IN THE SUPREME COURT OF FLORIDA

CASE NO. **74,201**

JAMES ROGER HUFF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT COURT, IN AND FOR SUMTER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

JULIE D. NAYLOR
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COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Huff's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. **3.850**. The circuit court summarily denied Mr. Huff's claims, without an evidentiary hearing.

Citations in this brief shall be as follows: The record on direct appeal shall be referred to as **"R. ___."** The record on appeal from the denial of the Rule **3.850** motion shall be referred to as "M. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Huff has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Huff through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

A. INTRODUCTION

A Motion to Vacate Judgments of Conviction and Sentences was filed in this case pursuant to Rule 3.850, Fla. R. Crim. P. Ten issues were pled and briefed before the circuit court, and an evidentiary hearing was requested on many of those claims. However, the circuit court summarily denied Mr. Huff's Motion to Vacate Judgments and Sentences, without even the benefit of a State's response. The files and records here do not conclusively show that Mr. Huff is entitled to no relief, and so an evidentiary hearing was and is more than proper.

In its Orders denying Mr. Huff's Motion to Vacate Judgments and Sentences, the circuit court committed a number of errors and erred in its ultimate disposition of Mr. Huff's claims. The record amply demonstrates Mr. Huff's entitlement to relief, or at the very least the need for a full and fair hearing in order to allow Mr. Huff to more fully establish his claims.

B. STATEMENT OF THE FACTS

On April 21, 1980, Mr. Huff appeared on the doorstep of a resident of Sumter County, Florida, and reported that he had been driving with his parents when he was flagged down by unknown persons who forced him to drive, at gunpoint, to a remote area. Once there, Mr. Huff was rendered unconscious, and awoke to find his parents dead.

The police were called. A short time later, Mr. Huff was arrested for the murder of his parents. There were no other witnesses to the shooting; the unknown persons were never seriously sought by the police, and were never located.

C. PROCEDURAL HISTORY

Mr. Huff was charged by Indictment with two counts of first degree murder, on June 2, 1980. He was tried before a jury and found guilty on both counts on November 1, 1980. A penalty phase was conducted on November 3, 1980, the jury recommending death on both counts. On November 6, after the judicial sentencing proceeding, the trial court imposed two sentences of death.

Both the judgments of guilt and the sentences of death were reversed by this Court on direct appeal, on the basis of prosecutorial misconduct. This misconduct arose from the State's closing argument during the guilt phase when the prosecutor implied that Mr. Huff had forged his father's name to a guarantee agreement; in fact, there was no evidence concerning the forgery of documents. Huff v. State, 437 So. 2d 1087 (Fla. 1983).

A new trial was conducted from May 1 to June 1, 1984. The jury returned a verdict of guilty on both counts on June 1, 1984. Mr. Huff was sentenced to death by the circuit court. These new sentences of death were upheld by this Court on direct appeal. Huff v. State, 495 So. 2d 145 (Fla. 1986).

On December 2, 1988, Mr. Huff filed a verified Motion to Vacate Judgments and Sentences with Special Request for Leave to

Amend, pursuant to Rule 3.850, Fla. R. Crim. P. (M. 9-115). The Circuit Court entered an Order Striking Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend, without prejudice, on February 29, 1989 (M. 118). Filed with the Motion to Vacate on December 2, 1988 was a Motion to Admit Counsel Pro Hac Vice (M. 1-3). The Order entered on February 29, 1989, did not deny the Motion to Admit Counsel Pro Hac Vice, but struck the Motion to Vacate on the basis that one of Mr. Huff's attorneys, Julie D. Naylor, was not admitted to practice law in the State of Florida.[1]

On March 14, 1989, Mr. Huff re-filed his Motion to Vacate Judgments and Sentences, signed only by Mr. Spalding (M. 119-199), and also a Motion for Rehearing (M. 208-219). This motion for rehearing set forth the reasons why the circuit court's Order striking the Rule 3.850 motion was in error.

On March 16, 1989, the circuit court entered its summary Order, denying the previous Motion for Rehearing (M. 220). On that same day, the circuit court summarily entered an Order Denying Motion filed Pursuant to Florida Rules of Criminal Procedure 3.850 (M. 221-28). Attached to that Order was the

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[1]The other attorney of record in Mr. Huff's case is Mr. Larry Helm Spalding, the Florida Capital Collateral Representative, and a member in good standing of the Florida Bar. Since the original filing of the motion to vacate, undersigned counsel (Julie Naylor) has been admitted to the Florida Bar and is a member in good standing.

Mandate of the Supreme Court of Florida, the circuit court Judgment of guilty entered on June 1, 1984, and the Sentence of the Circuit Court entered on June 2, 1984.

A Motion for Rehearing was filed on March 31, 1989 (M. 250-57). This Motion for Rehearing was also summarily denied on April 4, 1989 (M. 258). A Notice of Appeal was thereafter duly filed (M. 261), and the case is now before this Court for review.

It should be noted that the only response that the State has filed to any of Mr. Huff's pleadings is a Response to Defendant's Motion for Costs (M. 229-30). No evidentiary or other in-court proceedings were allowed by the lower court.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN STRIKING MR. HUFF'S MOTION TO VACATE JUDGMENTS AND SENTENCES AS UNTIMELY FILED.

I. INTRODUCTION

Mr. Huff filed his verified Motion to Vacate Judgments and Sentences with Special Request for Leave to Amend pursuant to Rule 3.850, Fla. R. Crim. P., on December 2, 1988. Also filed was a Motion to Admit Counsel Pro Hac Vice. On February 29, 1989, the circuit court (Edwards, J.) entered his order striking Mr. Huff's Motion to Vacate, without prejudice, ruling:

> 1. Said Motion was signed by Julie D. Naylor, attempting to represent the defendant, James Roger Huff.
>
> 2. Julie D. Naylor is not an attorney authorized to practice law in the State of

> Florida as evidenced by the MOTION TO ADMIT COUNSEL PRO HAC VICE filed by Larry Helm Spalding and the AFFIRMATION IN SUPPORT OF PRO HAC VICE APPLICATION signed by Julie D. Naylor.

(M. 118).

Thereafter, Mr. Huff re-filed his Motion to Vacate Judgment and Sentence With Special Request for Leave to Amend, signed by Larry Helm Spalding, the Director of the Office of the Capital Collateral Representative, and a longstanding member of the Florida Bar, whose name had also appeared on the originally filed Motion to Vacate. On March 16, 1989, Judge Edwards entered an order denying this motion. In that Order, Judge Edwards stated:

> 3. That an attempted MOTION TO VACATE JUDGMENT AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND was filed in this cause dated 2 December, 1988 said date being more than two years after the Judgment and Sentence became final.
>
> 4. That this Court, by Order dated 27th day of February, 1989 struck said motion as being a nullity.

(R. 221). The Order goes on to deny the refiled Rule 3.850 Motion to Vacate because "the prisoner is entitled to no relief under this Rule." (Id.). It is thus not clear whether the Motion to Vacate was denied for lack of timeliness, or for lack of merit. Additionally, there has never been a State's response to any of Mr. Huff's motions,[2] therefore the State's position on

[2]The sole exception is the State's objection to Mr. Huff's motion for costs (R. 229-30).

this issue is unknown.

To the extent that the circuit court denied Mr. Huff's Motion to Vacate on untimeliness grounds, the court was in error. This case should therefore be remanded for a proper initial ruling on the motion by the lower court.

II. THE COURT ERRED IN STRIKING THE MOTION ON THE BASIS THAT IT WAS SIGNED BY JULIE D. NAYLOR

Florida Statute 454.021, provides as follows:

> (1) Admissions of attorneys and counselors to practice law in the state is hereby declared to be a judicial function.
>
> (2) The Supreme Court of Florida, being the highest court of said state, is the proper court to govern and regulate admissions of attorneys and counselors to practice law in said state.

Rule 9.440, Rules of Appellate Procedure, provides in part as follows:

> (a) Foreign Attorneys. Attorneys who are members in good standing of the bar of another jurisdiction may be permitted to appear in a proceeding if a motion to appear has been granted.

Also, Rule 1-3.2(a), Rules Regulating the Florida Bar, provides that a "practicing attorney of another state, in good standing, who has professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business upon such conditions as the court deems appropriate under the circumstances of the case." The lower court never ruled that undersigned counsel was not qualified to or otherwise should not be allowed to appear on a pro hac vice basis.

Moreover, Mr. Spalding, a member in good standing of the Florida Bar, was also counsel of record.

The order striking the motion to vacate did not specifically deny the motion to admit counsel pro hac vice. As this Court is aware, pro hac vice motions have been routinely granted by circuit courts as well as by this Court in death penalty cases in Florida. Looking only at the Fifth Judicial Circuit, pro hac vice motions were granted on behalf of CCR counsel in the cases of State v. Hall, State V. Henderson, State v. Routlv, and State v. Lightbourne.

