

IN THE SUPREME COURT OF FLORIDA

CASE NO. 01-2523

MICHAEL T. RIVERA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of post-conviction relief following an evidentiary hearing on Mr. Rivera's claim that trial counsel provided ineffective assistance at the penalty phase. That hearing was ordered by this Court in Rivera v. State, 717 So. 2d 477 (Fla. 1998). The circuit court had previously denied post-conviction relief on Mr. Rivera's other post-conviction claims.

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

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

"1PC-R." -- record on prior Rule 3.850 appeal to this Court;

"2PC-R." -- record on instant 3.850 appeal to this Court;

"Supp. 2PC-R." -- supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

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

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PROCEDURAL HISTORY

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

On October 31, 1991, Mr. Rivera filed a motion under Fla. R. Crim. P. 3.850 and subsequently filed two amended Rule 3.850 motions. The circuit court initially ordered an evidentiary hearing on Claim II F, J and K, and Claim XIX (1PC-R. 1205-06). At the evidentiary hearing, when the State began attempting to present evidence on Claims XX and XXI, upon which no hearing had been granted, the court ordered a hearing on those claims as well and set a later date for that

hearing (1PC-R. 190-99). The court summarily denied the remainder of the claims without attaching any files and records demonstrating that the claims were conclusively refuted by the record (1PC-R. 1205-06). The circuit court subsequently denied all relief (1PC-R. 1717-21).

Mr. Rivera appealed. This Court remanded for an evidentiary hearing on Mr. Rivera's claim that trial counsel provided ineffective assistance at the penalty phase and affirmed the circuit court's denial of relief as to other claims. Rivera v. State, 717 So. 2d 477 (Fla. 1998).

The evidentiary hearing ordered by this Court was held on April 26 and 27, 1999. After the hearing, Mr. Rivera and the State filed memoranda (2PC-R. 354-94, 395-415, 416-26). The circuit court denied relief (2PC-R. 584-600). Mr. Rivera timely filed a notice of appeal (2PC-R. 602).¹

STATEMENT OF THE FACTS

A. TRIAL AND DIRECT APPEAL

Mr. Rivera's trial was held in April 1987. The jury returned a guilty verdict on April 16, 1987 (R. 1899). The penalty phase began on April 17, 1987 (R. 1904).

¹Mr. Rivera filed a second Rule 3.850 motion on October 1, 1999, and amended that motion on September 28, 2001 (2PC-R. Vol. 2 at 262-339; Vol. 3 at 534-583). The motion is still pending in the circuit court. This Court recently directed the circuit court to hold proceedings on that motion.

After the guilty verdict, defense counsel requested a continuance of the penalty phase:

THE COURT: When do we have the penalty?

MR. HANCOCK: Judge, I would ask we start tomorrow morning.

MR. MALAVENDA: Judge, I can't start that quick.

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

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

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

MR. MALAVENDA: Right. I know that.

(R. 1901-02). Counsel's request for more time in which to prepare was denied (R. 1903). The penalty phase began at 9:00 a.m. the following morning (R. 1904).² This was the first time counsel had ever proceeded to penalty phase in a capital case (R. 2089).

At the penalty phase, the State presented the testimony of assistant state attorney Joel Lazarus, who had prosecuted Mr. Rivera in another case. Lazarus testified that the victim

²At that time defense counsel again requested a continuance because the defense wished to call Dr. Wright, the medical examiner, as a witness, but he was out of town (R. 1905). The request was denied (R. 1908).

in that case was Jennifer Goetz and that Mr. Rivera was convicted of "[f]our counts. Attempted murder in the first degree, kidnapping, aggravated child abuse, aggravated battery" (R. 1923). On cross-examination, when defense counsel asked questions to demonstrate that the four convictions were based upon the same set of facts, Lazarus described the convictions as arising from "four separate crimes all occurring July 10th, 1986" (R. 1924). The State also presented former assistant state attorney Bruce Raticoff, who testified he had prosecuted two cases against Mr. Rivera in 1980 for burglary with intent to commit battery and for indecent assault on a child under fourteen (R. 1929).

The defense presented the testimony of Mr. Rivera's sisters, Elisa and Miriam. Elisa Rivera's testimony on direct examination consists of two transcript pages during which trial counsel asked her questions such as "Do you have anything to say about Michael, about how you feel about this situation?" and "In light of [Michael's past] problems, do you still feel the way that you just said, that you love him?" (R. 1937). On cross-examination, the State asked when Mr. Rivera began having problems, and Elisa testified that Mr. Rivera's problems began "when he was molested himself" (R. 1939). The prosecutor asked Elisa what problems Mr. Rivera had, and Elisa

testified "he was always to himself and he started falling farther away from us than he used to be, and he just closed up" (R. 1939).

Miriam Rivera's testimony on direct examination also consists of only two transcript pages during which trial counsel asked questions such as "how would you describe your relationship to your brother at that point?" and "Are there any good things that you can say about your brother?" (R. 1942-43).

Peter Rivera, Mr. Rivera's brother, testified on direct examination for about three transcript pages (R. 1945-47). Trial counsel asked him if he was aware of all of Mr. Rivera's prior convictions and then asked, "in light of all that information that you have of your brother, how do you feel about him today?" (R. 1946). When asked, "Is there any good things you have to say about Michael," Peter answered that Mr. Rivera was "very helpful" (R. 1946). Peter also testified that Michael had girlfriends and that he had heard that when Michael was thirteen or fourteen, he was molested by a Mr. Donovan (R. 1947). On cross-examination, the State elicited that Peter had only heard about the Donovan incident from his mother, that Mr. Rivera was friends with Donovan and went on trips with him and that Peter did not know whether Donovan or

Mr. Rivera had initiated the alleged molestation incident (R. 1948-49). The State also elicited that Peter had told police that Mr. Rivera was "a total maniac" when he got mad (R. 1949-50).

Judith Delease, Peter's girlfriend, testified for one and one-half pages on direct examination (R. 1952-53). She had known Mr. Rivera for three years, had never seen him in women's clothing, never saw him do anything which would cause her concern, and knew he had a girlfriend (R. 1952-53). When trial counsel asked, "Now is there anything good that you have to say about Michael," Ms. Delease testified, "I know Michael couldn't have done this. I know this is wrong" (R. 1953). On cross-examination, the State elicited that Ms. Delease and Peter did not really associate with Mr. Rivera, that Ms. Delease could count the number of times she had been out with Mr. Rivera on one hand and that when she first began dating Peter, Mr. Rivera was in prison (R. 1953-54). On redirect, trial counsel elicited that Mr. Rivera helped his parents "move stuff around the house" and helped Ms. Delease "take a tree out of the back yard" (R. 1955).

A woman identified only as "Linda" testified that she went to a concert with Mr. Rivera in 1985 and described that evening in some detail (R. 1960, 1962-63). After the concert,

Mr. Rivera took Linda home, where she lived with her parents (R. 1963). About 1:30 a.m. that night, Mr. Rivera called Linda, who berated him for calling so late and disturbing her parents (R. 1964-65). About 3:30 or 4:00 a.m., Linda received a call from "a different man" who "sounded very frustrated, capable of anything in my opinion" (R. 1965). The caller threatened Linda's mother, and the next day, Linda reported the incident to the police (R. 1965). Linda believed the caller was Mr. Rivera (R. 1965). Linda explained that she was testifying because she believed "Michael is not a murderer and this is another side of Michael that is uncontrollable for him" (R. 1966). Linda testified, "I believe Michael suffers from a mental disorder because I saw the nice side of Michael. I've never seen the bad side of him" (R. 1966).

On cross-examination, the prosecutor brought out that Linda had gone out with Mr. Rivera only the one time and that at most, Mr. Rivera had dropped by Linda's house maybe three times but certainly less than ten times (R. 1971-72). Linda knew nothing about Mr. Rivera's background except what he told her (R. 1970). The person who called during the night after the concert and threatened her mother sounded violent, and Linda thought the person might be able to kill or harm her or her family (R. 1973-74). Linda was certain the caller was Mr.

Rivera, but when she confronted him, he did not admit to being the caller (R. 1975, 1981-82). Linda believed Mr. Rivera had two sides, one of which was capable of killing an eleven-year-old child (R. 1988-89).

Mr. Rivera's girlfriend, Lisa Keena, testified for two and one-half transcript pages on direct examination (R. 2090-92). She had been Mr. Rivera's girlfriend for about a year and a half (R. 2090). She was aware he had been in jail, still talked to him on the phone, loved him and thought he was a nice guy (R. 2090-91). She had no concerns about leaving Mr. Rivera with her children (R. 2091-92).

Mr. Rivera's mother, Esther Rivera, testified for about five transcript pages on direct examination (R. 2096-2101). Mrs. Rivera loved her son, even though she knew about his sexual problems (R. 2097). Mr. Rivera lived with his mother most of his life and helped her around the house (R. 2097-98). Mr. Rivera was "fine" with his siblings and made drawings (R. 2099-2100). Mr. Rivera was there when his mother or sister needed him (R. 2101).

Dr. Patsy Ceros-Livingston, a clinical psychologist, testified that she had interviewed Mr. Rivera three times, for a total of seven and one-half hours (R. 1992-93). Dr. Ceros-Livingston read her written report to the jury (R. 2007). Dr.

Ceros-Livingston read brief summaries of Mr. Rivera's educational history, his relationships with family members and friends and his employment history (R. 1995-98). Dr. Ceros-Livingston briefly referred to some drugs Mr. Rivera had used (R. 1994, 2026, 2031, 2032). At some length, Dr. Ceros-Livingston described Mr. Rivera's sexual history and fantasies, his encounters with legal authorities, his wearing woman's bathing suits and exposing himself to women, his attending sexual offender programs while on probation and in prison, being molested by Bob Donovan from age 14 until age 16 or 17, his continuing relationship with Donovan, his attempt to rape a woman, the incident with Jennifer Goetz and making obscene phone calls (R. 1998-2006, 2008-32). Mr. Rivera said he had nothing to do with Staci Jazvac's murder (R. 2025-26). Mr. Rivera said he had called Starr Peck and told her he had murdered Staci Jazvac, but that story was a fantasy (R. 2027-29).

Dr. Ceros-Livinston diagnosed Mr. Rivera with borderline personality disorder, exhibitionism and transvestism (R. 2033). Dr. Ceros-Livingston believed the time she spent with Mr. Rivera was a sufficient basis for her diagnoses (R. 2041). The borderline personality disorder diagnosis was based upon Mr. Rivera's history of impulsivity, unstable relationships,

lack of control of anger, identity disturbance, affective instability, and intolerance of being alone (R. 2034-36). The diagnosis of exhibitionism was also based on Mr. Rivera's history (R. 2037-38), as was the diagnosis of transvestism (R. 2038-39).

Dr. Ceros-Livingston gave Mr. Rivera three tests, the Draw-A-Person Test, the Carlson Psychological Survey and the Minnesota Multiphasic Personality Inventory (MMPI) (R. 2039). The Draw-A-Person Test indicated a strong obsessive-compulsive mechanism, voyeuristic and inhibition tendencies, excessive sensuality, effeminacy and sexual ambivalence (R. 2040). The MMPI indicated that Mr. Rivera was immature, narcissistic and dependent, was uncomfortable around the opposite sex, showed some paranoia and suspiciousness, and may have problems with drug abuse (R. 2041). On the Carlson test, Mr. Rivera fell within the normal range (R. 2041-42). Dr. Ceros-Livingston read from her report regarding what the psychological literature said about Mr. Rivera's personality characteristics and behavior (R. 2042-45).

Dr. Ceros-Livingston testified that at the time of Staci Jazvac's murder, Mr. Rivera was under the influence of extreme mental or emotional disturbance (R. 2046). Counsel asked the expert to assume that Mr. Rivera made threatening phone calls

in which he identified himself as "Tony," and asked whether Mr. Rivera was under extreme duress or under the substantial domination of another person (R. 2047). Dr. Ceros-Livingston testified that although borderline personality disorder can sometimes produce psychosis which might occur "[i]f the person really thought that they were two people," but "I don't have that" (R. 2048). When asked if she had an opinion whether or not Mr. Rivera's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, Dr. Ceros-Livingston testified, "Yes. I think I would say this, counsel: the history that I have indicates to me that Mr. Rivera is a very impulsive, driven person" (R. 2049).

