IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,836

HAROLD LEE HARVEY, JR.

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court for
the Nineteenth Judicial Circuit,
in and for Indian River County, Florida

Honorable Dwight L. Geiger

APPELLANT'S INITIAL BRIEF

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I.

STATEMENT OF THE CASE

This is a capital case. Appellant, Harold Lee Harvey, Jr. is sentenced to die under an unconstitutional conviction and judgment. He sought post-conviction relief before the trial court pursuant to Fla. R. Crim. P. 3.850. The trial court denied Mr. Harvey's request and he appeals from that order.

As demonstrated below, the order denying post-conviction relief is erroneous and contrary to law. It should be reversed, Mr. Harvey's conviction and sentence vacated, and the case remanded for a new and constitutional trial.

II.

COURSE OF PROCEEDINGS BELOW

A. Arrest, Indictment and Pretrial Motions.

On February 27, 1985, the Okeechobee County Sheriff arrested Harold Lee Harvey, Jr. and charged him with second-degree murder and robbery in connection with the deaths of William Herman Boyd and Ruby Louise Boyd, husband and wife. (R. 03111.)[1/] Another individual, Harry Scott Stiteler, also was arrested and similarly charged. (R. 03102.) On March 7, 1985, the grand jury indicted Mr. Harvey and Mr. Stiteler for the first degree murder of the Boyds. Both defendants pled not guilty to the charges. (R. 3104-5.)[2/]

[1/] The record in this case derives from three sources, the record from Mr. Harvey's direct appeal, cited as "R," the collateral record on appeal, cited as "CR," and the supplemental collateral record on appeal, cited as "SR." A page reference will follow each record citation.

[2/] The court later severed the two cases. (R. 03430.) On the eve of his trial, Mr. Stiteler pled guilty pursuant to a plea agreement and received a life sentence.

The Public Defender initially appeared on behalf of both defendants but soon perceived a conflict of interest and withdrew from representation of Mr. Harvey. On March 28, 1985, the trial court appointed Robert J. Watson of Stuart, Florida, a sole practitioner, as counsel for Mr. Harvey. (R. 03127.) Mr. Watson, who had never before tried a capital case alone, moved in advance of trial for appointment of co-counsel. (R. 03237-39, CR. 937.) The motion was denied. (R. 03261.)

The prominence of the Boyds in Okeechobee and its surrounding counties guaranteed extensive media coverage of Mr. Harvey's arrest and other pre-trial matters. The trial court, recognizing the impossibility of a fair trial in Okeechobee County as a result of this saturated coverage, granted Mr. Watson's motion for change of venue and moved the trial one county over, to adjacent Indian River County. (R. 03371-72, 03375-76.)

B. Trial and Sentencing.

Again recognizing the extensive media coverage afforded Mr. Harvey's case in South Florida, the trial court granted sequestered voir dire of all potential jurors who acknowledged having information about the case from the media. (R. 00290-91.) The conduct of voir dire and, in particular, Mr. Watson's incomprehensible failure to challenge "for cause" or peremptorily an admittedly biased and unrehabilitated juror form one of the principal bases of Mr. Harvey's motion and this appeal. (See pp.21-25, infra.) It is enough to note here that voir dire lasted five days and that the jury was sworn on the afternoon of June 13, 1986. The trial commenced the following morning. (R. 01848.)

On June 18, 1986, Mr. Harvey was convicted of two counts of first degree, premeditated murder. (R. 02570, 03455-56.) After a penalty proceeding, the jury voted eleven to one to recommend sentences of death on both counts. (R. 03046-47.) The trial court followed the jury's recommendation and sentenced Mr. Harvey to death on June 20, 1986. (R. 03051-52.)

C. Direct Appeal.

Mr. Harvey appealed his convictions and death sentences to this Court, which affirmed the trial court's judgment. Harvey v. State, 529 So. 2d 1083 (Fla. 1988). For reasons which are addressed in Mr. Harvey's separately filed Petition For Writ of Habeas Corpus, the errors complained of in this brief were not made known to this Court on direct appeal. The United States Supreme Court denied certiorari on February 21, 1989. Harvey v. Florida, 489 U.S. 1040, 109 S. Ct. 1174, 103 L. Ed. 2d 237 (1989). Mr. Harvey's request for executive clemency was denied.

D. Post-Conviction Proceedings.

1. Death Warrant

On March 29, 1990, former Governor Martinez signed Mr. Harvey's death warrant, setting execution "for the week beginning noon, Tuesday, the 29th of May, 1990, and ending noon, Tuesday, the 5th of June, 1990." (CR. 168.) This triggered Fla. R. Crim. P. 3.851's expedited proceedings provision, shortening the period in which Mr. Harvey might file motions for post-conviction or collateral relief from two years to thirty days, or until April 30, 1990.

2. Habeas Corpus Petition

On April 18, 1990, undersigned counsel filed a petition for habeas corpus in this Court and requested that Mr. Harvey's execution be stayed for a time sufficient and reasonable for counsel to prepare appropriate post-conviction papers on Mr. Harvey's behalf. On April 25, 1990, this Court stayed Mr. Harvey's execution and granted Mr. Harvey four months from the date of its order to file appropriate post-conviction papers.

3. The Rule 3.850 Motion

On August 27, 1990, Mr. Harvey timely filed his motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 in the trial court (the "Rule 3.850 motion"). (CR. 169-548.)

On October 5, 1992, the trial court entered a non-final order summarily denying all but one of Mr. Harvey's claims (the "Non-Final Order"). The court set the surviving claim, Claim I.B., for evidentiary hearing on March 11, 1993. (CR. 1649-50.)

4. Evidentiary Hearing

At the March 11th hearing, Mr. Harvey called two witnesses. James K. Green Esq., an attorney and former public defender in Palm Beach County, was tendered as an expert on the standard of care to be exercised by attorneys in selecting a capital jury and on the fundamental principles of capital jury selection. (CR. 26-28.) The State objected to Mr. Green's qualification as an expert on the fundamentals of capital jury selection. (CR. 28-30.) After the voir dire, the trial court sustained the government's objection and admitted Mr. Green's expert testimony only on the standard of care to be exercised by attorneys in selecting a capital jury. (CR. 30.)

The second witness was Dr. Gary Moran, a professor of psychology at Florida International University ("FIU") and head of the jury studies program at FIU. He was tendered as an expert on the effect of juror bias on the deliberative and decisional processes of the panel and the capacity of jurors to disregard personal biases. (CR. 67-71.) The State objected to Dr. Moran's testimony, expert or otherwise. (CR. 80-88.) After voir dire, the trial court sustained the objection. Undersigned counsel then proffered Dr. Moran's testimony. (CR. 89-94.)

The State called only Robert Watson, Mr. Harvey's trial counsel. Mr. Watson was tendered by the State as an expert on the standard of care to be exercised by attorneys in selecting a capital jury. His testimony was admitted. (CR. 117.)

5. Motion for Reconsideration of the Non-final Order

At the hearing, undersigned counsel moved ore tenus that the trial court reconsider the Non-Final Order, particularly that portion which denied Claim I.F., which alleged ineffectiveness based on Mr. Watson's unauthorized concession of guilt. (CR. 149-51.) In support of this motion, counsel proffered to the court evidence discovered the day of the hearing that additionally supported Mr. Harvey's claim. (CR. 150.) This motion was later renewed in writing and summarily denied. (CR. 1685-90, 1899-1900.)

6. Final Order Denying Relief

On March 17, 1993, Judge Geiger entered a final order (the "Order") denying Mr. Harvey's 3.850 motion in its entirety. The Order held that:

> [T]he motion and the files and records in the case conclusively show that defendant is entitled to no relief on his Claims I.A., I.C., I.D., I.E., I.F., and all of Claims II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII,

> XIV, XV, XVI, and XVII. A copy of that portion of the files and records in this case [sic] will conclusively show defendant is entitled to no relief in these claims is attached hereto.

(CR. 1691.) Contrary to the recitals of the Order, however, no files and records relating to Claims I.D., I.E., I.F., II.G., V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII were attached to the Order. Moreover, the record excerpts the trial court attached as support for his holding on Claims I.A., I.C. and IV bear no relation to those claims and do not, therefore, support the holding. (CR. 1695-1700, 1705-15, 1895-98.) Finally, the record excerpts the trial court attached as support for his holding on Claims II.A., II.B., II.C., II.D., II.E., II.F. and III do not, as the law requires, conclusively show that Mr. Harvey is not entitled to relief. (CR. 1716-46, 1747-57, 1758-60, 1761-73, 1774-89, 1790-95, 1796-1893.)

Respecting Claim I.B., the subject of the evidentiary hearing, Judge Geiger held that:

> [T]he court determines that defendant is not entitled to relief, defendant having neither proven serious errors that denied [sic] of his right to counsel nor actual prejudice that deprived him of a fair trial.

(CR. 1691-92.) Again, the record excerpts referred to in the Order bear no relation to the trial court's factual determination.

On April 12, 1993, Mr. Harvey timely filed his notice of appeal. (CR. 1903-04.)

III.

STATEMENT OF FACTS

A. The Boyds' Murder And Mr. Harvey's Arrest.

On February 23, 1985, Ruby Louise and William Herman Boyd were shot to death in their Okeechobee, Florida home. The killing sent

shock waves through Okeechobee, a small rural community unaccustomed to violence. Concern was heightened because the Boyds were prominent citizens who owned and operated a large dairy farm. It was also common knowledge that the Boyds were close friends of the influential Graham family and, in particular, of Bob Graham, at that time the Governor of Florida. These facts were all reported in the press and the stage was set for a politically charged investigation and prosecution.[3/]

The ensuing statewide manhunt for the Boyds' murderers was unprecedented in Okeechobee County. The effort to apprehend the killer or killers and bring them to justice enlisted scores of officers from the Okeechobee County Sheriff's Office, the State Police and the Florida Department of Law Enforcement. The print and electronic media in Okeechobee and neighboring Indian River and Martin Counties followed and reported closely on the progress of the case.[4/]

[3/] Robert Watson, Mr. Harvey's trial counsel, recalled the tense atmosphere in the courtroom on the opening day of the Harvey trial.

> This was a high profile case in this judicial circuit. I believe the jury was aware that this was an important case to the prosecution. The case was tried by the newly-appointed State Attorney and his most skilled assistant, with a host of support staff members assisting. In addition, the proceedings were attended every day by a large number of friends and family of the victims. These spectators occupied about two rows of seats in the courtroom and were the most involved, attentive courtroom observers I've ever seen. These family and friends of the victims' were well-dressed and showed their wealth and station. I believe, in contrast, the Harvey family members were excluded under the rule of sequestration of witnesses.

(CR. 939.)

[4/] See, e.g., (1) Rob Kinneberg, *Okeechobee Couple Found Murdered*, PALM BEACH POST, Feb. 26, 1985, at B1; (2) Rob Kinneberg, *Okeechobee Couple Found Murdered*, PALM BEACH POST, Feb. 26, 1985; (3) Rob (continued...)

[4/] (...continued)
Kinneberg, *Okeechobee Slayings' Motive Baffles Officers*, PALM BEACH TIMES, Feb. 26, 1985; (4) Fran Hawkins, *Boyds Found Dead, Murder is Suspected*, OKEECHOBEE NEWS, Feb. 27, 1985, at 1; (5) Peter Vilbig, *Dairyman, Wife Found Killed*, MIAMI HERALD, Feb. 27, 1985, at 1A; (6) Peter Vilbig, Mary J. Tierney, *Two Men Charged in Couple's Slaying*, MIAMI HERALD, Feb. 28, 1985, at 22A; (7) Rob Kinneberg, *Two Held in Robbery-Slaying Case*, PALM BEACH POST, Feb. 28, 1985; (8) Rob Kinneberg, *Boyd, Horatio Alger Type*, PALM BEACH POST, Feb. 28, 1985; (9) Rob Kinneberg, *Two Men Held in Murder Case*, PALM BEACH TIMES, Feb. 28, 1985; (10) Rob Kinneberg, *2 Held in Fatal Robbery of Dairyman, Wife*, PALM BEACH POST, Feb. 28, 1985, at 1B; (11) *Trucker, laborer, charged in Okeechobee Slayings*, SUN SENTINEL, Feb. 28, 1985; (12) Fran Hawkins, *Arrests Made in Murder Case*, OKEECHOBEE NEWS, Mar. 1, 1985, 1A; (13) Peter Vilbig, *Slaying Suspect Called "Quiet, Easygoing,"* MIAMI HERALD, Mar. 1, 1985, at 1TC; (14) Peter Vilbig, *Murders Thrust Okeechobee into Unwanted Spotlight*, MIAMI HERALD, Mar. 3, 1985, at 24A; (15) Peter Vilbig, *Murders End Innocence for Okeechobee*, MIAMI HERALD, Mar. 3, 1985, at 1A; (16) Chris Kelly, *Okeechobee Feels Pain of Growing*, Aug. 12, 1985; (17) Fran Hawkins, *Suspected Murder Weapon is Found*, OKEECHOBEE NEWS, Mar. 6, 1985, at 1B; (18) *Two Men Indicted in Okeechobee Deaths*, MIAMI HERALD, Mar. 8, 1985, at 1C; (19) *Two Indicted in Murder of Okeechobee Couple*, PALM BEACH POST, Mar. 9, 1985; (20) Sue Smith, *Grand Jury in Okeechobee Expected to Go for 'Max,'* NEWS TRIBUNE, Mar. 9, 1985; (21) Rob Kinneberg, *Boyd's Will Lists Assets in Millions*, PALM BEACH TIMES, Mar. 13, 1985; (22) Joe Crankshaw, *Boyd Will Gives Most to Children*, MIAMI HERALD, Mar. 14, 1985, at 2TC; (23) *Most of Boyd's Estate Slated to be Split Among 3 Daughters*, OKEECHOBEE NEWS, Mar. 15, 1985.

The foregoing articles were proffered to the trial court during the March 11, 1993 evidentiary hearing. (CR. 36-37.) On April 26, 1993, Mr. Harvey, pursuant to Fla. R. App. P. 9.200(a)(1), timely filed his Directions to the Clerk of the trial court requesting that "all exhibits admitted into evidence and/or proffered by any party" at the evidentiary hearing be included in the record on appeal. (CR. 1913-14.) Mr. Harvey's Directions also requested that all documents and other submissions filed with the court be included in the record on appeal. (CR. 1915-17.)

To assist the Clerk, on April 28, 1993, Mr. Harvey separately filed the articles and the other exhibits admitted into evidence or proffered at the evidentiary hearing.

In preparing this brief, undersigned counsel discovered that the Clerk apparently failed to include any of the exhibits admitted into evidence or proffered at the evidentiary hearing, including the foregoing articles, in the record on appeal. Mr. Harvey will move to supplement the record.

The break in the case came when a confidential informant overheard Harry Scott Stiteler boast of committing a murder. (R. 00175-82.) The Sheriff arrested Stiteler and Stiteler immediately implicated Mr. Harvey. The Sheriff arrested Mr. Harvey at approximately 6:00 a.m. on February 27, 1985, as Mr. Harvey was on his way to work. (R. 00550.)

B. The Booking Process, Mr. Harvey's Request For Counsel, And Mr. Harvey's Confession.

Upon arrest, routine procedure requires that a suspect be searched by the arresting officer and then immediately transported to a holding facility to be formally received into the criminal justice system. The procedure accomplishing this receipt is known as "booking."

The booking process routinely involves a number of formal steps designed to document police custody of the person of the accused. The booking officer first notes the accused's name, the time of his arrival at the holding facility, the offense for which he was arrested and is being detained and his Miranda status. This last notation is particularly important because, as every police officer knows, the United States Supreme Court has articulated a "bright-line rule" regarding invocation of Fifth and Sixth Amendment rights after arrest.

Under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), once a suspect in custody asks to speak with a lawyer, all questioning must stop. Because, under Michigan v. Jackson, 475 U.S. 625, 634-35, 106 S. Ct. 1404, 1410, 89 L. Ed. 2d 631 (1986), knowledge of a request for counsel is imputed from one state actor to another, a request to speak to a lawyer made to one police officer invokes the Edwards rule as to all. The booking process thus records an accused's request for counsel and that record can accompany the

accused's person, advising those seeking to question the accused that they are prohibited from doing so unless an attorney for the accused is present. See, e.g., Y. Kamisar, et al., Modern Criminal Procedure at 16-17 (5th ed. 1980).

Mr. Harvey was transported to the Okeechobee County Jail and booked at approximately 6:35 a.m. (R. 00542-44.) Following usual procedure, the booking officer, Lt. Manson, created a booking sheet. Lt. Manson noted that Mr. Harvey was asking to speak with a lawyer.[5/] (CR. 945-47.)

Mr. Harvey's 6:35 a.m. request for counsel on the booking sheet gave rise to an obligation on the part of the Okeechobee County Sheriff's Office to "respect and preserve the accused's choice to seek

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[5/] The relevant portion of the booking sheet is set forth below:

BOOKING OFFICER HAS ADVISED ARRESTEE OF THE FOLLOWING RIGHTS:

a. You have the right to have a lawyer.
b. If you cannot afford to pay a lawyer, one will be appointed for you immediately at no charge.
c. Do you want to have a lawyer now?
_X_ YES ___ NO

IF ARRESTEE SAYS HE DOES NOT WANT A LAWYER, HE MUST SIGN THE FORM BELOW:

I do not want an attorney and I hereby waive my right to have an attorney. I do so voluntarily and of my own free will. No one has made any promises, threats, or inducements of any kind in order to make me sign this waiver.

