IN THE SUPREME COURT OF FLORIDA

NO. 72467

ERNESTO SUAREZ,

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Suarez's capital convictions and sentences of death. See Suarez v. State, 496 So. 2d 126 (Fla. 1986). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Suarez to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Suarez's capital convictions and sentences of death, and of this Court's appellate review. Mr. Suarez's claims are therefore of the type classically considered by this Court

pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Downs, supra; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Suarez's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Suarez's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Suarez's claim, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So.

2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Suarez will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Suarez's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Suarez's petition includes a request that the Court stay his execution (presently scheduled for June 22, 1988). As will be shown, the issues presented are substantial and warrant a stay. This court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Suarez's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Ernesto Suarez asserts that his capital convictions and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

III. CLAIMS FOR RELIEF

CLAIM I

> THE TRIAL JUDGE ERRED IN DENYING MR. SUAREZ'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE PREMEDITATED ELEMENT OF THE OFFENSE SINCE THE EVIDENCE WAS LEGALLY INSUFFICIENT. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ISSUE ON DIRECT APPEAL. THIS COURT HAS THE POWER AND AUTHORITY TO CORRECT THE ERROR AND IN THE INTEREST OF JUSTICE, REDUCE MR. SUAREZ'S CONVICTION TO MURDER IN THE SECOND DEGREE.

The facts set forth by this Court in its opinion affirming Mr. Suarez's conviction are as follows:

> The state's evidence at trial showed that Suarez drove a car with four accomplices to a convenience store in Immokalee. Suarez waited in the car while the four accomplices went into the store and robbed the clerk at gunpoint. During the robbery an off-duty detective pulled into the parking lot of the store and observed the robbery in progress. He left the parking lot and called in marked units to aid in capturing the perpetrators. The accomplices got into the car and Suarez drove away from the store followed by the off-duty officer. When a marked sheriff's deputy's car pulled in behind Suarez, Suarez

> attempted to evade by speeding up. A high-speed chase ensued during which Suarez forced several oncoming cars off the road and also went through two attempted roadblocks. The chase ended when Suarez pulled into a driveway at a migrant labor camp, his car coming to rest at the rear of a parked bus. Four deputies by this time were close behind the getaway car, and they pulled into the area and stopped. Suarez got out of the car taking with him his .22 caliber semi-automatic rifle. He fired before it apparently jammed. One of those bullets found its way into the chest of one of the deputies as he was exiting his vehicle. The shot killed him instantly, a fact not discovered until a short while later after two suspects had been captured and Suarez and two other accomplices had fled the scene.

Suarez v. State, 481 So.2d 1201, 1202-1203 (Fla. 1985)(emphasis added).

Petitioner was charged with first degree murder and prosecuted under the alternative theories of premeditated and felony murder, robbery being the underlying felony. Premeditated murder is defined as:

> The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.

Section 782.04(1)(a)1, Florida Statutes. Premeditation is an essential element of the crime and must be proved beyond a reasonable doubt. Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984); Daniel v. State, 108 So.2d 755, 759 (Fla. 1959); Snipes v. State, 154 Fla. 262, 17 So.2d 93, 97 (1944); Miller v. State, 75 Fla. 136, 138, 77 So. 669 (1918).

> If every homicide shall be presumed to be murder until the perpetrator shows that the act is not murder, this emasculates the statute; for the design of the statute is to require that the degree or quality of crime shall be established by proofs. The common law says the killing is murder; the statute says the unlawful killing is murder, manslaughter or not criminal at all according to the facts and circumstances. And so it is to be ascertained from all the facts and circumstances whether any crime has been committed, and it cannot therefore be allowed that a man shall be adjudged guilty of the highest crime upon proof of only one of the ingredients, the single act of killing being but one of the ingredients of the crime. The

> very terms of the classification of the different degrees of murder and manslaughter and of justifiable and excusable homicide require something more than the proof of the killing, because it cannot be determined without consideration of all the facts and circumstances of each case whether the act be murder, manslaughter or the criminal intent be entirely wanting.

Miller v. State, 75 Fla. at 139, quoting, Dukes v. State, 14 Fla. 499 (1874).

In order to prove first degree felony murder the state must prove that the defendant entertained the requisite intent required to convict on the underlying felony. Gurganus v. State, supra; Jacobs v. State, 396 So.2d 1113 (Fla. 1981). Robbery is a specific intent crime. Bell v. State, 394 So.2d 979 (Fla. 1981); Smith v. State, 461 So.2d 991 (Fla. 1st DCA 1984).

Consequently, under either theory of the prosecution, the state was required to prove beyond a reasonable doubt that petitioner had a specific intent at the time of the offense. The jury's verdict in this case specifically found premeditated first degree murder and specifically did not find first degree felony murder (R. 225).

In Gurganus, this Court held:

> To convict an individual of premeditated murder the state must prove, among other things, a 'fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues.' Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 9843, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. E.g., Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944); Chisolm v. State, 74 Fla. 50, 76 So. 329 (1917)....
>
> In order to prove first-degree felony murder the state need not prove premeditation or a specific intent to kill but must prove that the accused entertained the mental element required to convict on the underlying felony. Jacobs v. State, 396 So.2d 1113 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Adams v. State, 341 So.2d 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977)....

> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1891)....

The state's case was based almost entirely on circumstantial evidence. This is particularly true with regard to the essential element of premeditation. But if the facts and reasonable inferences were not available to establish first degree murder the state has as a fallback its case of felony murder.

The evidence set out below establishes that Ernesto Suarez's act of firing was merely reckless and random. Even the state's own careful reconstruction of the crime scene could prove no more. This Court's own reporting that "[o]ne of those bullets found its way into the chest of one of the deputies as he was exiting his vehicle," id. at 1202, intimates that the lethal bullet may have been an errant one not intended for any particular target. A significant fact overlooked by this Court in its factual recount was that it was pitch black at the time of the homicide. This is well-documented by the state's own precipient witnesses. See (R. 705 [McDaniel])(no illumination); (R. 743 [Wallen]) ("totally dark"); (R. 826 [Kuhl]) ("It was dark"); (R. 1018, 1022, 1024 [Gant])("total black," "totally dark," "downright dark"). That not one of the officers at the scene at the time testified that they actually saw Mr. Suarez firing the rifle drives home this point.

If Ernesto Suarez had the specific intent to shoot and kill Officer Howell, then it is hard to reconcile why the victim, as large a man as he was (260 lbs. R. 792), was not struck by more than a single shot. Mr. Suarez was alleged to have "fired more than a dozen rounds." Id. at 1202. Moreover, Howell's car was not riddled with bullets. Based on the state's expert testimony, "those [bullet] holes through the palm fround [were] consistent

with someone shooting at Officer McDaniel's automobile" and not at Howell (R. 1350). The state's hypothesis was that Suarez's strafing the area with his rifle demonstrated a specific intent to kill. This theory, however, surely does not outweigh the defendant's explanation that his actions were intended merely to frighten off his aggressors while he escaped. Mr. Suarez's conduct was at most consistent with an "act imminently dangerous to []others and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." Section 782.04(2), Fla. Statutes (emphasis supplied), namely murder in the second degree.

It is axiomatic that an accused cannot be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crimes for which he is charged. In re Winship, 397 U.S. 358, 364 (1970). Premeditation was never so established. The trial judge erred when he denied defense counsel's motion for judgment of acquittal (R. 1160). Defense counsel argued that the state had not proved "premeditation and design in the killing of Officer Howell" (R. 1154). Moreover:

> ...that the defendant even, if he were firing the weapon, might not even have seen Officer Howell through all the bushes and everything, and definitely, from the pattern of the scattered shots fired, could not have been [] aiming at any specific individual in this regard.

(R. 1155).

The defense grew stronger following Mr. Suarez's testimony. This Court wrote:

> [Mr. Suarez] ...claimed he fired the rifle only after he saw the flash of muzzle fire from the direction of the sheriff's deputies, and that he had merely fired the rifle blindly. He claimed that this was an automatic reaction resulting from his military experience as a Cuban soldier.

Id. at 1203 (emphasis added).

Evidence that the Court did not mention in its opinion

further discredits the premeditation theory. Moments before the fatal shooting, and during the high speed auto chase, Mr. Suarez ordered the co-defendant's Rodriguez and Montoya, to "'[t]ake the rifle and throw it out the window'" (R. 1213, 1263). See also (R. 866, 883). At the actual scene of the crime when Suarez "opened fire...[he] did not aim at anyone. [He] just fired to get them away from [him]." (R.1215-16). Moreover Ernesto testified:

> A. I never shot to kill. I shot just to protect myself so that they wouldn't again shoot at me. I shot to make them, that they would go back in their cars, and if they -- that they wouldn't fire upon me.

(R. 1217)(emphasis supplied). It was, "[in] this state of mind, [that Mr. Suarez] agree[d] to accept the blame for the killing of Deputy Howell" (R. 1220).

Under cross-examination, Mr. Suarez exclaimed: "I did not assassinate anybody. I defended my life" (R. 1239). He conceded that:

> [his] desire at this particular point was to do whatever was necessary in order to get away from the police?
>
> A. And to throw the rifle out, because I thought they'd catch me, but I was trying to do what was possible.
>
> Q. In other words, you didn't want to shoot anybody?
>
> A. No, sir.

(R. 1265) (emphasis supplied).

The co-defendants did not jettison the rifle from the auto when Mr. Suarez told them to. When Ernesto first started to flee from the scene, he left the rifle behind (R. 1269). However, feeling trapped and being fired upon, he felt compelled to retrieve it in order to shoot his way out of a life-threatening predicament (R. 1270). But he insisted that he "didn't see any people. [He] just saw the muzzle fire" (R.1270), and he fired in that direction (R. 1272), intending to do so purely in "self-defense" (R. 1275). He reiterated that he "shot to only get them

to get out of [his] way, not to kill, so that [he] would have time to escape" (R. 1276)(emphasis supplied).

Although not dispositive of the issue, it is telling that Ernesto went home and remained there until he was arrested the next day. As his lawyer argued, that was hardly consistent with the actions and mental state of someone who intended to commit first degree murder. (See R. 1217, 1328-29). There was also evidence of Mr. Suarez's background and training as a Cuban soldier, and testimony that his act of firing was purely reflexive. This evidence is more fully set out in Claim IV.

Following Mr. Suarez's testimony defense counsel renewed his motion for judgment of acquittal on "the same ground that was previously stated in the original motion," namely lack of proof of premeditation beyond a reasonable doubt (R. 1278). The motion again was denied (R. 1278).

The standard for weighing the constitutional sufficiency of the evidence is set forth in Jackson v. Virginia, 443 U.S. 307 (1979). An accused is entitled to relief if upon the evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. See also, Florida Rule of Criminal Procedure 3.380. The concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Tibbs v. State, 397 So.2d 1120, 1123 (1981), id. In this instance, neither the "character, weight or amount" of evidence can legally justify the result. Ibid. The court stated in McArthur v. State, 351 So.2d 972, 976 n.12 (1977):

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629 (Fla. 1956); Mayo v. State, 71 so.2d 899

> (Fla. 1954); Head v. State, 62 So.2d 41 (Fla.1952). (The meaning of "not inconsistent" may be sufficiently different from "consistent" as to prevent a substitution of terms.) In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, above; Holton v. State, 87 Fla. 65, 99 So. 244 (1924)(emphasis supplied).

The evidence in this case is not "inconsistent with...innocence" to the extent that there is the conflict between the degree of murder. Mr. Suarez's "version" of the event "must be believed" since "the circumstances [did] not show that version to be false" beyond a reasonable doubt. Ibid.

> "[E]ven though the circumstantial evidence is sufficient to suggest a probability of [murder in the first degree], it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of [murder in the second degree]." On this record appellant's innocence of first degree murder has not been disproved.

Id. at 978. See also Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir. 1982); ("If the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty then the evidence is not sufficient for conviction.")

"Premeditation is the one essential element which distinguishes first-degree murder from second-degree murder." Tien Wang v. State, 426 So.2d 1004, 1005 (Fla. 3d DCA 1983) (citations omitted). A premeditated design to effect the death of a human being is more than simply an intent to commit homicide, Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980), and "more than an intent to kill must be proved to sustain a first-degree murder conviction." Tien Wang, 426 So.2d at 1005. To show premeditation,

> it must be proven that before the commission of the act which results in death that the accused had formed in his mind a distinct and definite purpose to take the life of another human being and deliberated or meditated upon such purpose for a sufficient length of time to be conscious of a well defined purpose and intention to kill another human being.

State v. Wilson, 436 So.2d 908 913 (Fla. 1983) (McDonald, J., dissenting, quoting Snipes v. State, 17 So.2d 93, 97 (1944) (Chapman J., concurring)(emphasis supplied).

This record simply does not support the proposition that the homicide was premeditated. A view of the record most favorable to the State demonstrates that the homicide was the result of Mr. Suarez's conduct being imminently dangerous to others and evincing a depraved mind. Not a shred of direct or circumstantial evidence adduced can prove that Mr. Suarez "deliberated" over the act. And deliberation and reflection resulting in a "premeditated design" and conscious purpose to kill are the prerequisites to the crime for which he was convicted. Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983), motion denied, 446 So.2d 100 []; Gurganus v. State, 451 So.2d 817 (Fla. 1984); Tien Wang v. State, supra; Littles v. State, 384 So.2d 744 (Fla. 1980).

Ernesto Suarez testified that he "was a soldier" and that his conduct was "a reflex" and that he would not "shoot at anybody except in [his] defense. For [him] to fire at a person [] they would have to have a weapon pointing at [him] and...[want] [to] shoot [him]" (R. 1217). He "hadn't shot anyone to kill" (R. 1217).

Only after he exited his car without the rifle did he see the "muzzle fire." But he "didn't see any people" (R. 1270). It was then that he reached back into the car, grabbed the rifle and instinctively returned the fire, the action being a "reflex" resulting from his "many years in combat" and an act of "self-defense" (R. 1271-72, 1276).

> A. I can tell you that I don't know the form in which [the rifle] came to my hands. I just know that I shot.
>
> Q. Okay, so you pulled up the rifle and you shot in the direction of where you saw the flash come from?
>
> A. Exactly.

> Q. And then after you fired the shots you ran alongside of the bus?
>
> A. Yes. I jumped between the two fences. I crouched down like I was trained, like a guerilla to get underneath the bullets.