On cross-examination, the prosecutor brought out that all of Dr. Ceros-Livingston's data came from Mr. Rivera and that she had not talked to any of Mr. Rivera's family members (R. 2068-69). Because the evaluation was confidential, Dr. Ceros-Livingston believed she was not permitted to talk to family members (R. 2069-70). Before Dr. Ceros-Livingston performed the evaluation, defense counsel had told her, "You've got the court order [to do a confidential evaluation] and try to get as much information as you can" (R. 2073). The only document Dr. Ceros-Livingston reviewed was a probable cause affidavit

regarding the Jennifer Goetz offense, and she did not read any police reports about the Jazvac homicide (R. 2074-75, 2084-85).

The jury recommended death by a vote of 12 to 0 (R. 2139). The court imposed death, finding four aggravating circumstances: prior conviction of violent felony, committed during commission or attempt to commit kidnapping and sexual battery, heinous, atrocious or cruel, and cold, calculated and premeditated (R. 2147-49). The court found one statutory mitigating circumstance--committed while under the influence of extreme mental or emotional disturbance--and no nonstatutory mitigating circumstances (R. 2150-52).

On direct appeal, this Court summarized the evidence presented at the penalty phase as follows:

During the penalty phase, the state introduced evidence of prior convictions. [footnote omitted] Rivera introduced the testimony of his sisters, Elisa and Miriam, through whom the jury learned that Rivera was himself the victim of child molestation. Rivera's present girlfriend testified that she had no concerns about leaving him with her children. Rivera's former girlfriend was allowed to testify under an alias. She expressed the opinion that Rivera had two personalities. Through Michael he demonstrated a good side and through "Tony" he exposed his dark side which compelled him to do terrible things.

Dr. Patsy Ceros-Livingston, a clinical psychologist, interviewed Rivera in jail. She diagnosed Rivera as having a borderline personality disorder, which is characterized by impulsivity, a pattern of unstable

and intense interpersonal relationships, lack of control of anger, identity disturbance, affective instability, intolerance of being alone, and physically self-damaging acts. The doctor also diagnosed exhibitionism, voyeurism, and transvestism.

Dr. Ceros-Livingston opined that Rivera acted under extreme duress and that he had some special compulsive characteristics that substantially impaired his capacity to appreciate the criminality of his conduct or to conform this conduct to the requirement of the law.

Rivera v. State, 561 So. 2d 536, 538 (Fla. 1990). This Court struck the cold, calculated and premeditated aggravating factor. Id. at 540. The Court affirmed the trial court's finding of only one statutory mitigating factor: "We conclude on this record that the trial court was acting within the parameters of its discretion in rejecting the additional mitigating factors. The trial court's findings with regard to the existence or nonexistence of mitigating circumstances are supported by substantial competent evidence." Id. at 540-41. The Court concluded that striking an aggravating factor did not require resentencing: "On this record, we are persuaded that the one mitigating factor weighed against the magnitude of the aggravating factors would render the same result in the trial court below, absent the single invalidated aggravating circumstance." Id. at 541.

B. POST-CONVICTION

In its opinion remanding for an evidentiary hearing, the Court described the mitigation which Mr. Rivera contended could have been presented had trial counsel conducted an adequate investigation. Rivera v. State, 717 So. 2d 477, 484-85 (Fla. 1998). The Court then explained why an evidentiary hearing was necessary: "Considering the volume and extent of these alleged mitigators in comparison to the limited mitigation actually presented at trial, we agree with Rivera that he warrants an evidentiary hearing on his claim of penalty phase ineffective assistance of counsel." Id. at 485.

1. Deficient Performance

At the evidentiary hearing, members of Mr. Rivera's family and other lay witnesses explained that trial counsel, Edward Malavenda, did not contact them and/or did not ask them what they knew about Mr. Rivera's life. Mr. Rivera's sister Miriam testified that Malavenda brought her and other family members to his office the night before or the morning of the day they testified at the penalty phase (2PC-R. Vol. 6 at 145). Malavenda did not ask Miriam if she knew anything about Mr. Rivera's drug use, although Miriam "would have been more than willing to talk about anything he wanted to talk about" (Id.).

Mr. Rivera's sister Elisa testified that she only met

Malavenda the day before or on the day she testified:

Q Did you have an opportunity to speak to [Mr. Malavenda] any time after Michael was arrested in February of '86?

A The only time I remember speaking to him, I believe, the day of the trial. It was more like to let us know what was going on.

Q He never spoke to you any time prior to that?

A No.

Q Did he ever try to contact you prior to that?

A No.

Q Did you--

A I believe that was the first time I even met the guy, was the day before the trial.

Q And what happened the day before the trial?

A We went into his office, and he just had a conference with us like how it was going to go and what to expect because I never been in a courthouse before or a courtroom. It was basically he wanted to let us know what was like t.v. and what wasn't type of thing.

Q Did he ever at that time or any time prior to this ask you about Michael's drug use?

A No, he didn't.

Q Okay. And if he had asked you about the drug use, would you have told him what you know?

A I would have told him whatever he needed to know, sure. There would be no reason to not, you know. I don't see a reason why I wouldn't.

Q Okay. About how long was that meeting when you went into his office?

A Twenty minutes the most. It wasn't that long.

Q Did he meet with you individually?

A No. He met the family as a group. It wasn't individual.

Q He never spoke to you one-on-one?

A No.

Q Did he ever go over testimony with you, what he was going to be asking you?

A No. It was more or less to let us know what to kind of expect. Where the jury is going to be sitting. What people are going to be sitting, so we could get familiar what the room looks like before walking in there.

Q But again, if he had asked you questions about the drugs or Robert Donovan or whatever, you know, you would be able to tell him?

A Yes.

Q And you would be willing to tell him?

A Yes, of course.

(2PC-R. Vol. 6 at 160-61).

Mr. Rivera's brother Peter testified that Malavenda contacted him once and had him come to Malavenda's office about four to six months before Mr. Rivera's trial (2PC-R. Vol. 6 at 180). At that meeting, Malavenda asked Peter about Mr. Rivera's alibi (Id.). Malavenda talked to Peter "very

little" about the penalty phase, and that discussion occurred right after Mr. Rivera was found guilty, the day before the penalty phase (Id. at 180-81). At that time, Malavenda asked Peter "a little bit" about Mr. Rivera's drug use, and Peter told him that Mr. Rivera used a lot of drugs (Id. at 181). When Peter testified at the penalty phase, Malavenda did not go into detail about Mr. Rivera's drug use (Id.).

Danny Franklin had been friends with Mr. Rivera for about ten years, beginning when Mr. Rivera was 13 or 14 years old (2PC-R. Vol. 6 at 186-87). After Mr. Rivera was arrested, no attorney or investigator for Mr. Rivera tried to contact Franklin (Id. at 199). Franklin was living in Florida at the time, at the same address where he had lived for six or seven years (Id.). He was available to come to court to talk about what he knew about Mr. Rivera (Id.). Franklin was shown Defense Exhibit 1, a phone message from Franklin to Malavenda dated September 4, 1986 (Id. at 200). Franklin "[v]ery vaguely" remembered calling Malavenda about Mr. Rivera, but did not remember Malavenda ever calling him back (Id.). The telephone number on the message to Malavenda was Franklin's phone number at the time (Id.). Franklin thought he had talked to Peter Rivera, who told him to call Malavenda to see if Malavenda could use him at trial (Id. at 201). Franklin

remembered that he never spoke to Malavenda (Id.).

Mark Peters knew Mr. Rivera through Andy Ramos, who sold crack cocaine (2PC-R. Vol. 6 at 202-03). In 1986, Malavenda took Peters' deposition (Id. at 207).³ After the deposition, Peters never talked to Malavenda again (Id.). About six weeks later, Peters moved to Orlando, where he lived at 4019 Barwood Drive, which was rented in the name of his mother, Lorraine Peters (Id. at 208). At the time, Peters had a state I.D. card which showed his address as 4019 Barwood Drive (Id. at 209). Peters lived at that address for three or four years (Id.).

When Mr. Rivera's counsel attempted to ask Peters whether any investigator ever came to speak to him after the April 1986 deposition, the State objected, arguing that "[t]his issue has also been affirmed by the Florida Supreme Court that this witness was, in fact, unavailable and that Mr. Malavenda was not ineffective to present this alibi witness" (2PC-R. Vol. 6 at 209-10). Mr. Rivera's counsel explained that the defense was trying to show that Peters was available as a mitigation witness for the penalty phase (Id. at 210). The court sustained the State's objection (Id.).

³The deposition occurred on April 21, 1986 (2PC-R. Vol. 6 at 208).

Mr. Rivera lived with Andy Ramos from about August or September of 1985 until January or February of 1986 (2PC-R. 212-13). Ramos was distributing cocaine from his house (Id. at 212). In April of 1986, Ramos was incarcerated for possession of cocaine, distributing cocaine and carrying a concealed weapon (Id. at 219). He was released on December 23, 1986, and placed on three years' probation (Id.). While on probation, Ramos reported to the state every month, and the state had his address (Id. at 220). The only time anyone talked to Ramos about Mr. Rivera was when a police detective came to his home right after the offense occurred (Id.). While Ramos was on probation, no one came and asked him to testify at Mr. Rivera's trial (Id.).

On cross-examination, the state asked Ramos, "Certainly you were not going to come into a courtroom in Broward County at the defendant's trial and testify that you were, in fact, running a crack house and dealing in drugs, were you, sir?" (2PC-R. Vol. 6 at 223). Ramos answered, "That's what I stated, ma'am," continuing, "I spent my time for that. I did my time for that" (Id.). On redirect, the following exchange occurred:

Q I'm going back to 1987 when you were on probation, and if you would have been given a subpoena to come to court and testify about what you're testifying to --

A In 1987, I did my time. I got punished for dealing drugs, for firearms. I went and did my time. I could have done more than what I did. It cost me money for my attorney. I did eight months and I was a good prisoner. I'm out. I wouldn't have been afraid to state what I just stated today.

Q You don't think you would or you would have?

A No, ma'am, because I'm done. I paid my punishment. I completed my punishment and I made three years probation. I made three years probation. A lot of people said you don't make three years probation. You end up going back to prison. I made it. So I have nothing to hide.

Q So in April of '87, you would have had nothing to hide if you were subpoena[ed] to come to Court?

A Correct, ma'am.

(Id. at 227-28).

Malavenda testified that Danny Franklin's name "rings a bell," but he could not remember what he did about Franklin (2PC-R. Vol. 6 at 96). When shown the telephone message from Danny Franklin, Malavenda testified that the message contained his name and the name of the secretary who worked for him at the time, but he could not remember anything about contact with Franklin (Id. at 97-99). The name of Andy Ramos also rang a bell with Malavenda (Id. at 96). Malavenda was shown an investigation billing which reflected a meeting between Malavenda and his investigator regarding "Goyette, Taylor, Ramos, and Rogers, Mark Peters" (Id. at 99-100). Malavenda

testified that he could not tell if the billing related to the penalty phase and that the billing was not detailed enough to tell whether they ever found these witnesses (Id.). Later, Malavenda testified that Ramos was one of the names Mr. Rivera had provided him, and he had asked his investigator to locate Ramos (2PC-R. Vol. 7 at 349-50). Malavenda did not recall the investigator telling him that Ramos had been found and was on probation (Id. at 350).

Malavenda's theory for the penalty phase was to show "whether [Mr. Rivera] was disturbed at the time, whether he appreciated the consequences, you know, of his acts even though he claimed innocence, and whether or not he had been molested himself. I mean, he had a history of that. And if he was a person that other people cared about, you know, was he loved" (2PC-R. Vol. 6 at 94-95). Malavenda knew that Mr. Rivera had used drugs and had experienced child sexual abuse (Id. at 95).

Malavenda explained what he did to prepare to present Mr. Rivera's drug abuse:

Okay. With the drug abuse, the only information I had about his drug abuse was primarily from what Michael had told me, and I believe his brother had indicated that he had done some drugs. Michael had given me names of people, certain people. I can't remember who they are that he was supposedly doing these drugs with and I couldn't locate those people. That's what I did. But also, you know, his family,

I believe Peter testified as to his drug abuse. Doctor Patsy Ceros-Livingston testified to his drug abuse in her report.

I mean, I may not have done, you know, detailed investigation, but we did present some evidence of that. I believe through the report of Doctor Patsy Ceros-Livingston, she talked about him doing drugs I think as early as age of 14 years old. He started out with crack cocaine. He did some pot. He also used alcohol on a regular basis, and so I mean we did present that.

(2PC-R. Vol. 6 at 95).

As far as the drug use is concerned as I indicated earlier, I was not able to confirm a lot of that based on the names that he gave me. Through the penalty phase, you know, it came out through Doctor Livingston's report, and it also came out through his brother that he was doing drugs. As far as getting other people in here, I couldn't get them in here.

