IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,841

HAROLD LEE HARVEY, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Appeal from the Circuit Court for
the Nineteenth Judicial Circuit,
in and for Indian River County, Florida
Case No. 86-322B

Honorable Dwight L. Geiger

PETITIONER'S REPLY TO STATE'S RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

In his Amended Petition for Writ of Habeas Corpus ("Initial Brief"), Mr. Harvey, through pro bono collateral counsel,[1/] alleged numerous instances of ineffective assistance of appellate counsel. Considered separately, each instance of appellate counsel's deficient performance caused substantial prejudice to Mr. Harvey. Cumulatively, these errors deprived Mr. Harvey of a meaningful appeal from an unconstitutional conviction, compounding a miscarriage of justice in the trial court.

In addition, since Mr. Harvey's conviction, this Court has issued two opinions that have fundamentally changed the law, Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1024, 112 L. Ed. 2d 1106 (1991), and Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1937, 104 L. Ed. 2d 408 (1989). In Porter, this Court fundamentally changed the manner in which the jury must apply the "heinous, atrocious or cruel" aggravating factor. In Scull, this Court held that evidence of contemporaneous crimes could not be used to reject the mitigating factor of "no significant history" of prior criminal conduct. Because Porter and Scull work fundamental changes in the law, those cases should be applied retroactively in Mr. Harvey's case.

[1/] Jenner & Block is a participant in the American Bar Association's Capital Litigation Project, a pro bono program of attorneys assisting in the representation of defendants under sentence of death. Mr. Harvey's case was referred to Jenner & Block by the ABA in December, 1989.

ARGUMENT

I. 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. Appellate Counsel Was Ineffective For Failing To Raise On Direct Appeal The Trial Court's Failure Sua Sponte To 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.

The State asserts that Mr. Harvey's claim--that appellate counsel rendered ineffective assistance for failing to raise on direct appeal the trial court's failure sua sponte to strike an admittedly biased juror--is procedurally barred. As this Court has consistently made clear, however, a claim raised in a petition for habeas corpus is procedurally barred only if the claim could have been, should have been or was raised on direct appeal, if it was not preserved at trial, or if it is otherwise raised pursuant to a motion for postconviction relief under Fla. R. Crim. P. 3.850. Clark v. Dugger, 559 So. 2d 192, 193 (Fla. 1990). Under this standard, this claim is not procedurally barred because it could not have been raised on direct appeal.

Indeed, none of Mr. Harvey's claims relating to ineffectiveness of his appellate counsel could have been raised on direct appeal. As the Seventh Circuit recently noted:

> How could appellate counsel attack his own competence? Although this is not logically impossible . . . it is so implausible that we cannot demand it of counsel. Few of us have insight into our own shortcomings; fewer still have the nerve to flaunt our own failings. Just as trial counsel need not attack his competence during trial, appellate counsel need not protest his inadequacies.

Page v. United States, 884 F.2d 300, 301 (7th Cir. 1989).

The State also contends that this claim is procedurally barred because appellate counsel cannot raise issues that were not preserved at trial. While appellate counsel cannot generally raise issues on appeal that were not preserved at trial, appellate counsel can, and must urge those issues on appeal that amount to fundamental error.[2/] Indeed, the doctrine of fundamental error has long been part of Florida jurisprudence and provides a vital exception to the contemporaneous objection rule. See e.g., Clark, 559 So. 2d at 194; Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) ("The main benefit to a defendant of having a procedural defect declared fundamental error is that such error can be considered on appeal even though not objected to in the lower court."); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978).

As fully discussed in Mr. Harvey's Initial Brief, the trial court's failure to excuse an admittedly biased juror from the panel amounted to fundamental error because it effectively deprived Mr. Harvey of his constitutional right to a jury of twelve impartial members without his consent. This error is so substantial that prejudice to the defendant is presumed. (Initial Brief, at 44-47.) See e.g., Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992) ("The presence of a biased juror is no less a fundamental structural defect than the presence of a biased judge."); Presley v. State, 750 S.W.2d 602 (Mo. Ct. App.), cert. denied, 488 U.S. 975, 109 S. Ct. 514, 102 L. Ed. 2d 549 (1988) ("The instant record shows that the jury

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[2/] A fundamental error is an error "which goes to the foundation of the case or goes to the merits of the cause of action," Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970); in effect amounting to a denial of due process. Castor v. State, 365 So. 2d 701, 704 n.7 (Fla. 1978).

contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury."); see also Jones v. State, 452 So. 2d 643 (Fla. 4th DCA 1984) (claim of an invalid waiver of 12-person trial in capital case alleges fundamental error, thus, permissible to raise claim for first time on appeal). The law is equally clear that if a prospective juror is not qualified to serve, the trial court must excuse the juror on its own motion. See Fla. R. Crim. P. 5.300(c); Singer v. State, 109 So. 2d 7, 23-24 (Fla. 1959) (court has independent duty to strike partial jurors).