(R. 1272). When Ernesto Suarez fired, he "didn't see a face. [He] saw only the muzzle fire [and he] fired towards the flame" (R. 1275).

The state tried its best to introduce expert crime scene reconstruction and investigatory evidence to prove that Mr. Suarez was the only person who fired a weapon. They failed to do so, however. Two of the state's own precipient witnesses testified that they heard shots, other than from Mr. Suarez's rifle. See (R. 763, 772 [Walker]) (formed an impression that more than one weapon was being fired); (R.823, 824, 827, 831 [Kuhl] (knew "for a fact that there was more than one [gun being fired], heard 25 to 30 shots").

Appellate Counsel was Ineffective for not Raising the Matter of Legal Sufficiency as to Premeditation

Evitts v. Lucy, 105 S.Ct. 830 (1985), guarantees a defendant the sixth amendment right to effective assistance of appellate counsel. Florida's counterpart is Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

> The criteria for proving ineffective assistance of appellate counsel parallel the Strickland [v. Washington], 466 U.S. 668 (1984)] standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson v. Wainwright, 474 So.2d at 1163.

Ironically, Wilson v. Wainwright, dealt with precisely the same issue sub judice, namely the failure of appellate counsel to raise the matter of the sufficiency of the evidence to support a finding of premeditation. This issue was so apparent

from the "cold record" that two dissenting justices raised it on their own. Wilson v. Wainwright, 436 So.2d at 912 (Overton, J. dissenting); 913 (McDonald, J., dissenting). These facts of Wilson bear repeating.

> Appellant, Sam Wilson, Jr., twenty-eight, was visiting in his father's, Sam Wilson, Sr.'s, home. Appellant apparently became enraged when his stepmother, Earline Wilson, told him not to take food from the refrigerator. Appellant grabbed a hammer and attacked the stepmother. Her cries for help brought the father from the next room and he too was beaten with the hammer. During the struggle between the two men, a five-year old cousin, Jerome Hueghley, was stabbed in the chest with a pair of scissors by the appellant. Appellant then procured a gun and shot his father in the head. He next pursued Earline Wilson, who was now hiding in a closet, and emptied the pistol at her through the locked door, inflicting multiple wounds. Appellant hastened to a friend's house where he showered and changed clothes. He then went to his brother's home and he and his brother returned to the father's house. Sam Wilson, Sr. and Jerome Hueghley were dead from their wounds. After the police arrived, Earline Wilson came out of hiding and after being asked "Who did this," pointed at appellant and said "Sam, Jr." Appellant eventually told the police three versions of the event, finally admitting the homicides but contending that they were accidental.

Id. at 909.

According to McDonald, Justice dissenting, Wilson's conduct:

> was not planned and, while there [was] evidence to support a conclusion that the defendant intended to perform the acts he did, the circumstances [could not] support a conclusion that he reflected upon them before commission, even for a moment.

Id. at 913.

Simply put, the circumstances and evidence in Wilson bearing on the element of premeditation are far stronger than those which exist in the case sub judice. Mr. Suarez had far less time to reflect upon his conduct than did Mr. Wilson.

Petitioner seeks habeas corpus relief because appellate counsel failed to raise a meritorious allegation in the direct

appeal.[1] His failure cannot be attributed to strategy. The matter was perfectly preserved by defense counsel at trial. See also Johnson v. Wainwright, 498 So.2d 938, 939 (1987) (ineffective assistance of appellate counsel where counsel failed to raise issue objected to and preserved by trial counsel). This Court has stated:

> [W]e will be the first to agree that our 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. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Id. at 1165.

This Court has also recognized that "death penalty cases are different and consequently the performance of counsel must be judged in light of these circumstances." Knight v. State, 394 So.2d 997, 1001 (1981).

The court's granting petitioner's request for a writ of habeas corpus need only reduce the conviction from first to second degree murder.

In summary, the evidence was legally insufficient to establish premeditation beyond a reasonable doubt. Appellate counsel was deficient for his failure to pursue this matter on direct appeal. Mr. Suarez has been prejudiced and is entitled to

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[1]Appellate counsel did not file a reply (See App. 1).

habeas corpus relief under the sixth, eighth and fourteenth amendments to the United States Constitution.

CLAIM II

THIS COURT DENIED MR. SUAREZ HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT STATED THAT IT IS ONLY THE JUDGE'S "SENTENCING ORDER WHICH IS SUBJECT TO REVIEW VIS-A-VIS DOUBLING" AND IMPLIED THAT INSTRUCTIONS TO THE PENALTY PHASE JURY THAT INCORRECTLY SET OUT THE LAW WERE NOT IMPROPER.

A trial judge has the responsibility to correctly charge the jury on the applicable law. Under Florida law, if the defendant's request (i) clearly suggests to the trial judge the need for an instruction, (ii) on an issue that is critical to the defense, and (iii) that issue is not covered by standard jury instructions, a proper instruction should be given. See generally, Smith v. State, 424 So.2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So.2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So.2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So.2d 817, 819 (Fla. 3d DCA 1979). Failure to give a timely and proper request renders vulnerable any resulting conviction and sentence. A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case.

This Court's opinion in the case sub judice states that the aggravating circumstances that the crime was committed for pecuniary gain and that the murder occurred in the commission of a robbery, and that the murder was committed to avoid arrest and committed to hinder the exercise of law enforcement, have been held to constitute improper doubling in Provence v. State, 337 So.2d 783 (Fla. 1976) cert. denied 431 U.S. 969 (1977), and White v. State, 403 So.2d 331 (Fla. 1981) cert. denied 463 U.S. 1229 (1983), respectively. See Suarez v. State, 481 So.2d at 1209.

At trial, defense counsel twice objected to the trial judge's proposed instructions which included these two sets of "duplicated" aggravating circumstances (R. 1430-32). The

objections were denied (R. 1432). Defense counsel alternatively proposed that the jury be given a cautionary instruction in order to alert them to the problem doubling creates (R. 1432). Cf. Hopper v. Evans, 456 U.S. 605, 609, 611 (1982) citing Beck v. Alabama, 447 U.S. 625, 6637 (1980) (Defendant entitled to a lesser included offense instruction as a matter of due process when the evidence so warrants). This motion was also denied (R. 1433).

Counsel raised the matter again in Mr. Suarez's motion for a new trial (R. 1466) but fared no better than earlier (R. 1470). The matter was revisited on direct appeal. (See Appellant's Brief 26-29). This Court sidestepped the issue noting that neither Provence nor White related to the propriety of the instructions to the penalty phase jury. Suarez v. State, 481 So.2d at 1209. The Court then stated that "jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case" Ibid. This grossly understates the critical role that a capital jury performs in sentencing and the importance of accuracy regarding the instructions it receives. Cf. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985) (constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of Defendant's death lies elsewhere). See also Grossman v. State, No. 68,096 (Feb. 18, 1988) and cases cited; Fead v. State, 512 So.2d 176 (Fla. 1987) (Florida jury has primary responsibility for sentencing); Adams v. Wainwright, 804 F.2d 1526, 1531 n.7, 1532 (11th Cir. 1986), modified sub nom Adams v. Dugger, 816 F.2d 1495 (11th Cir. 1987) cert. granted, 56 U.S.L.W. (March 7, 1988) ("danger of bias in favor of death penalty" created due to "false impression as to the significance

of [the jury's] role in the sentencing process.").

It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978) that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). See also Godfrey v. Georgia, 446 U.S. 420 (1980) (condemning overly broad application of aggravating factors).

Under Florida's capital sentencing scheme, the trial judge must defer to a jury's recommendation of a life sentence unless the facts suggesting death are "so clear and convincing that virtually no reasonable person could differ" Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). It is axiomatic that a death recommendation must be soundly based on correct and applicable law. This surely cannot occur when the trial judge can effectively determine the outcome. In this case the judge did so by providing the jury with five aggravating factors to consider, two of which were mutually exclusive. And the judge never alerted them to this fact. The prosecutor then capitalized on the judge's generous listing by telling the jury that they had five aggravating circumstances to weigh against two mitigating circumstances (R. 1425). The result is unreliable. The jury recommended death 8-4. Their verdict was skewed by having five aggravating factors to choose among. They may have believed that the four aggravating factors i.e., 921.141(5)(d) and (f), and (e) and (g), were all present. Had they been instructed that they could base their recommendation on only two of these four circumstances the result could have been different, a life sentence was warranted.

To permit trial judges the opportunity to charge juries on aggravating factors that are duplicitous without alerting them to this fact is to tolerate a capital sentencing that is skewed to

death rather than to life. In this instance, the application of Sections 921.141, Fla. Stat. was unconstitutional. Rather than "genuinely narrow[ing] the class of persons eligible for the death penalty" Zant v. Stephens, 462 U.S. 862, 877; 103 S.Ct. 2733, 2742 (1983), here the statute's application broadened the class and enhanced the likelihood of a death recommendation due to the overlapping aggravating circumstances which pertained to the same aspect of Mr. Suarez's conduct.

The judge never told the jury that there were other statutory aggravating circumstances not applicable to this case R. 1451). Nor did he caution the jury that "the procedure to be followed" [was] not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances...." And he did not tell them the procedure they were to follow required "rather a seasoned 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...." State v. Dixon, 283 So.2d 1, 10 [Fla. 1973]). Due to the court's stress on the five aggravating factors and the dearth of other information, the jury probably thought that Mr. Suarez's case fit hand-in-glove with the type of case the legislature contemplated should receive the death penalty.

Based on what they had and knew, the jury probably did perceive their function as largely pro forma in order to perform a mathematical task. Mr. Suarez's chances would have been far better had the jury been allowed to consider three aggravating and two mitigating factors only. This in addition to the statutory catch-all provision could have certainly resulted in a life recommendation. What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Suarez's capital sentencing proceeding unreliable. Rather than channelling sentencing discretion to avoid arbitrary and

capricious results, Hopper v. Evans, 456 U.S. at 611 and narrowing the class of persons eligible for death, Zant v. Stephens, 462 U.S. at 877, the duplication or "doubling" instructions worked just the opposite. Mr. Suarez is entitled to relief under the eight and fourteenth amendments.

CLAIM III

MR. SUAREZ WAS STRIPPED OF A DEFENSE WHEN HIS TRIAL COUNSEL ABANDONED HIS PLEA OF NOT GUILTY BY REASON OF INSANITY AND HIS APPELLATE COUNSEL FAILED TO RAISE THE ABANDONMENT ON DIRECT APPEAL THEREBY DENYING MR. SUAREZ HIS RIGHTS GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

On March 2, 1984, Mr. Suarez filed a "Notice of Intent to Rely on the Defense of Insanity." As grounds for the defense, counsel stated:

> The nature of the insanity the Defendant expects to prove is that, at the time of the alleged offense, the Defendant, by virtue of his prior military and guerilla training and experience was unable to form a specific intent or to premeditate. The Defendant will call the court-appointed psychiatrist in this cause in support of such defense.

(R. 173).

The court raised the matter of Mr. Suarez's special plea of insanity March 9, 1984, at a pretrial motion hearing because he was concerned about having to appoint experts. Defense counsel stated:

> We received a notice but no motion and I am not certain that it was necessary to file that notice. I did that in an abundance of caution. The motion speaks for itself. It would be our position that Mr. Suarez has a tremendous amount of military background training. He fought in Angola and other places and on the night in question we believe that the psychiatrist will testify that he was acting out of a reflex rather than out of intention or premeditation. Whether that is an insanity defense or a state of mind defense, I don't know. On my original thing it was more a state of mind, support for his state of mind of not being one of premeditation or intending to commit the act rather than any type of insanity defense. But later I felt upon reflecting on

> the nature of it, that perhaps in an abundance of caution I ought to file that.

(R. 1693) (emphasis added).

The court indicated that it "just wanted to make sure" what the defendant's position was on the matter because "the last time [they] met, counsel agreed that there would not be any problem with the issue of insanity being raised" (R. 1693-94). The prosecutor responded:

> Mr. Brock: I don't know, this was based on what Mr. Martin has told us but we're going to depose Dr. Lombillo Monday afternoon. He's really not raising the issue of insanity but something similar, I think, intoxication to negate the premeditation, at least that's the way I understand what Mr. Martin has explained to us. Therefore, it would not be necessary for him to file this notice of intent to rely on insanity. If after we have deposed Dr. Lombillo and there is a basis for his testimony, then we will file a motion or move the Court prior to the beginning of the trial to strike that notice of intent to rely on the defense of insanity, for it will have an effect, or could have an effect at a later point in the trial, that particular defense being in there.

(R. 1694).

With the matter "clear on the record" and the court finding "no problem with that at all," the hearing ended (R. 1695).

The first time the jury heard about Mr. Suarez's special plea was when defense counsel Erickson inartfully attempted to conduct a limited voire dire on the matter. Later in the trial, the court indicated that he was "not still very comfortable, quite frankly, with the answer [he] received from Mr. Martin on the issue of the insanity defense" (R. 752). The court wished to "narrow this thing down" because he "sure [did not] intend to see it come back on appellate issue" R. 753). The court stated:

> I want to know when we come back, for the record, whether Mr. Martin or the defense in this case is raising the issue of insanity under Rule 3.216, which is commonly referred to as the insanity defense.
>
> I know that <u>on the basis of this "prior military and guerilla training</u>", that <u>we're</u>

> dealing with some form of an oddity here of the insanity defense, but I want to nail this thing down, quite frankly. And, it is -- then I want you both to review the rules regarding the requirements that the Court has regarding appointing of psychiatrists.

(R. 753)(emphasis added).

Defense counsel waived Mr. Suarez's right to have a second expert appointed. Mr. Martin was "willing to rely upon the testimony of Dr. Lombillo," only (R. 755). Unless "the State gets two psychiatrists then maybe [the defense] might want another one..." he intoned (R. 756). The matter was resolved with each side agreeing to proceed with only one expert (R. 756). The court said that he "just want[ed] to make sure that the record [was] clear from any potential future appellate point, that counsel has waived any right to have a minimum of two [experts]" (R. 756). The conference concluded with the court leaving open the option for either side to have another expert appointed (R. 757).

At the end of the state's case and after the court denied the motion for judgment of acquittal, defense counsel indicated that he was not "ready to proceed" due to "a couple of difficulties" (R. 1160).

