IN THE SUPREME COURT OF FLORIDA

ERNESTO SUAREZ,

Petitioner-Appellant,

v. CASE No._____

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

Respondents-Appellees.
_____/

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SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL
OF DENIAL OF MOTION FOR FLA. R. CRIM. P. 3.850
RELIEF, AND CONSOLIDATED REPLY TO RESPONDENT'S RESPONSE
TO PETITION FOR WRIT OF HABEAS CORPUS AND
APPLICATION FOR STAY OF EXECUTION

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## PRELIMINARY STATEMENT

This is an emergency appeal from the trial court's denial of Mr. Suarez's motion for Rule 3.850 relief. Mr. Suarez's execution is presently scheduled for June 22, 1988. All matters involved in the Rule 3.850 action, and all matters presented on Mr. Suarez's behalf before the lower court, are raised again on this appeal and incorporated herein by specific reference.

Given the pendency of a death warrant which has been signed against Mr. Suarez, and the corresponding emergency nature of the instant proceedings, counsel has also consolidated into this document Mr. Suarez's application for a stay of execution as well as his reply to the State's response to the petition for a writ of habeas corpus previously filed with the Court on Mr. Suarez's behalf. Those matters are presented in the latter sections of this document.

With regard to the Rule 3.850 appeal, certain matters should be noted at the outset. A very limited evidentiary hearing on the issues presented on Mr. Suarez's behalf was conducted before the lower court. At the time this brief is being prepared the transcript from the hearing is not available to counsel. Thus, it is anticipated that as to the two issues upon which evidence was taken, a supplemental brief will be necessary. Supplemental briefing will also be provided on other claims to the extent

possible under the present under-warrant exigencies once the transcript has been received. The issues raised by the lower court record and those raised by Mr. Suarez's habeas corpus action raise serious and legitimate questions regarding the constitutional validity of Mr. Suarez's capital conviction and sentence of death. This brief is intended to demonstrate that a careful, judicious and studied review of the record is proper and necessary, that a stay of execution is warranted in this case, and that Mr. Suarez can establish his entitlement to relief if given an adequate opportunity. In short, the normal appellate process is warranted upon this record.

Citations in this brief shall be as follows: the original record on appeal from Mr. Suarez's capital conviction and sentence of death shall be cited as "ROA [page number]"; the record of the Rule 3.850 proceedings shall be cited as "P.C./ROA [page number]" and/or "Tr. [page number]" with regard to the evidentiary portions of the proceedings. All others references shall be self-explanatory or otherwise explained.

Mr. Suarez's execution should be stayed given the substantial nature of the claims he presents to this Court. The issues raised by Mr. Suarez, in fact, reflect the substantial, meritorious nature of Mr. Suarez's challenge to the proceedings which resulted in his conviction and sentence -- the record developed below amply supports the claims, and the instant brief

reflects the wealth of evidence which supports Mr. Suarez's claims.

This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dugger, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 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 Roman v. State, ___ So. 2d ___, No. 72.159 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986), cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Suarez presents are no less substantial than those involved in any of those cases. A stay is proper.

## ISSUE I

THE CIRCUIT COURT JUDGE WAS IN ERROR IN REFUSING TO DISQUALIFY HIMSELF FROM PRESIDING OVER THE 3.850 PROCEEDING.

The Florida Rules of Criminal Procedure provide for the disqualification of a judge as follows:

### VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

RULE 3.230. DISQUALIFICATION OF JUDGE

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify

> him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(emphasis added).

The Florida Supreme Court has repeatedly held that where a petition demonstrates a preliminary basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Bundy v. Rudd, 366 So.2d 440 (Fla. 1978).

The Code of Judicial Conduct emphasized the importance of an independent and impartial judiciary in maintaining the integrity of the judiciary:

> Canon 1
>
> A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

* * *

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonable be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(emphasis added).

The purpose of the Code of Judicial Conduct and the Disqualification Rule is to prevent "an intolerable adversary atmosphere" between the trial judge and the litigant. Department of Revenue v. Golder, 322 So.2d 1, 7 (Fla. 1975) as cited in Bundy v. Rudd, supra.

Prior to the 3.850 hearing, counsel for Mr. Suarez filed with circuit court the following:

MOTION TO DISQUALIFY JUDGE

The petitioner, ERNESTO SUAREZ, hereby moves this Court to enter an order disqualifying himself from hearing the Motion to Vacate Judgment and Sentence pursuant to Rule 3.230 Fla.R.Crim.P. and as grounds would state:

1. Judge Hugh D. Hayes, heard the original trial of Ernesto Suarez conducted March 14-26, 1984, and has been assigned to hear the Motion to Vacate Judgment and Sentence presently pending before this Court.

2. In the evidentiary hearing on the motion to vacate, Judge Hayes is a necessary and material witness in regard to Claim XXII: The Trial Court Erred By Failing To Independently Weigh The Aggravating And Mitigating Circumstances And Argument Of Counsel Contrary To Mr. Suarez's Fifth, Sixth, Eighth, And Fourteenth Amendment Rights.

3. In respect to Claim XXII the Court instructed the defense interpreter, Helen Miller, to go to the holding cell and to read a draft of the sentencing order to Mr. Suarez in Spanish without the knowledge or presence of defense counsel or a court reporter. Judgment and sentence was then repeated in English in the courtroom. The only visible reason for this bizarre procedure was to create an uninterrupted presentation for the television cameras. It is necessary for the Court to present testimony on the circumstances surrounding the reading of the sentence in Spanish as regards what was said to the interpreter, her responses, the responses of Mr. Suarez, the presence of other courtroom personnel, and other relevant matters. It will be impossible for the Court to give testimony, subject to cross-examination, unless he recuses himself.

4. In respect to Claim XXII, a charge conference was held regarding the

instructions to be given to the jury at the penalty phase. During this conference the Court reportedly expressed opinions that Mr. Suarez was guilty of certain aggravating circumstances prior to the taking of evidence. Since the conference was not recorded, it will be necessary to explore the precise nature of the statements made by the Court subject to cross-examination.

5. In addition to disqualification as a witness, Mr. Suarez requests the Court recuse itself due to public statements showing prejudice against Mr. Suarez resulting in the prejudgment of issues contrary to Mr. Suarez prior to the taking of evidence.

a.) At the trial the Court indicated a predisposition against Mr. Suarez in three instances:

1) The Court expresses an opinion that aggravating circumstances were appropriate before the taking of evidence in the penalty phase;

2) By indicating at the close of the penalty phase an intention to impose the death sentence; and

3) By having a draft of the judgment and sentence read to Mr. Suarez in Spanish off the record, without the presence of counsel and before counsel had the opportunity to present argument and/or other evidence in mitigation to the Court.

b. Subsequent to the trial, the Court continued making public expressions demonstrating a special interest in the speedy execution of the death sentence in Mr. Suarez' case. In a letter addressed to the Florida Parole and Probation Commission, the Court expressed opinions in favor of the death penalty and an opinion that the appeal procedure should be truncated:

> It has been well observed, that it is of great importance, that the punishment should follow the crime as early as possible, that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible fight, than as the necessary consequence of transgression.

In the more than 200 years since Sir William Blackstone recorded these observations, our society has continued to pay lip-service to this legal as well as psychological principle, all the while dissecting these same principles under the crucibles of our courts. It is unnecessary for this dissection to continue any further.

Additionally, even though the imposition of the death penalty is clearly the most severe penalty that society may extract from its members, the first requisite of civilization is justice and as Freud so accurately described it:

> One is irresistably reminded of an incident in the French Chamber when capital punishment was being debated. A member had been passionately supporting its abolition and his speech was being received with tumultuous applause, when a voice from the hall called out: 'It's the murderers who should make the first move.'

* * *

Lastly, I would make the

following observation. It seems somewhat intellectually as well as psychologically disingenuous to have this appeal procedure go on forever.

Excerpt from letter to Florida Parole and Probation Commission dated June 1, 1987. (See Exhibit A.)

c. Finally, in response to the signing of a death warrant prior to exhaustion of the two-year period provided by Rule 3.851, Fla.R.Crim.P., Judge Hayes gave an interview to a reporter for the Naples Daily News and was quoted as follows:

> On Thursday, the governor signed a warrant that schedules Suarez for execution June 22 at the Florida State Prison. But no inmate has been executed on his first warrant since the state resumed carrying out the death penalty in 1979.
>
> Hayes said today he was pleased with the governor's decision. <u>And it's fine with me if this one is the first they actually do impose (immediately)," he said</u>. . . .
>
> "There's a point where enough is enough," Hayes said. "But no one ever seem to know when that point is."
>
> <u>Hayes does not believe this case merits postponements</u>.

Naples Daily News, April 4, 1988. Emphasis added. See Exhibit B.

6. It would be contrary to the right to due process and the precepts of evenhanded justice, as well as exert a chilling effect on the presentation of the petitioner's request for a stay of execution to present evidence to a Court that has already publicly announced a belief that this case does not

merit postponement.

> Wherefore the petitioner moves this Court to disqualify itself from further proceedings in this cause and to request that another judge be designated pursuant to Rule 3.230, Fla. R. Crim. P. in that the judge has become a necessary witness and has publicly expressed opinions prejudging the merits of Mr. Suarez's claims which are pending before the Court.
>
> Certificate of Good Faith
>
> The undersigned counsel certifies that she is a counsel of record in this cause and that the motion for disqualification is made in good faith for the purposes described in the Florida Rules of Criminal Procedure.

The motion was addressed by Judge Hayes, the circuit court judge in question, in open court at the commencement of the 3.850 proceedings. Judge Hayes acknowledged the factual accuracy of the motion. He specifically addressed the newspaper quotes and indicated that he was certain he had been quoted correctly. He even acknowledged as accurate the reporter's statement that "Hayes does not believe this case merits postponements." However Judge Hayes believed that it was important to note that the comments to the newspaper had been made before the filing of the 3.850 motion and that thus they did not constitute a prejudgment of the issues presented therein. The judge denied any prejudice or bias in the case. He indicated that the letter to the Florida Parole and Probation Commission was not meant as bias against Mr. Suarez or CCR attorneys but merely as commentary on the delay in

carrying out Mr. Suarez's execution. Judge Hayes also opined that, as to Mr. Suarez's desire to call the judge as a witness, on certain issues the testimony would not be allowed because there was no merit to the issues. Judge Hayes then denied the motion to disqualify.

Both prior to the judge's ruling on the motion and after, counsel for Mr. Suarez sought the issuance from this Court of a writ of prohibition, the remedy recognized as proper in Bundy v. Rudd, supra, when the circuit court judge erroneously denies a motion to disqualify. However, this Court without explanation denied the request for stay pending disposition of the application for a writ of prohibition and did not rule on whether the writ should issue.

Since this Court's decision in Bundy v. Rudd, the law in this state has been clear. Where a facially sufficient motion to disqualify has been presented, the judge may not refute the charges of partiality. His or her only choice is to grant the motion. Canady v. Johnson, 481 So. 2d 983 (Fla. 4th DCA 1986). When a judge attempts to refute the allegations contained in the motion to disqualify, "he [has] exceeded the proper scope of his inquiry and on that basis established sufficient grounds for his disqualification" Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987). A judge's attempt to respond to the allegations contained in the motion and establish his or her own impartiality

is itself cause for disqualification. A.T.S. Melbourne, Inc. v. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985). Such action by the judge causes the judge to assume "the posture of an adversary" and requires disqualification. Gieseke v. Moriarty, 471 So. 2d 80, 81 (Fla. 4th DCA 1985). Further it matters not when in the proceedings the motion to disqualify is presented. As long as there is something further for the judge to do in the proceedings a motion to disqualify may be presented, and if sufficient "the judge 'shall proceed no further.'" Lake v. Edwards, supra, 501 So. 2d at 760, quoting Florida Rule of Civil Procedure 1.432(d)(emphasis in original). It should be noted that Florida Rule of Criminal Procedure 3.230(d) contains virtually identical language.

This Court has explained at length the purpose behind the rule permitting disqualification of a judge:

> The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Can 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned . . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553

(Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping delay, or some other reason not related to providing for the fairness and impartiality of the proceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Section 38.10 and Florida Rule of Criminal Procedure 3.230 also require two affidavits stating that the party making the motion for disqualification will not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.

* * * *

What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would

place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Livingston v. State, 441 So. 2d 1083, 1086-87 (Fla. 1983)(emphasis added).

Here Judge Hayes did not address whether the motion set forth such facts as would "place a reasonably prudent person in fear of not receiving a fair and impartial [hearing]." Instead Judge Hayes justified himself and his conduct explaining that he was not biased. This is precisely what case law establishes that the judge may not do in response to a motion to disqualify. In such circumstances, the judge's efforts to explain his prior conduct in order to refute the charge of prejudice became cause itself for disqualification. Judge Hayes assumed "the posture of an adversary." Gieseke, 471 So. 2d at 81.

Certainly, the matters set forth in the motion would have placed anyone in Mr. Suarez's position in fear of not receiving a fair and impartial hearing on his 3.850 motion. The judge's letter to parole and probation and his comments to the newspaper could reasonably be understood as prejudgment of the matter and the need for 3.850 proceedings. As a result, once the motion for disqualification was filed it was incumbent upon Judge Hayes to disqualify himself. This Court should have issued a writ of prohibition prior to the hearing.

In Livingston, supra, the issue arose in this Court on appeal from a conviction of first degree murder and the

imposition of the death sentence. There this Court concluded that the failure of the judge to disqualify himself was error. Consequently, this Court ruled that resulting conviction and sentence of death had to be reversed and the matter remanded for a new trial presided over by a different judge. A fair hearing before a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

In this case, it was reversible error for the judge to refuse to recuse himself. At this point the order denying relief must be vacated and the case remanded for new proceedings before another duly assigned judge. Moreover, the patent unconstitutionality attendant to a capital proceeding involving a biased judge also raises significant questions about the validity of Mr. Suarez's capital conviction and sentence of death. The lack of impartiality herein at issue has infected the process. The conviction, sentence and post-conviction resolution in this action are invalid under the fifth, sixth, eighth and fourteenth amendments. Relief is proper.

## ISSUE II

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIMS II, III, IV, V, VI, VII, VIII, XIX AND XII IN HIS RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING. THE COURT FURTHER ERRED IN LIMITING EVEN THE EVIDENCE ON THE ISSUE OF DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE AS TO THESE CLAIMS.

Mr. Suarez's motion alleged facts in support of claims which have traditionally been presented in Rule 3.850 actions and tested at an evidentiary hearing. The claims were not barred from review by procedural or successive/successor petition constraints. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985). The lower court, in fact, reached the merits of Mr. Clark's claims and denied them; to the extent that the issues were not presented at trial or on appeal the court found no ineffective assistance in the failure to litigate the issues, and precluded the introduction of evidence to make out an ineffectiveness claim. However, the trial court neither attached any portion of the record to its order, nor referred in its order to what portion of the record "conclusively" showed that Mr. Suarez was entitled to no relief on those claims on which an evidentiary hearing was denied. See Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987). Moreover, it is apparent from the record on appeal before this Court that the Rule 3.850 trial court did not have before it the complete record

of Mr. Suarez's previous proceedings. See Steinhorst v. State, 498 So. 2d 414 (Fla. 1986). Consequently, although nothing in prior records by any means conclusively rebuts Mr. Suarez's claims, it is the facial validity of Mr. Suarez's motion and the need for adequate evidentiary resolution on the basis of the claims therein pled, that comprises the primary issue before this Court. Gorham; Squires; Steinhorst.

