IN THE SUPREME COURT OF FLORIDA

HAROLD LEE HARVEY, JR.,

Prisoner #102992
Florida State Prison
Starke, Florida,

Petitioner,

v.

RICHARD L. DUGGER,

Secretary of Florida
Department of Corrections

and

TOM BARTON,

Superintendent
Florida State Prison
Starke, Florida

Respondents.

Case No. 75,841

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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I.

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

A. Procedural History.

1. The Circuit Court for the Nineteenth Judicial Circuit in and for Indian River County, Florida entered the judgment and sentences at issue.

2. On March 7, 1985, a grand jury issued an indictment of Mr. Harvey and Harry Scott Stiteler on two counts of first degree murder.

3. Mr. Harvey entered pleas of not guilty.

4. Mr. Harvey's trial was held in June 1986. A judgment of conviction was entered on each offense on June 18, 1986.

5. A penalty phase was conducted on June 19-20, 1986. A jury recommended sentences of death on both counts by a vote of 11 to 1.

6. On June 20, 1986, the trial court sentenced Mr. Harvey to death on both counts.

7. Mr. Harvey appealed his conviction. His conviction and death sentence were affirmed by this Court on June 16, 1988. Harvey v. State, 529 So.2d 1083 (Fla. 1988). Rehearing was denied on September 16, 1988.

8. The United States Supreme Court denied certiorari on February 21, 1989, making any motion pursuant to Fla. R. Cr. P. 3.850 due February 21, 1991.

9. An executive clemency proceeding was held and clemency was denied.

10. On March 29, 1990, Governor Martinez signed a warrant for the execution of Harold Lee Harvey.

11. The Superintendent of Prisons scheduled Mr. Harvey's execution for May 30, 1990.

12. On April 17, 1990, Petitioner filed a Petition for Extraordinary Relief, Petition for a Writ of Habeas Corpus, Request for Stay of Execution, and Request for Leave to Amend.

13. On April 25, 1990, this Court ordered that Mr. Harvey's scheduled execution be stayed for four months.

14. No other post conviction petitions are pending in this or any other Court, nor have any previously been filed.

B. Jurisdiction To Grant Habeas Corpus Relief

Pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, this Court has jurisdiction to entertain the claims presented in this Petition. See Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989); Card v. Dugger, 512 So.2d 829 (Fla. 1987); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

C. Grounds For Habeas Relief.

1. Mr. Harvey Was Denied Effective Assistance Of Counsel On Direct Appeal In Violation Of His Sixth, Eighth And Fourteenth Amendment Rights And Their Florida Counterparts

A habeas corpus petition is the appropriate vehicle for raising ineffective assistance of appellate counsel claims in a capital case. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). In order to prevail, the petitioner must identify

a specific act or omission by appellate counsel which constituted a serious and substantial deficiency and which prejudiced the petitioner by undermining the essential fairness and reliability of the appeal. 490 So.2d at 940 (Fla. 1986). In this case, appellate counsel's performance was deficient in a number of respects, and that deficiency undermines confidence in the outcome of petitioner's appeal, thus depriving Mr. Harvey of his constitutional right to the effective assistance of appellate counsel.

a. Appellate Counsel Was Ineffective For Failing To Raise On Direct Appeal The Trial Court's Failure To Sua Sponte Dismiss Juror Brunetti After She Stated During Voir Dire That She Believed That Mr. Harvey Was Guilty As Charged And That Two Statutory Aggravating Circumstances Existed.

As a result of the extensive pretrial publicity surrounding this case, the trial court permitted individual sequestered voir dire of all potential jurors who indicated they had read about or heard of the case. Mrs. Brunetti was called for voir dire as a possible alternate juror. During voir dire the following exchange took place:

THE COURT:	Okay. Now, you've seen something on television; is that correct?
MRS. BRUNETTI:	And the Miami Herald.
THE COURT:	. . . When did you come in contact with this coverage?
MRS. BRUNETTI:	Well, last year when it happened. And I can't tell you what date but I read the paper every day and I watch the news every night.

THE COURT: What do you recall?

MRS. BRUNETTI: Well, I recall that he confessed to doing it and that's why I feel that I couldn't be, you know, impartial about it.

* * *

THE COURT: What was the name of the person who confessed; do you know that?

MRS. BRUNETTI: Harvey.

* * *

THE COURT: What else do you recall about the case?

MRS. BRUNETTI: I just recall seeing it and reading it in the paper that two people were murdered.

THE COURT: Do you recall any of the incidents about the events?

MRS. BRUNETTI: That it was a robbery case. They robbed the people and that they had a big dairy farm or something, farmers of some kind.

THE COURT: What you recall about the case or think you recall about the case, would that affect (sic) your ability to be fair and impartial here and confine your decision in the case only to the evidence and the law that I will instruct you?

MRS. BRUNETTI: I don't think I could be impartial after reading about it.

* * *

PROSECUTOR: One of the instructions on the law that the judge will give you is that you're to put aside anything that you read or heard about the case and form your verdict based on the evidence that you heard in the courtroom; could you do that?

MRS. BRUNETTI: I don't know if I honestly could.

* * *

DEFENSE COUNSEL: What is your present perception as to what happened based upon those articles?

MRS. BRUNETTI: Well, I think they broke in, is the best that I can remember, and they robbed them or something and then they were afraid they would be identified and they killed them.

DEFENSE COUNSEL: Okay. Do you have any feeling at this time if that's what happened what the punishment would be in that situation if that should happen?

MRS. BRUNETTI: I'm kind of confused on the death penalty after listening to all of these different people. I think it's a deterrent because a person would not be able to go out to do the same thing again. But I don't necessarily think that two wrongs make a right.

* * *

DEFENSE COUNSEL: When you say that you think he did it . . . do you mean you think he committed a certain crime?

MRS. BRUNETTI: I feel that he committed the crime that he was charged for.

DEFENSE COUNSEL: First degree murder?

MRS. BRUNETTI: Yes.

* * *

DEFENSE COUNSEL: Do you . . . think you could follow the judge's instruction?

MRS. BRUNETTI: <u>I can't honestly say that I could have an open mind</u> after reading it and seeing it on the news. I have to be honest. I wouldn't want to get on the jury and not say what I feel.

* * *

THE COURT: Motions?

PROSECUTOR: No motion, Your Honor.

DEFENSE COUNSEL: No motion, Your Honor.

THE COURT: Are there any preemptories (sic)?

PROSECUTOR: No.

DEFENSE COUNSEL: No.

* * *

THE COURT: Just so I understand, there is not motions (sic) for cause that have been made at this time?

DEFENSE COUNSEL: That's correct.

THE COURT: State is not making a motion?

PROSECUTOR: No.

DEFENSE COUNSEL: Defense isn't making any motion for cause.

THE COURT: There are no preemptories (sic) at this time?

PROSECUTOR: No.

DEFENSE COUNSEL: Defense is not using any preemptories (sic) at this time.

THE COURT: So these two that are seated at this point will be the two alternates. Mrs. Brunetti would be the first alternate, the first person employed . . . .

(R. 1820-1829) (emphasis supplied).

The following morning, the judge brought the court to order and the following took place:

THE COURT: Good morning. I trust you all had a pleasant weekend. I guess we have got a juror problem to deal with right off the bat this morning . . . This [deals with] Mary Ronk who is currently seated as the fourth juror in the front row.

* * *

> We are faced with a situation where we have got a note from a physician, apparently a treating physician, that states a specific illness.
>
> * * *
>
> I think at this point the basic question -- and I want the record clear -- I am considering excusing Mrs. Ronk based upon the note from Dr. Kirby. And then that would mean if she is excused Mrs. Brunetti will be seated as a juror. Is there any objection to doing that at this point?

PROSECUTOR: Not for the state.

DEFENSE COUNSEL: No, none from the defense.

(R. 1869-1872) (emphasis supplied). Mrs. Brunetti then sat on the jury for both the guilt and penalty phases of the trial.

The trial court improperly failed to excuse Mrs. Brunetti from the panel, and appellate counsel's failure to raise this critical issue on appeal was a serious and substantial deficiency which clearly prejudiced Mr. Harvey.

The law is clear that if a prospective juror is not qualified to serve as a trial juror, the trial court must excuse the juror from the trial. Florida Rule of Criminal Procedure 5.300(c) specifically provides that if counsel fails to challenge a juror who is not competenent to serve, the court must then execute the juror on its own motion:

> Prospective Jurors Excused. If, after the examination of any prospective juror, the court is of the opinion that such juror is not qualified to serve as a trial juror, the court shall excuse such juror from the trial of the cause. If, however, the court does not excuse such juror, either party may then challenge such juror, as provided by law or by these rules.

Fla.R.Crim.P. 3300(c) (emphasis added).

Moreover, in Singer v. State, 109 So.2d 7, 23-24 (Fla. 1959) this Court stated:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Id at 23 (Fla. 1959) (emphasis supplied). Accord Moore v. State, 525 So.2d 870, 872 (Fla. 1988) (quoting Singer); Hill v. State, 477 So.2d 553, 556 (Fla. 1985).

The test for determining whether a juror is competent to serve as a trial juror is whether the juror can disregard bias or prejudice and render a verdict based solely upon the evidence presented and the instructions on the law given to him by the court. Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984) (citing Singer, supra). See also Farias v. State, 540 So.2d 201, 202 (Fla. 3d DCA 1989) (citing State v. Williams, 465 So.2d 1229 (Fla. 1985)); Davis v. State, 461 So.2d 67 (Fla. 1984), cert. denied, 473 U.S. 913 (1985); Jefferson v. State, 489 So.2d 211 (Fla. 3d DCA), review denied, 494 So.2d 1153 (Fla. 1986); Waddell v. State, 458 So.2d 1140 (Fla. 5th DCA 1984), review denied, 466 So.2d 218 (Fla. 1985). See also Fla. Stat. § 913.03(10).

There can be no doubt that in this case Mrs. Brunetti was unable to disregard her bias and render a verdict based solely on the evidence presented at trial. Her inability to disregard her bias was illustrated very clearly by her responses

during voir. She stated that she could not be impartial because she believed that Mr. Harvey was guilty of two counts of first degree murder, that he confessed to the murders, that the murders were committed during a robbery as well as to avoid arrest, that she could neither base her verdict on the evidence adduced at trial nor follow the court's instructions, and that she thought the death penalty was a deterrent.

It is equally clear that the trial court recognized that Mrs. Brunetti was unqualified to remain on the panel, even as an alternate.[1/] It is obvious that the judge expected objections to Mrs Brunetti. After the voir dire of Mrs. Brunetti, he rhetorically asked, "Motions?" (R. 1828). His dismay at defense counsel's failure to challenge her is clear from the record. In fact, he later inquired, "Just so I understand, there is not motions (sic) for cause that have been made at this time?" (R. 1828).

The trial court earlier recognized that it had a duty to excuse an unqualified juror from sitting on the panel. The Court exercised its duty on two occasion. First, the court dismissed Ms. Keneven after briefly questioning her (R. 1037-1045). In addition, on its own motion, the court excused the only black member of the venire (R. 960). Thus, even though counsel should have moved to strike Mrs. Brunetti for cause, the

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[1/] Florida Rule of Criminal Procedure 3.280 provides in pertinent part: Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors.

court was aware that it had an independent duty to excuse her. Singer , supra; Fla. R. Cr. P. 3.300(c). Incredibly, the trial court breached its duty.

Appellate counsel's failure to raise this issue on direct appeal was a serious and substantial deficiency. The prejudice to Mr. Harvey as a result of appellate counsel's substandard performance is obvious. Because the right of an accused to a trial by a fair and impartial jury is one of the most fundamental rights guaranteed by our system of government, Floyd v. State, 90 So.2d 105, 106 (Fla. 1956), and is the cornerstone of a fair and impartial trial, Florida Power Corp. v. Smith, 202 So.2d 872, 882 (Fla. 2d DCA 1967), an infringement of that right constitutes fundamental error.

Fundamental error occurs not only when an accused is forced to proceed to trial with no jury at all, but also when he is forced to proceed to trial with fewer jurors than he is entitled to by law. Nova v. State, 439 So.2d 255, 262 (Fla. 3d DCA 1983) (citing United States v. Taylor, 498 F.2d 390 (6th Cir. 1974)). As such, this error should have been raised on direct appeal even though it was not raised by trial counsel. Steele v. State, 561 So.2d 638 (Fla. 1st DCA 1990) (citing Castor v. State, 365 So.2d 541 (Fla. 3d DCA 1981)).

Because Mr. Harvey was charged with capital offenses, he was statutorily and constitutionally entitled to a twelve member jury unless he waived that right. Fla. Const. Art. I, § 22; Cotton v. State, 85 Fla. 197, 95 So. 668 (1923); State v. Griffith, 15 FLW S173 (Fla. March 29, 1990), citing § 913.10,

Fla. Stat. There is no evidence in the record which even remotely suggests that Mr. Harvey waived this right.

Mr. Harvey was denied the fundamental right to be tried by a fair and impartial jury as well as a jury consisting of twelve members. Because Mrs. Brunetti had not only prejudged Mr. Harvey's guilt, but had also determined that two aggravating circumstances existed, Mr. Harvey's jury, in effect, consisted of only eleven jurors. Moreover, the influence she may have had on other members of the jury during the two week trial cannot be underestimated.

But for appellate counsel's wholly inadequate performance, there is a reasonable probability that the outcome of Mr. Harvey's direct appeal would have been different.

b. Appellate Counsel Rendered Ineffective Assistance By Failing To Raise On Appeal The Trial Court's Denial Of Mr. Harvey's Motion For A New Trial Due To The State's Withholding Of Favorable Evidence In Violation Of Brady v. Maryland.

On the day before the penalty phase of Mr. Harvey's trial began, the State disclosed that it intended to call three witnesses whose names had not previously been disclosed to the defense. (R. 2586). One of the witnesses, Hubert Bernard Griffin, was a convicted felon then incarcerated in the Okeechobee County Jail. The following day, when defense counsel informed the trial court that he did not know what Mr. Griffin was going to testify about, the prosecution stated that it had "just found out about [Griffin and] listed him contemporaneously with finding out his name and what he was going to testify about." (R. 2594). In actual fact, the State was quite familiar with Griffin and had used him as a "jailhouse witness" on other occasions.

The State's withholding of evidence favorable to the accused, whether or not intentional, deprives the accused of a fair trial and violates an accused's right to due process under the Fourteenth Amendment. Brady v. Maryland, 373 U.S. 83, 86-87 (1967); United States v. Bagley, 473 U.S. 667, 675 (1985). The State must reveal to defense counsel any and all information that is materially favorable to the defense, regardless of whether that information relates to guilt-innocence or punishment. Brady, 373 U.S. at 87; Bagley, 473 U.S. at 674. This is true even if defense counsel fails to request the

specific information. See, e.g., Bagley, 473 U.S. at 679. Because defense counsel cannot be effective if evidence is improperly withheld, the failure to disclose exculpatory information also violates the Sixth and Fourteenth Amendment rights to the effective assistance of counsel. See, e.g., United States v. Cronic, 466 U.S. 648, 658 n.22 (1984).

When the evidence withheld goes to the credibility and impeachability of a State witness, the accused's Sixth Amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).[2/] As is obvious, there is a "particular need for full crossexamination of the state's star witness." McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1988).

Here, the prosecution called Griffin in order to authenticate drawings pictured in photographs of a jail cell wall. The trial court had earlier ruled, during the guilt phase of the trial, that the photographs were inadmissible because there was insufficient authentication of the authorship of the drawings. (R. 2594-5). The prosecution claimed that after the Court made that ruling, it called investigators who then found Griffin and found that he could "establish the fact that [Mr. Harvey] in fact created those drawings." (R. 2594).

[2/] "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). "The right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, 107 S.Ct. 989, 999.

Defense counsel was permitted to depose Griffin immediately before he testified at the penalty phase. Although three days passed between the Court's ruling on the photographs and the beginning of the penalty phase, Griffin testified during deposition that "[y]esterday was the first time they came and I talked to anybody." (R. 2606). "They" referred to Detective Hargraves, who had investigated the crime for which Griffin was in jail at the time, and Lieutenant Fisher. (Id.).