_____
Signature of Arrestee

WITNESS TO WAIVER:
We, the undersigned, certify that the above waiver was signed voluntarily by the arrestee:

1._____
Signature of first witness
2._____
Signature of second witness

(CR. 945-47.)

this assistance." Maine v. Moulton, 474 U.S. 159, 171, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481 (1985). Instead, the officers improperly and unlawfully commenced interrogation. The law could not be clearer. Under the "bright-line rule" of Miranda, Edwards and Michigan v. Jackson, everything Mr. Harvey said after 6:35 a.m., including his entire confession and the fruits thereof, was inadmissible and would be suppressed.

At 9:00 a.m., approximately two and one-half hours after booking, Det. Fisher of the Okeechobee County Sheriff's Office called Clyde Killer, an Okeechobee County Assistant Public Defender, and told him that two suspects had been arrested in connection with the Boyd murders and that they were being held at the Okeechobee County Jail. (R. 00517-18.)

Between 2:00 and 2:20 p.m. on that day, Mr. Killer, having received word from the court that he would be appointed to represent the suspects, went to the Okeechobee County Jail to speak with Mr. Harvey and Mr. Stiteler. When he arrived, Mr. Killer was given access to Mr. Stiteler, but jail personnel refused to allow Mr. Killer to speak with Mr. Harvey. (R. 00519-23.) This puzzled Mr. Killer because the jail's operating procedures routinely allowed public defenders the opportunity to speak with suspects in custody and never before had he been denied such access. (R. 00519-25.)

Working his way up the chain of command, Mr. Killer finally spoke with Assistant State Attorney Edward Miller. Mr. Miller reiterated that Mr. Killer could not speak with Mr. Harvey. He added that, contrary to the police's written acknowledgement of Mr. Harvey's earlier invocation of the right to counsel, Mr. Harvey didn't "need

or want to talk to an attorney." (R. 00525-26.) At this moment, as Mr. Miller knew, or should have known, Mr. Harvey had invoked his right to counsel, was undergoing unlawful interrogation and had not yet confessed. That unlawful interrogation would ultimately last until almost 6:00 p.m., eleven and one-half hours after Mr. Harvey had first requested a lawyer. Only then, after a confession was unlawfully obtained, did Assistant State Attorney Miller allow Mr. Harvey to see Mr. Killer.[6/] (R. 00526-28.)

At approximately 3:00 p.m., after more than seven hours of unlawful questioning, the police had still not obtained a confession. They decided to try a new tactic and contacted Mr. Harvey's wife, Karen, a school teacher. The police asked Mrs. Harvey to come to the Okeechobee County Jail. When she got there, Mrs. Harvey was asked to assist the police in eliciting a confession from her husband:

> Karen Harvey did come to the Okeechobee County Sheriff's Office Detective Bureau and talked with writer in private prior to talking to her husband Lee Harvey. Mrs. Harvey advised writer that if talking with her husband (Lee) would help the case investigation, she would do so. Writer told Mrs. Harvey that Lee would tell (writer) what we wanted to know after he had talked with her. Mrs. Harvey then stated she would talk with Lee.

(CR. 1566.)

After the meeting with Mr. Harvey's interrogators, officers took Mrs. Harvey to the room where Mr. Harvey was being questioned. Although the police left the interrogation room, the tape recorder was set to record the conversation. (R. 03604.)

[6/] Mr. Harvey's first appearance was scheduled for 5:00 p.m. that afternoon. It was postponed until 6:00 p.m. to allow the police to complete their interrogation of Mr. Harvey. (R. 00527-28.)

Mrs. Harvey asked her husband, as she had been instructed to do: "How could you do something like that?" Trusting his wife, and without knowledge that their conversation was being recorded, Mr. Harvey answered, "Scott's idea." The conversation continued, the tape recorder running:

MRS. HARVEY: Have they asked you about this?

MR. HARVEY: No.

MRS. HARVEY: If it was Scott's idea then why are you the one that shot 'em?

MR. HARVEY: What do you mean that it was Scott's idea.

(R. 03604-05.) These were the first incriminating statements Mr. Harvey made. The trick had worked.

As he had intended, Sgt. Flynn used Mr. Harvey's visit with Mrs. Harvey as the basis for a threshold admission of guilt. Within minutes of Mrs. Harvey's departure, Sgt. Flynn had obtained a full-blown confession. (R. 03608-12.) The strategy had taken nine hours of non-stop questioning in complete disregard of Mr. Harvey's request for counsel. It had required the cooperation of Assistant State Attorney Miller in refusing access to the lawyer who was trying to find Mr. Harvey. Finally, it required the solicitation and receipt of the covert cooperation of Mr. Harvey's own wife. But the strategy had worked; Sgt. Flynn had the confession. Now he had to find a way to make it admissible.

Mr. Harvey's desire for counsel and non-waiver of his right to counsel recorded on the booking sheet by Lt. Manson continued throughout the interrogation, as the transcript makes plain. Over and over Mr. Harvey asked why he had not been allowed to speak with a lawyer. Each time he did this, the interrogators responded by asking

Mr. Harvey to execute another Miranda card, a document he plainly did not understand. (R. 03596, 03599, 03601.)

DET. HARGRAVES: Lee, what I want to do is get you to sign another one of these. I know you signed one, two, or three of em today (inaudible) It's just simply a waiver.

(inaudible-unsure who talks)

LEE HARVEY: **How come nobody ain't said nothing about a lawyer before they started questioning me?**

(R. 03634.) (Emphasis added.)

Responding to this patent confusion, and the clear absence of a voluntary and intelligent waiver of the right to counsel, the officers continued.

DET. HARGRAVES: We told you, advised you this morning on two different occasions about an attorney. Do you remember when you signed your Miranda this morning? Do you remember, I had you sign one of these this morning?

LEE HARVEY: **But I haven't had time to get ahold of one.**

(R. 03634.) (Emphasis added.) That Mr. Harvey did not understand his right to remain silent when his request for counsel was being ignored is clear from this record.[7/] It was equally clear to officers Hargraves and Flynn.

The response of the interrogators to Mr. Harvey's statements is telling. Whatever their actual belief about the status of Mr. Harvey's waiver of rights may earlier have been, the police clearly knew from Mr. Harvey's statements at this point in the interrogation that Mr. Harvey had wanted a lawyer, and that he had not been provided with

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[7/] There might well be a physiological reason for Mr. Harvey's failure to appreciate his rights, apart from the detective's tactics. As noted at pp. 28-29, infra, Mr. Harvey was a person of subnormal intelligence with organic brain damage.

one. But instead of terminating the interrogation and allowing Mr. Harvey to see the Assistant Public Defender who was even then trying to get in to see him, Detectives Hargraves and Flynn, in a hurried and half-audible colloquies, plainly decided to try and cure the error on their own.

SGT. FLYNN:	Now there's not a question about your rights now is there? You, you you understood those this morning when I read em to you.
LEE HARVEY:	**I, I didn't know I could have a lawyer til just now when I read that paper.**
SGT. FLYNN:	Okay. Do, do you remember me reading this to you from this card?
SGT. FLYNN:	Okay.
SGT. FLYNN:	And what does number four state and say right there?
LEE HARVEY:	(inaudible)
SGT. FLYNN:	Okay.
DET. HARGRAVES:	Also that is the same standardized Okeechobee County Sheriff's Department rights card that I read to you this morning when I first placed you under arrest.
SGT. FLYNN:	Do you remember signing that card for me? Do you remember me asking you do you understand your rights? Okay? Ah you're not trying to backslide on us now here are you?
LEE HARVEY:	**No, I just I didn't know I could have one until I just read that.**
SGT. FLYNN	Do you want to go ahead and continue on now and get this over with?
LEE HARVEY:	**All I wish somebody would of said I could of used the phone or call one or something.**

(R. 03635-36.) (Emphasis added.) It did not work. Mr. Harvey would not sign the waiver form.

The officers again conferred.

SGT. FLYNN: Do you want to continue on or...are we on tape now. Okay.

DET. HARGRAVES: (inaudible)

They decided to force a waiver by use of the prior, uncounseled confession.

SGT. FLYNN: Well let me ah ah ask you Lee, do you not want to talk anymore? Is that your problem? **I mean after all you've already given two statements. Ah we just would like to get it down formally on this. We'll swear you in as to the facts. It doesn't make a whole lot of difference....**

LEE HARVEY: Yea

SGT. FLYNN: But that's all we want to do.

LEE HARVEY: Yes.

SGT. FLYNN: (inaudible-both talk)

DET. HARGRAVES: This will be shorter than the others I can promise you that. We, we've got the information now. I've got something to go by here. It's just strictly up to you.

LEE HARVEY: Alright.

(R. 03636.) (Emphasis added.) Shortly after this dialogue, Mr. Harvey was asked to sign, and signed, two Miranda cards. (R. 03599, 03601.) After all, as Sgt. Flynn noted, "it [didn't] make a whole lot of difference." This is precisely the scenario Edwards and its progeny forbid; the Harvey confession was useless to the State.

C. Pretrial Motions.

1. Suppression

On June 12, 1985, Mr. Watson moved to suppress Mr. Harvey's statement and related testimony on the grounds that the police had interfered with Mr. Harvey's Sixth Amendment right by refusing

Mr. Killer access to Mr. Harvey prior to Mr. Harvey's confession. (R. 03177-79.) The motion neglected to seek suppression of the fruits of the confession and, on October 10, 1985, Mr. Watson supplemented and amended his motion to cure that oversight. (R. 03272-74.) On January 30, 1986, Mr. Watson filed another suppression motion based, apparently, on the theory that Mr. Harvey had agreed to incriminate himself in exchange for "a contact visit with his wife," and that this in some unspecified way violated Mr. Harvey's Fifth and Sixth Amendment rights. (R. 03341-42.)

While these motions were pending, the booking sheet on which Lt. Manson had noted Mr. Harvey's 6:35 a.m. pre-interrogation request for counsel lay in Mr. Watson's files, where it was later discovered by undersigned counsel. Incredibly, and tragically, this evidence was never argued as a factual basis for suppression of the confession and the evidence derived from it. In fact, Mr. Watson, unaware either of the existence or the significance of this evidence, or both, erroneously conceded that Mr. Harvey had waived his right to counsel.[8/] (CR. 937-43.)

2. Timing of the Motions to Suppress

At a pretrial conference on January 16, 1986, Mr. Watson urged the trial court to rule on Mr. Harvey's suppression motions in advance of trial. Clearly, the admissibility of the confession would fundamentally affect the case and Mr. Watson was concerned about that effect on the preparation of his defense. (R. 00217-18.) The trial

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[8/] This error was compounded on appeal to this Court when Mr. Harvey's appointed appellate counsel, Robert Udell, likewise conceded that Mr. Harvey had waived his right to counsel. (Appellant's Supp. Br. at 1.)

court denied the motion, ruling that it would hear and decide the suppression motions only after voir dire and the selection of the jury. (R. 00220.)

On February 18, 1986, Mr. Watson again moved for a suppression ruling in advance of trial. He stressed that without such a ruling, he would be unable to conduct a meaningful voir dire. (R. 00302.) The court was adamant. "[A]t this time the court will not recede from the original ruling and unless otherwise necessary, we will hold the motion to suppress hearings after the jury is selected." (R. 00306.)

On the eve of trial, in May, 1986, Mr. Harvey escaped from custody by walking through an unlocked door at the Okeechobee County Jail. (R. 02303-10.) He stole a truck, took an unloaded pistol from his brother's house and drove south to Dade County. (R. 02320-23.) After a statewide manhunt, Mr. Harvey was found in Dade County, arrested and returned to Okeechobee County for trial in June, 1986. (R. 02333-56, 03386.)

3. The Hearing

Jury selection began on June 6th and ended on June 13th. On the evenings of June 11th and 12th, the court heard argument and testimony on Mr. Watson's motions to suppress. (R. 00457-727.) When the State argued the motions to suppress the Harvey confession before the trial court, Assistant State Attorney Midelis told Judge Geiger that the State's case against Mr. Harvey and his co-defendant would collapse if the Harvey confession were suppressed. (R. 00153.) As Mr. Midelis

put it, "the State of Florida...may not be able to proceed to trial if the Court...suppresses the statements."[9/] Id.

Thus, by the State's own admission, the admissibility of the Harvey confession was critical to the State's case. As such, the confession determined not only the outcome but possibly the existence

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[9/] These representations arose in the context of the trial court's concern about severance. The State explained that severance would not arise as an issue if the Harvey confession were suppressed because there would be no case against either defendant.

> THE COURT: Okay, now just as an aside, I think we're still using that suggestion which is a good suggestion, I think we still have the potential problem, if the statements are ruled inadmissible, do we then at that time try to put the two defendants back together, or do we go ahead?
>
> MR. MIDELIS: Well, from a procedural standpoint, Your Honor, the State of Florida would be very, very hard pressed, if the Court ruled that the statements are inadmissible. We would, of course, take the appropriate remedies available, which is appeal, of course; otherwise, you know, we could not --
>
> THE COURT: Okay, so what --
>
> MR. MIDELIS: -- may not be able to proceed to trial if the Court --
>
> THE COURT: Okay --
>
> MR. MIDELIS: -- suppresses the statements.
>
> THE COURT: Okay, so --
>
> MR. MIDELIS: Either singly or jointly.
>
> THE COURT: Okay, so you're saying that problem is going to take care of itself, if the statements are ruled by the trial court to be inadmissible, okay.

(R. 00152-53.)

of the case against Mr. Harvey. Had Mr. Watson succeeded in suppressing Mr. Harvey's confession, the outcome of the case against Mr. Harvey, if there were a case at all, might have been profoundly different.

On June 13th, after the jury was seated, the court denied the motions to suppress. (R. 00727.)

4. Other Motions

Mr. Watson, to his credit, was also concerned about his lack of experience, the massive amount of trial preparation required in this case and, most particularly, his credibility with the possible penalty phase jury. For these reasons, he moved on August 21, 1985 for appointment of co-counsel. (R. 03237-39.) Although, as Mr. Watson argued, professional norms governing capital cases at the time required appointment of a minimum of two lawyers for representation of a defendant in a capital case, especially a high profile case such as this one, the trial court denied the motion. (R. 03261.)

Mr. Watson also moved to postpone the penalty phase of the trial, if necessary, out of a concern that there would be insufficient time to review the evidence presented in the guilt/innocence phase and to prepare expert witnesses. The trial court denied that motion as well.[10/] (R. 03318-19, 03361.)

[10/] In practical terms, these rulings go a long way toward explaining Bob Watson's collapse in the trial to come. However understandable his failure to advocate his client's rights may be the trial resulting from that failure was nevertheless unconstitutional.

D. **Voir Dire -- Mrs. Brunetti.**

The trial court conducted jury selection from June 6 through June 13, 1986. The court, Mr. Watson and the prosecutors conducted the examination. Many of the venirepersons examined acknowledged hearing information about the case through the media. (R. 00731-01828.)

The alternate jurors were selected on June 13, 1986. (R. 01744-01828.) Mrs. Marlene Brunetti was one of the last venirepersons examined that day. During her sequestered examination, she acknowledged under oath that she had seen and listened to daily news coverage of the Boyd murders on television. She also had read about the murders in The Miami Herald. (R. 01819-22, 01824-25.) She also acknowledged that she had learned from media reports that suspects had been arrested in connection with the Boyds' deaths and a suspect named Harvey had confessed. (R. 01822-23.)

Mrs. Brunetti also readily identified Mr. Harvey by name and emphatically told the trial court, Mr. Watson and the prosecutor that she could not be an impartial juror in the trial:

THE COURT: Mrs. Brunetti, I explained basically what the function of the alternate juror will be. Do you have any difficulty in being an alternate juror?

MRS. BRUNETTI: Yes, because of the news media.

* * *

THE COURT: Okay. Do you have any biases or prejudices for or against the state or for or against defendants in general that might affect your ability to be a juror here?

MRS. BRUNETTI: Only from the news media.

* * *

THE COURT: Okay. Now, you've seen something on television; is that correct?

MRS. BRUNETTI: And the Miami Herald.

THE COURT: And the Miami Herald, okay. 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 what's why I feel that I couldn't be, you know, impartial about it.

THE COURT: Why do you think there was a confession?

MRS. BRUNETTI: Because I think he did it. I think he did it and he confessed to doing it.

* * *

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

MRS. BRUNETTI: Harvey.

THE COURT: You're sure of the name?

MRS. BRUNETTI: Yes.

(R. 01815-16; 01820-21.) (Emphasis added.)

Mrs. Brunetti also told the court, the prosecutor and Mr. Watson that she knew the Boyds were killed during the course of a robbery and for the purpose of preventing identification, facts which the State would later advance as aggravating circumstances warranting that Mr. Harvey be sentenced to death:

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.**

* * *

MR. WATSON: 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.**

(R. 01821-22, 01824-25.) (Emphasis added.)

Despite the State's efforts to rehabilitate Mrs. Brunetti, she remained adamant about her bias.

MR. COLTON: One of the instructions on the law that the Judge will give you is that you're to put aside everything 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.**

* * *

(R. 01823.) (Emphasis added.)

MR. WATSON: Do you feel because Mr. Colton and I may not have explained to you as well as the Judge would later, do you think you could follow the Judge's instruction?

MRS. BRUNETTI: **I can't honestly say that I could have an open mind 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.**

(R. 01827.)

At the conclusion of voir dire, the trial court invited motions to strike Mrs. Brunetti for cause. There were none. The trial court then asked whether either the defense or the government desired to strike Mrs. Brunetti by preemptory challenge. Both the prosecutor and, incredibly, Mr. Watson, answered "no." Nor did the trial court

disqualify Mrs. Brunetti on its own motion. Accordingly, Mrs. Brunetti was seated as the first alternate. (R. 01828-01829.)

