IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,276

JAMES ROGER HUFF,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's summary denial of Mr. Huff's motion for post-conviction relief, filed pursuant to Fla. R. Crim. P. 3.850. No evidentiary hearing was conducted below.

The citations in this brief are as follows: The record on direct appeal is referred to as "R. ." The record on appeal in the current Rule 3.850 proceedings is referred to as "M. ." All other references are self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Huff has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, and Mr. Huff accordingly urges that the Court permit oral argument.

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INTRODUCTORY STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This Court's opinion at Huff v. State, 437 So.2d 1087 (Fla. 1983) (Huff I), held that a retrial was warranted due to prosecutorialmisconduct and manipulation of evidence by the State. This Court's opinion at Huff v. State, 495 So.2d 145 (Fla. 1986) (Huff II), affirmed the conviction and death sentence imposed after the remand.

Mr. Huff thereafter timely initiated proceedings under Fla. R. Crim. P. 3.850. As discussed in Huff v. State, No. 74,201 (Fla. Oct. 11, 1990), the trial court denied relief in a manner which violated Mr. Huff's due process rights. This Court reversed the denial of relief and remanded for an appropriate resolution of the merits by the trial court. Id.

As discussed in detail in Argument I, infra, after the remand, the trial court again summarily denied an evidentiary hearing and relief employing procedures which cannot be squared with due process. Mr. Huff sought rehearing; the rehearing request was summarily denied (M. 443). Timely notice of appeal was filed (M. 444). This appeal follows.

Because no evidentiary hearing was allowed, there are no facts elicited at a hearing to summarize herein. The facts pled by Appellant below and now involved in this appeal are substantial and complex. For ease of review and in the interest of avoiding repetition, Appellant does not restate those facts in this section. Rather, the facts are detailed in the body of this brief as they relate to the individual issues involved.

The first section of this brief addresses the improprieties in the 3.850 court's denial of relief (Argument I). The brief is then divided as follows: Arguments II through V involve issues implicating the conviction; Arguments VI through VIII involve issues implicating the sentence. Within each claim, appellant discusses the attendant issues of fact, law, and procedure.

ARGUMENT

(I)

THE CIRCUIT COURT'S TREATMENT OF THE MOTION TO VACATE WAS ERRONEOUS AND VIOLATED DUE PROCESS.

A. The Circuit Court Erred in its Treatment of the Motion to Vacate

1. The Procedure Followed by the Trial Court Violated Due Process

When Mr. Huff first filed for relief pursuant to Fla. R. Crim. P. 3.850 the Circuit Court struck the motion and refused to consider Appellant's requests for relief. This Court found that the Circuit Court's treatment of the application for Rule 3.850 relief violated Mr. Huff's due process rights, reversed the trial court's ruling, and remanded the case for appropriate trial court consideration. Huff v. State, No. 74,201 (Fla. Oct. 11, 1990). Proceedings below were reinitiated.

On September 6, 1991, while Appellant was pursuing relief after the remand, Appellant's counsel received a letter drafted by James Hope, the Assistant State Attorney representing the State below, which had been previously provided to the trial court. The letter attached an order which had been drafted by the State for the trial court's signature (M. 398). The record reflects no hearing at which the trial court requested a proposed order. There is also no written document from the trial court requesting that the parties submit proposed orders. Indeed, at the time Appellant's counsel received the State's order, Appellant was preparing for an evidentiary hearing as this would have been the next step in the litigation process. Not only is there no record

request (oral or written) for proposed orders by the trial court, there is no record indication (oral or written) by the trial court of how it perceived the claims or what it perceived as proper findings -- this is not a case where a trial judge states his or her findings in open court and then requests that a party memorialize them in a written proposed order.

The record does not reflect what, if any, discussions the trial judge had with the Assistant State Attorney prior to the provision of the State's order. If there were such communications, Appellant was not a party to them. The trial court neither requested a response, nor did it afford Appellant a reasonable opportunity to respond, nor did it conduct any hearing regarding the order. In fact, no in-court proceedings whatsoever have been allowed on the Rule 3.850 motion, before or after the remand.

Nothing in the record reflected that the trial court believed it would be appropriate to sign the State's order or even to deny relief. Then, before Appellant had the opportunity to file a formal objection or response to the State's order and without the benefit of any response, the trial judge signed it. The order "issued" by the trial court was identical to the one submitted by the State in every respect.

Appellant then sought rehearing, addressing the improprieties in the trial court's disposition and in the procedure the trial court employed (M. 398-406). The State responded to the rehearing motion by forwarding a letter to the trial judge stating that the procedure involved in the denial of relief in this case was

appropriate and had been confirmed as appropriate by the Florida Supreme Court (M. 407-08). The trial court summarily denied the rehearing motion, without comment (M. 443).

No request for proposed orders had been made by the Circuit Court, nor did the court indicate what its rulings or findings were going to be. No notice was given that the court would even entertain an order drafted by a party. And the court not only signed the State's order without requesting comments or objections from Mr. Huff's counsel, it signed it before counsel had a reasonable chance to respond. Not even the normal period of time for the filing of a response under the applicable rules of procedure was allowed. As discussed infra, the procedure involved in this case in every meaningful sense mirrored the procedure condemned by this Court and found to warrant reversal in Rose v. State, No. 74,248, 17 FLW ___ (Fla. May 28, 1992).

In submitting its order, the State presented to the Court findings in the light most favorable to its position. The State used the order to amend and strengthen its arguments on the issues. The order is the State's self-serving document, signed by the judge without the benefit of evidentiary or even independent resolution of the issues.

When a court is required to make findings, "the findings must be based on something more than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy, but by both." Simms v. Greene, 161

F.2d 87, 89 (3rd Cir. 1947). A death-sentenced inmate deserves at least as much. The procedure involved in Mr. Huff's case, however, not only calls into question the impartiality of the Circuit Court, Rose, supra, slip op. at 5-6, 17 FLW ___, it violated Mr. Huff's rights to an independent resolution by the trial court of the issues involved in his case. Rose, supra. Cf. Huff v. State, No. 74,201 (Fla. Oct. 11, 1990) (finding that the Circuit Court's prior disposition in this case violated due process).

> [T]he reviewing court deserves the assurance [given by even-handed consideration of the positions of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F. 2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F. 2d 426, 435 (5th Cir. 1977).

Rule 3.850 proceedings are governed by the principles of due process. Holland v. State, 503 So.2d 1250 (Fla. 1987). When a court adopts wholesale one side's submission "the taste remains" that the ruling was provided "by the prevailing party to a bitter dispute." Amstar Corp. v. Domino's Pizza, Inc., 615 F. 2d 252, 258 (5th Cir. 1980). See also Shaw v. Martin, 733 F. 2d 304, 309 n.7 (4th Cir. 1984); Rose v. State, sunra. Given the heightened scrutiny which the eighth amendment requires in **capital cases, a** resolution such as the one involved in this case is even more distasteful.

This Court has held that it is reversible error for a Circuit Court to deny a Rule 3.850 motion without an examination of the

trial record. See Steinhorstv. State, 498 So. 2d 414 (Fla. 1986). It is unclear here whether the trial court reviewed the record or whether that was done only by the State, a party opponent. Cf. Rose, susra.

Contrary to the position taken by the State below when responding to Mr. Huff's motion for rehearing -- that this Court has approved the procedure followed by the State and Circuit Court in this case -- this Court has expressly condemned such practices, Most recently, in Rose v. State, No. 74,248, 17 FLW ___ (Fla. May 28, 1992), this Court reversed the denial of 3.850 relief and remanded for full and fair consideration by the trial court precisely because the trial court acted in a manner akin to the trial court's actions here.

In Rose, as here, "the State submitted a proposed order, adopted in its entirety by the trial court, denying all relief." Rose, slip op. at 3, 17 FLW at In Rose, as here, there was no record statement from the trial court regarding what it believed to be an appropriate resolution before receiving the State's order. In Rose, as here, the trial court "adopted the State's proposed order" without allowing the Petitioner's counsel "an opportunity to object to its contents." Rose, slip op. at 3, 17 FLW at . In Rose, this Court forcefully condemned the procedure employed in denying relief -- the same procedure as that involved in Mr. Huff's case -- and reversed, remanding for resolution bv the court.

Indeed, even where a request for a proposed order "is made in the presence of both parties or by a written communication to both

parties" -- assuredly not the case here -- this Court has condemned "[t]he judicial practice of requesting one party to prepare a proposed order for consideration" as "fraught with danger" and "giv[ing] the appearance of impropriety." Rose, slip op. at 4, 17 FLW at .

Citing Canon 3A(4) of Florida's Code of Judicial Conduct, this Court stated:

> No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.

Rose v. State, slip op. at 5, FLW at .

As in Rose, the record here does not reflect the extent of communications between the Circuit Court and the State prior to the submission of the State's proposed order. As in Rose, the Circuit Court here signed the order without affording Appellant an opportunity to respond. As in Rose, the procedure involved in Appellant's case demonstrates not only that the treatment received by Appellant below was fundamentally unfair, the procedure employed calls into question the impartiality of the trial judge.

"The impartiality of the trial judge must be beyond question." Rose, slip op. at 5, 17 FLW at . In his concurring opinion in Rose, Justice Harding further noted that even regarding non-controversial administrative matters, care should be exercised to allow both parties equal participation. "Ex parte communications

with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible." Rose, slip op. at 8, 17 FLW at ___ (Harding, J., concurring).

Here, it was not a scheduling matter that was involved, but the ultimate ruling of the court. Appellant's 3.850 application was initially treated in a way which violated due process. Huff v. State, No. 74,201 (Fla. Oct. 11, 1990). After this Court's remand, Appellant's application was again denied in a manner which cannot be squared with due process and fundamental fairness. Rose v. State, supra. As in Rose, Appellant's case should be remanded for impartial consideration by the trial court.

2. The Order Was Fundamentally Flawed.

The State's order, signed by the trial court, attached no specific portion of the record to support the summary denial of relief. As in Hoffman v. State, 571 So.2d 449 (Fla. 1990), the order purported to support the summary denial of relief by "incorporating" "the record" in its entirety "as though attached." (See M. 397, "This court incorporates the record herein as though attached to this order in support of summary denial.").