Following the deposition, Mr. Harvey's counsel requested a 24-hour continuance for the purpose of conducting additional investigation of Griffin. Despite Griffin's own admission that he had had four felony convictions during the previous two years (R. 2621), and the State's eleventh-hour disclosure of this very important witness, the trial court denied the requested continuances. (R. 2622).

Griffin testified during the penalty phase of Mr. Harvey's trial, and identified five or six photographs of "little sections of the cell" (R. 2670), depicting drawings allegedly made by Mr. Harvey. Central to the prosecution's use of Griffin was his authentication of a writing on the wall -- "If I can't kill it, it is already dead, Lee." (R. 2659). The State's sole purpose in introducing this testimony was to unfairly prejudice the jury by creating the inference that Mr. Harvey showed no remorse for the killings. Although Griffin denied having made a deal with State officials in exchange for his testimony against Mr. Harvey, (R. 2672), he admitted that he hoped it would benefit him. (R. 2669).

During closing argument at the penalty phase, as a result of the investigation defense counsel had hurriedly instituted, Mr. Harvey's counsel received a note revealing that Griffin was a jailhouse witness in another case. He moved for a mistrial. The State responded that counsel had had adequate time to investigate Griffin when the "State gave him notice of this witness as soon as [it] found out him [sic]." (R. 3003). In the State's view, this had been "plenty of time to look into [Griffin's] background to bring this out." (Id.)

In response, defense counsel noted that the prosecution knew of Griffin's history "as a witness in another murder case for which he had been called as a jailhouse witness." (Id.) The State flatly denied any prior knowledge of Griffin. The court then denied Mr. Harvey's motion for mistrial. (Id.).

During the evidentiary hearing held on Mr. Harvey's motion for a new trial, the uncontroverted testimony of Michael Sullivan, an attorney and former public defender, established that Griffin had on prior occasions testified against other defendants with whom he had allegedly had while they were fellow inmates at the Okeechobee County Jail. (R. 3076-3078). This testimony flatly contradicted the State's representation that it was unfamiliar with the surprise witness.
(R. 2594).

Griffin had testified for the State in a case in which Sullivan was defense counsel. In that trial, as in Mr. Harvey's, Griffin "was listed as a witness well after the

original answer to discovery was presented by the State." (R. 3078). Even more incredibly, Sullivan reported that:

> at the time of the case that I was involved with [Griffin] was listed as a witness in another case involving someone else. . . . And I know also that at the time of the Harvey case and also as of this time he is listed as a witness in another person charged with a crime or charged with community control violation . . . in Okeechobee.

(Id.). The State did not challenge Mr. Sullivan's testimony on cross examination.

This uncontroverted evidence, unchallenged by the State, demonstrates clearly that Griffin, a man with at least four felony convictions in two years, had testified for the State against fellow inmates many times.

Not only did the prosecution fail to reveal that Griffin had previously testified for the State, but the State actively concealed this evidence from defense counsel. Mr. Morgan, one of the prosecutors who tried Mr. Harvey's case, had previously prosecuted Mr. Griffin. (R.). Yet, the State insisted that before penalty phase of Mr. Harvey's trial, it was unfamiliar with Griffin.

The information withheld by the State in this case strikes at the very heart of Brady. There can be no doubt, given the State's pattern of placing Griffin in a cell near a defendant, that his use in this trial was planned and that the State deliberately withheld his identity. The State thus deprived Mr. Harvey of a fair trial, the right to effectively cross-examine a crucial witness at the penalty phase, the right

to effective assistance of counsel, and the right to a reliable capital sentencing determination. This kind of deception and concealment is exactly the misconduct condemned by by Brady and its progeny.

Failure by the State to disclose exculpatory evidence requires a reversal when material information is not disclosed. Bagley, at 668 (1985). Here there can be no question that the suppressed information -- that Griffin would testify -- was both material and favorable to the defense. Griffin's history, coupled with the implicit quid pro quo for his cooperation, materially undermines his credibility as a witness and thus the outcome of the proceeding. This is true here, because Griffin's testimony was crucial in persuading the jury and the Court that Mr. Harvey deserved the death penalty. The Court and the jury were entitled to know that Mr. Harvey's case was not the first in which Griffin had testified against a fellow inmate, and that the State routinely placed Mr. Griffin near the cells of certain inmates so that he could later testify against them. Had the Court been aware of these facts, it might not have permitted Griffin to testify. Similarly, the jury would have found this evidence material to Griffin's credibility.

Normally, evidence is material when there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Bagley, 473 U.S. at 678. Under Giglio v. United States, 405 U.S. 150 (1972), when false testimony has been presented by the State, the materiality standard is less

rigorous than the Bagley materiality standard. This case meets either standard.

The evidence strongly suggests that the prosecution knowingly allowed Griffin to testify falsely that there was no deal for his testimony. In addition, one of the prosecutors, Mr. Morgan, falsely represented that he was unfamiliar with Griffin prior to his testifying in this case. Whether the other prosecutor, Mr. Colton, was unaware of the false testimony given by Mr. Griffin or the false statement made by Mr. Morgan is irrelevant. 405 U.S. at 153. A new proceeding is required under Giglio if "the false testimony could . . . in any reasonable likelihood" have affected the judgment of the jury." Id. at 154 (emphasis supplied). Given the importance of Griffin's testimony during the penalty phase of Mr. Harvey's trial, that standard has clearly been met here.

c. Appellate Counsel Rendered Ineffective Assistance By Failing To Assert That The Trial Court Failed To Fully Consider All Mitigating Circumstances.

The law is clear that the trial court may not "refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original); Rogers v. State, 511 So.2d 526, 534 (Fla. 1989). See also Skipper v. South Carolina, 476 U.S. 1 (1986). Here, the trial court clearly violated that basic principle by considering only a small part of the extensive mitigating evidence regarding Mr. Harvey. The court failed to

consider many mitigating circumstances that were supported by clear and uncontroverted evidence.

Mr. Harvey came from a home that did not stress education. His parents completed the eighth grade before leaving school (R. 2749), and Mr. Harvey himself did not graduate from high school (R. 2685). Mr. Harvey had a low I.Q. (R. 2747) and low academic ability (R. 2723). His academic achievement tests were low (R. 2772), and he had academic and reading problems (R. 2773). Tests performed on Mr. Harvey showed that his spelling ability was equivalent to that of a sixth-grader and his mathematic skills were equivalent to those of a fifth grader (R. 2773).

In addition, Mr. Harvey suffered from an abnormal level of insecurity, lacked self esteem and self confidence, particularly socially, and felt very inadequate. (R. 2744, 2750, 2753, 2758, 2760, 2763). He had poor coping skills and was unable to think quickly and abstractly. He was unable to tie things together and look at consequences. (R. 2747,2756, 2764). He had difficulty making decisions and difficulty operating in an open society where decision making and responsibility are significant factors. (R. 2747, 2774).

Mr. Harvey was immature and socially underdeveloped. He was unable to interpret social situations and see the consequences of his actions. (R. 2748). He was a follower. He was passive in interpersonal relationships and did not have aggressive tendencies. (R. 2750, 2753). Mr. Harvey's mental and emotional problems were aggravated by stress. (R. 2748).

As a teenager, Mr. Harvey was a passenger in a very serious automobile accident in which the teenage girl driving the car was killed. Following the accident, Mr. Harvey's behavior changed significantly. (R. 2820).

Despite his mental and emotional problems and his low intelligence, Mr. Harvey's life was nothing like that of a hardened criminal. He worked continuously from the time he left high school. (R. 2685, 2827, 2939). He was hardworking and dependable and did not have problems with his employers or co-workers. (R. 2713-2716, 2826, 2910). Indeed, while Mr. Harvey's father was injured and unable to work, Mr. Harvey worked to support his family. (R. 2815, 2822-2823). In addition, Mr. Harvey often helped his father around the house. (R. 2814, 2936, 2938).

He was known as being kind and generous and helpful to friends and neighbors. (R. 2684, 2700, 2876, 2910, 2911). He was very supportive of his family and especially protective of his younger siblings (R. 2924), providing them with emotional support. (R. 2816, 2897). For example, Mr. Harvey loved and cared for his younger sister while she was bedridden as a result of scoliosis. (R. 2681, 2923, 2924). He once saved his younger brother's life. (R. 2899). He taught this same brother to hunt and fish, drive a car, weld, and operate heavy machinery, the last of which became the brother's livelihood. (R. 2396-2898). Mr. Harvey was also very close to his young nephew (R. 2700) and was described as a proud and good uncle (R. 2700, 2821). It thus comes as no surprise that Mr. Harvey's family testified

that Mr. Harvey would continue to provide them with emotional support even if he was confined to prison. (R. 2692, 2816, 2821, 2943).

Later, Mr. Harvey married a school teacher -- a woman whose economic and educational background differed substantially from his own. (R. 2733). After the marriage, there was another noticeable change in his personality -- his depression and emotional problems worsened. (R. 2686, 2687, 2692, 2816, 2820, 2940). His wife pressured him to earn more money (R. 2686, 2687), and he experienced a significant weight loss and worried about their financial matters. (R. 2816, 2820, 2941).

At the time of the crime for which he was convicted, Mr. Harvey had suffered from deep-seated mental and emotional problems for a long time and was chronically depressed and withdrawn. (R. 2746, 2761, 2773). He also had suicidal tendencies. (R. 2767). Nonetheless, numerous witnesses testified that they were shocked to learn that he had been charged with murdering the Boyds because committing murder was so inconsistent with Mr. Harvey's personality. (R. 2716, 2814, 2877, 2878, 2883, 2911, 2914, 2944).

This extensive evidence of mitigating circumstances stands in sharp contrast to the trial court's superficial discussion of non-statutory mitigating evidence. The trial court failed to find the mitigating circumstances discussed above, despite the uncontroverted evidence presented at trial. Indeed, the court gave no indication that it even considered

most of the extensive non-statutory mitigating evidence, finding only that:

> Defendant has an IQ of 86 which places him in the eighteenth percentile, and he is of low average intelligence. This in and of itself is not a mitigating factor. However, also his education skills and social skills are poor; he is unable to reason abstractly and is characterized as an introverted person who lacks self-confidence and has feelings of inadequacy.

(R. 3467, 3470).

The court specifically found that some of the evidence established the existence of mitigating circumstances (R. 3467, 3470), and some did not. (R. 3466, 3467, 3470). The failure to even mention the major portion of the mitigating evidence presented by Mr. Harvey, while making such specific findings with respect to some of the other evidence, demonstrates clearly that the trial court failed to even consider all of the evidence presented.

A trial court's failure to find uncontroverted mitigating circumstances is reviewable on direct appeal. See Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). Mr. Harvey's appellate counsel, however, did not raise this error on appeal. The failure to raise this meritorious claim constitutes a serious and substantial deficiency on the part of Mr. Harvey's appellate counsel. If this issue had been properly raised on direct appeal, there is a reasonable probability that this Court would have found that the error improperly affected the trial court's sentencing determination, requiring resentencing by the court, or that, in light of the additional mitigating evidence,

the death sentences were disproportionate to the crimes committed. See Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

Accordingly, this Court should issue a writ of habeas corpus.

d. Appellate Counsel Rendered Ineffective Assistance By Failing To Effectively Raise On Appeal The Trial Court's Denial Of The Penalty Phase Jury Instructions Requested By Mr. Harvey.

Through trial counsel, Mr. Harvey requested numerous special penalty phase jury instructions. (R. 3587-94). Many of these instructions were constitutionally mandated in order to preserve Mr. Harvey's fundamental right to a reliable capital sentencing proceeding. The trial court denied all of the requested instructions. Appellate counsel raised this issue in a perfunctory manner, relying primarily on the marginal citations to precedent contained in the requested special instructions, and providing little or no argument or citation with respect to the constitutional issues involved. See Initial Brief of Appellant at 61. This Court's relegation of the issue to a footnote in its opinion on direct appeal is further evidence of counsel's superficial treatment of this issue. See Harvey, supra, 529 So.2d at 1084 n.2.

Effective appellate representation requires the knowledge and use of applicable case law. See, e.g., Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Effective appellate counsel would have raised the following constitutional issues with respect to the requested jury instructions:

(1) Preclusion Of Jury Consideration Of Nonstatutory Mitigating Evidence.

Mr. Harvey requested that the jury be instructed that it could properly consider evidence engendering sympathy and mercy in reaching its sentencing verdict. (R. 3588). The trial court refused to give this instruction, (R. 2859), and instead effectively instructed the jury that it could not properly consider such evidence in the penalty phase. Immediately following the guilt/innocence phase of Mr. Harvey's trial the court instructed the jury that

> feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these instructions.

(R. 2553). At the penalty phase of the proceeding, the court failed to instruct the jury that it could properly consider sympathy or mercy for Mr. Harvey in its sentencing determination, nor did it instruct the jury to disregard the guilt/innocence phase instruction. Indeed, despite Mr. Harvey's request for an instruction that the jury could consider sympathy and mercy, (R. 3588), the court reiterated its instruction to the jury that it must base its sentencing recommendation solely on the law and the evidence relating to aggravating and mitigating factors, which did not include any reference to sympathy or mercy. (R. 2624, 3039-41). In light of the Court's statement to the jury at the outset of voir dire that he would explain all of the laws that applied to the case, (R. 753), this instruction, coupled with the Court's failure to correct its guilt/in-

nocence phase instruction regarding sympathy, amounted to an instruction that they could not consider evidence engendering sympathy in the penalty phase.

The significance of the court's instructions was magnified by the prosecutor's comments during voir dire and closing argument, which effectively convinced the jury that if it were not given a specific instruction with respect to the consideration of sympathy and mercy, it was forbidden from considering evidence that might evoke sympathy. For example, during voir dire, the prosecutor first asked the members of the entire panel if they understood that "things such as sympathy are not to enter into your verdict?", and then asked if they understood that they would reach a "second verdict" at penalty phase. (R. 913). As a result, several jurors indicated that at penalty phase they would close their minds to evidence engendering sympathy. (R. 987-88, 1435-36). The prosecutor then persuaded jurors to agree that they would not consider evidence engendering sympathy unless specifically instructed by the court that they could do so. (R. 1546, 1641-42). This was precisely the instruction that the court refused to give.

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (sentence may not be precluded by statute from considering any aspect of defendant's character or record)

(emphasis in original; footnote omitted). Skipper v. South Carolina, 476 U.S. 1 (1986) (the court's rulings may not preclude sentencer from considering any aspect of defendant's character or record); Hitchcock v. Dugger, 482 U.S. 393 (1987) (jury instruction may not preclude consideration of any aspect of defendant's character or record). Because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," the Eighth Amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). These principles require that the jury be free to consider feelings of sympathy and mercy in making a sentencing recommendation.

Instructing jurors to disregard any sympathy they may feel for the defendant undermines the jury's ability to weigh and evaluate all of the mitigating evidence. The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra. An instruction to disregard sympathy improperly suggests to the jury "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538 (1987) (O'Connor, J., concurring).

When jurors are foreclosed from considering sympathy and mercy toward the defendant, they are prevented from

considering the entirety of the defendant's character. This fact was made very clear during the penalty phase of Mr. Harvey's trial. During the closing argument of the penalty phase, the prosecutor urged the jury to disregard much of the mitigating evidence presented by Mr. Harvey, precisely because that evidence would tend to arouse sympathy for Mr. Harvey. The prosecutor told the jury that sympathy "is not the point of this mitigating circumstance." (R. 3015). In actual fact, however, engendering feelings of sympathy and mercy is precisely the point of nonstatutory (and some statutory) mitigating evidence.[3/]

The testimony offered by Mr. Harvey's family members was classic nonstatutory mitigating evidence. This evidence included the following:

(a) Laura Ann Harvey, The Defendant's Sister.