As stated, and as will be discussed in the body of this brief, Mr. Suarez's motion presented claims which have been classically deemed cognizable pursuant to Rule 3.850. Since the files and records by no means demonstrated that Mr. Suarez was "conclusively" entitled to "no relief," an evidentiary hearing was required as to each of those issues, and as to all subparts of ineffective assistance counsel claims. Specifically on the ineffective assistance claim the circuit court erred in precluding the introduction of evidence of counsel's ineffectiveness in failing to 1) insure word for word translation and Mr. Suarez's constructive as well as actual presence at all trial proceedings; 2) object to the introduction of the illegally obtained handwriting exemplar; 3) assert that under the sixth amendment statements of Mr. Suarez to law enforcement personnel and prosecutors were inadmissible as impeachment evidence because they were obtained in violation of the right to counsel; 4) require Mr. Reyes to himself assert his fifth amendment rights;

5) object to the court's deficient admonishments to the jury; 6) ask for an instruction at the penalty phase regarding the great weight accorded the jury recommendation; 7) object to victim impact evidence; 8) proffer accurate instructions regarding the need for the aggravating circumstances to outweigh the mitigating before a death sentence can be recommended; and 9) obtain consistent instructions advising the jury of the impact of a six-six vote. Evidence on all of these matters and the reasons for counsel's failings was precluded from being presented. As to these matters there was no evidentiary hearing. Under this Court's prior rulings, this was error since nothing in the record conclusively shows that counsel's failings were not deficient performance which prejudiced Mr. Suarez.

Evidence was received as to certain limited aspects of defense counsel's deficient performance. Of record there is no basis or distinguishing those claims on which evidence was received rom those claims on which evidence was not received other then the presence or absence of an objection by the state to the evidence. The very limited scope of the hearing is clearly in very sharp contrast to the hearing conducted in Goodwin v. Balkam, 684 F.2d 794 (11th 1982); a case Judge Hayes distinguished with zest from Mr. Suarez's case in the course of his order. However, Mr. Suarez's inability to present evidence on all aspects of his ineffectiveness claim precluded him from

establishing that this case is like Goodwin. For example Mr. Suarez could not present evidence that defense counsel here was totally ignorant of sixth amendment case law and that his failure to object to the state's use of Mr. Suarez's statements resulted from ignorance, as was the case in Goodwin. Nor was he able to present evidence regarding any of the other eight claims set out above.

The preclusion of this and other evidence regarding ineffective assistance, however, prevented the court from having the totality of the circumstances in ruling on Mr. Suarez's claim that he received ineffective assistance. As a result, the order denying relief must be vacated and the matter remand for a full and fair evidentiary hearing.

## ISSUE III

MR. SUAREZ WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS NOT LEGALLY COMPETENT, HE NEVER RECEIVED A COMPETENT MENTAL HEALTH EVALUATION AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL.

A criminal defendant is entitled to post-conviction relief if he was not legally competent at the time of his trial. See, e.g., Hill v. State, 473 So. 2d 1253 (Fla. 1985). Here, Mr. Suarez was in fact not competent at the time of his 1983 trial.

However, no one conducted the requisite evaluation under Rule 3.211 -- counsel failed to ask. A request was made to have Mr. Suarez evaluated and treated following a suicide attempt; however there was no competency evaluation requested or obtained. As an indigent whose mental capacity is at issue at all stages of a capital case, Mr. Suarez was entitled to a competently conducted psychiatric or psychological evaluation. Defense counsel failed to obtain a competency evaluation despite evidence readily available to counsel that would have established, at a minimum, the need for a professional competency evaluation and a hearing on the defendant's competency. Defense counsel failed to recognize obvious signs and symptoms of Mr. Suarez's mental deficiencies and emotional disturbance which was compounded by his inability to speak English and his lack of basic knowledge concerning the American criminal justice system. Counsel failed to obtain his client's jail records -- records which raised serious doubts about Mr. Suarez's competency. Counsel did not recognize the obvious, and failed to raise the issue of Mr. Suarez's competency under Rule 3.211. In fact counsel was unfamiliar with Rule 3.211; counsel believed that in order for competency to be placed in issue there must first be a showing of a mental illness or deficiency.

The circuit court ruled that on this issue Mr. Suarez was not entitled to an evidentiary hearing. The court's position was

that it was clear from the record that Mr. Suarez was competent. However, once the evidentiary hearing commenced the court permitted evidence on the question of whether counsel had any knowledge of Mr. Suarez's mental or emotional disturbances which should have caused them to raise the issue. The court specifically excluded any evidence of whether Mr. Suarez was in fact competent. Dr. Harry Krop and Dr. Anastacio Costiello were both proffered by the defense to establish that Mr. Suarez was incompetent at the time of trial. But as to each, the circuit court ruled the evidence was irrelevant. The court was not interested in expert testimony but only whether counsel had reason to notice Mr. Suarez's bizarre behavior.

Jail records offered by Mr. Suarez however, were admitted. These records disclosed that throughout his incarceration prior to trial Mr. Suarez suffered from frequent hallucinations -- ranging from imagining that he was beseiged and eaten by cockroaches to believing he had been stabbed with bayonet and that blood was flowing all over his body. The jail records showed that because of the hallucinations the jail frequently medicated Mr. Suarez with elavil, mellaril, and sinequam. Of course defense counsel claimed ignorance of both the hallucinations and the medication, with one notable exception. Harold Smith one of Mr. Suarez's attorney indicated he could tell that Mr. Suarez was on some kind of drugs, but he made no

inquiries and did absolutely nothing about it.

Also of note was Mr. Monaco's testimony that Mr. Suarez told him to get in touch with Mr. Suarez's contact in the CIA who could verify Mr. Suarez's story. Mr. Monaco did not question or pursue Mr. Suarez's wild claim. Mr. Monaco also asked for and received from Mr. Suarez his sister's phone number. Mr. Monaco failed to get in touch with her in order to verify Mr. Suarez's claims of CIA ties.

If defense counsel had contacted them, Mr. Suarez's family members would have explained a history of delusions, fantasies, paranoia, inappropriate laughter, sudden personality changes, inappropriate affect, and childlike behavior as well as a family history of mental illness. The family would have also described serious head injuries suffered by Mr. Suarez and considerable deprivation. Family members and friends testified that Mr. Suarez, after being incarcerated by Fidel Castro, was placed in the mental ward of a Cuban prison. This history when coupled with Mr. Suarez's inability to speak English and his lack of knowledge and understanding of the basic concepts of the American criminal justice system established his inability to function as competent in a trial setting. Mr. Suarez was not competent under Rule 3.211 and counsel failed to raise the issue. This was because of counsel's failure to discover the evidence, to follow up on what was known, and ignorance of the law concerning

competency.

Dr. Harold Krop a qualified clinical, forensic psychiatrist, was proffered by Mr. Suarez at the hearing. During a lunch recess outside the presence of the court he was deposed for record purposes. After conducting an evaluation, reviewing the background material, and reviewing the results of the Minnesota Multiphasic Personality Inventory, Dr. Harry Krop determined that Ernesto Suarez suffered from a major mental illness at the time of the offense and trial, namely, paranoid schizophrenia. The MMPI results ruled out malingering and indicated a serious thinking disorder characterized by hostility, suspicion, and delusions consistent with a diagnosis of paranoid schizophrenia. It appeared that Mr. Suarez had an extensive history of paranoia schizophrenia and was suffering from this illness at the time of the incident, during the course of the criminal proceedings and at the time of making various statements. The diagnosis was borne out by corroborating data including a family history of mental illness.

In regard to his competency to stand trial, Dr. Krop testified at his deposition that Mr. Suarez was not compent to assist counsel at the time of trial because he lacked the ability to understand the adversaried nature of the legal process, the capacity to disclose pertinent facts surrounding the alleged offense, and the ability to relate to his attorney. Mr. Suarez

was also impaired as to his ability to assist his attorney in planning his defense, his capacity to realistically challenge prosecution witnesses, his capacity to testify relevantly and his capacity to cope with the stress of incarceration prior to trial. According to Dr. Krop Mr. Suarez lives in a fantasy world. In fact, his testimony was of that fantasy world and not the real one.

Dr. Anastasia Castillo is a forensic clinical psychiatrist. He was proffered by the defense, but as with Dr. Krop, Judge Hayes refused to consider or allow this evidence. After an evaluation and consideration of the relevant background material, he diagnosed Mr. Suarez as suffering from a paranoid disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders III and as reclassified as Delusional (Paranoid) disorder in the DSM III Revised. He concluded that Mr. Suarez was incompetent.

Once Mr. Suarez had been arrested for murder and incarcerated, he appeared willing to make statements to anyone indiscriminately who would talk to him. This was due to his mental illness and possible organic brain damage which affected his judgment and perception. In addition, his background as a Cuban national further reduced his ability. In Cuba defendants are presumed guilty unless they can convince the prosecuting authorities otherwise.

Dr. Castillo is of the opinion that there were numerous indications that Mr. Suarez should have been evaluated for his competency to stand trial. The suicide attempts and the aberrant behavior which caused the jail personnel to place him on antipsychotic medication, also indicated the need for a mental health evaluation of competency to stand trial. Further, it is Dr. Castillo's opinion that Mr. Suarez' ability to relate to his attorney was substantially impaired due to his paranoia and grandiosity.

Mr. Suarez was forced to proceed to trial and required to make critical life and death decisions although he lacked the mental capacity to make such choices. He was forced to trial when he did not understand the adversarial process nor the role of his counsel. He could not relate to his attorney because he did not understand the process. In addition, Mr. Suarez's mental illness precluded him from knowing reality from delusion and thus defeated his capacity to relate the pertinent facts surrounding the alleged offense to his attorney. Mr. Suarez could not aid in his defense, nor aid counsel, nor testify rationally, nor realistically challenge prosecution witnesses, nor understand the proceedings transpiring before him. None of this was professionally assessed, considered, or analyzed prior to trial. And the circuit court in the proceedings below ruled that the record the court did not possess conclusively showed that Mr.

Suarez was competent.

The record does show Mr. Monaco arranged for the appointment of a psychiatrist, Dr. Jose Lombillo. Prior to the hearing it was not known that the State would attempt to assert that Dr. Lombillo's appointment somehow insulated the conduct of counsel from an ineffective assistance claim. To the extent that the State tried to use Dr. Lombillo for this purpose even though it did not call him to testify, it inject the question of whether there was a professionally adequate competency evaluation under Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

Dr. Lombillo's appointment was following a suicide attempt and was for purposes of evaluation and treatment. This appointment was not for a competency determination. As Dr. Costiello would have explained, Dr. Lombillo could not and did not provided a professionally adequate competency evaluation when he was not asked to do one and when he had no collateral data. The need for collateral data is particularly acute according to Dr. Krop when presented with a paranoid schizophrenic such as Mr. Suarez. Mason v. State, 489 So. 2d 734 (Fla. 1986). Information regarding the patient's past and present physical condition should be reviewed. See, e.g., Kaplan and Sadock at 544, 837-38 and 964. The profession's standards require that the evaluating psychologist or psychiatrist review information concerning the patient's past and present physical condition: the mental health

professional "should be expected to obtain [a] detailed medical history..." Kaplan and Sadock, supra at 544. Any past or present somatic complaints should be considered as should any evidence of odd or unusual behavior. Here, such factors were ignored. Had adequate information been obtained, Mr. Suarez's history of psychosis, delusions, fantasies, sudden personality changes, inappropriate affect head injury, and brain damage would have been revealed. Again, Dr. Lombillo and defense counsel failed to obtain or even ask for critically necessary and easily accessible information concerning Ernesto Suarez's background and history. No information was obtained or considered as to Mr. Suarez's history of mental problems or his family's history of mental illness, critical factors to an adequate evaluation. See, e.g., State v. Sireci, 502 So. 2d at 1224 (evaluations which ignore evidence of brain damage, such as history of head injury, are professionally inadequate); see also State v. Sireci (circuit court's order granting Rule 3.850 relief) failed to meet professionally recognized standard of care because examiners ignored evidence of brain damage).

Psychology and psychiatry have long recognized that a professionally adequate evaluation requires consideration of organic brain damage See, R. Slovenko, Psychiatry and the law at 400 (1973). See also S. Arieti, American Handbook of Psychiatry at 1161 (2d ed. 1974); J. MacDonald, Psychiatry and The Criminal

at 102-03 (1958). Accord H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry at 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in the Evaluation of Behavioral Disorders, 248 J. Am. Med. Ass'n. 964 (1982). As succinctly stated in the 1985 edition of the Comprehensive Textbook of Psychiatry, "it is the rule, not the exception, that organic defects...mimic facets of personality disorder." Id. at 964. Similarly, major mental illnesses (e.g., paranoia, schizophrenia) may result in symptoms similar to those exhibited by patients with a behavioral disorder. See DSM-III, pp. 305-331; see also id. at pp. 181-205 (19810. Such illnesses, therefore, must also be always properly evaluated, considered, and assessed.

Because organic brain damage and major mental illness can be readily but mistakenly diagnosed as personality disorder, the mental health profession has recognized that before a diagnosis of personality disorder can be made, the evaluating psychologist or psychiatrist must first rule out those bases for the symptoms presented. See, e.g., Kaplan and Sadock, supra, at 964.

Here, neither Dr. Lombillo nor counsel ever obtained the requisite history, ignored obvious signs of Mr. Suarez's mental illness, Sireci, supra, 502 So. 2d at 1224, ignored the possibility of brain damage, id., and, failed to provide adequate testing. Tis all fell below the recognized standard of care, as the evidence which Mr. Suarez sought to present at the Rule 3.850

hearing would have demonstrated. There was no professional competency evaluation. Mr. Suarez was represented by a court-appointed attorney who failed to raise his client's lack of competency, although his client's mental deficiencies and disturbances were obvious. Even the jail personnel recognized Mr. Suarez's deficiencies and obtained medication in order to try and control Mr. Suarez's disruptive delusions. No assessment was ever made of the impact of these medications. In no other single instance is it more important for an attorney to protect his client than when a client is mentally ill and unable to protect himself. No one protected Mr. Suarez.

On the issue of Mr. Suarez's competency the circuit court denied an evidentiary hearing. The circuit court's order unfortunately is phrased in such a fashion as to obscure that point. In addition the court ruled no expert testimony was admissible to establish Mr. Suarez's condition in connection with whether counsel should have recognized or realized that Mr. Suarez was incompetent. Contrary to the circuit court's order the state did not call Dr. Lombillo to testify at the evidentiary hearing. The state failed to present any evidence that Dr. Lombillo had performed a competency evaluation or that he had conducted a professionally adequate evaluation or that he even had opinion that Mr. Suarez was competent under the criteria set forth in Rule 3.211.