The Eleventh Circuit and this Court have recognized that an appellate counsel's failure to raise fundamental error, even if the error has not been preserved by trial counsel, amounts to ineffective assistance of appellate counsel. See Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984) ("We note that there may be some cases in which trial counsel's failure to preserve error will not excuse appellate counsel's failure to raise the error, if, for example . . . the error is of such magnitude that the appellate court would likely consider it plain or fundamental error."); Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990) (same). Here, appellate counsel failed to raise the presence of an admittedly biased juror on the panel; an obvious and fundamental error. This failure was measurably below the standard of competent counsel and so egregious that prejudice is presumed. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (holding that the presumed prejudice standard for ineffective assistance claims applies equally to trial and appellate counsel).

The State also asserts that Mr. Harvey's claim is procedurally barred because "Harvey has already raised this issue--under the guise of ineffective assistance of trial counsel--in his motion for post-conviction relief." Response, at 4-5. Again, the State misinterprets the law. Mr. Harvey is entitled to effective representation of counsel during his appeal as of right. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). A petition for habeas corpus is the proper remedy for ineffective assistance of appellate counsel. State v. Stacey, 482 So. 2d 1350 (Fla. 1985). In his habeas petition, Mr. Harvey seeks relief for his appellate counsel's constitutionally deficient performance. In contrast, Mr. Harvey's Rule 3.850 motion raises claims regarding his trial counsel's performance. The claims are separate and distinct, involving different facts and legal standards. Mr. Harvey's habeas claim has not been previously heard or litigated and thus is not procedurally barred. See e.g., McCoy v. Lynaugh, 874 F.2d 954 (5th Cir. 1989) (separately reviewing ineffective assistance of trial counsel and appellate counsel claims where underlying facts giving rise to claims were essentially the same).

b. Appellate Counsel Rendered Ineffective Assistance By Failing To Raise Trial Court's Denial of Mr. Harvey's Motion For A New Trial Due To The State's Withholding of Favorable Evidence

The prosecution failed to inform the defense that its key witness during the penalty phase of trial, Hubert Bernard Griffen, was a confidential informant who testified on a number of other occasions for the State. There can be no doubt that Mr. Griffen's testimony was devastating to the defense. His testimony was the only means to

authenticate the jailhouse sketches that the prosecutors introduced and attributed to Mr. Harvey, effectively undercutting Mr. Harvey's evidence of remorse, and quiet and non-violent nature.[3/] Mr. Watson was effectively deprived of his ability to impeach Mr. Griffen, however, because the prosecution in this case withheld crucial information in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972), specifically, that Mr. Griffen was a "rent-a-witness."[4/]

Despite a clear and prejudicial violation of the State's obligation to tender to the defense all exculpatory evidence and information, appellate counsel failed to raise the issue on direct appeal. The State asserts that appellate counsel could not have raised Mr. Harvey's Brady claim because trial counsel did not object to the testimony of Griffin, a jailhouse informant. While trial counsel did not cite Brady and its progeny, he preserved the issue by moving for a new sentencing hearing on the ground that the State knew Griffen had been called as a jailhouse witness in the past and failed to provide this information to the defense for effective cross-examination. (R. 3003.) See Giglio v. United States, 405 U.S. 150 at 153. Indeed, at the hearing on Mr. Harvey's motion for new trial, Mr. Harvey's only witness was a public defender, Mr. Sullivan, whose testimony

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[3/] Indeed, this failure is particularly significant since Mr. Watson allowed the government to rebut the mitigating evidence of remorse. (Claim II.E.)

[4/] The State also violated Brady by refusing to produce to Mr. Harvey the original tapes of the confession. (Claim XII.B.)

established that Mr. Griffen was often used as a jailhouse informant for the State. (R. 3075-77.)

In fact, the State implicitly admits that Mr. Harvey's Brady claim was preserved for review. In its Response to Mr. Harvey's appeal from the denial of his Rule 3.850 motion, the State asserts that Mr. Harvey is procedurally barred because he failed to raise this issue on direct appeal. Such an argument necessarily rests on an assumption in conflict with the State's allegations here, specifically, that the issue was preserved, and could have been raised on direct appeal. Indeed, the basis for the State's assertion of procedural bar as to each avenue for relief, shifts and becomes inconsistent when the two responses are examined together.