(Id. at 100-01).

When asked if he recalled specific conversations with family members regarding Mr. Rivera's drug use, Malavenda responded, "I recall speaking I think primarily with Peter about the drugs, and that's when we were looking for witnesses for the alibi witnesses" (Id. at 129-30). When recalled by the State, Malavenda testified that Peter Rivera "talked to me a little bit about [Mr. Rivera's drug use]" (2PC-R. Vol. 7 at 341). Peter gave Malavenda "some names of possible witnesses that we tried to locate. I don't recall who those witnesses are" (Id. at 342). Malavenda tried to find those witnesses,

but was unsuccessful (Id.). Mr. Rivera provided some names of possible witnesses, but Malavenda did not remember those names (Id. at 343). The State asked Malavenda if Mr. Rivera's family members were cooperative with him, and he responded:

A The only person that I recall having any conversation with and when I say conversation, I mean more than once is Peter Rivera.

Q Do you recall approximately how many times you spoke with him?

A I think I was talking to him at least once a week. I mean because I was asking him if he knew certain people, if we could locate certain people, things of that nature.

Q Was he helping you with that?

A He was helping me as much as he could, yes.

Q Did you speak with him on the telephone or in person?

A I believe I spoke to him primarily on the phone, and I'm sure I met him, you know, in person a couple of times, yes.

(2PC-R. Vol. 7 at 343-44). Malavenda could not recall if he had conversations with Mr. Rivera's parents or sisters specifically concerning drug use (Id. at 351-52). Malavenda presented all the evidence of drug use that he could get (Id. at 352).

Malavenda testified that he was "in the process of preparing for [the penalty phase]" when the guilt phase ended and did not wait until after the guilt phase to begin penalty

phase preparation (2PC-R. Vol. 6 at 125). Malavenda testified that "from the beginning of the case when I took it, I was preparing for both, for both guilt phase and sentencing phase" (2PC-R. Vol. 7 at 340). Regarding his request for a continuance of the penalty phase, Malavenda testified:

[T]he reason I requested a continuance and I think it's in the transcript at the sentencing point. I wanted Doctor Wright to be present and he wasn't available. That was my main concern. I needed him for some mitigating purposes, so I was asking for a continuance. That was the main purpose. I wanted Doctor Wright available.

(Id. at 341). Malavenda testified that he was prepared to present other evidence of mitigation (Id.).

Regarding contacts with Mr. Rivera's family, Malavenda testified, "I think at least once a week I was communicating with somebody in his family. I was communicating with Peter a lot, and I know I talked to his mother every now and then. I didn't have a lot of conversations with his dad. I know I was communicating with [Mr. Rivera] a lot" (2PC-R. Vol. 6 at 126). On cross-examination, Malavenda testified that when he spoke to the family, they did not have a lot of great things to say about Mr. Rivera, which is why he relied upon Dr. Ceros-Livingston to get into a lot of those areas (Id. at 127-28). On redirect, Malavenda agreed that mitigation does not consist solely of good things "because a lot of bad things were

brought out during the sentencing phase. I couldn't find a lot of good things to say about him" (Id. at 129). Malavenda also agreed that the family could have talked about the bad things as well as the good (Id.).

William Venturi was the defense investigator at the time of Mr. Rivera's trial (2PC-R. Vol. 7 at 325). Venturi reviewed his bills for Mr. Rivera's case (Id. at 326-30). The only names of potential witnesses on these bills were Minery, Reid, Gooding, Mark Peters, Kalatan, Groose, Spivak, Griskin, an informant named Judy, Goyette, Taylor, Ramos and Rogers (Id. at 327-39). If he had attempted to locate and serve these people, that would have been on the bills (Id. at 329). He did serve three subpoenas on April 8, 1987, but the bills do not name the people served (Id.). If the record reflects that he was paid the total amount of these bills, Venturi testified that the bills would reflect all the work he did on the case (Id. at 330). The bills accurately represent what Venturi did on Mr. Rivera's case (Id. at 331).

Venturi did not remember the name of Danny Franklin (Id. at 330). Venturi did remember once going to a gas station to meet some of Mr. Rivera's family members, but did not remember what the meeting was about or which family members were there (Id.). Venturi did not remember if he spoke to witnesses

about Mr. Rivera's drug use (Id.). Venturi did not recall whether Malavenda asked him to look for witnesses for the penalty phase (Id. at 330-31).

Dr. Ceros-Livingston testified that she would not have been able to talk to Mr. Rivera's family members at the time she evaluated him because she was asked to do a confidential evaluation (2PC-R. 7 at 365). Her standard practice when conducting an evaluation is not to talk to outside sources of information unless the attorney specifically tells her to do so (Id. at 365-66). If Malavenda had said she should talk to family members, she would have done so (Id. at 366). Dr. Ceros-Livingston did not go to Malavenda and tell him it would be helpful for her to talk to people about Mr. Rivera's drug use (Id.). The information Mr. Rivera provided the doctor about his drug use was not enough for her to diagnose addiction (Id.). Information that Mr. Rivera was a crackhound, was living in a crack house, was doing \$300 a day in crack cocaine and was on a crack run the day of the offense could have indicated to Dr. Ceros-Livingston that Mr. Rivera suffered from addiction (Id. at 367). The doctor had some of that information (Id. at 368). Dr. Ceros-Livingston is not an expert in addictionology and did not know as much about crack cocaine in 1987 as she does today (Id. at 369).

Dr. Faye Sultan, a clinical psychologist with expertise in the evaluation and treatment of sexual and physical abuse and disorders, evaluated Mr. Rivera for the post-conviction proceedings (2PC-R. Vol. 6 at 232). Dr. Sultan testified that her most significant difference with Dr. Ceros-Livingston concerned Mr. Rivera's history of drug abuse (2PC-R. Vol. 7 at 269). Dr. Sultan explained that Dr. Ceros-Livingston's report showed that Mr. Rivera provided information regarding his use of crack cocaine, but that Dr. Ceros-Livingston did not "do anything with that information at all" (Id.). Dr. Ceros-Livingston did not question Mr. Rivera "about the extent of his use, about the way that was interfering with his life, how it was impacting his ability to control his sexual impulses, or how it might have been exasperating [sic] his sexual acting out" (Id.). Dr. Ceros-Livingston did not make a diagnosis based upon Mr. Rivera's drug abuse and therefore "miss[ed] a very significant part of his psychological functioning at the time of the offense" (Id. at 269-70). Dr. Sultan explained that "a true account of the cocaine abuse and the other drugs that are being used at the time of the offense . . . significantly changes Mr. Rivera's psychological picture" (Id. at 270). Further, Dr. Sultan explained, Dr. Ceros-Livingston's report simply alluded to a personality

disorder and to sexual deviation, but did not identify a diagnosis of Mr. Rivera (Id.).

2. Prejudice

At the evidentiary hearing, Mr. Rivera's sisters, Miriam and Elisa, and his brother, Peter, testified about Mr. Rivera's childhood and youth. Friends Danny Franklin, Mark Peters and Andy Ramos provided their observations of Mr. Rivera during his late teens and early twenties. Clinical psychologist Faye Sultan and addictionologist Milton Burglass discussed their evaluations of Mr. Rivera's mental health impairments and addictions.

Mr. Rivera lived in Mount Vernon, New York, until he was 13 or 14 years old (2PC-R. Vol. 6 at 132-33, 165). In Mount Vernon, the Rivera parents and four children lived in a two-bedroom apartment (Id. at 132, 147). The family lived in a bad neighborhood, so the children were not allowed to go outside, but did all of their playing in the apartment and went to a private Catholic school (Id. at 132-33, 147-48, 164-65). Michael got average or above average grades in school and attended school regularly (Id. at 148). The Rivera children's lives were "[v]ery restricted" and "very controlled" by their parents (Id. at 147, 164). Sometimes, the children were permitted to go to their grandparents' house

(Id. at 148, 164). Because they did not have any friends, the children were each other's playmates (Id. at 133, 148, 164-65). At that time, Michael Rivera was creative and did a lot of drawing and art (Id. at 133). Michael had a very close relationship to his mother, and she seemed to favor him over the other children (Id. at 148-49). Michael's mother was very protective of him (Id.).

Michael Rivera was 13 or 14 years old when the family moved to Florida and life changed "overwhelming" (2PC-R. Vol. 6 at 133, 149, 165). The children's lives went "from one extreme to the other, from sheltered to let free. It's almost like a bird cage, open the door, to do what you want" (Id. at 133). The children "had our freedom to do what we wanted" (Id. at 149). There "was kind of basically no restriction anymore" (Id. at 165). The children attended public school and spent time at the apartment complex pool and recreation room (Id. at 133-34, 150, 165). They were not "like the close-knit brother and sibling thing anymore. We started straying away finding our own friends" (Id. at 149, 165-66). Once in public school, Michael "was straying away from us, finding his own friends. He wasn't as close with us anymore" (Id. at 150). He also "wasn't into school work as much like his homework and everything. It just wasn't important to him

anymore" (Id.). He often was not on the school bus and asked his sisters to tell their mother that he had been on the bus (Id. at 150-51).

The children played games such as billiards, foosball and pinball at the recreation center, and were also introduced to alcohol and drugs there (2PC-R. Vol. 6 at 134, 166). They started drinking at the recreation center and snorted a room deodorizer they called "rush," which made them "act all goofy, go doing things you wouldn't normally do" (Id. at 134-35, 152). Other kids from the apartment complex hung out there, and Michael Rivera made new friends, including Danny Franklin (Id. at 135, 151, 166).

The Rivera family lived at this apartment complex for about four years and then moved to North Lauderdale (2PC-R. Vol. 6 at 136). When he was not using drugs, Michael was sensitive, creative, intelligent and artistic (Id. at 144). He did a lot of drawing and painting, but lost interest in that hobby after moving from New York to Florida and beginning to use drugs (Id.). He was "really funny," liked to win games, loved animals, loved people, and "always tried to make you smile if he knew you were down" (Id. at 162). He "loved to draw" and "did some beautiful work" (Id.).

Michael told Danny Franklin that he was scared of his

father because he was a "rough man" (2PC-R. Vol. 6 at 191). One time when Michael and Danny were picked up by the police and taken home, Michael's father "knocked Mike across the room, and knocked over two chairs and a table" (Id.).

a. Mr. Rivera's History of Drug Abuse

The drugs the Rivera children used at the apartment recreation room progressed to alcohol, marijuana and crack cocaine (2PC-R. Vol. 6 at 135). Michael Rivera used drugs in the presence of his siblings often (Id. at 136, 151). Sometimes, Michael would obtain marijuana joints for his sisters and their girlfriends (Id. at 136). Elisa noticed that Michael seemed to really know what he was doing when he was rolling a marijuana joint (Id. at 151). When he came home, Michael smelled like marijuana, had red eyes, was really hungry, and asked Elisa for money (Id. at 151-52). Elisa also often saw Michael sniffing a handkerchief that he carried, but did not know what was in it (Id. at 152).

Peter Rivera remembered that Michael and Danny were two of the kids who were doing drugs at the recreation center (Id. at 166). Some kids, including Michael, hung out at Danny Franklin's house and started to drink and do other things their parents would not want them to do, like smoking cigarettes and marijuana (Id. at 151). Michael was also using

quaaludes and acid, and "whatever he could get his hands on, he would get high" (Id. at 167).

After the family moved to North Lauderdale when Michael was about 17, Michael's drug use progressed (2PC-R. Vol. 6 at 167-68). Peter noticed that when Michael came home, he had "[g]lassy eyes, big wide eyes, you know. Blank look on the face, you know, which was not him when he was straight" (Id. at 168). Michael was "zombie looking like" and "[a]rgumentative with me, the family and everything" (Id.). When he was not using drugs, Michael was not argumentative, but would hang out with Peter and help him with whatever he was doing (Id.). "But then it just became less and less when he wasn't straight. It became more of him being out away from the house. When I did see him, it was away from the house in other neighborhoods. He was always stoned" (Id. at 168-69). When he was not on drugs, Michael "was a very nice person, a very good person," but when he was on drugs, Michael "was like Dr. Jeckly [sic] and Mr. Hyde" (Id. at 182).