When a Circuit Judge denies a 3.850 motion without an evidentiary hearing, the express terms of the rule require the Judge to attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief ..." Fla. R. Crim. P. 3.850. This rule is premised on the requirement that the trial court support any denial of relief with

concrete facts: if the Petitioner is to be denied the opportunity to establish claims at an evidentiary hearing, the Petitioner is at least entitled to an order attaching specific record items which support the trial court's findings.

This Court discussed this rule, and the impropriety of a disposition such as the one involved in Appellant's case, in Hoffman v. State. As in Hoffman, the procedure employed here did not afford Appellant due process:

> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to every case before this Court. Some greater degree of specificity is required.

Hoffman, 571 So.2d at 450 (emphasis in original).

Here, the Circuit Court did not allow Appellant an evidentiary hearing. The order then denied relief by making findings of fact adverse to Appellant without attaching specific portions of the record supporting the findings (see section B, infra).

The procedure followed here violated due process (see section A(l), supra; Rose v. State, supra) and resulted in an order which was fundamentally flawed. Hoffman v. State.

B. The Circuit Court Erred In Not Allowing An Evidentiary Hearing.

Mr. Huff presented the Rule 3.850 trial court with claims which require an evidentiary hearing for their proper resolution. The issues included claims of ineffective assistance of counsel. The issues included claims premised on this Court's intervening,

retroactive decisions in Caso v. State, 524 So.2d 422, 425 (Fla. 1988), and Alvord v. State, 541 So.2d 598, 600 (Fla. 1989), see also Traylor v. State, 596 So.2d 957, 966 (Fla. 1992); Thompson v. State, 17 FLW S78, S79 (Fla. Jan. 30, 1992), which required evidentiary resolution and full and fair treatment. And Appellant submitted additional factual claims for relief. The claims related specifically pled allegations of fact, including matters that are not of-record. The files and records did not rebut the allegations and no specific portions of the record were appended to the order denying relief (see section A(2), supra, discussing, Hoffman v. State).

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 so. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Huff's motion alleged facts which, when proven at a hearing, would entitle him to relief. An evidentiary hearing was (and is) appropriate. The summary denial was erroneous. Indeed, claims such as those involved in Appellant's case have traditionally been tested through evidentiary hearings in Rule 3.850 proceedings.

As noted above, no specific portions of the files or records were attached to the order denying relief. Although it is not sufficient to direct the clerk of court to attach the entire record on appeal to an order denying 3.850 relief, Hoffman, this is what the trial court did when it signed the State's order denying Mr. Huff's motion (M. 397).

The trial court erred. An evidentiary hearing is appropriate in this case. For example, the question of whether a prisoner was denied effective assistance of counsel during capital proceedings is a classic example of a claim requiring an evidentiary hearing for proper resolution. See Squires v. State, 513 So.2d 138 (Fla. 1987) ; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Huff's claim that he did not receive a professionally adequate pretrial mental health evaluation is also a traditionally-recognized Rule 3.850 evidentiary claim. See Groover . Mr. Huff's claims based on the intervening retroactive decisions in Caso and Alvord seriously called into question the constitutionality of the means by which Appellant's alleged statement was obtained. The issues of fact raised by Appellant related to the substantive claim, its prior resolution, and to questions of ineffective assistance of counsel. This claim was properly before the court in these proceedings (See Argument II(A), infra, discussing Caso and Alvord). It involved contested issues of fact which necessitated an evidentiary hearing for their proper resolution.[1] In short, numerous evidentiary

[1] Mr. Huff pled that he had not been provided with full warnings as to his right to counsel. The State contested certain (continued...)

claims requiring a full and fair hearing for their proper resolution were presented by Mr. Huff's Rule 3.850 motion.

A Circuit Court errs when it denies relief by making findings of fact adverse to the Petitioner if it does not allow the Petitioner the opportunity to establish the claims at an evidentiary hearing. The Circuit Court so erred in Appellant's case. This case should be remanded for an impartial ruling by the trial court (see section A, supra) and for an evidentiary hearing.

(II)

APPELLANT'S CLAIM THAT HIS PURPORTED STATEMENT WAS ADMITTED AT TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND HIS CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FORMER ATTORNEYS' INADEQUATE LITIGATION OF THE ISSUE, WERE PROPERLY BEFORE THE TRIAL COURT AND REQUIRED AN EVIDENTIARY HEARING AND RULE 3.850 RELIEF.

A. Inadequate Warninss

On direct appeal, Mr. Huff argued that the "state never established the proper predicate that sufficient Miranda [v. Arizona, 384 U.S. 436 (1966),] warnings were given by Overly [the officer who the State said provided the 'warnings' to Appellant.] At no time did Overly ever remember telling the appellant that he

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[1](...continued)
of the facts pled by Appellant which demonstrated that his case involved error under Caso, Alvord, and their progeny. The trial court signed the State's order, which included the State's version of what it wanted the findings to be, without affording Appellant an evidentiary hearing and with a general citation to testimony which did not rebut the claim (M. 393, discussed in Argument II(A), infra).

was entitled to appointed counsel if he could not afford one."

Initial brief of Appellant, Huff v. State, Case No. 65,695, p. 33.

On direct appeal, the State responded by arguing that

> Overly recalled giving all the warnings except the fact that counsel would be appointed at state expense if appellant could not afford private counsel (Huff I, R. 1821-22; 1827-28). Failure to inform a suspect of the availability of appointed counsel does not warrant suppressing an otherwise voluntary statement. Alvord v. State, 322 So.2d 533 (Fla. 1975)...

Answer Brief of Appellee, Huff v. state, No. 65,695, p.12.

At trial, Appellant's counsel argued that proper warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), had not been provided to Appellant, that the resulting statement should be suppressed, and that because the defense counsel who had litigated the suppression hearing in Huff I had failed to adequately litigate this issue the State's argument that the Huff I ruling admitting the statements was "law of the case" should be rejected (See, R. 867).

The State responded by arguing that Miranda v. Arizona rights need not be "recited verbatim" (R. 861); that this Court's ruling in Alvord I (322 So.2d 533 (Fla. 1975)) stood "for the proposition that it is not fatal to admissibility to give an incomplete Miranda Warning where YOU fail to indicate to the Defendant that counsel would be supplied to him at State expense" (R. 864, emphasis supplied); that Overly's statement that Appellant "had" the right to counsel, although omitting the provision that an attorney would be made available to Appellant without expense if Appellant wished

one during questioning, "comes close enough" (R. 865); that the statement should not be suppressed because "anyone who watches TV knows the Miranda Rights pretty much by heart" (R. 865); and that the prior ruling denying the motion to suppress in Huff I was "law of the case" or "res judicata" (R. 875). The State also sought to argue that Mr. Huff was not in custody and therefore that Miranda did not apply (R. 856-57). The trial court summarily ruled that the warnings given were "adequate" (presumably under Alvord I) and that "I feel it is the law of the case and Res judicata and will not disturb the original ruling [sic]" (R. 877-78).

In his 3.850 motion and supporting supplemental proffer/ memorandum (M. 333, 345-49), Appellant asserted that the admission of the purported statement violated his rights, inter alia, because of the inadequacy of the warnings provided. Appellant pled specific facts in support of his claim and requested an evidentiary hearing to afford resolution to any contested issues of fact.

Appellant specifically relied on this Court's intervening retroactive decisions in Caso v. State, 524 So.2d 422, 425 (Fla. 1988), and Alvord v. State, 541 So.2d 598, 600 (Fla. 1989) (Alvord II), and explained that these decisions affected the prior denial of relief on his claim, that this change in law warranted consideration of the claim in these proceedings and, given the facts pled, that the claim warranted an evidentiary hearing (M. 345-49).

Caso and Alvord II were not available at the time the claim was previously denied at trial and on appeal. They directly

changed in Appellant's favor the law in effect at the time of the trial and appeal. Indeed, at trial and on direct appeal, the State relied on Alvord I to argue that the failure to advise Mr. Huff that counsel would be appointed without expense at his request did not render the warnings given inadequate.

> In Caso v. State, 524 So.2d 422, 425 (Fla.), cert. denied, 488 U.S. 870 (1988), this Court held that "the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief."

Thompson v. State, 17 FLW S78, S79 (Fla. Jan. 30, 1992), quoting and discussing Caso v. State.

In Alvord v. State, 541 So.2d at 600 (Alvord II), this Court noted that in Caso it had overruled the holding of Alvord I -- as relied on by the State in Appellant's case, that the failure "to explain that [the defendant] had a right to appointed counsel if indigent" did not render Miranda warnings inadequate. Alvord, 541 So.2d at 600. Because "in Caso v. State, we receded from that holding in Alvord [I] and stated: 'We therefore recede from that portion of Alvord [I] which holds that the trial court did not err in admitting the custodial statements of the defendant,'" 541 So.2d at 600, this Court found that the change in law required reconsideration of the claim in post-conviction proceedings:

> Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless.

Alvord, 541 So.2d at 600.

Mr. Huff's claim was appropriately brought in these post-conviction proceedings. Alvord II. In support of his request for an evidentiary hearing and Rule 3.850 relief, Mr. Huff pled facts which amply met the requirements for a valid Caso claim under this Court's decisions in Alvord II, Thompson v. State, Travlor v. State, 596 So.2d 957, 966 (Fla. 1992), and Caso itself.

First, there is no question that Appellant was in custody at the time the statement was elicited. On April 21, 1980, Mr. Huff appeared at the residence of Francis Foster in Wildwood, Florida. He was hysterical, yelling repeatedly for help for himself and his parents and for someone to call the police (R. 652-58). Mr. Foster directed his son to call the police (R. 659). (Appellant discuses his emotional state -- a state which precluded a valid Miranda waiver -- in subsequent sections of this brief.)

