IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-866

HENRY GARCIA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

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

"PCR" -- record on postconviction appeal;

"Supp. PCR" -- supplemental record on postconviction appeal.

AD@ **B**- memorialized testimony deposition of Rufina Perez, 9/22/00

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of convictions and sentences under consideration.

On October 8, 1985, a Dade County grand jury indicted Mr. Garcia for two counts of first degree murder, one count of sexual battery and one count of armed burglary.

Mr. Garcia was first tried in May 1988, found guilty, and sentenced to death. On direct appeal this Court granted Mr. Garcia a new trial. See Garcia v. State, 564 So.2d 124 (Fla. 1990).

Mr. Garcia was retried May 14 through May 28, 1991. On May 23, 1991, a jury returned a verdict of guilty on all counts. The jury recommended a life sentence without the possibility of parole for twenty five years on the charge of first-degree murder as to Mabel Avery by a vote of seven to five. The jury recommended a sentence of death by a vote of twelve to zero as to the first-degree murder of Julia Ballentine (R. 1629).

On July 12, 1991, the trial court sentenced Mr. Garcia to death for both counts of first degree murder, overriding the jury's recommendation as to Ms. Avery (R. 1640-1641).

On direct appeal, this Court affirmed Mr. Garcia's convictions and sentences. Garcia v. State, 644 So. 2d 59 (Fla. 1994), cert. denied, 115 S.Ct. 1799 (1995).

On March 26, 1997, Mr. Garcia, filed an incomplete Motion to Vacate in order to toll the time. On April 24, 2000 Mr. Garcia filed a Consolidated Amended Motion. After the State responded, a Huff hearing was held on October 20, 2000.[1]

On May 9, 2001, the lower court entered an order concerning what claims in the Rule 3.850 motion an evidentiary hearing would be granted, stating: A[T]his Court has found that there will be an evidentiary hearing on the claims concerning ineffective assistance at the guilt phase as they relate to counsel=s failure to fully investigate Rufina Perez Cruz and her relationship with Elizabeth Feliciano and Feliciana Aguero; his failure to investigate the defense of intoxication and his failure to investigate and present more evidence of other suspects; and his failure to present

[1]According to an affidavit filed by the court reporting agency, the stenographic notes for the Huff hearing on October 20, 2000 were destroyed in a fire before being transcribed, along with those from two other hearings in the instant case, March 3, 2000 and August 14, 2000. PCR. 652.

evidence in mitigation (other than model prisoner testimony).@ PCR 542.

Subsequently, on June 18, 2003, Mr. Garcia served an amendment to his Rule 3.850 motion including new claims XXXI and XXXII concerning Ring v. Arizona and the constitutionality of lethal injection. Supp.PCR 716-912.

The lower court entered an order on August 6, 2003 denying an evidentiary hearing on these two new claims. Supp.PCR. 927. Thereafter, a limited evidentiary hearing based on the lower court=s May 2001 order was held on November 17, 2003. PCR. 653-724.

Only one witness was called at the evidentiary hearing, re-trial counsel Reemberto Diaz. Mr. Diaz testified on direct that he was appointed to represent Mr. Garcia in the early 1990s. PCR. 669. He recalled that Mr. Garcia=s prior counsel was Clinton Pitts, who had represented Mr. Garcia at his first trial, when he was convicted and sentenced to death. PCR 670. He stated that he received everything related to Mr. Garcia=s case that Pitts had, including the prior discovery. Id. He testified that he never received any additional discovery from the State nor did he take any depositions after he was appointed to do the re-trial. PCR. 671.

He testified that the work records concerning when and where Mr. Garcia was working at the time of the offense were important in regards to Pitts= defense case. PCR. 672. Mr. Diaz also testified that there was no physical evidence of any kind linking Mr. Garcia to the murder of the two sisters. PCR. 672. He agreed that the witnesses Feliciano Aguayo, Elizabeth Feliciano and Rufina Perez/Cruz Aplayed a significant role in the trial@ of what was a circumstantial evidence case. PCR. 673. He testified that he had at best a vague recollection that perhaps Mr. Garcia was related in some way to one or more of these witnesses. PCR. 674-76.

Mr. Diaz recalled that he did question Ms. Perez about whether her testimony at trial had been influenced in some way by the existence of a reward for information concerning the murder of the two sisters. PCR. 676. Mr. Diaz testified that while he did bring up in opening statement that Mr. Garcia had a lot to drink on the night of the murders, he never followed up with that theme in his examination of Feliciano Aguayo, and was Acertainly not raising the issue on intoxication.@ PCR. 678-83. He then testified that he attempted to point to another suspect, a Ahomeless guy@ with Adirty hair@ named John Conners, Jr. PCR. 683-89.

On cross-examination, Mr. Diaz testified that he intended to use the work records of Mr. Garcia at trial. PCR 690. He stated that unlike Pitts before him, he wanted to focus on another suspect as a central feature of his defense of Mr. Garcia. PCR. 691. At the instruction of the lower court, he testified that Mr. Garcia told him that Feliciano Aguayo=s account of seeing Mr. Garcia with a knife on the morning after the murders with some blood on him was true, although Mr. Diaz qualified this by saying that Mr. Garcia told him that the blood was from a bar fight of some sort. PCR. 693. He also testified that Mr. Garcia told him that Elizabeth Feliciano could not have seen him that morning from the bathroom where she was taking a shower. PCR. 694.

Diaz stated that his recollection was that although he did question Rufina Perez on the witness stand about a reward, no reward was ever paid to anyone related to Mr. Garcia=s case. PCR. 697-98. He testified that he never contemplated putting Mr. Garcia on the witness stand to testify about his drinking on the night of the offense or about anything else. AWe were not going to do that.@ PCR. 698-700. Diaz stated that his purpose in raising the issue of Mr. Garcia=s drinking was to demonstrate the inherent unreliability of his client=s recollections to counter-act the State=s attack on his alleged

alibi. AI wasn=t trying to show that he was drunk or that he wasn=t intoxicated.@ PCR. 700.

In response to the State=s inquiry, Mr. Diaz described John Conners as a Agood scape goat@ for purposes of his defense of Mr. Garcia. PCR. 700. Diaz agreed that pursuing whether John Connors had been eliminated as a suspect would have potentially Aopened the door@ to evidence coming into the case from Enrique Fernandez, Mr. Garcia=s co-defendant, who had previously given a confession to law enforcement implicating Mr. Garcia in the murders of the two sisters. PCR. 700-05. AThere was some relationship between [Fernandez=s plea] and dropping this retard or whoever he was that lived in the woods behind his parent=s house.@ PCR 702.

Mr. Diaz then testified about his attempt to use David Rhodes, a State Ahair expert@, in the defense case. PCR. 705-08. Mr. Diaz agreed that the jury deliberated for eleven hours before returning a guilty verdict against Mr. Garcia. PCR. 709. He testified that he could not recall what Elizabeth Feliciano said. PCR. 709. His stated that his goal was to make the jury believe that the witnesses against Mr. Garcia were anticipating receiving a reward. PCR. 710.

He testified that he called police witness technician David Gilbert who was not a detective to ask about possible

other suspects so he could Afeel safe that he=s not going to come in and say, >Well somebody else confessed to the crime, that=s why.=@ PCR 715.

On re-direct, he testified that no knife was ever recovered from Mr. Garcia=s custody. PCR. 716. Diaz testified that even if Feliciano Aguayo and Rufina Perez were related to each other, AI know what the values of Hispanics are and so I really don=t pay too much attention to that because when they tell you, you know, we are somewhat related, usually they are so far distant, that it=s meaningless.@ PCR. 717. He then testified that he could not recall if he had ever interviewed Detective Gordil[la]. PCR. 720.

On re-cross, Diaz recalled that Detective Gordil[la] was the first detective assigned to the case of the murder of the two sisters, but not the detective that Asolved@ the case. PCR. 721.[2]

After Mr. Diaz was excused, the lower court admitted without objection a copy of Rufina Perez=s deposition to

[2]See *Order Denying Defendant Henry Garcia=s Claim for Postconviction Relief*, April 13, 2004(AIt is obvious that evidence establishes that the Areport@ of Detective Miriam Royle (f/k/a Gordilla) was not a reliable account of what Ms. Perez-Cruz had told police [in 1983] when they first interviewed her@).

perpetuate testimony which had been taken on September 22, 2000 Awhen she was gravely ill at the time.@ PCR. 722.

In the deposition, Ms. Perez testified that the first time any police officers came to talk to her about the case there was a woman and two men who identified themselves as investigators who asked her if she knew Enrique AKiki@ Fernandez and Henry Garcia. D8. She told them that she knew Kiki because Ahe played with my sons and all that@ but that she did not know Mr. Garcia Athat much.@ Id.

She then testified that she did not use her husbands= names from her first two marriages, Ramos and Cruz. D9. She denied using the name Josephina Cruz. D10. She stated that her father used to live at 136, or 13600 SW 312th Street, at the same time she lived at 132 Court #40. D14. She stated that she lived at that address from 1965 until Hurricane Andrew. D15. She then testified that she never told the female Latin police officer she first spoke with that she had heard Mr. Garcia talking to Enrique AKiki@ Fernandez in the field on the day she overheard Mr. Garcia. D16. She reiterated that she had known Enrique Fernandez and his mother and his brothers since they were children. D17.

She then denied that she told the police woman she first talked to that she had heard Henry Garcia Asay something like

I killed some guys and old ladies@. D18. She then testified that Elizabeth Feliciano is the mother of her brother-in-law, Feliciano Aguayo, who is married to her sister Linda. D20. She confirmed that she also knew George (Jorge) Feliciano, Elizabeth=s husband. D20.

Ms. Perez then stated that she never had heard about a reward concerning the murders of the sisters in Leisure City. D21. She stated that around the time the murders took place she heard Henry Garcia say something although he didn=t Aexactly@ say that he committed the murders. D22.

Ms. Perez then testified that several years later she gave a sworn statement before a court reporter on September 17, 1985 about her recollections. D27. After several questions concerning that statement, Ms. Perez recalled the comments that she overheard Mr. Garcia make to unknown field workers on a break from picking limes. AThis man asked [Mr. Garcia] what happened, what he did or do. And they asked him, they said, te las chingaste. And he say, yes, I fucked them up. They will not bother me anymore because they=re already in hell.@ D28.

She further testified that she hardly knew Mr. Garcia, but he was there working, picking tomatoes and limes, and she did not know who the other people he was talking that day with

were. D30. She stated that she also knew Mr. Garcia had an Uncle Wally. Id.

Ms. Perez again denied knowing anything about or seeking a reward in this case. D31-32. She then denied ever talking with Elizabeth and Jorge Feliciano about either helping to bail Feliciano Aguayo out of jail or about telling the police that Mr. Garcia was the killer in order to get a reward. D32-33. On cross, Ms. Perez stated that she had never seen the police report dated 8/25/83 memorializing Detective M.G. Royle=s contact with AJosephina Cruz@ at 9:00 p.m. at 13600 SW 312 Street, South Dade labor camp. D41-45.[3] After counsel read the statement to her, Ms. Perez testified that everything that the police statement reported that she had said was all lies and that she never said it. D44-46.

Ms. Perez testified that she had never revealed to the State until this deposition that she was related to Feliciano Aguayo. D. 47-48. She also testified that Mr. Garcia=s co-defendant, Enrique AKiki@ Fernandez is also a friend of hers. D.48. She also testified that she had represented herself as

[3]The report was attached as an exhibit to the deposition. It may also be found at PCR 566-67.

Enrique=s aunt and as his girlfriend, and had taken Enrique=s mother to visit him in jail. D49.

She identified her signature on a letter to Union Correctional Institution (UCI) dated November 29, 1988 and a visitation application to UCI March 3, 1989 requesting to be allowed to visit Enrique Fernandez. D49-52. She stated that the State was not aware when she testified in 1991 that she was visiting Mr. Garcia=s co-defendant, and that she has never let the State know. D52. She testified that Enrique Fernandez=s mother is a Avery, very close@ friend who she has known for many years. D53. She stated that AShe always told me about her son=s troubles and I was telling her about mine. Sometimes when we have parties, we party together. Her sons come over. They all would respect me. And they always said they were in love with me.@ D53.

Ms. Perez then testified that Cheryl Perez is her sister-in-law. D53. She stated that she never told law enforcement or the state attorney that Enrique Fernandez was one of the people who was sitting with Henry Garcia the day she overheard the conversation in the fields. D64. She then testified that she does not know if Mr. Garcia=s Uncle Wally was a labor contractor. She stated that she never worked for Wally. She admitted that Mr. Garcia may have worked for Wally. D65. She

stated that Mr. Garcia worked in the field for Guadalupe Trevino, sometimes five days a week and sometimes he would not work all week. She says the work records should reflect that Mr. Garcia worked more than one day for Mr. Trevino. D65. She volunteered that she never had a conversation with Mr. Garcia while he was working for Trevino or at any other time. D65-66.

Ms. Perez agreed that the 1983 police report apparently does refer to her son, Richard Ramos, and although she denied ever going by the name Josephina Cruz, she agreed that she did sometimes use the name Fina Cruz. D67. She then testified that she had refused to give a sworn statement to the police in 1983. D69. She stated that when she did give a sworn statement in 1985, she had not done so earlier because nobody asked her. D70. Ms. Cruz testified that she is not able to spell very well. D72. Ms. Perez stated that the police officers who interviewed her in 1983 did ask her some questions about Enrique AKiki@ Fernandez D82. She also told the officers about the conversation she had overheard in the field between Mr. Garcia and others. D83.

Ms. Perez denied watching television reports about the murder with Elizabeth Feliciano or Jorge Feliciano. D86. She states that her recollection now is that she heard the

conversation in the fields between Mr. Garcia and the other men before she heard the news about the murders. D88. She testified that she has never been able to identify any of the other men that she heard Mr. Garcia talking to. D89. Enrique Fernandez and her son were Areal close friends.@ D94.

Following the conclusion of the evidentiary hearing, the lower court entered an order denying all relief on April 14, 2004. PCR. 568-70. This appeal follows.

SUMMARY OF THE ARGUMENTS

1. When Mr. Garcia attempted at the beginning of his evidentiary hearing below to waive the presentation of evidence on some of his penalty phase claims, the lower court had an

obligation pursuant to the case law to assure a clear record of waiver of mitigating factors. The lower court failed to require counsel for the Appellant to proffer into the record what evidence of mitigation was available to be presented at the evidentiary hearing on the penalty phase ineffective assistance of trial counsel claims. This negligent abuse of discretion was predicated on judicial bias and the lower court's lack of familiarity with the existing mitigation including Mr. Garcia's mental status, which made any assurance of a knowing, intelligent and voluntary waiver impossible, to Mr. Garcia's prejudice.

