigation at penalty phase, but failed to adequately investigate mitigating factors. Although four family members of Mr. Rivera testified, they were asked about little more than their feelings for Mr. Rivera. A very incomplete picture of Mr. Rivera was painted to the jury.

Had defense counsel adequately investigated and prepared he could have presented and argued to the jury a wealth of mitigating factors. The following mitigating factors, each of which has been separately found by a Florida court to be valid mitigating evidence in a capital case, were available to be presented to Mr. Rivera's judge and jury for consideration:

1) Dissociative disorder.

2) Psychosexual disorder.
3) History of hospitalization for mental disorders.
4) Sexually abused as a child.
5) Expressed remorse.
6) A substantially impaired capacity to appreciate criminality of his conduct or to conform his conduct to the requirements of the law.
7) Childhood trauma.
8) Developmental age.
9) Long term personality disorder.
10) Defendant's behavior at trial was acceptable.
11) Original sentence in prior case of sexual battery was later reduced by the sentencing judge.
12) Under the influence of drugs at the time of the crime.
13) Non-applicability of the aggravating circumstances.
14) Drug abuse problem.
15) Character as testified to by members of his family.
16) Suffers from psychotic depression and feelings of rage against himself because of strong pedophilic urges.
17) No drug or alcohol treatment program.
18) Substantial domination by alternate personality "Tony."
19) Artistic ability.
20) Capable of kindness.
21) Family loves him.

The prejudice to Mr. Rivera resulting from counsel's deficient performance is clear. The trial court found only one statutory mitigating factor yet myriad mitigating factors existed and could have been considered.

Michael Thomas Rivera was born on June 25, 1962, at Bronx Municipal Hospital Center in Bronx, New York. Michael was the second child of four children born to Esther and Peter Rivera. Esther Rivera was a heavy cigarette smoker throughout her pregnancy, and when Michael was born, he could not breathe. Even

after he was whacked by the nurse, he still could not breathe. In an attempt to save Michael's life, the attendants quickly put him in alternating cold and warm water. After another whack, Michael finally took a breath. Esther feared she would lose her child and wondered if her smoking had been the cause of Michael's distress.

This incident set the stage for Michael's health throughout childhood. He never was a hearty child and soon endured additional illness. At the age of six, Michael suffered from a ruptured appendix. It first started with a stomach ache which turned into vomiting and a high fever. Michael's family doctor thought it might have been a stomach virus and prescribed some medicine. The family did not know what to do as their son's condition was only worsening. Twenty-four hours after Michael had taken the medication he was still showing no sign of improvement, so he was finally taken to Mount Vernon Hospital where it was determined that he was indeed suffering from appendicitis. Surgery was immediately scheduled for 9:00 a.m. the following morning, When Michael's mom arrived at the hospital at 8:30 a.m., Michael was already in surgery because his appendix had ruptured. Michael was subsequently hospitalized for about two weeks with a tube inserted into his body to drain all the poison that had gotten into his body. Again, Michael's mother endured the fear that she would lose her son.

As a result of these two encounters with death, Michael's mother kept him close to her. He seemed to be particularly

vulnerable and needed extra attention. He was very insecure and became a "mama's boy" who was afraid to go anywhere without his mother. Because of Michael's relationship with his mother, the rest of the children resented Michael.

Michael's insatiable desire for attention was often a problem for his family. They describe him as a hyper child and compare his childhood behavior to "having ants in his pants." He was a difficult child. When Michael pushed his mom to the limit, she used to terrify him by beating on the bed next to him with the belt and threatening to tell his father. Michael lived in fear of his father, so this threat carried with it great weight.

After his twin sisters were born, his parents could not find anywhere in the area they lived in New York that would take a Puerto Rican family with four kids. Eventually, they were forced to moved into a two bedroom apartment in an unsafe neighborhood. Michael's parents were overprotective of the children. Because of the condition of the neighborhood, they were fearful of allowing the children out to play. Therefore, the children were confined to the tiny apartment where all four shared a bedroom.

Michael was not allowed to go out but he was allowed to visit a couple who were neighbors. Peggy and Frank did not have any children of their own and lived in the same apartment complex. Michael's parents would allow Michael and his siblings to visit one at a time without their immediate supervision. One of Michael's sisters reports that Frank attempted to sexually molest her. Michael's sister does not know if he tried the same

with Michael, but Michael was Peggy and Frank's "favorite." Michael does not have any independent memories whatever from the that time period.

Michael attended Catholic schools when living in New York. Though he was never truant, Michael was often absent from school. School records show that he missed twenty seven days of school during his second year of elementary school and twelve days of school per year three other times. During his early schooling some of the teachers at the school were very strict and corporal punishment of difficult children was common.

Michael's father was a heavy drinker when the children were growing up. He would drink at work with his friends and employees and then would arrive home drunk and in a bad mood. When he drank, he became very argumentative which frightened the children. As a result, they would all hide in their rooms as soon as he came in the door and even the dog would hide under the bed. One time the father came home drunk and started complaining that the dog got more attention than he did. In a fit of anger, he threw the dog out the window. Michael's mother sneaked out and took the dog to someone else's house until he sobered up. Michael's father put a bureau dresser in front of the door to try to keep the mother out.

Similar incidents occurred after the family moved to Florida. Once again, Michael's father came home drunk and angry and decided to take it out on the defenseless dog by throwing the dog in the pool. Each time the dog tried to get out of the

water, he pushed him under the water or away from the wall. Esther finally had to push Peter into the pool in order to save the dog. Michael was very afraid of his father's temper outbursts and never understood his father's drinking problem. On one occasion, the father went to the neighbor's house and punched Michael so they called the police.

Michael's father was badly abused as a child and this perhaps explains his inability to relate to his own children and give them any guidance growing up. His mother gave him constant whippings as a child. She would tell him to take a bath and then whip him while he was naked and wet. Also, many of Michael's father's family members had serious drinking problems. Michael's father never learned how to show affection or bond with Michael as a son. He was also much more abusive to his sons than he was with his daughters.

In New York, Michael's father owned and operated a service station. As early as nine years of age, his father started having Michael work at the station. His father acted toward Michael as a boss instead of as a father, and there was never any normal father-son relationship. He just treated Michael like one of the employees. Once when Michael was helping his father out at the service station, his father discovered Michael with glue all over his hands. When he asked his wife about it, she said that "some kids sniff glue" but nothing was ever done about it.

When Michael was about nine years old, he discovered his father's pornographic literature. It was at this time that

Michael began masturbating compulsively. Also around this time, Michael had a brief sexual experience with one of his sisters just as she was entering puberty.

Though the family lived in very cramped quarters, they were always extremely secretive and isolated from each other. One time when Michael's parents were called to school because Michael had suffered a serious head injury by running into a gymnasium wall. The parents took him to the doctor for treatment and then took him home. Although they were all living together, none of the other children knew that this incident had occurred until years later. This isolation continued throughout Michael's childhood and into adulthood and is evidenced by the fact that Michael's sisters were unaware he had been arrested for indecent exposure until many years later. Also, Michael's parents were never aware Michael was abusing drugs.

When Michael was thirteen years old, the family moved to Ft. Lauderdale. For the first time, he and his siblings were allowed to go outside without supervision. The shock of going from complete confinement to too much freedom was more than Michael could handle. Michael started spending all his free time outside the home. Because of his dysfunctional home life, he had learned none of the mechanisms necessary to cope in the real world.

Michael was always the type to want to please other kids. He was a child who lacked self confidence and desperately craved attention. He always struggled to be in with the crowd. He

would bug his mother for money, so he could give stuff to other children. Because of his age and his susceptible nature, he was a prime candidate for drug and alcohol use.

When he moved to Florida from New York, he was at a very critical and vulnerable stage in his development. His dysfunctional home life had left him unprepared to contend with problems of the real world. He started hanging around with an older boy who had little parental supervision and who provided Michael with alcohol and drugs. Soon, Michael was abusing alcohol, along with other drugs. Eventually, he used everything that was on the street including acid, quaaludes, THC, Rush, cocaine, and huffing a transmission sealant called "GO." If the drug was available, Michael did it. The taking of drugs to fit in with his peers and to quell the pain of his life led to a serious addiction. Drug use became a necessary part of Michael's life. He would use whatever drug was available until it was gone. At the age of 14, he was arrested for breaking into a house to obtain alcohol and pills, His drug use affected both his home life and his schooling. He went from being an A-B student when he lived in New York to a D-F student when he moved to Florida. Finally, he failed the eleventh grade and left school at age 16 due to his addictions and mental disabilities.

Within six months of moving to Florida, Michael was approached by an older man named Robert Donovan. Mr. Donovan lived in the same apartment complex. Mr. Donovan would allow the boys to ride his motorcycle and would buy them beer and let them

drink it in his home, even though Michael was only fourteen at the time. Soon after meeting Michael, Mr. Donovan began giving Michael drugs and sexually abusing him. It was at this time, the family noticed that Michael started to separate from the family. This sexual abuse went on for years and had a profound effect on Michael. It was after this molestation began that Michael started wearing a woman's bathing suit. A short time later he had his first heterosexual intercourse with a young woman during which he was wearing the woman's bathing suit.

Also around this time, Michael had his first arrest for indecent exposure. During one of his incarcerations at the juvenile center, he told his mother that he saw the other kids drag a boy out and rape him. He wanted to help but didn't because he was afraid he would be punished for fighting. At age 14-15 he was referred to a psychiatrist for several months of counseling.

Michael was placed on probation and ordered to enter counseling on October 22, 1980. This counseling consisted of group therapy and did nothing to assist Michael in overcoming his sexual dysfunctions. Due to his dysfunctional family life and abusive background, Michael was in desperate need of individual counseling. Unfortunately, this was something he would not get. By the time Michael was seventeen years old, he was exposing himself on a regular basis, and by the time he was eighteen, he was making obscene phone calls.

In February 1981 Michael was convicted of loitering and prowling. In September 1981 he was arrested for possession of more than 20 grams of marijuana. In November 1981 he was arrested for indecent exposure but this charge was dropped when he was sent to prison for violating his probation. Michael was diagnosed as a mentally disordered sex offender and substance abuser and sent to South Florida State Hospital from July until October 1982. Once again, he was placed into group therapy. He left this program when he found that listening to the other inmates talk about molesting children was worsening his condition and causing him to have fantasies about rape and children. On July 12, 1984, Michael was released from prison.

When Michael came back from prison he seemed to be changed. He was distant and unreachable. He tried very hard to succeed and worked at a regular job. However, a few weeks after his release, he was again compulsively exposing himself. In October of 1984 he started making obscene phone calls to Starr Peck. Over the next year and a half, he made numerous obscene calls to Ms. Peck and to other women.

