IN THE SUPREME COURT OF FLORIDA

NO. ~~74,527~~ 74927

ANGEL NIEVES-DIAZ,

Petitioner,

v.

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

# CORRECTED

## PETITION FOR WRIT OF HABEAS CORPUS

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## INTRODUCTION

This 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. Diaz was deprived of the effective assistance of counsel on direct appeal and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Significant errors which occurred at Mr. Diaz's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel raised no issue regarding the constitutionally inadequate competency proceeding conducted in Mr. Diaz's case. After the jury was chosen, when Mr. Diaz indicated he wished to represent himself, defense counsel requested a competency evaluation because Mr. Diaz had exhibited "bizarre tendencies." The court appointed two experts to evaluate Mr. Diaz, but ruled that the evaluation would not occur until that evening and that the trial would continue that afternoon. Thus, that afternoon, with Mr. Diaz's competency yet to be determined, the State presented five witnesses, and Mr. Diaz acted as his own counsel. The next morning, without Mr. Diaz, stand-by defense counsel or the prosecutor present, the court announced that one expert had reported to her that Mr. Diaz was "very competent" and accepted the other expert's oral conclusion that Mr. Diaz was competent. Neither expert submitted

a written report at that time, and neither expert addressed Florida's competency criteria. Still in Mr. Diaz's absence, but with the prosecutor and stand-by defense counsel present, the court found Mr. Diaz competent. When Mr. Diaz was finally brought into the courtroom, he was asked by stand-by defense counsel if he would stipulate that the experts had said he was "competent in a mental sense," and Mr. Diaz said "yes." The court made a two-sentence inquiry of Mr. Diaz, and no one informed him of the hearings that had occurred in his absence, nor of the fact that the experts had not submitted written reports at that time, nor of the rules governing competency determinations. This procedure violated Florida and federal laws requiring that proceedings be suspended while a competency determination was being made, violated Florida law requiring experts to submit written reports addressing specific criteria, and violated Mr. Diaz's rights to be present and to confront the evidence against him.

Further, although Mr. Diaz was involuntarily absent from numerous, significant portions of his capital trial, appellate counsel raised no issue regarding these absences. These absences are significant not only because, as the criminal defendant, Mr. Diaz had a right to be present, but also because Mr. Diaz was acting as his own counsel. Mr. Diaz was not present when the court heard from the mental health experts appointed to determine Mr. Diaz's competency and when the court found Mr. Diaz competent, nor did the court inform Mr. Diaz that such a hearing

had occurred. Mr. Diaz was not present when, after the conclusion of the State's case, the court, prosecutor and stand-by defense counsel discussed whether certain witnesses Mr. Diaz wished to call in his defense would offer evidence favorable to Mr. Diaz, nor did the court inform Mr. Diaz that such discussions had occurred. Mr. Diaz's absences violated due process.

Although presenting a claim that Mr. Diaz's death sentence was disproportionate to that of co-defendant Angel Toro, who received a plea to second degree murder and a life sentence, appellate counsel never pointed this Court to the compelling facts in the record showing the injustice of Mr. Diaz's death sentence in comparison to Toro's life sentence. Without being pointed to these facts, this Court thus rejected the proportionality argument although noting that a co-defendant's life sentence is a relevant proportionality consideration if the co-defendant is the more culpable actor. Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1989). In a special concurrence, Justice Barkett noted, however, "if one believed that this defendant was not the actual triggerman, the proportionality argument would have merit." Id. The facts showing Mr. Diaz was not the shooter were in the record, but appellate counsel failed to bring them to the Court's attention. Appellate counsel did not tell the Court that the prosecution conceded at trial it could not establish that Mr. Diaz was the shooter. In opening statement, the prosecutor said, "there will be no evidence as to who the actual shooter of [the victim] was" (R. 788). The prosecutor reiterated

this concession in closing argument, stating, "I do not believe the evidence has shown that this defendant went in there with the intention of killing anyone," and arguing that the jury should convict based solely on felony murder (R. 1257-58).

Further, appellate counsel failed to show the Court that the only testimony implicating Mr. Diaz in the offense -- that of Candance Braun and Ralph Gajus -- fell far short of showing that Mr. Diaz was the shooter. Indeed, Candance Braun's testimony established the opposite, i.e., that Angel Toro was the shooter, not Angel Diaz. Braun testified that on the evening of the shooting, she was present in her apartment along with Mr. Diaz, Angel "Sammy" Toro and two other men named Willie and Luisito (R. 880). At that time, Braun testified that "[h]e [Mr. Diaz] told me that Sammy thought somebody was reaching for a gun and shot a guy during a robbery" (R. 881). Braun also testified that Sammy Toro, Willie, and Luisito were arguing in the apartment (R. 880), and that the reason she eventually came forward to the police was because she "was under the impression that Angel Toro was blaming the actual murder on Angel Diaz, and from my -- from what I had heard, overheard, and from what Papo [Mr. Diaz] later explained to me, Papo did not shoot anyone" (R. 889-90). Braun later reiterated that she believed that Mr. Diaz "was being accused of doing the shooting in a robbery that I knew he did not do the shooting in" (R. 896). Braun also explained that "[e]verybody was yelling at Sammy" (R. 913), and went on to detail the conversation she overheard in her apartment:

THE WITNESS: They were arguing. If they weren't arguing, I probably wouldn't have heard it. If they were talking in a normal voice, I probably wouldn't have heard anything, but they were definitely arguing.

Papo--when I walked into the room at one point, Sammy made a motion like this (indicating). Okay. He said words like, "disparan, tipo panikiado." Disparan is shot, shoot. Tipo is another word for person, for a guy. Panicado is panic.

When he said that, Papo said to him, yelling mad, that that wasn't necessary. That's all.

BY THE DEFENDANT:

Q. That what was not necessary?

A. Whatever Sammy did.

Q. What did Sammy do?

A. Apparently he shot somebody.

(R. 912).

Ralph Gajus **was** also an important witness, as he provided the only evidence on behalf of the prosecution which arguably went to establishing that Mr. Diaz was the shooter. Gajus testified that he was incarcerated in the Dade County Jail and struck a relationship with Mr. Diaz, whose cell was across the hall (R. 1113; 1115). Gajus explained that "over a period of several months" Mr. Diaz would talk about his case (R. 1118), and that Gajus "inferred" from his conversations with Mr. Diaz that Mr. Diaz shot the victim in the chest during a robbery, and that "it was either he [the victim] or him [Mr. Diazl that would die" (R. 1123). Gajus clarified that Mr. Diaz *never* said to him "in the words, 'I shot the man in the chest'" (R. 1123).

Appellate counsel presented none of these and numerous other significant matters to this Court on direct appeal. Had counsel done so, Mr. Diaz would have received a new trial. The lack of appellate advocacy on Mr. Diaz's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwrisht, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that her representation of Mr. Diaz involved "serious and substantial deficiencies." Fitzpatrick v. Wainwrisht, 490 So.2d 938, 940 (Fla. 1986).

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Diaz. "[E]xtant legal principles.. .provided a clear basis for . . . compelling appellate arguments [s]." Fitzpatrick, 490 So.2d at 940. The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson, 474 So. 2d at 1164. Appellate counsel's omissions demonstrate appellate counsel's "failure to grasp the vital importance of [her] role as a champion of [her] client's cause." Wilson, 474 So, 2d at 1164. Individually and "cumulatively," Barclay v. Wainwright, 444 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 Wilson, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So.2d at 1165. In Mr. Diaz's case appellate counsel failed to act as a "zealous advocate," and Mr. Diaz was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the issues presented herein. Mr. Diaz is entitled to a new direct appeal.

## 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. Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized:

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason. . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right,

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), awwroved 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common

> law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ *is not to be circumscribed by hard and fast rules* **or** *technicalities which* often *accompany our consideration of other processes.* If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. *In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.*

Anslin v. Mavo, 88 So. 2d 918, 919-20 (Fla. 1956) (emphasis added). Most recently this Court has written:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haaq v. State, 591 So. 2d 614, 616 (Fla. 1992).

## PROCEDURAL HISTORY

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration. Mr. Diaz was indicted by a grand jury for first-degree murder on January 25, 1984. After entering not guilty pleas, Mr. Diaz was tried by a jury on December 17-21, 1985. Penalty phase began on January 3, 1986 and Mr. Diaz was sentenced on January 24, 1986, The judge's sentencing order was entered on February 14, 1986,

Mr. Diaz unsuccessfully appealed his convictions and sentence, Diaz v. State, 513 So. 2d 1045 (Fla. 1987), and

certiorari to the United States Supreme Court was denied on February 22, 1988. Mr. Diaz applied for executive clemency on June 23, 1988, Clemency was denied by the signing of a death warrant on August 28, 1989, and Mr. Diaz's execution was scheduled for October 27, 1989. On October 25, 1989, the circuit court temporarily stayed Mr. Diaz's execution, and on October 26, 1989, this Court granted an indefinite stay of execution. The circuit court denied all relief, and Mr. Diaz's appeal of that denial is pending.

## GROUNDS FOR HABEAS CORPUS RELIEF

### CLAIM I

**APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL ANY ISSUE REGARDING THE COMPETENCY PROCEEDINGS CONDUCTED IN MR. DIAZ'S CASE, WHEN THOSE PROCEEDINGS DID NOT COMPORT WITH FLORIDA OR FEDERAL LAW AND WHERE THESE VIOLATIONS OF LAW REQUIRED A REVERSAL OF MR. DIAZ'S CONVICTIONS AND SENTENCES.**

Mr. Diaz's trial began on December 17, 1985. Up until the day of opening arguments, Mr. Diaz was represented by attorney Robert Lamons. After the jury was empaneled, but before opening statements, Mr. Diaz asked, through his interpreter and his attorney, to speak to the court. At a sidebar conference, Mr. Lamons informed the court that Mr. Diaz wished to represent himself (R. 765-68). The court ruled that the prosecution would give its opening statement and that the court would talk to Mr. Diaz after lunch (Id.).

After the prosecutor's opening statement, the court inquired whether Mr. Diaz was "still desirous of representing himself" (R. 794). After a lunch break, the following occurred:

> MR. LAMONS: Yes, Your Honor. It is my client's desire to address the jury. Before we address that issue, I would make a motion for a defense caused mistrial and ask the Court to appoint three psychiatrists to examine the defendant. My impressions and the impressions of the interpreter are that Mr. Diaz has exhibited some rather bizarre tendencies over the last two days that were heretofore unnoticed.
>
> THE COURT: Such as?
>
> MR. LAMONS: I have noticed that his responses to my questions have been irrational and not responsive. I have

> noticed that his eyes are not focusing properly. I have noticed that when I ask a question on a certain topic, that either no answer comes forth or an answer comes forth that has no relevance to the question which was posed.
>
> The defense that we have spent countless hours developing over the last couple of months has now over the last twenty-four hours been rejected by my client. I would like to go further on that regard if Your Honor is not inclined to grant my motion for a defense caused mistrial because --
>
> THE COURT: Not only am I not inclined, I am going to deny your motion. The only thing the Court would even consider would be a short recess, and that would only be after some thought on the matter.

(R. 797-98) (emphasis added).

The prosecutor assured the court that, once put on notice, the court was required to have a psychiatrist examine Mr. Diaz on an emergency basis, but reassured the court that there need be no delay in the trial since the exam could be done after the court broke for the evening. The defense attorney argued that the exam needed to be done immediately:

> MR. LAMONS: Judge, here is my position. First of all, it is not, as Mr. Scola has indicated. It is not the defendant's tactic to delay. This was not posed by him. It was posed by myself.
>
> I think the rules require that on this basis, if I have a factual basis, a reasonable basis to believe that he may need or he is incompetent, and it is verified by the interpreter, then I think the aroceedinss shall stop at this point and determine his competency.
>
> Furthermore, the next step in this trial is a very crucial step in this trial. It is a step when we essentially will set out our

> defense. My client has indicated his desire, in fact, his absolute insistence is the word, and he has prepared what I will tell Your Honor is quite an eloquent opening statement, at least what I have heard of it so far, and we have gone over the basics. He is prepared and insists to address the jury at the next phase of the trial.
>
> I do not see where we can go forward and then evaluate his competency. I think it is a situation --
>
> THE COURT: You also have the opportunity of waiving opening statement.
>
> MR. SCOLA: Or reserving.
>
> THE COURT: That is what I mean.
>
> MR. LAMONS: My client desires to go forward at this time. My client desires likewise, your Honor, for me to essentially withdraw as attorney but be his advisor in an advisory capacity with him doing the cross-examination, with him doing the talking to the jury, and I, in an advisory capacity, which I will so do if the Court orders . . .

(R. 799-80) (emphasis added).

Without benefit of a mental health evaluation of Mr. Diaz, the trial court proceeded to question Mr. Diaz regarding his desire to represent himself. During this inquiry, Mr. Diaz, through an interpreter, told the court that he only spoke English "SO so. Just the elementary things. Not that much," that he had only had experience in one trial, that he had read the United States Constitution only "in part," that he "ha[d] no idea" about Florida law because he did not speak English, that he did not "know what I may be able to argue," and that "in law I don't have an idea in matters to be able to cite in my defense" (R. 801-07). After this colloquy, the prosecutor, with reason, was still not

convinced that Mr. Diaz had waived his absolute right to counsel because his answers did "not appear totally unequivocal" (R. 810), and urged the court to ask Mr. Diaz a yes or no question:

> THE COURT: I will try yes or no.
>
> * * * *
>
> Do you, yes or no, desire to represent yourself?
>
> THE DEFENDANT: Yes, ma'am.

(R. 810-11).

After this exchange, the trial court advised Mr. Lamons to act as stand-by counsel, and then made arrangements to have two psychiatrists appointed to evaluate Mr. Diaz for "competency, present competency," and report to the court the next morning (R. 814). The court reaffirmed a few minutes later that the appointment was only for "competency to stand trial" (R. 816). The trial then proceeded without any determination of Mr. Diaz's competency. Neither the trial court nor standby counsel explained to Mr. Diaz that the trial could not proceed until the issue of competency had been determined-l Neither the court nor stand-by defense counsel explained to Mr. Diaz the reason for a competency determination, what a competency determination involved, nor the rules governing competency determinations. Rather, the court forced Mr. Diaz to proceed with his opening statement, explaining to him that his opening statement was

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[1] See Fla. R. Crim. P. 3.210 (a). See also Pridsen v. State, 531 so. 2d 951, 954 (Fla. 1988) (determination of defendant's competency requires trial court "to suspend proceedings and order a competency hearing").

limited to explaining what he believed the evidence would show, and specifically ordering that "you cannot tell them what you think, how you feel, how you are treated in this country or anything else" (R. 817). Mr. Diaz's opening statement is reported in approximately four pages of transcript (R. 819-22). The court then interrupted and chastised Mr. Diaz, telling him, "I have given you a considerable enough time to explain to the jury, even though I did tell you that this part of the case is not to do exactly what you have done" (R. 822).

After the opening statement, the trial proceeded, with five critical witnesses presented by the prosecution before the evening break. During this time, Mr. Diaz, whose competency to stand trial was still in doubt, and whose competency to proceed without counsel would in fact never be adequately assessed, conducted his own "defense." The court was not even convinced that Mr. Diaz was competent to represent himself. At one point during the testimony, Mr. Diaz asked to speak to the State's attorney and then to the judge, and told the judge he could not represent himself:

> THE COURT: I want you to translate this. Tell Mr. Diaz that if I find he is not able to conduct the trial, I am going to have to tell him that he cannot represent himself, and I am going to have to appoint Mr. Lamons to represent him. It is not possible to speak with the State Attorneys in the middle of questioning a witness. I did give you an opportunity to confer with Mr. Lamons. I am sure that he told you that that is not a possible procedure during the trial.
>
> THE DEFENDANT: I accept that.

