IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,375

GUILLERMO OCTAVIO ARBELAEZ

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Chief Assistant CCRC
Florida Bar No. 0899641
CAPITAL COLLATERAL
REGIONAL COUNSEL
1444 Biscayne Boulevard
Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Arbelaez's request for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

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

"Supp. R" -- supplemental record on direct appeal;

"PC-R." -- record on postconviction appeal;

"Supp. PC-R." -- supplemental record on postconviction appeal"

"T. (date)" -- transcript of hearing below.

REQUEST FOR ORAL ARGUMENT

Mr. Arbelaez 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 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. Arbelaez, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

TABLE OF CONTENTS

STATEMENT OF THE CASE AND OF THE FACTS

A. TRIAL.

Mr. Arbelaez was indicted by the grand jury in Dade County, Florida, on April 27, 1988 (R. 1). He was charged with first-degree murder and kidnapping. Jury trial commenced February 11, 1991. The jury found Mr. Arbelaez guilty of both counts. The penalty phase took place on March 4, 1991. The jury rendered a sentencing verdict of death by a vote of eleven to one (R. 1056). On March 14, 1991, the Court sentenced Mr. Arbelaez to death (2d Supp. R. 22). The trial court entered written findings (R. 246).

A timely direct appeal was filed in this Court. Mr. Arbelaez' appellate counsel, who was also trial counsel, filed an Initial Brief consisting of nine (9) pages of argument addressing two guilt phase issues. The Attorney General's Office moved to strike the brief as insufficient because it failed to raise any issues as to the death sentence. Appellate counsel objected to the request of the Attorney General's Office, but this Court ordered appellate counsel to file a supplemental brief addressing sentencing issues. Thereafter, appellate counsel filed a supplemental brief raising three (3) arguments totalling less than three and a half pages. This Court affirmed Mr. Arbelaez' convictions and sentences. Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), cert. denied, 114 S. Ct. 2123 (1994).

B. POSTCONVICTION PROCEEDINGS.

Approximately three and a half months before filing his Rule 3.850 motion, Mr. Arbelaez filed a motion to compel disclosure of public records pursuant to Chapter 119 (Supp. PC-R. 8-20). Thereafter, on August 15, 1995, a verified motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 was filed (PC-R. 28-143). The State filed no responses to these motions.

On March 14, 1996, Mr. Arbelaez's counsel received a telephone call from Dade County Assistant State Attorney Sally Weintraub, who inquired whether counsel would be attending the hearing scheduled for the next morning before Judge Leslie Rothenberg (Supp. PC-R. 163).[1] Counsel informed Ms. Weintraub that he had received no notice of any hearing nor the subject matter of the hearing; Ms. Weintraub informed counsel that it concerned Mr. Arbelaez's Rule 3.850 motion (Id.). Counsel agreed to reset the hearing to April 15, 1996, so that he could be present, and was assured by Ms. Weintraub that no substantive matters would be discussed in his absence, and if Judge Rothenberg had any questions, she was the kind of judge who would pick up the phone and call counsel (Id.).

Counsel heard nothing from the court on March 15, 1996; on March 20, 1998, counsel received a letter from Ms. Weintraub informing him that the March 15 hearing exceeded simply resetting the case for April 15, 1996: the court had directed the State to

[1]Mr. Arbelaez's trial was presided over by Judge Allen Kornblum.

respond to Mr. Arbelaez's Rule 3.850 motion on or before May 15, 1996, and also indicated that counsel should set the motion to compel for a hearing (Supp. PC-R. 376). Judge Rothenberg later issued an order to that effect (Supp. PC-R. 157-58).

Mr. Arbelaez thereafter filed a motion to disqualify Judge Rothenberg alleging a due process violation because of the ex parte hearing, as well as her employment at the State Attorney's Office as a senior prosecutor at the time of Mr. Arbelaez's trial, and her bias against criminal defendants due to her judicial campaign in which she prominently stated her position as a "tough prosecutor" and "crime fighter" (Supp. PC-R. 162 et. seq.). The State filed a written opposition to the motion to disqualify (Supp. PC-R. 175).

A hearing was conducted on April 15, 1996, and without allowing Mr. Arbelaez's counsel to argue the motion or even introduce himself to her, Judge Rothenberg denied the motion to disqualify as legally insufficient (T. 4/15/96 at 4). Judge Rothenberg then inquired as to a prior order regarding dates for a hearing, but Mr. Arbelaez's counsel had never received it (T. 5-6). The Court then ordered a public records hearing and the State's response to the 3.850 motion for May 17, 1996 (Id at 9). The State then asserted it was claiming exemptions from Chapter 119 disclosure (Id. at 8),[2] and Mr. Arbelaez requested that the

[2]The State acknowledged that "unfortunately our office did not notify" Mr. Arbelaez that it was claiming exemptions (Id. at 8).

State provide a detailed list of what it was not turning over; the State refused to provide a page-by-page explanation of the documents it was withholding (Id. at 10).

On May 14, 1996, the State filed a written response to Mr. Arbelaez's Rule 3.850 motion (Supp. PC-R. 232-98), as well as a motion to compel Mr. Arbelaez to produce for inspection the files from trial counsel (Supp. PC-R. 184-87).

On May 17, 1996, a hearing on public records was conducted, and Judge Rothenberg ordered the City of Miami Police to turn over all records within ten (10) days of the hearing (T. 5/17/96 at 70). The State Attorney's Office and the Attorney General's Office then submitted documents to the court for an in camera inspection, and Mr. Arbelaez submitted a memorandum of law in support of disclosure of their records (Supp. PC-R. 299-307).

On May 29, 1996, Mr. Arbelaez filed a motion to compel disclosure of records, alleging that the City of Miami Police had failed to turn over any records within the ten (10) days allotted by the court at the prior hearing (Supp. PC-R. 318). The State filed a response (Supp. PC-R. 321).

On June 5, 1996, Mr. Arbelaez filed a motion to transfer his case to the original trial judge pursuant to the recently-enacted rule of judicial administration requiring that the original judge preside over the postconviction proceedings (Supp. PC-R. 326-27), as well as a written response to the State's motion for production of trial counsel's files (Supp. PC-R. 337-42). At a telephonic hearing on June 5, the court allowed Mr. Arbelaez

additional time to amend his Rule 3.850 motion because he had not received the records from the City of Miami Police (T. 6/5/96 at 12), and deferred ruling on the motion to transfer the case to back to the trial judge (Id. at 15).

On June 19, 1996, a status hearing was conducted regarding Mr. Arbelaez's motion to transfer the case to the trial judge. The hearing commenced with Judge Rothenberg's announcement that the Florida Supreme Court had entered an order appointing her to preside over the case (T. 6/19/96 at 3), an order which Mr. Arbelaez's counsel had not seen (Id.). Judge Rothenberg then produced a memorandum she wrote to Chief Judge Farina, as well as documentation sent by Judge Farina to the Florida Supreme Court (Id. at 4-6).[3] Mr. Arbelaez objected as he had not been informed of these matters nor copied with any of the documentation (Id. at 8). The court stated she sent counsel the documents, but acknowledged that the communication problem "appears to be coming from this end" (Id. at 6). Mr. Arbelaez then informed the court that he was in receipt of approximately 900 pages of records from the City of Miami Police Department (Id. at 9-10), and a Huff hearing was scheduled for August 16, 1996 (Id. at 12). The court also upheld the State's asserted work-product privilege with the exception of a telephone message, and further indicated that she would "do a little more research on the Brady issue before I make a ruling as to whether it's the court's responsibility to be

[3]See Supp. PC-R. 374 et. seq.

looking for Brady material" (Id. at 14).

The State raised its motion to compel production of the trial attorney files, and Mr. Arbelaez argued that "the proper thing to do would be to address that once we have had the hearing so we can determine what issues because disclosure of those [trial attorney] files is limited to those issues in my reading of the law based on what the court determined should be an evidentiary hearing on" (Id. at 17). The prosecutor disagreed, arguing that "I have a separate duty as I pointed out beyond the 3.850, not myself personally but the Office of the State Attorney has a separate duty to make sure the allegations in there are truthful because if they're not, under the case law they could be subject to perjury charges and I'm just saying I don't know if there is, I'm not accusing anyone of that but I have a right to make sure of that, and I have a duty to make sure the allegations are truthful and at best believed" (Id. at 18). In response, Mr. Arbelaez's counsel argued that the State "can prosecute the case or prosecute me. She can investigate me or prosecute the case. She cannot do both. I have the obligation as an attorney to make sure the pleadings I sign are true to the best of my knowledge" (id. at 19), and further argued that if the State could go behind collateral counsel's signature, "I can go into those notes [withheld by the State] to make sure everything she gives you is not Brady and not [anything] I can use to rebut her response" (Id. at 19). The Court then reserved ruling on the State's motion "[i]f I believe it depends on what issues are going to be

heard at the motion for post-conviction" (Id. at 20).

On July 22, 1996, collateral counsel wrote to Assistant State Attorney Penny Brill because he had been informed by Mr. Arbelaez's trial attorney that she had attempted to obtain the trial attorney files directly from him (Supp. PC-R. 422). Ms. Brill responded in a letter that she had a different interpretation of Reed v. State, 640 So. 2d 1094 (Fla. 1996), and indicated that the issue should be decided by the courts (Supp. PC-R. 424).

On July 31, 1996, Mr. Arbelaez filed an amended Rule 3.850 motion (PC-R. 12-124), and renewed his request to have the case transferred to the original trial judge (PC-R. 125-29).[4] At an August 12, 1996, hearing, the court did not expressly deny the renewed motion to transfer the case, but set a Huff hearing for September (T. 8/12/96 at 9). The Court also provided the defense with a telephone message that had been withheld by the State even though "I don't think it's a public record . . . [and] [i]t's clearly not Brady material" (Id. at 9). The State also filed a response to Mr. Arbelaez's amended Rule 3.850 motion (PC-R. 136-

[4]In the original Rule 3.850 motion, an allegation was made that the trial judge had delegated to the State the responsibility of drafting the sentencing order in this case. It is for this reason that the State objected to having the case transferred out of Judge Rothenberg's division. Upon further investigation, Mr. Arbelaez determined that the basis for the claim no longer existed, and withdrew the allegation in his amended motion (PC-R. 126). Thus, he renewed the request to have the case transferred to Judge Kornblum.

62).

A Huff hearing was conducted on September 12, 1996. In addition to arguing his entitlement to an evidentiary hearing, Mr. Arbelaez argued that the State's motion for access to trial counsel's files should be denied:

> In so far as the State's motion for access to trial counsel's files, I believe that the law is clear that because the standard at this point is whether the files and records in front of the Court are the direct appeal records as to whether Mr. Arbelaez is not entitled to relief, the State at this stage is not entitled to access of the files of the former trial counsel[].
>
> Basically, they asserted two reasons for entitlement to the records. Number one, they claim to need these records to refute the claim of ineffectiveness of counsel. If they do that, they are conceding . . . that Mr. Arbelaez is entitled to a hearing, not based on the records, not on what is in trial counsel's files, or may not be in trial counsel's files. So therefore they are not entitled to those records for that reason, until at least an evidentiary hearing is granted on any of the claims that are raised in the motion.
>
> The second reason that they allege they are entitled to access is to investigate the truthfulness of the motion. In my response to the State's motion, I indicated that contrary, none of the law reads, and the two cases that address the issue on trial counsel's files on capital post-conviction cases, the State has not authority for access under the circumstances.
>
> The allegations in my motion have to be taken as true. If the State has any information or belief that the truthfulness of the allegation is suspect or questionable, then they need to bring that up in the proper forum. Doing so at this point creates an inherent conflict in the case, and certainly there is no authority for them to have access to those files based on a supposition or inquisition of me, basically about the truthfulness of the motion. My signature is on the motion. I am an officer of the court. Therefore under the law that motion has to be taken as true. And they are not entitled to go behind that

signature and obtain trial counsel's files.