> One, the psychiatrist, Dr. Lombillo, [was] issued a subpoena and he's in Colorado right now and will return on Monday. So, we would request a continuance until Monday to allow Dr. Lombillo to testify. In addition, [] the psychiatric examination of Dr. Collins, was conducted last night. Paul was there from our office, but we would want to have the opportunity to take his deposition before proceeding, and we have got him scheduled for tomorrow morning.

(R. 1160-61).

The other difficulty related to defense depositions scheduled the next morning for two state's rebuttal witnesses (R. 1161).

The prosecutor felt it important to raise the question of the "admissibility" of Dr. Lombillo's testimony in "the form which [he] anticipated that [it was] going to be offered" (R.

1162). Defense counsel was agreeable and tendered the doctor's "expected testimony" as set out in the state's deposition of him (R. 1162-63). The court, not wanting to continue the case from mid-morning Thursday until Monday, agreed to resolve the matter at that time (R. 1162-65). The court excused the jury until 1:00 p.m. (Thursday) (R. 1166). Defense counsel waived Mr. Suarez's presence (R. 1167). (Thursday)(R. 1166). The conference resumed. Defense counsel repeated that he had subpoenaed Dr. Lombillo and thus learned that he was out-of-state and unavailable until Monday. Counsel also said that he had anticipated the state's case would last through the week, but that the severance of the co-defendants on the eve of trial "compressed the time somewhat" (R. 1167, 1170).

Secondly, defense counsel stated that he expected that Lombillo's testimony "to be consistent with [his] notice of intent to rely on insanity, which, as [he] said earlier, was filed in an abundance of caution. [He] didn't really know if it was necessary to file that notice, but [he] didn't want to be faulted for not filing it" (R. 1168).

When asked by the prosecutor whether he was "relying on the defense of insanity" (R. 1168), defense counsel responded:

> MR. MARTIN: I'm relying upon the testimony of Dr. Lombillo, which simply says that <u>at the time he did not and could not premeditate and act intentionally, that he was acting out of a reflex</u>. Whether this falls under the category of insanity or diminished mental capacity or whatever, I don't know.
>
> I simply -- <u>these are the facts that I want to use and the theory that I'm proceeding under</u> is that, <u>as I stated in my notice</u>, it could certainly be stated more articulately than at the deposition where he's being cross-examined by the adversary party, but I still feel that within the pages of the deposition are the facts that I would anticipate his testimony.
>
> If I <u>feel it is relevant as to the issues of intent and premeditation</u> --

(R. 1168)(emphasis added).

The prosecutor conceded that that was also his "understanding of what Dr. Lombillo [was] going to testify" and he felt they could "probably agree to the basis on which he [was] going to promulgate that particular opinion" (R. 1168). The prosecutor's concern was that "the facts which [gave] rise to that particular opinion, [were] not based upon what he [] observed as a recipient [sic] witness. He was being given a set of facts which were related to him by the defendant through the course of his conversation with the defendant, and he ha[d] no other facts on which to base that other than what the defendant told him during those interviews..." (R. 1169).

Defense counsel, however, said that he had "had several conversations with [Lombillo] in which [he] explained to [Martin] what the facts were as [he] understood them from reading the discovery material. Whether he relied exclusively on what the defendant told him or whether he used some of the other information, [counsel could not] be sure, but he was made aware of certain events as [he] related them to him taken from the discovery that [counsel] received in the case" (R. 1169).

The prosecutor then urged the judge to review the deposition (R. 1169), since he was bothered by the "basis for [Lombillo's] opinion" or its "general tenor" being primarily "based upon what the defendant had told him..." (R. 1170-71).

The court implied that he might be able to make a ruling as to the admissibility of the expert testimony provided it would be "the same or very similar to what's in the transcript of the deposition" (R. 1171). Defense counsel was "hesitant to summarize" the deposition. Ibid. The court read aloud from the deposition which contained the doctor's opinion and interpreted it as "trying to say that even if he did do it, it was not premeditated" (R. 1173).

The prosecutor next set forth three reasons why he felt the doctor's testimony was inadmissible. The first was that the

doctor was "not a precipient witness" to the events. The prosecutor argued that the doctor in giving his opinion, would be placing facts "not otherwise in evidence" and therefore inadmissible, before the jury (R. 1173). Secondly, he argued that expert testimony on this matter would invade the jury's domain (R. 1174). Thirdly, the state felt the continuance until Monday would give the defendant an advantage because the jury would have forgotten much of the state's case (R. 1173-75).

As the prosecutor registered his objections, the court continued to "skim" through the deposition. It appeared to him that the expert testimony was "oriented toward premeditation" (R. 1176), which presented a "problem" for both the court and the prosecutor (R. 1177). Another "potential problem" for the court related to "the facts in evidence or within the knowledge of the doctor" (R. 1177).

Defense counsel interjected that he "anticipate[d] that the defendant would testify to facts consistent with those facts related to the doctor. [Therefore], if you get that you'd have evidence in the record upon which the doctor could base his opinion even though that evidence would be disputed" (R. 1177).

The prosecutor was quick to "agree...that <u>if the defendant</u> testifie[d] and [] <u>testifie[d] to those particular facts</u> that the doctor [] us[ed], that <u>the doctor then would be able to express those opinions</u>, because he would have [had] an evidentiary basis for the facts" (R. 1177)(emphasis added). The state's position was that the doctor's opinion would then "certainly" be admissible (R. 1178).

Defense counsel added that he thought that there were "things," Mr. Suarez told the doctor that were already consistent with the testimony presented (R. 1178).

The court repeated that he was troubled because the doctor's opinion was "more oriented towards premeditation than...towards any insanity defense" (R. 1179). Being agreeable, the prosecutor

stated that "if the defendant, Suarez, testified, even assuming that the -- that the need for expert testimony is not there, provided that the defendant, Suarez, testified, we don't have any objection to Dr. Lombillo getting up and saying anything he wants to (R. 1179)(emphasis supplied).

The court agreed with the prosecutor that without the defendant's testimony the doctor's testimony was "probably" inadmissible (R. 1180). But the judge stated:

> If the defendant testifie[d] and put the facts into evidence, even whether they [were] self-serving or not. It does -- it's not -- doesn't really matter, because the aspect of cross examination is the curative aspect. That would allow the testimony in just as any other testimony. So, that takes care of that problem. Based on that then, of course, Dr. Lombillo could testify, assuming the assumptions that were in evidence, and the same thing that's in the deposition, we wouldn't have to --..." (R. 1180)(emphasis added).

The court proposed that the trial resume at 1:00 p.m. The defendant would testify and if the trial ended early the next day (Friday), the judge would then wait until Monday for the doctor (R. 1181). The court reiterated that "at that point [he did not] see how [the defense could] get his testimony in without some kind of predicate being established. And, if in fact [the defense was] going to use Suarez as a witness that would solve that problem..." (R. 1181).

To make sure the record was clear, defense counsel repeated that a condition of his being able to introduce the doctor's testimony was that he first bring Mr. Suarez as a witness (R. 1182). The court responded that his was not a "hammer position" nor was he "threatening" the defense, but he "probably" would allow the doctor to testify only if the Defendant did so first (R. 1182). After defense counsel's motion to admit Dr. Lombillo's deposition was denied, the trial recessed until 1:00 p.m. (R. 1183). That afternoon, Ernesto Suarez was called as a

witness (R. 1190). Ernesto Suarez testified[2] that he entered military training in Cuba when he was sixteen. Because he "did not accept" Castro's regime, he was imprisoned for three years (R. 1191-92). After this he was sent to Angola and there had "actual combat experience" (R. 1192, 1263). Up to the time of the mental examination he had had many memories and visions of his combat experience (R. 1194). During the high speed attempt to elude the police, Mr. Suarez's flashed back to when "[he] was a soldier" (R. 1212). See also (R. 1263-64). Similarly when he fired the rifle, he stated: "I was a soldier. It was a reflex." (R. 1217, 1271). It was in this "state of mind" he "agree[d] to accept the blame for the killing..." (R. 1220). Mr. Suarez attempted suicide after his arrest (R. 1219). He experienced "memories" and "visions" of his combat history (R. 1220). He told others that he was "responsible" for the homicide, he said, so that "they would kill [him]" (R. 1220). But he also believed that he was going to be killed, so that he felt as a "human being" he should try to help his co-defendants (R. 1220).

Defense Counsel Abandons Mr. Suarez's Most Viable Defense

Mr. Martin was given the green light to call Dr. Lombillo conditioned upon Mr. Suarez testifying first. For reasons inexplicable, defense counsel abruptly rested his case following the state's cross examination of Mr. Suarez (R. 1276). There was an ostensible breakdown of communication between defense counsel because in the charge conference, attorney Smith stated: "We intend to take up 3.04(B), insanity" (R. 1284). But Mr. Martin's closing argument made no mention whatsoever of Mr. Suarez's insanity. He did emphasize the lack of evidence to support a finding of premeditation (R. 1326-35). But his sole reference to Mr. Suarez's abnormal mental state at the time of the crime

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[2]*(See Claim I for additional pertinent summary of Mr. Suarez's trial testimony.)

occurred when he remarked: "It's also possible that [Mr. Suarez] relapsed and thought he was back in combat" (R. 1328). Even though attorney Smith intended to "take up...'insanity,'" the matter was ignored. The court's charge made no mention of the defense. Nor was there a special instruction that gave the jury the option to consider any abnormal mental condition that the defendant might have had at the time that would have acted to negate his specific intent to kill. See (R. 1375, 1379, 1380, 1384). Lastly, the verdict form did not include insanity or any derivative as an available alternative to guilt or innocence (R. 225).

Lombillo's Testimony

Dr. Lombillo was called as a witness (R. 1408), but not in the guilt/innocence phase. His testimony at the penalty phase was too little, too late, and probably did more harm than good due to its timing and substance. On the other hand, had he been called in the guilt/innocence phase, his testimony regarding Mr. Suarez's mental state at the time of the shooting could have convinced the jury that Mr. Suarez was culpable of no more than murder in the second degree.

Dr. Lombillo testified inter alia that his training in psychiatry included four years at the Meninger School of Psychiatry and that he was licensed in three states. At the time of trial he was chairman of the Department of Psychiatry and Neurology of Naples Community Hospital. He was also certified by the American Board of Psychiatrists and Neurologists. In addition to having published several articles, he also presented a scholarly paper "on the crisis of the Cuban refugee to his country and the stresses that they suffer and how they are able to cope..." (R. 1411). He indicated that he had been court qualified as a expert in psychiatry several times (R. 1411).

Dr. Lombillo met with Mr. Suarez twice. The first time he was summoned by the court following Mr. Suarez's attempted

suicide (R. 1412). His second encounter was the result of the court appointment in this case (R. 1412). That second meeting involved the taking of a "history" from Mr. Suarez and administering psychological and psychiatric examinations (R. 1412).

According to the doctor, Mr. Suarez was born in Cuba in 1954, a time when a military coup d'etat was occurring and the country was a "military state" (R. 1413-14). Mr. Suarez was actually born in a military fortress and his family was linked to the military (R. 1414). Ernesto left school in the ninth grade and joined the military as a means of survival (R. 1414). Apparently he had been rejected by a stepfather (R. 1413). Ernesto's life as a child and youth was a "series of struggles" (R. 1413). The "turmoil" in his life continued on into his military career (R. 1414). He was "absent without leave" for a period, hiding in the mountains, but when he was caught, he had to spend several years in jail (R. 1414). When he turned twenty-one, he was sent to Angola as a soldier (R. 1414-15). Being in a strange country and different culture, in order to survive he had to rely on "not only his intelligence, but his reflexes and his guns." In Angola, he was seriously hurt three times, once almost fatally (R. 1415). Dr. Lombillo described the wounds Mr. Suarez still had (R. 1415).

According to the doctor, "under stress, [Mr. Suarez] performed at his best," whereas "in times of peace" he was lost (R. 1416). Mr. Suarez emigrated to the United States as a Mariel refugee (R. 1417). He arrived in placid Miami without a skill other than that of a soldier so he joined a right-wing para-military organization, Alpha 66 (R. 1417). During his tenure with the group, Mr. Suarez purportedly returned to Cuba in some clandestine military operatives and he also got involved in training operatives for Central American subversive activities (R. 1418). In summary, Dr. Lombillo tried to convey the

"constant turmoil and struggling" that was a part of Ernesto Suarez's daily life (R. 1418).

Although Dr. Lombillo found Mr. Suarez to be "pleasant and cooperative," he also observed that Mr. Suarez could suddenly "react completely different when the instincts for survival take over" to the point where he ostensibly lost self-control (R. 1418).

Dr. Lombillo concluded by stating that "at the time of the offense [Mr. Suarez] was under a great deal of stress" and that his "survival" played a key role at the time and that what occurred at the time was "similar" to his Angolan experience (R. 1420)(emphasis added).

The prosecutor was brief but underscored first that the doctor was "relying solely upon what the defendant ha[d] related to [him] as far as his background"" (R. 1421). Next he pinned down that Mr. Suarez "was not suffering from any mental illness" when they met (R. 1423). Lastly, "under the McNaughton Rule," Mr. Suarez was responsible" according to the expert (R. 1423).

Mr. Martin conducted no redirect examination of the doctor the defense called no other witnesses in the penalty phase and the case moved immediately into closing arguments (R. 1424).

An ineluctable impression emerges from a perspicacious review of the record that defense counsel was too busy with conflicting matters to do more than a superficial job at representing Mr. Suarez. Dr. Lombillo obviously was not well-prepared. He presented a rich opportunity for counsel to paint a clear picture for the jury of a Mariel refugee who had been perverted primarily due to his history of militarism and family background. This was never fully elicted or developed. Another rich vein never mined was the "stress" factor that the expert referred to as being some sort of trigger mechanism which would cause an abrupt change in Mr. Suarez's personality and behavior. At the time of this trial, the American Psychiatric Association's

DSM-III recognized Post-traumatic Stress Disorder as a mental illness. Its principal components follow:

> 309.81 Post-traumatic Stress Disorder, Chronic or Delayed
>
> The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience.
>
> The characteristic symptoms involve reexperiencing the traumatic event; numbing of responsiveness to, or reduced involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms.
>
> The stressor producing this syndrome would evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict. The trauma may be experienced alone (rape or assault) or in the company of groups of people (military combat).
>
> * * *
>
> The disorder is apparently more severe and longer lasting when the stressor is of human design.
>
> * * *
>
> The traumatic event can be reexperienced in a variety of ways.
>
> * * *
>
> After experiencing the stressor, many develop symptoms of excessive autonomic arousal, such as hyperalertness, exaggerated startle response, and difficulty falling asleep.
>
> * * *
>
> Symptoms characteristic of Post-traumatic Stress Disorder are often intensified when the individual is exposed to situations or activities that resemble or symbolize the original trauma...(emphasis added).
>
> * * *
>
> A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.
>
> B. Reexperiencing of the trauma as evidenced by at least one of the following:
>
> (1) Recurrent and intrusive recollections of the event

(2) Recurrent dreams of the event

(3) Sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus.