2. Certain public records, the existence of which was revealed by investigation, have never been provided to Mr. Garcia.

3. Trial counsel's performance at the guilt phase of Mr. Garcia's trial resulted in materially unreliable convictions. Evidence presented at the evidentiary hearing supported a finding that trial counsel failed to properly cross-examine state witnesses Rufina Perez, Feliciano Aguayo and Elizabeth Feliciano
concerning their familial relationships and statements to law enforcement. Trial counsel's deficient performance was also

exhibited by his lack of preparation for his examination of witnesses Gilbert and Aguayo.

4. Trial counsel=s performance during voir dire was deficient and the resulting prejudice was Mr. Garcia=s convictions and two death sentences.

5. The prosecutor=s arguments throughout the trial below were inflammatory and improper. Trial counsel=s repeated failure to object to these comments constituted ineffective assistance of counsel.

6. Most of Mr. Garcia=s claims below were summarily denied without a hearing or found to be procedurally barred. The claims included herein are not impacted by the alleged waiver at the evidentiary hearing. An evidentiary hearing is required on the penalty phase and guilt phase claims where the files and records in this case do not conclusively show that Mr. Garcia is entitled to no relief.

7. This Court should consider the cumulative effect of all the evidence not presented to the jury whether due to trial counsel=s ineffectiveness, the State=s misconduct, or because the evidence is newly discovered.

ARGUMENT I

APPELLANT=S ALLEGED WAIVER OF PENALTY PHASE CLAIMS AT EVIDENTIARY HEARING WAS INVALID WHERE THE LOWER COURT FAILED TO DIRECT COUNSEL TO PROFFER INTO THE RECORD WHAT THE EVIDENCE OF MITIGATION WOULD BE AND TO CONFIRM WITH APPELLANT WHAT THE MITIGATION EVIDENCE WAS AND THAT THE EVIDENCE HAD BEEN DISCUSSED WITH HIM BY COUNSEL

The lower court ordered an evidentiary hearing on ineffective assistance of counsel for failure to present evidence of the defendant=s mental and physical health at the penalty phase, and in not obtaining the testimony of experts such as a clinical psychologist, neuropsychologist, neurologist, and a toxicologist. PCR. 537.

The lower court also ordered an evidentiary hearing on trial counsel Diaz= failure to present evidence of the defendant=s childhood and upbringing. PCR 537. Mr. Garcia=s rule 3.850 motion included a detailed life history gleaned from substantial investigation and collection of secondary source materials. Supp.PCR. 835-47. This included a detailed description of his juvenile placement in the custody of the Texas Youth Commission (ATYC@) from the age of thirteen to nineteen. SuppPCR. 839-47. In addition, several defense experts were retained during postconviction. One of them,

clinical psychologist, Dr. Faye Sultan, did additional investigation into and verification of Mr. Garcia=s background.

Mr. Garcia pled below that trial counsel, Reemberto Diaz, failed to investigate and prepare at all for the penalty phase of Mr. Garcia's trial. Supp.PCR 820-25; 827-50. Mr. Diaz was appointed to represent Mr. Garcia in his 1991 re-trial in lieu of prior trial counsel Clinton Pitts. Mr. Garcia's trial began on May 13, 1991. The jury returned with a guilty verdict on May 23, 1991. The penalty phase began on May 28, 1991.

Diaz simply failed to conduct any penalty phase investigation or preparation prior to the jury's guilty verdict on May 23, 1991. Failure to prepare a case in mitigation until after a guilty verdict is objectively unreasonable attorney performance, and constitutes ineffective assistance of counsel. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

The transcript of the limited evidentiary hearing held on November 17, 2003 covers only 69 pages. PCR. 655-724. The only witness called at the hearing was trial counsel Reemberto Diaz. Prior to the testimony of Diaz, the lower court took up two matters at the request of Kenneth Malnick, lead counsel for Mr.
Garcia. The first matter was Mr. Malnick=s recent discovery that his second cousin, Stuart Adelstein, was Asharing office

space@ with Mr. Diaz. PCR. 655. At the request of the lower court, Mr. Garcia stated on the record that he had no concerns about Mr. Malnick=s cousin=s relationship with his former trial counsel:

> THE COURT: Does this bother you in any way that Mr. [Malnick] is related to someone who shares space with him?
> MR. GARCIA: No, sir, it doesn=t bother me at all. Mr. Malnick talked to me about it yesterday or last night. I=m okay with that. It=s just shared space. It wasn=t working together.
> THE COURT: All right. Okay. That=s fine. Thank you. Mr. Malnick?
> MR. MALNICK: The second matter is Mr. Garcia has gone back and forth with the decision that=s that will affect the presentation of evidence in this case and he would like to address the Court.
> THE COURT: Okay.

PCR. At 656. This was actually **not** the end of the matter. During his later testimony, Diaz stated that while he and Mr. Malnick=s cousin had separate professional associations, they did do business together in the practice of law. He testified that as much as twenty per cent (20%) of his workload involved work with Mr. Adelstein and another attorney, apparently a partner of Mr. Adelstein, identified as Mr. Matters. PCR. 665. Mr. Malnick advised the lower court that he was unaware of this fact. Id. Diaz further testified that Mr. Malnick=s cousin, Mr. Adelstein, had Apaired@ with him on death penalty cases, with one of them doing the guilt phase and the other the

penalty phase, Abut in addition to that, we do a great deal of private cases together.@ PCR. 666. He also testified that he shared ten to fifteen cases with Mr. Adelstein=s firm, including a federal habeas corpus case, Aa 2254 in Texas which Mr. Adelstein and I are full partners in." PCR. 667.

Trial counsel Diaz responded to an inquiry from the lower court by testifying that he did not consider his professional relationship with Mr. Malnick=s cousin, Mr. Adelstein, to be Aanything of a conflict nature.@ PCR. 667. Given that Diaz=s testimony completely contradicted the representations made by postconviction counsel Malnick, the very limited subsequent colloquy by the lower court in the face of these revelations of a potential conflict of interest was deficient and inadequate to protect Mr. Garcia=s rights:

> MR. MALNICK: I think that maybe the real nature of the inquiry would be whether Mr. Garcia is comfortable with my questioning. That maybe where --
> THE COURT: Very well.
> MR. MALNICK: Bmaybe the conflict maybe.
> THE COURT: I asked you some questions, Mr. Garcia, about the fact that Mr. Diaz here today is perhaps going to be a witness on behalf or perhaps not, I don=t know what he=s going to say, but does that bother you in any way?
> MR. GARCIA: No, it is not. I=m okay.
> THE COURT: You want to go forward as it stands?
> MR. GARCIA: Yes, I do.
> THE COURT: Okay.

PCR. 668. This is particularly troubling given that the next matter of business taken up by the lower court at the

evidentiary hearing after the initial inquiry of Mr. Garcia was the issue of Mr. Garcia waiving the presentation of any evidence or testimony concerning mitigation evidence connected to the alleged ineffective assistance of Mr. Diaz at the penalty phase of his 1991 trial. For the lower court to not require studied consideration by Mr. Garcia as to the potential conflict implications of this situation was negligent and prejudicial. Mr. Malnick=s self-evident failure to investigate the relationship of his own cousin to Mr. Diaz is compounded by the fact that he actually learned about the details of that relationship only during his direct examination of Diaz. This should have raised all sorts of red flags for both Mr. Garcia, the State and the lower court. This cavalier approach to the alleged waiver of a potential conflict of interest concerning lead post-conviction counsel was the very model for the lower court=s handling of Mr. Garcia=s alleged waiver of the presentation of certain aspects of his post-conviction case.

The record reflects no written memorialization of any desire by Mr. Garcia to waive any portion of his previously plead Rule 3.850 motion. The State early on conceded Athat an evidentiary hearing should be held on some of the defendant=s claims, including that he was mentally impaired at the time of the offense and organically brain damaged, and counsel was

ineffective for not presenting such evidence at his penalty phase.@[4] Supp.PCR 689. However, as previously noted, Mr. Garcia announced at the evidentiary hearing that he did not wish to carry forward his penalty phase claims:

> MR. GARCIA: I would like to drop or not continue with the penalty phase claims I have.
> THE COURT: Well, there is the death sentence case as you probably know. There=s the first guilt phase and if you are found guilty, then we enter into what=s called the penalty phase, at which time the Court will take a recommendation from the jury as to what should be done with you. Now, I would like to understand you completely as to what you want to do here. I think what you=re saying to me is that you=re abandoning or giving up your claims as to the punishment phase; is that correct?
> MR. GARCIA: That=s correct.
> THE COURT: You want to proceed then only on the part of the claim which has to do with your guilt?
> MR. GARCIA: Right.
> THE COURT: Is that correct?
> MR. GARCIA: That is correct.
> THE COURT: Is that what you understand it to be, Mr. Malnick?
> MR. MALNICK: Yes.
> THE COURT: Ms. Dannelly?
> MS. DANNELLY: That=s the way I understand it.
> THE COURT: Okay. I want to be very careful here. I don=t want to create a record that=s questionable about what he want=s to do.
> MS. DANNELLY: We need to delineate those arguments that have been placed in his brief to indicate exactly which ones he understand record abandoning in this proceed and which of those as we delineate he wants to proceed within this hearing. That would be my suggestion.

[4] *Joint Motion For Continuance of Evidentiary Hearing*, April 18, 2001.

THE COURT: Sounds sensible.
MS. BRILL: I would like it if you would further colloquy Mr. Garcia to make sure it was a knowing and intelligent waiver of those claims.
THE COURT: Mr. Garcia, as you know, I'm sure somewhere along the lines whether it be this year or next year or whenever, if you don't prevail in this hearing --
MR. GARCIA: Right.
THE COURT: **B** you probably will be executed. Do you understand that?
MR. GARCIA: I understand that.
THE COURT: Now, there is nothing wrong with you doing what you're doing. You're free to do what you're doing. I just have to make sure that you fully grasp what it is you're doing.
MR. GARCIA: I understand fully. I'm not attempting to give up my appeal during the hearing. I just want to abandon that part of my appeal.
THE COURT: Okay. That means essentially that if I deny the relief you're seeking in the guilty portion of this situation, then you will be executed; do you understand that?
MR. GARCIA: I do.
THE COURT: I'm not going to ask you the reason why you're abandoning this. I don't think it is my right to do that, but I want to make sure that you are doing it on your own because it makes no difference to me. I want you to know that it makes no difference to me at all, not at all.
MR. GARCIA: I understand that.
THE COURT: And I'm going to do what I think is right whether you agree with it or not because that's my job, that's my function.
MR. GARCIA: I understand
THE COURT: And you're giving up something that is important and I want you to realize that. I want you to realize that as a result of this, you may very well be executed.
MR. GARCIA: I realize that already, yes. I know pretty much exactly what I'm doing.
MS. BRILL: I would ask that Your Honor ask him whether he has consulted with his attorney about it and if he's satisfied with his representation on that issue alone.
THE COURT: Mr. Malnick has been here on your behalf many times. Have you discussed this issue with him?

MR. GARCIA: We've been back and forth on it a lot of times during the past couple of years. There's been times when I want to go forward and times when I just couldn't stand it, but I told him last week that I wanted to do this. I was sure.
THE COURT: All right. So then, if we could just go through the list of pleadings and determine which issues are still alive and which are not.
MS. BRILL: In your order, on the hearing Order entitled Order or Request of Evidentiary Hearing signed by Your Honor on May 9, 2001, claims which he would be waiving are claim seven, I believe, that the Defendant alleges his right to assistance of competent mental health experts such as a neurologist and toxicologist was denied. Claim that Counsel provided ineffective assistance during the penalty phase --
THE COURT: That would be what number?
MS. BRILL: Claim nine.
THE COURT: Nine?
MS. BRILL: Uh-huh. Part of that specifically that Counsel was ineffective in failing to present evidence of Defendant's mental and physical health by not obtaining the testimony of experts such as a clinical psychologist, neurologist, serologist. Toxicologist. That one claim, you're going to have an evidentiary hearing on.
THE COURT: What number?
MS. BRILL: That was part of nine, 9-B. 9-C, Counsel was ineffective in failing to present evidence of his childhood upbringing. D, which was that counsel was ineffective in failing to present evidence that he was a model prisoner. E, that Counsel was ineffective in failing to object to victim impact letters. F, Counsel was ineffective in failing to appoint defendant consent before conceding to merge **B** Judge, some of these claims were summarily denied.
THE COURT: Okay. Before we get too much into this problem, it would be better if you filed a pleading, a pleading indicating which claims are abandoned and then show it to Mr. Malnick and see if Mr. Malnick agrees.[5]

[5]The State filed a pleading on November 26, 2003 entitled *Penalty Phase Claims in the Amendment to Consolidated Amended*

MS. BRILL: That will be fine.
MR. MALNICK: That=s fine.
THE COURT: Does that sound okay?
MS. BRILL: I can do that.
THE COURT: Mr. Malnick, she is going to do that and send it to you. You can review it and see if you approve or disapprove; okay?
MR. MALNICK: Yes.
THE COURT: Okay, All right. Are there any remaining issues then?

Motion to Vacate Judgments of Conviction and Sentence Which Have been Waived by the Defendant. It stated that penalty phase portions of two claims, 7 & 9, had been waived by Mr. Garcia at the evidentiary hearing: A7. The defendant alleged that his right to the assistance of a competent mental health expert and a neurologist and a toxicologist was denied as to both the guilt and penalty phases of the trial. This claim has been waived as it applies to the penalty phase. 9. The defendant alleged that counsel provided ineffective assistance at the penalty phase. In particular, this Court had ordered an evidentiary hearing on the allegations that counsel was ineffective for failing to present evidence of the defendant=s mental and physical health, and in not obtaining the testimony of experts such as a clinical psychologist, neuropsychologist, neurologist, and a toxicologist; and in failing to present evidence of the defendant=s childhood and upbringing.