After opening statements the next day, the trial court informed counsel that one of the jurors had taken ill and that the first alternate, Mrs. Brunetti would be seated as a juror. (R. 01869-73.) Again, neither the prosecutor nor Mr. Watson objected, and the court did not disqualify Mrs. Brunetti. (R. 01871-73.) As a result, Mrs. Brunetti sat on the jury which deliberated Mr. Harvey's guilt and which recommended that he be sentenced to death.

E. The Trial.

1. Opening Argument

The trial began on June 13, 1986. The court instructed the jury that Mr. Harvey had entered a plea of not guilty and must be presumed innocent until proven guilty. (R. 01837.) The government opened its case. Then Mr. Watson stood and addressed the jury. His first words were:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law that my client is guilty of murder. But he is.

(R. 01859-60.) Although the trial continued afterwards for some days, it was effectively over before it began.

Mr. Watson continued his opening statement:

> What events place this young man in that chair in this room before these 14 people **to determine not whether or not he's a murderer but merely what type of murderer he is?**
>
> ***
>
> This is clearly Harold Lee Harvey Junior's case. He committed the crime and he gives us the evidence.
>
> ***

> Now, I want in closing just to say to you that this is a case of murder, and it's a case that's darn close to first degree murder.

(R. 01860-67.) (Emphasis added.)

The same concessions were made during closing argument:

> The Boyds, Mr. and Mrs. Boyd, are dead. Lee shot Mr. and Mrs. Boyd and killed them. Lee did it . . . and he did it the way that he told the police that he did it.
>
> ***
>
> We have got felony murder.

(R. 02460-68.)

In his affidavit submitted in support of Mr. Harvey's motion for post-conviction relief, Mr. Watson explained his reasoning:

> 15. My trial strategy, upon learning that the confession would be admitted into evidence, was to try to gain as much credibility with the jury as possible by being totally honest with them about the facts of the case. Because the court refused my motion to appoint co-counsel, I attempted to establish credibility in the guilt phase that would carry over into the penalty phase. . . . I had to concede that the offenses occurred in the manner described in the confession. Although this resulted in the functional equivalent of a guilty plea, I had to look ahead to the penalty phase.

(CR. 941.) (Emphasis added.)

Mr. Harvey never waived his right to a trial on the issue of his guilt; there was no plea colloquy in which the intelligent and voluntary nature of his consent to an admission of his guilt could be determined. Indeed, as set forth in the motion and as the trial court was again informed at the March 11th evidentiary hearing,[11/]

[11/] Undersigned counsel told the trial court:

> In an interview with Mr. Harvey this afternoon -- this morning at 11:40 a.m. at the correctional facility here in Vero Beach, I asked him this question. I asked Mr.

(continued...)

Mr. Watson never consulted Mr. Harvey before adopting this "strategy" and Mr. Harvey's first knowledge that his lawyer would concede guilt was when he heard his lawyer do it. (CR. 149-50.) Understandably, he was shocked.

2. The Evidence And The Verdict.

As the State had acknowledged, the centerpiece of its case against Mr. Harvey was his confession and the physical evidence derived from it. The State also introduced expert testimony, graphic post-mortem photographs of the victims and other evidence. In addition, the prosecution called a number of fact and expert witnesses. (R. 01874-02356.)

The last prosecution witness was Nathan Platt, Jr., a guard at the Okeechobee County Jail. At Mr. Watson's request, the court required the State to proffer Mr. Platt's testimony outside the presence of the jury. (R. 02431.) Mr. Platt's evidence was that Mr. Harvey and another inmate, Marvin Davis, had engaged in a heated argument in which Mr. Harvey had told Davis (1) that he had "killed twice" and (2) that he would kill Mr. Davis, if he got the chance, because he had nothing to lose. (R. 02432-37.) Mr. Watson objected

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11/ (...continued)
Harvey, do you remember when your attorney Mr. Watson made the statement that my client Harold Lee Harvey, Jr. is guilty of [sic] murder? He said, yes, I do. I asked him this question, did Mr. Watson ask your consent to make that statement? He answered, no. I then asked him whether Mr. Watson told Mr. Harvey that he, Mr. Watson, would make that statement, even if he didn't ask his consent, did he at least, tell you he was going to do it. Mr. Harvey said no; in his words, I about fell out of my chair when he said it. I didn't know he was going to say that and he didn't tell me.

(CR. 149-50.)

to the admission of Mr. Platt's testimony on the ground that its probative value was outweighed by the risk of unfair prejudice. (R. 02437-39.) The trial court, however, ruled against Mr. Watson, in part, holding that the first part of Mr. Platt's testimony, that Mr. Harvey had said he had "killed twice," would be admitted. (R. 02438-39.)

The court then asked Mr. Watson and the State whether the second part of Mr. Platt's testimony, that Mr. Harvey had threatened to kill Mr. Davis because he had nothing to lose, should be admitted. The State, recognizing the Eighth Amendment problem, did not seek admission of the statement. But Mr. Watson did. He argued that, in light of the court's prior ruling, the entire statement should be admitted. (R. 02437-39.) It was.

Mr. Platt testified consistent with the State's proffer and, as a result of Mr. Watson's advocacy, the jury in the guilt/innocence phase of the trial heard that Mr. Harvey had said that he not only had killed twice, but that he would kill again because he had nothing to lose.[12/] (R. 02440-46.)

On June 18, 1986, the jury returned a verdict of guilty on two counts of first degree murder. (R. 02570.)

F. The Penalty Phase.

The penalty phase began the following morning, on June 19, 1986, and lasted until June 20th. The government opened and then Mr. Watson again addressed the jury.

[12/] On cross-examination of Mr. Platt, Mr. Watson elicited his opinion that if Mr. Harvey and Mr. Davis had "gotten to one another they probably would have tried to kill one another." (R. 02444.)

> Ladies and gentlemen, as you might imagine, yesterday was a very difficult day. It was a first probably for all of us and certainly the first time that a client of mine had ever been convicted of first degree murder.

(R. 02635.) The State objected to Mr. Watson's attempt to distance himself from Mr. Harvey, and the court sustained the objection. (Id.)

The State's sentencing case included photographic evidence depicting drawings on the wall of the jail cell in which Mr. Harvey had been held. One of these drawings contained the caption, "if I can't kill it then it's already dead." (R. 02657.) It also depicted a stick figure shooting a gun. (Id.) The government called two witnesses to authenticate the drawing and to attribute it to Mr. Harvey. One of these witnesses was Hubert Bernard Griffin, a convicted felon and Okeechobee County Jail inmate. (R. 02601-19, 02650-77.) The State gave notice of this witness only the night before he testified. (R. 02586.) The State never told Mr. Watson that Mr. Griffin was an informant who had testified to jailhouse confessions for the State numerous times before. (R. 02620-22, 03002-04.)

Mr. Harvey's case followed. Mr. Watson called friends, family members and a psychologist, Dr. Fred Petrilla, who had twice examined Mr. Harvey in jail, to testify that Mr. Harvey was a decent, hardworking young man from a loving family who had below normal intelligence, was easily influenced and confused and who suffered from depression. The story was grossly incomplete. It also was inaccurate. (R. 02734-02812.)

Mr. Watson failed to elicit readily available evidence from testifying witnesses that would have shown, among other things, that Mr. Harvey had suffered organic brain damage from numerous childhood and adult injuries and that he was an alcoholic and a drug addict and

frequently acted under the influence of both alcohol and drugs. (CR. 937-43.)

Mr. Watson's presentation of mitigating evidence at the penalty phase was grossly inadequate because, inexplicably, he severely limited any meaningful investigation into Mr. Harvey's background and his psychological and physiological well-being. Although Mr. Watson hired investigators to interview potential witnesses for the penalty phase, he specifically directed the investigators to look only for evidence that Mr. Harvey had socially-redeeming characteristics. (R. 03482.) Because he so limited the investigation, Mr. Watson failed to discover, and, as a result, failed to present to the jury, compelling evidence in mitigation.

A minimally competent investigation into Mr. Harvey's background would have revealed that Mr. Harvey was raised in an impoverished, emotionally and physically abusive household. (CR. 950-51, 960, 991-92, 1130-31.) Throughout Mr. Harvey's childhood, his parents, teachers and friends noticed that, although good-natured, Mr. Harvey was slow to comprehend things, unable to make independent decisions and frightened of being alone. As Mr. Harvey approached adulthood, these childhood insecurities began to manifest themselves as serious mental and emotional abnormalities. (CR. 951, 1062, 1112, 1115, 1118, 1131, 1149-50, 1156, 1159.)

The Harveys lived at or below the poverty level. Mr. Harvey and his siblings worked in the citrus fields to support the family rather than attend school. In this work, Mr. Harvey was exposed throughout the years to deadly pesticides and neurotoxic chemicals which

aggravated his mental and emotional problems. (CR. 981, 982-83, 1026-27, 1074-78, 1080-82, 1085-88, 1090-91, 1093-1100, 1103-07.)

On March 3, 1979, Mr. Harvey was involved in an auto accident that nearly took his life and did kill his girlfriend. Mr. Harvey suffered severe physical and emotional injuries as a result of this accident which thereafter altered his behavior dramatically. Mr. Harvey became moody, silent and withdrawn, started falling asleep while driving, had inexplicable mood swings, headaches, and became easily distracted. (CR. 955, 1067-68, 1071, 1113, 1138-39, 1143.) It was at this time that Mr. Harvey began to manifest symptoms of a dependent personality disorder as he became increasingly dependent on his close friend, Scott Stiteler, the young man who would later suggest the robbery and murder of the Boyds. (CR. 952-57, 962, 966, 1063-64.)

This evidence was extensive, compelling and readily available from testifying witnesses for presentation at the penalty phase of Mr. Harvey's trial. However, Mr. Watson again either did not know of this evidence or did not appreciate its significance. He had directed the investigators to obtain evidence only about Mr. Harvey's good nature, not to delve into other facts, such as childhood injuries and other potential sources of organic brain damage.

Even more significantly, Mr. Watson had ignored the advice of Dr. Petrilla to hire a competent psychiatrist to examine Mr. Harvey. Had he done so, a competent psychiatrist would have uncovered and informed Mr. Watson of crucial information regarding Mr. Harvey's psychological predispositions, history of physiological trauma, social isolation and dysfunctional family life. That psychiatrist also could

have tied those factors into the events in Mr. Harvey's life that led inexorably to the Boyds' murders. [13/]

Since trial, Mr. Harvey finally has received proper psychiatric testing and evaluation from Dr. Michael Norko, a psychiatrist retained by undersigned counsel in connection with these post-conviction proceedings. (CR. 949-74.) At the time of his examination, Dr. Norko

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[13/] Although Mr. Watson retained Dr. Petrilla, a psychologist, to assist him at the penalty phase, Dr. Petrilla was limited in two significant respects. First, Dr. Petrilla had only minimal and superficial background information, supplied by Mr. Watson, thus, Dr. Petrilla's information was extremely limited in its breadth and depth.

Second, Mr. Watson intentionally limited the role played by Dr. Petrilla in Mr. Harvey's defense. Although Mr. Harvey's motion to suppress the confession was denied, and Mr. Watson now realizes that there was no reason for Dr. Petrilla not to discuss the offense with Mr. Harvey, he nevertheless instructed Dr. Petrilla not to discuss the circumstances of the offense with Mr. Harvey, and to limit his testimony to an explanation of the results of his psychological testing. (CR. 938-39.) As a result, Dr. Petrilla was unable to tie his test results to the crime itself, or to voice his professional interpretation of aggravating and mitigating circumstances. Dr. Petrilla expressly disclaimed any intention to "justify" or "explain" the murders in terms of Mr. Harvey's personality, stating "I'm just here to explain the test results." (R. 02769.) Had counsel permitted, Dr. Petrilla would have rendered an opinion:

> I was not asked to render an opinion on the mitigating factors outlined in the Florida statutes. Had I been so asked, I would have testified that the following mitigating factors were applicable to Mr. Harvey's mental and emotional condition: Mr. Harvey was under the influence of extreme mental or emotional disturbance; Mr. Harvey's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and; Mr. Harvey was under extreme duress or under the substantial domination of another person.

Dr. Petrilla also recommended to Mr. Watson that he hire a psychiatrist to evaluate Mr. Harvey. (CR. 938.) Although the trial court approved additional funds to pay for a defense psychiatrist, Mr. Watson never retained a psychiatrist. (R. 00310.)

was a professor at Yale University and Unit Chief at Whiting Forensic Institute.[14] (CR. 970-74.) Before examining Mr. Harvey, Dr. Norko reviewed copious background material on Mr. Harvey, all of which was submitted in two bound volumes to the trial court as an appendix to Mr. Harvey's Rule 3.850 Motion. Dr. Norko conducted an extensive clinical interview of Mr. Harvey and performed neurological tests. He also reviewed the results of a battery of neuropsychological tests performed by an experienced psychologist, Dr. Brad Fisher, on Mr. Harvey. (CR. 949-74.)

Based on this extensive information and test results, Dr. Norko found that Mr. Harvey has an organic brain dysfunction, consistent with both frontal lobe and brain stem damage. In addition, Dr. Norko found that Mr. Harvey suffered from long standing intellectual deficits, Major Depressive Disorder, and numerous substance dependence disorders. (CR. 959-62.)

In contrast to Dr. Petrilla, Dr. Norko had the benefit of extensive background and medical information, in-depth and unrestricted clinical interviews with Mr. Harvey, and, of course, as a psychiatrist, the level of experience necessary to prepare a competent and complete psychological and physiological profile on Mr. Harvey. In contrast to Dr. Petrilla, Dr. Norko also analyzed how these findings would have implicated Mr. Harvey's ability to understand and waive his Miranda rights, the voluntariness of his confession, Mr. Harvey's competency to stand trial, Mr. Harvey's state of mind at the time of the murders, and the fact that Mr. Harvey was extremely depressed, under the

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[14] Dr. Norko is now the Director of the Whiting Forensic Institute.

influence of controlled substances, and under the psychological domination of Scott Stiteler at the time of the murders. (CR. 962-64.)

Mr. Watson, therefore, presented a weak and unfocused body of mitigating evidence illustrating Mr. Harvey's good character and the results of Dr. Petrilla's testing. The prosecutor pointed out this weak mitigating evidence, stating that "Dr. Petrilla was smart enough to say that he was limiting his opinion here to the tests and that these tests were indicators and showed tendencies. He didn't pin himself down too much." (R. 03011-12.) The prosecutor attacked the other mitigating evidence as an attempt to evoke sympathy, (R. 03014-16.) Although this argument was constitutionally impermissible, it was undoubtedly effective.

Faced with this powerful argument, with little to argue in mitigation, Mr. Watson told a story about his walk on the beach the night before. (R. 03021.) He quoted Donne's admonition that "No man is an island," (R. 03025), conceded the "enormous amount of evidence" against his client, (R. 03034), and admitted that this task was "just too awesome a job" for him. (R. 03036.)

The prejudice to Mr. Harvey that resulted from counsel's deficient performance at the penalty phase of trial is apparent. Even without having heard this substantial evidence, jurors considered a life recommendation, as is clearly indicated by their questions to the judge concerning how long Mr. Harvey would be incarcerated if he received a life sentence. (R. 03044-45.)

Mr. Watson also made a number of other errors substantially increasing the likelihood that the jury would recommend the death penalty. For example, Mr. Watson decided to ask the court to find in

mitigation that Mr. Harvey had no significant history of prior criminal activity. (R. 02586-97.) Yet, under the law controlling at that time, this position made Mr. Harvey's pre-trial escape and recapture relevant in the penalty phase. The State raised this evidence in closing, to devastating effect.

Mr. Watson also failed to object to certain misstatements of the law made by the court and the prosecution. For example, both the trial court and the prosection erroneously instructed jurors that they had to recommend the death penalty unless they found mitigating circumstances sufficient to outweigh the aggravating circumstances. (R. 02623-24, 03000-18, 03039.)

The trial court and the government also erroneously told jurors that their role as sentencer was only advisory. (R. 03039.) Although Mr. Watson objected to these comments, the trial court overruled the objections.

Moreover, the trial court improperly instructed the jury on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances. (R. 03038-43.)

On June 20th, the jury voted eleven to one to recommend that Mr. Harvey be sentenced to death (R. 03046-47).[15/] Mr. Watson did not present any argument to the court before it recessed to consider

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[15/] During their deliberation, jurors sent a note to the trial court. In their note, jurors asked when Mr. Harvey would become eligible for parole if he received a life sentence. They also asked whether Mr. Harvey would be required to serve 25 or 50 years if he was sentenced to life imprisonment before being eligible for parole. (R. 03044.) The trial court refused to answer the jury's questions. (R. 03045-46.)

Mr. Harvey's sentence. After recess, the trial court followed the jury's recommendation and sentenced Mr. Harvey to death. (R. 03052.)

IV.

STANDARD OF REVIEW

In reviewing an order denying post-conviction relief pursuant to Fla. R. Crim. P. 3.850, this Court distinguishes between claims denied **without evidentiary** hearing and claims denied pursuant to factual findings made after an evidentiary hearing has been afforded. See Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980). Where the trial court has denied a Rule 3.850 claim without evidentiary hearing, he or she must attach to the order denying that claim excerpts from the record in the case which conclusively show that the movant is entitled to no relief. Id. If the attached record excerpts do not conclusively show no entitlement to relief, this Court remands the case to the trial court for evidentiary hearing. Id.

Where the trial court has denied claims based upon factual findings and conclusions of law determined after an evidentiary hearing, this Court applies a two-tiered analysis. The Court reviews the trial court's factual findings to determine whether those findings are supported by substantial competent evidence. See Stewart v. State, 481 So. 2d 1210, 1212 (Fla. 1985). The trial court's conclusions of law are accorded no weight and are reviewed de novo. See Thomas v. State, 616 So. 2d 1150, 1150 (Fla. 4th DCA 1993).