Lay testimony, documentary evidence and background information existed and/or should have been developed which demonstrated that Mr. Suarez should not have been forced to proceed to trial, should not have been convicted of first degree murder and should not have been sentenced to die. It is undisputed that Mr. Suarez was and is a paranoid schizophrenic -- that he is delusioned. Mr. Suarez should have been permitted to prove his claim. He was entitled to an evidentiary hearing. Mr. Suarez should have been permitted a full, fair, and adequate opportunity to prove this claim -- his claim should not have been summarily denied. Mr. Suarez's conviction and sentence of death stand in violation of the fifth, sixth, eighth, and fourteenth amendments, see, e.g., Pate v. Robinson, 383 U.S. 375 (1965); Hill v. State, 473 So. 2d 1253 (Fla. 1985), and his claim should now be heard.

The circuit court's ruling on this claim was absurd. The court precluded expert testimony explaining the mental illness from which Mr. Suarez suffered. In fact the court refused to allow the proffer of the testimony in his presence. Yet the court found Mr. Suarez competent. The proceedings were not full and fair.

## ISSUE IV

THE INTENSE SECURITY MEASURES UNDERTAKEN DURING MR. SUAREZ'S TRIAL BY COURT OFFICERS IN THE PRESENCE OF THE JURY ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his motion to vacate, Ernesto Suarez requested an evidentiary hearing on the prejudice resulting from the overwhelming security measures in evidence during his trial. Mr. Suarez's jury was presented with nonprobative, inflammatory, and unconstitutional "evidence" throughout his trial. Despite the presumption of innocence, Mr. Suarez's jury was continually reminded that he was a prisoner in the custody of the State. Instead of the usual staff of older bailiffs, tough, young officers in uniform and armed, acted as bailiffs. These officers were placed at the doors and four corners of the courtroom. Additionally two plainsclothes officers were stationed directly behind the defense table. It was obvious these officers were security personnel. At one point they even grabbed Mr. Suarez and forced him to sit.

The jury was constantly exposed to the sight of Mr. Suarez being summoned and escorted from the courtroom by law enforcement personnel. This exposure could do nothing but tell the jury that

the State had already determined that Mr. Suarez was guilty, creating a significant probability that the jury's feelings and ultimate judgment regarding Mr. Suarez were based upon nonprobative matters, completely irrelevant to the issues at trial.

This procedure removed Mr. Suarez's presumption of innocence and relieved the State of its burden to prove guilt beyond a reasonable doubt. It injected wholly irrelevant factors into the guilt-innocence and sentencing determinations that the jurors were called on to make. The prejudice from such security measures was particularly acute in the penalty phase. It served as a graphic statement of the manpower the State believed was necessary to guard Mr. Suarez if he is given a life sentence. Mr. Suarez's convictions and sentences of death were thus obtained in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

The fourteenth amendment guarantees a state criminal defendant the right to a fair trial. Fundamental to this guarantee are the defendant's right to be presumed innocent and the state's concomitant duty to prove guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Therefore, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503

(1976). Procedures or practices which are not "probative evidence" but which create "the probability of deleterious effects" on fundamental rights and the judgment of the jury thus must be carefully scrutinized and guarded against. Id at 504. Similarly, in a capital case, the eighth amendment mandates heightened scrutiny and requires that the proceedings not dilute the jury's sense of responsibility by the injection of impermissible factors. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

The trial court denied a hearing on this issue on the basis that the issue should have been raised on direct appeal. The issue could not possibly have been raised on direct appeal in that it would require the presentation of evidence to establish what the security measures consisted of, how they differed from the norm, whether such measures were reasonable, and what prejudice resulted from the excessive security. These are factors that can only be established through the presentation of evidence and do not appear on the face of the record which Mr. Suarez sought to do at the evidentiary hearing.

Although the court remarks that there was no objection raised by defense counsel, there is no ruling as to whether the failure to object was ineffective. This despite the fact the court allowed evidence as to counsel's failure to adequately safeguard Mr. Suarez's rights in this regard. The court merely

commented in its order that two attorneys, who assisted lead counsel, did not think the security was overly intense. It does not appear that these gratuitous comments were dispositive of any issue before the court, particularly in light of the refusal to permit Mr. Suarez to present evidence on this issue.

It was fundamentally unfair to Mr. Suarez to be subject to such intense security measures and trial counsel was ineffective for failing to object to overwhelmingly prejudicial and unnecessary security measures. Mr. Suarez was entitled to a hearing on this issue to establish prejudice. The matter must be remanded to permit the introduction of evidence as to Mr. Suarez's claim since the court records do not establish no basis for this claim.

## ISSUE V

THE TRIAL COURT'S FAILURE TO ASSURE MR. SUAREZ'S ACTUAL AND CONSTRUCTIVE PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the motion to vacate, Mr. Suarez argued that he was denied his right to be present at all proceedings in that: 1) his translator was used to translate the co-defendant's testimony for the court and there was no translator available to permit him to communicate with his counsel during that time period; 2) Mr. Suarez was not present during the jury instruction conference;

and 3) there was no word-for-word translation.

The trial court denied a hearing on this issue by alleging it had been raised on direct appeal. In fact, the only issue raised on direct appeal was the lack of word-for-word simultaneous translation. The trial court failed to address the remaining two issues and specifically failed to recognize that the lack of translation between the defense counsel and Mr. Suarez was a totally different issue. Further, the court makes no mention of the lack of Mr. Suarez's presence at the charge conference.

It is remarkable that after denying the right to present evidence on this issue, the court gleans "evidence" from the hearing which he then cites contrary to Mr. Suarez. Specifically, the trial court finds, "Secondly, the evidence adduced at the evidentiary hearing clearly reflected that counsel were able to communicate openly and freely Defendant. (sic)" Order, p. 3. The evidence did <u>not</u> reflect that counsel could communicate openly and freely without a translator. In fact, the evidence reflected that 1) Mr. Suarez spoke very little English, 2) counsel spoke no Spanish, and 3) there was no translator to provide communication between Mr. Suarez and his counsel during the testimony of the co-defendants. Howeer, it should also be noted that very little evidence in this regard was admitted, as the court sustained the State's objections to any evidence

showing a failure to provide word-for-word translation, lack of presence, or inability of counsel to communicate with Mr. Suarez during the proceedings because of a language barrier.

As stated in the motion to vacate, a capital criminal defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution, see, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970); Drope v. Missouri, 420 U.S. 162 (1975); Hall v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), Florida constitutional and statutory standards, Francis v. State, 413 So. 2d 1175 (Fla. 1982), and by Rule 3.180 of the Florida Rules of Criminal Procedure.

The purpose of the presence requirement is to effectuate the rights guaranteed by the sixth amendment. Perhaps the most important of those rights implicated by the defendant's presence or absence is the right to counsel. As the United States Supreme Court explained, "[O]ne of the defendant's primary advantages of being present at trial, his ability to communicate with counsel, is greatly reduced when the defendant is in a condition of total physical restraint." Illinois v. Allen, supra at 344.

During various critical stages of the proceedings resulting in his conviction and sentence of death, Mr. Suarez was involuntarily absent both actually and constructively. Mr. Suarez never waived his right to be present. However, during his

involuntary absences, important matters were attended to, discussed and resolved. During the testimony of his co-defendant's, Mr. Suarez was denied the benefit of an interpreter and thus the ability to communicate with counsel. Throughout the trial Mr. Suarez was denied word for word translation and thus denied constructive presence in the courtroom. Additionally, Mr. Suarez was not present during the instruction conference and was thus denied the ability to consult with counsel as to the defenses the jury would be instructed upon.

This case is in all pertinent respects no different than Proffitt v. Wainwright, supra. There, the defendant was involuntarily absent from a hearing held after the jury had rendered its advisory sentence at which a doctor presented testimony concerning psychiatric reports that had been presented to the court. 685 F.2d at 1256-58. The state argued that Proffitt's absence was harmless. The federal court of appeals, however, applied the well-established standard attendant to such situations and refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a difference." Proffitt, 685 F.2d at 1260, citing Davis v. Alaska, 415 U.S. 308, 317 (1974). Rather, the court explained that because Proffitt could have provided information to counsel which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless even though the defendant

had not shown that the information would have changed the doctor's opinion. Proffitt, 685 F.2d at 1260-61.

Thus, the prejudice inquiry under such circumstances is whether the absent defendant "could have" made a difference had he been present. Mr. Suarez clearly could, and would, have -- provided counsel with information regarding his co-defendant's and their testimony if he had had a means to communicate with them; he did not, because he was even in a real sense, not there. He had no interpreter through which to speak. He is now entitled to relief.

According to Profitt v. Wainwright, supra, the defendant's presence of a capital trial "is so fundamental that the defendant cannot waive it." 685 F.2d at 1257. However, here there was not even an attempt to place a waiver on the record. The matter was simply ignored.

Counsel failed to raise the issue until after trial and then not as a "presence" issue. In this, counsel failed to represent Mr. Suarez's interest and thus rendered ineffective assistance.

The court records did not conclusively show that Mr. Suarez was entitled to no relief. In fact the court relies on evidence from the hearing to deny this claim, even though the court whenever an objection was registered precluded Mr. Suarez from presenting evidence on this issue. Mr. Suarez's involuntary absences violated his fifth, sixth, eighth, and fourteenth

amendment rights. Mr. Suarez was entitled to present all the evidence available on this clain. The order denying relief must be reversed.

## ISSUE VI

MR. SUAREZ WAS DENIED HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN LAW ENFORCEMENT PERSONNEL TRICKED HIM INTO PRODUCING A WRITING SAMPLE TO BE USED AS A HANDWRITING EXEMPLAR, AND COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE ASSISTANCE BY FAILING TO EFFECTIVELY LITIGATE THIS CLAIM.

At. Mr. Suarez's trial, a handwriting expert was called to testify. He had been provided a writing sample obtained from Mr. Suarez and asked to compare it to a letter whose authorship was unknown. The expert on the basis of his examination of the known writing sample concluded that the letter was written by Mr. Suarez (R. 1077-86).

The known writing sample had been obtained by Robert Isaacs, a correctional officer for the Collier County Sheriff's Department. Mr. Isaacs "was asked to get a handwriting sample." He did not tell Mr. Suarez of his mission. Instead he simply wrote Mr. Suarez a message, the only means Mr. Isaacs had of communicating with Mr. Suarez. The message called for a written response. When Mr. Suarez gave Mr. Isaacs the written response, it was seized as a handwriting sample and used as evidence by the State. It was introduced as State's Exhibit Number 88 (R. 1073-

76). Mr. Suarez was tricked into producing evidence for the State. This occurred after Mr. Suarez had had the charges read to him and had invoked his sixth amendment right to counsel.

Mr. Suarez was never told that pursuant to the fourth, fifth, sixth, and fourtenth amendments he could refuse to provide the State with a handwriting exemplar and require the State to obtain the appropriate court order.

As to the fourth amendment right implicated by the seizure of the writing sample, the United States Supreme Court has stated:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct 524, 535, 29 L.Ed. 746:
>
> > "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to

> be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Certainly the fourth amendment condemns seizures obtained by trick. Mr. Suarez's rights under the fifth and sixth amendments were implicated when he provided Mr. Isaacs with a written response to Mr. Isaacs' message. For a waiver of those rights to be valid it must be shown by the State that the defendant intentionally relinquished a known right. In resolving this, consideration must be given to the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Here there can be no claim that Mr. Suarez knowingly and intelligently waived his rights under the fifth and sixth amendments, simply because he was never informed of those rights by Mr. Isaacs. The State's conduct here of circumventing counsel and tricking Mr. Suarez into producing a writing sample, is reprehensible and precisely the kind of activity the constitution was intended to prohibit. The State's use of its illegally-obtained bounty violated Mr. Suarez's rights under the fourth, fifth, sixth, and fourteenth amendments.

The error was compounded by defense counsel's failure to object and zealously protect and advocate Mr. Suarez's constitutional guarantees. Counsel's failure to timely assert

the clear violation of Mr. Suarez's rights was ineffective assistance under Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). As a result, Mr. Suarez was prejudiced by the introduction of the writing sample, Exhibit 88, and the handwriting expert's opinion based on that sample that Mr. Suarez had also penned the letter introduced as Exhibit 87. This letter written in Spanish was interpreted for the jury by Mr. Suarez's interpreter at the end of the handwriting expert's direct testimony (R. 1086).

Accordingly, Mr. Suarez was denied his rights under the fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

In the motion to vacate, Mr. Suarez clearly raised this issue and raised the related issue concerning the ineffectiveness of trial counsel when he failed to object to the improper seizure of Mr. Suarez's handwriting. The trial court erred in denying a hearing on this claim. The trial court did not address the ineffectiveness of counsel in failing to object to the use of the handwriting sample. Further, the trial court found that it was harmless because "the State would have been able to obtain a hand-writing exemplar" had they followed the procedure set forth in the Rules of Criminal Procedure. Order, p. 5. It is difficult to understand how the trial court can make such a finding without ever having been presented with any evidence or argument regarding this issue.

Mr. Suarez was entitled to a hearing on this issue and had a hearing been granted, relief would have been mandated.

ISSUE VII

MR. SUAREZ WAS DENIED HIS RIGHT TO BE FREE FROM SELF-INCRIMINATION, TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DANIEL MONACO, HIS APPOINTED ATTORNEY, UNDERTOOK REPRESENTATION OF BOTH HIM AND CODEFENDANTS SORY AND REYES AND RECEIVED CONFIDENTIAL COMMUNICATIONS FROM MR. SUAREZ, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The trial court erred in finding that this issue was procedurally barred. The conflict of interest created fundamental error. To the extent that trial counsel failed to object, he rendered ineffective assistance of counsel.

Daniel Monaco initially accepted a court appointment to represent Mr. Suarez, Mr. Sory and Mr. Reyes. After approximately six months, Mr. Monaco withdrew from Mr. Suarez and continued to represent Sory and Reyes. Larry Martin then represented Mr. Suarez for the nearly six months remaining until trial. Neither Mr. Monaco or Mr. Martin brought the conflict of interest to the attention of the court until after the completion of voir dire. At that time, the jury was informed that Mr. Suarez had requested a severance.

In the motion to vacate, Mr. Suarez argued prejudice in that 1) during the first critical six months of investigation, Mr.