Soon after his release from prison, Michael's drug use escalated and he became addicted to crack cocaine. He hid his drug use from his parents and they were unaware of the problem until recently. Unfortunately, Michael became addicted to crack cocaine in the early days before there were drug education programs or cocaine treatment centers. In the words of another drug user, "crack hit the Broadview area like a firestorm." No

one ever tried to get drug treatment for Michael. Of all the times he appeared in court, drug treatment was never ordered. Because no one in his family knew how to get help, his family pretended that nothing was happening. He was never placed in an alcohol or drug treatment program despite the fact that he drank so heavily that he developed peptic ulcers.

The family has described Michael as being another person while under the influence of drugs. When he was doing drugs, especially crack, he constantly begged for money from everyone in the household or stole the money to buy more crack. Michael would do anything to support his drug habit. Finally, his sister, Miriam, could not tolerate Michael's behavior anymore and kicked him out of the house a few months before the offense.

The parents were not aware of Michael's sexual problems until his first arrest for exposure. The first time the family became aware was when they were notified by the police. Although the police said that Michael needed help, the family did not know what to do. Instead of getting him the counseling he so badly needed and desired, Michael's father sat him down and told him there must be "something wrong with his head." Around this time Michael allowed Robert Donovan to have sex with him.

On September 6, 1985, Michael was severely burned by hot tar over much of his body. Today, Michael still wears the scars of this incident. As a result of this, Michael was hospitalized for more than two weeks. The pain was so awful that he often wished he would die. He had enrolled in a modeling school and this hope

for a better life was dashed. In addition, he was very concerned with how women would react to him because the scars were so extensive. Michael's psychological reaction was so severe that he was referred to a psychologist in the hospital. The hospital psychologist reported that Michael believed that the Lord was punishing him for things he's been doing for a long time and he had a "fatalistic attitude" about his future. The psychologist also opined that in addition to the episodic mental disturbance related to the burns, that Mr. Rivera suffered from underlying mental disorders.

Michael was so depressed about the burns and being without a job that his crack abuse got completely out of hand. He went to live at a drug buddy's house. While he was there, he displayed two different personalities. When he was his normal self he was a nice person, but when he was on crack he would act very paranoid, looking out of the windows and thinking people were after him. During this time, his girlfriend could no longer deal with his crack habit and they broke up. He was kicked out of the friend's house so he rented a room at a crack house. When he told the crack house owner that he had a problem with wearing women's clothes, he was told to leave.

The owner of the crack house describes an incident where a minister came over to persuade the owner to change his ways. Everyone else left but Mike who stayed and listened. The witness says, "It was as if he was crying out for help." At one point Michael lived on the streets staying in an abandoned house

and under a bridge. During this time, Michael was showing the effects of his addiction to crack. He became thin and looked scruffy and scrawny.

Michael was full of guilt because of his sexual problems and was unable to cope with the knowledge that he could not control these urges, All attempts to get help had fallen through. It was soon after Michael's release from prison in 1984 that Michael started sometimes going by the name of "Tony." People who knew Michael and also knew "Tony" report that there is a complete difference in the personality of the two.

When Mr. Rivera was evaluated for competency and sanity, he told the expert about a homosexual encounter that happened when he was 13-14 years old that was "very unpleasant." The examining psychiatrist reported Michael's despair over the inability to control his behavior. Michael stated that he needed more "willpower" and "if there was a miracle drug instead of a psychiatrist, I'd take the miracle drug: I've just about given up." He said that the sex offenders program had screwed him up more than it helped him. Finally, he made mention of not knowing "the other side" of him and not permitting others to become aware of it. Throughout all of his statements to friends, family, police and mental health experts, Michael Rivera expressed his extreme anguish over his inability to control his sexual obsessions despite repeated desperate attempts to do so.

Upon arrival at Florida State Prison, medical authorities noted that he had been treated with Sinequan in the county jail

for his nerves, that he had a peptic ulcer due to alcohol consumption, and that the MMPI results suggested severe psychopathology and he was given an Axis I diagnosis of psychosexual disorder.

At the penalty phase hearing, defense counsel also failed to present adequate psychological testing. The mental health expert testified during penalty phase that she based her entire evaluation on personal interviews with Mr. Rivera and accounts of the crime and trial read in the paper. Counsel did not provide the expert with the background information summarized above. Although it is clear from defense counsel's closing argument that he was attempting to show that Mr. Rivera was under the substantial domination of "Tony", he provided his mental health expert with no statements from people who had spoken with "Tony" and with no evidence to substantiate the existence of this other personality, although such evidence existed in abundance (R. 2129-30).[9] In sentencing Mr. Rivera to death, the judge found that this mitigating factor does not exist because there is "no credible medical or legal evidence to substantiate such claim" (R. 2150). This failure to pursue and develop corroborating mitigating evidence was clearly prejudicial deficient performance. Defense counsel, of course, could have presented

[9]In fact, Dr. Ceros-Livingston was unable to form an opinion about whether Mr. Rivera was under the substantial domination of another because she did not have the information concerning his other personality of "Tony" (R. 2148). There can be no tactical nor strategic reason for counsel's failure to provide the expert with the relevant background materials.

this substantial and compelling evidence at either the penalty phase of the trial or the sentencing hearing.

Had defense counsel provided the mental health expert with background materials relevant to Mr. Rivera, substantial mental health mitigation would have been forthcoming. Background materials were either at the disposal of Mr. Rivera's defense counsel or could have been obtained had a reasonably thorough investigation been completed. Having evaluated Mr. Rivera and studied his background, a mental health expert would have been able to testify at an evidentiary hearing to the existence of an abundance of statutory and non-statutory mitigation.

A mental health expert who evaluated Mr. Rivera in post-conviction reports that Mr. Rivera suffers from a combination of mental disorders. Michael's deficits at birth, his dysfunctional and chaotic family life, his abuse of drugs and alcohol starting at an early age and the trauma caused by the sexual abuse when he was a teenager combined to cause a whole array of disassociative disorders. In reaching these conclusions, the expert reviewed background materials as well as conducting personal interviews with Mr. Rivera.

The postconviction expert could explain that Michael comes from a family with a chaotic and non-cohesive atmosphere. Because of this, Michael suffered a lack of development of internal controls. His psychosexual developmental stages were completely corrupted, causing all sorts of sexual deviations. The age at which Michael moved to Florida, fourteen, was a

critical stage because this was the time when he was developing his sexual identity and identity of self. He was particularly vulnerable at this time because he was in a state of flux concerning his sexual identity. The abuse at this age corrupted the identification process and created problems of guilt and frustration on his part. Michael's ego suffered so much injury that he was no longer able to tolerate it and as a defense mechanism his self created another personality known as "Tony." Because of his sexual deviations and inability to control them, Michael feels guilty. The existence of "Tony" allows Michael to survive. Michael has no control over "Tony" and "Tony" is the dominant personality. The mental health expert opines that had Michael's defense mechanism not created this other personality, Michael would have committed suicide.

It is the expert opinion of the mental health examiner that at the time of this offense, numerous statutory mitigating factors were applicable. As found by the trial court, Michael was under the influence of extreme mental or emotional disturbance. Also, Michael's capacity to conform his conduct to the requirements of the law was substantially impaired. Michael had absolutely no control over his sexual disorders nor over "Tony". As a result, Michael was acting under the substantial domination of "Tony". Lastly, the expert opines that Michael's age at the time of the crime is mitigating. Although he was 24 at the time, his developmental age was not in keeping with his chronological age.

Counsel failed to investigate for the penalty phase. This failure is deficient performance, pose v. State, 675 So. 2d 567 (Fla. 1995). The fact that some testimony was presented does not establish effective assistance. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). Full and fair evidentiary resolution is now proper, for the files and records by no means show that Mr. Rivera is "conclusively" entitled to "no relief" on this claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 542 So. 2d 1324, 1355 (Fla. 1989). Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994). An evidentiary hearing must be conducted, and Rule 3.850 relief is proper.

ARGUMENT V

MR. RIVERA WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.

Mr. Rivera's trial counsel failed to use plentiful and available evidence of Mr. Rivera's voluntary intoxication at the time of the offense. Counsel could have used this evidence in a number of significant ways both at trial and sentencing but instead counsel ignored this area. Counsel failed to develop a defense of voluntary intoxication, failed to request a jury instruction on the issue, and failed to present evidence of intoxication to rebut aggravating circumstances.

"Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State,

480 So. 2d 91, 92-93 (Fla. 1985). Voluntary intoxication could have been employed as a defense to Mr. Rivera's first-degree murder charge on both theories of first-degree murder: premeditated murder and felony murder. On the theory of felony-murder, the State must prove the required mental element for the underlying felony. The underlying felony here, robbery, is a specific intent crime. Stewart v. State, 420 So. 2d 862, 863 (Fla. 1982). An intoxication defense could have defeated first-degree murder on the felony-murder charge as well.

At the evidentiary hearing, Dr. Milton Burglass, a psychiatrist with expertise in addictions, provided testimony that greatly expanded upon the limited information developed by defense counsel at trial regarding Mr. Rivera's substance abuse history. Dr. Burglass Mr. River's addiction history, "both in terms of chronic use pattern as well as with an eye towards any possible intoxication issues around the time or at the time of this alleged crime" (PC-R. 456). Dr. Burglass described Mr. Rivera's "chronic history" of addiction to drugs and alcohol (PC-R. 459-72). Dr. Burglass then described Mr. Rivera's level of intoxication around January 30, 1986, the date of the offense, and Dr. Burglass's opinion as to whether there would be an impact on Mr. Rivera's ability to form specific intent:

> Q Were you able to determine the extent of Michael Rivera's drug use around the time of January 30th, 1986?
>
> A Yes, that's what I was coming to. He -- as I said, he had started with crack around 3 of '85, rapidly progresses to dependence and then addiction, then he was on

a crack run, it's the term we use. He was using crack on a daily basis, and whatever -- as much as he can afford up until the time he was arrested. But this is the history that I have obtained about the pre-event period, on the 29th of [January] '86, and I believe that's the day before the crime, is that correct.

Q Yes, it is.