In addition, volunteer counsel from outside the state are routinely admitted to practice in Florida in death penalty cases even when not employed by CCR. See Lishtbourne V. State, 471 So. 2d 27 (Fla. 1985)(Philadelphia); Smith v. State, 457 So. 2d 1380 (Fla. 1984)(New York and District of Columbia); Bundv v. State, 14 F.L.W. 42 (Fla. 1989)(District of Columbia); Cave v. State, 13 F.L.W. 455 (Fla. 1988)(New York); Downs v. Duqqer, 514 So. 2d 1069 (Fla. 1987)(New York): O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984)(New York); Demps v. State, 416 So. 2d 808 (Fla. 1982)(Alabama)); Daugherty V. State, 533 So. 2d 287 (Fla. 1988)(District of Columbia). Indeed, at least half of the capital cases litigated in Florida in post-conviction proceedings since the issuance of State V. Dixon, 283 So. 2d 1 (Fla. 1975), have been litigated by out-of-state counsel. In-state counsel had historically shied from such cases.

At the time of the filing of Mr. Huff's Motion to Vacate, Julie D. Naylor had been admitted in various Florida circuits for the purpose of participating in particular cases.[3] These cases include State v. Rose, Sixth Judicial Circuit, State v. Deaton, Seventeenth Judicial Circuit, State v. Marek, Seventeenth Judicial Circuit, State v. Parker, Eleventh Judicial Circuit, and State v. Johnson, Fourth Judicial Circuit. She had also been admitted pro hac vice by this Court, the Florida Supreme Court, on a number of occasions. See, e.g., Parker v. Dugger, 13 FLW 695 (Fla. 1989); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). This is a unique case, involving the denial of a motion to vacate solely because of perceived problems with a pro hac vice motion. But Mr. Huff had Florida counsel -- Mr. Spalding. In the only case known to counsel in which a pro hac vice motion was denied, the circuit court nevertheless determined the merits of the motion, and this Court then also determined the merits while allowing that same attorney to appear pro hac vice. See Glock v. State, 14 F.L.W. 29 (Fla. 1989).

This Court is well aware of the reasons why pro hac vice representation is necessary in death penalty cases in this state, and, in the interests of brevity, they will not be repeated here.

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[3] On April 18, 1989, Ms. Naylor was admitted to the Florida Bar.

Attached to the Motion for Rehearing in the circuit court (M. 231-236) is a letter prepared by Mr. Larry Helm Spalding, as Capital Collateral Representative, for the Florida Bar in response to an FDLE investigation of CCR. This letter details the impossibility of hiring Florida attorneys (M. 238-249). The circuit court in this case had the authority to grant Ms. Naylor's pro hac vice motion, and never expressed any reason whatsoever why it was disinclined to do so. Since Ms. Naylor has since become a member of the Florida Bar, the pro hac vice issue itself became moot; however, to the extent that the order striking Mr. Huff's motion to vacate was based on the pro hac vice issue, Appellant contends it was error to refuse to grant the motion, and, further, error to strike the Motion to Vacate, which was also filed in the name of Mr. Spalding, a member of the Florida Bar, and also verified by Mr. Huff, who is certainly entitled to file a Rule 3.850 motion pro se.

III. THE CIRCUIT COURT ERRED IN STRIKING THE MOTION TO VACATE AS NULL AND VOID

The motion to vacate was also filed by Larry Helm Spalding, Florida Capital Collateral Representative, as attorney for Mr. Huff. Mr. Spalding is a member of the Florida Bar, in good standing. This alone is sufficient for the filing of a motion to vacate. Also, Mr. Huff signed a verification, verifying that he has personal knowledge of the facts and matters contained in the motion to vacate, and that these facts and matters are true and correct. Even if Ms. Naylor were not allowed to represent Mr.

Huff Mr. Huff is certainly entitled, under the Florida and the United States Constitutions, to file a motion to vacate in this matter, even if such motion is treated as a pro se request for relief.

In any event, the court was incorrect in striking the motion to vacate as null and void, when the Office of the Capital Collateral Representative, through Larry Helm Spalding, was clearly set out on the pleading as counsel of record, and when Mr. Huff is guaranteed the due process right to proceed with a motion to vacate. See Holland v. State, 503 So. 2d 1250 (Fla. 1987).

IV. THE CIRCUIT COURT ERRED IN DENYING THE MOTION TO VACATE AS UNTIMELY

As noted above, in its Order Denying Motion to Vacate filed pursuant to Rule 3.850, the circuit court stated that the Motion to Vacate dated December 2, 1988, was untimely "said date being more than two years after the Judgment and Sentence became final." (M. 221).

The judgments and sentences in this case were entered on June 1 and 2, 1984 (R. 3772-76). The Findings of Fact in support of the death sentences were entered on June 21, 1984 (R. 3788-3804). This Court issued its Mandate on direct appeal, Huff v. State, 495 So. 2d 145 (Fla. 1986), on December 2, 1986.

Florida Rule of Criminal Procedure 3.850 provides that a motion to vacate judgment and sentence must be filed on or before

"two years after the judgment and sentence become[s] final . . . ." This Court has held that the judgment and sentence becomes final either upon the issuance of the mandate after direct appeal or after a petition for writ of certiorari is finally determined. See Burr v. State, 518 So. 2d 903 (Fla. 1987).

The circuit court's order calculated the two-year deadline of Rule 3.850 as running from October 27, 1986, the date this Court denied Mr. Huff's Petition of Rehearing. However, the circuit court failed to recognize that the two-year deadline runs from the issuance of the mandate, not the date rehearing is denied.

The correctness of Mr. Huff's position is more fully illustrated by the letter sent by the Office of the Clerk of the Supreme Court of Florida to Mr. Huff, a letter upon which Mr. Huff and his counsel relied. That letter, dated August 2, 1988, informed Mr. Huff:

> The final disposition of your initial appeal (after retrial) was made on December 2, 1986, when this Court issued our Mandate since no petition for writ of certiorari was filed with the United States Supreme Court. Pursuant to Florida Rules of Criminal Procedure 3.850 you have two years from final disposition in which to file a motion for post conviction relief. Your motion should be filed with the circuit court on or before December 2, 1988.

Mr. Huff's Motion to Vacate was timely filed on December 2, 1988. It was clearly timely. Whether treated as a pro se filing, or

the filing of a pleading by a death row individual represented by the Office of the Capital Collateral Representative, the Motion to Vacate should not have been struck as untimely when it was clearly timely. The circuit court's orders to the contrary should be reversed, and Mr. Huff's case remanded for a proper initial ruling on the merits and proper findings from the circuit court, findings which this Court does not have because of the circuit court's erroneous procedural rulings. By its actions in summarily denying Mr. Huff's Motion to Vacate as untimely, by denying Mr. Huff's attorney admission pro hac vice, and by summarily denying Mr. Huff all relief without a state's reponse or an evidentiary hearing, the circuit court judge has indicated his bias against Mr. Huff. Mr. Huff therefore requests that, in the event his case is remanded to circuit court, that the court direct that it be assigned to a judge other than Judge Edwards. See Stevens v. State, 14 F.L.W. 513, 515 (Fla. Oct. 5, 1989).

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. HUFF'S MOTION TO VACATE WITHOUT A STATE'S RESPONSE AND WITHOUT AN EVIDENTIARY HEARING, AND THE RULE 3.850 COURT'S SUMMARY DENIAL OF THE MOTION WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477

So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Huff's Motion alleged facts which, if proven, would entitle him to relief. The files and records did not "conclusively show that he is entitled to no relief," and the trial court's summary denial of the motion, without an evidentiary hearing, was therefore erroneous.

Mr. Huff's verified Rule 3.850 Motion alleged and supported extensive non-record facts in support of claims which have traditionally been raised by sworn allegations in Rule 3.850 post-conviction proceedings and tested through evidentiary hearings. Mr. Huff is entitled to an evidentiary hearing with respect to his claims, unless the files and records in the case conclusively show that he will necessarily lose on each claim. In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief. . . " Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper. Those portions of the record which were attached to the trial court's order here (the Mandate of the Supreme Court of Florida, and the Judgments and Sentences) in no way refuted or rebutted Mr. Huff's sworn and supported allegations, and an evidentiary hearing was and is therefore proper.

Mr. Huff's claims are of the type classically recognized as issues warranting full and fair Rule 3.850 evidentiary resolution. Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See O'Callaghan, supra; Squires, supra; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Huff's claim that he did not receive a professionally adequate pretrial mental health evaluation is also a traditionally-recognized Rule 3.850 evidentiary claim, see Mason: Sireci; cf. Groover v. State, supra. Numerous other evidentiary claims requiring a full and fair hearing for their proper resolution were also presented by Mr. Huff's Rule 3.850 motion.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). In such circumstances, this Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d 537 (1984); Vaught, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 461 So. 2d 1354 (Fla. 1985); Morgan v. State, 461 So. 2d 1534 (Fla. 1985); Meeks v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982);

Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranso v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Huff was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 Motion was therefore erroneous.

