IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,223

MICHAEL GEORGE BRUNO, SR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of relief pursuant to Fla. R. Crim. P. 3.850 following an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

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

"Supp. PC-R.__" - supplemental record on appeal to this Court;

"T.__" - transcripts of hearings conducted below.

"PC-M.__" - the postconviction motion filed by Appellant on July 26, 1993.

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Bruno has been sentenced to death. Given the seriousness of the claims involved and the stakes at issue, Mr. Bruno, through counsel, urges that the Court permit oral argument.

STATEMENT OF FONT

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STATEMENT OF THE CASE AND FACTS

Mr. Bruno was indicted on September 11, 1986, on one count of first degree murder and one count of armed robbery with a firearm (R. 960). The guilt phase was held August 5, 1987 through August 11, 1987 (R. 125-783). After a two day deliberation, the jury returned a guilty verdict on both counts (R. 777-780). After a sentencing hearing, R. 783-917, the jury recommended death by an 8-4 vote (R. 913), and the trial judge imposed death (R. 931-955, 1102-1103). This Court affirmed Mr. Bruno's conviction for first-degree murder and his sentence of death, but vacated the robbery sentence. Bruno v. State, 574 So. 2d 76 (Fla. 1991), cert. denied, 112 S. Ct. 112 (1991).[1]

Mr. Bruno filed a Rule 3.850 motion raising, *inter alia*, substantial instances of ineffective assistance of counsel. The motion was accompanied by an appendix (PC-R. 4-68; Supp. PC-R. 1-66). The state filed a response on November 10, 1994 (Supp. PC-R. 67-165). On May 8, 1995, a reply was filed (Supp. PC-R. 166-197).

Mr. Bruno sought leave to depose trial counsel, Craig Stella, which the State opposed. The court eventually permitted the deposition noting that it was "concerned about" the allegations of Stella's drug use at the time of his representation of Mr. Bruno (T. 9).

Stella, represented by counsel, was deposed on September 21, 1995 (Supp. PC-R. 198 *et. seq*). He repeatedly invoked various privileges

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[1]The robbery sentence on remand was appealed to the Fourth District Court of Appeal, which ordered resentencing. Bruno v. State, 596 So. 2d 1205 (Fla. 4th DCA 1992).

and refused to answer any questions about his drug and alcohol use during the time he was representing Mr. Bruno unless the State immunized him or immunity was obtained from the Supreme Court (Id. at 221; 227; 228; 229; 233; 234; 235; 236; 248; 249; 261). At a hearing on a motion to compel Stella to answer the questions, the lower court gave the State a week to determine whether it would extend immunity to Stella (T. 62-63). The State eventually entered into an immunity agreement with Stella granting him limited use immunity (Supp. PC-R. 434-35), and Stella was re-deposed in order to answer the questions he had previously refused to answer (Supp. PC-R. 398-448).

A hearing was held on February 4, 1997, at which time the lower court outlined the parameters of the upcoming evidentiary hearing he had decided to allow (T. 77-90). Over the State's objection, the court granted an evidentiary hearing on all the claims in the 3.850 motion because he "would rather have the evidentiary hearing first then deal with those matters before I prepare an order whether or not the defendant is actually entitled to it. This way any reviewing court will know what would have come out at an evidentiary hearing" (T. 80-81).

The evidentiary hearing took place in two parts: from March 10-13, 1 997 and on August 11, 1997 (T. 103-944). Mr. Bruno submitted a post-hearing memorandum on October 10, 1997 (PC-R. 75-113). The State submitted a response on November 18, 1997 (PC-R. 114-173). The trial court entered an order on December 9, 1997, denying relief (PC-R. 174-203). A notice of appeal was timely filed (PC-R. 204-210).

SUMMARY OF THE ARGUMENTS

1. Mr. Bruno was denied an adversarial testing at all phases of his capital trial. During significant portions of the pretrial preparation period, trial counsel was abusing alcohol and cocaine to such an extent that he was hospitalized two weeks before Mr. Bruno's case was set for trial. Trial counsel, despite being armed with substantial impeachment evidence regarding numerous state witnesses, failed to use it. Trial counsel's proffered strategies were neither credible nor reasonable, nor did they comport with the facts of the case and the record. The adversarial process completely broke down at the penalty phase. Trial counsel testified that his investigator was responsible for investigating mitigation, yet the investigator testified he did no penalty phase investigation and did not even attend the penalty phase. Trial counsel did not even know that the mental health expert was going to testify that Mr. Bruno was insane at the time of the crime, and he when he did learn of it, counsel divulged privileged information to the court and the State which in essence devastated any reliance on the mental health evidence. Trial counsel also failed to object to numerous jury instructions and improper commentary and argument. Singularly and cumulatively, the errors alleged undermine confidence in the jury's guilt verdict its 8-4 death recommendation.

2. Mr. Bruno was denied his right to a competent court appointed mental health expert due to ineffectiveness of trial counsel.

3. An empirical scientific study, unavailable at the time of Mr. Bruno's capital trial, establishes that the penalty phase jury instructions in this case were unconstitutionally vague.

4. The cumulative effect of the errors in Mr. Bruno's case, coupled with the errors found on direct appeal by this Court but found to be harmless, establish that Mr. Bruno is entitled to a new trial and/or a resentencing.

ARGUMENT I -- NO ADVERSARIAL TESTING OCCURRED AT MR. BRUNO'S CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS.

In his Rule 3.850 motion, Mr. Bruno alleged that trial counsel, Craig Stella, provided prejudicially deficient performance due to a combination of his own personal problems at the time, which included cocaine and alcohol abuse resulting in his commitment to a rehabilitation center during his representation of Mr. Bruno, and a failure to adequately prepare and investigate at both the guilt and penalty phases. Given the nature of this case, given the over 26 hour guilt-phase deliberation by the jury, and the narrow 8-4 death recommendation, counsel's deficiencies singularly and cumulatively prejudiced Mr. Bruno and require that a new trial and/or a resentencing be granted. The lower court's order is rife with conclusions that are contrary to well-settled precedent on what claims are cognizable in Rule 3.850 motions, reflecting the court's lack of understanding of the proceedings and misapplication of the facts to the correct law.

A. Trial Counsel's Testimony.[2] Stella became a member of the Florida Bar in 1978 (T. 127), following which time he worked in the State Attorney's Office for about 18 months where he handled juvenile cases (T. 128-29). He then worked with various criminal defense practitioners before opening his own private

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[2]In addition to trial counsel, Craig Stella, Mr. Bruno presented Dr. Henry Dee, a neuropsychologist (T. 479-597); Dr. Jonathan Lipman, a neuropharmacologist (T. 792-873); Professor Michael Radelet (T. 354-425); Arthur Mahue (T. 760-92); and Elizabeth Bruno (T. 883-903). The State presented no mental health testimony and called only investigator Sidney Patrick (T. 904-35). Mr. Bruno will detail the full testimony of trial counsel in this section of the brief, and refer to the testimony of the other witnesses in the relevant sections of the brief.

practice which he maintained at the time of Mr. Bruno's trial (T. 130-31). Stella had an associate, Russell Adler, who "started out as a law student" and "then evolved into a full-time associate over the years" (T. 131); his role in Mr. Bruno's case was "ministerial" (T. 147). At the time of Mr. Bruno's trial in 1987, Stella had conducted "about three" first degree murder cases, but after the Bruno case, only had done one or two (T. 133).[3]

Investigator Sidney Patrick was appointed as "[t]hese cases take on a life of their own and I think it's always good to have an investigator and he can be used as little or as much as is necessary in any given case" (T. 148). Patrick was used to interview witnesses, run down bits of evidence, and check out alibis (T. 149).[4] Stella did not seek to have co-counsel appointed because he "had not heard of it being done all that frequently" but acknowledged that it is "probably a good idea to have one lawyer prepare the penalty phase and one lawyer prepare the guilt phase" because "[t]wo heads are always better than one and it allows one lawyer to focus on one set of legal circumstances and the other lawyer to focus on the other, which are equally important" (T. 146).

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[3]Stella was retained by Mr. Bruno's parents for a sum of approximately $25,000, with approximately $15,000 payment given up front (T. 142). The Brunos would send Stella $1,000 every month which came out of Mr. Bruno's father's disability pension (Id.). No contract was ever executed as "[t]hat was not my custom in practice in those days" (T. 143).

[4]Patrick's bill, introduced into evidence (T. 152), showed that he spent 31 hours on the Bruno case (T. 150).

Stella's relationship with Mr. Bruno was "[g]ood"; Mr. Bruno was "always very cordial" (T. 170-71). The focus of his efforts from the beginning was on the guilt phase because "[m]y opinion is you cannot prepare a penalty phase until you have thoroughly investigated, to the best of your ability, the guilt phase" (T. 251).

Stella felt that Mr. Bruno's statement to the police was a significant piece of evidence for the State, as well as his son's statement (T. 170), and focused on guilt issues in preparing for trial (T. 185). Trial was initially set for October 17, 1986, but Stella sought a continuance because of a motion he had previously filed to have a competency evaluation conducted on Mr. Bruno (T. 179). Stella could not recall why he had concerns about Mr. Bruno's competency (T. 179), but the motion indicated that Mr. Bruno "appears to be deteriorating and having difficulty aiding and assisting" him in preparing for trial (T. 181). Stella requested the appointment of three experts but the judge selected Dr. Stillman (T. 181). The evaluation was to encompass only competency and insanity (T. 182-84).

Stella had difficulty remembering what information, if any, he had provided to Stillman at the time, but recalled that "there may have been an issue regarding a voluntary intoxication defense for his trial. I thought that to be the - if we lost the motion to suppress, I thought that to be the most legally meritorious defense" (T. 186). Over time, Stella became concerned whether Mr. Bruno "really gets it, that he's hitting on all cylinders" and conveyed his concerns to Stillman (T. 187). As to when he

"had discussions with Stillman regarding drug use versus other particular problems of a psychological nature, I don't recall which was first and which was later" (T. 188). Stella also did not recall what information, if any, he had provided to Stillman, but it was his practice to speak with doctors before they go in to evaluate a client (T. 191). Stella would also have provided Stillman with police reports and other discovery, which he testified he did have at the time Stillman evaluated Mr. Bruno (T. 192). Stella eventually filed another motion for continuance of trial on November 26, 1986, because Stillman had still not evaluated Mr. Bruno (T. 191). At that point, trial was rescheduled for March 30, 1987.

In January, 1987, Stella was in a federal trial which lasted three weeks (T. 194). The case required a lot of preparation and was "certainly time consuming" (T. 195). When the federal case was being tried, Stella was in court all day and spent "very little" time working on Mr. Bruno's case (T. 197). At the time the federal case was being tried, Mr. Bruno's trial was set for March 30, 1987 (T. 197-98).

On March 20, 1987, a motion for continuance was filed under Adler's signature (T. 198), asserting that Stella's "hospitalization" would be approximately 21 days, and that Adler was coordinating his efforts along with Stella so as not to further delay Mr. Bruno's case (T. 200). The motion detailed that the hospitalization was for "diagnostic testing and evaluation" but in reality it was for alcoholism (T. 200).

Stella explained that alcohol "had become a factor in my life"

and that his drinking was "[o]ut of hand," and in October of 1986, he began to attend Alcoholics Anonymous because "it began to effect my personal life and when I noticed that it began to effect my work habits as well, then I sought immediate counseling" (T. 201-02). He explained that his drinking had increased in the time leading up to October, 1986, and was "significantly worse" after he was retained to represent Mr. Bruno in August of 1986, and "I'm sure I was drinking" during the workweek between August and October of 1986 (T. 207). After he stopped drinking in October, 1986, he remained alcohol free until ten days prior to his seeking hospitalization on March 15, 1987, just two weeks before Mr. Bruno's trial was set to begin (T. 201).

At the time he agreed to represent Mr. Bruno, Stella was also abusing cocaine (T. 204). Although acknowledging that "[i]f I was drinking and it was the weekend and I was particularly intoxicated, I may have done a line of cocaine," his cocaine use was "nothing that I ever considered that I had a problem with" (T. 204). Stella could not state under oath that he never used cocaine during the week (Id.). At the time he took Mr. Bruno's case, he used cocaine until October of that year, then had a relapse for about ten days in late February and early March of 1987 (T. 205-06). On March 15, 1987, he entered the Coral Springs Care Unit, where he remained for 28 days (T. 208).

Stella did not recall when he talked with Adler about filing the motion for continuance in Mr. Bruno's case, but believed that the phraseology "diagnostic testing" was taken from Dr. Rose, his

doctor (T. 208). Stella believed that Dr. Rose had written a letter to Judge Coker but did not know "if Judge Coker made that part of the file or not" (T. 209).

At no time prior to October of 1986 did Stella alert Mr. Bruno to his cocaine and alcohol problems, or that he was "going out that Friday night and have a drink or do a line or anything like that" (T. 209). Stella made no attempt to contact Mr. Bruno while he was in rehab (T. 211).[5] After he was released from rehab, Stella testified that he gave Mr. Bruno the option of withdrawing from the case, and also spoke with Judge Coker about the matter because "I thought he was owed an explanation as Mr. Bruno was owed an explanation as to why his lawyer disappeared" (T. 211). Stella believed that the prosecutor, Jack Coyle, was present when he spoke with the judge (T. 211). Stella reaffirmed that he was testifying under a grant of immunity offered by Assistant State Attorney Susan Bailey (T. 213).

When he entered rehab, Stella did not know what the extent of his preparation was for Mr. Bruno's trial, which at the time was set for March 30, 1987, but did recall that "[w]e would have been in the process of preparing the capital motions for hearing," which is one of the "[l]ater things" you do to get ready for a capital trial (T. 214). As to the motion to suppress Mr. Bruno's oral statements, which he acknowledged was a "[v]ery significant" motion, Stella did not know why it was not filed until June,

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[5]Nor did he ever meet with the defense investigator (T. 926), and the investigator was not aware why Stella was hosptialized (T. 911).

1987, when trial was initially set for March (T. 214).

Trial commenced in August, 1987, and Stella was questioned about an incident he brought to Judge Coker's attention the first day of trial. The trial record reflects the following occurring on August 4, 1987, before Judge Coker:

> MR. STELLA: Judge, I would like to explain to the Court what happened to me last night. It has nothing to do with this case but I'm glad that you're continuing so that I can have additional time to speak with my client which is what I was going to do yesterday.
>
> I left and went home to find out that my house had been robbed.
>
> THE COURT: They call that burglary, not robbery.
>
> MR. STELLA: Thank you for the correction, Your Honor.
>
> Aside from rolling up the carpets, they took everything I had.
>
> THE COURT: Really?
>
> MR. STELLA: Everything. I had some case in a wall safe and some bearer bonds and some gold coins, and they drilled the wall safe our of the wall, ransacked it.
>
> The bearer bonds I had gotten from my grandmother. They were worth in excess of $30,000. They drilled it out of the wall.
>
> They took a painting that my father had given me for my 30th birthday, from an original Simbari.
>
> They took my Rolex watch. They took everything.
>
> Jack is on the verge of tears, I can tell.
>
> So I was up with the police until about 3:00 in the morning.
>
> THE COURT: Well, I'm sorry.

(R. 120-21).

Stella explained that he used some "dramatic flair" in recounting to Judge Coker what had happened (T. 217), and that he later found out that what he had assumed was stolen had in fact been in another portion of his parents' house (T. 218). Stella admitted that when he told Judge Coker that the wall safe had been drilled out of the wall, that was not true (T. 218), but as to why he told that to Coker, "I don't recall and I don't want to speculate" (T. 219). After refreshing his recollection from his deposition, Stella acknowledged that "I was very fond of Judge Coker and still am" and that "I told him some dramatic lies" (T. 227). As to why he had so much cash lying around, Stella responded:

> A [] I was having some I.R.S. problems in those days. All the funds I made in my practice were all reported to the I.R.S. I had a tax lean [sic] at that time and I could never put any money in my bank because the I.R.S. would never -- their payment scheduled, any time I put any money in my bank account, they'd take it. So, until I got the lean [sic] cleared up, I kept all of my funds in cash.
>
> Q How about the money that Mr. Bruno's parents were paying you; what did you do with those checks?
>
> A They were deposited.
>
> Q In your bank account?
>
> A Uh-huh.
>
> Q Was this during the same time period?
>
> A I believe so.
>
> Q So, did you have a bank account?
>
> A Oh, yes. Bank accounts were normally such that we would deposit checks or cash and then we would write checks on it, almost immediately, so that money would be in the account for a minimal amount of time and then once the I.R.S. lean [sic] was cleared up,

> then we no longer had the necessity or reason to put cash or to keep cash anywhere other than the bank.

(T. 228-29).

Stella explained that an intoxication defense was the most viable in the case (T. 232-33). He also had a conversation with Mr. Bruno's son, who told him that he and his father were "loaded" and "high" (T. 235). He emphasized that while voluntary intoxication is always "a risky defense," it was "the number one defense in my play book, that I thought it was the most appropriate way to proceed" (T. 233). He later commented that "I thought that the voluntary intoxication would sway the jury, hopefully, to a murder two or manslaughter, would be the best route to go, the best route to go" (T. 237).