Chief Ed Lynum and Officer Terry Overly arrived at the scene together (R. 678;793). Chief Lynum asked Mr. Huff what the problem was, and Mr. Huff stated that his parents had been shot (R. 681). Shortly thereafter, Chief Lynum told Officer Overly to place Mr. Huff under arrest (R. 681-82). Officer Overly testified that Mr. Huff was placed in a "caged unit" and that "he was not free to leave [the] patrol car" (R. 857-58).

Second, the Miranda warnings were inadequate under Caso, Alvord II, Thompson, and Travlor. The "Miranda warnings" provided by Officer Overly, as the officer himself acknowledged, were insufficient -- the warnings were skimpy overall and they failed to inform Mr. Huff that counsel would be appointed for him at his

request (See R. 814, Appellant was warned only that "[h]e is allowed to have an attorney..."; R. 844 (same); Huff I Supp. Hrng. Tr., R. 1828 (same)). Officer Overly testified that he had an amalgamation of various "Miranda forms," including one he had used while he was a law enforcement officer in Dade County. Officer Overly did not provide the warning that an attorney would be afforded without expense if Mr. Huff wished one:

> I don't remember line 4, if you cannot afford to hire a lawyer, one will be appointed to represent you for any questioning.

(R. 839-40). Officer Overly's testimony was consistent on this issue at the first (Huff I) and second (Huff II) suppression hearings.

When shown a Wildwood Police Department warning form and asked if the one he used was similar, Officer Overly expressly testified: "No, this doesn't look like the one." (R. 838, emphasis supplied). On further questioning Officer Overly was steadfast that the provision of counsel warning was not included in the rights he provided to Mr. Huff (R. 839-40). Officer Overly testified that Mr. Huff was emotional, hysterical (R. 806), and "didn't want to talk to me about anything" (R. 854).

Third, the statement was elicited from Mr. Huff based on these inadequate warnings without an initiation of contact by Mr. Huff. Officer Overly left Mr. Huff in custody in the "caged unit." Sheriff Johnson then approached the unit some 20 minutes later and initiated questioning of Mr. Huff without providing any Miranda warnings whatsoever: "I stuck my head inside the car and looked

back at him and I asked him . . . what happened here...." (R. 1005-06; see also Huff I, Supp. Hrng. Tr., 1843, Johnson testified at bond hearing that he did not provide Miranda warnings to Mr. Huff.) Mr. Huff then made the purported incriminating statement to Johnson (see infra, discussing the questionable nature of Johnson's testimony), the only such statement involved in this case: "He said, 'I shot them in the face'." (R. 1005-06).

Fourth, the error in the admission of the statement cannot be deemed harmless beyond a reasonable doubt. In Thompson, 17 FLW at S78-79, this Court ruled that the error could not be deemed harmless in a case involving much more incriminating evidence in addition to the statement than the evidence involved in Appellant's case. The evidence involved in Mr. Huff's case, aside from the purported statement, was circumstantial at best and surely does not establish beyond a reasonable doubt that the admission of the statement can be deemed harmless. See Huff v. State, 495 So.2d 145, 147 (Fla. 1986) (outlining the prosecution's evidence); Huff v. State, 437 So.2d 1087, 1088 (Fla. 1983) (Huff I) (same). The statement was the centerpiece of the State's case at the retrial. Cf. Caso v. State (finding the error not harmless where the statement was important to the State's case). Appellant's case is thus manifestly different than the situation in Alvord v. State (Alvord II) where, although finding reconsideration appropriate in collateral proceedings due to the intervening change in law effectuated by Caso, this Court ultimately found the error harmless because Alvord had independently confessed to his girlfriend and

thus because "Alvord's statements were clearly not the focus of this trial but were cumulative to the primary evidence presented by his girlfriend." Alvord, 541 So.2d at 601.

As the summary related above shows, Mr. Huff pled a valid claim for relief which was cognizable due to the intervening decisions in Maso and Alford II. He was entitled to an evidentiary hearing and full and fair resolution by the court on his claim (see Argument I, susra). Mr. Huff also pled that his former trial attorneys had ineffectively litigated the claim and an evidentiary hearing in this regard was also appropriate. Indeed, counsel at the Huff II suppression hearing asked the court not to accept the State's "law of the case" argument because counsel at the Huff I suppression hearing had inadequately litigated the claim (see discussion, susra). The Huff II trial court disagreed and accepted the State's "law of the case" argument (R. 878).

The Circuit Court denied 3.850 relief by signing the State's proposed order. Notwithstanding Officer Overly's express testimony that the Wildwood Police Department "Miranda sheet" introduced at trial was not the one he used (R. 838, "No, this doesn't look like the one"; R. 839-40, "I don't remember line 4, if you cannot afford to hire a lawyer, one will be appointed to represent you for any questioning"); notwithstanding Officer Overly's express testimony that the provision of counsel warning was not included in the "rights" he provided (R. 838-40); and notwithstanding the allegations in Appellant's Rule 3.850 motion that the "Miranda sheet" introduced by the State at trial was not the one Officer

Overly used and that the provision of counsel right had not been provided to Appellant -- allegations which surely required an evidentiary hearing -- the trial court accepted the State's invitation to make findings contrary to Appellant's allegations although not affording Appellant the opportunity to prove his claim at a hearing. Accepting the State's order wholesale, the order signed by the trial court cited the existence of the Wildwood "sheet" -- a "sheet" Officer Overly said was not the one he used (R. 838-40) -- in support of the denial of relief on this claim (see M. 393 citing R. 967-75).

The Circuit Court erred in signing the State's version of the contested issues of fact involved in this case without affording Mr. Huff the opportunity to establish this valid claim for relief at an evidentiary hearing. The Circuit Court's ruling should be reversed and this case should be remanded for a full and fair hearing on each aspect of Appellant's claim and for a full and fair ruling on the claim by the trial court.

B. Invalidity of Waiver

When Officer Overly took Appellant into custody and placed him in the "caged unit" Mr. Huff was hysterical, emotionally distraught, incoherent, "in shock," and unable to understand his rights, much less so to execute a valid waiver. Mr. Huff expressly pled record and non-record facts in his 3.850 motion supporting his claim that any "waiver" was invalid. He discussed some of those facts in his proffer/memorandum (M. 337-45). Mr. Huff also pled that counsel rendered ineffective assistance in failing to

reasonably litigate Appellant's inability to form a valid waiver and in failing to secure expert assistance on this issue. See Squires v. State, 513 So.2d 138, 139 (Fla. 1987) (directing a Rule 3.850 evidentiary hearing on Petitioner's allegations that counsel failed to employ mental health assistance to challenge the statements elicited from Petitioner and introduced at trial).[2] Indeed, as the Huff II suppression hearing record reflects, defense counsel at the second trial argued that the trial judge should not rely on the Huff I suppression ruling as "law of the case" because former defense counsel had failed to adequately litigate the issue at the Huff I hearing.[3] The State had argued at the Huff II suppression hearing that the trial judge should find the earlier suppression ruling to be "law of the case" and "res judicata." The judge did (R. 878).

Mr. Huff's Rule 3.850 allegations and his proffer/memorandum (M. 334-53), showed that this aspect of the claim was relevant to the issues discussed in section A, supra, and independently established a claim of ineffective assistance of counsel warranting an evidentiary hearing and full and fair review. As Mr. Huff's

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[2] The Sauires opinion directs an evidentiary hearing but does not specifically discuss the issue. The briefs of the Petitioner and the State in Squires v. State, No. 69,003 (subsequently reported at 513 So.2d 138) demonstrate that the issue involved related to counsel's ineffective assistance in failing to employ a mental health expert to assist in challenging the admissibility of the statements.

[3] The trial judge himself commented that the Huff I suppression hearing transcript was hard to follow (R. 828).

submissions to the 3.850 court related (M. 337-45), Officer Overly testified at the Huff I proceedings:

> He [Mr. Huff] was very obviously very upset, and he stated to me that someone had shot his parents and that they were, he just pointed in a direction,...

(Huff I Supp. Hrng. Tr., R. 1817).

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

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

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

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

* * *

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

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

A. Yes. He was sobbing and complainins, well, not complaining, he kept talking about his warents and what had transwired.

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

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

(Huff I, Supp. Hrng. Tr., R. 1823-24).

Officer Overly's testimony in Huff I continued:

I don't think he was listenins to me the whole time, I think he more less said 'yes' to more less just to, so called shine me on, so I would quit bothering him. He didn't want to talk to me about anything.

(Huff I Supp. Hrng. Tr., R. 1834) (emphasis added). Officer Overly told defense counsel at the Huff I hearing that he did not believe

Mr. Huff understood the rights (Huff I R. 1830; see also Huff I R. 1835).

Then, at the Huff II hearing, Officer Overly testified that Mr. Huff was "very confused and more concerned with the condition of his parents" than with the rights (R. 805-06). Indeed, each trial record is replete with references to Mr. Huff's "hysteria" on the night of the arrest, as testified to by various witnesses (R. 790-15; Huff I R. 1810-39). Officer Overly stated:

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

(R. 808)(emphasis supplied). Officer Overly continued:

> Q And upon reflection over the four years is it your opinion now that the man seated over here did not understand his rights because of the condition that he was in, being hysterical, worried about his parents and crying, things of that nature?
>
> A I just can't say that he understood his rights.

(Id.) (emphasis added). Officer Overly explained that because of his condition, it was doubtful that Mr. Huff understood the rights (R. 799); that Mr. Huff was "really upset" and "wasn't really cognizant of what was going on" (R. 800); that Mr. Huff was

"confused" (R. 805), "hysterical" (R. 808), and "very upset," inquiring about his parents (R. 851); and, reaffirming his earlier testimony, that Mr. Huff did not "appear to understand what [Overly was] saying to him," that Mr. Huff was "[n]ot at all times" cognizant of what Overly was saying when the rights were provided, and that Overly "had to constantly get his attention" because of Mr. Huff's confused state (R. 852). Mr. Huff was "sobbing" (R. 852), was in an "excited state" (R. 853), did not give Overly "a hundred percent of his attention" (R. 853), and "I think he just more or less said yes so I would quit pestering him" (R. 853). Chief Lynum also testified that Mr. Huff was hysterical, crying, upset about whether his parents were alive or dead, and emotional (R. 869; 877).