ARGUMENT III

THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HUFF'S CASE: HIS EMOTIONAL STATE PRECLUDED HIM FROM VALIDLY WAIVING THOSE RIGHTS AND GIVING A FREE AND VOLUNTARY CONFESSION, AND HIS COUNSEL DID NOT EFFECTIVELY LITIGATE THE ISSUE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

On April 21, 1980, James Huff appeared at the residence of Francis Foster, in Wildwood, Florida. Mr. Huff was yelling repeatedly for help, and for someone to call the police (R. 652-8), and saying that someone had been killed. Mr. Foster directed his son to call the chief of police (R. 659).

Chief Ed Lynum and Officer Terry Overly arrived at the scene together (R. 678; 793). Chief Lynum asked Mr. Huff what was the problem, and Mr. Huff stated that his parents had been shot and killed (R. 681). Shortly thereafter, Chief Lynum told Officer Overly to place Mr. Huff under arrest (R. 681-2).

Mr. Huff was clearly emotionally distraught when Overly advised him of his rights pursuant to Miranda. The Record is replete with comments concerning Mr. Huff's "hysteria" (R. 790-815; First Trial, R. 1810-39). At a suppression hearing held

prior to the first trial, Officer Overly testified that when he first saw James Huff:

> He was very obviously very upset, and he stated to me that someone had shot his parents and that they were, he just pointed in a direction, lying over in a field, and he pointed in a southeasterly direction.

(First Trial, R. 1817).

When asked if Mr. Huff understood those rights, Officer Overly stated:

> A. He didn't give me a hundred per cent of his attention.
>
> Q. Did he appear to understand what you were saying to him?
>
> A. Not at all times.
>
> Q. At the time that you were reading him his rights and advising him of his rights of Miranda decision, did you stop after each right or read the whole thing and then ask him that question?
>
> A. I would read a line, I would pause...
>
> Q. What was the purpose for your pausing?
>
> A. I would pause so that he could more clearly understand, the Miranda rights.
>
> Q. And did he give any indication on each of those pauses whether or not he was understanding?
>
> A. No, the only time I asked him if he understood was at the end of reading him his rights.
>
> Q. And what answer, if any, did he give when you asked if he understood those rights?

A. He said 'yeah'.

Q. Did he appear to be cognizant of what was going on about him at that time?

A. Not all times, while I was reading the rights, I had to constantly get his attention.

Q. Did you re-read any of the rights to him?

A. I don't recollect, there might have been one or two lines that I might have read to him twice, to make sure he understood.

Q. What would your reason be for reading a line twice to him?

A. Make sure he understood.

Q. Did you satisfy yourself that he understood each line before moving to the next?

A. Let me state something. At this time, I realized that the subject wasn't my subject. Okay. It was out of the jurisdiction of the Wildwood City limits, and he wasn't my subject. It belonged to the Sheriff's office, as far as I was concerned. But, I did this just as a routine part of doing my job. I wasn't...I did my best to try and make him understand, but the man was, he was rambling on and he was very excited and it was very difficult ...

Q. ...was he speaking while you were advising him of his rights?

A. Yes. He was sobbing and complainins, well, not complainins, he kept talking about his parents and what had transpired.

Q. What was he saying about his parents and what had transpired?

A. That what he kept repeating, was somebody had shot them, and kept asking me what condition they were in, and stuff like this.

(First Trial, R. 1823-24).

Officer Overly continued:

A. Just like I stated to you before. Okay. Just, like I said, you know, I can't read the man's mind. I don't know if he understood or not. All I know is, is I read him his rights. It's up to the individual. Like I said. I'm just a policeman. I just, you know, I just read him his rights, and I don't know if he understood them or not, but that was my job, that's why I did it.

Q. That's correct. But you have made the statement that you didn't think he understood them, and that is what I'm trying to find out.

A. I didn't say that he, I, he understood what they were about. When I told him that, I mentioned, he seemed like he knew, had seen on TV and knew about it and read in different places of media and so forth, that he knew about Miranda rights. I advised him of his rights from Miranda, he should have understood what they were about, that is what the Miranda rights are for, they are for if you want counsel or if you want to remain silent and all that, first thing I read off was do you want to remain silent. He said 'yes' to me and when he said 'yes' I just felt in my mind that he acknowledged them. As far as understanding them a hundred percent of what I said to him, I don't think he was listening to me the whole time, I think he more less said 'yes' to more less just to, so called shine me on, so I would quit botherins him. He didn't want to talk to me about anything.

Q. Last night you told me that you didn't think he understood his rights. Were you being honest with me then?

A. When I was speaking at this time, I had a crowd of about thirty or forty people around me. I was busy. I was at work. It is not the greatest atmosphere in the world to recollect things. At that time, if that is what I said, you know, yes, I probably said that at that time.

Q. You acknowledge that you did --were you being honest with me last night when you told me that?

A. At that time, I felt I was being honest, yes. I always try to tell the truth and I try to be honest. Things might, you know, slip my mind or something like that, but I would never flagrantly lie or flagrantly not tell the truth.

(First Trial, R. 1834-35)(emphasis added).

Even though he ultimately said Mr. Huff "understood his rights" it is clear that Officer Overly had serious reservations about Mr. Huff's ability to understand and therefore his capacity **"knowingly"** to waive any of the rights guaranteed under Miranda. Of course, the officer's ultimate opinion as to whether Mr. Huff understood is not controlling. The facts must clearly and unequivocally establish a knowing, intelligent, and voluntary waiver. The government bears the burden of proof that the waiver was valid. Defense counsel, however, failed in the responsibility to effectively litigate this issue.

Some four years later, during the retrial of Mr. Huff, Officer Overly's opinion was still guarded:

But like I said, in my memory, all I remember is him being in the back seat of my car, very

confused and more concerned with the condition of his parents.

(R. 805-6).

Q Mr. Overly, I think you reviewed the statement that you made or that Mr. Brown has shown to you that you gave to Mr. Kelly of the State Attorney's Office some eight days after the incident. And during your testimony there you said that the Defendant appeared to be hysterical, crying, confused, very upset about the condition of his parents: is that true?

A That's true.

Q And do you remember today that he was also very upset, confused, hysterical?

A That's true today.

Q Now, isn't it true that upon reflection over these four years and upon that reflection and you not being in a police uniform you have some -- Let me put it this way. You don't lean towards the police point of view?

A Not at all.

Q And upon reflection over the four years is it your opinion now that the man seated over here did not understand his rights because of the condition that he was in, being hysterical, worried about his parents and crying, things of that nature?

A I just can't say that he understood his rights.

(R. 808)(emphasis added). Obviously, under the officer's later testimony, it is clear that there was no **"understanding"** and intelligent waiver.

Mr. Huff was emotionally upset at the time of **his** interrogation by the police. This **"confused"** (R. 805),

"hysterical" (R. 808), condition made it impossible for him to freely and deliberately, and without coercion, knowingly, intelligently, and voluntarily waive his constitutional right to silence.

The inquiry into the validity of a waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141 (1986). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surroundins that case, including the backqround. experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); see Miranda, 384 U.S. at 475, 86 S.Ct. at 1628 (applying Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor. But here the accused's mental state was never properly investigated by trial counsel.

In Mr. Huff's case his ability to rationally and understandingly waive his rights to silence and counsel should have been evaluated at the time of trial. Counsel, however, sought no mental health assistance whatsoever on the issue. Neither did counsel properly bring the issue to the trial court's attention when the officer testified at the second trial that he could not say that Mr. Huff understood his rights, given his emotional state. Given the particular importance of the statement, a statement made during a time of extreme emotional shock, counsel's failure to have him competently evaluated was prejudicially deficient performance. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

When evaluated by Dr. Krop during post-conviction proceedings, some eight years after the trial, Dr. Krop still noted that:

> Mr. Huff had considerable emotional difficulty when talking about his parents
> . . .

(Motion to Vacate, Att. 3). Dr. Krop could not conclude, given the facts, that Mr. Huff had the ability to comprehend or knowingly waive anything at the time approximate to the offense (Id.). Counsel's failure to seek expert assistance denied Mr. Huff a proper evaluation of the issue when it would have counted -- at the time of the original proceedings. At a minimum, "[t]he inability to gauge the effect of this omission undermine[s] the

court's confidence in the outcome [of the proceedings.]" State v. Michael, 530 So. 2d 929, 930 (Fla. 1988).

Moreover, Officer Overly testified that Mr. Huff in fact indicated a desire to invoke his right to silence and his right to direct that questioning cease. In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Emphasis added). 384 U.S. at 473-74. This ruling was reaffirmed in Edwards v. Arizona, 451 U.S. 477, 482 (1981), and in Michigan v. Mosley, 423 U.S. 96 (1975). After these rights were asserted, the questioning had to cease. See Owen v. Alabama, 849 F.2d 536 (11th Cir. 1988); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987). To the extent Mr. Huff's assertion of his rights may have been ambiguous, law enforcement was limited solely to questions intended to clarify the assertion. Owens; Christopher. This law enforcement did not do.