Laura Ann testified that Mr. Harvey helped her when she was bedridden with scoliosis. (R. 2682). Mr. Harvey was in a serious accident that prevented him from completing school,

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3/ The prosecutor's argument in itself violated Mr. Harvey's right to a reliable sentencing proceeding. In this case, as in Caldwell v. Mississippi, 472 U.S. 320 (1985), the argument "sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Id. at ___ quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). The Eleventh Circuit has repeatedly condemned prosecutorial arguments that seek to preclude the jury from exercising mercy. Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd, 1990 U.S. App. LEXIS 12655 (11th Cir., July 20, 1990); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985), cert. denied, 476 U.S. 1153 (1986).

but he worked continuously after leaving school. (R. 2685). He became depressed after getting married, shortly before his arrest, to Karen Frank, who pressured him to lose weight and to earn more money. (R. 2686-87).

(b) Harold Lee Harvey, Sr., The Defendant's Father.

Mr. Harvey's father described him as a good boy and a loving son, who did anything he was asked around the house. (R. 2814). The defendant helped take care of the family, at the age of 18, when his father was disabled for six months by a back injury. (R. 2815-16). His father confirmed that Mr. Harvey's personality changed after his marriage. (R. 2816).

(c) Jenny Fennig, The Defendant's Sister.

Jenny described how her older brother helped take care of his younger siblings. (R. 2819). He was a loving brother, who was very proud of his nephew, Jenny's son. Mr. Harvey was a good uncle who used to hold her son and helped teach him to walk. (R. 2821-22). Mr. Harvey's personality changed after the automobile accident, and even more so after his marriage. (R. 2820).

(d) Jack Steven Story, The Defendant's Uncle.

Mr. Story testified that Mr. Harvey was a "hard-working young man" and that the two of them were like brothers. (R. 2826).

(e) William Patrick Harvey, The Defendant's Brother.

Mr. Harvey taught William how to run heavy equipment (William's livelihood), hunt and fish, drive a car, and weld. (R. 2896-98).

(f) Shirley Ann Harvey, The Defendant's Mother.

Shirley testified that Mr. Harvey loved and watched over his younger siblings. (R. 2920). When his sister, Laura, was in a body cast on two occasions Mr. Harvey spent a couple of hours each day taking care of her. (R. 2923). Mr. Harvey worked part time from the age of 15 and full time from the time he left school. (R. 2937-38). After his marriage, Mr. Harvey became so depressed that at times he would go to the family's house and go to his mother's room to watch television, without saying a word to anyone. (R. 2939).

(2) Validity Of The Nonstatutory Mitigating Evidence.

"Contribution to community or society as evidenced by an exemplary work, military, family, or other record" are valid nonstatutory mitigating circumstances). See Campbell v. State, No. 72,622, slip op. at 9 n.6 (Fla., June 14, 1990). By equating this type of mitigating evidence regarding Mr. Harvey with "sympathy," which the State told the jury could not be considered in the absence of a specific instruction from the judge, the State told the jury that it could not consider this nonstatutory mitigating evidence. The court's instruction reinforced the State's argument that evidence that might evoke sympathy was not valid nonstatutory mitigating evidence. The fact that the jury was uncertain about what mitigating evidence

it could consider is demonstrated by its request to the Court for a list of mitigating factors which it could consider. The court refused to respond to the jury's request. (R. 3044).

In this case, as in Eddings, supra, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." Eddings, 455 U.S. at 114. A death sentence resulting from such an instruction is inherently unreliable and violates the Eighth Amendment. Hitchcock, supra, at 398-99. Appellate counsel's failure to make such an argument, based on citations to the record and to applicable and readily available precedent, constituted a serious and substantial deficiency which prejudiced Mr. Harvey.

(3) Consideration Of Nonstatutory Aggravating Circumstances.

Mr. Harvey requested that the jury be instructed not to consider as a basis for recommending the death penalty any facts or circumstances other than the aggravating circumstances on which it was instructed. (R. 3588). The request was denied. (R. 2860). It is fundamental that the judge and jury in a Florida capital case may consider in aggravation only those factors that are expressly set out in the capital sentencing statute, § 921.141(5), Fla. Stat. See also Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). An instruction such as the one requested by Mr. Harvey is necessary to insure that the jury does not consider other extraneous and prejudicial factors, such as the impact of the crime on the victim's family or the personal characteristics of the victim. See Booth v. Maryland, 482 U.S. 496 (1987); Grossman v. State, 525 So.2d 833, 842 (Fla.

1988). In the absence of such an instruction, there is an unacceptable risk that the death penalty will be imposed in an arbitrary and capricious manner. Proffitt v. Florida, 428 U.S. 242, 258 (1976).

Numerous statements concerning the age, wealth and status of the victims was improperly presented at Mr. Harvey's trial. At the very least, the jury should have been given a specific instruction, such as the one requested by Mr. Harvey, to ensure that the jury not consider any evidence or argument in support of the death penalty other than that relating to the relevant statutory aggravating circumstances. Appellate counsel's failure to raise this issue by more than a mere citation to the requested instructions themselves was a serious and substantial deficiency which prejudiced Mr. Harvey.

(4) Denial Of Instruction On Non-statutory Mitigating Factors.

Mr. Harvey requested an instruction that would have set forth in detail the nonstatutory mitigating factors that Mr. Harvey claimed to have established. Those factors included Mr. Harvey's remorse, strong family relationships, emotional problems and intellectual deficits suffered, even if not rising to the level of extreme duress or extreme emotional disturbance, deprived background, work record, limited education, and others. (R. 3590-91). The court refused to give this instruction, on the basis that no instruction with respect to specific nonstatutory mitigating circumstances was necessary. (R. 2858).

In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court held that the sentencer may not be "precluded from considering, as a mitigating factor," any evidence proffered by the defendant. Id. at 604. In Hitchcock v. Dugger, 481 U.S. 393 (1987), the Court applied Lockett to a sentencing instruction that effectively precluded the sentencing jury from considering nonstatutory mitigating evidence. The trial court's bare bones instruction that the jury could consider "[a]ny other aspect of the Defendant's character or circumstances of the offense," (R. 3041), violated the principles of Lockett and Hitchcock, because it failed to inform the jury what nonstatutory mitigating evidence it could consider.

Unless a jury is given some instruction concerning the types of valid mitigating evidence it can consider it is effectively precluded from considering nonstatutory mitigating evidence. That is particularly true where, as here, the prosecutor and court told the jury that it could not consider evidence engendering sympathy for the defendant, and the jury did not understand what mitigating evidence it could consider. The jury's specific request for a list of the mitigating circumstances, which was denied by the court (R. 3043), demonstrates that the jury did not understand what mitigating evidence it could consider or what effect it could give to the nonstatutory mitigating evidence. The court's refusal to give the requested instruction therefore violated Lockett and Hitchcock and appellate counsel was ineffective for failing to raise this issue.

(5) Denial Of Instruction On Heightened Premeditation.

Mr. Harvey's trial counsel requested an instruction informing the jury that it could only find the cold, calculated and premeditated aggravating circumstance if there was heightened premeditation. (R. 3589). The court denied this requested instruction. (R. 2955). Appellate counsel made no argument that denial of this instruction was erroneous or unconstitutional.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court held that the Eighth Amendment requires that aggravating circumstances channel the discretion of sentencing juries. When an aggravating circumstance is vague on its face, Godfrey requires that the sentencing jury be given some limiting instruction with respect to the application of the aggravating factor. Id. at 428-29.

The words of the "cold, calculated and premeditated" aggravating circumstance, standing alone, fail to provide any guidance to the jury or to limit their sentencing discretion. As with the "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance reviewed in Godfrey, an ordinary person could "fairly characterize almost every" premeditated murder as "cold, calculated and premeditated." Godfrey, 446 U.S. at 428-29. The addition of the vague and subjective adjectives "cold" and "calculated" to the word "premeditated" does nothing to tell the jury what, if anything, beyond ordinary premeditation is required in order for the aggravating circumstance to apply.

Thus, the "cold, calculated and premeditated" aggravating circumstance is vague on its face.

The trial court merely read the statutory language to the jury and did not give any limiting instruction with respect to the cold, calculated and premeditated aggravating factor. (R. 3040). The need for such a limiting instruction was made clear by former Chief Justice Ehrlich, who dissented, in part, from this Court's decision in Herring v. State, 446 So. 2d 1049 (Fla. 1984). He emphasized that this Court has "gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated" under Florida law if this aggravator is to be present. "Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute." Id. at 1058.

In Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 108 S. Ct. 733 (1988), this Court adopted Justice Ehrlich's view, holding that the "cold, calculated and premeditated" aggravating factor requires proof beyond a reasonable doubt of a "careful plan or prearranged design to kill." Here, the jury was not given any limiting instruction which would prevent it from finding that the aggravating factor applied per se to any premeditated murder.

Appellate counsel failed to raise this issue, and failed to file a supplementary brief or notice of supplemental authority citing Rogers, even though Rogers was decided in July 1987 and appellate counsel filed a supplementary brief based on

Haliburton v. State, 514 So.2d 1088 (Fla. 1987), on October 30, 1987. See Appellant's Supplementary Brief. Failure to raise this well error on appeal was a serious and substantial deficiency which prejudiced Mr. Harvey.

(6) Denial Of Special Verdict Form.

Finally, Mr. Harvey requested a special verdict form setting out which aggravating factors were found by the jury. (R. 3593-94). This request was denied by the trial court. (R. 2842). Under Tedder v. State, 322 So.2d 908 (Fla. 1975), the trial court in imposing sentence and the Florida Supreme Court in reviewing the sentence are required to give great weight to the jury's advisory verdict. Requiring courts to defer to the jury without at the same time requiring the jury to make factual findings upon which its advisory verdict is based, gives rise to the possibility that the death sentence will be imposed in an arbitrary and capricious manner, in violation of Furman v. Georgia, 408 U.S. 238 (1972). See Grossman v. State, 525 So.2d 833, 848 (Fla. 1988) (Shaw, J., concurring). In order to remedy this situation and insure that the jury properly carried out its responsibility, the court should have given the requested special verdict form. The failure of appellate counsel to raise this issue was a serious and substantial deficiency.

Mr. Harvey was prejudiced by the failure of appellate counsel to raise these meritorious issues regarding penalty phase jury instructions. Accordingly, this Court should grant a new appeal and remand his case for a new sentencing proceeding before a properly instructed jury.

e. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Trial Court's Denial Of An Instruction Regarding The Mitigating Factor Of Mr. Harvey's Substantially Impaired Capacity To Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Law.

Through trial counsel, Mr. Harvey requested that the jury be instructed on the mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Fla. Stat. § 921.141(6)(f). (R. 3590, 2852). The trial court denied the request for this instruction, stating that this mitigating circumstance is like a "sanity defense," and that there was insufficient evidence to support it. (R. 2855). The issue was preserved for appellate review by the trial court's denial of the instruction. Toole v. State, 479 So.2d 731, 733 (Fla. 1985) (citing Thomas v. Stte, 419 So.2d 634 (Fla. 1982)). Yet, appellate counsel failed to raise the denial of this instruction on appeal.

As trial counsel argued, (R. 2855), there was sufficient evidence concerning Mr. Harvey's impaired capacity to require a jury instruction. It was undisputed that Mr. Harvey's intelligence is below normal and that he suffers from depression and dependent personality disorder. (R. 2754). In addition, there was uncontroverted testimony that Mr. Harvey had very poor coping skills. And, which Dr. Petrilla explained that individuals with such personality disorders "becom[e] easily stressed out, easily frustrated, [act] out in inappropriate ways, ... because they can't control themselves." (R. 2747).

Dr. Petrilla further testified that Mr. Harvey was unable to reason abstractly. (Id.). These problems were further compounded by his family's inability to provide him with the educational and other resources he needed to address his problems. (R. 2749-50). Dr. Petrilla summarized that if Mr. Harvey was placed under stress:

> with his poor coping skills and his poor ego strength and his poor educational background and his inability to reason abstractly and his lower IQ, it would just compound the problem.
>
> In addition, if he had an environment where it wasn't very enriched, where he wasn't stimulated at home and taught appropriate coping skills, that would manifest itself in a big problem for him like a bomb going off inside a person's head.

(R. 2748). There was also testimony that his personality changed after he was in a serious automobile accident, (R. 2820), and that his verbal IQ was 12 points above his performance IQ. (R. 2755).

In addition, there was a great deal of testimony concerning the amount of stress that Mr. Harvey was under at the time of the offense. Mr. Harvey had recently married a school teacher, a woman from a substantially different background. (R. 2733). She placed increasing demands on him financially, as the trial court found, (R. 3467), and also demanded that he lose weight. As a result, he virtually stopped eating and lost over thirty pounds, and became almost totally withdrawn. (R. 2686-87, 2820, 2939).

Viewing these facts in the light most favorable to Mr. Harvey, it is certainly possible that a jury would believe that Mr. Harvey's ability to conform his conduct to the requirements of the law was substantially impaired. Particularly as the events unfolded and the situation became more and more stressful, Mr. Harvey became less and less able to reason, to cope, and to conform his conduct. Therefore, it was error to deny the requested instruction on the substantial impairment mitigating factor. This is particularly so in light of the court's finding that there was sufficient evidence to require an instruction on the extreme emotional or mental disturbance mitigating factor. Fla. Stat. § 921.141(6)(b). (R. 2959). Thus, the court's failure to give an instruction with respect to one of the mental mitigating factors requires reversal.

In Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 451 U.S. 916 (1981), a case involving a schizophrenic defendant, this Court found that it was error for the trial court to fail to consider the statutory mental mitigating circumstances. This Court held that where there is evidence that the defendant had a "substantial mental condition at the time of the offense," Id. at 337, the court must consider the mitigating circumstance of extreme mental or emotional disturbance and the circumstance of substantially impaired capacity before imposing sentence. Implicit in this holding is the principle that the jury must also be instructed with respect to both factors where there is evidence of significant mental or emotional impairment.

This principle was made explicit in Toole, supra. In Toole, there was evidence that the defendant suffered from pyromania, was borderline retarded and suffered from a personality disorder, as well as limited coping ability and impulsive behavior. Toole, 479 So.2d at 733. There, the court instructed the jury only on the mitigating circumstance of substantial impairment, but not on that of extreme emotional or mental disturbance. The court held that the failure to instruct on extreme emotional or mental disturbance was reversible error:

> We find that the trial court erroneously refused the instruction on (6)(b). The above-mentioned evidence might very well suggest to the jury that appellant suffers from mental or emotional disturbance. Had the jury been properly instructed that it could consider this specific mitigating factor, it might not have recommended death. A jury recommendation of life is entitled to great weight and may not be overruled unless there was no reasonable basis for it. Richardson v. State, 437 So.2d 1091 (Fla. 1983). Appellant has been prejudiced by the trial court's refusal to give a proper instruction that might have led to a different jury recommendation.

Id. at 734.

Just as the defendant in Toole, Mr. Harvey has suffered prejudice as a result of the trial court's failure to properly instruct the jury. The evidence in Mr. Harvey's case showed that he suffered from significant mental and emotional deficits. That evidence "might very well suggest" to the jury that Mr. Harvey's capacity was substantially impaired. If they had been instructed with respect to that specific mitigating factor, they might have made a binding recommendation of life

imprisonment. Under Toole, the failure to give Mr. Harvey's requested instruction on the mitigating circumstance of substantially impaired capacity was reversible error. Competent counsel would have raised that error on appeal, and counsel's failure to do so undermines confidence in the outcome. Therefore, Mr. Harvey is entitled to habeas corpus relief.

f. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Trial Court's Denial Of Mr. Harvey's Motion To Appoint Co-Counsel.

Mr. Harvey requested that the trial court appoint co-counsel to represent him in this case. (R. 172-173, 3237-39). The trial court denied Mr. Harvey's motion, stating that "this case may make the law on that point, but I don't think there's any authority or requirement to appoint [an] additional lawyer." (R. 175). The trial court clearly erred in reaching this conclusion.

