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

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I

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

This Court remanded for an evidentiary hearing on the penalty phase ineffectiveness claim saying:

> Rivera claimed in his postconviction motion and in his brief to this Court that the following potential mitigation was available if counsel had adequately investigated Rivera's personal history: (1) dissociative disorder; (2) psychosexual disorder; (3) history of hospitalization for mental disorders; (4) sexual abuse as a child; (5) expressions of remorse; (6) a substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; (7) childhood trauma; (8) developmental age; (9) long-term personality disorder; (10) acceptable behavior at trial; (11) reduction in sentence by trial judge in prior case of sexual battery; (12) under the influence of drugs at the time of the offense; (13) non-applicability of the aggravators; (14) drug abuse problem; (15) character testimony from family members; (16) psychotic depression and feelings of rage against himself because of strong pedophilic urges; (17) no drug or alcohol treatment program; (18) substantial domination by alternate personality; (19) artistic ability; (20) capable of kindness; and (21) family loves him. **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.

Rivera v. State, 717 So.2d 477, 484-85 (Fla. 1998)(emphasis

added).[1]

The State's Answer Brief "accepts appellant's presentation of the case and facts" (Answer Brief at 2) (hereinafter "AB").[2] However, the State's arguments then proceed to ignore the detailed facts presented in Mr. Rivera's Initial Brief. Thus, while accepting Mr. Rivera's presentation of the facts, the State argues that the mitigation evidence presented at the evidentiary hearing is cumulative to that presented at the penalty phase without undertaking any comparison of the penalty phase and

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[1]When denying relief, the circuit court recited this list of mitigating circumstances as having been presented to the penalty phase jury (2PC-R. Vol. 3 at 598-99)("Having considered the record on appeal and the testimony of the witnesses at the suppression [sic] hearing this Court finds that the Defense presented mitigation evidence to the jury concerning the Defendant's [personal history and his 21 mitigating circumstances]"). The circuit court completely overlooked this Court's opinion remanding the case in which this Court compared "the volume and extent of these alleged mitigators" to "the limited mitigation actually presented." Neither the circuit court nor the State in its Answer Brief acknowledged this Court's specific and clear determination when it remanded for an evidentiary hearing.

Both the State and the circuit court ignore the fact that the sentencing judge found only one mitigating circumstance was established by Mr. Rivera's trial counsel. Rivera v. State, 717 So.2d at 484 ("the trial court found only one statutory mitigator despite the fact that numerous mitigating factors allegedly existed and could have been considered").

[2]Although the State qualifies this acceptance with the statement "to the extent that they are accurate," the Answer Brief points out no inaccuracies in Mr. Rivera's recitation of the facts.

evidentiary hearing evidence (AB at 6, 18, 25-26).[3] Further, the State relies upon the circuit court's conclusions without pointing to facts--much less competent, substantial evidence--supporting these conclusions (AB at 5-6).[4] Finally, as the circuit court did, the State analyzes the evidence of mitigation presented at the evidentiary hearing piece-by-piece,[5] rather than conducting the cumulative effect analysis required by law.[6]

A. DEFICIENT PERFORMANCE

In remanding for an evidentiary hearing on Mr. Rivera's

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[3]The State asserts in direct contravention to this Court's prior opinion, "the penalty phase presentation in this case was very similar to the evidentiary hearing presentation" (AB at 25).

[4]The State notes that Mr. Rivera continues to claim he is innocent of the murder (AB at 6 n.2). This is true. In proceedings currently being conducted in the circuit court, DNA testing is being performed on various pieces of physical evidence. In fact, after Mr. Rivera requested DNA testing of one hair, the State has decided to test many more items, including many totally unconnected to Mr. Rivera.

[5]The State's brief concentrates solely on evidence presented below regarding Mr. Rivera's drug abuse history and does not address other significant mitigating factors which were established at the evidentiary hearing. <u>See</u> <u>infra</u>.