Officer Overly testified that he "just can't say that [Mr. Huff] understood his rights" (R. 808) and that Mr. Huff "didn't want to talk to [Overly] about anything" (R. 854). Given the record in this case and the specific allegations in Appellant's Rule 3.850 motion and proffer/memorandum, Appellant's statements cannot be deemed to have resulted from a valid waiver under settled principles of constitutional law.

The inquiry into the validity of a waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Miranda v.

Arizona, 384 U.S. 436 (1966); see also Travlor v. State, 596 So.2d 957, 965-66 n.12 (Fla. 1992) (collecting cases). "A waiver of a suspect's constitutional rights must be voluntary, knowing, and intelligent...." Travlor, 596 So.2d at 966. The accused's mental state is a critical factor.

This case involved no written waiver whatsoever. Cf. Travlor, 596 So.2d at 966 and n.15. Mr. Huff pled in these 3.850 proceedings that the invalidity of any "waiver" in his case is not only relevant to the issues discussed in section A, supra, and section C, infra, but also that an independent ground for relief, requiring an evidentiary hearing for full and fair resolution, is established by the ineffective assistance of counsel in the litigation of this issue.

In the Huff I proceedings, defense counsel barely litigated this issue at all. The trial court in Huff II nevertheless relied on the resolution in Huff I as "law of the case." In the Huff II proceedings, counsel failed to develop critical evidence relevant to the question of whether any purported "waiver" could be deemed rational, knowing, and intelligent. Neither the attorneys in Huff I nor the attorneys in Huff II sought any mental health assistance on the issue whatsoever. Given the importance of the alleged statement, a statement made during a time of extreme emotional shock and duress, counsel's failure to seek mental health assistance on the issue was prejudicially deficient performance and undermines confidence in the result of the suppression hearing and trial. See Kimmelman v. Morrison, 477 U.S. 365 (1986).

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

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

(M. 343; See also Motion to Vacate, Att. 3). Dr. Krop could not conclude, given the facts of this case, that Mr. Huff had the ability to comprehend or knowingly waive anything at the time approximate to the offense (Id.). Counsel's failure to seek expert assistance denied Mr. Huff a proper evaluation of the issue when it would have counted -- at the time of the original proceedings. At a minimum, "[t]he inability to gauge the effect of this omission underminers] . . . confidence in the outcome (of the proceedings.]" State v. Michael, 530 So. 2d 929, 930 (Fla. 1988).

Although this claim required an evidentiary hearing and meaningful review by the Circuit Court, the Circuit Court summarily denied it. Given the improper procedure employed in the denial of relief herein and the wholesale adoption of the State's order (see Argument I, supra), there is a serious question as to whether the Circuit Court reviewed the claim or any of the others raised by Mr. Huff in these 3.850 proceedings.

Trial counsels' failure (in Huff I and Huff II) to utilize mental health assistance in moving to suppress the statement was a valid claim of ineffective assistance which required a full and fair hearing. See Squires v. State, discussed supra. Counsel's stark failure to meaningfully litigate Mr. Huff's mental state at the hearing in Huff I -- a hearing whose result was relied on by the trial judge in Huff II as "law of the case" to support the

denial of the motion to suppress (R. 878) -- even without the mental health assistance issue, was a case of plain ineffective assistance warranting an evidentiary hearing for proper resolution. Ineffective assistance of counsel is an issue properly raised under Rule 3.850. Such issues generally require evidentiary hearings for appropriate resolution. One cannot assume a tactic or strategy on the part of defense counsel where it is expressly alleged that there is no tactic. A hearing was and is necessary on the basis of Mr. Huff's allegations. The trial court erred in denying one.

c. The Assertion of the Right to Silence

Officer Overly repeatedly testified that Mr. Huff had been "confused" (R. 80) and "hysterical" (R. 806). When he informed Mr. Huff about the right to remain silent, Officer Overly testified that the following transpired:

> The first thing I read off was do YOU want to remain silent and he said, "yes" to me and when he said "yes," I just felt in my mind that he acknowledged them.

(R. 854) (emphasis supplied). Officer Overly also testified, "He [Mr. Huff] didn't want to talk to me about anything" (R. 854). Mr. Huff was then left in the "caged unit." Although he said "yes" in response to the question "do you want to remain silent?", twenty minutes later Sheriff Johnson, without providing any Miranda rights, and without any effort to clarify what the "yes" answer meant, then approached Mr. Huff in the "caged unit":

> I stuck my head inside the car and looked back at him and I asked him -- when I asked him what happened here, he said, "I shot them in the face."

(R. 1005-06) (emphasis added).

At the Huff II hearing the trial judge opined, "The Court recalls reading a recent case in the Law Weekly, a fairly recent case that indicated that a Defendant could change his mind about his decision to speak or make a statement anyhow" (R. 881). Nothing in the record, however, demonstrates that Mr. Huff initiated contact -- it was Sheriff Johnson who did so after Mr. Huff had indicated to Officer Overly that "[h]e didn't want to talk to me about anything" (R. 854). And although defense counsel at the Huff II hearing urged that the State's "law of the case" argument should not be accepted because counsel at the Huff I hearing had failed to litigate Mr. Huff's assertion of his right to silence (see R. 868, "The third new issue that was not discussed at the first hearing is that he chose to exercise his rights"; see also R. 877), the trial court stated, "I feel it is the law of the case and Res judicata and will not disturb the original ruling" (R. 878). The motion to suppress was denied.

In these Rule 3.850 proceedings, Appellant argued that defense counsel rendered ineffective assistance with respect to the litigation of this issue. Indeed, as counsel at the Huff II hearing indicated, this critical issue was inadequately litigated by counsel at the hearing in Huff I. Defense counsel in Huff I neglected it. The trial judge, however, relied on the ruling in Huff I to support, as "law of the case," the denial of the motion to suppress at the hearing in Huff II (R. 878).

As Mr. Huff submitted in the 3.850 proceedings, this issue involved a valid claim addressing the lack of effectiveness of former counsel's representation, particularly counsel in Huff I. Mr. Huff asserted, and asserts, that there was no tactic or strategy supporting defense counsel's omission. The omission undermines confidence in the suppression ruling and, given the critical nature of the statement evidence at trial, in the result of the trial proceedings.[4] This valid claim of ineffective assistance of counsel required an evidentiary hearing for proper resolution.

Indeed, at the Huff II proceedings (R. 1005-06), Sheriff Johnson testified that he never asked anyone if Mr. Huff had "waived" his rights. Mr. Huff had not only not "waived," he asserted his right to remain silent. The Sheriff, however, when he approached Mr. Huff 20 minutes later, initiated questioning with no effort to readvise Appellant of his rights, much less so to clarify Appellant's earlier response. Miranda itself demonstrates the impropriety of such a procedure. Under Miranda, once a person asserts right, such as the right to silence, further interrogation

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[4] This was a wholly circumstantial case and, absent the alleged statement, there was a dearth of evidence implicating Appellant. The State's theory at trial was inconsistent and internally contradictory. The defense case was that Mr. Huff and his parents had been attacked. The State argued that Mr. Huff killed his parents, drove their car away from the scene to wash up, then drove back to the scene. However, car keys were never found at the scene, even though a search was conducted with a metal detector. "A gunshot residue test was administered at the jail but was inconclusive." Huff v. State, 437 So.2d 1087, 1088 (Fla. 1983). Other than the alleged statement, there was a dearth of concrete evidence implicating Mr. Huff.

must cease. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."); Edwards v. Arizona, 451 U.S. 477 (1981); Michigan v. Mosley, 423 U.S. 96, (1975)(interrogation must cease when person in custody "indicates in any manner" that he wishes to remain silent); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987)(following equivocal statement of desire to remain silent, police may only ask questions designed to clarify earlier response); see also Traylor v. State, 596 So.2d at 966 ("If the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.").

When Sheriff Johnson approached Mr. Huff, he did not provide Miranda rights. No effort was made to clarify Appellant's earlier responses to Overly. Cf. Christopher, supra. Johnson simply began questioning Mr. Huff and then, at trial, testified as to how he responded. It should also be noted that this interrogation was not taped, nor were there any written acknowledgements or waivers of rights which had been signed by Mr. Huff. Cf. Traylor v. State, 596 So. 2d 966 and n.15. There are no written indicia supporting any "waiver" here.

Notwithstanding the substantial nature of Appellant's allegations, the Rule 3.850 court signed the State's order summarily denying an evidentiary hearing and relief. The Circuit Court erred. An evidentiary hearing, including evidentiary

resolution concerning the issue of ineffective assistance of counsel at the motion to suppress hearings, was and is appropriate.

D. Conclusion

The statement evidence was not only central at trial, it was relied on by the court to support aggravators, reject mitigators, and impose a death sentence. The issues presented by Mr. Huff were substantial, validly pled, and required an evidentiary hearing for proper resolution. The Circuit Court not only failed to allow a hearing but denied Rule 3.850 relief by employing procedures which violate due process and which this Court has expressly condemned (**see** Argument I, supra). The ruling below should be reversed and this case remanded for an evidentiary hearing and full and fair resolution by the trial court.

(III)

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

The 3.850 court signed the State's order denying an evidentiary hearing and relief on Appellant's claim of ineffective assistance of counsel and the various underlying issues Mr. Huff presented in support of the claim. As discussed herein, the Circuit Court erred. In order to establish a violation of the right to effective assistance of counsel, a Petitioner must demonstrate deficient performance (i.e., an unreasonable omission or action on counsel's part) and prejudice (i.e., that counsel's omissions or actions undermine confidence in the result). Strickland v. Washinston, 466 U.S. 668 (1984); Blanco v.

Singletary, 943 F.2d 1477 (11th Cir. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989). In these 3.850 proceedings (including his Motion to Vacate and Proffer/Memorandum), Mr. Huff alleged each.

Appellant requested an evidentiary hearing. Notwithstanding the fact that evidentiary hearings have traditionally been held to test claims such as those presented by Appellant, O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984); Squires v. State, 513 So.2d 138 (Fla. 1987); Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983), the Circuit Court signed the State's order declining to allow a hearing.