C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:

(1) Markedly diminished interest in one or more significant activities

(2) Feeling of detachment or estrangement from others

(3) Constricted affect.

D. At least two of the following symptoms that were not present before the trauma:

(1) Hyperalertness or exaggerated startle response

(2) Sleep disturbance

(3) Guilt about surviving when others have not, or about behavior required for survival

(4) Memory impairment or trouble concentrating

(5) Avoidance of activities that arouse recollection of the traumatic event

(6) Intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

DSM-III, 236-238.

Dr. Lombillo mentioned "stress" several times as a critical component to understanding Mr. Suarez's behavior. But defense counsel, apparently oblivious, did not appreciate the connection between Mr. Suarez's behavior and post-traumatic stress disorder. Counsel's superficial cross examination was due to poor investigation and preparation. Clearly there was this need for expert testimony on the matter of Mr. Suarez's state of mind at the time. Moreover, Mr. Suarez's cultural background was not a subject within the common knowledge and experience of the average juror. The post-traumatic stress syndrome defense certainly was a matter that the jury could only appreciate with the aid of an

expert.

Dr. Lombillo could have been an invaluable witness in guilt/innocence in order to negate specific intent. At penalty, however he was devastating. Failure to call Dr. Lombillo during the guilt/innocence phase deprived Mr. Suarez of his constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments to the United States Constitution and Article 1 Sections 9 and 16 of the Florida Constitution. See Washington v. Texas, 388 U. S. 14, 17, 87 S.Ct. 1920, 1922 (1967), and Chamber v. Mississippi, 410 U.S. 284, 285, 93 S.Ct. 1038, 1040 (1973). This expert testimony would have established that Mr. Suarez either could not or did not entertain the specific intent or state of mind essential to proof of first degree premeditated murder or felony murder. Evidence of Mr. Suarez's abnormal mental condition affected his capacity to form the requisite specific intent to kill.

In Gurganus v. State, 451 So.2d 817, 822-23 (Fla. 1984), this Court held that when specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Florida Statutes. Evidence which tends to disprove the specific intent element of the crime charged is relevant and must be allowed. Thus evidence of a mental condition offered as bearing on the capacity of the accused to form the specific intent essential to constitute a crime is relevant. Case law from Florida and elsewhere indicates that petitioner had the right to present expert testimony on this issue.

In the landmark case of Garner v. State, 28 Fla. 133, 153-54, So. 835 (1891), it was held that evidence of voluntary intoxication was relevant to negate specific intent or a

premeditated design. See also Gentry v. State, 437 So.2d 1097, 1099 (Fla. 1983). Jacobs v. State, 395 So.2d 1113, 1115 (Fla. 1981).

Other jurisdictions also recognize that where the crime charged requires proof of a specific mental state, evidence is admissible to show that because of a mental defect or condition not amounting to legal insanity the defendant did not possess the requisite mental state at the time he committed the crime. See 16 A.L.R. 4th 666. See also, People v. McDowell, 69 Cal.2d 737, 73 Cal.Rptr. 1, 447 P.2d 97 (1968)(failure to introduce psychiatric testimony regarding capacity to form specific intent in prosecution for robbery, burglary and murder deprived defendant of effective assistance of counsel). The court's reason that just as evidence of intoxication bears on a defendant's ability to premeditate intent to commit murder, so, too, does evidence of a mental defect or disorder.

In United States v. Brawner, 153 App.D.C. 1, 471 F.2d 969 (1972), the Court of Appeals, sitting en banc, considered the issue of a defense based on a mental condition that negates a specific mental element of certain crimes or degrees of crime. The court ruled that expert testimony of an abnormal mental condition is admissible when it bears on the existence of a specific mental element necessary for a crime. The Court reasoned:

> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

471 F.2d at 998-999. The court noted that its holding found support in the opinions of the highest courts of fifteen states.

The number has now increased. See 16 A.L.R. 4th 666.

Mr. Suarez's abnormal mental condition may not have been so acute as to constitute legal insanity. His mental condition was, however, serious enough to negate specific intent. The expert testimony should have been presented in the guilt/innocence phase, particularly where the court had indicated it would permit the testimony (R. 1182). In the case sub judice, petitioner's mental condition at the time and its impact upon his mental processes during the fatal episode were relevant to demonstrate an absence of premeditation or specific intent. See State v. Christensen, 628 P.2d 580 (Ariz. 1981)(court held it was error in a first degree murder prosecution to exclude psychiatric testimony that defendant had difficulty in dealing with stress, and in stressful situations, his actions were more reflexive than reflective. Because defendant acted impulsively, jury could have concluded that he did not premeditate the homicide).

Mr. Suarez's plea of not guilty by reason of insanity was grounded in "his prior military and guerilla training and experience" (R. 173), so that by virtue of this at the time of the shooting, he was "acting out of a reflex" (R. 1693). Whether this was "insanity" or "a state of mind" defense was unclear to defense counsel, but he determined it was wise to enter the special plea. The judge acknowledged that "on the basis of this 'prior military and guerilla' [they were] dealing with some form of an oddity [] of the insanity defense..." (R. 753), but the court did not reject the notion that the evidence would be admissible. Moreover, after the lengthy colloquy summarized above, it was resolved that the expert could testify as to Mr. Suarez's state of mind at the time provided Mr. Suarez do so first.

This proffered evidence of a mental condition short of insanity is not the equivalent of diminished capacity where it directly relates to the issue of intent in a prosecution for

first degree murder. As emphasized by the court in United States v. Brawner, 471 F.2d at 998, its holding:

> has nothing to do with 'diminishing' responsibility of a defendant because of his impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants.

In Commonwealth v. Gould, 405 N.E.2d 927 (Mass. 1980), the court also recognized that evidence of a mental condition short of insanity is not the equivalent of diminished capacity where it directly relates to the issue of intent in a homicide prosecution.

> Permitting a jury to consider whether a defendant's mental illness affected his capacity to deliberately premeditate is not tantamount to adopting a doctrine of diminished responsibility. This change merely broadens our present practice by allowing jury consideration of mental impairment as well as voluntary intoxication on the issue of deliberate premeditation. Our rule 'contemplates full responsibility, not partial, but only for the crime actually committed.' [Citations omitted]. Evidence of the defendant's mental disease, like voluntary intoxication, bears on the specific intent required for murder in the first degree based on deliberate premeditation.

405 N.E.2d at 932.

Similarly, in Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978), the Seventh Circuit Court of Appeals, held that the defendant's right to present witnesses on his behalf had been violated by the exclusion of the expert testimony as to defendant's abnormal mental condition. The court emphasized that it was not seeking to impose a "diminished responsibility" defense for emotional or mental problems upon the State of Wisconsin, nor was it attempting to constitutionalize the law of evidence by constructing a constitutional right to introduce psychiatric testimony. The court was simply recognizing the defendant's basic due process right to present evidence relevant and competent to his defense, namely, that he was guilty of only second degree murder because of his inability to form the

requisite intent for premeditated murder.

But for his lawyer's deficient performance, Mr. Suarez could have presented a defense relating to his abnormal mental condition at the time of the incident, a condition that resembled post-traumatic stress syndrome. Cf. Hawthorne v. State, 408 So.2d 801, 806-807 (Fla. 1st DCA 1982), rev. denied, 415 So.2d 1361 (Fla. 1982) where the district court approved the admissibility of expert evidence as to the battered woman's syndrome as it related to the defendant's claim of self-defense.

> We think there is a difference between offering expert testimony as to the mental state of an accused in order to directly 'explain and justify criminal conduct,' Tremain, at 706, and the purpose for which the expert testimony was offered in the instant case. In this case, a defective mental state on the part of the accused is not offered as a defense as such. Rather, the specific defense is self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm to herself or her children. The expert testimony would have been offered in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief. The factor upon which the expert testimony would be offered was secondary to the defense asserted. Appellant did not seek to show through the expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case.

408 So.2d at 806-807 (footnote omitted).

The evidence of a substantial mental impairment or post-traumatic stress syndrome, though not a defense in itself, is akin to the battered woman's syndrome. Expert testimony regarding any such abnormality aids the jury in understanding the circumstances and evaluating the accused's state of mind.

Florida rules of evidence allow expert testimony as to the ultimate issue. See Sections 90.702 and 90.703, Florida Statutes (1981). Those sections provide:

> Testimony by experts. -- If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.
>
> Opinion on ultimate. -- Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Dr. Lombillo's testimony was relevant and would have aided the jury as to Mr. Suarez's state of mind had it been timely presented. As he had said at the penalty phase, "when under great stress 'instincts for survival take over'" see 481 So. 2d at 1201.

The fact that Mr. Suarez had entered a plea of not guilty by reason of insanity gave the state and court appropriate notice thereby eliminating surprise and allowing time so that experts could be appointed. Cf. Zeigler v. State, 402 So.2d 365, 373 (Fla. 1981); Tremain v. State, 336 So.2d 705, 706-07 (Fla. 4th DCA 1976)(testimony regarding defendant's mental state inadmissible in absence of plea of not guilty by reason of insanity) and cases cited.

Defense Counsel's Performance Was Deficient When He Did Not Call the Expert to Testify as to Mr. Suarez's State of Mind at the Time of the Shooting

The Supreme Court articulated a general test in regard to what constitutes a sixth amendment ineffective assistance claim in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). This test consists of two components: (1) counsel's representation must have fallen below "an objective

standard of reasonableness," id. at 696, 104 S. Ct. at 2068, and (2) the defendant must have demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" Id. at 695, 104 S. Ct. at 2068. Furthermore, a defendant must satisfy both the performance and prejudice prongs to demonstrate successfully an ineffective assistance claim. Id. at 698, 104 S. Ct. at 2069.

The Supreme Court has consistently adhered to its requirement that the qualitative difference between a prison term and a death sentence requires a heightened degree of reliability in the death sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court has also recognized that "death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstnaces." Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981). That heightened standard should be applied in reviewing the factual basis of this claim.

Mr. Martin's performance was deficient under the sixth amendment in a number of respects. See Claim III. But Mr. Suarez's most essential rights were abrogated by a single error. Counsel failed to develop and present the defense which even he recognized held the key to Mr. Suarez's life or death. This was whether Mr. Suarez's mental condition at the time he fired the rifle was such that it negated the specific intent requisite for premeditated murder. Counsel failed to provide guidance regarding mitigating factors to his mental health expert. The due process right to a competent mental health evaluation conducted by a professionally competent mental health expert, see Ake v. Oklahoma, 407 U.S. 68, 105 S. Ct. 1087, 1094-97 (1985); Mason v. State, 489 So. 2d 734, 736-37 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987), are dependent on the effectiveness of counsel in seeing to it that this occurs. A single isolated error by counsel may be sufficient to demonstrate

ineffective assistance. Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986); Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Nero v. Blackburn, 597 F.2d 991, at 994 (5th Cir. 1979). See also Weidner v. Wainwright, 708 F.2d 614, 6117 (11th Cir. 1983)(Counsel was ineffective where "pretrial investigation into [defendant's] most plausible defense was woefully inadequate."); See Smith v. State, 461 So.2d 991, 992 (Fla. App. 1st Dist. 1984)(Summary denial of post conviction relief was inappropriate as to whether defense counsel was ineffective in not adequately investigating and/or advising defendant of possible defense and in allowing defendant to plead guilty in light of defense of lack of intent based on his having ingested drugs and alcohol prior to committing offense, where doctor's opinion was that defendant "was suffering from an alcoholic blackout spell during the time of the commission of the alleged offense.")

As a lawyer, Mr. Martin was neither inexperienced nor incompetent, but in this instance he was indifferent and his performance was deficient. He clearly did not fill the role imposed on him by the rigors of the adversary system. He especially did not do everything a diligent lawyer could to assist his client.

There is a reasonable probability that if this case had been handled competently, the verdict would have been to a lesser degree of murder. Moreover, had the jury nevertheless returned a verdict of murder in the first degree, they would have returned a recommendation for a life sentence based on what should have been the evidence. Mr. Suarez was denied the effective assistance of counsel in violation of his rights under the sixth, eighth and fourteenth amendments to the United States Constitution, and Article I, Section 16 of the Declaration of Rights of the Florida Constitution. He is entitled to habeas corpus relief. His conviction and sentence must be vacated.

CLAIM IV

THIS COURT ERRED IN FINDING THAT THE RECORD SUPPORTED THE AGGRAVATING FACTOR THAT MR. SUAREZ KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

This Court's opinion affirming the trial judge's finding that Mr. Suarez knowingly created a great risk of death to many persons fails to cite Kampff v. State, 371 So. 2d 1007 (Fla. 1979). In Kampff, this Court stated:

> When the legislature chose the words with which to establish this aggravating circumstance, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons.... The great risk of death must be to "many" persons. By using the word "many," the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.

Id. at 1009-1010 (emphasis supplied).

Kampff sets the standard. Johnson v. State, 393 So. 2d 1069 (Fla. 1980), helps flesh out the meaning of a great risk to "many" or to a "small number". In Johnson, the defendant engaged in a pistol shoot-out with the proprietor of a pharmacy during an attempted armed robbery. Three other persons were present in the drugstore at the time. In reversing the trial court's finding that the defendant had created a great risk of death to many persons, this Court emphasized:

> The "many persons" referred to by the trial court were the other three persons present in the drugstore at the time of the shoot-out. three people are not "many persons" as we have interpreted that term in the context of Section 921.141(5)(c).

Id. at 1073. See also Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981)(defendant's acting with total disregard for safety of two bystanders is not enough to establish this aggravating circumstance). So Johnson almost certainly stands for the proposition that as a matter of law, the presence of three persons in addition to the victim is insufficient to establish the aggravating circumstance of great risk of death to "many".

