IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1998

LOWER TRIBUNAL CASE NO. F95-019816

RORY ENRIQUE CONDE, 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 3.851 relief. The trial court denied all of Mr. Conde's claims after a hearing, and had previously denied some of Mr. Conde's claims during the Huff hearing. 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 post

conviction appeal;

REQUEST FOR ORAL ARGUMENT

The Appellant, Rory Conde, suggests that the facts and legal arguments are adequately presented in this brief and does not request oral arguments.

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STANDARD OF REVIEW

A post conviction defendant sentenced to death is entitled to an evidentiary hearing unless the response and record conclusively show that the defendant is entitled to no relief. This Court encourages trial courts to conduct evidentiary hearings on initial post conviction motions in capital cases. See *Finney v. State*, 831 So.2d 651, 656 (Fla. 2002). The rules of

procedure provide that such a hearing "shall" be held in capital cases on initial post conviction motions filed after October 1, 2001, "on claims listed by the defendant as requiring a factual determination." *See Finney*, 831 So.2d at 656; *see also* Fla.R.Crim.P.3.851(f)(5)(A)(i). Upon review of a trial court's summary denial of post conviction relief without an evidentiary hearing, the reviewing court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999) [citations and footnote omitted].

An appellate court's standard of review of a trial court's ruling on an ineffective assistance claim is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues but (2) must review *de novo* ultimate conclusions on the performance and prejudice prongs. *Bruno v. State,* 807 So.2d 55, 61-62 (Fla. 2001).

STATEMENT OF THE CASE

The Circuit Court for the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, entered the judgments of convictions and death sentences at issue.[1] On July 12, 1995, Mr. Conde was indicted with six counts of first degree Murder. R. 1. After extensive litigation on the issue, Mr. Conde's counts were severed. Mr. Conde went to trial on the murder case wherein the victim was Rhonda Dunn. A jury trial on one count resulted in a guilty verdict. On December 14th, 1999, the jury recommended a sentence of death by a vote of nine (9) to three

(3) on each count of murder. R. 1649. At issue during the trial was the fact that a critical

defense witness for mitigation, Chaplain Bizarro, was not discovered by the defense until the fourth day of the penalty phase. The court denied the defense request to allow the testimony of the witness. The Court followed the jury's recommendation and entered its sentencing order on March 24, 2000. R. 17251751. The Court sentenced Mr. Conde to death for the first-degree murder charge.

The Florida Supreme Court affirmed Mr. Conde's conviction and sentence on direct appeal. *Conde v. State*, 860 So. 2d 930 (Fla. 2003)**.** The United States Supreme Court denied certiorari on 04/05/2004.

1 The judgments and sentences under attack are as follows: Judgment of guilty for Count 6 (murder), sentence of death, life sentences for remaining balance.

On March 24th, 2005, Mr. Conde filed a motion to vacate judgment of conviction and sentence with special request for leave to amend (PCR. 68-95).

The Court held the *Huff* hearing on 10/12/2005, wherein it denied claim I, claim II and claim VI as being legally insufficient and procedurally barred. The court granted an evidentiary hearing. The hearings were held on August 31st and September 1st, 2007.

Subsequent to the hearings, Defendant filed his notice of appeal as the denial of his motion for post-conviction relief and the instant appeal ensued.

Appellant, Rory Conde, is currently a state prisoner incarcerated "on Death Row" at the Union Correctional Institution in Union County, Florida. His prison number is M25274.

STATEMENT OF FACTS IN POST CONVICTION PROCEEDINGS

This case found its genesis in the year 1994 in Miami Dade County, when, during a period of five months, the bodies of six prostitutes were discovered on the side of a road. Since the road is known as Tamiami Trail, and the autopsy performed on the victim's bodies showed that they had been strangled and died of asphyxiation, the killer was named by the media the "Tamiami Strangler."

In June, 1995, Rory Conde was arrested after a woman was able to escape from his apartment. Evidence found at that scene lead investigators to suspect that Mr. Conde may be the culprit of the homicides.

After a lengthy interrogation, Mr. Conde admitted to the homicides. Moreover, DNA evidence linked him to the murders. On July 12, 1995, Mr. Conde was charged through indictment in Miami-Dade County with six counts of first-degree murder. (R1-1-4)

On or about August 15th, 1997, the parties were engaged in plea negotiations. An agreement was reached and accepted by Mr. Conde, whereby Mr. Conde would enter guilty pleas to the six homicides and associated charges arising from some other pending cases and would be sentenced to consecutive life sentences without the possibility of parole, sparing Mr. Conde from the death penalty. The state made the representation that the victims' families and the police agencies were either in agreement with the plea offer or had no objection. The plea offer was made by Mr. Laeser, the assigned assistant State Attorney, during a meeting with Judge Margolius and Jeffrey Fink, Esq.

At a later time, the assigned assistant state attorney had a change of heart. Additionally, the families who did appear for a hearing became adamant that Mr. Conde

should receive the death penalty. (R 3,426). However, subsequent to that event, the fact that Mr. Conde had been willing to plea to a life sentence was made public in the media, causing injury to Mr. Conde's ability to complete a thorough mitigation analysis. Friends and coworkers of Mr. Conde, critical witnesses for mitigation, no longer wanted to be involved and, in fact, the Defense lost touch with several that had been up to then involved. Subsequent to this incident, Mr. Conde went to trial and was found guilty by a jury.