Rather than presenting an intoxication defense, however, Stella presented a defense that Jody Spalding committed the crime "and/or the State failed to prove their case beyond a reasonable doubt," a defense he "wasn't that crazy about" (T. 238). Furthermore, "one of the key elements to that defense was the element of surprise" which dissipated when the State, through Mr. Bruno's son, eventually got wind of the defense strategy (T. 239). The loss of the surprise factor "kind of shot that defense a little bit, at least injured it, or the viability of that presentation, anyway" (T. 239).

Stella was shown a police report from Detective Lavarello, which provided a statement from Paul Holland that he saw Jody Spalding going into the victim's apartment at the time the State alleged the homicide occurred (T. 240-41). He acknowledged that

he never elicited at trial the fact that an individual by the name of Jody Spalding was seen going into the victim's apartment on the night of the homicide and did not recall any reason why (T. 246). He admitted that the information in the report "would have been consistent with the defense" at trial, and "[i]f I were to give you a number of reasons, it would be speculation" (T. 246). After the lower court questioned collateral counsel about whether any hearsay objection had been lodged at the time of trial about this information, Stella then "recalled" that which he had just previously not been able to and testified that "I perceived that the be a hearsay problem" (T. 249). But he repeated several times that he was simply speculating (T. 249-50).

Stella was then questioned about various off-the-record conferences that occurred during the jury selection (T. 252-53). He acknowledged that if the conference was about "lunch plans or something like that" he would not ask for a court reporter, but if it was "anything other than ministerial" he would have wanted the discussions to be on the record (T. 254), for example anything relating to the exercise of jury challenges (T. 256).

Stella was then questioned about juror Hrytzay, who had indicated during questioning that while she could keep an open mind, "I know policemen know what to look for" (T. 265). Stella acknowledged that this answer "merits a strike for cause" and stated that "it would appear that these bench conferences, wherein the jury selection was made without benefit of a court reporter, I can only speculate, but I would assume that I would

have challenged that for cause" (T. 266). Stella also indicated that he though he had moved to strike her peremptorily (T. 265).

Regarding juror Henry, who indicated during questioning that the defendant should have to testify, Stella indicated that "I would probably have moved to strike for cause and same would probably have been denied by Judge Coker" (T. 268). However, he had no recollection of doing that, and did not feel that for appellate review purposes, Judge Coker's rehabilitation was sufficient (T. 268). Stella concluded that "I would have probably made an objection for cause at side bar" (T. 268).

Stella testified that Mr. Bruno's statement was the "[n]umber one" piece of evidence for the State (T. 269). He did not recall whether he had discussed with Dr. Stillman the issue of Mr. Bruno's mental state and his ability to knowingly, intelligently, and voluntarily waive his Miranda rights (T. 269). Stillman "would have done so at my request if I would have asked him" (T. 270). Stella did not recall what information he had about Mr. Bruno's level of intoxication at the time of arrest, acknowledging that such would have been significant to the issue of voluntariness (T. 271), and would have been "cannon fodder for cross-examination" at the trial in terms of impeaching the officers who elicited the statement (T. 272). If he had an expert who would have been able to testify that Mr. Bruno was incapable of voluntarily waiving his Miranda warnings, he would have presented it "as long as it was supported by viable competent evidence" (T. 272).

Stella was also provided with a police report which indicated

that Detective Edgerton questioned Mr. Bruno but failed to give him his Miranda warnings (T. 275). Stella had no recollection of why he did not move to suppress the statements, but indicated that these statements were "non custodial in nature" (T. 276). He acknowledged, however, that the police report indicated that they believed Mr. Bruno was a suspect at the time they questioned him without giving him his Miranda warnings (T. 276). The lower court judge then stated out loud that he did not believe that Miranda warnings needed to be given unless there was a custodial interrogation (T. 277), and then Stella stated that he did not seek to suppress the statements and essentially parroted what the judge had just stated, that "this is not a custodial interrogation as per Miranda" (T. 278). Stella admitted that his lack of recollection had suddenly changed following the judge's statement (T. 280). He also acknowledged that he had no recollection of discussing this strategy with Mr. Bruno (T. 280), and agreed that the fact that Mr. Bruno was not Mirandized as to these statements was something which could have been used on cross-examination at trial but was not (T. 280-81).

Stella was then questioned about the statement given by Mr. Bruno's son, Mike Bruno Jr. Stella could not recall anything about the statement or whether it was inculpatory or exculpatory as to Mr. Bruno (T. 294). He did recall that at some point prior to trial that Mike Jr's story had changed and that he was cross-examined on that (T. 295-96), and that he called Mike Jr. a liar (T. 296), because his new story was "kind of unbelievable" (T. 297). One of his trial strategies was to attack Mike Jr's

believability (T. 297). Stella recalled Mike Jr. telling him about LSD use on the night of the crime (T. 300-01), and also recalled efforts by Mike Jr.s family "seeking to have him declared incompetent, so he would not have to testify" (T. 301).

Stella testified that he did not cross-examine Mike Jr. at trial about his mental problems and his drug use because "it would corroborate that he saw what it was that he saw" (T. 298). Stella was then questioned about his sudden ability to recall a strategy reason when at his deposition he stated "I can't really advise you accurately as to what, but I would hasten to add that I can't imagine I would go through some sense of inadvertence I just failed to address that issue" (T. 302). Stella said he had no concerns about Mike Jr's competency to testify based on "[g]eneral observation" but acknowledged that he only saw Mike Jr. during his deposition and outside the courtroom, that is, "[n]ot very often" (T. 304). Stella was then shown a motion he filed seeking a competency evaluation for Mike Jr., which "[a]bsolutely" indicated Stella's concerns about Mike Jr's competency (T. 305). Attached to the motion was a letter from Dr. Northrup, who indicated that Mike Jr., in addition to suffering from post-traumatic stress disorder, was also suffering from "memory impairment" and "disassociative states" and from an "emotional disturbance [] severe enough that it's medically contradicted for him to testify about this matter at this time" (T. 307). That a witness had problems with memory and disassociative states is significant for cross-examination, but Stella did not question Mike Jr. at all on these issues (T. 307-

08) . Nor did Stella question Mike Jr. during his deposition about his memory impairment, disassociative states, or about his or his father's drug use on the night of the crime (T. 308). Stella acknowledged that this issue of drug use by Mike Jr. was important because "if he was on drugs or if he was highly intoxicated on that particular night, it would be cannon fodder for cross-examination regarding his ability to accurately recall what he had seen if he was intoxicated" (T. 309). As to drug use by Mr. Bruno himself, such would "lend credence to the voluntary intoxication defense and/or potentially to a penalty phase, in terms of showing a mitigating circumstance" (T. 309). However, Stella acknowledged not cross-examining Mike Jr. about either his mental condition, i.e., post traumatic stress, or about his or his father's use of drugs on the night in question (T. 310). As to the issue regarding Dr. Northrup's letter and Mike Jr's inability to testify, Stella believed he may have spoken with the prosecutor about the issue, but "it's very difficult to answer these questions, ten years after the fact. It's very difficult. I may very well have had perfectly logical reasons and explanations for all of this . , ." (T. 310). After reviewing his deposition, Stella recalled vaguely having a discussion with Jack Coyle about Mike Jr's family "conspiring to keep this witness from testifying" and that it was "a sham to keep him from testifying" (T. 311). As to why he was discussing these strategic matters with the prosecutor, Stella did not think "that's discussing a strategy with him" (T. 312). At no time during Mike Jr's cross-examination at trial did Stella question

him about his interactions with the prosecutor, even though it "certainly shows the witness working hand in glove with the State, and he certainly was" (T. 312-13).

Stella did not know whether Mike Jr. was on medication at the time of trial and that "it was the State's responsibility to tell me when and if he was on some type of medication and that was never done" (T. 315). If he had known that Mike Jr. was on medication, that would have affected his strategy in terms of his cross-examination (T. 316). If he had known that the State was having ongoing contact with Mike Jr, "I would have wanted to know whether or not the prosecutor, in my opinion, was taking unfair advantage of a young child or a young boy that was under the influence of medication" (T. 318). See also T. 346-47.

Stella was then questioned about the trial testimony of Diana Liu, who had told the jury that Mr. Bruno made an inculpatory statement (T. 327), for example, that Mr. Bruno had said "it's going to be a murder party" (T. 328). Stella could not recall whether he knew that Liu was going to be making that statement, and could not recall taking her deposition, which he acknowledged "would be very unusual in a first degree murder case" (T. 330). That he did not depose her could be a reason why he did not know she was going to be making that statement, and this statement was something which should also have been disclosed by the State (T. 331).

With respect to witness Sharon Spalding, Stella recalled that she was "important" for the State because "[s]he was a potential accessory after the fact, at the very least," as well as "the

mother of a key suspect in the case" (T. 333). One of the main goals in cross examining Spalding at trial was to undermine her credibility because she made various prior inconsistent statements (T. 334). Stella recalled seeing in Spalding's deposition that she was on nerve medication at the time she was testifying, but could not recall cross-examining her about this (Id.). He reiterated that during her deposition, Spalding asserted she could not recall certain events because of her nerve medication, and that she was under a doctor's care (T. 337). Stella never questioned her about the type of medication she was using, and acknowledged that "I should have asked her, and then made additional inquiry to see whether or not it was the type of thing that would be appropriate for cross examination" (T. 343).[6] Her recollections about her involvement with the police and her statements about Mr. Bruno could have helped undermine her credibility on cross examination (T. 338). Spalding also in her deposition indicated that she was not wearing her glasses when she purportedly identified the gun in question, and also could not recall the length of the barrel (Id.). Stella could not recall whether he brought these issues out at trial, but acknowledged that "[i]f the gun and the facts and circumstances surrounding the description of the gun, and the length of the barrel, was an important issue, then she should have been cross examined as to whether or not she was wearing her glasses" (T.

'However, Stella acknowledged that in the deposition of her husband, Archie Mahue, Mahue said that his wife was taking Tranxene, which was "a nerve medication. It's in the same category as Xanex, Valium, things like that" (T. 344).

339).

As to knowing of Sharon Spalding and Jody Spalding's involvement in drugs, Stella recalled knowing that they both sold drugs, and he questioned them about it in the depositions (T. 340). The investigator, Sidney Patrick, "was primarily involved in this aspect of the case, running down criminal records, and running down, talking to neighbors, talking to people that may have known them, potential employers, or employees, people that could give us some insight in[to] the Spaldings, whether they were involved in the drug business, things like that" (T. 340). Questions about their illegal activities, "would put her credibility as a witness at issue" (Id.).

Stella was also questioned about Sharon Spalding's trial testimony where she stated that saw Mr. Bruno at her house the morning after the crime with a gun (T. 340-41). Spalding, however, made no such contention in her police statement (T. 340), which, in Stella's words, "is a potentially very important fact that was left out" (T. 342). He acknowledged that such "[a]n omission is important and it is something that unless there was a tactical reason to do so, should probably have been explored, and if I didn't, I probably should have" (Id.).

Stella had no recollection of the significance of Archie Mahue's testimony, but after reading his deposition, testified that Mahue, in his deposition, expressed a motivation for coming forward with his damaging statements about Mr. Bruno (T. 403). For example, Mahue had explained that he was "tired of this" and "I'm going to settle it" and "I think this here alone should hang

him" (T. 403). Stella could not recall whether he cross-examined Mahue on his motivation for coming forward, but testified that such statements "would go as to his motive, bias, etc., in testifying" (T. 404).

Stella was then questioned about Jody Spalding's statement to the police that he did not know the victim (T. 406). Stella acknowledged that it is possible to cross-examine a witness with a prior taped sworn statement (T. 408). At no time during his sworn statement did Spalding discuss throwing a gun away into a canal (T. 409), but indicated that Mr. Bruno had told him that he threw a pipe in the canal, **wasn't there when that occurred, and** that Mr. Bruno never showed him where he threw the pipe (T. 409-10). However, at **trial,** Spalding testified that he was with Mr. Bruno and saw him throw a gun and a pipe into a canal, which Stella acknowledged was inconsistent with his sworn statement (T. 410).

Stella was also questioned **about various** comments that were made during witness' testimony (T. 410). As to Jody Spalding's testimony in explaining why he didn't come forth to the police, Spalding had testified "his son was with me the first time that the police talked to us and if he went back and told Bruno, you **never know what he would have done to** us" (T. 413). Stella had "no independent recollection as to why an objection was not posed" even though the testimony was objectionable (Id.). As to Sharon Spalding's comments during trial that she was scared of Mr. Bruno doing something to her family, Stella also did not object, but acknowledged "very candidly, an objection should have

been made because it's very questionable and certainly that type of answer would prejudice Mr. Bruno in the eyes of the jury" (T. 414). As to the prosecutor's improper belittling of the defense during it's closing argument (R. 704), Stella made no objection although the comments were objectionable (T. 415). As to the prosecutor's comment that the State did not charge Jody Spalding because "they don't deserve to be charged. The police didn't think so. I didn't think so. The Grand Jury indicted [Mr. Bruno]," this too was objectionable but Stella did not object even though acknowledging that "it's an unfair comment on the evidence, as far as I'm concerned, and it, in addition to that, Mr. Coyle is placing himself in the position of being judge and jury . . . That's unfair and it's not legally accurate" (T. 416). As to the comments that "Mr. Stella finds himself in the same position that his client found himself," that the defense position **was** "silly," that "there is no real defense," that the defense is "a shotgun defense, just sort of hit everything a little bit, because there is no theory of defense," and that Stella "can't even make up **a** story that goes in this. There is not even a fantasy that fits," Stella testified that they were all objectionable but he made no objection (T. 418-19).

Stella was also asked about an incident occurring during jury deliberations when the trial judge ***sua sponte*** brought the jury into the courtroom and gave them **a** sort of Allen charge (T. 419-20). He did not object even though "there is no question from the jury which is pending. There is no indication that they are deadlocked. There is no note from them that they are having

problems. The court just kind of pulled them out to take their temperature, as it were, and see how things were going" (T. 421). Such a procedure is "[k]ind of a de facto Allen charge" and "it was not right back in 1986, nor is it right in 1997" (Id.).

Stella also was asked about not objecting to the short form jury instruction on excusable homicide (T. 423-24), and acknowledged that he knows that the long form instruction should be given, but that "I didn't know that that was the state of the law in 1986. And if it was, it should have been objected to" (T. 424).

Regarding the penalty phase, which began almost immediately after the guilt verdict, Stella's goal was to save Mr. Bruno's life, and was hoping to use information such as "his psychiatric history, drug usage, family problems, childhood upbringing problems, things like that" (T. 425), as well as statutory mitigating circumstances (T. 426). He asked the judge for a continuance to prepare, but it was denied, and Judge Coker "put you under a bit of a time gun" (T. 430). As to the investigation into the penalty phase, Stella testified that "Mr. Sidney Patrick [] was actively involved in that portion of the investigation" and Patrick spoke with Dr. Stillman and Mr. Bruno's family (T. 428). Stella recalled speaking to Mr. Bruno's parents "throughout the case" but did not recall exactly when he would have spoken to them about their testimony (T. 429), but that "it's quite difficult, particularly when you're dealing with the parents of a defendant who obviously loved their son very much, to start talking about - to start talking to them too early about

pleading for their son's life because it would appear clear, or it's a possibility that the jury may come back guilty" (T. 430).

The focus of his efforts had always been the guilt phase, and that to satisfy all of the legal requirements for handling a capital case is "virtually[] a full time thing" (T. 430). As he acknowledged, "attorneys should have, within appropriate and reasonable restraint, all the time he needs to prepare for something like that" (T. 431). Stella would have liked to have had more time to prepare for Mr. Bruno's penalty phase, and that is why he asked for the continuance (T. 431-32).

Stella did not remember when he contacted Dr. Stillman about testifying at the penalty phase (T. 432). One of the goals in presenting Stillman was to provide statutory mitigating factors, but Stella had no recollection of discussing the issue of statutory mitigating factors with him (T. 433). Stillman was appointed to do a competency evaluation of Mr. Bruno, but he had been advised that he might be needed at the penalty phase (T. 434). Stella did not remember whether he asked Stillman during his penalty phase testimony about statutory mitigating factors (T. 435; 448).

As to whether, prior to Dr. Stillman's penalty phase testimony, he knew about any prior psychiatric hospitalizations regarding Mr. Bruno, Stella would "avert to the record. I recall that I don't believe I did" (T. 436). He also did not have any records prior to the penalty phase from any of Mr. Bruno's prior psychiatric hospitalizations, and that "[t]he record seems to indicate . . . that I did not have those records" (T. 436). The

significance of having such records and providing them to an expert "almost speaks for itself" (T. 436). Stella then gratuitously stated that the failure to get the records was "not because of any negligence on our part" (T. 436), because Mr. Bruno did not tell Stella about these records (T. 437). Mr. Bruno's parents "were wonderful" but the rest of the family "were not cooperative with me, at all" (T. 437).