A Okay. He was still on the same coke run that he had been on continuously that had started in March or so of '85. He had -- on that day, he had some -- a coin collection he had stolen, he sold it at a coin shop and got about five hundred or so dollars for that, promptly went out and bought five hundred dollars and one Go from a crack dealer, and he and his brother did up most of that with Michael by his admission doing vastly more than his brother Peter did. They then went back to the carnival where they worked or something, they went back to the carnival several times during the day and they would -- Michael would sell small amounts of crack in an effort to make - like make double his money so he could run back to the crack house and buy more so he could smoke for free, sort of a standard procedure. But he did go back to the crack house six or seven times that day on Thursday and -- to buy more crack and sold a little and kept it, but in the course of that day, he did an enormous amount of crack, that's quite obvious. During the course of the day while driving around and cruising with his brother, then he drank -- they split somewhere between five and six six packs of beer between morning and maybe around 6:00 P.M. at night. They also -- Michael was also smoking some marijuana, perhaps as many as three joints, this is on the 29th. On the 30th, this is per Michael's history, he was at home waiting for his brother Peter to come and take him to another coin shop 'cause he still had about two hundred unfenced coins, two hundred dollars worth of unfenced coins to sell. During the day while he was hanging around the house waiting for his brother, he smoked up the crack that he had left over from the night before which was about eight or ten

rocks, eight or ten five dollar rocks which is a considerable amount of crack cocaine. No marijuana, no beer during the day. About 5:00 P.M. on the 30th, thereabouts, 5:00 or 6:00 or something, and I know that's an issue in this case and I don't mean to be commenting on that, but he went -- stated that he went back to the coin shop, sold another two hundred dollars worth of coins and immediately went and bought another two hundred dollars worth of crack which he promptly did up all by himself, did it all by himself and alone and also smoked marijuana. Later that night sometime after 7:00 and before midnight, he went with another friend of his and they bought and split a twenty dollar crack rock, claims that he came home then at 11:45 and then if it's worth anything on the 31st of January, he did a couple of ten dollar rocks in the afternoon simply because -- he would have done more but he had no more money left and had nothing else that he could have stolen and fenced. I add as -- for whatever it's worth because this was an intoxication history around the time of the crime, that Mr. Rivera denied committing this crime, denies knowledge of it and alleges to have no memory for any part of it, anything leading up to it, the act itself, or any memories of having done it retrospectively,

Q Would Michael Rivera's drug use around the time of January the 29th, 30 of 1986 impair his ability to perform - to form specific intent to commit such as murder or kidnapping?

A I must preface that answer; there's no question that the drugs in the range of these amounts of crack cocaine were done, no question that that would have impaired his cognitive emotional and behavioral abilities, no question that it would have impaired them. Now to go to your question of whether or not it would negate specific intent, were awfully long after the fact here, tougher to judge for somebody like me, But I - the best I can say and the most honest answer I can give you is within reasonable medical probability, yes. It would have impaired his ability to form specific intent and I'll explain why.

> Cocaine is a very peculiar drug, a drug for which the jurisprudence in America has not managed to make adjustments, to account for, This is, in my mind -- because I'm writing a law review article right now with an attorney on this, so it's fresh. All the jurisprudence about intoxication in America is based on alcohol which is a release of inhibitions, taking your foot off the brake, letting bad things that were in there escape out in the absence of social controls and morality. Cocaine doesn't work that way. Cocaine is not like taking your foot off the brake, cocaine is like stepping on the gas.. Cocaine, as I frequently will say, cocaine is a drug which supplies intent where there would otherwise have been none. It drives fantasies, it particularly drives and stimulates and feeds sexual fantasies. It provides the energy to enact those which is why I say within reasonable medical probability which is as certain as I feel I can honestly be, it would have impaired the ability for specific intent. Certainly, it impaired him without question, I mean, that amount of cocaine would impair anyone and everyone will agree with that. My opinion is and I repeat it within medical reasonable probability, yes, it would impair the ability to form specific intent.

(PC-R. 472-476).

Had trial counsel conducted a reasonable investigation into Mr. Rivera's drug experience he would have found considerable testimony from willing witnesses. Mr. Rivera's post conviction counsel located several witnesses with ease. They described his use of cocaine and the striking changes it brought to his ability to think and make reasoned decisions, both historically and on the day of the murder.

Testimony at the evidentiary hearing from Mr. Rivera's sister Miriam, his brother Peter, and friends Andres Ramos, Jr. and Mark Peters provided ample lay evidence of the serious and

extreme nature of Mr. Rivera's abuse of substances in early 1986. Miriam reported that even though she appeared as a witness in Michael's trial, defense counsel never asked her about Michael's drug use (PC-R. 435). She frequently did drugs, including crack cocaine, with Michael and "partied" with him, and was knowledgeable as to the level of his use and the negative impact such use had on him and the family (PC-R. 432-435). She testified that she would have been willing to talk with Malavenda about Michael's drug use even though she was also involved (PC-R. 436-437). Although she was unable to specifically recall if she saw Michael on the night of the offense, Miriam testified that Mr. Rivera was constantly using crack cocaine at that time and "when you're on something like crack cocaine, it's something you just keep going with. I've been on crack cocaine myself" (PC-R. 437-439). Similarly, Mr. Rivera's older brother, Peter, testified that he knew that Michael had started doing drugs at age fourteen, progressing from smoking "pot" to taking "heavier drugs", including acid, "ludes", alcohol, and huffing "rush" and "Transmission Go" (PC-R. 440-441). Again, trial counsel did not ask Peter about Michael's drug use (PC-R. 444). Peter testified that Mr. Rivera used "anything he can get his hands on, crack, powder cocaine, marijuana, ludes, acid, you know, whatever he basically can get his hands on" (PC-R. 442). Peter described Mr. Rivera's drug use around the time of the offense:

> MR. SHABAZZ: On Wednesday, January 29, 1986, did Michael use drugs?
>
> PETER RIVERA: Yes.

MR. SHABAZZ: What kind of drugs?

PETER RIVERA: It was crack and also we drank.

MR. SHABAZZ: Did he purchase drugs?

PETER RIVERA: Yes, he did.

MR. SHABAZZ: Monetarily, how much?

PETER RIVERA: In money wise, it would -- probably five, six hundred dollars, somewhere in that area.

MR. SHABAZZ: And how much crack cocaine did he smoke that day?

PETER RIVERA: About five, six hundred dollars worth, well, we both shared, but I think he smoked more or the majority of it than I did.

MR. SHABAZZ: And did you drink any - did you drink any alcohol?

PETER RIVERA: Yes, we drank plenty of alcohol that day. I'd probably say a couple of cases to maybe four or five. I mean the whole day was nothing but a big party, you know, you kind of forget what you -- you know, how much you've had, you know, how much you're drinking, how much you smoked after a while.

MR. SHABAZZ: So approximately, what time that day did you begin drinking and smoking?

PETER RIVERA: Oh, early in the morning, probably 8:00 or 9:00 o'clock.

MR. SHABAZZ: And approximately what time that day did you leave Michael's presence?

PETER RIVERA: Probably around 1:00 o'clock, 2:00 o'clock in the morning.

MR. SHABAZZ: And was he drinking and smoking crack up to that time?

PETER RIVERA: Yes.

(PC-R. 443-44). Andres Ramos, Jr. testified that Mr. Rivera lived in his house for more than two months until Ramos asked him to move out about a week before the Jazvac murder (PC-R. 448). Ramos testified that he was personally dealing in crack and powder cocaine then (PC-R. 446). He smoked crack and pot with Michael Rivera (PC-R. 446). He detailed that usage:

> MR. SHABAZZ: At one particular time, how many hours would you smoke crack with Michael Rivera?
>
> MR. RAMOS: It all depends how much we had, sometimes it be three days and four days until, you know, from twenty-four to forty-eight hours, seventy-eight hours - seventy-two hours.
>
> MR. SHABAZZ: Could you describe for the Court what Michael was like when he was using crack cocaine?
>
> MR. RAMOS: Crack cocaine, it's like an individual high, you kind of like go onto your ownself, you know, you get high, you just kind of -- you don't associate with nobody around you. You just kind of focus on your own high and you just -- you know, you don't communicate or have a conversation with somebody else. You just kind of get on your own different high, whatever, you might get paranoia or whatever, it's really a weird high.
>
> MR. SHABAZZ: How did Michael look during that time he was smoking crack cocaine?
>
> MR. RAMOS: Confused to me most of the time. I knew for a while there that he was having some kind of problems at home or something, you know, and he really -- to me, he didn't even enjoy his high, I mean, he was always, you know, looking like he was lost.

(PC-R. 447). Ramos confirmed that Mr. Rivera was smoking crack at the time he moved out in early 1986, and that trial counsel never asked him about Michael's drug use (PC-R. 448).

Mark Peters also did drugs with Mr. Rivera during the week of January 30, 1986. He testified that Mr. Rivera was on drugs the majority of the time (PC-R, 509-11).

Counsel failed to investigate voluntary intoxication as a potential defense and as a consequence failed to inform his expert on the topic. Strategic or tactical decisions made in ignorance are not valid. Even if trial counsel believed Mr. Rivera was innocent, as he testified during the evidentiary hearing (PC-R. 526, 545), such a belief could not relieve him of the obligation to investigate all appropriate defenses that were available to his client. Counsel has an obligation to investigate and prepare. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989).

Substantial and valuable lay testimony as to Mr. Rivera's cocaine addiction and intoxication was available. This important evidence was not developed for the jury or for consideration by the mental health expert at trial. Confidence is undermined in the outcome by counsel's deficient performance. Relief is warranted.

ARGUMENT VI

MICHAEL RIVERA'S JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to his capital trial, Mr. Rivera was convicted in a separate case of kidnapping, attempted first-degree murder, aggravated child abuse and aggravated battery. These convictions were then introduced and relied upon in the capital case to support the aggravating factor of prior felony conviction. However, the convictions for aggravated battery and aggravated child abuse were later vacated. Rivera v. State, 547 So. 2d 140 (Fla. 4th DCA 1989).[10] Mr. Rivera's death sentence violates the Eighth Amendment. Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

The prosecutor urged the jury to consider the prior conviction as aggravation, as rebutting mitigation, and as a critical factor upon which to sentence Mr. Rivera to death (R. 2108-2109, 2121). The sentencing court then relied on the prior conviction as an aggravating factor and used it to rebut mitigation (R. 2309). In Castro v. State, 547 So. 2d 111 (Fla. 1989), this Court found Williams Rule error in the guilt phase of a capital trial. This Court concluded that the error was harmless as to the guilt phase, but not as to the penalty phase.

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[10] Mr. Rivera timely filed a Rule 3.850 motion challenging the other two convictions. That motion is pending.

The court held the introduction of improper evidence before a sentencing jury concerning the defendant's criminal history, which is precisely what occurred in Mr. Rivera's case, is reversible error. Castro, 547 So. 2d at 116.

Mr. Rivera's death sentence is unreliable. Resentencing is appropriate.

ARGUMENT VII

MR. RIVERA'S SENTENCE OF DEATH RESTS UPON AN UNCONSTITUTIONAL AGGRAVATING FACTOR IN VIOLATION OF SOCHOR V. FLORIDA, ESPINOSA V. FLORIDA, STRINGER V. BLACK, CLEMONS V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal, this Court found that the aggravating factor cold, calculated and premeditated was not supported by the facts of this case, and thus struck it. Rivera v. State, 561 So. 2d 536 (Fla. 1990). However, the majority opinion affirmed without any assessment of the fact that the jury heard the improper aggravator and its death recommendation was therefore tainted under the Eighth Amendment. This Court's analysis of the Eighth Amendment error was constitutionally flawed.

In Sochor v. Florida, 112 S. Ct. 2114 (1992), the United States Supreme Court, in finding that Maynard v. Cartwright, 486 U.S. 356 (1988), was applicable in Florida, held that Eighth Amendment error occurring before either the trial court or the jury requires application of the harmless-beyond-a-reasonable doubt standard. Moreover, in Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court held that the "use of a vague or imprecise aggravating factor in the weighing process invalidates

the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." Id. at 1140. In Strinser, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard not utilized by this Court in affirming Mr. Rivera's death sentence.