[6]The State and circuit court use the word "cumulative" to mean that the evidence presented at the evidentiary hearing did not add anything to the evidence presented at the penalty phase. Mr. Rivera uses the word "cumulative" to refer to the prejudice analysis required by United States Supreme Court precedent. <u>See</u> <u>Kyles v. Whitley</u>, 115 S. Ct. 1555, 1566-67 (1995).

claim of ineffective assistance of counsel at the penalty phase, this Court noted that the evidence presented at the penalty phase was "limited." Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998). The Statement of the Facts in Mr. Rivera's Initial Brief provides a detailed account of the penalty phase and evidentiary hearing facts. This account shows that the evidence which trial counsel did not present at the penalty phase was of significantly greater quality and quantity than the evidence which trial counsel did present.

Nevertheless, the State's Answer Brief contends, "Most of the evidence offered at this evidentiary hearing was actually presented at trial" (AB at 18). The State presents abbreviated summaries of the evidentiary hearing testimony and of Dr. Ceros-Livingston's penalty phase testimony (AB at 9-18). According to the State, this summary "conclusively establishes that trial counsel rendered constitutionally adequate representation at the penalty phase" (AB at 18).

The State's thesis is that if some passing reference to a possible mitigating factor is made at the penalty phase, defense counsel has rendered "constitutionally adequate representation," even if readily available information of greater quality and quantity would have *established* the

mitigating factor.[7] For example, the State concedes that the evidentiary hearing testimony presented Mr. Rivera's history of drug abuse "in much greater detail" than it was presented at the penalty phase (AB at 19).[8] However, the State contends that since Dr. Ceros-Livingston was "aware" of Mr. Rivera's drug use and mentioned at the penalty phase that Mr. Rivera had used some drugs and that one psychological test indicated he "may" have problems with drug abuse (AB at 18-19),[9] the

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[7]Of course, this Court rejected the State's position when it remanded for an evidentiary hearing on Mr. Rivera's penalty phase ineffectiveness claim. Rivera v. State, 717 So.2d at 485 ("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").

[8]The State focuses its arguments on the evidence of Mr. Rivera's drug abuse. While drug abuse is key to understanding and explaining Mr. Rivera's character and behavior, Mr. Rivera also presented evidence through lay and expert witnesses establishing other significant mitigating factors, as detailed in Mr. Rivera's Initial Brief and in this Reply Brief.

[9]The State asserts that Dr. Ceros-Livingston "concluded in her report that Rivera was a drug abuser" (AB at 19). This is wrong. At the penalty phase, Dr. Ceros-Livingston read from her report that one psychological test indicated Mr. Rivera "may" have problems with drug abuse (R. 2041). At the evidentiary hearing, Dr. Ceros-Livingston testified that she did not have enough information at the time of the penalty phase to diagnose addiction (2PC-R. Vol. 7 at 366). 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). Dr. Ceros-Livingston is not an expert in

subject of drug abuse was exhausted at the penalty phase, and trial counsel did enough.

In contrast to the State's assertions, the evidence which was available but unpresented on the subject of drug abuse would have *established*--not merely mentioned--the following:

1) Mr. Rivera's addiction to crack cocaine;

2) Mr. Rivera's long history of abusing every drug he could find;

3) Mr. Rivera's changes in behavior when he used drugs;

4) Mr. Rivera's heavy use of crack cocaine in the months and days before the offense;

5) Mr. Rivera's crack cocaine-induced behavior in the days before the offense.

(See Initial Brief, Statement of the Facts, Subsection B.2.).[10] Trial counsel testified that part of his strategy for the penalty phase was to present evidence of Mr. Rivera's drug

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addictionology and did not know as much about crack cocaine in 1987 as she does today (Id. at 369).