Stella was asked about a motion seeking a psychiatric evaluation of Mr. Bruno he filed after the penalty phase in which he alleged, *inter* alia, that he learned from Mr. Bruno's sister, who Stella was not aware existed, that Mr. Bruno had a long term drug history, as well as prior psychiatric hospitalizations (T. 438-41).[7] Stella acknowledged that it **was** not until after the penalty phase that he became aware that Mr. Bruno had a sister (T. 447).

Stella **was** surprised by Dr. Stillman's testimony because Stillman testified that Mr. Bruno was insane at the time of the offense; Stella had no idea beforehand that Stillman had reached that conclusion (T. 449). When he said it on the stand, "[i]t really was the first I had heard of it" (Id.). Stella was concerned about Stillman's testimony and "I made the decision that it was important that Judge Coker know that these events were catching me by surprise because I knew that the damage, not the damage, but I knew - I believed or reasoned tactically that the judge would probably deny our motion for any further or

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[7] The trial court denied the motion (T. 441).

additional psychiatric evaluation or continuance of the penalty phase if he thought these were items or important things that we'd known about for some time" (T. 450). Stella's concerns about Stillman's testimony led him to go sidebar with the trial judge as "a tactical decision, albeit a wrong one on my part" because "I wanted the judge to know this caught me by surprise" (T. 451).

Stella believed that Stillman had spoken to Mr. Bruno's sister at some point, but Stella himself did not recall speaking to the sister until either during or immediately after the penalty phase, acknowledging that this sounded "bizarre" (T. 454-55). Stella did not contemplate subpoenaing the sister because she was out of state and she **was** going to testify adversely to Mr. Bruno (T. 455). Stella believed that the sister told him that Mr. Bruno had molested her, but "we did not seek corroboration of what she said" but did later obtain the psychiatric hospitalization records (T. 456).

When Stella's examination continued the next day, he indicated he had no recollection of the nature of the testimony of Mr. Bruno's parents at the penalty phase (T. 600). After his recollection was refreshed, that they testified that Mr. Bruno deserved what he got if he was guilty and that he would deserve the death penalty, Stella "was not very happy" with their testimony (T. 601). He did not know in advance they were going to say what they said, even though he believed he had spoken with them and they were "actively involved in their son's case" (T. 601).

Regarding his motion to seek a psychiatric evaluation of Mr. Bruno filed after the penalty phase and the inclusion of allegations that Mr. Bruno did not assist counsel in informing him of his mental hospitalizations, Stella testified that he did so because "you had to state with specificity the grounds upon which you were seeking an evaluation" (T. 604). He did not believe divulging the fact that Mr. Bruno allegedly failed to inform him of this matter violated the attorney-client privilege because "I was trying to assist my client," not impugn that he was a liar or being less than candid (T. 605). Stella added that ten or twelve years ago, judges were much less willing to grant mental health evaluations (T. 606). The motion was filed after the penalty phase and after Mr. Bruno himself had testified at the penalty phase, but before Judge Coker actually sentenced Mr. Bruno (T. 606-08). At the sidebar during the penalty phase, Stella had told Judge Coker that he was "shocked and dismayed" at Stillman's testimony, and that he did not want it coming back that he was remiss or failed to follow up on an insanity defense (T. 609-10). Had he known about the nature and extent of Mr. Bruno's drug and psychiatric history, he would have sought appointment of additional experts, such as a neuropharmacologist because "it should be addressed and it should have been addressed" (T. 612).

Stella was questioned about another side bar between him and the prosecutor alone, where he again told Coyle that he was taken by surprise by Stillman's testimony, and wanted to "make it abundantly clear that it was not oversight on the part of Defense

counsel to explore or give reason to explore the defense of insanity" (T. 613). See R. 917. Stella explained that "at first blush it would appear that all Mr. Bruno is doing is trying to cover your own fanny" but "[t]hat was really and truly not the case" (T. 614). Stella then recalled that the nature of the State's closing argument at the penalty phase was that "Mr. Coyle didn't have much nice to say about Dr. Stillman, in terms of his believability, or in terms of his ability" (T. 616).

Stella was then asked about a renewed motion for judgment of acquittal and for a new trial, in which he urged the judge to "take into consideration the mitigating factors of the Defendant's sanity as the time of the offense, as testified to by Dr. Arthur Stillman, the Defendant's prior drug use, and drug intoxication at the time of the offense" (T. 618). Stella also filed a motion to override the jury's death recommendation based on Stillman's testimony (T. 618-19).

As to various comments during voir dire which diminished the jury's sense of responsibility, Stella testified that he did not object and "so one would think that I was not thinking of Caldwell at that time" (T. 622).

Stella was also questioned about his stipulation to introducing Mr. Bruno's prior conviction of possession of cocaine and marijuana (T. 624). He did not recall if he knew he could waive the statutory mitigator of no significant prior criminal history, but was aware that if he did so, the State could not bring in any of the prior history (T. 625).

Stella was also questioned about his lack of objection to

Stillman's testimony about Mr. Bruno's tattoos, including a swastika, that they represented evil (T. 626-27). After initially testifying that the jury's knowledge of a swastika tattoo "coul d be" prejudicial, he later stated that "yes, a swastika is definitely prejudicial. I know very few people that think a swastika stands for anything very good" (T. 627). Stella did not know that Stillman was going to be testifying or relying on Mr. Bruno's tattoos as part of his testimony (T. 627).

As to the State's argument in the penalty phase that the jury could use the armed robbery that they just convicted him of as an aggravating circumstance even though it involved the same victim "is clearly not the law" (T. 628). Stella did not know what the state of the law was at the time of trial, but in 1997, "that aggravator could not be used" (T. 628-29). Stella made no objection to this argument, however (T. 628). As to the State's argument that the jury could consider the felony murder, pecuniary gain, and the robbery conviction as three aggraving factors instead of merging them into one, Stella did not know if at the time of trial the jury was allowed to do that, but offered that "I would like to think that the case law has changed in light of the fact that I did not object" (T. 632). He acknowledged that consideration of three aggravators as opposed to one "this certainly tips the scales against the Defendant" (T. 633).

Finally, Stella was asked about a motion he filed seeking leave of court to file a belated notice of insanity on June 12, 1987 (T. 638). He filed the motion because even though Dr. Stillman

had evaluated Mr. Bruno, Stella "continued because of my contact with the Defendant to have genuine concerns regarding his ability to assist counsel, his, generally, his ability to assist counsel" (T. 639).

On cross, Stella felt he had plenty of time to prepare for trial, since he had a year from the time he was retained until trial (T. 657). Stella met with Mr. Bruno "[s]everal times" and "Mr. Bruno and I got along very well" (T. 657). Stella was also questioned about the fact that he knew Judge Coker "quite well" and he "appointed me on a lot of first degree murder cases" (T. 660). The reason he divulged to Judge Coker his dismay about Stillman's testimony was to maximize Mr. Bruno's chances for some relief and to explain that "I didn't know, when I was sitting next to this guy, that he had all these problems. And this was the man that was assisting me in -to some extent- in his first degree murder trial and he may not have been competent to assist" (T. 662) .

Stella **was** not using drugs of alcohol during either pretrial preparation periods or during trial (T. 662). During his rehabilitation, Mr. Patrick was still working on the investigation (T. 665),[8] but he did not know exactly what **was** done during the federal trial (T. 666).

As to voluntary intoxication, "Mr. Bruno did not believe in that defense" because a jury would not have sympathy for it (T. 667). Following the leading questions by the State, Stella's

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[8] However, Patrick denied talking to Stella while Stella was hospitalized (T. 926).

memory was "refreshed" and he said he **was** "urging him the viability of an intoxication defense" in light of the statement to the police and in light of his son's testimony (T. 668). He explained that "on the eve of trial, I see this guy [Mike Bruno Jr] in the hallway, so we discussed the voluntary intoxication defense with renewed vigor" but Mr. Bruno "didn't want to do it" (T. 668). Upon questioning by the judge as to when he recommended that an expert be retained to investigate intoxication, Stella said that it was only when they were getting ready to pick a jury and it became clear that Mr. Bruno's son was going to testify (T. 669). Stella reiterated that voluntary intoxication was the best defense "under the facts of this case" (T. 670).[9]

Stella's strategy as to cross-examining Mr. Bruno's son was "to

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[9]At one point, Stella called the allegations made by Mr. Bruno "preposterous" and he was "astonished and dismayed" (T. 675). Apparently Mr. Stella believed his glib repetition of the "astonished and dismayed" language, originally invoked during the penalty phase with reference to Dr. Stillman, was humorous. Glibness is present throughout Stella's testimony, as well as many examples of the "dramatic flair" he employed when completely exaggerating the "robbery" at his home on the first day of trial (T. 217). And the fact that he was able to "recall" on cross examination strategic decisions about incidents which he professed lack of recollection of on direct was not lost on Stella, who at one point told the prosecutor:

> I'm going to be candid with you, Ms. Bailey. I don't recall what all the factors were ten years later. I'm not going to play the - gee, Todd Scher, I don't remember anything, but Ms. Bailey, all of a sudden, when I'm being cross-examined, I remember everything.

(T. 680).

get him off the witness stand as quickly as I could" because he was "a very damaging witness" (T. 681). Mr. Bruno "was crazy about his son" and "[h]e didn't want his son cross examined" (Id.). Thus, after a leading question by the State, Stella acknowledged not cross examining Mike Bruno Jr. on a number of topics which, on direct, he acknowledged would have gone to his credibility and bias (T. 682). Stella thought Mike Jr. was "a good witness" for the State. Stella did not recall why he didn't question Mike Jr. about his drug usage (T. 686). The state then asked him "Would that be your decision, due to your instructions from the Defendant, to get Michael, Junior, off the stand as quickly as possible," to which Stella, who in the previous line indicated no recollection, testified "it's certainly possible" (Id.).

Stella was also questioned about his motion for continuance filed on June 12, 1987, attached to which was Dr. Northrup's letter regarding Mike Jr.'s mental problems (T. 691). He reaffirmed that he knew that Mike Jr. was on medication because of the letter from Dr. Northrup (T. 691).

As to Diana Liu's "murder party" statement and the allegation that the State withheld such from the defense, Stella acknowledged, in the State's words, that it was possible that she never told that police that "or even that she was just making it up" (T. 694). As to the fact that Sharon Spalding was on medication at the time, that information was not withheld by the State because it had been elicited by Stella during the depositions of Spalding and Archie Mahue (T. 696).

As to the failure to call Paul Holland, Stella explained that he "would have been an important witness in our case" but that "we couldn't find him, that he was not around anymore. As a matter of fact, I'm pretty sure that was the case" (T. 698). Moreover, Stella believed he had already gotten the information before the jury in any event through Detective Hanstein (T. 699, 702-03).

Regarding the failure to question Sharon Spalding about Mr. Bruno having a gun (T. 704). Stella testified that in her August 13, 1986, statement, Spalding told the police that she knew Mr. Bruno had a gun (T. 705).

Regarding the off-the-record conferences where challenges were made, Stella explained that the system was that "you would make your selections with your client and then you would come up to the bench and exercise them, outside the hearing of the jury" (T. 706). He recalled that the attorneys would also fill out slips of paper and write down their challenges and then bring them up to the bench (T. 707). Thus, the prosecutor was "absolutely right" that no off-the-record conferences were held regarding juror challenges because it was done via the slips of paper (T. 707). According to Stella, "there was no court reporter. The court reporter never left her chair" and nothing went on during a side-bar (Id.).

As to Stella's direct examination testimony that he had no tactical reason for not objecting to the pseudo Allen charge given by the trial court, the State then impeached Mr. Stella with his deposition, where he said he did not object because it

was not objectionable (T. 712-13). Stella then explained that "[t]he way Mr. Scher made it sound, it sounded objectionable. I know what Mr. Scher's point is, **at least** I believe I do, that it was kind of a de facto Allen charge, which is more or less what I captioned it as. If I had the same experience that I have now, I would have objected to it" (T. 713). Stella then retreated again and stated that "at the time I didn't' object because it I didn't feel that it was objectionable" (T. 714). He went on to elaborate that "I **was** pretty upset when I read that 3.850 about the allegations about me personally, my personal life and other things about it, and I wanted to set the record straight about that . . . I was very offended by those things" (T. 714). After his gratuitous statement, Stella then gave another answer to the question, this time testifying "I don't think it's real objectionable, but I would probably object to it" and then acknowledged that "that's a very long winded answer, but it happens to be the whole story" (T. 715).

As to the penalty phase, Stella parroted "yes" answers to the State's questions, acknowledging that he was "actively searching" for mitigating circumstances but that Mr. Bruno was not cooperative (T. 717). As to the discovery after the penalty phase of Mr. Bruno's mental health problems, Stella testified that he did not know if Mr. Bruno's parents, who were always cooperative, knew that much about their son, and did not believe that the would withhold something from him (T. 718). Mr. Bruno did not assist him and he "thwarted our attempts in regards to a preparation of a penalty phase" (T. 719).

Regarding the post-penalty phase motion for a psychiatric evaluation, Stella testified that overnight he came up with "other strategic reasons" for divulging his dismay about Stillman's testimony and the surprise factor, namely, that the State's cross-examination of Stillman was "thorough and devastating" (T. 721). Stella wanted another doctor because Stillman "disintegrated" and did "lousy for me" (T. 722).

Stella reaffirmed that Stillman received corroborating evidence of Mr. Bruno's mental state on the night before the penalty phase (T. 726), and that Sidney Patrick did not uncover any of this evidence prior to that time (T. 726).[10] Stella then again parroted back "yes" answers to each of the State's questions about Mr. Bruno's alleged uncooperativeness (T. 726-27).

Stella also explained on cross examination that he knew that Jody Spalding was selling cocaine, and that Sharon Spalding was "low rent, untrustworthy, probably involved in this case, and covering up for it" (T. 732).

On redirect examination, Stella conceded that Mr. Bruno did not waive mitigation at the penalty phase, and although he may not have wanted his parents to testify, they were nonetheless called at the penalty phase (T. 734). As to whether Mr. Bruno allegedly fought the decision to call Dr. Stillman, Stella stated "I made my only decision, called the people I called, irrespective of my client's wishes" (T. 734). Nor did Mr. Bruno fight with him

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[10]Of course, as Patrick later explained when the State called him to testify, he did not work on the penalty phase at all (T. 922), and never interviewed Mr. Bruno about his drug use in general or on the night of the offense (T. 918).

about arguing in favor of life, and acknowledged that "I wasn't just going to roll over and say that my client says now that you found him guilty, he just as soon die" (T. 735).

As to the motion for psychiatric examination motion filed after the penalty phase, Stella conceded that he had good cause to file the motion, and it was not just filed for strategic reasons (T. 735), that he had doubts about Mr. Bruno's mental state at the time (T. 736).

Mr. Bruno never refused to tell Stella where he went to school (T. 736). In fact, if he had obtained the school records, he would probably have needed a release from Mr. Bruno himself (T. 737). If a release was necessary for medical records, "we would have got it from Mr. Bruno" (Id.). However, prior to the penalty phase, Stella "didn't know about the Pilgrim Hospital" records regarding Mr. Bruno's past psychiatric treatments (Id.). Despite the fact that Mr. Bruno allegedly resisted on the issue, Stella recalled that "his family members, who were up in Massachussets, were going to get those records for me," and thus whether Mr. Bruno did or did not sign a release was not an issue (T. 738). Nothing prevented Stella from having the family members get the mental hospital records before the penalty phase other than the fact that "I didn't know anything about it" (T. 738).

Stella could not recall which family members were going to get the medical records, did not know where Mr. Bruno's family (other than his parents) lived other than maybe either Massachussets or Rhode Island (T. 739). Mr. Bruno's parents never denied the existence of their daughters, and Stella had no idea how many

siblings Mr. Bruno had, or if he had any brothers, or how many sisters (T. 740). However, he did not know about the existence of at least one of the sisters prior to the penalty phase (T. 741).

As to his testimony on cross-examination that he wanted the jury to be instructed on the statutory mitigating factors, Stella acknowledged that it was better when a jury is instructed on various issues to actually have the evidence that matches those instructions, did not recall whether he ever asked Stillman about statutory mitigating factors, and that the "record speaks for itself" (T. 741).

As to the off-the-record conferences about jury selection, Stella repeated that the practice at the time (which he recalled on cross examination after the prosecutor's questions) was via the slip system and that no jury challenges were ever discussed side-bar (T. 742). However, when confronted with the fact that some bench conferences were reported at which time some jury challenges were discussed, Stella testified that "you're talking about things that happened ten years ago. If you can show me a part of the record, I'll be happy to retract any of my statements substantiated by the record" (T. 743).

As to his cross-examination at trial of Mike Jr., Stella reiterated his own cross examination that Mr. Bruno did not want him "to lay a glove on him" (T. 744). However, Stella acknowledged impeaching Mike Jr, a few times and insinuated during his closing argument that Mike Jr. was the killer (Id.). After being confronted with this, Stella maintained his story

that Mr. Bruno did not want him to "lay a glove" on his son during cross-examination (Id.).