(T. 9/12/96 at 5-6).

As to Mr. Arbelaez's entitlement to an evidentiary hearing, the State contested the sufficiency of the allegations, specifically that the penalty phase allegations were insufficiently pled (Id. at 7). As to the trial attorney file issue, the State argued:

> As far as the records go, it is the State's position we are not asking for the records for the purpose of trying to refute the claim prior to the evidentiary hearing. We have the Supreme Court, Scott case, I cited in my motion says that the Defendant -- the purposes of that oath -- I am not talking about defense counsel. I am talking about the Defendant. He swears in his oath that the facts are true and correct. The State has an obligation, independent, whether or not there is an evidentiary hearing or not, to determine that those facts that this defendant has alleged are true and fact. And if they are not true and correct and demonstratively proved to be not true and correct, the State has certain decisions to make whether or not there are future charges that may come out of that. And that is why I did not subpoena the files.
>
> I think the State Attorney, under Chapter 37, has certain subpoena rights to investigate whether or not the crime has been committed in Dade County, if there has been false documents filed in the court. The State Attorney has every right to investigate that. And I didn't subpoena them because I knew if I had subpoenaed them, a motion to quash would come up and we would be arguing the same thing anyway. So I did this to expedite that proceeding and have the Court rule on whether or not we are entitled to it.

(Id. at 9-10).

The State then acknowledged it had no basis for alleging that any improprieties had occurred in Mr. Arbelaez's case, but was just engaged in a fishing expedition:

> I am not looking for anything right now. I am also not looking to have this case delayed later for that purpose. I just want you to know that is our position on that. I do want you to know that this is an important issue, that allegations are made. The Defendant swears this is true. Then they should be true. And this is something a defense counsel files which indicates it is not a true allegation or defense in fact did talk to the mother and the brother and had notes or something which can verify that, then that would not to be a true allegation. If family members was [sic] to come in here and swear under oath to that, or send an affidavit or something saying that is not true. He never talked to me. Then we might have some thing that needs to be looked into. that is the reason I am not looking for a way of getting around refuting an evidentiary hearing.

(Id. at 10).

The lower court deferred ruling on the 3.850 motion, but orally ruled that a copy of defense counsel's files be turned over to the State "and it can be sealed, if you want to take an appeal on that issue" (Id. at 12). The State then averred that it would wait until the final order on the 3.850 motion to determine when it would inspect the file (Id. at 13).

At a hearing on October 18, 1996, the court summarily denied Mr. Arbelaez's Rule 3.850 motion (T. 10/18/96 at 3). As to the trial attorney files, the State argued "I think they have a right to appeal the issue, and indicated "we would not be requesting they turn over the files until after the appeal is served" (Id. at 3-4). A written order denying the 3.850 motion and granting access to trial counsel's files were entered (PC-R. 346-79; 380-81). A timely notice of appeal was then filed (PC-R. 382-83).

SUMMARY OF ARGUMENTS

1. The lower court erred in summarily denying Mr. Arbelaez's 3.850 motions which contained extensive factual allegations requiring evidentiary development. The lower court failed to accept the allegations as true, and denied relief because Mr. Arbelaez did not attach affidavits to his pleading in direct contradiction to Rule 3.850 as discussed in Valle v. State. Trial counsel rendered prejudicially deficient performance in failing to know the law and failing to present expert and lay witness testimony at the guilt phase regarding Mr. Arbelaez's epileptic condition. No prohibition to this evidence existed, as two years before trial, this Court decided in Chestnut v. State that evidence of epilepsy was admissible to negate specific intent. Trial counsel also failed to voir dire jurors on their biases and beliefs regarding mental health issues relating to guilt and punishment to Mr. Arbelaez's prejudice, since mental health was the defense used at trial. Moreover, trial counsel failed to litigate Mr. Arbelaez's capacity to waive his Miranda rights. Most significantly, trial counsel failed to adequately investigate and prepare for the penalty phase. Mr. Arbelaez suffers from an IQ of 67, which is in the mentally retarded range, as well as organic brain damage. Trial counsel never had his client examined, and failed to contact the expert that prior counsel had contacted. This expert, Dr. Merry Haber, would have been able to testify to substantial mitigation. Moreover, trial counsel never investigated or presented any of

Mr. Arbelaez's family members in South America, and none testified. The 3.850 motion contained an extensive family history which was available; family members were willing and able to come to Miami to testify, but they were never contacted and asked to testify. An evidentiary hearing before the original trial judge is warranted.

2. Judge Rothenberg should have disqualified herself from the Rule 3.850 proceedings. Mr. Arbelaez had a reasonable fear that the judge could not be fair and impartial due to an ex parte hearing, the judge's longtime employment as a senior prosecutor in the office that prosecuted him and during that same time, as well as her judicial campaign platform of a "tough prosecutor" and "crime fighter." Because an evidentiary hearing is warranted in this case, and the original trial judge is available, this case should be remanded for a hearing before Judge Kornblum.

3. The court erroneously ordered trial counsel's files to be disclosed to the State even though the 3.850 motion was summarily denied. The State's argument that it needed the files to rebut the claims of ineffective assistance has no support in law or fact, as no extra-record materials can be used to rebut allegations in a 3.850 motion and the State opposed an evidentiary hearing. The State's true argument was that it had an obligation to investigate collateral counsel and Mr. Arbelaez for possible perjury, yet articulated no basis, much less a good faith basis, for its argument. The State's argument exceeded proper prosecutorial authority and was made solely to harass and

intimidate. If the State gets access to a defendant's privileged files, then the defendant should be entitled to access to the materials withheld by the State to "investigate" whether all Brady material has been disclosed. The lower court's order should be reversed.

4. Public records remain outstanding. The court refused to order the City of Miami Police to turn over specific documents based on the belief that the documents had been turned over to trial counsel. Moreover, the court turned over a document withheld by the State Attorney's Office, despite acknowledging it was neither public record nor Brady material, yet declined without articulating a reason to disclose the remaining materials. These materials have been provided to this Court for review, and Mr. Arbelaez submits they should be disclosed.

5. The State's use of psychological coercion against a brain damaged and mentally retarded Guillermo Arbelaez shocks the conscience. Trial counsel's failure to adequately present this information to the jury deprived Mr. Arbelaez of effective counsel.

6. Trial counsel rendered prejudicially deficient performance in striking a juror, then changing his mind and agreeing to have the juror sit as an alternate.

7. The appellate transcripts are missing numerous hearings and pages, and no reliable review of this case is possible without a complete transcript.

8. Trial counsel failed to object to the introduction of

gruesome photographs during trial, to Mr. Arbelaez's prejudice.

9. Trial counsel failed to object to constitutional error during the penalty phase, including jury instructions, Caldwell error, and burden-shifting error.

10. Fla. R. Crim. P. 3.851 arbitrarily accelerated the time in which Mr. Arbelaez had to initiate postconviction relief.

11. Florida's death penalty statute violates the Eighth Amendment on its face and as applied to Mr. Arbelaez.

12. Mr. Arbelaez is innocent of the death penalty.

13. The ethical rule precluding collateral counsel from interviewing jurors interferes with Mr. Arbelaez's right to effective counsel and access to the courts.

ARGUMENT I -- ERRONEOUS SUMMARY DENIAL

A. IMPROPER SUMMARY DENIAL.

The lower court summarily denied all of Mr. Arbelaez' claims, including significant allegations of ineffective assistance of counsel. The lower court's ruling was generally premised on the erroneous belief that allegations pled in a Rule 3.850 motion must be "proved" and supported by affidavits. The lower court erred. In Valle v. State, 705 So. 2d 331 (Fla. 1997), the Court rejected this very argument made by the same assistant state attorney in the same county. As the Court noted, "noting in the rule [3.850] requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so." Id. at 1334. This Court recently reaffirmed the proper standard: "A[n] [evidentiary] hearing is warranted on an ineffective assistance of counsel claim [] where the defendant alleges specific facts, not conclusively rebutted by the record, which demonstrate a deficiency in the performance that prejudiced the defendant." Ragsdale v. State, ___ So. 2d ___ (Fla. 1998). See also Rivera v. State, ___ So. 2d ___ (Fla. 1998). The files and records in this case do not conclusively rebut Mr. Arbelaez' allegations, and Mr. Arbelaez is entitled to an evidentiary hearing before the original trial judge.

B. INEFFECTIVENESS AT PRETRIAL AND GUILT/INNOCENCE PHASE.

Counsel has "a duty to bring to bear such skill and

knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). An attorney is charged with the responsibility of knowing the law and presenting legal argument in accord with the applicable principles of law. See, e.g., Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F. 2d 706, 709 (5th Cir. 1980). In Mr. Arbelaez's case, counsel rendered prejudicially deficient performance, and a hearing is warranted.

1. Failure to present evidence of epilepsy.

Defense counsel, without a reasonable strategic decision, failed to present evidence at trial that, due to his well-documented epilepsy, Mr. Arbelaez could not form the requisite specific intent for first-degree murder and kidnapping. To the extent that the State, through its affirmative misrepresentations to the trial court that such evidence was not admissible because no insanity defense was being pursued by Mr. Arbelaez, and the trial court's rulings in agreement with the State, precluded the presentation of such a defense, counsel's performance was rendered ineffective by the State and by the trial court. See United States v. Cronic, 466 U.S. 648 (1988); Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). The actions of the State and the trial court also precluded Mr. Arbelaez from

presenting a defense, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Washington v. Texas, 388 U.S. 14 (1967). The jury was not presented with any lay or expert testimony as to Mr. Arbelaez' serious epileptic condition and how that rendered him incapable of forming the intent to commit first-degree murder and kidnapping.

During a pre-trial hearing, the State moved to limit the defense from discussing or presenting any evidence to the jury "of the fact that the defendant has an illness that is sometimes described as seizure disorder or epilepsy. There has been no insanity defense in this case and there is no relevance for the jury . . . [i]n the guilt phase" (2d Supp. R. 8). Defense counsel noted that Mr. Arbelaez' disease is "not one that rises to the level of the insanity defense" (2d Supp. R. 9), but argued that "it will be appropriate to discuss whether or not this is an ailment that these individuals are familiar with, whether or not they've seen the defendant have these seizures, how he's acted, how he's reacted, what his recollection has been of events that have taken place while he was having these seizures" (2d Supp. R. 12). The State countered that unless defense counsel had support for Mr. Arbelaez' testimony of his epilepsy, the defense could not cross-examine the State's witnesses concerning the epilepsy because "[t]here is no relevance" (2d Supp. R. 12). The court agreed with the State, adding that "[t]he only way it would be relevant is if [Mr. Arbelaez] gets on the stand and testifies" (Id.).