V.

SUMMARY OF ARGUMENT

Appellant, Harold Lee Harvey, Jr., an organically brain damaged person of subnormal intelligence, is sentenced to die under an

unconstitutional conviction and judgment. He sought post-conviction relief in the trial court and his motion was denied by an order which purports to attach record support for its holding but which is in fact incomprehensible, supplying no indication of the trial court's reasoning on sixteen of the seventeen claims presented. Mr. Harvey appeals from the Order on the grounds that it is clearly erroneous and contrary to law. The result below is also, as will be shown, disturbingly unjust.

While no trial is perfect, the record in this case demonstrates that, within the meaning of the Sixth Amendment, this was no real trial at all. The system did not function as it was supposed to function; Mr. Harvey's convictions and death sentences were foregone conclusions. Critically, this was so not because of the presence of overwhelming admissible evidence, but because of the absence of any meaningful advocacy for the accused. When Mr. Harvey's lawyer permitted an admittedly biased and unrehabilitated juror to deliberate his client's guilt and punishment, he abrogated his client's right to a fair trial. When, without his client's consent, he told the jury in opening that Harold Lee Harvey, Jr. was a murderer, he forfeited his client's right to any trial at all. These were fundamental errors, evidencing counsel's wholesale abandonment of his role as an advocate for the accused and rendering Mr. Harvey's trial and its resulting conviction and sentence unreliable. As such, Mr. Harvey did not receive the fair and impartial trial guaranteed him by the Sixth Amendment and harmless error analysis is inapplicable. Prejudice should be presumed.

Additionally, Mr. Harvey received ineffective assistance of counsel fundamentally altering the outcome of his trial. Counsel

failed to discover and assert evidence in his own file which would have resulted in the suppression of his client's confession, the principal evidence against Mr. Harvey. Because, as the State acknowledged before the trial court, suppression of the confession would probably have resulted in dismissal of the charges against Mr. Harvey, Mr. Harvey was profoundly prejudiced by this failing. Counsel also failed to investigate and present during the penalty phase of Mr. Harvey's trial readily available evidence in mitigation of Mr. Harvey's offense. As such, substantial mitigating evidence, including evidence that Mr. Harvey's conduct might have been the result of organic brain damage, was never heard by the jury from which Mr. Harvey received a recommendation of death and Mr. Harvey was prejudiced by this error as well.

Finally, Mr. Harvey was denied a fair trial by other errors too numerous to summarize here. Argument on these claims reincorporates the facts and authorities urged before the trial court in the motion.

This conviction cannot stand. Florida cannot constitutionally execute Harold Lee Harvey, Jr. on the basis of this judgment. The Order denying post-conviction relief should be reversed, the trial court's judgment and sentence vacated and this case remanded for a new and constitutional trial.

VI.

ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING CLAIMS I.A., I.C., I.D., I.E., I.F., II.G., IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI AND XVII; THE RECORD EXCERPTS ATTACHED TO THE ORDER DO NOT CONCLUSIVELY SHOW MR. HARVEY IS ENTITLED TO NO RELIEF.

In his Rule 3.850 motion below, Mr. Harvey raised seventeen claims challenging the validity of his conviction. The trial court summarily denied sixteen of those claims without evidentiary hearing. The portion of the Order pertaining to these summarily denied claims recited that attached record excerpts conclusively showed that Mr. Harvey was entitled to no relief. As this Court can see from a cursory comparison of Mr. Harvey's Rule 3.850 motion and the record excerpts attached by the trial court, this recital is inaccurate.

Contrary to the recitals of the Order and to the requirements of law, the trial court failed to attach any record excerpts for Claims I.D., I.E., I.F., II.G., V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI and XVII. The record excerpts attached in support of the denial of Claims I.A., I.C. and IV do not relate to those claims,[16/] although it is possible they may relate to other claims. The source of this error is clear. A comparison of the record excerpts attached to the Order and the record excerpts proposed by Assistant State Attorney David Morgan in an ex parte submission to the trial court, dated June 19, 1991, (SR. 3-223), show that the trial court was led

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[16/] Claim I.A. alleges that Mr. Watson was ineffective in moving to suppress Mr. Harvey's confession. Claim I.C. alleges that Mr. Watson was ineffective in failing to move the court to change venue. Claim IV alleges that Mr. Harvey's constitutional rights were violated because he was tried before a de facto eleven person jury.

into error by counsel for the State; Judge Geiger simply entered what the State had requested, apparently without independent review. As a consequence, the trial court's denial of Mr. Harvey's motion is unsupported by factual findings on sixteen of the seventeen claims raised.

When a trial court denies sufficiently and properly raised claims for post-conviction relief brought pursuant to Fla. R. Crim. P. 3.850, and does so without affording the movant an opportunity for evidentiary hearing, it must demonstrate the factual basis for that denial by attaching record excerpts which conclusively show the movant is entitled to no relief. Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980). Where the excerpts fall short of this standard, the case is remanded for evidentiary hearing. Id. Clearly, where there are no record excerpts attached at all, the same result will follow. See id. It would otherwise be impossible for this Court to determine the basis of the trial court's ruling.

Mr. Harvey's claims are sufficiently alleged.[17/] They are properly raised by motion for post-conviction relief pursuant to Rule 3.850. If the other arguments raised in this appeal do not dispose of this conviction, as Mr. Harvey contends they should, this Court should reverse and remand the trial court's rulings on claims I.A., I.E., II.F., IV, V, VI, VII, VIII, IX, X, XI, XIII, XIV, XV, XVI and XVII for evidentiary hearing or factual finding of some kind, including at least the identification and attachment of pertinent record

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[17/] In support of his motion for post-conviction relief, Mr. Harvey filed a two volume appendix containing numerous affidavits and evidence that was not presented at trial or during Mr. Harvey's direct appeal. (CR. 932-1584.)

excerpts. Meeks, 382 So. 2d at 676. See also Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984).

B. THE TRIAL COURT ERRED IN DENYING CLAIMS I.B., I.F. AND IV; MR. WATSON'S ERRORS SO COMPROMISED THE INTEGRITY OF THE TRIAL THAT THERE CAN BE NO CONFIDENCE IN THE VERDICT.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. These guarantees are "fundamental to the American scheme of justice," Duncan v. Louisiana, 391 U.S. 145, 148-150 and n. 14, 88 S. Ct. 1444, 1447-48 and n. 14, 20 L. Ed. 2d 491 (1968), and for that reason are binding on the states. Id. They are fundamental because they are essential to the reliable functioning of our "Anglo-American regime of ordered liberty," as embodied in the common law jury trial. Id. When these guarantees are compromised, our trial system cannot function reliably and there can be no confidence in the outcome of the trial.

In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the Supreme Court recognized two kinds of constitutional error in a criminal trial. Constitutional errors which do not impair the basic trial process may be harmless if the nature and quantum of admissible evidence against the accused would, beyond a reasonable doubt, have ensured conviction anyway. Chapman, 386 U.S. at 24, 87 S. Ct. at 828. In this way, as the Court has subsequently explained,

the trial system corrects itself and the focus of judicial review of constitutional infringements will be "on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986). There is, however, an essential qualification to this practical rule.

Chapman and all subsequent harmless error cases recognize that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23, 87 S. Ct. at 827-28. See also Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105, 92 L. Ed. 2d 460, (1986) ("Some constitutional errors require reversal without regard to the evidence in the particular case."). The Court explained the rationale underlying this limitation of the harmless error doctrine in Rose.

> [S]ome errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, [citing Tumey v. Ohio], with counsel to help the accused defend against the State's charge, [citing Gideon v. Wainwright]. Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, [citing Powell v. Alabama], and no criminal punishment may be regarded as fundamentally fair. Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.

Rose v. Clark, 478 U.S. at 577-78, 106 S. Ct. at 3106. Where trial errors compromise "these basic protections" of our common law trial system the 'presupposition' of harmless error analysis, the reliable functioning of the trial mechanism, is missing and harmless error analysis does not apply.

The test for determining whether an error is of the kind that would compromise these basic protections was also articulated in Rose.

An error which either aborts the basic trial process or denies it altogether can never be harmless. Rose, 478 U.S. at 578 n. 6, 106 S. Ct. at 3106 n. 6. (citing, as examples, Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) (use of coerced confession); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (denial of counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (biased adjudicator). See also Young v. U.S. ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 811, 107 S. Ct. 2124, 2139-40, 95 L. Ed. 2d 740 (1987) (fundamental error to appoint an interested prosecutor); Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717, 90 L. Ed. 2d 69 (1986) (fundamental error to practice racial discrimination in selection of a petit jury); Waller v. Georgia, 467 U.S. 39, 48-50, and n. 9, 104 S. Ct. 2210, 2216-17, and n. 9, 81 L. Ed. 2d 31 (1984) (closure of suppression hearing constituted fundamental error since it abridged right to a public trial); Harding v. Davis, 878 F.2d 1341, 1344-45 (11th Cir. 1989) (counsel's failure to object to directed verdict against defendant was fundamental error, hence presumptively prejudicial). This principle applies equally to errors arising from ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984).

Some errors of counsel compromise the integrity of the basic trial process. Strickland v. Washington, 466 U.S. at 693, 104 S. Ct. at 2067. In such cases, "[p]rejudice is presumed." Id. (citing United States v. Cronic, 466 U.S. 648, 659 and n. 25, 104 S. Ct. 2039, 2046-47 and n. 25, 80 L. Ed. 2d 657 (1984)).

In Cronic, the Court again noted "that the right to the effective assistance of counsel is recognized not for its own sake, but because

of the effect it has on the ability of the accused to receive a fair trial." Cronic, 466 U.S. at 658, 104 S. Ct. at 2046. Again, the determining factor is the "effect of challenged conduct on the reliability of the trial process...." Id. Where the error in question may affect that process, prejudice is presumed. 466 U.S. at 658-59, 104 S. Ct. at 2046-47. The Court went on to give examples.

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659, 104 S. Ct. at 2047 (citing Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (prejudice presumed where defendant denied right of effective cross-examination) (footnote omitted).

Both the Rose v. Clark fundamental error analysis and the Strickland/Cronic error plus prejudice analysis emphasize the same concern. Because harmless error presupposes the proper operation of our adversarial common law trial system, errors which affect the integrity of that system are not subject to harmless error analysis and are presumptively prejudicial. No criminal punishment derived from such a trial may be regarded as fundamentally fair. See Stano v. Dugger, 921 F.2d 1125, 1154 (11th Cir.), cert. denied, 112 S. Ct. 116, 116 L. Ed. 2d 85 (1991). Accord, Blanco v. Singletary, 943 F.2d 1477, 1496 (11th Cir. 1991), cert. denied, 112 S. Ct. 2282, 119 L. Ed. 2d 207 (1992), and cert. denied 112 S. Ct. 2290, 119 L. Ed. 2d 213 (1992) (quoting Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984)).

Both the Florida courts and the Eleventh Circuit apply this rule. See, e.g., Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990), cert. denied, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991) (prejudice presumed where defense counsel conceded guilt of accused) (dicta); Holley v. State, 484 So. 2d 634, 636 (Fla. 1st DCA), rev. denied, 492 So. 2d 1335 (Fla. 1986) (prejudice presumed from eleventh hour substitution of counsel). See also Francis v. Spraggins, 720 F.2d 1190, 1195 (11th Cir. 1983), cert. denied, Kemp v. Spraggins, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985) (prejudice presumed where counsel, at guilt phase of capital penalty trial conceded defendant's guilt in order to enhance argument for leniency at penalty phase); Young v. Zant, 677 F.2d 792, 799 (11th Cir. 1982) (ineffective assistance presumed where counsel adopted insanity defense without support, ignored obvious defenses and conceded guilt of the defendant in order to enhance leniency argument); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (prejudice presumed where counsel failed to object to a directed verdict of guilt); Jackson v. James, 839 F.2d 1513, 1517 n.5 (11th Cir. 1988), (prejudice presumed where counsel constructively absent during jury selection).

At least two of the errors committed by Mr. Harvey's counsel in this case fall within this rule. They are fundamental errors and presumptively prejudicial. As a result, Mr. Harvey's conviction and punishment are unconstitutional.

1. Mr. Watson's Failure To Strike Mrs. Brunetti Deprived Mr. Harvey Of An Impartial Jury.

Mr. Watson allowed Mrs. Brunetti, who had prejudged Mr. Harvey's guilt, to sit on the jury and deliberate Mr. Harvey's case. In so doing, he abandoned his role as an advocate and accepted a biased jury.

This action fundamentally undermined the fairness of the trial. Such an error could never be harmless.[18/] Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992); Arthur v. Bordenkircher, 715 F.2d 118, 119-20 (4th Cir. 1983); Presley v. State, 750 S.W.2d 602 (Mo.Ct.App. 1988) (en banc), cert. denied, 488 U.S. 975, 109 S. Ct. 514, 102 L. Ed. 2d 549 (1988).

In Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992), defense counsel failed to challenge two veniremen who had earlier convicted another person of taking part in the same robbery as that with which the defendant was charged and who were convinced that the defendant was guilty before his trial had even started. In affirming the district court's grant of habeas relief, the court held that:

> [I]t is clear that [the defendant] was prejudiced by the appearance of two biased persons on his jury. It affords the defendant no comfort to argue that the other ten jurors were not biased. . . . Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself. . . . The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge.

Johnson, 961 F.2d at 755.

Similarly, in Arthur v. Bordenkircher, 715 F.2d 118 (4th Cir. 1983), defendant's attorney consented to an instruction which informed the jury that the defendant's earlier conviction for the same murder had been reversed on procedural grounds. In vacating the conviction, the Fourth Circuit held that counsel's action had impaired rights

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[18/] As set forth in Claim IV of Mr. Harvey's motion, the trial court had an independent obligation to disqualify Mrs. Brunetti. The court's failure to do so also constitutes fundamental error because it caused Mr. Harvey to be tried by a de facto eleven person jury. See Jones v. State, 452 So. 2d 643, 644 (Fla. 4th DCA 1984) (rev. denied, 461 So. 2d 116 (Fla. 1985)).

"basic to a fair trial" and for this reason could not be treated as harmless. Arthur, 715 F.2d at 119.

Finally, in Presley v. State, 750 S.W.2d 602 (Mo. App.), cert. denied, 488 U.S. 975, 109 S. Ct. 514, 102 L. Ed. 2d 549 (1988), a case virtually identical to this one, a potential juror volunteered during voir dire that he had seven years earlier been the victim of a robbery. Defense counsel asked the juror whether the incident "would make you unable to sit in judgment fairly on my client, fairly today?" and the juror responded, "I don't, yes, I think I'd be a little partial to your client, or against your client." Defense counsel then asked, "You'd be partial to the state?" The juror responded, "Right." Presley, 750 S.W.2d at 604. Counsel failed to challenge the juror and this failure was later asserted as a basis for post-conviction relief.

On appeal from the trial court's order granting post-conviction relief, the Missouri Court of Appeals affirmed. The court's reasoning, on facts virtually identical to those presented here, is compelling.

> The instant record shows that the jury contained one juror who was, by his own admission, biased. That was tantamount to a denial of the right to trial by jury. It is no answer to say that the other 11 jurors were free of bias and all of them agreed upon a verdict of guilty. 'A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person.'

Presley, 750 S.W.2d at 607 (quoting Patton v. United States, 281 U.S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854 (1930)).

The rationale underlying the court's holding in Presley is the same as that urged here.

> The instant situation, this court holds, is an example of the type the Court envisioned by the language in Strickland: 'In certain Sixth Amendment contexts, prejudice is

> presumed.' There was here a denial of the right to trial by jury.

Presley, 750 S.W.2d at 607. The facts of Presley are indistinguishable from those present here and the same result should follow.

In this case, Mrs. Brunetti swore under oath that she was biased against Mr. Harvey, that she had prejudged his guilt and that, regardless of the judge's instructions, she would be unable impartially to consider the case. Yet, after hearing this testimony, Mr. Watson allowed Mrs. Brunetti to sit on the jury. Because trial by a jury with a biased juror cannot be fair, Mr. Watson's error in failing to challenge Mrs. Brunetti was fundamental. Mr. Harvey was deprived of an impartial jury by this ineffectiveness of his counsel and prejudice must be presumed.

Although analyzed here under the fundamental error doctrine of Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), or the functionally equivalent presumed prejudice standard of United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), Mr. Watson's errors also, of course, more than meet the two-pronged test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, Mr. Watson's failure to challenge Mrs. Brunetti demonstrated a basic lack of competence. Second, Mr. Harvey was prejudiced because, as Mrs. Brunetti acknowledged, she had prejudged him guilty before the trial ever began. See Gordon v. State, 469 So. 2d 795, 797-98 (Fla. 4th DCA), rev. denied, 480 So. 2d 1296 (1985). Thus, the prejudice suffered by Mr. Harvey was that the jury which heard his case was not impartial,

as the Sixth Amendment requires; proof of prejudice resides in the transcript of voir dire.[19/]

Mr. Harvey's conviction and death sentences should be vacated.

2. Mr. Watson's Unauthorized Concession Of Guilt So Undermined Mr. Harvey's Not Guilty Plea That Mr. Harvey Was Denied Due Process.

Mr. Harvey pled not guilty to the charges against him. Yet, at trial, Mr. Watson conceded Mr. Harvey's guilt. This concession, which decided the outcome of Mr. Harvey's trial before it ever began, was fundamental error.

[19/] As noted, Mr. Harvey argued at the March 11th hearing that Mr. Watson's failure to strike Mrs. Brunetti was fundamental error and that prejudice should be presumed (CR. 8-14) but, in the alternative, offered evidence of prejudice in the form of expert testimony by Dr. Moran about the effect of Mrs. Brunetti's bias on the panel which deliberated Mr. Harvey's case. (CR. 65-85, 89-94.) The trial court excluded this evidence on the ground that it was irrelevant and that a factual predicate had not been laid for the testimony because Dr. Moran had no personal knowledge about what went on in the jury room in this particular case. (CR. 88.)