In its Response to Mr. Harvey's Habeas Brief, the State asserts that appellate counsel was not ineffective for failing to raise this claim on direct appeal, because "[s]ince trial counsel did not raise the issue as a Brady violation . . . appellate counsel would not have been able to raise it as such either." Response at 7. Specifically, the State argues that trial counsel, Mr. Watson, failed to preserve the Brady objection, and, as such, it could not have been raised on appeal.

In contrast, the State's response to the appeal of Mr. Harvey's Rule 3.850 motion rests on the opposite assumption -- that this issue was properly preserved and could have been raised on direct appeal. "Because [Mr. Harvey] did not raise this issue at that time, he was . . . procedurally barred from raising it in his motion for postconviction relief." Response, at 39.

The State cannot have it both ways. Either the issue was preserved or not. If the issue was preserved, it is properly raised in Mr. Harvey's Habeas Brief, because appellate counsel could have and should have raised this claim, and his failure to do so severely prejudiced Mr. Harvey. If the issue could not have been raised on direct appeal, however, a motion for postconviction relief is the appropriate vehicle for raising the State's Brady violations. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (trial court conducted evidentiary hearing on defendant's Brady claims raised in motion for postconviction relief).

Because of the materiality of this information, appellate counsel could have and should have raised this error below. His failure to do so severely prejudiced Mr. Harvey because trial counsel's deficient conduct affected the jury's weighing of aggravating and mitigating factors. See Maxwell v. State, 603 So. 2d 490 (Fla. 1992).

c. Appellate Counsel Rendered Ineffective Assistance By Not Asserting That The Trial Court Failed To Consider Fully All Mitigating Circumstances

Florida's capital sentencing statute requires that the trial court issue specific written findings of fact concerning which aggravating and mitigating factors the court considered in sentencing the defendant and the evidence supporting each factor. § 921.141(3), Fla. Stat. (1993); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201, 1207 (Fla. 1989). This requirement exists because the defendant is entitled to have every mitigating factor apparent in the record at sentencing "considered and weighed in the sentencing process." The trial court's written findings are essential

to this Court's assessment of whether any mitigating factors were inappropriately excluded from consideration. Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992). As this Court explained in Rhodes v. State, 547 So. 2d 1201 (Fla. 1989):

> This Court has stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation . . . Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application" of the aggravating and mitigating factors.

Id. at 1207 (citations omitted).

The State concedes that the trial court did not "specifically mention" whether the court considered all the mitigating evidence.[5/] The State attempts to excuse this failing, however, by speculating that the trial court "could" have "grouped the evidence into categories." Response, at 9. In other words, the trial court "could" have properly considered every mitigating circumstance supported by the evidence. Or perhaps not. Because the trial court did not enumerate all the mitigating circumstances it considered, as required by § 921.141, Fla. Stat. (1993), this Court can only speculate as to whether the trial court imposed the death sentence "on a well-reasoned application" of

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[5/] Incredibly, after conceding that the trial court did not list most of the mitigating circumstances supported by the evidence, the State asserts that the "record is clear that the trial court considered all of Harvey's proposed evidence in mitigation." State's Response, at 9.

the aggravating and mitigating circumstances. Id. Requisite certainty is missing.

This Court has repeatedly rejected the kind of speculation advanced by the State. Indeed, in Lucas v. State, 568 So. 2d 18 (Fla. 1990), a case cited by the State, this Court stressed that the trial court's findings must identify which aggravating and mitigating factors were weighed in its sentencing decision with "unmistakable clarity," and remanded the case for resentencing because this Court was "unable to tell for sure" what statutory and non-statutory mitigating factors the trial court considered. Id. at 23-24 (quoting Mann v. State, 420 So. 2d 578, 581 (Fla. 1982)).

Additionally, although this Court has authorized the grouping together of non-statutory mitigating evidence, the trial court's express written findings must reflect whether each mitigating factor proposed by the defendant was actually considered. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990).

The remaining cases relied upon by the State are distinguishable. In all of them, the trial court's orders clearly reflected, at minimum, what circumstances were and were not considered, even if they did not reflect the weight given each factor. Atwater v. State, 626 So. 2d 1325, 1330 (Fla. 1993), cert. denied, ____ U.S. ____, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994); Engle v. Dugger, 576 So. 2d 696, 703-04 (Fla. 1991). No such consideration is evident here.

In the present case, this Court can only speculate as to whether the trial court properly considered all mitigating factors supported by the evidence. If the trial court did not, then its failure to consider all mitigating circumstances supported by a "reasonable

quantum" of evidence deprived Mr. Harvey of a meaningful consideration as to whether the death sentence was proportionately applied.

