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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

A. PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL.

1. Affidavits and Failure to Accept Allegations as True.

The lower court summarily denied Mr. Arbelaez's claim that his trial counsel rendered prejudicially deficient performance at the penalty phase because, in the view of the lower court, the allegations about what mitigation was available and what mental health experts would say if called at an evidentiary hearing were "unsubstantiated" and "unsupported" by affidavits (PC-R. 360-61). See, e.g. PC-R. 360 ("This Court notes that there are no Affidavits by these `health professionals' attached to the Defendant's motion, and that no names were provided in the Defendant's Motion"); PC-R. 361 (Mr. Arbelaez is "not one who suffers from retardation as claimed but unsubstantiated by the Defendant"). Appellee's only justification for this plain error is that the lower court's statements about the lack of affidavits were made "in the context of not being provided with the identity of the alleged witnesses who would support appellant's proffer, which was otherwise purely conclusory in nature and legally insufficient" (Answer Brief at 5).

Appellee's argument is most significant for what it does not mention, *i.e.*, this Court's opinion in Valle v. State, 705 So. 2d 1331 (Fla. 1997). In Valle, the Court made it explicitly 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." Id. at 1334. Appellee's failure to address Valle is understandable only to the extent that Appellee has no cogent argument to meaningfully distinguish Valle from the instant case, where the lower court clearly denied these allegations because there were no supporting affidavits.

The lower court's reference to the "unsubstantiated" allegations and the concomitant need for supporting affidavits reflects an even more serious problem, that being that the lower court failed to accept Mr. Arbelaez's allegations as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). For example, despite Mr. Arbelaez's repeated allegations that examinations of his I.Q. revealed a result of 67 (PC-R. 49; 5253),[1] the lower court flatly rejected the allegations, concluding instead that

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[1]In the first footnote of its brief, Appellee asserts;

> Please note that appellant alleges in his brief that his IQ is 57; however, in Claim V of his amended motion, appellant indicated that his IQ is 67 (PC-R I, 49).

(Answer Brief at 16). Mr. Arbelaez acknowledges that a typographical error occurred whereby one time the IQ was referred to as 57 rather than 67. See Initial Brief at 27. If this were the only time that the IQ was mentioned, however, perhaps Appellee's counsel could have a point regarding the inconsistency. However, Appellee fails to "note" that the Initial Brief mentions that Mr. Arbelaez's IQ was tested to be 67 no less than *five times*. See Initial Brief at 11; 24 n.6; 29; 30; 32. The undersigned would have gladly corrected the error in a corrected brief had Appellee's counsel brought this obvious typo to his attention. Had Appellee acknowledged that the reference to 57 was clearly a mistake, this footnote would have been unnecessary.

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" (PC-R. 361) (emphasis added). How the lower court judge, who was not the same as the trial judge, could make such a determination without ever physically seeing Mr. Arbelaez, let alone permitting any evidence to be adduced, remains unexplained. The bottom line is that the lower court failed to apply the law and improperly summarily denied the claim.

2. Sufficiency of the Allegations.

a. Mental Health Allegations.

Appellee concedes that in his Rule 3.850 motion, Mr. Arbelaez alleged that "he has obtained the services of mental health experts, who have examined him and are now prepared to testify to various mitigating circumstances, in particular that appellant suffers from epilepsy, brain damage and mental retardation, that is, he has an I.Q. of 67" (Answer Brief at 25-26). However, Appellee asserts as a proper basis for summary denial that Mr. Arbelaez "failed to state who those experts were and that they were available and willing to testify at the time of trial" (Answer Brief at 26).

As to the allegation that Mr. Arbelaez "failed to state who those experts were," this is an improper basis for summary denial. Valle. The State utterly fails to explain how the name of the expert used in postconviction would somehow transform the

allegations he made into allegations that could not be rebutted by the records such that it would make the State's opposition to an evidentiary hearing any different. If the State wanted to know the name of the doctor, then it should have sought to discover the name of the doctor. See State v. Lewis, 656 So. 2d 1248 (Fla. 1994). The allegations made by Mr. Arbelaez are no different than those which warranted an evidentiary hearing in numerous recent cases. See, e.g. Ragsdale v. State, 720 So. 2d 203 (Fla. 1998); Rivera v. State, 717 So. 2d 477 (Fla. 1998).