THE COURT: Now why you want---

THE DEFENDANT: It has been difficult. I realize that in these kinds of matters--but my interest is to prove my innocence, and I have no objection if you sermit Mr. Lamons to help me because, truthfully, I am incasable of continuing. I recognize that, and I ask for forgiveness from the Court and the State in this matter. Because even right now I can prove that the witness is lying in certain matters, in a lot of matters, points that are interesting, but I don't have the time. I've got more nervous in wanting to, and I don't have enough time to select---

THE COURT: Are you tell me now that you want to withdraw, you no longer wish to represent yourself, because you are incapable of doing so and you wish Mr. Lamons again to take over the representation of you?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right.

(R. 898-900)(emphasis added).

The court, still without benefit of any mental health evaluation, concluded that Mr. Diaz was merely trying to stop the trial and "make a mockery out of justice" (R. 904). This is despite the fact that Mr. Lamons had informed the court that his client had "exhibited some rather bizarre tendencies over the last two days" (R. 797).[2]

Not only did the lower court fail to halt the proceedings in order to have Mr. Diaz's competency to proceed *pro* se evaluated, but the procedure employed by the court wholly failed to comport with any notion of due process. In fact, the proceeding at which

[2]The record supports Mr.Lamons' observations. (See R. 829; 841; 857; 885; 899; 900; 903-04; 916; 921; 1081-2; 1089; 1091; 1157; 1212-1214; 1224; 1241-2).

the "experts" appointed by the court rendered their reports was conducted ex *parte*. The State was not present. Mr. Diaz was not present, even though he was supposedly representing himself. Standby counsel Lamons was not present. The court conducted the "proceedings" totally on her own, and after this "proceeding" found that Mr. Diaz was competent to stand trial, Mr. Diaz's right to a lawful competency proceeding and his right to an adequate competency hearing during which he was present were totally violated.

What occurred in this case with respect to the competency "hearing" stands in stark violation to any notion of due process. After Dr. Haber and Dr. Castiello evaluated Mr. Diaz on the evening of the day trial commenced, the following exchange occurred the following morning:

> (Thereupon, a discussion was held off the record, after which the following proceedings were had outside the presence Of the attorneys, the defendant, and the jury:)
>
> THE COURT: For the record, the report on Angel Diaz, he is very competent.
>
> (Thereupon, other matters were handled, after which the following wroceedinss were had outside the wresence of the attornevs, the Defendant, and the jury:)
>
> THE COURT: Dr. Haber, would you give me an oral on Angel Diaz, please.
>
> DR. HABER: Angel Diaz is competent. But he did express to me that he would like some technical legal help in defending himself.
>
> THE COURT: Did Mr. Diaz tell you that Mr. Lamons sits next to him and gives him help during the entire trial?

DR. HABER: (Thereupon, Dr. Haber shook his head.)

THE COURT: No, he did not tell you that.

The report, as I said, from Dr. Castiello is that Mr. Diaz is very competent.

DR. HABER: Yes, he is.

(R. 981-82) (emphasis added). This was the competency "hearing" that was conducted in this capital case. Mr. Diaz, the defendant who was representing himself, was not present. The defendant's standby counsel was not present. The State was not present. One of the doctors, Dr. Castiello, was not present. The record is silent as to how Dr. Castiello reported his findings to the court. No questioning of Dr. Haber was conducted by the court as to the evaluation, the specific criteria of Fla. R. Crim. P. 3.211, the length of the evaluation, or **anything** about the evaluation. No cross-examination of Dr. Haber occurred, and obviously no questioning of Dr. Castiello occurred as he was not even there. The "hearing" was simply a sham. After her ex *parte* conversation with Dr. Haber and her off-the-record conversation with Dr. Castiello, the court concluded that Mr. Diaz was competent to stand trial.

Following this exchange with Dr. Haber, the record next reflects that the prosecutor and Mr. Lamons were present in court (but not Mr. Diaz, who was representing himself) and the court informed them that "there was an oral report by two, a psychiatrist and a psychologist. I think the report was Mr. Diaz is very competent" (R. 982). The court never explained what

really occurred -- that only Dr. Haber showed up and simply stated that Mr. Diaz was competent. The court never disclosed that Dr. Castiello did not come to court. The court never disclosed that the experts had not addressed the criteria of Fla. R. Crim. P. 3.211. The court indicated that she was providing this information to the prosecutor and Lamons "for your own information" (R. 983).

After this proceeding with the prosecutor and Mr. Lamons, Mr. Diaz was finally brought into the courtroom, and the prosecutor stipulated to the experts' findings (R. 985). Mr. Lamons observed that "[a]s his attorney, I would stipulate" but that because Mr. Diaz is representing himself, "I do not know if I have the ability to stipulate to those reports" (R. 985). The court then told Mr. Lamons to have Mr. Diaz "do that himself" (R. 985). After asking Mr. Diaz if he would "stipulate that the reports of the doctors are true" and that he was "competent in a mental sense" (whatever that means), Mr. Diaz said yes (R. 985-86). Then the court inquired of Mr. Diaz:

> THE COURT: All right. Mr. Diaz was sworn in yesterday.
>
> Mr. Diaz, you are still under oath. You were told -- no, you are still under oath. You were told that both Dr. Castiello and Dr. Haber, who have examined you this morning, have stated that you are competent to stand trial. As a matter of fact, they found you very competent.
>
> Do you stipulate to those reports?
>
> THE DEFENDANT: Yes, Your Honor.

> THE COURT: Again, the Court finds you competent, and we will be able to proceed with trial.

(R. 985-86).

This entire proceeding was a mockery. At no time was Mr. Diaz informed of his right to have an adversarial competency hearing. In fact, at no time was Mr. Diaz ever informed that a hearing even took place, and that he had the right to be present. The court pressured Mr. Diaz into "stipulating" to the fact that the doctors reports were "true," yet the court did not afford Mr. Diaz notice of the "oral" reports, much less the opportunity to review the doctors' written reports before stipulating to anything. In fact, written reports had not even been prepared when this "hearing" took place (R. 985).[3]

If Mr. Diaz was representing himself, he should have been informed that he had the right to be present, that he had no obligation to stipulate to reports the existence of which he had never been made aware, and in fact that he had the right to cross-examine the doctors about their opinions and findings. Given Mr. Diaz's difficulties with the English language, it is

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[3]Interestingly, among the conclusions contained in Dr. Castiello's written report submitted the next day was his finding that Mr. Diaz's "[i]nsight and judgment into his present situation did not appear more than superficially adequate" (PC-R. 480). This is a significant observation, and certainly one which should have been explored during a competency hearing. Because the conversation between Dr. Castiello and the court about Mr. Diaz's competency took place off the record, it is not known if Dr. Castiello reported Mr. Diaz's "superficially adequate" level of insight and judgment. If he did so report, the court certainly did not inform any of the parties, including Mr. Diaz, of Dr. Castiello's observations. An evidentiary hearing is warranted.

doubtful that Mr. Diaz even knew what "stipulate" meant, much less what its implications were as to the issues. Mr. Diaz "stipulated" to the truth of facts in reports which were not even written at the time.[4] Because the entire proceeding took place without his knowledge or presence (or even the knowledge or presence of standby counsel), Mr. Diaz would have no way of knowing what had actually occurred during the ex *parte* interlude between the court and Dr. Haber when competency was discussed. As such, Mr. Diaz's right to confrontation was also violated. Davis v. Alaska, 415 U.S. 308 (1974); Douglas v. Alabama, 380 U.S. 415 (1965).

Mr. Diaz's absence from the competency proceedings is *per se* reversible error entitling Mr. Diaz to a new trial. The State cannot show that Mr. Diaz made a knowing, voluntary, and intelligent waiver of his presence at the competency proceedings because no inquiry was made regarding whether Mr. Diaz waived his presence. Further, since Mr. Diaz was acting as his own counsel, his absence from these proceedings cannot be considered harmless error, In the alternative, the State cannot show that Mr. Diaz's absence from the competency hearing was harmless beyond a reasonable doubt. Mr. Diaz represented himself at trial. There can be no showing of harmlessness beyond a reasonable doubt when a defendant who is representing himself is involuntarily absent

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[4]Moreover, no "facts" were discussed by Dr. Haber when she announced her finding of competency to the court. Dr. Haber was only asked about her conclusion, which she provided to the court. Of course, any "facts" that Dr. Castiello provided to the court were not on the record.

from a critical stage in the proceedings. This is not a case where the State could argue that the portion of the trial from which the defendant was absent addressed "merely legal matters" about which the defendant would have no input. Here, Mr. Diaz was representing himself. As counsel, he had the right to be present when legal matters were discussed. This is not a case where the State can argue that the defendant's counsel adequately protected his interests during the defendant's absence,[5] or that an adequate waiver was solicited, or that the defendant ratified or acquiesced to the proceedings in his absence. Again, Mr. Diaz was representing himself. No waiver occurred, and no one ever informed Mr. Diaz of his right to be present during the competency hearing. The State can make no showing of harmlessness beyond a reasonable doubt.

In addition to violating Mr. Diaz's right to be present, the manner in which the competency proceedings were conducted violated Florida and federal law requiring the court to suspend trial proceedings pending a competency determination, requiring that competency evaluations address specific criteria, and requiring that competency proceedings comport with due process. The court allowed Mr. Diaz to represent himself and the trial proceeded through opening statements and five State witnesses before the competency examinations were conducted. This action violated the statutory rules concerning competency.

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[5]Of course, it cannot be forgotten that Mr. Lamons was likewise not present during the competency hearing either.

> RULE 3.210 COMPETENCE TO STAND TRIAL
> PROCEDURE FOR RAISING THE ISSUE
>
> (a) A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded asainst while he is incompetent.
>
> (b) If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable grounds to believe that the defendant is not mentally competent to stand trial, the court shall immediatelv enter its order setting a time for a hearing

Fla. R. Crim. P. 3.210 (1988). This action also violated due process. Drope v. Missouri, 420 U.S. 162, 181 (1975); Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978). The trial court's failure to suspend the proceedings pending a determination of Mr. Diaz's competency thus violated Florida and federal law.

The evaluations themselves also did not comport with Florida law. The rule in effect at that time required experts to consider specific criteria:

> (a) Whether the defendant meets the statutory criteria for competence to stand trial, that is, whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him.
>
> (1) In considering the issue of competence to stand trial, the examining experts should consider and include in their report, but are not limited to, and analysis of the mental condition of the defendant as it affects each of the following factors:
>
> (i) Defendant's appreciation of the charges;
> (ii) Defendant's appreciation of the range and nature of possible penalties;

(iii) Defendant's understanding of the adversary nature of the legal process;

(iv) Defendant's capacity to disclose to attorney pertinent facts surrounding the alleged offense;

(v) Defendant's ability to relate to attorney;

(vi) Defendant's ability to assist attorney in planning defense;

(vii) Defendant's capacity to realistically challenge prosecution witnesses;

(viii) Defendant's ability to manifest appropriate courtroom behavior;

(ix) Defendant's capacity to testify relevantly;

(x) Defendant's motivation to help himself in the legal process;

(xi) Defendant's capacity to cope with the stress of incarceration prior to trial.

Fla. R. Crim. Pro. 3.211 (1988).

At the oral report the experts merely told the Court that Mr. Diaz **was** competent (R. 981). The experts later submitted written reports that were superficial and conclusory (see Supplemental Record on Direct Appeal). No tests were performed and obviously there was no time for investigation of Mr. Diaz's background. The experts did not adequately address all eleven points of the statutory test.

The record is silent as to the length or depth of the "evaluations" conducted by Drs. Haber and Castiello. Because no one was notified that Judge Donner was conducting a "hearing" on Mr. Diaz's competency, no one representing Mr. Diaz or his interests was present to question the experts on the adequacy of their evaluations. Given that both evaluations were conducted in the evening, one can imagine that they were hurried at best. In fact, Dr. Castiello's written report, filed after the "hearing"

before Judge Donner, indicates that he did not even have Judge Donner's order when he conducted his evaluation (PC-R. 478). Rather, Dr. Castiello found out from Judge Donner's assistant that "the Court was requesting an opinion as to the defendant's competency" (Id.). Further, the observation in Dr. Castiello's written report that Mr. Diaz's "[i]nsight and judgment into his present situation did not appear more than superficially adequate" raises substantial questions regarding Mr. Diaz's competency. These questions could have been addressed had the court conducted a hearing with Mr. Diaz and stand-by defense counsel present. Had a competent evaluation been done when defense counsel requested it, and as contemplated by the criminal rules of procedure, the mental health experts could have predicted Mr. Diaz's bizarre behavior at trial and could have just as clearly stated that Mr. Diaz was not competent to represent himself. His actions were the product of his mental illness, not indications of his "competence" as the court wished to believe. See Pridsen v. State, 531 So. 2d 951, 955 (Fla. 1988) ("[i]f Pridgen was incompetent during the penalty phase of the trial, the tactical decisions made by him to offer no defense to the state's recommendations of death cannot stand"). Had the matter been subjected to the crucible of an adversarial proceeding, and had proper evaluations been conducted at the time, Mr. Diaz would not have been tried in violation of the United States Constitution.

As established above, reversible error occurred when Mr. Diaz was involuntarily absent from the competency "hearing." Inexplicably, and without any reasonable tactical or strategic decision, appellate counsel failed to raised this fundamental constitutional error on direct appeal. That a defendant's involuntary absence from a critical stage constituted constitutional error under Florida and federal law was widely known at the time of Mr. Diaz's direct appeal. See Drope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); Proffit v. Wainwrisht, 685 F.2d 1227 (11th Cir. 1982); Francis v. State, 413 so. 2d 1175 (Fla. 1982); Amazon v. State, 487 So. 2d 8 (Fla. 1986). That a competency hearing must comport with due process was also widely known at the time of Mr. Diaz's direct appeal. Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975); Lane v. State, 388 So. 2d 1022 (Fla. 1980); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Mason v. State, 489 So, 2d 734, 736 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). That competency determinations were required to address specific criteria was well known at the time of Mr. Diaz's direct appeal. Fla. R. Crim. P. 3.211 (1986). That a court must suspend the proceedings when it orders a competency evaluation in order to resolve disputed issues of competency was likewise widely known at the time of Mr. Diaz's direct appeal. Drope, 420 U.S. at 181; Fla. R. Crim. P. 3.210 (a) & (b); Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978) (noting with approval and adopting holding of Drope that "a

defendant's due process right to a fair trial was violated when the trial court failed to suspend a trial pending the determination of defendant's competence to stand trial"). See also Pridsen v. State, 531 So. 2d 951, 955 (Fla. 1988) ("we hold that the judge erred in declining to stay the sentencing portion of the trial for the purpose of having Pridgen reexamined by experts and holding a new hearing on his competency to continue to stand trial"); Finklestein v. State, 574 So, 2d 1164, 1169 (Fla. 4th DCA 1991)(assistant public defender's refusal to proceed with pretrial motions until competency evaluations conducted and hearing occurred supported by Florida and federal law, and trial court departed from essential requirements of law when removing attorney from case for failing to proceed). There is simply no reason for not raising this clearly meritorious issue on appeal. Had the issue been raised, this Court would have reversed Mr. Diaz's convictions and sentences. Mr. Diaz is entitled to a new direct appeal.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL ANY ISSUE REGARDING MR. DIAZ'S NUMEROUS INVOLUNTARY ABSENCES FROM HIS CAPITAL TRIAL.

A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, see, e.g., Hope v. Missouri, 420 U.S. 162 (1975); Illinois v. Allen, 397 U.S. 337 (1970); Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, Francis v. State,

413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure. As this Court has held, a capital defendant has "the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis, 413 So. 2d at 1177. See also Garcia v. State, 492 So. 2d 360, 363 (Fla. 1986) ("Appellant is correct in his assertion that he has a constitutional right to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings"). This right derives in part from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Proffitt, 685 F. 2d at 1256.

The constitution defines those stages where presence is required as any proceeding at which the defendant's presence has a "reasonably substantial relationship to his ability to conduct his defense." Id. at 1256. The determination of whether the defendant's presence is required should focus on the function of the proceeding and its significance to trial, Id. at 1257.