Recently, this Court, in Morgan v. State, 19 Fla. L. Weekly S290 (Fla. June 2, 1994), vacated defendant's death sentence and resentenced him to a life sentence because of the trial court's failure to consider eight mitigating circumstances supported by the evidence. This Court reasoned that despite the existence of two aggravating factors (one of which was the heinous, atrocious or cruel aggravating circumstance), the death sentence was disproportionate when the mitigating circumstances were considered. See also Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993) (defendant resentenced to life imprisonment because trial court failed to consider mitigating evidence); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (although heinous, atrocious or cruel factor properly applied, trial court failed to consider several mitigating factors that rendered death sentence disproportionate).

At minimum, the uncertainty as to whether the trial court properly considered all mitigating evidence requires this Court to vacate the death sentence and remand for resentencing. Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990); see also Maxwell v. State, 603 So. 2d 490, 492-93 (Fla. 1992); Santos v. State, 591 So. 2d 160, 164 (Fla. 1991); Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990); Stewart v. State, 558 So. 2d 416, 421 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). As such, appellate counsel was ineffective by failing to raise this claim on direct appeal.

d. 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

During the penalty phase, Mr. Harvey's trial counsel introduced evidence about Mr. Harvey's mental condition, establishing that he had a longstanding history of chronic depression, a dependant personality disorder, and poor coping skills. (R. 2744-48; 2754-56; 2773.)[6/] Although this evidence was not refuted or controverted by the State, the trial court refused to instruct the jury on the statutory mitigating circumstance that Mr. Harvey's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired, § 921.141 (6), Fla. Stat. (1993), and appellate counsel failed to raise the denial of this instruction on appeal.

The trial court based its refusal to instruct about this mitigating circumstance on the erroneous assumption that Mr. Harvey was obligated to introduce evidence of a "sanity defense" in order to provide grounds for the instruction. In other words, the trial court held that Mr. Harvey had to establish that the he was legally insane at the time of the offense. (R. 2854-55.) This standard, apparently advocated by the State in its Response, is simply not the law. Indeed, it was exactly this erroneous standard applied by the trial court, and now urged by the State, that this Court expressly rejected in Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990). See also Mines v. State,

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[6/] The extensive and uncontroverted evidence regarding Mr. Harvey's mental condition is discussed in detail in Mr. Harvey's Initial Brief, at 36-38.

390 So. 2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S. Ct. 1994, 68 L. Ed. 2d 308 (1981) (the finding of sanity does not eliminate consideration of the mitigating factors concerning mental condition).

In Campbell, the trial judge found that defendant did not suffer from impaired capacity because there was no evidence indicating that he was legally "insane" at the time of the killing. Id. at 418. This Court disagreed, however, noting that there was extensive and unrefuted evidence of impaired capacity sufficient to warrant an instruction under this mitigating circumstance, including that defendant had a low I.Q., poor reasoning skills, suffered from chronic drug and alcohol abuse, and was subject to a borderline personality disorder. Id. at 419. Because the trial court erred in not instructing on the mitigating circumstance of impaired capacity, this Court vacated the death sentence and remanded for resentencing. This Court recognized that the additional mitigating circumstance required a "reweighing" of the aggravating and mitigating circumstances. Id. at 420; see also Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (when competent and unrefuted evidence of a mental or emotional disturbance is presented, mitigating circumstances of extreme mental or emotional disturbance and substantial impairment should be considered).

Similarly, in Stewart v. State, 558 So. 2d 416 (Fla. 1990), this Court vacated defendant's sentence of death and remanded for resentencing because the trial court refused to instruct the jury on the mitigating circumstance of impaired capacity despite unrefuted evidence of chronic alcohol and drug abuse. Id. at 420-21. This Court stressed that a trial judge may not "inject into the jury's

deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction." Id. at 421. This Court remanded for resentencing because it could not determine "beyond a reasonable doubt" that the failure to give the requested instruction on substantial impairment had any effect on the jury's deliberations. Id. at 421.

Mr. Harvey presented unrefuted evidence, similar to that presented in Campbell, concerning his mental and emotional conditions of depression, dependant personality disorder, and inability to cope and appropriately respond to stressful situations. Once a "reasonable quantum" of evidence is presented on a mitigating circumstance, the trial court must find that the mitigating circumstance is proved and instruct the jury accordingly. Morgan v. State, 19 Fla. L. Weekly S290 (Fla. June 2, 1994); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A trial court cannot reject a mitigating factor unless there is "competent substantial evidence refuting the existence of the factor." Maxwell, 603 So. 2d at 491; see also Nibert, 574 So. 2d at 1062. Thus, contrary to the State's contention, the trial court's discretion as to finding the existence of mitigating circumstances is limited. Because Mr. Harvey introduced competent evidence during the penalty phase proceeding, and because the evidence remained unrefuted, the trial court should have instructed on the mitigating circumstance of impaired capacity. The failure of appellate counsel to raise this error on appeal resulted in substantial prejudice to Mr. Harvey.