Below, Judge Rothenberg acknowledged that counsel "was not precluded from calling any witnesses to establish and/or to develop this issue at trial" and that "trial counsel did not call any experts or lay people to establish the Defendant's epilepsy at trial" (PC-R. 355), yet summarily denied this claim because counsel "did effectively argue for the admissibility of this evidence" (R. 355). However, this finding is flatly refuted by case law in existence at the time. Two years before Mr. Arbelaez' trial, this Court handed down its decision in Chestnut v. State, 538 So. 2d 820 (Fla. 1989), in which it held that while evidence of an abnormal mental condition not constituting legal insanity was inadmissible to disprove specific intent, evidence of other objective mental illnesses, such as epilepsy and senility, was admissible as a defense to a specific intent crime like first-degree murder. The Court explained that it was rejecting what is commonly referred to as the "diminished capacity" defense in Florida because "[t]o permit the defense of diminished capacity would invite arbitrary applications of the law because of the nebulous distinction between specific and general intent crimes" and because "[p]ersons with less serious mental deficiencies should be held accountable for their crimes just as everyone else." Chestnut, 538 So. 2d at 824-25. However, the Court refused to include certain mental illnesses as constituting an impermissible "diminished capacity" defense: "Unlike the notion of partial or relative insanity, conditions such as intoxication, medication, epilepsy, infancy, or senility

are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding." Id. at 823 (quoting Bethea v. United States, 365 A.2d 64, 88 (D.C. 1976), cert. denied, 433 U.S. 911 (1977).

The decision by this Court to not exclude epilepsy from presentation to a jury to negate intent for specific intent crimes was reaffirmed in Bunney v. State, 603 So. 2d 1270 (Fla. 1992), a case with strikingly similar facts as this case. In Bunney, the defendant had strangled a five-year old girl. During a videotaped police interview conducted the day after the crime, Bunney disclosed to the police that he was an epileptic and that he used to take Dilantin. Id. at 1271-72. Prior to trial, the court granted the State's motion to exclude the presentation of lay or expert testimony concerning Bunney's epilepsy. The District Court of Appeals affirmed the trial court's ruling, concluding that "evidence of epilepsy is admissible only in the context of an insanity defense and is inadmissible to show lack of intent or premeditation." Id. at 1272. This Court reversed, holding that, consistent with Chestnut, "while evidence of diminished capacity is too potentially misleading to be permitted routinely in the guilt phase of criminal trials, evidence of `intoxication, medication, epilepsy, infancy, or senility' is not." Id. at 1273. The Court concluded that "it is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent, . . . [and] it stands to reason that evidence of certain commonly

understood conditions that are beyond one's control, such as those noted in Chestnut (epilepsy, infancy, or senility), should also be admissible." Id. (citing Gurganus v. State, 451 So. 2d 817 (Fla. 1984)).

At the time of Mr. Arbelaez' trial, Chestnut expressly held that evidence of epilepsy was admissible at the guilt phase to negate specific intent, notwithstanding that the disease did not rise to the level of an insanity defense. Defense counsel unreasonably failed to know the law, and the State was able to convince an uninformed trial court to preclude the admission of highly relevant and admissible evidence. Due to this failure to know the relevant case law, the defense stated that he did not intend to call anyone other than Mr. Arbelaez to shed some light on Mr. Arbelaez' disease (2d Supp. R. 10).[5] Although defense counsel recognized that the illness "might" go to intent (2d Supp. R. 9), he failed to update himself on the case law that deals with illness and intent. If he had done so, he would have realized that he had an obligation to present evidence of Mr. Arbelaez's illness during the guilt phase as the illness may have had a direct effect on underlying intent.

As the Rule 3.850 alleged, evidence was available to verify Mr. Arbelaez's epilepsy and the effects of the disease on Mr.

[5]Even the trial court acknowledged that evidence supporting epilepsy would be relevant "if [Mr. Arbelaez] gets on the stand and testifies" (2d Supp. R. 12), yet counsel presented to evidence to corroborate his client's testimony.

Arbelaez when he would have a seizure. However, this important information was neither discovered nor presented. For example, Mr. Arbelaez's Rule 3.850 alleged that Dade County Jail records from May, 1988 through 1991 clearly documented Mr. Arbelaez' seizure disorder; numerous epileptic attacks, some every few days; and Mr. Arbelaez' failure to take his medication, which resulted in more epileptic seizures. Jail records also indicated that Mr. Arbelaez was heavily medicated with anti-anxiety, anti-convulsant and mood-elevation medication. The information contained in the jail records, which corroborated Mr. Arbelaez's history of severe epilepsy, was not presented to the jury. Either the State failed to provide these records to Mr. Arbelaez's counsel in violation of Brady v. Maryland, 373 U.S. 83 (1963), or counsel unreasonably failed to request and/or present this information at trial. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). In either event, no adequate adversarial testing occurred on the issue, and Mr. Arbelaez was entitled to an evidentiary hearing.

2. Expert testimony during the guilt phase.

Defense counsel failed to produce expert testimony to explain to the jury that, due to his epilepsy, Mr. Arbelaez was unable to formulate the requisite level of specific intent for first-degree murder. Such expert testimony was available had defense counsel investigated and known the law. Various available lay witnesses could also have provided relevant

admissible evidence as to Mr. Arbelaez' disease and, in particular, the fact that Mr. Arbelaez, on the day of the crime, was exhibiting symptoms consistent with his disease. To the extent that defense counsel did attempt to elicit such testimony and its relation to the epilepsy, the State's objections were sustained and the jury was instructed to disregard the evidence of epilepsy. However, the law clearly permitted the testimony, Chestnut, and counsel's failure to cite that law rendered his assistance to Mr. Arbelaez prejudicially deficient. Mr. Arbelaez was precluded from presenting a defense due to the actions of the State and the trial court.

As the lower court noted, Mr. Arbelaez himself testified "regarding his seizure-type illness which he identified as epilepsy" (PC-R. 355). However, defense counsel presented no evidence to corroborate his client's testimony. The lower court also relied on the testimony from the penalty phase to find that there was no prejudice to Mr. Arbelaez at the guilt phase for failure to adduce evidence of epilepsy (PC-R. 356). However, the witnesses who testified on this point at the penalty phase were admittedly not competent to render opinions on the issue of specific intent. For example, Dr. Raul Lopez testified that while he had treated Mr. Arbelaez for epilepsy in the past, the last time he saw or treated Mr. Arbelaez was in January of 1996, some two years before the crime. The lower court conceded that Mr. Arbelaez did not see Dr. Lopez for nearly two years before the crime (PC-R. 356), yet found that Dr. Lopez's testimony

somehow established no prejudice. This is erroneous. As the Rule 3.850 motion alleged, expert witnesses and documentation were available to establish Mr. Arbelaez's condition during leading up to and during the time of the offense, and how that condition lessened his culpability. The lower court failed to accept these allegations as true, concluding that "the Defendant was not suffering from any epilepsy-related symptoms or trauma on the day in question" and that such "has not been shown to have any relevance either as to guilt or in mitigation" (PC-R. 358). These conclusions are erroneous as a matter of fact and law. See Chestnut; Bunney.

Because no mental health testimony was presented, the jury was never presented with any evidence regarding the disease known as epilepsy and its involuntary affects upon a person's behavior and personality. As the 3.850 alleged, epilepsy is a disease affecting the functioning of the brain, and in fact is among the most common of the chronic neurologic disorders. *Strub & Black*, *Organic Brain Syndromes – An Introduction to Neurobehavioral Disorders*, at 336. As Straub & Black explain:

> The term `epilepsy,' as used by most physicians, implies a recurrent paroxysmal uncontrolled discharge of cerebral neurons resulting in clinical signs and symptoms that interfere with normal levels and quality of the individual's functioning. In most cases there is impaired thinking, awareness of and/or observable convulsive movements or repetitive behaviors (automatisms). During attacks in which the seizure discharge remains well localized without spread, there may be no loss of consciousness. In other cases with a deeper locus or bilateral spread, lapses in consciousness can be a very prominent feature of the disorder. One of the most striking clinical features

> of epilepsy is the intermittent nature of the disorder and the almost total lack of overt symptoms between the actual seizures. Some patients may experience multiple seizures daily, while most patients have intervals between attacks of many months or years.

Id. at 337 (footnotes omitted). In addition to abnormal psychomotor expressions which can accompany an epileptic seizure, alterations in higher cognitive[6] and emotional function are often seen, including illusory hallucinatory experiences, sexual arousal, feelings of prescience or familiarity, feelings of strangeness or unreality, violence, fear, depression, and cognitive dysfunction. In addition, personality traits commonly ascribed to epileptics are perseveration, excessive religiosity, paranoia, impulsivity, mental slowness, and mood fluctuations. Id. at 356. All of these personality traits apply to Mr. Arbelaez, as an expert could have explained to the jury.

An expert also would have explained that the actions of Mr. Arbelaez, an epileptic, were a result of his disease, not purposeful actions. Kaplan and Sadock, in their COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/V, write that

> Purposeful aggressive behavior is virtually never an ictal event, despite the occasional medicolegal claim to the contrary. However, complex partial

[6]The incidence of mental retardation among epileptic patients is higher than among the normal population. Id. at 348. Mr. Arbelaez is mentally retarded with an IQ of 67, as he alleged in his 3.850 motion. The lower court refused, however, to accept that allegation as true. See, e.g. PC-R. 361 (Mr. Arbelaez "is of moderate intelligence and one who has received minimal education - not one who suffers from retardation as claimed but unsubstantiated by the Defendant").

> seizure patients in their interictal period may very well show increased tendencies toward retaliatory violence arising out of escalating interpersonal situations. Their increased anger and self-righteousness make them formidable adversaries.
>
> These interpersonal difficulties may lead to a consideration of the diagnosis of a functional character disorder (e.g. antisocial personality). Epileptic patients, however, tend to accept responsibility for their behaviors more readily and lack the early history of poor socialization, truancy, or unstable personal behavior that characterizes the antisocial personality.

Kaplan & Sadock at 639.[7]

The above information is but a brief overview of the type of information that was not presented to the jury in order to negate specific intent. Contrary to the repeated representations of the State and the trial court, evidence of Mr. Arbelaez' epilepsy was relevant and admissible under Chestnut and Bunney.[8] The jury did not know the evidence that existed concerning Mr. Arbelaez's epilepsy, how his condition affected him on the date of the offense, and how he was unable to formulate the specific intent necessary for a finding of first-degree murder.

3. Failure to voir dire.

---

[7]The term "ictal" event refers to the actual epileptic seizure.

[8]Evidence of epilepsy and its relation to Mr. Arbelaez's actions on February 14, 1988, was mitigation which should have been presented to the jury, but was not. Had the evidence been properly and adequately presented in terms of mitigating factors, a life recommendation would have resulted which could not have been overridden by the trial court. McCray v. State, 582 So. 2d 613 (Fla. 1991).

In the face of substantial and compelling evidence of severe mental illness, defense counsel failed to ask voir dire the potential jurors regarding mental health issues. Not one question was asked about the jurors' feelings about their perceptions of mental health issues as viable defenses in a criminal case or their understanding of the concept that evidence of mental illness can negate the specific intent required for a finding of first-degree murder. Not one question was asked about the jurors' understanding or feelings about mental health issues relating to mitigating circumstances. No evidence was adduced about the potential jurors' biases and feelings about psychiatrists and psychologists in general, and the importance of forensic mental health testimony. This is prejudicially deficient performance. Given defense counsel's awareness of Mr. Arbelaez' obvious mental health problems, the failure to ask any questions in this area falls below reasonably professional standards.

The lower court rejected this argument, finding that "the only `mental health' issue in this case is the Defendant's epileptic condition which has not been shown to have any relevance either as to guilt or in mitigation" (PC-R. 358).[9] Mr.