As to the motions for experts to evaluate Mr. Bruno's sanity and the insanity pleadings, Stella did not get Mr. Bruno's permission to file those; "I didn't question - I didn't ask him about it" and just did it anyway (T. 745). Stella also reaffirmed that he had concerns about Mr. Bruno's competency not just in the few months before trial, but within a month of his being retained, as he filed a motion for a competency examination in September of 1987 (T. 746). Stella was concerned about some of Mr. Bruno's behaviors which were "self defeating" and "irrational" (T. 746). He reiterated that "clearly, I thought that to be an issue" (Id.).

B. Denial of Effective Assistance of Counsel.

1. **Introduction.** The lower court, without conducting a meaningful evaluation of counsel's testimony, essentially condoned each and every tactical decision without consideration of either counsel's credibility or the reasonableness of the asserted strategies, It is clear even from the cold record that trial counsel, who professed a lack of recollection as to most matters during his direct examination testimony, was able to suddenly recall specific reasons and strategies upon the leading questions offered by the State on cross-examination. Stella had every reason to generally testify favorably for the State, as he would not testify without a specific grant of immunity for his prior cocaine possession habits during the time he represented Mr. Bruno. The purported strategy reasons should thus be

carefully examined by the Court in light of the record and the circumstances surrounding counsel's testimony, and also in light of the glaring legal errors committed by the lower court. Under Strickland v. Washington, 466 U.S. 668 (1984), and its progeny, Mr. Bruno is entitled to relief.

2. Trial Counsel's Impairments. After receiving immunity from the State, Stella testified to his abuse of cocaine and alcohol during critical time periods during which he was representing Mr. Bruno. He was retained in August, 1986, at which time he was actively abusing alcohol and cocaine (T. 201-02; 204; 207), and in the months between August and October of 1986, his drinking in particular became "significantly worse" to the point where, in October of that year, he went to Alcoholic Anonymous when he realized that "it began to effect my personal life and . . . my work habits as well" (T. 201-02).

After he stopped drinking and abusing cocaine in October, 1996, he remained alcohol and cocaine free until 10 days prior to seeking hospitalization on March 15, 1987, just 2 weeks before Mr. Bruno's trial was to begin (T. 201). Stella entered the Coral Springs Care Unit, where he remained for 28 days (T. 208).

The lower court wrote "[t]here was no evidence presented at the evidentiary hearing, that Mr. Stella was under the influence of an alcoholic beverage or a controlled substance during the Defendant's trial" (PC-R. 180). While Stella did not admit to such use during the trial itself, the evidence is conclusive that he was abusing alcohol and cocaine during substantial portions of his representation of Mr. Bruno, and entered rehab a mere two

weeks before trial was set. When he was hospitalized, Stella did not recall what the extent of his preparation was for Mr. Bruno's trial, but he did recall that "[w]e would have been in the process of preparing the capital motions for hearing," which is one of the "[l]ater things" you do to get ready for a capital trial (T. 214). In fact, the "capital motions," which are essentially form motions, were filed almost immediately after Stella was retained.[11] None of the significant motions in the case, such as the motion to suppress Mr. Bruno's statements, a belated motion for leave to file an insanity defense, and a motion to preclude the State from introducing Williams-rule evidence, were filed until June and July of 1987, after Stella's hospitalization. This is important because Mr. Bruno's trial was set for March 30, 1987, and Stella entered rehab on March 15; at that time, none of the significant trial motions had been filed. Stella had no idea that the judge would continue Mr. Bruno's trial, and during his relapse, not to mention the lengthy federal trial which took up most of January, 1987 (T. 194), Stella's attentions were obviously elsewhere.[12]

When the relevant dates are viewed it becomes clear that during

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[11] See R. 961; 964; 966; 968; 972; 989; 991; 993; 995; 997; 999.

[12] Moreover, Stella did not candidly represent to the trial court what was going on when the March 20, 1987, motion for continuance was filed. The motion did not, as the lower court wrote, indicate that Mr. Stella was being hospitalized "as a result of alcohol addiction" (PC-R. 179). Rather, it simply stated that Stella needed a continuance because he was hospitalized for "diagnostic testing and evaluation" (R. 113-14).

significant periods of pretrial preparation, Stella was impaired or had his attentions focused elsewhere. "[P]retrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F. 2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984). Stella was actively using alcohol and cocaine from August until sometime in October of 1986; he was involved in a federal trial for three weeks in January of 1987 which, by his own admission, required a lot of preparation and was "certainly time consuming" (T. 195). When the federal case was being tried, Stella was in court all day and spent "very little" time on Mr. Bruno's case (T. 197). Once the federal trial ended at the end of January, Stella's relapse occurred within weeks, and on March 15, 1987, he was hospitalized.

The lower court failed to evaluate the credibility of and recollections about alleged strategies offered by trial counsel in light of his alcohol and cocaine abuse during critical phases of Mr. Bruno's trial preparation period, not to mention his immunity offered by the State. It was patently obvious during the hearing that Stella, who could not recall much during direct examination by Mr. Bruno's counsel, suddenly "recalled" strategies during his cross-examination by the State. Stella himself apparently realized the credibility problem he was facing at one point during the cross-examination:

> I'm going to be candid with you, Ms. Bailey. I don't recall what all the factors were ten years later. I'm not going to play the - gee, Todd Scher, I don't

> remember anything, but Ms. Bailey, all of a sudden, when I'm being cross-examined, I remember everything.

(T. 680).

Thus, even if Stella did not acknowledge drug or alcohol usage during the trial itself, this information is relevant to the pretrial preparation in this case, as well as relevant to Stella's motivations and bias and his ability to recall critical facts during the relevant time periods.

3. Breach of Confidentiality and Duty of Loyalty.

a. Procedural Bar. The lower court barred this claim because it was allegedly raised on direct appeal and was being relitigated under ineffective assistance of counsel (PC-R. 177). This issue was not raised on direct appeal, where it **was** argued that Judge Coker erred in failing to grant a hearing, new trial, or continuance of the sentencing phase when trial counsel learned that Dr. Stillman's conclusions were at odds with Stella's understanding. Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991). Significantly, in its Answer Brief on direct appeal, the State took the position that "Appellant has raised this claim in the guise of an ineffective assistance of counsel claim, which . . . is not cognizable in this proceeding." Answer Brief of Appellee, Bruno v. State, No. 71,419, at 83.[13] It is well-settled that

[13]The State below did not stand by its argument on direct appeal, instead arguing that "Bruno is trying to relitigate the same issue using a different argument, which he cannot do" or that these issues could and should have been raised on direct appeal (Supp. PC-R. 98-99). The State is estopped from making contradictory arguments from one appeal to the next. Kaufman v. Lassiter, 616 So. 2d 491, 493 (Fla. 4th DCA), rev. denied, 624 so. 2d 267 (Fla. 1993).

claims of ineffectiveness are cognizable in Rule 3.850, not on direct appeal, Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996), and the court erred as a matter of law finding a res *judicata* procedural bar.

b. The Merits. Stella repeatedly and unreasonably divulged confidential and damaging information to the trial court, the ultimate sentencer in this case. His actions resulted in a conflict of interest which deprived Mr. Bruno of the effective assistance of counsel at both phases of trial.

In a pleading filed on June 12, 1987, Stella revealed that Mr. Bruno "on numerous occasions recounted his recollection of the events on the night in questions" and "he attributes [it] to sporatic [sic] memory loss" (R. 1031). He further divulged that Mr. Bruno "failed to advise" him of "his contacts with his son and former wife regarding their son's whereabouts or competency to testify and did represent to the undersigned that he could not get in touch with his son and did not know where he was." Id. He went on to write that these conversations took place "despite the undersigned's numerous warnings to the Defendant not to have any contact with witnesses" (Id).

The most damaging instance of ineffectiveness occurred at penalty phase, after the testimony of the defense psychiatrist who testified that Mr. Bruno was insane at the time of the killing (R. 820). After lunch recess taken in the middle of the state's cross-examination of Mr. Bruno, Stella asked for a sidebar. With the prosecutor (but not Mr. Bruno) present, Stella contradicted the testimony of the single mental health expert

testifying for Mr. Bruno:

Mr. Stella: Thank you, your Honor, for seeing me at side bar. The reason that I asked to be seen at side bar is because I know that there is press in here.

Dr. Stillman, to my surprise and dismay testified today that he had told me, at least verbally that, number one, my client was probably or at least possibly insane at the time of the offense because of drug, alcohol and substance abuse as well as a number of other factors.

I did not receive a report from Dr. Stillman. However, I did receive an initial letter dated December 8th of 1986 and another letter after I had had a conversation with Doctor Stillman regarding the fact, that, despite his findings in the December 8th letter finding my client completely competent, finding no indication of insanity or competency at the time of the offense nor incompetency to stand trial nor at the time of the offense, I still had my doubts.

I called him verbally. He reevaluated the defendant or at least visited him; wrote me a letter on June 19, 1987, verifying and resubstantiating that position.

When I called Doctor Stillman 48 hours ago I made it abundantly clear to the doctor this was not for the purposes of the M'Naughton rule but **was** for the purpose of mitigating circumstances and predicated upon that put him in touch with the defendant's family.

And I do not want it coming back that I, as the attorney and representative for the defendant, was remiss or failed to follow-up on a potentially viable insanity defense.

THE COURT: If you would like for the purposes of the appellate record, like to put in a copy of that letter in there -- 1 don't know if it is confidential.

MR. STELLA: It is confidential, and at this particular point in time I will probably do some research before I do that.

THE COURT: But you are saying, in fact, in these letters he is found by you to be totally competent?

MR. STELLA: Found by Doctor Stillman.

THE COURT: And that is confidential, not supplied to anybody else?

MR. STELLA: Right.

THE COURT: And he didn't say to you anything today about his stand, in taking a stand as to competency or insanity?

MR. STELLA: No, sir. And I again indicated to him this was for the purpose of mitigating, not Mnaghten. I was placed in an unenviable position of either cross-examining my own witness in a death phase or penalty phase or in bringing to the Court's attention

I feel that as an officer of the Court and to protect the record, I had to bring it to you as well as Mr. Coyle's attention.

(R. 863-66) (emphasis added).[14]

Later, after the judge and jury (and Mr. Bruno) and were out of the courtroom, Stella took the prosecutor to the court reporter:

MR. STELLA: I have moved side bar with Jack, as you are well aware, and I just wanted to reemphasize the fact that Dr. Stillman had indicated in his direct examination and as well as excuse me, I believe it was cross-examination that he had given the defense attorney, namely me in this case, a clear indication that the defendant was, in fact, sane at the time of the offense; however, he needed additional corroborate evidence.

I have two letter, one dated June 19, 1987, and one dated December 8, 1986, and basically, and I think for purposes of this transcript of the trial by stipulation, the transcript of the tape will go in and basically the indications are unequivocal and clear that's upon examination both on November 30 as to the December 8 letter and as to June 15 as to the June 19 letter, that it was Dr. Stillman's opinion at that time that the defendant was, in fact, sane and incompetent, and there seems to be no indication of any request for further corroborative evidence. I say that not in derogation of Doctor Stillman because it's been some time and he probably had forgotten that he had written me these short reports, but the reason I am putting it

[14]Stella's "concern" about putting the letters into evidence because of their confidential nature is absurd, given that he told the court that Stillman had found Mr. Bruno competent, which was itself a breach of the privilege, and he later discussed these very letters at a sidebar with the prosecutor (R. 917).

> on the record is to make it abundantly clear that it was not over sight on the part of Defense counsel to explore or give reason to explore the defense of insanity.

(R. 917) (emphasis added).

The prejudice is evident. The prosecutor used Stella's representations against Mr. Bruno in closing argument against any finding of mental mitigation and in the trial court's sentencing findings. See R. 884 (prosecutor argued to the jury that Dr. Stillman "doesn't know what he's talking about"); R. 884-85 ("all of a sudden at the time of sentence [Dr. Stillman] runs in and says the defendant was insane at the time of the offense . . ..You know that he never came to that conclusion"); R. 885 ("If they had had an insanity defense, Dr. Stillman would have appeared before this."). Judge Coker also rejected Dr. Stillman's testimony *in toto* (R. 1106-07).

Stella's conduct leaves no doubt that there was a real conflict between counsel and client, as his comments establish that his primary concern was defense of himself. Stella offered no reasonable strategy for divulging this information to the court. The lower court wrote that "Stella testified that he explained his surprise to Judge Coker, in order to justify his subsequent motion for an additional psychological evaluation" (PC-R. 177). This, however, does not square with Stella's two statements on the record that he was divulging this so as not to be facing an ineffective of assistance of counsel claim. See R. 864-66; 917. Moreover, Stella repeatedly voiced his concerns at the evidentiary hearing about his friendship with Judge Coker, who

assigned him a lot of lucrative first-degree murder cases, and even acknowledged that his decision to tell the judge was "a tactical decision, albeit a wrong one on my part" but he emphasized how important it was for him to let "the judge to know this caught me by surprise" (T. 451).

As to the disclosures made in the June 12, 1987, motion, the lower court wrote that they were made "as a justification for his seeking leave of court to file a belated notice of intent to rely on an insanity defense, pursuant to Rule 3.216" (PC-R. 177-78). The court found that the statements in the motion "reflect [Stella's] conflicts with the Defendant as to the conduct of the trial" (PC-R. 178). Stella had no business discussing conflicts with his client in a pleading before to the court and the State. If Stella had such alleged conflicts with Mr. Bruno to the extent that he had to "seek the Trial Court's help with a client who consistently refused to co-operate with his defense counsel's trial preparations," then he should have moved to withdraw, not announce publicly his internal disputes with his client.

Stella's disclosures of confidential, damaging information to the trial court denied Mr Bruno the effective assistance of counsel. Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983) (emphasis in original). See also Blanco v. Singletary, 943 F.2d 1447, 1500 (11th Cir. 1991). Moreover, Stella's actions were "not simply poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention of weakening his client's case." Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1983). Due to

the level of breach occurring, Mr. Bruno was actually or constructively denied counsel, and prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659-60 (1984). Under either Strickland or Cronic, Mr. Bruno is entitled to relief.

4. Voluntary Intoxication. A meritorious intoxication defense was available yet not presented. The lower court acquiesced to Stella's purported strategy that Mr. Bruno did not want a voluntary intoxication defense presented (PC-R. 183), yet never assessed that for reasonableness under the facts of this case. Moreover, the court concluded that "[t]he evidence presented at the evidentiary hearing does not demonstrate that the Defendant was intoxicated to the point where he could not form a specific intent to murder Mr. Merlano. Prior to the murder, the Defendant had the mental capacity to secrete the gun and a crow bar, which he later used in the murder" (PC-R. 183). This finding is totally contrary to the evidence established at the evidentiary hearing.

Voluntary intoxication is a defense to specific intent crimes such as first-degree murder. Gurganus v. State, 451 So. 2d 817 (Fla. 1984); Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985). The defense of voluntary intoxication applies also to felony murder when the underlying felony upon which the murder charge is based is a specific intent crime. Linehan v. State, 476 So. 2d 1262 (Fla. 1985). Robbery, the underlying felony for which Mr. Bruno was charged and convicted, is a specific intent crime to which voluntary intoxication is a defense. Bell v. State, 394 so. 2d 979 (Fla. 1981).

Stella testified that voluntary intoxication was "the most legally meritorious defense" because of Mr. Bruno's post-arrest statement and the statement of his son (T. 186; 232-33). Although it was "a difficult defense" in any case (T. 236), "I thought that the voluntary intoxication would sway the jury, hopefully, to a murder two or manslaughter, would be the best route to go, the best route to go" (T. 237).

Rather than presenting "the most legally meritorious defense" available in the case, Stella presented a reasonable doubt as to the identity of the killer defense, namely that Jody Spalding committed the murder (T. 240). He "wasn't crazy about it" and that the "viability of that defense" was "injured" by the fact that the State had investigated and was prepared to present witnesses to an alibi for Spalding (T. 239). As he acknowledged, the Jody-did-it defense was "was damaged by the notice of alibi or alibi witnesses that were going to place our prime suspect, as it were, at the Red Lobster and the date and time in question" (T. 314).

On cross examination, Stella reaffirmed that voluntary intoxication "[w]as the best defense under the facts of this case" (T. 670), and that up until the time of jury selection, he believed this to be the best defense (Id.). However, he did not present the defense because Mr. Bruno did not want him to (T. 667). On the eve of trial, after realizing that Mr. Bruno's son would be testifying because he saw him in the hallway of the courthouse, Stella discussed voluntary intoxication with Mr. Bruno "with renewed vigor" and that he "would try to get an

expert to examine him and maybe even a neuropsychologist or neuro pharmacologist" (T. 668). However, at that last moment, Mr. Bruno did not want to go through with the defense (T. 669).

