IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1316

HENRY GARCIA,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This first petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Garcia was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. page number). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Garcia's convictions and sentences of death.

Jurisdiction in this action lies in the Court, see, e.g. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the

fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Garcia's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Garcia requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Miami-Dade County, entered the judgments of conviction and sentence under consideration.

Mr. Garcia was indicted on October 8, 1985 for two counts of first-degree murder, one count of sexual battery and one count of armed burglary.

Mr. Garcia was first tried and convicted in May 1988 and was sentenced to death. On direct appeal, the Florida Supreme 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, the 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. (R. 1629). 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. 1640-41).

In justifying the death sentences, the trial court found the following aggravating circumstances: (1) the capital felony was committed by a person under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony or of a felony involving a threat of violence to the person; (3) the capital felony was committed while the defendant was engaged in the commission of a sexual battery; and (4) the capital felony was especially heinous, atrocious, or cruel. The lower court found no mitigating factors.

On the direct appeal following the retrial, the Florida Supreme Court affirmed Mr. Garcia's convictions and sentences. Garcia v. State, 644 So. 2d 59 (Fla. 1994), cert. denied, 115 S. Ct. 1799 (1995).[1]

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[1]Appellate counsel for Mr. Garcia raised the following issues in the initial brief:

Mr. Garcia filed his original Rule 3.850 motion for post conviction relief on March 26, 1997. After a period of litigation in the circuit court regarding public records and other issues, Mr. Garcia filed his "Amendment to Consolidated Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request

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Guilt Phase
(1) The trial court erred in denying Mr. Garcia's motions for judgment of acquittal on the murder, sexual battery, and armed burglary charges; (2) The trial court erred in instructing the jury as to the elements of the offense charged; (3) The trial court erred in reading some portions of the trial testimony to the jury and in failing to read other portions; (4) The trial court erred in allowing the prosecutor to introduce inadmissible and prejudicial hearsay; (5) The trial court erred in admitting and allowing the improper uses of inflammatory photographs, the unfair prejudice of which outweighed their relevance; (6)The trial court erred in denying Mr. Garcia's motion in limine and in overruling objections to the State's efforts to place a burden on Mr. Garcia to prove his innocence by proving a defense he never raised at trial; (7) The trial court erred in instructing the jury on circumstantial evidence; (8)The trial court erred in excusing a juror based on the juror's inconsistent and inconclusive comments regarding the death penalty; (9)Prosecutorial misconduct throughout the trial deprived Mr. Garcia of a fair trial; (10) The cumulative effect of the errors mandates reversal.

Penalty Phase
(1)The trial court erred in finding that the capital felonies were committed by a person under a sentence of imprisonment; (2) The trial court erred in finding that Mr. Garcia was previously convicted of a felony involving the use or threat of violence to the person; (3) The trial court erred in finding that the capital felonies were committed while Mr. Garcia was engaged in the commission of a sexual battery; (4) The trial court erred in finding that the capital felonies were especially heinous, atrocious and cruel;(5)The trial court erred by the doubling of aggravating circumstance in sentencing for the killing of Julia Ballentine;(6)The trial court erred in rejecting and/or failing to consider any mitigating factors; (7) The trial court erred in enhancing the sentences for sexual battery and burglary (I.B., pp. i-iv)

for Leave to Amend" on June 18, 2003. (Supp. PCR 716-912). After a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), the court granted an evidentiary hearing on some claims and denied others. (PCR. 531-543). The evidentiary hearing was conducted in November 2003 and the trial court entered an order denying relief on April 14, 2004. (PCR. 568-571). Mr. Garcia appealed, and his Initial Brief is being filed simultaneously with this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH.

Mr. Garcia had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Garcia's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said

that the "adversarial testing process worked in [Mr. Garcia's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Garcia's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Garcia involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE A COMPLETE APPELLATE RECORD AND TO PRESERVE ISSUES CONCERNING THE RECORD UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A. Introduction

Appellate counsel for Mr. Garcia failed to ensure that a complete record of the lower court proceedings was compiled.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 195 (1971); Entsminger v. Iowa, 386 U.S. 748, 752 (1967). Eighth Amendment considerations demand even greater precautions in a capital case. See, Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the Eighth amendment. See, Proffitt v. Florida; Dobbs v. Zant, 113 S.Ct. 835

(1993), Johnson v. State, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, §3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).