While "[a] capital defendant is free to waive his presence at a crucial stage of the trial," such a waiver "must be knowing, intelligent, and voluntary." Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986). See also Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Johnston v. Zerbst, 304 U.S. 458 (1938). "Counsel may make the waiver on behalf of a client, provided that the client, subsequent to the waiver, ratifies the waiver either by examination by the trial judge, or by acquiescence to the waiver

with actual or constructive knowledge of the waiver." Id. See also Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995). In determining the constitutional adequacy of the waiver, a trial court must question the defendant about his understanding of his right to be present during the critical stage at issue, and the record must affirmatively demonstrate that the defendant knowingly waived this right. Francis, 413 So. 2d at 1178.

If a defendant is involuntarily absent from any critical stage of the proceedings, relief is warranted unless the State can show first that the defendant made a knowing, intelligent, and voluntary waiver of the right to be present, Francis, 413 So. 2d at 1178, and that the defendant's absence was harmless beyond a reasonable doubt. Id. (citing Chapman v. California, 386 U.S. 18 (1967). If the Court is "unable to assess the extent of prejudice, if any, [the defendant] sustained by not being present during [a critical stage]," the Court must conclude that "[the defendant's] involuntary absence without waiver by consent or subsequent ratification was reversible error and that [the defendant] is entitled to a new trial," Francis, 413 So. 2d at 1179.

It cannot be seriously argued that if a defendant like Mr. Diaz represents himself during a trial, all stages of the trial are critical stages during which the defendant, acting as his own counsel, must be present. This did not occur in Mr. Diaz's trial.

**A. ABSENCE FROM THE COMPETENCY HEARING**

As detailed in Claim I above, Mr. Diaz was absent from the proceedings at which the trial court received the mental health experts' conclusions that Mr. Diaz was competent and at which the court ruled Mr. Diaz was competent. There can be no question that a competency hearing in a capital case is a critical stage in the proceedings. See Fla. R. Crim. P. 3.210 (a)(l); 3.212 (a). This is particularly so in a case when the defendant is representing himself. If Florida law precludes Mr. Diaz from being tried if he is incompetent, as it does, see Fla. R. Crim. P. 3.210 (a), then the proceeding during which the competency determination is made is a critical stage. Proffitt, 685 F. 2d at 1257. This Court has held that due process applies to competency determinations. See Mason v. State, 489 So. 2d 734, 736 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

Mr. Diaz, who was representing himself, was not present during the competency hearing at which time the court heard the opinions of the court-appointed mental health experts and determined that Mr. Diaz was competent. Standby counsel and/or the trial court failed to ensure that Mr. Diaz was present during the "hearing" that was conducted concerning Mr. Diaz's competency to stand trial and to represent himself. The trial court and/or standby counsel failed to inform Mr. Diaz that he was entitled to an adversarial hearing regarding his competency, at which time he was entitled to confront the witnesses against him and cross-

examine the doctors about their opinions. The trial court and/or standby counsel likewise failed to elicit a waiver from Mr. Diaz of his right to be present at the competency hearing, although such a waiver would not have been valid, given the fact that he was representing himself during the proceedings.

**B. ABSENCE FROM DISCUSSIONS ABOUT WITNESSES**

1. **Discussions Resardins Hector Torres**

During trial, Mr. Diaz was absent several times from discussions regarding potential witnesses. At a recess during the State's case, with Mr. Diaz out of the courtroom (R. 1094), the court told the prosecutor and stand-by defense counsel that the public defender representing a man named Hector Torres, who was supposed to enter a plea before the court, had asked to withdraw from representing Mr. Torres because Mr. Torres said he had some information about the Angel Diaz trial (R. 1095).[6] Although familiar with the Hector Torres case, the prosecutor in Mr. Diaz's case did not know whether the information Hector Torres possessed was inculpatory or exculpatory to Mr. Diaz (R. 1095-96). However, the prosecutor and court assumed that the information must be inculpatory because Hector Torres wanted to discuss it with the State (Id.). The prosecutor offered to talk to Hector Torres along with stand-by defense counsel, "and then come back and report to the court. Certainly if it is Brady material at that point, then Mr. Lamons can make him available to

[6]The public defender representing Mr. Torres asked to withdraw because he represented a co-defendant of Mr. Diaz's in another case.

Mr. Diaz to testify in his behalf" (R. 1096). The court stated she would appoint an attorney for Mr. Torres (R. 1097). After a short recess, court reconvened, still without Mr. Diaz present (R. 1097), and the court stated that a Mr. Galanter had been appointed to represent Mr. Torres (R. 1097-98).

At the close of the State's case, with Mr. Diaz absent from the courtroom, the following occurred regarding the Hector Torres matter:

> (Thereupon, the defendant left the courtroom, after which the following proceedings were had outside the presence of the defendant:)
>
> THE COURT: Let's hear the rest of it. Okay. Let's hear it.
>
> MR. GALANTER: Judge, I have had a preliminary conversation with Mr. Torres. He would like me to represent him on the substantive case.
>
> THE COURT: He now wants to go to trial?
>
> MR. GALANTER: He would just like me to investigate the other case and look into it, and then advise him.
>
> THE COURT: Okay. We are talking about the case that we have here. Does he have anything to say or does he just want a new attorney?
>
> MR. GALANTER: Does the Court want to make specific inquiries of me?
>
> THE COURT: I do not want you to do anything that would jeapordize your attorney/client relationship, Mr. Galanter. However, Mr. Torres made a statement to me, and I asked you to represent him, but I also asked you to first investigate that statement. Does he really have anything to

say about the case or did he just hear that it was a good idea to come to court ---

MR. GALANTER: I need for the Court to ask me specific questions before I can respond, Judge. I am placed in a situation where if I start to volunteer information to the Court I may be placed in a situation where I am --- if the Court can make specific inquiries, I can make a determination.

THE COURT: Does Mr. Torres know Mr. Diaz?

MR. GALANTER: Directly?

THE COURT: Yes, directly.

MR. GALANTER: No.

THE COURT: Has he heard rumors in the jail and that is what he is basing his statements upon?

MR. GALANTER: No, that is not the basis for his information.

THE COURT: That is not the basis of his information.

Does he know people that know Mr. Diaz?

MR. GALANTER: Possibly.

THE COURT: Well, this information came to him from somebody other than the fact that it telepathically came into his cell. Do you know that somewhere?

MR. GALANTER: Or something; not necessarily somebody.

THE COURT: Did he intercept any of the writings that Mr. Diaz allegedly wrote during --

MR. GALANTER: We never discussed that, Judge.

THE COURT: Did he receive any written materials that told him about the case?

MR. GALANTER: Not to my knowledge.

Judge, maybe I can help you. I can tell you that based on my interview with Mr. Torres, he has nothing that would put the State under any obligation to disclose any information under Maryland v. Brady, Brady v. Maryland. Nor does he have any information that would in any way be considered exculpatory for the defense. I did not think it was going to be exculpatory when he only wanted to speak to the State Attorney,

MR. SCOLA: Also indicates, Mr. Galanter, that he would not be willing to divulge that incriminating information unless he got a deal by the State.

MR. GALANTER: He wants a deal up front.

THE COURT: The Court would not allow the State to make a deal with Mr. Torres.

* * * *

MR. GALANTER: I will relay the message.

MR. SCOLA: Mr. Galanter received the substance of the information, even though he cannot divulge it.

Have you received the substance of the information from Mr. Torres?

MR. GALANTER: I have had conversation with my client that indicates he has some knowledge about the case.

MR. SCOLA: None of it exculpatory.

MR. GALANTER: In my opinion, none of it exculpatory.

* * * *

THE COURT: All right. If he wishes to say anything about the case without a deal, I will certainly allow the State and the defense to talk to him.

MR. SCOLA: We are not interested because we have rested our case,

THE COURT: That is right.

MR. SCOLA: I think it would be prejudicial to the defendant at this point to introduce new evidence that they have not had an opportunity to investigate, and I think his information is inherently unreliable when he waits until the moment he is going to take a plea, and I do not want to be involved in any of that type of testimony.

THE COURT: Mr. Lamons.

MR. LAMONS: The only other additional question I would ask Your Honor to pose would be does he have information about any witnesses, specifically, Ralph Gajus or others that would tend to be favorable to the defendant, something that the defense could utilize.

MR. GALANTER: Judge, I can only tell you as an officer of the Court that, in my opinion, there is absolutely no exculpatory evidence --

MR. LAMONS: Okay.

MR. GALANTER: -- involved in any way in this case.

MR. LAMONS: I am satisfied.

THE COURT: The Court is, too, and I never thought, Mr. Lamons, it was anything other than incriminating for your client because those persons that he wishes to make a deal with is the State. You cannot do anything for him. The only people who he thinks to ask is the State and, therefore, anything he would say would be beneficial to the State.

I believe that Mr. Galanter, as an officer of the Court, would not only inform the Court, but inform you that he might not be able to take the appointment and you better do something about it, and the Court is satisfied with that.

(Thereupon, an overnight recess was taken until Saturday, December 21, 1985, at or about 9:30 a.m.).

(R. 1169-1176) (emphasis added).

Mr. Diaz, who was representing himself at this time, was never present for any of this. Mr. Galanter, who was not involved in Mr. Diaz's case and thus likely knew very little about it, offered his opinion that Mr. Torres possessed no exculpatory information. Bound by the attorney/client privilege, Mr. Galanter revealed none of the substance of Mr. Torres' knowledge, just his own opinion that the information was not exculpatory. Mr. Lamons had no authority to be agreeing to or waiving anything on behalf of Mr. Diaz. Had Mr. Diaz been present, he could have at least chosen to interview or depose Mr. Torres to see what information he had so that Mr. Diaz could have then made an informed decision about subpoenaing the witness. He was never given that opportunity. The court never informed Mr. Diaz about the discussions regarding Hector Torres. Since Mr. Diaz was never informed of these discussions, he never waived his presence. These discussions regarding a potential witness constituted a critical stage of the proceedings.

2. **Discussions About The Defense Case**

After the State rested its case, Mr. Diaz requested that he be allowed to call numerous witnesses in his defense (see R. 1160-61, 1185-1226; see also Claim III). Several of the witnesses Mr. Diaz wished to call were jail inmates who Mr. Diaz said could provide testimony impeaching the credibility of State

witnesses Gajus, a jailhouse informant (R. 1201). As to these witnesses, the court ultimately allowed Mr. Diaz and Mr. Lamons to interview them in a holding cell (R. 1216-17).

That afternoon, the court convened to discuss the outcome of these witnesses interviews. Mr. Diaz was not present:

Afternoon Session

> (Thereupon, the following proceedings were had outside the presence of the Defendant and the jury)
>
> THE COURT: Who is the first [defense witness]?
>
> MR. LAMONS: I guess it is up to Angel, Judge. I would not call either one of them, but it is up to him --
>
> THE COURT: Okay.
>
> MR. LAMONS: -- in what order he chooses.
>
> Could I have him brought out as soon as you have the proper personnel?
>
> MR. KASTRENAKES: I am ready to go.
>
> THE COURT: Listen, I was going to start this trial at 12:30. I came back in this building at exactly 12:30. It is now 1:15. We have got to start this trial. I am going to give you all another five minutes, and we are starting the trial.

(R. 1218).

A discussion between the Court, the prosecutors, and Mr. Lamons then occurred (without Mr. Diaz's presence) concerning the witnesses' statements:

> MR. SCOLA: Judge, based upon what information was brought out during the depositions of these two witnesses, one of the witnesses in particular, Mr. Sanborne,

the main thrust of his testimony is going to concern Mr. Gajus' previous attempted escapes, and I think, once again, the Court has to warn Mr. Diaz, when he gets here, that that could possibly open areas that the Court has previously ruled the State would not be allowed to go into.

MR. LAMONS: I have explained that to him, but these escape attempts predate even the concept arising of the escape attempts of Mr. Diaz.

MR. SCOLA: Judge, as we argued to you, we tried to introduce evidence of Mr. Gajus' attempt to escape with this defendant in relating his other previous attempts of escape to show how they got to know each other and trusted each other. If we cannot go into this escape, I do not see how they cannot allow us to go into everything and explain how he knew the defendant.

THE COURT: That is going to be the Court's ruling.

MR. LAMONS: I have explained that to Mr. Diaz and, as usual, he is not following my advice. So I will explain it again.

THE COURT: Perhaps maybe I should explain that I am not going to permit that kind of testimony.

(R. 1218-19).[7] Although the court later reiterated her ruling to Mr. Diaz (R. 1222), the court never informed Mr. Diaz about the discussion quoted above between the court, prosecutor and stand-by counsel. The court did not inform Mr. Diaz of the prosecutor's arguments about these witnesses' testimony nor of stand-by counsel's comments about these witnesses. Since Mr. Diaz was not informed of these discussions, he never waived his

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[7]The court had previously ruled that the State could not elicit testimony regarding Mr. Diaz's purported attempt to escape from jail (R. 739).

right to be present. These discussions of witnesses Mr. Diaz was considering presenting in his defense clearly constituted a critical stage of the proceedings.

**C. OTHER ABSENCES**

Mr. Diaz was absent from many other proceedings concerning significant matters. At a pretrial hearing on a defense motion for the state to produce a witness, Mr. Diaz was not present (R. 374-79). Key witnesses in the case either recanted or "disappeared." The state's discussion of the availability and relevance of witnesses was therefore important to the trial,

The State had been refusing to permit the defense access to certain key witnesses. When the court asked "Is this a confidential informant situation" (R. 375), the state responded:

> MR. HOGAN: To divulge the name, Your Honor. You see, to some extent it is an academic question because I don't know where the witness is today. I don't know any of the agents of the State of Florida that do, however, I do have some information as to where she last was. I would object to having to disclose that based on the fact that I think there was a genuine threat as to that witness's life. The one witness in the case has allegedly been fire bombed already and one defendant is under sentence of first degree murder in Massachusetts. There is evidence to indicate that the other defendant in the case also has had a murder conviction in the past, and the witness that we are talking about received a threat in the mail, She has a number of threats. She has disappeared from us.
>
> MR. FERRERO: First of all, my client is in jail. Regarding threats to witnesses, I do respect Mr. Hogan's right to have an evidentiary hearing. I would just ask the Court to not take those statements on face

value because that is an issue which is hotly contested by the defense.

THE COURT: You want to see this lady for what purpose?

To take her deposition?

MR. FERRERO: We want her address for purposes in aiding us in our cross examination.Apparently we have reason to believe this witness is a heroin dealer, convicted of heroin trafficking, grand larceny, robbery and prostitution. Her reputation in the community where she resides will become relevant and will be an issue, and I believe we have a right to her address.

(R. 375-376).

Mr. Diaz was not present for any of this colloquy (R. 3714). The court made no inquiry about his absence nor was any waiver ever presented (R. 374).

Clearly, this colloquy was a critical stage of the proceedings in any event, but even more so because Mr. Diaz would attempt to represent himself. During his defense, he displayed great concern about these witnesses and unsuccessfully attempted to cross examine Detective Smith about the improprieties instigated by the state with regard to these witnesses (R. 1073-85). Mr. Diaz also unsuccessfully attempted to have Georgina Deus produced at trial as a defense witness (R. 1188-1189).

Mr. Diaz was present but without an interpreter at a later hearing on a motion to continue by the state (R. 422-28). The State requested this motion because of the unavailability of Candace Braun, a key State witness. At this hearing the defense attorney and the prosecutor discussed the admissibility of this

evidence and whether Mr. Diaz or his co-defendant, Toro, had spoken to this witness (R. 423-24). Defense counsel noted that one witness had already recanted (Georgina Deus) and he was concerned that Braun would also recant (R. 424-25).