"[P]retrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F. 2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984). Stella conducted no investigation into a voluntary intoxication defense, thereby rendering deficient performance. Despite acknowledging that it was "the most meritorious defense," he did nothing to investigate. He did not engage the services of any mental health professionals in order to evaluate Mr. Bruno's substance abuse history and the level of his intoxication at the time of the offense, despite the knowledge of compelling evidence, corroborated by his son, that Mr. Bruno was "very high" at the time of the offense on L.S.D., cocaine, and other substances. Although Stella testified that he used investigator Sydney Patrick "extensively" to investigate potential witnesses and evidence (T. 149), Patrick testified when called by the State that he never discussed with Mr. Bruno his drug use either in general or on the night of the offense (T. 918),[15] and only acted at the express direction of Stella (T. 926).

An attorney's incantation that he had a tactical reason is not the end of the constitutional analysis, yet that is where the

[15]Patrick testified that the extent of his investigation into Mr. Bruno's intoxication was a discussion with Sharon Spalding, who was not specific about whether he was intoxicated on that evening "but that she knew that he drank" (T. 918).

lower court ended its inquiry. "[M]erely invoking the word strategy to explain errors [is] insufficient since 'particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991). "[C]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Id. at 1462.

Stella failed in his duty to investigate and present a voluntary intoxication defense. As he testified, it was only on the eve of trial was there any discussion about even the possibility of seeking expert mental health opinions on the issue. Waiting until the last minute to discuss the possibility of retaining a mental health expert is no better than not doing so at all. Mr. Bruno's alleged decision to reject a voluntary intoxication defense was made in a vacuum, without the benefit of his attorney's having investigated or sought expert opinions. A defendant cannot make a decision to forego or waive a viable area of inquiry without first being fully advised of all the options after counsel has fully investigated. See Deaton v. Dugger, 635 so. 2d 4, 8 (Fla. 1993). See also Blanco v. Singletary, 943 F. 2d 1477, 1501 (11th Cir. 1991).

A lawyer may not "blindly follow" the commands of a client. Blanco, 941 F.2d at 1502. Stella's decision to forego an adequate investigation was unreasonable, particularly in light of the fact that he had evidence that Mr. Bruno was heavily intoxicated on the night of the offense, believed that voluntary

intoxication was "the best defense" under the facts of the case, and did not believe the Jody-did-it defense would go anywhere. In short, Stella unreasonably acceded to the alleged "command" of Mr. Bruno rather than investigate and present the "most legally meritorious defense" in the case. Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) (counsel rendered deficient performance when he "chose to present this theory [of defense] **even** though he thought it was far-fetched at the time. . . Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived"),

The reasonableness of Stella's wholesale reliance on Mr. Bruno's alleged directive is further diminished due Stella's concerns about Mr. Bruno's competency. Stella testified on numerous occasions that he had continued concerns about Mr. Bruno's competency; in fact, only one month after being appointed Mr. Stella filed a motion seeking a competency evaluation (T. 746). Total deference to his client's alleged "command" not to present a voluntary intoxication defense was even more unreasonable given Stella's clear concerns about his client's competency and his "self-defeating" behavior. See Pridgen v. State, 531 so. 2d 951, 955 (Fla. 1988) ("[i]f Pridgen was incompetent during the penalty phase of the trial, the **tactical** decisions made by him to offer no defense to the state's recommendations of death cannot stand"), When an attorney has concerns about a client's mental capacity to exercise reasonable judgment, the attorney has a greater obligation to investigate. Blanco, 943 F. 2d at 1502. See also Thompson v. Wainwrisht, 787

F. 2d 1447, 1451 (11th Cir. 1986).

Stella's blind deference to Mr. Bruno rings hollow given the fact that Stella filed a motion noticing his intent to rely on an insanity defense (R. 1031). Insanity and intoxication defenses are essentially the same in that they are both premised on a lack of mental capacity at the time of the offense. The lower court wrote that Mr. Bruno rejected a voluntary intoxication defense because it was "wholly inconsistent with an alibi defense, or a defense that the murder was committed by Jody Spalding" (PC-R. 183). However, the lower court failed at all to evaluate Stella's testimony in light of the insanity defense that he at one point informed the State he **was** pursuing. When asked how this came about when Mr. Bruno allegedly refused to cooperate with an intoxication defense, Mr. Stella said that he "didn't ask him about it," he did it anyway (T. 745).[16] Moreover, at trial, Stella requested and obtained a jury instruction on self-defense/defense of others (R. ___). This instruction is even more inconsistent with reasonable doubt, and clearly a voluntary intoxication defense would in no way have been inconsistent with a self-defense/defense of others. Stella's post-hoc "strategies" simply do not comport with the record of his actions at trial.

Mr. Bruno has established prejudice. As Stella repeatedly

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[16]Stella's purported tactical reason also is contradicted by his calling Dr. Stillman at the penalty phase. Although Mr. Bruno allegedly "thwarted" his attempts to prepare for the penalty phase (T. 718), the same alleged attitude that Mr. Bruno supposedly exhibited regarding the intoxication defense at trial, Stella "called the people I called, irrespective of my client's wishes" (T. 734).

pointed out, the voluntary intoxication defense in this case was the most legally meritorious defense available. There is no better way to ensure an adversarial testing in a capital case than by presenting the most legally meritorious defense available. By presenting such a defense, more than a reasonable probability exists that the jury would have come back with a verdict of a lesser degree of homicide, such as second degree murder or manslaughter. The jury deliberated for over 26 hours at the guilt phase; Stella even acknowledged that he was "surprised at their verdict in both the guilt and the penalty phases, particularly in light of the length of their deliberations" (T. 140). Under these circumstances, there is more than a reasonable probability of a different outcome if the jury had been presented with the most legally meritorious defense available.

Mr. Bruno presented compelling and unrebutted evidence at the evidentiary hearing which established a viable intoxication defense. Dr. Lipman opined that Mr. Bruno's ability to form a specific intent at the time of the offense was "deranged and disordered" (T. 833), explaining that his conclusion was based on the description from both Mr. Bruno and his son, Mike Jr., as to the combination and amount of drugs being used by Mr. Bruno (T. 834). The drugs ingested by Mr. Bruno on the evening of the offense included up to an ounce of cocaine, quaalude and five doses of L.S.D., which in combination with his history of chronic substance abuse and his neuropsychological make-up, placed Mr. Bruno in a psychotic state (T. 834-35). This state, according to

Dr. Lipman, would have seriously affected Mr. Bruno's ability to perceive reality (T. 835-36).

Unrebutted testimony established that the fact that Mr. Bruno allegedly "secret[ed] the gun and a crowbar which he later used in the murder" (T. 183) was in no way inconsistent with a high level of intoxication. Dr. Dee testified that Mr. Bruno's level of intoxication at the time "would make it difficult to premeditate anything" (T. 548), that his "ability to plan anything very meaningfully is terribly impaired," and that while he could "do some things, whether to walk out **a** door or to get into a car," anything requiring "complex planning" was doubtful (T. **584).** Dr. Lipman explained that, even assuming the State's facts as true (which they are in dispute), his opinion that Mr. Bruno was incapable of forming specific intent was not affected by the fact that Mr. Bruno had a crowbar with him, for such a factor in no way meant that he was not severely intoxicated.

Given the fact that the defense that was presented was one that Stella was not crazy about because it was not particularly supported by any evidence, the fact that the State presented the testimony of an eyewitness to the murder (Mr. Bruno's son), and the fact that the State presented an oral statement made by Mr. Bruno about the offense, the prejudice to Mr. Bruno from the failure to present intoxication is manifest. There is more than a reasonable probability that the jury would have returned a verdict of less than first-degree murder had a viable defense of voluntary intoxication been presented.

5. **Failure to Seek Suppression of Initial Statement.**

a. **Procedural Bar.** The lower court erroneously barred this claim (PC-R. 184).[17] This claim alleged counsel's failure to seek the suppression of Mr. Bruno's initial statement to law enforcement given without Miranda warnings and under coercion. This claim was not raised on direct appeal nor could it have been since it is an ineffectiveness claim. Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996).

b. **The Merits.** Mr. Bruno **was** first interrogated by the police in the early evening hours of August 12, 1986; this statement was not recorded and was obtained without Miranda warnings, the police contending that Mr. Bruno was not in custody at the time. The statement was introduced at trial through the testimony of Detectives Hanstein and Edgerton. The substance of the statement was that Mr. Bruno had no knowledge of the whereabouts of the victim and had not killed him. Mr. Bruno told the officers that he knew the deceased, and had been over to his apartment either several days or weeks before to have a few beers and tune the electronic equipment (depending on Hanstein's or Edgerton's recollection). As for his whereabouts over the weekend, with the exception of one trip (according to Hanstein) or two trips (Edgerton) to the Candlewood apartment complex, Mr. Bruno told the police he spent the weekend working on Jody Spalding's car. That one exception was to go to the apartment complex to obtain a receipt for a refrigerator Sharon Spalding had bought from a man named Jim (R. 500-02) (Hanstein); R. 611-12

[17]Even the State in its response to the 3.850 motion did not allege a procedural bar (Supp. PC-R. 125).

(Edgerton).

This statement provided the State with additional evidence to use, as it contradicted the later statement in which Mr. Bruno said he killed the victim in self-defense and defense of his son; it contradicted other testimony about his whereabouts in the days following the killing; and shows guilty knowledge. Yet Stella failed to seek suppression of the statement, which was taken in the absence of Miranda warnings. Police reports show both that Mr. Bruno was actually in custody and/or was the focus of the investigation, triggering the Miranda requirements.

Hanstein and Edgerton's report shows they were led to Mr. Bruno through their conversations with residents at the apartment complex. Early on, according to the report, Mr. Bruno was the focus of the investigation, and the police considered him a prime suspect. They knew he was on probation, a condition of which he was required to cooperate with the police. He **was** not told he was free to leave, and had to be transported home by a detective. They expressly told Mr. Bruno he was not free to leave town, and immediately contacted his probation officer, Samantha Atkinson, and "advised her of our suspicions concerning Mr. Bruno" (Report at 19). They told Atkinson to tell Mr. Bruno that the prior permission he had received from her to **leave** the area **was** revoked, which she did, Every witness questioned after this interrogation **was** Mirandized, further demonstrating Mr. Bruno was the focus.

At the time of initial questioning, Mr. Bruno had become the prime focus of the police investigation, thereby triggering

Miranda. Stella testified at the evidentiary hearing that he knew of no caselaw that suggested that simply being the focus of the investigation was tantamount to a custodial investigation thus triggering Miranda. However, on March 16, 1987, the First District Court of Appeals issued an opinion in Moslev v. State, 503 so. 2d 1356 (Fla. 1st DCA 1987), where it addressed this very issue and rejected the State's contentions:

> We find that appellant was the only suspect in this investigation and was the focus of a precalculated plan designed to get him to the stationhouse, confess and then cooperate as an informant in exchange for leniency in prosecution. We further find that, although appellant was not in custody arising to the level of a formal arrest most often viewed as that which requires a Miranda warning, he was the accused from whom a confession and future cooperation were sought as a result of a plan involving promises of leniency and threats of future prosecution which was formulated before appellant ever got to the station. Given the totality of these circumstances, we find that appellant should have been apprised of his Miranda rights and given an opportunity to waive them. In light of the sheriff's deputy's own testimony at the suppression hearing, we cannot conclude that appellant was free from undue influence while interrogated at the station and therefore the state has failed to prove that his inculpatory statements were freely and voluntarily made.

Moslev, 503 So. 2d at 1359.[18]

Here, the detectives' intent was to obtain incriminating statements; the questioning took place at the police station, after Mr. Bruno was transported in a police car, while on probation. Drake v. State, 441 So. 2d 1079, 1081 (Fla. 1984). The detectives exploited the fact that Mr. Bruno was on probation to get him to cooperate. Id. at 1081. It is plain that at the

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[18] "During the time period when Mosley issued, trial counsel had just been hospitalized for alcohol addiction.

time of questioning, Mr. Bruno was, in effect, in custody for purposes of Miranda. See Dunaway v. New York, 442 U.S. 200 (1979).

The lower court misapprehended Mr. Bruno's claim, concluding that "there is no reasonable probability that the verdict would have been different, had Bruno's initial exculpatory statements been received in evidence" (PC-R. 184). First, Mr. Bruno's statements were introduced into evidence; Mr. Bruno was alleging that counsel unreasonably failed to seek the suppression of the statement. Moreover, as explained above, the statement was used against Mr. Bruno at trial because it was contradictory to his later statement, as well as the testimony of other witnesses. Under Strickland, Mr. Bruno established that confidence in the reliability of the outcome was undermined.

6. **Failure to Attack "Confession" on Intoxication Grounds.**

a. **Procedural Bar.** The lower court erred in finding the allegations that counsel failed to investigate and present evidence that Mr. Bruno **was** incapable of competently waiving his Miranda warnings as to the second police statement due to intoxication were barred (PC-R. 184).[19] Mr. Bruno alleged ineffective assistance of counsel in failing to investigate and challenge the purported confession due to Mr. Bruno's intoxication at the time he made the statements. These allegations, as the State conceded below, are not procedurally

[19]The State never alleged a bar (PC-R. 119-24). The State only alleged a ***res judicata*** bar as to the allegations regarding law enforcement's failure to call an attorney in violation of Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

barred. Oats v. Dugger, 638 So. 2d 20, 21 (Fla. 1994).

b. The Merits. This claim must be considered in the context of Stella's failure, due to his own problems, to adequately prepare for the important issue of the suppression of Mr. Bruno's statements. As outlined above, even though trial was originally set for March 30, 1987, Stella filed no motion to suppress at all before that date, and on March 15, was hospitalized for alcohol addition. Stella dodged that bullet however when the court granted a continuance. In June, 1987, a motion to suppress was filed; however, Stella failed to investigate Mr. Bruno's severe intoxication at the time he made his second statement, where he told the police he killed the victim in self-defense. Had counsel properly investigated, and consulted with competent and prepared mental health experts, Mr. Bruno's statement would have been suppressed as he was incapable of waiving his Miranda rights due to severe intoxication.

Stella testified that Mr. Bruno's statement **was** the "[n]umber one" piece of evidence for the State (T. 269). He did not recall whether he had discussed with Dr. Stillman the issue of Mr. Bruno's mental state and his ability to knowingly, intelligently, and voluntarily waive his Miranda rights (T. 269), although Stillman "would have done so at my request if I would have asked him" (T. 270). Stella did not recall what information he had about Mr. Bruno's level of intoxication at the time of arrest, acknowledging that such would have been significant to the issue of voluntariness (T. 271), and would have been "cannon fodder for cross-examination" at the trial in terms of impeaching the

officers who elicited the statement (T. 272).[20] If he had an expert who would have been able to testify that Mr. Bruno was incapable of voluntarily waiving his Miranda warnings, he would have presented it "as long as it was supported by viable competent evidence" (T. 272).

Mr. Bruno presented unrebutted expert testimony that Mr. Bruno was incapable of waiving his Miranda warnings. At the time Mr. Bruno was interviewed by the police, Mr. Bruno was "actively hallucinating" and was "perhaps, delusionally under the impression the police were going to have his son raped if he didn't tell them the story they told him to tell" (T. 848). Dr. Lipman explained that Mr. Bruno told him that "it was like a movie or a cartoon. As the cops moved and he made a whooshing noise, woosh, from here to there, around the room. He said there was a clock that they told him to read the time from and it never moved" (Id.). Immediately preceding his arrest, Mr. Bruno had ingested cocaine as well as L.S.D (Id.), which would have "reduced his ability to distinguish between the reality and unreality of the situation. He was in a nightmare" (T. 849-50). Dr. Lipman concluded, based on his review of the materials and his evaluation of Mr. Bruno, that Mr. Bruno was not in "a

[20]It is clear that counsel failed to properly investigate the issue of Mr. Bruno's intoxication either at arrest or on the night of the crime. Stella did not even broach the issue of hiring an expert to look into these issues until they were getting ready to pick the jury and it became clear that Mr. Bruno's son was going to be testifying (T. 669) . Moreover, the defense investigator never interviewed Mr. Bruno about his drug or alcohol use in general or on the night of the offense (T. 918).

condition to waive his rights knowingly" (T. 849).

Because of trial counsel's failure to prepare and investigate, a viable attack to the voluntariness of Mr. Bruno's alleged statement never occurred, nor did counsel ever cross-examine the detectives about these issues at trial. Because of counsel's deficient performance, Mr. Bruno was prejudiced by the introduction of his statement.

7. **Failure to Effectively Challenge State's Case.** The trial court summarily rejected the allegations that Stella failed to effectively challenge the state's case, finding that "these matters were tactical choices, and are within the standard of competency of defense counsel" (PC-R. 185). The court also found that there is "no reasonably probability that the verdict would have been different" (Id.). Both conclusions are erroneous as a matter of law and fact. Singularly and/or cumulatively, these errors undermine confidence in the guilt and penalty phases of Mr. Bruno's trial.

a. **Failure to Effectively Cross-Examine Mike Bruno Jr.** Stella failed to cross-examine Mike Bruno, Jr., who testified at trial that he was an eyewitness to the crime and implicated his father in committing the killing, as to his mental condition and his drug use both at the time of the crime and during his testimony. Stella acknowledged that one of his trial strategies was to attack Mike Jr.'s credibility (T. 297), and that he was "a very damaging witness" (T. 681). Stella recalled knowing not only that Mike Jr. was on LSD at the time of the crime, but also that his family was "seeking to have him declared incompetent so

he would not have to testify" (T. 300-01). Stella also knew that, at the time he was testifying, Mike Jr. was under the care of a psychiatrist and under sedative medication (T. 691-92).