During the sentencing phase of Mr. Conde's trial, Mr. Conde presented the testimony of three primary experts: psychiatrist Dr. Fred Berlin, (v141-8808-75), neuropsychologist Dr. Charles Golden, (v142-8924-9005) and psychotherapist/social worker Olga Hervis. (v138-8486-8501; v140-8704). Dr. Berlin, who specializes in sexual disorders, testified that in his opinion Mr. Conde committed the murders while suffering from an incident of "major depression" with "despondency" and "agitation," linking his condition with chronic emotional and psychological childhood abuse, exacerbated by the dissolution of his marriage. (v141-8818-23, 8826-30). Dr. Golden agreed, adding that Mr. Conde's profile reflected severe childhood psychological trauma and was consistent with childhood sexual abuse. (v142-8954-5)

Olga Hervis's testimony concentrated on Mr. Conde's familial relationships. She testified that Mr. Conde disclosed that from age 6 to 12, on almost a daily basis, he was sexually molested by his uncles Carlos and Alfredo while living in Colombia (v140-8619-31).

Additionally, Mr. Conde's sister, Nellie, testified to their family life in Colombia. Mr. Conde's mother testified that the she and the father attempted to make a good home for her brother, and that their father never abused Rory. Approximately 15 other friends, neighbors, coworkers, and family members testified on Rory's behalf regarding more than 70 proffered mitigating circumstances. (R9-1701-5)

However, on the fourth day of the penalty phase proceedings, the defense proffered the testimony of Chaplain Bizarro. Chaplain Bizarro was the first person that Rory Conde came into contact after his arrest and protracted interrogation back in 1995. During this first meeting, just after his arrest, and well before meeting with any attorney, psychologist or social worker, Rory Conde bared his heart to Chaplain Bizarro and confided the sexual abuse he suffered as a child. (v140-8579-80 (proffer by counsel); v142-9014- 22 (proffered testimony of witness)). They claimed to have just discovered the existence of this witness. The importance of Chaplain Bizarro's testimony was critical not only to corroborate Mr. Conde's claim of childhood sexual abuse, but also to rebut the state's assertion that this claim was recently fabricated. (v135-7977). The jury never heard Mr. Conde's confession to Chaplain Bizarro. Inexplicably, the relevance of Chaplain Bizarro was not discovered.

During the evidentiary hearing held on this cause, the defense's first witness was Martha Galindo. Ms. Galindo is a friend of the Conde family for some 27 years. (R 846). Ms. Galindo was a frequent social visitor of Mr. Conde while he was detained at Metro-West. During these visits, Mr. Conde would often speak about Chaplain Bizarro. (R

848). In fact, Mr. Conde stated that he would speak with Bizarro almost every Saturday morning, before the social visits. As per Ms. Galindo's testimony, Chaplain Bizarro was a person of importance in Mr. Conde's life and he appeared calmer after speaking with Bizarro. Ms. Galindo encouraged Mr. Conde to speak with Chaplain Bizarro as to Mr. Conde's life, to open up to him and to talk to the Chaplain about the incidents that occurred and for which he was being charged. (R. 850). Ms. Galindo conveyed to Laura Blankman, the investigator working with the Defense, Mr. Conde's developing relationship with Chaplain Bizarro. (R 849). Ms. Galindo testified that she never met with Mr. Rafael Rodriguez nor with Mr. Jeffrey Fink, Appellant's mitigation and lead attorneys respectively. (R. 850). Ms. Galindo testified that after the aborted plea offer she was disillusioned with the case and the process. Prior to the incident where the plea offer, Ms. Galindo worked towards helping the Conde family and assisting with the critical task of locating witnesses. (R. 852). Subsequent to the incident regarding the plea, an event that was publicized in the newspaper, Ms. Galindo testified that "nobody wanted to know about the case." (R. 853). She herself stopped trying to locate or find witnesses, and "completely disconnected from the system." (R. 853). Ms. Galindo also stopped attempting to meet with Mr. Conde's attorneys. (R. 854). Ms. Galindo testified that she knew of the sexual molestation that Mr. Conde had suffered as a child and that the source of this information was Olga Hervis, the defense clinical social worker. (R. 855). Mr. Conde had not told Ms. Galindo of the abuse himself.

Ms. Jennie Carranza, Mr. Conde's sister, testified after Ms. Galindo. She corroborated the fact that Mr. Conde would speak of Chaplain Bizarro often, in fact, her recollection was that Mr. Conde would speak about Chaplain Bizarro each time they met. (R. 861). Jennie Carranza felt that Mr. Conde's relationship with the Chaplain had "turned his life around." (R. 862). Ms. Galindo stated that she met with "Laura," that the meeting lasted about half an hour, and she did not mention Chaplain Bizarro because she was not asked to do so and was not given any guidelines as to what to mention or topics to go into. (R. 865, 863). Ms. Carranza stated that she met with Mr. Rafael Rodriguez, Mr. Conde's mitigation attorney, once, in the courthouse, right before trial. (R. 864).