In his Rule 3.850 motion, Mr. Huff requested an evidentiary hearing. The circuit court denied the motion, without benefit of an evidentiary hearing, and without even the benefit of a State's response.

On direct appeal, this Court held that Judge Huffstetter was correct in ruling that he was bound by the ruling of the trial

judge in the first trial, since that was "simply [Judge Huffstetter's] way of stating that no new evidence had been presented in this suppression hearing that would require overturning the Huff I holding on this issue." Huff v. State, 495 So. 2d at 149. But new facts were heard at the retrial. And new facts concerning counsel's ineffectiveness were presented by the motion to vacate.

In ruling on the motion to vacate, Judge Edwards had no facts before him with which to conclude that indeed Judge Huffstettler had found no new evidence, or whether, as Judge Huffstetter stated, he merely believed he was bound by the law of the previous case. An evidentiary hearing is necessary. In the alternative, it is clear from Officer Overly's testimony that Mr. Huff did not fully understand his rights under the fifth and sixth amendments. The admission of the statements at trial violated the fifth, sixth, eighth and fourteenth amendments. Remand for an evidentiary hearing and thereafter Rule 3.850 relief are appropriate.

ARGUMENT IV

THE FAILURE TO FULLY ADVISE MR. HUFF OF HIS CONSTITUTIONAL RIGHTS UNDER MIRANDA VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT GUARANTEES, AND MR. HUFF IS ENTITLED TO RELIEF UNDER THIS COURT'S HOLDING IN CASO V. STATE.

In addition to not understanding and rationally waiving the rights that were read to Mr. Huff by Officer Overly, see Miranda v. Arizona, 384 U.S. 436 (1966), Mr. Huff was never properly

informed of his rights at all. The State never established that Mr. Huff had been sufficiently advised of his right to appointed counsel. In fact, Officer Overly never remembered advising Mr. Huff that an attorney would be appointed (First Trial, R. 1821-22).

A full recitation of an accused's rights must be conveyed by the police. Failure to do so may result in the inadmissibility of any subsequent statements. This Court has spoken directly to this issue:

> We hold that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief and Caso's statement in the present case was improperly admitted.

Caso v. State, 524 So. 2d 422, 425 (Fla. 1988). Caso was issued after Mr. Huff's direct appeal. At the time of the direct appeal, the Court relied on its pre-Caso case law. See Alvord v. State, 322 So. 2d 533 (Fla. 1975)(holding that statements may be admitted even if police do not fully advise defendant of right to appointed counsel). Indeed, the State specifically relied on Alvord in its brief on direct appeal (Answer Brief of Appellee, p. 12). However, the Alvord analysis, which this Court applied on Mr. Huff's appeal, was specifically overruled by this Court in Caso: "We therefore receded from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant." 524 So. 2d at 425. Caso is a

change in the law, issued by this Court, and Mr. Huff is entitled to the benefit of the new, proper standard.

In Caso, the defendant had been at work when the police came to ask him to voluntarily accompany them to the station for questioning. Caso did and was advised of his rights via a form which did not contain information about right to appointed counsel. Caso made statements, was released and then later arrested based on the information he had given the police. The Court found that there had been a custodial interrogation and remanded for a new trial based on the incomplete Miranda warnings.

Here the constitutional error is even clearer: Mr. Huff was in custody, but he was not advised that he had a right to appointed counsel if he could not afford one. Moreover it is the State's burden to establish that adequate Miranda warnings were given. Here, the State's witness could not remember whether he had ever even advised Mr. Huff of his right to appointed counsel.

Caso is a fundamental change in the law, and Mr. Huff is entitled to its benefit. Caso establishes that improper and inadequate Miranda warnings were given in this case. This case was not available at the time of Mr. Huff's trials or appeals. The circuit court summarily denied this claim, without comment. This Court should address this claim, and thereafter grant relief.

ARGUMENT V

THE INTRODUCTION OF INCULPATORY STATEMENTS ALLEGEDLY MADE BY MR. HUFF VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

As discussed in Claims III and IV of this brief, Mr Huff, given his mental and emotional state, was incapable at the time of his arrest of understanding and therefore voluntarily waiving his rights under Miranda. However, even if he had been perfectly rational and lucid at the time of interrogation, the introduction of his alleged statement was clearly violative of Miranda: Mr. Huff had invoked his right to silence.

Officer Overly repeatedly testified that Mr. Huff had been "confused" (R. 80), and "hysterical" (R. 806), and provided the following testimony concerning what transpired when he read the Miranda warnings to Mr. Huff:

> [f]irst thing I read off was do you want to remain silent. He said "Yes" to me.

(First Trial, R. 1834). According to Sheriff Johnson's testimony:

> Q At the time you saw the Defendant, what, if anything, did you do to ascertain whether he had already received his Miranda rights?
>
> A When I first drove up to the scene, I started walking towards the officer that was standing outside the car. I didn't know the officer at the time. When I walked towards him, he said, "I have a 10-15 in the car and he's been advised of his rights."
>
> Q Could you tell us, please, what a 10-15 refers to?

A A 10-15 is a prisoner.

Q After having ascertained that there was a prisoner, the Defendant, in the back seat of that Wildwood patrol car and that he had been advised of his rights, did you have occasion to speak with him?

A Yes, sir, I did.

Q Would you please relate to us, to the best of your recollection, everything that Defendant said to you in the course of that conversation?

A I stuck my head inside the car and looked back at him and I asked him -- when I asked him what happened here, he said, "I shot them in the face." And then he put his hands up over his face and he sat like this for quite a while. (indicating) I got in the car then and sat down and I asked him who he shot in the face. And he sat there for quite a while with his hands up over his eyes and face like this (indicating) and I don't -- when he said -- or when I said, "Who did you shoot in the face" again, like I said, he sat there for a while and then he said, "They shot them in the face." And I asked him who "they" were. And he just sat there for a while again also. And he said that, he told me that he was forced off of the road. This was a little later on. I had rolled the window up on the car because some people had come up and was standing outside the car talking and I couldn't hear what was going on. So I rolled the window up in the car and I asked him who "they" were and he said that he was stopped or forced off of the road by a green '72 or '73 Ford and he said one of them came up to the car and forced him to drive down the road. I asked him who "they" were. I asked him what they did with the car, the '72 or '73 green Ford. And he said there were two of them and then he said there were four of them. And I asked him to give me a description and he never did say any more to

> me. He just sat there. But he did tell me that his head was hurting.

(R. 1005-06).

Sheriff Johnson never asked anyone if Mr. Huff had **"waived"** his rights. He merely determined that Mr. Huff had been "advised of his rights." But Mr. Huff did not **"waive"** any right. Instead he asserted his right to remain silent (First Trial, R. 1984). The classic case in this area is Miranda itself. Under Miranda, once a person has asserted his right to silence, further interrogation must cease. Edwards v. Arizona, 451 U.S. 477 (1981); Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975)(interrogation must cease when person in custody "indicates in any manner" that he wishes to remain silent); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987 (following equivocal intention of desire to remain silent, police may only ask questions designed to clarify desire).

When Sheriff Johnson approached Mr. Huff, he did not read him his rights nor did he inquire as to any waiver Mr. Huff may have made. Johnson simply began questioning him and then, at trial, testified as to how Mr. Huff responded. It should be noted that this interrogation was never taped, nor were there any written acknowledgements or waivers of rights signed by Mr. Huff. Cf. Henderson v. State, 463 So. 2d 196 (Fla. 1985). There are no written indicia supporting a waiver here.

This question was part of a broader question of admissibility of the alleged statement raised both at trial and

on direct appeal. As noted previously, Caso has changed the law then applied in Florida. The trial judge allowed the statement to be introduced relying on the previous judge's ruling as "the law of the case." On appeal, the appellant argued that the law of the case doctrine did not apply since the statement was never used in the first trial. Therefore, any ruling by that judge as to its admissibility was moot.

This Court held on direct appeal that the trial court had not erred on this point and yet ruled that an aggravating factor found at the first trial had to be stricken in the second trial, as well as the only mitigating factor, because it was improper for the court to rely on the matters presented in the first trial. Huff v. State, 495 So. 2d 145 (Fla. 1986). If the factfinder is not to consider any evidence from the first trial during the proceedings in the second trial, then clearly he may not consider the question of suppression as it was dealt with in the first trial.

In any event the merits of this issue have never adequately been addressed in light of the proper legal standards. The specific question that needs to be addressed is whether Mr. Huff invoked his right to remain silent when he spoke with Officer Overly and whether he ever waived that right before talking with Sheriff Johnson. The record indicates that he did in fact invoke his right to silence, and that he never waived it. In light of the proper law, an evidentiary hearing is required to properly

resolve this issue. An evidentiary hearing was requested in Mr. Huff's Motion to Vacate, but the motion was summarily denied. This Court should remand for a hearing, or direct that relief be granted.