Nor was Mr. Diaz present at other pretrial hearings at which Toro's responsibility for the shooting was discussed. He was not present when defense counsel moved for appointment of an expert psychologist and for production by the state of favorable evidence, specifically evidence detrimental to co-defendant Toro (R. 350). Mr. Diaz was also absent from a motion by defense counsel to strike the death penalty on grounds that the state had failed to produce favorable evidence (R. 359) . At that hearing, defense counsel noted that he had reason to believe that Toro was the triggerman. Defense counsel also brought up the state's failure to respond to his Brady request filed on April 26, 1984, some 20 days prior to the hearing (R. 359). Mr. Fererro asked about his client's presence:

> MR. FERRERO: Is the defendant present?
>
> CORRECTIONS OFFICER: He is in the safety cell. I believe he was not brought over. I was advised that they had called, and that they were having administrative problems.
>
> THE COURT: His presence?
>
> MR. FERRERO: I advised him that this motion was on; although I don't know if he knew what the motion was for.
>
> THE COURT: Are you waiving his presence?
>
> MR. FERRERO: Yes, Your Honor.

(R. 359). There is no indication in the record that Mr. Diaz ever knew of or ratified this waiver. Mr. Diaz was also absent from a hearing concerning a potential witness against the co-defendant Toro and the conflict resulting from his own attorney's, Mr. Ferrero's, representation of that witness (R. 396-413). Mr. Diaz was present but without an interpreter during a portion of voir dire (R. 540). A defendant's right to be present at jury selection is unquestionable. Fla. R. Crim. P. 3.180; Chandler v. State, 534 So. 2d 701 (Fla. 1988).

A defendant's right to be present during testimony against him is also fundamental. Mr. Diaz was absent during the testimony of security officer Rogers (R. 696-702). Sergeant Rogers testified about the reasons he and Commander Bencomo felt the extreme security measures were necessary. This became critical because Mr. Diaz attempted to represent himself at trial while shackled. Rogers said that Mr. Diaz had a reputation for violence and had already bribed a security guard (R. 697). This testimony was doubly damaging because the source of these facts is not clear: the injection of such unreliable facts was harmful to the court's general perception of the case. Mr. Diaz, however, was not there to challenge them. The testimony was also prejudicial because the judge relied on it to approve of the extraordinary security measures, including shackles (R. 700-02). During his testimony, the officer also mentioned a plea offered to Mr. Diaz and defense counsel pointed out that the officer was

misinformed (R. 698-99). Mr. Diaz had no chance to challenge this.

Again, before Mr. Diaz was brought in to the courtroom to begin presenting the defense case, the following took place outside his presence:

> (Thereupon, the following proceedings were had outside the presence of the Defendant and the jury)
>
> MR. LAMONS: Could I have Angel out for a minute? I would like to talk to him before we start.
>
> THE COURT: Bob, listen; you have to remind him of the following; That a statement made by him on the witness stand is not closing argument.
>
> MR. SCOLA: I think the concern is going to be just the opposite of that.
>
> MR. LAMONS: His closing argument will be presenting tomorrow. I have already discussed that with him.
>
> THE COURT: You think he is going to make the statement from the stand?
>
> MR. LAMONS: I think he might not testify. I think he might go into closing argument, and that is what I want to talk to him about.
>
> THE COURT: The difference between testimony and closing.
>
> MR. LAMONS: We discussed it yesterday through the interpreter. I think he understands. I do not think it will cause too much of a problem.
>
> MR. SCOLA: I would still ask the Court to admonish him when he comes in.
>
> MR. KASTRENAKES: Judge, we need him to agree tentatively to the jury instructions.

THE COURT: I know.

MR. KASTRENAKES: He took them home last night.

THE COURT: Before we bring him him [sic] -- gentlemen, you are not now wearing weapons, are you?

THE CORRECTIONAL OFFICER: No.

THE COURT: We cannot talk about this in front of him, so close the door. We need liaison.

THE CORRECTIONAL OFFICER: Yes, ma'am. Getting Liaison in here so we can lock the door.

THE COURT: Okay. We need to have a conversation about the fact that Corrections wants to use weapons, have weasons on him, and it is up to you guys. If you say no they cannot ---

THE LIAISON OFFICER: (Thereupon the Officer shook his head)

THE COURT: No? It is too dangerous. You men walk around too much. You are too much of a target. They are the ones with the guns.

I am ready for them.

(R. **1179-81)** (emphasis added). The judge then had a conversation with the prosecutors outside the presence of Mr. Diaz during which she asked how much time the State wanted for its closing argument, and addressed other matters such as the verdict forms (R. **1181-82)**. Finally, the prosecutor acknowledged to the court that "[w]e should have the defendant here for all these discussions" (R. 1182). To that, the court responded "[t]here is life after this courtroom, you know" (Id.). Finally, Mr. Diaz was brought into the courtroom (R. 1182). Instead of explaining

what had transpired in his absence, the court and the prosecutor immediately went on to address the jury instructions.

The following discussions were also had outside the presence of Mr. Diaz:

> (Thereupon, there was a pause in the proceedings, after which the following proceedings were had outside the presence of the Defendant and the jury)
>
> THE COURT: Mr. Lamons, my clerk has just thought of a wonderful question; she wants me to have a bad weekend. The question is, has Mr. Diaz fired you in all cases or just in the murder trial?
>
> MR. LAMONS: That has not been addressed. I would think that there might possibly be some sort of conflict after all of this in the January 6th case. However, I anticipate -- of course, depending on the results of this case, I anticipate there may not be a necessity for any further proceedings, but I do not know. Depending on the outcome of this case.
>
> MR. KASTRENAKES: The final outcome.
>
> THE COURT: I think I am going to tell the jury that I appreciate their patience. They have been up here since 9:30 this morning.
>
> When do you think we are going to set him?
>
> THE CLERK: They were here before 9:30.
>
> MR. LAMONS: Two or three minutes. That is all we need.

(R. 1220-21).

D. CONCLUSION

There can be no doubt that these absences had an affect at trial. The nature of the proceedings from which Mr. Diaz was

precluded, the language and cultural barriers he faced and his attempt at self-representation worked together to exacerbate the prejudice from those absences. Those involuntary absences constitute fundamental error. No tactical or strategic reason can be reasonable as a matter of law for appellate counsel's failure to raise these issues on Mr. Diaz's direct appeal. The issues leaped out from the transcript, such as the portions of the transcript where it is clearly indicated that the proceedings were conducted "outside the presence of the defendant." Mr. Diaz's direct appeal was inadequate. On this claim alone, the Court cannot conclude that the adversarial testing process worked in Mr. Diaz's direct appeal. Habeas relief is warranted.

CLAIM III

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ISSUE OF THE TRIAL COURT'S DENIAL OF MR. DIAZ'S REQUEST FOR COMPULSORY PROCESS AND TO CALL WITNESS ON HIS BEHALF DURING THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL. MR. DIAZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

At the close of the State's case, Mr. Diaz indicated that he wanted to call several witnesses in the defense case (R. 1160). The court immediately told Mr. Diaz: "Mr. Diaz, do you understand that we are starting the trial tomorrow at 9:30? Anyone who is not here cannot testify" (R. 1160). Mr. Diaz explained to Judge Donner that "I was told to wait for trial. When the State Attorney's finished, I could present to the Judge my petition for the witnesses that I wanted to present. I have waited for this moment" (R. 1161). Although Mr. Diaz clearly meant that he was

requesting subpoenas ("my petition for the witnesses that I wanted to present"), the court then told Mr. Diaz:

> THE COURT: I do not understand what you mean by petition. You have the right to call witnesses, of course, and they are to be ready, just as the State's witnesses are ready.
>
> We are going to begin the trial again tomorrow. You have the right to put on whatever witnesses you wish or call any State witness back to the stand who is still available. You did not wish to hold any, but I am sure if they are around, they are available to come to the stand.
>
> Other than that, the trial will continue tomorrow.

(R. 1161).[8]

Ironically, the *prosecutor* then pointed out to the Court that if Mr. Diaz "needs the assistance of the Court and he has a proper address, in securing the attendance of witnesses, he has the right to have the Court aid him in producing people" (R. 1161). In line with her actions throughout the trial, the court proceeded to blame Mr. Diaz for the situation:

> THE COURT: Well, I think at this time the defendant, knowing that he was coming to trial, requesting the Court to bring him to trial, that he would have previously let his attorney or me know that that is what he wanted. I believe it would be impossible to keep fourteen people for as many days as it might take to locate someone. That is not something that would be proper, and the Court would consider that a delaying tactic.

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[8]Of course, the court explained none of this to Mr. Diaz during the purported Faretta inquiry she conducted before permitting Mr. Diaz to represent himself.

> However, the trial will continue tomorrow morning at 9:30 in the morning. Any witnesses who are here -- and if there are no other witnesses to testify, the defense wishes to call and he wishes to make a statement on the witness stand, he can be sworn in and make that statement.

(R. 1162). The Court then went on to discuss jury instructions with the prosecutor.

Next, a discussion occurred on the record at which time the court inquired about the status of the case (R. 1185). Mr. Lamons informed the court that Mr. Diaz advised him of a list of witnesses which Mr. Diaz wanted to ask the court's assistance in locating (R. 1185). The prosecutor then demanded a list of the names of the witnesses, and wanted Mr. Diaz to show "whatever efforts he personally has made up to this point to secure their attendance before coming to court, not at the eleventh hour, and asking for your assistance" (R. 2186). After responding that "I almost think this is the twelfth hour" (R. 1186), the court asked Mr. Diaz for the names and addresses of the witnesses he wanted to call to testify (Id.). After conferring with Mr. Lamons, Mr. Diaz stated that "my desire is to present as a potential witness for these charges in favor of the defense Ms. Georgina Deus; the Detective O'Neill, Department of the Police of Boston, Massachusetts; Detective ---" Id. The court interrupted Mr. Diaz and asked if this was Detective O'Neill of the Department of Police in Massachusetts (R. 1186-87). Mr. Diaz responded:

> THE DEFENDANT: I have it understood that he is from the State of Massachusetts. I don't know the city. I haven't had the time to be able to get all this information.

> I have asked for it, and the Court hadn't given it to me. That I can assure you that Detective O'Neill works for a department of some city of the State of Massachusetts.

(R. 1187).

Mr. Diaz also told the court that he also wanted to call "Detective Murphy from the Department of Homicide from Boston. I want to present the attorney Gutierrez. I want to present Emilio Bravo, This is a prisoner who is now in the institution where I am, the jail, and a known State Prisoner Rusty Simon on the fourth floor, the same institution. I would desire to present Virginia Cummings from Connecticut and Roberto Martinez, a State prisoner" (R. 1189-90). Mr. Diaz further explained to the court that "I have evidence which I am going to present to the Court that these witnesses, the first witnesses, are witnesses that in one way or another are working with the government or some government of the United States" (R. 1190).

In support of his desire to call Georgina Deus, Mr. Diaz proffered Detective Smith's statement for the court (R. 1191) . The prosecutor then argued that in that statement, Deus had recanted her earlier statement implicating Angel Toro and Mr. Diaz in the killing because she said she was forced by Det. Smith to make the inculpatory statement about Mr. Diaz (R. 1191). The prosecutor then said that since Deus' recantation, "she has been unwilling to testify" for the State (R. 1192). Detective Smith, who was present in the courtroom at this time, then explained that "[i]n the last year I have made no efforts to contact

[Georgina Deusl; none whatsoever" (R. 1192). At that point, the court asked Mr. Diaz where Deus was, and Mr. Diaz responded:

> THE DEFENDANT: I don't know, but according to the statements she resides in Massachusetts, the State of Massachusetts, Boston or Long Island.
>
> As I understand, the State gave her the opportunity or gave the opportunity to the State -- or until all the parties that understand this business well to investigate. I think it must be pretty easy to find her if they wish to present her in this court.
>
> I will now present to the Judge the statement from Georgina Deus taken by Mr. Gutierrez, a lawyer. That was the 4th day of May of 1984. I would like the Judge to look at that and study it.

(R. 1193).

After the prosecutor was permitted to provide the court with self-serving information about Ms. Deus, Assistant State Attorney Scola demanded that Mr. Diaz show "what effort he has made to secure her attendance" because "[w]e cannot at the time the witness is going to be here then start looking for them" R. 1195). The court added, "[t]he Court feels the same way, Mr. Scola" (Id.). The court then questioned Mr. Lamons about the witnesses, and Mr. Lamons acknowledged that he "knew they could be potential witnesses, I had heard of them, obviously" (R. 1189-90). The following discussion occurred next:

> THE COURT: It was not your opinion that you would call them.
>
> MR. LAMONS. Well, no, I would not have called them had I been the attorney on this. I would not have called them.

THE DEFENDANT: In other words, for what reason -- with your permission, I would ask Mr. Lamons, for what reason would you not call these witnesses?

MR. LAMONS: Well ---

THE COURT: I do not think you have to say that on the record, Mr. Lamons. I think you can go tell him that privately.

THE DEFENDANT: But I would like to appear on the record that it is very important for the defense to present in this court and the jury these witnesses I have just mentioned. I have handed over evidence of legal materials that may demonstrate to this Court the innocence of the accusations that they have against this defendant.

MR. SCOLA: Judge, if I may say something for the record. What Mr. Diaz is trying to prove through these witnesses is that if Georgina Deus had testified, then he would have been able to impeach her by showing, number one, that she later recanted her statement and she said that the police pressured her. We have not even attempted to present any evidence from Georgina Deus, and all he is trying to do is say anything that she says should be thrown out because it should not **be** believed because of her later recantations. So, therefore, everything the State has presented is going to be attacked by him. That is the equivalent of the State creating a straw man and attempting to knock it down. He is attempting to do the same thing.

THE COURT: As to Georgina Deus ---

THE DEFENDANT: Your Honor, I understand that is a determination that the jury should take.

(R. 1197) (emphasis added).

The court then ruled that Mr. Diaz was precluded from calling Deus on his behalf because "since 1983 Mr. Diaz knew Georgina could possibly be a witness in this trial" and because

Mr. Diaz has had "several attorneys, both of them exceptionally capable, and neither of them desired to call Georgina Deus" (R. 1198). The court also ruled that Deus' statements were not yet in evidence, and although recognizing that "Mr. Diaz wants to put them into evidence" (R. 1198), and that Mr. Diaz was "welcome to argue that to the jury when you have the closing argument, for whatever reason you would desire to do so" (R. 1198-99), the court ruled, "I am not going to stop this trial to find someone who lives in the State of Massachusetts" (R. 1199).[9] In reply to the court's remarks, Mr. Diaz stated:

> THE DEFENDANT: Before anything else, I would like to say that the statement is only possessed since 1983, and the statement where Georgina Deus is accusing me of these accusations, the other statements, I had them two days ago right here in this court. I want this to appear on the record, what I am now saying. In other words, that I have not had the opportunity -- I have had lawyers. Peter Ferrero, that was the only document he gave me from 1983, one statement from Georgina Deus where I was being accused.
>
> THE COURT: Thank you,

(R. 1200).

Mr. Diaz was then asked about what Detective O'Neill would testify about, as well as Detective Murphy and Mr. Gutierrez. Mr. Diaz explained that they were all related to the Georgina Deus statement (R. 1200-01). As to Emilio Bravo, Mr. Diaz explained that "[t]his witness . . . will [] prove in this court

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[9]The court ignored Mr. Diaz's argument that he had been told that he could not petition the court to have his witnesses available until the State's case was completed. See R. 1161.

that the witness the State Attorney has presented, and I am referring to Ralph Gajus, was lying" (R. 1201), as would Rusty Simon and Mr. Sanborne because "[t]hose are witnesses that found themselves sharing space with us" (R. 1201) . As for Virginia Cummings, Mr. Diaz told the court that when Candace Braun had testified for the State, Braun "mentioned that this lady had sent a letter or something threatening with cutting her face if she came to accuse or something like that" (R. 1203), and that Cummings "will take away credibility from this lady in this aspect and in many other aspects as well" (R. 1203) . The court replied "[t]hat is not good enough" (Id.). The court then asked Detective Smith if he ever heard of this woman, and Smith replied that "the name was provided to me by Candace Braun just this past week" (R. 1204). Mr. Diaz repeated that "[w]ith your permission also, I think this witness is very important to his case" Id. Mr. Diaz further detailed that he had Cummings' address and telephone number in Connecticut, and that she also "can take away credibility from Ralph Gajus" (R. 1205). In response to Mr. Diaz's requests, the prosecutor told the court:

> MR. KASTRENAKES: The bottom line is, he has admitted to the Court he has the address of the person from Connecticut. He knows her exact phone number. He knows for a period of time. This is judgment day, and yet he has done nothing until this very moment to inform the Court or anybody that he needs that witness.