The trial court's ruling illustrates the "Catch-22" in which Mr. Harvey finds himself. In applying Strickland to Claim I.B. and requiring proof of prejudice resulting from a biased jury, the trial court required Mr. Harvey to prove what, under our system of law, cannot be proved, that but for Mrs. Brunetti's bias the jury would have reached a verdict of not guilty or recommended life. Yet the trial court rejected, as irrelevant, expert testimony of the effect of Mrs. Brunetti's bias on the panel. The clear import of this ruling is that only the innocent are entitled to fair trials and that, thankfully, is not our law. Because the defect occasioned by counsel's error skewed the basic process of Mr. Harvey's trial, the quantum of evidence of guilt is irrelevant to the question of the fairness of the verdict. Because the error affected Mr. Harvey's fundamental rights, prejudice must be presumed. Strickland does not, indeed, cannot apply.

Moreover, in light of the trial court's application of Strickland, its exclusion of Dr. Moran's testimony was an abuse of discretion. See Lake Hospital and Clinic, Inc. v. Silversmith, 551 So. 2d 538, 545 (Fla. 4th DCA 1989).

By entering a not guilty plea, a defendant preserves his right to compel the government to prove its case beyond a reasonable doubt. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S. Ct. 656, 70 L. Ed. 2d 630 (1981). A defendant's attorney cannot override his client's not guilty plea without first obtaining the client's knowing and voluntary consent to do so. Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985); Wiley, 647 F.2d at 650. If he does, he compromises the functioning of the trial mechanism and renders the harmless error doctrine inapplicable. Id. United States v. Swanson, 943 F.2d 1070, 1072-76 (9th Cir. 1991) (prejudice presumed from defense counsel's unauthorized admission of a defendant's guilt); Scarpa v. DuBois, 1993 WL 245655 (D. Mass. June 24, 1993) (same); North Carolina v. Harbison, 315 N.C. 175, 337 S.E.2d 504, 507 (N.C. 1985), cert. denied, 476 U.S. 1123, 106 S. Ct. 1992, 90 L. Ed. 2d 672 (1986) (same).

Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985), a case decided before Cronic, is directly on point. In Spraggins, the Eleventh Circuit vacated the defendant's conviction on the grounds that his counsel's concession of his guilt "nullifie[d] his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance." In rejecting the State's argument that conceding guilt was a reasonable strategy in light of the overwhelming evidence of guilt, the Eleventh Circuit held:

> Even though an adverse verdict would have the effect of precluding further argument on the issue of guilt, counsel

> does not have license to anticipate that effect and to concede the issue during the guilt/innocence phase simply because an adverse verdict appears likely.

Id. at 1194 (citing Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1981)). See also Young v. Zant, 677 F.2d 792, 798-800 (11th Cir. 1982). The rule is the same even if the defendant has confessed and the confession is held to be admissible. Magill v. Dugger, 824 F.2d 879, 888 (11th Cir. 1987).

In this case, Mr. Watson conceded Mr. Harvey's guilt in opening statement in the guilt/innocence phase. He repeatedly emphasized throughout the trial that Mr. Harvey was a murderer, perhaps even a first degree murderer. Mr. Watson never obtained Mr. Harvey's consent to make these concessions. Indeed, as proffered by undersigned counsel at the March 11th evidentiary hearing, Mr. Watson did not even inform his client that this strategy would be followed. Mr. Harvey was shocked when he learned of it for the first time at opening.

Mr. Watson did not have the right to concede his client's guilt and when he did so, he abrogated Mr. Harvey's Sixth Amendment guarantee of a trial. This error was fundamental and affected the basic processes of the trial. In fact, it denied Mr. Harvey any trial at all. Such an error can never be harmless. Francis v. Spraggins, 720 F.2d at 1195; Rose v. Clark, 478 U.S. at 570, 578 n. 6, 106 S. Ct. 3101, 3106 n. 6, 92 L. Ed. 2d 460 (1986).

C. THE TRIAL COURT ERRED IN DENYING CLAIMS I.A., II.A. AND III; MR. HARVEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Mr. Harvey received ineffective assistance of counsel at trial in violation of his rights under the Sixth and Fourteenth Amendments to the U.S. Constitution when his counsel negligently and prejudicially failed to suppress a confession, the inadmissibility of which might, by the State's own admission, have resulted in dismissal of the charges against Mr. Harvey. Counsel was also ineffective by failing adequately to investigate and present readily available evidence in mitigation of the offenses of conviction. But for counsel's errors, the outcome of this case, if it were prosecuted at all, might certainly have been different. Mr. Harvey's convictions and sentences of death should be vacated on this ground.

This Court evaluates claims of ineffective assistance of counsel on a case by case basis under the two-pronged standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991); Gordon v. State, 469 So. 2d 795, 797 (Fla. 4th DCA), rev. denied, 480 So. 2d 1296 (1985); Downs v. State, 453 So. 2d 1102 (Fla. 1984). Under Strickland, a movant must show that his attorney's performance was (1) deficient, i.e., that it fell below an objective standard of reasonableness; and (2) prejudicial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. 466 U.S. at 688-96, 104 S. Ct. at 2064-69.

A movant has the burden of specifically identifying the acts or omissions of counsel that are alleged to have been deficient. 466 U.S. at 690, 104 S. Ct. at 2066. The court then must determine whether the identified acts or omissions fell outside the range of professionally

competent assistance. Id. In making this evaluation, the reviewing court looks to the prevailing norms of practice as reflected in state and national codes of professional conduct such as the American Bar Association Standards for Criminal Practice. 466 U.S. at 688-89, 104 S. Ct. at 2065.

A movant also must show prejudice. 466 U.S. at 692, 104 S. Ct. at 2067. Prejudice is established when the court finds that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Id. As the Strickland court elaborated:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, 466 U.S. at 695, 104 S. Ct. at 2068-69.

Finally, courts have recognized that, under Strickland, errors, although harmless when viewed individually and out of their context at trial, may by their combined effect have rendered the trial unfair. Prejudice has been found in such cases. United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n. 8 (11th Cir. 1993). See also United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (defendant deprived of fair trial, hence was prejudiced, by cumulative effect of errors, each of which, standing alone, would have been harmless: trial court's errors in voir dire; erroneous admission of evidence; and trial

court's failure to give curative instruction after improper prosecutorial comments); Nowitzke v. State, 572 So. 2d 1346, 1356 (Fla. 1990) (defendant deprived of fair trial by cumulative effect of numerous minor instances of prosecutorial misconduct).

1. Mr. Watson Was Ineffective In Failing To Assert Mr. Harvey's Booking Sheet Reflecting A Pre-Interrogation Request For Counsel In Support Of The Motion To Suppress Mr. Harvey's Confession.

At the time he moved to suppress Mr. Harvey's confession, Mr. Watson had in his files a copy of the booking sheet which indicated that Mr. Harvey asked to speak with an attorney at 6:35 a.m. on the day of his arrest.[20/] This request preceded interrogation. Mr. Watson also had a copy of Mr. Harvey's taped interrogation in which Mr. Harvey repeatedly reiterated his request to speak with an attorney and made statements demonstrating the absence of an intelligent and voluntary waiver of his Fifth and Sixth Amendment rights. Had Mr. Watson asserted this evidence as a basis for suppression of Mr. Harvey's confession, the confession would likely have been suppressed. As the State admitted to the trial court in argument, had the confession been suppressed the case against Mr. Harvey would probably have to be dismissed. Certainly, it would have been materially weakened. These facts constitute ineffective assistance of counsel under Strickland. Yet, in moving to suppress Mr. Harvey's confession, Mr. Watson did not use this evidence.

[20/] The booking sheet was never admitted into evidence at trial. A second booking sheet was created on March 7, 1985, eight days after Mr. Harvey's arrest and confession and in connection with his indictment for first degree murder. That booking sheet was admitted into evidence at trial. (R. 03115-16.)

a. Mr. Watson's Errors Resulted In Ineffective Assistance of Counsel.

Mr. Watson's failure to assert the booking sheet on which the Okeechobee County Sheriff's Office had documented Mr. Harvey's request for counsel and Mr. Watson's failure to assert that evidence in conjunction with his client's continuing requests for counsel during the interrogation could have arisen only from one of two circumstances. Either Mr. Watson was unaware of the evidence contained within his own files or he did not realize the significance of that evidence. In either case, he was ineffective within the meaning of Strickland.

A lawyer is required to know and understand the legal significance of evidence in his own file. Smith v. Dugger, 911 F.2d 494, 498 (11th Cir. 1990) (defense counsel's ignorance of unsigned waiver form in his own files which would have provided "significant ammunition" in a motion to suppress confession, and subsequent failure to file a motion to suppress, fell below scope of reasonable representation under Strickland); Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982) (defense counsel's failure to understand client's factual claims or the legal significance of those claims is representation below the acceptable range of competency expected of members of the criminal defense bar); Baty v. Balkcom, 661 F.2d 391, 394-95 (5th Cir. Unit B Nov. 1981) (inadequate preparation of trial counsel, evidenced, inter alia, by unfamiliarity with the factual record of the case, constituted ineffective assistance of counsel). See also McClendon v. State, 603 So. 2d 607 (Fla. 1st DCA 1992) (defendant's assertion that counsel failed to object to errors in presentence report, allowing defendant to be sentenced on erroneous belief that prior conviction was a felony rather than a misdemeanor, stated a viable claim for ineffective

assistance of counsel); Harrison v. State, 562 So. 2d 827, 828 (Fla. 2d DCA 1990) (counsel's failure to assert a valid basis to suppress a confession gives rise to a viable claim of ineffective assistance of counsel); Chapman v. State, 442 So. 2d 1024, 1026 (Fla. 5th DCA 1983) (counsel's failure to raise defense of double jeopardy based on erroneous belief that he could raise it later via a post-trial motion was "substantial error"); Hyman v. Aiken, 824 F.2d 1405, 1414-16 (4th Cir. 1987) (ignorance of documents necessary to understanding of client's case and for meaningful cross-examination of witness supported conclusion that counsel's performance fell below reasonably objective standard of Strickland); Martin v. Rose, 717 F.2d 295, 296 (6th Cir. 1983) (same).

(1) But For Mr. Watson's Errors, The Confession Would Have Been Suppressed.

The legal significance of Mr. Harvey's 6:35 a.m. booking sheet and the request for counsel reflected on it is clear. That evidence would almost certainly have resulted in the suppression of Mr. Harvey's confession under the exclusionary rule of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), as applied in Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378 (1981).

Under Edwards, once a suspect under custodial interrogation requests an attorney, interrogation must stop. Edwards, 451 U.S. at 484-85, 101 S. Ct. 1884-85. If it does not, any subsequent response to police-initiated conversation is inadmissible under the exclusionary rule. Id. This is a "bright-line rule." Smith v. Illinois, 469 U.S. 91, 99, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984).

Once the right to counsel has been invoked, subsequent responses to continued police questioning, in addition to being inadmissible, cannot be used to establish a retroactive waiver of the initial request. Edwards, 451 U.S. at 485, 101 S. Ct. 1885. As Justice White explained in Edwards, this prophylactic measure is imposed as a necessary safeguard of the Sixth Amendment guarantee:

> [T]he Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards, 451 U.S. at 484-855, 101 S. Ct. at 1884-85; see also Smith v. Illinois, 469 U.S. 91, 94-97, 105 S. Ct. 490, 492-93, 83 L. Ed. 2d 488 (1984).

In Smith, the Court further explained the necessity of this rule and, in doing so, foreshadowed this case:

> With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." [citing Edwards]. Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable. "No authority, and no logic, permits the interrogator to proceed ... on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all."

Smith, 469 U.S. at 98-99, 105 S. Ct. at 494 (citations omitted).

Finally, if an accused under custodial interrogation asks to speak with an attorney and the request is unclear, "[f]urther questioning thereafter must be limited to clarifying that request until it is clarified." Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988) (emphasis in original) (citing Thompson v. Wainwright, 601 F.2d 768,

771 (5th Cir. 1979). Any statements made by an accused after the equivocal request for counsel is made, but before it is clarified, violate Miranda and are inadmissible under Edwards. Owen, 849 F.2d at 539 ("[The Eleventh Circuit] employs an equally 'rigid prophylactic rule' [when request for counsel is equivocal]."); see also Towne v. Dugger, 899 F.2d 1104, 1110 (11th Cir.), cert. denied, 498 U.S. 991, 111 S. Ct. 536, 112 L. Ed. 2d 546 (1990) (reversing conviction because defendant's statement "what do you think about whether I should get a lawyer?" was an equivocal statement requiring clarification before continuing interrogation).

Because knowledge of a request for counsel is imputed from one state actor to another, Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), a request made to one officer invokes the Edwards rule as to all. Michigan v. Jackson, 475 U.S. at 634-35; 106 S. Ct. at 1410.

(2) The "Bright-Line" Edwards Rule Applies In Florida.

Florida courts consistently applied the Edwards rule at the time of Mr. Harvey's arrest. See, e.g., Drake v. State, 441 So. 2d 1079, 1081-82 (Fla. 1983), cert. denied, 466 U.S. 978, 104 S. Ct. 2361, 80 L. Ed. 2d 832 (1984). They still apply it today. See, e.g., Slawson v. State, 619 So. 2d 255, 258 (Fla. 1993); Long v. State, 517 So. 2d 664, 667 (Fla.), cert. denied, 486 U.S. 1017, 108 S. Ct. 1754, 100 L. Ed. 2d 216 (1988); Kyser v. State, 533 So. 2d 285, 287 (Fla. 1988); State v. Sawyer, 561 So. 2d 278, 291-93 (Fla. 2d DCA 1990).

For example, in Drake v. State, 441 So. 2d 1079 (Fla. 1983), the police had questioned the defendant at the sheriff's office after reading him the Miranda warnings. After some questioning, the

defendant asked to see his attorney. After the police made three unsuccessful attempts to contact the defendant's attorney by phone, they proceeded with additional questioning. The defendant paused and stumbled in response to key questions. At trial, the court allowed a police witness to interpret for the jury what the pauses meant.

The defendant later appealed his conviction and death sentence on the grounds, inter alia, that his taped confession was improperly admitted into evidence. This Court reversed the defendant's conviction and remanded for a new trial, holding that once a suspect in custody expresses his desire to have counsel, "the only permissible additional inquiry would be to clarify an equivocal request." Id. at 1081.

Here, as in Drake, the police failed to follow Edwards. Although Mr. Harvey had unequivocally asserted his right to counsel when he was booked, the police disregarded his request and interrogated him until they elicited a confession. Moreover, the fact that Mr. Harvey ultimately confessed does not vitiate his right to counsel. This is because a defendant's responses to further interrogation may not be used to cast retrospective doubt on the clarity of his initial request. See Smith v. Illinois, 469 U.S. 91, 98-99, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984); Owen v. Alabama, 849 F.2d 536, 539 (11th Cir. 1988).

(3) Mr. Watson Should Have Known Of The Edwards Rule.

Mr. Watson's failure to seek suppression of his client's confession based upon Edwards was grossly negligent and clearly below any objective standard of reasonableness. Edwards was decided in 1981, Smith in 1984. These are important and well-known cases which established cornerstone principles of Sixth Amendment law. Both are directly on point. Mr. Watson should have known of them.

b. Mr. Watson's Ineffectiveness Profoundly Altered The Outcome of Mr. Harvey's Trial.

As noted, Strickland also requires a movant to establish prejudice arising from his counsel's ineffective representation. Strickland, 466 U.S. at 695. In the context of ineffectiveness arising from counsel's failure to investigate and assert a claim to suppress evidence, the appropriate standard for determining prejudice under Strickland is "whether the failure to investigate and make the motion to suppress rendered the proceeding itself unfair, even if such failure 'cannot be shown by a preponderance of the evidence to determine the outcome.'" Smith v. Dugger, 911 F.2d 494, 498-99 (11th Cir. 1990) (Kravitch, J., concurring).

In Smith, the defendant confessed after two hours of interrogation. The confession constituted the primary evidence against the defendant at trial. The State argued that the defendant had voluntarily waived his right to counsel and defense counsel was unable successfully to rebut this contention. A post-conviction investigation established, however, that defense counsel's file contained an unsigned waiver of rights form on which defendant had been asked whether he waived the right of counsel and had answered "no." Defense counsel was unaware of this document at the time of trial. On this record the Eleventh Circuit concluded that counsel's failure to discover the unsigned waiver form in his files constituted ineffective assistance and that his "failure to move to suppress the confessions was extremely prejudicial to Smith." Smith, 911 F.2d at 497. Significantly, a successful showing of prejudice under Strickland did not require Smith to show that he would have won the motion to suppress but only that

counsel had overlooked "significant ammunition" to rebut the State's argument that the confession was voluntary. Smith, 911 F.2d at 498.

In this case, as in Smith, counsel's files contained evidence bearing materially upon the admissibility of the defendant's confession. In Smith, prejudice was established merely by a showing that such evidence could have rebutted a State argument of voluntariness. In this case, however, the evidence overlooked by counsel would almost certainly have resulted in the successful suppression of evidence under the "bright-line" rule of Edwards. By the State's own admission, suppression of the Harvey confession might well have resulted not only in acquittal of the defendant, but, possibly, the dismissal of the charges against him in the first instance. (R. 00153.) Clearly, prejudice is far clearer in this case than it was in Smith; counsel's failure to assert the 6:35 a.m., pre-interrogation request for counsel was prejudicial to Mr. Harvey's rights.

Mr. Harvey's conviction and sentences of death should be vacated on this ground.