The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. Gardner v. Florida, 430 U.S. 349, 357-358 (1977). Consistent with this basic principle, Florida courts have recognized that the appointment of two attorneys to represent a defendant in a first-degree murder case is often necessary to ensure that the defendant receives the effective assistance of counsel to which he is entitled under the Sixth and Fourteenth Amendments. See, e.g., Schommer v. Bentley, 500 So.2d 118 (Fla. 1986); Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986); Pinellas County v. Maas, 400 So.2d 1028 (Fla. 2d DCA 1981). Dade County v. Goldstein, 384 So.2d 183 (Fla. 3d DCA 1980); County of Seminole v. Waddel, 382 So.2d 357 (Fla. 5th DCA 1980);

Indeed, the refusal to appoint additional counsel for an indigent charged with a capital crime has been found to constitute an abuse of the trial court's discretion. See Keenan v. Superior Court and County of San Francisco, 640 P.2d ___ (Cal. 1983); See also Seaman v. Superior Court, 193 Cal. App. 3d. 1279, 238 Cal. Rptr. 878, 883 (1987) ("the court appoints a second attorney when it is convinced that the appointment is necessary to provide effective representation."); Gardner v. State, 733 S.W. 2d 195, 207 (Tex. Cr. App. 1987) (constitutional error occurs when a trial court fails to appoint additional counsel and the accused does not receive the reasonably effective assistance of counsel to which he is entitled under the Sixth and Fourteenth Amendments.)

The defense of a murder prosecution always places a substantial burden on defense counsel. As the court in Keenan recognized, in a capital case, "the possibility of a death penalty raises additional factual and legal issues," not present in a non-capital case. 640 P.2d, at 493. Moreover, for defense counsel

> [t]he difficulty of preparation [is] compounded . . . by the inherent problem present in any capital case of simultaneous preparation for a guilt and a penalty phase of the trial . . . . the issues and evidence to be developed in order to support mitigation of the possible death sentence [are] substantially different from those likely to be considered during the guilt phase.

Id. at 494.

Here, Mr. Harvey's counsel, recognizing that his client was likely to be found guilty, pointed out to the trial

court the difficulty in preparing for the defense of a capital case. Under Florida law, the guilt/innocence phase and the penalty phase of a capital trial are distinct proceedings involving separate issues. Mr. Harvey's trial counsel recognized that if only one lawyer were appointed to represent Mr. Harvey and Mr. Harvey were convicted of first degree murder, counsel would be placed in the position of representing Mr. Harvey in the penalty phase, facing a jury that had already rejected his arguments, and thus his credibility. (R. 173-74, 3237-38).

In light of the enormous volume of facts and the complexity of the legal issues involved in this case, as well as the Florida death penalty trial system which provides for a bifurcated trial, the trial court's refusal to appoint co-counsel violated Mr. Harvey's right to the effective assistance of counsel.

Appellate counsel's performance was grossly deficient for failing to bring the trial court's error to this court's attention on direct appeal. Mr. Harvey has clearly been prejudiced as a result of this deficiency, and accordingly this court should issue a writ of habeas corpus.

g. Appellate Counsel Was Ineffective For Failing To Argue On Direct Appeal That The Evidence Relating To The Gun "Taken" From Mr. Variotto's Vehicle Was Inadmissible Under The Williams Rule, And For Failing to Properly Argue That The Flight Evidence Was Improperly Admitted.

It is axiomatic that "any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of exclusion." Williams v. State, 110 So.2d 654, 658 (Fla. 1959) (emphasis added). In Williams, this Court held that relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. Id. at 659. "The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy." Id. at 660.

The Williams Rule was subsequently codified:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

Fla. Stat. § 90.404(2)(a) (emphasis added). The rule also requires that

> when the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information....

Fla. Stat. § 90.404(2)(b).

While the State is entitled to present evidence of the crimes charged, it cannot do so if the probative value of that evidence is outweighed by the prejudicial impact it has upon the jury. "Even when the evidence of separate criminal activity has

relevance, it is possible for such evidence... to have an improper prejudicial impact that outweighs its probative value". Straight v. State, 397 So.2d 903, 909 (Fla. 1981).

In this case, the trial court allowed irrelevant but highly prejudicial collateral crime evidence to be presented to the jury over defense counsel's strenuous objections. Appellate counsel failed to raise this issue properly on direct appeal. This failure was a serious and substantial failure which prejudiced Mr. Harvey.

The first irrelevant and improperly admitted collateral crime evidence dealt with the gun, an "AR-15," that was used in these offenses. Robert Variotto testified for the State that he had purchased the AR-15, that it was "removed from [his] possession", (R. 1877), but that it was neither sold nor loaned. He went away for the weekend and it was "missing" when he returned. (R. 1874-1883). The testimony was not offered to tie Mr. Harvey to the murders, but rather to show the origin of the weapon. See, e.g., Ruffin v. State, 397 So.2d 277 (Fla. 1981). Yet the origin of the gun or identity of its true owner was not even remotely relevant "to a fact in issue." Williams v. State, supra at 658. Counsel had already conceded that Mr. Harvey had committed the murders. Moreover, the State failed to give any notice whatsoever that it intended to rely on collateral crime evidence regarding the weapon. (See R. 3404-3405).

Defense counsel strenuously objected to the testimony regarding the origin of the gun on the ground that it was

irrelevant. (R. 1878-1880). In a classic ruling of form over substance that would be amusing in a work of fiction, the trial court held that Mr. Variotto could not say the words "steal" or "stolen," but that he could testify that he left the gun in his vehicle; that he went somewhere; when he returned the gun was gone; and that he did not loan, sell, or give the weapon to anyone. (R. 1880-1881). Consequently, although Mr. Harvey was not charged with theft of the gun, the jury was permitted to hear testimony that left no doubt that he stole it.

The State provided notice that it intended to rely on evidence of the second collateral crime, Mr. Harvey's escape from the Okeechobee County Jail, and the ensuing bad acts at trial. (R. 3404-3405). At trial, however, defense counsel properly objected to the introduction of this testimony on the basis that it did not tend to prove a material fact in issue. (R. 2299). See Fla. Stat. § 90.404(2)(a). Counsel correctly pointed out that any testimony concerning the escape was irrelevant since Mr. Harvey confessed to killing the Boyds. (R. 2300). The court granted Mr. Harvey a continuing objection to this line of testimony but denied his motion to exclude it (R. 2298-2301). Thereafter, five witnesses testified about events surrounding Mr. Harvey's escape from jail and his subsequent capture. (R. 2304-2358).

The prejudice caused by the improperly admitted collateral crime evidence was so grossly disproportional to its purported probative value, that it destroyed the impartiality of the jury and denied Mr. Harvey a fair trial. Mr. Harvey's

guilt had been conceded by his lawyer in his opening statement. Thus, the only remaining material fact at issue was whether the killings constituted first or second degree murder. The collateral crime evidence pertaining to the gun and the escape was simply not relevant to that issue. The only purpose of this evidence was to show bad character or criminal propensity on the part of Mr. Harvey. As such, the court had a duty to exclude the evidence.

The admission of improper collateral crime evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Peek v. State, 488 So.2d 52, 56 (Fla. 1986) (quoting Straight v. State, 397 So.2d 903, 908 (Fla. 1981) (emphasis added)). In a capital case, the harm done to a defendant by presenting improper collateral crime evidence to the jury during guilt phase is even greater. In addition to its effect there, the improper evidence also infects the penalty phase, amounting to a nonstatutory aggravating circumstance. Thus, not only was Mr. Harvey's right to a fair determination of his guilt destroyed by the collateral crime evidence, the sentencing recommendation and the sentences themselves were also tainted by it.

Mr. Harvey's appellate counsel completely failed to raise the issue of the improperly admitted evidence regarding the gun. Furthermore, he failed to put forth the proper legal argument for the exclusion of the parade of horribles in conjunction with the escape. (R. 2304-2358). Appellate counsel

argued only that the evidence was inadmissible because it was remote in time from the crimes with which Mr. Harvey had been charged, and therefore, it should not have been admitted.

Competent appellate counsel would have argued, as trial counsel did, that the evidence was inadmissible because it was both prejudicial and was not "relevant to prove a material fact in issue." Fla. Stat. § 90.404(2)(a). Consequently, the trial court's rulings went unchallenged and the convictions and sentences obtained as a result were affirmed. Appellate counsel's failure to properly raise this issue was a serious with substantial deficiency which prejudiced Mr. Harvey.

h. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Denial Of Mr. Harvey's Request For A Jury Instruction Supporting His Theory Of Defense.

Florida law is well settled that a defendant is entitled to a jury instruction on the law applicable to his theory of defense "where any trial evidence supports that theory." Gardner v. State, 480 So.2d 91, 92 (Fla. 1985) (citing Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882 (1981)) (emphasis supplied). In this case, however, the trial court refused to grant Mr. Harvey's request that it merely follow the clear requirement of the law. (R. 2396).

The theory of defense about which Mr. Harvey asked the court to instruct the jury was that "sudden impulsive acts may be committed under certain circumstances showing lack of

premeditation." (R. 2395). In Spaziano v. State, 425 So.2d 1201, 1202 (Fla. 2nd DCA 1983), the Court acknowledged that a sudden impulsive act might mitigate, or demonstrate the absence of, premeditation.

The evidence presented at Mr. Harvey's trial was clearly sufficient to warrant the requested instruction. Mr. Harvey's shooting the Boyds was clearly an impulsive act, not a premeditated plan as argued by the State. Mr. Harvey and his co-defendant, Scott Stiteler, set out only to rob the Boyds, not to murder them. Although Mr. Harvey and his co-defendant discussed having to shoot the Boyds, Mr. Harvey's recorded confession, which was introduced at trial, demonstrates clearly that before Mrs. Boyd ran, Mr. Harvey had not made a definite decision to shoot her. Mr. Harvey was very nervous and frightened, and when Mrs. Boyds started running, he impulsively, shot her:

Det. Hargraves:	Okay, Lee, let's start when you first . . . ah first started surveilling the house on Saturday afternoon.
Lee Harvey:	(inaudible) ah we wasn't surveilling it then. We was just hunting.
Det. Hargraves:	You were just hunting?
Lee Harvey:	Yea.
Det. Hargraves:	Okay, what point did you, at what point did you ah go to, decide that you were going to go in and rob the Boyd's?
Lee Harvey:	Sometime that, that afternoon in the late afternoon.

* * *

Det. Hargraves: . . . Ah, what was the discussion about in reference to the ah robbery?

* * *

Lee Harvey: Well we just thought that we'd rob em.

Det. Hargraves: Whenever you say rob ah in what, in what way? In other words at gun point, strictly to go in strong arm em or, or what? Did you ever discuss that aspect of it?

Lee Harvey: Not really.

* * *

Sgt. Flynn: Were you gonna wear a stocking cap or anything like that?

Lee Harvey: Yea.

Det. Hargraves: Or a mask or what?

Lee Harvey: Yea.

Det. Hargraves: What kind of mask were you going to wear?

Lee Harvey: A stocking.

Det. Hargraves: Did you have one with you?

Lee Harvey: Yea.

Det. Hargraves: Was it just a regular pantyhose type ah hosiery stocking? Did ya'll discuss this?

Lee Harvey: Yea.

Det. Hargraves: Okay, and what else was the plan in reference to the robbery?

Lee Harvey: That's it.

Det. Hargraves: Did you discuss the possibility of using guns? Were you gonna use em to scare em or . . . .

Lee Harvey: Yea.

Det. Hargraves: Did you discuss that prior?

Lee Harvey: Yea.

Det. Hargraves: Did you discuss the possibility of them resisting?

Lee Harvey: Yea, well when we went up there I, I figured we would both back out but Scott wanted to go ahead on with it so, so I didn't, I didn't really want to do it and then he just kept on ya know wanting to do it so.

Det. Hargraves: Okay, explain to me again let me go back ah you discussed the possibility of them resisting prior to going up there is that right?

Lee Harvey: Yea.

Det. Hargraves: Okay, what did you decide you would do if they did resist?

Lee Harvey: I don't know what we decided. I don't think either one of us knew . . . .

Det. Hargraves: What had you thought that you might do if they recognized you?

* * *

Lee Harvey: Well, that's why we had the ma . . . . the masks.

Det. Hargraves: Did you put the masks on?

Lee Harvey: We was but I don't know why we didn't.

Det. Hargraves: Did Mrs. Boyd surprise you when she came around the west end of the house as Scott was knocking on the door?

Lee Harvey: Sort of.

Det. Hargraves: Did you expect to see her there?

Lee Harvey: No.

* * *

Det. Hargraves: You walked in the patio door or the side door?

Lee Harvey: The side door . . . .

Then I, I told him I needed, I needed money and he said okay I'll give it to you. So . . . .

* * *

Det. Hargraves: He climb then up the stairs, he turned to his left and went down to his bedroom which is the next room after you go through the hallway. Is that correct?

Lee Harvey: Yea.

Det. Hargraves: Okay, when you were in the bedroom what transpired at that time?

Lee Harvey: Well he said well let me get my wallet so they went and got their wallets out of the dresser.

Det. Hargraves: Which dresser?

Lee Harvey: I don't know. I wasn't really paying no attention to him. He could of shot me right there for all I knew. I was already too scared. She went in that room back there somewhere and got a wallet out . . . .

Det. Hargraves: Okay, what happened at that point Lee?

Lee Harvey: They got their wallets and brought them over there to me you know so we could take the money out. They took it out and he said we'll need a little bit for church. And I said alright . . . .

* * *

Sgt. Flynn: In other words did you tell Scott during this discussion of what you're gonna do, well they know me, they can identify me and everything else, what are we gonna do, kill em? Do you remember anything like that?

Lee Harvey:	Yea I said, yea I said well he knows me.
Det. Hargraves:	(inaudible) Meaning Mr. Boyd.
Lee Harvey:	Yea.
Det. Hargraves:	Knows me, right? Okay, go ahead.
Lee Harvey:	And then ah I said what are we gonna do. And ah he said ah I guess we're gonna have to shoot em.
Det. Hargraves:	Okay, go ahead.
	* * *
Det. Hargraves:	Were they saying anything to you?
Lee Harvey:	I walked back through the door, I was standing right there and I stepped through the door and they said what are you gonna do with that? And then they got up like they was gonna run so I had to shoot em.
Det. Hargraves:	Which way did they intend to run?
Lee Harvey:	(inaudible-crying)

(R. 3613-23). Consistent with this evidence, Mr. Harvey's trial counsel argued, during his closing argument, that the acts committed by Mr. Harvey were the result of sudden impulse. (R. 2464, 2527).

As indicated above, the record is replete with evidence which strongly supported the instruction Mr. Harvey requested. Moreover, in deciding whether there was a proper evidentiary foundation to warrant giving the instruction on Mr. Harvey's theory of defense, the trial court was required to view the evidence in the light most favorable to Mr. Harvey. United States v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984) (citing United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979)).

The trial court clearly failed to follow this requirement, and its refusal to properly instruct the jury constitutes reversible error. Appellate counsel's failure to raise this meritorious claim was a serious and substantial deficiency which prejudiced Mr. Harvey.

i. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Denial Of Mr. Harvey's Request For A Complete Instruction On The Underlying Felony of Burglary.

The trial court's instruction regarding felony murder constitutes reversible error. The court gave the following instruction:

> [b]efore you can find the Defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt: First, William H. Boyd is dead; second, either the death occurred as a consequence of and while Harold Lee Harvey, Jr., was engaged in the commission of a robbery, a burglary or a kidnapping or while he was attempting to commit a robbery, attempting to commit a burglary, or attempting to commit a kidnapping, or the death occurred as a consequence of and while Harold Lee Harvey, Jr., or an accomplice was escaping from the immediate scene of a robbery, burglary or kidnapping.

(R. 2535-36) (emphasis supplied).

Thereafter, the trial court explained that it would give the jury the "general definition then of robbery, burglary and kidnapping," and proceeded to define burglary as follows:

> Concerning burglary, the following are the three elements of burglary: The first, Harold Lee Harvey, Jr. entered or remained in a structure owned by or in the possession of William H. Boyd; second, Harold Lee Harvey, Jr., did not have the permission or consent of William H. Boyd or anyone

> authorized to act for him to enter or remain in the structure at the time; third, that at the time of entering or remaining in the structure Harold Lee Harvey, Jr., had a fully formed conscious intent to commit an offense in that structure.