As the Court held in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck. See Schaefer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987). Jury resentencing is warranted,

ARGUMENT VIII

RR. RIVERA WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

A. MR. RIVERA WENT TO TRIAL IN A COMMUNITY TEAT BAD BEEN SATURATED WITH PUBLICITY FOR OVER A YEAR

The Rivera case generated a massive amount of publicity. This was due to several factors, An intensive police search was conducted for two weeks after the victim disappeared with regular news stories. Mr. Rivera's arrest on February 13, 1986, on other charges resulted in extensive media coverage when he was

implicated as a prime suspect in the disappearance of this victim. Despite the fact that the Sun Sentinel on February 17, 1986, reported charges were imminent against Mr. Rivera in the Jazvac case, he was not charged with the case until August 6, 1986, six months later. Sheriff Navarro identified Mr. Rivera by name on February 18, 1986. From that day forth, each time that Mr. Rivera went to court for other matters more publicity was generated and each time he was identified as the prime suspect in this case.

Finally, he was arrested for the Jazvac case and taken to trial twice. The first trial resulted in a mistrial due to the massive publicity. Yet, the second trial was held in the same venue where the massive publicity took place, and where massive publicity was continuing. If the first jury was tainted by publicity, the second jury, chosen from persons exposed to both the same publicity previously complained of and continuing publicity since, is implicitly tainted also. At least two jurors who stated that they could not be fair due to adverse publicity were challenged for cause and the challenge was denied. Almost the entire venire, thirty (30) persons, had heard about the case.

Mr. Rivera's statements to the police, including the fact that he was administered sixteen (16) polygraph tests during the lengthy eight hour interrogation, were prominently featured in the news articles. The Miami Herald featured a story on June 24, 1986, page 3 B, in which details of the interrogation were released including Detective Thomas Eastwood giving quotes of

statements allegedly made by Mr. Rivera. Yet, Mr. Rivera was still only an unindicted suspect at that time. Detective Eastwood informed the papers that he did not give Mr. Rivera his Miranda warnings until after the sixth test.

One of the newspaper accounts to which the jurors were exposed before Mr. Rivera's trial, openly expressed Judge Ferris' bias and opinion:

> I believe this man has committed crimes many times in the past, and I believe he has resisted many attempts at rehabilitation, Ferris said. I don't think society should permit him to visit this conduct on anyone else.

Friday, November 21, 1986, the Sun Sentinel, page 8 B.

In response to the massive publicity, once the jury had been selected, the court admonished the jury not to discuss the case or read or listen to news accounts. However, the admonition itself emphasized that it was a "high visibility media case" (R. 691-92).

A substantial majority, thirty (30) of the venire members, admitted hearing of Mr. Rivera or the case through the various media. One venire member believed Mr. Rivera should be convicted based on the media accounts (R. 175-76). According to this juror, the publicity had denigrated the presumption of innocence (R. 177-78). Based on the media reports, the juror believed that Mr. Rivera had been involved in another murder (R. 183-84). Despite these expressions of bias, the court denied the defense challenge for cause (R. 185). Another venire person admitted that she thought Mr. Rivera was guilty, but the court refused to

dismiss her for cause (R. 365-66). Another juror honestly admitted that the publicity made it impossible for her to be fair (R. 647-48). In addition to the above persons, at least twenty other members of the venire indicated hearing news or being familiar with the case to some degree. Six of those persons served on the jury.

Although it was impossible for Mr. Rivera to get a fair trial under these conditions, his motion for change of venue was denied repeatedly by the trial court (R. 685-86, 694, 698-99). However, the court could hardly render an impartial ruling having already announced his personal belief to the media that "I don't think society should permit him to visit this conduct on anyone else."

B. MR. RIVERA'B TRIAL WAS TURNED INTO A MEDIA EVENT

A venireman documented the media presence at trial when he noted that "apparently we were filmed or something coming in" to the courthouse (R. 444). Trial counsel described the scene in the courtroom to the clemency board:

> During the course of the trial itself, we had present the Adam Walsh Foundation - I don't know if the board is familiar with the Adam Walsh Foundation, but it has to do with a person by the name of John Walsh who is now chairman of the show "The Most Wanted" on the Fox Network. His son, I believe back in late '70s or early '80s was -- had disappeared, and they found his body floating in a canal in Broward County, decapitated and, shortly after, the Adam Walsh Foundation was founded.
>
> During the course of the trial, John Walsh sat in a strategic area of the courtroom, which the jury had direct eye contact with him. He had his arms around the

> mother of the victim in this case, Mrs. Jazvac.
>
> The state attorney, Mr. Hancock, had every day during the course of the trial brought a different elementary class of students between the ages of 7 and 12 and sat those students -- so many of them that they took up half of the courtroom, and they all sat around John Walsh, where the jury could observe what was happening.

The tactic of packing the courtroom with children of the same age as the victim and seating John Walsh in a prominent position with his arms around Mrs. Jazvac was improper prosecutorial conduct and so inimical to a fair trial that the judge had an independent duty to assure that the jury not be subjected to circumstances in the courtroom which made it impossible for them to be fair and impartial. Defense counsel objected that the presence of numerous children and John Walsh in the courtroom would influence the jury and prejudice the jury against Mr. Rivera (R. 694-95, 699-700).

c. **THE FOREMAN OF THE JURY FAILED TO DISCLOSE THAT HE WAS A MEMBER OF THE SHERIFF'S 100 CLUB**

Not only did the prosecution launch a full fledged media campaign against Michael Rivera, not only did they pack the courtroom with elementary children gathered around the well-known John Walsh who held the victim's mother in his arms throughout the trial, but they actually succeeded in having one of the Sheriff's staunchest supporters as foreman of the jury. As trial counsel describes to the clemency board:

> During the course of the trial it was brought to my attention that one of the jurors was a member of what's known as the

100 club, which is a group of people who paid up to $5,000 to join Nick Navarro, who is the sheriff of Broward county. A club. This person, whose name is Mr. Thornton - he has since then died; he died, I think, about a year ago - he was the owner of the Mai Tai Club, which is a big restaurant in Fort Lauderdale. It was brought to my attention that Mr. Thornton had allowed the 100 Club to use his facilities for whatever purposes, banquettes, et cetera.

During the course of voir dire Mr. Thornton was asked individually - we spoke to each prospective juror individually so as to not contaminate the rest of the panel - questions were asked about his connections with law enforcement, and none of this came up.

When I found out, I requested the court to allow me to speak to *Mr.* Thornton. That was denied. And it turns out that Mr. Thornton was the foreperson. Okay.

These are things that have come out that are not on the appellate record and that I, as a defense attorney, was seeing taking place during the course of this trial.

A two-week trial, all circumstantial evidence and I'm not going to get into the facts. The jury, when they went out to deliberate did not request any piece of evidence. There must have been at least 72 pieces of evidence that were introduced by the state, all circumstantial. They went out during lunch, never requested any piece of evidence, and they were back within 70 minutes with a guilty verdict, which in my opinion, and, of course - I don't think there's anything that can be done at this point, thev had already made up their minds before they even went into that room, which is somethins they should not have done. And I believe Mr. Thornton may have had a lot to do with that.

I, again, was not allowed after the verdict to discuss with any of the jurors if conversations had taken place with Mr. Thornton. That was denied.

Judge Ferris volunteered that he had once represented Mr. Thornton as an attorney (R. 305-6); however, Mr. Thornton did not reveal his membership in Sheriff Navarro's 100 Club in voir dire (R. 310). The prosecutor did not ask Mr. Thornton about his relationships with the police or state officers, nor about his membership in clubs and social organizations, although he asked most other venire persons questions on these matters and despite his apparently familiar with Mr. Thornton and his business, where the supporters of Sheriff Navarro held meetings (R. 308).

When Mr. Malavenda learned of Mr. Thorton's ties to the Sheriff's Office and Sheriff Navarro, he immediately brought his concerns before the Court, pointing out that Thornton had not revealed his connection to the Sheriff in voir dire and that much of the defense case was based on arguing that the Sheriff's Office did not do its job properly, including the Sheriff for making improper remarks to the press. Counsel presented a statement from another lawyer who told the court that Thornton was a strong supporter of the Sheriff's 100 Club and had hosted functions for that club at his restaurant. Counsel offered to gather more information, and the court declined to take any action (R. 1231-38).

Despite the fact that the judge, who had once been Mr. Thorton's attorney, didn't "think he misrepresented anything" (R. 1234), the record of the voir dire reflects a misrepresentation of Mr. Thorton's true relationship to the Sheriff's office and Sheriff Navarro. Mr. Thorton's answers to defense counsel's

questions were false and misleading and counsel has indicated he would have challenged for cause had he known the truth. Relief is appropriate where a juror gives a false answer during voir dire which precludes the defense from challenging for cause. Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991).

At least thirty persons, practically the entire venire, admitted to having read or heard about this case. However, Mr. Thorton was only one of three (discounting those who were out of town) venire persons who claimed to have never heard of this case (R. 309). This was despite the fact that he subscribed to two newspapers which constantly carried the stories and read the specific section of one of those newspapers where said stories were featured (R. 313-14). Among the other persons who said they had not heard of this case were a woman who had spent the previous year in New Hampshire, another woman who had been out of state for an extended period of time, and a 22-year-old male who stated the most interesting thing he had done in his life was "mess with womens" (sic) and fancies himself a "gigilo". It stretches the imagination to place Mr. Thornton, civic activist, crusader against drugs, entrepreneur, and member of the 100 Club in with those who had not heard about this case in the press or media.

Mr. Thorton, juror number 10, had been brought to the court's attention previously when he made a comment heard by other jurors to the effect that "I think he did it." Defense counsel moved for a mistrial because Thornton had formed an

opinion. The court denied the motion and refused to question Thornton (R. 1111-15).

Furthermore, Mr. Thorton, who was a staunch supporter of the Sheriff, host and charter member of the 100 Club, avid anti-drug advocate, who misled the defense about his affiliations, and who told the rest of the jurors "I think he did it," became the foreman of the jury. From this position of power, it can be assumed that he tainted the rest of the jury, preventing Mr. Rivera from receiving a fair trial, and violating due process.

D. THE DUE PROCESS DENIAL

The facts discussed above demonstrate that Mr. Rivera was denied his right to a fair and impartial jury and to a jury selected according to the requirements of due process and equal protection. Irvin v. Dowd, 366 U.S. 717 (1961). To assert Mr. Rivera's jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963). In Mr. Rivera's case, the inflamed community atmosphere and the jurors' knowledge of the case caused by the massive publicity and the circus atmosphere in the courtroom deprived Mr. Rivera of a fair trial under both an inherent prejudice and an actual prejudice analysis. Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985).

To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. Kimmelman v. Morrison, 477 U.S. 365

(1986). An evidentiary hearing and Rule 3.850 relief are appropriate.