2. Trial Counsel's Investigation Into Mr. Harvey's Background and Presentation of Statutory and Non-Statutory Mitigating Circumstances was Ineffective and Mr. Harvey was Denied A Competent Mental Health Examination.

It is well-settled that defense counsel has a duty to make a reasonable investigation of a criminal defendant's background in order to present statutory and non-statutory mitigating evidence to the factfinder at the penalty phase of the trial. Heiney v. State, 620 So. 2d 171, 173-74 (Fla. 1993) (quoting Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989); Loren v. State, 601 So. 2d 271, 273 (Fla. 1st

DCA 1992)). This duty is especially significant in a capital case where the jury will be asked to choose between recommendations of life imprisonment and the death penalty. "When counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state." Stevens, 552 So. at 1087.

Counsel's decision not to investigate should be a reasoned and informed choice rather than the consequence of neglect, oversight, inattention or insufficient time to prepare. See Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (counsel presented only statutory mitigating evidence since he failed to investigate non-statutory factors; counsel clearly "did not make decisions regarding mitigation for tactical reasons" since he "did not even know" that such evidence existed; death sentence vacated and remanded); Phillips v. State, 608 So. 2d 778, 782 (Fla. 1992), cert. denied, 113 S. Ct. 3005, 125 L. Ed. 2d 697 (1993) (counsel admitted at post-conviction hearing that he did virtually no preparation for penalty phase; counsel presented only evidence that defendant was a good son, despite extensive available mitigating evidence of defendant's poor childhood, mental and emotional deficiencies; new sentencing hearing ordered); Mitchell v. State, 595 So. 2d 938, 941-42 (Fla. 1992) (trial judge did not err in ordering new sentencing hearing on petitioner's motion for post-conviction relief; counsel admitted that he did not present any evidence at penalty phase because he believed he would prevail at guilt phase of trial, and did no preparation for penalty phase).

When a claim of ineffective assistance of counsel at the penalty phase is raised, counsel's decision not to investigate "must be

directly assessed for reasonableness." Loren v. State, 601 So. 2d 271, 273 (Fla. 1st DCA 1992). If counsel does not undertake an investigation, it must be for tactical reasons that are reasonable, i.e., counsel considered the investigation, and concluded for strategical reasons that it would not be in the best interests of the defendant. Stevens, 552 So. 2d at 1087.

If counsel's performance at the penalty phase was indeed deficient, the issue becomes whether the defendant was prejudiced by counsel's failure, specifically, whether there is a "reasonable probability" that the mitigating evidence would have changed the jury's recommendation. Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989). See also Heiney v. State, 620 So. 2d 171, 174 (Fla. 1993) (the additional mitigating evidence would have provided the judge with a reasonable basis upon which to uphold the jury's recommendation of life). When counsel fails to present substantial evidence of non-statutory mitigating factors to a jury, and there is also evidence that the jury might have considered a life recommendation -- as in the present case -- prejudice to the defendant is established, and a new sentencing hearing must be provided to defendant.

In the present case, Mr. Watson presented woefully incomplete and inaccurate evidence in mitigation at the penalty phase of Mr. Harvey's trial. Because he limited his investigation of Mr. Harvey's background to only evidence of Mr. Harvey's socially redeeming qualities, he failed to discover and present to the jury compelling evidence of Mr. Harvey's life and the tragic events that led to severe psychological and physiological dysfunction. Additionally, Mr. Watson's refusal to follow Dr. Petrilla's advice to retain a

psychiatrist to evaluate Mr. Harvey resulted in a complete lack of meaningful evidence on Mr. Harvey's disorders, and how these disorders led to the murders for which Mr. Harvey was on trial. This failing is particularly egregious because funds were appropriated by the trial court to pay the psychiatrist. (CR. 938.)

a. Mr. Watson Failed to Investigate and Present Compelling Evidence of Mr. Harvey's Background Which Would Have Mitigated Against Imposition of the Death Penalty.

Mr. Watson had a duty to conduct a reasonable investigation to gather statutory and non-statutory mitigating evidence and then to present that evidence at the penalty phase of Mr. Harvey's trial. Mr. Watson breached this duty and the jury never heard the extensive and compelling evidence that could have been presented in mitigation. Mr. Watson's representation of Mr. Harvey at the penalty phase clearly fell below the standard of representation, and this severely prejudiced Mr. Harvey. See, e.g., Heiney v. State, 620 So. 2d 171 (Fla. 1993); Bassett v. State, 541 So. 2d 596 (Fla. 1989); Phillips v. State, 608 So. 2d 778 (Fla. 1992), cert. denied 113 S. Ct. 3005, 125 L. Ed. 2d 697 (1993); State v. Lara, 581 So. 2d 1288 (Fla. 1991).

For example, in Bassett v. State, 541 So. 2d 596 (Fla. 1989), defendant was convicted of two counts of first degree murder. At the penalty phase of the trial, one of the primary issues was whether the defendant was under the domination of his co-defendant, Cox. Although trial counsel presented some evidence in mitigation, including the significant age disparities between Cox and defendant, counsel did not adequately investigate defendant's background. At the hearing on defendant's motion for post-conviction relief, counsel presented extensive evidence in mitigation, including the fact that defendant

was raised in an economically depressed and violent family environment, he was characterized as a "follower" and would frequently attempt to gain attention in a negative way, and that he had several abusive father figures. Id. at 596-97.

Although the trial court ruled that defendant received ineffective assistance at trial, the court concluded that defendant was not prejudiced. This Court disagreed and remanded for a new sentencing hearing, concluding that the additional mitigating evidence raised a "reasonable probability that the jury recommendation would have been different." Id. at 597.

Similarly, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), this Court affirmed the trial court's order vacating defendant's death sentence and granting a new sentencing hearing to defendant on the grounds that trial counsel failed to present substantial and compelling mitigating evidence at the penalty phase. Although counsel presented the testimony of defendant's aunt who testified that defendant's father treated him "very bad," this evidence barely scratched the surface of the evidence available that established brutal childhood abuse, poverty conditions, defendant's bizarre behavior signalling mental disorientation, and prior mental hospitalization. The trial court noted that counsel "was overwhelmed and panicked in handling his first capital case, spent ninety percent of his time working on the guilt-innocence phase of the trial, did not investigate in any detail the defendant's background, and did not properly utilize expert witnesses regarding defendant's psychological state." Id. at 1289 (emphasis added). Each of those facts is present in Mr. Harvey's case.

Mr. Watson -- also handling his first capital case alone -- performed an inadequate and unfocused investigation of potential mitigating evidence. This was Mr. Watson's first penalty phase presentation on his own, and his lack of experience was painfully evident. Mr. Watson foreclosed an adequate investigation of Mr. Harvey's background by directing his investigators to look only for evidence that Mr. Harvey had socially redeeming characteristics. Mr. Watson failed to consider other potential sources of mitigating evidence. Mr. Watson failed to retain and properly use expert medical testimony, even though he had been allowed funds to do so.

As a consequence of Mr. Watson's failures, the State's compelling picture of Mr. Harvey as a cold-blooded murderer who gunned down an elderly couple in the security of their home, and who had escaped from jail and committed other crimes while awaiting trial, went substantially unrebutted. In response, Mr. Watson offered only evidence that Mr. Harvey was a decent, hard working young man from a loving family, whose intelligence was below normal and who later became depressed. As the prosecution pointed out, however, those facts standing alone are inconsistent and unconvincing. (R. 03006-13). So much more could have been shown. Although the evidence that Mr. Harvey was a nice person who was slow and suffered from depression was true, it was only a tiny fraction of the truth about Mr. Harvey, barely scratching the surface of Mr. Harvey's troubled and violent past. Mr. Watson's failure to discover this evidence not only prevented a meaningful presentation of mitigating evidence to the jury, but, as discussed below, denied Mr. Harvey the effective assistance of the psychologist retained by Mr. Watson.

b. Mr. Watson's Was Ineffective In Failing to Retain A Psychiatrist to Evaluate Mr. Harvey And Mr. Harvey Was Denied A Competent Mental Health Examination.

Whenever the State makes a defendant's mental condition relevant to guilt/innocence, or punishment, the due process clause of the Fourteenth Amendment, and Article I, Section 9 of the Florida Constitution require that an indigent defendant have access to an independent competent mental health expert to conduct a mental health examination. Ake v. Oklahoma, 470 U.S. 68, 83, 105 S. Ct. 1087, 1096, 84 L. Ed. 2d 53 (1985); State v. Sireci, 536 So. 2d 231 (Fla. 1988). This requirement is no less compelling in the penalty phase of trial, where evidence of mental and/or physiological disorders can mitigate sentencing and result in a life recommendation. Mr. Harvey was entitled to a competent and professional medical evaluation.

Mr. Watson failed to retain the competent medical experts to provide the evaluation to which Mr. Harvey was entitled. Indeed, the psychologist that he did retain, Dr. Petrilla, advised Mr. Watson that Mr. Harvey should be evaluated by an experienced psychiatrist. Despite this advice and the trial court's approval of funds to hire a psychiatrist, Mr. Watson inexplicably failed to do so.

Dr. Petrilla's evaluation was also severely limited because he did not have the necessary background information on Mr. Harvey to conduct a meaningful and competent psychological profile. Most significantly, Mr. Watson specifically instructed Dr. Petrilla to avoid any inquiry into the circumstances of the offense with Mr. Harvey and to limit his testimony to an explanation of the results of his psychological testing. As a result, Dr. Petrilla was unable to tie

his test results to the crime itself, or to voice his professional interpretation of aggravating and mitigating circumstances.

After his trial and direct appeal, Mr. Harvey received psychiatric testing and evaluation from Dr. Norko. He found that Mr. Harvey has an organic brain dysfunction, consistent with both frontal lobe and brain stem damage. In addition, he found that Mr. Harvey is predisposed to depression episodes, and that he was experiencing Major Depressive Disorder during the entire time surrounding the Boyds' murders. He further concluded that Mr. Harvey has a Dependent Personality Disorder. Most significantly, Dr. Norko was able to tie these psychological and physiological conditions to the events leading up to the murders. Mr. Harvey's jury never heard any of this crucial evidence.

Once Mr. Watson decided to concede Mr. Harvey's guilt, it became crucial to present the jury with complete background information about Mr. Harvey. This information would have painted a believable an accurate picture of Mr. Harvey. By taking the acts surrounding Mr. Harvey's life and shedding light on how a hard working, slow, and depressed man could commit this crime, the jury and judge might have concluded that Mr. Harvey did not deserve to be put to death. Indeed, the jury's questions concerning how long Mr. Harvey would be incarcerated if he received a sentence of life imprisonment, (R. 03044-45), demonstrate that they gave that option serious consideration even without such evidence.

Had counsel presented powerful and compelling mitigating evidence concerning Mr. Harvey's deprived and abused childhood, the lack of affection and support he received throughout his life, his early

exposure to alcohol and longstanding history of substance abuse, the traumatic experiences he had as a young adult including the acute injuries he suffered in a 1979 automobile accident, his dependence and passivity, his debilitating depression at the time of the offense, and above all his organic brain damage, there is a reasonable probability that Mr. Harvey would not have been sentenced to death. There is no possible justification for Mr. Watson's failure to conduct a proper and comprehensive investigation. Mr. Watson's performance was clearly deficient and fell below the standard established in Strickland. His ineffectiveness requires that Mr. Harvey's death sentences be vacated.

D. THE TRIAL COURT ERRED IN DENYING CLAIMS I.A., I.D., I.E., II.B., II.C., II.D., II.E., II.F., II.G., IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI AND XVII; OTHER GROUNDS OF ERROR.

In his motion for post-conviction relief, Mr. Harvey asserted a number of other significant claims, each of which was denied by the trial court. As noted above, the Order is unsupported by the record excerpts attached to it. It is not possible, therefore, to determine the legal or record bases for the trial court's rulings. As a result, undersigned counsel cannot address any specific deficiencies in the record of the Order. Each of these claims warrants this Court's review, however, and is briefly addressed below.

1. Other Instances Of Ineffective Assistance of Counsel.

a. Mr. Watson Failed To Assert That The Police Used Mr. Harvey's Wife To Elicit A Confession In Support Of The Motion To Suppress.

Mr. Watson failed to raise the police's use of Mrs. Harvey as their agent in moving to suppress Mr. Harvey's confession. As shown below, Mr. Watson's omission denied Mr. Harvey the effective assistance of counsel.

The Sixth Amendment is violated when the government uses undercover agents to deliberately elicit a confession from a defendant after he has requested to speak with an attorney. Massiah v. United States, 377 U.S. 201, 206, 84 S. Ct. 1199, 1203, 12 L. Ed. 2d 246 (1964); United States v. Henry, 447 U.S. 264, 272-74, 100 S. Ct. 2183, 2188-89, 65 L. Ed. 2d 115 (1980); Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481 (1983); United States v. Terzado-Madruga, 897 F.2d 1099, 1110 (11th Cir. 1990) (finding that government violated defendant's Sixth Amendment rights by arranging to record conversations between defendant and informant that occurred after indictment). This is because the government has an affirmative obligation not to act in a manner that circumvents the protections afforded the accused by invoking the right to counsel. Moulton, 474 U.S. at 176, 106 S. Ct. at 487.

For this reason, incriminating statements are inadmissible when they are obtained from a defendant by the State through an undisclosed confidential informant after a defendant has requested counsel.

Moulton, 474 U.S. at 177, 106 S. Ct. at 487; Henry, 447 U.S. at 275, 100 S. Ct. at 2189.[21/]

Here, those principles were violated. The police asked Mr. Harvey's wife to act as a government agent to "help the case investigation." Once the police initiated contact with Mrs. Harvey and elicited her agreement to aid in their investigation, she became an agent of the State. Malone v. State, 390 So. 2d 338, 340 (Fla. 1980), cert. denied, 450 U.S. 1034, 101 S. Ct. 1749, 68 L. Ed. 2d 231 (1981). Under Massiah and its progeny, Mr. Harvey was entitled to counsel when his wife spoke with him, and, accordingly, any incriminating statements made by him in her presence were inadmissible. As in Massiah, Mr. Harvey was denied:

> the basic protections of [the right to the assistance of counsel] when there was used against him at his trial evidence of his own incriminating words, which [undisclosed agents] had deliberately elicited from him . . . in the absence of his counsel.

Massiah, 377 U.S. at 206, 84 S. Ct. at 1203.

Had the trial court afforded Mr. Harvey an evidentiary hearing on this claim, Mr. Harvey would have established that Mr. Watson's failure to challenge the admission of Mr. Harvey's confession based on the State's use of Mrs. Harvey as a confidential informant fell below the standard of care. He also would have established that but for counsel's errors, there is a reasonable probability that his

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[21/] The principle applies even if the informant elicits incriminating statements from a defendant without specific government instruction to do so. This is because the government is accountable when it creates the risk that a government agent will deliberately elicit incriminating statements from a defendant whose right to counsel has attached. Henry, 447 U.S. at 273-275, 100 S. Ct. at 2188-89.

confession would have been suppressed and that the outcome of his trial would have been different.

b. Mr. Watson Did Not Produce Evidence To Support Claims He Made During His Opening Statement.

During his opening statement in the guilt/innocence phase, Mr. Watson told the jury that the defense would call witnesses and present evidence that would show, among other things, that: (1) Mr. Harvey had lived with his parents until he fell in love and got married two months before the Boyds' murders; (2) the members of the Harvey family were hard-working farm people; (3) Mr. Harvey was extremely immature and had low intelligence; (4) Mr. Harvey could not support his wife in the lifestyle she expected; and (5) Mr. Harvey was extremely depressed at the time of the murders because he perceived himself a failure. (R. 01860.)

Yet, during his case-in-chief, Mr. Watson failed to present any of the promised evidence. Nor did he elicit on cross-examination of the State's witnesses the information he told the jury he would present.[22/] By breaking his promise, Mr. Watson opened the door and allowed the State to argue during closing that he had failed to prove everything that he had promised to prove in his opening. (R. 02477-84.)

A defendant's attorney's failure to present the evidence or testimony that he promised during opening to produce falls below the appropriate standard of care. See McAleese v. Mazurkiewicz, 1 F.3d 159, 166-67 (3rd Cir.), cert. denied, 114 S. Ct. 645 (1993). Moreover, because it is so damaging, prejudice is presumed. This is because when

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[22/] In fact, Mr. Watson did not present any evidence or call any witnesses during the guilt/innocence phase.

"counsel primes the jury to hear a different version of events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised." Id. See, e.g., Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990) (counsel ineffective when he failed to call witnesses whom he told the jury would testify); Anderson v. Butler, 858 F.2d 16, 17-19 (1st Cir. 1988) (same).

In this case, by failing to produce the evidence he promised to present, Mr. Watson put jurors in the position of wondering whether the witnesses Mr. Watson said he would call didn't testify because they were unable to do so or were unwilling to do so. In either case, Mr. Watson's failure to present the evidence he said he would produce denied Mr. Harvey the effective assistance of counsel. McAleese, 1 F.3d at 166-67.

c. Mr. Watson Caused The Introduction Of Irrelevant And Highly Prejudicial Testimony.

During the guilt/innocence phase, Nathan Platt, Jr., an Okeechobee County prison guard, testified that he had heard Mr. Harvey threaten to kill another inmate, Marvin Davis. This testimony was admitted at the insistence of Mr. Watson. He hoped that its admission would lessen the impact of Mr. Platt's testimony that Mr. Harvey had boasted about having killed twice. As shown below, Mr. Watson's error caused the admission of highly prejudicial Williams Rule evidence that was inadmissible.