ARGUMENT VI

JAMES HUFF WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

I. INTRODUCTION: EVALUATING MR. HUFF'S CLAIM

In Strickland v. Washinston, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washinston requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In this motion Mr. Huff pleads each. Given a full and fair evidentiary hearing, he can prove each. He is entitled to present the facts supporting his claim at an adequate evidentiary hearing. The circuit court, however, denied the issue summarily. This Court should allow proper evidentiary resolution.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot,

446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Homer, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client receives

professionally adequate expert mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin V. Wainwright, 723 F.2d 799 (11th Cir. 1984). Here, counsel failed in these areas.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washinston v. Watkins, 655 F.2d 1346, 1355, rehearins denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). A single prejudicial error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washinston, supra; Kimmelman v. Morrison, supra.

Each of the errors committed by Mr. Huff's counsel is sufficient, standing alone, to warrant relief. Each undermines confidence in the fundamental fairness of the proceedings. The allegations were more than sufficient to warrant an evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also, Code v.

Montgomery, 725 F.2d 1316 (11th Cir. 1983). The lower court erred in refusing to conduct one.

11. FACTS

The theory of defense was that Mr. Huff had been rendered unconscious by a man who had gained entrance to Mr. Huff's parents' car, and when he regained consciousness he found that his parents had been shot. The defense then argued that in investigating, the law enforcement officers so contaminated the crime scene that they destroyed the exculpatory evidence of the other man and his companion. To prove this theory, defense counsel cross-examined each law enforcement officer about his activities at the crime scene. As an example, Francis Foster, a civilian, had testified that when he observed the crime scene, Chief Ed Lynum had pulled his private car at least partially into the crime scene (R. 670). However, when Chief Lynum testified, he admitted that there were about five people depicted in a photograph of the crime scene (R. 418-19) in very close proximity to the vehicle in which the apparent murders had taken place (R. 421), but he denied that there was any contamination of the crime scene:

> [CHIEF LYNUM]: Well, I can't say that, you know. But in my experience, I pretty well preserved the crime scene area, the tracks, not the footprints. You couldn't do anything with the footprints.

(R. 731).

Chief Lynum did testify that he had initially parked his car approximately six feet behind the crime scene vehicle (R. **716),** and that he had to back his car up in order for the crime scene to be roped off (R. **731),** but denied that any evidence was lost, or that the crime scene was contaminated (R. **762-3):**

> A. [CHIEF LYNUM]: No. I would say there was no contamination of the crime scene area because I think everything was, you know, as far as preserving the tire tracks, which were all we could really go by that was related to the two bodies and we couldn't tie anything as far as the foot tracks because there were so many there. But these tracks were fresh from the car and tied into the same vehicle. I don't think anything was contaminated. I would say that, no.

(R. 771). Thereafter, the theme of the trial was consistently whether or not the crime scene was contaminated by the many officers and spectators present.

Practically every officer who testified stated that some other officer did something that was not proper preservation of the crime scene, but then denied that the crime scene was contaminated. Chief Lynum testified that one picture depicted Sheriff Johnson apparently walking on a tire tread print (R. **719-20),** and holding a check, from a purse inside the vehicle, in his hands (R. **733),** but denied that any evidence, such as fingerprints or tire tracks were lost (R. **771).**

Sheriff Johnson testified that there were photos of approximately sixteen **(16)** people in the crime scene area, some of whom he could not identify, and that the photos did not depict

a rope which supposedly was arranged to mark off the crime scene area (R. 1013-14).

In addition to unknown people in the crime scene area, Sheriff Johnson testified that a reporter was there, but he would not state how close she was to the crime scene area:

> Q And isn't it a fact that the reporter is some probably six, seven, maybe ten feet from the body of Genevieve Huff?
>
> A I don't know that, sir.
>
> Q Well, I think the jury can see the photograph.
>
> A Yes, sir.

(R. 1011).

> Q Was it the customary practice at the Sumter County Sheriff's Office or at least the customary practice back then when you were sheriff, sworn to uphold the law, protect and preserve -- to serve the people of Sumter County, was it your policy to allow reporters, civilians, into the crime scene area before the crime scene had been what you might say processed by your evidence technicians?
>
> A No, sir.
>
> Q It wasn't your policy; was it?
>
> A No, sir, it wasn't.
>
> Q But, indeed, in the photographs that I showed you, there is a photographer; isn't there?
>
> A Yes, sir. Yes, sir.

(R. 1032). However, on redirect he stated that the crime scene was not contaminated; that the tire track evidence was not

violated, that the bodies were not disturbed and that the vehicle was not contaminated (R. **1094-95).**

Another area in which the defense argued police mishandling involved Mr. Huff's clothes which were removed when he was booked into the jail. His clothes, some of which had blood on them, were all placed in one bag (R. **1727).** The defense argued that the blood from some of the clothes would have gotten on to other of the clothes that they were touching in the bag. Numerous other witnesses testified to similar occurrences. However, the State's witnesses consistently testified, in spite of all these irregularities, that it was a well-investigated crime scene. For example:

> Q [BY DEFENSE COUNSEL]: Okay. Would you say that the investigation was up to the standard that you liked to see with these investigations?
>
> A [MABRY WILLIAMS]: Yes, ma'am. I believe it was a well conducted investigation. I really do.

(R. 1278).

It is beyond dispute that the handling of the crime scene was a critical issue at trial. After the State rested, defense counsel began its presentation. One of the witnesses called was Mr. A.L. White. The State requested that Mr. White's testimony be proffered because it had not deposed him (R. **2425-26).** The trial court allowed this (R. **2427).** Mr. White was called as an expert in the area of crime scene investigation. He testified to his numerous qualifications starting as an officer with the

Kentucky State Police, then as a patrolman with the St. Petersburg Beach Police Department, and then with the St. Petersburg Police Department where he went from a patrolman to an identification technician and was finally promoted to lieutenant in charge of records and identification section. In his 17 years of involvement with law enforcement, Mr. White investigated in excess of 150 felony crime scenes (R. 2428-32), and attended more than 2,000 hours of education (R. 2433). He had also testified as an expert concerning crime scene investigation techniques on at least six occasions (R. 2434).

Mr. White testified that Mr. Huff's attorney had familiarized him with the crime scene in Mr. Huff's case, and that he had been able to look at several photographs depicting the crime scene (R. 2437). From this information, Mr. White testified, in proffer, that in his opinion the crime scene was not properly secured. It would have been proper to barricade the scene, and then completely photograph the scene before anyone disturbed anything (R. 2444-47). He would allow two (2) people at most into the crime scene (R. 2445). He also testified that several things done in the actual investigation were improper, such as driving a private car within 20 feet of the victims' vehicle (R. 2445) and moving things within a vehicle in the crime scene.

At the end of the proffer, the State argued that Mr. White was not competent to testify because the information on which he

based his opinion was insufficient (R. **2455).** After lengthy argument, the trial court ruled that the testimony was inadmissible, stating, **"I** think it's just totally inadequate amalgamation of data to allow any expert, regardless of how knowledgeable he is, to give an opinion" (R. **2479).** Defense counsel then asked what additional data they would need to give Mr. White in order for him to be competent to testify. The court refused to give legal advice (R. 2479-80), and then recessed for the weekend (R. **2481).**

On the next day of the trial, the defense again called Mr. White as a witness. This time, Mr. White had reviewed additional material, including the trial testimony of Investigators Thompson, Williams and Elliott, three police reports, submittal sheets to the lab, a drawing of the crime scene and more photographs (R. **2484-85).** However, on cross-examination, the State brought out that Mr. White had only skimmed much of that material that morning in defense counsel's office, and that he had not been given the complete testimony of the officers, but only partial testimony (R. **2502-03; 2516-17).** The State cross-examined Mr. White extensively concerning the matters he had not reviewed (R. **2518-86; 2598-2605).** Then the State renewed its objection **(R. 2605)** and the court again sustained the objection (R. **2607).**

In short, as this Court's opinion on direct appeal reflects, Mr. White was not allowed to provide an important opinion on a

critical issue at Mr. Huff's trial because defense counsel did not provide him with materials or adequately prepare him. Counsel never took him to (and never asked him to) view the crime scene, although even the jury did that (R. 597). He did not provide him with any depositions of the witnesses, even though depositions of substantially all the witnesses were done prior to both trials, and he did not even provide him with the complete trial testimony of the witnesses called in the State's case, even though this was transcribed as the trial progressed, and at least the majority of it was available.

Had it not been for counsel's failure to prepare this most valuable witness, the jury would have been able to hear testimony on the proper preservation and investigation of the crime scene, and the results of a poorly preserved and investigated crime scene, such as lost and contaminated evidence. This was especially critical since the evidence presented was almost entirely circumstantial, as well as weak. The testimony was clearly admissible as expert testimony. See Buchman v. Seaboard Coastline Railroad Company, 381 So. 2d 229 (Fla. 1980). The expert was just not given enough information, because defense counsel did not act reasonably.

This Court on direct appeal affirmed the circuit court's ruling because Mr. White had not been properly prepared to give any more than "a general critique of proper police practice in processing crime scenes, a collateral and irrelevant issue."

