IN THE SUPREME COURT OF FLORIDA

NO. 83163

MILFORD WADE BYRD,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION OF CLAIMS

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Byrd was deprived of the effective assistance of counsel on direct appeal and during his Rule 3.850 proceedings, that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives, and that his death sentence is neither, fair, reliable, nor individualized.

PROCEDURAL HISTORY

Debra Faye Byrd, the wife of Petitioner, Milford Wade Byrd, was killed on October 13, 1981. On October 28, 1981, at 2:30 a.m., police entered Mr. Byrd's residence without a warrant in order to arrest Mr. Byrd for the murder. At the time of Mr. Byrd's arrest, Jody Clymer was present in the residence. She was directed by the police to accompany the arresting officers to the Tampa Police Department. Mr. Byrd and Ms. Clymer were transported to the police department by the arresting officers.

At 2:55 a.m., the arresting officers began an interrogation of Mr. Byrd after Mr. Byrd signed a "Consent to Interview" embodying an advisement of constitutional rights. During the ensuing three hours of interrogation, Mr. Byrd made no statements to the police either implicating himself or denying involvement in the alleged first degree murder of Debra Byrd for which he had been arrested. Mr. Byrd was silent. The police ignored Mr.

Byrd's silence and continued to try to get him to talk. One officer told Mr. Byrd that the police did not know how to deal with Mr. Byrd's silence. Mr. Byrd steadfastly maintained his silence for nearly three hours. He finally asked if he could see his girlfriend, Jody Clymer, who was still present at the police department. Mr. Byrd was concerned for Ms. Clymer's well-being; he was afraid the police was trying to build a case against her. The interrogating officers agreed to allow Mr. Byrd to speak to Ms. Clymer privately after first eliciting a promise from Mr. Byrd to then tell them what they wanted to hear. One of the interrogating officers (Detective Reynolds) approached Ms. Clymer with tears in his eyes, took her hand, and told her to go in and talk to Mr. Byrd because he was being eaten up with guilt (R. 303, 717, 720). After a private conversation with Ms. Clymer, Mr. Byrd felt compelled to protect her by giving the interrogating officers the statement they wanted. The statement began at 5:35 a.m. After his statement, Mr. Byrd was booked for the first degree murder of his wife and Ms. Clymer was released (R. 724).

Pursuant to Florida law, Mr. Byrd was given a First Appearance during which he was advised of his Sixth Amendment rights to counsel. Mr. Byrd expressed his desire to be represented by counsel. Subsequently, on October 30, 1981, the police initiated a further interrogation of Mr. Byrd without counsel present and obtained an additional statement from him.

Mr. Byrd was indicted for first degree murder on November 12, 1981 (R. 1702). The prosecution felt unsure of the strength of its evidence. Prior to his trial, a co-defendant, Ronald Sullivan, was given probation for testifying against Mr. Byrd. Mr. Sullivan testified at Mr. Byrd's trial that Mr. Byrd hired him to kill Mr. Byrd's wife. The jury returned a verdict of guilty on July 23, 1982, for first degree murder (R. 1282, 1899).

Mr. Byrd's sentencing phase began Monday, July 27, 1982 (R. 1286). The jury returned a death recommendation (R. 1349-50). Mr. Byrd was sentenced to death on August 13, 1982 (R. 1692). The sentencing judge filed his written Sentencing Order on November 15, 1982 (R. 1982-1991).

Mr. Byrd appealed from the judgment of conviction and sentence. Mr. Byrd's conviction and death sentence were affirmed by the Florida Supreme Court on November 14, 1985. Byrd v. State, 481 So. 2d 468 (Fla. 1985), cert. denied, 476 U.S. 1153, 106 S. Ct. 2261 (1986).

Mr. Byrd filed a Rule 3.850 motion on May 27, 1988. The circuit court denied relief, and Mr. Byrd appealed. This Court denied Mr. Byrd's appeal. Byrd v. State, 597 So. 2d 252 (Fla. 1992).

This is Mr. Byrd's first and only petition for habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND TO GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Byrd's sentence of death, and of this Court's appellate review. Mr. Byrd's claim is therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct the error pled here, is warranted in this action. As the petition shows, habeas corpus relief is more than proper. This Court therefore has jurisdiction to entertain this petition and to grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Byrd asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE STATE OF FLORIDA VIOLATED MR. BYRD'S RIGHT TO REMAIN SILENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THIS COURT'S RESOLUTION OF THIS ISSUE ON DIRECT APPEAL WAS IN ERROR.

On October 28, 1981, Mr. Byrd was arrested at his home and taken to police headquarters. There he was given Miranda warnings[1] and signed a written waiver which provided in pertinent part:

> I, Wade Byrd do hereby consent to being interviewed by Det. K.C. Newcomb Det. R.J. Reynolds concerning the offense of homicide. I understand that . . . I have the right to remain silent and not answer any questions asked of me relative to this crime . . . .

(State's Trial Exhibit 32).

For nearly three hours thereafter, Mr. Byrd maintained his silence while the police tried in vain to prompt a response. Mr. Byrd then requested to speak to his girlfriend, Jody Clymer, and the police permitted a private conversation of six minutes

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

duration with Ms. Clymer before resuming the interrogation during which Mr. Byrd made a statement. Mr. Byrd moved to suppress his statement, which the trial court denied. At the hearing to suppress Mr. Byrd's statement, ample evidence was presented to show that he had remained silent at the time of his interrogation and thus invoked his constitutional right of silence:

> Q. And isn't it true, Detective Newcomb, that during this two-and-a-half hour period that you told Mr. Byrd that you did know how to deal with his silence ?
>
> A. There was a lot said during that period. I may have said that.

(R.679)

> Q. Well, isn't it true that he never verbally articulated anything to you and that he maintained his silence during nearly three hours of your telling him what you thought the facts were ?
>
> A. Yes, except at the end he did make certain confessions.

(R.681)

> Q. Isn't it true that he was initially arrested at or about 2:35 in the morning, 2:55 in the morning and that almost three hours passed before he gave a statement to you or any other person in your presence, sir?
>
> A. That's correct.
>
> Q. Isn't it true that during this entire three hours of almost time span that you and/or Detective Newcomb were telling Byrd what other witnesses had allegedly told you about the homicide?
>
> A. The whole time, no, sir.
>
> Q. During any point in time?

A. Yes, sir.

Q. Isn't it true that from 2:55 in the morning until 5:35 in the morning, almost three hours, that Wade Byrd had neither admitted his guilt or denied his guilt during the entire period of time ?

A. Not -- that is not totally true....

Q. He made statements during the interim that involved him in the homicide ?

A. He made statements to the effect that he wanted to talk to his girlfriend and would tell us the truth.

Q. Did he make statements to you during that period of time prior to talking to the girlfriend that he was involved in a homicide?

A. No, sir, he did not.

(R. 713-14)

Q. Well, what had he said at that point in time to implicate himself in a homicide, Detective?

A. He said to me, "Let me talk to Jody," and I told him that was not our procedure. He said, "If you let me talk to Jody I will tell you the truth."