A defense attorney has a duty to reasonably investigate and prepare sources of evidence which may be helpful to the defense. Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Mr. Huff specifically pled allegations demonstrating that former counsel failed in this duty and that he was prejudiced as a result of counsel's deficiencies. An attorney also must intelligently and knowledgeably present the client's defense. Carawav v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Mr. Huff pled specific instances of his former counsels' failures in this regard and the resulting prejudice to Appellant. An attorney is also responsible for presenting legal argument appropriately and for effectively litigating legal issues. See Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Huff also pled specific instances of deficient performance and prejudice in this regard. See also Argument II, supra (relating

instances of ineffective assistance relating to the statement admitted at trial). The errors identified in this case, singularly and collectively, see Nero v. Blackburn, 597 F.2d at 994 (a single error by counsel may be sufficient to warrant relief), warranted the granting of an evidentiary hearing.

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

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

(R. 731).[5]

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

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

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

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

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[5] Nothing could be done with the prints because of the crowd law enforcement had allowed into the area.

Sheriff Johnson testified that there were photos of approximately sixteen (16) people in the crime scene area, some of whom he could not identify, and that the photos did not depict a rope which supposedly was arranged to mark off the crime scene area (R. 1013-14).

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

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

(R. 1011).

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

(R. 1032). However, on redirect he stated that the crime scene was not contaminated (R. 1094-95).

Another area in which the defense argued police mishandling involved Mr. Huff's clothes which were removed when he was booked into the jail. His clothes, some of which had blood on them, were all placed in one bag (R. 1727). The defense argued that the blood from some of the clothes would have gotten on to other of the clothes that they were touching in the bag. Numerous other witnesses testified to similar occurrences. However, the State's witnesses consistently testified, in spite of all these irregularities, that the scene was not contaminated. For example:

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

(R. 1278).

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

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

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

At the end of the proffer, the State argued that Mr. White was not competent to testify because the information on which he based his opinion was insufficient (R. 2455). After lengthy argument, the trial court ruled that the testimony was inadmissible, stating, "I think it's just totally inadequate amalgamation of data to allow any expert, regardless of how knowledgeable he is, to give an opinion" (R. 2479). Defense counsel then asked what additional

data they would need to give Mr. White in order for him to be competent to testify. The court refused to give legal advice (R. 2479-80), and then recessed for the weekend (R. 2481).

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

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

the majority of it was available; did not provide him with the discovery materials; and did not provide him with the transcript and record of the first trial proceedings (which had been prepared as a result of the appeal in Huff I) although many of the same law enforcement witnesses testified in Huff I.

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

As Mr. Huff's submissions in these 3.850 proceedings demonstrate, had counsel reasonably prepared the expert, substantial evidence supporting the defense theory would have been heard by the jury. Expert White, or another qualified expert, would have discussed the gross inadequacies in the State's investigation; would have discussed the inexperience and lack of qualifications of the law enforcement investigators in this case; and would have provided specific instances demonstrating that the State's investigation was inadequate. An evidentiary hearing was needed to address counsel's deficient performance and in order for the expert testimony to be heard -- testimony which would have

shown the prejudice to Mr. Huff resulting from counsels' deficiencies.

This Court on direct appeal affirmed the trial court's ruling because Mr. White had not been properly prepared to give any more than "a general critique of proper police practice in processing crime scenes, a collateral and irrelevant issue." Huff v. State, 495 so. 2d at 148. Effective counsel would have been prepared to properly present the expert evidence. Reasonably effective counsel would have provided information to the expert. Here, there was no tactical or strategic reason for counsel's omission -- to the contrary, counsel wanted to present the testimony. Moreover, if Mr. White could not be prepared, then defense counsel could have called as a witness his own investigator, who sat through the trial at defense table, who had investigated the case, and who was a former law enforcement officer.[6]

This Court's ruling on direct appeal limited itself to the trial court's ruling as to Mr. White. It properly did not concern itself with the ineffective assistance of counsel in failing to properly present this crucial evidence. That issue of ineffective assistance of counsel was properly raised in the Rule 3.850 motion, and is not procedurally barred, contrary to the position of the State which the lower court adopted (M. 393). An evidentiary hearing is proper and necessary to resolve this issue.

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[6] Counsel also should have attempted to elicit the expert's testimony though the use of hypothetical questions, but was not appropriately prepared to do this.

counsel's ineffectiveness deprived Mr. Huff of the critical expert testimony which would have proved that the State's investigation was considerably less than the "well conducted investigation" alleged by the State. Properly prepared expert testimony would have provided the jury with much more than a general critique of police practice, and would have illustrated specific errors that resulted in lost or contaminated evidence in this case -- including the crime scene, the evidence (e.g., clothing) taken from Mr. Huff, and the results of the gunshot residue test. This Court should remand Mr. Huff's case for a full and fair evidentiary hearing on this claim.

Counsel was also ineffective in other respects. The ineffective assistance of counsel issues relating to the admissibility of Mr. Huff's alleged statement were discussed in Argument II, **supra**. Additional instances of ineffective assistance are related in subsequent arguments in of this brief.

Counsel failed to object to Mr. Huff's absence at critical periods of the trial. Mr. Huff was absent from the jury's view of the crime scene (R. 595-99), during which the jury was driven around and informed of what was where (**see** R. 598-99). Indeed, counsel themselves were absent during much of this (R. 598). This viewing was an important testimonial portion of the trial, relating directly to the alleged crime and scene, conducted in the defendant's absence. Counsel failed to demand that Mr. Huff be present and failed to object to Mr. Huff's absence. Mr. Huff was also not present -- without objection from defense counsel -- at a

discussion about the admissibility of physical evidence (R. 1616-18), and at a discussion regarding the presentation of prior testimony (R. 2064-65). Mr. Huff's presence during these proceedings was important -- the Huff II defense attorneys were not the attorneys in Huff I; Mr. Huff's presence was needed to assist counsel regarding the prior testimony. As to the physical evidence, it allegedly involved Mr. Huff, and his assistance to counsel on this issue was needed. None of these absences were objected to by defense counsel, although each was a critical stage of the proceedings. Indeed, the State itself pointed out Mr. Huff's absence in the last two instances.

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

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

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

evidentiary hearing was needed on counsel's ineffective performance relating to Mr. Huff's absence (Appellant submitted in these proceedings that there was no tactic or strategy for counsel's omissions). Had Mr. Huff been present, he would have been able to, inter alia, assist counsel, correct testimony taken at the time of the jury view/ride, voice objections, and suggest questions and/or objections to counsel.

Not only was Mr. Huff absent from portions of his capital trial, but the presiding judge also absented himself from portions of the trial. On one occasion the defense attorney failed to object to the judge not being present in the courtroom during the taking of evidence. This occurred after the prosecutor made a remark to one of his assistants in the courtroom to the effect that he had just caught a witness in a lie. The defense had recalled Officer Overly who had been called as a court witness during the State's case. Overly's testimony was detrimental to the State, because he pointed out numerous instances of conduct which contaminated the crime scene. During cross-examination, the prosecutor was very obviously hostile to Officer Overly, as he had been during the State's case-in-chief. Indeed, Overly testified that the State had told him prior to trial that there were certain things he should not say (R. 801-02).

The prosecutor indicated to the defense and the court that he wanted to bring out in cross-examination that Officer Overly had been dismissed from his job as a policeman (R. 2232), to show his bias against law enforcement. The defense argued that since the

defense was not allowed to impeach Sheriff Johnson with his history of misconduct even though that would show his motive to lie in order to win a murder conviction to counter the bad publicity and help his chances at re-election, the State should not be allowed to impeach Overly (R. 2238). The trial court ruled that Overly's employment in the Miami police department was not material to this trial (R. 2242), but that the prosecutor could ask him why he left Wildwood and then could go into detail if he denied that he was dismissed (R. 2243).

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

What followed was a lengthy debate about what exactly was said by the prosecutor (R. 2276-94). At one point the defense requested permission to question the jurors individually as to what they heard. The prosecutor objected to this, and the court did not allow it (R. 2283). Defense counsel then indicated that he should at least question every spectator in the courtroom to see what they had heard (R. 2292). The judge then indicated that he would not be

remaining in the courtroom to hear the testimony (R. 2293). There was no objection by defense counsel. Thereafter approximately ten (10) spectators were called and questioned under oath about what they had heard (R. 2293-2354). The judge was not there.

The following morning, counsel filed memoranda on the motion for mistrial, and requested that the testimony taken the day before be attached and included in the record on appeal. Immediately thereafter the court, without reviewing the testimony, denied the motion for mistrial (R. 2359). There was never any objection to this procedure by defense counsel. Proper objection at the time of the trial was crucial. The defense essentially allowed the court to rule on an important motion without ever hearing the facts. Defense counsel did not object to this failure of the court to carry out its duty or even to be present. There was no tactical **or** strategic reason for this omission -- there could not have been. This was ineffective assistance.

Mr. Huff also alleged in these proceedings that counsel were ineffective in failing to raise inconsistencies in witnesses' sworn testimony. At the time of this trial, there had been a previous trial, and prior depositions. Several of the State's witnesses' prior accounts were different from their eventual testimony in the second trial. These were not utilized by defense counsel. The inconsistencies were not brought out.

Defense counsel also failed to proffer Mr. Huff's testimony about why he was on his way to see his attorney before the offense (R. 2683-88). This was important, as the State was allowed to

raise the specter that Mr. Huff was doing something improper. Counsel also failed to object to surprise testimony that was first revealed during the State's opening statement, to the effect that Mr. Huff had asked one of the State's witnesses for information about a permit to carry a gun (R. 578). No Richardson hearing was requested. One should have been. The surprise testimony was detrimental although inadmissible under the rules of discovery. Richardson v. State, 246 So.2d 771 (Fla. 1971).