(R. 2536-38) (emphasis supplied). The court offered the jurors no instruction regarding the meaning or definition of "an offense."

Mr. Harvey specifically objected to the trial court's incomplete instruction before it was given to the jury and requested that the State be required to comply with Florida's standard jury instructions regarding burglary which require that the offense that was the object of the burglary be specified. (R. 2518-20). The trial court refused to comply with the standard jury instructions (R. 2520), and, following the guilt/innocence phase of the trial, proceeded with the inadequate instruction. (R. 2538). See Florida Standard Jury Instruction in Criminal Cases 135.

In Robles v. State, 188 So.2d 789 (Fla. 1966), this Court ruled that an insufficient jury instruction regarding the elements of the underlying felony of burglary in the context of a felony murder instruction is reversible error. In Robles, the trial court provided the jurors with the statutory definition of first degree murder, including the felony-murder rule. The trial court then gave the following definition of the underlying felony of burglary:

> The Court further instructs you that the gravamen of the offense of statutory burglary is the breaking into and entering of a dwelling house of another with the intent to commit a felony therein.

Id. at 793 (emphasis supplied).

On appeal, this Court found that the instruction was insufficient, stating:

> As to the precise intent that [the accused] was alleged to have, these instructions fail to identify the felony that he allegedly intended to commit or even to define the term "felony" in the abstract.

Id. Further, this Court held that because proof of the underlying felony is necessary in order to convict the accused under the felony-murder rule, "the [trial] court was obligated to instruct the jury concerning [the underlying felony of burglary] . . . ." Id. This Court explained:

> [T]he word "felony" is a generic term employed to distinguish certain high crimes, as murder, robbery, and larceny, from other minor offenses known as misdemeanors.

Id. at 794 (quoting 13 Am. Jur. "Burglary," Section 36).

The use of the term "an offense" in the jury instruction at issue here is even more general than the term "felony" which this court found unacceptable in Robles. Although the term "felony" distinguishes between types of crimes, the term "an offense" does not distinguish anything.

Here, in support of its position that a complete instruction regarding burglary was not required, the State argued to the trial court that it had not charged Mr. Harvey with the crime of burglary. (R. 2519). As this Court noted in Robles, that argument has no merit.

> It is equally, if not more, important that the jury be adequately instructed concerning the essential elements of the crime charged than it is that the elements be

> alleged in the indictment or information. And this is even more true when the burglary or other secondary crime is involved under the felony-murder rule than when it is the primary crime charged.

Robles, at 794.

The trial court's failure to properly instruct the jury regarding the underlying felony of burglary was reversible error. Appellate counsel's failure to raise this issue on appeal was a serious and substantial deficiency which prejudiced Mr. Harvey.

j. The Presentation Of Victim Impact Evidence To The Jury Violated Petitioner's Rights Under The Eighth And Fourteenth Amendments To The U.S. Constitution And Their Florida Counterparts And Appellate Counsel Was Ineffective For Failing To Raise This Error On Appeal.

In June 1987, after Mr. Harvey's appellate briefs were filed,[4/] the United States Supreme Court decided the case of Booth v. Maryland, 482 U.S. 496 (1987). Booth held that evidence relating to the impact of the victim's death on the victim's surviving relatives may not constitutionally be presented to the sentencer because it is not relevant to the capital sentencing determination. That determination is limited to a consideration of the characteristics of the defendant and the circumstances of the offense. In South Carolina v. Gathers, 109 S.Ct. 2207 (1989), the United States Supreme Court affirmed and extended Booth, holding, for similar reasons, that

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4/ Mr. Harvey's initial brief was filed on March 2, 1987, and his reply brief was filed June 19, 1987.

prosecutorial comment concerning a victim's personal characteristics violates the Eighth Amendment.

Appellate counsel's failure to raise this issue on direct appeal was a glaring omission, particularly in light of the Appellant's Supplementary Brief which was filed four months after the Supreme Court decided Booth and cited a decision of this Court rendered three and one-half months after Booth. But for Appellate counsel's omission, Mr. Harvey would have been entitled to a new sentencing hearing.

As this Court recognized in Jackson v. Dugger, 547 So.2d 1197, 1198-1199 (Fla. 1989), Booth "represents a fundamental change in the constitutional law of capital sentencing" that must be applied retroactively. As in Jackson, this case presents a record based Booth claim that directly challenges a prior ruling of this Court. Moreover, as in Jackson, the improper emphasis on the character of the vicitms was objected to at trial. Accordingly, it is clearly appropriate for this Court to exercise its habeas corpus jurisdiction to consider Mr. Harvey's claim in light of Booth and Gathers. Id. at 1199-1200 n. 2. See also Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980). This is particularly true given this Court's special and unique responsibility in capital cases to insure that any death sentence is reliable and not imposed in an arbitrary and capricious manner.

As in Jackson, all of the pertinent facts regarding the Booth/Gathers claim in Mr. Harvey's case are contained in

the original record on appeal. See, Jackson, supra, at 1199. Mr. Harvey's trial counsel originally contended that the prosecutor's remarks violated a long line of state court decisions which condemned similar prosecutorial argument that appealed to the jury's sympathy for the victims and asked for retribution. See e.g., Bertollotti v. State, 476 So.2d 130, 133-134 (Fla. 1985); Jennings v. State, 453 So.2d 1109, 1113-1114 (Fla. 1984); Teffeteller v. State, 439 So.2d 840, 844-845 (Fla. 1983); Grant v. State, 194 So.2d 612, 613-615 (Fla. 1967).

In Booth, however, the Court focused not on the egregiousness of prosecutorial misconduct but on the "constitutionally unacceptable risk," Booth, supra, at 503, that victim impact evidence may lead to the arbitrary and capricious imposition of the death penalty. Moreover, Gathers made clear that the holding of Booth extends to cases involving prosecutorial argument concerning victim impact or characteristics. Gathers, supra at 2210.

The prosecutor began a litany of Booth/Gathers violations during his closing argument at the guilt/innocence phase of the trial by repeatedly commenting on the characteristics of the victims, over defense counsel's objections. The prosecutor's comments resulted in precisely the same violation of Mr. Harvey's right to a reliable sentencing proceedings as in Gathers and in Jackson. In Gathers, the Supreme Court clearly recognized that argument from the prosecutor concerning the victim's characteristics or the impact

of the crime is just as pernicious as testimony by witnesses. Gathers at 2210.

During his closing, the prosecutor referred to the victims as in poor health, (R. 2490), "nervous," "security conscious," and as "an elderly couple living like that, out in the middle of nowhere." (R. 2494). When the prosecutor again referred to the age of the victims, (R. 2498), defense counsel objected and moved for a mistrial on the grounds that the prosecutor was seeking to arouse sympathy for the victims. The motion was denied. (R. 2498-99).

The prosecutor returned to this theme at the opening argument in the penalty phase. He again referred to the victims as "two elderly people," and told the jury that they were "obviously affluent and wealthy" people with a "large home." (R. 2629). The prosecutor then asked the jury to put themselves in the victims' place, telling them that the victims were

> two elderly individuals who were held at gunpoint and marched around their own home before they were finally killed. You know the terror that must have been going through each of their minds throughout this whole transaction....

(R. 2630). There can be no question that by these remarks the prosecutor urged the jury to return a sentence of death for reasons based on "emotionally charged opinions," Booth, supra at 508, that had no bearing on "the defendant's moral culpability." Gathers at 2210.

At the end of the opening statement, defense counsel objected at the closing of the opening statement to the prosecutor's repeated comments concerning the personal

characteristics of the victims (R. 2634). Once again the objection was overruled. (R. 2635).

Having now established beyond any doubt that any objection to his comments concerning the personal characteristics of the victims would be overruled, the prosecutor launched into his most extensive harangue at the closing argument of the penalty phase. Among other comments, he told the jury that they must consider the following:

> First of all, this was a couple in what they thought was the security of their own home. Here they sat on a Saturday night, they were supposed to go out but couldn't because Mr. Boyd was ill. They had just finished having supper, had settled in for the night. They were wealthy, it was a large house set back from the road. They were in for the night.
>
> * * *
>
> It was a place where they felt secure and a place where they had a right to feel secure.
>
> * * *
>
> And then Mr. and Mrs. Boyd, an elderly couple, he with a back problem for which it was bad enough that he couldn't go out that night to a dinner, they are made to walk back and forth throughout the house to go through their drawers and find their money ... and turn it over to this Defendant.

(R. 2991-93).

The repeated comments by the prosecutor concerning the victims' age, financial status and health were clearly improper references to the personal characteristics of the victims, in violation of Booth and Gathers. They were inflammatory remarks clearly intended solely to appeal to the jury's sense of

sympathy and divert its attention from deciding whether death was an appropriate punishment based on the relevant evidence concerning Mr. Harvey and the circumstances of the offense.

As the Supreme Court admonished in Booth and Gathers, such inflammatory appeals create the unconstitutional risk that sentencing juries will be distracted from their constitutionally required task of determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the offense." Booth at 507.

Indeed, in Jackson, the Court stated

> we believe . . . the presentation of this information serves the same purpose of inflaming the jury; further it diverts the panel from deciding the case based on the relevant evidence concerning the crime and the defendant.

Jackson, supra at 1199.

A common thread running through all of the Supreme Court's Eighth Amendment jurisprudence and this Court's decisions applying it has been that any decision to impose the death penalty as punishment must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Because the comments made by the prosecutor in this case so clearly trammelled upon the jury's responsibility to recommend a sentence untainted by inflammatory considerations, the degree of reliability in death sentences mandated by the Supreme Court is not present here.

The prosecutor's errors were properly preserved for appellate review by defense counsel's objections. Appellate counsel's failure to bring this issue to the Court's attention

on direct appeal was a serious and substantial deficiency. Accordingly, Mr. Harvey respectfully requests that his petition for a writ of habeas corpus be granted, that his death sentence be vacated, and that his case be remanded to the trial court for a new sentencing hearing.

k. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Improper Restriction On Cross-Examination Of The Medical Examiner.

Mr. Harvey's defense counsel sought to elicit from the medical examiner that the autopsies of the victims revealed that one victim had a .059 blood-alcohol level, and that the other victim had a .049 blood-alcohol level, as well as an unknown amount of Benzodiazipine metabolites, indicating the use of Valium or a similar drug. (R. 2044). This information was brought out on a proffer by defense counsel. The court sustained the State's objection to this testimony and held that the testimony was "insufficiently conclusive and irrelevant." (R. 2057).

It is well settled that the rule which prohibits proof of a defensive matter on cross-examination never applies where the adverse party, through such cross-examination, simply seeks to disprove, weaken or modify the case against him made by the witness himself. Coco v. State, 62 So.2d 892, 895 (Fla. 1953) (citations and quotation omitted); Frost v. State, 104 So.2d 77, 79-80 (Fla. 2d DCA 1958) (quoting Coco; citations omitted). Obviously, whether the victims were lucid directly affects the amount of physical pain they endured, as well as whether they

heard and comprehended discussions between Mr. Harvey and the co-defendant. The jury relied on both of these factors in support of its finding that the crime was heinous, atrocious or cruel. Mr. Harvey simply desired to elicit testimony from which the jury could infer that perhaps either or both victims did not possess their normal faculties. Yet, contrary to the clear holding of this Court, the trial court denied Mr. Harvey his right to cross-examine the medical examiner.

The test for admissibility of evidence is whether the evidence is relevant. Fla. Stat. § 90.402 (1985). Relevant evidence is evidence tending to prove or disprove a material fact. Fla. Stat. § 90.401 (1985). The trial court excluded clearly relevant evidence that would have weakened the State's claim that the victims suffered and heard Mr. Harvey discuss shooting them. Mr. Harvey was clearly entitled to have the jury consider this evidence.

Under Florida law, a victim's intoxication and the extent of such intoxication are critically important in determining whether the heinous, atrocious or cruel aggravating factor is applied. Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983). In Herzog, evidence was admitted that the victim was under heavy influence of methaqualone prior to her death. Id. Also, there was eyewitness testimony that the victim was unconscious. Although the actual period of unconsciousness was unclear, the evidence indicated that the victim was unconscious during the act that caused her death. Id. In Herzog, this

Court held that the aggravating factor of heinous, atrocious or cruel was inapplicable in light of the victim's state. Id.

The trial court's restriction on Mr. Harvey's right to cross-examination also violated his right to due process, to effective assistance of counsel and to confront his accusers. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982) (the right of criminal defendant to cross-examine adverse witness is derived from the Sixth Amendment and the due process right to confront one's accusers; one accused of a crime has an absolute right to a full and fair cross-examination); Herring v. New York, 422 U.S. 853, 857 (1975) ("there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."); Proffitt v. Wainwright, 685 F.2d 1227, 1255 (11th Cir. 1982) ("right to cross-examine adverse witnesses is guaranteed to criminal defendants by the confrontation clause of the sixth amendment").

This violation of Mr. Harvey's Sixth and Fourteenth Amendment rights was not harmless. The improperly excluded evidence clearly could have affected the jury's recommendation in favor of the death penalty. If the jury were aware of the evidence concerning the victims' blood alcohol level, it might well have determined that the murders were not heinous, atrocious or cruel, and that the mitigating evidence outweighed any remaining aggravating factors.

Appellate counsel's failure to challenge this error on appeal was a serious and substantial deficiency which prejudiced Mr. Harvey.

2. In Light Of This Court's Recent Decision That The Aggravating Factor Of Especially Heinous, Atrocious Or Cruel Does Not Apply Unless The Crime Was Intended To Be Deliberately And Extraordinarily Painful, This Court Should Revisit Its Earlier Decision That The Trial Court Correctly Found That Aggravating Circumstance.

This court has recognized that it is appropriate to exercise habeas corpus jurisdiction to reconsider earlier decisions rejecting record-based claims in light of significant new developments in the law. Jackson v. Dugger, 547 So.2d 1197, 1199-1200 n.2 (Fla. 1989). Consistent with that principle, this Court should revisit its earlier rejection of Mr. Harvey's claim, raised on direct appeal, that the evidence did not support the trial court's finding of the especially heinous, atrocious or cruel aggravating factor. This Court's recent ruling in Porter v. State, No. 72, 301 (Fla., June 14, 1990), supports reconsideration of that claim.

In Porter, this Court addressed the recurring question of the meaning of the "especially heinous, atrocious or cruel" aggravating factor, an issue that has troubled the trial courts and this Court since this Court's decision in Dixon v. State, 283 So.2d 1 (1973). In Dixon, this Court limited the applicability of that aggravating factor to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 9. However, following Dixon, it was unclear

whether in applying this factor, sentencing courts and advisory juries were to focus on the manner in which the crime was carried out, the degree of suffering presumably experienced by the victim, or the intent of the perpetrator to cause suffering. See Barnard, The 1988 Survey of Florida Law: Death Penalty, 13 Nova L. Rev. 905, 929-35 (1989).

In Pope v. State, 441 So.2d 1073 (Fla. 1983), this Court rejected the notion that a lack of remorse could be properly considered in assessing the presence of the heinous, atrocious or cruel aggravator, and held that any definition of heinous, atrocious, or cruel should focus on "the manner in which the crime was accomplished," rather than on "the perpetrator of the act" and "the mindset of the murderer." Id. at 1077. This Court further noted that the 1981 revised Standard Jury Instructions in Criminal Cases reflected the principle that the mindset of the defendant is not relevant to the heinous, atrocious, or cruel aggravator. Id. at 1077-78. Both the trial court in imposing sentence, and this Court in reviewing the sentence presumably followed the dictates of Pope.

In Porter, supra, however, this Court effectively overruled Pope, holding that the mindset of the defendant is a crucial factor in deciding whether the "especially heinous, atrocious or cruel" aggravating circumstance applies. Specifically, this Court reversed a trial court finding that this aggravator was present, stating:

> this record is consistent with the hypothesis that Porter's was a crime of

> passion, not a crime that was meant to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

Porter, slip op. at 7 (emphasis original).