The State contends, however, that even if this mitigating factor was improperly excluded from consideration, "there is no reasonable probability" that Mr. Harvey would have received a life sentence because of the existence of four aggravating factors. Response, at 13. Again, the State's speculation is inadequate under law.

When a mitigating circumstance has been improperly excluded from consideration, the death sentence should be vacated and the cause remanded for a "reweighing" of the aggravating and mitigating factors in a new sentencing proceeding. Maxwell v. State, 603 So. 2d 490, 492-93 (Fla. 1992); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). This is because "every mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process." Maxwell, 603 So. 2d at 491. The addition of previously unconsidered mitigating factors may establish that the death sentence, which is reserved only for the "most aggravated and least mitigated murders," is disproportionate under the circumstances. Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).

If it is possible that one or more aggravating factors were improperly considered, as in the present case (see discussion in sections II and III below), the death sentence must be vacated and defendant granted a new sentencing hearing, or a life sentence. Morgan v. State, 19 Fla. L. Weekly S290 (Fla. June 2, 1994); Stewart v. State, 558 So. 2d 416, 421 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Therefore, appellate counsel's failure to raise this claim, preserved by objection below, seriously prejudiced Mr. Harvey and denied Mr. Harvey the effective assistance of appellate counsel.

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

While a trial court is not required to appoint co-counsel in every capital case, this Court has recognized that there are certain cases where appointment of co-counsel is necessary to provide and ensure effective representation. Schommer v. Bentley, 500 So. 2d 118, 120 (Fla. 1986); Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986), cert. denied, 479 U.S. 1043, 107 S. Ct. 908, 93 L. Ed. 2d 857 (1987). And although a trial judge has considerable discretion to determine whether co-counsel is necessary, pursuant to its "inherent right to control the conduct of the judicial system," Pinellas County v. Maas, 400 So. 2d 1028, 1030 (Fla. 2d DCA 1981), this discretion is not unfettered. Indeed, in recently re-affirming the rule that appointment of co-counsel is not mandatory, this Court recognized that the trial court's decision is subject to an abuse of discretion standard. Reaves v. State, 19 Fla. L. Weekly S173, 174 (Fla. April 7, 1994).

The State infers that Mr. Harvey's case was a run-of-the-mill capital murder case, arguing that Mr. Harvey "points to nothing about his case that would render the trial court's decision an abuse of discretion." Response, at 13. The State ignores very unique and complex circumstances in this case that converged with trial counsel's inexperience and several key "eleventh hour" trial court rulings that, in the final analysis, effectively deprived Mr. Harvey of adequate

representation.[7] In addition, the case was complicated by extensive pre-trial publicity and the prominence of the victims that caused the State to direct all its forces towards obtaining a conviction -- at any cost. Trial counsel was clearly overwhelmed. The grievous errors raised in Mr. Harvey's motion for postconviction relief both flow from and evidence these facts.

If ever a capital case warranted co-counsel, it was this one, a fact confirmed by the trial judge who, when he denied Mr. Harvey's motion for co-counsel, observed "this case may make the law on that point." (R. 175.) This case should make law on the issue of abuse of discretion in the failure to appoint co-counsel. Mr. Harvey was entitled to appointment of co-counsel in order to ensure proper and effective representation, and the trial court abused its discretion when it refused to appoint co-counsel for Mr. Harvey. Mr. Harvey's appellate counsel's failure to raise this issue, particularly when the trial record contained so many examples of where Mr. Watson was clearly over his head, constituted ineffective assistance of appellate counsel.[8] This case should be reversed on that ground.

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[7] For example, the trial court did not rule on Mr. Harvey's motion to suppress Mr. Harvey's confession until the eve of trial, after the jury was selected. Trial counsel also refused to continue the penalty phase of trial to allow Mr. Watson, trial counsel, an opportunity to recoup and prepare for that phase of trial.

[8] The state erroneously infers that Mr. Harvey raises the identical claim in his motion for post-conviction relief. That motion raises the claim that the trial court's ruling denying appointment of co-counsel deprived Mr. Harvey of effective assistance of counsel. Here, Mr. Harvey does not repeat this claim, but rather, argues that appellate counsel was ineffective for failing to raise this claim on direct appeal.

f. 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.