Critical and material transcripts of proceedings from the record on appeal were omitted from Mr. Garcia's record. For example, there were several bench conferences that were apparently not recorded. (R. 492, 869, 1019, 1096, 1038). Appellate counsel had the duty to ensure that the record was complete and should have sought to reconstruct the record in the lower court in reference to key issues that were raised on direct appeal. See e.g. Johnson v. State, 442 So. 2d 193(Fla. 1983). Appellate counsel was therefore prevented from rendering effective assistance in the absence of a complete record. Moreover this Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1996). When errors or omissions appear, as here, re-examination of the complete record

in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

B. Testimony of Material Witness Rufina Perez-Cruz

This Court considered and rejected Mr. Garcia's claim that "The court erred in reading portions of the testimony to the jury." (Garcia v. State, 644 So. 2d 59 (Fla. 1994); See I.B., p. 15-22). However, this Court did not specifically address the merits of Mr. Garcia's argument that the lower court erred in agreeing to change the record concerning the testimony of Rufina Perez-Cruz at the behest of the prosecutor. (I.B., p. 18-20).

On appeal, Mr. Garcia argued that he was prejudiced by the lower court's decision to change Ms. Perez-Cruz' statement from "te la chingastes" to "te las chingastes," in direct contravention as to what was transcribed by the court reporter. This was a material issue at the trial in that her testimony was used by the State to establish that Mr. Garcia was talking to other men about two victims and not one woman. (R. 1360). Rufina Perez-Cruz played an important and critical role in Mr. Garcia's trial.

Once the jury was sent out to deliberate, they came back with questions three times, and all three times they asked that the testimony of Rufina be read back to them. During their initial request, the jury asked that her testimony as to what she heard

Mr. Garcia say be reread to them. (R. 1447). The jury then made a second request for information during deliberations, asking, among other things, that the court reread Rufina Perez-Cruz' entire testimony. (R. 1494-96). Finally, the jury again requested that testimony of Rufina Perez-Cruz' regarding when she first spoke to the police read back to them. (R. 1547).

Appellate counsel should have sought relinquishment to the trial court for an evidentiary hearing on the actual words used by the witness. See Johnson v. State, 442 So. 2d 193 (Fla. 1983). The failure to do so was deficient performance.

C. Read-back of testimony of David Rhodes

The direct appeal attorney also rendered ineffective assistance of appellate counsel in his presentation of the issue regarding the read-back of David Rhodes' testimony. Appellate counsel asserted that the read-back should have been transcribed but did not argue that the failure to record the read-back was a violation of due process under federal law. See Parker v. Dugger, 111 S.Ct. 731, 739 (1991)

The testimony of David Rhodes was complex, detailed and scientific. This testimony was material in that it highlighted that the physical evidence excluded Mr. Garcia as a perpetrator and that someone else committed the crimes. David Rhodes 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).

Rhodes testified that he was given hair evidence to examine during the initial investigation of the murders. (R. 1265). He stated that a hair was found on one of the victims, and that there were hairs found on a rug from Julia Ballentine's room that were similar in texture to the one hair found on the victim's body. (R. 1266). Rhodes testified that these were not the victim's hairs, but were of brown Caucasian origin. (R. 1267). Rhodes testified that there was some kind of foreign matter on the hairs, some sort of encrusted material on them. (R. 1267). He stated that the material could have been dirt among many other things. Rhodes stated that the material on the hair could be caused by someone not bathing or who was not very tidy in his appearance. (R. 1268). Rhodes compared a hair sample from Mr. Garcia and came to the conclusion that the hairs at the scene did not come from Henry Garcia. (R. 1268-699).

Given that appellate counsel recognized the significance of this witnesses testimony to the defense, it was incumbent upon him to seek a remand to the lower court for reconstruction of the record.

CLAIM III

APPELLATE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO THE TESTIMONY OF ROSE FLIGHT.

A. The appellate attorney was ineffective in failing to raise on appeal the introduction of highly prejudicial "victim impact evidence" that served to improperly garner sympathy from the jury.

Rose Flight was a neighbor of the victims in this case and she was the first witness the prosecutor called for the ministerial purpose, according the trial court, of "identification." (R. 421). The State chose to improperly use this witness for the express purpose of garnering sympathy with the jury, thus setting the tone and theme for the entire trial. The State, from the very beginning sought to have Mr. Garcia convicted and sentenced to die based on the frailities of the victims and the nature of the crime itself. The challenge raised on direct appeal concerning witness Rose Flight and the improper appeal for sympathy did not begin to apprise this Court of the magnitude of the impact on Mr. Garcia's right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution.[2]

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[2]The appellate attorney only raised the problems with respect to Mrs. Flight's testimony in the context of his argument on the prosecutor's misconduct that took place throughout the trial. He argued that the prosecuting attorney's act of helping Ms. Flight to the stand, coupled with the references to contacting the