After the defense completed its case, the State indicated that it would call three (3) witnesses in rebuttal, including Dr. Rojas, a doctor at the jail. Dr. Rojas was going to testify that he examined Mr. Huff, and spoke to him, a few days after he was arrested, and that he did not believe that Mr. Huff had been hit on the head and rendered unconscious. The defense strenuously objected to this on the basis that it was not truly rebuttal because the State knew that the head injury was an issue during its case-in-chief. The defense also argued that the calling of Dr. Rojas would prompt surrebuttal by a physician for the defense (R. 2855-57). The defense objection was overruled (R. 2857). The defense failed, however, to object to the testimony on the basis that Mr. Huff had not been provided with any Miranda warnings prior to being examined by Dr. Rojas, the State's doctor, although Dr. Rojas would eventually be called to provide testimony adverse to Mr. Huff at trial. See Estelle v. Smith, 451 U.S. 454, 462-63 (1981); Jones v. State, 289 So.2d 725, 727-28 (Fla. 1974); cf. State v. Hamilton, 448 So.2d 1007, 1008-09 (Fla. 1984).

Dr. Rojas testified at length about his view of Mr. Huff, and stated that he did not believe Mr. Huff had received a blow to the head (R. 2867). In cross-examination, defense counsel attempted to discredit Dr. Rojas by asking him about available testing -- that the doctor did not provide tests which would have accurately portrayed trauma to the head (R. 2880). Dr. Rojas nevertheless asserted that his examination was adequate (R. 2891-92).

After the State finished rebuttal, the Defense never followed up by presenting the surrebuttal testimony of a defense expert physician which defense counsel said he was going to present. Such testimony, as Mr. Huff has submitted in these proceedings, would have undermined Dr. Rojas' testimony and discredited the procedures he employed (procedures which involved absolutely no adequate testing). Appellant asserted that there was no tactical or strategic reason for counsel's omissions.

Counsel's failings were deficient performance, which prejudiced Mr. Huff. But for counsel's deficient performance, there exists a reasonable probability of a different outcome. The ineffective acts and omissions identified in this proceeding undermine confidence in the outcome.

However, because the trial court declined to allow an evidentiary hearing, there is no record before this Court upon which Appellant's claims of ineffective assistance of counsel can be resolved. The files and records do not conclusively show that Mr. Huff is entitled to no relief, and a full and fair evidentiary hearing is required. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

The Circuit Court did not, and could not, attach to the order any specific files and records refuting Appellant's claims. Appellant's claims of ineffective assistance of counsel were properly raised in this 3.850 proceeding and require evidentiary resolution. This Court should remand this case for an evidentiary hearing and a full and fair independent ruling by the trial court.

(IV)

MR. HUFF WAS DENIED HIS FUNDAMENTAL RIGHT TO CONFRONT THE CENTRAL EVIDENCE AGAINST HIM IN THESE CAPITAL PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND THE COURT'S RULING PRECLUDING COUNSEL'S EFFORTS DEPRIVED APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him." The right to confrontation is primarily exercised through cross-examination. Douglas v. Alabama, 380 U.S. 415 (1965).

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

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

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

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

The Courts of Florida also recognized the impropriety of restricting cross-examination regarding bias, motive or self-interest. See Livingston v. State, 565 So.2d 1288 (Fla. 1988). See also Cherry v. State, 572 So.2d 521, 522 (Fla. 1st DCA 1991) (referring to the "absolute right to elicit facts showing a state witnesses' bias, motive or self-interest," citing Morrell v. State, 297 So.2d 579 (Fla. 1st DCA 1974); Hernandez v. Ptomey, 549 So.2d 757 (Fla. 3d DCA 1989)).

In Mr. Huff's trial, Sheriff Johnson was a critical witness. He alone stated that he heard Mr. Huff say, "I shot them in the

face" (R. 1005-1007). Mr. Huff denied ever having said this. There was a credibility conflict between Johnson and Appellant. The defense had obtained some very significant information with which to challenge Johnson's credibility (R. 1065-1070). The trial court, however, precluded the defense's efforts to show Johnson's interest, bias, and lack of credibility. Johnson was under investigation for alleged sexual improprieties while in office (R. 1066-1067). The investigation on Johnson had commenced in late 1979 (R. 1067-1068). Since Sheriff Johnson was running for re-election in 1980, at the time of Appellant's arrest, the timing of the Huff investigation was critical to Johnson's re-election campaign. The defense was prepared not only to cross-examine Johnson but also had witnesses who would have testified about Johnson's bias and interest relating to the Huff case.

The defense argued at trial that this testimony went to impeachment of the witness and showed his bias and motive for testifying as he did. Johnson's public position that he "solved" a major crime with Mr. Huff's arrest was impressive campaign propaganda. The trial court precluded defense counsel from presenting and arguing this evidence.

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

> [B]ecause "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial <u>voluntariness</u> determination

> does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial.

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

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

> It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. at ___, 94 S. Ct. at 1111.

The factors to be considered include the importance of the witnesses' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination permitted. Id. at 1438.

Under settled Confrontation Clause principles, the error here cannot be deemed harmless error beyond a reasonable doubt. Sheriff Johnson's testimony was crucial to the State's case, particularly in light of the mishandling of the crime scene, and especially

because without it there was no incriminating statement. Mr. Huff had continuously and vigorously denied committing this crime. Sheriff Johnson's testimony was not cumulative -- no one else claimed to have heard the statement. No witnesses could corroborate Sheriff Johnson's account. However, no cross-examination on the issue of Sheriff Johnson's bias and interest was allowed. The failure to allow full cross-examination was constitutional error.

The trial court's ruling precluding defense counsel from pursuing appropriate avenues of confrontation rendered counsel ineffective. Counsel would so testify at an evidentiary hearing. The trial court's erroneous ruling also affected counsel's overall performance, as counsel never recovered from the court's preclusion on a central aspect of the case the defense wished to present. An evidentiary hearing was needed on the effect of the trial court's ruling on defense counsel's performance and on the error resulting from the trial court's ruling -- affording this Court an appropriate record for review of this claim.

(V)

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

Ronald Elliott, the crime scene investigator for the Hernando County Sheriff's Department, testified that Mr. Huff had refused to take a gunshot residue test while being transported to the jail after his arrest (R. 1754; 1851). The defense objected immediately before the testimony (R. 1750), immediately after the testimony (R.

1754), and moved for a mistrial (Id.). The defense again objected and moved for a mistrial when the prosecutor commented on the refusal (R. 1856-57). The State argued that the defendant did not have a right to refuse the gunshot residue test and that the refusal was not covered by the fifth amendment (Id.).

When they reached the jail, Appellant agreed to take the test and he then took it. "A gunshot residue test was administered at the jail but was inconclusive." Huff, 437 So.2d at 1088. The testimony about Mr. Huff's initial refusal was plainly irrelevant to explaining the inconclusive nature of the test results -- Mr. Huff obviously did not have the opportunity to wash off any residue while in the police car. The testimony was not only grossly prejudicial, it was inadmissible under constitutional standards. Appellant agreed to take the test, and evidence about the initial refusal was grossly misleading.

Appellant was never informed that a refusal may be used against him (Cf. Herring v. State, discussed infra). The fifth amendment provides, "No person shall be ... compelled in any criminal case to be a witness against himself...." A suspect in custody is therefore entitled to warnings if what he does in response to police questions is to be used against him. Doyle v. Ohio, 426 U.S. 610, 617 (1976). In Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980), the United States Supreme Court explained what constitutes questioning:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the

> term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

There was no court order directing that the test be taken here and Appellant was never informed by law enforcement that a refusal would be used against him at trial. Even where the defendant may not have a right to refuse to submit to taking the test, the admissibility of the refusal is governed by the fifth amendment.

Thus, in Herring v. State, 501 So.2d 19 (Fla. App.3 Dist. 1986), the Court held that it was error for the trial court to admit evidence of the defendant's refusal to submit to a gunshot residue test. The Court reasoned that the question was one of probativeness. Since the defendant had not been told that refusal to submit to the test would have any adverse consequences to him, it could not be assumed that the refusal to submit was circumstantial evidence on the issue of consciousness of guilt.

> The unfairness, of course, is that a defendant who is told he may refuse and is told of no consequences which would attach to his refusal may quite plausibly refuse so as to disengage himself from further interaction with the police to simply decide not to volunteer to do anything he is not compelled to do. In contrast, if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible.

Herring, 501 So.2d at 20.

In Herring, the State argued that because the residue test was compulsory, the defendant's refusal was admissible. The Court rejected this argument, holding:

> The simple answer to this argument is that the fact that the test legally could have been compelled is not relevant in determining the probative value of the defendant's refusal to take the test or the unfairness of admitting evidence of the refusal. Thus, the compulsory nature of the test is relevant only if there is evidence that the defendant was aware of its compulsory nature.

Herring, 501 So.2d at 21, applied in Occhicone v. State, 570 So.2d 902, 905 (Fla. 1990). Indeed, in Appellant's case, once he was advised that the residue test was compulsory, he did consent to it (R. 1765).

Here, as in Herring, the introduction of Appellant's initial refusal to submit to the residue test was for the purpose of showing "consciousness of guilt," not for some other purpose, such as in Occhicone, 570 So.2d at 905, where the refusal was admitted to refute Occhicone's claim of diminished capacity.

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

There was additional fifth amendment error in Appellant's trial. Under Doyle v. Ohio, 426 U.S. 610 (1976), a defendant's action in exercising his right to silence may not be used against him. In Doyle the defendant had remained silent after being read Miranda warnings and the State used this fact to try to impeach him

when he testified. The United States Supreme Court found constitutional error.