> MS. BRILL: I don:t know, but did you make a specific finding that the waiver of his claims were knowingly and voluntarily as you would with a plea?
> THE COURT: **B** with plea?
> MS. BRILL: Same type of finding, yes.
> THE COURT: Sir, anyone forcing you to do this?
> MR. GARCIA: No sir. This is all on my own.
> THE COURT: Okay. No one has influenced you in making this decision?
> MR. GARCIA: Nobody.
> THE COURT: And is this then still your sole decision?
> MR. GARCIA: My sole decision. Actually, against my Counsel:s wishes, yes.
> THE COURT: Fine. The Court will find, after that inquiry, that the Defendant has made a free and voluntary waiver of his claims as to the death sentence portion of his 3.850 relief as stated here today.
> MS. BRILL: Just so the record is very clear, could you ask Mr. Garcia about whether or not he:s taking any type of drugs or are under the influence of any type of alcohol as well as just ask quickly about his educational background, so it:s clear he understands and he:s an intelligent person and he is competent, you know, those questions.
> THE COURT: All right. While making this decision, Sir, did you ingest any alcohol or psychotropic drugs or anything?
> MR. GARCIA: No. I had a vitamin pill is all.
> THE COURT: I didn:t hear you.
> MR. GARCIA: I had a vitamin pill. No medications.
> THE COURT: Very well. So what do we got left then?
> MR. MALNICK: We have approximately three or four guilt claims which now narrows the issues of which I can make inquiry of Mr. Diaz at this time.
> THE COURT: That:s fine. David, swear him in, please.

PCR. 657-664.

A crucial area of mitigation of which Mr. Garcia's jury was never made aware is mental health mitigation. Mr. Garcia was entitled to expert psychiatric assistance when the State made his mental state relevant to guilt-innocence or

sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida law made Mr. Garcia's mental condition relevant to both guilt/innocence and sentencing in the following areas: (a) specific intent; (b) statutory mitigating factors; (c) aggravating factors; (d) a myriad nonstatutory mitigating factors. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

If a defendant Awaives@ mitigation and the client is in the dark about what he is Awaiving,@ the Sixth Amendment is violated. Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991); Emerson v. Gramley, 91 F. 3d 898 (7th Cir. 1996); Glenn v. Tate, 71 F. 3d 1204 (6th Cir. 1995). No where in the record is there any indication that Mr. Garcia knew what the opinions of the experts retained in his case were. He was not present at any of the depositions. Only Dr. Sultan and Dr. Schretlen prepared reports, and nowhere on the record is there any indication that Mr. Garcia was provided with a copy of the reports. The lower court never saw the reports or the copies of the depositions. The failure by the lower court to require a proffer of available mitigation by counsel for Mr. Garcia was an abuse of discretion and evidence of judicial bias.

Mr. Garcia had received ineffective assistance of counsel because his trial attorney failed to obtain an adequate mental health evaluation and background on Mr. Garcia for penalty phase. Mr. Garcia failed to make a knowing and intelligent waiver of his rights at the penalty phase in 1991. Trial counsel was ineffective for failing to investigate his client=s capability to make that waiver, and for failing to, at least, proffer that evidence to the court. See, Muhammad v. State, 782 So. 2d 343, 363-364 (2001). At the evidentiary hearing on November 17, 2003, postconviction counsel did not proffer the existing evidence that had been developed concerning the penalty phase after Mr. Garcia=s alleged waiver of some of his penalty phase claims and the same lower court utterly failed to require or to instruct counsel to proffer the mitigation into the court record.[6] Expert depositions and reports should have been proffered in support of the penalty phase claims. [7]

[6]Judge Carney was the trial judge in 1991. At the sentencing phase the jury verdict was 7 to 5 for life in Mabel=s case and 12 to 0 for death in Julia=s case. Judge Carney found that Athere are no mitigating circumstances, either statutory or non-statutory in any degree...@ Thereafter, he sentenced Mr. Garcia to death in both cases. (R. 1641)

[7]Muhammad at 363 (AIt is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty

David Schretlen, Ph.D., a diplomate in clinical neuropsychology, was deposed on August 14, 2001. Supp.PCR. 931-972. According to his deposition, he was retained by postconviction counsel to evaluate Mr. Garcia. After doing so, he prepared an eight page report on August 1, 2001, which the State submitted as an exhibit at the deposition.[8] SuppPCR. 935. Dr. Schretlen testified at the deposition that Mr. Garcia=s counsel supplied him with police reports about the murders of Miss Ballantine and Miss Avery after he prepared his report, but his review of the information contained therein Adid not fundamentally alter my findings.@ Supp.PCR 944. His deposition and report confirm that he administered a neuropsychological battery of tests and conducted a detailed nine hour clinical interview of Mr. Garcia over the course of three days: 4/26/01, 4/27/01 & 7/25/01. His report and

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of the trial court to consider *all* mitigating evidence Acontained anywhere in the record, to the extent it is believable and uncontroverted.@A *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993) (@*Farr I*@),*citations omitted*, AThis requirement Aapplies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.@ (*Farr I* 621 So.2d at 1369).

[8]To date, although the deposition is in the record, the report has not been included in the record or supplemental record. It is attached to this pleading as Attachment A.

deposition also confirm his review of an assortment of records and other background materials.

The report prepared by Dr. Schretlen includes a detailed description of his assessment procedures, a family and personal history of Mr. Garcia, a brief medical history of Mr. Garcia, and a detailed report on his behavioral observations and the results of his neuropsychological testing.

His AFormulation & Opinions@ concerning Mr. Garcia were included in his report:

> Based on a review of the available records and my examination of him, Henry Garcia is a 52-year-old man whose parents separated when he was a young child and mother abandoned him without explanation. He was raised in a migrant farmers= community under fairly impoverished circumstances by a grandmother and uncle who disciplined him in ways that were extremely strict and arbitrary, if not frankly abusive. In addition to his father=s and uncle=s alcoholism, some other family members may have had mental disorders, although this was not documented among the records that I reviewed and Mr. Garcia was unable to provide detailed information about his family psychiatric history. In any case, the defendant described extensive exposure to pesticides and other neurotoxic substances (gasoline, paint thinner, lighter fluid, airplane glue) as a result of doing farm work and abusing inhalants during childhood and adolescence. He later began abusing numerous other drugs, including intravenous heroin and cocaine, marijuana, LSD, and amphetamines, all of which he used both in and out of prison for many years. He rarely worked when out of prison, and repeatedly was incarcerated in reform schools and state or federal prisons for armed robbery and other offenses, including the murder of a younger boy when the defendant was just 13 years old. Mr. Garcia never married and has no children. The only woman he ever really loved died two weeks before he

was released from reform school. Not only did this shatter his dream of building a normal life, it also ushered in a sense of hopelessness and defeat that plagued him throughout most of his adult life. During the months leading up to the murders for which he was convicted and later sentenced to death, Mr. Garcia did farm work, stole farm equipment, abused drugs, and drank more heavily than ever before in his life. He frequently had alcoholic blackouts, and described at least one physical fight in which he seriously injured a friend while drunk, even though he remembers nothing of the fight. By his account, the murders for which he was convicted took place on a morning after he had been drinking all night, Although he claims that he did not commit the murders, and said he got into a violent altercation with two men and a woman in the early morning hours, he concedes that his memory of the night:s events is vague, raising the possibility that an alcoholic blackout obscures some of his activities.

On neuropsychological testing Mr. Garcia demonstrated average to low average intelligence and intact functioning in most other domains of information processing. However, he showed mild psychomotor slowing on a few tests, unambiguously impaired new learning/memory for verbal material, and borderline to low average new learning/memory for visual material. The finding that he consistently performed better on tests of recognition memory than on tests of recall suggests that his impairment primarily involves memory retrieval rather than the encoding or storage of new memories. Together with his reported longstanding difficulty with memory in daily life, these findings point to the presence of a mild, circumscribed cognitive disorder. Although the etiology of his brain dysfunction is not clear, the most likely explanation is that it represents the residual effects of chronic polysubstance abuse, possibly compounded by early childhood exposure to toxic pesticides. Alternatively, if liver function tests reveal hepatic damage secondary to hepatitis, this could result in chronic encephalopathy. In addition to his cognitive disorder, Mr. Garcia clearly has a history of alcohol and polysubstance abuse, now in remission in a controlled environment. Given that

alcohol and polysubstance abuse account, at least in part, for his cognitive disorder, it is reasonable to infer that Mr. Garcia was at least as cognitively impaired at the time of the murders as he is at present. Both his reported history and psychological test results suggest that Mr. Garcia also suffers from chronic mild depression. I cannot exclude the possibility that his mood disorder was more severe at the time of the murders. Finally, although he clearly has antisocial personality traits, it is less clear whether he meets diagnostic criteria for an antisocial personality disorder. Thus, my diagnostic formulation can be summarized as follows:

Axis I Cognitive disorder not otherwise specified

Alcohol and polysubstance abuse, now in remission in a controlled environment

Dysthymic disorder; possible history of major depression

Axis II Antisocial personality traits versus antisocial personality disorder

After considering the mitigating circumstances, as defined in *West=s Florida Statutes Annotated* _ 921.141, I believe with a reasonable degree of neuropsychological probability that the combination of Mr. Garcia=s cognitive impairment, depression, polysubstance abuse, and pervasive sense of hopelessness caused him to suffer from Aextreme mental or emotional disturbance@ at the time of the murders for which he was sentenced to death. In addition, because his cerebral dysfunction rendered Mr. Garcia more susceptible than most normal adults to the disinhibiting effects of alcohol, I also believe with a reasonable degree on neuropsychological probability that his acute alcohol intoxication substantially impaired the defendant=s capacity to conform his behavior to the requirements of the law.

Neuropsychological Examination Report, 8/01/01, pages 6-7.

Thomas Hyde, M.D., a behavioral neurologist, was deposed on August 14, 2001. SuppPCR. 1048-1115. He testified at deposition that he met with and evaluated Henry Garcia on June 14, 2001. He stated that he had not prepared a written report, but did have his handwritten notes from the evaluation. Supp.PCR. 1052. Dr. Hyde stated that he had reviewed a two volume set of background materials that included prior Florida Supreme Court opinions in Mr. Garcia=s case, PSIs (pre and post sentence investigations), prison records of Mr. Garcia, raw data from a neuropsychological evaluation by Dr. Ruth Latterner, school records, juvenile records, a family history from the 3.850 motion, and a statement from Mr. Garcia=s co-defendant Enrique Fernandez. Supp.PCR. 1056-57. Dr. Hyde testified that he spoke with Mr. Garcia about Athe death of a peer that resulted in his placement at the Mountain View reform facility in Texas@ at the age of about 13. Supp.PCR. At 1065. He testified that Mr. Garcia was reluctant to provide details about his juvenile conviction other than AHe told me that he and his cousin were playing, that his cousin fell and he was felt to be at fault...it was determined that he was at fault in the death of his cousin and that=s all he related.@ Supp.PCR. 1066. Dr. Hyde confirmed that he never discussed with Mr. Garcia why the circumstances of the Amurder@ of his cousin and the fact

that he committed that Amurder@ were not brought up in any of his later trials. Supp.PCR. 1068. He confirmed that Mr. Garcia spoke with him about receiving beatings while incarcerated at the Mountain View Reform School and abusing inhalants while he was there. Supp.PCR 1068-1071. Dr. Hyde explained the goal of his evaluation:

> I was focusing during my interview and examination on psychiatric problems throughout his life, neurologic events or circumstances that would damage his brain throughout his life. I was not looking at specific instances of each particular crime that he was convicted of but the thrust of my examination and evaluation was to look at factors that might have a role in producing brain damage that could play a role in his decision making processes, not as exculpatory mitigation.

Supp.PCR. 1073. On neurological examination, Dr. Hyde found specific abnormalities indicative of frontal lobe dysfunction during both his mental status testing and his motor evaluation of Mr. Garcia. Supp.PCR. 1083, 1086. Dr. Hyde testified at the deposition that his opinion was that his findings from his evaluation of Mr. Garcia would support mitigation. Supp.PCR 1092.

> I think that Mr. Garcia has evidence [of impairment] on the basis of his attentional problems, his complex motor sequencing deficits and his two frontal release signs of a frontal lobe impairment historically from the information that he has provided to me. And the information in these two records there does not seem to be events since his incarceration in 1985 that would explain that impairment, that would be to say I don=t see evidence that he=s had any major

> closed head injuries, strokes, meningitis or encephalitis that would explain since his arrest in:85, the development of frontal lobe dysfunction, so within a reasonable degree of medical certainty that frontal lobe dysfunction predated his incarceration and within a reasonable degree of medical certainly was present at the time of the alleged murders or his alleged involvement in these murders, that that frontal lobe dysfunction while not incapacitating to him would have a profound effect on his behavior in rendering him prone to poor judgment, impulsive behavior, poor reasoning of the consequences of his action, and a poor dampening of his emotional response to any type of provocation, even trivial provocation, so I would think it would have a marked effect on his behavior throughout his life. And as far as the etiology of this frontal lobe dysfunction, where did this frontal lobe dysfunction come from, I think there are several factors at work. Number one, closed head injuries, being beaten, particularly at the Mountain View School, number two, and probably more importantly extensive substance abuse, particularly as a child and adolescent with organic inhalants which are well known to be toxic, particularly for cortical dysfunction and possibly the pesticide and chemical exposure when working as a migrant laborer although medical literature is less emphatic about that than it is about the toxic effects of inhalants. And those would be the major factors at work, closed head injury, substance abuse, especially inhalant abuse as a child, and possibly exposure to pesticides and other farm related chemicals and when working as a migrant laborer from ages five to eleven years of age.

Supp.PCR. 1092-94.

Dr. Hyde expressed the opinion that it was unlikely that Mr. Garcia:s frontal lobe abnormality would show up on an MRI scan, and also noted that obtaining PET scans or Spec scans for incarcerated individuals was usually not practical. Supp.PCR.

1090. However, he stated that Mr. Garcia=s condition could be treated appropriately with medication.

> Placement on either a serotonin, an uptake inhibitor such as Prozac, Zoloft, Paxil or an anticonvulsant which would dampen his emotional response to provocative stimuli such as a Neurontin, Tegretol, Depakote. With the use of that and placed in a very rigid, structured environment, i.e., prison, I think that he can function within a prison environment and not pose a danger to the prisoners or to the guard staff.

Supp.PCR. 1107.

The trial court failed to understand that a waiver requires a heightened level of understanding and cognition to effectively waive counsel or mitigation. Faretta v. California, 422 U.S. 806 (1975) requires a court to conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of his waiver. Here, trial counsel failed to ensure that a proper colloquy took place with the judge to determine the depth of Mr. Garcia=s understanding. The lower court found no mitigation in 1991. Although he possibly read the Rule 3.850 pleading before the evidentiary hearing, which included a detailed social history which had never been previously made part of the record, he had heard no mitigation testimony in 1991 and he never was provided the expert reports and depositions in 2003. Supp.PCR. 835-47.