The prosecutor impermissibly used this witness to admit irrelevant and highly prejudicial "victim impact evidence" and hearsay and to garner sympathy for the jury in violation of Mr. Garcia's right to a fair trial. Rose Flight had a key to the victims' home and went to the house to check on them after another neighbor had raised a concern for their well-being. She was able to identify the victims and the only purpose of her testimony should have been to tell the jury how the deaths were discovered. The State seized on the opportunity to introduce irrelevant and prejudicial evidence:

> Q. (ASA Dannelly) Did you used to know two ladies by the name of Julia Ballantine and Mabel Avery?
>
> A. (Rose Flight) Yes, I did, very well. I knew them for ten years, and the last two years, I was really close to them because they both had cars and they gave them up, so they couldn't drive. One was 86, and one was 90 already, and so they asked my husband and I if we would take them wherever they had to go, to shopping, to the doctor, library, wherever, and we took then wherever they wanted to go.
>
> Q. Can you tell the members of the jury a little bit about Mabel's interests and Julia's interests?

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deceased's sister - who was a nun - was inflammatory and improperly garnered sympathy from the jurors. (R. 622 -623, I.B., p. 56). The entire argument on this issue was less than one page. The appellate attorney did not address the State's improper opening statements, the hearsay that was introduced through Rose Flight, or the emotional verbal attack on defense counsel. Appellate counsel also failed to argue that the misconduct rose to the level of fundamental constitutional error under federal law.

A. Mabel was the youngest one, and she used to love books, and everytime she would call, she would ask me to take her to the library. She would always have a shopping bag full of books.

The librarian would let her take a whole bag because she was just a reader. She just read from morning until night, and she used to go out and get the paper at around 6:00 every morning, and she would read the paper before her sister would get up, and she would also save the sports section because she knew my husband loved sports, so she would bring it over, as a rule, every morning after she had read the paper.

Mabel would read her library books, and she would call again, and I would take her back and refill her grocery bag with books. That what we used to say, because she was such a book worm.

Julia was 90 years old, and she was real frail, but she was spunky for her age. She was a crossword puzzle fan. She would work every crossword puzzle that anybody would give her.

For her birthday, for any holiday or anything, everybody used to bring her crossword puzzles, because she would work from morning until night. That was her hobby while Mabel was reading.

(R. 817-818).

The defense's objection to the following on relevance was overruled:

Q. Did you have occasion, you and your husband, Edward, to take Mabel and Julia to the doctor when they needed to go?

A. Oh, yes, for check-ups. We took them wherever they needed because they were without a car, and so my husband and I, we would take them to wherever they needed to go. They went to the same doctor we went to.

(R. 619).

Mrs. Flight then proceeded to tell the jury how she came to go over to the victims' home that morning in a narrative fashion, peppering her story with irrelevant and prejudicial hearsay regarding the conversations she had with her neighbors. (R. 619-621). The defense attorney objected to the fact that the prosecutor helped the witness to the stand and he objected to the narrative and irrelevant hearsay as well as the prejudicial nature of the testimony. (R. 624). Appeals to bias, passion and prejudice are entirely improper. Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984). The issues were preserved for appeal.

In the direct appeal, this Court was only apprised that the witness gratuitously made reference to the fact that the niece of the deceased was a nun and that the prosecutor had helped the witness to the stand.[3] Furthermore, appellate counsel was ineffective in failing to argue that the prosecutor's conduct was fundamental error or to preserve the issues surrounding Mrs. Flight's testimony under federal law.[4] The fact that an elderly woman provided irrelevant and prejudicial testimony that tended to garner sympathy with the jury may not in and of itself rise to the

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[3]This Court addressed and rejected Mr. Garcia's challenge in the issue of prosecutorial misconduct with respect to the State's improper closing arguments. This Court held that the remaining claims on this issue were either procedurally barred, or without merit. Garcia, 644 at 62-63.

[4]See Old Chief v. U.S., 519 U.S. 172 (1997).

level of reversible error. However, a review of the State's opening reveals that the prosecutor planned to present irrelevant information and make gratuitous religious references before the jury:

> And Mrs. Flight, who had the closest relationship with the sisters, and was, in fact, familiar with their family, had the task fall upon her to call one of the nieces, who was a nun up in New York, and let the Mother Superior know that the aunt and the sister had been murdered, and that the other aunt, as well, had been raped, and the family had to travel to Miami and make the appropriate arrangements.

(ASA Dannelly, opening statement, R. 587).