Suarez was effectively denied the representation of counsel because his appointed attorney, Mr. Monaco, represented conflicting interests; 2) by proceeding through voir dire before bringing the conflict to the attention of the court, counsel for Mr. Suarez were only granted 10 preemptory challenges which the adverse co-defendants and the State had a total of 50; 3) by proceeding through voir dire before moving for severance, the jury was permitted to draw the inference that Mr. Suarez wanted a severance because the co-defendants would make statements damaging to his defense (in fact the contrary was true: bringing Mr. Suarez to trial before Sory and Reyes prevented him from calling them as witnesses); and 4) finally, Mr. Suarez was prejudiced when it was revealed during the examination of witnesses that Mr. Monaco had been his attorney at the time of deposition leaving a clear inference that Mr. Monaco had chosen to continue to represent Sori and Reyes and to withdraw from Suarez because he thought Mr. Suarez was guilty.

The trial court denied Mr. Suarez the opportunity to present evidence or explore this issue. In the order denying the motion to vacate, the trial court failed to address any of these issues. Although no evidence was permitted on this issue, the trial court denied that there was in fact any conflict. This is in direct conflict to Mr. Monaco and Mr. Martin's representations to the court at the time of trial that in fact Mr. Monaco did have a

conflict of interest.

During the critical first months in which investigation of the circumstances surrounding the offense can be most fruitful, Mr. Suarez was effectively denied the representation of counsel because his appointed attorney represented conflicting interests. The sixth amendment to the United States Constitution guarantees the criminally accused the right to conflict-free representation: "The 'assistance of counsel' guaranteed by the sixth amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942). Prejudice is presumed when a defendant demonstrates "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). The former Fifth Circuit in Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981) (Unit B), defined actual conflict of interest as follows:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing.

Id. at 396.

On May 10, 1983, Daniel Monaco, Esquire, was appointed to represent Mr. Suarez and codefendants Sory and Reyes (R. 10).

On August 22, 1983, counsel Monaco moved to sever Mr. Suarez's trial from that of his codefendants (R. 118). In that motion, counsel explained that Mr. Suarez and his codefendants were charged with the same offense, that the State intended to use statements of the codefendants against Mr. Suarez, and that severance was thus necessary "in order to promote a fair determination of [Mr. Suarez's] guilt or innocence." Id. Despite the conflicts inherent in representing codefendants who had made statements damaging to one another, Mr. Monaco continued to represent Mr. Suarez.

Only after the passage of several months crucial to a proper investigation of Mr. Suarez's case, and during which Mr. Monaco continued to have confidential communications with Mr. Suarez, did counsel moved to withdraw from Mr. Suarez's representation on October 13, 1983 (R. 126). In that motion, counsel indicated that the defenses of Mr. Suarez and his codefendants would be antagonistic and that he knew what Mr. Suarez would be saying:

> 2. That over the course of the discovery process it has become apparent that the account of the alleged crimes provided by ERNESTO SUAREZ is in direct conflict with the accounts provided by RAYMUNDO REYES and MIGUEL SORI.
>
> 3. That ERNESTO SUAREZ has, contrary to the advice of counsel, continued to provide statements to the Office of the State Attorney which statements are contrary to information provided by said Defendant to counsel and which statements apparently implicate RAYMUNDO REYES and MIGUEL SORI in a

> manner contrary to each of the latter Co-Defendants' accounts.

(R. 126). Mr. Monaco represented Mr. Suarez and codefendants Sory and Reyes until the motion to withdraw was granted on November 7, 1983 (R. 130). It is thus clear that during this critical initial period of investigation of the case and of receiving confidential communications from Mr. Suarez that Mr. Monaco had conflicting loyalties in attempting to represent both Mr. Suarez and his codefendants.

Despite the actual conflict the trial court refused to sever the cases for trial until after voir dire had been conducted by all three defendants. At that time Mr. Martin renewed his motion for severance and explained that Mr. Monaco would be using information obtained from Mr. Suarez against Mr. Suarez in order to aid Mr. Reyes and Mr. Sory.

Severe prejudice was suffered by Mr. Suarez due to the failure to obtain a severance until after voir dire. After ordering a severance, the trial court gave the State the option of which defendant or defendants should continue on in the trial. The court told the State to decide which party it was most prepared to prosecute. No inquiry was made as to the prejudice Mr. Suarez would suffer from continuing on in the trial after Mr. Monaco's involvement in the voir dire. The court did not consider the fifty preemptory challenges which had been given to those interests in conflict to Mr. Suarez while he received only

ten peremptory challenges. Nor was consideration give to Mr. Martin's preparation or lack thereof for a trial without the co-defendants participating.

Following the severance, the jury, who had been introduced to all three co-defendants, was told that the severance occurred at Mr. Suarez's request (R. 494). Later during the course of cross-examining witnesses, it was revealed to the jury that at the time certain depositions were taken from Mr. Monaco, the co-defendants' attorney, had also been representing Mr. Suarez at that time (R. 694, 708). Under the circumstances, the jury would have inferred that for some reason Mr. Suarez did not want Mr. Monaco involved in the trial, perhaps because Mr. Monaco thought or knew Mr. Suarez was guilty.

The dangers inherent in multiple representation are forbidden by the federal rules, which require the court to make an immediate inquiry into conflicting defenses when it appears that multiple representation is involved. See Fed. R. Crim. P. 44(c). The United States Supreme Court has noted:

> Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation.

Cuyler, 446 U.S. at 346. In both Georgia and California, in all capital cases, each defendant is to be provided with separate,

independent counsel. Fleming v. State, 270 S.E.2d 185 (Ga. 1980); People v. Mroczko, 672 P.2d 835 (Cal. 1983).

The dangers of multiple representation are so antagonistic to our concept of an adversarial system of criminal justice that the courts require close scrutiny of any case in which it occurs. See Cuyler, supra. Here, an actual conflict of interest was allowed to exist. This conflict adversely effected the representation Mr. Suarez received. The trial court erred in failing to permit an evidentiary hearing on this claim since the court records clearly support Mr. Suarez's claim. The court in its order despite denying an evidentiary hearing and precluding evidence on this issue nevertheless relied on the limited evidence which filtered through the court's ruling. This was patently error and reversal of the order denying relief is required.

## ISSUE VIII

THE TRIAL COURT ERRED BY REFUSING TO MAKE AN INQUIRY ON THE RECORD AS TO THE CO-DEFENDANTS' WILLINGNESS TO TESTIFY ON BEHALF OF MR. SUAREZ CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

At the beginning of the trial, the court granted a severance as to co-defendants Raymundo Reyes and Miguel Sory. Later in the trial, defense counsel indicated an intention to call Mr. Reyes and Mr. Sory as witnesses on behalf of Mr. Suarez.

The court refused to allow them to be called to the stand in

the presence of the jury and did not examine the witnesses as to their willingness to testify on behalf of Mr. Suarez:

> MR. BROCK: Is that Raymundo Reyes? Before we proceed, if they're anticipating calling him as a witness --
>
> THE COURT: Don't jump the gun. I think for the record they want to call him but I don't think he's going to testify.
>
> MR. BROCK: That's the issue that I wanted to get resolved before that happens. Your Honor, it's impermissible to, for either the State or the defendant, to call a witness in front of a jury for the purpose of the individual, or presenting to the jury, that the individual is going to invoke his Fifth Amendment privilege. And, I cite to the Court the case of Apfel versus State, 429 Southern Second, 85, which is a Fifth District Court of Appeals decision, 1983.
>
> Also Favor versus State, 391 Southern Second 49, which is a Fourth District Court decision in 1981, that stands for the proposition that it's impermissible for either the State or the accused to call a witness to force him to invoke his privilege of self-incrimination before the jury.
>
> MR. MARTIN: The purpose that I'd be calling Sory and Reyes to the stand is not for the purpose of having them invoke the Fifth Amendment, but to testify as to their recollection of the events at the scene where the automobile was stopped and the shooting occurred.
>
> And, in particular, I anticipate that their testimony would be to the effect that there was gunfire coming from the officers as well as from the automobile in which they stayed. Whether or not they're going to invoke the Fifth Amendment, I can't say at this point.

(R. 1184-85).

Mr. Reyes' counsel allegedly consulted with him regarding his desire to testify on behalf of Mr. Suarez. According to the record this consultation with his Spanish-speaking client lasted three minutes including the time it took to get in and out of the holding cell:

> MR. MONACO: We have no objection to that, your Honor. I don't know if Mr. Reyes has been brought up before Mr. Faerber would talk to him.
>
> THE COURT: Go in there and talk to him so we can find out for the record if he's going to invoke his Fifth Amendment.
>
> (Thereupon, Mr. Faerber entered the holding cell at 1:09 p.m. and returned to the courtroom at 1:12 p.m.)
>
> MR. FAERBER: Your Honor, we discussed it with Raymundo Reyes and he does not wish to testify, and he would invoke his Fifth Amendment privilege not to testify.
>
> THE COURT: All right.
>
> MR. MARTIN: Judge, if that's the case, then I would want the jury advised that we called both of those witnesses and that they refused to testify.

(R. 1186)(emphasis added). The court ruled against defense counsel and denied the request to call Mr. Reyes and Mr. Sory to the stand (R. 1189).

The trial court specifically denied a hearing on this issue and counsel was not permitted to adduce any testimony. However,

Mr. Suarez proffered evidence that Mr. Reyes would in fact have testified on behalf of Mr. Suarez that shots were fired before Mr. Suarez fired. The court could have determined this at trial by making an inquiry of Mr. Reyes. Mr. Suarez proffered the testimony of Mr. Reyes at the evidentiary hearing. He would have testified that if called at Mr. Suarez's trial, he would have taken the stand and explained that the police fired first.

The circuit court ruled in its order that the issue was barred because it had been raised on direct appeal. However, the issue decided adversely to Mr. Suarez on direct appeal concerned the failure of trial counsel to request voir dire:

> Defense counsel may well have had the right to insist on a voir dire, but it was not the trial court's obligation to conduct one, absent a defense request.

481 So. 2d at 1209. On appeal there was no evidence available to show that Mr. Reyes was in fact willing to testify.

In his motion to vacate, Mr. Suarez raised the following issues: 1) had the court made an inquiry to Mr. Reyes as to his willingness to testify he would in fact have been willing to give exculpatory evidence for Mr. Suarez; 2) to the extent that trial counsel failed to request voir dire of Sori and Reyes, they rendered ineffective assistance of counsel and 3) trial counsel did in effect request that the court voir dire Sori and Reyes by requesting that they be called to the stand. The purpose of an evidentiary hearing is to present evidence outside the record.

Mr. Suarez offered to present post-conviction evidence that in fact Mr. Reyes would not have invoked his fifth amendment privilege and would have testified on behalf of Mr. Suarez had been called to the stand as requested by defense counsel. Mr. Reyes' statement that he was willing to testify for Mr. Suarez is corroborated by the record which reflects that Mr. Faerber took three minutes including getting in and out of an adjacent holding cell and conducting an inquiry through a translator. The defense presented by Mr. Suarez depended on showing that he did not fire the first shots. Mr. Reyes could have provided that crucial evidence.

The trial court refused to grant a hearing or permit the presentation of evidence in support of this claim. Mr. Suarez is entitled to an evidentiary hearing to establish his claims of ineffectiveness of counsel and prejudice resulting therefrom. The court records do not conclusively establish that there was no error.

## ISSUE IX

THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN MR. SUAREZ'S CAPITAL CONVICTION AND SENTENCE OF DEATH, THE JURY WAS PROVIDED WITH MISINFORMATION WHICH SERVED TO DIMINISH THEIR SENSE OF RESPONSIBILITY FOR THE AWESOME TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, IN VIOLATION OF CALDWELL V. MISSISSIPPI, 105 S.Ct. 2633 (1985), AND THE EIGHTH AND FOURTEENTH AMENDMENTS

Throughout the course of the trial proceedings, prosecutorial comments and judicial statements and instructions diminished the jurors' sense of responsibility in violation of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), and the eighth and fourteenth amendments. The trial court erred in refusing to permit any evidence or any questions whatsoever regarding this issue.

Caldwell established that when a capital sentencing jury is incorrectly informed regarding its function, its awesome responsibility, and its critical role in capital sentencing, the resulting death sentence must be vacated. The Eleventh Circuit has held that Caldwell applies to Florida capital sentencing juries and that diminution of a Florida capital jury's sense of responsibility for its task at sentencing requires that a resulting death sentence must be vacated. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified sub nom., Adams v. Dugger, 816 F.2d 1495 (11th Cir. 1987), cert granted, 56 U.S.L.W. 3601 (March 7, 1988); Mann v. Dugger, No. 86-3182 (11th Cir. April 21,

1988) (en banc). Under Caldwell, Adams, and Mann, Mr. Suarez is entitled to resentencing.

A. THE PROCEEDINGS RESULTING IN MR. SUAREZ'S SENTENCE OF DEATH

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Suarez's case, at each of those stages the jurors heard statements from the judge and prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the trial, the prosecutor and the judge told the jury that the judge, not the jury, was the one who made the "ultimate decision" about punishment and that the jury's role was to give the judge advice, which the judge may accept or reject. These comments went far beyond those condemned in Caldwell and were as egregious as those in Adams and Mann, entitling Mr. Suarez to relief. Pertinent examples are reproduced immediately below.

1. Voir Dire

Here the prosecutor explained and admonished, as the prosecutor in Mann v. Dugger explained and admonished, that the jurors' role at the penalty phase would be essentially insignificant, as compared to the jurors' sole responsibility at the guilt-innocence phase:

> Now, I anticipate that the Court's going to instruct you that there is the possibility that this trial will be conducted in two parts.
>
> In the first part it will be the jury's duty to determine the guilt or the innocence of the Defendants.
>
> Now, in order to find a verdict of guilty, of course, the verdict has to be unanimous. Now, if we get -- assuming that there's a finding of guilt on the charge of first degree murder against one or all of these Defendants, in the second phase of the trial you will be called upon to render to the Court an advisory opinion as to the proper sentence which should be imposed.
>
> One of those could be the death penalty. Now, this is done only by a majority vote.

(R. 1782) (emphasis supplied).

This theme denigrating the jurors' function at the penalty phase was repeated by the prosecutor several times during voir dire. The jurors heard that their function at the penalty phase was to render an "advisory opinion" and "to recommend to the Court that the Court impose a sentence of death." (R. 1786; see also R. 1892; 1898). The prosecutor also told the jurors that

they should "disregard the consequences" of their verdict and not allow "the possible penalty . . . interfere in their decision making process." (R. 1896).

The message of juror non-nonresponsibility for the sentence was clearly understood by the jurors. As the prosecutor attempted to clarify the death penalty views of a prospective juror, the following exchange occurred:

> [The Prosecutor]: Now, Mr. Nobles, the actual sentencing is done by the Court. The jury--
>
> [Prospective Juror]: We'll recommend it?
>
> [The Prosecutor]: The jury has the obligation to recommend one of two sentences, and this is an advisory opinion, it's not mandatory upon the Court. Do you feel that you could not advise the Court as to a sentence of death?

(R. 1897) (emphasis supplied).