The trial court=s colloquy of Mr. Garcia was not a Asearching interrogation@ of Mr. Garcia. See, Arthur v. State, 374 S.E 2d 291 (S.C. 1988). Without a Asearching interrogation,@ of Mr. Garcia, the record could never affirmatively show that a waiver occurred or that the waiver was Aan intentional relinquishment or abandonment of a known right or privilege.@ See, Boykin v. Alabama, 395 U.S. 238, 243 (1969), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The questions asked of Mr. Garcia were all leading questions that merely required a yes or no response from Mr. Garcia. The trial court never asked Mr. Garcia any non-leading questions that affirmatively demonstrated his knowledge of the penalty phase proceedings, the evidence in mitigation that was available to be presented, or his understanding of the consequences of his waiver.

At no point did the lower court ask counsel what the mitigation was, nor did postconviction counsel ever say on the record the type of mitigation he found. No proffer of mitigation was made. A proper postconviction mitigation case was prepared, but the fruits of the exhaustive investigation into Mr. Garcia=s background were never considered by the lower court.

In the instant circumstances, the lower court should have required a proffer from postconviction counsel as to the substance and depth of the mitigation found. This should have included a proffer of the reports and depositions of Dr. Hyde, the neurologist, Dr. Schretlen, the neuropsychologist, and psychologist Faye Sultan.

The State was also on notice as to the existence of mitigation in this case, and pursuant to Muhammed, the trial court should have ordered the State to place into evidence any mitigating evidence in its possession. Id. at 363-364. In Mr. Garcia=s case, the State had the defense expert reports and depositions and much of the information about Mr. Garcia=s term with the Texas Youth juvenile system from age thirteen to nineteen, but this material was not placed in evidence in the court file even in the face of Mr. Garcia=s alleged waiver. For example, when considering the waiver, the lower court was completely unaware of Mr. Garcia=s history of depression and frontal lobe dysfunction as diagnosed by Drs. Hyde, Schretlen and Sultan, and had no knowledge of the exchange between the State and Dr. Sultan during her deposition:

> Q. How did [Mr. Garcia] react?
> A. He cried a great deal.
> Q. Do you think his distress was due to embarrassment at disclosure or some other factor?
> A. Well, I can tell you what he said about his distress.
> Q. Sure.

A. What he said about his distress was that he knew it had been extremely painful for his siblings to come forward with the level of detail that I had asked for them to provide to me.[9] And he said he was crying because of his pain for them. It was an empathic response to their pain. He said he had come to term over the years with his background but he knew that they had not and he was sure that it had been extremely painful for them. He also said that he had a great deal of concern about exposing any of the details of his background at a public hearing or even in written documents that would be submitted to the court. He wanted to let me know that he didn=t like the idea that his personal background was going to be revealed. And in fact, suggested that maybe whatever consequence he faced might be better than the revelation and disclosure of his past.

Q. And this is just in August 2002?

A. Yes.

Supp.PCR. 1124-25. The State also was aware that Mr. Garcia=s life history of personal trauma had a significant impact on his reluctance to share his life history:

Q. Now this reticence to talk about a lot of these things, his childhood, for example, the abuse on him,

[9]Dr. Sultan=s Report of January 11, 2002 was attached as Exhibit 2 to her Deposition. The report notes that Dr. Sultan had, at that time, conducted four clinical interviews of Mr. Garcia totaling thirteen hours between May 15, 2000 and June 27, 2001. The report also states that she personally conducted fifteen hours of interviews in Texas during June 2001 with six different relatives of Mr. Garcia: His older sisters Linda Aquilar and Janie Rivera, his older brother Leonard J. Juarez, his biological mother Angela Hernandez, Jesse Vasquez, a maternal first cousin and Amelia Vasquez, Jesse=s sister, another maternal first cousin. The ARevelant Social History@ section of her report was based on a synthesis of the background materials noted in the report and her interviews with Mr. Garcia and his family members. Attachment B.

his circumstances growing up, even his crimes to some extent, do you **B** it:s obviously very deep-seated because it:s consistent throughout his life even up to the present. Do you attribute it to something more than embarrassment or denial or what exactly is motivating his refusal over many, many, many years to really discuss these factors in his life?

A. I have to give you an academic answer.

Q. Okay.

A. The research on child abuse among boys shows that a boy:s response to physical and sexual torture in terms of disclosure is very, very different than a girl:s response. That there is as low as a 10 percent reporting rate among boys with that kind of background. All the psychological factors that go into that reticence may be as follows: A sense of responsibility and guilt, a deep sense of shame, a desire not to have secrets revealed because it will mean the revelation that a person is not a man. Boys frequently will report that disclosing about physical and sexual abuse means they are admitting that in fact they are female and not male any longer. In our culture and particularly in Mr. Garcia:s culture it would be very, very shameful to admit to the kind of vunerability that talking about his background would have required him to admit.

Q. And this is consistent throughout his life really, right up to the present day?

A. Yes.

Supp.PCR. 1179-80. Dr. Sultan even opined that it was possible that there could be serious mental health consequences to Mr. Garcia:

Q. And the defendant:s reluctance over the years to address his past would be attributed to shame or guilt or what?

A. Well, we can name possibilities. Pride, embarrassment, the recognition that to begin this process of revealing would wind up revealing lots of sexual abuse that he himself experienced that he particularly does not want to recall or have exposed would be my theory, okay.

Q. Okay.

A. The pain of recollection. There have been clients over the years that I=ve worked with who have actually deteriorated into a psychotic state in the course of being encouraged by me to recall their circumstances. So what that says to me is that the defensiveness, the defense mechanisms, that make a person reticent may be very important protections. And I=m not sure that Mr. Garcia thinks that he could remain stable really psychologically if he were allowed himself to recall. He didn=t do very well with the few memories that I brought to him as fact. Lots of intense grieving. Anger too, lots and lots of deep emotion. And so, for example, I=m not looking forward to having him hear this recited.

Q. And in fact, I=m gathering from what you are telling me that some of this process is even destructive to him mentally?

A. Well, that depends on your psychological school of thought. The purist would tell you that any self-revelation, any self-discovery is positive even if a psychotic process happens along the way. It means he=s healing. Okay, maybe. The fact is that he=s really not in a place to get lots of good help. It doesn=t feel open to mental health treatment in there. And I=m not inclined to force him into some kind of state that he=s not going to be okay living in.

Q. Because under his circumstances it would probably be harmful to him?

A. I think it would certainly make his life harder. And I=m not interested in doing that.

Q. And neither would he be obviously?

A. Right.

Q. And that would be **B** I=m not using the term in terms of a value judgment but I=m using the term in terms of rational understanding that would be a normal reaction to protect one=s self mental processes in whatever circumstances surroundings you find yourself is normal?

A. Even instinctive.

Supp.PCR. 1213-14. The lower court should have been on notice about all these issues when considering Mr. Garcia=s alleged waiver. The lower court also should have know that Dr. Sultan=s

report indicated that she, like Dr. Schretlen, was prepared to testify in support of both statutory mental health mitigating factors.[10]

The State had their own expert psychologist, Dr. Lawrence Capp, who was deposed on May 19, 2003. Supp.PCR. 973-1047. He testified that the State had asked him, A[t]o conduct a through evaluation of Mr. Garcia relative to his psychological status.@ Supp.PCR 983. He reviewed the reports and depositions of the defense experts. Supp.PCR 985-86. However, Dr. Capp did not interview any collateral or family witnesses as did Dr. Sultan. Supp.PCR. 988. Therefore, he and the State were not in a position to rebut the family and cultural history obtained by Dr. Sultan. Dr. Capp stated that he is a clinical psychologist and not a neuropsychologist. Supp.PCR. 976, 991. He administered a Wide Range Achievement Test (WRAT),a WAIS-R IQ test, the MMPI 2, the Rorschach Ink Blot Test, and a sentence completion test. Supp. PCR 992-1005.

[10]AAssuming that Mr. Garcia committed the acts for which he was convicted in 1985, it is my opinion that Mr. Garcia was suffering from extreme mental disturbance at the time of this offense. He had extreme difficulty functioning in the world outside of an institution. Mr. Garcia was, at the time of the offense, highly upset and agitated about a woman=s Arejection@ of him. He was heavily engaged in the abuse of alcohol and other illegal substances. It is also my opinion, therefore, that Mr. Garcia would have been substantially impaired in his ability to conform his behavior to the requirements of the law.@ Report of Faye E. Sultan, PhD., January 11, 2002.

His testing results were all basically within normal limits with the exception of a slight elevation on an MMPI paranoia scale and another scale which he interpreted as indicative of a substance abuser. Supp.PCR 997, 1001. Despite these Anormal range@ findings, he diagnosed Mr. Garcia as anti-social personality disorder Abased upon a lot of the material obtained from the clinical interview [of Mr. Garcia], as well as the testing data, as well as some of the historical record that was included in the files provided to me.@ Supp.PCR 1034. He also disagreed about the presence of statutory mitigation. Supp.PCR 1038-39. He also appeared to believe Dr. Hyde was a psychologist. Supp.PCR 1042. Dr. Hyde=s findings of frontal lobe problems were based on a medical/neurological examination of Mr. Garcia, not psychological testing. In short, Dr. Capp ignored the findings of frontal lobe abnormality by a medical doctor, neurologist Dr. Hyde, and a neuropsychologist, Dr. Schretlen, who both did testing which Dr. Capp was unable to do because he was not qualified.

If Judge Carney had applied the four part test articulated by this Court in Koon v. State, 619 So.2d 246 (Fla. 1993), as cited in Mora v. State, 814 So.2d 322,332 (Fla. 2002)(emphasis added), the lower court would have required that postconviction counsel Amust indicate whether,

based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and **what that evidence would be**.@ This never happened in the instant case.

Here, Awhat the evidence would be@ necessarily included what was plead in the Rule 3.850 motion in Claims VII and IX upon which the lower court had granted a hearing.[11] But it also included any witnesses or evidence not specified in the pleading, most especially the experts who had been deposed and

[11]The Rule 3.850 motion was plead generally. AUndersigned counsel has retained a clinical psychologist who is willing to testify as to the impact of trauma on Mr. Garcia's life, including such trauma as abject poverty, physical and emotional abuse, neglect, abandonment by his parents at a young age, exposure to physical and sexual abuse of others, being forced to work as a migrant farm worker at an early age to help support his family, and the trauma associated with being accused of killing a small child at the age of thirteen and being sent to a reformatory school for six (6) years that was later found to be cruel and unusual punishment. This psychologist would have been available to evaluate Mr. Garcia and to testify at his 1991 trial. Undersigned counsel has also retained a toxicologist who will testify regarding the behavioral and cognitive effects of neurotoxin and pesticide exposure, including but not limited to brain damage and behavioral disfunction. Counsel may also present testimony from a neurologist to support these findings. In addition to mental health mitigation, defense counsel failed to adequately investigate other potential avenues of mitigation, making Mr. Garcia's sentence unreliable since defense counsel failed to present any of the available mitigation evidence to the jury. Counsel knew or should have known that witnesses reported that Mr. Garcia was drinking on the evening before the offense is said to have occurred. Whether counsel failed to discover this important mitigating evidence or the State rendered counsel ineffective by suppressing it, there was prejudice to Mr. Garcia in that his

were prepared to testify in support of the penalty phase portion of the Ake claim and the penalty phase ineffective assistance of trial counsel claim.

The pleadings below established that an evidentiary hearing was required on the performance of Mr. Diaz as trial counsel with regard to his complete lack of preparation for the 1991 penalty phase. The United States Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further

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sentence is unreliable.@ Supp.PCR 832.

Wiggins v. Smith 123 S.Ct. 2527, 2538 (2003)). In light of Wiggins, this Court should take account of the 1989 and 2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases when considering the circumstances of the alleged waiver in Mr. Garcia's postconviction case.[12] This argument is not intended to be an

[12]See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 2003, Guideline 10.7 INVESTIGATION (AThe investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented@), Guideline10.11 L THE DEFENSE CASE CONCERNING PENALTY (ACounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client@)(*Commentary*, Record Preservation, AIn some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client=s wishes. Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decision makers in the case.@) , and Guideline 10.15.1 C & E - DUTIES OF POST-CONVICTION COUNSEL (Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overtly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review@)(APost-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to: 1. Maintain close contact with the client regarding litigation developments; and 2. Continually monitor the client=s mental, physical and emotional condition for effects on the client=s legal position; 3. Keep under continuing review the desirability of modifying prior counsel=s theory of the case in light of subsequent

ineffective assistance of postconviction counsel claim. The New Jersey Supreme Court recognized in State v. Koedatich, 548 A.2d 939, 992, 997 (1988), that defense counsel may be required to present mitigating evidence against his client=s expressed wish or in the alternative the lower court Acould call persons with mitigating evidence as its own witnesses, or appoint new counsel to call them, and thereby place on the record the mitigating evidence essential to a careful balanced penalty determination.@

During the penalty phase of his 1991 trial, no witnesses, family members, experts, or mental health professionals were presented on behalf of Mr. Garcia. He was sent to Florida's death row as if the first twenty years of his life had never happened. The judge and jury never heard any of the evidence in mitigation outlined above. In November 2003, before the same trial court, an equally useless proceeding took place because the lower court failed to inquire into what the evidence of mitigation was and why the defendant wanted to waive the inquiry into Mr. Diaz= performance at the penalty phase. This case should be returned to circuit court to allow Mr. Garcia an opportunity for a proper waiver.

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developments; and 4. Continue an aggressive investigation of all aspects of the case.

ARGUMENT II

MR. GARCIA WAS DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. GARCIA'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, MR. GARCIA WAS UNABLE TO PREPARE AN ADEQUATE 3.850 MOTION.

As plead below, a number of critical records have not been turned over to Mr. Garcia's counsel despite the contention of the Miami-Dade Police Department that these records do not exist. SuppPCR 724-25. Ann Gomez, who saw Mr. Garcia the same morning as Feliciano Aguayo, gave a sworn statement to police in January, 1983. Further, she underwent a lie detector test during the same period. Neither Ms. Gomez's sworn statement nor her lie detector test results were turned over to defense counsel. In addition, Wally Gomez, who spoke to several detectives regarding Mr. Garcia's physical appearance and demeanor on the day the crime occurred, was brought to the Miami Police Department on at least two occasions thereafter. Counsel has not been provided with the notes or statement from the interrogation of Mr. Gomez. Neither potential witness was used by the State. Both witnesses have reported to undersigned counsel's investigator that the events noted above did happen and should have been memorialized.