Nelly Conde ("Nelly') testified next. She is Mr. Conde's older sister. She met several times with Mr. Fink and Mr. Rodriguez. (R. 872). She was asked for a list of names of people to interview and she put the list together with the help of Ms. Galindo. (R. 873). Nelly stated that she met with Laura Blankman and Olga Hervis as well, several times with each. (R. 874). Nelly served as the conduit of information between Mr. Conde's family and the defense. (R. 874). Nelly stated that Mr. Conde would mention Chaplain Bizarro during each family visit to the Metro-West facility, during a pre-trial period that lasted years. (R. 876). Nelly met with Olga Hervis and Mr. Conde. During an interview, Mr. Conde admitted to the fact that he had been molested by his uncle, Carlos, while he was a child in Colombia. (R. 878). Afterwards, Mr. Conde told Ms. Hervis that he had disclosed this incident to Chaplain Bizarro. (R. 878). This information was later

conveyed to Laura Blankman before trial. (R. 879). Nelly gave the information as to the name of the Chaplain to Ms. Blankman during a meeting had at her house or at a restaurant before trial. (R. 880). Nelly testified that before the incident of the plea offer, friends and family would call to inquire as to the status of the case, but that stopped after the withdrawal of the plea. In fact, Nelly herself stopped gathering names and information for the defense, feeling that there was nothing else to be done. Nelly stated that neither Mr. Fink nor Mr. Rodriguez ever asked her whether her brother had any spiritual advisor or priest.

The balance of the fact patterns is offered pursuant to the parties' reconstruction of the testimony obtained during the hearing. The original of the transcript could not be obtained. As such, the reconstructed testimony is presented in its entirety.

On the second day of the evidentiary hearing, September 1, 2006, the State first called Jeffrey H. Fink. Mr. Fink testified that he was lead counsel for the Defendant at trial. Mr. Fink testified that he first learned of the existence of Chaplain Bizarro after the guilt phase, but probably before the penalty phase. Mr. Fink did not recall who alerted him to the existence of Chaplain Bizarro.

Mr. Fink did recall that he subpoenaed correctional officers from the Metro West Pretrial Detention facility on December 7, 1999, in an attempt to present evidence that the Defendant had behaved well during his pretrial incarceration. He had received the names of the officers to subpoena from either the Defendant or Laura Blankman.

Ms. Blankman was a mitigation specialist with Roy Matthews and Associates. She had been employed by counsel to gather records concerning Defendant and assist in formulating a penalty phase defense.

On December 8, 1999, which was during the penalty phase of the trial, Chaplain Bizarro appeared in response to the subpoena. Mr. Fink first met with Chaplain Bizarro outside of the courtroom. Chaplain Bizarro told Mr. Fink that the Defendant had revealed, very early on in his relationship with Chaplain Bizarro, that Defendant had been sexually abused as a child.

Mr. Fink stated that he had focused his investigation on whether the Defendant had been sexually abused as a young person early in his representation of the Defendant. He did so even though the Defendant initially denied such victimization. The defense attorneys, Ms. Blankman and Dr. Golden had always believed that there had to be something such as childhood sexual abuse that led him to commit these crimes. To further this investigation, Mr. Fink retained Dr. Fred Berlin because of his excellent credentials and his specialization in sex crimes cases. He did not tell Dr. Berlin his defense theory. Instead, he asked Dr. Berlin look for what was in the Defendant's psyche that may have led him to commit the crimes. Mr. Fink also had Ms. Blankman and psychotherapist/social worker, Olga Hervis, interview the Defendant, together and extensively.

Within a day or two of November 30, 1999, Defendant finally admitted to Ms. Hervis that he had been abused. Ms. Hervis then informed Ms. Blankman, who in turn

informed Mr. Fink. This was the first time that the Defendant or anyone else had provided factual support for a claim that he had been abused.

Prior to this revelation, all of the information the defense had regarding sexual abuse merely showed that it was possible that Defendant may have been abused.

Dr. Berlin's testimony was focused on showing that the Defendant suffered from a condition that led to his situation. However, the Defendant's lack of a history of sexual deviancy prior to the crime was contrary to the norm. Dr. Berlin opined that the Defendant was suffering from severe depression and that the depression may have resulted from sexual abuse in childhood.

If the Defendant had admitted to being sexually abused years before trial, Mr. Fink would have provided information about the abuse to Dr. Golden, Dr. Berlin, Ms. Hervis, and others at time of the disclosure.

On cross-examination, Mr. Fink confirmed that he always suspected that Defendant had been sexually molested as a child. He had this suspicion because he did not believe that the Defendant had the character to kill in cold blood.

However, Mr. Fink had difficulty in obtaining evidence of the Defendant's background. Defendant was from the nation of Colombia. The State Department had issued a warning about traveling to Columbia. Moreover, many of Defendant's family members had moved, died, or had otherwise become unavailable. Additionally, one family member was controlling the contact with the other family members and friends, and many

of the family members and friends were fearful of the Defendant's abuser, his uncle Carlos de Andres. However, the Defendant's wife's family, particularly Defendant's father-in-law, was very cooperative.

In addition, Mr. Fink found that it is difficult to probe psychological issues that people do not want to disclose. People do not disclose their dark secrets to people they do not trust. Moreover, there was a cultural barrier to having the Defendant reveal that he was sexually abused. In an attempt to overcome these obstacles, Mr. Fink retained Ms. Blankman because she was trained to deal with people, people liked her, and people would open up to her.

Mr. Fink acknowledged that it is imperative to speak with a defendant's spiritual advisor in developing mitigation if the attorney becomes aware that the defendant was speaking to a spiritual advisor. Mr. Fink spoke with and wrote the Defendant at least six times a year. He did not recall the Defendant wearing a cross, and was unsure if he ever saw the Defendant carrying a Bible. He was not sure if he asked the Defendant if he was seeking spiritual advice but his notes did not reflect such a question.

Chaplain Bizarro was not a layperson. He was ordained or, at least, had some religious training. As a result, Chaplain Bizarro refused to speak to Mr. Fink until the Defendant consented to him doing so.