One week later, this Court approved an amendment to the Standard Jury Instructions in Criminal Cases. Standard Jury Instructions Criminal Cases - 90-1, No. 75,956 (Fla. June 21, 1990) (motion for rehearing pending). The effect of the amendment was to re-incorporate language from Dixon, supra, regarding the mindset of the accused that had been removed from the 1981 version of the Standard Jury Instructions. It was the absence of that language that was relied upon by this Court in Pope in rejecting the relevance of the mindset of the accused to heinous, atrocious, and cruel aggravating factor.

Because the legal underpinning of this Court's rejection of Mr. Harvey's claim no longer exists, this Court should revisit its decision in light of the standard set forth in Porter.

Here, there was not a shred of evidence that Mr. Harvey intended to cause the victims extraordinary pain. Under Porter, the mindset of the defendant must be considered in determining whether the aggravating factor of especially heinous, atrocious or cruel applies. Mr. Harvey's confession reveals that he was panic stricken ("[Mr. Boyd] could of shot me right there for all I knew. I was already too scared.") (R. 3619); that he was concerned enough about the victims to leave

them money for church (R. 3640); and that he was truly horrified by what he had done:

Det. Hargraves	Where did you shoot her?
Lee Harvey	(inaudible - crying)
Det. Hargraves	Do you remember if you placed the gun barrel next to her head?
Lee Harvey	I just stuck it up there and turned my head away.

(R. 3626). When asked if he had eaten afterward, he replied, "Who could eat after something like that." (R. 3624).

Under the principles set forth in Porter, the facts that the defendant is terrified, of below average intelligence, depressed, remorseful, and in the middle of a botched robbery can rebut the heinous, atrocious or cruel aggravating factor.

Moreover, as in Porter, the facts of this case are virtually indistinguishable from those in Amoros v. State, 531 So.2d 1256 (Fla. 1988). In Amoros, the evidence showed that the defendant had gone to the victim's home to kill the defendant's former girlfriend, who was living with the victim. The victim was shot three times as he attempted to escape through the locked back door. Id. at 1257. This Court found that the fact that the victim was aware of his impending death and attempted to flee did not render the crime heinous, atrocious or cruel.

This Court distinguished Phillips v. State, 476 So.2d 194 (Fla. 1985), in which the defendant stalked the victim and reloaded his weapon before firing the final shots. Amoros, 531

So.2d at 1260-61. Clearly, this case, in which the victims were shot as soon as they attempted to flee, is much more like Amoros than Phillips.

Application of the especially heinous, atrocious or cruel aggravating factor to the facts of this case, but not to those of Amoros, is on its face arbitrary and capricious. Unless an aggravating factor is applied consistently, it fails to fulfill its purpose of providing a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

In light of the change in this Court's interpretation of the especially heinous, atrocious or cruel aggravating factor set forth in Porter, as well as the inconsistency between this case and Amoros, reconsideration of this Court's decision on direct appeal is warranted.

3. This Court Should Revisit Its Decision That the "Cold, Calculated and Premeditated" Aggravating Factor Was Properly Found, In Light Of Its Subsequent Decisions Concerning The Application Of That Aggravating Factor, And Because The Application Of That Aggravating Factor To Mr. Harvey Was Arbitrary And Capricious.

It is appropriate for this Court to exercise its habeas corpus jurisdiction to reconsider record based claims involving error denying fundamental constitutional rights. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986). Petitioner has a fundamental constitutional right not to be sentenced to death except after proof of aggravating factors

that provide a principled basis for distinguishing those cases in which the death penalty is imposed from those in which it is not. Godfrey v. Georgia, 446 U.S. 420, 433 (1980), "thus eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242, 258 (1976). As this Court has expressed it, "[r]eview by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

This Court's finding that Mr. Harvey's crime was cold, calculated and premeditated is fundamentally inconsistent with the standard set forth in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied. 484 U.S. 1020 (1988), and imposition of the death penalty based on this aggravating factor is therefore arbitrary and capricious, in violation of Article I, § 17 of the Florida Constitution.

In Rogers, supra, this Court sought to provide greater clarity in the definition of this aggravating factor. Stressing that the statutory language requires "calculation," the court held that the aggravating factor does not apply in the absence of evidence that the defendant "had a careful plan or prearranged design to kill anyone during the robbery." Id. at 533. This Court's conclusion that the facts in Rogers did not meet this standard is significant. The facts in that case showed that Rogers and the codefendant "cased" the store that they robbed, bought semi-automatic weapons, entered the store armed

and masked, attempted a robbery and while leaving shot a man three times, the final shots being fired while the victim was lying face down on the pavement. Id. at 529.

On direct appeal in Mr. Harvey's case, appellate counsel, in one paragraph, raised the issue whether the cold, calculated aggravating factor had been properly found. Initial Brief of Appellant, at 53. Although Rogers was decided while the appeal was pending, counsel did not file a supplementary brief or notice of supplemental authority regarding the effect of the Rogers decision on this issue.[5/]

Nevertheless, this Court reviewed the claim under the Rogers standard. Four Justices voted to uphold the finding of the aggravator on the sole basis that the codefendants discussed whether to kill the victims during the course of the robbery. Harvey, 529 So.2d at 1087. Three Justices disagreed with this ruling, explaining that a decision to kill during the course of a robbery "does not measure up to the planning or prearranging design" required by Rogers. Id. at 1088. A comparison of Harvey with other decisions of this Court under Rogers reveals

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[5/] Counsel's failure to do so fell below the standard of performance of reasonable appellate counsel. Rogers was a favorable and controlling decision on one of the issues raised in the initial brief. Reasonable counsel would not have left it to this Court to decide, unaided by counsel's advocacy, whether the aggravating factor applied under the Rogers decision. See Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Since three Justices would have ruled in petitioner's behavior even without the aid of any advocacy by appellate counsel, it is reasonably likely that petitioner would have prevailed on this claim if it had been properly argued. Appellate counsel's ineffectiveness is a separate ground for relief.

that application of the aggravating factor in this case is arbitrary and capricious.

Two weeks before this Court decided Harvey, it rendered its decision in Hamblen v. State, 527 So.2d 800 (Fla.), cert. denied, 109 S. Ct. 404 (1988). In Hamblen, the defendant killed a clerk during an armed robbery of a store. The defendant ordered the clerk to give him money and then to disrobe in a dressing room. The victim offered to go with him to get more money from the back of the store. On the way, she pushed an alarm button. The defendant was angered and ordered her back to the dressing room, where he shot her in the head. Id. at 801. The court held that the aggravator did not apply, relying on the lack of evidence that Hamblen intended to kill the victim before she pressed the alarm button and distinguishing cases in which the defendants transported the victims to other locations before the killings. Id. at 805.

This Court recently explained the rationale of Rogers and Hamblen as follows:

> The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. Hamblen and Rogers show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process.

Porter v. State, No. 72,301, slip op. at 9 (Fla. June 14, 1990) (emphasis supplied) (citations omitted).

This Court has repeatedly reversed findings of the cold, calculated and premeditated aggravating factor on this basis when a killing that was not planned in advance took place during the commission of a felony. See, e.g., (Michael) Rivera v. State, No. 70,563, slip op. at 12 (Fla. April 19, 1990) (murder that resulted "after the crime had escalated beyond its intended purpose"); (Samuel) Rivera v. State, 545 So.2d 864 (Fla. 1989) (killing of police officer during robbery attempt, where defendant could have killed officer earlier). In addition, the court has struck the aggravator when the defendant was in a "highly emotional" mental state prior to the killing. Thompson v. State, No. 73,300, slip op. at 16 (Fla. June 14, 1990).

This Court's decision in Harvey was flatly inconsistent with this line of cases. There is no principled way to reconcile the cases. As this Court implicitly found, there was no prearranged plan to kill the victims before the codefendants entered the victims' house. See Harvey, supra at 1087. Indeed, Mr. Harvey's confession, which is the only evidence with respect to this aggravating factor, makes it abundantly clear that he had no intention to do anything but rob the victims. (R. 3608, 3614, 3632, 3639). The robbery was so ill-conceived, in fact, that the codefendants did not have their masks on when they were surprised by one of the victims. (R. 3614-15). Moreover, it is clear that there was no intent to kill the victims throughout most of the robbery. Indeed, at the

victims' request, Mr. Harvey left them some money for church the next day. (R. 3640).

And, assuming that Mr. Harvey reached a conscious decision to kill the victims, that fact alone does not distinguish this case from Rogers and Hamblen. In Rogers, the fatal shots were fired after the victim lay helpless on the pavement and pleading for his life. Rogers, supra at 529. In Hamblen, the defendant decided to kill the victim and then walked her back to the dressing room before putting his gun to her head and shooting her. Hamblen, supra at 801. In addition, it is far from clear, based on Mr. Harvey's confession, that any final decision to kill the victims had been taken before they attempted to flee. Even if such a decision was taken, it was "more akin to a spontaneous act taken without reflection," id. at 805, than to a prearranged plan.

Mr. Harvey's most complete account of the moments before the shooting is as follows:

Det. Hargraves	Okay. What was the next discussion between you and Scott at that point?
Lee Harvey	I said, "What are we gonna do?" And he said, "I don't know what are we gonna do?"
* *	* * * *
Det. Hargraves	Okay. Did you make any statement to Scotty in refere ... or to Scott rather in reference to the Boyd's knowing you and maybe recognize you?
Lee Harvey	Yea I said, "Well they know me. What are we gonna do?"
Det. Hargraves	Well what did Scott say?

Lee Harvey	He said, "I don't know."
Det. Hargraves	Did Scott ever tell you that you were, ya'll were gonna have to kill em?
Lee Harvey	He said, "I guess we're gonna have to kill em, shoot em."
* * * * * *	
Det. Hargraves	.... Okay, go ahead. What did Mr. and Mrs. Boyd say at that point to you?
Lee Harvey	They said what are you gonna do with that and then they started to run, turned around and started to run. I shot them.

(R. 3641-42). Mr. Harvey's confusion, indecision and uncertainty are self-evident from his account. It is entirely possible that no real decision had been taken until the victims forced the issue by attempting to flee.

Finally, cold calculation is rebutted by the fact that Mr. Harvey's mental state at the time of the killings was "highly emotional rather than contemplative or reflective." Thompson, supra, slip op. at 16. Mr. Harvey did not want to go along with the whole idea, (R. 3615), and he was frightened. (R. 3619). As is clear from his account, he did not know what to do. He was under more stress than he had ever experienced. Mr. Harvey has an IQ of 86 and, according to Dr. Petrilla's undisputed testimony, the psychological testing showed that Mr. Harvey had poor coping skills, including difficulty making decisions, inability to reason abstractly, and a sense of frustration and confusion when faced with a problem, limitations that would be exacerbated under stress. (R. 2747-48). Not only

did he not decide to kill the victims after "reflection and calculation," he was incapable of reflection and calculation, particularly under the stressful circumstances of a botched armed robbery.

This case is indistinguishable on its facts from Hamblen and Rogers. As set forth above, in numerous cases since Hamblen and Rogers, this Court has struck the cold, calculated aggravating factor where there is no proof beyond a reasonable doubt of a prearranged plan to kill before the crime began. Since there was no evidence of such a plan in Mr. Harvey's case, it would be arbitrary and capricious for this Court to affirm his death sentence based in part on that aggravating factor. Accordingly, Mr. Harvey is entitled to habeas corpus relief.

4. In Light Of Its Decision In Scull v. State, 533 So.2d 1137 (Fla. 1988), This Court Should Reconsider Its Implicit Decision That The Trial Court Properly Rejected The Proposed Mitigating Circumstance Of Lack Of A Significant History of Prior Criminal Activity.

The trial court rejected the mitigating circumstance proposed by Mr. Harvey that he had no significant history of prior criminal activity. Fla. Stat. § 921.141(6)(a). The sole basis for the trial court's ruling was that Mr. Harvey had allegedly engaged in criminal activity while awaiting trial on the murder charges. (R. 3467, 3470). The trial court also ruled as a matter of law that criminal history includes all of the activity up to the time of sentencing, and refused to permit defense counsel to argue otherwise to the jury. (R. 3001). Thereafter, the state argued strenuously that Mr. Harvey's post-arrest conduct rebutted the mitigating circumstance. (R. 3004-5).

There was no evidence in the record of any criminal activity on the part of Mr. Harvey before the alleged murders. And, in Ruffin v. State, 397 So.2d 277, 283 (Fla.), cert. denied, 454 U.S. 882 (1981), this Court held that

> in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, "prior" means prior to the sentencing of the defendant and does not mean prior to the commission of the murder for which he is being sentenced.

Ruffin was controlling authority at the time of Mr. Harvey's trial. For that reason, presumably, appellate counsel did not raise on appeal the trial court's rejection of that mitigating

circumstance. Nevertheless, this Court was statutorily mandated to review all death sentences. Fla. Stat. § 921.141(4). In addition, it is the policy of this Court to independently review the record in death cases State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). We must presume then that this Court in fact reviewed and approved the trial court's finding.

After issuing its opinion in Harvey, but while rehearing was pending, this Court rendered its opinion in Scull v. State, 533 So.2d 1137 (Fla. 1988), overruling Ruffin. In Scull, the defendant was convicted of a number of crimes that took place at approximately the same time as the murders for which he was sentenced to death. The state cross-appealed from the trial court's finding of the no significant history of prior criminal activity mitigating circumstance. This Court affirmed the trial court's finding, holding:

> The state argues that, when considering the existence of this mitigating factor, it is proper to construe the term "prior" to mean prior to the sentencing, not the commission of the murder. Ruffin v. State, 397 So.2d 277, 283 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L.Ed.2d 194 (1981). However, we do not believe that a "history" of prior criminal conduct can be established by contemporaneous crimes, and we recede from language in Ruffin to the contrary.

Id. at 1143. See also Bello v. State, 547 So.2d 914, 918 (Fla. 1989) (error to reject the mitigating circumstance based solely on evidence of contemporaneous crimes).

Because a history of prior criminal activity cannot be established by contemporaneous crimes, it certainly cannot be established by subsequent crimes. There was no evidence in

the record of any crimes committed by Mr. Harvey before the murders. The trial court's reliance on subsequent crimes to rebut the mitigating circumstance is directly contrary to Scull and Bello.

This error cannot be deemed harmless. It is impossible to conclude beyond a reasonable doubt that the trial court would have reached the same result if it had properly found the mitigating circumstance of no significant prior criminal activity. Moreover, the result of the court's ruling during trial that post-arrest conduct could rebut the mitigating circumstance is that the jury undoubtedly rejected the mitigating circumstance based on the same evidence relied on by the judge.

Under Scull, evidence concerning subsequent alleged criminal activity would have been irrelevant, and therefore there would have been no basis for the jury to reject the mitigating circumstance. In the absence of this evidence, and with an additional mitigating circumstance, it is quite possible that the jury would have recommended a life sentence.

Pursuant to its jurisdiction to correct fundamental errors that took place during its review on direct appeal, Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986), this Court should revisit its earlier implicit decision concerning the mitigating circumstance. It would be arbitrary and capricious, and a denial of Mr. Harvey's rights to due process and equal protection, not to revisit its earlier decision based on current law. Certainly, a death sentence based on a now

discredited application of capital sentencing law is inherently unreliable and therefore violates Article I, § 17 of the Florida Constitution, as well as the Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Harvey should receive a new sentencing hearing.

5. Following This Court's Treatment Of Mr. Harvey's Caldwell v. Mississippi Claim On Direct Appeal, The United States Supreme Court Has Rendered Significant Decisions That Warrant Reconsideration Of His Caldwell Claim.

Mr. Harvey's attorney specifically requested that the jury not be instructed that "the final decision as to what punishment be imposed rests solely with the judge of this court," citing Caldwell v. Mississippi, 472 U.S. 320 (1985) (R. 2574, 2842). His request was denied, notwithstanding the fact that such an instruction is misleading given the jury's role in the capital sentencing determination. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

In addition, Mr. Harvey's jury was repeatedly misled when it was told by both the prosecutor and the court that it was the judge who was responsible for the sentencing determination, thus denigrating the jury's role in the determination of whether death is the appropriate punishment. For example, during voir dire, the prosecution repeatedly told the jury that "the judge is not bound by your recommendation." (R. 914). Moreover, during closing argument at the penalty phase the prosecution again stressed to the jury that the "final decision as to what punishment should be imposed rests solely

with the judge of this court." (R. 2623). The court reinforced the State's pervasive impermissible, misleading and inaccurate comments by overruling counsel's objections to these comments. (R. 964-966). Finally, as noted above, in instructing the jury following the penalty phase, the trial court misled the jury by telling them that the "final decision" as to punishment was the judge's responsibility." (R. 3038).