[10]Not only was a burden of proof imposed upon Mr. Rivera during the penalty phase to establish the mitigating circumstances, he was obligated to demonstrate the weight of each of the mitigating circumstances that were established. Therefore, the quantity and quality of the proof offered to support alleged mitigating circumstances is critical to the life and death decision that the sentencer is called upon to make. This Court recognized this concept when it remanded for the evidentiary hearing in light of "the volume and extent of these alleged mitigators in comparison to the limited mitigation actually presented." Rivera v. State, 717 So.2d at 485.

abuse and that he presented all of the information about drug abuse that he had. However, because of his failure to investigate, there was a great deal which trial counsel did not know and did not present. In light of these available but unpresented facts, if trial counsel did enough to investigate Mr. Rivera's drug abuse for the penalty phase, as the State asserts, the Sixth Amendment's right to the effective assistance of counsel is meaningless.

The State argues that trial counsel's performance was not deficient because the trial court found the statutory mitigating factor of extreme emotional disturbance, and therefore "any additional evidence relating to this mitigating factor would have been cumulative and unnecessary" (AB at 18). This Court has already determined in this very case that the State's contention is erroneous. When this Court remanded for an evidentiary hearing, the Court was aware of the sentencing judge's finding that one mitigating factor had been found. Rivera v. State, 717 So.2d at 485 ("Considering **the volume and extent** of these alleged mitigators **in comparison** to **the limited mitigation** actually presented at trial")(emphasis added).

The State does not mention that the weight of a mitigating factor matters under Florida's capital sentencing

statute.[11] See Stringer v. Black, 503 U.S. 222 (1992). The evidence presented at the evidentiary hearing clearly added significant weight to this factor. Further, the State does not mention that evidence was also available but unpresented which would have established the statutory mitigating factors of age (developmental) and Mr. Rivera’s substantially impaired capacity to conform his conduct to the requirements of the law. See Initial Brief, Statement of the Facts, Subsection B.2.d.v.

The State argues that trial counsel’s performance was not deficient because Dr. Ceros-Livingston testified her penalty phase opinions would not have changed had she had more information about Mr. Rivera’s drug abuse (AB at 19). First, this is a misstatement of Dr. Ceros-Livingston’s testimony. The doctor testified that she did not have enough information at the time of the penalty phase to diagnose addiction, but that the additional information revealed in post-conviction could have indicated to her that Mr. Rivera suffered from

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[11]Mr. Rivera’s jury was told to weigh the mitigating circumstances that were established by the defense against the aggravating circumstances established by the State. Thus, it is not like a pin ball game in which points are scored no matter how softly the pin ball hits the bumper. To make a difference in the outcome, the mitigators must not only be mentioned, they must be established and given substantive weight through the presentation of supporting evidence.

addiction (2PC-R. Vol. 7 at 366-67). Second, the State makes too much of Dr. Ceros-Livingston's testimony that her opinions would not have changed: she is not an expert in addictionology and did not know as much about crack cocaine in 1987 as she does today (Id. at 369).[12] Thus, she was not and is not qualified to provide an opinion regarding addiction.

Most importantly, however, whether or not Dr. Ceros-Livingston would change her opinions or whether Dr. Sultan agreed or disagreed with Dr. Ceros-Livingston (see AB at 10, 16) is not the issue. The issue is whether trial counsel failed to investigate and present evidence establishing mitigating factors. Evidence was available but unpresented which would have supported and added substance to Dr. Ceros-Livingston's opinions. For example:

> 1) Family members and friends described Mr. Rivera's life history and behavior, providing support for a mental health evaluation (Initial Brief, Statement of the Facts, Subsection B.2.a., b., c.);
>
> 2) Dr. Sultan described the development and effects

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[12]Moreover, additional evidence supporting those opinions that she was qualified to make would have made her opinion more credible and of more weight. The question is not simply whether her diagnostic opinion would have changed, but whether her ability to illuminate Mr. Rivera's mental disturbance would have been enhanced. In this Court's own words in remanding this case for an evidentiary hearing, would "the volume and extent" of the mitigation that she discussed in her testimony have been increased? Rivera v. State, 717 So.2d at 485.

of Mr. Rivera’s borderline personality disorder, explaining that it exists independently of his other mental health impairments, but also underlies those other impairments (Initial Brief, Statement of the Facts, Subsection B.2.d.i.);

3) Dr. Sultan described the development and effects of Mr. Rivera’s sexual disorder (Initial Brief, Statement of the Facts, Subsection B.2.d.iv);

4) Drs. Sultan and Burglass testified that Mr. Rivera was suffering an extreme mental disturbance at the time of the offense as a result of the combined effects of his mental health impairments and crack cocaine addiction (Initial Brief, Statement of the Facts, Subsection B.2.d.v.).