Q. You are a homicide detective. What did he mean by "I will tell you the truth"? Had he made any statement prior to that?

A. No sir.

Q. Well what exactly did he mean "I'll tell you the truth" at that point in time? Did you know?

A. I did not know, Mr. Johnson.

Q. What statement, Detective, had he made to implicate himself in the homicide at that point in time?

A. Nothing, sir.

Q. I'm sorry, I didn't hear you.

A. Nothing.

Q. So you were in error a minute ago when you said he made a statement, were you not? Either yes or no, sir.

A. Yes, sir.

(R. 718-19).

Q. Okay. Isn't it true, Detective Newcomb, that you remarked to Wade Byrd during the course of the interview that "I don't know how to deal with your silence and your calmness"? This is the interview on October 28th, 1981.

A. What was your question? Did I say that?

Q. Yes, sir?

A. Probably.

Q. And isn't it true, sir, that the reason you said that was because during the course of the interview Byrd was saying nothing and simply sitting listening to the discourse between you and Reynolds as to what the facts were?

A. Well, I can't say yes and no. It was -- that is partially correct and it was probably also a pact [sic] that we were using.

Q. You have gone to interrogation schools, have you not, sir?

A. Yes, I have.

Q. You have interrogated people before, have you not, sir?

A. I have.

Q. And yet you remark that this was a difficult interview, did you not?

A. It was a difficult interview.

Q. And it was a difficult interview because for the majority of the time the Defendant neither confirmed or denied?

A. That is correct.

(R. 831-32).

Q. And isn't true Detective Newcomb, that during that interview you remarked that the interview was pretty difficult because Mr. Byrd would neither admit nor deny his guilt in the particular homicide?

A. Yes, sir.

(R. 826).

Defense counsel argued at trial that Mr. Byrd's right of silence was violated: "Wade Byrd elected to maintain his silence. He ha[d] not said a single thing to [them] and yet they persist in an interview for three hours" (R. 698). Immediately thereupon, the judge ruled "the statement was knowingly given, voluntarily given and freely made." The judge did not address Mr. Byrd's three hours of silence. The judge seemingly accepted the State's assertion that "not saying anything is not an indication of a right to remain silent."

The State acknowledged Mr. Byrd's continued silence before making a statement, but asserted that Mr. Byrd's long silence and subsequent statements were nonetheless admissible: "This Defendant at no time invoked his right to remain silent. Merely not saying anything is not an indication of a right to remain silent." (R. 699).

On direct appeal, Mr. Byrd argued that the confession was unconstitutionally obtained and its admission violated Mr. Byrd's

"privilege against self-incrimination" (Initial Brief on Direct Appeal at 13). This was Mr. Byrd's lead issue. Mr. Byrd relied upon "Hawthorne v. State, 377 So. 2d 780 (Fla. 1st DCA 1979)(confession obtained by bringing defendant's children to police station and by telling defendant interrogation of them would stop if defendant confessed invalid)" (Initial Brief on Direct Appeal at 14). Mr. Byrd concluded "that he was worn down by repeated questioning for some two and a half hours clothes the confession with an involuntary nature" (Initial Brief at 15). The State responded "the lack of spontaneity alone did not render the statement inadmissible" (Answer Brief on Direct Appeal at 7). This Court found Mr. Byrd "signed a 'consent to be interviewed' form" and thus voluntarily submitted to interrogation. Byrd, 481 So. 2d at 472.

This Court's analysis has since been found to be erroneous. In Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992), Ms. Jacobs was Mirandized from a printed card, and she wrote "I understand" on the card. She later executed a waiver form. Then custodial interrogations began during which Jacobs remained silent, refusing to respond to questions including even questions regarding her name. Thereafter, successive sessions of questioning occurred encompassing more than two hours during which she made statements admitted against her at trial after the state court refused to suppress. "[B]y repeatedly refusing to speak at all to [the police], even to the point of not giving her name, Jacobs provided at least an equivocal or ambiguous

indication that she wished to remain silent." 952 F.2d at 1292.

Reversing, the Eleventh Circuit stated:

> **"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."** Lightbourne v. Dugger, 829 F.2d 1012, 1018 (11th Cir. 1987) (emphasis in original) (quoting Miranda, 384 U.S. at 473-74 []), cert. denied, 488 U.S. 934 [] (1988). **Law enforcement officials therefore must cease an interrogation if the suspect provides merely an "equivocal" or "ambiguous" indication of his desire to remain silent.** Delap v. Dugger, 890 F.2d 285, 290 (11th Cir. 1989), cert. denied, [] 110 S.Ct. 2628 [] (1990) ("equivocal indication" suffices); Lightbourne, 829 F.2d at 1018 ("ambiguous" invocation bars further questioning about investigation). **The suspect must only in some manner "evidence[] a refusal to talk further."** Moore v. Dugger, 856 F.2d 129, 134 (11th Cir. 1988).
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> After the initial exchange between Trooper Trice and Jacobs, Trice read Jacobs her Miranda rights. Jacobs said nothing else. She was placed in a patrol car. When Detective Gary Hill then repeatedly asked Jacobs her name, she refused to respond, telling him that "it didn't matter," and that "it didn't make any difference." Hill then recited her rights from a card and asked her to sign the card. Jacobs simply returned the card unsigned. Hill next asked her to write just her first name on the card. She again said nothing, and refused to comply. Hill still again asked her to sign the card. Jacobs finally wrote "I understand" on the card. Later at the police station, she repeatedly refused to respond when Hill again persisted in attempting, as Hill described it, "to get her name out of her." At trial, Hill concluded, "[s]he didn't want to tell me." Hill characterized his efforts throughout this period as an attempt "to find out what her status was in [the shootings]." Although Jacobs had not expressly invoked her right to remain silent, by repeatedly refusing to speak at all to Hill, even to the

point of not giving her name, Jacobs provided at least an equivocal or ambiguous indication that she wished to remain silent. Compare Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir.), cert. denied, 481 U.S. 1033, 107 S.Ct. 1965, 95 L.Ed.2d 536 (1986) ("Can't we wait until tomorrow" constitutes equivocal indication of right to cut off questioning) with Delap v. Dugger, 890 F.2d at 292-93 (questions regarding how long it would be before suspect could return home not an indication of "wish[] to terminate or delay questioning").

Once a suspect demonstrates her desire to terminate questioning, law enforcement officials may not take statements from the suspect unless they "scrupulously honor[]" the suspect's right to remain silent. Miranda, 384 U.S. at 479 []; Michigan v. Mosley, 423 U.S. 96 [] (1975). . . . Although determining whether the police have "scrupulously honored" the suspect's right requires a case-by-case approach, Jackson v. Dugger, 837 F.2d 1469, 1472 (11th Cir. 1988), cert. denied, 486 U.S. 1026 [] (1988), **this prophylactic standard minimally requires that for a "significant period of time" after the suspect has exercised her right to remain silent, the police must refrain from questioning her unless "the suspect both initiates further conversation and waives the previously asserted right to silence."** Delap v. Dugger, 890 F.2d at 290; Christopher v. State, 824 F.2d at 836, 851-42. **The police must equally honor equivocal and clear invocations.** Delap, 890 F.2d at 290.