Here, however, the State improperly relied on Mr. Huff's silence as evidence of guilt. While Mabrey Williams, an investigator for the Sumter County Sheriff's Department, was testifying the following transpired:

> Q Okay. One final question, during the course of time that you spoke with the Defendant, James Roger Huff, at the crime scene, did he ever at any time say anything to you or ask anything of you about the condition of his parents or ask for help for his parents?
>
> A No, sir, he did not.
>
> Q Did he even mention his parents to you?
>
> A No, sir, he did not.
>
> MR. BROWN: A moment, Your Honor?
>
> THE COURT: All right.
>
> MR. BROWN: Thank you, Mr. Williams. Your Honor, if the Court please, the State does tender for recross-examination to Ms. Pepperman.
>
> MS. PEPPERMAN [DEFENSE COUNSEL]: Thank you, Your Honor. May we approach the bench?
>
> (WHEREUPON, the following bench discussion ensued outside the hearing of the jury and the Defendant.)
>
> MR. HILL [DEFENSE COUNSEL]: Judge, at this time we would move for a mistrial in this case. We think the prosecutor has made an unfair comment on the Defendant's right to remain silent. Mr. Williams and Mr. Rabon advised him of his rights and any comment by the prosecutor that he refused to say anything it's an unfair comment on his right to remain

silent. We think that the error is obvious and we would move for a mistrial at this time.

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

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

MR. BROWN: No, it was --

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

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

THE COURT: Motion denied.

MR. BROWN: Thank you, Your Honor.

(WHEREUPON, that concluded the bench discussion.)

(R. 1358-1360).

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

Peterson v. State, 405 So. 2d 997 (Fla. 3d DCA, 1981). Mr. Huff's failure to ask Williams about the condition of his parents was used by the State to seek the inference that he did not care. The

procedure involved fundamental error and rendered the trial fundamentally unfair.

(VI)

APPELLANT'S DEATH SENTENCE AND ITS AFFIRMANCE BY THIS COURT VIOLATED SOCHOR V. FLORIDA, CLEMONS V. MISSISSIPPI, AND HITCHCOCK V. DUGGER.

In his brief to this Court relating to the Circuit Court's initial summary denial of the Rule 3.850 motion, Appellant explained that the trial court's weighing of aggravation and mitigation had been infected with unconstitutionality and that this Court failed to meaningfully review and correct the sentencing errors after striking invalid aggravation on direct appeal. See Initial Brief of Appellant, Huff v. State, Case No. 74,201, pp. 57-59. Appellant cited Elledge v. State, 346 So.2d 998 (Fla. 1977), and the then pendency before the United States Supreme Court of Clemons v. Mississippi, 109 S.Ct. 3184 (1989) (granting certiorari review). See Initial Brief, Huff v. State, Case No. 74,201, pp. 58-59. Mr. Huff pursued his claim in the 3.850 proceedings before the trial court before and after the remand.

The Supreme Court's ultimate opinion in Clemons v. Mississippi, 494 U.S. 738, 752 (1990), and more to the point, the Court's opinion this Term in Sochor v. Florida, 112 S.Ct. ___, 6 FLW Fed. S323 (March 2, 1992), demonstrate that Appellant's argument has been the constitutionally correct one.

Sochor is new law directly affecting the disposition of this claim. Appellant also respectfully submits that the claim involves a fundamental factual error committed by this Court on direct

appeal when reviewing the trial court's findings on aggravation and mitigation. See, e.g., Parker v. Dugger, 111 S.Ct. 731 (1991). This claim is a valid one and, given the change in law, warrants reconsideration in these proceedings.

The trial judge relied on three aggravating factors to support the death sentence imposed -- pecuniary gain; heinous, atrocious or cruel; cold, calculated, premeditated. Huff v. State, 495 So.2d at 150-51. This Court struck the "pecuniary gain" factor. See Huff, 495 So.2d at 152 ("No evidence supporting this [pecuniary gain] theory was produced during the guilt phase, and the record is devoid of evidence of any attempt by the state to introduce such evidence during the penalty phase.")

The trial court also found as a mitigating factor that Mr. Huff had no significant history of prior criminal activity. Id. at 151.[7] The trial court relied on the "Motion for the setting of bail" in support of the finding that Mr. Huff had no significant history of prior criminal activity (R. 3799; 3789). Based on a misreading of the record, however -- that the mitigating "factor of no significant prior criminal history was based exclusively on evidence from the first trial," Huff, 495 So.2d at 152 -- this Court struck the mitigator.

A. The Striking Of The Mitigation Was Based On A Misreading Of The Record

The trial judge did not find this mitigator "exclusively" on the basis of evidence "from the first trial." Rather, the primary

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[7] The trial judge's ignoring of other mitigating evidence is discussed infra.

evidence the judge relied on to find the mitigator was the evidence involved in Appellant's motion for bail (see R. 3799; 3789). The order on the motion for bail (that bail was not going to be granted) was in effect at the time of Huff II and was part of the case in Huff II. The motion for bail evidence was not evidence from the "first trial" but was a part of the litigation of the case in Huff II and in effect at the time of the litigation in Huff II. It was part of the Huff II record. Just as this Court affirmed the trial judge's reliance on the Huff I pretrial suppression hearing in the Huff II appeal, Huff, 495 So.2d at 149, the trial judge's reliance on the pretrial bail motion litigation in Huff II involved no impropriety. Indeed, a trial judge may rely on any evidence in the record to find mitigation. See Harvard v. State, 486 So.2d 537 (Fla. 1986); cf. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

This Court's misconstruction of the record in Huff II involved a fundamental error of fact akin to the one discussed by the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). The mitigator was a valid one; it was validly found; and it should not have been stricken. Indeed, the Huff II record was devoid of any competent, substantial evidence whatsoever that Appellant had a significant history of prior criminal activity.

The Court's error affected the disposition on appeal. Although the Court struck aggravation, leaving in effect only two of the aggravators found by the trial judge, the Court declined to

remand for resentencing because of the striking of the mitigation. Cf. Elledge v. State, 346 So.2d 998 (Fla. 1977).

The Court's fundamental error was one which directly denied Appellant his eighth amendment right to a resentencing by the trial court. Parker; Clemons. This error of fact, because of its fundamental nature -- one which directly affected the disposition on direct appeal to Mr. Huff's detriment (cf. Parker v. Dugger, supra) -- can be reconsidered and corrected in these proceedings. see Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986) (the court may revisit and correct an error previously ruled on during direct appeal where the error is fundamental in nature and deprived the defendant of constitutional rights). Relief is appropriate.

B. Sochor v. Florida

Although striking aggravation relied on by the sentencing judge and although only two aggravators remained, this Court did not remand for resentencing. The error involved in Appellant's case is the same as the error discussed by the United State Supreme Court in Sochor v. Florida, 112 S.Ct. ___, 6 FLW S323, S326 (1992), and warrants relief.

In Sochor, as here, this Court struck aggravation relied on by the sentencing judge to support the death sentence. In Sochor, as here, this Court then affirmed the death sentence without undertaking a meaningful harmless error analysis and in reliance on the inappropriate striking of the mitigator discussed above in section A. Compare Sochor, 6 FLW at S326, with Huff, 495 So.2d at 152.

Sochor demonstrates that reconsideration is appropriate. Indeed, the record now before the Court demonstrates that the aggravator struck on appeal was the aggravator which the trial court believed to be the most significant one supporting the death sentence. During clemency proceedings, the sentencing judge directly stated: "I believe his murder was for pecuniary gain and was premeditated. It is my feeling that Mr. Huff should be executed." (Interoffice Memorandum - Department of Corrections). Since sentence was imposed primarily on the basis of an aggravating factor which this Court found improper, this case should be remanded for a reweighing of aggravating and mitigating circumstances and a resentencing by the trial court. This Court has explained that it does not independently reweigh aggravating and mitigating circumstances. See Parker v. Dugger, 111 S.Ct. at 738, citing Brown v. Wainwright, 392 So.2d 1327, 1331-32 (Fla. 1981), and Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); see also Elledge v. State, 346 So. 2d 998 (Fla. 1977). The trial court's weighing here was infected with error and, under an appropriate application of constitutional harmless error analysis, the error could not be deemed harmless. Sochor; Clemons. The new decision in Sochor requires reconsideration and relief. The factors identified in the paragraph immediately below, and in subsections A (supra) and C, D, and E (infra) demonstrate that the error in the death sentence findings cannot be deemed harmless in this case.

The error was compounded by the trial court's refusal to even say anything about, much less to consider, mitigation apparent from the record in Huff II. As discussed in previous sections of this brief (see Argument II, supra), this record is replete with evidence relating to Mr. Huff's diminished mental state at the time approximate to the offense. Appellant was "in shock," confused, and "hysterical" when he had contact with Mr. Foster and the law enforcement officers who first arrived at the scene. Whether or not this evidence was sufficient to establish statutory mitigators such as extreme emotional disturbance, extreme duress, or substantially impaired capacity, the evidence was manifestly relevant to and supported nonstatutory mitigation. The trial court, however, gave the evidence no consideration whatsoever. The error warrants relief. Hitchcock v. Dugger, supra.

C. Purported Lack Of Remorse

As to aggravation, the trial court's order relied on a purported "lack of remorse" to support the findings of cold, calculated, premeditated and heinous, atrocious or cruel. This Court did not reverse on this basis on direct appeal. Huff, 495 So.2d at 153. This Court, however, subsequent to the direct appeal in Appellant's case held that "any consideration" of a defendant's purported lack of remorse is improper. Robinson v. State, 520 So.2d 1, 6 (Fla. 1988) (emphasis in original). Indeed, even in Pope v. State, 441 So.2d 1073 (Fla. 1983) -- the case cited by the Court on direct appeal when it denied relief on the "lack of remorse" issue -- this Court held:

> [A]bsence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

Pope, 441 So.2d at 1078 (emphasis added). See also Trawick v. State, 473 So.2d 123, 124 (Fla. 1985) ("[I]t is error to consider lack of remorse for any purpose in capital sentencing.")

This Court's resolution of the "lack of remorse" issue on direct appeal not only cannot be squared with this Court's established law in capital cases, it cannot be squared with Pope v. State itself -- the very case relied on to support the denial of relief on direct appeal. This is a claim of manifest and fundamental error. The error requires reconsideration and correction in these proceedings.