2. Closing Argument and Instructions at Guilt-Innocence

In closing argument at guilt-innocence, the prosecutor took the theme of juror non-responsibility for sentencing one step further, informing the jurors that the judge could impose any sentence, regardless of the jury's recommendation: The Judge will instruct you that murder in the first degree carries with it a maximum penalty of death, and that if you find the defendant guilty of first degree murder, that you'll have to come back and make a recommendation to the Court as to whether or not you feel

this is the appropriate sentence, or life imprisonment is the appropriate sentence.

> I say this is sort of a second part, second phase of the case, that you'll have to decide at a later date. If you find that the evidence supports a charge of first degree murder, I anticipate that the Judge will further instruct you that if you find the defendant guilty of first degree murder, that he might make a recommendation of death despite your recommendation for mercy.
>
> So, you will be further instructed to disregard the consequences of your verdict. . . .

(R. 1313) (emphasis supplied).

The Court reinforced these improper comments by the prosecutor during its instructions at guilt-innocence:

> It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.

(R. 1390) (emphasis supplied).

> The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict.

(R. 1391) (emphasis supplied). Following the verdict, the Court informed the jurors that they must return in order to give the Court "an advisory recommendation" as to sentence. (R. 1404).

3. Closing Argument and Instructions at Penalty Phase

At the penalty phase, the refrain of jury non-responsibility was repeated by the prosecutor and the judge. In its preliminary

instructions at sentencing, the court instructed the jurors:

> Okay, ladies and gentlemen, you have found the defendant guilty of murder in the first degree of Deputy Sheriff Amedicus Q. Howell. The punishment for this crime is either death or life imprisonment without possibility of parole for 25 years.. The final decision as to what punishment would be imposed really resides with the Judge of this court, however, the law requires that you, the jury, render to the Court and advisory sentence as to what punishment should be imposed upon the defendant.

(R. 1409) (emphasis supplied).

The prosecutor began his closing argument to the jury by emphasizing the distinction between the jurors' and the judge's responsibility for sentencing:

> Ladies and gentlemen, the Court has told you the purpose of this proceeding is to present evidence and argument so that you may advise the Judge as to the sentence that he should pronounce upon the defendant. The final responsibility for sentence lies with the Court.

(R. 1424-25) (emphasis supplied).

During a bench conference discussing the appropriateness of instructing the jury regarding several aggravating circumstances, it became clear that the Court believed the jury's responsibility at sentencing was minimal compared to the Court's responsibility. As defense counsel argued that instructing the jury on both the robbery and pecuniary gain aggravating circumstances constituted impermissible doubling, the Court responded that it would correct any errors the jury made:

> [I]f the Court finds that the jury does double up the Court will take them out so that as far as the sentencing goes there will be no doubling. The jury could find one or all of those factors that are before them and if in fact they do find robbery and pecuniary gain then the Court is not going to agree to that or will not in the sentencing phase use those aggravating circumstances. The Court will take one out.

(R. 1432; see also R. 1433). Thus, although the Court clearly understood that such doubling was impermissible, the less important jury--which could be corrected by the Court--was instructed on the challenged aggravating circumstances (R. 1451-52).

Finally, the jury received its final, improper instructions:

> Ladies and gentlemen of the jury. It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder. . . . As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law as it will now be given you by the Court and to render to the Court an advisory sentence. . . .

(R. 1451) (emphasis supplied).

The jury returned with a death recommendation by a vote of 8 to 4 (R. 1456). While excusing the jury, the Court announced that it intended to accept the jury's advisory sentence (R. 1458).

B. MR. SUAREZ'S ENTITLEMENT TO RELIEF

On March 7, 1988, the United States Supreme Court granted certiorari in Dugger v. Adams, 56 U.S.L.W. 3601, previous history in Adams v. Dugger, 916 F.2d 1493 (11th Cir. 1987), modifying on rehearing Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). If the Supreme Court affirms the Eleventh Circuit's grant of relief in Adams, Mr. Suarez's death sentence must be vacated: the prosecutorial arguments and judicial comments discussed above violated Mr. Suarez's rights to a reliable and individualized capital sentencing determination in the same way as those condemned by the Adams panel.

On April 21, 1988, the Eleventh Circuit, en banc, issued its opinion in Mann v. Dugger, ___ F.2d ___ (No. 86-3182, 11th Cir. April 21, 1988). There, relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed above violated Mr. Suarez's eighth amendment rights. Mr. Suarez is entitled to relief under Mann.

In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," id., slip op. at 17, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that

> its role in unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the nature of its responsibility. such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted 56 U.S.L.W. 3608 (U.S. March 7, 1988).

Id. Mann entitles Mr. Suarez to relief, as does Caldwell.

The genius of the jury system enables us to employ lay persons unacquainted with legal processes in an essential factfinding role. Jurors are drawn from their ordinary pursuits into a venire. If selected, they are placed in an environment where every aspect of their surroundings suggests deference to the judge. The judge is the lawgiver, specially clad in a black robe, elevated by the architecture of the courtroom, and elevated also by the conventions and protocol of our normal practice. There is a natural and proper tendency for the jurors to defer to the judge.

To grasp the essence of the central issue before the court, it is useful to mentally take the place of the lay person summoned from ordinary pursuits into this extraordinary setting, isolated from fellow citizens, dwelling in a domain where the judge has control.

Jurors summoned and selected in capital cases will feel special pressure. They do not know what lies in the realm of the jury and what responsibility rests with the judge. Jurors are told that they are to receive instructions on the law from the judge. Under these circumstances, lay persons listen closely as the lawyers and the judge tell them about the jurors' job.

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S.Ct. 2633, 2641-42 (1985) (emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Suarez's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments "at issue" had no effect on the deliberations. Caldwell, 1205 S.Ct. at 2645-46.

The comments here at issue were not isolated, but were made by judge and prosecutor throughout the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility for deciding whether Ernesto Suarez would live or die, while the "critical" role of the jury,

Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), was substantially minimized.

The gravamen of Mr. Suarez's claim is based on the fact that the prosecutor's and judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi. The key to why Mr. Suarez is entitled to relief is that the focus of a Caldwell inquiry should not be on how often the jury-minimizing comments were made, nor on the egregiousness of the jury-minimizing comment at issue -- Caldwell held that any comment which minimizes the jurors' sense of responsibility violates the eighth amendment. As in Caldwell itself, the inquiry must focus on the question of whether the comments at issue could be reasonably said to have had "no effect" on the jury's verdict. In Mr. Suarez's case, as discussed below, the jury-minimizing comments cannot be said to have had "no effect": substantial mitigating evidence was elicited throughout the proceedings, and the jury reached a death verdict by a narrow margin -- 8 to 4. Under such circumstances, no jury-minimizing comment can reasonably be said to have had "no effect" on their verdict. There can be little doubt that the jury-minimizing comments here at issue and the judge's instructions surpassed what was condemned in Caldwell and violated the eighth amendment requirements that any death

sentence be reliable and individualized in the same way as those rights were violated in Mann.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Mann, supra; Adams v. Wainwright, 764 F.2d at 1365; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 136 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, supra, 804 F.2d at 1529. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight.

McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Suarez's jury, however, was led to believe that the judge was free to impose whatever sentence he wished.

In Mr. Suarez's case, the judge failed to point out that the jury's decision would be reviewed with a presumption of correctness. Thus the jury was left unaware of the extreme deference and great weight their decision carried in the determination as to whether death would be the proper punishment. See McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Le Duc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). In explaining the sentencing process to the jury, the judge failed to inform them that a court may override a jury's recommendation only when the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 323 So. 2d 908, 910 (Fla. 1975). As in Caldwell, these comments misled the jury -- the jurors were given a "false impression as to the significance of their role in the sentencing process" which in turn "created a danger of bias in

favor of the death penalty." 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. 3601 (March 7, 1988). See also Caldwell, 105 S. Ct. at 2641.

In this case the jury could not have missed the impact of the pervasive improper judicial instructions and prosecutorial comments. Because they were not properly informed of their critical role, they could not have felt the full, proper weight accorded to their sentencing responsibility. A reasonable juror could well have been left with an understanding of the law that violated Caldwell. See Sandstrom v. Montana, 442 U.S. 510, 514 (1979)("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instructions").

In Caldwell, 105 S. Ct. 2633, the Court held "it is 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 the defendant's death lies elsewhere," 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the

improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability comments such as the ones at issue in Mr. Suarez's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640.

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its "deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence." See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive.

Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but were heard by the jurors at each stage of the proceedings. Cf. Mann v. Dugger. In Mr. Suarez's case the Court itself made some of the statements at issue -- the error is thus even more substantial: "[B]ecause . . . the trial judge . . . made the misleading statements in this case, . . . the jury was even more likely to

have . . . have minimized its role than the jury in Caldwell." Adams v. Wainwright, 804 F.2d at 1531.

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Suarez's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here, as in Adams, the significance of the jury's role was minimized, and the comments at issue thus "created a danger of bias in favor of the death penalty." Id., 804 F.2d at 1532. The jury had a difficult task at sentencing, reflected by their narrow 8 to 4 vote for death. Had they not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, a life verdict would not have been unlikely. Such a verdict, for a number of reasons, could not have been overridden by the court -- ample mitigation establishing a "reasonable basis" for a jury verdict of life existed in the record. For example, the evidence presented regarding Mr. Suarez's difficult background in Cuba and regarding his military experience, which established that the shooting was a reflexive rather than intentional action, was more than a "reasonable basis" which would have precluded an override. See Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations in this case had an effect on the ultimate sentence.

This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case were no Caldwell error can be deemed to have had "no effect" on the verdict -- a jury so close obviously could have turned to even the most minimal jury-minimizing comment in rendering a verdict of death. Mr. Suarez has been denied his eighth amendment rights. His sentence of death is therefore neither "reliable" nor "individualized." Further defense counsel was ineffective for failing to ask for an instruction pursuant to Tedder, explaining the great weight accorde the jury's recommendation.

The trial court ignored the effect of the State's burden of proof in its analysis of the Caldwell claim. Instead of enforcing the existing law, the trial court launched into a criticism of the Eleventh Circuit:

> In fact, the Eleventh Circuit's reasoning in Mann, with its overly broad emphasis on Tedder appears to totally eviscerate the Florida standard jury instructions in the death penalty area.

Order, p. 18. Nor does this Court escape the trial court's ire:

> Indeed, the Florida Supreme Court's reliance upon Tedder as a means of keeping trial judges in line with the jury's recommendations, has not only been overly broad when reading its language literally, but likewise creates dangerous impingements on the State's statutes as well as the Court's own rules of procedure. Tedder has

> been a well-inmtentioned but overly restrictive and misleading aspect of Florida's capital sentencing structure, as unfortuntely seen by the 11th Circuit's confusion in Mann.

Order, pp. 18-19.

Mr. Suarez is entitled to relief in that the claim is not procedurally barred, and the State cannot carry its burden to demonstrate that there is no prejudice where there was substantial mitigating evidence presented at the penalty phase. Further, the case should be remanded for new sentencing.

## ISSUE X

> THE INTRODUCTION OF IMPERMISSIBLE "VICTIM IMPACT' EVIDENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE INTRODUCTION OF SUCH EVIDENCE WAS FUNDAMENTAL EIGHTH AMENDMENT ERROR WHICH RENDERED MR. SUAREZ'S CAPITAL SENTENCING PROCEEDINGS FUNDAMENTALLY UNRELIABLE AND UNFAIR AND WHICH ABROGATED MR. SUAREZ'S EIGHTH AMENDMENT RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND COUNSEL'S WAS INEFFECTIVE IN FAILING TO OBJECT.

The trial court erred by denying Mr. Suarez an evidentiary hearing in regard to this claim. The trial court erred in ruling that this claim was procedurally barred. The admission of the improper victim impact evidence constituted fundamental error and to the extent that counsel failed to object, he was ineffective for failing to do so.

The State argued evidence calculated to call the jury's

attention to the personal characteristics of the victim. The information was provided to the judge and jury during the opening statement that:

> There's also a number of names which I want you to be familiar with that will be mentioned frequently throughout the course of the testimony. First of all, there will be Deputy Amedicus Q. Howell, who was the deceased victim of this particular incident. He's called by his, the people who knew him, as Med.
>
> The testimony will indicate that he is a 33-year old officer and father with ten years of service here in Collier County on the Sheriff's Department.

(R. 501-2).

This information was developed during the presentation of evidence by providing the jury with a photograph of the victim in uniform while he was alive. A fellow police officer also testified that he had known the victim four or five years and that he had been employed as a road corporal. Trial counsel made no objection to this introduction of this evidence before the jury which used to humanize the victim for the jury and to demonstrate that he had been a good guy and a sterling member of the community.

Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529 (1987), requires the exclusion of evidence of "the victim's personal characteristics," in a capital case. This is because the decision should not turn on whether the "victims were assets to

their community." The Court found the introduction of this information to be improper constitutional error. It violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983).

In Booth the Court stated: "Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion." Booth, supra at 2532. The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Court in Booth noted that it has not limited the permissible sentencing considerations to the defendant's record, characteristics, and the circumstances of the crime. However, "a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.'

Enmund v. Florida, 458 U.S. 782, 801 (1982)." Booth, supra at 2533. A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, supra, at 885.

The Booth court explained that there would be cases where "the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe." Booth, supra at 2534. In those circumstances the chances of a death sentence would be reduced if victim impact was admissible evidence. This would interject the risk of a death sentence being returned for wholly arbitrary reasons. Thus the Booth Court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535.

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which may mislead the jury into imposing a sentence of death. Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985). Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985), reh. denied, 784 F.2d 404 (11th Cir. 1986). The Eleventh Circuit, in fact, has repeatedly ruled that a defendant must not be sentenced to die by a jury which may have "failed to give its decision the

independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 21, quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors' are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. Wilson; Caldwell.

In this case the prosecutor relied on the truth of the old adage that "a picture is worth a thousand words." He made sure that the judge and jury not only knew the victim was a father but that they were provided with a picture of tthe victim while he was alive and in uniform.

In Booth the United States Supreme Court ruled "the introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The court further invalidated the Maryland statute requiring consideration of such a statement at a capital sentencing hearing and vacated Mr. Booth's death sentence because the statements had been considered. Reversal is required where contamination has occurred. Id.

In Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), the Court discussed when eighth amendment error required reversal. "Because we cannot say that this effort had no effect on the

sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646. Thus the question is whether the prosecutor's argument may have effected the sentencing decision. As in Booth, the improper argument herein at issue did affect the capital sentencing decision.

The burden of establishing that the error has no effect on the sentencing decision rests upon the State. See Booth, supra; cf. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). That burden can be carried only on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell v. Mississippi, supra, and Booth v. Maryland, supra. The state cannot carry this burden with regard to the prosecutorial misconduct in Mr. Suarez's case. Accordingly, Mr. Suarez is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentence's consideration.

Since this claim is based on a substantial change in law, Booth v. Maryland, and since the "tools" on which it could be based were unavailable earlier, it is now properly brought, and no bars to a review of the merits, and relief, apply.

This is a patently unreliable basis for sentencing, and a violation of the eighth and fourteenth amendments. The improper factors "may" have affected the sentencing decision, Booth,

supra, and they certainly cannot be said to have had "no effect" on sentencing, Caldwell, supra. Consequently, resentencing is required.