Michael's cocaine use progressed from powdered cocaine to crack cocaine sometime after he was 18 and no longer attending school (2PC-R. Vol. 6 at 137, 154). When he used crack cocaine, Michael showed "jitteriness" and "nervousness" (Id. at 138). He would be on a "constant search of money or any

type of thing that would be saleable at a pawn shop from stealing from the family" (Id.). Michael was in and out of the family home and when he was home, looked "[s]ort of scrubby," with eyes that were "all red and small" (Id. at 138, 143). When he was home, Michael was distant and tried to avoid everybody (Id. at 154). He looked pale, his eyes looked like he had not slept in days, and he looked anxious, like he could not relax (Id. at 155). When he was using crack cocaine, Michael "started to look pretty rough and everything. Always looking wide eye, a blank face look. So you always knew he was high" (Id. at 174).

Sometimes Michael stayed with Danny Franklin or Andy Ramos (Id. at 143). Ramos sold drugs and lived in a crack house (Id. at 144).

Michael stole from the family to buy drugs (2PC-R. Vol. 6 at 139). At one point, Miriam Rivera put a lock on her bedroom door because she was tired of her things going missing (Id.). Later, Miriam wanted to lock Michael out of the house, but her mother and sister did not want that, so Miriam moved out to get away from Michael's stealing (Id.). Michael asked Elisa for money, or would get money from their mother (Id. at 155). Elisa sometimes found things missing from her room or her wallet (Id.). Once Michael's drug use progressed to crack

cocaine, he was not working (Id. at 174). He might have been doing side jobs or stealing things and pawning them (Id.)

Michael's sisters tried to tell their mother that he was using drugs, but she was still very protective of him (2PC-R. Vol. 6 at 156). The mother "more or less turned her head because she didn't want to see it type of thing. She didn't want to get involved or she didn't want to bring up something that could shake the family" (Id. at 156).

Danny Franklin and Michael became friends when Michael was 13 or 14 and stayed friends for about 10 years (2PC-R. Vol. 6 at 186-87). At that time, they drank beer and smoked marijuana (Id.). Later, Michael and Danny also used powdered cocaine and crack cocaine (Id. at 187-88). They started using crack cocaine in the early 1980s (Id. at 188). After that, their typical day was "[u]sually chasing the buzz, you know. Just trying to find ways to get money to stay high" (Id.). Michael and Danny stole things so they could buy drugs and were afraid of getting caught (Id. at 190-91, 196). That fear did not stop them from stealing "because crack cocaine addiction it's like you got to have it. You chase it all the time. You want more and more and more" (Id. at 196).

Mark Peters met Michael Rivera in January or February of 1986 in Fort Lauderdale at the home of Andy Ramos, where

Peters went to buy crack cocaine (2PC-R. Vol. 6 at 203). Peters knew Michael for about three weeks (Id. at 204). Peters went to Ramos' house three or four times a week, and Michael was always there (Id.). Michael and Peters drank beer, smoked marijuana and smoked crack cocaine (Id.). They smoked crack cocaine all evening until midnight or 1:00 a.m. (Id.).

Andy Ramos met Michael Rivera in August or September of 1985 (2PC-R. Vol. 6 at 211-12). Ramos distributed cocaine from his house, and Michael stayed with him for about four months until January or February of 1986 (Id. at 212-13). Michael and Ramos used crack cocaine "all day long, through the night. Some times three or four days in a row" (Id. at 213). Ramos kicked Michael out of the house because "right before that I read in the paper about what happened with Michael, and what happened to the young girl" (Id. at 215).

b. Mr. Rivera's Sexual Abuse By Robert Donovan

Shortly after the Rivera family moved to Florida, when Michael Rivera was 14, a man named Robert Donovan, who lived in the same apartment complex, would come to the recreation center (2PC-R. Vol. 6 at 175). Donovan had a motorcycle and would entice the boys who were hanging out at the recreation center, including Michael, to go out to the field to ride the

motorcycle (Id.). Donovan also gave the boys beer and marijuana (Id. at 192). Donovan took Michael and a couple of other boys on trips in a motor home (Id. at 140, 158). These were overnight trips to places like Disney World or Cape Canaveral (Id. at 140, 159). Donovan and the boys stayed in the motor home on these trips (Id. at 140). Donovan was in his mid or late forties or early fifties (Id. at 140, 159). Michael also went to Donovan's apartment quite often and was there most of the time (Id. at 141). Donovan did not invite girls on the trips or to his apartment (Id. at 195). Peter did not go places with Donovan because he "didn't like the way [Donovan] touched everybody" in a way that "made me feel like weird" (Id. at 176, 178).

Danny Franklin testified that Michael started hanging around alone with Donovan when Michael was about 14 (Id. at 192). The kids called Donovan "Gay Bob" (Id. at 195). Sometimes, Donovan came looking for Michael, who would leave with him for one or two hours and come back with money (Id.).

c. Mr. Rivera's Behavior In The Months Before His Arrest

In the months before his arrest, Mr. Rivera was exhibiting the behavior that his siblings knew meant he was using crack cocaine (2PC-R. Vol. 6 at 139). When he came

home, he "hadn't been shaved. He looked like he was living a street person for a while" (Id. at 157).

Peter Rivera got heavily into drugs in 1984 or 1985 when he started using cocaine and crack cocaine (2PC-R. Vol. 6 at 169-70). He did these drugs with Michael (Id. at 170). Peter bought crack cocaine from Andy Ramos, who Michael lived with (Id.). Peter bought crack once or twice a week and saw Michael at Ramos' house (Id.).

From November of 1985 until February of 1986, Peter was visiting Ramos' house (2PC-R. Vol. 6 at 171). Peter went to Ramos' house three or four times a week, and Michael was always there (Id.). Sometime between January 28, 1986, and January 30, 1986, Peter took a day off from work and spent the day with Michael (Id. at 172).⁴ Michael had a bunch of money and wanted to party all day (Id.). Michael and Peter "went out, drank a lot of beer, bought crack, did a lot of crack" (Id.). They smoked \$200 to \$400 worth of crack and drank two or three cases of beer (Id. at 173). They did this until about 11:00 p.m. (Id. at 183). Michael smoked more crack than Peter did (Id. at 184). Although Peter went to work at 6:30 a.m. the next morning, he "was pretty much burned out" and

⁴Staci Jazvac disappeared in the early evening of January 30, 1986.

"very tired, very foggy in my head" and was only able to work because his job "was just repetitious mechanical work" (Id. at 184).

For a couple of weeks or a month before his arrest in the Jazvac case, Michael stayed with Danny Franklin (2PC-R. Vol. 6 at 189).⁵ They were spending \$200 to \$300 a day on crack cocaine at that time (Id.). That amount of crack kept Michael and Danny high "all day, most of the night" (Id.). Danny did not see Michael for about two weeks after Staci Jazvac was murdered because Michael had moved out of Danny's house (Id. at 201).

d. Mr. Rivera's Mental Health Impairments

Dr. Faye Sultan, a clinical psychologist with expertise in evaluation and treatment of sexual and physical abuse and disorders (2PC-R. Vol. 6 at 232), saw Mr. Rivera for twelve hours in four meetings from November 1998 until March 1999 (Id. at 234). Dr. Sultan reviewed police reports, prior psychological testing, school records, prior psychological evaluations, hospital records, court opinions, newspaper articles, trial testimony and prior post-conviction testimony (Id. at 233-37). Dr. Sultan also interviewed Peter Rivera,

⁵Mr. Rivera was first taken into custody on February 13, 1986.

Miriam Rivera and Esther Rivera (Id. at 236). The prior psychological evaluations which Dr. Sultan reviewed included an evaluation by Dr. Seth Krieger in 1980, an evaluation by Dr. Jess Cohn in 1986 and an evaluation by Dr. Ceros-Livingston in 1986 (Id. at 234-35). Dr. Sultan testified that all of the documents she reviewed regarding Mr. Rivera's history were available in 1987 and that her diagnoses of Mr. Rivera "existed in a rather obvious form for a long time" (Id. at 257).⁶

Milton Burglass, M.D., an expert on addictions, evaluated Mr. Rivera in 1995 to explore his substance abuse history, possible addiction and possible intoxication around the time of the offense (2PC-R. Vol. 7 at 292). In conducting his evaluation, Dr. Burglass considered the affidavits of Andre Ramos, Miriam Rivera, Elisa Brownfield and Peter Rivera (Id. at 293).⁷ Dr. Burglass also reviewed school records, hospital records, an evaluation by Dr. Cohn, a report by Dr. Ceros-Livingston, trial testimony and prison records (Id. at 295-96).

⁶The four volumes of background materials reviewed by Dr. Sultan were introduced at the evidentiary hearing as Defense Exhibit 6 (2PC-R. Vol. 7 at 288).

⁷These affidavits were admitted at the evidentiary hearing as Defense Exhibit 8 (2PC-R. Vol. 7 at 294).

i. Personality Disorder

Dr. Sultan testified that Mr. Rivera suffers from a long-standing Borderline Personality Disorder which exists independent of his other mental health impairments, but which underlies those other impairments (2PC-R. Vol. 6 at 238-39). Mr. Rivera was first diagnosed as having a personality disorder when he was 18 years old (Id. at 238). That personality disturbance grew worse over time such that "he function[ed] less and less as the demands of adult life increased. And that by 1985 and 1986, he wasn't able to cope in the world" (Id. at 238-39). The personality disorder was identified by the time Mr. Rivera was 18, but the "characteristics began much earlier according to the descriptions that I heard about his behavior from his mother, from his siblings, from things that Mr. Rivera has told me" (Id. at 239).

Borderline Personality Disorder means that "Mr. Rivera's inner experience of the world and his behavior deviates dramatically from what's expected of him in society. . . . [H]e remains rigid in his functioning rather than flexible to meet the demands of the world" (2PC-R. Vol. 6 at 240). Mr. Rivera has significant disabilities "with the way that he thinks about life, with the way that he handles his emotions,

and with the way that he deals with his impulses" (Id. at 240). Because of "those three areas of disability, his functioning interpersonally between himself and other people has been very much damaged" (Id.). Mr. Rivera meets far more than the minimum diagnostic criteria set forth in the Diagnostic and Statistical Manual for borderline personality disorder, and therefore "one could say that he is very clearly suffering from Borderline Personality Disorder because of the number of symptoms that he displays very obviously" (Id.).

Certain aspects of Mr. Rivera's behavior are attributable to his Borderline Personality Disorder alone (2PC-R. Vol. 6 at 243). Dr. Sultan explained:

For example, one of the primary qualities of Borderline Personality Disorder has to do with impulsivity, the inability to make a decision that gratification should be delayed to a more appropriate point in time. So the person with Borderline Personality Disorder seems to be ruled by much by his or her emotions.

Another primary characteristic has to do with that very issue of emotionality. It's called emotional reactivity. The person seems to react in a big way, in a large way to any stimulus in the environment. He seems to be quite upset or quite happy or quite distraught or quite confused with very little outside influence.

Another characteristic has to do with engaging in behaviors that you might think of [as] self-destructive behaviors. Frequently, people with Borderline Personality Disorders engage in sexual practices that are unsafe or unusual. Frequently, they would abuse substances. Mr. Rivera certainly

manifested both of those characteristics.

Frequently people with Borderline Personality Disorders have very disruptive or odd relationships. They may be artificially very intense for a period of time and then will breakup or explode.

The person with Borderline Personality Disorder may then be traumatized, highly traumatized by the breakup of a relationship and again very overly emotional. Somebody with Borderline Personality Disorder is said to not have very good control over his life and emotions as he operates in the world.

Another characteristic that's fairly common with people who have Borderline Personality Disorder is [their] sense that they are bored in the world unless there's chaos, unless there's excitement. They experience day to day life as very boring and unsatisfying, and Mr. Rivera certainly meets those qualities as well.

(Id. at 243-45).

ii. Childhood Abuse

Mr. Rivera experienced child abuse from his father and childhood sexual abuse from Bob Donovan (2PC-R. Vol. 6 at 247-51). From accounts by Miriam Rivera and Peter Rivera, Dr. Sultan learned that Mr. Rivera's father had a very serious problem with alcohol (Id. at 250; 2PC-R. Vol. 7 at 279). From early childhood, Mr. Rivera often witnessed his father's drinking behavior (2PC-R. Vol. 6 at 250). "[A]bout once a week Mr. Rivera's dad would come to their home in New York drunk enough to frighten the mother, into convincing her, to tell the siblings, the children to go and hide in their

bedrooms" (Id.).

The Rivera children described incidents in which the father tried to injure the family dog (2PC-R. Vol. 6 at 250; 2PC-R. Vol. 7 at 279). Once, the father tried to drown the dog in the swimming pool; another time, the father threw the dog out the window in New York into the snow (2PC-R. Vol. 6 at 250). In the snow incident, the mother ran outside to check on the dog, and the father locked the door and put furniture in front of it so she could not get back in the apartment (Id.). The children waited until the father fell asleep and then let the mother back in the apartment (Id.).