Mr. Harvey's trial counsel sought an instruction on the theory of defense that a "sudden impulsive act may be committed under circumstances showing lack of premeditation." See Spaziano v. State, 425 So. 2d 1201, 1202 (Fla. 2d DCA 1983) (recognizing that a sudden impulsive act may demonstrate the absence of premeditation). This instruction went directly to the key material issue of whether the killings constituted first or second degree murder. The trial court refused to grant Mr. Harvey's request despite the clear mandate of Florida law that a defendant is entitled to a jury instruction applicable to his theory of defense where any competent trial evidence introduced supports that theory. Hansbrough v. State, 509 So. 2d 1081, 1085 (Fla. 1987); Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985); Carruthers v. State, 636 So. 2d 853, 855 (Fla. 1st DCA 1994); Kiernan v. State, 613 So. 2d 1362, 1363 (Fla. 4th DCA 1993); Boswell v. State, 610 So. 2d 670, 673 (Fla. 4th DCA 1992); Cooper v. State, 573 So. 2d 74, 76 (Fla. 4th DCA 1990); Hudson v. State, 408 So. 2d 224, 225 (Fla. 4th DCA 1981).

The State does not, and cannot, deny that the existence of any evidence in support of trial counsel's theory of defense.[9/] During closing argument, Mr. Watson reviewed the evidence, and argued that Mr. Harvey acted impulsively out of fear and nervousness. (R. 2464-65, 2527.) Rather, the State argues the weight of the evidence did not support this instruction. Response, at 16. It is not the weight of

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[9/] The evidence regarding Mr. Harvey's impulsive behavior is discussed in Mr. Harvey's Initial Brief, at 49-53.

the evidence that is relevant, however, but rather, whether any evidence exists to support a proffered theory of defense. As the Second District noted:

> It is not the quantum or the quality of the proof . . . that determines the requirement for giving the charge. If any evidence of a substantial character is adduced . . . [then the jury] should be duly charged as to the law thereon, because it is the jury's function to determine that issue.

Kilgore v. State, 271 So. 2d 148, 152 (Fla. 2d DCA 1972) (emphasis in original).

Here, given trial counsel's concession of identity, the principal issue, if not the sole issue, before the jury during the guilt phase was whether Mr. Harvey acted with premeditation. Trial counsel argued as his theory of defense that Mr. Harvey acted suddenly and impulsively. In deciding whether Mr. Harvey's confession provided the evidence required to warrant giving the requested instruction, the trial court must view the evidence in the light most favorable to Mr. Harvey, United States v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984), no matter how improbable or weak the evidence may be. Williams v. State, 588 So. 2d 44, 45 (Fla. 1st DCA 1991). The trial court's failure to provide Mr. Harvey his requested instruction amounts to reversible error. In light of the central nature of the requested charge, appellate counsel's failure to raise trial court's denial of his requested jury instruction prejudiced Mr. Harvey by undermining the essential fairness and reliability of the court proceedings.

g. 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 State recites the general principle that it is not necessary to instruct on the elements of the underlying felony "with the same particularity" as would be required if the underlying felony were charged, and argues that, since the trial court listed the "essential elements of burglary," without any definition or further instruction, there is no fundamental error. Thus, the State contends, appellate counsel was not ineffective.[10/] Response, at 17.

Again, the State misstates the standard upon which appellate counsel's performance must be measured. Appellate counsel is obligated to raise, at minimum, serious deficiencies that, in light of the individual case, may have affected its outcome. Bryan v. State, 19 Fla. L. Weekly S328 (Fla. June 16, 1994) (citing Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981)). That the error is "fundamental" is only a requirement if trial counsel failed to object to the error at the proceeding below. Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990).

Here, Mr. Harvey's trial counsel strenuously objected to the trial court's refusal to provide any definition of the term "offense." (R. 2518-20.) Defense counsel urged that Florida's standard jury instruction on burglary requires the court to specify the "offense" that was the object of the burglary. (R. 2518.) The prosecutor stated that this Court had just then decided in "Waters versus State" that the State does not have to prove that the underlying felony was

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[10/] It is fundamental error to fail to provide any instructions on the felony underlying the felony-murder charge. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

committed in order to charge felony-murder. (R. 2519-20.) The State clearly missed the point that defense counsel attempted, in vain, to establish:

> [I]f it's the law that they don't have to allege in the charging document what the underlying felony is, and then can charge burglary and don't have to allege what the underlying crime for the burglary is, I mean that's -- I've got to believe somebody is going to have a problem with that.

(R. 2519-20.) The "problem" with providing no definition of the term "offense," as explained by this Court in Robles v. State, 188 So. 2d 789, 794 (Fla. 1966), is that the jury has no guidance or means with which to distinguish between levels or types of crimes. Because proof of the underlying felony was necessary to convict Mr. Harvey of felony murder, the trial court should have provided at least some definition as to the term "offense." Robles, 188 So. 2d at 794.