## ISSUE XI

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INTRODUCE THE POLYGRAPH EXAMINATION IN MITIGATION OF THE DEATH PENALTY CONTRARY TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Prior to the trial, defense counsel obtained a polygraph examination of Mr. Suarez. The polygraph examiner prepared a report stating that Mr. Suarez was being truthful when he stated that he did not intend to kill a deputy sheriff or anyone:

> [Question] 9 - On last March 29, after the convenience store was robbed, did you intend to kill a deputy sheriff or anyone?
>
> Please note that during the running of each polygraph chart concerning the above relevant questions, Mr. Suarez answered No to each relevant question.
>
> After a careful examination of the polygraph charts, using a numerical evaluation of the total weight of the above relevant questions as compared to control questions, it would have to be my opinion, based on the polygraph charts, that Mr. Suarez was not answering truthfully in reference to the shooting of his rifle. However, after examining each individual question and weighing them separately, it would be my opinion that Mr. Suarez was answering truthfully when he answered No to question No. 9 listed above.
>
> If you have any further questions regarding this examination or if I can be of any

> further help to you in this matter, please do not hesitate to contact me.

(Motion to Vacate, Appendix 4). The results of the polygraph examination constituted substantial evidence in mitigation which was not offered to either the jury or the judge in mitigation of the death penalty.

In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original). The Court has consistently reaffirmed Lockett. In Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Court held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Most recently, in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Court reversed where a Florida sentencing jury and judge had been limited in their consideration of mitigating circumstances). These principles apply with full force to Mr. Suarez's case. Mr. Suarez's counsel was ineffective for failure to present the polygraph evidence to the jury and judge in mitigation of his sentence.

No procedural bar can be applied to foreclose a merits review of a Lockett/Hitchcock claim. The fact that no state

procedural bar is any longer applicable to such claims is apparent from every post-Hitchcock pronouncement of the Florida Supreme Court. See Waterhouse v. State, 13 F.L.W. 98 (Fla. February 11, 1988)(defendant sentenced after Lockett v. Ohio and Songer v. State; no procedural bar applied and merits relief granted because Hitchcock v. Dugger represents change in law mandating merits post-conviction review); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"; merits relief granted); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(granting relief and rejecting State's procedural default contentions because Hitchcock is a "change in law" mandating merits review in post-conviction proceedings); Morgan v. State, 515 So. 2d 975 (Fla. 1987)(same); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(same); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987) ("Hitchcock represents a substantial change in the law . . . [mandating post-conviction merits review]."); Mikenas v. Dugger, 13 F.L.W. 52 (Fla. January 21, 1988)(merits relief granted and no procedural bar applied to Hitchcock claim because Hitchcock "represented a sufficient change in the law to defeat the application of procedural default."); Combs v. State, 13 F.L.W. 142 (Fla. February 18, 1988)(same); Foster v. State, 518 So. 2d 901 (Fla. 1988)(same); Zeigler v. Dugger, ___ So. 2d ___ (No. 71,

463, Fla., April 7, 1988), slip op. at 2 "(Even though Zeigler unsuccessfully sought to raise this issue in prior proceedings, . . . he is not barred from raising the claim at this time since the United States Supreme Court's ruling in Hitchcock represented a sufficient change in the law so as to defeat the application of procedural default . . ." [citing Mikenas and Thompson]). The Florida Supreme Court has reviewed the merits of every post-conviction litigant's Hitchcock claim, whether the claim had been raised in earlier proceedings or not, and irrespective of whether the defendant was sentenced before Lockett, see McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987), between Lockett v. Ohio and Songer v. State, 365 So. 2d 696 (Fla. 1978), see Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), or after Lockett and Songer, see Waterhouse v. State, 13 F.L.W. 98 (Fla. 1988); Combs v. State, 13 F.L.W. 142 (Fla. 1988); Card v. Dugger, 512 So. 2d 829 (Fla. 1987).

The failure to present the results of the polygraph examination to the jury precluded the jury from considering relevant mitigating evidence. As a result, Mr. Suarez's sentence of death violated the eighth and fourteenth amendments to the United States Constitution.

Although polygraph evidence is inadmissible as to guilt or innocence, it is admissible in mitigation of a death sentence at the penalty phase pursuant to Lockett, supra. The State can then

argue as to the weight to be given polygraph evidence. The failure to offer the polygraph evidence was particularly egregious in this case when considered with Mr. Suarez's diminished capacity and the evidence that he was unable to even see the victim due to darkness, and the intervening growth. The circuit court precluded evidence on this issue. The court concluded that since polygraph results are inadmissible at the guilt/innocence phase they are similarly inadmissible at the penalty phase. The court reasoned that therefore there could have been no ineffectiveness and thus barred all evidence on this point. The court's ruling was clearly error under Lockett.

## ISSUE XII

### THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. SUAREZ OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The trial court erred in ruling that this claim was proceduraly barred. The improper jury instruction constituted fundamental error and the extent that counsel failed to object, he was ineffective for failing to do so. The trial court also erred in holding that this claim had already been addressed on direct appeal. On direct appeal, this Court never addressed the issue of instructing the jury that they must give a death sentence unless the circumstances outweighed the

aggravating circumstances thus shifting the burden of proof.

In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), the Florida Supreme Court held that a capital sentencing jury must be

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

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973). The Florida Supreme Court has, in fact, held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon.

Mr. Suarez's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Suarez's sentencing jury was specifically and repeatedly instructed that Mr. Suarez bore the burden of proof on the issue of whether he should live or die. Mr. Suarez's sentencing jury was instructed at the outset of the sentencing process:

> You are instructed that this evidence, when considered with the evidence you have already heard is presented in order that you might determine first whether there are sufficient aggravating circumstances that would justify the imposition of the death

> penalty and secondly whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any.

At the close of the penalty phase, in his instructions before the jury retired to deliberate, the judge again explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

> If you find the aggravating circumstances could not justify the death penalty, your advisory sentence should be one of life in prison without possibility of parole for 25 years. Should you find sufficient aggravating circumstances do exist it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1452)(emphasis added).

The instructions, and the standard upon which the court based its own determination, violated the eighth amendment. Arango, supra; Dixon, supra; Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Suarez on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Suarez's due process rights under Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, ___ F.2d ____, No. 86-5630 (11th Cir. Feb. 2, 1988). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Suarez's rights to a fundamentally fair and reliable

sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Jackson, supra; Arango; supra; Dixon, supra; see also, Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) as well. Caldwell is new law, and this issue is thus cognizable in the instant proceedings. The instructions and argument, and the sentencing court's own application of the improper standard, "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Ernesto Suarez should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original).

The prejudice to Mr. Suarez of the burden-shifting was compounded by the improper doubling of the aggravating circumstances which resulted in the presentation of five aggravating circumstances instead of three, and by the failure to present the mitigating circumstances of no significant history of prior criminal behavior and acting under extreme duress. Had the jury been properly instructed, they would have been presented with three aggravating and four mitigating circumstances.

The trial court's instructions allowed the jury and the court to sentence Mr. Suarez to death without ever requiring the

State to prove that death was the appropriate sentence. Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption and showed that the mitigating circumstances outweighed the aggravating circumstances. Mr. Suarez was deprived of rights which, even in any ordinary misdemeanor, are mandated as a matter of fundamental fairness. See In re Winship, 397 U.S. 358 (1970). Mr. Suarez's death sentence resulted from a proceeding at which the "truth-finding function" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). Further, no evidence was permitted regarding counsel's failure to request adequate and proper instructions. The circuit court erred in precluding any inquiry of counsel in this regard. Furthermore, Mr. Suarez's sentence of death violated the eighth and fourteenth amendments.

## ISSUE XIII

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. SUAREZ'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court erred in ruling that this claim was procedurally barred. The improper jury instruction constituted fundamental error and to the extent that counsel failed to

object, he was ineffective for failing to do so. The trial court also erred in holding that this claim had already been addressed on direct appeal. On direct appeal, this Court never addressed the issue of the improper jury instruction.

The jury in Mr. Suarez's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. (See, e.g., R. 1453-55). As decisions of the Florida Supreme Court have made clear, the law of Florida has never been that a majority vote was necessary for the recommendation of a life sentence; rather, a six-six vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Suarez's jury was erroneously told that, to recommend a life sentence, its verdict must be by a majority vote:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.
>
> The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

> If a majority of the jury determine that Ernesto Suarez should be sentenced to death, your advisory sentence will be, a majority of the jury, by a vote of blank to blank -- you have to insert what the final vote was -- advise and recommend to the Court that it impose the death penalty upon Ernesto Suarez for the first degree murder of Deputy Sheriff Amedicus Q. Howell.
>
> On the other hand, if by six or more votes the jury determines that Ernesto Suarez should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Ernesto Suarez without possibility of parole for 25 years.
>
> In just a moment you will retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(R. 1453-55)(emphasis added).

These erroneous instructions are the type of misleading information condemned by Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), in that they "create a misleading picture of the jury's role." Id. at 2646 (O'Connor, J., concurring). As in Caldwell, the instruction here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There is no question that error was committed by the charge

in this case. The Court told the jury a majority was needed for a life recommendation. As in Harich, supra, the incorrect instructions here were not ameliorated by the single passage later provided which accurately stated that a six-to-six vote is a recommendation of life.

As a matter of state law, Mr. Suarez's jury was erroneously instructed. Thus he may well have been sentenced to die solely because his jury was misinformed and misled. Such a procedure violates the eighth and fourteenth amendments, for it creates the substantial risk that a sentence of death was imposed despite factors calling for a less severe punishment. By incorrectly instructing the jury that it had to reach a majority verdict, the judge "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction created may have encouraged one of the jurors to change his/her vote to death -- not because of equivocation as to the appropriate penalty but because of a belief that a majority vote had to be reached. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Beck, 447 U.S. at 643. It is akin to the giving of an "Allen charge" to the jury during the penalty

phase of the trial, for it erroneously directs the jury to reach a majority verdict.

A verdict on life or death should not be the product of pressure but should be the result of independent and unhampered deliberations. Because the challenged instructions were of the type condemned by Caldwell in that they created "a misleading picture of the jury's role," id. at 2646, Mr. Suarez need not show prejudice: under Caldwell, the State must show that the challenged jury misinformation had "no effect" on the sentencing decision. Id. The State cannot carry that burden in this case. Further, Mr. Suarez should have been able to pursue counsel's ineffectiveness because of his failure to insure proper and consistent instructions. Mr. Suarez's death sentence violated the sixth, eighth and fourteenth amendments.

## ISSUE XIV

THE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILURE TO ARGUE AND REQUEST INSTRUCTION ON THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE COURT DENIED MR. SUAREZ HIS EIGHTH AMENDMENT RIGHTS TO A RELIABLE, INDIVIDUALIZED, AND FUNDAMENTALLY FAIR CAPITAL SENTENCING DETERMINATION BY FAILING TO PROVIDE THE REQUIRED INSTRUCTION, IN VIOLATION OF HITCHCOCK, LOCKETT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court erred in ruling that this claim was procedurally barred. The failure to present the mitigating

circumstance of no significant prior history of prior criminal activity was fundamental error.

Ernesto Suarez had no prior convictions for violent felonies at the time of his murder trial. Counsel was ineffective for failing to argue this mitigating circumstance on his behalf. 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." The court should grant relief in that the failure to consider Mr. Suarez's lack of a prior criminal record constituted fundamental error.

The trial court erred in recalling the evidence in regard to its finding that:

> many of the witnesses that he would have used to demonstrate these facts were themselves in Cuban jails at the time, and would not have been available for trial purposes.

(Order, p. 23.) In fact only one of the approximately eight witnesses who testified regarding this issue was in a Cuban jail at the time of the trial.

The testimony established that Mr. Suarez endured a brutal incarceration for approximately seven years for minor acts of sabotage committed against the Castro government. The trial court's suggestion that the jury would have viewed this activity as "not so patently anti-Castro as to not likewise have been considered anti-social and in fact, criminal" grasps at straws. The penalty alone demonstrates that Ernesto Suarez was not being

punished for minor acts of vandalism. Coupled with the compelling testimony of witnesses, including the court's own appointed translator, that these acts were committed in a political struggle against the oppression of Castro's communism, there can be no doubt that Mr. Suarez was punished for his political beliefs. Trial counsel erred in failing to present evidence of no prior significant history of criminal activity and relief should be granted.

In any event the court's denial of an evidentiary hearing because the records conclusively establish that Mr. Suarez was entitled to no relief on this point is undermined by the court's reliance upon evidence presented at the evidentiary hearing.

## ISSUE XV

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

This issue was asserted in Mr. Suarez's petition for habeas corpus relief. In the State's response to that petition it maintains that review is improper because the claim was already determined. This Court, however, has the authority to reconsider its earlier decision on a matter, particularly when fundamental error is implicated. See Lucas v. State, 490 So. 2d 943, 946

(Fla. 1986).

The circuit court denied Mr. Suarez's similar claim set out in his 3.850 motion that the instructions to the penalty phase jury incorrectly set out the law. Mr. Suarez asserted that the instructions were improper and unlawful because contained within them were duplicitous aggravating circumstances that skewed the outcome toward a death recommendation. In it's denial of this claim in Mr. Suarez's post-conviction proceeding, the court stated:

> Claim XXIV is denied in that this claim was specifically raised on direct appeal and was rejected by the Florida Supreme Court, which held that it was not improper to give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was a proper sentence. The record is clear that the trial judge's sentencing order did not include any improper doubling circumstances.

(Order at 23).

This matter was raised on direct appeal and was rejected by this Court when it held that only the sentencing order was "subject to review vis-a-vis doubling." This was fundamental error by the circuit court compounded by this Court's improper ruling.

A trial judge has the responsibility to correctly charge the jury on the applicable 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 an timely and proper request renders vulnerable any resulting conviction and sentence since it may constitute "fundamental error." In Carter v. State, 469 So. 2d 194, 195-96 (Fla. 2d Dist. Ct. App. 1985), the court reasoned that when a trial judge gives an incorrect statement of the law that necessarily misleads the jury, and when the effect of that instruction is to negate the defendant's only defense, it is fundamental error. A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case.

To permit trial judges the opportunity to charge juries on aggravating factors that are duplicitious without at the same time alerting the juries to these facts 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.

What occurred was fundamental error. See Carter v. State, supra. The unfairness in this instance rendered the 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 "doubling" instructions worked just the opposite. Mr. Suarez is entitled to relief under Article I sections 2, 9 and 17 of the Florida Constitution and the eight and fourteenth amendments to the United States Constitution.

## ISSUE XVI

MR. SUAREZ 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.

As to this issue, it was set forth as Claim VI in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim VII in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set

forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XVII

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.