(R. 1206). To make matters worse, the court then questioned Mr. Lamons about his discussions with Mr. Diaz about this witness:

THE COURT: More importantly, Mr. Lamons, did Mr. Diaz tell you he wanted Virginia Cummings of Ginny Cummings to testify in this case?

MR. LAMONS: Not that I recall.

THE DEFENDANT: I haven't had the owwortunitv with this lawyer.

THE COURT: Mr. Diaz, you sat with your attorney, that I can see, at least two days. So you could have mentioned the name.

(R. 1206) (emphasis added). Mr. Diaz was not just "sitting" during the past two days, of course; he was attempting to represent himself with his life at stake.

The questioning continued. As to why he wished to call Robert Martinez, Mr. Diaz explained, "[t]his person was mixed in the case of Ralph Gajus" (R. 1206), and again reiterated that with all the witnesses he named, "I consider them to be important to be presented by the defense" (R. 1207). Mr. Diaz also told the court that these witnesses were important because the State witnesses alleged that he spoke perfect English, which is not the case (R. 1207-08). As to this, the prosecution replied, "if he wants to put somebody on to say he does not speak English we are prepared to present Captain Zappy from the Corrections Department who will testify that he has had many conversations with the defendant in English" (R. 1208). Mr. Diaz then stated:

THE DEFENDANT: I don't owwose anv witnesses that the State can wresent in this, but I would like the Court not to owwose my witnesses that I wish to present for my defense.

(R. 1208)(emphasis added).

The court ruled that as to Georgina Deus, Detective O'Neill and Detective Murphy, "the Court can find no reason at this twelfth hour to bring, to look for, to find, and perhaps to persuade or not to be able to persuade these witnesses to come down to the State of Florida to testify in your behalf, Mr. Diaz" (R. 1209-10), and found that "the matters that you wish to bring into this trial are irrelevant" (R. 1209). The court ignored Mr. Diaz's argument that he had been advised that he could not petition the court for witnesses until the State's case had ended (R. 1161). As to Cummings, the court told Mr. Diaz:

> the Court finds that since you had the ability to telephone her and to write to her, that had you desired to have her as a witness, knowing that I told you when your trial was going to be, and that you wrote to me demanding a fast and speedy trial, that Ms. Cummings should have been --
>
> THE DEFENDANT: And just.
>
> THE COURT: That Ms. Cummings should have been called prior to this time; that your attorney did not even know the name of this witness or that which she would testify to.

(R. 1210) (emphasis added).[10] As to Sanborn and Bravo, the court noted that because it was possible to go across the street to the jail, she would permit the State and Mr. *Lamons* to interview the witnesses (R. 1210-11). Then the court changed her mind, and ordered Mr. Lamons to speak with the witnesses first because "that would be appropriate" (R. 1213). Mr. Lamons then

[10]The court ignored the fact that the existence of this witness was not even known until the week before when Candace Braun talked to Detective Smith (R. 1204).

questioned whether he was authorized, and stated that he "would not on my own call these witnesses" (R. 1213). The court then told Mr. Diaz that he was not going to be allowed "because of the circumstances of your incarceration" to speak to these witnesses, but Mr. Lamons would go instead (R. 1213). In response, Mr. Diaz stated:

> THE DEFENDANT: I understand, but that's not my desire. I understand that Mr. Lamons is not my lawyer. I am representing myself.

(R. 1213) (emphasis added). The following discussion then ensued:

> THE COURT: Mr. Diaz, YOU may not go over and speak to those people in the jail and have a meeting with them to decide whether or not they are going to testify for YOU. Though you are representing yourself, there are certain limited restrictions concerning your ability to do that.
>
> THE DEFENDANT: I was not informed by the Court of that, The Court did not inform me that when they told me that they would permit me to take all my own defense.
>
> THE COURT: Well, Mr. Diaz, Mr. Lamons is free to go to the State of Connecticut to look for a witness. Do you think you should be also?
>
> MR. DIAZ: I think so.
>
> THE COURT: Then I do not think you understand that you are being held without bond, and that this is the law of the State. I am not going to get into it with YOU, but I am going to ask YOU one time. If YOU decide not to, then I will feel that you are not desirous of calling those witnesses.
>
> Do YOU or do not wish Mr. Lamons on your behalf to speak to Emilio Bravo and Rusty Sanborn? Because if you do, I will order him to go over there.

THE DEFENDANT: That's not my desire. I don't consider that just.

THE COURT: Okay, Mr. Diaz, then we will continue with the hearing. We are going into closing arsument.

(R. 1214-15)(emphasis added).

Again, the prosecution, in an apparent realization of the court's error, asked if there was a way "where they could be transferred one by one over here where the defendant could somehow be present when we speak to them" (R. 1215). The court replied that Mr. Lamons "has got to be there" (Id.) . The prosecutor again pointed out that Mr. Lamons "is right now not his own attorney. Mr. Lamons is nothing but an advisor" (Id.). After the warning by the prosecution, the court then brought the correctional staff in, and told the security people that "[i]f you agree to let the two, Diaz and one of them, Diaz and the other one, that is all right with the Court" (R. 1216). At the conclusion of the discussion, the prosecutor noted that "[i]f [Mr. Diaz] was convicted, it might be reversed otherwise" (R. 1217). The hearing that morning then ended.

That afternoon, court convened again to discuss the outcome of the witness interviews. Mr. Diaz was not present:

Afternoon Session

(Thereupon, the following proceedings were had outside the presence of the Defendant and the jury)

THE COURT: Who is the first?

MR. LAMONS: I guess it is up to Angel, Judge. I would not call either one of them, but it is up to him --

THE COURT: Okay.

MR. LAMONS: -- in what order he chooses.

Could I have him brousht out as soon as you have the proper personnel?

MR. KASTRENAKES: I am ready to go.

THE COURT: Listen, I was going to start this trial at 12:30. I came back in this building at exactly 12:30. It is now 1:15. We have got to start this trial. I am going to give you all another five minutes, and we are starting the trial.

(R. 1218). A discussion between the Court, the prosecutors, and Mr. Lamons then occurred (without Mr. Diaz's presence) Concerning the witnesses statements. After listening to the lawyers, the Court stated that "[p]erhaps maybe I should explain [to Mr. Diazl that I am not going to permit that kind of testimony" (R. 1219).

Finally, Mr. Diaz was brought into the courtroom. After the court told him that she would not allow his witnesses to testify (R. 1222), and explained that he would have the right to two closing arguments if he did not present any witnesses (R. 1223), Mr. Diaz stated:

THE DEFENDANT: Before making this decision, and I would like everything I am about to say go on the record, first of all, I would like to announce to the Court that I give up the supposed assistance that is being offered by Mr. Lamons, upon understanding that he was offering -- it is being allowed for me to make a mistake in my own defense. Therefore, I ask this Court that Mr. Lamons hand over to me all documents, legal, that he possesses on this case or any other case.

Another thing, I wish to present a motion for appeal.

THE COURT: Mr. Diaz, motions for appeal happen after the trial, not during trial.

THE DEFENDANT: Okay, then. A motion -- I'm sorry. A motion, a petition, a motion that is a petition for the Court to consider the petition once again of presenting my witnesses in court. I have been able to demonstrate to the State that my only interest in presenting these witnesses is to prove my innocence.

Of the nine witnesses, the State has been able to present or present themselves personally in front of the two witnesses out of the nine I am speaking of, and they have been able to verify, and I understand that I have not used any technique that's dirty to prove my innocence. Therefore I beg this tribunal to take my motion into consideration to present my nine witnesses that I wish.

I would also like to inform the Court that if those are not considered, I understand that this Court is not being impartial.

THE COURT: All right. Mr. Diaz, I have considered your motion previously, and whether or not you believe this Court is being impartial, I am conducting this trial in what I believe to be a fair, just, and impartial manner.

The witnesses that I told you we will not delay trial to attempt to obtain are those four witnesses whom the Court feels would not in any way assist YOU in any defense. The two witnesses that we have here you are, of course, are able to call. The other witnesses you do not know where to locate, and the Court will not postpone this trial in order to allow YOU to search all over the United States to find two people whose location we are unaware of.

Do you still wish to call the two witnesses whom you are now aware are not able to testify concerning the escape of Mr. Gajus?

THE DEFENDANT: After listening to your determination that since it is not being granted that motion, petition, and presenting my nine witnesses, I will not present these two witnesses, and I will have them present -- I will have them present, and I think that this trial should be considered nullified.

THE COURT: Thank you, Mr. Diaz, for your opinion.

(R. 1226) .[11]

The trial court's refusal to allow Mr. Diaz to call witnesses denied Mr. Diaz his right to present a complete defense, in violation of the sixth, eighth and fourteenth amendments. See Washington v. Texas, 338 U.S. 14 (1967); Crane v. Kentucky, 476 U.S. 683, 690 (1986); Pointer v. Texas, 380 U.S. 400 (1965). Due process requirements supersede the application of state evidence rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Taylor v.

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[11]The court also questioned Mr, Diaz about whether he wished to testify in his own behalf. The entire colloquy is produced herein:

THE COURT: Mr. Diaz, are you going to testify? Are you going to take the witness stand?

THE DEFENDANT: Well --

THE COURT: Mr. Diaz.

THE DEFENDANT: I have a statement.

THE COURT: Si 0 no?

THE DEFENDANT: No, ma'am.

THE COURT: Thank you, sir.

(R. 1227) (emphasis added).

Illinois, 108 S. Ct. 646 (1988). Where a defendant is prevented from presenting evidence which is 'plausibly relevant' to his theory of defense, this constitutes reversible error. Coxwell v. State, 361 So. 2d 148 (Fla. 1978); Coco v. State, 62 So. 2d 892 (Fla. 1953). The evidence discussed above was more than plausibly relevant.

As Mr. Diaz repeatedly explained to the court, these witnesses would have challenged the credibility of State witnesses Braun and Gajus.[12] Thus, Mr. Diaz was asking to present impeachment evidence clearly relevant to disputing the State's evidence.

The trial court's failure to permit Mr. Diaz to introduce evidence that would have rebutted the State's case and shown his innocence violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These violations denied Mr. Diaz the latitude necessary to present his defense to this weak charge and eviscerated his right to confrontation under the Sixth Amendment, requiring a reversal of his conviction and a new trial. United States v. Berkowitz, 662 F.2d 1127 (11th Cir. 1981). It also denied him a fundamentally fair trial under the due process clause of the Fourteenth Amendment to the United States Constitution. Haas v. Abrahamson, 910 F.2d 384, 389 (7th Cir. 1990). This exclusion of evidence creates a reasonable

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[12]During guilt-innocence deliberations, the jury asked for transcripts of the Braun and Gajus testimony (R. 1329), a request indicating these two witnesses were essential to the State's case,

doubt as to Mr. Diaz's guilt. United States v. Asurs, 427 U.S. 97 (1976). The trial court's exclusion of evidence was constitutional error of the first order "and no showing of want of prejudice [will] cure it." Davis v. Alaska, 415 U.S. 308, 317-18 (1974).

These issues should have been presented to this Court on direct appeal. The issues were preserved for appeal. The failure of the trial court to allow a defense and the failure of appellate counsel to raise these issues on direct appeal clearly undermine confidence in the outcome of the direct appeal. A new direct appeal should be ordered.

CLAIM **IV**

**DIRECT APPEAL COUNSEL INEFFECTIVELY FAILED TO ASSURE THAT THE RECORD ON APPEAL WAS COMPLETE AND THUS NO RELIABLE TRANSCRIPT OF MR. DIAZ'S CAPITAL TRIAL EXISTS, RELIABLE APPELLATE REVIEW WAS AND IS IMPOSSIBLE, AND THERE IS NO WAY TO ENSURE THAT WHICH OCCURRED IN THE TRIAL COURT WAS OR CAN BE REVIEWED ON APPEAL DUE TO OMISSIONS IN THE RECORD.**

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). An accurate trial transcript is crucial for adequate appellate review. Id. at 219. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964), Justice Goldberg, in his concurring opinion, wrote that, because the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the

complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy."

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. In Mr. Diaz's case, several matters are missing from the trial record. For example, Mr. Diaz was initially represented by Mr. Ferrero. At some point, Mr. Ferrero withdrew, and Mr. Lamons became Mr. Diaz's counsel. The record does not indicate when this occurred, why Mr. Ferrero withdrew or how Mr. Lamons came to be appointed. This information is clearly relevant to Mr. Diaz's later decision to represent himself, but the record is silent. Additionally, several pretrial conferences appear to be missing from the record. Finally, since appellate counsel never consulted with Mr. Diaz, she did not know that the record contains no transcript of matters which occurred the morning of the day Mr. Diaz's trial began. The trial began on December 17, 1985 (R. 430). The only thing indicated in the record for that morning is the court announcing that Mr. Diaz's case is set for trial (R. 433). Then the proceedings were adjourned until 1:30 p.m. (id.), when various motions were heard and jury selection began, However, on the morning of December 17, Mr. Diaz spoke to the court, explained that he had just recently met Mr. Lamons, and asked for two or three weeks to get ready for trial.[13] The court informed Mr. Diaz that Mr. Lamons

[13]Mr. Lamons appears to have begun representing Mr. Diaz around September, 1985 (R. 439), and trial was set for February, 1986 (Id.). The trial date was then moved up to December, 1985

was a good attorney, that everything would be okay, and that there would be no continuance. Mr. Lamons also spoke to the judge that morning, but the court said the trial was going ahead. When Mr. Diaz protested, the court said he would have to represent himself. Mr. Diaz did not ask to represent himself, but just asked for two or three weeks to prepare for trial. The self-representation idea was proposed by the judge, not Mr. Diaz. The judge then asked Mr. Diaz if he knew how to pick a jury, and when Mr. Diaz said no, the judge said Mr. Lamons would pick the jury. The first time the record indicates anything regarding Mr. Diaz representing himself is after the jury was selected, just before the State's opening. None of the discussion which occurred that morning is in the record.

Entsminser v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. In Evitts v. Lucev, 467 U.S. 387 (1985), the Supreme Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job. Finally, in Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Supreme Court held that even if it was proper to withhold the report at trial, the report had to be part of the record for appeal. The record must disclose considerations which motivated the imposition of the death sentence. "Without full

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(Id.).

capital sentencing procedure would be subject to defects under Furman v. Georsia, 408 U.S. at 361."

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. Mr. Diaz was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his convictions and sentences. The circuit court is required to certify the record on appeal in capital cases. Art. 5, § 3(b)(1), Fla. Const.; § 921.141(4), Fla. Stat. When errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

No tactical or strategic reason could explain appellate counsel's failure to assure that the record on appeal was complete. An evidentiary hearing and reconstruction of the record is required. Habeas corpus relief is proper.