Most of the information provided by Mrs. Flight was irrelevant and not material to any fact in dispute: not the sisters hobbies and their personal endearing characteristics; not the sisters' friendship with the Flights; not that they could no longer drive or how they got to their doctor's office; and certainly not that their niece was a nun. Neither was the hearsay that Mrs. Flight relayed concerning the discussions among the neighbors the morning of the crime. Fla. Stat. 90.401; (relevant evidence is evidence tending to prove or disprove a material fact.) The only purpose of this testimony was to garner sympathy: nothing about their lives was relevant in the guilt phase of the trial and the introduction of this highly prejudicial evidence deprived Mr. Garcia of his right to a "dispassionate a trial as possible and to prevent interjection of matters not germane to the

issue of guilt." Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981).

The error of allowing this witness to testify violated Mr. Garcia's right to a fair trial under the U.S. Constitution especially in light of the fact that defense counsel offered to stipulate to the identity of the deceased women. (R. 624); See Old Chief v. U.S., 519 U.S. 172 (1997); Brown v. State, 719 So. 2d 882, 887 (Fla. 1998); Fla. Stat. 90.403. There was no real probative value in Mrs. Flight's testimony - even as to her description of the events that occurred the morning that the victims were discovered. The trial court should have excluded this testimony because it was a "matter of scant or cumulative force, dragged in by the heels for the sake of its prejudicial effect." U.S. v. Roark, 753 F.2d 991 (11th Cir. 1985).

"Under our law, the prosecutor has a duty to be fair, honorable and just . . . [T]he prosecuting attorney 'may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984), citing Berger v. United States, 55 S. Ct 629 (1935). The prosecutor's actions throughout Mr. Garcia's trial exceeded the bounds of zealous advocacy and resulted in plain error requiring reversal.

B. Appellate Counsel was ineffective in failing to raise on appeal the trial court's error in denying the motion for mistrial following the witness's emotional outburst.

The emotional outburst displayed by Mrs. Flight as she left the witness stand only served to compound the prejudice to Mr. Garcia. The trial attorney informed the trial court that the witness "thanked the Court, thanked the prosecutor, looked at me and advised me that she had just had three heart attacks, in a not very friendly fashion" and moved for a mistrial on that basis. (R. 629) The witness's conduct engendered sympathy both for her as well as the deceased, and antagonism for Mr. Garcia, depriving him of a fair trial. Ms. Flight's conduct was similar to the situation in the case cited by the trial attorney where the witness interspersed her testimony with "impassioned statements evidencing her hostility" toward the defendant. See Rodriguez v. State, 433 So. 2d 1273 (Fla. 3rd DCA 1983).

The lower court's refusal to grant the mistrial was an abuse of discretion under the circumstances of this case. In Mr. Garcia's case, the State used this elderly witness during her direct testimony in a flagrant effort to garner sympathy for the elderly victims. The witness's verbal attack on defense counsel can only be viewed as an intentional effort to disparage Mr. Garcia and his attorney. There is a qualitative difference between what happened at Mr. Garcia's trial and a situation where

a victim or witness, as a result of a natural impulse, cries in the presence of the jury. See e.g. Burns v. State, 609 So. 2d 600 (Fla. 1992)(defendant not denied a fair trial where the victim's wife, in the audience, was crying and the attorney did not request a mistrial); See also Torres-Arboledo v. State, 525 So. 2d 403 (Fla. 1988) cert. denied, 488 U.S. 901 (1988).

The trial judge exhibited bias and abused his discretion by relying on his own perception of the incident concerning Mrs. Flight instead of properly questioning the jurors with respect to what they heard. The trial court stated, "Insofar as the Court's interpretation of what she did, the woman, I could almost to a certainty say the jury didn't hear her." (R. 631). For example, in the case of Arbelaez v. State, 626 So. 2d 169 (Fla. 1993), the witness yelled at the defendant in Spanish during her testimony. The lower court in Arbelaez denied the motion for mistrial only after first questioning the jurors as to what they heard and then determining, based on their answers, that they could disregard the outburst. The lower court also gave the jurors in the Arbelaez case a cautionary instruction.

In Mr. Garcia's case, the trial court failed to determine whether what the jurors heard and whether they could remain impartial in light of Mr. Flight's emotional outburst. The appellate attorney should have raised this issue, especially in the context of the fact that the prosecutor walked this woman to

the stand and then used her to introduce irrelevant and inflammatory evidence. The failure to raise this issue was deficient performance that resulted in prejudice to Mr. Garcia.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE TRIAL COURT'S RULING ON EVIDENTIARY ISSUES THAT ALLOWED THE STATE TO IMPROPERLY ATTACK THE VERACITY OF KEY EVIDENCE PRESENTED BY THE DEFENSE.