As to this issue, it was set forth as Claim VII in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim VIII in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XVIII

MR. SUAREZ WAS ERRONEOUSLY STRIPPED OF A DEFENSE THEREBY DENYING MR. SUAREZ HIS RIGHTS GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

As to this issue, it was set forth as Claim VIII in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim IV in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XIX

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

As to this issue, it was set forth as Claim IX in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim IX in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XX

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.

As to this issue, it was set forth as Claim XI in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim X in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XXI

ERNESTO SUAREZ WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE COURT FAILED TO PROPERLY ADMONISH THE JURY. HE WAS FURTHER DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO OBJECT TO SUCH SEPARATION AND IMPROPER JURY CAUTION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As to this issue, it was set forth as Claim XIII in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim XI in the petition for a writ of habeas corpus filed in this Court.

As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XXII

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.

As to this issue, it was set forth as Claim XIV in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim XII in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XXIII

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

As to this issue, it was set forth as Claim XXII in the Rule 3.850 motion to vacate judgment and sentence as filed in the circuit court and a closely related issue was raised as Claim VI in the petition for a writ of habeas corpus filed in this Court. As to these issues, Mr. Suarez would rely on the arguments set forth in those pleadings. Additional discussion of the issue will be provided once the transcript of the proceedings has been received and reviewed.

## ISSUE XXIV

THE CIRCUIT COURT'S REFUSAL TO CONTINUE THE HEARING AND THEREBY AFFORD MR. SUAREZ THE ABILITY TO AMEND HIS MOTION AND THE OPPORTUNITY TO PREPARE FOR A HEARING DENIED MR. SUAREZ HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his 3.850 motion to vacate, counsel for Mr. Suarez advised the circuit court of those matters brought to this Court's attention in Spalding v. Dugger, No. 72,510. Even though the State of Florida has chosen to provide Mr. Suarez with the right to counsel in his 3.850 proceedings, the right is an empty one where counsel lacks both the time and the financial resources

to provide competent assistance. In Pennsylvania v. Finley, 107 S. Ct. 1990 (1987), the United States Supreme Court indicated their was no denial of the sixth amendment right to effective representation where a convicted criminal defendant received exactly that to which he or she was entitled under state law, "an independent review of the record by competent counsel." 107 S. Ct. at 1995.

Here state law guarantees to convicted capital defendants the substantive right to effective representation in post-conviction proceedings. Due process will not permit the denial of the right by the creation of circumstances which will preclude effective representation. United States v. Cronic, 104 S. Ct. 2039 (1984). Where as here circumstances have been created whereby counsel has neither sufficient time nor resources to adequately prepare and present Mr. Suarez's claims, the right to competent representation is denied and due process is violated. A state cannot grant a substantive right and then take it away without due process. Evitts v. Lucey, 469 U.S. 387 (1985).

The current arrangement whereby the understaffed and underfinanced Office of the Capital Collateral Representative had to simultaneously brief and prepare six warrant cases, as well as stay current with the number of nonwarrant cases constantly demanding attention, operates to defeat and deny the statutory right created in the legislation establishing CCR. In the

present case, not only was counsel denied the time and money necessary to adequately prepare and investigate a 3.850 motion, but he received three working days notice of hearing. Counsel was told that the court had arranged for the local public defender to handle the issuance of any subpoenas necessary for the hearing. No consideration, however, was given the fact that counsel has other simultaneous and competing demands, in this case on Wednesday, May 25, 1988, when counsel was told by the court's secretary of the arrangement with the Naples public defender, 3.851 pleadings were due on May 27, 1988, in Daniel Johnson's case, and on June 6, 1988, in Robert Peede's case. A 3.850 motion was due on May 27, 1988, in a nonwarrant case, a post-hearing memo was due on May 27, 1988, in state circuit court, and a traverse in federal district court on May 31, 1988. As a result, a subpoena list was not compiled until Saturday, May 28, 1988. It thus was not provided to the local public defender until the day before the hearing, which was also the day after a three day holiday weekend during which public defender's office was closed.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 45, 61 S. Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. ordean, 234 U.S. 385, 34 S. Ct. 779, 58 L.Ed 1363; Priest v. Board

> of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S. Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S. Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S. Ct. 580, 53 L.Ed. 914.

Mullane v. Central Hanover Bank, 399 U.S. 306 (1950).

What is reasonable depends upon the circumstances. In the civil context, it has been held that five days notice that a pending action has been set for trial is unreasonable. Urich v. Fox, 687 P.2d 893 (Wyo. 1984).

Similarly in the criminal context a continuance of a matter may be necessary because of insufficient time to subpoena a material witness. In a criminal case, the sixth amendment right to compulsory process further heightens the need for reasonable notice. State v. Jones, 226 Kansas 503, 601 P.2d 1135 (1979).

As the United States Supreme Court has indicated:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory

> process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1979).

> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:
>
> > The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967).
>
> The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." Id., at 18.

Taylor v. Illinois, ___ U.S.___, 42 Cr.L. 3042, 3044 (1988).

Here the denial of Mr. Suarez's request for time to amend and a continuance of the hearing prejudiced Mr. Suarez in several ways. The 3.850 pleading was inartfully drafted due to the time constraints operating upon counsel. Counsel sought in the motion

and again at the commencement of the hearing for leave to amend. The circuit court denied this request. The state thereafter was permitted to argue that the pleading's failure to more explicitly set forth its claim precluded the presentation of evidence; this was particularly true as to the ineffective assistance of counsel's claim. Mr. Suarez's claims were strictly and narrowly construed. The denial of the continuance request denied counsel the time necessary to fully prepare for the examination of witnesses. The time allotted (three working days notice) was insufficient and guaranteed counsel's ineffectiveness under United States v. Cronic, supra. In this regard it should be noted that the circuit court refused to conduct a status conference. As a result counsel did not know in advance which issues an evidentiary hearing would be held upon. The failure to conduct a status conference prevented counsel from being advised that the court would dictate the order the witnesses were presented. Counsel on several occasions had no opportunity to prepare for a witness' testimony before the court required that the particular witness take the stand in advance of another witness.

Finally the lack of notice was directly responsible for the absence of a material witness. Nelson A. Faerber one of the defense attorneys alleged in the pleadings to have provided ineffective assistance was not subpeonaed. This occurred because

the public defender's office was unable to get the subpoenas to the sheriff's office any sooner than 3:00 p.m. on the afternoon of Tuesday, May 31, 1988, the day before the hearing began. The sheriff's office attempted to serve the subpoenas before 5:00 p.m. that afternoon, but failed to serve all of the subpoenas. The sheriff's office did not serve those remaining subpoenas the next day because the subpoenas were for 9:00 a.m., Wednesday, June 1, 1988. The sheriff's office policy was not to serve subpoenas once the time for the appearance had passed. As a result, Nelson Faerber among others was never subpeonaed. Defense counsel was not advised of this until Friday, June 3, 1988, when counsel attempted to call Mr. Faerber. The record reflects that Mr. Faerber could have been subpoenaed up until 1:30 p.m. Friday, but apparently at that time he left town. Attempts to locate Mr. Faerber, Friday afternoon and evening and all day Saturday were unsuccessful. Thus, Mr. Suarez was precluded from calling Mr. Faerber and presenting his deficiencies in performance. Mr. Suarez's repeated requests for a continuance until such time as Mr. Faerber could be found were denied.

In Rose v. Palm Beach County, 361 So. 2d 135, 137-38 (Fla. 1978), this Court held:

> We agree with respondent that the responsibility for the adequate and efficient prosecution of violations of law is a matter lying with the policy-making branches of

government. But where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements. We agree with petitioner that this situation involves the right of an accused to compulsory process against witnesses.

Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

But the courts find themselves in the position of one who must play the dual role of being both a referee and a partisan participant in an athletic contest. Like the other two branches, the judiciary is interested in preserving its prerogatives and may sometimes be in an adversary position, vis-a-vis the other branches, with regard to the ongoing contest over governmental power. Yet it is the judiciary that must decide upon the ultimate delineation of power. The doctrine of inherent power should be invoked only in situations of clear necessity. the courts' zeal in the protection of their prerogatives must not lead them to invade areas of responsibility confided to the other two branches. Accordingly, it is with extreme caution that this Court approaches the issue of the power of trial courts to

order payments by local governments for expenditures deemed essential to the fair administration of justice. The same extreme caution should be used by trial courts in seeking solutions to practical administrative problems that have not been resolved or provided for by the Legislature.

Footnote 6 provided:

> If the separation of powers is to be maintained, it is essential that the judicial branch of government not be throttled by either the legislative or administrative branches, and that the courts be empowered to mandate what is reasonably necessary to discharge their duties." McAfee v. State ex rel. Stodola, 258 Ind. 677, 681, 284 N.E.2d 778, 782 (Ind. 1972).
>
> . . . [T]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent branch of our Government. Commonwealth ex rel. Carroll v. Tate, 442 Pa. 45, 52, 274 A.2d 193, 197 (1971).

Id. at 137. Footnote 7 provided:

> It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court. Courts from time immemorial have been the refuge of those who have been aggrieved and oppressed by official and arbitrary actions under the guise of governmental authority. It is the protector of those oppressed by unwarranted official acts under the assumption of authority. Our sense of justice tells us that a court is not free if it is under financial pressure, whether it

> be from a city council or other legislative body, in the consideration of the rights of some individual who is affected by some alleged autocratic or unauthorized official action of such a body. One who controls the purse strings can control how tightly those purse strings are drawn, and the very existence of a dependent. Justice, as well as the security of human rights and the safety of free institutions requires freedom of action of courts in hearing cases of those aggrieved by official actions, to their injury. Carlson, et al. v. State ex rel. Stodola, 247 Ind. 631, 633-634, 220 N.E.2d 532, 533-534 (Ind. 1966).

Id. at 137-38. Footnote 8 provided:

> It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise, it is recreant to the trust reposed in it by the people. State ex rel. Schneider v. Cunningham, 39 Mont. 165, 168, 101 P.962, 963 (Mont. 1909).

Id. at 138.

Here the circuit court should have granted the leave to amend and the continuance even if that meant that a stay of execution was also necessary. Furthermore, this Court similarly should have exercised its inherent power to insure that Mr. Suarez's fundamental right to due process of law were honored and preserved. Because neither the circuit court nor this Court intervened the order denying relief must be vacated. Mr. Suarez was denied his right to counsel; he was denied his right to fully and fairly present his claims in his court, he was denied his right to reasonable notice; he was denied his right to compulsory

process; he was denied a full and fair hearing; in sum, he was denied his right to due process under the fourteenth amendment. The proceedings below and resulting order below must be vacated, and Mr. Suarez must be given an opportunity to amend his 3.850 motion and to adequately prepare for the evidentiary hearing which is required.

## ISSUE XXV

### THE APPLICATION OF RULE 3.851 TO MR. SUAREZ'S CASE VIOLATED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHT TO UNIMPEDED ACCESS TO THE COURTS.

The Governor of Florida signed a death warrant against Mr. Suarez on April 21, 1988, and Mr. Suarez's execution is presently scheduled for June 22, 1988. Under Rule 3.851 Mr. Suarez's pleadings therefore had to be filed by May 23, 1988. However, under the two-year time limitation provision of Rule 3.850, Mr. Suarez had until June 9, 1988, to file for post-conviction relief. The signing of Mr. Suarez's death warrant accelerated the time within which he must file for post-conviction relief by seventeen (17) days. Unlike all of the other more than 32,000 inmates sentenced by Florida courts who have two years from final judgment to bring such actions, Mr. Suarez was arbitrarily deprived of the time remaining in which he could timely file under Rule 3.850. This acceleration was unreasonable and furthered no legitimate state interest. To the contrary, it

impeded Mr. Suarez's right to properly investigate, research, prepare, and present a Rule 3.850 motion, particularly since counsel provided for by statute had competing and conflicting demands on his time and which caused him to plan on using those seventeen days to prepare and complete the 3.850 motion. As the Florida Supreme Court has recognized, Rule 3.850 proceedings are governed by due process principles. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). The timing of the litigation of Mr. Suarez's post-conviction actions, however, has now been dictated by the Governor, a non-judicial officer and a party opponent, through the signing of a death warrant. Due process and equal protection do not countenance such a result.

The Governor's stated policy for issuing warrants as soon and as frequently as possible is to "keep the pressure on" capital defense attorneys. Rule 3.851, under these circumstances, indeed creates a pressure-cooker atmosphere. The Florida Supreme Court, however, through the creation and implementation of Rule 3.851, could not have intended that the State receive a windfall benefit, or that the inmate suffer a significant detriment -- the arbitrary acceleration of the litigation of this action is a substantial detriment to Mr. Suarez, as is the arbitrary deprivation of seventeen days from the time allotted for the filing of a Rule 3.850 motion; both benefit the State at Mr. Suarez's expense. No rule of criminal

procedure could possibly be interpreted as an attempt by the Court to provide a strategic advantage to one of a controversy's litigants. (In this case, not only does Rule 3.851 provide the state's executive with such a strategic advantage, but it has allowed the executive [a party opponent] to specifically determine the timing of this action.) Indeed, the Court's rationale was that Rule 3.851 "[was] necessary to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So. 2d 320, 321 (Fla. 1987)(emphasis added). The arbitrary and discriminatory acceleration of the filing requirements applicable to Mr. Suarez's case, however, denied that very right to "orderly access to the courts," and disrupted precisely the order sought by the Florida Supreme Court. Cf. Davis v. Dugger, 829 F.2d 1513, 1521 (11th Cir. 1987)(Dismissal of habeas petition reversed and case remanded, because "[i]t was . . . the scheduling of petitioner's execution . . . that both made petitioner's delay unreasonable and created the prejudice that respondent contends justified the district court's [dismissal] of the habeas petition . . . [P]rejudice must be due to the petitioner's delay and not to some other factor . . ." (emphasis in original)); see also id. at 1520 ("[I]t would be anomalous to hold that pursuit of collateral relief within the two-year statutory limitations period in Florida might

nevertheless constitute unreasonable delay . . .").

Undersigned counsel's office has in the past and will continue in the future to inform the courts of the hardships required to meet its statutory responsibilities and to comply with the stringent timing rules governing capital cases, both under and not under death warrant. During the time CCR was preparing the 3.850 motion, the agency was responsible for nine active death warrant cases (although volunteer counsel from outside the agency had accepted responsibility for three cases, in those cases CCR still had to assist). Five of the six cases that were handled exclusively by CCR had their pleadings due under Rule 3.851 within a two-week period: the other case did not come within the scope of Rule 3.851 (a writ of habeas corpus was filed in federal court in that case a week before Mr. Suarez's 3.850 motion). During the previous two months, CCR had also been responsible for seven other death warrant cases, these adversely affected CCR's ability to prepare Mr. Suarez's 3.850 motion in advance of its due date.