To say in Mr. Suarez's case that three other persons in addition to the victim, were exposed to a great risk of death is disingenuous. The Court wrote:

> The record shows that Suarez fired in the area of a migrant labor camp, and that his accomplices were also present at the time. Although there is no evidence that the police fired their weapons, this seems more an act of providence, in that they were unable to spot the precise location of defendant's shooting position. This aggravating factor is adequately supported in the record.

481 So.2d at 1209 (emphasis added).

It is true that Mr. Suarez fired "in the area of a migrant labor camp..." ibid. A careful review of the state's own crime scene reconstruction evidence and expert testimony, however, establishes the fact more precisely (See Crime Scene Photographs 24, 25, 34). When Mr. Suarez fired his gun, the camp proper was to his back. According to the state's evidence, his line of fire was toward an open, uninhabited field. Officer Howell, unfortunately, was in that same line of fire, thus he stopped one of Mr. Suarez's errant bullets. This Court misquotes Mr. Suarez's direct appeal brief regarding the whereabouts of the other three officers at the time of the shooting. The Court wrote that "[t]he defendant notes that only three deputies besides the victim were in the line of fire during the shooting..." id. at 1209 (emphasis added). Mr. Suarez never made any such statement or concession. The defendant's brief stated: "there were. . . three. . . other. . . officer's present at the time of the shooting." Id. (emphasis added). There is a vast difference between being "in the line of fire" and merely being "present." Two of the officers were well protected by a large tree during the fusillade of bullets and the third officer remained ensconced in his car until the brief shooting spree ended.

Another troubling part of this Court's reasoning in the case sub judice is that it appears to be penalizing Mr. Suarez for "an

act of providence." See 481 So. 2d at 1209. In White v. State, 403 So. 2d 331, 337 (Fla. 1981), cert. denied, 103 S. Ct. 3571 (1983), this Court stated that "a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance." (Emphasis in original.) See also King v. State, 514 So. 2d 354, 360 (Fla. 1987); Barclay v. State, 470 So. 2d 691, 694-95 (Fla. 1985); Dougan v. State, 470 So. 2d 697, 701-02 (Fla. 1985). If this is the law, how then can the Court reconcile what it wrote in Suarez?: "Although there is no evidence that the police fired their weapons, this seems more an act of providence...." Id. at 1209. Must not the risk be based on a high probability, not a mere possibility or speculation?. See Lusk v. State, 446 So. 2d 1038 (Fla.), cert. denied, 469 U.S. 873 (1984); Francois v. State, 407 So. 2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982).

The case at bar presents a set of facts that is certainly no more serious than in Johnson, supra. Cf. also Jacobs v. State, 396 So. 2d 713, 781 (Fla. 1981)("Although shooting occurred in a rest area close to a major highway, it was done with pistols at close range where few, not many, suffered a risk of injury. These facts fall short of aggravating factor of risk to many persons"); Tafero v. State, 403 So. 2d 355, 362 (Fla. 1981); Diaz v. State, 513 So. 2d 1045, 1048-49 (Fla. 1987); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986)("...upon reconsideration, we find that the aggravating factor of creating great risk of death to many people is not applicable to this homicide. Notwithstanding the "raging gun battle," 376 So. 2d 1153, this episode involved only the victim and her two friends. There has never been any evidence that Lucas' conduct endangered more than the three people directly involved. Three people simply do not constitute "many persons" as meant by Section 921.141(5)(c).)

The facts in the case at bar are plainly inadequate to

support finding this aggravating circumstance. The Court's conclusion that it does is flawed both legally and factually. The finding is inconsistent with the Court's construction of the pertinent statutory subsection as set out in Kampff, supra. Moreover, it contradicts the Johnson standard, supra, as to what constitutes "many" persons. Furthermore, the Court's decision ignores the rule in White that proscribes punishment for what "might" have been. These several flaws are responsible for the perverse ruling as to this aggravating factor. The Court's ruling deprived Mr. Suarez of his eighth and fourteenth amendment rights to the United States Constitution. This Court must reweigh and reevaluate the aggravating and mitigating evidence in this case. Mr. Suarez is entitled to a sentence of life.

CLAIM V

IN ORDER NOT TO VIOLATE HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS THIS COURT HAS A DUTY TO CONDUCT A FAIR PROPORTIONALITY REVIEW OF MR. SUAREZ'S CONVICTION AND THEREAFTER REDUCE HIS SENTENCE TO LIFE SINCE IT IS INDISTINGUISHABLE FROM THE NORM.

What precisely is there about the case sub judice that sets the crime apart from the norm of capital felonies? See State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973) cert. denied, 416 U.S. 943. (1974). Mr. Suarez was denied even-handed appellate review as required by Dixon.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

Id. at 10.

> Given the imprecision of the criteria set forth in our capital punishment statute [this Court] must test for reasoned judgment in the sentencing process rather than a mechanical tabulation to arrive at a net sum.

Brown v. State, 381 So. 2d 690, 696 (Fla. 1980). See for example

Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984); Proffitt v. State, 510 So. 2d 896, 897-98 (Fla. 1987); Lewis v. State, 398 So. 2d 432, 434 (Fla. 1981).

The facts of this case have been adequately set out in various parts of the preceding claims for relief so they will not be repeated. There is one fact, however, that does set this case apart from the norm of premeditated murder so as to make it extraordinary. The fact is not that Mr. Suarez shot a law officer. This was not a lawful distinction upon which to base a death sentence at the time of Mr. Suarez's trial. To the contrary, what needs emphasis is how little reflection must have been a part of Mr. Suarez's thought process at the time of the shooting, assuming for argument's sake that premeditation did exist. The record plainly shows that events surrounding the shooting unfolded rapidly. Mr. Suarez's response to a perceived threat was almost automatic or by reflex. There was little if any time to ponder or rationally plan his conduct. A comparison of Mr. Suarez's conduct with that of others will demonstrate that he is entitled to a sentence of life.

Two recent decisions of this Court implicitly illustrate how extreme an accused's behavior must be in order to receive a death recommendation that will withstand appellate scrutiny.

In Caillier v. State, No. 70, 297 (Fla. April 7, 1988), the defendant and her lover conspired to kill her husband. Evidence supported the aggravating circumstance that the murder was committed for financial gain since Ms. Caillier stood to profit as the sole beneficiary on a life insurance policy and the recipient of a large amount of money her husband had had in the bank. Evidence also supported the aggravating circumstance that the murder was committed in a cold, calculated and premeditated way. In addition there was some indication that Ms. Caillier had tried to have her husband killed by someone else at an earlier time. The trial court found one mitigating factor, namely that the

defendant had no significant prior criminal history. This Court found a second, the disparate treatment between Ms. Caillier having been sentenced to death while her boyfriend, who committed the murder, received a life sentence in return for his acting as a state's witness. This Court vacated Ms. Caillier's death sentence and remanded the case for resentencing.

In Lloyd v. State, No. 65,631 (Fla. March 17, 1988), the defendant, as part of an apparent contract killing went to the home of the 28 year old victim, and after attempting to rob her, in the presence of her five-year-old son shot her twice, once in the neck and once in the head. The trial judge found three aggravating circumstances; the offense was committed while the defendant was engaged in an attempt to rob, the felony was committed in a cold, calculated and premeditated manner and the crime was heinous, atrocious and cruel. The mitigating circumstance present was that the defendant had no significant prior criminal history. This Court discarded two of the aggravating circumstances and concluded that the imposition of the death penalty [was] proportionately incorrect. Slip op. p.14. See also Perry v. State, 13 F.L.W. 189 (March 18, 1988), which is a recent reversal of a jury override where the trial court had found five aggravating and no mitigating circumstances. This Court reduced the number of aggravating circumstances to two, but still found no mitigating circumstances. Despite this, the Court determined that the existed a reasonable basis for a life sentence based on substantial nonstatutory mitigating evidence.

The even-handed appellate review required by Dixon failed to operate in the case at bar. No meaningful basis exists to distinguish Suarez's sentence from other similar cases that resulted in life sentences. Dixon makes it clear that the recommendation process is not a mere counting of aggravating and mitigating factors. Mr. Suarez's conduct is far less shocking and

reprehensible than were the actions of Caillier and Lloyd. The fact that Caillier and Lloyd each had an available mitigating circumstance working in their favor cannot be dispositive.

Mr. Suarez's culpability pales in comparison to Caillier and Lloyd since he had little if any time to reflect on his conduct. If for no other reason, Mr. Suarez is entitled to receive similar treatment. Cf. Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)("evidence suggests the conclusion that the commission of the death act was probably upon reflection of not long duration".) Rembert v. State, 445 So. 2d at 338 (death penalty unwarranted where defendant, after drinking for part of the day and worrying about how to make his car payments, entered the elderly victim's shop, hit her in the head once or twice with a club and stole money from the drawer); Proffitt v. State, 510 So. 2d at 898 (death sentence disproportional for a homicide during a burglary unaccompanied by any additional acts of abuse or torture to the victim).

When Mr. Suarez's case is compared with any of those cases or discussed above, it is patently clear that Mr. Suarez is entitled to a reduction of his sentence. To do less would be a violation of his eighth and fourteenth amendment rights under the United States Constitution.

CLAIM VI

THE TRIAL COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND ARGUMENT OF COUNSEL AND BY ARBITRARILY IGNORING NONSTATUTORY MITIGATING EVIDENCE CONTRARY TO MR. SUAREZ'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The trial judge specifically indicated on three different occasions that he had reached conclusions regarding Mr. Suarez's sentence prior to the presentation of evidence and argument.

First, the trial judge indicated to the attorneys during the jury charge conference at the penalty phase that he had already

found certain aggravating circumstances (R. 233-237). This was prior to the presentation of evidence to the jury or argument of counsel.

Secondly, the trial judge stated for the record at the close of the penalty phase that he intended to impose the death sentence:

> I intend to accept the advisory sentence of the jury and will be imposing sentence at ten o'clock on Thursday. That just happens to be one year to the day when this tragic event occurred. At this time the bailiff is going to give you a certificate of award. Thank you very much.

(R. 1458). (emphasis added).

Thirdly, the judge had a draft order imposing the death sentence read to Mr. Suarez by the Spanish interpreter without the knowledge or presence of counsel prior to hearing argument by defense counsel in mitigation at the time of sentencing:

> MR. MARTIN: Your Honor, before proceeding with sentence, I have at least one motion, possibly two motions, which should be heard before sentencing.
>
> The first motion is a motion to disqualify the trial judge in this cause. I served the State with a copy and, I apologize for the lack of notice. I have been out of town and the issue that I'm raising just arose on Monday.
>
> I have the original for the Court's consideration. I am prepared to make argument.
>
> THE COURT: All right, proceed.
>
> MR. MARTIN: Your Honor, we rely upon the allegations in the motion, and also I ask the Court to take judicial notice of the matter stated in the record, both on Monday and today, if I understood the Court correctly, the Court has already decided to sentence this defendant to death without benefit of argument of counsel.
>
> And I feel that this does satisfy the grounds set forth in the motion, in accordance with the criminal rule, that states that a Judge must recuse himself if it can be shown by the record through affidavits that the trial judge is prejudiced against a party or against the moving party.

THE COURT: Okay, the court will take notice of the motion. The motion is going to be denied.

The Court feels it's totally groundless. I thing the case law reflects that there's even case law to the effect that the Judge can, that I'm aware of, that judges have written opinions that they have issued immediately after the jury's recommendation of death.

And, obviously, there's a strong recommendation by the Supreme Court against such activity, but the fact that the Court may have reached its conclusion at the same time that the jury did is of absolutely no legal impediment in this Court's opinion.

And the record, I think, clearly speaks for itself, for any purposes for appeal. I'll let the Supreme Court decide.

MR. MARTIN: Your Honor, I would ask to have marked as an exhibit a copy of the Court's draft order that, if the Court has one, concerning the issuance of the penalty of death.

THE COURT: Well, I'm going to issue the order. The draft order was exactly that, a draft, and the final order that the Court's going to read today, I think is going to be the final order.

I don't intend to make a draft order, a copy of it, part of the record. You can file it for whatever purpose you want to otherwise, but it's not going to be part of the record as far as I'm concerned.

As far as I'm concerned it's not the final order.

MR. MARTIN: I want to move into evidence, apparently speaking to the defendant, he said that a written statement was read to him by the interpreter, and I want to move that into evidence in support of my motion. I think this may be the document that -- over here --

THE COURT: Okay. You're free to move it, but the Court will deny it.

(R. 1462-64)(Emphasis added).

It is a fundamental precept that constitutes a primary underpinning of the constitutionality of the death penalty that a 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. In State

v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974), the Florida Supreme Court held:

> [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

(emphasis added). In this case the trial judge expressly abdicated his duty to impose a reasoned judgment so that "the inflamed emotions of jurors can no longer sentence a man to die..."

The Florida Supreme Court has addressed the ramifications of a failure of the trial judge to engage in a meaningful weighing of the aggravating and mitigating circumstances before imposing the death sentence. In a number of cases, the issue has been presented in the context of written Findings of Fact 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 Royal, the Florida Supreme Court set aside the death sentence because the record did not support a finding that the imposition of the death sentence was based on a reasoned judgment. As stated by Judge Ehrlich in his concurring opinion:

> 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.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Florida Supreme Court again emphasized the importance of an independent weighing process of the aggravating and mitigating circumstances. In Patterson the trial court failed to engage in an independent weighing process by delegating the responsibility to the state attorney:

> With regard to his first contention, we 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. Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1 (Fla. 1983), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). . . .

The trial court denied Mr. Suarez's constitutional rights to due process, right to counsel, confrontation of witnesses and the protection against cruel and unusual punishments by finding aggravating circumstances prior to taking evidence regarding penalty; adopting the jury recommendation without a reasoned, independent weighing process; and deciding and imposing sentence without argument or even the presence of counsel.

The Florida Supreme Court has made it clear in Dixon, supra, and Van Royal, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances and (b) not abrogate the responsibility for that weighing process to another entity. In this case the trial judge first violated this fundamental requirement by indicating findings of aggravating circumstances prior to taking evidence in the penalty phase. The court next abdicated its responsibility to independently weigh the aggravating and mitigating circumstances to the jury by stating that the court would follow the jury's recommendation prior to the possible admission of additional evidence or the argument of counsel at sentencing. Thirdly, the court blatantly ignored the right to counsel, due process and the right of confrontation by reading a draft judgment and sentence to Mr. Suarez in his holding cell prior to the sentencing hearing without the knowledge or presence of counsel or a court reporter.