**CLAIM V**

**APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE ANY ISSUE REGARDING THE TRIAL COURT'S IMPROPER HANDLING OF THE JURY'S REQUEST TO HAVE CERTAIN TESTIMONY READ BACK.**

During its deliberations, jury requested that the testimony of Candace Braun and Ralph Gajus be read back to them (R. 1329). After asking Mr. Diaz if he understood the question, the court told Mr. Diaz "[t]his is the answer I am going to give the jury" and refused the jurors' request, telling them instead that they were to "rely on [their] collective memories concerning the testimony of any witness" (R. 1329). The court never informed

Mr. Diaz that he had the right to object to this answer and had the right to require that the testimony be read back. Fla. R. Crim. P. 3.410. Rather, the court informed Mr. Diaz that "[t]his is the answer I am going to give the jury" (R. 1329). Mr. Diaz had no choice in the matter, although he was supposed to be representing himself.[14]

The testimony of Candace Braun and Ralph Gajus was extremely critical to Mr. Diaz's defense. Braun testified that on the evening of the shooting, she was present in her apartment along with Mr. Diaz, Angel "Sammy" Toro and two other men named Willie and Luisito (R. 880). At that time, Braun testified that "[h]e [Mr. Diazl told me that Sammy thought somebody was reaching for a gun and shot a guy during a robbery" (R. 881). Braun also testified that Sammy Toro, Willie, and Luisito were arguing in the apartment (R. 880), and that the reason she eventually came forward to the police was because she "was under the impression that Angel Toro was blaming the actual murder on Angel Diaz, and from my -- from what I had heard, overheard, and from what Papo [Mr. Diazl later explained to me, Papo did not shoot anyone" (R. 889-90). Braun later reiterated that she believed that Mr. Diaz "was being accused of doing the shooting in a robbery that I knew he did not do the shooting in" (R. 896). Braun also explained that "[e]verybody was yelling at Sammy" (R. 913), and went on to detail the conversation she overheard in her apartment:

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[14]The record does not reflect that Mr. Lamons was present in the courtroom when the jury's question was discussed.

THE WITNESS: They were arguing. If they weren't arguing, I probably wouldn't have heard it. If they were talking in a normal voice, I probably wouldn't have heard anything, but they were definitely arguing.

Papo--when I walked into the room at one point, Sammy made a motion like this (indicating). Okay. He said words like, "disparan, tipo panikiado." Disparan is shot, shoot. Tipo is another word for person, for a guy. Panicado is panic.

When he said that, Papo said to him, yelling mad, that that wasn't necessary. That's all.

BY THE DEFENDANT:

Q. That what was not necessary?

A. Whatever Sammy did.

Q. What did Sammy do?

A. Apparently he shot somebody.

(R. 912).

Ralph Gajus was also an important witness, as he provided the Only evidence on behalf of the prosecution which arguably went to establishing that Mr. Diaz was the shooter. Gajus testified that he was incarcerated in the Dade County Jail and struck a relationship with Mr. Diaz, whose cell was across the hall (R, 1113; 1115). Gajus explained that "over a period of several months" Mr. Diaz would talk about his case (R. 1118), and that Gajus "inferred" from his conversations with Mr. Diaz that Mr. Diaz shot the victim in the chest during a robbery, and that "it was either he [the victim] or him [Mr. Diazl that would die" (R. 1123). Gajus clarified that Mr. Diaz never said to him "in the words, 'I shot the man in the chest'" (R. 1123).

The court did not inform Mr. Diaz that the rules of criminal procedure allowed reading back the testimony, Fla. R. Crim. P. 3.410, although at the beginning of trial Mr. Diaz had told the court he did not know Florida law. The court's action violated Rule 3.410 and due process. Appellate counsel was ineffective in failing to raise this clear error on appeal. Habeas relief is proper.

**CLAIM VI**

**MR. DIAZ'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY IMPOSED IN LIGHT OF THE FACT THAT THE CO-PERPETRATOR WHOM THE EVIDENCE SHOWED TO BE THE TRIGGERMAN RECEIVED A LIFE SENTENCE, IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL'S PRESENTATION OF THIS ISSUE ON DIRECT APPEAL WAS INEFFECTIVE.**

Although presenting a claim that Mr. Diaz's death sentence was disproportionate to that of co-defendant Angel Toro, who received a plea to second degree murder and a life sentence, appellate counsel never pointed this Court to the compelling facts in the record showing the injustice of Mr. Diaz's death sentence in comparison to Toro's life sentence. Without being pointed to these facts, this Court thus rejected the proportionality argument although noting that a co-defendant's life sentence is a relevant proportionality consideration if the co-defendant is the more culpable actor. Diaz v. State, 513 So. 2d 1045, 1049 (Fla. 1989). In a special concurrence, Justice Barkett noted, however, "if one believed that this defendant was not the actual triggerman, the proportionality argument would

have merit." Id. The facts showing Mr. Diaz was not the shooter were in the record, but appellate counsel failed to bring them to the Court's attention. Appellate counsel did not tell the Court that the prosecution conceded at trial it could not establish that Mr. Diaz was the shooter. In opening statement, the prosecutor said, "there will be no evidence as to who the actual shooter of [the victim] was" (R. 788). The prosecutor reiterated this concession in closing argument, stating, "I do not believe the evidence has shown that this defendant went in there with the intention of killing anyone," and arguing that the jury should convict based solely on felony murder (R. 1257-58).

Further, appellate counsel failed to show the Court that the only testimony implicating Mr. Diaz in the offense -- that of Candance Braun and Ralph Gajus -- fell far short of showing that Mr. Diaz was the shooter, Indeed, Candance Braun's testimony established the opposite, i.e., that Angel Toro was the shooter, not Angel Diaz. Braun testified that on the evening of the shooting, she was present in her apartment along with Mr. Diaz, Angel "Sammy" Toro and two other men named Willie and Luisito (R. 880). At that time, Braun testified that "[h]e [Mr. Diaz] told me that Sammy thought somebody was reaching for a gun and shot a guy during a robbery" (R. 881). Braun also testified that Sammy Toro, Willie, and Luisito were arguing in the apartment (R. 880), and that the reason she eventually came forward to the police was because she "was under the impression that Angel Toro was blaming the actual murder on Angel Diaz, and from my -- from what I had

heard, overheard, and from what Papo [Mr. Diaz] later explained to me, Papo did not shoot anyone" (R. 889-90). Braun later reiterated that she believed that Mr. Diaz "was being accused of doing the shooting in a robbery that I knew he did not do the shooting in" (R. 896). Braun also explained that "[e]verybody was yelling at Sammy" (R. 913), and went on to detail the conversation she overheard in her apartment:

> THE WITNESS: They were arguing. If they weren't arguing, I probably wouldn't have heard it. If they were talking in a normal voice, I probably wouldn't have heard anything, but they were definitely arguing.
>
> Papo--when I walked into the room at one point, Sammy made a motion like this (indicating). Okay. He said words like, "disparan, tipo panikiado." Disparan is shot, shoot. Tipo is another word for person, for a guy. Panicado is panic.
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> When he said that, Papo said to him, yelling mad, that that wasn't necessary. That's all.
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> A. Whatever Sammy did.
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hall (R. 1113; 1115). Gajus explained that "over a period of several months" Mr. Diaz would talk about his case (R. 1118), and that Gajus "inferred" from his conversations with Mr. Diaz that Mr. Diaz shot the victim in the chest during a robbery, and that "it was either he [the victim] or him [Mr. Diaz] that would die" (R. 1123). Gajus clarified that Mr. Diaz never said to him "in the words, 'I shot the man in the chest'" (R. 1123).

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court reviewed the constitutionality of the death penalty as it then operated. This review came against a background of increasing concern that those being chosen to pay society's ultimate penalty were being chosen on a more or less random basis.

The Court found these concerns to be well founded. Justice Douglas wrote:

> [W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes should die or should be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man, or of twelve.

408 U.S. at 253. After noting the small number of executions carried out in the preceding years Justice Brennan wrote:

> When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No-one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.

408 U.S. at 294. The phrase which summed up the essence of the unconstitutional nature of the death penalty was written by Justice Stewart:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual... .the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

408 U.S. at 309. The justices who agreed that the death penalty as then applied was unconstitutional recognized that inherent in the Eighth Amendment's prohibition of cruel and unusual punishment was a requirement that the penalty not be administered capriciously or arbitrarily,

More than twenty years after the Supreme Court decided Furman v. Georsia the conclusions reached by Justices Douglas, Brennan, and Stewart remain valid and have become the cornerstones of modern Eighth Amendment jurisprudence. Gregg v. Georgia, 428 U.S. 153 (1976). Statutes which provide for the death penalty must be structured in a way which prevents the penalty from being arbitrarily applied. California v. Brown, 107 S.Ct. 538 (1987).

In Parker v. Dugger, 111 S.Ct. 731 (1991), the Supreme Court overturned a Florida death sentence for reasons which amounted to an affirmation that the death sentence was arbitrary. Writing for the Court, Justice O'Connor stated:

> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate

> sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. **Id.**, at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.

This court recognized in State v. Dixon, 283 So. 2d 1 (1973), that Furman v. Georgia required that the discretion inherent at every stage of the criminal justice process be exercised in a manner that is reasonable and controlled. This requirement was not met in this case. According to the evidence, Angel Toro shot the victim, yet Mr. Diaz received death while Toro received life. It is difficult to imagine treatment which so clearly violates the Eighth Amendment's prohibition on arbitrary and capricious punishment.

Appellate counsel's presentation of this issue on direct appeal was ineffective. Mr. Diaz has been denied the effective assistance of counsel on direct appeal and this Court should grant Mr. Diaz a new appeal.

**CLAIM VII**

**THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. DIAZ'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, MUD APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL.**

At sentencing the court stated:

> Mr. Diaz, you have been found guilty by a jury of your peers of murder in the first degree, and eight other counts, including armed robbery and armed kidnapping.

> The jury during the penalty phase of the trial had the opportunity to consider the aggravating and mitigating factors before making its recommendation to this court.
>
> The jury and this Court had to consider the fact that you were previously convicted of a violent felony and while serving that sentence, you were found guilty of killing the director of the program in that prison. Thereafter, after being convicted of that murder and from that penal institution, that in December of 1979, you committed the crimes for which you are being sentenced here today; said crimes being committed solely for pecuniary gain and which crime resulted in the death of another; that thereafter you left the State of Florida and was [sic] incarcerated in Hartford, Connecticut, and subsequently attempted to and succeeded in escaping from that institution by taking corrections officers as hostages to be later apprehended; and thereafter convicted of escape.
>
> This court must find that you have a total disregard for human life and the welfare of others; and that this total disregard is apparent to this Court.
>
> I, therefore, and because of the recommendation of the jury, have no choice, sir, but as to Count I, murder in the first degree, sentence you to death in the electric chair. May God have mercy on your soul.

(R. 1467-1469).

The State then pointed out that the court needed to make findings and offered to provide the court with written findings (R. 1470). Miraculously, the sentencing order written by the State took twelve legal size pages to recap some 330 words of the judge's comments at sentencing. (R. 319-330).

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is

that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this Court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. The court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case. Patterson v. State, 513 So. 2d 1257 (Fla. 1987).

In this case the trial court did not prepare her own findings. She delegated that responsibility to the State. The judge here simply signed the sentencing order prepared by the State. In fact, the record here reflects that no independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. Indeed, the court's oral sentencing did not mention mitigation at all. The sentencing order was not prepared under the judge's direction. The court simply abrogated the responsibility of making findings in support of the sentence to the state, a task that clearly cannot be assigned to a party opponent.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v, State, 508 So. 2d 1 (Fla. 1987); Muehleman v.

State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Roval, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30. The Van Roval judge prepared his own sentencing order. Mr. Diaz's judge did not.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court was presented this very issue. The Court ordered a resentencing, emphasizing the importance of the trial judge's

independent weighing of aggravating and mitigating circumstances. In Mr. Diaz's case, as in Patterson, the trial judge failed to engage in any independent weighing process; here, as in Patterson, the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261.

The Patterson court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." 513 so. 2d at 1262. This constitutes sentencing error. This is exactly what transpired in Mr. Diaz's case.

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the eighth amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon, 283 So. 2d 1 (1973).

This Court has strictly enforced the written findings requirement mandated by the legislature, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences were based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings serve to "assure [] that the trial judge based the [] sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6)." The

> written findings of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it.

Here, the trial court made no findings but simply left it to the State to fill in the blanks. The trial court denied Mr.

Diaz's right to an individualized and reliable sentencing determination by failing to conduct the independent weighing which the law requires. She never made findings of fact to support the sentence at all **and** she then signed a sentencing order prepared by the State. This Court made it clear in Dixon, Van Roval, and Patterson that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, and (b) not delegate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility: it simply relied on the State's "Sentencing Order." Although law extent at the time of Mr. Diaz's direct appeal established that the trial court's abrogation of its responsibility was error, appellate counsel ineffectively failed to present the issue to this Court. Habeas relief is proper.

**CLAIM VIII**

**THIS COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL AFTER STRIKING AN AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF MR. DIAZ'S RIGHT TO DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.**

On direct appeal, this Court found that the aggravating factor that Mr. Diaz created a great risk of danger to many persons was not supported by the facts of this case, and thus struck it. Diaz v. State, 513 So. 2d 1045 (1987). However, the majority opinion affirmed without any assessment of the fact that the jury heard the improper aggravator and its death

recommendation was therefore tainted under the Eighth Amendment. Rather, the Court simply found that in this case, "death is presumed to be the proper penalty." Diaz v. State, 513 So. 2d at 1049. This Court's analysis of the Eighth Amendment error was constitutionally flawed.

In Sochor v. Florida, 112 S.Ct. 2114 (1992), the United States Supreme Court, in finding that Maynard v. Cartwright, 486 U.S. 356 (1988), was applicable in Florida, held that Eighth Amendment error occurring before either the trial court or the jury requires application of the harmless-beyond-a-reasonable doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," Stringer v. Black, 503 U.S. ___, ___, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddinss v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing

the invalid factor was harmless error. Id. at ___, 111 S.Ct. at 738.

Sochor, 112 S.Ct. at 2119. Sochor further held that the harmless error analysis must comport with constitutional standards. Id. at 2123.

Moreover, in Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court held that the "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." Id. at 1140. In Stringer, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard not utilized by this Court in affirming Mr. Diaz's override death sentence.

Sochor established that when a reviewing court strikes an aggravating factor on direct appeal, the striking of the aggravating factor means that the sentencer considered an invalid aggravating factor and that eighth amendment error therefore occurred. When an aggravating factor is "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence[,] , , . . [i]t follows that Eighth Amendment error did occur when the trial judge weighed the . . . factor." Sochor, 112 S.Ct. at 2122. When this kind of Eighth Amendment error occurs before a Florida capital sentencer, this Court must conduct a constitutionally adequate harmless error analysis. Id.

This principle was reaffirmed by the United States Supreme Court in Richmond v. Lewis, 113 S. Ct. 528 (1992). In Richmond, the Supreme Court reiterated its Sochor holding that only "constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." Richmond, 113 S. Ct. at 535. The Court went on to conclude that "[w]here the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." Id. In Mr. Diaz's case, this Court "did not purport to perform such a calculus, or even mention the evidence in mitigation." Id.

Sochor and Richmond overrule longstanding practice of this Court. In Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), the Court wrote that under Florida's capital sentencing statute, "when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." Since Dixon, the Court has relied upon this standard when it strikes aggravating circumstances on direct appeal but refuses to remand for resentencing.[15]

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[15]See, e.g., Shriner v. State, 386 So. 2d 525, 534 (Fla. 1980) ("We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation, improper consideration of a nonstatutory factor does not render the sentence invalid."); Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) ("There remain, however, two valid aggravating circumstances, counterbalanced by

The automatic rule of affirmance created by the standard announced in Dixon and followed by the Court in numerous cases since Dixon, including Mr. Diaz's case, was soundly rejected in Sochor and Richmond. In Mr. Sochor's case, this Court had struck an aggravating factor on direct appeal but did not remand for resentencing, writing:

> Even after removing the aggravating factor . . . there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991). The Court's statement that "[s]triking one aggravating factor when there are no mitigating circumstances does not necessarily require

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no mitigating circumstances. Since death is presumed in this situation, the trial court's improper consideration of the factors discussed above does not render the sentence invalid."); Blanco v. State, 452 So. 2d 520, 526 (Fla. 1984) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty."); Smith v. State, 407 So. 2d 894, 903 (Fla. 1982) (citing Dixon) ("Because there are two aggravating circumstances, and no mitigating ones, the sentence of death would not have to be overturned even if we were to find the first aggravating circumstance improper. **The** second finding alone is sufficient basis for imposition of the death penalty."); Jackson v. State, 502 So. 2d 409, 412-13 (Fla. 1986)("We are left then with two valid aggravating factors and nothing in mitigation. Under such circumstances, death is presumed to be the appropriate penalty. . . . We have repeatedly held that when there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty."); Cherry v. State, 544 So. 2d 184, 188 (Fla. 1989)("Although we have concluded that there was an improper doubling, we are still left with three aggravating factors, . . . In the absence of any mitigating factors, under these circumstances we affirm the death penalty.") .

resentencing" is equivalent to its statements of the Dixon presumption in the cases cited above. The United States Supreme Court found this analysis constitutionally inadequate, overruling the Florida courts' longstanding practice.