Huff v. State, 495 So. 2d at 148. Effective counsel would have been prepared to properly present this evidence. Reasonably effective counsel would have provided information to the expert. Here, there was no tactical or strategic reason for counsel's omission -- to the contrary, counsel wanted to present the testimony. Moreover, if Mr. White could not be prepared, then defense counsel could have called as a witness his own investigator, who sat through the trial at defense table, and who had investigated the case.

This issue requires an evidentiary hearing. Counsel's ineffectiveness deprived Mr. Huff of the critical expert testimony which would have proved that the State's investigation was considerably less than the "well conducted investigation" alleged by the State. A properly prepared expert could have presented much more than a general critique of proper police practice, and could have illustrated specific errors that resulted in lost or contaminated evidence. For instance, an expert could have testified for the defense about the results of the gunshot residue test. This Court should remand Mr. Huff's case for a full and fair evidentiary hearing on this claim.

Counsel was also ineffective in other respects. He failed to object to Mr. Huff's absence at critical periods of the trial. Mr. Huff was absent from the jury's view of the crime scene (R. 595-99), at a discussion about the admissibility of physical evidence (R. 1616-18), and at a discussion regarding the

presentation of prior testimony (R. 2064-65). None of these were objected to by defense counsel, although each was a critical stage of the proceedings. Indeed, the State itself pointed out Mr. Huff's absence in the last two instances.

Obviously, a defendant has a right to be present at critical stages of a capital proceeding. Proffitt v. Wainwright, 685 F.2d 1227, 1258 (11th Cir. 1982); Diaz v. United States, 223 U.S. 442 (1912); Hopt v. Utah, 110 U.S. 574 (1884). Here, there is absolutely no indication in the record that there was any waiver, Illinois v. Allen, 397 U.S. 337 (1970); Johnson v. Zerbst, 304 U.S. 458 (1938), but rather when the prosecutor pointed out Mr. Huff's absence in one instance, defense counsel merely stated that he was trying to save time:

> MR. BROWN: Mark, excuse me, if the Court please, the Defendant is not present in the Courtroom. Is that with the Defendant's consent?
>
> MR. HILL: No, I think we need to have him in the Courtroom. We need to stop them. I thought we could save some time, just get it done quick.

(R. 1617-18). This was prejudicially deficient performance. Indeed, the very instructions given to the jury in Mr. Huff's absence were defective, but counsel interposed no objection.

Not only was Mr. Huff absent for portions of his capital trial, but the presiding judge was also absent from the trial on occasion. On one occasion the defense attorney failed to object to the judge not being present in the courtroom during the taking

of evidence. This occurred after the prosecutor made a remark to one of his assistants in the courtroom to the effect that he had just caught the witness in a lie. The defense had recalled the police officer who had read the Miranda warnings to Mr. Huff at the time of his arrest. This officer, Terry Overly, had been called as a court witness during the State's case, but was recalled by the defense. His testimony was very detrimental to the State, because he pointed out numerous instances of conduct which contaminated the crime scene. During cross-examination, the prosecutor was very obviously hostile to Mr. Overly, as he had been during his case-in-chief.

The prosecutor indicated to the defense and the court that he wanted to bring out in cross-examination that Officer Overly had been dismissed from his job as a policeman **(R. 2232),** to show his bias against law enforcement. The defense argued that since the defense was not allowed to impeach Sheriff Johnson with his prior sexual misconduct even though that would show his motive to lie in order to win a murder conviction to counter the bad publicity and help his chances at reelection, the State should not be allowed to impeach Overly **(R. 2238).** The trial court ruled that Overly's leaving the Miami police department was not material to this trial **(R. 2242),** but that the prosecutor could ask him why he left his job, and then could go into detail if he denied that he was dismissed **(R. 2243).**

During cross-examination, the prosecutor asked Officer Overly why he left the Wildwood Police Department, and he responded that he had been fired, and then began to explain why, in his opinion, he was fired. The record does not, at this point in the transcript, contain any comment by the prosecutor, but defense counsel broke in with an objection and said "We would move for a mistrial because Mr. Brown has commented on the evidence by going, 'we got him, we got him', in front of the jury, and it was clear to the jury. If [sic] was not five feet away from them, and we would move for a mistrial" (R. **2276**).

What followed was a lengthy debate about what exactly was said by the prosecutor (R. **2276-94**). At one point the defense requested to question the jurors individually as to what they heard. The prosecutor objected to this, and the court did not allow it (R. **2283**). The defense then indicated that he was at least going to interview every spectator in the courtroom to see what they had heard (R. **2292**). The judge then indicated that he would not be remaining in the courtroom to hear the testimony (R. **2293**). There was no objection by defense counsel. Thereafter approximately ten (10) spectators were called and questioned under oath about what they had heard (R. **2293-2354**).

The following morning, counsel filed briefs on the motion for mistrial, and requested that the testimony taken the day before be attached and included in the record on appeal. The court then, apparently without reviewing the testimony, denied

the motion for mistrial (R. 2359). There was never any objection to this procedure by defense counsel. Proper objection at the time of the trial was crucial. The defense essentially allowed the court to rule on a motion without ever sitting in to hear the facts. Any appellate court could read a sworn statement, but the trial judge was the only one who could rule on this motion after benefit of listening to and watching live, animated witnesses. Defense counsel did not object to this failure of the court to carry out its duty. There was no tactical or strategic reason for this omission -- there could not have been. This was ineffective assistance.

Counsel was also ineffective in failing to raise inconsistencies in witnesses' sworn testimony. At the time of this trial, there had been a previous trial, and prior depositions. Several of the State's witnesses' depositions were different from their eventual testimony in the second trial. These were not utilized by defense counsel.

Also, defense counsel failed to proffer Mr. Huff's testimony about why he was on his way to see his attorney at the time of the offense (R. 2683-8). This was important. He also failed to object to surprise testimony that was first revealed during the State's opening statement, to the effect that Mr. Huff had asked one of the State's witnesses for information about a permit to carry a weapon (R. 578). No Richardson hearing was requested. One should have been.

After the defense completed its case, the State indicated that it would call three (3) witnesses in rebuttal, including Dr. Rojas. Dr. Rojas was going to testify that he examined Mr. Huff, and spoke to him, a few days after he was arrested, and that he did not believe that Mr. Huff had been hit on the head and rendered unconscious. The defense strenuously objected to this on the basis that it was not truly rebuttal because the State knew that the head injury was an issue during their case-in-chief. The defense also argued that the calling of Dr. Rojas would prompt surrebuttal by a physician for the defense (R. **2855-57**). The defense objection was overruled (R. **2857**). The defense failed, however, to object to the testimony on the basis that Mr. Huff had not been provided with any Miranda warnings prior to being examined by Dr. Rojas.

Dr. Rojas testified at length about the examination he performed on Mr. Huff, and that he did not believe Mr. Huff had received a blow to the head (R. **2867**). In cross-examination, defense counsel attempted to discredit Dr. Rojas by asking him about available tests that would have more accurately portrayed trauma to the head (R. **2880**), but Dr. Rojas steadfastly asserted that his examination was adequate (R. **2891-92**).

After the State finished rebuttal, the Defense never followed up by presenting the surrebuttal testimony of their own expert physician. They were never precluded from doing so by the court, but they never did it. This was prejudicial deficient

performance. There was no tactical or strategic reason for these omissions.

Counsel's failings were deficient performance, which prejudiced Mr. Huff. But for counsel's deficient performance, there exists a reasonable probability of a different outcome. Certainly, confidence in the outcome is undermined. Mr. Huff alleged below that he did not receive a true adversarial testing. Since the files and records do not conclusively show that Mr. Huff is entitled to no relief, a full and fair evidentiary hearing is required. Lemon v. State, 499 So. 2d 923 (Fla. 1986). This Court should remand this case for an evidentiary hearing, and thereafter grant relief.

ARGUMENT VII

COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE FOR A CONTINUANCE OF THE PENALTY PHASE IN MR. HUFF'S TRIAL IN ORDER TO PROPERLY EXPLAIN TO MR. HUFF THE CONSEQUENCES OF WAIVING THE PENALTY PHASE.

The sixth amendment right to counsel is among the most fundamental of rights. The right to counsel is the right to the effective assistance of counsel. Strickland v. Washinston, 466 U.S. 668 (1984). In some cases, it has been recognized that circumstances beyond an attorney's control can render him ineffective. Such circumstances include the conduct of the trial court. See, United States v. Cronic, 466 U.S. 648 (1984).

The jury in Mr. Huff's case came back with two verdicts of guilty of first degree murder, on Friday evening (R. 3089-90).