Moreover, Mr. Arbelaez did allege the name of the expert who trial counsel contacted yet failed to properly prepare and use at the penalty phase:

> In Mr. Arbelaez's case, the overwhelming evidence of severe mental health disabilities should have been presented to the judge and jury charged with the responsibility of whether he should live or die. This evidence was readily available, yet defense counsel inexplicably and without a tactic or strategy failed to investigate its existence and present it. Had defense counsel prepared for the penalty phase in advance of the guilt verdict, retained an expert and provided that expert with the necessary materials and documents, including independent corroboration of Mr. Arbelaez's mental history and family background, substantial mental mitigating evidence, statutory and nonstatutory, could have been presented. Without this information, the jury was incapable of assessing the proper penalty and rendering an individualized determination as to the proper sentence in this case. No adversarial testing occurred.
>
> 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, 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 would also have been able to testify to substantial mitigating evidence. However, counsel never contacted Dr. Haber after her initial examination of Mr. Arbelaez. A hearing is warranted.

(PC-R. 51-52). It is evident from the allegations that they not only identified Dr. Haber by name, but that they specified that she had examined Mr. Arbelaez, had not been contacted by substitute counsel, and had not been provided with adequate background information. These allegations are more than sufficient under Rule 3.850 and cannot support a summary denial. Valle; Ragsdale; Rivera.[2]

Appellee's argument that "appellant has not alleged that Dr. Haber would testify any differently than Dr. Castiello would have if called" (Answer Brief at 28), is indefensible. Dr. Castiello

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[2]Although devoting a number of pages to its argument regarding Dr. Haber, the Appellee makes no attempt to explain or defend the lower court's failure to even mention the allegations in Mr. Arbelaez's Rule 3.850 motion regarding Dr. Haber and trial counsel's failure to contact her and to have her testify at the penalty phase.

did not testify at Mr. Arbelaez's penalty phase. Dr. Castiello performed a pretrial evaluation regarding sanity and competency, and was never called to testify at any proceeding. How is Mr. Arbelaez supposed to allege that Dr. Haber would have testified "differently" from a witness who was never called to testify? This argument is simply frivolous, and highlights the lengths that the State will go to defend a clearly indefensible summary denial.

Both the lower court (PC-R. 361), and the Appellee (Answer Brief at 26-27), rely on a report by Dr. Castiello as establishing the legal insufficiency of Mr. Arbelaez's allegations. Any reliance on Dr. Castiello is misplaced because not only did Castiello never testify in Mr. Arbelaez's case, he only evaluated Mr. Arbelaez for sanity and competency.[3] See R.

[3]Appellee asserts that Mr. Arbelaez's allegations that his IQ has been tested at 67 "is in conflict with Dr. Castiello's conclusions as to appellant's mental functioning" (Answer Brief at 27). However, all that Dr. Castiello found was that Mr. Arbelaez was functioning at a "low average intellectual capacity" (PC-R. 237). His report is silent as to what, if any, IQ testing he conducted, or whether his conclusion was simply based on clinical impressions gleaned from his interview (the length of which is also not reported by Dr. Castiello). In fact, the 3.850 motion alleged that the 67 IQ "was never presented to the jury because Mr. Arbelaez was never tested" (PC-R. 52). Moreover, as explained infra, Dr. Castiello's report was extra-record, and thus to the extent that the State argues that it rebuts the allegations, an evidentiary hearing must be afforded as the State has chosen to refute the allegations in the motion. This is not a case where "new mental health experts disagree" with those presented at trial, as Appellee argues (Answer Brief at 27), nor did trial counsel "rely" on Dr. Castiello for

93; 99-100. This is the *exact* same argument raised by the State in Ragsdale and soundly rejected by the Court:

> In finding that an evidentiary hearing was unwarranted on this issue, the trial court concluded that this issue was without merit because the record reflected that a motion to appoint a mental health expert was filed and an order appointing such an expert was issued. According to Ragsdale, however, that expert was appointed solely for the purpose of determining competency to stand trial, and no expert was appointed to evaluate Ragsdale for the purposes of presenting mitigating.