The children did not remember the father being physically aggressive toward them, but "[h]e yelled and screamed and banged things around the house and threw things" (2PC-R. Vol. 6 at 251). Most of the father's aggression was focused on the mother and the family pet (Id.).

Mr. Rivera also experienced childhood sexual abuse (2PC-R. Vol. 6 at 248-49). Mr. Rivera told Dr. Sultan that "when he was 14 and for several years after that, a grown man, a man in his 40s, committed sexual acts on him and to him and with him" (Id. at 248). At the time this was occurring, Mr. Rivera saw it as "an even trade. What he got in exchange for submitting to that kind of inappropriate sexual contact was

money and adventure and trips" (Id.). Mr. Rivera's mother told Dr. Sultan that in the time period the sexual abuse was occurring, the mother noted "a very marked personality change" in Mr. Rivera (Id. at 249). Although the mother "was aware that something was wrong with him," she "did not discuss it with him" (Id.).

In retrospect Mr. Rivera came to see the sexual abuse as greatly damaging to himself, but at the time he did not perceive it as damaging (Id.). Dr. Sultan explained that the inability to perceive the damage of childhood sexual abuse is "fairly typical of people who have been sexually abused, especially adolescent[s]" (Id.). A victim of childhood sexual abuse is unable to relate to his own pain and suffering, and therefore, "the rage that the abuse produces lives and goes on to cause this person or to assist this person, in developing other abusive behaviors in adulthood" (Id.).

Childhood sexual abuse is always traumatic, although different children respond to it differently (2PC-R. Vol. 6 at 249). Dr. Sultan testified that the abuse "must have been traumatic" for Mr. Rivera because "a lot of really serious maladaptive behaviors began around that time" (Id.). This is the time when Mr. Rivera began wearing woman's bathing suits, when he began to think he "might have girl-like traits [and]

might be more comfortable as a girl than a boy," and when his urge to expose himself began (Id.).

iii. Crack Cocaine Addiction

Dr. Burglass testified that Mr. Rivera began drinking alcohol when he was about 9 years old (2PC-R. Vol. 7 at 296). After the Rivera family moved to Florida, Mr. Rivera quit school and drank more often, although not to the point of drunkenness (Id.). This behavior continued until about 1985 (Id. at 297).

Mr. Rivera first tried marijuana at age 13 or 14 and started using it regularly in 1985 (2PC-R. Vol. 7 at 297). He would typically smoke two to three marijuana joints a day, but never to the point of unconsciousness (Id.). Between the ages of 14 to 16, Mr. Rivera also sniffed solvents, including a transmission fluid additive called Go and a household product called Rush, which is butyl nitrate (Id. at 299). Mr. Rivera tried several sedatives, including valium, librium and quaaludes, but did not like them (2PC-R. Vol. 7 at 297). He did not use barbiturates or opioid drugs (Id. at 297-98). Mr. Rivera used drugs weekly or every other week from the ages of 16 to 19, which is from 1978 to 1981 (Id. at 298).

Mr. Rivera began using psycho stimulants, which include cocaine, between the ages of 16 and 18 (2PC-R. Vol. 7 at 298).

He tried a drug known as Black Beauties, which is a form of amphetamine, and also tried LSD, but did not like either of them (Id.). Mr. Rivera used PCP, which he crushed up and put into marijuana cigarettes (Id. at 298-99).

Mr. Rivera began using powdered cocaine in 1979 (2PC-R. Vol. 7 at 299). From 1979 until 1985, he used a gram of cocaine a week, which clinically is considered a low dose user (Id. at 299-300). However, in March of 1985, Mr. Rivera discovered crack cocaine (Id. at 300). He had heard that it was a compelling drug and was concerned about that, but "he liked it a great deal, and his occasional use rapidly progressed within weeks to essentially daily use" (Id.). By August or September of 1985, he described himself as "strung out" (Id.).

Mr. Rivera "was working during 1985, and very quickly reached a point where he was spending \$180 to \$220 of his weekly salary buying either crack or he would buy regular cocaine and make his own crack" (2PC-R. Vol. 7 at 301). In the time period from 1985 until his arrest, Mr. Rivera thought he was "buying pretty high on the chain," which meant he was "buying higher purity cocaine than the ones you might get if you went out today to buy \$20 or \$40 single rocks" (Id.).

By the end of 1985, Mr. Rivera had lost his job, somewhat

alienated himself from his family and was homeless for a while (2PC-R. Vol. 7 at 302). He moved into a crackhouse, where people went to use crack and hang out (Id.).

From March of 1985 until February of 1986, Mr. Rivera did not have blackouts or seizures or hallucinations, but he "was certainly delusional which is common as the [dose] goes up" (2PC-R. Vol. 7 at 302). He also had "frequent sweats," because cocaine raises the body temperature (Id.). At this time, Mr. Rivera said he had an "irresistible urge to chase that high again and again" (Id. at 303). Dr. Burglass explained that this description is "a pathognomonic quote one hears from people who are involved with crack" (Id.).

Dr. Burglass described Mr. Rivera's typical pattern of crack use:

He just generally deteriorated to the point that what he was doing, was doing whatever he had to do to get money to take to the crackhouse and get more rocks, do the drugs, do it until he just burned out. The body reaches a fatigue in a few days typically in a crack run. That's the way we describe them, and then he would have a crash, C-R-A-S-H. And he would have to as they say kind of recover from his crack head, and then he would be able to go back out and start doing the same thing all over again.

(2PC-R. Vol. 7 at 302-03).

Dr. Burglass also testified that during this same time period, Mr. Rivera was using alcohol and marijuana to take the edge off the cocaine:

At the time he was using crack in this period of '85 and '86, although he did not himself understand that he was using alcohol and marijuana to do what we in this speciality refer to as take the edge off cocaine, he was in fact during that period a regular continued user of marijuana still about two, three joints a day and a fairly consistent drinker, always beer although he was not in his mind intentionally using those in order to do more cocaine. Certainly clinically, that's a common pattern and that's a motivation so you could keep doing cocaine without jumping out of your skin literally.

(2PC-R. Vol. 7 at 303).

Dr. Burglass explained that crack cocaine is more addictive than regular cocaine or even heroin:

The drug is short acting and so potent, it takes you up so far so fast and wears off so quickly and brings you so far down that the impetus to use again immediately is enormously higher than it is with any other drugs in the modern era and certainly any street drug, and certainly vastly more so than regular cocaine, in orders of magnitude more compelling, than would be something like heroine [sic].

(2PC-R. Vol. 7 at 303-04).

When a high wears off for a cocaine abuser such as Mr. Rivera, the person either does whatever he can to obtain more cocaine or crashes if no more cocaine is available (2PC-R. Vol. 7 at 304-05). A "crash" is "very much like a depressive state. They become very sleepy, and will just sort of curl up from over anywhere from 48 hours up to a few weeks. They will just be lethargic, irritable and essentially dysfunctionable [sic]" (Id. at 305).

The length of time it takes for a cocaine abuser to return to normal functioning after discontinuing cocaine use varies from person to person (2PC-R. Vol. 7 at 305-06). Some cognitive functions may start to improve in 48, 72 or 96 hours, while others may remain impaired for weeks or months (Id. at 305). However, Dr. Burglass testified, normal functioning is "not something that you stop using at eight o'clock Monday morning and by Tuesday everything is just like it used to be. I mean, that's fiction. That doesn't happen. That does not happen, not once you've reached the level of being . . . a crackhound" (Id. at 306).

Dr. Burglass explained that crack cocaine is a "psycho stimulant," which increases the heart rate, blood pressure, oxygen consumption, stomach contraction and sweating (2PC-R. Vol. 7 at 307). The crack cocaine user's behavior becomes driven, hyper or fidgety (Id.). As the person progresses up the dosage scale, the user's behavior deteriorates, and the person exhibits disorganized thinking, cognitive dysfunction and delusions (Id. at 308). Also as the dosage increases, the person develops an enormous confidence in the reality of their perceptions while a sober person would see the user as extremely cognitively disorganized (Id. at 309). A crack cocaine user can "become totally psychotic, floridly

completely out of touch with so-called reality, and their cognitive function[s] are virtually nill in terms of higher level, abstract judgment, reasoning, so on in that fashion" (Id.).

A person is addicted when his life "is sacrificed on the altar of the drug. Meaning that you spend your time getting the drug, doing the drug, recovering from doing the drug, and getting the drug" (2PC-R. Vol. 7 at 308). Addiction is a "behavioral stage," and differs from dependence (Id.).

For Mr. Rivera in the period of 1985 and 1986, Dr. Burglass testified, "I certainly would have characterized him as cocaine dependent, and certainly also as someone that was a cocaine addict" (2PC-R. Vol. 7 at 308). The behavioral effects of cocaine use on Mr. Rivera were evident "by his own account and by the statement of others":

[H]e lost his job. He was out living in the streets. He was hustling around doing this and that and the other to come up with crack.

People testified he was disorganized, slovenly, not cogent, not thinking clearly. I mean, he deteriorated into a crackhound. I mean, I read, saw, heard, nothing either from experts or from non-experts, contemporaneous witnesses to his behavior that suggested anything other than that.

(Id. at 311-12).

Dr. Sultan diagnosed Mr. Rivera as suffering from Cocaine Dependence (2PC-R. Vol. 6 at 242). Mr. Rivera was

physiologically addicted to cocaine, such that "[o]ver time it became clear that Mr. Rivera physically needed to consume more and more . . . cocaine. And that once he did not have it, he suffered from physiological and psychological withdrawal symptoms" (Id.). Dr. Sultan explained that "the level of drugs that Mr. Rivera was ingesting" produced characteristics such as "profuse sweating at times, experiencing delusions. At times being unable to make a determination between fact and fiction. Some times thinking about things and wondering if he had done those things. That sort of perceptual distortion is part [and] parcel of cocaine used at the level we are talking about here" (Id.). Because of the amount of cocaine Mr. Rivera was consuming, "his cognitive, emotional and behavior abilities would all have been impaired to one degree or another, but would have had some impairment just by virtue of the amount of drugs that he was consuming" (Id. at 243).

Dr. Sultan testified that at the time of the offense, Mr. Rivera "was abusing cocaine to a level that included physiological dependency" (2PC-R. Vol. 6 at 238). Mr. Rivera's "use of the drugs was escalating, and was greatly changing his view of the world in his ability to monitor and to control his behavior [and] was interfering with his ability to distinguish between what was fact and what was fantasy"

(Id.). Mr. Rivera "was increasingly dysfunctional even in every way as his drug abuse escalated" (Id.).

iv. Sexual Disorder

Dr. Sultan also diagnosed Mr. Rivera as suffering from Paraphilia, Not Otherwise Specified (2PC-R. Vol. 6 at 241). A paraphilia is "a recurrent, an intense sexual urge, that maybe is acted out in the fantasy, maybe has behavioral problems through involving unusual or inappropriate objects or activity or situations" (Id.). Mr. Rivera's paraphilia is described as "not otherwise specified" because "he actually fits the diagnostic criteria for at least four and potentially six different Paraphilia Disorders, so that he doesn't quite have all of the phenomena of any one, but rather seems to have a cluster of different types" (Id.). The features of Mr. Rivera's sexual disorder include "Exhibitionism, the urge to expose his genitals to strangers; the Transvest and Fetishism, this involves cross dressing and use of non-living objects for stimulation; Pedophilia, sexual activity with prepubescent children; Voyeurism, the urge to observe unsuspecting individuals who may or may not have known him" (Id.). Mr. Rivera also "experiences sexually aggressive urges and fantasies which are additional kinds of Paraphilias. Although he doesn't meet the criteria for what we think of as a

Sadistic or the sadistic kind of paraphilia, he has some of the qualities of that" (Id.).

Mr. Rivera's inappropriate sexual urges fell into two categories (2PC-R. Vol. 6 at 245). One category involved "urges to talk about imagined behavior, behaviors that Mr. Rivera likes to fantasize about, and then to act out those behaviors" (Id.). The second category concerned "the kind of self-loathing and hatred that resulted from him considering himself to be a freak" (Id.). Both categories grew over time, with Mr. Rivera experiencing urges to fantasize or act out as well as "the urge to be punished for his freakishness" (Id.). The two categories of urges competed with each other, and sometimes were probably equally strong (Id.).