Although a trial court is not required to instruct the jury on the elements of the felony underlying a felony-murder charge "with the same particularity as would be required if the defendant were charged with the underlying felony," Brumbley v. State, 453 So. 2d 381, 386 (Fla. 1984) (emphasis added), this principle assumes that the trial court will provide some definition of those elements, as the particular circumstances of the case require. Franklin v. State, 403 So. 2d 975, 976 (Fla. 1981) ("the elements [of the underlying felony] must be sufficiently defined to assure the defendant a fair trial").

This requirement is of particular importance where, as here, the State advanced and presented evidence on alternative theories of premeditated murder and felony-murder. The jury could have convicted Mr. Harvey of first-degree murder on either theory, and there is no way to know upon which scheme the jury acted. Franklin, 403 So. 2d

at 976; State v. Jones, 377 So. 2d 1163, 1164 (Fla. 1979). In fact, since there was more evidence supporting felony-murder than premeditated murder, the failure to provide a definition as to each element of the underlying felony cannot constitute harmless error. Franklin, 403 So. 2d at 976; Tubman v. State, 633 So. 2d 485 (Fla. 1st DCA 1994). As this Court explained in State v. Jones, 377 So. 2d 1163 (Fla. 1979), which concerned the trial court's failure to provide instructions on the underlying felony of robbery, "[s]ince proof of the elements of robbery was necessary in order to convict the defendant under the felony-murder theory, the court was obligated at least to give some minimum instructions on these elements." Id. at 1164; see also Robles v. State, 188 So. 2d 789, 793 (Fla. 1966) (failure to provide basic definitions of elements of burglary was reversible error since proof of these elements is required in order to convict defendant under felony-murder rule). Here, no such minimum instructions were given.

The trial court's failure to provide even a minimum definition of "an offense," an essential element of burglary, constituted harmful error in this case. The trial court's ruling deprived Mr. Harvey of a fair trial because it was "at least as likely as not that [Mr. Harvey's] jury based its verdict on felony murder." Franklin v. State, 403 So. 2d 975, 976 (Fla. 1981). Appellate counsel's failure to raise this claim constituted ineffective assistance of appellate counsel.

h. Appellate Counsel Rendered Ineffective Assistance By Failing To Challenge The Improper Restriction On Cross-examination of The Medical Examiner

Mr. Harvey sought to elicit evidence from the medical examiner that the victims had a certain level of drugs and alcohol in their blood at the time of the crime. The State does not dispute that some measure of alcohol and drugs were in the victims' systems when the killings occurred. Indeed, the State concedes that the trial court rejected defense counsel's proffer on the ground that the evidence was "insufficiently conclusive." Response, at 18. The State further concedes that "[h]ad the doctor been able to determine the amount of alcohol in the victims at the time of the murders and any possible effect it might have had on their behavior, then this testimony might have been relevant." Id. (emphasis added). The test for admissibility of evidence, however, is not the weight of that evidence, but rather, whether the proffered evidence tends to prove or disprove a material fact. § 90.401, Fla. Stat. (1993); see Tracton v. City of Miami Beach, 616 So. 2d 457, 458 (Fla. 3d DCA 1992) (exclusion on relevance grounds of blood-alcohol level reversible error because fact of delay between testing and arrest went to weight of evidence and not to its admissibility).

The trial court rejected Mr. Watson's proffer despite settled Florida law that the victim's state of consciousness at the time of the crime is directly relevant to the material issue of whether the crime warrants application of the "heinous, atrocious or cruel" aggravating factor. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (aggravating factor of heinousness was not established beyond a reasonable doubt in capital murder case when there was evidence

indicating that victim may have been semiconscious at the time she was strangled); see also Herzog v. State, 439 So. 2d 1372 (Fla. 1983).

Here, defense counsel was precluded from eliciting evidence from which the jury could infer that the victims did not possess their normal faculties. The trial court's error seriously prejudiced Mr. Harvey by affecting the jury's weighing of aggravating and mitigating factors and its recommendation regarding the death penalty. See Bates v. State, 465 So. 2d 490, 493 (Fla. 1985) ("When the evidence does not support an aggravating factor and there are mitigating circumstances to be weighed, the death sentence should be vacated and the case remanded . . . because we cannot know if the result would have been different if the impermissible circumstances had not been used."). Appellate counsel rendered ineffective assistance by failing to raise the error preserved by defense counsel, an act measurably below the standard of competent counsel. Appellate counsel's deficiency seriously and substantially prejudiced Mr. Harvey.