Despite the fact that Jacobs quickly established that she desired to remain silent, Hill continued to question her about her identity until she finally stated that she was Sandy Jenkins and that she had joined the men as a hitchhiker. Hill clearly ignored Jacobs' right to cut off questioning. Although Hill may have been unsure whether Jacobs was indicating that she desired to remain silent, **he was entitled only to clarify whether she wished to remain silent.** Owen v. State of Alabama, 849 F.2d 536, 536 (11th Cir. 1988). Instead, Hill improperly

> persisted in probing her identity until he elicited this statement.
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> Within twenty minutes of this round of questioning, Hill moved Jacobs to another office in the police station for additional questioning. Jacobs was again advised of her Miranda rights. She executed another waiver form and made another exculpatory statement, differing from the first but equally untrue. **Because an insignificant amount of time had passed since Jacobs had invoked her right to remain silent, the police could take a statement only if she both had waived her right and had initiated further conversation.** See Delap, 890 F.2d at 290. Although Jacobs clearly waived her right, her exculpatory statement was "not the product of a conversation initiated by the suspect." Christopher, 824 F.2d at 844. The trial court thus should have also suppressed this statement.
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> * * *
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> Determination of the "significant period" following an invocation of the right to remain silent, as an inquiry merely corollary to that of determining scrupulous observance, thus involves careful scrutiny of the totality of the circumstances. See Jackson v. Dugger, 837 F.2d at 1432; United States v. Hernandez, 547 F.2d 1362, 1369 (5th Cir. 1978). We would eviscerate Miranda were we to hinge our evaluation of scrupulous observance on only the passage of a discrete amount of time from the suspect's invocation of her right to remain silent until a given round of subsequent questioning. . . . We decline to adopt an analysis that would "frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." Mosely, 423 U.S. at 102 []; see United States v. Hernandez, 574 F.2d at 1369.

Jacobs v. Singletary, 952 F.2d at 1291-93, 1294 (emphasis in **bold** added; parallel citations omitted).

In United States v. Ramsey, 992 F.2d 301 (11th Cir. 1993), the Eleventh Circuit had before it a fact situation almost identical to that found in Mr. Byrd's case. The Eleventh Circuit found that a Miranda violation occurred when officers continued to question Ramsey after Ramsey had invoked his right to silence by looking at the officer and then looking away when the officer had asked him if he wanted to make a statement:

> One way an individual can invoke his right to remain silent is by refusing to speak. (citations omitted). Although we have found no case in which a suspect's silence in response to a single question was held to be an invocation of his right to remain silent, we find it significant that agents here interpreted Ramsey's action of looking away after Prattes asked him if he wanted to make a statement as indicating that he did not want to talk to Prattes. ... Ramsey's refusal to speak with Prattes was at least an equivocal invocation of his right to remain silent because he indicated in some manner that he did not wish to speak.

United States v. Ramsey, 992 F.2d 301, 305 (11th Cir. 1993).

The Eleventh Circuit emphasized that once a suspect has at least "equivocally" indicated that he wishes to remain silent by refusing to speak investigators may ask questions designed only to clarify whether the suspect indeed wishes to remain silent. Ramsey, at 305; Jacobs v. Singletary, 952 F.2d 1282. In particular, they are precluded from asking questions or performing actions "that they should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The actions of Detective Reynolds in going to Mr. Byrd's girlfriend with tears

in his eyes in order to get her to tell him to confess clearly violated this prohibition. Detective Reynolds knew that Mr. Byrd was concerned for Ms. Clymer's well-being and treatment during the three hours between their arrest and Mr. Byrd's request to see her. Detective Reynolds knew that a motivated Ms. Clymer could push Mr. Byrd into giving up his silence. As a direct result, Mr. Byrd was persuaded to incriminate himself despite having indicated by nearly three hours of silence that he did not wish to speak to the police.

Detective Newcomb clearly indicated that Mr. Byrd maintained his silence throughout the three hours except for his statement at the end that he wished to see his girlfriend. Mr. Byrd's refusal to answer their questions was at least an "equivocal" invocation of his right to remain silent and so the actions of the police in continuing to question him violated his Fifth Amendment rights. Jacobs v. Singletary, 952 F.2d 1282; Ramsey.

Jacobs cannot be distinguished on the basis that Mr. Byrd signed a written waiver of his Miranda rights, whereas Ms. Jacobs did not. This distinction is irrelevant, as a waiver does not preclude a suspect from deciding at a later time to invoke his Fifth Amendment right to cut off questioning. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir. 1986), cert. denied 107 S. Ct. 307 (1986). Mr. Byrd's silence after signing his written waiver was thus an invocation of his right to remain silent, and any subsequent questions should have been restricted to clarifying whether in fact he

wished to remain silent. Jacobs. Moreover, if the police officers were in any doubt as to whether Mr Byrd wished to remain silent, then their duty was to clarify his position, and they should not have continued to pressure him into answering their questions. In United States v. Pena, 897 F.2d 1075, rehearing denied 907 F.2d 1145 (11th Cir. 1990), the Eleventh Circuit Court of Appeals emphasized that police officers have a duty to clarify any ambiguous utterances or behavior by defendants.

Mr. Byrd's prolonged silence for nearly three hours after being Mirandized was, in its own right, an invocation of the right of silence which required the police to cease the interrogation. In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74 (emphasis added). See also Edwards v. Arizona, 451 U.S. 477, 482 (1981); Jacobs v. Singletary.

Refusing to answer questions for nearly three hours indicates an exercise of the right to remain silent. Even though the exact number of minutes necessary to constitute an invocation of the right of silence may be an open question (cf. Smith v. Illinois, 469 U.S. 91 (1984)), certainly it takes considerably less than one hundred eighty minutes of stoic silence to convey the invocation of the right to remain silent. See United States

v. Ramsey; Jacobs v. Singletary; See also, Edwards v. Arizona, 451 U.S. 477 (1981).

Further, Mr. Byrd's Fifth Amendment Miranda rights were violated by the police officers' failure to Mirandize Mr. Byrd following a **six minute break** following a three hour interrogation session during which Mr. Byrd had steadfastly remained his silence. During that six minute period Mr. Byrd conversed privately with his girlfriend. Until Mr. Byrd's six minute conversation with his girlfriend, Mr. Byrd had effectively invoked his right of silence by remaining silent for nearly three hours and had made no statements. Jacobs v. Singletary. Because only a very insignificant period of time, six minutes, had passed since Mr. Byrd invoked his right to silence for nearly three hours, it is Mr. Byrd who was required to initiate further conversations and the police were required to re-Mirandized and obtain valid waivers before Mr. Byrd made his statement. Miranda; Jacobs. The failure of the police to scrupulously honor Mr. Byrd's exercise of his Fifth Amendment right to silence, the police-initiated second interrogation session without a significant intervening period following the invocation of silence, and law enforcement's failure to Mirandize Mr. Byrd after he had invoked his right to silence before taking his subsequent statement all rendered the resulting statements inadmissible. United States v. Ramsey; Jacobs v. Singletary.