Stella did not fully cross-examine Mike Jr. about his mental health problems or his drug intoxication at the time he allegedly witnessed the murder because Mr. Bruno allegedly told him he did not want his son cross-examined (T. 681). Of course, Stella did cross-examine Mike Jr, thereby refuting his own ***post hoc*** strategy reason. Yet Stella never crossed him on the important issues of drug usage at the time of the offense, despite acknowledging that Mike Jr. story that he witnessed his father killing the victim was "kind of unbelievable" and that "if he was on drugs or he if was highly intoxicated on that particular night, it would be cannon fodder for cross-examination regarding his ability to accurately recall what he had seen if he was intoxicated" (T. 309).

The lower court acquiesced to Stella's purported strategy that Mr. Bruno "told him to go easy on the cross-examination of his son Mike Jr." (T. 185). Again, the court failed to square this "strategy" with the record, which establishes the wholly incredible nature of Stella's testimony. Right from the opening statement Stella promised credibility attacks on Mike Jr, stating that "[m]urder being the most serious crime that it is will make even the most loved ones, even those closest to you, turn against you in sheer panic" (R. 318). Stella told the jury that he would establish through cross-examination that Mike Jr.'s testimony is a part of "a house of cards based on half truths, lies, recanted

and redacted statements by individuals who had nothing but personal gain and motive to testify against the defendant" (R. 319). At trial, Stella called Mike Jr. a liar (R. 438), that he could have been charged with murder himself (R. 439), that he was given immunity (Id.), and pointed out discrepancies in his statements (R. 445).

Yet as to the significant issue of Mike Jr's own intoxication on the night he allegedly witnessed the killing, which would have provided the jury with a new and different area for discounting his testimony, Stella asked nothing, despite acknowledging that such information would be "cannon fodder for cross examination" (T. 309). The testimony that he did not do so because Mr. Bruno told him not to cross examine his son is just not credible, as Stella did conduct a limited cross examination, just not on the issues which Stella himself labeled "cannon fodder." Stella's purported strategy simply cannot withstand scrutiny from the record.

b. Failure to Effectively Impeach Diana Liu. At trial, Diana Liu testified that she saw both Mr. Bruno and the deceased at a party that evening around 8:00, drinking beer (R. 376-78). She saw Mr. Bruno alone close to 8:00 that evening, and testified that he asked her to go to another party: "It's a murder party. It's going to be a great killing" (R. 378). Stella, however, failed to bring out on cross-examination that Liu did not tell the police about this obviously damaging and memorable statement when first questioned, and further failed to impeach her through the detectives, who did not believe her statement and that "she

appeared not to be totally with it" (Deposition of Det. Hanstein at 27). To make matters worse, Stella never deposed Liu prior to trial (T. 330).

That he did not depose her could have been why he did not know she was going to be making that statement, which was something that should have been disclosed under Brady v. Maryland, 373 U.S. 83 (1963) (T. 331). On cross-examination, Stella acknowledged, ***in the State's own words,*** that it was possible she never told the police about the "murder party" statement **"or** even **that she was** just **making it up**" (T. **694).** Mr. Bruno was prejudiced by counsel's failure to properly investigate and depose Diana Liu and properly impeach her. To the extent that the State did not disclose Liu's statement, Brady was violated.

c. **Failure to Effectively Impeach Bob Bryant.** Bob Bryant was the first witness to testify at trial, testifying that he was awakened in the early morning hours of Saturday, August 9, by noises coming from what he thought was the apartment of the deceased (R. 327). In his statement to the police, however, Bryant said that the walls were paper thin and he did not hear a gunshot, but rather "what really woke him up was the kids across the hall, screaming, . . . no mommy, no mommy." Without a reasonable tactic or strategy, Stella failed to elicit this significant impeachment evidence on cross-examination.

d. **Failure to Effectively Impeach Sharon Spalding.** Sharon Spalding was an "important" witness for the State because "[s]he was a potential accessory after the fact, at the very least," as well as "the mother of a key suspect in the case" (T. 333).

Despite acknowledging the importance of undermining her credibility Stella failed to effectively impeach Spalding.

Spalding's testimony would have been devastated by the fact that she was on medication in the months preceding and during trial. Stella acknowledged that during her deposition she indicated she was taking "nerve medication" and that she could not recall certain events due to her medication (T. 337) . He testified that "I should have asked her, and then made additional inquiry to see whether or not it was the type of thing that would be appropriate for cross examination" (T. 343), and that her husband, Archie Mahue, testified in his deposition that Spalding was taking Tranxene, a nerve medication on par with "Xanex, Valium, things like that" which "can have an intoxicating effect" (T. 344-45). Yet Stella made no further inquiries and never questioned Spalding about this at trial. Stella offered no tactical reason for not cross-examining Spalding on this issue, yet the lower court found that Stella made tactical decisions (PC-R. 185). The lower court's order is contrary to the evidence.

As Stella testified, Spalding was extremely important. She testified that on the morning of the killing, she saw Mr. Bruno with a gun at her house (R. 450). On cross, Stella brought out that she had told the police that it looked like a toy gun with a long barrel and a white handle (R. 459). Stella failed to bring out, however, that Spalding had not mentioned to the police in her first police questioning that Mr. Bruno had a gun, as well as

the fact that when she described the gun during her deposition,[21] she acknowledged that she did not know "if [she] had her glasses on. If I didn't have my glasses on, everything looks smaller" and "I can't see without my glasses." Stella acknowledged that "she should have been cross examined as to whether or not she was wearing her glasses" (T. 339).

Stella also failed to question Sharon Spalding, as well as her son Jody, about their illicit drug dealings in the Candlewood Apartment complex. During his opening statement at trial, Stella promised the jury that he would prove that Sharon and Jody, "despite the fact that they will deny it," were "some of the primary suspects and individuals that were, in fact dealing marijuana there with the very people that are accusing and testifying against my client in this particular case" (R. 316). Stella failed to follow through on his promise, despite know that that they both sold drugs, and he questioned them about it in the depositions (T. 340) . The investigator, Sidney Patrick, "was primarily involved in this aspect of the case, running down criminal records, and running down, talking to neighbors, talking to people that may have known them, potential employers, or employees, people that could give us some insight in[to] the

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[21]During Stella's cross, the State pointed out that Spalding, in her August 13, 1986, statement, did tell the police that Mr. Bruno had a gun (T. 705). However, that was not Mr. Bruno's allegation. In her first statement to the police, introduced below, she made no mention of Mr. Bruno having a gun, which Stella acknowledged "is a potentially very important fact that was left out," and that "[a]n omission is important and it is something that unless there was a tactical reason to do so, should probably have been explored, and if I didn't, I probably should have" (T. 342).

Spaldings, whether they were involved in the drug business, things like that" (T. 340). Questions about their illegal activities, "would put her credibility as a witness at issue" (Id.). Yet he never brought the issue up at trial, despite advising the jury to "listen closely on cross-examination that this will become abundantly clear to you" (R. 317).

e. **Failure to Effectively Impeach Archie Mahue.** Sharon Spalding's husband, Archie Mahue, testified at trial to a very detailed confession that Mr. Bruno allegedly made on the morning after the crime; Mahue, however, did not come forward with this information for 6 months (R. 564-69). Stella's cross examination focused solely on the fact that he did not come forward with this "confession" until 6 months later, and that he was told his wife was a potential suspect (T. 571-72).

Stella failed to cross-examine Mahue on the real reason he came forward with his story about the alleged confession. In his deposition, Mahue stated that he was only coming forward with his story **was** because he was "tired of this" and "I'm going to settle it" and that "I could hang him myself" by coming forward with the alleged confession, and "I think this here alone should hang him" (T. 402-03). Stella recognized that Mahue's remarkable assertions "would go **as** to his motive, bias, etc. in testifying," yet offered no tactical reason for not bringing up this powerful evidence on cross.[22] No tactical reasons were made, contrary to

[22]Stella also told the jury in opening statements that "[e]ach and every one of these individuals that will testify against my client and attempt to wrap this neat and tidy little package has a genuine and bona fide motive for testifying against

the lower court's order, and none would have been reasonable.

f. **Failure to Effectively Impeach Jody Spalding.** Stella's failure to effectively cross-examine Jody Spalding was prejudicial to Mr. Bruno. Jody testified at trial that Mr. Bruno asked him to drive while he got rid of the gun and pipe used in the killing the night before, and at trial detailed how Mr. Bruno supposedly directed him to drive to three different canals to facilitate Mr. Bruno's disposal of "what looked to be" "a steel bar" "wrapped up" in "cloth, like a towel," what "looked to be a gun" also wrapped in cloth, and finally, the cylinder of a gun (R. 393-96).

The State had Jody testify that when he first spoke to the police, he did not tell the "whole truth' (R. 404). Stella briefly cross-examined Jody on this, after Jody confirmed that "I told them I knew nothing about it, so I guess I didn't tell the truth", but Stella failed to effectively impeach through the use of the actual police report of Jody's first statement when he was interviewed at Candlewood Apartments on August 13, 1986, or through Detective Lavarello, who actually took the first statement (R. 407-410); (T. 405). In the report, Jody denied knowing the victim by name, said nothing about the crime or disposal of weapons, and reported driving his brother to the airport on the morning of August llth, accompanied by Chris Tague and Michael Bruno, Sr. (T. 406). In his testimony at the

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my client" (R. 315), which is a nice thing to argue, but then he never brought out the actual evidence of the devastating motivation on Mahue's cross.

hearing, Stella deferred to the record as to the effectiveness of his questioning of the witness about these matters (T. 406).

In addition, the jury never heard that in his second, sworn tape-recorded statement, Jody Spalding also gave the police an entirely different version of the events than what he testified to at trial. At the evidentiary hearing, Stella agreed that one of his goals at trial was to impeach the credibility of Jody Spalding (T. 404). In fact, he admitted that his primary defense strategy for Mr. Bruno's case was a "Jody did it" defense (T. 32). Calling into question the credibility of Jody Spalding should have been of critical import considering the importance of Spalding's testimony. Stella agreed during his testimony that it would have been possible for him to impeach a witness with their prior taped sworn statement (T. 408). In the August 13 sworn statement, Jody Spalding never mentioned that Bruno had a gun; that the gun was thrown in a canal; and he did not say that he drove Mr. Bruno to different locations when the pipe and the gun parts were being dumped in the canals. He mentioned only the pipe, and swore that he was told it had been thrown in the canal, denying specifically that he had been present or that he knew where it had been thrown, as he later related in his testimony. Jody Spalding 8/13/86 Statement at 4. Detective Hanstein later returned to the issue of the location of the pipe, and Jody Spalding, under oath, continued to deny he was there when the pipe was thrown, and mentioned nothing about a gun. Id. at 11. Stella did not question Spalding about this wholly inconsistent sworn testimony, and on his cross examination of Detective

Hanstein, failed to correct the false and misleading testimony given by that officer that bolstered Spalding's testimony by leading the jury to believe that in his second statement to the police, Spalding had told the authorities where the gun and pipe were, and that he had been present when they were thrown in the canal(s) (R. 517-19). In his testimony at the evidentiary hearing, Stella agreed that Jody Spalding's two prior statements were inconsistent with his later testimony (T. **410).** He also agreed that the record would reflect whether he questioned Jody Spalding about the inconsistencies between his sworn statement and his testimony (T. 410). The record of his cross-examination does not reflect that Mr. Stella asked Mr. Spalding any questions about the inconsistencies (R. 404-22).

It was not until August 19, 1986, after the officers learned from Chris Tague about Jody's involvement in disposing of the weapons, that they went back to him and then Jody told the police he had been present when the weapons were thrown in the canals (Det. Hanstein 8/19/86 Report) (R. 362-63).

These were not the actions of an innocent or truthful person, and given the defense theory of pointing the finger at Jody Spalding, the failure to impeach on Jody's perjured testimony was deficient. The jury had no knowledge of this because of Mr. Stella's ineffective cross-examination of Jody Spalding, and if he had effectively cross-examined, it would have made a difference in the outcome.

g. Failure to Object to "Fear" Testimony.

1. Procedural Bar. The lower court barred this claim

because its substance was raised and rejected on direct appeal (PC-R. 186). This Court found these comments were not objected to and therefore unpreserved, and also improper but harmless. Bruno, 574 so. 2d at 80. Nevertheless, in order to conduct a proper analysis of whether confidence was undermined at either phase of trial, the lower court was required to assess counsel's conduct as a whole, and in assessing prejudice, take into account **all** the error in the case, including the improper testimony that witnesses were in fear of Mr. Bruno. Thus, this claim is not procedurally barred.

ii. The Merits. Prior to trial, Stella filed a motion to exclude any collateral bad act evidence (R. 1034-39), and the State agreed not to elicit such evidence (R. 106). Contrary to its agreement, however, the State elicited testimony first from Jody Spalding that he did not go immediately to the police because "I was worried about what he [Mr. Bruno] might do to me and my family" (R. 403).[23] As to why he did not tell the truth to the police initially, Spalding, after being asked "Why not" by the prosecutor, told the jury "[b]ecause his son was with me the first time that the police talked to us, and if he went back and told Bruno, you never know what he could do to us" (R. 404). No objection was made by Stella to this testimony.

The State then launched the same improper inquiry of Sharon Spalding; when asked why she did not go to the police

[23]This was not something that Jody Spalding just suddenly blurted out, his answer was in direct response to the prosecutor's question "Why not?" when Spalding said he did not immediately go to the police (R. 403).

immediately, she responded "because I **was** scared" (R. 452). That not being sufficient for the prosecutor, he then asked what she was scared of, and Spalding testified "[s]cared of him [Mr. Bruno] doing something to my family" (Id.). After another inquiry by the prosecutor, Spalding testified that she did not tell the police the truth because "I was scared" (Id.).

As this Court found, this testimony was improper. Stella's failure to object to this testimony reflects on his abilities and his testimony as to alleged strategy reasons for the other errors alleged in Mr. Bruno's Rule 3.850 motion. The lower court failed to consider not only the overall cumulative effect of all the errors demonstrated, but also failed to analyze how the previous determination of harmlessness as to the "fear" testimony could nevertheless be undermined due to the substantial other errors demonstrated below. The lower court erred.

f. **Failure to Object to "Allen" Charge.**

1. **Procedural Bar.** The lower court found that this issue was raised and rejected on direct appeal (PC-R. 186). However, in responding to this issue on appeal, the State argued that "any alleged error has not been preserved for review and is not fundamental" (Answer Brief of Appellee at 74). A claim that trial counsel failed to properly preserve a point on appeal by not objecting is cognizable in a Rule 3.850. "[T]rial 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). This claim is not

barred.

ii. The Merits. Without any apparent reason, the trial court, during the jury's deliberations, brought the jury into the courtroom and the following occurred:

> THE COURT: Ladies and gentlemen of the jury, according to my calculations, it's been some 26 hours ago that I sent you all back to the juryroom.
>
> Since that time we have heard practically nothing from you, I would like to inquire is there some problem that the Court might be of some assistance to you as you deliberate?
>
> MR. GILLIS: Your honor, not at this time. We're coming pretty close.
>
> THE COURT: Okay. I will speak to you again shortly. You may retire.

(R. 769-70). Stella testified below that the judge's actions were "[k]ind of a de facto Allen charge" which "was not right back in 1986, nor is it right in 1997" (T. 421). Despite this acknowledgement, Stella explained on cross that he did not object because "I didn't feel that it was objectionable" and went on to discuss how upset he was with the allegations in the 3.850 motion (T. 714). Stella then changed his strategy reason, this time testifying that "I would probably object to it" (T. 715).

8. Failure to Object to Guilt Phase Jury Instructions.

a. Excusable Homicide. The lower court acknowledged that this claim was raised on appeal, where this Court "faulted trial counsel for failing to request the long form excusable homicide instruction" (PC-R. 187). Again, Mr. Bruno raised in his Rule 3.850 claim an allegation of ineffective assistance of counsel. The lower court simply applied a *res judicata* procedural bar

without analyzing the cumulative effect of counsel's omissions in determining whether his conduct amounted to ineffective assistance of counsel. For that reason, this Court should consider trial counsel's lack of knowledge of case law which this Court **clearly** held **at** the time of Mr. Bruno's trial to require the long form instruction on excusable homicide. Bruno, **574 so.** 2d at 80. Counsel's lack of knowledge of such fundamental areas of law also contradict his alleged "preparedness" to conduct Mr. Bruno's trial.

b. Justifiable Homicide. The trial court's instructions on justifiable homicide were inaccurate in that they failed to clearly explain defense of another as self-defense. In Mr. Bruno's statement, he related how the victim was harassing his son, how a fight ensued, and that he had to wrest a gun from his control. These facts, together with the medical examiner's testimony, plainly raised the defense of others. However, the instruction on justifiable homicide made no mention of defense of others (R. 734, 1049). The longer version later given makes one brief mention of defense of another. Had trial counsel objected, the jury's verdict would have been different, or reversal would have resulted on direct appeal.