From the time Mr. Rivera first began to engage in inappropriate sexual behavior, he described himself as "perverted, as demented, as inferior. The word 'freak' came out a lot" (2PC-R. Vol. 6 at 247). Those feelings about himself "seem to fuel the compulsion to reoffend. So that as he grew to loath himself and despise his behavior, the urge to commit those behaviors grew and grew as well" (Id.). Since the time of the offense, Mr. Rivera's self-loathing had changed from just viewing himself as a freak to "look at who I hurt. My freakishness, my disease, my disability, my

inability to profit from my experience has resulted in harm" (Id.).

Mr. Rivera was treated for his sexually abnormal behavior several times (2PC-R. Vol 6 at 252). When he was 16 years old, he participated in an HRS group counseling program as a result of an indecent exposure (Id.). At age 18, Mr. Rivera was placed in out-patient treatment with Dr. Seth Krieger for treatment of sexual deviation (Id.). Mr. Rivera violated his probation in that case and did not complete the treatment (Id.). He was sent to prison and ordered to receive treatment at South Florida Hospital as a Mentally Disordered Sex Offender (Id.).

v. Combined Effect of History and Disorders

Dr. Sultan testified that the combination of Mr. Rivera's borderline personality disorder, drug abuse and sexual disorder resulted in "an individual at the time of this offense who was extremely impaired" (2PC-R. Vol. 6 at 238). At the time of the offense, Mr. Rivera's "deviant sexual behavior was escalating" (2PC-R. Vol. 6 at 238).

However, although Mr. Rivera's inappropriate sexual urges grew over time, Dr. Sultan testified, "it isn't clear to me that they would have had we not have introduced cocaine into

the mix" (2PC-R. Vol. 6 at 245-46). Dr. Sultan explained that for a number of years, Mr. Rivera's sexual urges were satisfied "simply by exposing himself in public situations, by wearing woman's bathing suits, and putting himself in a position where people would see him touching himself while he was wearing that bathing suit [or by] wanting to watch women in various stages of dress and undress" (Id. at 246). However, "with the addition of cocaine, his behavior took on an entirely different dimension. Then became the issue of touching and grabbing and coercing and wanting to take physical control over another human being" (Id.). Dr. Sultan testified that when Mr. Rivera's drug history and sexual offenses are lined up, "there are no acts that would be described as aggressive, assaultive acts without the additional presence of substance, specifically cocaine. So that I think that assaultive aggressive behavior for Mr. Rivera and cocaine go hand-in-hand" (2PC-R. Vol. 7 at 272).

Dr. Burglass likewise testified that cocaine is "a very very very powerful stimulant of sexual and psychological fantasies of all kind[s]" (2PC-R. Vol. 7 at 309). Dr. Burglass explained how crack cocaine use interacts with sexual urges:

[O]ne thing that one sees in cocaine use and the higher the dosage is, it's a kind of sexual drivenness to the point of almost looking like compulsive sexuality. . . .

The explanation for that is not murky or psychoanalytic. It's really biochemical, and there [are] neurotransmitters that are responsible for driving sexual functions in males and females that are the very neurotransmitters that's stimulated by cocaine users.

The astonishing paradox in males, although they become increasingly driven and obsessed about sex and with whatever fantasies they may have had prior to normal, abnormal deviant, whatever they like, they would just be magnified enormously.

The paradox you might say or the surprise in all of this is that cocaine makes in males, the ability to get and maintain an erection anywhere from very difficult to almost impossible. So past a certain point, cocaine will cease to be -- it will continue to be a sexual stimulant driving you toward sexual activity, but it will not be very much of an aphrodisiac because you can't do anything about it as a male.

(2PC-R. Vol. 7 at 310-11).

One result of the combination of Mr. Rivera's history and disorders was that at the time of the offense, Mr. Rivera's developmental age was much younger than his chronological age

(2PC-R. Vol. 6 at 251). Dr. Sultan explained:

In many ways, Mr. Rivera perhaps because of his childhood sexual abuse, perhaps because of his Personality Disorder, perhaps because of his substance abuse, perhaps as a function of all three of those things, was very much younger than his chronological age throughout this period in which these offenses occurred. He didn't think or act like an adult, much more like an early adolescent in terms of his impulsivity, in terms of his emotionality, in terms of his terrible decision-making.

(Id.). Included in Mr. Rivera's developmental delay are

factors such as "poor impulse control, over-emotionality in situations that don't call for extreme emotions, manipulativeness in an emotional situation, extreme desire for closeness" (2PC-R. Vol. 7 at 273).

Dr. Sultan testified that "there is a significant indication that at the time of the offense, Mr. Rivera was significantly under the influence of cocaine and other drugs" (2PC-R. Vol. 6 at 253). Dr. Sultan based this conclusion on information from Mr. Rivera, Miriam Rivera, Peter Rivera and Esther Rivera regarding Mr. Rivera's behavior in the weeks before the offense, the quantity of his drug use in the weeks before the offense, and the quantity of his drug use in the day or two preceding the offense (2PC-R. Vol 7 at 273-78).

Dr. Sultan testified that at the time of the offense, Mr. Rivera's capacity to conform his conduct to the requirements of the law was substantially impaired (2PC-R. Vol. 6 at 253-54). Dr. Sultan explained why she reached this conclusion:

His ability to modulate his own behavior, to monitor his own behavior was significantly impaired because of his mental illness, because of the substance that is additional to that mental illness, the combination of Personality Disorder, the impulse control problems that are [a part] of that, the lack of judgment, the over reactivity, emotionality, along with extremely strong urges to commit deviant sexual acts.

Again, in combination with cocaine which removes whatever residual ability a human being might have

to resist an impulse or to use good judgment or to modulate behavior, I think significantly impaired Mr. Rivera in that regard.

(Id.). Dr. Sultan also testified that at the time of the offense, Mr. Rivera was suffering from an extreme mental or emotional disturbance because "all of the psychiatric and psychological characteristics that I described constitute significant mental illness and emotional disturbance" (2PC-R. Vol. 6 at 254-55).

Dr. Burglass testified that at the time of the offense Mr. Rivera's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired by crack cocaine abuse:

Being so disorganized as one cognition can result in a blurring of a line between so-called reality and so-called fantasies, one's judgment in the broad sense of that word, social and personal judgment. One just deteriorates as the [dose] goes up.

So certainly one of the cognitive functions that is requisite to appreciating the criminality of one[']s behavior is a preservation of abstract reasoning; the ability of self-reflection, self-analysis. All of those things are substantially impaired by high [dose] cocaine. It does not -- this is not to say one becomes a zucchini who walks and talks and chews gum. But higher cognitive functions, those like judgment are going to be compromised, generally in proportion to the dose as the dose goes up.

Now, taking the next step going toward the conforming one[']s behavior to the dictates of the law, again if you are basing your behavior on your

reading, that is to say your analyses of the situation that you are in and what's going on around you and those -- and those analyses are flawed because your perceptual mechanisms are munged, M-U-N-G-E-D, by the cocaine, then your judgments are going to be flawed as well.

Because cocaine promotes this feeling of grandiosity and feeling [in]vincible and invulnerable, you could say that one who is in a high dose of cocaine use has a very hard time differentiating between those things which they should do or shouldn't do based upon higher level criteria like morality or awareness of the law just because their apparatus to analyze those kind of problems is compromised. They can't do it very well.

Now, because the drives or instinctive urges of cocaine if someone is angry and you give them cocaine, it's like pouring gasoline on a roaring fire. If someone is sexually aroused and stimulated and you give them cocaine, it's like pouring gasoline on a roaring fire.

Now, if we get someone like Michael Rivera with what I'm going to characterize . . . as someone who has a problem with compulsive and shall we say quote, deviant, unquote, sexual behaviors and impulses and fantasies and urges and behavior. Giving him cocaine is like pouring gasoline on a roaring fire. So it's going to increase that, therefore making it harder if as I know you are, where you are referring to conforming your sexual behavior to the requirements of the law number one, knowing the true status of what your own behavior is like, is compromised because of cognitive dysfunction. And then secondly because cocaine at the same time it[']s decomposing your cognitive apparatus, it's driving your instinctual urges so that the higher the dose goes up, the worse the judgment is. But the stronger the urges are to do these things and that result of that certainly decreased the ability to say, no, I shouldn't do that, no, that's wrong or no, I'll w[a]it. O[r], no, I will or, no, whatever level of decision making

criteria you apply that's going to be compromised for those two reasons because you're driving it from both ends. Cognition is impaired, the perception, and emotions are all out of whack, and basic biological urges are being fueled like a boiler. That's a deadly combination.

(2PC-R. Vol. 7 at 312-14). Dr. Burglass also testified that at the time of the offense, Mr. Rivera was suffering from an extreme mental or emotional disturbance because he would "by definition be under extremely emotional disturbance by virtue of disorganization that is [the] inevitable physiological [e]ffect of that kind of cocaine use" (*Id.* at 315).

SUMMARY OF ARGUMENT

1. Mr. Rivera was denied the effective assistance of counsel at his capital penalty phase. Counsel failed in his duty to investigate and prepare for the penalty phase. Had counsel properly investigated and prepared, the defense would have established three statutory mitigating factors and numerous nonstatutory mitigating factors. The lower court's analysis of the deficient performance and prejudice prongs of Strickland v. Washington, 466 U.S. 668 (1984), was contrary to the law, was an unreasonable application of the law, and was contrary to and unsupported by the record. This Court should vacate Mr. Rivera's death sentence.

2. Mr. Rivera was denied a full and fair hearing by

erroneous lower court rulings excluding evidence.

ARGUMENT

ARGUMENT I

**MR. RIVERA WAS DENIED THE EFFECTIVE
ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.**

Mr. Rivera's trial counsel failed in his basic duty to investigate evidence of mitigation. Mr. Rivera provided him with names of people who had known him in the period before the offense, and counsel failed to find them. Mr. Rivera's family cooperated with trial counsel, who failed to conduct any interviews regarding mitigation. Trial counsel retained a mental health expert, but provided that expert with no background information and simply had her read her report to the jury.

Because of trial counsel's failures, the jury never heard a complete explanation of Mr. Rivera's life and complex impairments. The contrast between the evidence presented at the penalty phase and the evidence presented in post-conviction is striking. The evidence presented in post-conviction provided a complete story and established significant statutory and nonstatutory mitigating factors.

A. LEGAL FRAMEWORK

Analysis of an ineffective assistance of counsel claim

proceeds under Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of deficient attorney performance and prejudice. An attorney representing a client at a capital penalty phase has a duty to conduct a "requisite, diligent investigation" into the client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). See also Id. at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence").

In addition to conducting a thorough investigation, a defense attorney also has a duty to ensure that the client receives appropriate mental health assistance, including providing the mental health expert with necessary information.

Mason v. State, 489 So. 2d 734 (Fla. 1986).⁸ The mental health

⁸See also Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes"); Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998) ("When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective

expert also must protect the client's rights, and violates these rights when he or she fails to provide competent and appropriate evaluations. State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. As this Court has recognized, the mental health profession regards reliance solely upon the self-report of a patient as an inadequate basis for reaching a diagnosis or forming an opinion. Id.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A petitioner is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability: "The question is not whether the defendant would more likely than not have received

penalty phase assistance of counsel"); Glenn v. Tate, 71 F.3d 1204, 1210 n.5 (6th Cir. 1995) ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant").

a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickland, 466 U.S. at 693.

A piece-by-piece prejudice analysis is erroneous. In Kyles v. Whitley, 115 S. Ct. 1555 (1995), the court addressed the materiality standard for claims under Brady v. Maryland, 373 U.S. 83 (1963). The court pointed out that the Brady materiality standard and the Strickland prejudice standard are the same. 115 S. Ct. at 1566-67. The Court emphasized that this standard must consider the effect of omitted evidence "collectively, not item-by-item." Id. at 1567.

The correct standard is whether unrepresented, available evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability" or "may alter the jury's selection of penalty." Williams v. Taylor, 120 S. Ct. at 1515-16. Further, under Strickland, prejudice is established when the omitted evidence likely would have affected the "factual findings". Strickland, 466 U.S. at 695-96.

B. DEFICIENT PERFORMANCE

The evidence presented below establishes that counsel did not conduct a "diligent" and "thorough," Williams, investigation of readily available sources of information

regarding Mr. Rivera. Counsel also did not provide available evidence to his penalty phase mental health expert. Counsel did not make a strategic decision not to present any mitigating evidence.