This Court should remand the case back to circuit court because all public records have not been properly disclosed. See Jennings v. State, 583 So. 2d 316 (Fla. 1991). The lower court ruled that this claim had been resolved by the lower court:s rulings, and denied an evidentiary hearing. PCR 532.

ARGUMENT III

MR. GARCIA'S CONVICTIONS ARE MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE CUMULATIVE EFFECTS OF INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, NEWLY DISCOVERED EVIDENCE, AND/OR IMPROPER RULINGS OF THE TRIAL COURT, IN VIOLATION OF MR. GARCIA'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Garcia pled below that he was denied a reliable adversarial testing at trial. Supp.PCR. 726-92. The jury never heard the considerable and compelling evidence that was exculpatory as to Mr. Garcia. Either the prosecutor failed to disclose this significant and material evidence, or defense counsel failed to investigate and present this evidence. It cannot be disputed that the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bailey, 473 U.S. at 675, it was essential for the jury to hear the evidence. State v. Gunsby. Whether the State suppressed the evidence, defense counsel unreasonably failed to present the evidence, or the evidence is newly discovered, confidence is undermined in the outcome

because the jury did not hear the evidence. Kyles v. Whitley, 115 S.Ct. 1555 (1995).

Following the Huff hearing, the lower court=s order adopted the State=s numbering system with regard to the adversarial testing claim made below and granted an evidentiary hearing on parts of six subclaims: III a, e, i, j, m & p. PCR. 532, 533, 534 & 535. The lower court=s order summarily denied seven subclaims: III b, c, d, k, l, n & o. PCR. 532, 533, 534 & 535.

Following the one day evidentiary hearing on November 17, 2003, the lower court entered an order denying all requested relief. PCR. 568.

The lower court ordered that an evidentiary hearing was required concerning whether a familial relationship existed between state witnessses Elizabeth Feliciano, Feliciano Aguero and Rufina Perez and the related issue of whether Perez lied about her testimony implicating Mr. Garcia in an attempt to collect reward money. PCR. 532. The lower court found that there was no evidence to show the three witnesses conspired to lie to collect a reward. PCR. 568.

This issue was plead in detail below. Supp.PCR 729-31. The State repeatedly asserted that the three main witnesses at trial, Rufina Perez-Cruz, Feliciano Aguayo and Elizabeth

Feliciano, had no bias or motive for their involvement in this case or for giving false testimony. The State claimed that these witnesses did not know each other and had no reason to conspire against Mr. Garcia. (R. 1360, 1362, 1397).

Rufina Perez=s testimony was memorialized in a deposition entered into evidence at the evidentiary hearing as Defense exhibit A. She testified that Elizabeth Feliciano is the mother of her brother-in-law, Feliciano Aguayo, who is married to her sister Linda. She also testified that she knew Jorge Feliciano, Linda=s husband. D20.

The assertions by the State as to the absence of any relationship between the witnesses were false. Had trial counsel properly conducted an investigation he would have discovered that a family relationship existed between the State's star witnesses. This fact would have severely discredited the State's theory that these witnesses were "unrelated to one another" and "independent" with "no motive" or reason to lie and would have provided ample area=s for impeachment of these witnesses. Rufina Perez testified in her deposition that she never revealed to the State her relationship to Feliciano Aguayo and the others. D44-46. Why?

She also testified that Enrique Fernandez, Mr. Garcia=s co-defendant, and his mother were close friends of hers. D48, D53. She also testified that she secretly visited and wrote Mr. Fernandez at Union Correctional, representing herself as his aunt and his girlfriend, in the late 1980s without the knowledge of the State. D49. All this information was unknown to trial counsel in 1991.

The lower court also granted a hearing on limited aspects of the ineffectiveness claim related to Mr. Diaz= failure to properly cross examine Rufina Perez Cruz regarding her relationship with the other witnesses (Supp.PCR 750-51), the reward (Supp.PCR 751) and a statement given to Detective Miriam Royle/Gordilla in August 1983 under the name of Josefina Cruz. PCR 533. Supp.PCR 744-58. The order of the lower court denying relief refers to Athis so-called report@ in finding that trial counsel was not ineffective by failing to find the 1983 police report and to cross-examine Rufina Perez with it. PCR. 569.

She was a vital witness to the State, as recognized by this Court during Mr. Garcia's first direct appeal. see Garcia v. State, 564 So. 2d 124 (Fla. 1990)("Perez's testimony provided a crucial link between Garcia and the crimes").

At the evidentiary hearing Diaz still didn:t recognize that any familial relationship existed. He just commented that far distant relationships were meaningless to him. PCR 717.

Counsel should have been aware that Feliciano Aguayo and Perez-Cruz were related by marriage. Their relationship is indicated in the police reports. See PCR. 566-67. Although Perez-Cruz was, mistakenly or not, initially referred to as Josifina Cruz, she is the only person in 1983 to have claimed to have overheard Mr. Garcia make reference to the killing of a woman. She is the only one to have said that she overheard this conversation in a field and that Mr. Garcia was surrounded by a group of men. These facts required defense counsel to investigate who this person was. It was unreasonable for him not to ask about their relationship and Mr. Garcia was prejudiced by his failure to do so.

One of the most important areas of impeachment where Diaz' performance was deficient was his failure to impeach Perez-Cruz with her initial statement to the police in August 1983. The prosecution made this an issue on direct examination, specifically stating to the jury that Perez-Cruz told the police shortly after the murders in 1983 the same story that she was testifying to. (R. at 1028). At that point

the door was opened and Diaz should have impeached Perez-Cruz' credibility.

During her 2000 deposition, Rufina Perez admitted that she sometimes did go by the name of Fina Cruz. D67. And although she stated in her deposition that she had never seen a copy of the August 25, 1983 police report of the interview with her until the 2000 deposition, she ultimately confirmed that she had talked with a female detective that day about Enrique Fernandez, her son Richard Ramos and Henry, although she also contended the report was Aall lies@. D41-46; D82-83.

When the police interviewed Josifina Cruz, i.e. Rufina Perez-Cruz, on August 25, 1983 she told the police that she didn't know "Henry" well, but that he worked in the fields of the South Dade Labor Camp with her. She further stated:

> that after the murder of the two elderly W/F's in Leisure City, she had heard "Henry" talking in a field with Kike, aka Enrique Fernandez[13], and other seasonal Mexican Migrant workers, about having stabbed to death a **woman**, **possibly older,** and that the **woman** did not even defend herself. She thinks that she heard subject Henry say something like **"Night before last I killed some guys and old ladies."** Mrs.

[13]In her deposition in 2000 Rufina specifically denied telling the police in 1983 that Enrique Fernandez, her close friend and the son of her very close friend, had been in the field that day talking with Mr. Garcia. D64. Her relationship with the co-defendant was unknown in 1991.

> Cruz stated she did not pay much attention to this **because she still had not heard of the murder** in Leisure City of the elderly women.

PCR. 567. There was no mention at this time of Mr. Garcia saying "te la shingestes" or him saying "I went through the back door and I ripped out the screen door" (R. at 1027); nor was there any mention of Mr. Garcia saying that he sent anyone to hell. (R. 1026).

This statement to the police in no way tied Mr. Garcia to the present murders. If anything, it supported Mr. Garcia's alibi that he had been attacked on his way home from the Cuervo Bar that evening, and had stabbed a woman during his flight. At the evidentiary hearing, trial counsel Diaz testified that Mr. Garcia always told him he had been in a bar fight of some sort. PCR. 693.

A hearing was granted as to IAC allegations for failure to properly cross-examine Elizabeth Feliciano, only as to her relationship with Rufina Perez-Cruz and the reward. Mrs. Feliciano is the **only** witness that trial counsel asked about the reward. (R. 839). She admitted that she knew about the reward, but said that it did not interest her. Id. On redirect, the assistant state attorney stressed the fact that Mrs. Feliciano did not receive any of the reward money and

that she was never interested in the money. (R. 840-41). The lower court denied relief because neither of the Felicianos testified at the evidentiary hearing, finding that Mr. Garcia failed to show that Rufina Perez had lied in her trial testimony concerning a reward. PCR. 569. It was unreasonable for trial counsel Diaz not to have investigated and developed before the jury both the familial relationship between Mrs. Feliciano and the other witnesses.

Diaz' trial strategy was to show that Mr. Garcia was not the person who committed these crimes. He raised the issue of "other suspects" in this case. Due to the fact that he did not properly investigate or prepare for this trial, Diaz' attempts to introduce evidence of other suspects were a complete and total failure. His performance was substandard, and the resulting prejudice was Mr. Garcia's conviction and death sentence. An evidentiary hearing was granted on counsel:s failure to present evidence of other suspects. PCR. 534. This claim is found at SuppPCR 785-86; 779-80 regarding Rhodes.

The simple fact that it took the police from September 6, 1983, when the police first went to Texas and spoke with Mr. Garcia, until September, 1985 to arrest him says much about the strength of the case. When the Cold Case Squad picked up

this case, they did not even attempt to locate any of the other original suspects. Instead, they focused only on Mr. Garcia.

The only witness Diaz presented in regards to other suspects in this case was Detective Technician David Gilbert. Diaz relied on this witness to set forth evidence of the existence of other suspects and to testify about how these suspects were eliminated by either the original investigation team or the Cold Case Squad. Trial counsel's attempts to cross-examine witnesses who had no knowledge of these suspects or who could not testify as to the elimination of these suspects in an attempt to get the information before the jury was unreasonable and deficient performance. (See e.g. R. at 930-31, 1012, 1184-85, 1190-92, 1196, 1202-03, 1218). See Supp.PCR 785-86. Diaz testified at the evidentiary hearing that he attempted to point to a Ahomeless guy@ with Adirty hair@ named John Conners, Jr. PCR. 683-89. In response to the State=s inquiry, Mr. Diaz described John Conners as a Agood scape goat@ for purposes of his defense of Mr. Garcia. PCR. 700. Diaz further testified that pursuing whether John Connors had been eliminated as a suspect would have potentially Aopened the door@ to evidence coming into the case from Enrique Fernandez, Mr. Garcia=s co-defendant, who had

previously given a confession to law enforcement implicating Mr. Garcia in the murders of the two sisters. PCR. 700-05. AThere was some relationship between [Fernandez=s plea] and dropping this retard or whoever he was that lived in the woods behind his parent=s house.@ PCR.702. The lower court denied relief on this claim after the evidentiary hearing stating that no evidence connecting Connors to the case was offered. PCR. 570.

An evidentiary hearing was also granted on failure to present an intoxication defense. PCR. 534-35. See SuppPCR 789-91. Trial counsel Diaz completely failed to investigate or present any evidence of Mr. Garcia's intoxication the night of the murders. Diaz made the assertion during opening argument that Mr. Garcia was drunk that evening and that he did not remember what happened to him that night (R. at 612-13), suggesting a possible intoxication defense. Diaz testified at the evidentiary hearing that his purpose in raising the issue of Mr. Garcia=s drinking was to demonstrate the inherent unreliability of his client=s ability to remember what had happened, not to prove that Mr. Garcia was drunk or sober. PCR. 700. As Feliciano Aguayo was the person who was with Mr. Garcia the night all of these events occurred, he could have provided valuable information in regards to Mr.

Garcia's intoxication, yet Diaz failed to question Aguayo in regards to this area on cross-examination. He testified at the evidentiary hearing that he did not ask any questions of Mr. Aguayo about intoxication because he was Acertainly not raising the issue of intoxication.@ PCR. 678-83.

Diaz not only should have questioned Aguayo in regards to Mr. Garcia's level of intoxication, he also should have investigated and questioned other witnesses who may have seen or come into contact with Mr. Garcia that evening, including Elizabeth Feliciano (R. at 951), people at the Sky Vista Amusement Center and at the South Dade Labor Camp. (R. at 949-951).

Because of the probative value that this information could have had during the penalty phase, Diaz had a responsibility to present this information to the jury. His failure to do so was unreasonable. Supp.CR 789-91. The lower court denied relief after the evidentiary hearing, finding that because the defendant did not testify about his drinking and the defense being offered at trial was that Mr. Garcia had not committed the murders at issue, there was no deficient performance. PCR. 570.

Whether this highly material evidence was kept from the jury due to the State's failure to disclose it to the defense

in violation of Brady v. Maryland, 373 U.S. 83 (1963),Napue v. Illinois, 360 U. S 264 (1959), and their progeny, whether false contradictory evidence or argument was presented by the State in violation of Giglio v. United States, 405 U.S. 150 (1972), or trial counsel rendered prejudicially deficient performance in failing to learn of this evidence and present it, Mr. Garcia was denied the adversarial testing to which he is constitutionally entitled. The Brady claim at SuppPCR. 792 was summarily denied by the lower court based on a finding that the claim failed to allege what favorable evidence was withheld. PCR. 535. The claim extends to the public records in Argument II, the police report and imputed knowledge of the relationships between the witnesses in Argument III, and the imputed knowledge of the relationship of Rufina Perez with Mr. Garcia:s co-defendant in Argument III.

ARGUMENT IV

MR. GARCIA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S INEFFECTIVENESS DURING VOIR DIRE WHETHER DUE TO COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

In Mr. Garcia's case, trial counsel asked no questions about the potential jurors' death penalty views. He made no attempt whatsoever to determine whether any cause or

peremptory challenges could be predicated upon jurors' strong or intractable views in favor of the death sentence. See, e.g., Smith v. Balkcom, 660 F.2d 573, 578-79 (5th Cir. 1981) ("All veniremen are potentially biased. The process of voir dire is designed to cull . . . [for example] those who, in spite of the evidence would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence.") It will never be known who on Mr. Garcia's jury "would automatically vote to convict or impose the death penalty" because Mr. Garcia's lawyer neglected to inquire into this fundamental area of voir dire. This claim at Supp.PCR 793-805 was summarily denied, Aas the allegations are insufficient to state a claim for relief under the standards of Strickland v. Washington, 466 U.S. 668, 688 (1984), where the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Counsel not only failed to properly question the jurors regarding the death penalty, he also failed to strike jurors for cause, even when the court would have allowed. Defense counsel did not move to strike another juror who had reasons to identify with the State and seek a conviction in this case. Although counsel had an opportunity to remove Juror Hepburn

for cause because his brother had recently been murdered, the case was unsolved, and the same law enforcement agency was investigating that case that investigated Mr. Garcia's case, Diaz left Mr. Hepburn on the jury (R. 573).