Evidence also was available but unpresented which would have established mental health mitigating factors about which Dr. Ceros-Livingston did not testify. For example:

1) Dr. Sultan testified that Mr. Rivera experienced childhood psychological and sexual abuse and explained the effects of that abuse (Initial Brief, Statement of the Facts, Subsection B.2.d.ii.);

2) Drs. Burglass and Sultan diagnosed Mr. Rivera as being cocaine dependent and a cocaine addict (Initial Brief, Statement of the Facts, Subsection B.2.d.iii.);

3) Drs. Burglass and Sultan explained the combined effects of Mr. Rivera’s mental health impairments and addiction, including the fact that Mr. Rivera may not have acted out his inappropriate sexual urges had it not been for his crack cocaine addiction (Initial Brief, Statement of the Facts, Subsection B.2.d.v.);

4) Drs. Burglass and Sultan identified the existence of the statutory mitigating factors of age (developmental) and substantially impaired capacity to conform conduct to the requirements of the law (Initial Brief, Statement of the Facts, Subsection

B.2.d.v.).

Because of trial counsel's failure to investigate, evidence supporting Dr. Ceros-Livingston's opinions and evidence establishing mitigating factors about which Dr. Ceros-Livingston did not testify was not presented.[13] This is deficient performance.

The State argues that Dr. Ceros-Livingston had "a strong basis" for rejecting the "'new' information" regarding Mr. Rivera's drug abuse because she testified that "much of Rivera's sexual deviancy and acting out was done while he was not under the influence of drugs" (AB at 20) (emphasis in original). First, Dr. Ceros-Livingston did not reject the information about Mr. Rivera's drug abuse. She testified that she was unaware of the extent of that drug abuse at the time of the penalty phase. Since she was unaware of the extent of Mr. Rivera's drug abuse history, Dr. Ceros-Livingston had no basis for saying that Mr. Rivera's acting out occurred when he was not on drugs. 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

[13]This goes to "the volume and extent" of the mitigating circumstances that could have been presented in comparison to "the limited mitigation actually presented." Rivera v. State, 717 So.2d at 485.

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). Indeed, the State's Answer Brief concedes, "The state has never attempted to refute the claim that Rivera does have a chronic drug abuse history" (AB at 28 n.5).

The State argues that trial counsel's failure to present additional evidence about Mr. Rivera's drug abuse did not result from inadequate investigation, but from an inability to locate witnesses (AB at 21).[14] This assertion is based solely on Malavenda's testimony that he could not locate the witnesses, although Malavenda also conceded, "I may not have done, you know, detailed investigation" about drug abuse (2PC-R. Vol. 6 at 95). The State's argument ignores these facts:

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[14]The circuit court concluded counsel was not deficient largely because of its erroneous legal conclusion that the presentation of any quantum of evidence in support of a mitigating circumstance, no matter how unconvincing, relieves counsel of any burden to actually persuade the sentencer to impose a life sentence. Again, this may work for tabulating the score in a pin ball game, but in a capital case a jury is charged to weigh aggravating and mitigating circumstances. In those circumstances, effective counsel must be concerned with the quantity and quality of the proof establishing the mitigation and its weight. The circuit court's order overlooked the law in this regard. See Williams v. Taylor, 120 S. Ct. 1495 (2000).