The court compounded the error by refusing to place a copy of the "draft order" read to Mr. Suarez in the record.

A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S.

> 242, 258, 96 S. Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449)11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation.

Similarly the court here acted in an arbitrary and capricious manner in totally disregarding the nonstatutory mitigating evidence offered by Dr. Lombillo at the penalty phase.

The court erred in failing to consider the lack of prior convictions in mitigation of the death penalty. The judge and jury should not be allowed to make findings resulting in a judgment and sentence of death based on an incomplete and inaccurate factual premise. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The Court has repeatedly held, even in nondeath cases, that a sentence must be set aside if it is based on an unconstitutional prior conviction or "misinformation" of constitutional magnitude. In United States v. Tucker, 404 U.S. 443, 444-45 (1972), the defendant, after being sentenced in a noncapital case, succeeded in post-conviction relief proceedings in vacating two convictions -- one 15 years old and the other 9 years old -- that had been considered by the sentencer. The Court noted that the "sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of these convictions were wholly unconstitutional. . . ." 404 U.S. at 447 (footnote omitted). Despite the fact that the sentence was based also on other, valid convictions, the Court reversed, holding that but for his unconstitutional prior convictions, "the factual circumstances of the [defendant's] background would have appeared

in a dramatically different light at the sentencing proceeding." 404 U.S. at 447-48.

In Townsend v. Burke, 334 U.S. 736, 741 (1948), the Court held that a conviction and sentence would be vacated where the defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." This issue is properly before the Court in that it constitutes fundamental error and was not raised on direct appeal due to the ineffective assistance of appellate counsel.

CLAIM VII

MR. SUARAZ WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On March 30, 1983, Mr. Suarez was arrested on charges of first degree murder and armed robbery. That same day Mr. Suarez appeared before County Court Judge Eugene C. Turner for the First Appearance Hearing. At that time Mr. Suarez was advised that he was charged with first degree murder and armed robbery. He was advised of his right to an attorney. According to the record of the first appearance hearing, Mr. Suarez indicated he was indigent and requested court appointed counsel. App. 5.

On April 1, 1983, Mr. Suarez requested to see the law enforcement officer investigating the case. Deputy Winters responded to the request and arranged a meeting with Mr. Suarez in an interview room. During the questioning Deputy Ortega served as the interpreter. At the commencement of the interrogation Mr. Suarez was placed under oath without an explanation of what the significance of an oath was. He was then asked if he had requested to see the police, and Mr. Suarez indicated that was true. Mr. Suarez was then asked to explain what had occurred the night of the homicide. No Miranda warnings

were given to Mr. Suarez before or during the interrogation. Mr. Suarez was not advised of his right to counsel, nor was he asked if he knowingly and intelligently waived his right to counsel (R. 1230-1233).

On August 19, 1983, as a result of his request, Mr. Suarez was interviewed by Assistant State Attorney Jerry Berry. Also present was Assistant State Attorney Hernan Castro who acted as interpreter. The interview was taped. According to the transcript of the interview, there had been a previous conversation between Mr. Berry and Mr. Suarez, which had occurred because of Mr. Suarez's request to speak to Mr. D'Alessandro, the State Attorney. After making note of that, Mr. Berry in a series of leading questions asked if he had advised Mr. Suarez of his rights at the previous interview:

> Q. I am going to again advise you of your rights. Do you recall that I went over your rights with you before I spoke to you in the jail?
>
> A. Yes.
>
> Q. And I advised you that prior to speaking to you at the jail that you had a right to remain silent?
>
> A. Yes Sir.
>
> Q. And that anything you said could and would be used against you at trial? And you stated that you understood those rights?
>
> A. Yes Sir.
>
> Q. And you agreed that you would waive your right to remain silent and you agreed that you would talk to me in jail?
>
> A. Yes Sir.
>
> Q. And that I also advised you that you had the right to have an attorney present?
>
> A. Yes.
>
> Q. And we discussed that? And you stated that you understood that right
>
> A. Yes. <u>But the lawyer's never come</u>.
>
> Q. Okay. I told you that we would be able

to get you an attorney if you wanted an attorney prior to speaking to me? That we would have an attorney there and you agreed to talk to me without an attorney, is that correct?

A. Yes Sir.

(App. 6)(emphasis added).

Thereupon Mr. Suarez agreed to again speak with Mr. Berry and gave him a statement.

Subsequently Mr. Suarez's counsel learned that the prosecutors had taken a statement from Mr. Suarez without their knowledge and consent. Even though Mr. Suarez's lead counsel was out of town and unavailable, his co-counsel immediately objected.

On November 7, 1983, a hearing was held upon the defense's motion to suppress. At that time counsel argued that the prosecutors' actions violated the Canon of Ethics and as a result the statement must be suppressed. When the Court refused to find suppression of the statement an appropriate sanction for the violation of the Canon of Ethics, defense counsel argued his motion to withdraw which included:

> 4. That ERNESTO SUAREZ has, by his refusal to follow the advice provided to him by counsel, been uncooperative and has rendered his defense increasingly difficult as pertains to the below signed attorneys.

At the conclusion of the November 7, 1983, hearing defense counsel was permitted to withdraw from his representation of Mr. Suarez although he continued to represent Mr. Suarez's co-defendants, Miguel Sori and Raymundo Reyes.

Following the hearing, Mr. Berry arranged yet another taped interview of Mr. Suarez. The transcript, which does not contain the Spanish translation of the questions and answers, reflects that the interview began as follows:

> Today's date is November 7th, 1983. The time is approximately 5:01 P.M. We are present at the State Attorney's Office. Present is myself, Assistant State Attorney Jerry Berry, Assistant State Attorney Hernan Castro and Ernesto Suarez. We are here upon the request of Mr. Suarez. Mr. Suarez has indicated earlier today that he wished to speak to me

personally and I have obliged him.

Q. Mr. Suarez is all the things that I have said correct?

A. Yes Sir.

Q. And Mr. Suarez prior to starting this statement we had you fill out an indication in Spanish written showing that you requested this interview, did you do that?

A. Yes Sir.

Q. Mr. Suarez before I speak to you I want to go over a few things with you. First of all, you have the right to remain silent. What that means is that you do not have to speak to me. Do you understand that? You have to verbalize.

A. Yes.

Q. Anything you tell me can and will be used against you in a court of law. What that means is that anything you tell me will be used against you at the trial. Do you understand that?

A. Yes.

Q. You have the right to have an attorney present. We have gone through this before, do you wish to have your attorney present?

A. I do not have a lawyer.

Q. Okay. I know that you do not have a lawyer at this point but there is going to be another attorney appointed to represent you. Do you want him present before you talk to me?

A. It's the same.

Q. I just want to make sure that you understand that you have the right to have him here.

A. I do not know him. I cannot ask for a lawyer. It's the same to me to speak with you.

Q. Okay. That is just your right to have either him or another attorney here. What is your response?

A. It's the same.

Q. It's the same. That means you can speak to me without your attorney.

A. Yes as I do not have a lawyer.

Q. I am not sure but I believe the attorney that is being appointed for you will be Larry Martin, do you know who Larry Martin is?

A. No Sir.

Q. He is with George Vega's firm.

A. George Vega?

Q. Do you want him here before you talk to me?

A. It's the same in final at the end what I will speak to you is to give you the proof that I was not the one that shot the policeman.

Q. Okay. But you do want to talk to me without Larry Martin or any other attorney being here?

A. I will speak to you.

Q. Okay. Mr. Suarez there is one other thing that is at anytime during this discussion in which you desire not to speak to me anymore or in which you would like to have your attorney present before you answer anymore questions, you the right to do so and as soon as you request, I will desist and will not ask you anymore questions, do you understand that?

A. Yes Sir.

Q. What is it that you would like to talk to me about?

A. Before the last time that you and I spoke, I told you that I wanted to talk to you with a lawyer to give you the proof of my innocence in this trouble. I do not know if you remember that I tried to talk to you but Mr. Faerber, that today is accusing me, said he prohibited me from speaking with you.

App. 7 (emphasis added).

Mr. Suarez's new counsel, Larry Martin, entered an appearance on November 9, 1983. Thereafter he renewed the motion to suppress the statements given to the prosecuting attorney under the Canon of Ethics. This motion was denied.

At trial, prior to the cross-examination of Mr. Suarez, the prosecutors asked for a finding that the April 1 statement as well as the August 19 and November 7 statements could be used to

impeach Mr. Suarez. The defense again argued that the Canon of Ethics precluded use of the August 19 and November 7 statements. The question of the voluntariness of the statements was raised by the prosecutor and the judge. Defense counsel refused to concede the issue:

> MR. MARTIN: I would not go so far as to state the attempts were voluntary in that we're dealing with a foreign person talking with a lawyer without his lawyer present. I don't think that the voluntariness or the consent was knowingly or intelligently given.
>
> I'm not saying they were taken in violation of his Miranda rights, but I think when a person talks to a person who's not a lawyer and gets him to consent to answer questions, that that consent under our law is not freely and voluntarily given, and consent can't intelligently be given.

(R. 1223-1224).

Two witnesses were then called by the State out of the jury's presence, Hernan Castro, the Assistant State Attorney who acted as interpreter, and Deputy Winter. They were asked whether Mr. Suarez was threatened or coerced in any fashion and whether he appeared to be under the influence of any alcohol or drugs (R. 1225-1233). Defense counsel briefly cross-examined Mr. Castro and had no questions of Deputy Winter.

The prosecution thereupon argued that the statements were voluntarily given and thus could be used for impeachment purposes. Without any argument from the defense, the Court agreed and ruled the statements could be used for impeachment purposes (R. 1234).

The sixth amendment guarantees an accused the right to representation once adversarial proceedings have been initiated. Massiah v. United States, 377 U.S. 201 (1964).

> That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel

> serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Ash, 413 U.S. 300, 209, 93 S.Ct 2568, 2573, 37 L.Ed.2d 619 (1973). Indeed the right to counsel
>
> > "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938).
>
> Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," United States v. Ash, supra, 413 U.S., at 310, 93 S.Ct., at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, supra, 388 U.S., at 224, 87 S.Ct., at 1930.
>
> Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings "is far from a mere formalism." Kirby v. Illinois, 406 U.S., at 689, 92 S.Ct., at 1882. It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Ibid.

United States v. Gouveia, 467 U.S. 180, 188-89 (1984).

Here Mr. Suarez's sixth amendment right to counsel attached on March 30 when he appeared before the County Court Judge and was advised of the charges against him and of his right to counsel. Judge Turner noted Mr. Suarez's request to invoke his right to court-appointed counsel. App. 5.

Once the sixth amendment has attached, statements obtained from an accused without counsel's knowledge and consent are constitutionally admissible evidence only if there has been a valid waiver of the right to counsel. This waiver requirement was discussed by the United States Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977). There, as here, judicial proceedings had been initiated and the right to counsel invoked. As to the waiver the Court held that "the State must prove 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. [458] at 464." Further, "courts indulge in every reasonable presumption against waiver." 430 U.S. at 405.

The United States Supreme Court has explained:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance."

Maine v. Moulton, 106 S. Ct. 477, 485 (1985).

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry, 447 U.S., at 276, 100 S.Ct., at 2189 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a

> confrontation between the accused and a state agent.

Here Deputy Winter interrogated Mr. Suarez on April 1, 1983, after the sixth amendment right to counsel had attached and been invoked. Deputy Winter explained that the interrogation occurred at Mr. Suarez's request. He did acknowledge, however, that no Miranda warnings were given in order to ascertain whether Mr. Suarez was intentionally and knowingly relinquishing his right to have counsel act as his medium with the State. Thus the statements obtained by Deputy Winter were obtained in violation of the sixth amendment and cannot be found to have been voluntarily given. As the trial prosecutor implicitly recognized, absent sufficient proof of voluntariness the statements cannot be used for impeachment or any other purpose. See, United States v. Havens, 446 U.S. 620, 634-35 (1980)(Justice Brennan dissenting).

The transcripts of Mr. Suarez's statements to Mr. Berry demonstrate Mr. Suarez's confusion about the difference in roles between his court-appointed attorney and the prosecutor. Taking advantage of this confusion, Mr. Berry obtained consent and interrogated Mr. Suarez. However, the consent can hardly be categorized as a knowing and intelligent waiver.

No consideration was given to the fact that Mr. Suarez was Cuban and raised under the Cuban legal system. Under Johnson v. Zerbst, supra, consideration of an accused's background and experience is necessary in evaluating whether a waiver was knowing and intelligent.

The State's use of the statements it obtained in violation of the sixth amendment was fundamental error. The resulting conviction and sentence of death were thus obtained in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution.

CLAIM VIII

IT WAS A VIOLATION OF MR. SUAREZ'S PRIVILEGE AGAINST SELF-INCRIMINATION AND A DENIAL OF DUE PROCESS TO REQUIRE HIM TO TESTIFY AS A CONDITION PRECEDENT TO THE DEFENSE BEING ALLOWED TO CALL AN EXPERT REGARDING MR. SUAREZ'S STATE OF MIND AT THE TIME OF THE OFFENSE.

Mr. Suarez entered a plea of not guilty by reason of insanity. It was grounded in "his prior military and guerilla training and experience" (R. 173). By virtue of this history he claimed that at the time of the shooting, he was "acting out of a reflex" (R. 1693). Whether this was "insanity" or "a state of mind" defense was unclear to defense counsel, but he determined it wise to enter the special plea.

The judge acknowledged that "on the basis of this 'prior military and guerilla' [they were] dealing with some form of an oddity [] of the insanity defense . . . ." (R. 753). A lengthy colloquy occurred regarding Mr. Suarez's insanity plea and more particularly as to the admissibility of expert testimony pertaining to Mr. Suarez's state of mind at the time of the shooting. See R. 1160-83. Defense counsel proffered that Mr. Suarez acted out of reflex when he fired in self-defense (R. 1168, 1693), and that Mr. Suarez was incapable of premeditation under the circumstances. The prosecutor was strongly opposed to the proffered expert testimony (R. 1169, 1173-77). The court plainly leaned toward excluding the evidence (R. 1171-73, 1177, 1180).