[9]The lower court's finding cannot be squared with her concomitant acknowledgement that Mr. Arbelaez himself testified regarding his epileptic condition (PC-R. 355), thus making it relevant as a matter of fact. Nor can the lower court's relevance finding be squared with Chestnut and Bunney, thus making the lower court's finding erroneous as a matter of law as well.

Arbelaez's mental state is of course relevant to both guilt and punishment issues, yet the jury, which was faced with Mr. Arbelaez's testimony at the guilt phase, as well as limited expert and lay witness testimony at the penalty phase regarding mental health issues, was never questioned about mental health.

4. Waiver of Miranda.

Mr. Arbelaez's 3.850 motion alleged that defense counsel also failed to investigate or develop evidence concerning Mr. Arbelaez' inability to make a knowing, voluntary, and intelligent waiver of his Miranda rights. Due to his low intelligence which classifies him as mentally retarded, his brain damage (including the epilepsy), as well as cultural differences, Mr. Arbelaez was incapable of making a voluntary waiver of his Miranda rights. Jackson v. Denno, 378 U.S. 368 (1964). There was no tactic or strategy for failing to investigate and present this evidence, which was available had counsel investigated. The lower court erred in failing to accept as true Mr. Arbelaez's allegations as to his 57 IQ and his organic brain damage, concluding that there were "mere allegations unsupported by either Affidavit or the record" (PC-R. 358). This is erroneous under Valle, and an evidentiary hearing is warranted on this issue.

C. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

In Mr. Arbelaez' capital penalty phase proceedings, substantial mitigating evidence, both statutory and nonstatutory, went undiscovered and was thus not presented for the consideration of the judge and jury. Mr. Arbelaez was sentenced to death by a judge and jury who knew very little about him, and an unreliable death sentence was the resulting prejudice. As confidence in the result is undermined, relief is appropriate. Strickland v. Washington; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).

The lower court erred as a matter of fact and law in denying an evidentiary hearing on the penalty phase allegations and failed to accept the allegations pled in the 3.850 motion as true. For example, the court found that because no affidavits were attached to the motion from any mental health experts, the allegations about what the experts would say were "unsubstantiated" and "unsupported" (PC-R. 360-61). It is the lower court's legal conclusion that is unsupported; this Court recently made very clear that "nothing in the rule [3.850] requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so." Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997). The manner in which Mr. Arbelaez set forth his extensive factual allegations is consistent with numerous other cases where this Court has remanded for evidentiary hearings. See, e.g. Ragsdale v. State, ___ So. 2d ___ (Fla. Oct. 15, 1998); Rivera v. State, ___ So. 2d ___ (Fla. 1998).

1. Failure to retain a mental health expert.

At the penalty phase, counsel called a few witnesses who testified briefly as to some positive attributes of Mr. Arbelaez. Counsel also called Dr. Raul Lopez, who had previously treated Mr. Arbelaez for epilepsy. The testimony adduced did not even scratch the surface of the vast amount of compelling information that was available in mitigation in this case. Dr. Lopez was unable to provide any updated information on Mr. Arbelaez' epilepsy and whether or why his seizures had worsened. Furthermore, Dr. Lopez' medical records indicate that Mr. Arbelaez did not take his epilepsy medicine on a regular basis, yet continued to show up at the emergency room at Mercy Hospital after suffering from epileptic seizures. Dr. Lopez' records also show how frustrated and angry he became with his patient for his failure to follow the doctor's orders (a failure attributable to Mr. Arbelaez's significantly substandard IQ of 67). This information was not adduced at the penalty phase, nor was the fact that Mr. Arbelaez continued to show up at the emergency room at Mercy Hospital on a regular basis, even after Dr. Lopez no longer treated him. The medical records, which were available at the time of the penalty phase, are replete with instances of Mr. Arbelaez suffering from epileptic seizures and brought to the hospital on an emergency basis. Yet these files were not discovered by trial counsel and never presented at the penalty phase.

The most glaring and crucial area of mitigation of which Mr.

Arbelaez' jury was never made aware is mental health mitigation. The court file does reflect that Mr. Arbelaez's first attorney retained the services of a mental health expert early on in the case. However, as the 3.850 motion alleged, that expert -- Dr. Merry Haber -- was not provided with adequate materials and background information, and was therefore not in a position to assist Mr. Arbelaez. Dr. Haber was never asked to evaluate Mr. Arbelaez for the existence of mitigating factors, either statutory or nonstatutory. Moreover, after initial counsel conflicted out, newly-appointed defense counsel failed to contact the expert and request her assistance. This is deficient performance. Ake v. Oklahoma, 470 U.S. 68 (1985). Had Dr. Haber been provided with adequate time and background materials, she would have been able not only to assist defense counsel in preparing a defense for Mr. Arbelaez, but also would have been able to testify to substantial mitigating evidence. However, counsel never contacted Dr. Haber after her initial examination of Mr. Arbelaez. The lower court's order fails to even address the issue of Dr. Haber or the factual allegations about counsel's failure to contact her and present her testimony.

Further, the Rule 3.850 motion alleged that qualified mental health professionals have examined Mr. Arbelaez and have been provided with materials concerning Mr. Arbelaez' history, and were prepared to testify at an evidentiary hearing to compelling mitigating circumstances, both statutory and nonstatutory. Had defense counsel investigated, this type of evidence would have

been available to present to the jury.

The Rule 3.850 motion alleged the fact that, based on testing conducted by experts in postconviction, Mr. Arbelaez has an IQ of 67, suffers from mental retardation, organic brain damage, and epilepsy (PC-R. 52). This information was never presented to the jury because Mr. Arbelaez was never tested for IQ or for neuropsychological deficits. A composite of his reasoning skills, which include his conceptual, verbal and language skills, place him in the range of child who is 5 years and 11 months old. He has poor planning skills and has trouble grasping reality. The expert who evaluated Mr. Arbelaez would explain how the relevant mental health mitigating circumstances apply to Mr. Arbelaez, including the IQ of 67 and organic brain damage. All of the information relied upon by the experts was available at the time of Mr. Arbelaez' penalty phase, yet counsel failed to investigate, and the lower court erred in failing to accept these allegations as true, concluding instead that Mr. Arbelaez is "not one who suffers from retardation as claimed but unsubstantiated by the Defendant" (PC-R. 361).[10]

2. Failure to investigate abusive background.

The jury that sentenced Guillermo Arbelaez to death never

[10]The lower court also relied on a pre-trial report from Dr. Castiello (PC-R. 361). This report, on its face, only relates to competency and sanity; Dr. Castiello was never asked to evaluate Mr. Arbelaez for mitigating circumstances. The court's reliance on this report was erroneous. Ragsdale v. State, ___ So. 2d __ (Fla. Oct. 15, 1998).

knew anything about the man they had sentenced to the ultimate penalty because defense counsel failed to investigate. Had counsel contacted some of Mr. Arbelaez' acquaintances in Miami, counsel would have learned that they considered Mr. Arbelaez "abnormal" and "strange," and "mentally slow," yet was never violent or aggressive. Many of the acquaintances said they knew about the proposed marriage between Mr. Arbelaez and Graciela Alfaro, yet they all knew that Ms. Alfaro was using Mr. Arbelaez for his money. Mrs. Alfaro would entertain other men with the money she received from Mr. Arbelaez.

These witnesses also would have testified that Mr. Arbelaez was a severe epileptic who frequently forgot to take his medicine. Without his medication, he would become extremely nervous and agitated. Expert testimony would have explained that Mr. Arbelaez's inability to take medication is consistent with an individual with an IQ of 67, in addition to brain damage and significant lack of insight and judgment.

Had defense counsel contacted Mr. Arbelaez' family in Colombia, he would have discovered a wealth of information which should have been presented to the jury. No tactical or strategic reason existed for failing to investigate Mr. Arbelaez' background or contact the readily-accessible family members who wanted to help. As the 3.850 motion alleged, when family members would call defense counsel asking what they could do, their calls

went unreturned.[11] No family members testified, and the sentencing jury was kept in the dark about the man they were sentencing to death.

The jury never knew the circumstances of Guillermo Arbelaez' life in Colombia, a life which presents a classic case of mitigation which, had it been presented, would have required the imposition of a life sentence. Guillermo Arbelaez was born August 29, 1957 in Medellín, Columbia, to Margarita and Jorge Arbelaez. He was the tenth of twelve children. Guillermo's mother, Margarita, decided after the first six babies that she had had enough children. But she was forced by her husband and her strict Catholic values to continue producing children, including Guillermo, who she did not want.

Margarita's husband, Jorge, wanted as many children as possible - not because he loved children, but so that they could work like animals and bring money into the home. Jorge came from a wealthy family, which lost their money due to mismanagement. Jorge ran away from his home in San Vicente at the age of 12, after his father brutally beat him with a metal wire. The young boy found work as a traveling farm worker and eventually landed a

[11]These factual allegations were flatly rejected by the lower court, which wrote that the motion "failed to identify the specific family members he is referring to or offer any proof at all that they were willing and able to testify at the sentencing hearing" (PC-R. 362). "Proving" allegations occurs at a hearing; alleging facts is what a 3.850 motion is for. Mr. Arbelaez pled his claims in the same manner as in numerous other cases where this Court has reversed summary denials. See Ragsdale v. State; Rivera v. State.

job on a farm near Ituango, the violence-ridden town where Margarita and her family lived. Jorge met 14-year-old Margarita and told her he was a doctor. Margarita's mother decided Jorge would make a good husband because although he was poor, and 15 years older than Margarita, he came from a "noble" family - one of white skin and numerous priests. Margarita and Jorge married. They traveled from farm to farm so that Jorge could work. Margarita began to have babies and the economic situation went from bad to worse. Jorge vented his frustrations by beating his wife and children. He whipped his oldest son, Juan Manuel, with barbed wire. When Gloria, their oldest daughter, was five years old, she accidently let a rabbit loose while feeding it. Her father turned wild with rage and whipped Gloria over and over again with a metal wire. Forty-six years later, Gloria still has the scars.

Eventually, Jorge's father got him a job as a police inspector. Jorge was issued a revolver and put in charge of five uniformed policeman in a small town. Margarita and the children went to live with Margarita's mother in Medellín while Jorge moved to San Vicente, several hours away. He came home on his days off - sometimes every eight days, sometimes once or twice a month - and terrorized his family to the edge of insanity.

Guillermo's father imagined that since his wife was so young and beautiful she must be seeing other men while he was away. His imagination went wild with jealousy. Jorge would enter the house like a madman, waving his police revolver in the air and

screaming that his wife was a whore and that he was going to kill her. As Jorge put the loaded revolver to his wife's head, the children nervously watched and prayed he wouldn't pull the trigger. Guillermo and his brothers and sisters trembled uncontrollably, afraid to make a sound. They watched their father hit their mother with the gun while he shouted insults at her. This did not happen once or twice, but every time Jorge walked into the house for 13 years - from the time Guillermo was a year and a half until he was a teenager.

Guillermo, like his sister and brothers, spent his entire childhood in sheer terror. They never knew when their father would return home or when he would kill their mother as he promised during every visit. Margarita would tell the children, "When your father comes to kill me, you need to hide in your room." Terrified of their father, they would hide under their beds and wait. Jorge also brutally beat his children with a leather belt, venting all of his rage on them. The more jealous he was or the madder he became at Margarita - the harder he beat his children. Guillermo's father suffered from mental illness. When he did not have the revolver or a knife pointed at his wife's head, Jorge would threaten to kill himself - waving a knife or machete in the air. He also would feign "attacks" in which he would fall to the ground and pretend that he couldn't breath. The children would run to their dying father, fanning him and massaging his fingers until he came back to life. A doctor said that there was nothing wrong with Jorge - it was all

in his mind.