Mr. Fink stated that his main contact with the Defendant's family was through Defendant's sister, Nellie. Mr. Fink met with Nellie frequently. Mr. Fink did not recall

asking Nellie, Jenny Conde, or Martha Galindez, who was assisting Nellie, about the identity of the Defendant's priest. However, both Mr. Fink and Ms. Blankman did speak to the family at length about the identity of any confidant of the Defendant.

The Defendant then attempted to ask Mr. Fink about an incident concerning a plea offer. The State objected that the question was beyond the scope. The trial court sustained the objection.

On redirect examination, Mr. Fink stated that he believed that his secretary probably informed Chaplain Bizarro of why he was being called as a witness. Mr. Fink did recall that Chaplain Bizarro indicated that he needed the Defendant's permission before relating anything that the Defendant had told him (believing it to be privileged). After reviewing Chaplain Bizarro's testimony about his interaction with counsel and the Defendant from page 9020 of the trial transcript, Mr. Fink stated that there was a time period between when he learned of the existence of Chaplain Bizarro and when Chaplain Bizarro agreed to speak to Mr. Fink.

After Mr. Fink's testimony was complete, the State next called J. Rafael Rodriguez, Defendant's other trial counsel. Mr. Rodriguez testified that he and Mr. Fink worked hand in hand on both phases of the trial.

Mr. Rodriguez, who is fluent in Spanish, also stated that he received a list of the Defendant's family members in Colombia from the Defendant's sister, Nellie.

During the summer of 1999, Mr. Rodriguez traveled to Baranquilla, Colombia with Laura

Blankman, who was not fluent in Spanish, and spent five days interviewing family members. At that time, Colombia was in the midst of a guerilla war. As a result of the fighting, Mr. Rodriguez and Ms. Blankman remained at a hotel in Barranquilla to meet with the family members. The ability to interview the family about sexual abuse was further complicated by the fact that the family members were poor and looked to the Defendant's uncle (the alleged abuser) for financial support. The Defendant's uncle had recently won the Colombian lottery. This lack of finances also prevented the defense from presenting the family members' live testimony at the penalty phase, as did the family members' lack of the visas necessary to travel to the United States.

In addition to the information gathered by Mr. Rodriguez and Ms. Blankman in Colombia, Olga Hervis, a family systems analyst, was retained. Ms. Hervis received family information for Colombia and made additional calls to the family there. Ms. Hervis was assisted by Ms. Zapata, a psychologist and the sister-in-law of Carlos Andres. Mr. Rodriguez believed that someone had spoken to all the relevant family members in an attempt to get background information about the Defendant.

Mr. Rodriguez claimed to have first learned of the existence of Chaplain Bizarro during the actual conduct of the trial of the penalty phase. A few weeks before the penalty phase began, Mr. Fink sent Ms. Blankman to the jail to interview witnesses who could provide information relevant to the Defendant's lack of future dangerousness while incarcerated. Ms. Blankman had reported that she had run into Chaplain Bizarro during

this visit and that Chaplain Bizarro had stated that he had very good information about the Defendant. Chaplain Bizarro told Ms. Blankman that he had spoken to the Defendant approximately six months after the Defendant's arrest and that the Defendant had admitted to Chaplain Bizarro that he had been the victim of sexual abuse.

The Defendant had also admitted sexual abuse to Ms. Hervis, however, this admission only occurred immediately before the penalty phase. Ms. Hervis had previously had several sessions with the Defendant before he broke down and admitted that his Uncle Carlos had sexually abused him.

On cross-examination, Mr. Rodriguez testified that he became the second chair attorney near the end of 1995. He stated that Defendant had been arrested in June of that year. As a second chair attorney, Mr. Rodriguez split responsibility for both phases of the trial with Mr. Fink.

Defendant never admitted that he had been sexually abused as a child to either Mr. Rodriguez or Mr. Fink. However, Mr. Rodriguez had suspected that the Defendant had been sexually abused as a child. This suspicion arose as a result of Mr. Rodriguez's interviews in Colombia. During those interviews, a neighbor had informed Mr. Rodriguez that he thought his son had been abused by Alfredo, who shares a room with the Defendant. As a result, the attorneys suspected that Defendant may have been abused as well.

Mr. Rodriguez stated that he had been an attorney for 26 years. During that time, Mr. Rodriguez had represented many Hispanic defendants. He was aware that Hispanic

defendants were reluctant to admit sexual abuse as there is a cultural taboo about disclosing abuse.

The experts also suspected that there was something undisclosed in Defendant's background because the Defendant's actions were not normal. Sexual abuse was a potential area of undisclosed trauma. This was especially true because this was a sexually motivated crime. As a result, Mr. Rodriguez was of the opinion that sexual abuse would have been a powerful mitigator in this case. As such, Mr. Rodriguez and the defense team had interviewed as many family members and friends as possible about sexual abuse as they could.

Mr. Rodriguez did not recall specifically asking either the Defendant or his sister Nellie about the identity of the Defendant's priest. The Defendant had never indicated that his religious life was significant, and Mr. Rodriguez had not perceived the Defendant as a particularly spiritual person. Further, Mr. Rodriguez had instructed the Defendant not to speak to anyone in the jail. However, Mr.
Rodriguez acknowledged that it was possible that the Defendant might have unburdened himself to a priest.