1) Malavenda testified that he spoke to Peter Rivera once a week and that Peter was fully cooperative;

2) Peter Rivera testified that Malavenda did not question him in any detail regarding Mr. Rivera's drug abuse;

3) Malavenda did not ask Peter Rivera a single question about Mr. Rivera's drug abuse when Peter testified at the penalty phase;[15]

4) Mr. Rivera's sisters, Miriam and Elisa, both testified at the penalty phase and thus were clearly available and cooperative;

5) Miriam and Elisa both testified at the evidentiary hearing that they would have given Malavenda any information he requested regarding Mr. Rivera, including information about his drug abuse, but Malavenda never talked to them until just before the penalty phase;

6) a phone message from Danny Franklin listing Franklin's phone number was in Malavenda's file, but Malavenda never talked to Franklin;

7) before Mr. Rivera's trial, Mark Peters moved to Orlando, where he lived at 4019 Barwood Drive, which was rented in the name of his mother, Lorraine Peters; Peters had a state I.D. card showing that address and lived there for three or four years; Malavenda never contacted him;

8) Andy Ramos was released from prison on December 23, 1986, and placed on three years' probation; Ramos reported to the state every month, and the state had his address; Malavenda never talked to him.

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[15]At one point, the State says, "*Consistent with his trial testimony*, Peter [Rivera] stated that he spent the day before the murder with his brother and they drank and smoked crack all day" (AB at 13) (emphasis added). Peter testified to this episode at the evidentiary hearing, but made no mention of Mr. Rivera's drug use in his penalty phase testimony.

The State does not dispute any of these facts regarding Peter Rivera, Miriam Rivera, Elisa Rivera or Danny Franklin. These witnesses could have provided extensive details of Mr. Rivera's drug abuse and were clearly available to trial counsel.

The State argues that Peters and Ramos were not available to testify at the penalty phase (AB at 21). As to Peters, the State relies upon this Court's opinion in Rivera v. State, 717 So. 2d 477, 482 (Fla. 1998), regarding trial counsel's failure to call Peters as an alibi witness. As is explained in Mr. Rivera's Initial Brief, 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.

As to Ramos, the State misrepresents his testimony, not addressing the excerpts from that testimony quoted in Mr. Rivera's Initial Brief. According to the State, Ramos "admitted that he would not have testified at trial regarding his drug involvement with Rivera" (AB at 22, citing 2PC-R. Vol. 6 at 225, 227). Ramos was released from prison on drug

charges in 1986, and Mr. Rivera's trial was in 1987. On the same pages of the evidentiary hearing transcript cited by the State, Ramos clearly testified he would have been willing to testify at the penalty phase because he had already served his prison sentence on his drug charges. 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) (emphasis added). The State's argument and the lower court's similar conclusion are contrary to and unsupported by the record.

The State argues that trial counsel's performance was not deficient because Mr. Rivera's family was "not very cooperative" (AB at 22). The *only* family member whom Malavenda named as possibly being uncooperative was Mr. Rivera's father (2PC-R. Vol. 6 at 126). Malavenda could not recall if he had conversations with Mr. Rivera's parents or sisters specifically concerning drug use (2PC-R. Vol. 7 at 351-52). Malavenda testified that Peter Rivera "was helping me as much as he could" (2PC-R. Vol. 7 at 343-44). Peter testified that Malavenda talked to him "very little" about the penalty phase, and that discussion occurred right after Mr. Rivera was found guilty, the day before the penalty phase (2PC-R. Vol. 6 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). Miriam and Elisa both testified that Malavenda did not meet with them until just before the penalty phase and then did not

ask them questions about Mr. Rivera's life, including about his drug abuse (2PC-R. Vol. 6 at 145, 160-61). Miriam and Elisa would have told Malavenda anything he wanted to know (Id.). The State's argument and the lower court's similar conclusion are contrary to and unsupported by the record.

The family members' testimony establishes trial counsel's deficient performance. See Ragsdale v. State, 798 So. 2d 713, 719 (Fla. 2001) ("Ragsdale's siblings testified that they were never contacted and that they would have testified if they had been contacted at the time of Ragsdale's trial"); State v. Riechmann, 777 So.2d 342, 349-50 (Fla. 2000) (finding ineffective assistance of counsel and rejecting counsel's contention that family members were not available where counsel conducted no investigation); Ventura v. State, 794 So.2d 553 (Fla.2001) (finding trial counsel deficient for failing to investigate and present mitigating evidence where family members testified at postconviction evidentiary hearing that they would have testified at penalty phase had they been contacted). The evidence establishes that the family members were available and cooperative if counsel had conducted an appropriate investigation.