To be admissible, an accused's statements to law enforcement officers must have been voluntarily given. In Spano v. New York, 360 U.S. 315 (1959), the United States Supreme Court held:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. [citations] They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.
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> 360 U.S. at 323-24.

The police in the present case ignored Mr. Byrd's continued stoic silence for nearly three hours and employed psychological tactics designed to extract a confession in spite of his continued silence. One police officer told Mr. Byrd they did not know how to deal with his silence (R. 679). Finally, the officers agreed to let Mr. Byrd talk to his girlfriend, Jody Clymer, if Mr. Byrd would agree to afterwards tell them what they wanted to know.[2] A police officer with tears in his eyes then went to Ms. Clymer, who the police were holding at police

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[2]The officers maintain that he agreed to "tell them the truth" (R. 718). The differences in the language of the agreement has never been resolved.

headquarters, and told her to "go in there and talk to Mr. Byrd, his guilt was eating him up" (R. 717, 720). The police then had Ms. Clymer speak privately with Mr. Byrd for six minutes (between 0445 and 0451) (R. 685, 687). To this point, for almost three hours Mr. Byrd had made no statements to the police (R. 696, 714, 1434).

The statements the police were then able to obtain from Mr. Byrd resulted from his desire to shield Ms. Clymer from harassment and to insure her prompt release (R. 935-36, 937-38). Under the circumstances, Mr. Byrd reasonably believed she was being held under arrest and would continue to be held until he, Mr. Byrd, cleared her by confessing (R. 937-39). Mr. Byrd's subsequent statements were not voluntary.

Mr. Byrd's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated by the introduction of evidence of Mr. Byrd's exercise of his right to remain silent and by his later statements extracted in violation of the Fifth Amendment.

To the extent that appellate counsel failed to adequately brief this issue on direct appeal to this Court Mr. Byrd was deprived of the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.[3] Evitts v. Lucey, 469 U.S. 387 (1985);

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[3]Mr. Byrd believes that this issue was raised on direct appeal. However, Respondent has argued in federal court that the claim was not raised on direct appeal. This position has been asserted by the State even though in the 3.850 appeal in this (continued...)

United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993). Performance of counsel fell well below acceptable standards, and Mr. Byrd was prejudiced. This petition should be granted.

CLAIM II

MR. BYRD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Appellate counsel failed to present to this Court, for review, compelling issues concerning Mr. Byrd's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 957, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). (emphasis in original). In Wilson, this court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the

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[3](...continued)
court the State argued: "The State would request that this Court take notice of issue I of the Appellant's brief on direct appeal. Not only did the defendant raise this claim in his brief, but this Court explicitly rejected it in its opinion" (3.850 Answer Brief at 65)(Attachment A). If Respondent now asserts and this Court agrees that this issue was not raised on direct appeal then it is clear that appellate counsel provided ineffective assistance of counsel.

> court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165. In Mr. Byrd's case appellate counsel failed to act as a "zealous advocate," and Mr. Byrd was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the following issue to the Florida Supreme Court. Mr. Byrd is entitled to a new direct appeal.

A. MR. BYRD'S DEATH SENTENCE WAS THE RESULT OF A WEIGHING PROCESS WHICH INCLUDED CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCES AND EVIDENCE AND ARGUMENT IN SUPPORT OF INVALID NONSTATUTORY AGGRAVATING CIRCUMSTANCES, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase of Mr. Byrd's trial, the jury was instructed to consider three (3) aggravating circumstances. The totality of the instructions given the jury on these aggravating circumstances tracked the statutory language as follows:

> The aggravating circumstances which you may consider are limited to any of the following that are established by the evidence:
>
> 1. The crime for which the defendant is to be sentenced was committed for financial gain;
>
> 2. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel;
>
> 3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
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> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one

> of life imprisonment without possibility of parole for twenty-five years.
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> Should you find sufficient aggravating circumstances to exist, then it will be your duty to determine whether mitigating circumstances exist to outweigh the aggravating circumstances.

(R. 1345-46).

As early as Furman v. Georgia, 408 U.S. 238 (1972) the United States Supreme Court has held that the penalty of death may not be imposed under a sentencing procedure that creates a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. This position was reaffirmed in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg the Supreme Court held:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 189.

The positions in Furman and Gregg, that forbid standardless sentencing discretion, was upheld in Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey the Supreme Court held that a state:

> ...must channel the sentencer's discretion by "clear and objective standards" Gregg v. Georgia, 428 U.S. at 198, that provide "specific and detailed guidance," Proffitt v. Florida, 428 U.S. 242, 253 (1976), and that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

Godfrey v. Georgia, 446 U.S. at 428.

Appellate counsel did not include in his Initial Brief on appeal a challenge to the Florida Statute setting forth the aggravating circumstances that were applied by Mr. Byrd's jury under the analysis of Furman, Gregg and Godfrey even though those cases were decided well before Mr. Byrd's trial and direct appeal to this Court. He also did not include a specific challenge to Mr. Bryd's sentence of death as being unconstitutional because of the vagueness of the sentencing statute, section 921.141, Florida Statutes, and because of the instructions actually given to the jury. Instead, appellate counsel simply left those issues to be reviewed pursuant to this Court's mandatory capital review without advocacy on behalf of Mr. Byrd.

The United States Supreme Court recently issued several opinions which unequivocally establish that Mr. Byrd is entitled to resentencing. See Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Richmond v. Lewis, 113 S. Ct. 528 (1993). These opinions establish that Eighth Amendment error occurred at Mr. Byrd's penalty phase. The sentencing jury was not provided constitutionally narrowed aggravating circumstances and was urged to consider nonstatutory aggravating factors. Since the State cannot establish that these errors were harmless beyond a reasonable doubt, Mr. Byrd is entitled to resentencing.

In Espinosa, the Supreme Court examined a claim that the Florida language regarding the "heinous, atrocious or cruel" aggravating factor was unconstitutionally vague and overbroad

because it provided insufficient guidance as to when that aggravator applied. The Supreme Court held the language found in the statute and standard jury instruction to be unconstitutionally vague, and explained:

> Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. See Sochor v. Florida, 504 U.S. ____, ____, 112 S.Ct. 2114, 2119 (1992); Stringer v. Black, 508 U.S. ____, ____, 112 S.Ct. 1130, 1140 (1992); Parker v. Dugger, 488 U.S. ____, ____, 111 S.Ct. 731, 738 (1991); Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. See Stringer, supra, at ____. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See Shell v. Mississippi, 498 U.S. ____ (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

Espinosa, 112 S. Ct. at 2928.

In Espinosa, the State argued that a Florida capital sentencing jury need not receive constitutionally narrowed aggravating circumstances because, according to the State, the jury in Florida is not the sentencer for Eighth Amendment purposes. Espinosa, 112 S. Ct. at 2928. The Supreme Court rejected that argument, holding that a Florida capital sentencing jury is a sentencer for Eighth Amendment purposes and must received constitutionally narrowed aggravating circumstances:

> Our examination of Florida case law indicates, however, that a Florida trial

> court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2 d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 838, 829, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 112 S. Ct. 2928. The Supreme Court concluded by emphasizing, "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Id.