The penalty phase record itself is testament to counsel's failure to investigate and prepare for the penalty phase. The direct examination of the defense penalty phase witnesses is significant evidence of what counsel had prepared to present. Those direct examinations, in which counsel mainly asked vague questions about how witnesses felt about Mr. Rivera, show that counsel had prepared very little. Counsel brought out none of Mr. Rivera's humanizing life history, none of the information regarding how Mr. Rivera's drug abuse developed, or how the drug abuse affected Mr. Rivera personally or in his familial relationships.

At the evidentiary hearing, counsel did not identify any information which he knew about Mr. Rivera but which he chose not to present. For example, at the evidentiary hearing, counsel testified that he presented all the evidence of Mr. Rivera's drug abuse which he had (2PC-R. Vol. 7 at 352). Counsel testified that Peter Rivera had testified about Mr. Rivera's drug abuse at the penalty phase (2PC-R. Vol. 6 at 95, 100). In fact, the penalty phase record shows that Peter

Rivera was not asked about Mr. Rivera's drug abuse on direct, cross or redirect (R. 1945-51). Counsel testified that he relied upon Dr. Ceros-Livingston to present evidence of Mr. Rivera's drug abuse (2PC-R. Vol. 6 at 95, 100-01). However, at the penalty phase, Dr. Ceros-Livingston, reading from her report, only touched on this crucial area of Mr. Rivera's personal history. Dr. Ceros-Livingston reported only in summary fashion that Mr. Rivera used marijuana, LSD and Quaaludes on one occasion (R. 1994), that Mr. Rivera used "base rock" in November of 1985 (R. 2026), that Mr. Rivera said he stole from his family to get money for drugs (id.), that Mr. Rivera did not use "pot" around women (R. 2031), that he bought some "base rock" on the day Staci Jazvac disappeared (id.), and that later that day he smoked some more "rock" (R. 2032). The doctor later mentioned that according to personality tests she gave Mr. Rivera, "There was some indication that he may have problems in the area of drug abuse" (R. 2041). This is all that Dr. Ceros-Livingston said about Mr. Rivera's drug use.

At the evidentiary hearing, counsel identified only Peter Rivera as a family member with whom counsel had consulted before trial (2PC-R. Vol. 6 at 95, 129-30). Counsel testified that his consultations with Peter Rivera occurred when the

defense was investigating Mr. Rivera's alibi defense (Id. at 129-30). The only family member counsel spoke to more than once was Peter Rivera (2PC-R. Vol. 7 at 343). Peter Rivera "was helping me as much as he could" (Id. at 344).

Counsel's testimony did not contradict that of Peter Rivera or of Mr. Rivera's sisters. Peter Rivera testified that before trial, counsel had asked him about Mr. Rivera's alibi and that counsel talked "very little" about the penalty phase the day before it was held (2PC-R. Vol. 6 at 180-81). The sisters testified that counsel met with them only once, either the night before or morning of the penalty phase, and then did not discuss Mr. Rivera's history but only described what the courtroom would be like (2PC-R. Vol. 6 at 145, 160-61). The sisters would have provided any information about Mr. Rivera had counsel asked for it (Id.).

Counsel testified he could not locate witnesses regarding Mr. Rivera's drug abuse (2PC-R. Vol. 6 at 95). Counsel had no memory of what he did regarding Danny Franklin and Andy Ramos (Id. at 96-99). Counsel testified that both Peter Rivera and Mr. Rivera had provided him names of people who knew about Mr. Rivera's drug abuse, including Ramos (Id. at 95; 2PC-R. Vol. 7 at 342, 343, 349-50). Danny Franklin testified that he called counsel at Peter Rivera's request, but counsel did not return

the call (2PC-R. Vol. 6 at 200-01). Franklin testified he lived in Florida at the time, had been at the same address for six or seven years, and was available to testify (Id. at 199). Mark Peters testified that at the time of the penalty phase, he lived in Orlando, at the address listed on his state I.D. card (Id. at 208-09).⁹ Andy Ramos testified that at the time of the penalty phase, he was on probation in Florida and was available to testify (Id. at 219-20, 223, 227-28). The records from trial investigator Venturi contain no references to Franklin and show no interviews regarding Mr. Rivera's drug abuse (2PC-R. Vol. 7 at 326-30).

In light of this record, the lower court erred in concluding that trial counsel's performance was not deficient. The lower court concluded, "The Defendant has failed to establish that Attorney Malavenda's performance in calling witnesses was inadequate" and "Defense counsel clearly investigated mitigation and presented all the evidence that he found to be favorable that was at his disposal at that time" (2PC-R. Vol. 3 at 589, 595). Contrary to these conclusions, the record shows that Mr. Rivera's family cooperated with

⁹When Mr. Rivera's counsel attempted to ask Peters more questions about his availability for the penalty phase, the lower court sustained the State's objection (2PC-R. Vol. 6 at 209-10). This ruling deprived Mr. Rivera of a full and fair hearing. See Argument II.

counsel but that counsel did not request mitigation information from them and that counsel had leads to other witnesses who were easy to find.

The lower court erred in concluding:

Attorney Malavenda did prepare the family members who cooperated with him, but because his family generally did not have anything helpful to say about Michael, he limited their penalty phase testimony to the sexual abuse of and their love for the Defendant. . . . This Court finds Mr. Malavenda's strategy to be reasonable.

(2PC-R. Vol. 3 at 596). Mr. Rivera's brother and sisters testified that counsel did not interview them regarding mitigation evidence, and counsel's testimony did not contradict their testimony. The lower court did not consider the family member's testimony. Further, counsel did not identify any information which he knew about Mr. Rivera which he chose not to present. See Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (rejecting State's contention that counsel's failure to investigate was reasonable; "Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed. This is so because counsel did not attempt to develop a case in mitigation").¹⁰

¹⁰"[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

The lower court erred in concluding that "Peter and Dr. Ceros-Livingston testified as to the Defendant's drug abuse" and that "[t]he trial judge and jury heard extensive testimony regarding the Defendant's drug abuse history from a mental health expert" (*Id.* at 594, 595). Peter Rivera said *nothing* at the penalty phase regarding Mr. Rivera's drug abuse. Dr. Ceros-Livingston referred to drug use only in passing at the penalty phase and certainly did not come close to providing the detailed history which was available. Trial counsel himself testified that Dr. Ceros-Livingston only testified to "some" drug use by Mr. Rivera, but did not provide "extensive" evidence on that subject (2PC-R. Vol. 6 at 121).

The lower court erred in concluding that Andy Ramos testified at the evidentiary hearing that he would not have wanted to testify at Mr. Rivera's penalty phase (2PC-R. Vol. 3 at 589, 597). This conclusion is unsupported by and contrary to the record. As the excerpts of Ramos' testimony quoted in the Statement of the Facts show, Ramos testified he would have been willing to testify at the penalty phase because he had

circumstances.'" Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991), quoting Strickland, 466 U.S. at 691. As Horton noted, "our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and made a reasonable choice between them." 941 F.2d at 1462.

already served his prison sentence on his drug charges (2PC-R. Vol. 6 at 219-20, 223, 227-28).

The lower court erred in concluding that "Mark Peters was found by the Florida Supreme Court to be unavailable as an alibi witness. He is likewise unavailable as a penalty phase witness" (2PC-R. Vol. 3 at 597). The lower court incorrectly interpreted this Court's prior opinion. In reference to whether trial counsel was ineffective for failing to call Peters as an alibi witness, this Court said:

The trial court denied Rivera relief on this claim after finding that Peters' own decision to leave the area prevented him from testifying at trial.

. . . .

Peters left [for] Orlando after giving his information to both the police and Rivera's counsel, Edward Malavenda. He testified at the evidentiary hearing that he did not tell the police he was leaving and did not remember telling Malavenda he was leaving. Consequently, when the trial commenced, Malavenda had no alibi witnesses to present. Arguably, Malavenda should have presented Peters' deposition since he should have been able to establish his unavailability. Nevertheless, neither Peters' deposition nor his live testimony would have provided Rivera with an alibi for the crucial time after 7 p.m., the approximate time after which the victim was murdered. Therefore assuming, arguendo, that Rivera established that Malavenda rendered deficient performance, he still must satisfy Strickland's prejudice prong. We find that Rivera has not satisfied that prong of the test.

Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998). This Court's decision was based upon a lack of prejudice, and the

Court therefore did not address whether Peters was in fact unavailable or whether counsel was deficient in not locating him. Further, evidence that Peters had a state I.D. card listing his address and resided at that address for three or four years after moving to Orlando was not presented at the 1995 evidentiary hearing.

There is no dispute that trial counsel did not provide his mental health expert with any background information or request the expert to obtain such information. The lower court did not address this component of Mr. Rivera's claim.

C. PREJUDICE

The key to the prejudice resulting from trial counsel's failure to investigate and prepare is that the penalty phase presentation consisted of a few isolated facts about Mr. Rivera with no coherent explanation of his life or behavior and with no factual basis supporting statutory and nonstatutory mitigating factors. The testimony of family members and friends presented at the evidentiary hearing fleshed out, supported and corroborated Dr. Ceros-Livingston's conclusions at the penalty phase, which were instead based only upon Mr. Rivera's self-report.

Most significantly, the penalty phase testimony largely ignored the most crucial area of Mr. Rivera's history, his

drug abuse. Dr. Ceros-Livingston could not diagnose Mr. Rivera's crack cocaine addiction because she did not have sufficient information. Further, as Dr. Sultan testified, Mr. Rivera's behavior at the time of the offense could only be explained as resulting from the constellation of his history, his personality disorder, his psychosexual disorder *and* his drug abuse. The drug abuse exacerbated Mr. Rivera's other impairments, producing extreme behavior which Mr. Rivera might otherwise not have engaged in.

The lay and expert testimony at the evidentiary hearing established numerous statutory and nonstatutory mitigating factors. The evidence established the statutory mitigating factors of Mr. Rivera's age (developmental), substantial impairment of Mr. Rivera's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and extreme mental or emotional disturbance. See Sec. 921.141(6)(b), (f), (g), Fla. Stat. The evidence established recognized nonstatutory mitigating factors including severe drug abuse history, crack cocaine addiction, under influence of drugs at the time of the crime, history of treatment for psychosexual disorder, psychological abuse as a child, sexual abuse as a child, long-standing personality disorder, Mr. Rivera's feelings of revulsion at

himself for his "freakish" sexual urges, no drug treatment, Mr. Rivera's loving, kind and helpful qualities when not on drugs, and the love Mr. Rivera's family has for him.

In light of these factors, the lower court erred in finding that Mr. Rivera had not established prejudice under Strickland. The trial court's ultimate conclusion was that the evidence presented in post-conviction was cumulative to that presented at the penalty phase.¹¹ At trial, the judge found that the evidence presented at the penalty phase established only one mitigating factor. Analysis of prejudice must assume that the jury and judge would have found mitigating factors supported by the evidence. Under Strickland, "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695. Further, under

¹¹See 2PC-R. Vol. 3 at 595 ("The diagnoses by Dr. Sultan and Dr. Burglass, based on additional testimony and records differed slightly from Dr. Ceros-Livingston"); id. at 597 ("the evidence presented by appellate counsel during the evidentiary hearing was practically identical to the evidence presented by Mr. Malavenda during trial"); id. at 599 ("It is this Court's belief that adding the information given by the defense witnesses that testified during the evidentiary hearing would not have supported additional mitigation"); id. at 600 ("most of the testimony presented during the evidentiary hearing had already been presented to the trial judge and jury").

Florida law, a sentencer is required to find a mitigating factor if it is proved. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993).

Here, under the applicable standard of proof, Mr. Rivera established numerous, recognized mitigating factors which were not established or found at trial. The State presented no rebuttal to the evidence regarding Mr. Rivera's history and impairments. The additional mitigating factors would have added much weight to the life side of the sentencing balance, and their omission undermines confidence in the outcome of the penalty phase.