The State argues that Dr. Sultan's and Dr. Burglass's conclusions "must be called into question" because "there is

not one shred of evidence” that Mr. Rivera was intoxicated at the time of the offense (AB at 23). The State does not at all address the following evidence: 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. The evidence is thus circumstantial evidence that Mr. Rivera was intoxicated at the time of the offense.[16]

The State argues that after the first evidentiary hearing in Mr. Rivera’s case, this Court stated, “there was no evidence Rivera was intoxicated at the time of the murder” and

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[16]Circumstantial evidence is admissible and may provide the jury with a basis for concluding a fact proven. Neither the State nor the circuit court acknowledged that mitigating circumstances may be established through circumstantial evidence.

that Mr. Rivera has not offered evidence "to rebut that finding" (AB at 23, citing Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998)). The first evidentiary hearing did not involve Mr. Rivera's claim that trial counsel provided ineffective assistance at the penalty phase and did not involve the same evidence. Further, this Court's statement in the 1998 opinion was made in discussing Mr. Rivera's claim that trial counsel provided ineffective assistance in failing to present an intoxication defense at the guilt phase. The statement was not the Court's basis for rejecting the claim. The Court rejected the claim because the intoxication defense was inconsistent with Mr. Rivera's claim of innocence. There is nothing for Mr. Rivera to rebut.

B. PREJUDICE

The State's arguments regarding prejudice are largely the same as its arguments regarding deficient performance. *The State does not once contest that the evidence presented at the evidentiary hearing established mitigating factors.*

The evidence presented below established the following mitigating factors:

1) Mr. Rivera's age (developmental), see Sec. 921.141(6)(b), Fla. Stat.;

2) 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, see Sec. 921.141(6)(f), Fla. Stat.;

3) Mr. Rivera's extreme mental or emotional disturbance, see Sec. 921.141(6)(g), Fla. Stat.;

4) Mr. Rivera's severe drug abuse history;

5) Mr. Rivera's crack cocaine addiction and dependence;

6) Mr. Rivera's changes in behavior when he used drugs;

7) Mr. Rivera's heavy use of crack cocaine in the months and days before the offense;

8) Mr. Rivera's crack cocaine-induced behavior in the days before the offense;

9) Mr. Rivera was under influence the of drugs at the time of the crime;

10) combined effects of Mr. Rivera's mental health impairments and drug use;

11) Mr. Rivera's history of treatment for psychosexual disorder;

12) Mr. Rivera's psychological abuse as a child;

13) Mr. Rivera's sexual abuse as a child;

14) Mr. Rivera’s long-standing personality disorder;

15) Mr. Rivera’s feelings of revulsion at himself for his “freakish” sexual urges;

16) the lack of drug treatment Mr. Rivera received;

17) Mr. Rivera’s loving, kind and helpful qualities when not on drugs;

18) the love Mr. Rivera’s family has for him.

The State parrots the circuit court’s conclusion that prejudice was not established because the aggravating factors outweigh the mitigating factors (AB at 24). The State’s argument and the circuit court’s conclusion do not take into account the numerous and substantial mitigating factors established at the evidentiary hearing, nor do they consider the fact that the sentencing judge identified only one mitigating circumstance as established by trial counsel.

Further, the circuit court’s conclusion that the aggravating factors would outweigh the mitigating factors is a conclusion of law on the ultimate question of prejudice. This conclusion is therefore reviewable *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).[17]

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[17]The United States Supreme Court in Kyles v. Whitley, 514 U.S. 419, 449 n.19 (1995), while employing the prejudice test for whether

The State argues that this Court grants penalty phase relief only when there is a "virtual absence of mitigation at the penalty phase in contrast to the evidence presented [in post-conviction]" (AB at 25). This is not the correct standard.[18] The question is whether confidence in the outcome of the penalty phase is undermined by the evidence presented below. Strickland v. Washington, 466 U.S. 668, 693 (1984). The correct standard is whether unpresented, 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

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confidence is undermined in the outcome in the context of a Brady claim, said:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

This is a clear demonstration by the United States Supreme Court that the proper prejudice analysis is one of law that is conducted *de novo*.