Ms. Dannelly brought Juror Gentile sidebar to discuss the publicity issue. (R. 338). Juror Gentile stated that he remembered this case involved a really gruesome murder and that "it was rather sick." (R. 338). He only remembered the news coverage at the time of the crime, and stated that he had not been exposed to anything else. (R. 339-40).

Ms. Dannelly also asked the other prospective jurors briefly about their exposure to pretrial publicity. (R. 356, 358, 361, 385, 423). At least two of the jurors remembered reading about the case and were upset by it. (R. 361, 423). Upon the defense's opportunity to voir dire, defense counsel still failed to probe deeper into this issue. He failed to address this issue entirely, relying on the questions asked by the State Attorney. Thus, the extent of pretrial exposure to the case on the part of Mr. Garcia's jurors will never be known, again, because Diaz failed, unreasonably, to inquire.

To the extent that actions of the trial court in improperly refusing to grant challenges for cause and that

false or misleading assertions were made by the state, defense counsel was rendered ineffective.

ARGUMENT V

MR. GARCIA WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. GARCIA EFFECTIVE ASSISTANCE OF COUNSEL.

The unchallenged prosecutorial argument during Mr. Garcia's trial and re-sentencing proceedings violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper comments, misleading comments, and comments which relied on facts not in evidence. Defense counsel's failure to object to these blatantly improper comments constituted ineffective assistance of counsel. No reasonable tactic exists for this failure. This claim found at Supp.PCR 805-20 was summarily denied below on multiple grounds. First, the lower court found that the claim was procedurally barred Aas many of the claims were raised on direct appeal, or should or

could have been.@ These were not specified in the order. The lower court also found that the allegations in the claim were insufficient to state a claim for relief under the Standards of Strickland. PCR 536.

The State opened by repeatedly vouching for the "thoroughness" of the police investigation in this case, unveiling a strategy of damage control for what were, in reality, substantial loopholes in its case against Mr. Garcia. (R. 587-88, 604, 605).

The State also stated during opening that the people who were going to testify were unrelated to each other in time and circumstance. (R. 588). This was unequivocally false information. The State must have known that the State's three main witnesses at trial, Feliciano Aguayo, Elizabeth Feliciano and Rufina Perez-Cruz, were all related to each other and had motives to lie. Ms. Perez-Cruz's sister Linda was and still is married to Feliciano Aguayo. The third witness Elizabeth Feliciano is Mr. Aguayo's mother. Information about the relationships were in the police files and records.

Trial counsel continually and ineffectively failed to object to a substantial number of the prosecutor's improper comments in this case. (R. at 1213-15, 1251 (prosecutor's characterization of evidence), 1345, 1353, 1364 (comment on

facts not in evidence), 1370 (misinformed jury that rules require her to reserve remainder of her time for rebuttal), 1397 (the defense stipulated to facts)[14], 1409 (prosecutor testifying to facts not in evidence)). This failure was unreasonable. Relief should be granted.

ARGUMENT VI

MR. GARCIA IS ENTITLED TO AN EVIDENTIARY HEARING ON THOSE RULE 3.850 CLAIMS WHICH WERE ERRONEOUSLY SUMMARILY DENIED

Mr. Garcia's final Rule 3.850 motion was filed on June 18, 2003. He pleaded detailed issues and demonstrated his entitlement to an evidentiary hearing. However, on May 9, 2001 and August 6, 2003 the lower court summarily denied portions of Mr. Garcia's Rule 3.850 motion without granting a hearing. The lower court erred. The law strongly favors full evidentiary hearings in capital post conviction cases, especially where a claim is grounded in factual as opposed to legal matters. Some fact based claims in post conviction

[14]To whatever extent counsel conceded or stipulated to an aspect of the State's case without Mr. Garcia's express consent on the record, counsel was ineffective and prejudice should be presumed.

litigation can only be considered after and evidentiary hearing, Heiney v. State, 558 So.2d 398, 400 (Fla. 1990). Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief", Fla R. Crim. P. 3.850. The files and records in this case do not conclusively show that Mr. Garcia=s summarily denied claims deserve no relief.

A. PENALTY PHASE ERRONEOUS SUMMARY DENIAL

During the penalty phase, the state presented one witness, the medical examiner, who gave opinions on issues in which he had not been qualified as an expert and in which he had no expertise. (R. 1575-86). This portion of the penalty phase ineffective assistance claim is found at Supp.PCR 828-29. It was summarily denied by the lower court with a finding that the allegations are insufficient to state a claim for relief under the standards of Strickland. PCR. 536. During the penalty phase, the State presented the medical examiner again to repeat the evidence presented during the guilt phase. (R. 1577-78, 1581-1582). Counsel's failure to object was deficient performance which prejudiced Mr. Garcia. Trial

counsel failed to investigate and prepare for cross-examination of the medical examiner during the penalty phase.

There was non-record material suggesting the existence of available evidence that Mr. Garcia was a "model prisoner." This evidence was not presented in an adequate manner at trial. It was "rebutted" through the prosecutor's use of non-record, false, inaccurate, and misleading hearsay evidence to which defense counsel had no opportunity to reply. Mr. Garcia's due process rights were violated. Gardner v. Florida, 430 U.S. 349 (1977). Appellant=s ineffective assistance of counsel claim for failure to present evidence that the defendant was a model prisoner while awaiting trial and re-trial was summarily denied by the lower court because Athe [trial] record specifically sets forth counsel reasons for not presenting such testimony before the jury (R. 1639)@ PCR 537. This claim was set forth below. Supp.PCR 847. See Skipper.

Additional non-record information was before the court at the time of Mr. Garcia's sentencing. This information was in the form of letters containing inadmissible victim impact evidence and the sentencing recommendations of other individuals. It is not clear whether Mr. Garcia's counsel was informed of this correspondence. IAC claim for failure to

object to victim impact letters was summarily denied with out a hearing. PCR. 537. To the extent counsel knew of this correspondence and failed to respond and object, counsel was ineffective and that ineffectiveness rendered the sentences unreliable.

Defense counsel also provided ineffective assistance to Mr. Garcia when he emphasized the severity of the crime and conceded the "heinous, atrocious, or cruel" aggravating circumstance during voir dire (R. 434, 607, 611, 616). This IAC claim for failure by counsel to obtain the client=s consent before conceding that the murders were heinous, atrocious, or cruel was denied below without a hearing. PCR 537. Conceding an aggravating circumstance is deficient performance per se. Prejudice is presumed where counsel makes such a concession without obtaining the defendant's consent. Supp.PCR 848.

Trial counsel's performance was deficient when he failed to object to the prosecutor's introduction of an inadmissible offense for which Mr. Garcia had not been convicted as a non-statutory aggravating circumstance. The prosecutor told the jury that Mr. Garcia was in violation of his parole when he was in Florida in 1983 (R. at 1594). No conviction was presented. In any case, a violation of parole may not be used as a prior offense for purposes of aggravation. This evidence

was used to inflame the jury with concerns about the possibility that Mr. Garcia would not serve a life sentence, that he would be released on parole. See Simmons v. South Carolina, 114 S.Ct. 2187 (1994). Supp.PCR. 848. Summarily denied claim below of IAC for failing to object to the introduction of evidence that the defendant was in violation of his parole at the time he committed the homicides. PCR. 537.

Defense counsel also failed to adequately litigate the issues raised by the aggravating circumstances considered by the jury. For example, counsel failed to properly object to vague and inadequate instructions regarding aggravating circumstances. These errors began during voir dire and continued throughout the rest of the proceedings. Supp.PCR 848. The lower court summarily denied IAC claim concerning failure to object to omissions in the jury instructions on mitigating evidence, ABecause the jury was given the written instructions which contained the missing language@ (R.166). PCR. 538. Mr. Garcia's jury was instructed that mitigating circumstances need not be proved beyond a reasonable doubt (R. 1625). Nor were they told that they need only be "reasonably" convinced of a mitigating circumstance (R. 1625). Counsel was ineffective for failing to object, move for a mistrial and new

penalty phase, or request a curative instruction. Supp.PCR 848-49.

Trial counsel failed to object when the court made prejudicial remarks following the close of the guilt-innocence phase that tended to diminish the importance of Mr. Garcia's capital sentencing proceeding. (R. 1552). Counsel should have objected to the casual attitude which the trial court took with the jury in discussing the penalty phase. This claim was summarily denied below. PCR 538.

The United States Supreme Court has held that where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 505 U.S. 333 (1992).[15] Mr. Garcia=s Ainnocent of the death penalty@ was summarily denied below, on the grounds that the record conclusively demonstrates that it should be denied. PCR. 538, 851-54.

[15]According to Sawyer, where a death sentenced individual establishes innocence of the death penalty, his claims must be considered despite procedural bars. Sawyer, 505 U.S. at 339.

Mr. Garcia's sentencing judge relied upon four aggravating circumstances in sentencing Mr. Garcia to death. But for the failure of counsel to provide Mr. Garcia with mental health experts competent to testify to his mental state at the time of the offense, the State would not have been able to prove three aggravating circumstances. But for Mr. Garcia's counsel's concessions and other deficient performance, the remaining aggravator would not be present or would have been entitled to so little weight that it could not, standing alone, support a death sentence. This claim was procedurally barred below pursuant to the lower court:s order and also summarily denied on the grounds that the allegations are insufficient to state a claim for relief. PCR 538, Supp.PCR 855-58.

The instructions given to Mr. Garcia's jury were inaccurate and dispensed misleading information regarding who bore the burden of proof as to whether a death or a life recommendation should be returned. Defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). During the penalty phase opening statement, the State gave the jury this erroneous instruction. (R. 1596).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975). Fundamental error occurred when Mr. Garcia's jury received wholly inadequate instructions regarding the aggravating circumstances. The lower court found this claim to be procedurally barred. PCR. 539, Supp.PCR. 860-63.

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). The lower court found this claim to be procedurally barred and summarily denied on the merits. PCR. 539, Supp.PCR 863.

The prosecutor in this case argued that Mr. Garcia had committed a violation of parole and other non-statutory aggravating circumstances. (R. at 1598-1600, 1605-07, 1608, 1610, 1611). Counsel was ineffective for failing to object.

Diaz did not object to a wide range of grossly improper comments made throughout the trial by the judge and by the State. The lower court found this claim to be procedurally barred and summarily denied it on the merits. PCR. 539,

Supp.PCR. 864-69. Mr. Throughout the proceedings in Mr. Garcia's case, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told that they were the only ones who could determine the facts. (R. 431, 485, 580-81, 1436-37). As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder. (R. 1436-37). See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

During closing argument, counsel for the State proffered arguments which urged the jury to apply aggravating circumstances in a manner inconsistent with the Florida Supreme Court's narrowed interpretation of those circumstances. This claim was found below to be procedurally barred and summarily denied on the merits. PCR 539, Supp.PCR 871-73. Such arguments urged the jury to apply these aggravating factors in a vague and over broad fashion.

Florida's capital sentencing statute deprived Mr. Garcia of his right to due process of law and constitutes cruel and

unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows the application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S.Ct. 528 (1992). This claim was found below to be procedurally barred and was summarily denied on the merits. PCR 540, SuppPCR 876.

Mr. Garcia's jury was misinformed about the standard for finding mitigating evidence. The trial court omitted more than half the standard jury instruction on mitigating evidence. (R. at 1625). In doing so, the court failed to inform the jury that mitigation does not have to be proved beyond a reasonable doubt. Yet Mr. Garcia's trial counsel failed to object nor did he request the instruction. In doing so, trial counsel was ineffective. The lower court found this claim to be procedurally barred PCR. 540 (Note that Judge Carney=s order included the language that AThe State submits that this claim is procedurally barred”). Supp.PCR 877.

During his capital sentencing hearing Mr. Garcia presented evidence of mitigation which the trial court refused to find (R. 1638). According to his sentencing order the judge did not weigh this mitigation (R. 191-92). The judge failed to understand what constitutes mitigation, and thus erred as a matter of law in not considering and weighing the unrefuted mitigation. Mr. Garcia was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Skipper v. South Carolina, 476 U.S. 1 (1986); see also Lockett v. Ohio, 438 U.S. 586 (1978). This claim was found by the lower court to be procedurally barred below as raised on direct appeal and without merit. PCR 540., Supp.PCR. 880-83.

At sentencing, the trial court failed in its duty to play a role independent of the State's in making findings supporting the appropriate sentence. The lower court found that this claim, pursuant to Patterson v. State, 513 So. 2d 1257 (Fla. 1987), is procedurally barred and without merit. PCR 541, Supp.PCR 882-883.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956).

The existence of an accurate trial transcript is crucial for adequate appellate review. Id. In this case, many bench conferences took place off the record. (R. at 492, 870, 1019, 1038, 1096, 1306). The Sixth Amendment also mandates a complete transcript. The lower court found this claim to be Procedurally barred and without merit. PCR 541, Supp.PCR 884-85.

It was a violation of the Fifth, Eighth, and Fourteenth Amendments for either the jury or the trial court to consider Mr. Garcia's prior conviction. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988). This reversible error committed infected the penalty phase of the instant case resulting in an unreliable jury recommendation and death sentence, and further results in cruel and unusual punishment. The lower court found this claim to be procedurally barred and without merit. PCR. 541, Supp.PCR 885-86.

In Mr. Garcia's case, counsel failed to object to the use of the underlying felony in order to prove the existence of the corresponding aggravating circumstance. Counsel's performance was deficient and prejudiced Mr. Garcia. Because felony murder was the basis of Mr. Garcia's conviction, the use of the underlying felony as an aggravating factor violated the Eighth Amendment. State v. Middlebrooks, 840 S.W.2d. 317

(Tenn. 1992); Engberg v. Meyer, 820 F.2d 70 (Wyo. 1991). The lower court found this claim to be procedurally barred and without merit. PCR 541, Supp.PCR 886-89.

Mr. Garcia is insane to be executed. The lower court found this claim to be premature and summarily denied it without an evidentiary hearing. PCR 541, Supp.PCR 891. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane. Mr. Garcia does not waive any relief available pursuant to future holdings of this Court or the federal courts concerning the applicability in Florida of the rules of law derived from Ring v. Arizona, 122 S. Ct. 2428 (2002), related to jury sentencing and/or the constitutionality of the Florida death sentencing system. These issues were fully plead below. Supp.PCR at 893-909. The lower court summarily denied this claim without an evidentiary hearing. Supp.PCR. 927. This is notable in the circumstances where the death sentence imposed upon Mr. Garcia by the lower court in the case of victim Mabel Avery, was a override case where the jury verdict was a seven (7) to five (5) life recommendation. (R. 1629).