Ragsdale, 720 So. 2d at 208. The Court went on to reverse and remand for an evidentiary hearing on this issue.

Further highlighting the error in relying on Dr. Castiello's competency/sanity evaluation is the fact that Dr. Castiello's report does not appear to have been part of the original record; it was attached to the State's response to Mr. Arbelaez's Rule 3.850 motion. See PC-R. 236-39. Thus, not only does the report in no way rebut the allegations, it is not a part of the "record" for purposes of Rule 3.850, and any reliance by the lower court and the State on such non-record information defeats any argument that an evidentiary hearing is not warranted. See, e.g., Clark v. State, 491 So. 2d 545 (Fla. 1986).

Any reliance on the testimony of Dr. Lopez to rebut the allegations in the 3.850 motion is also misplaced. Dr. Lopez testified briefly at the penalty phase about his prior treatment

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anything (Id.). Dr. Castiello was never called to testify.

of Mr. Arbelaez for epilepsy. However, not only was Dr. Lopez unable to provide any updated information about Mr. Arbelaez's condition because he had not seem him for over two years before the crime took place,[4] he was not asked about, nor was he a competent witness to testify about, neuropsychological issues, retardation, or the existence of statutory mitigating circumstances. This should be contrasted with the allegations in the Rule 3.850 motion, which alleged that Mr. Arbelaez was evaluated by competent experts with all available information who diagnosed Mr. Arbelaez not only with epilepsy, but also severe organic brain damage and mental retardation (PC-R. 52), and that at a hearing, expert testimony "would explain how the relevant mental health mitigating circumstances apply to Mr. Arbelaez, including the IQ of 67" (PC-R. 53). Moreover, Dr. Haber, who was initially consulted on the case but never contacted by substitute counsel, would also have been able to testify to "substantial mitigating evidence" had she been contacted and provided with adequate time and background materials (PC-R. 52).

b. Family Member Allegations.

Appellee regurgitates the boilerplate complaint made in numerous cases such as Rivera, Valle, and Ragsdale, that the lower court's order was correct because Mr. Arbelaez failed to allege "who these witnesses were and their willingness and

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[4]The lower court conceded this point. See PC-R. 356.

availability to testify" (Answer Brief at 29). As explained supra, the actual names of the family members is not a pleading requirement under Rule 3.850 and Valle such that a summary denial can be sustained.

Moreover, the assertion that the Rule 3.850 motion failed to allege that the willingness and availability of the family members to testify is *flatly false*. Mr. Arbelaez's Rule 3.850 alleged:

> Had defense counsel contacted Mr. Arbelaez's 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's background or contact the readily-accessible family members who wanted to help. When family members would call defense counsel asking what they could do, their calls went unreturned. Mr. Arbelaez's family members were willing and ready to travel to Miami to help Guillermo, and the court indicated that counsel simply needed to ask for funds for the family (2d Supp. R. 964). However, no request was made, no family members testified, and the sentencing jury was kept in the dark about they man they were sentencing to death. No tactical or strategic reason exists for these omissions. This is prejudicially deficient performance.

(PC-R. 54) (emphasis added).