[18]Even if the State is correct that there must be a "virtual absence" of mitigation at the penalty phase for relief to be granted, that is the case here, as any fair comparison of the evidence presented at the penalty phase with that presented in post-conviction demonstrates.

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. Had the numerous and substantial mitigating factors established at the evidentiary hearing been presented at the penalty phase, they would have influenced the jury's view of Mr. Rivera's "moral culpability" and would have affected the jury's and judge's "factual findings."

ARGUMENT II

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

The State argues that the lower court correctly excluded testimony regarding Mark Peters' whereabouts at the time of Mr. Rivera's penalty phase because Mr. Rivera "does not offer any justification" for presenting such evidence (AB at 28). The State relies upon this Court's opinion in Rivera v. State, 717 So. 2d 477, 483 (Fla. 1998), and contends that Mr. Rivera has not explained "why he should be entitled to reopen this inquiry" (AB at 29-30).

First, Mr. Rivera did "justify" why he wanted to present evidence regarding Peters' availability. The first evidentiary hearing in Mr. Rivera's case did not address his claim that trial counsel provided ineffective assistance at the penalty phase. At the

evidentiary hearing at issue here, Mr. Rivera's counsel explained that Mr. Rivera wanted to present this evidence to show that Peters was available for the penalty phase. It is Mr. Rivera's burden to show that witnesses not presented by trial counsel were available to testify had counsel investigated properly. Mr. Rivera sought to meet this burden, but the circuit court excluded the evidence.

Second, there is no inquiry to "reopen." The State ignores Mr. Rivera's argument that this Court's 1998 opinion did not rest upon Peters' availability, but upon a lack of prejudice.

The State argues that the fact that two of Mr. Rivera's prior convictions in the Goetz case were later vacated is irrelevant because two other convictions remain (AB at 31-34). The State simply ignores the fact that 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.

Regarding the circuit court's exclusion of certain

testimony by Peter Rivera on the grounds that it constituted hearsay, the State does not address the cases cited in Mr. Rivera's Initial Brief. Those cases establish that the circuit court erred.

The State argues that the circuit court correctly excluded Miriam Rivera's testimony regarding her experiences with crack cocaine because the testimony was an attempt "to elicit from [Miriam] her opinion about what crack cocaine did to her and compare that to what crack cocaine did to her brother" (AB at 37). Mr. Rivera's counsel argued that the testimony was admissible because Miriam had used crack cocaine and therefore "knows what it did to a person. . . . She could then compare that with what she saw going on with her brother, and it gives more substance to what she's able to -- to what she knows about her brother" (2PC-R. Vol. 6 at 142). Such evidence--based upon personal experience and which could not be conveyed any other way--is admissible under Section 90.701.1, Fla. Stat. Floyd v. State, 569 So. 2d 1225, 1231-32 (Fla. 1990). Such evidence--relating to the character of the defendant--is certainly admissible at a capital penalty phase. See Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982).

The State argues that the circuit court correctly excluded

testimony from Malavenda regarding whether he believed nothing he could have presented at the penalty phase would have mattered because the testimony called for Malavenda's legal conclusion regarding the prejudice prong of Strickland (AB at 38). This is a mischaracterization of the question. The question was not whether Malavenda believed Mr. Rivera was prejudiced by the omission of evidence at the penalty phase, but whether Malavenda believed, going into the penalty phase, that nothing he presented would help Mr. Rivera (2PC-R. Vol. 6 at 102). This question was clearly inquiring into Malavenda's frame of mind *at the penalty phase*, not into whether Mr. Rivera had established prejudice in post-conviction. The circuit court erred in excluding the testimony.

CONCLUSION

Based upon the record and the arguments presented in his initial and reply briefs, 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 Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm

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CERTIFICATE OF FONT

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

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