Mr. Garcia also does not waive consideration of his claim that Florida=s lethal injection and electrocution system of punishment violates the Eight Amendment and the rule of In re Kemmler, 136 U.S. 436, 443 (1890). The lower court also denied this claim without an evidentiary hearing. Supp.PCR 927. This claim was advanced in 2003 with newly discovered evidence that had not been heard below. Supp.PCR 909-910.

B. GUILT PHASE ERRONEOUS SUMMARY DENIAL

The lower court ordered an evidentiary hearing only on limited aspects of the claim of ineffective assistance for failure to properly cross-examine Rufina Perez. The areas noted here were from the portions of the claim that the lower court summarily denied. Supp.PCR 744-58.

Rufina Perez-Cruz testified that she knew and worked with Mr. Garcia as a migrant farm worker. (R. 1022, 1025). She claimed that they both worked for Guadalupe Trevino. (R. 1023). She testified that in January, 1983, she overheard a conversation that Mr. Garcia was having with some men on the other side of the road. (R. 1024-25). She stated that during

this conversation she was approximately ten (10) to twelve (12) feet away from Mr. Garcia. (R. 1025).

Ms. Perez-Cruz testified that she overheard Mr. Garcia say to these men "I got in trouble with these women, but I don't have to worry about it, because they are already in hell." (R. 1026). Ms. Perez-Cruz then said that one of the men asked Mr. Garcia the question "[t]e la shingastes?" Ms. Perez-Cruz defined this as "[d]id you fuck them up?" Id. Trial counsel failed to impeach Ms. Perez-Cruz by identifying the numerous meanings of the phrase "te la shingaste." This Mexican slang phrase refers also to having sex, explaining why the group of men may have laughed if in fact Mr. Garcia made such a statement to a group of co-workers. This is the likely reason Ms. Perez-Cruz believed Mr. Garcia and the others were "joking around." (R. 1027).

Ms. Perez-Cruz then testified that Mr. Garcia said "Yes, but I don't have to worry about them, because they are already in hell." Id. Ms. Perez-Cruz also testified that the way Mr. Garcia and the other men were expressing themselves, it appeared that "they were just like joking around or something like that." (R. 1027).

Ms. Perez-Cruz then testified that one of the men asked Mr. Garcia how he did it, to which Mr. Garcia responded that

"I went through the back door and I ripped out the screen door." At that point in time, Mr. Garcia noticed that the witness was listening and stopped the conversation. (R. 1027). She testified that she spoke to the police in 1983 and told them about this conversation. (R. 1028).

Ms. Perez-Cruz also testified that she did not know anything about a reward in this case or heard anything about money. (R. 1031). In fact, she stated that "[t]his is the first time I've ever heard of that. Are they going to give [it] now or what." (R. 1030-31).

During cross-examination, Diaz focused on questions that were irrelevant at best and useless at worst. Although counsel reiterated that Perez heard about the murders on the news before she heard the conversation between Mr. Garcia and the other men, Diaz failed to tie this information to a more important question: if Perez-Cruz actually heard this conversation and already knew about the murders, why didn't she immediately go to her boss or other co-workers? (R. 1038). Perez-Cruz stated that:

> What I heard in the news was that they were saying that these two old ladies got killed. When they said that they used the back door, it clicked off.

(R. 1038). Diaz didn't ask Perez-Cruz why she didn't immediately go to the police? Why did she think that Mr.

Garcia could have been "joking" during this alleged conversation? If this conversation "clicked off" the fact that she believed Mr. Garcia had some involvement with these murders, why didn't she immediately come forward? Diaz failed to ask any of these questions.

Diaz' main focus during the cross-examination was on the issue of who else was in the field the day Perez-Cruz supposedly heard this conversation. (R. 1040). He attempted to find out who Mr. Garcia was talking to and who Perez-Cruz was speaking with. (R. 1040, 1043).

Diaz never asked Perez-Cruz about the distance between herself and Mr. Garcia when she overheard this alleged conversation. (R. 1043).

Diaz didn't ask Perez-Cruz why she didn't say anything to the people around her and why didn't she discuss this alleged conversation with anyone. Diaz asked Perez-Cruz about whether or not she told anyone about this conversation, but failed to find out why. (R. 1043-44).

If Perez-Cruz were telling the truth, why didn't she immediately tell someone about this alleged conversation? If she didn't tell anyone because she thought that Mr. Garcia was joking, what changed her mind?

The lower court summarily denied the portion of this claim involving trial counsel's alleged ineffectiveness for failure to locate witness William Diaz based on a finding that the allegations were insufficient to state a claim for relief under Strickland. PCR. 532.

The attempt to locate William Diaz was plead in detail below Supp.PCR 733-735. Trial counsel Diaz' deficient performance, even with regard to such a basic and simple matter as subpoenaing defense witnesses, is manifest in the trial record.

The Friday before the State rested its case, Diaz put the State on notice that he was subpoenaing Dave Gilbert, Robert Heart, David Rose and William Diaz. (R. 892). Diaz told the court that witness William Diaz was in the custody of prosecutor Susan Dannelly, so he would be serving her. It is obvious from the record that Diaz got this information from the discovery in Mr. Garcia's 1988 trial. By the time he wanted to serve Mr. Diaz with a subpoena, Ms. Dannelly had no idea where the witness was and hadn't seen him in years. (R. 892-94). By failing to update the six year old discovery in this case, Diaz relied on the State to provide current information to help him to serve William Diaz as a defense witness. He gave up and never served William Diaz at all.

Likewise, the lower court summarily denied the portion of this claim involving trial counsel's alleged ineffectiveness for failure to properly prepare defense witness Ida Paz, the custodian of records for Mr. Garcia's employer, Mr. Trevino, based on a finding that the allegations were insufficient to state a claim for relief under Strickland. PCR. 532, Supp.PCR 735-36. Diaz subpoenaed Ms. Ida Paz to validate as custodian Mr. Garcia's previous work records. These records were found to be inadmissible during Mr. Garcia's 1988 trial, and this ruling of inadmissibility was the basis for the Florida Supreme Court reversing Mr. Garcia's conviction on direct appeal. At the end of the State's case, Diaz informed the court that he spoke to Ms. Paz about 11:00 p.m. the night before. (R. 1222). He said that Ms. Paz had told him she didn't think the subpoena he served her with was valid. He said that she stated him that she didn't think she could be held in contempt for failure to appear and that she wanted to talk to judge. (R. 1222). At this time, Diaz also informed the court that he needed transportation to get her to court. Id.

Ida Paz was a crucial witness in Mr. Garcia's case. As explained supra, the ruling of inadmissibility of the work records in her custody was the reason why Mr. Garcia's 1988

trial was reversed. Effective counsel would have initiated contact with this crucial exculpatory witnesses -- known to defense through past discovery for nearly six years -- at some point prior to the night before she was to testify.

Summary denial below of claim that trial counsel was ineffective due to failure to object to Agrossly improper behavior@ by the prosecutor, based on trial court=s finding that allegations were insufficient to state a claim under Strickland. PCR. 533, Supp.PCR 739-41. One of the functions of counsel is to make timely objections during trial. As with every other aspect of his representation of Mr. Garcia, trial counsel failed to adequately perform this basic duty.

Defense counsel failed to challenge the State's case by objecting to irrelevant testimony tending to make the law enforcement investigation of this case more thorough than it was. (R. 745-48). Diaz failed to object when the prosecutor elicited testimony from a law enforcement officer that there were never any other suspects in this case. (R. 1212-13).

Mr. Garcia was denied his right to effective assistance of counsel when counsel failed to object to a lay witness being called upon to give an opinion about serology and blood spatter evidence. (R. 798-800). This witness had no expertise, the State did not attempt to qualify him as an

expert, and he was not subjected to voir dire. He nevertheless testified to his opinion about how blood was deposited. Diaz was ineffective in failing to object to these questions and failing to retain a defense expert.

Diaz never addressed that accusation by the State that Mr. Garcia had a relationship with Irma Trevino, the daughter of Guadalupe Trevino. The truth was that Mr. Garcia had gone out with a third sister, Mary Lou. The portion of the claim alleging that trial counsel was ineffective in failing to show that Mr. Garcia did not have a relationship with Irma Trevino was summarily denied without an evidentiary hearing Aas the allegations are insufficient to state a claim for relief@ under the Strickland standard. PCR. 533, Supp.PCR 755. On cross examination, Diaz asked Perez about Ida and Irma Paz in terms of who actually kept the books and wrote the checks for Guadelupe Trevino. Diaz established that although Perez-Cruz normally went to Irma Paz, she didn't know what Ida Paz' responsibilities were. (R. 1045-46). Diaz very easily could have established that Mr. Garcia was no more involved with Irma Paz than he was with Ida, and that neither had a motive for forging these documents.

Diaz never addressed how long Mr. Garcia worked for Trevino. He began this line of questioning but abruptly

stopped. Perez-Cruz testified that Mr. Garcia was working for Guadalupe Trevino, but that she didn't know how long he had been working there. (R. 1047). She later stated that Mr. Garcia worked there every day. (R. 1050). This statement was simply untrue. Mr. Garcia worked for Mr. Wally Gomez on a consistent basis rather than for Mr. Trevino. Diaz failed to impeach her with this information. Mr. Garcia=s claim that trial counsel=s was ineffective when he failed to demonstrate that Mr. Garcia did not work for Guadalupe Trevino was summarily denied by the lower court Aas the allegations are insufficient to state a claim for relief@ under the Strickland standard. PCR 533.[16]

Diaz asked if she knew anyone else who worked there, to which Perez responded with the name of Enrique Fernandez, Mr. Garcia's co-defendant. (R. 1048). Once she responded with this name, counsel dropped his line of questioning, instead relying on the work records from Ida Paz to demonstrate where

[16]Rufina Perez testified in 2000 that some weeks Mr. Garcia never worked for Trevino. That he worked a day here and there. She also said that she never had a conversation with Mr. Garcia.

Mr. Garcia worked. (R. 1048). This was deficient performance.

Diaz should have called other witnesses to support Mr. Garcia's claim that he did not work extensively for Guadelupe Trevino.

The jury did question the credibility of Perez-Cruz' statements. Rufina's credibility was bolstered during the trial and during deliberations by the assertion that Perez-Cruz spoke to the police in 1983 and gave them the same story that she testified to at trial. That assertion was simply not true. The jury relied on false information and their verdict was tainted. Supp.PCR 755-58. The claim that counsel was ineffective for failure to properly cross-examine Feliciano Aguayo was also summarily denied Aas the allegations are insufficient to state a claim for relief@ under the Strickland standard. PCR. 533. See original claim at Supp.PCR 758-69. Feliciano Aguayo was also one of the State's most important witnesses. He and Elizabeth Feliciano, placed Mr. Garcia at their house the morning after the crime. Aguayo testified that Mr. Garcia seemed "upset" and "scared" that morning, and that he had blood on his clothing. (R. 953).

Aguayo testified that Mr. Garcia told him that he [Garcia] had been attacked by a couple of guys and a girl on the way

home from the Cuervo Bar, and that is how he got blood on him. (R. 955-56). Aguayo testified that Mr. Garcia stated that the guys and girl started beating on him for no reason, and that he stabbed one of the men and the woman with his knife. (R. 956-57). Aguayo stated that he saw Mr. Garcia's knife and that it was "full of blood " and that the knife had a bent tip. (R. 960-961).

Aguayo stated that he asked Mr. Garcia to explain to him where this attack took place and that Mr. Garcia did so (R. 963). Aguayo testified that he searched the area in which Mr. Garcia said he was attacked for signs of blood or trampled grass and did not find anything (R. 967-68).

Aguayo stated that he drove Mr. Garcia home that morning and while he was driving, Mr. Garcia repeatedly said "I told them not to make me mad. I have an animal inside of me." (R. 965). Once they arrived at Mr. Garcia's house, Aguayo testified that Mr. Garcia did not want to immediately go in, that he wanted to drive around a couple of times. (R. 966). When they finally went to the house, Aguayo said that Mr. Garcia did not want to go in the front door, thus implying that Mr. Garcia had something to hide. Id. Aguayo testified that he heard about the murders and told the police about Mr. Garcia coming to his house with blood all over him the day

after the murders. (R. 971, 1017). He also testified that he didn't know anything about a reward in this case and that he didn't get any money. (R. 971).

Trial counsel was unprepared in his cross-examination of one of the State's most important witnesses.

Trial counsel should have impeached Aguayo's credibility by bringing out the inconsistencies between Aguayo's testimony at trial and his initial statement to the police.

Had trial counsel investigated the relationship between the witnesses[17], he would have known the impact of Aguayo's January 18th arrest on the State's case. Because of their son's arrest, Elizabeth and Jorge Feliciano, and arguably Feliciano Aguayo, became involved in this case. Not only was Diaz ineffective in cross examining the State's main witnesses, he was also woefully unprepared to question the rest of the State's case, thus denying Mr. Garcia any adversarial testing. The lower court summarily denied the IAC claims as to failure to cross-examine Crime Scene Technician David Gilbert, Sgt. Anne Gribbon, Dr. John Marraccini, Ximena Evans, Sgt. Jim Radcliff, and Detective John LeClair (Supp.PCR 772, 773, 774), PCR 534. The lower

[17]According to Rufina=s deposition, Aguayo is married to Rufina=s sister, Linda. Elizabeth and Jorge are Aguayo=s parents. D20.

court also summarily denied the IAC claim for failure to properly prepare witnesses Ahair expert@ David Rhodes and crime scene technician David Gilbert (Supp.PCR 780-83; 777-80), PCR 534. There appears to be nothing about the claim concerning Ida Paz in the order. She is in this same IAC for failure to properly prepare claim at Supp.PCR 783-85.

The defense's first witness was Detective Technician Gilbert, who was involved in the processing of the crime scene on January 17, 1983 and who testified earlier during the State's case-in-chief. Through Gilbert, Diaz sought to introduce evidence of other suspects in this case, including Sam Randel (R. 1232-33), Charles Williams (R. 1235), John Conner Jr. (R. 1237) and Sam Jonovich (R. 1248). He also sought to illustrate through Gilbert that no items were discovered that belonged to the victims', i.e. alluding that the was no burglary in this case as no items had been discovered missing. (R. 1241, 1246).