In Stringer v. Black, the Supreme Court explained that the Florida capital sentencing statute, like the Mississippi statute

at issue in Stringer, requires the jury and judge to weigh aggravating factors against mitigating factors in determining whether to impose life or death. Stringer, 112 S. Ct. at 1137. The Supreme Court discussed the "critical importance" of the distinction between weighing states and nonweighing states in assessing the effect of a sentencer's consideration of an invalid aggravating factor:

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. This clear principle emerges . . . from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.

Id.

In Stringer, as in Espinosa, the Supreme Court stressed that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." 112 S. Ct. at 1139. Use of

an aggravating factor "of vague or imprecise content" has a substantial impact upon capital sentencers who weigh aggravating and mitigating factors:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

Id.

Sochor v. Florida also discussed the effect of reliance upon invalid aggravating circumstances in a weighing state like Florida:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," Stringer v. Black, 503 U.S. ____, ____ (1992)(slip op., at 12), by placing a "thumb [on] death's side of the scale," id., at ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id, at ____ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104

(1982)); see Parker v. Dugger, 498 U.S. ____, ____ (1991)(slip op., at 11).

112 S. Ct. at 2119.

Espinosa, Sochor, and Stringer demonstrate that Mr. Byrd was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the three aggravating factors submitted to the jury were vague and overbroad: "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. Additionally, the jury was urged to consider nonstatutory aggravation.

Espinosa held that Florida capital juries must be properly instructed regarding the application of aggravating circumstances because "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." Espinosa, 112 S. Ct. at 2928. "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 112 S. Ct. at 2928.

Therefore, even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Espinosa, 112 S. Ct. at 2928. In imposing the death sentence, the trial court presumably

considered the jury recommendation, also presumably giving it the "great weight" required by Florida law. Espinosa, 112 S. Ct. at 2928. Thus, "the trial court indirectly weighed the invalid aggravating factor[s] that we must presume the jury found. This kind of indirect weighing of . . . invalid aggravating factor[s] creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, . . . and the result, therefore, was error." Id.

The heinous, atrocious or cruel aggravator considered by Mr. Byrd's jury does not satisfy the Eighth Amendment. Mr. Byrd's jury was given the identical aggravator given in Espinosa. Compare R. 1345-46 ("The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel") with Espinosa, 112 S. Ct. at 2928 ("One of the [penalty phase] instructions informed the jury that it was entitled to find as an aggravating factor that the murder . . . was 'especially wicked, evil, atrocious or cruel"). The Supreme Court held this aggravator to be unconstitutionally vague. Id.[4]

The "cold, calculated and premeditated" aggravator was also unconstitutionally vague. While the Florida Supreme Court has provided a narrowing construction of this aggravator, Mr. Byrd's

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[4]Additionally, this Court has held that this aggravator only applies where the evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"). Mr. Byrd's jury was not advised of this limitation and was not given any definition of the elements of this aggravator.

jury was unaware of the narrowing construction. In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence of absence of the factor." Espinosa, 112 S. Ct. at 2928. The Florida Supreme Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court has consistently rejected this aggravator when these limitations are not proven beyond a reasonable doubt. See, e.g., Waterhouse v. State, 17 Fla. L. Weekly S277, 280-81 (Fla. May 7, 1992); Gore v. State, 17 Fla. L. Weekly S247, 250 (Fla. Apr. 16, 1992); Jackson v. State, 17 Fla. L. Weekly S237, 239 (Fla. Apr. 9, 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Mr. Byrd's jury was not told about these limitations but presumably found this aggravator present. Espinosa. The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As the Florida Supreme Court has held, this definition does not establish the "cold, calculated and premeditated" aggravator.

The jury also received the overbroad "pecuniary gain" aggravating factor. In Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), this Court said that to find the aggravating circumstances of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions or profiting from his illicit acquisition." In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), the court further explained that Peek held, "it has [to] be [] shown beyond a reasonable doubt that **the primary motive** for this killing **was pecuniary gain.**" In Mr. Byrd's case, the jury received no guidance explaining this limiting construction or the proper application of this aggravating circumstance. The judge "fail[ed] adequately to inform [Mr. Byrd's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright.

Further, this Court has repeatedly held that aggravating circumstances specified in Florida's death penalty statute, §921.141(5), Fla. Stat., are exclusive, and no other circumstances or factors may be used to aggravate a crime for purpose of imposition of the death penalty. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); Miller v. State, 373 So. 2d 882 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988). The State's presentation of and both sentencers' consideration of impermissible nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion, creating a constitutionally unacceptable risk that

the sentencers imposed the death penalty in an arbitrary and capricious manner. See, Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Lowenfield v. Phelps, 108 S. Ct. 546 (1988). These impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Byrd's constitutional rights. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This error undermined the reliability of the jury's sentencing determination and prevented the jury from properly weighing the mitigation presented by Mr. Byrd. Extra thumbs had been improperly place on death's side of the scale. Stringer.

Considering invalid aggravating factors adds thumbs to "death's side of the scale," Stringer, 112 S. Ct. at 1137, "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 1139. The errors resulting from the unconstitutional instructions regarding aggravating circumstances provided to Mr. Byrd's jury and from the introduction of nonstatutory aggravation were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139. In Florida, the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Stringer. Thus, assessing whether an error occurring during the sentencing process was harmless or not requires assessing the effect of the error on the weighing process. In Mr. Byrd's case, the jury must be presumed

to have considered invalid aggravating factors, Espinosa, and to have weighed these invalid aggravating factors against the mitigation. Unless the State can establish beyond a reasonable doubt that the consideration of the invalid aggravating factors had no effect upon the weighing process, the errors cannot be considered harmless.

The facts that all three aggravating factors provided to the jury were invalid and that there was mitigation in the record establish that the errors were not harmless beyond a reasonable doubt. In Mr. Byrd's case, the trial judge found the statutory mitigating factor that Mr. Byrd had no significant criminal history (R. 1988). Although the judge's sentencing order does not address nonstatutory mitigation, there was nonstatutory mitigating evidence in the record. For example, co-defendant Sullivan who murdered the victim received only a sentence of probation. Such disparate treatment is a valid mitigating factor. Additionally, the record established that Mr. Byrd had no history of violence, was a hard worker, and was gainfully employed. These factors are valid mitigation.

Considering that the three aggravating factors were invalid and that there was mitigation in the record, it cannot be established beyond a reasonable doubt that the erroneous jury instructions regarding aggravating circumstances and the introduction of nonstatutory aggravation were harmless. The jury was permitted to weigh invalid aggravating factors against the mitigation, adding a "thumb" to "death's side of the scale."

Stringer, 112 S. Ct. at 1137. These errors skewed the weighing process in a case where mitigation is present in the record, and thus the errors were not harmless. See also Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J., specially concurring)("I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached."). Mr. Byrd is entitled to relief.