9. **Failure to Ensure Jury Challenges were Recorded.**

a. Procedural Bar. The lower court found this issue was or could have been raised on appeal (PC-R. 180). This is erroneous. On appeal, Mr. Bruno alleged that the trial court erred in failing to have a court reporter present during voir dire challenges made at side bars. Bruno, **574 so.** 2d at 81. The

State argued that the claim was barred for failing to object (Answer Brief of Appellee at 47). The Court rejected the claim without discussion. Id. Again, "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). This claim is not procedurally barred.

b. The Merits. There are numerous unreported bench conferences during voir dire at which time jury challenges were made (R. 215, 241, 255, 269, 278). The jury challenge slips indicate that the defense used all ten of its peremptory challenges. See Second Supplemental Record on Appeal at 141-44. Counsel failed to ensure that the court reporter was present during these jury challenges. The error was prejudicial because the record demonstrates challenges for cause to several jurors. For example, juror Hrytzay indicated that she would give improper weight to police witnesses over other witnesses (R. 199-203). Juror Henry indicated that she would penalize Mr. Bruno for not testifying in his defense (R. 265-66).

Stella acknowledged that Hrytzay's answers "merits a strike for cause" (T. 266), and thought he had challenged him for cause or peremptorily (T. 265-66). However, because the challenges were made off-the-record, it is impossible to know. As to juror Henry, Stella likewise "would have probably made an objection for cause at side bar" which he thought Judge Coker would have denied (T. 268). The existing record, however, reveals no challenges

for either of these jurors, and that the defense used **all** its peremptory challenges. Stella's failure to ensure that these conferences were put on the record was prejudicially deficient performance.

10. Failure to Investigate and Present Available Mitigation.

a. Argument. The adversarial process completely broke down at Mr. Bruno's capital penalty phase. Despite having almost a year to prepare and investigate for the penalty phase, no adequate investigation **was** conducted. Critical areas of compelling mitigation were overlooked or ignored. At the **evidentiary** hearing, it became clear that the fundamental problem regarding the penalty phase was that no one had truly taken responsibility for conducting a penalty phase investigation, and certainly no adequate investigation, if any, was conducted prior to the commencement of trial.

Stella explained that "[m]y opinion is you cannot prepare a penalty phase until you have thoroughly investigated, to the best of your ability, the guilt phase" (T. 251). Stella's explanation presumes that a thorough guilt phase investigation was conducted, which Mr. Bruno submits it was not. For example, it was not until the eve of trial that there was **a** general discussion with his client about retaining a mental health expert to evaluate Mr. Bruno for the purpose of determining the viability of an intoxication defense (T. 668-69). According to Stella, there was never discussion about any particular experts or names of experts (T. 752). Therefore, even presuming that Stella's understanding of his duty to investigate a penalty phase comports with

constitutional standards, his efforts fell short in Mr. Bruno's case.

The law requires that an attorney charged with the responsibility of conducted a capital trial begin investigating for the penalty phase before the guilt phase of the trial and not wait until the guilt phase is over. Blanco v. Singletary, 943 F. 2d at 1501-02. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." Id. In this case, the penalty phase commenced the day after the guilt phase concluded.

Part of the reason why no adequate investigation into Mr. Bruno's background was conducted, particularly mental health issues, was that Judge Coker did not allow any time between the guilt and penalty phases; as Stella explained, "[w]hen you are dealing with Judge Coker and many other judges, they did put you under a bit of a time gun" (T. 430). However, Stella knew that Judge Coker was like that, and also knew that "it was not unusual to go from a guilt phase to a penalty phase, give you a fifteen minute break where you go in, wash your face and hands, and come back out and start the penalty phase" (T. 431). Stella did acknowledge, however, that he would have liked more time to prepare for the penalty phase (T. 431-32).

The other significant reason why the penalty phase investigation fell through the cracks was that, despite Stella's acknowledgment that the handling of a penalty phase is "a full-time thing", no one had truly been assigned the responsibility

for doing so. At the hearing, Stella testified that his investigator "was actively involved in that portion of the investigation" (T. 428). However, when the State called Patrick in its case-in-chief at the evidentiary hearing, he explicitly stated that he did not work on the penalty phase at all (T. 922, 931, 934), and never interviewed Mr. Bruno about his drug or alcohol use in general or on the night of the offense (T. 918). Interestingly, Patrick also testified that he was never told why Stella was "away from the office" and "hospitalized for something" for 28 days in March 1987 in the weeks prior to the original trial date (T. 911-12). Thus, Mr. Bruno was faced with a situation where his life was virtually on the line, his attorney believed that the investigator was "actively involved" in investigating for the penalty phase, and the investigator did not conduct any investigation whatsoever; in fact, the investigator did not even attend the trial or the penalty phase (T. 931).

The little evidence that was put on at the penalty phase was not the product of a long-term and fully-investigated plan of defense, but rather a last-minute attempt to do something. For example, Stella presented the testimony of Mr. Bruno's parents, George and Elizabeth Bruno. However, their unpreparedness to testify at the penalty phase of their son's capital trial was evident from their testimony (R. 786-799). At the hearing, Stella's recollection of when exactly he prepared them for their testimony was not clear. At one point, he explained that he did talk to the Brunos prior to their taking the stand; however,

"[a]s to whether or not it was a few days before, or the night before, I don't recall, or if it was multiple occasions" (T. 429). Stella also explained that "it's quite difficult, particularly when you're dealing with the parents of a defendant who obviously loved their son very much, to start talking about - to start talking with them too early about pleading for their son's life because it would appear clear, or it's a possibility that the jury may come back guilty" (T. 429-30). However, Mrs. Bruno testified at the hearing that she and her husband did not talk to Stella about her testimony at the trial (T. 891).[24]

The record of what occurred at the penalty phase and after the penalty phase further demonstrates the break-down of the adversarial process. In addition to the Brunos, Stella called Dr. Arthur Stillman to the stand. At the evidentiary hearing, Stella explained that he wanted Dr. Stillman to be able to testify to both statutory and nonstatutory mitigating circumstances (T. 433, 435).[25] Stella did not recall when he contacted Dr. Stillman regarding the penalty phase (T. 434, 435, 448). At the penalty phase, Dr. Stillman testified that Mr. Bruno was insane at the time of the offense (T. 449). Stella testified that Stillman's opinion was "[a] true element of surprise. It really was the first I had heard about it" (T. 449).

Prior to the penalty phase, Stella did not know about Mr.

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[24]Mr. Bruno's father died in June, 1997.

[25]Stillman was never questioned by Stella about the applicability of the statutory mental health mitigating factors.

Bruno's prior mental health hospitalization, nor had he obtained the records (T. 436-47). He was quick to point out that this was "not because of any negligence on our part" (T. 436), and offered various reasons why these records were not obtained. First, he testified that prior to the penalty phase he had no indication from either Mr. Bruno or any of his family members about the hospitalization and suicide attempt (T. 437).[26] Stella explained that Mr. Bruno's mother and father "were wonderful" but that the "rest of his family were not cooperative with me, at all" (Id.).

The only family members that Stella knew about prior to the penalty phase were Mr. Bruno's parents and son. The realization that Mr. Bruno had a sister did not come until after penalty phase (T. 453-54). Stella explained it **was** either Sidney Patrick or Mr. Bruno's parents who brought the sister's existence to his attention (Id.).[27] Whoever it was that brought this information to his attention, it is undisputed that Stella did not know about this information prior to the penalty phase. It is also undisputed that the information about Mr. Bruno's prior hospitalization and suicide attempt was important information, as Stella made attempts after learning of the information to have Mr. Bruno reevaluated, to obtain the records from that hospitalization, and to continue the judge sentencing phase in

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[26]Mrs. Bruno testified at the hearing that she was aware of her son's hospitalization and suicide attempt (T. 898-99).

[27]It could not have been Sidney Patrick, since he was not involved at all in the penalty phase.

order to fully explore this important area. And it should be noted that the testimony by Dr. Stillman at Mr. Bruno's penalty phase was that Stillman examined Mr. Bruno two times, on November 1, 1986 and again in June 1987, and that he told Stella after the second examination that he had suspicions that Bruno was insane at the time of the murder but he needed some corroboration, which he did not receive until 48 hours before his testimony in August 1987 (R. 821, 822, 823).

Stella's performance at the penalty phase was constitutionally deficient. There can be no reasonable strategy for not knowing that Dr. Stillman was going to testify that Mr. Bruno was insane, and for not fully investigating Mr. Bruno's mental health history in advance of the penalty phase. On cross-examination by the State at the evidentiary hearing, Stella acknowledged that Dr. Stillman received information about Mr. Bruno's mental impairments on the evening before his testimony (T. 725-26); it is obvious that Stella never talked with Dr. Stillman either that night or on the day of the penalty phase, since he was unaware that Dr. Stillman was going to testify that Mr. Bruno was insane at the time of the crime.

There is no reasonable strategic decision for the lack of investigation into Mr. Bruno's prior mental health history and for not providing that information to Dr. Stillman in advance of the penalty phase. At the hearing, Stella did offer that Mr. Bruno "thwarted" the attempts to prepare for the penalty phase (T. 719); however, the objective facts establish otherwise. In the first place, Stella did present some information at the

penalty phase (albeit he did not prepare for that testimony), and there was no waiver of the penalty phase, nor did Mr. Bruno desire to waive the presentation of mitigation (T. 734). For example, when it came time to call Mr. Bruno's parents, Stella explained that he "called the people I called, irrespective of my client's wishes" (Id.). Moreover, Mr. Bruno did not "thwart" Stella when he presented Dr. Stillman and when he argued in favor of life at the closing argument (T. 735-36). Assuming arguendo the credibility of Stella's testimony about Mr. Bruno's alleged lack of assistance, this did not vitiate Mr. Stella's responsibility to investigate. Blanco v. Singletary. See also Rose v. State, 675 So. 2d 567, 571 (Fla. 1996); Heiney v. State, 620 So. 2d 171 (Fla. 1993); State v. Lara, 581 So. 2d 1288 (Fla. 1991).

Confidence in the jury's 8-4 death recommendation is undermined. There is more than a reasonable probability that had counsel properly prepared his witnesses, learned of his client's mental health background, and properly prepared and utilized available mental health expert testimony, that the result would have been different. Compelling statutory and nonstatutory mitigating evidence was available yet it was not presented. Rather, counsel presented an unprepared Dr. Stillman, who came up with an insanity diagnosis that was a surprise to counsel. What was not a surprise to counsel, however, was the fact that Dr. Stillman's testimony was effectively eviscerated by the State, and Mr. Stella could do nothing about it. The effect on the jury of this devastating performance of the only mental health expert

to testify on Mr. Bruno's behalf can only be imagined. Had properly prepared, qualified mental health experts been presented, the result would have been different.

At the hearing, Mr. Bruno presented compelling and unrebutted testimony from two mental health experts who testified to the existence of statutory mental health mitigating factors, as well as a plethora of nonstatutory mitigating factors which were also unrebutted by the State. Mr. Bruno first presented the testimony of Dr. Henry Dee, a clinical psychologist specializing in clinical, adult and pediatric clinical neuropsychology. Dr. Dee testified that his initial neuropsychological evaluation of Mr. Bruno in 1993 required six to eight hours of testing (T. 520). On March 7, 1997 he did an additional three to four hours of testing. In addition to the standard batteries of examinations, Dr. Dee also reviewed numerous background materials on Mr. Bruno (including the records from the Pilgrim Hospital regarding the prior hospitalization and suicide attempt), as well as personally interviewed Mr. Bruno's sisters and his son (T. 521,531,532,540). Dr. Dee obtained information directly from Mr. Bruno about his history of cocaine abuse. He obtained corroborative information from his sisters, his son, friends and relatives who described in detail a long history of extreme and chronic drug abuse, including cocaine, L.S.D. and marijuana (T. 531). Family members confirmed substance abuse beginning with glue sniffing (toluene) at age 11-13 and lacquer thinner. He graduated to become a regular user of marijuana, cocaine, L.S.D., and Quaaludes (T. 533).

Dr. Dee testified that Mr. Bruno suffered from organic brain damage in the frontal lobes, including the mesial **area** of the temporal lobe and the bilateral frontal involvement which leads to impulse control and increased impulsivity (T. 529). He concluded that Mr. Bruno suffers from organic brain syndrome with mixed features. As a result of continuous, heavy and chronic use of drugs, including cocaine, L.S.D., marijuana, Mr. Bruno sustained significant injury to his brain (T. 534). This resulted in impairments of memory, increased impulsivity, difficulty of impulse control, deteriorated work performance, inability to hold a job, "[h]e had become essentially a homeless person, who couldn't hold a job. His mental state was extraordinarily abnormal, his memory was extremely unreliable, and all the witnesses tell me this" (T. 535).

Dr. Dee further diagnosed Mr. Bruno as suffering from poly-substance abuse with a dependency on cocaine (T. 540). Dr. Dee obtained a history of substance abuse on the day of the offense from both Mr. Bruno and from his son Mike Bruno, Jr. (T. 541). This included smoking free base cocaine in the mid-morning and then continuously throughout the day, taking three microdots of L.S.D. and eight or nine quaaludes (T. 541-42). In combination, Dr. Dee testified, the effect of each drug would be enhanced. "Cocaine, in particular, leads to increasing agitation, depression, and its effects in producing paranoia is well-known, even in popular literature, it intensifies all those effects, L.S.D. has a bewildering effect with anyone with normal consciousness. This is intensified with anyone who has sustained

any kind of cerebral damage" (T. 543).

As a result of his complete evaluation of Mr. Bruno, Dr. Dee opined that Mr. Bruno was under the influence of an extreme mental and emotional disturbance at the time of the offense, a statutory mental health mitigating factor (T. 546). Dr. Dee also was of the opinion that Mr. Bruno's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense, another statutory mitigating factor (T. 547-48).

Dr. Dee also opined that his diagnoses of organic brain damage in addition to the substance abuse at the time of the offense would affect Mr. Bruno's ability to exhibit a high degree of premeditation (T. 548-49).

Finally, Dr. Dee also testified to his opinion on the existence of non-statutory mitigating factors which he believes exist in Mr. Bruno's case:

> [A] review of the interviews with the family members and then repeating the interviews and considering the evidence given by family members and friends, he lived an extraordinarily dysfunctional family life. He suffered, as did all the children, intense and **savage** attacks by his mother, child abuse as we would see it today, was quite severe. And I mean the family didn't function well in many ways.
>
> The children were beaten frequently. They were terrified, afraid if being at home, avoided being at home, and when he was at home, he used drugs, apparently, although he wouldn't **say** so. His siblings felt it was- he used drugs to mitigate against their shared feelings of terror and distress that were a result of the fact of simply being at home. They said the environment was so unpredictable they simply never knew what to expect from one day to the next or just indifference or added chores. They never knew what **was** going to happen.

> The oldest daughter left home at an early age, eloped in order to avoid the home. That's testified to by both her and the people that lived nearby, whom she talked about this decision with, and the middle child spent much of her life avoiding being at home, in order simply because she couldn't tolerate what went on there.
>
> ....the mother was clearly the dominant figure and they were terrified of her when they were small.

(T. 549-50, 552-53).

Mr. Bruno also presented the testimony of Dr. Jonathan J. Lipman, a neuropharmacologist, which discipline involves the effects of drugs on the nerves, brain and behavior (T. 798). Dr. Lipman was asked to investigate the possibility that neuropharmacological issues were relevant to the case of Mr. Bruno (T. 802), and interviewed and tested Mr. Bruno over "the better part of two days", and reviewed three volumes of background information to review in conjunction with his evaluation of Mr. Bruno (T. 802-04). Dr. Lipman testified that the interview with Mr. Bruno was conducted for purposes of doing a drug abuse history, for gaining an understanding of Mr. Bruno's mental functioning during the course of his life and how this had been influenced by drug use and abuse, and to review his medical, psychiatric and social history (T. 804). Dr. Lipman also interviewed Mr. Bruno's son, Mike Jr., his sisters Gina and Mary Ann, and discussed the case with Dr. Dee, who had performed neuropsychological testing on Mr. Bruno (T. 805).