In Jackson v. State, 451 So. 2d 458 (Fla. 1984), the defendant was convicted of murder and sentenced to death. At trial, a witness for the State testified that at one point the defendant had pointed

a gun at him and boasted that he was a "thoroughbred killer." In reversing the defendant's conviction and death sentence, this Court held that the witness' testimony was forbidden under the Williams Rule, which excludes evidence that "has no relevancy except as to the character and propensity of the defendant to commit the crime charged." Id. at 461 (quoting Paul v. State, 340 So. 2d 1249, 1250 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 953 (Fla. 1977)).[23/] Accord, Delgado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990) (reversing defendant's conviction for first degree murder where witness was allowed to testify that defendant had boasted about having killed ten men).

Here, as in Jackson, Mr. Platt's testimony that Mr. Harvey had threatened to kill Mr. Davis was not relevant to any issue in the case. Rather, the prosecution presented it to show jurors that Mr. Harvey was a bad person who would not hesitate to kill again. Mr. Watson's insistence that the jury hear Mr. Platt testify that Mr. Harvey had threatened to kill again could not have been a tactical decision. Even if it were, it was unreasonable. See Jackson, 451 So. 2d at 461.

Had the trial court granted an evidentiary hearing, Mr. Harvey would have shown that Mr. Watson's action in causing the admission of Mr. Platt's testimony that Mr. Harvey had threatened to kill again fell below the appropriate standard of care. He also would have shown that

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[23/] The Williams Rule was enunciated by this Court in Williams v. State, 110 So. 2d 654, 658 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959). It is now codified by statute. See Fla. Stat. § 90.404(2)(a).

but for Mr. Watson's error, there is a reasonable probability that Mr. Harvey would have received a life sentence.[24/]

d. Mr. Watson Failed To Object To The Trial Court's Instructions To The Jury That Required Mr. Harvey To Prove That Death Was Not The Appropriate Punishment.

During the penalty phase, the court instructed jurors that they must recommend the death penalty unless they found "mitigating circumstances sufficient to outweigh the aggravating circumstances." (R. 02623-24, 03039.) The court emphasized that the jurors had a duty, from which they could not stray, to "follow the law" as provided. (R. 03039.) The prosecution supported the court's instructions, telling jurors that the mitigating circumstances "have got to outweigh the aggravating [circumstances] for you under the law to vote for a recommendation of life." (R. 03000.) Moreover, during closing argument, the prosecution told jurors that they were required by law to recommend the death penalty. (R. 03018-20.) The court's and prosecution's instructions thus told jurors, in effect, that Mr. Harvey had the burden of proving that the death penalty was not the appropriate sentence. Incredibly, Mr. Watson failed to object to any of the court's and prosecution's instructions.

The Eighth Amendment requires that a jury's sentencing discretion in capital cases be guided and channelled by a system which focuses on the peculiar and individual circumstances of each defendant. See

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[24/] In fact, the jurors apparently had considered recommending a life sentence when they asked the trial court during their penalty phase deliberations when Mr. Harvey would become eligible for parole and whether he would have to serve a minimum of 25 or 50 years if they recommended a life sentence. Thus, Mr. Platt's testimony that Mr. Harvey had threatened to kill again may have swayed their decision toward recommending a death sentence.

Proffitt v. Florida, 428 U.S. 259, 242, 96 S. Ct. 2960, 2966, 49 L. Ed. 2d 913 (1976). Without such guidance, there is no assurance that the jury's decision or recommendation to impose the death penalty is reliable. See Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). See also Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Instructions to jurors that require them to recommend or impose the death penalty violate the this requirement. See Woodson v. North Carolina, 428 U.S. 280, 301, 96 S. Ct. 2978, 2989, 49 L. Ed. 2d 944 (1976). The Eleventh Circuit's decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), is instructive.

In Jackson, the trial court instructed the jury that:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Id. at 1473. In reversing this Court's order upholding the trial court's instruction, the court held that:

> Such a presumption [that death is the proper sentence unless the mitigating circumstances override the aggravating circumstances], if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment. [This is because the instructions are] "so skewed in favor of death that [they fail] to channel the jury's sentencing discretion."]

Id. at 1473-74.

Here, as in Jackson, the court's and prosecution's instructions told jurors that they were required to recommend a death penalty unless the mitigating circumstances outweighed the aggravating circumstances. These comments "may well have skewed the jury towards death and misled

the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence." Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir.), cert. denied, 479 U.S. 939, 107 S. Ct. 421, 93 L. Ed. 2d 371 (1986).

Had the trial court granted an evidentiary hearing, Mr. Harvey would have shown that Mr. Watson's failure to object to the court's and prosecution's improper instructions fell below the appropriate standard of care. He also would have shown that but for Mr. Watson's mistake, there is a reasonable probability that Mr. Harvey would have received a life sentence.

e. Mr. Watson Argued In Mitigation That Mr. Harvey Had No Prior History of Significant Criminal Activity.

During the penalty phase, Assistant State Attorney Morgan asked Mr. Watson whether he intended to ask the Court to find in mitigation that Mr. Harvey had no prior history of significant criminal activity. (R. 02578.) Mr. Watson answered yes on the erroneous belief that Mr. Harvey's escape from jail and other post-arrest misconduct were not admissible in rebuttal by the State. Mr. Watson was dead wrong. Yet, and as the trial court ruled, at the time of Mr. Harvey's trial, criminal activity occurring after the charged offense and up to sentencing was admissible to rebut the mitigating circumstance. See Ruffin v. State, 397 So. 2d 277, 283 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981), overruled in part, Scull v. State, 533 So. 2d 1137 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S. Ct. 1938, 104 L. Ed. 2d 409 (1989).

It is well-settled that defense counsel must be familiar with governing law in order to effectively represent his client. When he

is not, he is ineffective. See Young v. Zant, 677 F.2d 792, 799-800 (11th Cir. 1982) (defense counsel's lack of knowledge about Georgia's criminal procedural rules and bifurcated trial system resulted in ineffective assistance of counsel); McClendon v. State, 603 So. 2d 607 (Fla. 1st DCA 1992) (counsel was ineffective in failing to object to errors in pre-sentence report on the erroneous belief that defendant's prior conviction was a felony rather than a misdemeanor); Chapman v. State, 442 So. 2d 1024, 1026 (Fla. 5th DCA 1984) (counsel's failure to raise defense of double jeopardy based on erroneous belief that he could raise it later by a post-trial motion was a "substantial error").

Mr. Watson's ignorance of the law enabled the State to argue during closing in the penalty phase that Mr. Harvey was dangerous and might escape again. This, no doubt, affected jurors in deciding whether Mr. Harvey should be sentenced to life in prison, where he would have the opportunity to escape again, or to sentence him to death from which no escape was possible. With one exception, jurors chose death.

Had the trial court granted Mr. Harvey an evidentiary hearing, he would have established that Mr. Watson's decision to ask the court to find in mitigation that Mr. Harvey had no significant history of prior criminal activity deviated from the appropriate standard of care and was unreasonable under the circumstances. He also would have established that but for counsel's error, there is a reasonable probability that Mr. Harvey would have received a life sentence.

f. In Presenting His Penalty Phase Closing Argument, Mr. Watson Distanced Himself From Mr. Harvey, Conceded Numerous Aggravating Circumstances And Failed to Effectively Argue Mitigating Evidence.

At the start of his closing argument in the penalty phase, Mr. Watson, as he had done in his opening, distanced himself from Mr. Harvey by reminding jurors that he had been appointed by the court to represent Mr. Harvey.[25/] He further explained that, "what that means essentially is that an awful lot of work in this case is public service, it is my obligation to the people of the State of Florida." (R. 03021.) Mr. Watson failed to mention his obligations to Mr. Harvey.

Later during his argument, Mr. Watson reminded jurors that Mr. Harvey had admitted, in his own words, that "[w]e decided to kill them." (R. 03027.) Mr. Watson then emphasized the premeditated nature of the Boyds' murders and conceded the prosecution's argument that the murders occurred during a kidnapping, which was an aggravating circumstance:

> And it did occur and I'll grant [the prosecutor] a feather in his cap, it occurred during the course of a kidnapping. He sort of zeroed in on the burglary, but it did happen during the course of a kidnapping.

(R. 03027.) Although the court never found the existence of that aggravating circumstance, (see R. 03465-66, 03468-69), the jury may well have followed Mr. Watson's lead and recommended the death penalty on the basis of that factor.

Mr. Watson didn't stop there. He next conceded that the murders occurred during the course of a felony and were committed to avoid

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[25/] Mr. Watson also told the venire during voir dire that he had been appointed by the court. (R. 00750.)

arrest, two additional aggravating circumstances. (R. 03028.) This contrasted sharply with his argument during the guilt/innocence phase that the murders were simply the result of a "panic reaction by a fearful young man." (R. 02465.)

Mr. Watson later told jurors that:

> One thing leads to another. You go to commit a robbery, it ends up in murders. You go to jail, they leave it open, you walk out, the next thing you know there is a police dog on top of you in Miami. One thing leads to another. It all starts with a decision to commit a robbery, one thing after another. It snowballs to the point that I come to court and an enormous amount of evidence is introduced against my client. Enormous. I can't ever remember having a case where so much physical evidence was introduced against my client because of the entire sequence of events.

(R. 03034.)

Mr. Watson later commented on Dr. Petrilla's testimony concerning his evaluation of Mr. Harvey. Instead of discussing the mitigating circumstances that could be found based on Dr. Petrilla's testimony, such as extreme emotional disturbance, or connecting his testimony to the testimony of other witnesses, Mr. Watson did little more than vouch for Dr. Petrilla's credibility. His strongest endorsement of Dr. Petrilla was that "he did his level best to give a personality profile as he could. He went in and did his best. He didn't come here to lie." (R. 03036.)

Had the trial court granted an evidentiary hearing, Mr. Harvey would have shown that in preparing and giving his closing argument, Mr. Watson deviated from the appropriate standard of care. He also would have shown that there is a reasonable probability that but for

Mr. Watson's errors, Mr. Harvey would have received a life sentence.

g. Mr. Watson Failed To Present Evidence Or Argument During Sentencing.

The trial court sentenced Mr. Harvey to death two hours after the jury returned their penalty phase recommendation. Before sentencing, Mr. Watson did not present any argument or evidence to the court.

Because sentencing in a capital case is a critical stage of the proceedings, a defendant is entitled to receive the effective assistance of counsel. Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

Under Florida's sentencing scheme, the trial court:

> Is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendations, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters being relevant.

Engle v. State, 438 So. 2d 803, 813 (Fla. 1983). Accord Swan v. State, 322 So. 2d 485, 489 (Fla. 1975) (the trial court has discretion to impose "the death penalty or life imprisonment even if the jury recommends to the contrary"); Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S. Ct. 3234, 49 L. Ed. 2d 1226 (1976) (same); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980) (same).

The only words Mr. Watson uttered during sentencing were, "[w]e know of no legal cause for non-sentencing." (R. 03051.) He called no witnesses and did not argue that Mr. Harvey's life should be spared. Nor did he allow Mr. Harvey to beg for his life in allocution.

This Court has recognized the importance of a defendant receiving effective assistance of counsel at sentencing. For example, in Stevens

v. State, 552 So. 2d 1082 (Fla. 1989), this Court vacated the defendant's death sentence because his counsel did not argue to the judge on his behalf during sentencing, "essentially abandon[ing] the representation of his client." Id. at 1087. See also United States v. Cronic, 466 U.S. 648, 654 n. 11, 104 S. Ct. 2039, 2044 n. 11, 80 L. Ed. 2d 657 (1984); House v. Balkcom, 725 F.2d 608, 620 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Here, as in Stevens, Mr. Harvey was abandoned by his counsel just when he faced the prospect of being sentenced to death. Mr. Watson's conduct constitutes ineffective assistance as a matter of law. See Stevens, 552 So. 2d at 1087.

2. Trial Court Rulings Which Denied Effective Assistance of Counsel to Mr. Harvey.

Before trial, the court made certain rulings which denied Mr. Harvey effective assistance of counsel and a fair trial. These rulings included deciding Mr. Watson's motion to suppress after voir dire, refusing to appoint co-counsel and refusing to continue the penalty phase.

When a trial court places restrictions on defense counsel that deprive the defendant of a true, adversarial fact-finding proceeding, see Herring v. New York, 422 U.S. 853, 857-58, 95 S. Ct. 2550, 2552-53, 45 L. Ed. 2d 593 (1975), it also denies him the effective assistance of counsel. See, e.g., Powell v. Alabama, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 2d 158 (1932) (counsel had no time to prepare because he was appointed on the eve of trial); Geders v. United States, 425 U.S. 80, 84-85, 96 S. Ct. 1330, 1335-36, 47 L. Ed. 2d 592 (1976) (court order barring attorney-client consultation during overnight recess); Herring, 422 U.S. at 858, 95 S. Ct. at 2553 (court's refusal to allow

summation at a bench trial); Holloway v. Arkansas, 435 U.S. 475, 488, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426 (1978) (court-ordered representation of multiple defendants).

As with fundamental errors by trial counsel that render a trial unfair, see pages 40 - 44, supra, actions by the court that interfere with the ability of defense counsel to provide effective assistance cannot be harmless. For this reason, prejudice is presumed. Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984) (citing United States v. Cronic, 466 U.S. 648, 658-59 and n. 25, 104 S. Ct. 2039, 2046-47 and n. 25, 80 L. Ed. 2d 657 (1984)); Holloway, 435 U.S. at 488, 98 S. Ct. at 1181. This is because court interference impairs "the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him." United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976), cert. denied, 444 U.S. 944, 100 S. Ct. 302, 62 L. Ed. 2d 311 (1979).

a. The Trial Court Failed To Rule On The Motion To Suppress Until The Day the Jury Was Sworn.

Jury selection is a critical part of the trial -- particularly in a capital case, where the jury deliberates in both the guilt/innocence and the penalty phases. A trial court's interference with a defendant's voir dire deprives him of his due process rights and his right to effective assistance of counsel. See, e.g., Pineda v. State, 571 So. 2d 105, 106 (Fla. 3d DCA 1990); Gosha v. State, 534 So. 2d 912, 912 (Fla. 3d DCA 1988). This is particularly true where, as here, the defense has moved to suppress evidence that will be central to the State's case if it is admitted and the court does not rule on the motion until the conclusion of voir dire.

In this case, by not ruling on the motion to suppress until after voir dire, the trial court denied Mr. Watson the opportunity to effectively cross-examine the venire. As Mr. Watson recounts:

> [M]y ability to conduct voir dire was limited in its most meaningful sense because the court did not rule on my motion to suppress until after the last alternate juror had been selected. For that reason, I was unable to question any prospective jurors about their views and the weight they might give to confession evidence. Consequently, I was unable to conduct no more [sic] than superficial questioning of the potential jurors.

(CR. 940.)

Thus, the court left Mr. Watson with a true Hobson's choice between (1) not asking any questions about jurors' reactions to the confession, with the result that his voir dire would be ineffective if the confession was admitted; or (2) asking such questions, with the result that he would have irretrievably damaged his case if the confession later was suppressed. The court's ruling thus not only deprived Mr. Harvey of effective assistance of counsel, but a fair trial before an impartial jury.

b. Trial Court Failed To Appoint Co-Counsel.

A trial court should appoint co-counsel to assist the defense in a capital murder case when it is necessary to ensure that the defendant receives effective assistance of counsel. See, e.g., Keenan v. Superior Ct. of San Francisco, 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (Cal. 1982) (co-counsel required to be appointed in a capital case where the issues were highly complex, there was a large number of witnesses, complicated scientific and psychiatric testimony would be presented, and there were extensive pretrial motions). See also Schommer v. Bentley, 500 So. 2d 118, 119-20 (Fla. 1986) (court has discretion to appoint multiple attorneys when it is necessary in a

particular case for effective representation); ABA Guidelines For The Appointment And Performance Of Counsel In Death Penalty Cases, § 2.1, p. 41 (1989) ("ABA Guidelines") ("In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant.").

In United States v. Watson, 496 F.2d 1125, 1128 (4th Cir. 1973), the court applied 18 U.S.C. § 3005, which requires the appointment of an additional defense counsel in a federal capital murder prosecution. In its opinion, the court noted the need for a defendant facing the death penalty to be represented by at least two attorneys:

> The kinds of crimes made punishable by death are usually such as to generate revulsion in the trier of fact and, as a result, a high degree of prejudice if the trial is not conducted strictly in accord with recognized procedures, including the rules of evidence and burden of proof. It is not unlikely that Congress may have also sought to buttress the defense with two attorneys to provide greater assurance that a defendant's rights would be fully observed.

Accord, ABA Guidelines, § 2.1, p. 41 (it is very difficult for a single attorney to fulfill the "heavy responsibilities" of representing a capital defendant).

In this case, Mr. Watson moved for the appointment of co-counsel for three principal reasons: (1) he was concerned about his lack of experience in capital litigation; (2) the case required a tremendous amount of preparation; and most importantly, (3) he feared a complete loss of credibility in the penalty phase in the event Mr. Harvey was convicted. Yet, the trial court denied the motion. This undoubtedly contributed to Mr. Watson's failure to adequately prepare his case, and the numerous mistakes that he made both before and during the course of the trial. The end result was that Mr. Harvey was denied the effective assistance of counsel and a fair trial.

c. Trial Court Failed to Continue Penalty Phase.

In preparing for the penalty phase, defense counsel has a Herculean task. He must: (1) thoroughly investigate the defendant's background to gather evidence to be used in mitigation; (2) conduct thorough and extensive legal research in an area of the law that is fluid; (3) retain competent investigators and mental health professionals; (4) integrate the theories and strategy used during the guilt/innocence phase with a case for a life sentence during the penalty phase; and (5) prepare witnesses. See ABA Guidelines, § 2.1, p. 41.