After the jurors were polled, discussion was begun to determine when the penalty phase would start the next morning. To the surprise of everyone in the courtroom, including defense counsel, Mr. Huff stated, "Mr. Brown, I'll waive the second phase and accept the sentence" (R. **3093).** Defense counsel did ask for a recess, but the court responded, **". . .** but don't prolong it too much" (R. **3093).** Counsel ineffectively did not ask for more time. Whether because of his own deficiencies or the trial court's ruling, counsel's performance was prejudicially deficient. The court then recessed at 7:08 p.m. (R. 3095), and readjourned at **11:15** a.m. the next morning, a Saturday (R. **3096).** At that time, defense counsel presented a written waiver to the court; and the State objected to the waiver (R. **3096).** After colloquies between Mr. Huff and the court (R. 3097-99), and Mr. Huff and the prosecutor (R. 3099-3101), the court read a statement, written by Mr. Huff, to the jury (R. **3104-05).**

The penalty phase of a capital trial is literally a life or death matter. Defense counsel had part of one evening and part of the next morning to discuss this waiver with Mr. Huff. The record does not show how much time counsel spent with Mr. Huff, but it could not have been more than a few hours. The record does show that the waiver was made against counsel's advice (R. **3105).**

It is not clear whether a defendant can waive the penalty phase of a capital trial. Florida case law indicates that it is

permissible to waive an advisory jury recommendation. State v. Carr, 336 So. 2d 358 (Fla. 1976). However, many state courts have held that a capital defendant cannot waive challenges to his death sentence. See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978)("The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue -- the propriety of allowing the state to conduct an illegal execution of a citizen." (footnote omitted)).

The accused has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see Wainwright v. Sykes, 433 U.S. 72, 93 n.1, 97 S. Ct. 2497, 2509 n.1, 53 L.Ed.2d 594 (1977)(Burger, C.J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980)." Jones v. Barnes, 103 S. Ct. 3308 (1983). However, even these decisions should only be made after full consultation with and proper advice from competent counsel.

The record is clear that there were witnesses present in the courtroom who were prepared to testify on Jim Huff's behalf (R. 3100). But the record does not disclose who they were or the substance of their anticipated testimony. In Mr. Huff's first trial, the evidence presented in mitigation consisted of one page of testimony from his brother, Jeff Huff:

Q. Jeff, you are Jim Huff's brother, is that correct?

A. Yes, it is.

Q. Did there come a time and because of your father's blindness, someone had to step in and take over?

A. Yes, sir.

Q. Would you explain that, sir?

A. Yes, sir. Well, I can start from the beginning, if you would like me to. My dad and I were on vacation, quite a few years ago, and his eyes went bad on him while we were on the trip. And, he did drive back with bad eyes, I was just a small boy then, and after that, it put their business in jeopardy, and everything else, and Jim immediately stepped in and took over and worked extra hard to make it go and he did a real good job. And, he never complained, or did anything else about it, he just took it and did the job.

Q. How long did he do that?

A. Until they sold the store.

Q. How would you characterize Jim's relationship with your parents?

A. It was always a real good relationship. In times of need, they would come to him and in times of need, he would go to them.

MR. JOHNSON: No further questions.

MR. BROWN: Judge, I have no questions.

(First ROA, 1300).

The record does not show if Mr. Huff was advised that more could be presented. For example, Mr. Huff was only evaluated by a mental health expert during post-conviction proceedings. Defense counsel never asked an expert to ascertain whether

mitigation was available, and thus could provide Mr. Huff with no advice on what mitigation could be presented. Dr. Krop evaluated Mr. Huff during post-conviction proceedings, and his report reflects that mitigation could have been presented on Mr. Huff's behalf. Mr. Huff, however, received no proper advice, because counsel was not prepared for the penalty phase:

> I am writing to summarize my impressions of the above-named forty-three year old male who was evaluated at your request on November 17, 1988 at Florida State Prison. Mr. Huff was referred to determine whether any mitigating factors existed which may have been presented during his trial in June, 1984. Mr. Huff participated in a clinical interview and was administered a psychological screening inventory. I also had the opportunity to review a packet of information you provided and to speak to Ms. Helen Wild, the inmate's aunt and Judy Maddox, his sister.
>
> As you know, Mr. Huff has been on Death Row since November 7, 1980, although he was given a new trial in 1984. Following a conviction of two counts of First Degree Murder, he waived a sentencing hearing and again received the Death Penalty. Prior to his arrest for the killing of his parents, Mr. Huff had no significant criminal history. Since his initial incarceration, he has not presented as a management problem as he claims that he copes by watching television, listening to the radio and "minding my own business." Medical history is noncontributory and there is no history of mental illness, alcohol or drug abuse. He derives from a stable family environment and has two teenage children from a marriage which ended in divorce after thirteen years. He attended college for one year and reports that he had a stable vocational history. According to family members, the alleged murder is totally out of character for Mr.

> Huff as he is described as a nonviolent individual.
>
> The psychological evaluation is inconsistent with any significant emotional disorder, violent propensities or antisocial tendencies. Although neuropsychological testing was not conducted, there is no evidence of organicity either from history or the current evaluation.
>
> In conclusion, this evaluation does not show evidence of any serious emotional disorder, and, to the contrary, Mr. Huff presents as an intelligent individual who had led a fairly stable life style prior to his incarceration for the instant offenses. This personality profile is certainly inconsistent with those individuals on Death Row ***(88)*** whom I have evaluated. Since his incarceration, he has not presented any management problems and it is likely that he would have no difficulty functioning in an open prison population, and would likely be able to make constructive contributions in such a setting. In that Mr. Huff had considerable emotional difficulty when talking about his parents, this examiner cannot provide any definitive opinions regarding his mental status at the time of the alleged offenses or his competency to knowingly waive the sentencing proceedings. Based on the current evaluation, he is viewed as being currently competent to assist in all legal proceedings.

(Report of Dr. Krop, Att. 3).

Other mitigation that could have been presented included the fact that Mr. Huff had absolutely no significant history of prior criminal activity. This was proven in the first trial, and was part of the original presentence investigation report. Such mitigation would certainly have been forthcoming upon proper investigation. Since proper investigation was not conducted,

however, no proper advice was given to Mr. Huff. With proper advise, Mr. Huff's choice would have been quite different.

It is not clear whether counsel is under an obligation to present evidence in mitigation to the sentencing court even after his client has waived a jury recommendation:

> One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waiver is voluntary and intelligent. Upon finding such a waiver, the sentencing court may in its discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure. State v. Carr, 336 So.2d 358 (Fla. 1976); Lamadline v. State, 303 So.2d 17 (Fla. 1974).

Palmes v. State, 397 So.2d 648, 656 (Fla. 1981). However, counsel here did not even attempt to present anything, and never signalled the court that it could hear mitigation.

An evidentiary hearing is necessary to determine whether Mr. Huff received effective assistance of counsel and proper advice and counsel (that is, guidance) when deciding whether to waive a jury sentencing. Petitioner pled that he did not. **See** McMann v. Richardson. The lower court erred in failing to allow one. If a defendant can be constitutionally allowed to waive capital sentencing, cf. Whitmore v. Arkansas, 109 S. Ct. 3240 (1989)(pending certiorari review on this issue), the decision should not be made without adequate time to fully explore his options, and cannot be made without adequate assistance and advice from counsel.

The files and records do not show conclusively that Mr. Huff is entitled to no relief, and thus an evidentiary hearing is mandated.

ARGUMENT VIII

MR. HUFF WAS DENIED HIS FUNDAMENTAL RIGHT TO CONFRONT THE CENTRAL EVIDENCE AGAINST HIM IN THESE CAPITAL PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him." This right was extended to defendants in state prosecutions. Pointer v. Texas, 380 U.S. 400 (1965). The right to confrontation is primarily exercised by cross examination. Douglas v. Alabama, 380 U.S. 415 (1965).

> Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross examiner has traditionally been allowed to impeach, i.e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence Section 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in

> testifying is a proper and important function of the constitutionally protected right of cross examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L.Ed. 2d 1377 (1959).

Davis v. Alaska, 415 U.S. 308, 316 (1974)(footnote omitted).

In Davis v. Alaska, supra, the defense attempted to show the existence of possible bias and prejudice of a state's witness by cross-examining him about his status as a juvenile delinquent on probation. The Supreme Court held that it was constitutional error to limit the cross examination of this key witness. "[W]e do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof. . . of petitioner's act.' Douglas v. Alabama, 380 U.S., at 419, 85 S. Ct. at 1077." Davis, 415 U.S. at 317.

In determining whether the right to confrontation has been violated, the focus of the prejudice inquiry must be on the particular witness, not on the outcome of the entire trial. Delaware v. Van Arsdale, 106 S. Ct. 1431 (1986):

> It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross examine the witnesses against him nonetheless had been afforded his right to "confron[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of the witness, and

> thereby "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. at — , 94 S. Ct. at 1111.

However, a Confrontation Clause violation is subject to a harmless error analysis. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id. The factors to be considered include the importance of the witnesses' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination permitted. Id. at 1438.