Jorge sexually molested his daughters. Over and over again, the sisters would wake upin the middle of the night and see their father in the room they all shared - putting his hand inside the pajamas of one of his sleeping daughters. Too afraid to say anything, they would close their eyes and try to forget. In the morning, their father would comment, "You're getting kind of fat." Another time, Jorge came to his sleeping 12-year-old daughter and offered her money to let him touch her genitals. When she innocently accepted, Jorge put his hand inside her pajamas while forcing her hand upon his own genitals. Years later, when these daughters had their own children, Rosita, one of Guillermo's sisters, walked in a bedroom to find her father lying on a bed masturbating by rubbing her three year-old daughter against him. When she told her mother about the incident, she shrugged and said, "That's the way he is."

Jorge also would terrorize his children with black magic. He claimed to have conversations with the devil and would emerge from a room, after a ceremony of burning matches and reciting prayers, with his face contorted into that of a devil or a tiger. The children screamed when they saw this transformation. He proved his magical power with "tests" - claiming he could find items which had been lost in the house. After these demonic sessions, Jorge would be "sick" in his bed for several days. Jorge's family has a history of mental illness. One of his brothers was crazy. Other relatives spent time in mental

hospitals.

Guillermo also suffered more than his brothers and sisters because he was born mentally retarded. Margarita knew there was something different about Guillermo while she was pregnant with him. She didn't know why, but she was afraid that this child was going to have problems. She kept crying and felt nervous during the entire pregnancy. Even her labor was much different from the other babies. Margarita was in severe pain and hemorrhaging for two days until the doctors finally gave her an injection to knock her out. After she awoke, she found out that Guillermo had been born. She worried when she saw the "mongolic birthmarks" on Guillermo's legs. None of the other babies had that. This child was different.

Guillermo was very nervous as a child. He also seemed slower than the others in his development. He did not learn to talk as quickly as the others did. Guillermo's mental deficiency became most pronounced when he started school. He did not have the capacity to understand what was being taught. No matter how much time his mother spent studying with him, Guillermo cried in frustration because he could not understand. Margarita also was puzzled because none of the other children had such difficulty. Guillermo completed only sixth grade because he could not understand what was going on.

Juan Manuel, Guillermo's oldest brother, took on the role of disciplinarian while his father was away. Brutally violent in his punishments, the children began to fear Juan Manuel as much

as they feared their father. As he earlier had been terrorized by his father's beatings with barbed wire, Juan Manuel now turned his rage onto his younger brothers and sisters. For whatever slight infraction of his military-style rules, Juan Manuel would throw the child against the wall or into a corner and whip him with a leather belt as the child screamed and tried to cover his face with his hands. The other children, and their mother, watched silently. Nobody said a word. Even when the beating finally ended -- and the sobbing child remained collapsed in the corner covered head to toe with red leather strap marks -- nobody uttered a word. No one offered a kind word or a comforting hand.

Violence was intertwined with religion in the house. Both Guillermo's mother and grandmother were extremely religious. The children had to attend mass at 5:50 every morning as well as spend 40 minutes each night on their knees, reciting the rosary. If they fell asleep they were beaten with the belt or had water thrown on them. Once, when ten-year-old Lucero fell asleep during the rosary, her father lifted her up over his head and let her go, dropping her on the cement floor. He then picked her up and dropped her again. He did this three times. The next day, Lucero's body was so bruised that in school they asked her what happened. She just cried.

No one ever worried about anybody else in the house -- even when they were sick. For a year, Guillermo's younger brother, Jairo, complained to his mother about excruciating headaches. She never took him to a doctor. Jairo died at age 18 of an

aneurysm in his brain. Everyone in Guillermo's house was on their own. They never helped each other, never confided in one another, and rarely spoke to each other if it was not a threat. Following their father's example, the children became accustomed to threatening each other when somebody touched their belongings or bothered them in any way -- such as turning on the radio too loud. "Turn it off or I'll kill you," was not uncommon to hear among these children who had no one to guide them but a crazy father and a terrified mother.

The children did not even know when they had birthdays. No one received a present, had a cake, or even heard the words "Happy Birthday," -- except Gloria, the oldest, whose 15th birthday was celebrated because she was her father's favorite. Gloria and Juan Manuel, the two oldest, were the only children the father liked. Juan Manuel, despite suffering beatings with barbed wire when he was very young, came to be the king of the house. Gloria was the Queen. They were not as severely beaten or ridiculed as the other children. The rest of the children were called by the father, "the ugly ones." He often told them that they were not even his own children.

In this atmosphere of violence, mental illness and isolation, Guillermo failed to blossom. One of his teachers noticed that Guillermo had severe psychological problems and was mentally retarded. There were no special classes for mentally retarded or emotionally disturbed children at the public schools Guillermo attended. The teacher advised the family that it

needed to get Guillermo some sort of treatment. Whether Guillermo's mother paid attention to this advice or not is moot. The family lived in abject poverty and was unable to afford a psychologist for Guillermo. The family did not even have enough money to buy the children's school books. Though the father brought his paycheck home every month, it was not enough to feed and clothe 12 children. Guillermo's mother waited in line for relief food sent from the United States by President Kennedy. There was no money to buy fruit or meat. The children ate hot chocolate and a tortilla for breakfast. Lunch was flour and water cooked together to make a soup. Dinner was beans -- if they had them. One day, Guillermo's sister, Lucero, saw some girls in her school eating a delicious breakfast for their first communion. When she returned to the house very hungry, and saw that they had no food, Lucero cried. Her mother beat her for crying.

At the age of 11 or 12, Guillermo turned to sniffing finger-nail polish remover as a way to escape his painful life. His sister Rosita saw him sniffing out of the jar several times and she could smell it on him. Guillermo would walk around like he was in a cloud -- talking in half-sentences or saying things that didn't make sense. But, as with everything else, no one talked about it. Rosita also noticed that the level in her bottle of ninety-percent rubbing alcohol kept getting lower. She brought home bottles of the special extra-strength rubbing alcohol from the alcohol factory where she worked. It was much stronger than

the normal rubbing alcohol sold in the market. Only a crazy person would drink it. When she asked Guillermo about it disappearing he would say he spilled it.

Guillermo smoked marijuana on the stairs outside his house. He didn't need to hide it because nobody in his house seemed to care what he did. Rosita gave him money whenever he asked so he could buy more drugs. Guillermo would take any drug he could get his hands on. His brother Oscar saw him with all kinds of pills including LSD when Guillermo was 12 years old. Guillermo came home every night drunk or high on drugs. His mother, watching him walk in swaying like a drunk, chose not to say anything because she didn't want anyone else to know and because she did not want to have any problems. Those who knew Guillermo was using drugs daily kept it to themselves. No one talked to him about it. The unwritten rule of the family was that you don't confront anybody - just stay in your own little corner. The house was full of secrets.

At age 14 Guillermo began injecting drugs. A homosexual from England or the United States first taught Guillermo how to stick a needle into his arm. Guillermo's mother found a syringe in his bedroom. She threw it away but Guillermo told her he would just buy another one. Guillermo's new drug friends were ten years older than he was. This group, who called themselves "The Marijuaneros" had actually rescued Guillermo from another gang -- the Club of Death. This suicide club would play a sort of Russian roulette. Whoever was the unlucky one would have to

commit suicide or be killed by the others in the club. Guillermo had joined this club when he was 13, after a particularly severe beating from Juan Manuel. The Marijuaneros rescued Guillermo from this suicide club -- saying he was too young. Guillermo would follow anyone who would lead him and he never questioned them. He was lost, seeking someone who would care for him.

From about the age of six or seven, Guillermo spent endless hours at the church working as an alter boy and helper. The priests put him to work arranging the saints, decorating the church, and organizing everything for the mass. They would send him on dangerous missions -- to climb up the rafters in the church ceiling when they needed a decoration nailed up. Guillermo worked so hard that he often fell asleep at the church. He preferred to be a servant in the church rather than return to his house.

Guillermo tried to kill himself by drinking poison. It was one in a series of suicide attempts. Another time, Guillermo showed his sister Rosita where he had cut the veins in his arm. "I did this - but I sewed it up again," he told her. "Don't tell mom." Guillermo did not explain why he wanted to die and his sister didn't ask. Starting at the age of about 14, Guillermo tried to kill himself several times - at least twice by drinking rat poison. Once, the poisoning was so severe that Guillermo's hair fell out. He spent between eight and 15 days in the hospital.

In addition to cutting the veins in his arm, Guillermo also

attempted to kill himself by overdosing on tranquilizers. One of those times, Guillermo arrived at the hospital unconscious. He was in a coma for 48 hours. At least three of Guillermo's suicide attempts required hospitalization. Most family members do not know why Guillermo wanted so desperately to die. Keeping with the unwritten family rule of not communicating with each other, they did not even ask.

Following recovery in the hospital, Guillermo was sent to Medellín's mental hospital where he received massive drugs and electric shock treatments. After each electric shock treatment his head would be in the clouds for a day. He seemed even slower and did not talk much. The treatments failed to improve Guillermo's mental retardation or his psychological problems. The treatments only seemed to make matters worse.

As a teenager, Guillermo did not mature. His mind was still like that of a child's. Friends and family noticed that he did not have any friends his own age. Even friends younger than Guillermo would quickly surpass him, and moved on to other interests like computers or studying at the university. Guillermo stayed with the children. At the age of 18, Guillermo's friends were eight and ten years old.

Guillermo's life was complicated further when he had his first epileptic attack at the age of 18. Family members were horrified to see him fall to the ground, tremble and bang his head on the floor. After the second attack his mother took him to a doctor, who gave Guillermo an electric shock treatment and

sent him home. After another attack, Guillermo returned to the doctor and was told he had epilepsy. He was given pills to prevent the attacks but would often forget to take them. Numerous times, Guillermo fell to the ground, banging his head on the street or floor.

After so many problems in Colombia, Guillermo decided to go to Venezuela, where his sister Marta Elena lived. Guillermo arrived at his sister's office in Caracas with no money, no documents, and looking like he had lived in the mountains for years. Marta Elena found Guillermo a room to rent and helped him get a job at an ice company. Guillermo had problems working with the ice and suffered one epileptic attack after another. The woman whom Guillermo rented the room from called Marta Elena crying and said that she could not handle Guillermo's craziness. Guillermo wanted this woman to be his mother and she could not take care of him and bring him his coffee the way he wanted it. Also, Guillermo had fallen asleep smoking a cigarette and the mattress caught on fire. Guillermo left Venezuela and returned to Columbia.

At age 21, Guillermo, with the help of Juan Manuel, got a job at Postobon, a bottling plant in Medellín. Guillermo rode around on the delivery truck and kept track of how many bottles were delivered. He had difficulty with the math but was a good worker. A problem developed when Guillermo was assigned a new supervisor. He and the new supervisor did not understand each other and Guillermo was fired. Even while employed full time at

the bottling plant, Guillermo spent all of his free time working at the church without pay. The church had always been Guillermo's life. At times he wanted to be a priest.