Dr. Lipman testified to Mr. Bruno's long and severe history of drug and substance abuse, beginning with inhalants, graduating from tobacco to alcohol, to marijuana and amphetamines, to

barbiturates and Quaalude, into the "speedballing" behavior (T. 806-07). Mr. Bruno's use of L.S.D. impacted his drug behavior beginning at age seventeen:

> The drug use started to acquire a different character, in that he began to use hallucinogens, L.S.D. lysergic acid diethylamide, and STP, which is related to shorter action drugs, and mescaline, another hallucinogen.
>
> He continued to use these drugs in the years forward. What was remarkable, though, in his use of L.S.D. at this early age of seventeen, to me, was that **as** L.S.D. tolerance develops in the normal person, and it develops quite profoundly, this drug has less and less effect. Such that L.S.D. users will tell you that taking L.S.D. on two days because it will have no effect on the second day. And this is quite true. You have to wait at least a week to get the same kind of effect from it.
>
> But there is an alternative strategy, although it's not safe, and that is on the second day, you can take more L.S.D. to overcome the effects of tolerance. And at age seventeen, Michael Bruno was taking seven doses at a time of L.S.D.

(T. 809-10). Dr. Lipman also testified that **as** tolerance to L.S.D. developed it would not be unusual for the person taking the drugs to drive a car and otherwise function (T. 811). When L.S.D. is taken in combination with cocaine, a phenomenon that he described as "unusual", he stated that "[t]he two drugs do have an increased psychotoxic effect, in that the adverse effects of cocaine are psychotic momentum, meaning it resembles cocaine. Cocaine and the amphetamine, when chronically used, cause psychotic syndrome, which provoke or exasperate on, or make worse, those adverse effects" (T. 819).

Dr. Lipman testified that Mr. Bruno's cocaine abuse began at about age 22 after his return from Sweden and accelerated through age 25, when it became a chronically abused drug used in the

context of his rock-and-roll band and social group (T. 819-20). He began free-basing cocaine and suffering from the psychotic syndrome (T. 821-22). Dr. Lipman also testified that these behaviors which Mr. Bruno reported as beginning to happen in 1981 when he was 29, were confirmed by Mike Jr. as behaviors that he recognized at the time of the offense (T. 822). Dr. Lipman also testified that he received corroboration of Mr. Bruno's condition in the period preceding the crime from his sister, Mary Ann (R. 851), as well as other family members (T. 851-54).

Dr. Lipman agreed with Dr. Dee's findings and that as to Mr. Bruno, "[i]n general, he does have a neuropsychological evidence of impaired impulse control and, also, he has an abnormality of temporal lobe function" (T. 823). He opined that Mr. Bruno was under the influence of an extreme mental and emotional disturbance at the time of the offense, a statutory mitigator (T. 838), and that Mr. Bruno's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired at the time of the offense (T. 839; 40;47).

Mr. Bruno has established his entitlement to relief. Mr. Bruno presented unrebutted evidence of both statutory and nonstatutory mitigating factors. This evidence was not presented at the penalty phase; furthermore, to the extent that areas such as drug use were touched upon during the penalty phase, the evidence presented during the evidentiary hearing was qualitatively and quantitatively superior to that which was presented at the penalty phase. Judge Coker would not have been free to ignore

the evidence of mitigation presented by Mr. Bruno at the evidentiary hearing, had it been presented at trial. Nibert v. State, 574 so. 2d 1059, 1062 (Fla. 1991).

This Court have not hesitated to find ineffectivenss despite the presentation of some mitigation at trial, particularly when the trial courts in those cases found no mitigation to exist. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). Mr. Bruno was prejudiced by counsel's failures despite the existence of aggravating factors. In cases such as Mr. Bruno's, where trial counsel failed to present available substantial mitigation, particularly compelling and unrebutted statutory mitigating factors, this Court has granted relief despite the presence of numerous aggravating circumstances. Lara; Rose; Hildwin; Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989). This Court has also granted relief when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994). The evidence presented at Mr. Bruno's hearing is identical to that which established prejudice in these cases, and Mr. Bruno is similarly entitled to relief.

b. The Lower Court's Order. The lower court found that Mr. Bruno's alleged failure to cooperate with Stella "prevented Mr. Stella from initially obtaining information relating to Defendant's previous hospitalization at Pilgrim State Hospital" (PC-R. 192). This is not accurate. The reason that Stella did

not know about the prior hospitalization was he failed to conduct an independent investigation. For example, Stella acknowledged that he had a good relationship with Mr. Bruno's parents, yet he never discussed their son's history with him; Mrs. Bruno, for example, was well aware of her son's hospitalization at Pilgrim Hospital and his suicide attempt (T. 898-99). Mr. Bruno's sister obviously knew about her brother's hospitalization, but Stella did not even know of the existence of the sister until after the penalty phase (T. 454; 600).[28] See also PC-R. 195. The alleged noncooperation of Mr. Bruno in no way vitiated Stella's responsibility to investigate and prepare, and there can be no reliance on a "Bruno-did-not-want-mental-health" strategy since Dr. Stillman was presented, and once Stella found out about the

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[28]The trial court wrote that Stella did not call Mr. Bruno's sister at the penalty phase because "she would testify that the Defendant had previously attempted to sexually molest her during her adolescent years" (PC-R. 196). The court bought Stella's testimony without any regard to its patently self-serving nature and his frequent use of "dramatic license" he often exhibited at trial and during the hearing. His "recollection" of speaking to the sister was far from certain; as he testified, "as bizarre as this is going to sound, I don't recall if it was during or immediately after the penalty phase, when we were finally able to get in touch with her" (T. 454-55). The clearest evidence that Stella was using more "dramatic license" was his explanation for not calling her at the penalty phase because she would allegedly have said that Mr. Bruno molested her. However, Stella ***had already acknowledged that he did not know of the sister's existence until after the penalty phase.*** How Stella could testify that he had a strategic reason for not calling a witness about whose existence he was unaware demonstrates his lack of credibility. The court's reliance on this fact further overlooks that immediately following this testimony about alleged sexual molestation, Stella expressly stated that "we did not seek corroboration of what she had said" (T. 456). In any event, Stella did not need to call the sister as a witness in order to gain access to the Pilgrim Hospital Records, as he eventually got them with her assistance (despite her alleged hostility as explained by Stella) and never called her to testify.

mental hospitalization, he rushed to file a pleading in court. Of course, this was done not to assist Mr. Bruno but to cover his own deficiencies.

Any reliance on the fact that Dr. Stillman testified to mitigation at the penalty phase completely fails to contemplate that Stillman's testimony was not only divulged by Stella to the court and the State as incredible, but that it was destroyed on cross-examination and during the State's closing argument. Stella's dispute with the single mental health expert in the case infected the jury's consideration of the mental health evidence, and led the prosecutor to argue to the jury, without objection, that Dr. Stillman "doesn't know what he's talking about" (R. 885). As to Stillman's insanity testimony, the prosecutor further assailed its credibility: "All of a sudden at the time of sentence he runs in and says the defendant was insane at the time of the offense. He is wrong. He simply never came to that conclusion. You know that he never came to that conclusion. We have to give Mr. Stella more credit than this, to let that defense pass by" (R. 884-85). As if the State's assaults on Stillman's credibility was not enough, Stella himself distanced himself from his own expert (R. 886-87). Incredibly, Stella then told the jury that as to Stillman, "you can believe any part of what he says, all of what he says, none of what he says" (R. 898).[29]

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[29]Even this Court on appeal observed: "Viewing Dr. Stillman's testimony as a whole, we believe the trial judge had discretion to discount much of his opinion." Bruno, 574 So. 2d at 82-83).

The lower court concluded that the evidence presented at the evidentiary hearing as to mental mitigators was presented to and rejected by the trial court and the jury (PC-R. 202-02). The lower court ignored the evidence. At no time was Stillman asked about the statutory mitigators during the penalty phase. At the evidentiary hearing, Mr. Bruno presented unrebutted testimony of the existence of two statutory mental mitigators, corroborated by background information and competent evaluations by competent doctors, as well as a plethora of nonstatutory mitigating evidence. The lower court's conclusion that statutory mental health mitigation had been presented and rejected finds no support in this record.

Moreover, the scant testimony at the penalty phase from Mr. Bruno's parents as to the allegedly "happy" childhood of their son was a far cry from the truth (R. 787, 91). Dr. Dee provided a lengthy recitation of Mr. Bruno's childhood, gleaned from his interviews with the family and his evaluation of Mr. Bruno, which painted a far different picture than was portrayed at the penalty phase (T. 549-50, 552-53). None of this evidence was presented at the penalty phase because counsel failed to investigate.

As to Stella's failure to prepare Mr. Bruno's parents for their testimony, the lower court found that their testimony "was presented as a matter of reasonable trial strategy in an effort to reflect mental mitigating circumstances" (PC-R. 197). Mr. Bruno's parents were not in a position to testify as to the statutory mental health mitigators, nor were they prepared for their testimony by Stella. In addition to her scant testimony

about her son, including his strange haircuts, Mrs. Bruno stated, after being asked about what punishment should be meted out by the jury, that "All I can say is that I don't have much time, neither does my husband. But if that's your wish and you think that you are doing right, God bless you. But other than that I don't know what to say. I just feel very sorry for my husband, but if a child does something wrong, he should be punished. That is my belief" (R. 792-93). The testimony of Mr. Bruno's father fared no better. In addition to being asked about his son's tatoos and weird haircuts, he told the jury that essentially his son did not deserve "what he is going to get" (R. 798). The prosecutor then seized on this testimony in his closing argument: "These facts are a **case** for death. Even the defendant's own father knew it. He said when he was asked what he should get out of this, he said I don't think he deserves that he is going to set He knows what he's going to get. It's just inherent in the nature of the fact of the murder that Mr. Bruno committed. It's **a** death case. It is what he deserves" (R. 892).

There was no reasonable strategy to put on this type of testimony. Stella acknowledged that he "was not very happy" with their testimony, and did not know in advance they were going to say what they said, even though he believed he had spoken with them and they were "actively involved in their son's case" (T. 601). However, Mrs. Bruno testified at the hearing that Stella did not prepare them for their testimony at the penalty phase (T. 891). The lower court's order is erroneous.

11. Failure to Object to State's Improper Comments. A number of

improper arguments at the penalty phase were made and a number of improper comments were made by witnesses and the State that went unobjected to by counsel to Mr. Bruno's prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

a. **Caldwell violations.** The jury was repeatedly misinformed as to its sentencing responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) (R. 144, 176, 789, 883, 909, 911). Stella did not object "so one would think that I was not thinking of Caldwell at that time" (T. 622). The lack of objection was unreasonable and prejudicial, for it not only waived the point on appeal, but resulted in the jury being misinformed.

b. **Stipulation to Non-Violent Crimes.** Outside the presence of the jury at the penalty phase, Stella stipulated to the introduction of Mr. Bruno's prior convictions for marijuana and cocaine possession (R. 783). When the jury came in, the prosecutor then recited to the jury the stipulation as to the two prior felony convictions (R. 785).

Counsel unreasonably stipulated to these non-violent offenses and failed to object, to Mr. Bruno's substantial prejudice. Nonviolent felonies are not relevant at a penalty phase, and can only constitute nonstatutory aggravation. Maqqard v. State, 399 so. 2d 973 (Fla. 1981). Stella did recall if he knew that he could waive the statutory mitigator of no significant prior criminal history, but was aware that if he did, the State would be precluded from bringing in **any** priors (T. 625). The State made a feature of these crimes before the jury.

See R. 827, 828, 884.

c. Failure to Object to Evidence of Tattoos. One of the bases for Dr. Stillman's opinions about Mr. Bruno's mental health was numerous tattoos on his body. The prosecutor then portrayed the tattoos as demonstrating that Mr. Bruno was "evil" (R. 820). He was more explicit when he cross-examined Mr. Bruno, when, in his first question, he asked about the "swastika tattoo" and whether it was a "Nazi good luck sign" (R. 848). These inflammatory remarks were unobjected to by Stella, who initially opined that references to swastikas "could" be prejudicial; when questioned further, he altered his answer and testified that "yes, **a** swastika is definitely prejudicial" (T. 627). Stella's failure to object was unreasonable, and the prejudice is evident.

d. Improper Argument on **Aggravators.** The State argued to the jury that it could find as a prior violent felony the robbery that Mr. Bruno had just been convicted of, despite the fact that the robbery involved the same person that was killed. Counsel's failure to object was unreasonable. Wasko v. State, 505 So. 2d 1314 (Fla. 1987). Moreover, the State invited the jury to count three aggravators--pecuniary gain, felony murder, and prior violent felony--as three separate aggravators or just one (R. 889). This was also legally incorrect, Provence v. State, 337 so. 2d 783 (Fla. 1976), yet counsel unreasonably failed to object.

ARGUMENT II -- **AKE** VIOLATION. Due process requires that an indigent defendant have access to an independent competent mental health expert who conducts a competent examination and assists in

the defense of the case. Ake v. Oklahoma, 470 U.S. 68 (1985). Mr. Bruno's right to a professionally competent, court-funded evaluation of his competence to stand trial was violated by counsel's failure to ensure that Dr. Stillman had the necessary and vital information he needed to render a timely, accurate diagnosis of Mr. Bruno's mental condition, and by Dr. Stillman's reliance on Mr.Bruno's self report without any corroboration until 24 hours before his testimony,

Because his advocate and his expert totally failed to communicate, Mr. Bruno was left without the essential resources necessary to present the truth about his culpability. This failure to communicate or to operate in concert was exacerbated dramatically by counsel's other fatal failings, including the failure to perform even the most minimal of investigations into Mr. Bruno's life and background.

Counsel's knowledge about his client's life and family was such that he was unaware of such basic facts as who compromised Mr. Bruno's immediate family. He did not know that his client had a younger sister until after the jury recommended death, nor did he know that his client had attempted suicide, had an extensive drug dependence history, and had been psychiatrically hospitalized (R. 1094). When he belatedly discovered information which was readily available for use during the relevant stages of the trial, he filed a motion seeking another psychiatric evaluation before the judge sentencing proceeding. That motion was replete with privileged information, including the alleged "fact' that neither Mr. Bruno nor his family had relayed crucial background

information to counsel earlier (R. 1093) .

Because counsel failed to perform effectively in the gathering of background information about Mr. Bruno, his court appointed mental health expert could not consider facts vital to reaching accurate diagnostic impressions. The record makes it clear that Dr. Stillman was attempting to obtain additional information about Mr. Bruno, but had received only basic facts some 48 hours before he testified at the penalty phase (R. 822). Those facts allowed him to form the opinion that Mr. Bruno was insane at the time of the offense (R. 821). Not only were these opinions formed too late to provide Mr. Bruno a viable defense, but the psychiatric testimony strongly indicates that counsel and his expert did not even discuss the information or conclusions which flowed from its consideration.

Counsel and Dr. Stillman failed Mr. Bruno in other fundamental ways as well. In this capital case, counsel simply ignored or overlooked mental health issues relating to punishment. Dr. Stillman's appointment was limited to assessing Mr. Bruno's sanity at the offense and competency to stand trial (R. 975-77, 1004). When the sole issue before the penalty phase jury was the balancing of mitigating and aggravating factors, counsel failed to elicit a single opinion from the psychiatrist about the presence or absence of such factors. The closest Dr. Stillman came to rendering a direct opinion on these issues was his "surprise" statement on cross examination that he did not believe Mr. Bruno was sane at the time of the offense (R. 821).

Stella had a duty to provide accurate information about his

client and to investigate and relay the facts surrounding all relevant events related to this capital case. Had counsel performed effectively, a wealth of material would have been shared with the court appointed expert; viable conclusions would then have been presented to the judge and jury, and Mr. Bruno would not have been sentenced to death. Relief is warranted.

ARGUMENT III--- JURY INSTRUCTIONS. The lower court permitted Mr. Bruno to put on evidence regarding his allegations that the penalty phase jury instructions given in his case were unconstitunally vague. Michael Radelet, the chairman of the Department of Sociology at the University of Florida in Gainesville was called as a defense witness to testify in support of Mr. Bruno's claim.

An instruction violates the Eighth Amendment if there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S 370, 380 (1990). In assessing whether such a likelihood exists, courts in the past have been forced to rely on what amounts to judicial speculation concerning jurors' understanding of particular instructions. Radelet, however, was able to make a more direct, empirical assessment of the effect of challenged jury instructions, based on scientific research, including his 1993 study of penalty phase jury instructions. After describing the outlines of his study (T. 364-68, 374), he explained that the data from his research in a model death case, wherein he used the **same** instructions used in Mr. Bruno's case, indicated that

"number one, jurors have great misunderstandings of the instructions read at the penalty phase of capital trials, and two, these misunderstandings are directly related to increased imposition of the death penalty by creating a presumption in favor of death" (T. 392). His review of the responses to the twenty five questions he asked demonstrated empirically that the penalty phase instructions used in Florida were unreasonably vague and confusing from the perspective of his sample group (T. 376-93).

Based on Radelet's study, not available at the time of Mr. Bruno's trial, the jury instructions in this case violated the Eighth and Fourteenth Amendments and create an impermissible risk that the death penalty may be imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238 (1972); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978).

ARGUMENT IV -- CUMULATIVE ERROR. The numerous and varied constitutional violations that occurred in Mr. Bruno's case warrant relief. The errors outlined herein must also be considered in light of the various errors the Court found on direct appeal but determined harmless. Bruno, 574 so. 2d at 80; 81

CONCLUSION

Mr. Bruno submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding.

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 22, 1999.

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