A. Introduction: The importance of the payroll records on the ultimate outcome.

The direct appeal attorney provided ineffective assistance of counsel concerning the substantial errors surrounding the defense's admission of payroll records in order to impeach one of the State's star witnesses. The payroll records were introduced to show that Henry Garcia was not working at the labor camp at the time that Rufina Perez testified that she heard him make inculpatory statements. Therefore, she was either mistaken or lying when she said that she heard him make the statements. Appellate counsel's failure was particularly egregious considering that this Court reversed Mr. Garcia's first convictions in this case due to the improper exclusion of the payroll records. See Garcia v. State, 564 So. 2d 124 (Fla. 1990).

In the Initial Brief on direct appeal, Mr. Garcia correctly argued to this Court that the prosecutor's misstatements of fact

concerning the reliability and veracity of the payroll records amounted to misconduct. (See I.B., p. 52-55).[5] However, the appellate attorney neglected to point out several errors that were clearly preserved for the record and pertained directly to the veracity of the payroll records. The trial attorney objected to the State's introduction of irrelevant evidence concerning the star witness's social security number; to the improper "anticipatory" impeachment; and to the violation of the rule of sequestration.

B. The appellate attorney was ineffective in failing to raise on direct appeal the trial court's error in allowing Rufina Perez-Cruz to testify about irrelevant issues.

Rufina Perez-Cruz was called by the State to testify to her story that she heard Mr. Garcia make incriminating statements while they were at work at the labor camp. (R. 1024-1027). Ms. Perez-Cruz was the State's star witness and her damaging testimony gave the prosecution its only link between Mr. Garcia and the crime.[6] The prosecutor then asked a series of irrelevant questions

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[5]In the direct appeal opinion, this Court found that most of the claims of prosecutorial misconduct were either procedurally barred, without merit, or harmless beyond a reasonable doubt. Garcia, 644 So. 2d at 62-63.

[6]The rest of the State's case-in-chief consisted of the State's improper and unconstitutional efforts to force Mr. Garcia to prove that the statements he made to witness Feliciano Aguayo

about the witness's social security number and whether she supplied it to her employer. (R. 1032-1034). The trial attorney's objection to this was overruled, yet it was not raised on appeal. (R. 1032). The witness responded on cue: "I always apply every year for social security income tax returns, or whatever it's called." (R. 1033). The witness made a speech about unscrupulous crew leaders who do not pay social security so that was why, "Even if I work one day, if they are going to pay me that day, I tell them always, 'here's my social security number, so take whatever you have to take from there.'" (R. 1034).

It did not become clear until later in the trial that the State wanted to improperly bolster Ms. Perez-Cruz's testimony while casting doubt on the veracity of the payroll records. (R. 1409). In any event, at the time the question was asked and answered, it was not relevant for the purpose of proving any material fact in issue nor did the information ever become relevant. In Burns v. State, 609 So. 2d 600 (Fla. 1992), this Court did not allow this type of attack on the defense:

> The challenged testimony . . . was not relevant to any material fact in issue . . .Comments made by defense counsel during opening statement do not 'open the door' for rebuttal testimony by state witnesses on matters that have not been placed in issue by the evidence.

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and Detective John LeClair regarding his activities on the night of the crime were true. (I.B., pp. 31-34.)

Burns at 605.

The speech concerning Mr. Perez-Cruz's desire to make sure that her employers' have her social security number should have been excluded from evidence. cf. Jacob v. State, 546 So. 2d 113, 115 (Fla. 3rd DCA 1989)(anticipatory rehabilitation of a witness on direct examination is not allowed.)

C. The appellate attorney was ineffective in failing to raise on direct appeal the trial court's error in allowing the State to improperly impeach Sgt. Radcliff.

The trial attorney also objected to the prosecutor's attempt to improperly discredit the defense during the State's case-in-chief. (R. 1087-1088, 1099-1100). The prosecutor called Sergeant Radcliff to the stand to show him State's Exhibit 3-J and 3-I so he could say that he had never seen them before.[7] (R. 1088). These documents were shown to the witness for the express purpose of discrediting the defense, yet they had not even been offered into evidence. Burns v. State, 609 So. 2d 600 (Fla. 1992) The inadmissibility of Sgt. Radcliff's testimony on direct, as well as the improper use of the exhibits, should have been raised on direct appeal.