Guillermo's first sexual experience was with a nun. Several years older than Guillermo, the nun was the first person from whom Guillermo had ever felt any love. For seven years they had a secret relationship. Only Guillermo's brothers who worked in the church knew about the relationship. When the rest of Guillermo's family found out they were supportive. He needed someone like the nun to take care of him. As much as the nun loved Guillermo, she too began to see that Guillermo was not normal. His moods would change from one extreme to another. Any slight disagreement would be a crisis for Guillermo. After an argument with the nun, Guillermo made the mistake of talking with Father Javier about it. The priest was furious and kicked the nun out of the church. The relationship ended, leaving Guillermo devastated.

One morning, Rosita, Guillermo's sister, saw him leave for work. As she watched out the window, Guillermo tipped back his head and drank a bottle of poison called Mata 7. He arrived at work and began to vomit and have convulsions. His co-workers took him to the hospital Leon XIII where Guillermo stayed for several days, tied into the bed. Nobody in the family wanted to talk about it. Nobody asked Guillermo why he wanted to die.

More lost than ever, Guillermo decided to go to the United States to work. His brothers and sisters all had a plan for

their lives, but Guillermo had none. Guillermo had always loved to work and maybe things would be better in the United States.

Since the nun, Guillermo never had another serious relationship with a woman until he met Graciela. He told his family that she was the love of his life. Guillermo and Graciela called his family in Colombia. Graciela spoke of their plans to marry. The family was happy that both of them were so in love and happy together. Unfortunately, by this time, a lifelong history of abuse, drugs, violence, and severe mental illness were to culminate in the tragic events of February 14, 1988.

As the unfolding tragedy of Guillermo's life clearly shows, substantial mitigation was amply available. None of this evidence, however, reached the jury or the judge because counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel failed to discover and use the wealth of mitigation available in Mr. Arbelaez's background -- mitigating evidence without which no individualized consideration could occur. Had counsel adequately prepared and discharged his Sixth Amendment duties, overwhelming mitigating evidence which would have precluded a sentence of death in this case would have been uncovered. An evidentiary hearing is warranted.

ARGUMENT II -- JUDICIAL DISQUALIFICATION

A. JUDGE ROTHENBERG SHOULD BE RECUSED.

Mr. Arbelaez sought the disqualification of Judge Leslie Rothenberg because she conducted an ex parte hearing knowing that

Mr. Arbelaez's counsel had not been noticed, and because Mr. Arbelaez feared that she could not be fair and impartial due to her public pro-prosecution judicial campaign and her long employment as a senior prosecutor in the Dade County State Attorney's Office. Because Mr. Arbelaez's motion was legally sufficient, Judge Rothenberg should be disqualified, and this case remanded for a full hearing before the original trial judge. See Section B, infra.

On March 14, 1996, at approximately 4:30 PM, Mr. Arbelaez's counsel received a phone call from Assistant State Attorney Sally Weintraub, inquiring about whether counsel would be attending the hearing scheduled for the next day -- March 15, 1996 -- before Judge Rothenberg. Counsel informed Ms. Weintraub that he had not been noticed for any hearing, and asked what the hearing was about. Ms. Weintraub believed that it was a hearing to set a date for a hearing on Mr. Arbelaez's Rule 3.850 motion, and then inquired as to what she should do at the hearing. Counsel expressed concern that there would be a proceeding about the case in his absence, and indicated to Ms. Weintraub that she could inform the Court that counsel received no notice for this hearing, and that he would agree only to rescheduling the matter for a status hearing on April 15, 1996. Counsel expressed his concern to Ms. Weintraub that there was obvious confusion about the case, given that the judge wanted to set hearings when there were still outstanding public records issues, which were the subject of his motion to compel. As counsel explained to Ms.

Weintraub, resolution of that motion was essential so that Mr. Arbelaez could amend his Rule 3.850 motion and only then could the Rule 3.850 motion be addressed. Therefore, aside from informing the Court that counsel had received no notice and that he wanted the matter reset for April 15, counsel understood that no other matters would be addressed on March 14, 1996, outside his presence. Ms. Weintraub assured counsel that if any such matters arose, Judge Rothenberg was the kind of judge who would call counsel and discuss the matter on the telephone. Based on those assurances, counsel agreed that Ms. Weintraub would simply inform the Court that counsel had received no notice of the hearing, and that he wished to have the matter re-set for April 15, 1996.

Counsel did not hear from the Court on March 15, 1996, and therefore presumed that the matter had been simply reset for April 15, 1996, as he had arranged with Ms. Weintraub. On March 20, 1996, counsel received a letter from Ms. Weintraub wherein he was informed that the hearing on March 15 in fact exceeded the simple matter of resetting the case for April 15, 1996. Ms. Weintraub's letter informed counsel that after advising the Court that the undersigned requested a status hearing for April 15, 1996, the Court directed the State to file its response to Mr. Arbelaez's Rule 3.850 motion on or before May 15, 1996, and at time, a date for argument on the issue of an evidentiary hearing can be set. Ms. Weintraub's letter further informed that she advised the Court of the pending motion to compel, and that the

Court indicated that counsel could set that matter for any convenient time. All of these arrangements were made without counsel's presence or without the benefit of argument by counsel, that is, on an *ex parte* basis.

Mr. Arbelaez's motion to disqualify also alleged that he feared the judge's inability to be fair and impartial because Judge Rothenberg was an employee of the Dade County State Attorney's Office at the time of its prosecution of Mr. Arbelaez' conviction and death sentence. Mr. Arbelaez's trial began in January, 1991. Judge Rothenberg was an assistant state attorney since 1986 and spent two years as chief of the felony division. Adding to Mr. Arbelaez's fear was that because Judge Rothenberg was a prosecutor in the Dade County State Attorney Office during the period in which Mr. Arbelaez was prosecuted and convicted, Judge Rothenberg had a working relationship with Sally Weintraub, the prosecutor at trial.

Mr. Arbelaez further feared Judge Rothenberg could not be fair and impartial because in 1992, she ran for a vacancy on the Dade County Circuit Court bench on the platform of a "tough prosecutor" and "crime fighter." Because of her campaign platform, the Florida Association of Criminal Defense Lawyers urged Chief Judge Rifkind to assign Judge Rothenberg to the civil division because of the perception that she could not be fair and impartial in criminal cases. Mr. Arbelaez had and still has a reasonable fear that Judge Rothenberg, in an attempt to satisfy the promises she made to her electorate, could not provide him

with a fair and impartial determination of the significant constitutional issues he has raised in his postconviction motion.

Mr. Arbelaez was entitled to full and fair Rule 3.850 proceedings. The court's ex parte hearing violated due process. Rose v. State, 601 So. 2d 1181 (Fla. 1992). Moreover, her pro-prosecution bias, evident in her judicial campaign and evidenced in her order denying relief to Mr. Arbelaez, provide further fear about Judge Rothenberg's ability to be fair and impartial.

B. JUDGE KORNBLUM SHOULD HEAR THIS CASE ON REMAND.

Because an evidentiary hearing is warranted in this case, on remand Mr. Arbelaez requests that the Court direct the original trial judge, Judge Kornblum, to hear the evidence in the case. There is certainly no prejudice to the State, as the State repeatedly attempts to have cases assigned to the trial judge. In the interests of fairness and due process, this cause should be remanded to Judge Kornblum for the evidentiary hearing.

ARGUMENT III -- TRIAL COUNSEL'S FILES

The State filed a Motion to Compel Defendant's Present Counsel to Produce for Inspection the Files of Former Trial Counsel (Supp. R. 184). Although Judge Rothenberg summarily denied Mr. Arbelaez' 3.850 motion, she nonetheless ordered the trial attorney files disclosed to the State over objection by collateral counsel (R. 380). The lower court's ruling was erroneous as a matter of law.

What occurred in this case is a clear example of what can occur with a dangerous combination of prosecutorial misconduct and a biased judge. See Argument II. In seeking trial counsel's files, the State, through Assistant State Attorney Penny Brill, asserted two reasons why she was entitled to the records. First, she asserted that the files "are needed by the State to investigate and defend the allegations of ineffective assistance of counsel" (Supp. PC-R. 184). However, as Mr. Arbelaez argued below, this was an improper basis for ordering disclosure of the files, as the State had vehemently opposed an evidentiary hearing in the case, and under the rules, extra-record information, such as anything in trial counsel's files, could not be used to rebut the allegations in the 3.850 motion.

The State later retreated from this position, arguing that it had an independent obligation as a law enforcement agency to investigate whether either Mr. Arbelaez or his counsel had committed perjury in the 3.850 motion. At a June, 1996, hearing, the prosecutor averred "I have a separate duty as I pointed out

beyond the 3.850, not myself personally but the Office of the State Attorney has a separate duty to make sure the allegations in there are truthful because if they're not, under the case law they could be subject to perjury charges and I'm just saying I don't know if there is, I'm not accusing anyone of that but I have a right to make sure of that, and I have a duty to make sure the allegations are truthful and at best believed" (T. 6/12/96 at 18). In response, Mr. Arbelaez's counsel argued that the State "can prosecute the case or prosecute me. She can investigate me or prosecute the case. She cannot do both. I have the obligation as an attorney to make sure the pleadings I sign are true to the best of my knowledge" (id. at 19), and further argued that if the State could go behind collateral counsel's signature, "I can go into those notes [withheld by the State] to make sure everything she gives you is not Brady and not [anything] I can use to rebut her response" (Id. at 19). The Court then reserved ruling on the State's motion "[i]f I believe it depends on what issues are going to be heard at the motion for post-conviction" (Id. at 20).

At the Huff hearing, Mr. Arbelaez argued that the State was not entitled to the trial attorney files if the case were summarily denied:

> In so far as the State's motion for access to trial counsel's files, I believe that the law is clear that because the standard at this point is whether the files and records in front of the Court are the direct appeal records as to whether Mr. Arbelaez is not entitled to relief, the State at this stage is not entitled to access of the files of the former trial

counsel[].

Basically, they asserted two reasons for entitlement to the records. Number one, they claim to need these records to refute the claim of ineffectiveness of counsel. If they do that, they are conceding . . . that Mr. Arbelaez is entitled to a hearing, not based on the records, not on what is in trial counsel's files, or may not be in trial counsel's files. So therefore they are not entitled to those records for that reason, until at least an evidentiary hearing is granted on any of the claims that are raised in the motion.

The second reason that they allege they are entitled to access is to investigate the truthfulness of the motion. In my response to the State's motion, I indicated that contrary, none of the law reads, and the two cases that address the issue on trial counsel's files on capital post-conviction cases, the State has not authority for access under the circumstances.

The allegations in my motion have to be taken as true. If the State has any information or belief that the truthfulness of the allegation is suspect or questionable, then they need to bring that up in the proper forum. Doing so at this point creates an inherent conflict in the case, and certainly there is no authority for them to have access to those files based on a supposition or inquisition of me, basically about the truthfulness of the motion. My signature is on the motion. I am an officer of the court. Therefore under the law that motion has to be taken as true. And they are not entitled to go behind that signature and obtain trial counsel's files.

(T. 9/12/96 at 5-6).