To the extent that appellate counsel failed to this issue on direct appeal Mr. Byrd was deprived of the effective assistance of counsel as guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This error constituted the denial of due process which rises to the level of fundamental error. State v. Johnson, 18 Fla. L. Weekly 55 (Fla. 1993). The jury was not advised of the elements of the aggravating circumstances. Where the jury is not advised of the elements of the crime, such error is fundamental. Counsel's performance on direct appeal fell below any acceptable standard. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). Had this issue been briefed to this Court on direct appeal there is every degree of certainty that relief would have been granted on this claim.

B. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. BYRD'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE.

At the time of Mr. Byrd's trial, the language of sec. 921.141 Fla. Stat., which defined the "heinous atrocious and cruel", "cold, calculated and premeditated" and the "pecuniary gain" aggravating factors were facially vague and overbroad. "[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 113 S. Ct. 528, 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

In Florida, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). This indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendments. Id.

Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

Richmond and Espinosa have established that Mr. Byrd's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Byrd's jury was so instructed. (R. 1347). The State failed to prove each of these aggravating circumstance beyond a reasonable doubt. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Byrd's jury received wholly inadequate instructions regarding the elements of the aggravating

circumstances submitted for the jury's consideration. This was fundamental error. State v. Jones.

Moreover, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process. State v. Johnson, 18 Fla. L. Weekly at 56.

To the extent that appellate counsel failed to discuss the fundamental error in the direct appeal, he rendered deficient performance. Certainly, this Court was obligated to review for reversible error pursuant to its mandatory review in capital cases. However, Mr. Byrd was denied an advocate as to this unconstitutional statute. Mr. Byrd was deprived the effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). This Court must grant habeas relief and allow Mr. Byrd a new direct appeal where he will be adequately represented.

C. THE SENTENCING COURT ERRED BY FAILING TO PROPERLY AND TIMELY IMPOSE A WRITTEN SENTENCE OF DEATH, IN DIRECT VIOLATION OF FLORIDA LAW AND MR. BYRD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Sentencing was conducted on August 13, 1982, but not until November 15, 1982 did the court enter an Order imposing the death penalty with findings of fact (R. 1982-91). This was not a contemporaneous independent weighing by the court of the applicable statutory and constitutional standards as Florida law requires.

Contemporaneous written findings of fact in support of a death sentence are required. Section 921.141, Florida Statutes; see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993). Florida law requires the sentencing court to state specific reasons for the imposition of the death penalty. The sentencing court failed to properly state its reasons justifying the death sentence on the record. Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

The fundamental precept of the Florida Supreme Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, the Florida Supreme Court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. This Court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors before determining the appropriateness of the death penalty in a given case. Patterson v. State, 513 So. 2d 1257 (Fla. 1987).

In this case, the trial judge did not prepare findings until well after the filing of the notice of appeal. The notice of appeal was filed on August 13, 1982 (R. 1927) and the judges written findings were filed on November 17, almost three months later. In fact, the court did not realize that it needed to make

written findings. The trial court tried to remedy this error by filing his findings late. At the bottom of the last page the following comment was typed in:

> Sentencing of defendant was completed on August 13, 1982 but filing of this report was completed on November 15, 1982.

(R. 1991). Even though the sentencing was completed the "contemporaneous" findings were not filed until November 17. It is obvious that the court made an error which he tried to remedy on November 17, 1982, after jurisdiction had transferred to this Court. Without Mr. Byrd present, the court adopted the written findings well after the oral pronouncement. This was not as required by Florida law.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct

> 1950, 40 L.Ed.2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

The duty imposed by the legislature directing that a death sentence may only be imposed when there are specific written findings in support of the penalty serves to provide for meaningful review of the death sentence and fulfills the Eighth Amendment requirement that a death sentence not be imposed in an arbitrary and capricious manner. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The specific written findings allow the sentencing body to demonstrate that the sentence has been imposed based on an individualized determination that death is appropriate. Cf. State v. Dixon,

283 So. 2d 1 (1973). As the Florida Supreme Court recently stated:

> We reiterate . . . that the sentencing order should reflect that the determination as to which aggravating and mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to "memorialize" the trial court's decision. Van Royal, 497 So. 2d at 628. Specific findings of fact provide this Court with the opportunity for a meaningful review of a defendant's sentence. Unless the written findings are supported by specific facts and are timely filed, this Court cannot be assured the trial court imposed the death sentence based on a "well-reasoned application of the aggravating and mitigating factors.

Id. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

This is consistent with the United States Supreme Court's recent holding that the sentencer must make a "reasoned moral response" to the evidence when deciding to impose death. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The court in Penry also declared that its decision in that case applies retroactively.

The Florida Supreme Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes, and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id.

The written findings assure that this integral part of capital sentencing, the weighing of aggravating and mitigating factors, is well reasoned. Here, the record shows no such specific findings of fact that indicate that the trial court made a well reasoned decision as to why Mr. Byrd should die by electrocution.

The trial court denied Mr. Byrd's right to an individualized and reliable sentencing determination by failing to conduct the contemporaneous independent weighing which the law requires. It never made findings of fact to support the sentence at all until months later when it "memorialized" its decision through a writing that was not "timely filed" so as to show the "sentence was based on a well-reasoned application of the aggravating and mitigating factors" (See Rhodes).

The failure of appellate counsel to present this issue on direct appeal denied Mr. Byrd the effective assistance of counsel. Had appellate counsel read the statute, he would have known that the trial judge failed to comply with the requirements set by the legislature. Appellate counsel's failure was based upon ignorance. This was deficient performance which prejudiced Mr. Byrd. Other capital appellants whose counsel raised this issue obtained relief. Habeas corpus relief is required.

D. NEWLY DISCOVERED EVIDENCE UNDERMINES THE KEY GOVERNMENT WITNESS TO SUCH AN EXTENT THAT MR. BYRD WOULD PROBABLY HAVE BEEN ACQUITTED BY THE JURY.

Mr. Byrd was convicted and sentenced to death on the basis of false evidence presented by a key State witness. New evidence

appeared shortly after his conviction which counsel sought to bring to the judge's attention at the judge sentencing. Evidence not presented to the jury at Mr. Byrd's trial, and not readily available to counsel prior to trial, came to light at a civil deposition of Sullivan. This evidence showed that had the jury known of this evidence it would have probably acquitted Mr. Byrd of the charge of first degree murder. Mr. Byrd was denied of the effective assistance of appellate counsel by her failure to present this issue to the Florida Supreme Court on direct appeal.

At trial Ronald Sullivan, a previously convicted felon, testified that Mr. Byrd hired him to murder his wife.

Q. What was discussed by Mr. Byrd?

A. The question was -- well, he had asked me did James Richard Endress talk to me about --

Q. What did he tell you?

A. About having his wife killed.

Q. That was the question that was asked you?

A. He asked me did Jim Endress talk to me about it.

Q. Okay. Who asked you that, sir?

A. Mr. Byrd did.

Q. Did you respond to that question? Did you answer him back?

A. Yes, sir.

Q. What was your answer?

A. I told -- I told him yes, that Jim Endress had talked to me about it.

(R. 394).