Furthermore, the *nineteen page family history* alleged in the 3.850 motion identified the names of Mr. Arbelaez's mother and father as Jorge and Margarita (PC-R. 54), his oldest brother Juan Manuel (PC-R. 59), his sister Rosita (PC-R. 60), another sister Lucero (PC-R. 61), his oldest sister Gloria (PC-R. 62), the

youngest brother and sister Maria Victoria and Jairo (PC-R. 62), his grandmother Maria (PC-R. 65), another brother Oscar (PC-R. 66), another brother Javier (PC-R. 68), two priests named Father Javier Jaramillo and Father Jairo Jaramillo (PC-R. 68), and yet another sister Marta Elena (PC-R. 71). The notion that the State and the lower court were unaware "who the witnesses were" is simply unsupported by Mr. Arbelaez's Rule 3.850 motion.

Appellee asserts that the claim was properly summarily denied because "[t]he trial court found three aggravating circumstances" (Answer Brief at 30), and some mitigation was presented (Answer Brief at 31-35). Appellee argues that "[t]his case is similar to Thompkins [sic] v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989)" (Answer Brief at 36). Of course, in Tompkins, the lower court conducted an evidentiary hearing on the allegations before concluding that, although counsel's performance was constitutionally deficient, no prejudice had been established. Tompkins, 549 So. 2d at 1372-73. While it is true that defense counsel presented limited mitigation testimony at the penalty phase in this case, this case is like Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), where the Court found prejudice despite a *unanimous death recommendation* and that "Hildwin's trial counsel did present some evidence in mitigation at sentencing" but that it was "quite limited." Id. at 110 n.7.

This Court has often found prejudice despite the presentation of limited mitigation at the penalty phase. For

example, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), the Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290. Of course, the State below acknowledged at the Huff hearing that the allegations concerning Mr. Arbelaez's family history were far more detailed than that which was presented at trial (T. 9/12/96 at 8 ("Character evidence was presented by the friend who testified. [Mr. Arbelaez] himself testified a little bit to the family background. Not to the extent the generic family would have testified to ...").

Moreover, the existence of other aggravating factors is not determinative in assessing prejudice, particularly where there has been no evidentiary hearing. In cases such as this, where trial counsel failed to present available substantial mitigation, particularly compelling mental health mitigating factors, the Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, 675 So. 2d 567 (Fla. 1996) (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented [at the penalty phase]); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence");

Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). The Court has also granted relief based on penalty phase ineffective assistance of counsel when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994).

The evidence alleged in Mr. Arbelaez's Rule 3.850 motion is identical to that which established prejudice in these cases, and Mr. Arbelaez is similarly entitled to relief, or at a minimum, an evidentiary hearing. Reversal is warranted.

B. TRIAL COUNSEL'S FILES.

Appellee concedes that the sole basis for the State's request for trial counsel's files prior to a determination of the need for an evidentiary hearing was "to investigate the veracity of the claims in the postconviction motion" (Answer Brief at 41). However, ***in total contravention of the State's representations below,*** the State now has changed the argument:

> [b]y having defense counsel's files prior to filing its response to the postconviction motion, the State would be in a far better position to assess the claims raised in the motion. Whereas the State might otherwise argue for summary denial because it believes that the record refutes the claim, it might agree to an evidentiary hearing based on information in the file.

(Answer Brief at 43). This is typical of the State's gamesmanship in these proceedings, arguing one thing below, then, on appeal, arguing something totally different. And in the face of these ever-changing positions, the State asserts that Mr. Arbelaez is the one who has failed to prove that "he would suffer" from an adverse ruling (Answer Brief at 43). It is very difficult to adequately address an argument that changes depending on which representative of the State is making it.

The Appellee never directly addresses the outrageous arguments leveled at collateral counsel by Assistant State Attorney Penny Brill, who *directly, and in total contravention of what the State's appellate counsel has argued*, stated explicitly below that **"we are not asking for the records for the purpose of trying to refute the claim prior to the evidentiary hearing**" (T. 9/12/96 at 9) (emphasis added). Rather, Brill expressly threatened an investigation into the truthfulness of the allegations pled in the Rule 3.850 motion, stating that "if they are not true and correct and demonstratively proved to be true and correct, **the State has certain decisions to make whether or not there are future charges that may come out of that**," and

further threatened that 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" (Id.) (emphasis added).