ARGUMENT IX

THE TRIAL COURT 'S ERRONEOUS RULINGS CUMULATIVELY DENIED MR. RIVERA A FAIR TRIAL.

Defense counsel made numerous pretrial motions, and numerous requests and objections during the trial. Almost without exception, the court denied every defense motion and request.

Mr. Rivera asked that the judge be recused during the trial because of his lack of impartiality. The court made no inquiry as to the grounds for the motion and simply responded with the court's customary summary denial (R. 1665).

The Court erred in numerous rulings during jury selection. Several jurors who stated that they could not be fair were challenged for cause but the challenge was denied (R. 538, 541, 212, 352, 354, 355, 396-98). Several other jurors who stated that they could not be fair due to adverse publicity were challenged but the challenges were denied (R. 178, 185, 212, 366). As a result, defense counsel exhausted all his peremptory challenges (R. 628), and had to accept many biased jurors. Of the jurors who served, one believed in capital punishment "to weed out the jails" (R. 620). Another was a close family friend of an assistant state attorney in the same office which was prosecuting Mr. Rivera (R. 655), who stated that he did not want to sit on the jury (R. 657). Another juror had two son-in-laws and a daughter who were police officers (R. 523-24). Yet another had a son-in-law who was a police officer and knew about the Adam

Walsh Foundation (R. 552, 554). Defense counsel's request for a final voir dire to make sure that the jury panel had not been contaminated during the two-day selection process was denied and the court conducted no inquiry (R. 616-17). The jury was not sequestered although defense counsel had anticipated that they would be.

At the time of his arrest, law enforcement officers subjected Mr. Rivera to a coercive interrogation. Mr. Rivera was interrogated for over seven (7) hours during which time the police used every psychological tactic in the manual. Despite his repeated requests for the assistance of an attorney", the interrogation did not cease. Some of the tactics used were classic "good cop/bad cop" scenarios, psychological attempts to distort his judgment, and a series of no less than sixteen (16) successive polygraph tests. The polygraph expert candidly advised news reporters that he never gave the Miranda warnings until after the sixth test. Despite these circumstances, the court ruled that the statements were admissible.

During the trial, the State presented photographs of the victim which were excessive and unnecessarily graphic. Not only did the court allow all of these photographs to go to the jury over objection, but the court also permitted the jury to view a graphic and emotional videotape of the scene. There was no justification for this additional assault on the jurors'

"The police were also aware that Mr. Rivera had requested and was already represented by public counsel in another pending case.

emotions, the prejudice outweighed the relevance, and it made a dispassionate judgment by the jury impossible.

Although the medical examiner gave an expert opinion that there was no evidence of sexual molestation, the court permitted the detectives to speculate that there was sexual activity over the strenuous objection of counsel.

The State was permitted to introduce Williams Rule evidence which was insufficiently related to the case for which Mr. Rivera was being tried. This evidence then became a feature of the trial. However, when defense counsel attempted to introduce reverse Williams Rule evidence, the request was denied despite the fact that defense counsel had approximately twenty (20) points of similarity (including the same brand of pantyhose) with a virtually identical crime which was committed after Mr. Rivera was in jail.[12]

During the trial, the State introduced an extremely prejudicial photo taken of Mr. Rivera at the time of a separate arrest. The only purpose of this photo, which pictured Mr. Rivera in a woman's bathing suit, was to further inflame the emotions of the jury. Again, the court permitted the photo to be introduced over defense counsel's strong objections.

Over objection, the court permitted a detective to testify to an inadmissible hearsay statement that Mr. Rivera had gone

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[12]The only distinguishing feature between the two crimes was the age of the victim. A mental health expert could have testified that the age of the victim is a relatively minor consideration in comparing crimes of this type.

"mudding" on the day of the offense. This was particularly outrageous in light of the fact the detective denied hearing about "mudding" during deposition.

During the trial, a juror commented "I think he did it" loud enough for both Mr. Rivera and the other jurors to overhear. The court refused to permit defense counsel to question the juror regarding this remark or to grant a mistrial.

During the trial, defense counsel discovered that the same juror, Robert Thornton, who became the foreman, had close ties with Sheriff Navarro.[13] The court refused defense counsel's request to remove the juror from the panel even though an alternate juror could have taken his place.

During the trial the court made comments which were detrimental to defense counsel. At one time the court went so far as to give an opinion that the State's objection was appropriate because apparently the defense counsel was just not getting the answer he wanted to hear.

Although Mr. Rivera was not charged with an underlying felony, the State argued felony murder and the jury was allowed to enter an indeterminate verdict of first degree murder. The court erred in refusing the defense counsel's request to interview the jurors to determine whether they found premeditated

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[13]Judge Ferris disclosed that he also had close ties with juror Thornton and had previously represented him in a legal matter. A few months after the trial Sheriff Navarro gave a retirement party for Judge Ferris. Post-conviction counsel requested that Judge Ferris disqualify himself from hearing the motion to vacate to avoid the appearance of impropriety.

murder or felony murder. Due to the delay of indictment for six (6) months, defense counsel requested additional time to prepare and investigate for trial including time needed to find the alibi witnesses. This request was denied. As defense counsel has observed:

> "We had a judge by the name of Judge Farris (sic) who was in a rush to get this over with. There were a number of State witnesses that were very important, that I had attempted to locate, had located and, for whatever reasons, had disappeared prior to my taking their depositions. I was not given enough time to try to relocate them."

Defense counsel also moved for additional time to prepare for the penalty phase which was denied.

The individual and cumulative effect of the court rulings was to prevent jurors from hearing evidence favorable to Mr. Rivera and to permit the State to introduce evidence that was irrelevant and prejudicial. Judge Ferris was a friend of Sheriff Navarro. He had previously represented Juror Thorton. He had already expressed his opinion regarding Mr. Rivera's guilt in the media. The trial flouted the principles of due process.

To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. Kimmelman v. Morrison, 477 U.S. 365 (1986). No evidentiary hearing was allowed on these claims. An evidentiary hearing and Rule 3.850 relief are appropriate.

ARGUMENT X

MR. RIVER24 WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE.

The claims discussed in this argument were Claims II E, F, G, H, I and K of the Rule 3.850 motion. Although all of these claims alleged ineffective assistance of counsel, the lower court allowed an evidentiary hearing on Claims II F and K (PC-R. 1205). As explained in Argument I, the denial of an evidentiary hearing on Claims II E, G, H and I was erroneous.

A. EVIDENCE BY JAILHOUSE INFORMANTS WA8 IMPROPERLY PRESENTED

The State had only a weak circumstantial evidence case against Michael Rivera at the time of his original arrest. The fact that he did not confess even after seven hours of an intense, sophisticated interrogation was itself exculpatory. In addition, the police had interviewed alibi witnesses who stated that Mr. Rivera was with them at the time of the offense. When coupled with the fact that an almost identical crime had been committed after Mr. Rivera was in jail, it was clearly in the State's interest to find some means of bolstering their case.

It was predictable that after holding Mr. Rivera in the Broward County jail on other charges for a lengthy period of time, several jail house informants "came forward". Not only were they aware through general knowledge that the prosecutor would make deals with helpful inmates, but at least two of them were experienced State witnesses and one was actually in the

federal witness protection program. They were familiar with the system which encourages informants to mitigate their own charges.

Just as these snitches hoped and planned, the State was only too happy to offer them leniency in their own cases in return for testimony against Mr. Rivera. There was nothing about their testimony which gave it any independent corroboration. It was inherently unreliable.

B. THE JURY NEVER HEARD EVIDENCE WHICH WOULD HAVE ESTABLISHED THAT MR. RIVERA'S STATEMENTS REGARDING STACI JAZVAC DURING OBSCENE PHONE CALLS TO SEVERAL FEMALE WITNESSES WERE MR. RIVERA'S SEXUAL FANTASIES

During Mr. Rivera's capital trial, Starr Peck testified that she had received 25 or 30 or more obscene phone calls from "Tony" (R. 1087). On February 7, 1986, Mrs. Peck received another telephone call from "Tony" (R. 1081-1117). At that time, several news articles had been published providing information regarding the disappearance of Staci Jazvac on January 30, 1986.

According to Mrs. Peck's testimony, she told "Tony" she didn't have time to talk to him. He then said, "Starr, I've done something very terrible. I'm sure you've heard about the girl Staci. I killed her and I didn't mean to. I had a notion to go out and expose myself. I saw this girl getting off her bike and I went up behind her." He said it was at a small mall at Oakland and 441. He said that (he put ether up to her mouth, her nose), and then he dragged her into a van. He kept saying, "I didn't mean to kill her. I really didn't mean to kill her." The caller described Staci as "pretty," and said that ("she had silky shorts on.") He said "he dragged her into the van and that she

was dead," but "I put it in her and she bled and then I put it in her anyway." "Tony" then said that he put her somewhere where no one could find her. When pressed by Mrs. Peck, he said "by a lake," then finally stated, ("Lake Okeechobee"). Mrs. Peck then called the police (R. 1087-1092).[14]

Angela Green also testified that on February 7, 1986, she too received a call from "Tony", the same person who had called her 100 to 200 times before. "Tony" said he had the Staci girl; he was wearing his pantyhose; he put an ether rag over her face; and she's gone, they'll never find her. She also testified that on prior occasions, she had not paid attention to him and had always hung up on him (R. 1542-1553).

A large number of news articles had been published in the Miami Herald, News and Sun-Sentinel, and other newspapers distributed in the Broward County area between the time of Staci Jazvac's disappearance and February 7th, when "Tony" called Starr Peck and Angela Green.[15] Trial counsel argued to the jury that

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[14]The facts underlined were facts published in newspaper articles subsequent to the disappearance of Staci Jazvac and prior to this telephone call. The facts in parenthesis did not match the facts established by evidence.

[15]These news articles publicly revealed that Staci Jazvac was an 11 year old female; who had disappeared after 6:15 p.m. when she left home for a nearby mall on her bicycle; that her bicycle had been found in a vacant field near or adjacent to a mall at Oakland Boulevard and U.S. 441 at approximately 7:30 p.m.; that a small red pick up truck had been seen in the area; that Staci was 4' 4" tall, 60-65 pounds, had blue eyes, light brown shoulder length hair; was wearing blue jeans, a pink tee shirt with her name and a unicorn on it and a white nylon jacket. The articles also stated that the police were conducting searches of rock pits, canals, lakes and dumps in the Broward County area.

the statements made by Mr. Rivera during the phone calls were based upon known, published facts of the case augmented by Rivera's own fabricated sexual fantasies that he killed her and had sex with her but failed to introduce any news articles or testimony to establish this fact (R. 1831-32, 1837).[16]

Dr. Patsy Ceros-Livingston diagnosed Mr. Rivera at the time of trial as suffering from serious mental disorders (R. 2033, 2037-38). However, no expert was presented during the guilt/innocence phase of trial to provide the jury with expert evidence explaining Mr. Rivera's mental disorders. Expert testimony would have established that Mr. Rivera's obscene phone calls to Peck and Green (in which he claimed to have killed and had sex with Staci) were sexual fantasies fabricated on media reports of the case and were intended to shock and provoke responses from the recipients.[17]

Testimony from Dr. Frederick Berlin at the evidentiary hearing illustrated the type of information that an appropriate expert in the area of psychiatric diagnosis and treatment of psycho-sexual disorders could have supplied at trial if his assistance had been solicited by counsel. Interestingly, the defendant himself did solicit Dr. Berlin's help at the time of

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[16]Newspaper articles are admissible without prior authentication, Fla. Stat. 90.902(6), and could have been admitted into evidence to substantiate the facts which were then publicly known regarding the case.