The court and prosecutor finally did agree that if defense counsel called Mr. Suarez as witness and had him testify first, then the expert's testimony would be admissible (R. 1178-80). The judge back-paddled somewhat, asserting that his was not a "shammer position" nor was he "threatening" the defense, but he then repeated that he probably would only allow the expert to testify if Mr. Suarez did so first (R. 1182). The prosecutor promised not to object.

Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct. 1891 (1972), held that a statute which required a defendant desiring to testify to do so before any other defense testimony, violated an accused's right to remain silent and due process. Id. at 610-11, 612.

Conditioning the admission of the expert testimony proffered by the defense on Mr. Suarez's testifying first, as in Brooks v. Tennessee, constituted a violation of his privilege ot remain silent and his right to due process as defined in Ferguson v. Georgia, 365 U.S. 570, 81 S. Ct. 756 (1961). This is so because the condition precedent acted to coerce or pressure Mr. Suarez to take the stand if he wanted the benefit of Dr. Lombillo's testimony. The result is that Mr. Suarez was penalized for the exercise of his constitutional rights. This was patently unfair in the same way the accused in Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 1233 (1965), and penalized for exercising his right to remain silent.

The dilemma that Mr Suarez faced was that in order to have an expert testify on his behalf, he first had to admit under oath that he indeed fired the rifle that killed the victim. Actually testifying had devastating consequences for Mr. Suarez. The State's case had been constructed almost entirely on circumstantial evidence. Not even the two co-defendants who testified for the State were able to say that they saw Mr. Suarez shoot officer Howell. Mr. Suarez was able to recount his version and his state of mind at the time. But the latter was of little practical value without their being an expert who could render a professional interpretation of Mr. Suarez's testimony. For Mr. Suarez it was clearly a net loss when it turned out that Dr. Lombillo did not testify. His exercise of his right to remain silent was first taxed and then he was later penalized for exercising his right to testify. Pressuring Mr. Suarez to take the stand by foreclosing later testimony if he did not do so was

fundamental error. Mr. Suarez therefore is entitled to have his judgment and sentence reversed.

CLAIM IX

MR. SUAREZ WAS DENIED HIS RIGHTS UNDER THE SIXTH AND EIGHTH AMENDMENT TO HAVE THE JURY PROPERLY INSTRUCTED ON HIS CLAIM OF SELF-DEFENSE.

At the close of the evidence the jury was instructed:

> There has been raised as a defense that Ernesto Suarez was justified in the use of force likely to cause death or great bodily harm against Deputy Sheriff Amedicus Q. Howell. Ernesto Suarez was justified in the use of that force if he reasonably believed its use was necessary to prevent imminent death or great bodily harm to himself at the hands of Deputy Sheriff Amedicus Q. Howell.
>
> In deciding whether defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances which he was surrounded at the time the force was used. The danger facing the defendant need not to have been actual; however, to justify the use of force likely to cause death or great bodily harm the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could have been avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.
>
> The defendant cannot justify his use of force likely to use death or great bodily harm unless he used every reasonable means within his power and consistent with his own safety to avoid the danger before resorting to that force.
>
> The fact that the defendant was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if by retreating he could have avoided the need to use that force. However, if the defendant was placed in a position of immiment [sic] danger of death or great bodily harm and it would have increased his own danger to retreat, then his use of force likely to cause death or great bodily harm was justifiable.
>
> A person is never justified in the use of any force to resist an arrest. Therefore, you cannot acquit the defendant on the ground of self-defense if you find the

following facts have been proved:

One, the defendant was being arrested by Deputy Sheriff Amedicus Q. Howell.

Two, the defendant knew Deputy Amedicus Q. Howell was a law enforcement officer or Deputy Sheriff Amedicus Q. Howell reasonably appeared under the circumstances to be a law enforcement officer.

A law enforcement officer or any person whom he summoned or directed to assist him is not required to retreat or give up his efforts to make a lawful arrest because there is resistance or a threat to resist the arrest. He is justified in the use of any force that he reasonable believes to be necessary to defend himself or another from bodily harm while making an arrest, or arrest felons fleeing from justice.

The defendant's use of force is not justified and cannot be claimed as self-defense if the defendant was attempting to commit, committing, or escaping after committing a forcible felony. Robbery is defined as a forcible felony.

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force, you should find the defendant not guilty.

However, if from the evidence you are convinced that the defendant was not justified in the use of force, then you should find him guilty if all the elements of the charge have been proved.

(R. 1383-85)(emphasis added).

During the instruction conference, counsel had sought to have the jury instructed on the crime of accessory after the fact since the defense's claim was that Mr. Suarez only became involved in the robbery after it had occurred. Counsel argued to the court that the jury should be instructed on the legal difference between aiding and assisting before and after the fact (R. 1293-96). The State objected to such an instruction and the Court agreed, refusing to provide the jury with the requested instruction (R. 1296).

As a result the jury was simply told that:

If two or more persons help each other commit or attempt to commit a crime and the defendant is one of them, the defendant must

> be treated as if he had done all of the things the other person or persons did if the defendant knew what was going to happen, intended to participate actively or by sharing in an expected benefit, and actually did something by which he intended to help commit or attempt to commit the crime. Help means to aid, plan or assist.

(R. 1382-83)(emphasis added).

The jury could reasonably have read this instruction as saying that assistance that is provided after the completion of a crime and which only goes towards helping the principal get away is sufficient to justify convicting the accessory after the fact as a principal. Such a reading would have lead to a conviction of Mr. Suarez for the crime of robbery even if the jury believed that Mr. Suarez had no advance knowledge or intent for the crime to occur. It would also have precluded the assertion of self-defense under the Court's instruction.

However, this Court recently explained that an accessory after the fact cannot be a principal because the requisite intent is mutually exclusive. Staten v. State, ___ So. 2d ___ (Fla. 2/4/88). Specifically the Court stated:

> Our decision in this case rests solely on our construction of the crime of being an accessory after the fact. Section 777.03, Florida Statutes (1985), defines an accessory after the fact as one who
>
> > maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment. . . .
>
> Whether stated as an essential element of the crime or merely as a black-letter rule, commentators agree that a principal cannot also become an accessory after the fact by his or her subsequent acts. 2 W. LaFave & A. Scott, Substantive Criminal Law sec. 6.9, at 169 (1986); R. Perkins & R. Boyce, Criminal Law sec 8, at 749 (3d ed. 1982); 1 Wharton's Criminal Law sec. 33 (C.E. Tocia 14th ed. 1978); 22 C.J.S., Criminal Law sec 95, at 275 (1961). Case authority supports this proposition. State v. Kittelson, 164 N.W. 2d 157, 165 (Iowa 1969); Cooper v. State, 44 Md. App. 59, 407 A.2d 756, 759 (1979); Commonwealth v. Berryman,

359 Mass. 127, 129, 2689 N.E.2d 354, 356 (1971); People v. Hartford, 159 Mich. App. 295, 299-300, 406 N.W.2d 276, 278 (1987); Crosby v. State, 179 Miss. 149, 159-60, 175 So. 180, 181 (1937); State v. Key, 411 S.W.2d 100, 103 (Mo. 1967): People v. Chadwick, 7 Utah 134, 138, 25 p. 737, 738 (1891). See also People v. Prado, 67 Cal. App. 3d 267, 136 Cal. Rptr. 521 (1977)(rule of mutual exclusivity should apply absent exceptional factual circumstances). But see State v. Franks, 377 So. 2d 1231, 1232 (La. 1979).

The courts that have offered a rationale for the rule have reasoned that the intent required to be an accessory and the intent required to be a principal are mutually exclusive. As the Prado court explained:

> [W]hen an accused is convicted [as an accessory] . . . which necessarily requires that a principal have committed a specific completed felony and that he knowingly aided that principal with intent that the principal escape arrest, he cannot be convicted as a principal in that completed felony. His state of mind -- the intent required to be an accessory after the fact -- excludes that intent and state of mind required to be a principal. The requisite intent to be a principal in a robbery is to permenently deprive the owner of his property. Thus, this is a totally different and distinct state of mind from that of the accused whose intent is to aid the robber to escape. These are mutually exclusive states of mind and give rise to mutually exclusive offenses.

67 Cal. App. 3d at 273, 136 Cal.Rptr. at 524.

> The Hartford court reached the same conclusion:
>
> The difference . . . is that an aider and abettor knew about and intended to further the commission of the crime before it ended and did some act or gave some encouragement which helped in the commission. An accessory after the fact helped the person who committed the crime only after the crime had ended. . . . An accessory after the fact decides to help the principal only after the felony has been committed. It is impossible for one involved as a principal not to have known of the crime until after he had completed it.

159 Mich. App. at 300-01, 406 N.W.2d at 278 (emphasis supplied).

We agree with the reasoning of these cases. An intent to aid in the escape of a

> known felon formed after the crime has been committed necessarily excludes any intent to aid or participate in the crime formed before or during its commission.
>
> In addition, also allowing principals to be convicted as accessories after the fact could lead to illogical results. In this case, for example, by harboring the perpetrators in her mother's home or some other act of assistance, petitioner could be subject to greater punishment than the actual perpetrators of the robbery and murder. Or, as the Hartford court hypothesized, the person who actually committed a murder could be treated less harshly than the person who provided the gun and destroyed it after the murder. 159 Mich. App. at 301, 406 N.W.2d at 279.
>
> Reading section 777.011 against its common law background we do not believe the legislature intended such a result. Although Florida has abolished the common law distinctions between principals, aiders and abettors, and accessories before the fact, accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice. 1 Wharton's Criminal Law, supra, sec. 35, at 182. At common law, all parties to a crime were equally guilty and subject to the same punishment. Under our modern codification, however, an accessory after the fact is guilty of a third-degree felony regardless of the gravity of the substantive offense committed. Thus, the culpability of the accessory after the fact is substantially different from that of a principal, reflecting an intent to punish as an accessory after the fact only those persons who have had no part in causing the felony itself buy have merely hindered the due course of justice. See Perkins, supra, at 765.

(Slip op, 4-7)(footnotes omitted).

The trial court's refusal to instruct on the crime of accessory after the fact, and that not all "help or assistance" established that an accused was a principal, denied Mr. Suarez his rights under the sixth, eighth, and fourteenth amendments. In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Beck v. Alabama, 447 U.S. 625 (1980). The failure to raise the issue on appeal was ineffective assistance of appellate counsel.

In addition, the instructions on self-defense as given were plainly and fundamentally defective. The jury was specifically told, "A person is never justified in the use of any force to resist an arrest." (R. 1384). A law enforcement officer "is justified in the use of any force that he reasonable believes to be necessary to . . . arrest felons fleeing from justice." (R. 1385).

However, this was plainly and clearly not the law. In Ivester v. State, 398 So. 2d 926 (1st DCA 1981), it was held that "an individual [has the right] to defend himself against unlawful or excessive force, even when being arrested." 398 So. 2d at 930. The United States Supreme Court has also ruled a police officer does not have the ability to use "any force" he believes warranted.

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

Tennessee v. Garner, 105 S. Ct 1694, 1701 (1985).

A criminal defendant's due process right to a conviction resting on proof of his guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), requires the trial court to adequately charge the jury on a defense which is timely requested and supported by the evidence. United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (S.D. South Dakota, 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). See also, United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951);

Perez v. United States, 297 F.2d 12, 13-14 (5th Cir. 1961); United States v. Lofton, 776 F.2d 918 (10th Cir. 1985).

The due process right to a theory of defense instruction is rooted in a criminal defendant's right to present a defense. As a unanimous Supreme Court has recently explained in a similar context,

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. [479], at 485 [1984]. . .
>
> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."

Crane v. Kentucky, ___ U.S. ___, 106 S.Ct. 2142, 2146 (1986) (emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257 (1948).

The failure to adequately and properly instruct on a theory of defense is undeniably an error, one of constitutional magnitude, warranting habeas corpus relief. See, e.g., United States ex rel. Means v. Solem, supra, 646 F.2d 322; Zemina v. Solem, supra, 573 F.2d 1027; see also, United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States ex rel. Collins v. Blodgett, 513 F.Supp. 1056 (D. Montana, 1981); cf. Dawson v. Cowan, 531 F.2d 1374 (1976).

Mr. Suarez's conviction was derived from such a constitutionally defective proceeding, for the trial court's refusal to properly instruct left Mr. Suarez defenseless, see, Crane, supra, and relieved the State of its burden to prove his guilt. By taking the self-defense issue from the jury's province, the trial court effectively directed a verdict for the State on the sole issue raised by the evidence, see, Rose v. Clark, 106 S.Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), and deprived Mr. Suarez of his right "to raise a reasonable doubt in the jurors' minds."

Zemina v. Solem, supra, 438 F.Supp. at 470 (S.D. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). The trial court therefore violated Mr. Suarez's fundamental right to have the state put to its burden, In re Winship, supra, and to have the jury determine whether that burden had been met. In not correctly instructing the jury on self-defense the court effectively

> creat[ed] an artificial barrier to the consideration of relevant ... testimony ... [and] the trial judge reduced the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972).

The failure to properly and correctly instruct on the law of self-defense denied Mr. Suarez his rights under the sixth, eighth, and fourteenth amendments. Appellate counsel's failure to obtain proper and correct instructions was ineffective assistance of counsel under Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

CLAIM X

THE TRIAL COURT ERRED IN FAILING TO ORDER A MISTRIAL WHEN SEVERANCE WAS GRANTED TO THE CO-DEFENDANTS AND FAILURE TO DO SO CONSTITUTED A DENIAL OF MR. SUAREZ'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State elected to bring Mr. Suarez to trial with Mr. Sory and Mr. Reyes. After the full voir dire had been completed, Mr. Suarez's counsel moved for severance on two grounds: (a) defense counsel Monaco had previously represented Mr. Suarez and was in possession of confidential material, and (b) the defenses being offered by Mr. Sory and Mr. Reyes would be in conflict with that of Mr. Suarez (R. 469).

The Court expressed regret that the attorneys did not bring this matter to the court's attention at an earlier date and implied that this failure had placed the court in an awkward position (R. 475-77).

The jury was sent home after being informed that there was a motion for severance and "one, two or three" defendants would be tried the next day (R. 480-81).

The following day the court granted the motion of defense counsel for Mr. Suarez and gave the State the option of electing which defendant(s) to proceed to trial with at that time (R. 477, 478). The court made it clear that the severance was granted due to the conflict of interest of counsel.