D. Heinous, Atrocious, Cruel

This Court affirmed the judge's heinous, atrocious or cruel finding on direct appeal. In Sochor, the United States Supreme Court discussed the vague and overbroad nature of this aggravator and the fact that this Court's application of the aggravator has resulted in serious questions about whether this Court and Florida's trial courts have enforced an appropriate constitutionally limiting construction in non-strangulation cases. See Sochor, 6 FLW Fed. at S325. Appellant's is not one of those cases where the United States Supreme Court held that this Court has enforced a limiting construction. Id. The application of this vague factor in Appellant's case warrants reconsideration and the granting of relief in light of the intervening decision in Sochor.

E. Cold, Calculated, Premeditated

Just as there was not evidence supporting "pecuniary gain" in the Huff II record, there was absolutely no evidence of "heightened premeditation" -- of a calculated, pre-arranged plan. Cf. Rogers v. State, 511 So.2d 526 (Fla. 1987). The application of this aggravator and its affirmance involved fundamental error, warranting reconsideration and relief.

F. Conclusion

As discussed above, there was substantial error in the findings as to aggravation and mitigation and the review of the death sentence resulting from those findings on direct appeal. Each of the matters discussed above is relevant to a constitutional meaningful harmless error analysis. Appellant's death sentence and its affirmance were infected with error. Intervening changes in law and the fundamental nature of the prior errors warrant reconsideration. This Court does not independently weigh aggravation and mitigation. Proper evaluation and sentencing findings by the trial court sentencer are appropriate.

(VII)

THE PROSECUTOR'S SYSTEMATIC EXCLUSION OF NON-WITHERSPOON-EXCLUDABLES VIOLATED MR. HUFF'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT OR OTHERWISE TO LITIGATE THIS ISSUE.

Through its use of peremptory challenges, the prosecution systematically excluded all potential jurors from Appellant's trial who indicated even a question regarding the death penalty, thus

ensuring that the trial would be heard by a conviction prone jury panel.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court stated:

> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

391 U.S. at 520-1 (footnotes omitted)(emphasis added).

The State with its peremptory challenges did exactly what the above passage was intended to forbid -- it swept from the jury all who expressed any questions about the death penalty (Shreve, R. 324; Patterson, R. 325; Bell, R. 375; Norman, R. 431; Archer, R. 456; Smith, R. 456; Sliwoski, R. 469; Recob, R. 469; R. 472; Morgan, R. 475; Ruth, R. 475; Donk, R. 479)[8]. In the process, the State left a jury prone to convict and impose death.

Appellant submits that the State cannot achieve through its use of peremptory challenges what the Constitution prohibits it

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[8] The specific statements of these venire members are set out at length in the Rule 3.850 Motion, pp. 63-75 (M. 63-75),and, in the interests of avoiding redundancy, are not repeated here. Eleven of the twelve jurors struck by the State expressed some concern about the death penalty, but all of them said that their concerns would not have affected their functions at trial or sentencing and each stated that they would be able to convict and impose death.

from achieving through challenges for cause. Peremptory challenges are not of constitutional dimension. In a situation such as this where a constitutional right to an impartial jury comes into conflict with the statutory right to exercise peremptory challenges, the former (the constitutional right) prevails. Gray v. Mississippi, 107 S.Ct. 2045 (1987). To permit prosecutors to excuse peremptorily every prospective juror who expresses a concern about capital punishment directly implicates the concerns expressed in Witherspoon and Gray and the defendant's constitutional rights to an impartial jury.

Defense counsel failed to object to this process. The failure to object to this procedure involved ineffective assistance of counsel and was supported by no tactic or strategy. Mr. Huff's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. An evidentiary hearing and relief are appropriate.

(VIII)

COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WITH REGARD TO WAIVER OF THE PENALTY PHASE JURY SENTENCING.

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

The jury in Mr. Huff's case returned verdicts of guilt on Friday evening (R. 3089-90). After the jurors were polled, discussion was had to determine when the penalty phase would begin. Mr. Huff then stated to the prosecutor: "Mr. Brown, I'll waive the second phase and accept the sentence" (R. 3093). Defense counsel asked for a recess, but the court responded, "...but don't prolong it too much" (R. 3093). Counsel ineffectively did not ask for a reasonable time period to discuss the matter fully with Appellant. Moreover, due to counsel's inadequate preparation for sentencing, counsel "could not have advised [Appellant] fully as to the consequences of [the] choice" not to present mitigating evidence, i.e., counsel could not advise Appellant regarding the existence and effect of mitigation which the attorneys had not investigated. See Blanco v. Singletary, 943 F.2d 1477, 1501 (11th Cir. 1991). Counsel's performance was prejudicially deficient -- but for the ineffectiveness, there would have been no waiver.

When court reconvened the State objected to the waiver (R. 3096). After colloquies between Mr. Huff and the court (R. 3097-99), and Mr. Huff and the prosecutor (R. 3099-3101), the court accepted the waiver.

Appellant has submitted in these proceedings that the waiver was invalid for a number of reasons. First, defense counsel had not reasonably prepared for sentencing and had not effectively investigated mitigation. Counsel therefore could not meaningfully discuss with Appellant what Appellant was foregoing. Blanco, supra. Second, Appellant pled that counsel did not actually

discuss the waiver meaningfully with Appellant. Counsel did not request sufficient time to discuss the situation with Appellant and did not engage in reasonable communication during the time he had. As the Eleventh Circuit Court of Appeals noted in Blanco, the eve of the penalty phase is not an appropriate time for such discussions -- they cannot be conducted meaningfully in such circumstances.

Third, Appellant has alleged that counsel rendered ineffective assistance in not seeking a mental health evaluation of Appellant -- who was obviously distraught at the time of the waiver and whose condition undermined a constitutionally valid, knowing and intelligent waiver.

An evidentiary hearing on the issue of counsel's ineffective assistance was warranted. But for these errors of counsel, there would have been no waiver.

Fourth, Appellant has asserted in these proceedings that the "waiver colloquy" itself was insufficient. The court never ascertained Appellant's understanding of the mitigation he was forgoing. The court never asked counsel to state on the record what mitigation he had prepared. The colloquy was insufficient to meet this Court's requirements. Appellant has also asserted that defense counsel rendered ineffective assistance in failing to object to the trial court's improper colloquy.

Here, defense counsel had part of one evening to discuss this waiver with Appellant. Although Florida case law indicates that a defendant may waive a jury sentencing penalty phase, such a waiver

must be knowing, voluntary, and intelligent. Durocher v. State, ___ So.2d ___, 17 FLW S542 (Fla. Case No. 77,745, 1992).[9] Where counsel renders ineffective assistance, the resulting waiver cannot be deemed valid. Where the colloquy is insufficient, the resulting waiver again cannot be deemed valid.

Although a defendant has the "authority to make certain fundamental decisions regarding the case," see Wainwright v. Sykes, 433 U.S. 72, 93 n.1, (1977) (Burger, C.J., concurring), such decisions should only be made after full consultation with and proper advice from competent counsel.

In Mr. Huff's first trial, the evidence presented in mitigation consisted of one page of testimony from his brother, Jeff Huff:

> Q. Jeff, you are Jim Huff's brother, is that correct?
>
> A. Yes, it is.
>
> Q. Did there come a time and because of your father's blindness, someone had to step in and take over?
>
> A. Yes, sir.
>
> Q. Would you explain that, sir?
>
> A. Yes, sir. Well, I can start from the beginning, if you would like me to. My dad and I were on vacation, quite a few years

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[9] Other courts have found that there can be no such waiver. See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978)("The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue -- the propriety of allowing the state to conduct an illegal execution of a citizen."). Appellant's counsel acknowledge this Court's rulings, but respectfully assert that no penalty phase waiver should be deemed valid under our jurisprudence.

ago, and his eyes went bad on him while we were on the trip. And, he did drive back with bad eyes, I was just a small boy then, and after that, it put their business in jeopardy, and everything else, and Jim immediately stepped in and took over and worked extra hard to make it go and he did a real good job. And, he never complained, or did anything else about it, he just took it and did the job.

Q. How long did he do that?

A. Until they sold the store.

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

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

MR. JOHNSON: No further questions.

MR. BROWN: Judge, I have no questions.

(First ROA, 1300).

The Huff II record does not show if Mr. Huff was advised that more could be presented in Huff II or even if an adequate investigation of mitigation by counsel was undertaken in Huff II. In these 3.850 proceedings, Appellant alleged that such an investigation had not been undertaken. Thus, for example, Mr. Huff was only evaluated by a mental health expert during post-conviction proceedings. Defense counsel never secured an expert evaluation to ascertain whether mitigation was available, and thus could provide Mr. Huff with no advice on what mitigation could be presented through expert testimony. Dr. Krop evaluated Mr. Huff during post-conviction proceedings, and his report, proffered below (Motion to Vacate, Att. 3), reflects that mitigation could have been presented

on Mr. Huff's behalf. Mr. Huff, however, received no proper advice on such issues because counsel had not reasonably prepared for the penalty phase.

Additional mitigation that could have been developed included evidence relating to Mr. Huff's diminished mental state (see Argument II, supra) at the time of his arrest, shortly after the alleged offense; evidence of Mr. Huff's lack of a significant history of prior criminal activity; and evidence regarding Mr. Huff's positive background, employment, and the respect he had earned in the community.

Since proper investigation was not conducted, however, no proper advice was given to Mr. Huff. With proper advise, the choice would have been quite different. However, counsel here informed neither the court nor Mr. Huff as to what mitigation was available for presentation. Mr. Huff alleged that if mitigation had been presented, the result would have been different.

An evidentiary hearing is necessary, inter alia, to determine whether Mr. Huff received effective assistance of counsel and proper advice when deciding whether to waive a jury sentencing proceeding. Petitioner pled that he did not. The lower court erred in failing to allow evidentiary resolution. If a defendant can be constitutionally allowed to make such waivers, the decision should not be made without adequate time to fully consider options, and cannot be made without adequate assistance and advice from counsel.

The files and records do not show conclusively that Mr. Huff is entitled to no relief. An evidentiary hearing is appropriate.

CONCLUSION

On the basis of the foregoing, Appellant prays that the Court reverse the lower court's ruling, remand for an evidentiary hearing, and set aside his unconstitutional convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 13th day of Avgvst, 1992.

Billy H Nolas
Attorney