Q. Was anything discussed pertaining to his wife?

A. He asked how come you all haven't done it yet.

Q. What did you know him to mean by that, sir?

A. The death of Debra Byrd.

Q. Was any specific date planned concerning her death?

A. No, sir.

Q. Were you given any time frame on when it had to occur?

A. Supposedly a Sunday night or a Monday night.

Q. Why was that?

A. That was the hours that Debra worked.

(R. 408).

Q. Did you receive any money for this, Mr. Sullivan?

A. No, sir.

Q. Were you supposed to receive any money for it?

A. Yes, sir.

Q. How much?

A. Three thousand dollars.

(R. 429).

Finally Mr. Ober the state attorney asked:

Q. Mr. Sullivan, isn't it true that you went into that room on the date that this happened because that man right there hired you to kill his wife and he participated along with you and Mr. Endress?

A. Yes, sir.

Q. Are you telling the truth?

A. Yes, I am.

(R. 486).

Only days after Mr. Byrd was found guilty based upon the testimony of Mr. Sullivan, his story was different. In a deposition for a civil action Mr. Sullivan denied having been hired by Mr. Byrd to kill his wife. He denied that Mr. Byrd made any promises to give him money or other considerations for this crime. He denied that he had ever been promised $3,000 or $5,000 to kill Mrs. Byrd. (R. 1688-89). Mr. Byrd's trial counsel moved for a new trial on the basis of this deposition.

The fact that Mr. Sullivan testified differently at this deposition was new evidence that raised serious questions concerning Mr. Byrd's guilt. This evidence undermined the State's theory that Mr. Byrd hired killers and masterminded a plot to have his wife killed. Not only did this new evidence frustrate the State's case against Mr. Byrd but it destroyed Mr. Sullivan's credibility as a truthful witness. Mr. Sullivan had maintained throughout his trial testimony that he was telling the truth about all aspects of this incident. In less than a week from his trial testimony, against Mr. Byrd, he was telling another story. Mr. Byrd's trial counsel argued that this deposition warranted a new trial.

It can only be presumed that Mr. Sullivan was telling each tribunal a story that would benefit him the most. In the criminal proceeding against Mr. Byrd the State of Florida agreed to give Mr. Sullivan probation for his testimony. He would have to implicate Mr. Byrd in this testimony for this "deal." In the civil action he was probably attempting to avoid a judgment

against himself by denying his involvement. This evidence showing that Mr. Byrd had not hired Mr. Sullivan to kill his wife substantially withers Mr. Sullivan's credibility but it was never presented to the jury. This evidence was not available to trial counsel until after the trial.

This evidence was unknown to any party, except Mr. Sullivan. Under Jones this evidence, only able to be discovered after trial, would probably result in Mr. Byrd's acquittal. The failure of appellate counsel to present this issue to the Florida Supreme Court on direct appeal denied Mr. Byrd the effective assistance of counsel. The issue was presented by trial counsel and only because of appellate counsel's ineffectiveness was this issue not presented to the Florida Supreme Court.

New evidence shows that Mr. Sullivan, the State's key witness at Mr. Byrd's trial, was lying. Trial counsel relied upon this evidence in moving for a new trial; yet appellate counsel failed to raise the issue on direct appeal. Had the issue been raised, Mr. Byrd would have been given a new trial. At a minimum, an evidentiary hearing would have been ordered. At this new trial, the jury after hearing that Mr. Byrd had not hired Mr. Sullivan to murder Mrs. Byrd, would certainly acquit Mr. Byrd of first degree murder.

E. THE EXCLUSION OF CRITICAL EVIDENCE RENDERED MR. BYRD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Byrd's defense was that he had nothing whatsoever to do with the murder of his wife. In support of this defense, Mr.

Byrd presented an alibi defense. However, the State was proceeding under alternative theories. The State first argued that Mr. Byrd hired Mr. Endress and Mr. Sullivan to kill the victim, accompanied them when the killing was to take place, and actually participated in the homicide. The State's fallback argument was that he arranged for Mr. Endress and Mr. Sullivan to kill his wife at a specific time when he was able to set up an alibi. The State's case was presented largely through the testimony of Mr. Sullivan which supported the first theory and a confession given by Mr. Byrd which supported the latter theory.

During the trial, defense counsel attempted to introduce various pieces of evidence to cast doubt on the state's case. One such piece of evidence was a transcript of a tape-recorded statement of Mr. Sullivan made at the time of his arrest, October 28, 1981 (R. 471). This statement gave the police probable cause to arrest Mr. Byrd, but was considerably different from his trial testimony. After introducing the transcript, defense counsel learned that the Court had already ruled that it was inadmissible (R. 471). The transcript was then made a part of the record for appeal purposes (R. 1092). Apparently the state's objection to the transcript was that it contained hearsay (R. 472). Thus the defense was precluded from impeaching the state's key witness.

Another piece of evidence the defense sought to introduce concerned Mr. Byrd's own warrantless arrest, and the confession that followed. Defense counsel had filed to suppress the confession, on the basis that it was the fruit of an illegal

arrest (see: R. 1724; 1761; 1776; 1781) and that it was not voluntary (see: 1776; 1778). Each of these motions were heard and then denied (see: R. 1412; 1469; 1509; 1522). At trial, each time defense counsel attempted to introduce evidence concerning the illegality of his arrest, the trial court sustained the prosecution's objection (see: R. 791; 796; 820; 822). Accordingly, the defense was stopped from arguing the illegality of Mr. Byrd's arrest to the jury, and thus could not adequately show them the oppressive circumstances surrounding Mr. Byrd's confession.

Still another piece of evidence that the defense was precluded from presenting to the jury involved two individuals who had been suspects in the killing of Debra Byrd up until Mr. Sullivan's October 28, 1981, statement. That arose as follows:

> Q. Detective Newcomb, to your knowledge, sir, were there any other suspects other than Ronald Sullivan and James Endress arrested and involved linked to this particular homicide?
>
> A. As accessories, yes, as principles, not to my knowledge.
>
> Q. You're not aware, sir, of the facts of two individuals being arrested in the vicinity of this crime allegedly carrying machine guns and a large amount of cash?
>
> MR. LOPEZ: Objection, Your Honor. If I may approach the Bench?
>
> THE COURT: I will sustain the objection.

(R. 837). Because the court sustained the objection before hearing counsel even give a basis for the objection, let alone

argument, Mr. Byrd is left to guess at the reason for this objection being sustained. The police reports do bear out the fact that two individuals were arrested in the vicinity of the EconoLodge carrying guns.

The defense was also stopped from introducing evidence that Mr. Byrd had written numerous letters to Jody Clymer and that in each one he steadfastly maintained that he was not involved with the homicide of his wife (R. 306).

The defense was stopped from questioning a witness about her purchase of marijuana from Debra Byrd that Debra had allegedly bought from Mr. Sullivan. When defense counsel raised this question, the prosecution objected and the court sustained and asked the jury to disregard the answer (R. 342).

In short, Mr. Byrd was precluded from presenting a defense because of the court's evidentiary rulings. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284 (1973). Mr. Chambers trial was reversed by the United States Supreme Court because "the rulings of the trial deprived [him] of a fair trial." 410 U.S. at 303. That Court recognized that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

Mr. Byrd was denied his Sixth Amendment rights and deprived him of his right to a fair trial as a result of the court's rulings. Thus, his conviction and sentence of death were obtained in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

To the extent that appellate counsel failed to adequately brief these issues on direct appeal to this Court Mr. Byrd was deprived of the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993).