The act of showing this witness documents that the prosecutor knew he had never seen was improper and amounted to a dog and pony

[7]The prosecutor later told the jury that these exhibits were the payroll records for Henry Garcia and Rufina Perez-Cruz. (R. 1406).

show intended to mislead and confuse the jury. In fact, it appears Sergeant Radcliff answered the trial attorney's questions candidly from his perspective and his answers clearly demonstrated why he would never have seen the documents. In the Sergeant's mind, "We knew [Henry Garcia] was there. We knew Rufina Perez-Cruz was there. We were trying to find a group of people he was talking to." (R. 1090). The Sergeant appeared genuinely confused and could not seem to see any reason why he would have looked for the payroll records for either Mr. Garcia or Ms. Perez-Cruz: "There was a conversation that took place between Henry and some other people. We hoped to gather the names of the other people." (R. 1091)(emphasis added). The impropriety of the State's line of questioning as "anticipatory impeachment" of defense evidence that had not yet been offered was objected to and preserved for review. (R. 1087-1088, 1099-1100).

D. The appellate attorney was ineffective for failing to raise on direct appeal the trial court's abuse of discretion in allowing a lead detective to sit with counsel for the State throughout the trial.

Appellate counsel also failed to raise on direct appeal that one of the lead detectives on the case was allowed to sit at the State's counsel table over defense objection. The trial attorney invoked the rule of sequestration and properly preserved the issue for appeal. (R. 575-576, 582-583). The reason for the

sequestration rule is to avoid the coloring of a witness' testimony by that which he or she has heard from other witnesses who have preceded him or her on the stand. Knight v. State, 721 So. 2d 287, 293 (Fla. 1998); Ali v. State, 352 So. 2d 546 (Fla. 3rd DCA 1977). The rule is in place to discourage fabrication and collusion. Steinhorst v. State, 412 So.2d 332, 336 (Fla. 1982).

The credibility of Detective Greg Smith was greatly enhanced before the jury because he was allowed to sit with the prosecutors during the entire trial. Several State witnesses referred to Det. Smith as the co-lead during their own testimony and it was clear that he had a critical role in the targeting of Mr. Garcia as the prime suspect. (R. 1141-1142, 1172, 1087).

Detective Smith was called to establish that the name of "Enrique Juares" was one of Mr. Garcia's aliases.[8] (R. 1329). Det. Smith was privy to the all the testimony and arguments to the lower court concerning the payroll records. He had the opportunity to see and hear the testimony of Rufina Perez-Cruz, Sergeant Radcliff, and Ida Perez. As an integral part of the State's prosecution effort, he knew exactly what the prosecutor wanted from him when he was called to the stand. The State's questioning of Detective Smith was the final word that the jury

[8]The purpose of this was to establish that there was not a time card or pay record for Enrique Juares at the time that Rufina Perez-Cruz supposedly heard the statements and therefore she was either mistaken or lying because he was not working. The defense had to establish that Henry Garcia and Enrique Juares are the same person. (R. 1380-1381).

heard and his testimony was used to cast doubt on the fact that the name on the payroll records "Enrique Juarez" could possibly be the same man as Mr. Garcia who was charged in the indictment as "Enrique Juares."

Appellate counsel was ineffective for failing to raise the trial court's abuse of discretion under Fla. Stat. 90.616(c) in allowing Det. Smith to remain in the courtroom absent a compelling reason. This Court has held that before a law enforcement officer may be permitted to remain in the courtroom to assist a prosecutor, there must be a hearing to determine first whether it was actually necessary and second, whether the defense would be prejudiced. Randolph v. State, 463 So.2d 186, 192 (Fla. 1984) cert. denied, 473 U.S. 907 (1985). In Mr. Garcia's case, the lower court simply took the prosecutor's request that the detective was important at face value rather than hold a hearing. The result was that this witness was able to cast doubt on the veracity of Mr. Garcia's defense.

CLAIM V

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE DENIAL OF THE CONSTITUTIONAL RIGHT TO CROSS-EXAMINE WITNESSES

The Sixth Amendment right of cross examination of State witnesses has been recognized by the United States Supreme Court

as "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth." Ford v. Wainwright, 106 S. Ct. 2595, 2605 (1986), quoting 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974).

Detective John Leclair testified that he and Detective Smith were the co-leads in the investigation that led to Mr. Garcia's arrest. (R. 1172). As the person responsible for the investigation, he reviewed the police reports, crime scene information and physical evidence (including hair samples) that had been collected prior to the time that he had been assigned to the case. (R. 1174-1180). The detective verified that part of the reason that he reviewed the prior reports was so that he would have all of the information available to him and would not have to go back to the "drawing board." (R. 1181).