This issue was raised on direct appeal. This Court denied the claims without discussing whether Caldwell was applicable to Florida's sentencing scheme, apparently relegating the claim to a footnote. See Harvey, supra, at 1084 n.2 (1988). Before Mr. Harvey's appeal was decided, the Eleventh Circuit decided Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc) ("Mann I"), holding that Caldwell does apply in Florida. Mann I was not mentioned, however, in Petitioner's direct appeal.

Following the Court's rejection of Mr. Harvey's Caldwell claim on direct appeal, two Florida cases involving Caldwell error have been addressed by the United States Supreme Court. The Supreme Court's treatment of this issue suggests that reconsideration of the claim is now warranted. First, in Dugger v. Adams, 109 S.Ct. 1211 (1989), an appeal taken by the State of Florida to a decision granting Caldwell-based relief, the Court found the claim procedurally barred. The effect of the opinion was to require an objection at trial in order to raise a Caldwell claim.

Unlike in Adams, Mr. Harvey's trial counsel did object and therefore his claim is not procedurally barred. Second, the

Supreme Court denied the State's certiorari petition from the Eleventh Circuit's en banc opinion in Mann, supra. Dugger v. Mann, 109 S.Ct. 1353 (1989) ("Mann II"). As a result, Larry Mann is presently awaiting resentencing based on his Florida Caldwell claim.

Together, Mann II and Adams stand for the proposition that valid Caldwell claims that are not procedurally barred warrant relief in Florida. Mann II and Adams thus clearly represent a "sufficient change of law to merit [not merely] a subsequent post-conviction challenge," Card v. Dugger, 512 So.2d 829, 831 (Fla. 1987), but sufficient to warrant sentencing relief.

In light of these developments following Mr. Harvey's appeal, this Court should revisit Mr. Harvey's meritorious claim that his sentencing jury was impermissibly misled regarding its capital sentencing function.

6. Fla. R. Crim. P. 3.851, As Applied In The Context Of This Case And On Its Face, Has Resulted In A Violation Of Mr. Harvey's Rights To Due Process And Equal Protection Of Laws Under The Fourteenth Amendment To The United States Constitution And Their Florida Counterparts.

If a death warrant had not been signed in this case, Mr. Harvey would have had until February 21, 1991 -- two years from the date his conviction and sentence became final -- to file any motions for post-conviction relief under Rule 3.850. Because Governor Martinez signed Mr. Harvey's death warrant on March 29, 1990, and the Superintendent of the Florida State Prison set his execution for May 30, 1990, Mr. Harvey was required by Rule 3.851 to initiate any collateral post-conviction pleadings by April 30, 1990 or they would have been time barred. On April 25, 1990, this Court stayed the scheduled execution for four months, making any motions pursuant to Rules 3.850 and 3.851 due on August 27, 1990, over five months before they would have been due if the Governor had not signed a death warrant.

The signing of Mr. Harvey's death warrant in March shortened the time within which he must file motions for post-conviction relief by more than nine months. The stay granted by this Court in April restored only four of those months (without taking into account the time and effort expended to procure that stay). This drastic reduction was arbitrary and unreasonable and furthered no legitimate state interest. As illustrated by this case, it has significantly impeded Mr. Harvey's right and ability to investigate, research, and present

properly a Rule 3.850 motion and other post-conviction pleadings, and has seriously jeopardized Mr. Harvey's entitlement to a full and fair hearing on his Constitutional claims.

When it promulgated Rule 3.851, this Court could not have intended such a perverse outcome. Nor could this Court have intended to provide the State, one litigant in this controversy, with the tremendous strategic advantage that Rule 3.851 represents. Although the question of the rule's constitutionality has been presented to this Court before, the only published decision of this Court discussing the issue contains a brief mention of it that is, technically, dictum.

a. The Operation Of Rule 3.851 In This Case And On Its Face Violates Due Process Of Law Under Both The Florida And Federal Constitutions.

Collateral post-conviction proceedings are governed by due process principles. See Holland v. State, 503 So.2d 1250 (Fla. 1987). A statute or rule violates due process if it does not have a reasonable relation to a permissible legislative objective or if it is discriminatory, arbitrary or oppressive. Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981); Lasky v. State Farm Insurance Co., 296 So.2d 9, 15-16 (Fla. 1974) (objectives behind enactment must therefore be examined, with a view to constitutionality of means chosen). Whether state action violates due process is determined by balancing -- "protecting the individual's guaranteed right on one hand and the welfare of the general public on the other." Hadley v. Department of Administration, 411 So.2d 184, 188 (Fla. 1982) (quoting City of

Miami v. St. Joe Paper Co., 364 So.2d 439, 444 (Fla. 1978), appeal dismissed, 441 U.S. 939 (1979)).

Rule 3.851 cannot, on its face, pass these tests. The State can have no legitimate interest in executing someone before he has obtained the same process of review of his sentence that is accorded prisoners who are not sentenced to die. Given its finality, the death sentence should logically be the least likely candidate for such truncated procedures. Yet, the State has allowed the Governor to arbitrarily reduce the time period allowed an inmate on death row to initiate post-conviction remedies. So long as the death row inmate remains incarcerated, the welfare of the general public is protected, but the truncation of time for the filing of post-conviction papers could have a drastic impact on the right to life.

The oppressive effect of such a time reduction in Mr. Harvey's case is obvious. When his death warrant was signed in March, the operation of Rule 3.851 reduced the time available for filing motions for post-conviction relief by nine months (out of a possible twenty-four) to one month. The oppressive effect of this reduction was compounded by the fact that the State, through underfunding, had failed to provide him with counsel for the first ten months of the twenty-four month period.[6/] Altogether, Mr. Harvey has lost fifteen of the

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[6/] By statute, the State of Florida provides inmates sentenced to death with the right to counsel in state and federal post-conviction proceedings. This counsel is to be provided by the Capital Collateral Representative (CCR). Fla. Stat. 27.7001 et seq. As a result, however, of Governor Martinez' practice of signing death warrants at an

(continued...)

twenty-four months, without taking into account the time and effort expended in procuring the stay which is responsible for four of the nine months he has been given.

b. Rule 3.851 Violates Equal Protection Of The Law On Its Face And In Its Application To This Case.

It is axiomatic that all people charged with a crime in this State must be treated on an equal basis by the courts. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (citations omitted). Rule 3.851 improperly distinguishes between capital defendants and non-capital defendants and between capital defendants under

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6/ (...continued)
unprecedented rate and the Florida legislature's failure to provide adequate funding, the CCR has been unable to provide effective assistance to all death sentenced indigents. Instead, CCR must refer those defendants to the Volunteer Lawyers' Resource Center (VLRC). VLRC, in turn, attempts to recruit volunteer attorneys to accept representation on a pro bono basis. The inability of CCR to represent all indigents sentenced to death has effectively denied them their right to counsel, or at the very least, reduced dramatically the time available for preparation of post-conviction pleadings because much of the available time has been consumed in locating volunteer counsel. See Spalding v. Dugger, 526 so.2d 71 (1988); Lopez v. Dugger, Jackson v. Dugger and Turner v. Dugger, Consolidated Motions for Stay of Execution and for Appointment of Substitute Counsel filed in the Florida Supreme Court, April 6, 1990. Consequently, during the first ten months of the two-year period Mr. Harvey did not have the post-conviction counsel to which the State had given him a right. See Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) ("once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts"); Florida Department of Transportation v. E.T. Legg & Co., 472 So.2d 1336, 1337-1338 (Fla. 4th DCA 1985) (once a state accords its citizens a right, it must accord it without invidious discrimination) (citing Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir.), cert. denied, 444 U.S. 943 (1979)). Yet the intent of the legislature in establishing the CCR was specifically to assure that post-conviction proceedings "be commenced in a timely manner." Fla. Stat. 27.7001.

warrant and capital defendants not under warrant. In order to be constitutional, the statutory distinctions must be rationally related to legitimate governmental objectives. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 230 (1981). There is no such rational relationship with regard to either of the distinctions at issue here.

(i) Capital Versus Non-Capital Defendants.

Rule 3.851 is unconstitutional because it provides a shorter time for inmates sentenced to death to file for post-conviction relief than inmates not sentenced to death. This is truly a perverse result, and particularly so where the statutory scheme designed to provide Mr. Harvey legal representation through CCR failed.[7] There is absolutely no justification for providing fewer procedural protections when a person's life is in jeopardy. Given the irreversible nature of the death penalty, it is difficult to conceive of any class of cases for which this truncated procedure would be less appropriate than capital cases. Tauber v. State Board of Osteopathic Medical Examiners, 362 So.2d 90, 92 (Fla. 4th DCA 1978), cert. denied, 368 So.2d 1374 (Fla. 1979) ("due process is flexible and calls for such procedural protections as the particular situation demands") (quoting Matthews v. Eldridge, 424 U.S. 319, 334 (1976)).

Although the difference between capital cases and other cases is "the basis of differentiation in law in diverse ways," Williams v. Georgia, 349 U.S. 375, 391 (1955) (footnote

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[7] Id.

omitted), it has nowhere been suggested in our law that fewer safeguards are required where life, rather than only liberty or property is at stake. To the contrary, the United States Supreme Court has required additional procedural safeguards when the basic question is whether a human being will live or die. For example, long before the Court established the right to counsel in all felony cases, Gideon v. Wainwright, 372 U.S. 335 (1963), it recognized that right in capital cases. Powell v. Alabama, 287 U.S. 45 (1932). And, time and again, the Court has condemned procedures in capital cases that might be completely acceptable in a non-capital case.[8/]

Rule 3.851's allowance of a truncated time period solely for capital cases is contrary to established constitutional law. The amount of time available to challenge a sentence is a procedural protection. The full two-year period provided in Rule 3.850 is of particular value to those on death row, faced with both the real possibility of execution and the massive amount of work necessary to sift through the events -- both personal and legal -- that brought them there. Because Rule 3.851 allows it, Mr. Harvey has had approximately nine months to prepare a case for which a robber convicted to serve ten years would have two years. That the ramifications are far greater for Mr. Harvey need hardly be stated.

[8/] See, e.g., Maynard v. Cartwright, 486 U.S. 356 (1988); Skipper v. South Carolina, 476 U.S. 1 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Bullington v. Missouri, 451 U.S. 430 (1981); Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979) (per curiam); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

(ii) Defendants Under Warrant Versus All Other Capital Defendants.

Rule 3.851 provides even less reasoned and wholly irrational and arbitrary distinction among death row inmates. The Governor, a party opponent, decides by signing a death warrant precisely when the two-year period to file a motion under Rule 3.850 will expire. Mr. Harvey has been denied a substantial portion of that two-year period as a result of the signing of his death warrant. That denial is particularly unfair here, where the statutory scheme for providing him counsel failed.[9/]

Rule 3.851's distinction between defendants under warrant and all other capital defendants is analogous to the treatment accorded claimants under the Illinois system for processing employment discrimination claims which was found unconstitutional in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Incredibly, in that case the system's rules arbitrarily divided individuals who filed timely claims into two categories -- those whose claims the state agency managed to process within the statutory period and those whose claims the agency did not process within the statutory period. Although there was no distinction between the two groups other than chance (or perhaps influence), the claims of those in the latter group were automatically barred. Id. at 1153. The Court declared that the system violated due process because claimants had no meaningful opportunity to be heard. Id. at 1159.

9/ See supra note 3.

Justice Blackmun, who wrote the Court's opinion, also addressed the question presented on equal protection grounds in an unusual second opinion. A majority of the Court agreed with the holding. The opinion holds that "[t]he Equal Protection Clause imposes a requirement of some rationality in the nature of the class singled out, and that rationality is absent here." Id. at 1161 (citations and quotations omitted). Moreover, Justice Blackmun noted that "the State [had] convert[ed] similarly situated claims into dissimilarly situated ones, and then use[d] this distinction as the basis for its classification[,] . . . . the very essence of arbitrary state action." Id.

Rule 3.851 invites the type of arbitrary state action condemned by the Supreme Court in Logan, and Mr. Harvey's case exemplifies that fact. As noted in the other sections of this petition, Mr. Harvey's confession, trial, and representation by counsel have been replete with constitutionally questionable events. Yet under Rule 3.851 the difference between Mr. Harvey and another person sentenced to death is not the constitutional quality of the process afforded them, but rather the Governor's nearly unfettered use of a pen. In this case, the Governor has exercised that unconstitutional power to deny Mr. Harvey equal protection of the law.

c. Rule 3.851 Unconstitutionally Restricts Mr. Harvey's Access To The Courts.

Prisoners have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 822 (1977). Rule 3.851

grants the Governor of Florida, a non-judicial officer and a party opponent, the ability to curtail access to the courts by shortening the two-year period in which a Rule 3.850 motion may be filed. Granting a party opponent such power is particularly egregious when the statutory scheme for providing counsel through CCR has failed.[10/]

Although the United States Supreme Court "has never held that the States are required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (emphasis added) (citations omitted). See also Florida Dept. of Transportation v. E.T. Legg & Co., 472 So.2d 1336, 1337-1338 (Fla. 4th DCA 1985) (having accorded its citizens a right, the state must accord it to all without invidious discrimination and without violating equal protection) (citing Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir.), cert. denied, 444 U.S. 943 (1979)).

Rule 3.850's two-year limitation was designed, in part, to assure the inmates' right to reasonable access to a post-conviction forum, as was the CCR. Rule 3.851 permits the Governor to significantly foreclose Mr. Harvey's access to post-conviction remedies available to others similarly situated, by drastically reducing the time available to prepare a case for those remedies. The rule thus creates an unreasoned distinction

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[10/] See supra note 3.

which "confers upon a state officer outside the judicial system [the] power to take from an indigent all hope of any appeal." Lane v. Brown, 372 U.S. 477, 485 (1963) (post-conviction rule, that indigent petitioner could get a transcript only if public defender found merit in appeal, found unconstitutional). In Lane, the state officer involved was actually the public defender, not a party opponent, but the Court nevertheless struck down the statute.

This Court's stated rationale in establishing Rule 3.851 was to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So.2d 320, 321 (Fla. 1987) (emphasis added). Here, however, the arbitrary and discriminatory acceleration of the filing requirements for post-conviction remedies, coupled with the failure of the Florida statutory scheme to provide timely post-conviction counsel for Mr. Harvey,[11/] has denied him the very right to "orderly access to the courts" that this Court sought to ensure when it adopted Rule 3.851.

Due process and equal protection cannot be squared with the fact that, although Rule 3.850 provided Mr. Harvey with two years within which to initiate his post-conviction remedies, the Governor was permitted to deny arbitrarily a significant portion of that state-created interest through the signing of a death warrant. See Vitek v. Jones, 445 U.S. 480, 488-89 (1980) (involuntary transfer by state official of a prisoner to

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11/ Id.

a mental hospital implicates a liberty interested protected by Due Process Clause). The application of Rule 3.851 against Mr. Harvey makes it clear that Rule 3.851 grants the Governor the power to impede open and equal access to the court -- exactly what has been held time and again to be improper.

d. Cave v. State Is Not Dispositive Of This Issue.

Petitioner is aware of the Court's opinion in Cave v. State, 529 So.2d 293 (Fla. 1988), and of its references to Cave in Tompkins v. Dugger, 549 So.2d 1370, 1372 (Fla. 1989), and in Smith v. Dugger, ___ So.2d ___, ___ n.3, 15 Fla.L.W. 81, 83 n.3, 1990 WL 13564 n.3 (Fla. 1990).[12/] Although the language of Cave indicates that the Court did not at that time doubt the validity of Rule 3.851, the Court itself pointed out that, in fact, "[t]he issue was not presented below and [was] procedurally barred." 529 So.2d at 299.