Quite significantly, Appellee now agrees with collateral counsel's argument below, that Brill's accusations created a conflict of interest. Below, collateral counsel argued:

> If the State has any information or belief that the truthfulness of the allegations is suspect or questionable, then they need to bring that to the proper forum. Doing so at this point creates 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 6) (emphasis added). The undersigned gladly accepts the reversal of the State's position, which now is that "the State would agree that a conflict could exist if a prosecutor sought to simultaneously litigate the postconviction motion and investigate the defendant and/or counsel for perjury" (Answer Brief at 45). Given this concession, it is clear that the lower court erred in ordering disclosure of the files to allow the State to investigate collateral counsel and/or Mr. Arbelaez for crimes.

The Appellee's argument that "it is extremely unlikely" that prosecutors would be "motivated to simultaneously litigate a

3.850 motion and investigate the defendant's veracity of the allegations so as to create a conflict of interest" bears brief mention. While collateral counsel would hope that prosecutors would not abuse their authority as Assistant State Attorney Brill did in this case, unfortunately this very same conduct is not isolated to Mr. Arbelaez's case. In fact, the very same prosecutor leveled identical accusations at the undersigned counsel in another case currently pending before this Court, Patton v. State, No. 89,669. In that case, Brill made the same perjury arguments, but the lower court rejected them and refused to order disclosure of trial counsel's files following the summary denial of Mr. Patton's Rule 3.850 motion. Brill filed a cross-appeal of the issue, but the State waived the issue when it failed to brief it on appeal, apparently recognizing the correctness of the lower court's ruling in the case. See Answer Brief of Appellee, Patton v. State, No. 89,669. Obviously, the "extreme unlikeliness" of this unfortunate display of prosecutorial abuse of power and authority is not limited to Mr. Arbelaez's case, and thus the Court should make it clear that under Reed v. State, 640 So. 2d 1094 (Fla. 1994), while trial counsel's files can be subject to disclosure prior to an evidentiary hearing, such disclosure should not be mandated unless and until an evidentiary hearing is ordered. To hold otherwise would be to give the State free reign to baselessly accuse, threaten, and investigate collateral counsel as was done

in this case and in Patton. This is the "harm" that would ensue if prosecutors are allowed access to these files for no other purpose than to conduct an inquisition of collateral counsel and/or their death-sentenced clients.[5]

C. JUDICIAL DISQUALIFICATION.

Appellee faults Mr. Arbelaez for not indicating "why he could not attend the hearing" in question (Answer Brief at 38). Mr. Arbelaez's motion to disqualify stated that he did not become aware of the hearing until 4:30 in the afternoon on the day prior to the hearing, which was set for 9:00 am the following morning (Supp. PC-R. 163). At that time, Mr. Arbelaez's counsel was located in the CCR office in Tallahassee, and simply was unable to make the necessary arrangements --at State expense-- to immediately fly down to Miami for a hearing about which he had obtained no written notice. Moreover, the reason why he could

[5] Were the Court to agree with the State's position, a slippery slope would surely be created, for then the State should be obligated to disclose its work product and its notes to collateral counsel on demand without hiding such information under the cloak of privilege. Just as prosecutors, as officers of the court, would have an alleged obligation to ensure that allegations in a Rule 3.850 motion are true, then so should collateral counsel, also officers of the court, have an opportunity to challenge and investigate whether, for example, assertions by the State that no Brady material is being withheld in their "work product" documents that they do not disclose under Chapter 119. The easiest remedy is to only allow the State access to trial counsel's files if an evidentiary hearing is granted, which Mr. Arbelaez submits is what Reed really says.

not attend does not vitiate what occurred.