In response, the State argued:

As far as the records go, it is the State's position we are not asking for the records for the purpose of trying to refute the claim prior to the evidentiary hearing. We have the Supreme Court, Scott case, I cited in my motion says that the Defendant -- the purposes of that oath -- I am not talking about defense counsel. I am talking about the Defendant. He swears in his oath that the facts are true and correct. The State has an obligation, independent, whether or not there is an evidentiary hearing or not, to determine that those facts that this defendant has

> alleged are true and fact. And if they are not true and correct and demonstratively proved to be not true and correct, the State has certain decisions to make whether or not there are future charges that may come out of that. And that is why I did not subpoena the files.
>
> I think the State Attorney, under Chapter 37, has certain subpoena rights to investigate whether or not the crime has been committed in Dade County, if there has been false documents filed in the court. The State Attorney has every right to investigate that. And I didn't subpoena them because I knew if I had subpoenaed them, a motion to quash would come up and we would be arguing the same thing anyway. So I did this to expedite that proceeding and have the Court rule on whether or not we are entitled to it.

(Id. at 9-10) (emphasis added).

The State then acknowledged it had no basis for alleging that any improprieties had occurred in Mr. Arbelaez's case, but was just engaged in a fishing expedition:

> I am not looking for anything right now. I am also not looking to have this case delayed later for that purpose. I just want you to know that is our position on that. I do want you to know that this is an important issue, that allegations are made. The Defendant swears this is true. Then they should be true. And this is something a defense counsel files which indicates it is not a true allegation or defense in fact did talk to the mother and the brother and had notes or something which can verify that, then that would not to be a true allegation. If family members was [sic] to come in here and swear under oath to that, or send an affidavit or something saying that is not true. He never talked to me. Then we might have some thing that needs to be looked into. that is the reason I am not looking for a way of getting around refuting an evidentiary hearing.

(Id. at 10) (emphasis added).

The only two cases in which this issue has been addressed by this Court are Reed and LeCroy v. State, 641 So. 2d 853 (Fla. 1994), were cases in which an evidentiary hearing had been

granted.[12] Reed clearly contemplates that access to a trial attorney's file by the State is permitted in order to "refresh counsel's recollection concerning these matters [of client conversations and trial strategies] by reference to the attorney's files." Reed, 640 So. 2d at 1097. Therefore, any request for access for the purpose of refuting claims presented at an evidentiary hearing was not ripe for consideration by the circuit court, and the lower court's order granting access while at the same time denying the 3.850 was erroneous as a matter of

[12]The State acknowledged that "Reed involved a situation in which an evidentiary hearing was deemed appropriate based on the allegations by the defendant" (Supp. PC-R. 185), yet concluded that "the [Florida Supreme] Court's ruling is not predicated on that fact" (Id.). The State fails to cite any authority for its position on this point. Reed must be read in conjunction with longstanding precedent that the use of non-record materials to refute the allegations in a postconviction motion by necessity requires that an evidentiary hearing be conducted. Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla, 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d. 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). There is no question that the documents contained in the files of the original attorneys are non-record materials, the use of which to challenge the allegations contained in a motion for postconviction relief would mean that a hearing would be required. Given that it must be presumed that the Court's rulings in Reed and LeCroy are intended to be read in accordance with Rule 3.850 and the aforementioned line of cases, release of the files to the State would be improper for any other purpose than explained by the Reed Court: "the State should have a right to refresh counsel's recollection concerning these matters by reference to the attorney's files" Reed, 640 So. 2d at 1097. Refreshing recollection of witnesses occurs during testimony at evidentiary hearings, not during the pleading process.

law.

The true reason why the State wanted the files was to harass collateral counsel and Mr. Arbelaez based on some unarticulated "obligation" to investigate perjury and a groundless and bad-faith accusation that the allegations contained in the Rule 3.850 were not true. The State even acknowledged that it was "not looking for anything now," thus highlighting the outrageous impropriety of the State's assertions. The State cited no case law for its remarkable proposition because none exists. In fact, well-established case law provides just the opposite. The allegations contained in the motion must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). If the State contests the allegations contained in Mr. Arbelaez' motion, then it should have conceded an evidentiary hearing. If the State believes it is entitled to "investigate" the "truthfulness" of the allegations contained in the Rule 3.850 motion, then the State must recuse itself from this case in order to conduct whatever inquisition it wishes. The State cannot prosecute this case and simultaneously "investigate" Mr. Arbelaez and/or his counsel. Since Judge Rothenberg summarily denied all of Mr. Arbelaez' claims, there is no reason why the trial attorney's files should be turned over.

This Court should not condone this type of flagrant prosecutorial misuse of power.[13] "A lawyer should use the law's

[13]Ms. Brill's abusive conduct is highlighted by her efforts during the litigation to obtain trial

procedures only for legitimate purposes and not to harass or intimidate others" (Preamble to Rules of Professional Conduct). Openly accusing opposing counsel of a crime during pending litigation, and threatening the same to counsel's client, does not constitute permissible conduct under the ethical canons, particularly when such threat is intended as a tactic to intimidate and harass counsel, as it clearly was in Mr. Arbelaez's case. "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs" (Id.). Moreover, "prosecutors are also members of the Bar, bound by the same rules and the same disciplinary process which apply to all lawyers." Jackson v. State, 421 So. 2d 15, 17 (Fla. 3d DCA 1982). The lower court's order should be reversed.

ARGUMENT IV -- PUBLIC RECORDS

A. CITY OF MIAMI POLICE DEPARTMENT.

In his amended Rule 3.850 motion, Mr. Arbelaez alleged that the City of Miami Police Department failed to turn over various records, including sworn statements from Graciela Aflaro, Haram

---

counsel's files directly from trial counsel, notwithstanding her pending motion before the court (Supp. PC-R. 422). And unfortunately, Ms. Brill's conduct in attacking opposing counsel and accusing him of perjury and requesting files to conduct an investigation is not limited to Mr. Arbelaez's case: she made the same arguments in another case involving the undersigned counsel, which is now pending before this Court. See Patton v. State, No. 89,669. In that case, however, the lower court was not persuaded by Ms. Brill's arguments, and refused to order the trial attorney files to be disclosed in that case.

Alfaro, and Pedro Salazar, as well as a taped statement from Jorge Arbelaez and video and audio tapes of Mr. Arbelaez's statements and an audio tape of Enildo Aguilar's sworn statement (PC-R. 28-29). The lower court determined that these items were provided through discovery to trial counsel (PC-R. 351). However, there is nothing to demonstrate that in the record, nor is there anything to demonstrate that the withheld statements are not additional statements that were never disclosed pre-trial; this is why is it collateral counsel's obligation to obtain the statements to ensure that they were disclosed by the State. Counsel's later discovery of these files could result in a procedural bar. Porter v. State, 653 So. 2d 375 (Fla. 1995). The lower court erroneously refused to order these materials disclosed.

B. STATE ATTORNEY'S OFFICE/ATTORNEY GENERAL'S OFFICE.

Both the Dade County State Attorney's Office and the Attorney General's Office withheld documents they claimed were not public record.[14] After conducting an in camera inspection, the lower court refused to disclose the records with the exception of one document. As to that document, the court turned it over to collateral counsel even though she found "I don't think it's a public record . . . [and] [i]t's clearly not Brady material" (Id. at 9). Given this ruling, there was no basis for withholding the remaining documents. The lower court's

[14]These documents were sealed for this Court's review.

disclosure of alleged non-public record waived the exempt status of the remaining documents, and all documents should be disclosed.

The assertion by the State, without more, that its records were trial preparation materials is insufficient to shield them from disclosure. "[I]nteroffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988). See Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough County Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983). Additionally, notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge, regardless of whether in final form or the ultimate product of an agency, can be subject to disclosure under Chapter 119. Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990).

The lower court could not conduct a legally sufficient in camera inspection of the records withheld by the State Attorney's Office without comparing the "notes" with the final product and without discussing in detail what each withheld document was and why it was not public record. In Shevin, the Court held that

public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Shevin, 379 So. 2d at 640. The Court identified materials that were not public records and those which are: "Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business." Id. All such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted by the Legislature. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

If the withheld notes written by the prosecutor were intended as "final evidence of the knowledge to be recorded," State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), then those notes are public records; if the prosecutor's notes "supply the final evidence of knowledge obtained in connection with the transaction of official business," id., then those notes are public records. A record "merely prepared for filing," is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." Orange County v. Florida Land Co., 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing Shevin). Even if never circulated as inter-office memoranda, the notes at issue here may fall into

this category. The notes at issue were made a part of the State Attorney's file on Mr. Arbelaez's case. The inclusion of these notes into the State Attorney's files evinces the intent of the attorney preparing them to perpetuate the existence of the knowledge contained therein. Moreover, if the information contained in the "handwritten notes" contains Brady material, the information must be disclosed notwithstanding that the notes may not be public records or are exempt under Chapter 119. Walton, 634 So. 2d at 1062.

If the notes are "mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the notes are not public records. Shevin; Kokal. However, the determination of whether a record is a public record is a factual determination that can be made only when the party withholding the records provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge contained in the notes or draft, thus a public record. Only by comparing the draft/notes with the final version can the court make the determination that the draft or notes are not public record. In this case, the State did not provide the lower court with these records, and thus the in camera inspection was but a rubber stamping of the prosecutor's withholding of the notes from Mr. Arbelaez.

ARGUMENT V -- STATE COERCION

Mr. Arbelaez returned to the United States from Colombia because the Government deceived him into returning so they could close this case. It was no secret to law enforcement officers involved in this case that Mr. Arbelaez suffered from a severe mental disease, yet the government took advantage of Mr. Arbelaez' mental infirmities when psychologically coercing him to return to the United States from Colombia. Officers from the Miami Police Department and the United States Embassy in Bogota repeatedly telephoned Medellin and on occasion spoke to either Mr. Arbelaez or his family members. During these numerous contacts, law enforcement assured Mr. Arbelaez and his family that they wanted to help him with the situation. They also assured him they would keep the matter "confidential," as requested by Mr. Arbeleaz.

By "befriending" Mr. Arbelaez, law enforcement were able to convince a brain damaged and mentally retarded Mr. Arbelaez to board a plane on his own and return to Miami in order to confess to this crime. By "befriending" Mr. Arbelaez' family members, the law enforcement engaged in psychological deception so that the family was convinced that the law enforcement officers who were calling wanted to "help" Mr. Arbelaez.

In a taped telephone conversation between police and Mr. Arbelaez' brother, Jorge Arbelaez in Columbia, Detective Cadavid said he wanted to pave the way to help Mr. Arbelaez to return to the United States. Cadavid said he wanted to help arrange Mr.

Arbelaez' travels papers, such as his visa and passport, and if Mr. Arbeleaz turned himself in, everything would be fine. After Jorge Arbelaez mentioned his brother's psychiatric problems and the fact that he had spent time in a mental hospital, Cadavid said he was very interested in the psychiatric evidence about Mr. Arbelaez and would help him present it to a judge because it would greatly help Mr. Arbelaez' case. But, when Cadavid provided his mailing address in the United States for the psychiatric records, he failed to say that it was the Miami Police Department.

The police records are replete with instances where Mr. Arbelaez' mother telephoned the City of Miami Police Department from Columbia in an effort to learn how her son was doing after his arrest and whether he was taking his medication. When she questioned Sgt. Eddie Martinez about her son's case, Martinez told her he was only a "mediator" who provided information to the Court. He then gave his address to Mrs. Arbelaez so she could send her son money.

The records also indicate that after his arrest and while in the Dade County Jail, Mr. Arbelaez repeatedly asked Martinez legal questions about his case, such as what does Miranda mean, how does an insanity plea work, and how much time would he serve in prison. Mr. Arbelaez repeatedly asked the police to visit him while he was in jail and do favors for him, such as bring him clothing and cigarettes, and pick up his paycheck from his last place of employment. The police complied.