Under Sochor, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor, 112 S. Ct. at 2123. Under Sochor, this Court's application of the Chapman standard to Eighth Amendment error does not comport with constitutional requirements. When discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, 111 S. Ct. 1884 (1991). In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. Yates, 111 S. Ct. at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption,'" Id. at 1890, and then "held 'beyond a reasonable doubt . . . the jury would have found it unnecessary to rely on either erroneous mandatory presumption.'" Id. at 1891. The United States Supreme Court found the lower court's analysis constitutionally inadequate because the lower court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman formulated." Id. at 1894. In Yates, the Supreme Court explained that the "Chapman test is whether it

appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 1892 (quoting Chapman, 386 U.S. at 24). The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893.

In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." Sochor, 112 S.Ct. at 2123. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of Eighth Amendment error.

"[M]erely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."' Sochor, 112 S.Ct. at 2119 (citing Clemons v. Mississippi, 494 U.S. 738, 725; Lockett v. Ohio, 438 U.S. 586 (1978); Eddinss v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. ___ (1991)). Moreover, "[e]mploying an invalid aggravating factor in

the weighing process 'creates the possibility . . . of randomness.'" Sochor, 112 S.Ct. at 2119.

The failure to reverse and remand for resentencing is in direct conflict with Eighth and Fourteenth Amendment requirements. As the Court held in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck, and even when it is not. See Schaefer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987). That is a fundamental protection afforded to a capital defendant. That protection was denied to Mr. Diaz.

There is no indication in the record that this Court independently "found" nothing in mitigation. Rather, the Court simply relied on the trial court's finding that no mitigating circumstances existed.[16] Diaz v. State, 513 So. 2d at 1049. In fact, the State Attorney stated, at the judicial sentencing, that the jury had considered the defense's arguments in mitigation, including a plea for mercy, Mr. Diaz's expression of remorse and anger over the victim's death, and the disparate treatment of the

[16]Of course, in reality, the trial court made no such independent finding. Rather, she signed the sentencing order drafted by the State Attorney. See Claim VII.

co-defendant (R. 1465-6). Thus, the Court erred in failing to reverse Mr. Diaz's death sentence upon the striking of an improper aggravator.

CLAIM **IX**

**MR. DIAZ' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH TJNCONSTITUTIONALLY MUD INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, MANN V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE THIS ISSUE, IN VIOLATION OF MR. DIAZ'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

Caldwell v. Mississippi, 472 U.S. 320 (1985), invokes the most essential and basic eighth amendment requirements of a death sentence -- that such a sentence be individualized (i.e., based on the character of the offender and circumstances of the offense), and that such a sentence be reliable. Caldwell, 472 U.S. at 329. Caldwell applies to Florida's capital sentencing procedure. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1353 (1989).

The sentencing jury plays a critical role in Florida, and its recommendation is not a nullity which the trial judge may regard or disregard as he sees fit. To the contrary, the jury's recommendation is entitled to great weight, and is entitled to the court's deference when there exists any rational basis supporting it. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 so. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d

1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.

Both the trial court and the prosecution were responsible for providing the jury with material misrepresentations about the law, thereby diluting the jury's sense of responsibility when it came to the sentencing decision in this case. Against the backdrop of prosecutorial and judicial misrepresentations stands a jury recommendation of 8 to 4.

The State's efforts to misinform the jurors concerning the seriousness of their role in determining whether Mr. Diaz' lived or was put to death began during voir dire (R. 523-24). At one point in voir dire the prosecutor told the jurors:

> [THE STATE]: The law says to give your recommendation--
>
> [JUROR] SACKS: Consideration.
>
> [THE STATE]: --great weight and consideration. Ultimately it is her responsibility. You do not have to leave here saying I gave him this sentence or am responsible for sivins this sentence. Judge Donner sits here because she has some higher responsibilities than the rest of us, and that is Dart of her iob, to assume those responsibilities.

(R. 531) (emphasis added). The State's voir dire reveals that the veniremen were in fact misled by the prosecutor's statements:

[THE STATE] : Do each of you understand -- Mr. McBride, do you understand that your role as far as the sentence is just to make a recommendation, and it is only a majority of you to make a recommendation one way or the other?

[JUROR] MCBRIDE: Yes, I do, and it is the Judge's decision.

(R. 534)(emphasis added).

The Court gave its imprimatur to the State's inaccurate statement of the jury's role in sentencing:

[THE COURT]: . In the second part, if the defendant-is found guilty, then you would have to go into a second phase where you would hear testimony and evidence something like or exactly like a trial, where you would hear other evidence concerning aggravating and mitigating circumstances concerning whether or not you would recommend the death penalty. He then told you that in spite of what the jury recommends, the final decision is mine.

Do you remember all of that?

MS. CONNELL: Yes, ma'am.

THE COURT: So that you understand it is in two parts for you, and the final decision, if there is a guilty verdict, would be up to me to impose a death penalty. whether or not YOU agree to it or not.

Do you understand that?

MS. CONNELL: Yes .

(R. 559) (emphasis added).

[THE COURT]: There can be some who vote for the death penalty and some who vote against it, and when that comes back to the Court, then I must make the final decision. Do you all understand that--

[JUROR] CHRISTOPHER DIAZ: Yes.

THE COURT: -- what you do in the second place is called a recommendation, but that the final decision is me, that is, if you recommend the death sentence, I can override your decision and vice versa.

Do you all understand that?

(Thereupon, the members of the prospective jury panel answered, "Yes.")

(R. 633) (emphasis added).[17]

The prosecutor continued his diminution of the jury's role during the second day of voir dire.

[THE STATE] : You understand that what you do and your decision is only a recommendation. You are not the ones that are actually doing the sentencing.

[JUROR] CHRISTOPHER DIAZ: I understand.

(R. 648)(emphasis added).

During her introductory remarks at penalty phase, Judge Donner stressed again that she, not the jurors, held the final sentencing responsibility:

[THE COURT]: Ladies and gentlemen of the jury, it will now be your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of first degree murder.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

(R. 1371) .

---

[17]This comment by the court gave the impression that she could override the jury's recommended sentence for whatever reason she chose. This, of course, is a false statement of the law, see Tedder v. State, and it was error to mislead the jury in this manner. Caldwell; Mann.

During his penalty phase closing argument, the prosecutor continued to refer to the jury's task as merely to "give a recommendation to Judge Donner" (R. 1413). The prosecutor represented the jury's recommendation as an evaluation of Mr. Diaz (R. 1429-30), and defense counsel objected to this mischaracterization, arguing that the prosecutor's statements were improper and violated Caldwell because "this is an attempt to shift the burden, that the jury now has the burden of determining and making the recommendation of death versus life" (R. 1430). Defense counsel further observed that "the most recent case, 1985, of Caldwell versus Mississippi speaks about that issue of down playing the importance of their decision and trying to shift the burden elsewhere, that the burden goes with someone else as far as the ultimate recommendation" (R. 1431). Counsel concluded that "[t]he prosecutor is indicating that it is just an evaluation. It is more than an evaluation, and I move for a mistrial" (R. 1431). Defense counsel's motion for a mistrial on this error was denied (R. 1431).

The prosecution reiterated the unimportance of the jury's sentencing task, prompting defense counsel to again object:

> [THE STATE]: You are the voice of the community. Your vote speaks for the community. When you go back there, follow your oaths, follow the law because once your recommendation is made, then the iob become Judse Donner to impose the appropriate sentence.
>
> [MR. LAMONS] : Objection, based on Caldwell.
>
> THE COURT: I am going to overrule your objection.

> MR. KASTRENAKIS: Her job is the toughest job because she passes final judgment.

(R. 1435-36) (emphasis added).

As defense counsel feared, the trial court's final instruction simply emphasized the error:

> [THE COURT]: As you have been told, the final decision as to what punishment shall be imposed is the final decision of the Judge.

(R. 1454).

These instructions, and the trial judge's earlier Comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at 1458. Cf. Mann, 844 F.2d at 1458 ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge") (emphasis in original).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, 472 U.S. at 333 (emphasis supplied). This is why comments and instructions such as those provided to Mr. Diaz' jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 472 U.S. at 340-41. That the State

cannot meet its burden is highlighted by the fact that the jurors returned a vote of 8-4 for death.

No tactical decision can be ascribed to appellate counsel's failure to urge the claim on appeal. No procedural bar precluded review of this issue, as defense counsel objected to the prosecutor's comments based on Caldwell itself. Counsel's failure deprived Mr. Diaz of the appellate reversal to which he was constitutionally entitled under the Eighth and Fourteenth Amendments. Caldwell; Mann. Accordingly, habeas relief must issue.

**CLAIM X**

**JURY INSTRUCTIONS THAT SHIFTED TO MR. DIAZ THE BURDEN TO PROVE THAT DEATH WAS INAPPROPRIATE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND DENIED MR. DIAZ HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COWSEL IN FAILING TO RAISE THIS ISSUE, IN VIOLATION OF MR. DIAZ'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if **the state showed aggravating circumstances outweighed the mitigating circumstances.**

State v. Dixon, 283 So.2d 1 (Fla. 1973) (emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Diaz's capital proceedings nor was it raised on direct appeal, despite the fact that trial counsel objected below. The

burden was shifted to Mr. Diaz on the question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, violating Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); and Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853 (1988).

Under Hitchcock, Florida juries must be instructed in accord with Eighth Amendment principles. Mr. Diaz's sentence of death is neither "reliable" nor "individualized." This error undermines the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation contained in the record. Appellate counsel's failure to present this claim on direct appeal denied Mr. Diaz effective counsel as well as undermining the confidence in the opinion of this Court on direct appeal. Mr. Diaz should be given a new direct appeal.

During voir dire the prosecutor explained to the jury its sentencing task of weighing aggravating and mitigating factors. This explanation implied that death would be presumed appropriate if the state proved aggravating factors.

> [THE STATE]: Even though you are being asked to make this very serious recommendation, you are given very strict guidelines to assist you in your decision, and what the Judge is going to tell you, is that in making your recommendation you are to consider those aggravating circumstances, if any, that the State has proven, and weigh those against the mitigating circumstances, if any, that may exist.
>
> If the aggravating circumstances outweigh the mitigating circumstances, the law says you should recommend a sentence of death. If the mitigating

> circumstances outweigh the aggravating circumstances, the law says that you should recommend a sentence of life.

(R. 525). The prosecutor then repeatedly told veniremen that they should recommend the death penalty if aggravating circumstances outweigh mitigating circumstances and could only recommend life if mitigation outweighs aggravation (R. 526, 534, 647, 649). This explanation told the jurors that Mr. Diaz had the burden of proving the propriety of a life sentence. The Court's jury instructions at the penalty phase also placed on Mr. Diaz the burden of proving that a life sentence was appropriate (R. 1371, 1373).

The prosecutor's sentencing argument to the jury involved several inaccurate statements of the law. His explanation implied that aggravating circumstances were presumed present. He noted that the Defendant had to prove mitigating factors to justify a life sentence (R. 1414). Throughout the sentencing argument the prosecutor repeated these explanations that improperly shifted to Mr. Diaz the burden of proving a life sentence appropriate. Indeed, the prosecutor's argument was that death was mandated and required once aggravation was established, and if mitigation did not outweigh it (R. 1425, 1429).

The prosecutor in his penalty phase closing argument further distorted the jury's role by referring to their sentencing task as an evaluation (R. 1425; 1429). This improper characterization of the sentencing determination is entangled with the prosecutor's comments that shifted to Mr. Diaz the burden of

proving life appropriate. See Claim IX. This entanglement exacerbated both errors. Defense counsel objected to this improper characterization, and referred to Caldwell v. Mississippi, 472 U.S. 320 (1985), which had then been recently decided, but it is clear that his objection attacked the entirety of the prosecutor's improper explanation, including the burden-shifting error (R. 1430-31).

The prosecutor concluded his jury argument with a comment that virtually commanded the jury to vote for death (R. 1436).

The court in its sentencing instructions to the jury, reinforced the improper burden-shifting notion that the prosecutor created, leading the jury to believe that Mr. Diaz had the burden to prove life appropriate (R. 1454, 1455).

Instructions that shift to the defendant the burden of proving that life is the appropriate sentence violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as the Eighth and Fourteenth Amendments. Defense counsel objected to this erroneous burden shifting (R. 1430-31), yet appellate counsel, without a tactic or strategy, failed to raise this issue on direct appeal. The claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. When trial counsel had so clearly identified and preserved this issue for appeal, it can only be appellate counsel's failure that precluded this Court's review. Accordingly, habeas relief must be accorded now.

## CLAIM XI

**NEW LAW DICTATES THE COURT REVISIT THE ISSUE OF WHETHER THE INTENSE SECURITY MEASURES IMPLEMENTED DURING MR. DIAZ'S TRIAL IN THE JURY'S PRESENCE ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

On direct appeal, Mr. Diaz raised this claim and it was rejected on its merits. Diaz v. State, 513 So. 2d at 1047. However, since that time, new law has emerged which establishes that Mr. Diaz is entitled to relief on this issue. Because of new law, this claim is cognizable in this habeas petition.

The extreme security measures employed during Mr. Diaz's trial, in particular the imposition of leg shackles on Mr. Diaz as he attempted to represent himself, destroyed any presumption of innocence and perverted the judicial process. The prejudice from these extreme security measures, and the shackling, in the circumstances of this case far outweighed any possible danger and caused an unconstitutional conviction and sentence.

The Court implemented not one but numerous extreme security precautions during Mr. Diaz's trial. Many extra security officers were present in the courtroom at all times; some of these were plainclothes officers but extra uniformed officers were present as well (R. 449). Before the venire entered, defense counsel objected strenuously to the detailed searching of the venire, the number of obvious security personnel and to the

chains on Mr. Diaz's legs (R. 449-50). When the court insisted that it had an obligation to protect the courtroom participants and spectators, the defense offered a less obtrusive mechanism for security suggesting that the jurors simply walk through the metal detector at the courtroom entrance (R. 451). The court ruled that the extreme measures were necessary (R. 451-52), before any inquiry into the necessity for such extreme measures or the possibility of less restrictive alternatives. Indeed, throughout pretrial proceedings, the State continued to assert over objection Mr. Diaz's alleged dangerousness and possible escape attempts (R. 361-70, 374-80, 389-91). There was no concrete factual support for an allegation that Mr. Diaz would be a problem at trial, and the State never said anything to prove that he would be disruptive. He was neither disruptive, nor a problem.

The court noted further that Mr. Diaz had the obligation to hide the shackles (R. 452-53). After this ruling the State offered brief testimony from the officer in charge of security. The court accepted this testimony, which was no more than merely a conclusion that leg irons were appropriate (R. 454-55).

Defense counsel renewed his objections on the second day of voir dire and the court again overruled those objections and permitted the extraordinary security measures (R. 684-85). In again overruling defense objections the court acceded to Commander Bencomo's judgment rather than making its own impartial decision (R. 686-87). In its ruling the Court implicitly

recognized the prejudice of shackles and acknowledged the need to prevent the jury from seeing the shackles (R. 687). The Court heard further testimony from another security officer, Sergeant Rogers, whose testimony was not probative but only cumulative to that of Commander Bencomo and based not on personal knowledge but on hearsay and bald allegations (R. 697-98). Defense counsel reiterated his objections to the restraints and to this testimony, to no avail (R. 699-700). The Court shifted to Mr. Diaz an obligation to hide the shackles (R. 700-01).