Appellee concedes "Judge Rothenberg's public pro-prosecution judicial campaign and her prior employment as a senior prosecutor," but alleges that "this claim was not timely filed" because more than ten days elapsed between the time counsel became aware of Judge Rothenberg's assignment to the case (on March 14, 1996) and the time the motion was filed (on March 27, 1996) (Answer Brief at 36). However, the fact that the court and the State in fact had a hearing was not brought to collateral counsel's attention until March 20, 1997, when he received a letter from Assistant State Attorney Sally Weintraub which indicated that the hearing was not simply re-set, as collateral counsel had requested, but rather took place outside his presence (Supp. PC-R. 164). Thus Mr. Arbelaez's motion to disqualify, which alleged both bases for disqualification, was timely. If the motion to disqualify alleged only the open pro-prosecution judicial campaign of Judge Rothenberg as the sole basis for disqualification, perhaps Appellee's time argument would be persuasive. However, the main thrust of the motion was that an *ex parte* hearing occurred, and that ground was clearly alleged in a timely fashion.

Appellee argues that "[h]ad counsel been the least bit diligent, he could and should have determined" that his case was pending before Judge Rothenberg. However, Mr. Arbelaez was tried and sentenced by Judge Kornblum, who was still an active circuit

court judge in Dade County, and Mr. Arbelaez's counsel had no reason to believe or investigate the matter.

The grounds alleged in the motion to disqualify are clearly grounds which create a reasonable fear to Mr. Arbelaez that Judge Rothenberg could not be fair and impartial. As to the Appellee's claim that "mere allegations that a trial court is tough on crime are legally insufficient," Mr. Arbelaez would point out that his allegations were not simply that Judge Rothenberg was "tough on crime" but that her judicial campaign evinced such a clear pro-prosecution bent that even the Florida Association of Criminal Defense Lawyers urged the chief judge to assign Judge Rothenberg to the civil bench due the perception that she could not be fair and impartial in criminal cases (Supp. PC-R. 165-66). Mr. Arbelaez's fears are clearly reasonable. See, e.g. Porter v. State, 23 Fla. L. Weekly S548 (Fla. Oct. 15, 1998); Thompson v. State, ___ Fla. L. Weekly S___ (Fla. Dec. 24, 1998).

Even if the Court determines that Judge Rothenberg was correct in not recusing herself, Mr. Arbelaez submits that if the Court does determine that an evidentiary hearing is warranted in the case, the Court should instruct that the hearing be conducted before the original trial and sentencing judge, Judge Kornblum, who is far more familiar with this case then Judge Rothenberg.

D. FAILURE TO OBJECT.

In his Rule 3.850 motion, Mr. Arbelaez alleged that trial counsel was prejudicially deficient in failing to object to a

number of constitutional issues, such as the use of an automatic aggravating circumstance (Initial Brief at 65), the jury instruction on the heinous, atrocious, or cruel aggravating circumstance (Initial Brief at 66), the jury instruction on the cold, calculated, and premeditated aggravating circumstance (Initial Brief at 67), the vague statutory language of 921.141 regarding aggravating circumstances (Initial Brief at 68), Eddings/Caldwell error (Initial Brief at 68-69),[6] Caldwell error (Initial Brief at 69),[7] and the shifting of the burden regarding weighing of aggravating and mitigating circumstances (Initial Brief at 70). The Appellee argues that the lower court properly found a procedural bar because the issues were not raised at trial or on appeal, and that the claims are improperly raised as ineffective assistance of counsel claims.

The lower court and the Appellee are wrong. As Justice Pariente, while on the Fourth District Court of Appeals, recently wrote: "trial counsel's failure to object to reversible error, while waiving the point on direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel". Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995). While an ineffectiveness challenge to trial counsel's failure to object may not ultimately be successful

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[6] See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

[7] See Caldwell v. Mississippi, 472 U.S. 320 (1985).

under the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984), that does not mean that such a challenge is not cognizable in postconviction, as the Davis court correctly recognized. Any procedural bar would therefore not be consistently applied.

CONCLUSION

Mr. Arbelaez submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Arbelaez relies on the arguments set forth in his Initial Brief and on the record.

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 January 28, 1999.

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