When the jury was brought back into the courtroom they were advised that Mr. Suarez's motion for severance had been granted:

> THE COURT: Good morning. As we broke yesterday, I think I mentioned to you that in order to try to inform you as best as possible what was happening and to keep you from speculating and guessing too much, but at the same time not trying to give you more information than you're required to be given, on the motion for severance that's been requested by counsel for Mr. Suarez, and the Court, after giving it some deliberation and listening to counsel for both sides, has decided that that is the proper result that should be reached.
>
> So, the trial that you will be trying today is going to be the case of State of Florida versus Ernesto Suarez.

(R. 493-94).

It is clear that the court recognized that the jury would be "speculating and guessing" as to the reason for the severance. When the jury was informed that the severance was at Mr. Suarez's request, the inference that the co-defendants would give testimony contrary to his best interest is obvious. In fact, the testimony of Mr. Sory and Mr. Reyes would have been that Mr. Suarez fired in self-defense. The Court's instruction that the severance was at Mr. Suarez's request only misled the jury and compounded the error. At any time that the Court perceives that a defendant cannot receive a fair trial, the principles of fundamental due process mandate that the court on its own motion take corrective action. It constituted a denial of Mr. Suarez's fifth, sixth, eighth, and fourteenth constitutional rights that

the court failed to grant a mistrial in the face of incurable prejudice.

CLAIM XI

ERNESTO SUAREZ WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE COURT FAILED TO PROPERLY ADMONISH THE JURY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Defense counsel filed a pre-trial motion to sequester the jury during trial due to the pervasiveness of pre-trial and trial publicity Mr. Suarez's case had received. However, at the time of trial, counsel waived any objection to the nonsequestration of the jury on behalf of Mr. Suarez. When the jury had been selected and was preparing to leave the courtroom for the first time, the court gave an erroneous admonishment to the jury which compounded the prejudice of the nonsequestration.

In effect, the court instructed the jury that it was proper to discuss the case at home as long as the court did not hear about it and implied that it would not be a serious infraction:

> (A jury having been selected, the following proceedings took place.)
>
> THE COURT: Okay, those of you whose names were not called are free to go. To those of you whose names were called, I want you to take -- let me cover a couple of points before we break for luch.
>
> Okay, let me go over a couple of points. I'm not going to have you sworn in yet. It's a technical point. Once you're sworn in, jeopardy attaches, and its meaning is very significant.
>
> So, I just -- just in case something were to happend during luch, as a last resort I'll wait until you come back from luch to swear you in. However, after you have been sworn in, and I'll cover it roughly now, but after you have been sworn in it really -- is just as important, but I got to emphasize it, that now that you are the potential jury where there's a consideration here -- there's -- that I have to take into consideration, and that you have to give me, and that has to do with any press coverage, reading or feeling about it in the news media, et cetera.

The common sense would seem to say that you would prepare not to be sequestered and be forced to stay at a hotel for the next nine or ten days and have to have a bailiff guard you the whole time and these kind of things.

So, if there's any way possible, that's what we're going to try to do, so use common sense, and I want to make sure that I not only use mind, but you assure me you're going to use yours.

This is a very important trial, both to the State and to the defense, and each side has a very big stake in this case.

You, as jurors, and representatives of this community, likewise have a big stake in this case. You have a very large responsibility because it's your role to be jurors.

You are to fill that role. Now, I don't want to -- and, it goes both ways. Some would like to have you sequestered to make sure there's no question that you're not unduly influenced, and then there's some feeling that you should be sequestered.

My feeling is that if I can avoid it, I will. The problem is, is if I have misjudged and for some reason you become "tainted", then I can try to attempt to find out if that taint is sufficient to declare a mistrial.

But I already kind of started under the gun, so to speak, in that the ultimate relations that, if you're unduly influenced, and each of you do not think you are, it really doesn't matter what you think, if I believe you are, then my only alternative is to declare a mistrial, which means this whole process probably has to be done all over again at a later date.

So, there's a good responsibility that we all got here, and I, like I say, I want to make sure in common sense we try not to sequester you, but likewise, you know, I must have you to make sure that you use every available effort and your common sense to avoid reading about this case, to avoid watching the TV about the case, listening to the radio about this case, and especially, of course, talking to anyone about this case.

Even casually, these kind of things come back, and something you read about it a lot, unfortunately, where just a casual remark will be, "Oh, yeah, I'm serving on this jury and bla, bla, bla", and that could end up having to be, if you say it, you deserve to have it -- a lot of times, of course, it's never known that -- what jurors say in the

> privacy of their homes, but if it does come back to the Court, then we'll all have an obligation to hear that it's not substantially critical to the case. If it is, then you either individually will have to be taken off as a juror and replaced by one of the alternates, or if for some reason the whole jury is aware of it, then I got a real problem with the mistrial.
>
> So, I'll read these kind of instructions to you later on after you're sworn in, but I need you to make sure you understand that from this point forward you're basically tied into this case and, you know, we'll try to move as expeditiously as possible.
>
> We'll try to be as considerate of everybody and everybody's rights as we can. But you are part of the machinery of this system now, and you now have a great responsibility than just being a member of the venire and the panel, and you're no longer just a spectator.

(R. 460-463)(emphasis added).

The court instructed the jury that many times it is not known what jurors say in the privacy of their homes but "if it comes back to the court" then we'll all have an obligation to hear that "it's not substantially critical to the case." The message is loud and clear: it's alright to talk about it as long as the court doesn't hear about it.

The jury was understandably confused by this rambling statement. The court then instructs the jury that if they discussed the case amaong themselves prior to the close of evidence it is only a technicality:

> JUROR: Are allowed to discuss it between ourselves on breaks?
>
> THE COURT: The answer to that technically is no. I'll read you an instruction later on that says you're not to discuss this case among yourselves until all the evidence has been presented. So, technically, the answer to your question is no.

(R. 463-64).

Later, during the actual taking of testimony, the court advised the jury as follows:

> Okay, ladies and gentlemen of the jury, we're going to try to stay on this schedule if we can so that everybody can get all their work in and try to run from nine to four or

4:30 daily.

> At this time, as I previously talked to you about this, about a trade off that we have so that you won't have to be sequestered, I need to go officially on the record and to remind you that you're not only, of course, you are serving on the jury, but of the obligation you have regarding speaking among yourselves or to anyone else regarding the facts of this case.
>
> And, I just need to make sure that you understand that the testimony that you heard today is all you need to cover. When we come back Monday we'll begin with the cross-examination of the investigator by the defense.
>
> Again, as I previously stated, you should not form any definite or fixed opinions on the merits of the cause until you've heard all the evidence and the arguments of the lawyers and the instructions on the law as given you by the Judge.
>
> Until that time you should not discuss the case among yourselves. If you'll be back here approximately 8:45, somewhere around 8:30, 8:45 on Monday, I have a hearing at 8:30 that is anticipated will be over with at nine, and we'll start right up at nine o'clock.

(R. 664-665)(emphasis added).

Again, the court is emphasizing that the admonition not to discuss the case is a technicality when he says that it is a trade off that he has to go "officially on the record" to caution the jury. However, in direct contradiction to the instruction not to discuss the case, the court instructs the jury that "the testimony you heard today is all you need to cover." While telling the jury not to discuss the case (even though this is only a "technicality"), the court is also telling them they only need to cover the testimony heard today.

A correct admonishment to the jury would have been:

ADMONISHMENT

> Throughout the trial you should remain alert and listen attentively. You should remember all the evidence as clearly as possible, but you should not form any definite or fixed opinions on the merits of the case until you have heard all the evidence, the argument of counsel and the instructions on the law by the court. Until that time you should not discuss the case among yourselves.

> In the course of the trial the court may take one or more recesses during which you will be permitted to separate and go about your personal affairs. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case. If anyone attempts to say anything to you or in your presence about this case, tell him that you are on the jury tryinjg the case and ask him to stop. If he persists, leave him at once and report the matter to the court immediately upon your return to court. Such conduct on his part would be contempt of court, to be punished as such.
>
> You are instructed not to visit the scene of the alleged crime. Should it be necessary for you to view the scene, you will be taken there as a group under the supervision of the court.
>
> You are instructed not to read, listen to nor watch any news report of this trial. The only evidence which you may lawfully consider is that which is presented to you during the trial proper in the courtroom, free from any outside influence. News reports are not limited to the evidence and may contain material which is of no concern whatsoever to you but which might tend to influence you one way or the other. The case must be tried solely upon the evidence produced in court in the presence of all the jurors, the defendant, the attorneys and the court.

1.01 Preliminary Instructions, Florida Jury Instructions. This instruction is not difficult or unusual. It has been included in the Florida Standard Jury Instructions for many years. It is routinely given even in the most minor cases. There is no justification for the court's failure to give a proper instruction or for counsel's failure to object.

The original motion for sequestration had been inspired by the extensive media coverage of the murder. The media coverage during the trial was so intense that the court indicates that a change of venue will be granted for the co-defendants Sory and Reyes due to intensive publicity. The trial court repeatedly allowed the jury to separate during breaks and overnight.

At no time when the jurors reconvened did the court inquire whether any juror had been intentionally or inadvertently exposed to extra-judicial matters, or improper influences. Defense counsel ineffectively failed to request that such inquiry be made. Accordingly, because Mr. Suarez was denied his rights

under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, he is entitled to the relief sought herein.

CLAIM XII

THE REFUSAL TO GRANT MR. SUAREZ'S MOTION FOR A CHANGE OF VENUE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY TRIAL ON THE ISSUES OF GUILT-INNOCENCE AND PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Extensive and highly prejudicial pretrial publicity regarding Mr. Suarez, the offenses with which he was charged, and the pretrial proceedings in the case permeated the news media in the Twentieth Judicial Circuit and Collier County, where the trial took place. Detailed coverage of his and his codefendants' pretrial statements, the victim's position in law enforcement in Collier County, and the defedants' status as Mariel boatlift refugees from Cuba literally inundated the local media on a daily basis, and, as soon became apparent, made it impossible for him to obtain an impartial, untainted jury in Collier County. By the time of his trial on the instant offenses in Collier County, Mr. Suarez and his codefendants had been the subjects of extensive and pervasive media coverage since their arrests a year earlier.

Trial commenced in Collier County on March 14, 1984. The prejudicial effect of the extensive pretrial media coverage by newspapers, radio and television became immediately and manifestly apparent. Of the first 28 jurors questioned as to their extra-judicial knowledge, 15 had some knowledge and 2 were sufficiently tainted by pretrial publicity to be excused for cause (R. 1700-1853). Of the next 17 jurors interviewed, 11 had extrajudicial knowledge of the case (R. 1860-1955).

Not only were individual jurors already tainted by their exposure to pretrial publicity, but also the group voir dire conducted served to taint the rest of the jury pool. Voir dire

was conducted in the presence of the entire venire, so that those jurors who related their extrajudicial knowledge passed that knowledge along to other jurors. Defense counsel had moved for individual and sequestered voir dire, (R. 178), but that motion was denied. Thus, jurors who had somehow managed to avoid the extensive pretrial publicity regarding the case, heard other jurors relate that there was a robbery at a convenience store and that a deputy sheriff was killed, (see, e.g., R. 1700, 1702), heard one juror relate that she was made so curious by the media reports that she visited the scene of the crime, (see R. 1712, 1841), and heard other jurors express their disturbance about the fact that the defendants came to Florida during the Mariel boatlift, (R. 1921-25).

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and argument presented in court without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Taylor v. Kentucky, 436 U.S. 478 (1978); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1478 (11th Cir. 1986). Mr. Suarez was deprived of this right when the trial judge denied his motions for change of venue and for individual voir dire, despite the existence of extensive pretrial publicity and despite the extent of the venire's prejudicial exposure to the facts of the instant offense. (See, e.g., R. 1700-1853; 1860-1955). Mr. Suarez's attempts to seat a fair and impartial jury were further frustrated by the inadequate group voir dire conducted. Mr. Suarez was thus deprived of his rights to a trial by a fair and impartial jury.

While it is true that a motion for change of venue is addressed to the discretion of the trial court, Davis v. State, 461 So. 2d 67 (Fla. 1984), it is equally true that where a

community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," the court is obligated to grant the motion. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). Accordingly, when, as in this case, the inherently prejudicial nature of the publicity to which the community has been exposed is extreme, the voir dire examination of prospective jurors is deemed incapable of curing the impact of that publicity, and due process requires a change of venue without regard to voir dire. See Rideau, supra; Groppi, supra; Oliver v. State, 250 So. 2d 888 (Fla. 1971). This was such a case.

Even if the effect of the prejudicial pretrial publicity in Mr. Suarez's case could have been ameliorated by the voir dire process, it was not and could not have been by the group voir dire process actually conducted. Trial counsel recognized the inadequacy of group voir dire under such circumstances, and moved for individual and sequestered voir dire (R. 178). This motion was also denied, and its denial deprived Mr. Suarez of his right to be tried by a fair and impartial jury.

In order to protect the Sixth and Fourteenth Amendment rights of the accused in a case where, as here, there has been extensive and prejudicial pretrial publicity,

> it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the voir dire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Association v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, Marshall, Stevens, JJ., concurring). This was such a case. The trial court's denial of Mr. Suarez's motion for individual and sequestered voir dire consequently violated his due process rights to be tried by a fair and impartial jury. Cf. Patton v. Yount, 467 U.S. 1025 (1985); Irvin v. Dowd, 366 U.S.

717 (1961); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); United States v. Davis, 583 F.2d 190 (5th Cir. 1978).

Where, as here, pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Rideau, 373 U.S. at 726-27; Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Although Mr. Suarez is therefore not required to demonstrate actual prejudice, Rideau, supra; Murphy, supra, he undeniably can demonstrate substantial prejudice in this case: as previously discussed, over half of those venire persons questioned as to their extrajudicial knowledge admitted exposure to prejudicial publicity. Under such circumstances, due process requires the trial court to grant a change of venue, see Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire. It was ineffective assistance of appellate counsel when counsel failed to raise on appeal the failure to change venue.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Ernesto Suarez, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief he seeks. Since this action presents certain questions of fact, Mr. Suarez requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions. Mr. Suarez, alternatively, urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just, proper, and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Bob Krauss, Assistant Attorney General, Office of the Attorney General, Park Trammel Building, 1313 Tampa Street, Tampa, Florida, 33602 this 23rd day of May, 1988.

Marl J. Neal
Attorney