[17]Detective Amabile testified that Mr. Rivera told him that he had made up the entire incident of abducting, molesting and killing Staci Jazvac to keep Mrs. Peck on the line because he found it sexually fascinating (R. 1513-14).

trial, as documented in a letter from Dr. Berlin found in trial counsel's file dated December 29, 1986 (PC-R. 529-530). Dr. Berlin's testimony explained Mr. Rivera's confabulations about the murder of Staci Jazvac in telephone calls to Starr Peck (PC-R. 391-93). A specialist in addiction medicine, Dr. Milton Burglass, also testified at the evidentiary hearing that in addition to his psychosexual disorder, Mr. Rivera's drug use drove and enhanced his fantasy life (PC-R. 485-86).

The State's case was based upon convincing the jury that Mr. Rivera's comments to Starr Peck on the telephone indicated Mr. Rivera committed the murder. To that end, the State was not content simply with the presentation of Starr Peck's own testimony regarding these statements. The content of these statements, in the form of hearsay and hearsay within hearsay, contrary to Fla. Stat. sec. 90.805, was repeated without objection by counsel on at least three separate occasions by Detective Amabile (R. 1509, 1555-56, 1570-72). Counsel's failure to object allowed the State to over-emphasize this evidence, making it the focal point of the trial on the critical issue of identity, and prejudiced Mr. Rivera.

No evidence established that ether was used. Before trial, tissue samples of the victim were sent to Dr. William Lowry for analysis, but he was not requested to analyze for ether in the tissues although he had the scientific means to do so (R. 1437, 1445). Counsel was aware that no testing for ether had been done and that some of the victim's tissue samples were in a freezer,

well preserved (R. 1724). Evidence of the absence of ether in the victim's tissues would have shown that Mr. Rivera's claim that he used ether on the victim was, like his other claims to Ms. Peck, pure fabrication -- demonstrably untrue -- and simply the product of his own sexual fantasies.

C. THE JURY NEVER KNEW THAT MR. RIVERA LACKED SUFFICIENT CAPACITY TO FORM BPECIFIC INTENT TO KILL

Mr. Rivera suffers from serious mental deficiencies which can result in psychotic mental states. He was a severe crack addict at the time of the offense. He suffered from agonizing and debilitating sexual compulsions. His mental disability was so severe that his attorney argued that he was under the "substantial domination of another" due to his split personality. His mental disability was so severe that the court found that he suffered from an extreme emotional disturbance. Even prosecutor Joel Lazarus observed that, "there is no question in my mind that this is a very, very troubled young man." Although there was substantial evidence to support numerous guilt/innocence defenses including an intoxication defense, a defense of inability to form specific intent and inability to waive his Miranda rights, the jury heard no evidence or instruction during the guilt/innocence regarding mental health issues, Gurganus v. State, 451 So. 2d 815 (Fla. 1984), due to ineffective assistance of counsel.

D. THE JURY NEVER HEARD AVAILABLE EVIDENCE THAT THE VICTIM WAS DECEASED PRIOR TO THE OCCURRENCE OF ANY SEXUAL BATTERY

The body of Staci Jazvac was found on February 14, 1986, approximately two weeks after her disappearance (R. 840). The

State's forensic pathologist, Dr. Wright, testified that decomposition was advanced in the upper part of the body but the lower part of the body (from the chest down) was in reasonably good condition (R. 849). The body was completely clothed and he could not determine whether she had been sexually assaulted (R. 856). His expert opinion was that the open condition of her blue jeans was the result of the bloating of the body during natural decomposition, as opposed to evidence of sexual molestation (R. 872-73). Dr. Wright found no positive evidence of sexual molestation (R. 874).

During the trial, Detective Haarer testified over the objection of counsel that the clothing was not torn by the bloating of the body during decomposition, directly controverting the expert opinion of the medical examiner (R. 912-914). Detective Scheff, one of the principal detectives in the Jazvac case, testified before the jury that the condition of the victim's clothing was "suggestive of sexual activity," (R. 1024) again contrary to the medical examiner's opinion.

However, even more critical information never reached the jury. While under examination during a Reverse-Williams Rule proffer out of the presence of the jury and prior to presentation of the defense, Detective Scheff testified:

> Based upon the totality of the investigation, all of the statements of the witnesses, the sex would have been post-mortem. I'm basing that on statements that we obtained from Starr Peck and et cetera. The investisation would suggest that the victim had died during the abduction phase itself and prior to any sexual activity that misht have taken place.

(R. 1655).

This significant testimony was never presented to the jury due to ineffective assistance of counsel. Consequently, the jury never heard the evidence that a sexual battery, if it occurred at all, occurred only when the victim was not alive. At the time of the offense and trial, the law was that a victim must be alive when a sexual battery is committed. Jones v. State, 569 So. 2d 1234 (Fla. 1990); Owen v. State, 560 So. 2d 207 (Fla. 1990).

The State argued sexual battery to the jury as an underlying felony supporting first felony degree murder during the guilt/innocence phase (R. 1783, 1786, 1860). The jury was instructed by the court on first degree felony murder based upon an underlying felony of sexual battery; and sexual battery was defined in the instructions to the jury (R. 1873, 1875). Defense counsel did not request a jury instruction that the victim must be alive for a sexual battery to occur; nor did counsel request an instruction that evidence of mere sexual activity (such as touching without penetration) was insufficient to support a finding of sexual battery.[18] Evidence that the victim was not alive at the time any sexual battery occurred would have precluded, as a matter of law, a finding that sexual battery was

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[18] "Except for Rivera's fantasy statements during his obscene phone calls there was no evidence of the kind of penetration required under the statute. The evidence comprising the corpus delicti of sexual battery, if sufficient, was only suggestive of sexual activity, and jurors could have understood that sexual battery included conduct such as mere touching.

committed as the underlying felony to support a verdict of first degree felony murder. Jones v. State.

Further, acts which otherwise would constitute sexual battery but which are committed after the victim's death cannot be used to support sexual battery as an aggravating circumstances. Jones v. State. Cf. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)("[A] defendant's actions after the death of the victim cannot be used to support this aggravating circumstance [heinous, atrocious, and cruel]"). The State argued sexual battery as a statutory aggravating circumstance (R. 2109-10). The jury was instructed on sexual battery as an aggravating circumstance (R. 2133). At sentencing, the trial court found the murder to have occurred during commission of a sexual battery (R. 2146).

The jury considered a factually and legally invalid underlying felony of sexual battery in reaching its guilt verdict as well as in recommending death. Trial counsel failed to elicit the evidence on this issue or to object or argue this issue effectively, to Mr. Rivera's prejudice.

E. THE DEFENSE PATHOLOGY EXPERT WAS NOT PREPARED TO TESTIFY

During the presentation of the defense in the guilt/innocence phase, counsel called Dr. Abdulah Fatteh as an expert pathologist on the issue of whether Jennifer Goetz (the subject of the Williams Rule evidence which the State presented) had been asphyxiated to the point of near death. Dr. Fatteh's

expert opinion was that photos of Miss Goetz established that she had not been near death as the State claimed (R. 1683-84).

However, during cross examination of Dr. Fatteh by the State regarding the facts upon which his opinions rested, Dr. Fatteh was unable to recall those facts and had not had adequate time to review them "because this to me, the appearance in court today is a total surprise because the day before yesterday, somebody came with the subpoena marked rush. Therefore, I didn't have time to" (R. 1688-89).

Counsel had requested a continuance in order to prepare for trial. His request was denied. He was unable to adequately prepare. Thus, Dr. Fatteh was not prepared for his testimony and was not informed that he would be called as a witness so that he could independently review his own files and records. Consequently, Dr. Fatteh's testimony was substantially undermined and de-valued in the presence of the jury. During a sidebar, counsel noted that Dr. Fatteh had previously testified during the Goetz trial as to the same matters and at that time Dr. Fatteh had then been fully familiar with the facts upon which his opinions were based (R. 1690). Counsel's failure to prepare Dr. Fatteh's testimony and to object or argue this issue effectively was deficient performance which prejudiced Mr. Rivera.

F. COUNSEL FAILED TO OBJECT TO THE ADMISSION OF PREJUDICIAL AND INADMISSIBLE EVIDENCE

Throughout the course of the guilt/innocence phase of this capital trial, counsel repeatedly failed to object to the State's introduction of inadmissible and unduly prejudicial evidence.

Counsel also failed to move to strike, move for a mistrial or request curative instructions after his objections to evidence that the State introduced were sustained,

Counsel failed to object to the State's description of the character of the victim during opening argument to the jury (R. 702-718). The character of the victim has no bearing upon the guilt or innocence of the accused and served only to inflame and prejudice the jury against the accused.

Counsel failed to object to Officer Milford's hearsay repetition of what Mr. McDowell had told him (R. 897).

Counsel failed to object to Detective Haarer's identification of the body based on fingerprints (R. 933). Detective Haarer was not qualified at trial to give an expert opinion.

Counsel failed to object to Detective Scheff's opinion that condition of clothing on body of victim was "suggestive" of sexual activity (R. 1024). Such opinions were properly within the areas of expertise of the medical examiner, not a police officer.

Counsel failed to object to the playing of a video tape of the body which duplicated still photos previously admitted into evidence (R. 1080). This graphic video tape replicated and unduly emphasized evidence already placed before the jury, and therefore was cumulative and lacked independent probative value.

Counsel failed to object to the hearsay testimony by Officer Hutchinson that Mr. Rivera told a third party he used certain

phone numbers to make obscene phone calls (R. 1207). The statement was plainly prejudicial and inadmissible hearsay, introduced for the truth of the matter asserted.

Counsel failed to request a curative instruction, move to strike the answer, or move for mistrial, after a defense objection to Scheff's testimony that finding pantyhose in defendant's room took on a more "sinister" tone after speaking to Angela Green was sustained (R. 1025). The statement was clearly inadmissible and unduly prejudicial to the accused.

Counsel failed to object to admission of Howard Seiden's testimony that a single hair retrieved from the van could be "scientifically concluded as being from the victim" (R. 1305). Scott v. State, 581 So. 2d 887 (Fla. 1991). Nor did counsel present expert testimony to rebut this inaccurate testimony.

Counsel's objection to Detective Asher's hearsay recitation of what Dr. Wright told him about Goetz being "within minutes of death" was sustained but counsel failed to request a curative instruction, to move to strike, or to move for mistrial (R. 1376).