In order to carry out his responsibilities, defense counsel must have adequate time to prepare. In Scull v. State, 569 So. 2d 1251 (Fla. 1990), this Court found that the trial court's haste in sentencing a capital defendant without giving sufficient time for defense counsel to prepare violated the due process guarantee of Article I, § 9 of the Florida Constitution. As the court stated in Scull, "Haste has no place in a proceeding which a person may be sentenced to death." Id. at 1252.

In this case, the penalty phase issues, including jury instructions on the aggravating circumstances, the investigation of bases for the aggravating circumstances and appropriate mitigating circumstances, that Mr. Watson faced were difficult and complex. It also was the first time Mr. Watson had tried a capital case on his own and he was opposed by the full weight of the State. Because the court refused to appoint co-counsel to assist him, Mr. Watson anticipated that he would not be prepared to argue the penalty phase unless the court granted a continuance. This proved all too true. By the

conclusion of the guilt/innocence phase, Mr. Watson was exhausted. He also was unprepared to meaningfully argue Mr. Harvey's case.

The court's failure to continue the penalty phase denied Mr. Harvey the effective assistance of counsel and a fair penalty consideration. For this reason, Mr. Harvey's conviction and death sentences should be vacated and the case remanded for a new trial.

3. Trial Court and State Denigrated Jury's Sentencing Role In Violation Of Caldwell v. Mississippi.

Throughout the trial, the prosecution and the court instructed jurors that their role during the penalty phase was merely advisory; at best, their penalty phase sentence would be a non-binding recommendation to the court. Mr. Watson objected to these statements on the authority of Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 2639-40, 86 L. Ed. 2d 231 (1985). In Caldwell, the Supreme Court held that a death sentence is invalid when the sentencer "has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S at 329, 105 S. Ct. at 2639. (R. 02574, 02842.) In overruling Mr. Watson objections, the trial court ruled that Caldwell did not apply to Florida cases.

Mr. Harvey raised this issue in his direct appeal. This Court denied relief without expressly discussing whether Caldwell applied to Florida's sentencing scheme. Apparently, this Court adopted the position that Caldwell was inapplicable because the jury's penalty phase sentence is only advisory under Florida law. See Harvey v. State, 529 So. 2d 1083, 1084 n. 2 (Fla. 1988), cert. denied, 489 U.S. 1040, 109 S. Ct. 1175, 103 L. Ed. 2d 237 (1989).

Since this Court decided Mr. Harvey's direct appeal, the Eleventh Circuit has held that Caldwell applies to Florida's sentencing scheme because of the great weight Florida law accords to the jury's advisory penalty phase sentence recommendation. Mann v. Dugger, 844 F.2d 1446, 1454 (11th Cir. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L. Ed. 2d 821 (1989). The Supreme Court has recognized this as well, see Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 2928, 120 L. Ed. 2d 854 (1992) (noting the importance of the jury as co-sentencer with the trial court in Florida death cases), and held that Caldwell must be applied retroactively to Florida cases if the defendant objected at trial to the comments denigrating the jury's penalty phase role. Dugger v. Adams, 489 U.S. 401, 407, 109 S. Ct. 1211, 1215, 103 L. Ed. 2d 435 (1989).

Because Mr. Watson preserved Mr. Harvey's right to appeal this issue by timely objecting to the prosecution's and court's comments that denigrated the jury's penalty phase role as co-sentencer, this Court should revisit this issue and apply Caldwell to this case.

Accordingly, Mr. Harvey's death sentences should be vacated and the case remanded to the trial court for a new sentencing determination.

4. Invalid Aggravating Circumstances Instructions.

a. Trial Court Erred In Instructing Jurors On The Application Of The Heinous, Atrocious Or Cruel And Cold, Calculated and Premeditated Aggravating Circumstances.

In charging the jury during the penalty phase, the trial court gave jurors only the "bare bones" statutory instructions on the "especially wicked, evil, atrocious or cruel," otherwise known as the heinous, atrocious or cruel, and "cold, calculated and premeditated"

aggravating circumstances. Although Mr. Watson requested that the court modify the instructions with certain limiting language, the court refused to do so.[26] Nor did the court give jurors instructions limiting their discretion in applying these aggravating circumstances.[27]

(1) Heinous, Atrocious Or Cruel.

In Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court struck down the identical jury instructions on the heinous, atrocious or cruel aggravating circumstance that the trial court gave in Mr. Harvey's trial. It did so on the ground that without an appropriate limiting instruction from the trial court, the instruction is too vague under the Eighth Amendment. See Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 918 (1976) (upholding Florida's "heinous, atrocious or cruel" aggravating circumstance when it is given with the narrowing construction that the crime was "conscienceless or pitiless," and "unnecessarily torturous to the victim").

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[26] Mr. Watson requested that the word "shockingly" be added before the word "evil" so that the heinous, atrocious or cruel instruction read, "[t]he murder for which the defendant is to be sentenced was especially wicked, shockingly evil, atrocious or curel [sic]." (R. 03589.) The cold, calculated and premeditated instruction reads, "[t]he murder for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Mr. Watson requested that the instruction be supplemented with the following language: "In order to find this aggravating circumstance, you must find more than mere premeditation. You must find cold calculation as well as the absence of moral or legal justification." (Id.)

[27] As set forth in Claims X and XI of Mr. Harvey's motion for post-conviction relief, Mr. Watson was ineffective in failing to request that the trial court give jurors a limiting instruction on these aggravating circumstances.

Espinosa followed the Supreme Court's decision in Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), which struck down Oklahoma's "heinous, atrocious, or cruel" aggravating circumstance instruction as unconstitutionally vague. Maynard held that the instruction violated the Eighth Amendment because it failed to furnish principled guidance to the sentencer in choosing between death and a lesser penalty. 486 U.S. at 361-64, 108 S. Ct. at 1857-59. Shortly before it decided Espinosa, the Supreme Court held in Sochor v. Florida, ___ U.S. ___, 112 S. Ct 2114, 119 L. Ed. 2d 326 (1992), that there is Eighth Amendment error when the capital sentencer weighs an "invalid" aggravating circumstance in deciding to impose a death sentence. Id. at 2119. Because Florida law requires a trial court to accord "great weight" and deference to a jury's sentencing recommendation, Espinosa held that Florida capital juries are co-sentencers with the trial court. Accordingly, any weighing by the jury of an invalid aggravating circumstance violates the Eighth Amendment because it creates the potential for "arbitrariness." Espinosa, 112 S. Ct at 2928.

In Johnson v. Singletary, 612 So. 2d 575, 576-77 (Fla.), cert. denied, 113 S. Ct. 2049, 124 L. Ed. 2d 70 (1993), this Court expressly followed Espinosa and Sochor, holding that "an error would exist if the jury was instructed improperly on the heinous, atrocious or cruel factor, whether or not the trial court in its written findings found the same factor to be present." The standard established in Sochor, Espinosa and Johnson v. Singletary represents a fundamental change in

the law governing the procedural fairness of Florida's capital sentencing procedures.[28/]

In this case, the trial court refused to grant Mr. Harvey's request for a more specific instruction and failed to give jurors any limiting instruction. As a result, jurors followed the same bare-bones instruction invalidated in Espinosa. As a result, in reaching their penalty determination, they may have weighed an unconstitutionally vague and therefore invalid aggravating circumstance.

The error resulting from invalid instructions on aggravating circumstances can be cured only if the reviewing court decides for itself that valid aggravating circumstances outweigh the mitigating circumstances:

> "[O]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.

Richmond v. Lewis, ___ U.S. ___, 113 S. Ct. 528, 535, 121 L. Ed. 2d 411 (1992) (citation omitted). This means that a reviewing court must find that the state proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error

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[28/] Together, these cases overrule this Court's decision in Smalley v. State, 546 So. 2d 720 (Fla. 1989), which upheld the constitutionality of the "heinous, atrocious, or cruel" aggravating circumstance against a challenge based on the rule of Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). In Smalley, this Court declined to follow Maynard based on the determination that a Florida jury, unlike an Oklahoma jury, is not a sentencer under the Supreme Court's Eighth Amendment analysis. Smalley, 546 So. 2d at 722. Espinosa has eradicated this distinction and overruled Smalley.

contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). But see Slawson v. State, 619 So. 2d 255, 260-61 (Fla. 1993); Thompson v. State, 619 So. 2d 261, 266-67 (Fla. 1993).

Although in Mr. Harvey's direct appeal, this Court found that the Boyds' murders were heinous, atrocious and cruel, see Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988), Mr. Harvey respectfully suggests that this Court did not reweigh the aggravating and mitigating circumstances as required by Richmond.

(2) Cold, Calculated And Premeditated.

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. A juror might well characterize every murder as "cold, calculated and premeditated." See Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 1765, 64 L. Ed. 2d 398 (1980) (finding the "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance instruction invalid because it failed to provide any guidance to the jury or otherwise limit their sentencing discretion).

In this case, 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. For this reason, this Court in 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), set forth a limiting construction. There must be a "careful plan or prearranged design to kill," indicating a heightened level of

premeditation above and beyond that required for ordinary premeditation for first degree murder. Id. at 533.

In this case, the trial court denied Mr. Harvey's request to modify the statutory instruction. Nor did the trial court give the jury any limiting instruction. As a result, jurors did not receive sufficient guidance on the cold, calculated and premeditated aggravating circumstance.[29/]

In Mr. Harvey's direct appeal, this Court found that the Boyds' murders were cold, calculated and premeditated. Mr. Harvey respectfully suggests that this Court did not engage in the "reweighing" required by Richmond. To conduct the requisite reweighing, this Court had to find that the State proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."[30/] See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).[31/]

[29/] Significant mitigating circumstances also would have provided a reasonable basis for a life sentence. Mitigating evidence found by the trial court in this case included, among other things, that Mr. Harvey: (1) has a low IQ; (2) has poor educational and social skills; (3) was unable to reason abstractly; and (4) lacked self-confidence; and (5) felt inadequate. (See R. 03467, 03470).

[30/] Moreover, three of the Court's seven Justices found that the State had failed to prove a plan or prearranged design as required under Rogers.

[31/] This Court has recognized that resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989) (remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987). Resentencing is required here, where mitigating evidence was present in the record and found by the trial Court.

5. Fundamental Changes In Law; This Court Should Reverse The Trial Court's Rejection Of No Prior Significant History Of Criminal Activity Mitigating Circumstance.

As discussed at pages 33-34, supra, Mr. Watson asked the trial court to find in mitigation that Mr. Harvey had no significant history of prior criminal activity. See § 921.141(6)(a), Fla. Stat. (1985).[32/] The trial court rejected the mitigating circumstance, on the grounds that Mr. Harvey had a criminal history because he escaped from jail and committed other criminal acts while awaiting trial. (R. 03467, 03470.) The trial court also ruled as a matter of law that a defendant's criminal history includes all of misconduct up to the time of sentencing, and refused to permit Mr. Watson to argue otherwise to the jury;. (R. 03001.) During its penalty phase closing argument, the State argued strenuously that Mr. Harvey's escape and other post-arrest misconduct rebutted the mitigating circumstance. (R. 03004-5.) There is no evidence in the record of any significant criminal activity on the part of Mr. Harvey before the Boyd murders.

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), was controlling at the time of Mr. Harvey's trial. In Ruffin, 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.

Id. at 283.

[32/] Section 921.141(6), Fla. Stat. (1985), states in relevant part:

> (6) MITIGATING CIRCUMSTANCES. - Mitigating circumstances shall be the following:
> (a) The defendant has no significant history of prior criminal activity.

The law has since changed. In 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), the defendant had been convicted of a number of crimes that took place at approximately the same time as the murders for which he was sentenced to death. In affirming the trial court's finding in mitigation that the defendant had no significant criminal history, this Court held:

> 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.

Similarly, in Bello v. State, 547 So. 2d 914, 917-18 (Fla. 1989), the defendant was charged with first degree murder and several other crimes that were committed contemporaneously with the murder. In reversing the trial court's order finding that the defendant had a significant criminal history based on the contemporaneous crimes, this Court reaffirmed its holding in Scull.

Because crimes that are committed at or around the same time as the murder for which a defendant is tried cannot constitute prior criminal activity under Scull, crimes committed after the murder also should not.

There is no evidence in the record that Mr. Harvey engaged in significant criminal activity before the Boyd murders. Thus, if Mr. Harvey's trial was held today, in light of Scull and Bello, the trial court's finding that Mr. Harvey's escape and other post-arrest

misconduct constituted a history of prior criminal activity would be erroneous.

Bello, like Mr. Harvey's case, was tried before this Court decided Scull, and while Ruffin was controlling. This Court nonetheless applied Scull retroactively in Bello, without discussion. This Court apparently did so in recognition that Scull represents a fundamental change in the law and that application of Ruffin would be unjust.

In this case, the reasons for applying Scull retroactively are as strong as they were in Bello. For this reason, Mr. Harvey's death sentences should be vacated and the case remanded to the trial court with instructions to conduct a new sentencing proceeding and to find the mitigating circumstance that Mr. Harvey had no significant history of prior criminal activity.

6. The Government's Brady Violations.

During the penalty phase, the prosecution called Hubert Griffin to testify that Mr. Harvey had admitted making certain incriminating drawings. The State, however, failed to disclose to Mr. Watson that it had used Mr. Griffin as a confidential informant on a number of other occasions to testify to jailhouse confessions and other, like evidence. This information would clearly have been material to Mr. Watson's impeachment of Mr. Griffin. United States v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 3379-80, 87 L. Ed. 2d 481 (1985). The State's failure to disclose it was in breach of its obligations under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963) and Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972).

7. **Remaining Claims.**

Mr. Harvey restates and reincorporates in this brief the following claims raised in his motion for post-conviction relief which were denied by the trial court: Claim I.A.(b) (alleging ineffective assistance because Mr. Watson failed to argue in moving to suppress the confession that Mr. Harvey had been given invalid Miranda warnings); Claim I.A.(e) (alleging ineffective assistance because Mr. Watson failed to argue in moving to suppress the confession that Mr. Harvey's first appearance had been unreasonably delayed); Claim I.A.(g) (alleging that in moving to suppress the confession, Mr. Watson was ineffective in failing to investigate and present evidence that Mr. Harvey lacked the capacity to waive his Miranda rights); Claim I.E. (alleging that Mr. Watson was ineffective in failing to object to hearsay testimony concerning Mr. Harvey's escape from jail); Claim II.B. (alleging that Mr. Watson was ineffective in failing to investigate and present evidence that Mr. Harvey acted under the domination of his co-defendant); Claim II.E. (alleging that Mr. Watson was ineffective in allowing the government to rebut the mitigating circumstance of remorse); Claim II.G. (alleging that Mr. Watson was ineffective in failing to investigate evidence supporting the heinous, atrocious or cruel aggravating circumstance); Claim IV. (Mr. Harvey's trial was unconstitutionally conducted before a de facto eleven person jury); Claim VI (court failed to evaluate mitigating circumstances and committed other sentencing errors); Claim VIII.A. (court's instructions on the heinous, atrocious or cruel aggravating circumstance were improper); Claim VIII.B. (jury instructions and prosecutor's arguments improperly precluded jury from considering mitigating evidence which

could evoke sympathy for Mr. Harvey); Claim VIII.C. (court erred in failing to answer two questions from jury); Claim VIII.D. (court erred in denying special penalty phase instructions requested by defense); Claim X. (Mr. Watson was ineffective in failing to object to the lack of a limiting instruction on the heinous, atrocious or cruel aggravating circumstance); Claim XI. (Mr. Watson was ineffective in failing to object to the lack of a limiting instruction on the cold, calculated and premeditated aggravating circumstance); Claim XII.B. (State violated Brady by withholding evidence relating to taped confession); Claim XIII. (Fla. R. Crim. P. 3.851 is unconstitutional as applied and on its face);[33/] Claim XV. (Mr. Harvey was sentenced on the basis of improper victim impact evidence);[34/] and Claim XVII. (Florida's system for funding the defense of indigents charged with capital murder violates due process of law and equal protection).

[33/] In Koon v. Dugger, 619 So. 2d 246, 251 (Fla. 1993), this Court, citing Cave v. State, 529 So. 2d 293, 298-99 (Fla. 1988), held that Rule 3.851's "shortening of the time available" to seek post-conviction relief was constitutional. Although Mr. Harvey believes that Rule 3.851 is unconstitutional because, among other things, it unfairly and unequally treats capital defendants by denying them due process and equal protection, see Koon, 619 So. 2d at 251 (Barkett, C.J. concurring), this Court's decision in Koon appears dispositive of this claim.

[34/] Since the filing of Mr. Harvey's motion, the Supreme Court has ruled that victim impact evidence, with limited exception, is admissible. See Payne v. Tennessee, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (overruling Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) and South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989)). Although Mr. Harvey believes that Booth and Gathers represent the correct statement of the law, Payne appears dispositive of this claim. See Burns v. State, 609 So. 2d 600, 605 (Fla. 1992) (following Payne).

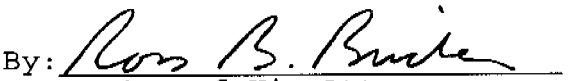
VII.

CONCLUSION

For the foregoing reasons, the Order denying post-conviction relief should be reversed, the trial court's judgment and sentence vacated and this case remanded for a new and constitutional trial.

Respectfully submitted,

HAROLD LEE HARVEY, JR.

By: 
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DATED: January 18, 1994

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant Harold Lee Harvey, Jr.'s Initial Brief was served by U.S. Mail upon Celia Terenzio, Esq., Assistant Attorney General, State of Florida, 111 Georgia Avenue, West Palm Beach, Florida 33401 and David C. Morgan, Esq., Assistant State Attorney, Nineteenth Judicial Circuit, 411 South Second Street, Fort Pierce, Florida 34950, this 18th day of January, 1994.