When trial counsel attempted to inquire as to the detective's reasonable conclusions regarding the evidence, the State objected. (R. 1177). When trial counsel attempted to inquire as to the extent of this detective's knowledge of the pertinent facts of the case, he was again thwarted as the trial court sustained the State's objection. (R. 1179). Trial counsel was similarly stopped when he attempted to determine if the detective had reason to believe that Mr. Aguayo was trying to curry favor with law

enforcement given that he had been arrested on unrelated charges. (R. 1174) The trial court also refused to allow defense counsel to cross-examine the detective regarding the evidence that had been obtained that pointed to other suspects. (R. 1185-1195). The denial of the fundamental right to cross-examination was preserved by trial counsel for appeal:

> . . . Your Honor, you noted I asked the police officer and I have been asking from the beginning of the case the significance of the hairs when in fact this prosecutor is fully aware that I have a crime technician who examined his hairs who will testify that these hairs appear to be someone who was dirty, had not bathed for some time. What does that mean, Your Honor? It means a drifter. If you look at the reports and the efforts the police officers made before the cold squad was assigned, . . .they were looking for drifters because they felt, they were positive that the people who had committed this crime or the person who committed this crime was a drifter who was hanging around the neighborhood.
>
> I am entitled to show this jury that the physical evidence pointed toward that and these police officers believed at that point the evidence pointed toward that and that is what I am doing. (R. 1190-1191)

The trial attorney then clearly outlined how the denial of the right to cross-examine the detective was prejudicial to Mr. Garcia:

> My question to this man and my very next question would be - by the way, [ASA Dannelly] was mistaken there is no connection between Sam Randel and John Conners. Sam Randel is yet another drifter. I have not gotten to John Conners, Jr. But I intend to get to John Conners and ask this officer did you ever make

> an attempt to question John Conners, Jr. or senior because I am entitled to show this jury how this investigation focused at this point on this man, not because of the physical evidence of the crime but because two individuals . . .[are] not credible to this, which are Mr. Aguayo and Mrs. Perez-Cruz who I intend to show there is no possible way to hear what she now says is a joke.

(R. 1192).

Even though Mr. Garcia's right to cross-examination the State's witnesses was completely stripped from him, the prosecutor elicited testimony that by the time the Cold Case Squad picked up this case, all other suspects had been eliminated. (R. 1212, 1366). The prosecutor stated that Mr. Conner's hairs were taken and eliminated him as a suspect. (R. 1365). The State later argued that hair evidence was essentially worthless as a means of exculpating Mr. Garcia.

The prosecutor stressed this point during closing, arguing that at the beginning of the investigation, the detectives looked at everyone. But by the end of the investigation, there were no suspects left; only Mr. Garcia. (R. 1363). To illustrate her point of how silly she thought trial counsel's argument was, the prosecutor made light of the defense argument that other suspects had not been eliminated. As she stated in closing:

> The air men from the Air Force base. I suppose they were suspects too. I guess they didn't get ruled out either.

(R. 1412).

The thrust of the State's argument was that Mr. Garcia failed to prove that either John Conner, Jr. or someone else committed this crime.

This view was honed in to the jury when Ms. Dannelly stated: " [a]nd who was never investigated or heard from again? John Conners." (R. 1365). The implication was that the police seriously investigated Conners and eliminated him as a suspect and that no cross-examination of any witness brought out evidence against Mr. Conner. (R. 1365-66).

Because of the trial court's refusal to allow Mr. Garcia to test the State's case against him, he had no way to effectively rebut the outrageous and prejudicial claims made by the State regarding the other suspects. Appellate counsel's failure to raise the confrontation clause violation was deficient performance that resulted in prejudice to Mr. Garcia.

CLAIM VI

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESERVE THE DEFIENCIES IN THE SENTENCING THAT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION UNDER FEDERAL LAW

During his capital sentencing hearing Mr. Garcia presented evidence of mitigation which the trial court refused to find (R. 1638). The jury and judge, acting as co-sentencers, were required to weigh these mitigating factors against the aggravating circumstances. According to his sentencing order the judge did not weigh this mitigation (R. 1191-92). The judge failed to understand what constitutes mitigation, and thus erred as a matter of law in not considering and weighing the unrefuted mitigation. Appellate counsel challenged the trial court's rejection of any statutory or non-statutory mental health mitigation but failed to apprise the court of relevant United States Supreme Court case law. (I.B., p. 83-87).