Counsel failed to object to the admission of photographs, Exhibit KKKK, because Dr. Wright could not state they accurately depicted the subject matter. Counsel further failed to object to Dr. Wright's expert testimony based upon those same photos for lack of proper foundation for his opinion (R. 1466-70).

Counsel failed to object to William Moyer's testimony that he told Detective Amabile he was willing to take a polygraph (R.

1496). The statement was clearly hearsay, the recitation of an out of court statement by Moyer to Amabile and offered for the truth of the matter asserted, improperly tended to suggest that Moyer's testimony was true, and was inadmissible and prejudicial. Crawford v. State, 321 So. 2d 559 (Fla. 4th DCA 1975).

Counsel failed to object to Detective Amabile's hearsay testimony regarding what Asher and Goetz told him about the facts of the Goetz case, including his hearsay recital of the facts of the Goetz case to the jury essentially in full (R. 1516).

Counsel failed to object on the ground of hearsay to Amabile repeating what Carney had said about technology for obtaining fingerprints from the body (R. 1526).

Counsel failed to object on the ground of hearsay to Amabile relating the content of a conversation he had with Larry Nelson (R. 1528) who never testified.

Counsel failed to object to Detective Amabile's description of the contents of Rivera's brother's work records (R. 1531), as hearsay and violative of the best evidence rule. The brother's work records, which purportedly refuted aspects of Mr. Rivera's alibi, were never introduced into evidence during the trial except via hearsay.

On cross examination of Detective Amabile, an adverse witness, defense counsel elicited from him that Michael Rivera never admitted to him that he had killed Staci. However, having responded to the question, Amabile then gratuitously volunteered the further statement that Rivera had admitted it to other people

(R. 1553). Counsel failed to object to this statement, failed to move to strike or to move for a curative instruction. On redirect, again without objection, Detective Amabile then named all of the persons to whom Mr. Rivera had purportedly admitted the crime (R. 1569). This evidence was plainly prejudicial and based upon hearsay. The content of Mr. Rivera's statements to Ms. Peck in the form of hearsay and hearsay within hearsay was repeated for the jury, without objection by counsel, on at least three separate occasions by Detective Amabile. counsel failed to object to Amabile's hearsay recital of what Detective Georgevich told him Starr Peck said Mr. Rivera had told her (R. 1509). Having failed to object to this hearsay testimony on direct, counsel himself then elicited a second full hearsay recital of the content of the statement Mr. Rivera allegedly made to Starr Peck (R. 1555-56). Then again on redirect by the State, and again without objection by counsel, Amabile, for a yet a third time, recited what Starr Peck said "Tony" had said to her (R. 1570-72). Hearsay within hearsay is excluded unless each part of the combined statements conforms with an exception to the hearsay rule. Fla. Stat. 90.805.

Counsel failed to object to Gail Mastando pointing out Mr. Rivera as looking like "John Oates" when she testified she had never seen her caller, "Tony" (R. 1593).

Counsel was not "present" during the taking of John Meham's testimony when Meham stated that he had seen Moyer talking to Lopez and Zuccarello. Counsel stated "I was talking on the

phone" (R. 1772). The State later misrepresented that Meham never testified Moyer had talked to Zuccarello (R. 1772). However, Meham had, in fact, testified he had seen Moyer talking to Zuccarello (R. 1769). Due to counsel's failure to listen to Moyer's testimony while he was talking on the telephone, counsel was unable to recognize, and object to, the State's misrepresentation of Moyer's testimony.

During the pre-trial proceedings, defense counsel had identified a number of persons whom he intended to present as alibi witnesses during the trial.[19] A number of those persons, most notably Mark Peters and Anthony Wade, had been deposed under oath prior to trial but were unavailable for trial. Fla. Stat. 90.804(e). The deposition testimony of these witnesses was therefore admissible. Fla. Stat. 90.804(2)(a). Counsel's failure to adequately establish the witnesses' unavailability and then to offer the witnesses' prior sworn testimony was ineffective assistance of counsel. Mr. Rivera was denied a true adversarial testing of the prosecution's case and, due to counsel's unreasonable omissions, was denied a full presentation of his alibi defense. Counsel also ineffectively failed to offer the depositions of these witnesses during the penalty phase as mitigating evidence. Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

"Defendant's Notice of Alibi dated January 22, 1987. This document was omitted from the record on direct appeal.

G. CONCLUSION

The Sixth Amendment requires that criminal defendants be provided the assistance of counsel and that the assistance be effective. Strickland v. Washinuton, 466 U.S. 668 (1984). Counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. "Without counsel the right to a fair trial itself would be of little consequence, . . . for it is through counsel that the accused secures his other rights." Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). Since the only way a criminal defendant can assert his rights is through counsel, counsel has the duty, inter alia, to know the law, to make proper objections, to assure that jury instructions are correct, to examine witnesses adequately, to present evidence, and to file motions raising relevant issues. In Kimmelman, counsel's performance was found deficient for failing to file a suppression motion, thus defaulting the suppression issue. counsel have been found ineffective for failing to object to jury instructions on aggravating factors, Starr v. Lockhart, 23 F.3d 1280, 1284-86 (8th Cir. 1994), for failing to know the law, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Garcia v. State, 622 So. 2d 1325 (Fla. 1993), and far failing to raise proper objections to evidence or argument and argue issues effectively. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Vela v. Estelle, 708 F.2d 954 (5th Cir.

1983); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992). An evidentiary hearing is required on those issues on which the circuit court denied a hearing. Rule 3.850 relief is appropriate.

ARGUMENT XI

MR. RIVERA'S SENTENCING JURY WAS MISLED BY ARGUMENT WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INSURE THAT THE JURY RECEIVED ACCURATE INSTRUCTIONS.

During voir dire, in the presence of a juror who ultimately served as foreman on the jury, the prosecutor stated:

> . . . and at that time . . . it's like a minitrial and you hear the evidence and you make a recommendation of life or death, and all it is is a recommendation to the Honorable Judge Ferris and he makes the final determination.

(R. 307). The prosecutor repeatedly referred to the jury's sentencing function as a "recommendation" throughout the voir dire. During the guilt phase, the trial court informed the jury it was not responsible for sentencing (R. 1859-61) and told the jury they were "not responsible for the penalty" (R. 1885). Although defense counsel objected to this instruction, the judge refused to correct it (R. 1890). The judge's initial instruction at the penalty phase told the jury that the penalty decision "rests solely with the Judge" (R. 1920). In the final charge to the jury before they retired to consider their verdict, the judy was again told "the final decision" rested with the judge (R. 2132).

These comments and instruction violated Caldwell v. Mississippi, 472 U.S. 3209 (1985). The State cannot show that the comments had "no effect." Caldwell, 472 U.S. at 340-41. Trial counsel was ineffective in failing to preserve this issue. Kimmelman. Relief is proper.

ARGUMENT XII

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Parker v. Dugger, 111 S. Ct. 731 (1991); Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Magwood, 791 F.2d at 1450.

The sentencing judge in Mr. Rivera's case found one mitigating circumstance. Finding four aggravating circumstances, the court imposed death (R. 2309-13). The court's conclusion that only one mitigating circumstance was present, however, is belied by the record.

Testimony from family members established that Mr. Rivera was a kind and thoughtful person whom they loved very much. He helped his mother around the home and was happy to help out others (R. 2098). He was never known to be violent (R. 1951). His mother testified that Michael was always there for her and his sister when they needed him (R. 2101). His girlfriend testified that Michael was a nice guy who loved her children and

that she had no problem with leaving her young children in Michael's custody (R. 2091-92). Michael's brother testified that Michael met and was molested by an older man when he was about thirteen or fourteen years old (R. 1937).

An acquaintance of Michael's, known only as "Linda," testified that Michael appeared to be nice, responsible man. He visited her home on a number of occasions and she attended an Elton John concert with him (R. 1960-64). She noted that he behaved like a gentleman when he dropped her off after the concert. At the door, he kissed her goodnight. When he attempted to kiss her again, she said no, and he did nothing further as was her wish (R. 1963-64).

Linda also testified that once when she was angry at Michael for calling her at her parents' home in the middle of the night, Michael was nice throughout this conversation and said he would call her again in the morning (R. 1964-65). Then, about 3:00 or 4:00 on the same morning, she received another phone call. Although she felt this was also Michael, she testified that it sounded like a differently man entirely, someone who was very frustrated (R. 1965). As a result of this, she felt that there was another side of Michael that was uncontrollable for him (R. 1966). After seeing both sides of Michael, Linda felt that he suffered from a mental disorder (R. 1966).

Linda also testified that she felt Michael was dominated by this other person. She stated that she felt the combination of the rejection, the time of night, and being alone brought out the

other person, the one who made Michael change into whatever he is to do the things he does (R. 1987). Michael's mother and girlfriend both testified that they felt Michael was under extreme emotional and mental disturbance during the period prior to his arrest (R. 2093, 2104).[20]

A clinical psychologist, Dr. Patsy Ceros-Livingston, testified about Michael's problems with sexual deviation. It was Dr. Ceros-Livingston's conclusion that Michael suffered from a multiple diagnosis: borderline personality disorder, exhibitionism, transvestism, and voyeurism (R. 2036-38). She also testified that Michael was under the influence of extreme mental or emotional disturbance and that the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (R. 2047-49). None of this testimony was refuted.

Even with this myriad of statutory and non-statutory mitigation presented on behalf of Mr. Rivera, the trial court found only one statutory mitigating factor was established. This Court also did not fulfill its duty to independently examine the record evidence of mitigation. Parker v. Dugger.

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[20]The prosecutor falsely argued at closing that only Dr. Ceros-Livingston testified that Mr. Rivera was suffering from extreme emotional disturbance (R. 2112). He further argued that Mr. Rivera's mother and girlfriend said that Michael was not suffering from any emotional or mental disturbance (R. 2112, 2117), which was the opposite of their testimony. Defense counsel's failure to object to this false argument was prejudicially deficient performance.

To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. An evidentiary hearing and Rule 3.850 relief are appropriate.

ARGUMENT XIII

TEE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. RIVERA TO PROVE THAT DEATH WAS INAPPROPRIATE AND THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase. The burden was shifted to Mr. Rivera on the question of whether he should live or die. This injected misleading and irrelevant factors into the sentencing determination, violating Hitchcock v. Dugger, 481 U.S. 393 (1987); and Mavnard v. Cartwright, 486 U.S. 356 (1988). This error undermines the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation contained in the record.

In his preliminary penalty phase instructions, the judge explained that the jury's job was to determine if the mitigating

circumstances outweighed the aggravating circumstances (R. 1920). This erroneous instruction was repeated by the prosecutor during closing argument (R. 2108). This error was emphasized when Mr. Rivera's own counsel ineffectively repeated this improper instruction in his closing argument (R. 2128-29). The judge repeated this incorrect statement of the law twice immediately before the jury retired for deliberations (R. 2132, 2134).

These instructions and argument shifted the burden of proof to Mr. Rivera on the sentencing issue and effectively told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances.