In spite of this advice the Court later allowed Mr. Diaz to represent himself, thus forcing him to parade before the jury in leg irons (R. 814). The Court failed to consider the effect of the security measures, especially the shackles, on Mr. Diaz's ability to represent himself, Mr. Diaz himself in his closing argument had to apprise the jury of the simple prejudicial fact of his shackles. He noted that it was easy for witnesses to point to him as the culprit:

> [MR. DIAZ]: It was easy to point there (indicating). That podium was not there when that witness pointed out. I am prisoner. I have chains.

(R. 1282). By that time, the damage was done. The extreme security measures distorted the judicial process and deprived Mr. Diaz of a fair trial.

This Court has examined this issue in other cases since Mr. Diaz's direct appeal, and has altered the standards previously applied in Mr. Diaz's case. In Bello v. State, 547 So. 2d 914 (Fla. 1989), the Court granted a new sentencing to a capital

defendant who was shackled during the penalty phase of his trial. The Court recognized that shackling is an inherently prejudicial restraint and that the constitutional concern centers on possible adverse effects on the presumption of innocence. Id. at 341. In Bello, as here, defense counsel objected to the shackling but the trial judge overruled the objection. There, as here, the trial judge merely relied on law enforcement's opinion. The Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry. Id.

In another case the Court recognized that shackling is inherently prejudicial but found that the trial court had properly exercised its discretion in permitting shackling. Stewart v. State, 549 So. 2d 171 (Fla. 1989). Although defense counsel objected, the trial court in Stewart found that the shackles were unobtrusive and necessary. "The judge pointed out that Stewart had remained stationary during the trial, thus giving the jury no opportunity to see him walk in shackles, and that the shackles were barely visible under the table." Id. at 174. Unlike the situation in Stewart, Mr. Diaz was in full view of the jury because he was representing himself. This Court did not have the benefit of Stewart and Be110 when it decided this issue on direct appeal. Those cases mandate that relief be given now.

## CLAIM XII

THE TRIAL COURT'S INTERFERENCE WITH MR. DIAZ'S PRIVILEGED DISCUSSIONS WITH HIS ATTORNEY AMOUNTED TO A DENIAL OF THE RIGHT OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Before Mr. Diaz's trial started, Mr. Lamons, defense attorney, informed the trial court that the State had just made a new plea offer to his client and that he needed time to discuss it with his client (R. 434). The court told Mr. Lamons that she was "not going to allow you to be in a room alone with him" (R. 434). The court then directed that a security officer go in the jury room with Mr. Lamons and Mr. Diaz and that Mr. Diaz be handcuffed and shackled (R. 435-36). Mr. Lamons objected to this interference with attorney/client privilege (Id.). The court then provided an interpreter but allowed Mr. Lamons only five minutes to discuss this new plea offer with his client (R. 436).

In Perry v. Leeke, 109 S. Ct. 594 (1989), the Supreme Court observed that a "defendant does have a constitutional right to discuss with his lawyer [matters] such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea barsain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess." Perry v. Leeke, 109 S. Ct. 594, 602 (1989).

A criminal defendant has an absolute right to be represented by competent counsel. See e.g., Perry v. Leeke, supra; United

States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984); Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963); Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 (1942). That representation must not be interfered with by a government agency or court, as the Supreme Court observed in Perry v. Leeke, 109 S. Ct. at 599-600.

Yet that is precisely what occurred in Mr. Diaz's case. His attorney, in attempting to convey a new plea offer to his client, was limited by the court to "five minutes" (R. 436), and was ordered to take Commander Bencomo and a "correctional officer" into the room with them, thereby violating the client-attorney privilege.

This was a clear violation of Mr. Diaz's Sixth Amendment right to counsel. Appellate counsel on direct appeal failed to raise this issue. No tactical or strategic reason exists for this failure to raise a preserved Sixth Amendment violation. This violation cannot be permitted to stand, nor should Mr. Diaz be precluded from the relief to which he is clearly entitled because appellate counsel failed to raise the issue on appeal. Habeas relief is warranted,

**CLAIM XIII**

**APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE ANY ISSUE REGARDING THE DENIAL OF MR. DIAZ'S RIGHT TO SELF-REPRESENTATION AT THE PENALTY PHASE**

In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that a criminal defendant has the absolute right to

conduct his own defense when he "knowingly and intelligently" so chooses. Here, if Mr. Diaz properly could assert a waiver and then waive his right to counsel (whether he was competent to do so is discussed elsewhere in this brief), even though it was clear that he was not versed in the law, not literate, and not capable of representing himself (R. 809; 815; 822), then denying the right of self-representation at the penalty phase was plain error.

At the penalty phase, upon a similar inquiry and similar responses as those elicited at guilt-innocence, the court found that Mr. Diaz would not represent himself and denied his request (R. 1359-63). Mr. Diaz was either competent to represent himself or he was not. The court, in appointing counsel at the penalty phase, stated:

> The Court is going to make the following statement. I would be derelict in my duties as a circuit court judge if I did not appoint Mr. Lamons to represent him, because he has stated at this time that he was not capable of representing himself at these proceedings.

(R. 1363) (emphasis added). If this were the case, Mr. Diaz should not have been allowed to represent himself at "the last trial."

There was no change in Mr. Diaz between the guilt and sentencing phases. There was no reason to distinguish between allowing him to proceed pro se in one phase and not in the other. Mr. Diaz did not agree with the court's appointment of counsel in the penalty phase (R. 1363). "In forcing [Diaz], under these circumstances, to accept against his will a state-appointed

[attorney], the [Florida] courts deprived him of his constitutional right to conduct his own defense." Faretta, 95 S. Ct. at 2541. Appellate counsel unreasonably failed to raise this meritorious claim on direct appeal. Habeas relief is proper.

**CLAIM XIV**

**APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT RAISING AN ISSUE ABOUT THE STATE'S WRITTEN SENTENCING PROFFER**

At the close of judicial sentencing, the state indicated that it needed to put reasons on the record for the disparate treatment between Mr. Diaz and his co-defendant. The Court suggested that this be done in a proffer. Mr. Lamons, who was representing Mr. Diaz at that time, made no objection (R. 1470-1). Thereafter, a written stipulation was submitted by the State's attorney explaining in detail Assistant State Attorney Hogan's reasons why Angel Toro was offered a reduced charge and Angle Diaz was prosecuted to the ultimate punishment (R. 310-13).

There was no cross-examination of Mr. Hogan. There was no adversarial testing of his proffer. There is no indication that he was even under oath. The proffer is full of hearsay, personal opinion and conjecture. Presentation and consideration of the proffer violated due process and the Eighth Amendment. This issue should have been raised on direct appeal. Habeas relief is proper.

## CLAIM XV

### APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE INADEQUATE AGGRAVATING FACTOR JURY INSTRUCTIONS CLAIM

A capital sentencing jury must receive appropriate instructions regarding the limiting constructions of an aggravating circumstance. Esainosa v. Florida, 112 S. Ct. 2926 (1992). The trial judge violated this principle by providing skeletal instructions regarding aggravating factors. The instructions gave absolutely no guidance for determining whether the aggravating circumstances were present. The court instructed the sentencing jury in the bare language of the statute (R. 1454-55).

The failure to explain the aggravating factor of pecuniary motive is especially detrimental here because the prosecutor forcefully argued that greed motivated Mr. Diaz (R. 1422-23). The Court's instruction and the prosecutor's argument were both inaccurate statements of the law. In Peek v. State, 395 So. 2d 492 (Fla. 1981), the court concluded that to find the aggravating circumstances of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions of profiting from his illicit acquisition." 395 So. 2d at 499. In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), the court explained that Peek held that "it has [to] be [] shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain." In Mr. Diaz's case, the jury did not receive an

instruction regarding this limiting construction of this aggravating circumstance. In fact, the prosecutor argued that no such limitation was applicable.

Mr. Diaz's sentencing jury was not properly instructed regarding the limiting constructions applicable to the aggravating circumstances upon which the jury was to base its sentencing recommendation and which the jury was to weigh against mitigating circumstances. Thus, the jury's sentencing discretion was not suitably guided and channeled. Espinosa. The jury's 8 to 4 recommendation and the mitigation in the record (including the State's concessions that it could not prove the identity of the shooter or premeditation) establish that this error was not harmless. Mr. Diaz's death sentence violates the Eighth Amendment. This claim should have been raised on direct appeal. Relief is proper.

## CLAIM XVI

### APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE PRESENTATION AND CONSIDERATION OF THE NONSTATUTORY AGGRAVATING FACTORS CLAIM

The United States Supreme Court found that Florida's capital sentencing statute was constitutional because the statute required consideration of specific factors. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976). Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v.

State, 373 So. 2d 882 (Fla. 1979); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977).

In Mr. Diaz's case, one area in aggravation that the state presented was the possibility of future dangerousness. "'[A] person may not be condemned for what misht have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance.' [Emphasis in original.]" Dousan v. State, 470 So. 2d 697, 702 (Fla. 1985).

The prosecutor improperly argued to the jury at sentencing that Mr. Diaz should not be allowed to live because he was likely to again escape from prison and commit violent acts in the future. This argument of future dangerousness did not address a statutory aggravating factor and was based on speculation. This was mere prediction and was designed to inject fear of future acts into the jury's sentencing deliberation. Defense counsel strenuously objected (R. 1436-37, 1439). The Court gave a curative instruction that did not specifically or adequately rebut the prosecutor's insinuation. Defense counsel correctly noted that the damage was done (R. 1452-53).

It appears that the prosecutor's argument infected not only the jury but the trial court as well. The court throughout trial displayed fear of the defendant (R. 689, 701, 1055). In sentencing, the court referred to Mr. Diaz' past violent acts and escapes and implied a risk of future violence (R. 1468).

The prosecutor also argued that Mr. Diaz was intelligent and therefore should be put to death (R. 1434-35). Intelligence does

not aggravate; it mitigates. It violates the eighth amendment to treat as aggravating that which is mitigating.

The prosecutor's introduction and use of, and the sentencer's reliance on, these wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the Eighth Amendment. The risk of capricious action is compounded here because the factor of future dangerousness rests on speculation rather than on concrete facts. See Dougan, 470 So. 2d at 702. Similarly, the use of rank hearsay, victim impact information (former victims), and other grossly impermissible factors improperly infected the jury's and court's penalty phase determination with unconstitutional, unreliable, arbitrary, and capricious factors. Cf. Caldwell v. Mississippi, 472 U.S. 320 (1985). At the sentencing phase, the State called four witnesses. These witnesses testified to hearsay evidence (R. 1383), thus depriving Mr. Diaz of the opportunity to cross-examine them. They also presented evidence irrelevant to any of the statutory aggravating factors (R. 1380, 1381, 1393, 1397). This rendered the resulting sentence of death constitutionally unreliable. The State may not introduce rank hearsay, especially unreliable hearsay. To do so violates the defendant's right to confront the witnesses against him and due process.

The introduction of nonstatutory aggravating factors resulted in a capricious sentencing of Mr. Diaz in violation of the Eighth and Fourteenth Amendments. This claim should have been raised on direct appeal and entitles Mr. Diaz to relief,

## CLAIM XVII

### APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE SENTENCING COURT'S FAILURE TO FIND MITIGATING CIRCUMSTANCES

A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Parker v. Dugger, 111 S. Ct. 731 (1992); Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Magwood, 791 F.2d at 1450.

Mr. Diaz's sentencing judge in her oral sentencing stated that, because of the jury recommendation, she had no choice but to impose the death sentence. The oral pronouncement did not mention mitigation. In her later order written by the State, she found five aggravating factors and no mitigation. This oral sentencing and the written finding of no mitigation are improper. The record reveals that substantial mitigation was present which the court failed to fully consider.

Possibly the most important mitigation consisted of evidence that the trigger man was not Mr. Diaz, but his codefendant Toro. Candance Braun testified repeatedly that she understood that Toro shot the victim (R. 880-81). Braun stated that the reason she came forward with this information was to prevent Toro from blaming the shooting on Diaz (R. 889-90, 896, 912, 917).

Three eye witnesses who testified about the incident were unable to positively identify the robbers; none of them could identify Mr. Diaz as one of the robbers. Mr. Pardinas, a patron

at the bar, testified that he was not a hundred percent certain Mr. Diaz was the man who robbed him (R. 965-66). The bartender, Norman Bulenda testified that he did not get a good look at the man who robbed him; Bulenda could not recognize the robber (R. 1004-05) . Another patron told police the night of the crime that the bar was dark. He could not identify the face of the culprit and could not pick out anyone from a photographic line-up (R. 1020-24). Another eyewitness, Leila Robinson, was unable to identify or recognize the culprits (R. 1035).

The prosecutor conceded in opening argument that he could not prove the identity of the shooter (R. 788), and admitted in his closing argument that there was no evidence Mr. Diaz went in the bar intending to kill anyone (R. 1257). The record reveals no evidence that Mr. Diaz killed anyone, but rather that he intended no one be killed. The court should have fairly evaluated this evidence as mitigation.

There was also a plethora of evidence in the record establishing Mr. Diaz' incompetence and inability to adequately defend himself. Before opening statements, defense counsel moved for a mistrial and asked the court to order a competency evaluation (R. 797-98). After defense counsel expressed Mr. Diaz' desire to address the jury and to discharge counsel, the court questioned Mr. Diaz about his desire and ability to represent himself. The court itself recognized that Mr. Diaz was unable to adequately represent himself (R. 805). The jury was not aware of these exchanges and could not fully understand Mr.

Diaz' limitations. Nonetheless, the court, as an impartial observer, was aware of the obstacles confronting Mr. Diaz and should have considered these circumstances in mitigation.

Mr. Diaz struggled to comprehend his predicament and the legal proceedings, and his frustrated efforts to represent himself are apparent at various points in the record. During his cross-examination of Candance Braun, Mr. Diaz became very upset and confused (R. 919-20, 929, 950). Mr. Diaz' confusion and irrationality are also apparent in his cross-examination of Detective Smith (R. 1081-82).

Apparently Mr. Diaz became upset when the court lectured to him about arguing with the witness or with the court, because defense counsel requested a break (R. 1094). Mr. Diaz became so distraught that he loudly interrupted defense counsel's sentencing argument (R. 1446-50). The court should have recognized these indicia of his mental, emotional, and cultural impairment as proper and reasonable mitigation.

The court was also aware of prior drug abuse by Mr. Diaz. Dr. Castiello in his competency evaluation reported that Mr. Diaz had previously misused drugs. One of the sentencing orders on a Puerto Rico conviction ordered that Mr. Diaz be evaluated and treated for drug addiction (R. 275). One of the State's witnesses testified that Mr. Diaz had been in an institutional drug program (R. 1379).

Despite the presence of clearly mitigating circumstances, the court never addressed the presence of any mitigating

circumstances, This Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating.

Here, the judge refused to recognize mitigating circumstances that were present. Under the requirement that a capital sentencer fully consider and give effect to the mitigation, Penry v. Lynaugh, 109 S. Ct. 2934 (1989), as well as under Eddinss v. Oklahoma, 455 U.S. 104 (1982), Parker and the sentencing court's refusal to consider the mitigating circumstances which were established was error. The factors should now be recognized. This claim should have been raised on direct appeal. Mr. Diaz is entitled to relief.

CLAIM XVIII

APPELLATE COUNSEL INEFFECTIVELY RAISED NO CLAIM REGARDING THE ERRONEOUS **MAJORITY** VOTE JURY INSTRUCTION

The jury in Mr. Diaz's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. Florida law is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a majority vote of seven-five or greater, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Diaz's jury throughout the proceedings was erroneously informed that, even to recommend a life sentence, its verdict had to be by a majority vote (R. 525, 534, 535-36, 1457-

58). These erroneous instructions are like the misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) and Mann v. Dugger, 844 F.2d 1444 (11th Cir. 1988)(en banc), because they "create a misleading picture of the jury's role." Caldwell at 2646 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment. This claim should have been raised on direct appeal. Relief is proper.

**CONCLUSION**

For all of the reasons discussed herein, Mr. Diaz respectfully urges the Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 3, 1996.

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