Mr. Rodriguez was not keen on the use of questionnaires. Instead, he preferred to sit down with people and take his own notes. He did not have any notes indicating that he asked anyone about the identity of a priest or spiritual advisor, however, he had questioned people about religion generally. The responses he received indicated that the Defendant

did not have a church-going background. As such, Mr. Rodriguez did not get into the issue of a priest or spiritual advisor.

After presenting Mr. Rodriguez's testimony, the State rested, and the Defendant indicated he had no rebuttal. Defendant then presented his closing argument. In the argument, Defendant asserted that Mr. Fink had testified that the experts told counsel that they suspected that the Defendant had been sexually abused as a child because there was no evidence of sexual deviance in the Defendant's background and something must have triggered the Defendant's behavior. Because the guilt phase evidence was overwhelming, counsel should have focused their efforts in developing mitigation. Knowing that Dr. Berlin believed that the Defendant had to have been abused as a child and that the family in Colombia did not provide the information, counsel should have sought to locate someone else in whom the Defendant would have confided. As such, to be effective, the attorneys should have asked about the identity of the Defendant's priest or spiritual advisor. By failing to do so counsel were ineffective.

In its closing argument, the State responded that the evidentiary hearing had been limited to the issue on which the trial court had granted a hearing after the *Huff* hearing. It argued that most of the testimony, which it summarized, was not directed to those issues. It asserted that Nellie's testimony was not credible. The State pointed to the inconsistencies between Nellie's testimony about the disclosure of sexual abuse before trial on direct and cross and Ms. Hervis's testimony. It asserted that the attorneys had no indication that

would have caused them to know what the Defendant told to a priest or advisor, who refused to disclose Defendant's confidences until after the Defendant made a waiver during trial. Instead, counsel did conduct a reasonable investigation into the Defendant's background by going to Colombia and interviewing family members and friends. The fact that the investigation was hampered by a guerilla war and the economic condition of the family did not make the investigation unreasonable.

SUMMARY OF THE ARGUMENTS

I. The trial court erred when it denied claim III insofar trial counsel's failure to preserve the record on appeal and object to closing arguments that amount to a ridiculing of the defense's theory of the case and allegations that the defense was trying to **mislead and confuse** the Jury, and that trial counsel was creating and fabricating evidence.

II. In light of the *Strickland* presumption applicable to post-conviction relief, the trial court abused its discretion when it denied the use of the defense expert, Manuel Alvarez, insofar trial counsel's failure to discover mitigating evidence.

III. The trial court erred in denying Appellant's claim IV where the testimony obtained during the evidentiary hearing clearly shows that trial counsels knew or should have know of the existence of both the abuse and chaplain Bizarro well in advance of the middle of the sentencing date.

IV. The trial Court erred in denying Mr. Conde Fifth Claim in his post-conviction pleading where his Sixth, Eighth, And Fourteenth Amendments to the United States Constitution were violated due to the fallout effect of the withdrawn plea as it affected his ability to collect and present mitigating information during his sentencing phase, resulting in a death sentence that is unreliable.

V. The trial court erred in denying claim VI of Appellant's post conviction pleading as the Florida capital sentencing procedures are unconstitutional as employed in Appellant's case in violation of his Sixth Amendment rights

ARGUMENTS

I. THE TRIAL COURT ERRED WHEN IT DENIED CLAIM III INSOFAR THE TRIAL COUNSEL'S FAILURE TO PRESERVE THE RECORD ON APPEAL AND OBJECT TO IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENTS

During the State's closing argument, the State made multiple improper comments that were not objected to by trial counsel. These comments amounted to \. The comments Appellant objected to in his motion appear next, and went wholly unobjected. Moreover, these comments were not mentioned in direct appeal.

*** [When commenting as to the initial instruction read to the jury] It didn't say render a true verdict **according to some theory or some plan or something the lawyers "come up with." R,** 7767.

*** [commenting as to counsel's questioning or argument] Was it for the purpose of trying to distract you from the true issues in the case. R 7769

*** And yet everything that you have heard today in argument from the defense attorney had nothing to do with these issues. R 7816

*** There is a phrase as it deals with attorneys and I don't know, I don't mean to diminish my profession, but the phrase is only painters and lawyers can change white to black. R 7820 (Important to note Mr.

> Laeser had up to that time referred to himself as the prosecutor, not a lawyer)… but to cover it up with another layer of paint… blame everybody else except the defendant. R 7821.

The question, then, is whether the prosecutor's comments were so prejudicial as to vitiate the entire trial. In *Street v. State*, 636 So.2d 1297 (Fla.1994) this Court set the standard for determining whether prosecutorial misconduct in closing argument, absent an objection, is such fundamental error as to warrant a new trial:

> ... The law is clear that a party's failure to object to improper prosecutorial comments will preclude appellate review, unless the comments are so prejudicial as to constitute fundamental error. See *Street v. State*, 636 So.2d 1297 (Fla.1994), cert. denied, 513 U.S. 1086, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995); *Fuller v. State*, 540 So.2d 182, 184 (Fla. 5th DCA 1989) Absent a contemporaneous objection, an Appellant is required to demonstrate that the prosecutor's comments constituted fundamental error. See *Crump v. State*, 622 So.2d 963, 972 (Fla.1993) (holding that since prosecutorial comments did not constitute fundamental error, absence of preservation of issue by defense counsel precluded appellate review). Fundamental error in closing occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." *Silva v. Nightingale*, 619 So.2d 4, 5 (Fla. 5th DCA 1993), *548 quoting *Tyus*