To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. An evidentiary hearing and relief are appropriate.

ARGUMENT XIV

DUE PROCESS WAS DENIED WHEN THE COURT RELIED ON FACTS NOT OF RECORD IN SENTENCING MR. RIVERA CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Judge Ferris presided over other judicial proceedings relating to Mr. Rivera. Based upon these other proceedings, Judge Ferris expressed his opinion prior to trial that:

> I believe this man has committed crimes many times in the past, and I believe he has resisted many attempts at rehabilitation, Ferris said. I don't think society should

> permit him to visit this conduct on anyone else.

The judge also considered the facts adduced at these other proceedings when sentencing Mr. Rivera to death. This violated due process. To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. An evidentiary hearing and relief are appropriate.

ARGUMENT XV

THE TRIAL COURT IMPOSED UPON MR. RIVERA THE UNCONSTITUTIONAL BURDEN OF ESTABLISHING THE EXISTENCE OF MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

This Court has held that mitigating circumstance must be "reasonably established by the greater weight of the evidence." Nibert v. State, 547 So. 2d 1059, 1061 (Fla. 1990). In the Sentencing Order, however, the court stated:

> The Court has carefully and conscientiously complied with the provisions of Section 921.141(2)(b) and find from the evidence at trial and at the sentencing proceeding beyond a reasonable doubt as follows: . . .

(R. 2311)(emphasis added). The trial court then enumerated and discussed, inter alia, the one statutory mitigating circumstance it found to have been established together with those statutory and nonstatutory mitigating circumstances which it found not to have been established beyond a reasonable doubt (R. 2311-12).[21]

[21]Among the mitigating circumstances which the Court expressly rejected as not having been established beyond a reasonable doubt were: (1) that Mr. Rivera acted under extreme duress or under substantial domination of another person; (2) that the capacity of Mr. Rivera to appreciate the criminality of his conduct or conform

As to non-statutory mitigation, the court found that "the sum total of the nonstatutory 'mitigating' circumstances offered . . . presents no mitigating circumstances to weigh as against the aggravating circumstances" (R. 2312) (emphasis added).

The trial court required that mitigating circumstances be established beyond a reasonable doubt and, upon applying this legally erroneous standard, the court then concluded the mitigating circumstances had not been established. By applying a higher burden of proof than is mandated by Florida law, the trial court placed an unlawful state-imposed restriction on what mitigating circumstances would be considered.

A finding that mitigating circumstances introduced into evidence do not exist due to application of a legally incorrect burden of proof is, in substance and consequence, a refusal by the court to consider relevant mitigating evidence presented. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989). Relief is appropriate.

ARGUMENT XVI

MR. RIVERA'S JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION BY EXPLAINING THE LIMITING CONSTRUCTIONS OF THE AGGRAVATING CIRCUMSTANCES.

Mr. Rivera was sentenced to death on the basis of four aggravating factors--"especially wicked, evil, atrocious or

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to the requirements of the law was substantially impaired; (3) Mr. Rivera's age at the time of the offense; (4) and all non-statutory mitigation introduced during the penalty phase, including the psychological testimony of Dr. Patsy Ceros-Livingston (R. 2311-12).

cruel", "cold, calculated and premeditated," felony murder, and prior conviction. Mr. Rivera's jury was never instructed on the limiting constructions of these aggravating factors. Consequently, the aggravating factors were improperly applied to Mr. Rivera's case by the jury, and the trial court's sentence was tainted by the jury's consideration of invalid aggravators.

The jury was improperly instructed that it could rely on the same underlying felony, i.e., kidnapping and/or sexual battery, both to justify finding guilt as well as to justify the imposition of death. This automatic finding of aggravation was unconstitutional. Stringer v. Black, 112 S. Ct. 1130 (1992); Engberg v. Meyer, 820 P.2d 70, 89-90 (Wyo. 1991).

This Court has held that the "in the course of a felony" aggravator is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987). The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt.

The instruction given the jury on the "heinous, atrocious, or cruel" aggravator was almost identical to the instruction struck down in Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury was never instructed that this aggravator applied onlv to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

The jury instruction on "cold, calculated and premeditated" violates the Eighth Amendment because its description "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Jackson v. State, 648 So. 2d 85 (Fla. 1994)(quoting Espinosa, 112 S. Ct. at 2928). The instruction given to the jury is unconstitutionally vague, and the jury did not receive the required limiting constructions of the factor. Jackson v. State.

The trial court erred further in instructing the jury that prior convictions were as a matter of law offenses involving the use or threat of violence, and that there was no question that they applied (R. 2108). The standard instructions in effect at the time of the trial provided that the trial court could instruct the jury that specific offenses as a matter of law involve the use or threat of violence, but this instruction is limited to offenses "only when violence or a threat of violence is an essential element of the crime." Florida Standard Jury Instructions in Criminal Cases at 83 (2d ed. 1975). Attempted murder may be proven without proof that there was violence or the threat of violence. Section 782.04, Florida Statutes (1991). Farmer v. State, 315 So. 2d 225 (Fla. 2d DCA 1975). The same may be said of burglary with intent to commit battery. The court's instruction directed the jury to find this aggravator, eliminated the State's burden to prove this aggravator, and substituted the court's factual finding of use or a threat of violence for the jury's recommendation.

To the extent that trial counsel failed to properly preserve this issue, his performance was deficient and Mr. Rivera was prejudiced. Kimmelman. This Court will consider the merits of an Espinosa claim if the issue was preserved at trial and raised on direct appeal. James v. State, 615 So. 2d 668 (Fla. 1993).

Mr. Rivera's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion, Consequently, the jury's death recommendation (which was given great weight by the trial court) was tainted by consideration of invalid aggravating circumstances, and Mr. Rivera's death sentence is unconstitutional. Espinosa.

While this Court has adopted narrowing constructions, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond v. Lewis, 113 S. Ct. 528, 535 (1992). In Mr. Rivera's case, a constitutionally adequate sentencing calculus was not performed. Mr. Rivera is entitled to relief.

ARGUMENT XVII

THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR ENGAGED IN OTHER PROSECUTORIAL MISCONDUCT. SUCH OMISSIONS RENDERED DEFENSE COUNSELS' REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

The prosecution's suppression of material exculpatory evidence violates due process. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963); Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959). In Mr. Rivera's case the State failed to disclose critical evidence which was both useful to impeach witnesses and which was directly exculpatory.

At trial, Mr. Rivera sought to introduce evidence of an abduction rape-murder substantially similar to the Jazvac case. Within a few days after his incarceration, a woman named Linda Kalitan was riding a bicycle when she was abducted, sexually assaulted, and murdered by asphyxiation. Her body was dumped within a few feet of where Jazvac's body had been found. Like the Jazvac case, pantyhose were found in the area.

The State argued at trial and in direct appeal that this evidence should not be admissible because there was no connection between the two cases. The State argued this position despite the fact that there were officers in the Broward County Sheriff's Office actively investigating the connection between the two cases (Supp. PC-R. 2357).

At trial, one of the State's key witnesses was Frank Zuccarello, a professional informant. Mr. Zuccarello had

testified many times previously in exchange for lenient or favorable treatment. He testified that the State had made no promises to him and there was no deal (R. 1407, 1410). However, the State had written several letters in an effort to secure lenient treatment for Mr. Zuccarello. Further, the State made no attempt to correct Mr. Zuccarello's apparently misleading testimony. Where the prosecution fails to inform the defense of false or misleading testimony the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667 (1985). To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Rivera was prejudiced. Relief is appropriate.

ARGUMENT XVIII

THE PROCEDURE BY WHICH SPECIAL ASSISTANT PUBLIC DEFENDER8 AND EXPERT WITNESSES ARE APPOINTED TO HANDLE CAPITAL CASES AND THE MANNER IN WHICH THEY ARE FUNDED IN BROWARD COUNTY CREATES AN IRRECONCILABLE CONFLICT OF INTEREST.

The procedures employed for appointment and funding of Special Assistant Public Defenders for capital cases in the Seventeenth Judicial Circuit, which includes Broward County, Florida, and for the appointment and funding of expert witnesses who are appointed to assist capital defendants in Broward County creates a conflict of interest because this funding comes from the same fund judges use to operate their offices. Judge Tyson, a Broward County circuit court judge, was recently faced with a request for funds to pay the fee of a special public defender and

noted that he was burdened with a conflict of interest by virtue of the county's budgeting process (PC-R. 1122-23).

To resolve these conflicting uses of county funds, many Broward Circuit Judges, including Judge Ferris, have engaged in the practice of negotiating lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes. Because expert witnesses are also paid from this same fund, Special Assistant Public Defenders appointed to capital cases are also expected to "shop for the best deal" before the Court will approve an expert. The experience or competence of the attorney and/or expert takes a back seat to economy in the judge's determination of appointment in capital cases.

This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Mr. Rivera was prejudiced because Mr. Rivera was tried in Broward County, was represented by a Special Assistant Public Defender, and received a court-appointed expert. Additionally, there was inadequate psychological testing performed or presented during Mr. Rivera's trial and sentencing. As a result of this situation, Mr. Rivera's rights to a fair trial, due process, and the effective assistance of counsel have been violated.

ARGUMENT XIX

THE INTRODUCTION OF SIMILAR FACT EVIDENCE, OR "WILLIAMS RULE" EVIDENCE IN THE STATE'S CASE-IN-CHIEF CONSTITUTES REVERSIBLE ERROR IN LIGHT OF THE FACT THAT TWO OF THE FOUR CONVICTIONS RELIED UPON HAVE BEEN STRUCK DOWN.

This issue was originally raised on direct appeal and this Court found that the "Williams Rule" evidence presented at Mr. Rivera's trial was proper. However, the "Williams Rule" evidence relied upon has become tainted and Mr. Rivera's conviction and sentence is unreliable and unconstitutional. Two of the four convictions the State relied upon as "Williams Rule" evidence were vacated. Rivera v. State, 547 So. 2d 140, 142 (Fla. 4th DCA 1989). Because it was error to admit this evidence tainted by the subsequent reversal of two of the charges and because it cannot be concluded beyond a reasonable doubt that the evidence did not have an impact on the verdict, Mr. Rivera's case should be remanded for a new trial with instructions that the evidence is not admissible in the State's case-in-chief. An evidentiary hearing and relief are appropriate.

ARGUMENT XX

HR. RIVERA'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Rivera contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Derden v. McNeel, 938 F.2d

605 (5th Cir. 1991). Numerous and varied violations occurred at both stages of Mr. Rivera's trial. These claims have been raised in direct appeal or are currently being raised. However, the claims which arise as a result of Mr. Rivera's trial should not only be considered separately. Rather, these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Rivera did not receive the fundamentally fair trial to which he was entitled. Derden; Jones v. State, 569 So. 2d 1234 (Fla. 1990); Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984). Relief is appropriate.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Rivera respectfully urges the Court to reverse the lower court, order a full and fair evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 21, 1997.

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