Above and beyond CCR's <u>sole</u> responsibility for death warrants, CCR is now required to file, with ever-increasing frequency, the numerous non-warrant Rule 3.850 motions which become due on a regular basis under the limitation provisions of Rule 3.850. In all of these cases investigation and research is required, in addition to the requirement that an attorney review

and become familiar with extensive records. These extraordinary conditions comprise the context in which counsel attempts to keep up with the relatively "normal" scheduling of motions, briefs, and hearings, in dozens of state and federal courts. For obvious reasons, the unnecessary acceleration of a case, unforeseen, on counsel's already untenable docket makes any professional and effective level of representation almost impossible. CCR must continually juggle all its active cases and the competing demands on its time. On a moments notice, CCR must remain prepared for the Governor to suddenly activate new cases, toss them CCR's way, and require CCR to keep juggling without missing a beat. Here, warning was not provided that nine warrants would be signed --the warrants simply struck like lightning. Mr. Suarez's counsel was simply required to squeeze his case in, making time to complete the filings due pursuant to Rule 3.851.

Rule 3.851 provides:

> Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period, . . . .

This rule, to the extent that it grants to the Governor of Florida, a non-judicial officer, and a party opponent, the ability to curtail access to the courts by shortening the two-year period in which a Rule 3.850 motion may be filed is

unconstitutional. Moreover, the facts supporting a post-conviction claim for relief cannot become known unless the case is adequately investigated. A case cannot be adequately investigated when counsel's duties are made impossible to fulfill, or where, as here, a death warrant is arbitrarily signed.

The United States Supreme Court in a long line of cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), recognized the right of convicted inmates to unrestricted access to the courts in order to use established avenues for seeking post-conviction relief.

In Lane v. Brown, 372 U.S. 477 (1963), the United States Supreme Court addressed the Indiana post-conviction procedure which authorized an appeal to the Indiana Supreme Court from the denial of a writ of error coram nobis. The appeal, however, was dependent upon the filing with the Indiana Supreme Court of a trial transcript -- in fact this was a jurisdictional requirement. An indigent petitioner could only get a transcript for purposes of meeting the jurisdictional requirement if the state public defender believed there was merit in the appeal and agreed to direct that the transcript be prepared and sent to the Supreme Court. The United States Supreme Court struck this procedure down saying: "The provision before us confers upon a state officer outside the judicial system power to take from an

indigent all hope of any appeal at all." 372 U.S. at 485.

Three years later in Rinaldi v. Yeager, 384 U.S. 305 (1966), the Court addressed the constitutionality of a New Jersey provision which authorized the withholding of prison pay from an unsuccessful indigent appellant in order to recoup the cost of the appeal. In striking the provision down the Court pronounced: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The Court again discussed the Griffin progeny in Bounds v. Smith, 430 U.S. 817 (1977). There the question was an inmate's right to a law library or legal assistance. The Court's opinion observed: "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. at 821. Implicit in the Court's reasoning was the notion that Griffin and its progeny are founded upon the fundamental right to court access and thus that under either substantive due process or equal protection analyses distinctions between individuals and/or groups must withstand strict scrutiny.

The United States Supreme Court has thus made it very clear that although a state is not required to provide inmates with a procedure for seeking post-conviction relief, where such a

procedure has been established there arises the fundamental right of access to the courts in order to take advantage of it. Distinctions that are made between those who would seek relief cannot impede open and free access: there must be equal access. At issue here, in the application of Rule 3.851 to Mr. Suarez's case, are two distinctions: first, the distinction between the capital defendant and the non-capital defendant; and second, the distinction between the capital defendant under warrant and the capital defendant not under warrant. For Rule 3.851 to be constitutionally applied to deprive Mr. Suarez of any of his remaining time to seek Rule 3.850 relief the distinctions must be shown to be necessary to a compelling state interest. There exists no such interest.

Obviously, the two-year limitation established by Rule 3.850 itself for seeking relief was created to give convictions finality. However, if that was the only consideration, the court could have easily established a one month, or one week, as opposed to a two year limitation. The Court could not but have had another competing concern in mind. This was the realization that time is essential to prepare a Rule 3.850 motion -- time to investigate, to research, and to prepare. Two years is necessary in order to ensure sufficient time for the investigation and the preparation of the pleading. The legislature in creating CCR to assist death row inmates in preparing and presenting Rule 3.850

motions must also have recognized the time, energy, skills, and costs associated with pursuing a Rule 3.850 motion. Rule 3.850 contains no distinction between capital and non-capital movants; the rule applies equally to all. However, the time that the death row inmate has to marshall his resources and prepare his Rule 3.850 motion can without warning be slashed to thirty days. A distinction can arbitrarily be made between one death row inmate and another death row inmate, and between capital and non-capital litigants. The distinction is made by the executive, a party opponent, when he signs a warrant before the two year period to file a Rule 3.850 motion has run. When that occurs, whatever remains of the two year period under Rule 3.850 is automatically converted to thirty days. See Rule 3.851. Mr. Suarez has been denied quite an important portion of that two year period.

In addition, the Governor by signing nine warrants between April 21 and May 6, 1988, a fifteen-day period, placed intolerable burdens upon CCR's resources as the fiscal year was drawing to a close. The signing of the warrants was the heighth of capriciousness. Mr. Suarez was arbitrarily chosen by the Governor to be one of the nine warrant cases litigated by an overtaxed CCR. Nine warrants at once placed intolerable and conflicting demands on CCR's resources at a time when the resources were most vulnerable.

The distinction that the Governor made when he signed a warrant in Mr. Suarez's case along with eight other warrants was in the words of Rinaldi v. Yeager, supra, 384 U.S. 305, "unreasoned". Constitutional error arises when the two year limitation is applied only against the death row inmate but not against the State, when the State is given the power to use 3.851 as a sword. The two year limit in Rule 3.850 represented a balancing which gave to the State a date certain and which created, in return, an obligation on the State to honor that date. Here, the State's executive officer, however, flouted the rule by the arbitrary signing of nine death warrants, and by arbitrarily chosing to sign the warrant Mr. Suarez's warrant along with eight others in order to force CCR to be whip sawed by the thirty day provision contained in Rule 3.851.

To the extent that Rule 3.851 is interpreted to permit the Governor to shorten the two year period established by Rule 3.850, it creates a distinction which, in the words of Lane v. Brown, "confers upon a state officer outside the judicial system [the] power to take from an indigent." In Lane the state officer involved was the public defender, not a party opponent. Even this, however, was not enough -- the Court struck down the statute. Certainly, the application of Rule 3.851 against Mr. Suarez gave to the Governor the power to impede open and equal access to the courts; exactly what has been held time and again

to be improper.

To be constitutional, Rule 3.851 must be construed as only applying to Rule 3.850 motions or writs of habeas corpus which are or may be filed beyond the two year time limit. Its application to those cases in which the two years has not run infringes upon the very right of access to the courts which Rule 3.850's two-year standard sought to protect.

Moreover, due process and equal protection cannot be squared with the fact that although Rule 3.850 provided Mr. Suarez with two years within which to prepare and file a Rule 3.850 motion, the executive was arbitrarily permitted to deny that state-created "liberty interest" through the signing of a death warrant. Cf. Hicks v. Oklahoma, 447 U.S. 343 (1980); Vitek v. Jones, 445 U.S. 480, 488-89 (1980). Rule 3.850's two year limitation was created, in part, to assure the inmates' right to reasonable access to a post-conviction forum. The dictates of Evitts v. Lucey should apply to Mr. Suarez's case and make clear his entitlement to the relief sought herein:

> [W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause.

469 U.S. 387, 401 (1985); see also Johnson v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). The Governor's arbitrary action in this case violated the very test

of due process which the United States Supreme Court made mandatory in such instances -- i.e., Mr. Suarez was deprived of "a reasonable opportunity" to have his claims fairly presented to, and heard and determined by the state courts. See Michael v. Louisiana, 350 U.S. 91, 93 (1953); Reece v. Georgia, 350 U.S. 85 (1955). Finally, due process was violated because this case involves a classic example of "interference by [State] officials" -- i.e., the Governor -- which impeded Mr. Suarez's rights to full and fair access to courts. Cf. Brown v. Allen, 344 U.S. 443, 486 (1953), quoted in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

As the en banc Eleventh Circuit Court of Appeals stated in Spencer v. Kemp, 781 F.2d 1458, 1470 (1986):

> [A] state procedural rule that is facially valid and has been consistently followed by the state courts will not preclude review of federal claims where its application in a particular case does not satisfy constitutional requirements of due process of law. Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

Here, the Governor's stated purpose has been to "keep the pressure on" the capital defense attorneys. Mr. Suarez was denied the protections of Rule 3.850 through the arbitrary actions of the state's executive -- actions whose purposes (keeping the pressure on attorneys) have no relationship to any legitimate and constitutionally recognized state interest, but

which have nevertheless impeded and restricted Mr. Suarez's rights to due process, equal protection, and reasonable access to courts, and which have arbitrarily deprived him of the liberty interest created by Rule 3.850. All parties must be required to honor the two year limit established by Rule 3.850.

As noted, Mr. Suarez's Rule 3.850 motion was not due before June 9, 1988, until his death warrant was signed. After the signing of a death warrant against Mr. Suarez on April 21, 1988, which advanced this due date to May 23, 1988, Mr. Suarez's counsel took the initial steps necessary for his representation. Considering the crisis-posture CCR was placed in by the Governor's action in signing eight other death warrants in a fifteen day period as well as the other fiscal difficulties CCR was enduring as the fiscal year draws to a close, it was clear that the interests served by Rules 3.850 and 3.851 would be rendered illusory unless the circuit court granted a stay and adequate time to amend his pleading and prepare for hearing. The circuit court had inherent power under Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978) to act in order to safeguard Mr. Suarez's fundamental rights.

Similarly, this Court is faced with a situation in which the system has broken down. Certainly the Governor has power to sign death warrants under Florida law. However, just as clearly where the Governor uses that power in such a way as to overwhelm the

courts or to restrict fundamental rights, this Court may invoke its inherent power to insure the proper administration of justice. For example, the Governor's power to sign warrants appears unlimited. Under the law, would it be proper for him to sign thirty warrants a month, even if the effect was to overload the court with cases being filed pursuant to Rule 3.851? The answer is no where the Governor's action would defeat fundamental rights or conflict with the proper administration of justice. In such a situation this Court holding in Rose makes clear that the Court would have inherent power to automatically stay warrants in excess of the number this Court could reasonably handle. Similarly, this Court has the inherent power to act in order to insure that each death row inmate receives his right to counsel and court access. In the present case, this Court should reverse the lower court's ruling that the exercise of the inherent power discussed in Rose "would undermine and pre-empt the Governor's authority to sign a death warrant after the [Mr. Suarez's] petitions have been ruled upon, though prior to the expiration of two years." Order, p. 2. Further, this Court should invoke its own inherent power, reverse, remand and allow Mr. Suarez the opportunity to fully and fairly litigate his claims pursuant to the rights and procedure established by law.

## ISSUE XXVI

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.

Given the time constraints imposed by the failure to receive the court's order and transcript, counsel is unable to further brief this issue at this time.

## ISSUE XXVII

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 IMPRISONMENT SINCE THE OFFENSE IS INDISTINGUISHABLE FROM THE NORM OF CAPITAL FELONIES.

This issue arises from Mr. Suarez's petition for habeas corpus relief. The State has set forth its response. The question that remains is 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).

> 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. Mr. Suarez was denied even-handed appellate review.

> Given the imprecision of the criteria set forth in our capital punishment statute [this Court] must test for reasoned judgement 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, e.g., 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 will not here be repeated since they have been adequately set out in other parts of this brief. What must be said, however, is that Mr. Suarez's case cannot legitimately be set apart from the norm of capital felonies based on his having shot a law enforcement officer. This Court should focus on how little reflection if any must have preceded Mr. Suarez's act. The tragic event unfolded rapidly. Mr. Suarez asserted that his response was reflexive. There was no time to plan or ponder one's conduct. A comparison of Mr. Suarez's purported premeditated conduct with that of other defendants demonstrates that his culpability is relatively far less. The State in its response failed to address two recent decisions of this Court implicitly illustrate how extreme an accused's

behavior must be before a death sentence is warranted.

In Collier v. State, No. 70,297 (Fla. April 7, 1988), the defendant and her lover conspired to kill her husband. This was Ms. Caillier's second effort to do so. The murder was committed in part for financial gain since Ms. Caillier stood to profit as the sole beneficiary on an insurance policy and the recipient of her husband's large bank deposit. The murder was also a cold, calculated and premeditated one. This Court remanded Ms. Caillier's case for resentencing to life primarily because her boyfriend, who committed the actual murder, but who later acted as a State's witness, received a life sentence.

In Lloyd v. State, No. 65,631 (Fla. March 17, 1988), the defendant, apparently as a contract killer, 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 only mitigating circumstance present was that the defendant had 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)(reversal of a jury override where the trial court had foudn five aggravating, reduced to two by this Court, and no mitigating circumstances).

The even-handed appellate review required by Dixon failed to

operate in the case at bar. Mr. Suarez's conduct, for example, is far less shocking and reprehensible than were the actions of either Caillier or Lloyd. His culpability pales in comparison to theirs, particularly since the time he had to reflect on his conduct compared to Caillier and Lloyd was virtually nonexistent.

When Mr. Suarez's case is properly compared with any others, it is patently clear that his sentence does not, but should, reflect the norm. The State has failed to show how this sentence under Dixon. This Court has a duty to conduct a proportionality review in this case and to reduce Mr. Suarez's sentence. To do nothing would be a violation of Article 1, sections 2, 9 and 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

## ISSUE XXVIII

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 claim has been previously detailed in the petition for habeas corpus relief. The State in its response to Mr. Suarez's claim in this instance asserts that the claim is not cognizable on habeas review since the issue was already raised on direct appeal. The latter is true but this claim is cognizable in this post-conviction appeal since the error is based on fundamental grounds. See Johnson v. State, 460 So. 2d 954, 958 (Fla. 5th DCA

1984); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986); Carter v. State, 469 So. 2d 194, 195-96 (Fla. 2d DCA 1985).

ISSUE XXIX

MR. SUAREZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue was addressed as Claim XV in the Rule 3.850 motion to vacate judgment and sentence filed in the circuit court. In light of the fact that the court granted a limited evidentiary hearing as to this issue and no transcript has yet been received, counsel is unable to brief the issues before the Court regarding this issue. Further briefing will be provided as soon as counsel has received the transcript and had a chance to review it.

ISSUE XXX

THE STATE'S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. SUAREZ'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was addressed as Claim XVI in the Rule 3.850 motion to vacate judgment and sentence filed in the circuit court. In light of the fact that the court granted a limited evidentiary hearing as to this issue and no transcript has yet

been received, counsel is unable to brief the issues before the Court regarding this issue. Further briefing will be provided as soon as counsel has received the transcript and had a chance to review it.

## CONCLUSION

Based on the foregoing discussion, Mr. Suarez urges that the Court enter an order staying his execution, reverse the proceedings below and order new proceedings before another duly assigned judge, grant the post-conviction relief sought herein, and grant all other and further relief which the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been served by (U.S. MAIL) (HAND DELIVERY) to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Tramell Building, 1313 Tampa Street, Tampa, FL 33602, this 10th day of June, 1988.

Attorney