v. Apalachicola Northern R.R. Co., 130 So.2d 580, 587 (Fla.1961) Thus, to be considered fundamental error, prosecutorial miscomment during closing arguments must be "such as to utterly destroy the defendant's most important right under our system, the right to the 'essential fairness of [his] criminal trial.' " *Cochran v. State*, 711 So.2d 1159, 1163 (Fla. 4th DCA 1998) (citations omitted);

see also *Rhodes v. State*, 547 So.2d 1201, 1206 (Fla.1989), cert. denied, 513 U.S. 1046, 115 S.Ct. 642, 130 L.Ed.2d 547 (1994). Fundamental error in a criminal case is error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Kilgore v. State*, 688 So.2d 895, 898 (Fla.1996) (quoting from *State v. Delva*, 575 So.2d 643, 644-45 (Fla.1991), cert. denied, 522 U.S. 832, 118 S.Ct. 103, 139 L.Ed.2d 58 (1997)).

In the instant case, the prosecutor disparaged defense counsel and the theory of the defense. *See, e.g.*, *Lewis v. State*, 780 So.2d 125, 130 (Fla. 3rd DCA 2001) and *Alvarez v. State*, 547 So.2d 1119 (Fla. 3rd DCA 1991). The comment about a theory the lawyers "come up with" is a direct and impermissible attack. Yet it went unobjected and not preserved. These particular comments were not specifically included in Mr. Conde's direct appeal. This Court has noted that "[a]ny error in prosecutorial comments is harmless if there is no reasonable probability that those comments affected the verdict." *Hitchcock v. State*, 755 So.2d 638, 643 (Fla.2000) (citing *King v. State*, 623 So.2d 486, 487 (Fla.1993)). In the case at bar, however, the comments attacked the very seed of the defense, whether Mr. Conde was guilty of premeditated murder.

In the case at bar, these arguments required the granting of a new trial. *See Ruiz*; *Caraballo v. State*, 762 So.2d 542 (Fla. 5th DCA 2000)

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE USE OF THE DEFENSE EXPERT, MANUEL ALVAREZ, INSOFAR TRIAL COUNSEL'S FAILURE TO DISCOVER

MITIGATING EVIDENCE

The Defendant contends that the trial court erred in denying him the ability to present expert testimony regarding the reasonableness of the failure by trial counsel to discover witness Chaplain Bizarro in a timely fashion so as to present him for mitigation. As a result, the jury that recommended – although not unanimously – the death penalty, did so without having received crucial information regarding extensive sexual abuse received by Mr. Conde. The jury simply was not told of the true facts behind the Defendant's background. If such facts as are now known had been presented during the Defendant's penalty phase proceeding, the jury would have heard of the potential "reason why" and Mr. Conde would have received a life sentence. Thus, the question as to the reasonableness of the trial attorneys conduct is the critical issue in the case at bar.

This Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied under *Strickland.* First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Dufour v. State*, 905 So.2d 42,51 (Fla. 2005). Thus, the *Strickland* test presents a mixed question of law and fact.

A defendant presenting such claims toils against a "strong presumption that trial counsel's performance was not ineffective." *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). "A fair assessment of attorney performance requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

The issue before the lower court was to reach a determination as to whether trial counsel had conducted a *reasonable* investigation into mitigation. Strickland, 466 U.S. at 691, 104 S.Ct. 2052; *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Counsel's conduct should be judged by a reasonableness standard under prevailing professional norms. For example, the

U.S. Supreme Court has consistently cited ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases for capital defense counsel.

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Dufour v. State*, 905 So.2d 42,51 (Fla. 2005) Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So2d 766, 771-72 (Fla. 2004).

A claimant challenging his conviction and sentence on the bases of ineffective assistance of counsel faces a steep uphill climb; there is a strong presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id* at 689.

In the case at bar, Manuel Alvarez would have testified as to the prevailing professional norms of a defense attorney charged with defending a person facing the death penalty. This is not a situation such as where this Court has stated that "[c]ounsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. Moreover, strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhione v. State*, 768 So.2d 1037, 1048 (Fla. 2000). The issue before the court is twofold: what is the "prevailing professional norm," and did the conduct at issue fall short of such norm. It is also well held law that pursuant to F.R.Ev. Section 90.703, testimony in the form of an opinion or inference is not objectionable because it goes to the ultimate issue to be decided by the trier of fact. The judge of Jury has the right and power to accept or reject such testimony.

"Although a trial court's decision on evidence admissibility is subject to the abuse of discretion standard of review, that discretion is limited by the rules of evidence." *Michael v. State*, 884 So.2d 83, 84 (2 DCA 2004) (citing Sexton v. State, 697 So.2d 833 (Fla.1997)). Section 90.703, Florida Statutes (2003), permits opinion testimony on an ultimate issue of fact: "Testimony in the form of an opinion or inference *otherwise admissible* is not objectionable because it includes an ultimate issue to be decided by the trier of fact." In the case at bar, Mr. Alvarez would testify as to the reasonable professional standard or norm, and the normal pitfalls that a competent attorney needs to watch out for. This information was both material and relevant to the decision at hand.

To deny the entry of such opinion testimony is leaves Mr. Conde with scant little basis from which to work. Specifically and critically, Mr. Alvarez would have testified, if allowed, that the failure to discover Chaplain Bizarro was not reasonable.