This information was never presented to the judge or jury during either the guilt or penalty phases of Mr. Arbelaez's capital trial despite its availability at the time. Either the State failed to disclose the information or defense counsel unreasonably failed to investigate and present it. In either event, no adequate adversarial testing occurred at either phase of Mr. Arbelaez's capital trial. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The government's actions in this case "shock the conscious" and rise to the level of a due process violation. Rochin v. California, 342 U.S. 165 (1952). In engaging in long-distance coercion of Mr. Arbelaez, the government's actions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Id. at 169 (citation omitted). "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are `so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . or are `implicit in the concept of ordered liberty." Id. See also Sherman v. United States, 356 U.S. 369, 382 (1958) (Frankfurter, J., concurring in the result). Because of the actions of the government, Mr. Arbelaez was effectively coerced into returning to the United States so that a confession could be obtained. An evidentiary hearing is warranted to the extent that trial counsel failed to litigate and present this issue.

ARGUMENT VI -- NO IMPARTIAL JURY

Mr. Arbelaez' trial counsel struck potential jury David Kelley using one of his peremptory challenges, but later changed his mind and agreed that Mr. Kelley could sit as an alternate juror (R. 258, 267). Counsel's acquiescence in conceding to a juror who was earlier struck constituted deficient performance which prevented Mr. Arbelaez from having a fair and impartial jury. Strickland v. Washington, 466 U.S. 668 (1984). An evidentiary hearing is warranted.

ARGUMENT VII -- UNRELIABLE APPELLATE TRANSCRIPT

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). See also Evitts v. Lucey, 105 S. Ct. 830 (1985). A trial record should not have missing portions of the voir dire or be so incomplete and with errors that it is incomprehensible. The trial record does not reflect any significant pretrial proceedings or pretrial conferences, including the withdrawal of Public Defender Rodney Thaxton after the Mr. Arbelaez filed a motion to dismiss on March 1, 1989, a competency hearing or a penalty phase jury charge conference. In fact, there are no transcripts of any hearings which took place in this case during the period of August 1, 1988, to January 28, 1991 -- a three year period of time.[15] With the record provided, it is impossible to

[15]According to the Clerk's minutes, proceedings were held in this case on the following dates: April

know what actually occurred. Additionally, numerous pages of the trial transcript are missing from the record, including pages 94, 95, 97, 103, 104, 109 through 189 and 974 are missing from the trial transcript.

Because the record in this case is incomplete, inaccurate, and unreliable, confidence in the record is undermined. As it was trial counsel's duty to raise this issue on appeal, and trial counsel was ineffective for failing to do so, this claim is proper under rule 3.850. An evidentiary hearing is warranted.

ARGUMENT VIII -- GRUESOME PHOTOGRAPHS

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. These included photographs of the victim's body taken at the scene of the crime (R. 310-316). The admission of these photographs permitted the state to elicit the passion of the jurors by shocking them with graphic pictures and inflaming their passions. The probative value of these photographs was not only outweighed by their

---

28, 1988; April 29, 1988; May 3, 1988; September 2, 1988; September 14, 1988; October 6, 1988; October 18, 1988; November 14, 1988; January 18, 1989; February 21, 1989; June 5, 1989; September 22, 1989; October 3, 1989; December 11, 1989; January 22, 1990; January 23, 1990; January 26, 1990; January 31, 1990; March 12, 1990; May 29, 1990; September 5, 1990; December 14, 1990; January 3, 1991; January 9, 1991; January 23, 1991; February 4, 1991; and February 6, 1991. These proceedings were never transcribed for appellate purposes.

prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses. Defense counsel's failure to object constituted prejudicially deficient performance, and an evidentiary hearing is warranted.

ARGUMENT IX -- FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. AUTOMATIC AGGRAVATOR.

Mr. Arbelaez' jury was unconstitutionally instructed to consider an automatic aggravating factor: "committed while he was engaged in the commission of the crime of kidnapping" (R. 1050). The use of the underlying felony -- kidnapping -- as a basis for any aggravating factor, rendered that aggravating circumstance "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). See also Blanco v. State, 706 So. 2d 7, 12 (Fla. 1998) (Anstead, J., specially concurring). Due to the outcome of the guilt phase, the jury's consideration of automatic aggravating circumstances served as a basis for Mr. Arbelaez' death sentence, as even the trial judge that "the aggravating factor that the capital felony was committed in the course of the kidnapping was proven because the jury found you guilty of the kidnapping" (2d Supp. R. 9).

Trial counsel's failure to object, which is a cognizable claim in Rule 3.850, see, e.g., Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995), constituted ineffective assistance, and an evidentiary hearing is warranted, as no tactical reason existed for failing to object.

B. HEINOUS, ATROCIOUS, AND CRUEL INSTRUCTION.

The trial court instructed Mr. Arbelaez' jury on the "heinous, atrocious and cruel" aggravator. The State failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this aggravating circumstance. Because the aggravating circumstance did not apply as a matter of law, it was error to submit it for the jury's consideration. Stringer v. Black, 112 S. Ct. 1130 (1992); Archer v. State, 613 So. 2d 446 (Fla. 1993); Kearse v. State, 662 So. 2d 677 (Fla. 1995).

Moreover, the instruction on HAC provided to the jury violated the Eighth Amendment because it was unconstitutionally vague. Godfrey v. Georgia, 446 U.S. 420 (1980). See also State v. Breedlove, 655 So. 2d 74 (Fla. 1995); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). To the extent that Mr. Arbelaez' counsel failed to adequately object to the jury instruction at issue, Mr. Arbelaez did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984).

Judge Rothenberg summarily denied this claim on the basis that it was procedurally barred, or in the alternative, that the claim was without merit since trial counsel could not be faulted for failing to provide effective assistance since Espinosa v. Florida, 112 S. Ct. 2929 (1992), was not decided at the time of Mr. Arbelaez' original trial. However, this Court has held that a legal basis existed as early as 1978 for alleging an Eighth Amendment violation as to the HAC instruction. State v. Breedlove. See also James v. State, 615 So. 2d 668 (Fla. 1993). An evidentiary hearing is warranted.

C. COLD, CALCULATED, AND PREMEDITATED INSTRUCTION.

The trial judge instructed Mr. Arbelaez' sentencing jury that when considering aggravating circumstances it could consider that "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (R. 1050). This jury instruction violated the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420 (1980); Jackson v. State, 648 So. 2d 85

(Fla. 1994). The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder (R. 928), which, as this Court has held, does not establish the "cold, calculated and premeditated" aggravating factor. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). To the extent that Mr. Arbelaez' counsel failed to adequately object, Mr. Arbelaez did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing was required.

D. UNCONSTITUTIONALLY VAGUE STATUTORY LANGUAGE.

At the time of Mr. Arbelaez' sentencing, the language of § 921.141 (5), Fla. Stat. (1991), which defined the "cold, calculated and premeditated," "heinous, atrocious, or cruel," was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980); Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). To the extent that Mr. Arbelaez' counsel failed to adequately object, Mr. Arbelaez did not receive effective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing was required.

E. EDDINGS/LOCKETT ERROR.

The proceedings resulting in Mr. Arbelaez' sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). Limited evidence was presented showing Mr. Arbelaez' history of epileptic attacks, which rendered him unconscious on numerous occasions, and with uncontrollable shaking. State witnesses testified they had seen Mr. Arbelaez nervous and trembling on

numerous occasions, and after an epileptic attack, Mr. Arbelaez typically did not remember what had occurred (R. 430-432).

Judge Rothenberg summarily denied this claim on the basis that Mr. Arbelaez' epilepsy "was argued by the Defendant's trial counsel, considered by the trial [c]ourt and raised on direct appeal. Therefore the Defendant's claim is both procedurally barred and without merit." (R. 22) As illustrated above, the issue of Mr. Arbelaez' illness was not effectively argued, particularly concerning the issue of intent. Had it been, the trial court would have had to find this evidence in mitigation. To the extent that counsel inadequately failed to litigate this issue at trial, Mr. Arbelaez was denied effective assistance of counsel.

F. CALDWELL ERROR.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Caldwell v. Mississippi, 472 U.S. 320 (1985). Throughout Mr. Arbelaez's case, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. During jury selection, the State told the potential jurors that the judge "will be asking for a recommendation, if we get that far" (R. 131). As to sentencing, however, the jury was told it merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for

first-degree murder. The Court repeatedly informed the jurors that the Court had the "final decision" for deciding whether Mr. Arbelaez would be sentenced to death. These comments violated Caldwell and the Eighth Amendment, and defense counsel's failure to object as ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). An evidentiary hearing is warranted.

G. BURDEN SHIFTING.

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)(emphasis added). This standard was not applied at Mr. Arbelaez's penalty phase, and counsel failed to object to the court and prosecutor improperly shifting to Mr. Arbelaez the burden of proving whether he should live or die. Mullaney v. Wilbur, 421 U.S. 684 (1975). Relief is warranted.

ARGUMENT X -- RULE 3.851

On January 1, 1994, Rule 3.851 of the Florida Rules of Criminal Procedure went into effect. Under this rule capital defendants are allowed one year from the date their conviction becomes final to file a motion to vacate his Judgement and Sentence under Rule 3.850 of the Florida Rules of Criminal Procedure. Rule 3.851, which sets out this time requirement, is unconstitutional on its face and in its application since it denied Mr. Arbelaez due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Rule 3.851's time requirement also violates

Article I, §§ 2, 13 and 21 of the Florida Constitution. Relief is warranted.

ARGUMENT XI -- DEATH PENALTY UNCONSTITUTIONAL

Florida's death penalty scheme is unconstitutional on its face and as applied to Mr. Arbelaez. Execution by electrocution constituted cruel and unusual punishment under the Florida and United States Constitutions. Mr. Arbelaez hereby preserves any arguments as to the constitutionality of the death penalty, given this Court's precedent.

ARGUMENT XII -- INNOCENCE OF THE DEATH PENALTY.

Where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850, Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991), and that innocence of the death penalty constitutes a claim. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Arbelaez' trial court relied upon three aggravating circumstances to support his death sentence: (1) heinous, atrocious, or cruel; (2) cold, calculated, and premeditated; and

(3) the crime was committed during the course of a kidnapping. As noted in this brief, however, the jury was given unconstitutionally vague instructions on two of the aggravating circumstances relied upon by the judge to support Mr. Arbelaez' death sentence: (1) cold, calculated, and premeditated; and, (2) heinous, atrocious, and cruel. The third aggravator constituted an unconstitutional automatic aggravating factor, and is insufficient standing alone to establish death eligibility. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Relief is warranted.

ARGUMENT XIII -- JUROR INTERVIEWS PROHIBITED

Florida Rule of Professional Conduct 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Arbelaez' ability to allege and litigate constitutional claims that would show that his conviction and sentence of death violate the United States Constitution. Moreover, because of this prohibition, Mr. Arbelaez is prevented from discovering information which could warrant a new trial and which will be procedurally barred if not investigated now. Buenoano v. State, 708 So. 2d 941 (Fla. 1998).

Florida's rule prohibiting Mr. Arbelaez' counsel from contacting his jurors violates Mr. Arbelaez' rights under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It also denies him access to the courts of this state in violation of Article I, § 21 of the Florida Constitution and the federal courts in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. This

Court must grant relief or rule that this Rule is unconstitutional.

CONCLUSION

Mr. Arbelaez submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, an evidentiary hearing should be ordered.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 23, 1998.

TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCRC
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Appellant

Copies furnished to:

Fariba Komeily
Assistant Attorney General
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131