In Cave, this Court framed the question as a claim "that procedural Rule 3.850 prohibits the Governor of Florida from signing a death warrant until two years after a death sentence becomes final." Id. After noting that claim was procedurally barred, the Court opined that "this Court has no constitutional authority to abrogate the Governor's authority to issue death warrants on death sentenced prisoners whose convictions are final." Id. Petitioner does not question the Governor's authority to sign a death warrant or the State's

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[12/] In Cave v. Dugger, No. 88-977-CIV-T-15B (M.D. Fla. 1990), the court also summarily dismissed a due process challenge to Rule 3.851. Id., slip op. at 26-27.

authority to carry it out. The sole question is one of state-created right to a certain amount of time.

This Court has consistently held that "the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights." Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So.2d 912, 918 (Fla. 1985) (emphasis added; citations omitted). At issue here is a constitutional violation based in part on statutory rights and in part on very analogous rights. For this Court to determine that a rule that it promulgated is unconstitutional or that the State must wait the two-year period to execute someone, for reasons of due process and equal protection, would not abrogate the Governor's authority. The Governor, after all, has no authority to use his discretionary powers to abrogate arbitrarily the rights of citizens. Evitts v. Lucey, 469 U.S. 387, 401 (1985) (when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless follow the Constitution -- and in particular the Due Process Clause).

Moreover, a significant difference in the time periods involved distinguishes this case from Cave. The operation of Rule 3.851 referred to in Cave shortened the time available under Rule 3.850 by only thirteen days. Id. In Mr. Harvey's case, the early signing of the death warrant resulted initially in a loss of well over nine months. Although the stay granted by this Court restored some of that time, even that restored

time must be weighed against the time wasted in obtaining the stay. Also significant is the fact that the petitioner in Cave was represented by CCR, who had assumed representation after Cave's conviction and sentence became final. Here, the Florida statutory scheme for providing counsel failed,[13/] and Mr. Harvey had been represented by volunteer pro bono counsel for only approximately twelve weeks at the time his warrant was signed, triggering the operation of Rule 3.851.

The Cave opinion reflects a natural reluctance on the part of this Court to overstep its authority when dealing with the exercise by the Governor of his role. In our system of checks and balances this is understandable. However, it is precisely the power of the State that due process and equal protection are designed to counteract. Petitioner is not aware of any case in which the constitutionality of Rule 3.851 was briefed for this Court by the State. In Cave itself, the State did not. At the very least, the issues raised here are too fundamental to be dismissed without the State having to justify the Rule.

e. The History of Rule 3.851 Indicates That It is Ripe For Detailed Constitutional Analysis By This Court.

The Court adopted Rule 3.851 in 1987 on its own initiative, primarily to assure a cut-off date for the filing of motions under Rule 3.850, which before then had often been filed as late as a number of hours before scheduled executions.

13/ See supra note 3.

In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So.2d 320 (Fla. 1987). "Such late filings [left] little time for judicial consideration and [had] resulted in many stays of execution simply because the courts...[had] had insufficient time to rule." Id. There can be no argument that the rule addressed a problem that needed to resolved.

The Court observed that then-Governor Graham had attempted in 1979 to impose some order on the process by signing warrants "for a week certain approximately thirty days after the signing," id., rather than the one-week period that had been prior practice. That attempt was not enough. Rule 3.851 was "predicated on the governor's signing death warrants for a week certain at least sixty days in the future," id., and expressly applies only if the governor complies. Fla. R. Crim. P. 3.851(a). Apparently, the governors have complied in fact since the rule was adopted, and this Court has never had to rule on whether they must comply.

Questions of Rule 3.851's constitutionality have been raised since the rule was promulgated or before. Justice Barkett concurred specially when it was first published for comment, noting her concerns

> with the due process and equal protection issues raised by a rule which affords capital defendants under death warrants less time to pursue remedies provided under Rule 3.850 than that afforded other defendants, including capital defendants who are not under death warrants.

Id. at 321.

About three months later, the Court published another short opinion on Rule 3.851. In re Amendment to Florida Rules of Criminal Procedure - Rule 3.851, 507 So.2d 606 (Fla. 1987). The Court stated:

> We recognize some adjustments and changes to this Court's rule may be appropriate. At the same time, we believe the rule to be better than none and should continue in effect until modified.

Yet, when the procedurally barred issue was raised in Cave, the Court unnecessarily went out of its way to express affirmation of the rule without exposition of the issues. Since then, at least three opinions have relied on Cave as dispositive of the issues, but none of them analyzes those issues.

Mr. Cave's case admittedly did not represent the most egregious operation of Rule 3.851. The rule took from him thirteen days out of a possible 730, not a horrifying result. In Mr. Harvey's case, before this Court granted the stay that Rule 3.851 was intended in part to avoid, the rule took nine months from him, after the failure of the CCR had already taken ten months, leaving him with approximately one-fifth (5 months out of 2 years) the time Rule 3.850 would have allowed him.

Surely this result is not what the Court intended. The State should be required to explain why the Governor's right to time an execution supersedes Rule 3.850 in the first place. If it does not, and petitioner argues that it does not, it would not be necessary to refashion Rule 3.851 at all. If it does, Rule 3.851 must be modified to conform to due process and equal protection principles. And at the very least, this Court should

explain in some detail the relationship between the rule and those principles.

7. Florida's System For Funding The Defense Of Indigents Charged With Capital Murder Violates Due Process Of Law And Equal Protection Of The Laws Under Both The United States And Florida Constitutions.

Under Florida law, the State has no obligation to fund the defense of criminal defendants including those charged with capital murder. Rather, that burden rests with the county in which the criminal defendant is tried. See Fla. Stat. §§ 925.035-.036 (1989).[14/] In fact, the State's only obligation is to provide an indigent criminal defendant with counsel, and with other appropriate assistance, including mental health and other experts and investigators. That duty is discharged by the trial court in which the action is pending. Thus, if a defendant is entitled to the assistance of experts

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[14/] Section 925.035(6) provides in pertinent part:

> All compensation and costs provided for in this section . . . shall be paid by the county in which the trial is held unless the trial was moved to that county on the ground that a fair and impartial trial could not be held in another county, in which event the compensation and costs shall be paid by the original county from which the cause was removed.

In this case, Okeechobee County was responsible for "all compensation and costs" although Mr. Harvey was tried in Indian River County. This is because Mr. Harvey's trial was transferred to Indian River County from Okeechobee County after the Court found that Mr. Harvey could not receive a fair and impartial trial in Okeechobee County. (R.3375-76).

and investigators, he may be denied such assistance if the trial court refuses to authorize the required monies.

In representing Mr. Harvey, which included guilt/innocence and penalty trials, counsel sought funds to hire an additional mental health expert, co-counsel and experts to study the composition of the venire. The Court denied all of these requests.

The State of Florida's procedures for funding the defense of indigent capital defendants, including counties bearing the financial burden of court-appointed counsel, experts and other professionals and the trial court having final authority over the disbursement of funds, violates the due process and equal protection guarantees of the United States and Florida Constitutions on their face and as applied to Mr. Harvey.

a. Florida's System For Funding The Representation Of Indigent Capital Defendants Violates The Due Process Guarantees Of The United States And Florida Constitutions.

It is well-settled that the due process clause of the Fourteenth Amendment requires that a criminal defendant receive a fundamentally fair trial. See, e.g., Gideon v. Wainright, 372 U.S. 335, 342 (1963); Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968). A statute or rule violates due process if it does not have a reasonable relation to a permissible legislative objective or if it is discriminatory, arbitrary or oppressive. Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981); Lasky v. State Farm Insurance Co., 296 So.2d 9, 15-16 (Fla. 1974) (objectives

behind enactment must therefore be examined, with a view to constitutionality of means chosen). When a criminal defendant is indigent, fundamental fairness mandates that a state "take steps to assure that the defendant has a fair opportunity to present his defense." Ake v. Oklahoma, 470 U.S. 68, 76 (1985). This requires a state to provide an indigent defendant with counsel when he is subject to death or incarceration, Powell v. Alabama, 287 U.S. 45, 71 (1932); Gideon v. Wainright, 372 U.S. at 343 (1963); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), and with the assistance of a mental health professional when he makes a preliminary showing that his mental capacity will be an issue in his case. Ake v. Oklahoma.

A state's obligation to provide funds for the defense is not limited to the defendant's trial. A state must provide a trial transcript or an adequate substitute to an indigent defendant to enable him to file an appeal when the state affords all defendants that right, Griffin v. Illinois, 351 U.S. 12, 20 (1956), and must appoint counsel to represent him to prosecute that appeal. Douglas v. California, 372 U.S. 353, 357-358 (1963). In addition, a state must waive docket fees to enable an indigent defendant to appeal his conviction or seek post-conviction relief when it accords that right to all defendants. Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961). See also Bounds v. Smith, 430 U.S. 817, 828 (1977) (because prisoners have a constitutional right of access to the courts, states are required "to assist inmates in the preparation and filing of meaningful legal papers by providing

prisoners with adequate law libraries or adequate assistance from persons trained in the law"); Johnson v. Avery, 393 U.S. 483 (1969) (Tennessee state prison regulation forbidding inmates from assisting other prisoners in preparing post conviction petitions invalid).

This Court has addressed the funding limitations imposed on appointed counsel in criminal cases vis-a-vis a defendant's Sixth Amendment right to counsel and the due process guarantees of the United States and Florida Constitutions. In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), Florida's statutory fee cap on the amount of attorneys fees that can be awarded to attorneys who represent indigent capital defendants was held unconstitutional to the extent that it prohibited a trial court even in exceptional circumstances from exercising its inherent authority to award a fee greater than permitted by the statutory maximum cap. 491 So.2d at 1112. In so holding, the court noted that what was at stake was the defendant's Sixth Amendment right to counsel: "[A] defendant's right to effective representation rather than the attorney's right to fair compensation . . . is our focus. We find the two inexorably interlinked." Id.

In White v. Board of County Commissioners, 537 So.2d 1376 (1989), the Florida Supreme Court reaffirmed its holding in Makemson. The court stated that "[d]ue to the bifurcated nature of a capital case, counsel is actually representing the defendant in not one but two separate trials," id. at 1380, and thus "the time expended in a capital case may well become

unusual and extraordinary in comparison with other criminal cases, regardless of whether the case is 'complex.'" Id. (citations omitted). Significantly, the court also noted that it was "hard pressed to find any capital case in which the circumstances would not warrant an award of attorney's fees in excess of the current statutory fee cap." Id. at 1378. Whether state action violates due process is determined by balancing -- "protecting the individual's guaranteed right on one hand and the welfare of the general public on the other." Hadley v. Department of Administration, 411 So.2d 184, 188 (Fla. 1982) (quoting City of Miami v. St. Joe Paper Co., 364 So.2d 439, 444 (Fla. 1978), appeal dismissed, 441 U.S. 939 (1979)). Underpinning the court's ruling in White was its understanding that the State's "primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases," id. at 1379-80 (citing Makemson, 491 So.2d at 1112). Accord Board of County Commissioners v. Scruggs, 545 So.2d 910 (Fla. 2nd DCA 1989); Leon County v. McClure, 541 So.2d 630 (Fla. 1st DCA 1988). See also Board of County Commissioners v. Curry, 545 So.2d 930 (Fla. 2nd DCA 1989) (Makemson also applies to non-capital cases).[15/]

[15/] During the recent American Bar Association Convention held in Chicago in August, 1989, Associate Justice John Paul Stevens of the United States Supreme Court echoed the Florida Supreme Court's holding in White stating that, "States with death-penalty laws have a 'vital interest' in guaranteeing that the accused have a competent lawyer at trial. If the State wants to have this as a remedy, it should finance both sides of a death penalty trial." Chicago Tribune, § 1, at 2 (August 7, 1990). As Justice Stevens noted, the adequate funding of an indigent's capital defense is necessary to insure that he receives a fundamentally fair trial.

However, Florida's system for funding the defense of indigent criminal defendants does not ensure that the accused receives competent representation. The State of Florida has conditioned the availability of the funds (and thus the tools) necessary to ensure that a capital defendant can mount a constitutionally adequate defense on the discretion of the trial court.

In this case, the dangers of such a system were realized. The trial court denied Mr. Harvey's request to appoint an additional mental health professional to assist in his defense when his mental condition was the crucial issue in both the guilt and penalty phases. (R.3362). This resulted in a denial of the assistance of mental health professionals to Mr. Harvey. See, e.g., Ake v. Oklahoma, supra, at 76.

Moreover, the trial court denied the defense's request for the appointment of an additional counsel which was crucial to Mr. Harvey receiving the effective assistance of counsel, given the complexity of capital litigation. (R.3261). This resulted in Mr. Harvey being denied the effective assistance of counsel. See, e.g., Strickland v. Washington, 466 U.S. 668, 686 (1984).

Further, the Court denied Mr. Harvey's request to retain experts to study the composition and attitudes of the venire. (R.3358). Had Mr. Harvey been afforded the assistance of experts to study the composition and attitudes of the venire, the defense would have been able to challenge the venire on the grounds that it did not represent a cross-section of the

community. The absence of such assistance resulted in Mr. Harvey being tried before a partial jury. See, e.g., Rideau v. Louisiana, 373 U.S. 723, 724-27 (1963).

By limiting the availability of funds for the defense of a capital defendant and making such allocation contingent upon court approval, while the State is not subject to such limitations, the State of Florida's procedures for funding the defense of indigent capital defendants results in the denial of due process on their face and as applied to Mr. Harvey. In his trial, for example, the prosecution included a battery of visible lawyers, assistants, and secretaries. Not only did this have the effect of making Mr. Harvey seem especially dangerous, it demonstrated the grossly unequal allocation of resources. For these reasons, Mr. Harvey's conviction and sentences must be vacated. At the very least, Mr. Harvey is entitled to an evidentiary hearing in which the claims discussed above may be fully presented.

b. Florida's Failure To Adequately Fund The Defense Of Indigent Capital Defendants Violates The Equal Protection Of The Laws.

In order to comply with the constitutional requirement of equal protection, a state law establishing classifications among different groups must be non-discriminatorily applied and be rationally related to legitimate governmental objectives. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Rinaldi v. Yeager, at 308 (1966). Florida's scheme for funding the representation of indigent criminal defendants employs a

discriminatory classification which is not rationally related to any legitimate state purpose.

It is well established that the equal protection guarantee commands that "all people charged with crime, must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American Court.'" Griffin v. Illinois, 351 U.S. 12, 17 (1956) (citations omitted). This forbids a State from making unreasoned distinctions that impede open and equal access to the courts. Rinaldi v. Yeager, supra, at 310 (1966). This requires the State to guarantee that the rendering of justice does not depend on the amount of money a defendant has. Douglas v. California, 372 U.S. 353, 355 (1963).

In Griffin, the Supreme Court struck down an Illinois law that provided a free trial transcript as a matter of right only to indigents convicted of capital crimes. Although it noted that Illinois was not obligated to provide a first appeal as a matter of right, the Court held that once a state granted that right to all defendants, it could not condition the exercise of that right upon a defendant's wealth. 351 U.S. at 18. "Plainly, the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence." Id. at 17-18.

Here, Florida's failure to adequately fund the defense of indigent capital defendants creates an unreasoned distinction between capital defendants solely on the basis of their personal wealth. This distinction constitutes precisely the type of discriminatory classification which bears no rational

relationship to any legitimate State objective that was condemned by the Supreme Court in Griffin. There is no rational reason to deny a capital defendant equal treatment under the law because he is too poor to mount an adequate defense, especially given the finality and harshness of the death penalty. Florida's scheme for funding the defense of indigent capital defendants therefore violates the equal protection guarantees of both the Florida and the United States Constitutions. On that basis, Mr. Harvey's conviction and sentences must be vacated. At the very least, Mr. Harvey is entitled to an evidentiary hearing in which the claims presented above may be fully heard.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Federal Express to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32302, this 27th day of August, 1990.

Rosa I. Rodriguez