In Mr. Huff's trial, a critical witness was Sheriff Johnson. Only he stated that he heard Mr. Huff say, "I shot them in the face" (R. 1005-1007). Mr. Huff denied ever having said this. It was clearly a credibility test between Johnson and Mr. Huff. The defense had obtained some very interesting information with which to challenge Johnson's credibility (R. 1065-1070). According to evidence proffered at trial, Johnson was under investigation for alleged sexual improprieties while he was in office (R. 1066-1067).

The investigation on Johnson had commenced in late 1979 and concluded just four months prior to the Huff murders (R. 1067-1068). Since Sheriff Johnson was running for re-election in

1980, the timing of this investigation was critical and apparently had a damaging effect on the campaign. Of course, Johnson denied any truth to the allegations but the defense was prepared to present witnesses who would contradict him (R. 1047-1072).

The defense unsuccessfully argued that this testimony went to impeachment of the witness and would show his potential bias and motive for testifying as he did. Clearly under the circumstances, "solving" such a major crime would be impressive campaign propaganda.

These circumstances should have been known to the jury: they were critical to Mr. Huff's defense, and to the jury's assessment of the credibility of the only witness who said that Mr. Huff admitted complicity:

> In laying down these rules the Court has never questioned that "evidence surrounding the making of a confession bears on its credibility" as well as its voluntariness. Id., at 386, n. 13, 84 S.Ct., at 1786, n. 13. As the Court noted in Jackson, because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial.

Crane v. Kentucky, 106 S. Ct. 2142, 2145 (1986)(emphasis added).

The denial here was fundamental error and clearly deprived Mr. Huff of basic rights to confrontation and to present a

defense. An evidentiary hearing is necessary. See McKinzy v. Wainwright. Relief is appropriate.

ARGUMENT IX

MR. HUFF'S CONVICTION SHOULD BE VACATED BECAUSE THE STATE'S COMMENTS ON HIS RIGHT TO SILENCE VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Under Doyle v. Ohio, 426 U.S. 610 (1976), it is clear that a defendant's action in exercising his right to silence may not be used against him. In Doyle the defendant had remained silent after being read Miranda warnings and the State used this fact to try to impeach him when he testified.

Here, on at least two occasions the State improperly referred to Mr. Huff's silence as evidence of guilt. The first occurred through the testimony of Mabrey Williams who was an investigator for the Sumter County Sheriff's Department at the time of the Huff murders:

> Q Okay. One final question, during the course of time that you spoke with the Defendant, James Roger Huff, at the crime scene, did he ever at any time say anything to you or ask anything of you about the condition of his parents or ask for help for his parents?
>
> A No, sir, he did not.
>
> Q Did he even mention his parents to you?
>
> A No, sir, he did not.
>
> MR. BROWN: A moment, Your Honor?
>
> THE COURT: All right.

MR. BROWN: Thank you, Mr. Williams. Your Honor, if the Court please, the State does tender for recross-examination to Ms. Pepperman.

MS. PEPPERMAN: Thank you, Your Honor. May we approach the bench?

(WHEREUPON, the following bench discussion ensued outside the hearing of the jury and the Defendant.)

MR. HILL: Judge, at this time we would move for a mistrial in this case. We think the prosecutor has made an unfair comment on the Defendant's right to remain silent. Mr. Williams and Mr. Rabon advised him of his rights and any comment by the prosecutor that he refused to say anything it's an unfair comment on his right to remain silent. We think that the error is obvious and we would move for a mistrial at this time.

MR. BROWN: Your Honor, if the Court please, I think that it is blatantly obvious that the motion must be denied. If the Defendant had not said anything at all, that might be proper. However, he ran his mouth to numerous people and on numerous occasions, including the statements made to Mabry Williams. And we're allowed to question Mabry Williams about statements made by the Defendant to him. This is just one more of those statements, it's very obvious.

MR. HILL: It was a statement that he refused to say anything.

MR. BROWN: No, it was --

MR. HILL: The witness has answered that he didn't say anything about that.

MR. BROWN: He said he told me this, he told me that, he told me the other thing, he talked to me about this, but he left that out. So obviously it's not a comment on his failure or on his right to

remain silent. I ask the Court to deny the motion.

THE COURT: Motion denied.

MR. BROWN: Thank you, Your Honor.

(WHEREUPON, that concluded the bench discussion.)

(R. 1358-1360).

> It is said in Miranda itself that "[t]he mere fact that [the defendant] may have answered some questions . . . does not deprive him of the right to refrain from answering any further inquiries . . ."

Peterson v. State, **405** So. 2d 997 (Fla. 3d DCA, **1981).** Clearly, Mr. Huff's failure to ask Williams about the condition of his parents was used by the State to infer that he did not really care, therefore he did not ask: ergo, he must be guilty.

The second instance was during the testimony of Ronald Elliott, the crime scene investigator for the Hernando County Sheriff's Department. Elliott testified that Mr. Huff had refused to take a gunshot residue test (R. **1851).** The defense moved for a mistrial claiming this was a comment on silence, hence a violation of Mr. Huff's fifth amendment right (R. **1856-**57). The State argued that the defendant did not have a right to refuse the gunshot residue test and that it was not covered by the fifth amendment.

The State was wrong. The fifth amendment provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . .

Doyle v. Ohio, 426 U.S. 610, 617 (1976) explained:

> The warnings mandated by that case as prophylactic means of safeguarding Fifth Amendment rights require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation.

This right against self-incrimination therefore includes the right to counsel as well as the right to be advised of the right to counsel whenever questioning of a person in police custody takes place. In Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980)(emphasis added), the United States Supreme Court explained what constitutes questioning:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. (Footnotes omitted) (Emphasis added)

Clearly taking a gunshot residue sample is precisely one of those actions described in Innis. It is important to distinguish between the introduction of the gunshot residue test and the introduction of the refusal to submit to the taking of the gunshot residue test. While the defendant may not have a right

to refuse to submit to taking the test, the admissibility of his refusal is governed by the fifth amendment.

Mr. Huff's refusal to take the gunshot residue test was testimonial and was used to incriminate him. This was fundamental error and the circuit court erred in denying this claim.

ARGUMENT X

MR. HUFF WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHTS UNDER HITCHCOCK V. DUGGER BECAUSE MITIGATING CIRCUMSTANCES WERE IGNORED.

This Court struck the only mitigating circumstance found by the trial judge (no prior, significant criminal history), claiming that since it was based on evidence presented at the first trial, it could not now be used. Huff v. State, **495** So. 2d **145** (Fla. **1986).**

This was clearly erroneous since Judge Huffstetler could have taken judicial notice of any presentence investigation report or other evidence of record that indicated that Mr. Huff had no prior criminal history. See Harvard v. State, **486** So. **2d 537** (Fla. **1986);** see also Hitchcock v. Dugger, **107** S. Ct. **1821 (1987);** Penry v. Lynaugh, **109** S. Ct. **(1989).** Mr. Huff clearly had a right to have mitigating circumstances which were of record construed in his favor. The failure to do so violated his eighth and fourteenth amendment rights. This is fundamental eighth amendment error.

In addition, this Court has held that upon a waiver of the right to a jury recommendation in a capital case, the sentencing court can hold a sentencing hearing before a jury anyway, and receive their recommendation. Palmes v. State, 397 So. 2d 648 (Fla. 1981). Surely the judge should take judicial notice of a mitigating factor found in a presentence investigation in the same case. This was not even a situation where the judge had to rely on testimony, but rather could rely on the information in the presentence investigation which the court had before it. In the alternative, the judge could have ordered a new presentence investigation.

Further, the trial judge, Judge Huffstetter, indicated during clemency proceedings that "Mr. Huff asked for and hopefully will receive exactly what he asked for. I believe his murder was for pecuniary gain and was premeditated. It is my feeling that Mr. Huff should be executed." (See attached Interoffice Memorandum - Department of Corrections). Since sentence was imposed on the basis of an aggravating factor which this Court found improper, this case should be remanded for a reweighing of aggravating and mitigating circumstances and a resentencing. This Court is not authorized to reweigh aggravating and mitigating circumstances. Elledae v. State, 346 So. 2d 998 (Fla. 1977). The issue of an appellate court reweighing trial court findings is also pending certiorari before the United States Supreme Court. Clemons v. Mississippi, 109 S.

Ct. 3184 (1989). But what is clear is that the trial court considered improper aggravation and refused to consider proper mitigation. This was fundamental eighth amendment error.

Mr. Huff urges this Court re-examine this issue, and remand for resentencing.

ARGUMENT XI

OTHER CLAIMS

All other arguments and claims raised by Mr. Huff's Rule 3.850 motion but not briefed here are incorporated in full and urged on this appeal. Mr. Huff does not, by attempting to comply with this Court's page limitations, waive any claims for relief or arguments asserted below.

CONCLUSION

On the basis of the argument presented to this Court above, and on the basis of his Rule 3.850 motion, Mr. Huff respectfully submits that he is entitled to an evidentiary hearing, and respectfully urges that this Honorable Court set aside his unconstitutional convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid to Margene Roper, Assistant Attorney General, Office of the Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 12 day of January, 1990.

Julie D Naylor
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