Gilbert had no information in regards to any suspects other than John Conner Jr.; and the information that he provided in regards to Mr. Conner did not help the defense, but actually hurt it. In reference to John Conner Jr, a police suspect in the homicides, Gilbert was extremely vague and unhelpful in his recollections. (R. 1238, 1243). Gilbert

became a much better witness for the State on cross-examination. He testified that he did not find any evidence that a drifter or crazy person lived in woods near the victims (R. 1250-51). Gilbert's memory in regards to John Conner Jr. improved as well. He stated that Conner was tall, clean-shaven and that when he saw him, he was in parents' mobile home in Leisure City. Gilbert testified that he never saw John Conner Jr. living in the woods. (R. 1253).

Gilbert stated that he turned over hair samples from Conner to the evidence section at the request of Detective Gordel and that he never heard anything about Conner again. (R. 1254). Gilbert acknowledged that John Conner Jr. was a suspect at one time and that Sam Jonovich could have been a suspect, but he testified that by the end of this investigation, there were no other suspects in this case other than Mr. Garcia. (R. 1257-58).

As with David Gilbert, defense witness David Rhodes also worked for the Metro Dade Police Department. At the time of the trial, he was a serologist assigned to do blood typing, hair examination, and identifying body fluids. (R. 1261). Diaz attempted to use Rhodes as a defense hair expert to eliminate Mr. Garcia as the perpetrator in this case. Counsel's lack of preparation of this witness and/or his

negligence in failing to retain an expert in this area who might have helped the defense, prejudiced Mr. Garcia.

By the end of cross-examination, Rhodes stated that it was possible that the hairs from the rug didn't come from the same area of the body that Mr. Garcia's samples came from and that there was no way to know what part of the body the hairs found at the scene came from. (R. 1277-78). As far as he knew, he could have compared thorax hair with Mr. Garcia's head hair. Thus, he concluded that he could not make any positive conclusion about whether or not Mr. Garcia was the perpetrator in this case. (R. 1279).

Ida Paz is the daughter of Guadelupe Trevino, the man who employed Rufina Perez-Cruz. She testified as custodian of the work records of Perez-Cruz and Enrique Juares (alias Henry Garcia). (R. 1306, 1309). She testified during direct examination that Mr. Garcia last worked for her father the week ending 1-7-83 and that she supplied these records [to the police] years ago. (R. 1326)

During cross-examination, the State questioned the reliability of the records and the fact the witness did not remember whether the work records were given to Sergeant Radcliff when he spoke to her father in 1985. (R. 1318-21, 1327-28). The State in essence placed Ms. Paz' word against

that of Sergeant Radcliff in regards to whether these records were fakes.

As with the other witnesses, Diaz failed to adequately re-direct Ms. Paz. He failed to address key issues that had been attacked by the prosecution. In this instance, Diaz had difficulty in even getting his witness to trial. When Ms. Paz finally agreed to testify, Diaz failed to ask her questions which would have bolstered her credibility, which had been seriously placed into question by the State. Diaz' actions were unreasonable.

As stated supra, at the end of the State's case, Diaz informed the court that he was having difficulty in obtaining Ms. Paz as a witness. He in fact spoke to Ms. Paz and said that she didn't believe the subpoena he served her with was valid. She stated him that she didn't think she could be held in contempt for failure to appear and that she wanted to talk to judge. (R. 1222).

Trial counsel Diaz blamed Ms. Paz for her failure to appear, rather than taking the blame himself. At the beginning of the defense case, Diaz requested a recess until Ida Paz could be brought in. He told the judge that he had served Ms. Paz with two subpoenas, and informed the judge that, although he was hesitant to do so, he would agree to

have her arrested to ensure that she testified. (R. 1227). It was only through the efforts of the trial court and the State Attorney that Ms. Paz was located and became a witness for the defense. (R. 1227-29).

Trial counsel may have spoken to Ms. Paz the night before and the morning the defense case began. (R. 1226). Not only does it appear that trial counsel did not prepare Ms. Paz for her direct examination, he also failed to address the bias issues raised by the State. Instead of asking Ms. Paz about her sister Irma and her alleged intimate relationship with Mr. Garcia, he asked about one of her other sisters, Irene. (R. 1035-36, 1308). This line of questioning made Diaz appear unprepared and disingenuous to the jury, especially since it was caught by the State and pointed out to the jury during closing argument. (R. 1407). Trial counsel should have known that his client once dated another sister, Mary Lou, not Irma or Irene.

Diaz did not adequately defend against the State's assertion, through Sergeant Rafcliff, that he had asked for the Garcia work records in 1985 and did not receive them, implying that they did not exist.

Diaz' closing argument on behalf of Mr. Garcia was clearly not ably integrated. For one thing, he was severely

hampered in summarizing the evidence by the fact that he had not presented much to summarize and had not confronted the State's case diligently. The wealth of exculpatory and, at a minimum, reasonable doubt-producing evidence painstakingly detailed in the above sections was not presented and was therefore unavailable for argument purposes. Thus, because he had done such a poor job at trial, Diaz was fairly well doomed to doing a poor job in closing. The failure to present an effective closing argument claim was summarily denied by the lower court because allegations were deemed to be Ainsufficient to state a claim for relief@ under the Strickland standard. PCR. 535.

Due to the fact that Diaz had not adequately investigated and prepared for this case, he had little of substance to present in closing. He did not present evidence that the three main witnesses at trial were all related to each other and were biased. Diaz' closing argument for Mr. Garcia was worse than unhelpful; it was affirmatively harmful. Throughout his closing he repeatedly referred to the "horrible" pictures in this case, that the deaths were "horrible," and that the crime was "horrible." (R. 1372, 1373, 1375, 1383, 1394).

These statements were completely unnecessary and may have inflamed the jury's passions even more. Original claim can be found at Supp.PCR. 786-89.

More of the State's case went to tearing down the straw-man alibi it constructed through Aguayo's hearsay evidence than was devoted to proving any connection between Mr. Garcia and this crime. Indeed, the State could prove no such connection. The State's case was not that Mr. Garcia was at the scene of the crime, but that he could not have been where he allegedly said he was. Trial counsel objected to the State's shifting of the burden of proof through the use of the straw man (R. 34-37) but failed to raise the constitutional objection that the State's strategy violated the Due Process Clause of the Fourteenth Amendment and principles of In re Winship, 397 U.S. 358 (1970), Cool v. United States, 409 U.S. 100 (1972), and Mullaney v. Wilbur, 421 U.S. 684 (1975). Thus the materiality of defense counsel's failure to challenge this aspect of the State's case is obvious. Summary denial of claim that trial counsel was ineffective for failure to object to the State=s Astraw man@ alibi allegations were deemed by the lower court to be insufficient to state a claim for relief@ under the Strickland standard. PCR. 535.

Courts have long recognized that it is constitutionally impermissible for a criminal defendant to be called upon to prove an alibi. Here the State went far beyond introducing Mr. Garcia's exculpatory statements. The State put on an elaborate display, using plat maps so large the proceedings had to be moved to another courtroom. The prosecutor also made several remarks calling upon the defense to prove the bias of witnesses to which trial counsel made no objection. (R. at 1362). This was deficient performance. The prejudice to Mr. Garcia lies in his having been denied a right fundamental to the fairness of a criminal trial: not to be called upon to prove one's innocence. Supp.PCR 789.

The lower court summarily denied an evidentiary hearing on the guilt phase aspects of the claim below pursuant to Ake v. Oklahoma, 105 S. Ct. 1087 (1985) related to obtaining the assistance of a competent mental health expert, neurologist and toxicologist. Supp.PCR 820-825. The lower court justified this finding because Athere was no request by defense counsel for these experts which was denied by the trial court.@ PCR. 536. This finding is not relevant to the claim. This summary denial does not square with the court=s finding that there should be a hearing on the issue of failure by trial counsel to present a voluntary intoxication defense.

Mr. Garcia should have been allowed to present expert testimony to show what Mr. Diaz could and should have presented in support of an intoxication defense. A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). This is certainly the case when an intoxication defense is being investigated and prepared. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

In Mr. Garcia's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). In fact, trial counsel failed to provide any expert at all.

The state in this case charged Mr. Garcia alternatively under the theory of premeditated first-degree murder or felony murder. In regards to the charge of premeditated first-degree

murder, it is counsel's assertion that this was an legally impossibility due to Mr. Garcia's intoxication level the evening of the offense, thus prohibiting the formation of the necessary element of intent for the crime of premeditated murder. As such, it was impossible for him to be convicted of first degree premeditated murder in this case. The lower court held that the record conclusively refuted this claim. PCR 538, Supp.PCR 850. Testimony from a qualified mental health professional would have provided the jury with an understanding of how alcohol would affect one's mind and how it could obstruct the formation of intent. Such testimony was available to be presented at an evidentiary hearing, as is evident from the expert depositions and reports cited in *Argument I*.

In regards to the charge of felony murder, there was no evidence presented at trial that a robbery ever took place, other than the fact that certain personal items of the victims were not located at the house, such as pocket books or wallets. (R. at 752). The charge of sexual battery was conceded by Mr. Garcia's trial counsel without his consent. It was due to counsel's ineffectiveness that no evidence challenging the sexual battery was ever brought forth.

Defense counsel did not object to the expert witness instruction given at trial. (R. 1435). This claim was found below to be procedurally barred and was summarily denied on the merits. PCR. 539, Supp.PCR. 858-59. By permitting the jury to accept or reject an expert's qualification in a field, a question of law reserved exclusively for the Court, the instruction at issue here allowed the jury to reject the expert's opinions with no legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). In so instructing the jury, the Court violated Mr. Garcia's fundamental right to present a defense, guaranteed by the Sixth and Fourteenth Amendments.

This Court also allowed the medical examiner to testify beyond the scope of his qualifications. The State offered detailed testimony about the pain suffered by the victims through the medical examiner's testimony. Mr. Garcia's trial attorney failed to object that these opinions were beyond the scope of a pathologist's expertise.

Defense counsel unreasonably failed to request a change of venue, denying Mr. Garcia the effective assistance of counsel. Not only were the jurors exposed to pretrial coverage, they were also exposed to newspaper articles and television stories shortly after the trial began. (R. 709-

718). In light of the pretrial, and later, media coverage in this case, there can be no strategic or tactical reason for defense counsel's omission. Mr. Garcia was deprived of his right to a fair and impartial jury. Mr. Garcia's trial did not comport with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Garcia's jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963). This claim was summarily denied below without a hearing PCR. 540, Supp.PCR 878-80.

The trial court's bias in favor of the State is evident in the record. On numerous occasions the trial court deferred to the legal conclusions of an assistant state attorney as though she was his law clerk and not a representative of the State (R. at 890-91, 1516, 1530). At one point there was a suggestion that the court and this assistant state attorney may have engaged in ex parte communication regarding what case law applied to a situation where a juror may have been excludable (R. at 890-91). Later, the trial court indicated its deference to the State and its lack of regard for the prosecutor as an adversary in the proceedings when the court asked "for a dispassionate legal opinion" to resolve a dispute between another prosecutor and the defense (R. 1530).

Counsel's failure to object to the trial court's obvious bias was deficient performance which prejudiced Mr. Garcia. This claim was found below to be procedurally barred and summarily denied on the merits. PCR 541, Supp.PCR 889-91.

Mr. Garcia was prejudiced by the Court's improper and biased conduct, and by his counsel's failure to object to such conduct. The other allegations were deemed to be insufficient to state a claim for relief@ under the Strickland standard. PCR 534. Thus the claim related to impeachment with her prior statements was summarily denied. Supp.PCR 769-71.

Elizabeth Feliciano was the last of the State's star witnesses. She testified that she was getting into the shower on Sunday morning when she saw Mr. Garcia through the window, running towards her house. (R. 813-14). She said that she picked up her clothes and went to tell her husband [Jorge Feliciano] that somebody was at the door. (R. 815). Her husband woke her son, Feliciano Aguayo, who then came out to meet Mr. Garcia. Aguayo and Mr. Garcia went outside to talk. (R. 816). She testified this occurred at about 7:00 a.m. (R. 818).

Mrs. Feliciano testified that Mr. Garcia had blood on his clothing. (R. 817). Her son Feliciano took Mr. Garcia home and then returned. Id. She testified that she accompanied her

son and his wife to "check out" the area around the Dade Correctional Institute [where Aguayo stated that Mr. Garcia's fight occurred]. (R. 819, 835). Mrs. Feliciano also described the weather the preceding night as rainy, and the weather on that Sunday as wet and cloudy. She stated that Mr. Garcia wasn't wet or dirty when she saw him. (R. 820).

On cross-examination, Mrs. Feliciano testified that she spoke to the police about this case in 1983. (R. 822). Trial counsel appeared to be surprised by the statement, and dropped the line of questioning. (R. 822-23). In doing so, he lost a significant opportunity to impeach the witness with her prior statement.

Trial counsel's failure was unreasonable and deficient performance. In Mrs. Feliciano's initial interview with the police, she told the police that on the morning that Mr. Garcia came to her house, she did not see him because she was taking a shower. PCR. 567. This is certainly a very significant difference from her testimony. She also failed to make any mention that she and her son Feliciano "checked out" Mr. Garcia's story regarding the fight he had Saturday evening. Mrs. Feliciano should have been impeached on cross examination by Mr. Diaz with these discrepancies along with her relationship to Rufina Perez.

ARGUMENT VII

CUMULATIVE ERROR

It is Mr. Garcia's contention that the process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). The lower court found this claim to be procedurally barred and summarily denied it without an evidentiary hearing. PCR 542, Supp.PCR 892. This Court must consider the cumulative effect of all the evidence not presented to the jury whether due to trial counsel's ineffectiveness, the State's misconduct, or because the evidence is newly discovered. Kyles v. Whitley, 514 U.S. 419(1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1994); Swafford v. State, 679 So. 2d 736 (Fla. 1996). All the information discussed in this claim goes not only to the guilt-innocence phase, but also undermines the jury's 12 to 0 death recommendation in the Julia Ballentine case. Summarily denied below at PCR. 536.

CONCLUSION

Mr. Garcia requests that this Court, after a review of the entire record of the case, return this case to circuit court so that a proper colloquy can be undertaken as to the

alleged waiver of certain penalty phase claims noted elsewhere upon which an evidentiary hearing had been granted. In addition, appellant requests that this Court return the case to circuit court for evidentiary hearing on those claims that the lower court improperly denied without a hearing, and whatever additional relief this Court deems to be appropriate based on the evidentiary development below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Sandra S. Jaggard, Assistant

Attorney General, 444 Brickell Ave., Rivergate Plaza, Suite 950, Miami, FL 33131 on July 26, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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