Even when some mitigation is presented at a capital penalty phase, prejudice occurs when other available evidence is not presented. See Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995) (prejudice established despite counsel's presentation of some mitigation evidence and despite jury's unanimous vote for death). Under Florida law, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell v. State, 571 So. 2d 415, 419-20

(Fla. 1990), quoting Fla. Std. Jury Instr. (Crim.) at 81. Thus, the defense has a burden of proof regarding mitigating factors, and failure to meet that burden when evidence establishing mitigating factors is available prejudices the defendant. Proving a fact requires a certain quality and quantum of evidence. Here, substantial evidence was available but not presented, and the trial court found only one statutory mitigating factor and found no mitigating factors based upon Mr. Rivera's life history or crack cocaine addiction. Further, once established, the weight of a mitigating factor matters in the ultimate decision between life and death because Florida's capital sentencing scheme requires the sentencers to weigh mitigation against aggravation. See Stringer v. Black, 112 S. Ct. 1130 (1992). The lower court's analysis--that the evidentiary hearing evidence was cumulative to the evidence presented at the penalty phase--ignores the difference between merely asserting a mitigating factor and proving that factor with compelling evidence such as was presented in post-conviction.¹² The lower court also relied upon the aggravating factors found at

¹²The lower court's cumulateness conclusion is also incorrect in light of this Court's opinion remanding for an evidentiary hearing. In ordering that hearing, the Court knew what evidence had been presented at the penalty phase and characterized it as limited. Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998).

trial in concluding prejudice was not established (2PC-R. Vol. 3 at 598, 600). This Court was aware of the aggravating factors when it ordered an evidentiary hearing, and did not find those matters sufficient to foreclose establishing prejudice. The trial judge found four aggravating factors and one statutory mitigating factor. This Court struck one aggravating factor on direct appeal. The numerous, significant mitigating factors which were omitted would have substantially altered the balance of aggravation and mitigation. This Court has granted relief on penalty phase ineffective assistance of counsel claims despite the presence of numerous or strong aggravating factors. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989).

Further, the lower court refused to consider that two of Mr. Rivera's prior convictions had been vacated. In Rivera v. State, 547 So. 2d 140 (Fla. 4th DCA 1989), the court reversed Mr. Rivera's convictions for child abuse and aggravated battery in the Jennifer Goetz case. While these reversals are not a basis for Mr. Rivera's penalty phase ineffective

assistance of counsel claim, they are relevant to a determination of prejudice. However, when Mr. Rivera's counsel attempted to present evidence of these reversals at the evidentiary hearing, the lower court refused to consider the reversals, believing them to be irrelevant to Mr. Rivera's claim (2PC-R. Vol. 7 at 335).¹³ Mr. Rivera's counsel argued that the reversals were relevant to the prejudice analysis of Mr. Rivera's claim (Id. at 336-37).

The reversals were relevant to the prejudice analysis because such an analysis must consider the totality of the evidence before the jury. Strickland, 466 U.S. at 669; Kyles v. Whitley, 115 S. Ct. at 1567. Although two of Mr. Rivera's other convictions in the Goetz case were not reversed, at the penalty phase the state presented evidence that Mr. Rivera was convicted of four separate crimes in the Goetz case and relied upon all four convictions to argue that Mr. Rivera should be sentenced to death (R. 1923, 1924, 2108-09). The reversal of two of those convictions affected the weight of the prior conviction aggravator, see Stringer v. Black, 112 S. Ct. 1130 (1992), and therefore was relevant to the prejudice analysis under Strickland.

¹³This ruling also denied Mr. Rivera a full and fair hearing. See Argument II.

The lower court recited a list of mitigation which the court stated was presented "to the jury" at trial (2PC-R. Vol. 3 at 598-99). This list is identical to the list which Mr. Rivera's Rule 3.850 motion alleged should have been, but was not, presented. See Rivera v. State, 717 So. 2d 477, 484-85 (Fla. 1998). The court's conclusion that all these mitigating factors were presented "to the jury" is patently wrong, as any review of the penalty phase reveals.

The lower court seemed to find it significant that "Dr. Sultan did not testify that she was of the opinion that the Defendant could not appreciate the criminality of his act" (2PC-R. Vol. 3 at 590). The lower court did not recognize that this statutory mitigating factor is phrased in the alternative; the factor applies if the defendant's ability to appreciate *or* to conform his conduct is substantially impaired. See Sec. 921.141(6)(f), Fla. Stat.

The lower court relied on Dr. Ceros-Livingston's testimony that Mr. Rivera did not commit the abduction of Jennifer Goetz, expose himself to women, or make obscene phone calls while under the influence of alcohol or drugs (2PC-R. Vol. 3 at 593). Dr. Ceros-Livingston was unaware of Mr. Rivera's extensive drug abuse history. The history detailed at the evidentiary hearing shows that Mr. Rivera has

consistently used drugs and alcohol since he was about 14 years old and that the level of his inappropriate sexual behavior escalated as the drug use escalated. Dr. Burglass testified that no lay witness or expert had offered any information to contradict the fact that Mr. Rivera was a "crackhound" by the time of the Jazvac disappearance (2PC-R. Vol. 7 at 311-12).

The lower court concluded that "[n]o evidence was presented that proves that the Defendant was under the influence of drugs at the time of the offense" (2PC-R. Vol. 3 at 599). Peter Rivera, Danny Franklin, Mark Peters and Andy Ramos all described Mr. Rivera's drug abuse, especially his crack cocaine abuse, in the weeks and months before the offense. Peter Rivera described a crack cocaine binge which he and Mr. Rivera engaged in no more than two days before Staci Jazvac disappeared and possibly on the same day as her disappearance. Dr. Burglass testified that Mr. Rivera was addicted to crack cocaine and therefore spent his time either seeking and smoking crack cocaine or "crashing" when he did not have any crack cocaine. This evidence establishes that at the time of the offense, Mr. Rivera was most likely high on crack cocaine; if he was not, he would have been in the "crash" mode and entirely nonfunctional.

Finally, the lower court did not address at all the fact that what counsel did do at the penalty phase caused more harm than good. Counsel allowed Dr. Ceros-Livingston to testify in great detail about crimes which Mr. Rivera had told her about, but which Mr. Rivera had never been charged with (R. 2017-20). Counsel allowed Dr. Ceros-Livingston to testify that Mr. Rivera enjoyed his sexual encounters in prison, that Mr. Rivera was known as a "butch queen" in prison, and that Mr. Rivera enjoyed his sexual encounters with Bob Donovan (2012-15). Clearly, without the humanizing evidence presented at the evidentiary hearing, this information about Mr. Rivera could only serve to prejudice him in the eyes of the jury.

D. CONCLUSION

The evidence presented below established that trial counsel's performance was deficient and that Mr. Rivera was prejudiced. Had counsel adequately investigated, he would have discovered evidence establishing numerous, unrebuttable statutory and nonstatutory mitigating factors. These mitigating factors "might well have influenced the jury's appraisal of [Mr. Rivera's] moral culpability" or "may [have] alter[ed] the jury's selection of penalty." Williams v. Taylor, 120 S. Ct. at 1515-16. The evidence likely would have affected the "factual findings" regarding mitigating factors.

Strickland, 466 U.S. at 695-96. This Court should grant Mr. Rivera relief.

ARGUMENT II

THE LOWER COURT'S RULINGS DEPRIVED MR. RIVERA OF A FULL AND FAIR HEARING.

Post-conviction litigation is governed by due process. See Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996). The right to present evidence is essential to due process. Chambers v. Mississippi, 93 S. Ct. 1038 (1973). A defendant has a right to present a full and fair defense. Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987). Mr. Rivera was unable to present his case fully due to erroneous rulings excluding evidence. This denied due process, prejudiced Mr. Rivera, and resulted in the trial court's erroneous and inadequate analysis of Mr. Rivera's penalty phase ineffective assistance of counsel claim.

During the examination of Mark Peters, the lower court did not permit Mr. Rivera's counsel to establish Peters' availability as a penalty phase witness. Peters testified that at the time of the penalty phase he lived in Orlando at the address listed on his state I.D. card (2PC-R. Vol. 6 at 208-09). When Mr. Rivera's counsel asked whether any investigator came to speak to Peters after his deposition of

April, 1986, the State objected, arguing that this Court had affirmed Peters' unavailability (Id. at 209-10). Mr. Rivera's counsel argued that she was attempting to show that Peters was available for the penalty phase, but the court sustained the State's objection (Id. at 210).

The court's order denying relief then found that Peters was not available for the penalty phase. As explained in Argument I, the lower court erred in relying upon this Court's prior post-conviction opinion. The lower court erred in refusing to allow Mr. Rivera's counsel to establish Peters' availability for the penalty phase and, after excluding that evidence, finding Peters was unavailable.

The lower court refused to consider that two of Mr. Rivera's prior convictions had been vacated. In Rivera v. State, 547 So. 2d 140 (Fla. 4th DCA 1989), the court reversed Mr. Rivera's convictions for child abuse and aggravated battery in the Jennifer Goetz case. While these reversals are not a basis for Mr. Rivera's penalty phase ineffective assistance of counsel claim, they are relevant to a determination of prejudice. However, when Mr. Rivera's counsel attempted to present evidence of these reversals at the evidentiary hearing, the lower court refused to consider the reversals, believing them to be irrelevant to Mr. Rivera's

claim (2PC-R. Vol. 7 at 335). Mr. Rivera's counsel argued that the reversals were relevant to the prejudice analysis of Mr. Rivera's claim (Id. at 336-37).

The reversals were relevant to the prejudice analysis because such an analysis must consider the totality of the evidence before the jury. Strickland, 466 U.S. at 669; Kyles v. Whitley, 115 S. Ct. at 1567. Although two of Mr. Rivera's other convictions in the Goetz case were not reversed, at the penalty phase the state presented evidence that Mr. Rivera was convicted of four separate crimes in the Goetz case and relied upon all four convictions to argue that Mr. Rivera should be sentenced to death (R. 1923, 1924, 2108-09). The reversal of two of those convictions affected the weight of the prior conviction aggravator, see Stringer v. Black, 112 S. Ct. 1130 (1992), and therefore was relevant to the prejudice analysis under Strickland.

During the testimony of Peter Rivera, Mr. Rivera's counsel attempted to ask questions regarding why other boys stopped associating with Bob Donovan and what Mr. Rivera was doing with Donovan (2PC-R. Vol. 6 at 178-79). The State objected that the questions called for hearsay (Id.). Mr. Rivera's counsel argued that hearsay was admissible at a penalty phase and that Mr. Rivera was attempting to show what

evidence could have been presented at his penalty phase (Id.). The court sustained the State's objections because the State would not have an opportunity to rebut what was said by witnesses who were not testifying (Id.).

The capital sentencing statute provides, "Any such evidence which the court deems to have probative value may be received . . . provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Sec. 921.141(1), Fla. Stat. This Court has interpreted this provision as allowing the State to present hearsay testimony because the defendant has the opportunity to cross-examine the person who recounts the hearsay. Damren v. State, 696 So. 2d 709, 713 (Fla. 1997) (testimony of State witnesses regarding statements made by deceased co-defendant admissible); Spencer v. State, 645 So. 2d 377, 383-84 (Fla. 1994) (testimony of police officer regarding statements made by deceased victim admissible because defendant had opportunity to cross-examine officer). Under this analysis, Peter Rivera's testimony regarding what others had said about Donovan was admissible because the State had the opportunity to cross-examine Peter Rivera.

During the examination of Miriam Rivera, Mr. Rivera's counsel began to ask Miriam about her own use of crack

cocaine, but the State objected (2PC-R. Vol. 6 at 142). Mr. Rivera's counsel explained that she was attempting to bring out Miriam's experience with crack cocaine and its effects in order to support Miriam's observations of what crack cocaine was doing to Mr. Rivera (Id.). The court sustained the State's objection because Miriam was not being offered as an expert (Id.). The excluded testimony should have been admitted: it was relevant to the issues, involved matters about which Miriam had personal knowledge, could not otherwise be conveyed with equal accuracy and adequacy, and did not require expert testimony. See Sec. 90.701.1, Fla. Stat.; Floyd v. State, 569 So. 2d 1225, 1231-32 (Fla. 1990).

During the examination of trial counsel Malavenda, Mr. Rivera's counsel attempted to ask whether his opinion was that nothing he could have presented at the penalty phase would have made a difference, but the State objected (2PC-R. Vol. 6 at 102). Mr. Rivera's counsel argued that the questions went to Malavenda's theory and tactics for the penalty phase (Id.). The court ruled, "You can't ask that question" (Id.). A trial attorney's view of how evidence might have influenced the jury is clearly relevant to an ineffective assistance of counsel claim and should be admitted. Further, even if such testimony is considered to be lay opinion testimony, it meets the

requirements for admissibility. See Sec. 90.701.1, Fla. Stat.; Floyd v. State, 569 So. 2d 1225, 1231-32 (Fla. 1990).

The lower court erred in excluding and/or not considering evidence offered by Mr. Rivera. These errors deprived Mr. Rivera of a full and fair hearing.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Rivera respectfully urges the Court to reverse the lower court and vacate his unconstitutional death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, 3rd Floor
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This brief is typed in Courier 12 point not proportionately spaced.

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