II. 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

The State argues that Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991), was a mere evolutionary refinement in the law where, in fact, it fundamentally changed the way the heinous, atrocious or cruel ("HAC") aggravating factor is applied. Porter effectively overruled the reasoning of Pope v. State, 441 So. 2d 1073 (Fla. 1983), in which this Court held that a lack of remorse could not be properly considered in assessing the presence of the HAC

aggravator. This Court held the reverse is true in Porter, leading to an immediate change in the Florida Standard Jury Instructions in Criminal Cases. The jury now no longer focuses solely on the manner in which the crime is accomplished, but considers the mind-set of the suspect.

The State claims that Porter is similar to Herring v. State, 580 So. 2d 135 (Fla. 1991), where this Court elected not to apply retroactively Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). Herring is inapposite to the instant case because this Court already decided not to apply Rogers retroactively in Eutzy v. State, 541 So. 2d 1143 (Fla. 1989). Here, the Court has not addressed whether Porter should be applied retroactively.

More importantly, Rogers did not, as did Porter, work a fundamental change in the law. In Rogers, the Court held that the cold, calculating and premeditated ("CCP") aggravating factor demanded a careful plan or prearranged design. Rogers did not, as Porter did, shift the entire focus of the aggravating factor, but merely raised the necessary level of premeditation needed for finding the aggravator. Porter, on the other hand, fundamentally altered the way the jury applies the HAC aggravator.

More on point is Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), where this Court found that Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), had worked a substantial change in the law. In Hitchcock, the Supreme Court held that the mere opportunity to present nonstatutory mitigating evidence was not sufficient to meet constitutional requirements if the jury or judge

believed that some of that evidence could not be weighed. 481 U.S. at 398-399; see Downs, 514 So. 2d at 1071. The change of law set forth in Porter, at a minimum, has the same impact on the course of sentencing as the Hitchcock rule recognized in Downs. Under Porter, the jury must consider the mind-set of the defendant when assessing the HAC factor, where under Pope it did not consider it at all. Here, where there was not a shred of evidence that Mr. Harvey intended to cause the victims extraordinary pain, reconsideration of this Court's decision on direct appeal is warranted.

III. 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 State argues that Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989), should not be applied retroactively. The case the State cites for this proposition, Lucas v. State, 568 So. 2d 18 (Fla. 1990), does not so hold. In Lucas, the defendant claimed on direct appeal that he was entitled to a new sentencing hearing because the prosecution introduced evidence of contemporaneous crimes to rebut the mitigating factor of "no significant history." This Court refused to hear Lucas' claim because the issue had not been preserved at trial. Lucas does not hold that Scull should not be applied retroactively. Lucas, 568 So. 2d at 21.

Here, Mr. Harvey preserved the Scull issue at trial when he refused to waive the "no significant history" mitigating circumstance and sought to argue that prior criminal history includes activity only up to the time of the charged offense. (R. 3000-3002.) This Court

has applied Scull retroactively under similar facts on direct appeal. See Bello v. State, 547 So. 2d 914 (Fla. 1989).[11/] Here, as in Scull and Bello, the State was only able affirmatively to introduce highly prejudicial evidence of subsequent criminal activity because trial counsel did not waive the "no significant history" mitigating circumstance. Under Bello, and consistent with the reasoning of Scull and Lucas, this Court should apply Scull retroactively to Mr. Harvey and order resentencing.

[11/] Bello was cited by Mr. Harvey in his initial brief but ignored by the State in its Response. In Bello, the defendant, like Mr. Harvey, was sentenced before this Court decided Scull. On direct appeal in Bello, this Court nonetheless applied Scull retroactively, without discussion. Bello, 547 So. 2d at 918.

CONCLUSION

For the foregoing reasons and those stated in his Amended Petition for Writ of Habeas Corpus, Mr. Harvey respectfully requests that this Court issue a Writ of Habeas Corpus.

Respectfully submitted,

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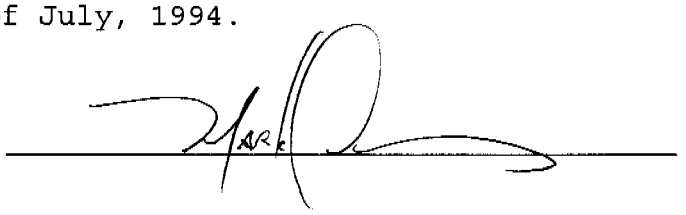
DATED: July 27, 1994.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply to State's Response to Amended Petition for Writ of Habeas Corpus was served by U.S. Mail, postage prepaid, upon Sara D. Baggett, Esq., Assistant Attorney General, Department of Legal Affairs, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299 and David C. Morgan, Esq., Assistant State Attorney, Nineteenth Judicial Circuit, 411 South Second Street, Fort Pierce, Florida 34950, this 27 day of July, 1994.



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