The appellate attorney also argued on direct appeal that the trial court erred, under Florida case law, in not even considering other relevant mitigation such as Mr. Garcia's exemplary prison record[9] (I.B., p. 87); the fact that he would be imprisoned for 50 years without parole (I.B., p. 88); the lack of premeditation (I.B., p. 88); Mr. Garcia's work record (I.B., P. 89); evidence of Mr. Garcia's peaceful nature (I.B., P. 89); the life sentence of the co-defendant (I.B., P. 89) or the lack of significant

[9]Because one previous conviction used against Mr. Garcia as an aggravating circumstance was his conviction for mutiny in a federal prison, this evidence of his good behavior in prison since that offense could have been used to lessen the weight the jury gave that prior conviction. The State responded by presenting non-record evidence to which Mr. Garcia had no opportunity to reply (R. 1640). The State's use of this information violated Mr. Garcia's rights to due process of law. Gardner v. Florida, 430 U.S. 349 (1977).

history of prior criminal history (I.B., P. 91). However, the appellate attorney was ineffective in failing to argue that the trial counsel's failure to consider these mitigating circumstances violated Mr. Garcia's right to an individualized sentencing as required by the Eighth and Fourteenth Amendments. Skipper v. South Carolina, 476 U.S. 1 (1986); see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Mr. Garcia's sentence of death was rendered arbitrary and capricious and otherwise constitutionally infirm by the combined effects of the trial court's failure to consider this mitigating evidence and the failure of the court to comply with precedent in writing its sentencing order. Mr. Garcia is entitled to new penalty phase trial.

CLAIM VII

MR. GARCIA'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL ERRORS AS WELL AS INSTANCES OF PROSECUTORIAL MISCONDUCT WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS INEFFECTIVE IN HIS PRESENTATION OF THESE ISSUES.

Mr. Garcia did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991); Derden v.

McNeel, 938 F. 2d 605 (5th Cir. 1991). Mr. Garcia's due process rights were deprived 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.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

This Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan,

J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." ant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Larkins v. State, 655 So. 2d 95 (Fla. 1995).

The appellate attorney apprised this Court of numerous instances of prosecutorial misconduct that occurred during Mr. Garcia's trial. He challenged the prosecutors actions in suggesting that there were additional reasons to convict Mr. Garcia; the improper attacks on defense counsel; the improper efforts to bolster the credibility of State witnesses; the improper attacks on Mr. Garcia's character, manner of dress, and demeanor; the misstatements of fact regarding the payroll records; the flagrant misstatements of law concerning the presumption of innocence, reasonable doubt, and the burden of proof; the appeals to sympathy; the comment on Mr. Garcia's failure to testify in

violation of his Fifth Amendment rights under the United States Constitution; and that the cumulative effect of the prosecutorial misconduct amounted to fundamental error. (I.B., p. 41-59).

While the appellate attorney did urge this Court to consider the errors cumulatively, (I.B., P. 57-59), Mr. Garcia urges that this Court should consider all of the claims and arguments that were preserved and raised on direct appeal as well as the claims in this Petition.

For example, while appellate counsel argued that the prosecutor improperly appealed to the sympathies of the jurors, he did not fairly apprise this Court of the intentional plan of the prosecutor to use Rose Flight as a vehicle to unfairly prejudice the jury. (I.B., p. 56). It is clear that while defense counsel failed to object to many of the prosecutor's attempts to infect the jury with irrelevant and prejudicial comments and evidence, there were other instances where he clearly argued to the Court that Mr. Garcia's rights were being violated. The errors concerning the gratuitous religious comments must be considered with the preserved error concerning Mrs. Flight's outburst as well as the prosecutor's improper opening argument.

Similarly, appellate counsel on direct appeal informed this Court that the State twisted the facts concerning the veracity of the payroll records. (I.B., p. 52-54). However, he failed to raise the preserved issues concerning the irrelevant and improper

evidence elicited from Rufina Perez-Cruz and Sgt. Radcliff or the fact that the lead officer was allowed to remain in the courtroom throughout the trial.

The prosecutor's actions in this case were so egregious as to vitiate the entire trial and the result was a denial of due process. Mordenti v. State, 630 So. 2d 1080, 1084 (Fla. 1994). A new trial is warranted.

The flaws in the system which convicted Mr. Garcia of murder and sentenced him to death are many. They have been pointed out throughout not only this Petition, but also in Mr. Garcia's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

These errors cannot be harmless. The results of the trial and sentencing are not reliable. Appellate counsel was ineffective for failing to raise this issue. Habeas Corpus relief must issue.

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 Jaggard, Assistant Attorney General, 444 Brickell, Miami, Florida 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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