III. THE TRIAL COURT ERRED IN DENYING APPELLANTS CLAIM IV WHERE THE TESTIMONY OBTAINED DURING THE EVIDENTIARY HEARING CLEARLY SHOWS THAT TRIAL COUNSELS KNEW OR SHOULD HAVE KNOW OF THE EXISTENCE OF BOTH THE ABUSE AND CHAPLAIN BIZARRO WELL IN ADVANCE OF THE MIDDLE OF THE SENTENCING DATE

The testimony of witness Galindo clearly sets out both the issue of childhood abuse and the existence of Chaplain Bizarro, as well as the fact that he had become a critical person in Rory Conde's life. As testified to by Ms. Galindo, and unrebutted by the State's witnesses, Ms. Galindo was never interviewed by mitigation counsel, although her presence and existence was known to them. This testimony is buttressed by the testimony of Jennifer Carranza, Mr. Conde's younger sister, who only met with Mr. Rodriguez once, and who, during her interview with the social worker, did not speak about Chaplain Bizarro due to the fact that no one gave her parameters as to who to speak about.

The unrebutted testimony of Nelly Conde, Appellant’s older sister, is more dramatic. Nelly Conde testified to the fact that Mr. Conde would mention Chaplain Bizarro during each family visit to the Metro-West facility that took place during a pre-trial period that lasted years. (R. 876). Nelly met with Olga Hervis and Mr. Conde together, and during one of those interviews Mr. Conde admitted to the molestation at the hands of the uncle in

Colombia. (R. 878). Worse yet, Mr. Conde told Ms. Hervis that he had disclosed this incident to Chaplain Bizarro. (R. 878). This critical information was passed on to Laura Blankman well before trial, together with the name of Chaplain Bizarro. (R. 879). Nelly gave the information as to the name of the Chaplain to Ms. Blankman during a meeting had at her house or at a restaurant before trial. (R. 880).

This evidence is contrary to the information provided to the court by trial counsel. They did not “just found out about it,” rather there had been a failure of representation at the critical point of the case – that of mitigation. This is not a case where the client was not telling the attorney's about the incident. The item had been told, it was just processed along the line and presented at the critical point: the jury.

It is well held law that beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428
U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id.* at 206. See also *Roberts v. Louisiana,* 428 U.S. 325 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Meeting the requirements of individualizing a defendant requires a thorough

investigation into the defendant's background. Recently, the U.S. Supreme Court re-emphasized the importance of conducting an investigation into a defendant's personal history for mitigation purposes. In *Wiggins v. Smith*, 123 S.Ct. 2527 (2002), the Court examined the investigation done by a public defender's office in a capital murder case; as it was determined that defense counsel failed to follow up on evidence of their client's troubled past, their representation was deemed ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When faced with claims of this nature, this Court has stated that the ("[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated-this is an integral part of a capital case."); Ragsdale v. State, 798 So.2d 713, 716 (Fla.2001). And thus, "The failure to do so 'may render counsel's assistance ineffective.' " *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir.1994). The issue in that case, in light of *Wiggins*, is whether the investigation conducted by counsel and the subsequent failure to present a critical component of evidence *was itself reasonable* "from counsel's perspective at the time the decision was made." *Holland v. State*, 916 So.2d 750, 757 (Fla. 2005). (quoting *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

To make this determination of reasonableness, the *Wiggins* court turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See id*. At 2536-7. Under these guidelines, trial counsel

in a capital case "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. *Id*. at 2537. Furthermore, when examining trial counsel's investigation, a reviewing court "must consider not only the quantum of evidence already known to counsel, **but also whether the known evidence would lead a reasonable attorney to investigate further**." *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (emphasis added). Thus, under *Wiggins*, the issue is whether Counsel's decision not to interview Chaplain Bizarro prior to the sentencing phase, his failure to uncover Bizarro's importance to the case, and his failure to timely present his testimony before the jury, was reasonable, or whether the information readily available to Conde's mitigation and trial counsel should have left a reasonable attorney to investigate further? In the case at bar, the "further investigation" required was to merely speak to a readily available witness.

The answer to this question in Mr. Conde's capital penalty phase is a resounding no; available mitigation never reached the jury, who plays such a key sentencing role in Florida. See *Espinosa v. Florida*, 112 S. Ct. 2926 (1992).

Counsel's failure to explore, develop, and present readily available mitigating material was unreasonable and deprived Mr. Conde of his constitutional right to effective assistance of counsel and a reliable sentencing proceeding.

The mitigating evidence that counsel failed to properly discover and present is powerful. Conde's complaint to Chaplain Bizarro at the time it was made erased the State's

complaint that it was “created” by the attorneys after the fact. This available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of Mr. Conde’s moral culpability, and have provided an insight into Mr. Conde human condition and served to humanize him before the eyes of the jury, so as to explain his criminal behavior. *Williams v. Taylor*, 529 U.S. 362, 146 L Ed 2d 389, 120 S Ct 1495 (2000).

IV. MR. CONDE ’S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED DUE TO THE FALLOUT EFFECT OF THE WITHDRAWN PLEA AS IT AFFECTED HIS ABILITY TO COLLECT AND PRESENT MITIGATING INFORMATION DURING HIS SENTENCING PHASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

On or about August 15th, 1997, during a meeting with Judge Margolius and Jeffrey Fink, Esq., prosecutor Laeser, the assigned assistant state attorney, made a plea offer of life imprisonment. The plea was conditional upon the acceptance by the trial court, after determining that the victim’s families were in agreement or had no objection.

At a later time, the assigned assistant state attorney had a change of heart. Additionally, the families who did appear for a hearing, became adamant that Mr. Conde receive the death penalty.(R 3,426). Subsequent to the event, the fact that Mr. Conde had been wiling to plea to a life sentence was made public in the media. After this fact became known, and during the mitigation phase as well as the investigation and preparation of Mr. Conde’s defense case in mitigation, Mr. Conde’s attorneys encountered greater difficulty in contacting witnesses. Friends and coworkers of Mr. Conde, critical witnesses for mitigation, no longer wanted to be involved, and in fact the Defense lost touch with several

that had been up to then involved.

Accordingly, Mr. Conde was denied a fair, reliable capital sentencing determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding Florida law. Trial counsel's failure to present the prejudice suffered by the defense due to the withdrawal or denial of the plea was deficient, thereby prejudicing Mr. Conde.

The fall out from the aborted plea was made clear through the testimony of Martha Galindo. Ms. Galindo, a friend of the Conde family was a frequent social visitor of Mr. Conde while he was detained at Metro-West. During these visits, Mr. Conde would speak about Chaplain Bizarro at almost every social visit. Ms. Galindo, however, testified that she never met with Mr. Rafael Rodriguez nor with Mr. Jeffrey Fink, Appellant's mitigation and lead attorneys respectively, and that after the aborted plea offer took place, Ms. Galindo testified that "nobody wanted to know about the case." (R. 853). Prior to this she was assisting the family in locating witnesses. She herself stopped trying to locate or find witnesses, and "completely disconnected from the system." (R. 853). Ms. Galindo also stopped attempting to meet with Mr. Conde's attorneys. (R. 854).

It is clear, thus, from the testimony, that the fact of the matter is that the aborted plea offer had a negative effect on Mr. Conde's case. Counsel never brought the case back before the court to effectively convey the fallout and seek enforcement of the plea.

V. THE TRIAL COURT ERRED IN DENYING CLAIM VI OF APPELLANT'S POST CONVICTION PLEADING AS THE FLORIDA CAPITAL SENTENCING PROCEDURES ARE UNCONSTITUTIONAL AS EMPLOYED IN MR. CONDE'S CASE IN

VIOLATION OF HIS SIXTH AMENDMENT RIGHTS

In the landmark decision of in *United States v. Booker*, 543 U.S. 220 (2005), the U.S. Supreme Court held that the Sixth Amendment right to a jury trial is violated when a district court imposes a sentence under the Federal Sentencing Guidelines greater than the maximum permitted by facts admitted by the defendant or found by a jury beyond reasonable doubt. Subsequently, in *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002), the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609, 122 S.Ct. 2428 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Thus, the Court has applied the rule of *Apprendi* to facts subjecting a defendant to the death penalty. *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002). Under the Florida capital sentencing scheme, to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating factor. However, the defendant need not prove any mitigating factors at all to obtain a life sentence. See F.S. § 921.141(5)(a-n).

Thus, in Florida, to recommend a sentence of death for the crime of first-degree murder, a majority of the jury must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating factor as listed in the capital sentencing statute. See Florida Statutes § 921.141(2)(a). It must also find that any aggravating circumstances outweigh any mitigating circumstances, also listed in the statute, that may exist. *See* Florida Statutes § 921.(2)(b). However, and this is one the most particularly

problematic features of the Florida's hybrid Capital Sentencing scheme: a jury may recommend a sentence of death so long as a majority concludes that at least one aggravating factor exists, but there need not be any agreement as to which factor exists. F.S.A. § 921.141(2,0). It is the sentencing Judge who must independently determine the existence of aggravating and mitigating factors, and the weight to be given each. F.S.A. § 921.141(3).

In the case at bar, the jury did not return a unanimous recommendation. As a matter of fact, we do not know if some of the jurors found any aggravating circumstances since the jury recommended a sentence of death by a vote of nine

(9) to three (3). (R. 1649). The trial court then found CCP and HAC on its own. It concluded that the victim's murder was "cold," (R9-1730) following the State's theory Mr. Conde "did not act out of emotional frenzy, panic, or a fit of rage." The "calculated" appears to have been based on the similar crimes evidence, and the finding of premeditation appears to have been based on the *modus operandi*. (R91731). The sentencing judge likewise found HAC.

The fact of the matter is that these elements were not presented and found by the jury selected to try this case, and thus violates *Ring* and *Apprendi*. Moreover, the fact that the jury may enter a recommendation without expressing which factors it found, nor whether it agrees on the factors, is a further violation of *Ring* and *Apprendi*.[2]

[2] Appellant is aware of the holdings of *Bevel v. State,* 983 So.2d 505 (Fla.2008) and *Carter v. State,* 980 So.2d 473 (Fla.2008), insofar the existence of the prior conviction as it applies to the Ring argument; as well as this Court's opinion of *Merck v. State,* 975 So.2d 1054, 1067 (Fla. 2007), *Frances v. State,* 970 So.2d 806, 822 (Fla. 2007), and *Hunter v. State* --- So.2d ----, 2008 WL 4352655 (Fla., 2008)_

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Rory Conde respectfully urges this Court to reverse the lower court order, and grant such other relief as the Court deems just and proper.

Respectfully Submitted

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CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing memorandum of law has been furnished by United States Mail, first class postage prepaid, to all parties appearing below on this Monday, October 20, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellant's Initial Brief, complies with Rule 9.100(1) and Rules 9.210(a)(2), Florida Rules of Appellate Procedure, and that this Brief has been submitted in Times New Roman 14-point font and with Administrative Order No. AOSC04-84.

Respectfully Submitted

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