Had appellate counsel raised to this Court the issue of the trial court's failure to admit the transcript of Mr. Sullivan's statement this Court would have reversed Mr. Byrd's conviction. This statement, which contradicted his trial testimony, would have undermined Mr. Sullivan's credibility. Mr. Byrd was prevented from defending himself. Other instances where Mr. Byrd was prevented, by the trial court, from defending himself include evidence of Mr. Byrd's, illegal arrest, evidence of the involvement others identified by the police, his steadfast denial of his involvement, and the drug involvement of the victim with Mr. Sullivan.

Had these issues been raised by appellate counsel on direct appeal this court would have ordered a new trial. The requirements of due process apply to all stages of a capital case. Engle v. State, 438 So. 2d 803 (Fla. 1983). The right of

defendant in any trial to defend against the accusations of the state is a fundamental notion of due process. Harrell v. State, 405 So. 2d 480, 482 (Fla. App. 1981).

If appellate counsel had raised these issues on direct appeal this Court would have reversed Mr. Byrd's conviction since he was denied the ability to present any meaningful defense. See also United States v. Hammond, 598 F.2d 1008 (5th Cir. 1979); Cash v. Culver, 122 So. 2d 179 (Fla. 1960)(Before one can be deprived of his liberty in a criminal proceeding, he is entitled to a trial according to due course of law. Anything else is ineffective as a basis for detention).

Performance of appellate counsel fell well below acceptable standards, and Mr. Byrd was prejudiced. This petition should be granted.

F. MR. BYRD WAS IMPROPERLY DENIED HIS RIGHT TO CROSS-EXAMINE KEY STATE WITNESSES ON MATTERS THAT WOULD HAVE UNDERMINED THEIR CREDIBILITY, AND AS A RESULT HE WAS DENIED HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At Mr. Byrd's trial, the trial judge improperly limited counsel's ability to cross-examine Regina Schimelfining as to her deal with the state that pending charges against her would be dismissed in exchange for her cooperation with the State and her testimony against Mr. Byrd:

> Q. Isn't it true, Ms. Schimelfining, that you were charged in this offense, this First Degree Murder initially?
>
> MR. LOPEZ: Objection, that is a misstatement of what happened here, Your Honor. She was never --

MR. JOHNSON: Judge, I withdraw the question.

MR. LOPEZ: I would please ask the jury to disregard and move to strike the answer if she did give any answer, Your Honor.

THE COURT: Strike it and disregard that last question.

(R. 557). In her deposition, page 49, line 11, Ms. Schimelfining admits that she was arrested in connection with this murder on October 30, 1981. The defense should have been permitted to go into why those charges were dropped.

Counsel was also precluded from cross-examining Ms. Schimelfining regarding whether or not she took a quaalude on the day of the homicide:

Q. Do you recall, Ms. Schimelfining, whether or not you were under the influence of any narcotic substances on or about October 12, 1981?

A. No, sir.

Q. I want to refer you, Ms. Schimelfining, to page 14 of your deposition given on February 23rd, 1982, and I want to refer you, Ms. Schimelfining, to line 2 and the question is: "Did you take any quaaludes referring to the day in question," and your answer on line 3, "No, sir."

Line 4 I asked --

(R. 552). The prosecutor interjected an objection at that point, and after a bench conference, the defense was not allowed to inquire further (R. 553). The information would have been helpful to allow the trier of fact to ascertain Ms. Schimelfining's ability to perceive on the night to which her

testimony pertained. It should have been left to the trier of fact, the jury, to determine if the effects of the quaalude would have worn off by then.

Defense counsel was also precluded from cross-examining Ronald Sullivan regarding why he pled to second degree murder when he did not believe he had killed the victim.

> Q. (By Mr. Johnson): Mr. Sullivan, as you pulled your hands away from the neck of Deborah Byrd, was she still breathing?
>
> A. Yes, sir, I believe she was.
>
> Q. She was still breathing? If she was still breathing why did you plead guilty to Second Degree Murder?
>
> MR. OBER: I object, Judge.
>
> MR. JOHNSON: I have no further questions, Your Honor.
>
> THE COURT: Sustained.

(R. 473). Mr. Sullivan was the pivotal state witness. He pled guilty to second degree murder, yet he continually minimized his role in the homicide. The defense should have been allowed to attack the credibility of this witness.

The right of confrontation is one of our most sacred and fundamental rights and is contained in the Sixth Amendment to the United States Constitution. An accused must be permitted reasonable latitude to cross-examine witnesses against him as to matters which call into question the witnesses credibility. Smith v. Illinois, 390 U.S. 129 986 (1968); Davis v. Alaska, 415 U.S. 308 (1974).

The failure of appellate counsel to present this issue to the Florida Supreme Court deprived Mr. Byrd of the effective assistance of counsel. Appellate counsel should have briefed and presented to this Court the trial court's failure to allow Mr. Bryd to cross-examine Ms. Schimelfining and others. Had this issue been presented this Court would have granted relief on direct appeal since Mr. Byrd has a fundamental right to defend himself by cross examining witnesses. The jury was prevented from hearing about Ms. Schimelfining's drug use and about Mr. Sullivan's motivation for dealing with the state.

Mr. Byrd was deprived of the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993). Performance of counsel fell well below acceptable standards, and Mr. Byrd was prejudiced. This petition should be granted.

G. THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF SENTENCING DEPRIVED MR. BYRD OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. THE RULINGS CREATED CIRCUMSTANTIAL INEFFECTIVE ASSISTANCE OF COUNSEL.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Byrd's capital proceedings. To the contrary, the burden was shifted to Mr. Byrd on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Byrd's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 2997, 2998).

The jury instructions here employed a presumption of death which shifted to Mr. Byrd the burden of proving that life was the appropriate sentence (R. 1302). The prosecutor reiterated that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence (R. 1319, 1324). The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face,

to apply retroactively to cases on collateral review. Under Hitchcock, Florida juries must be instructed in accord with the Eighth Amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review because Hitchcock decided after Mr. Byrd's trial worked a change in law; Florida sentencing juries must be instructed in accord with Eighth Amendment principles. Hitchcock held that the Eighth Amendment applied to the Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. The jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Mr. Byrd's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Byrd.

To the extent that appellate counsel failed to adequately brief this issue on direct appeal to this Court Mr. Byrd was deprived of the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993). Performance of counsel fell well below acceptable standards, and Mr. Byrd was prejudiced. This petition should be granted.

H. MR. BYRD WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF THE STATE'S WITNESSES AND THE STATE'S CASE,IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In his closing argument, the prosecutor vouched for the credibility of a State's witnesses:

> MR. SHAD: -- I believe the gentleman is Persian --- a friend of the Byrds, an admitted friend of Debra Byrd and Wade Byrd, no motive to lie or misrepresent anything.

(R. 1199)(emphasis added). This was false. Mr. Shad did have a motive to lie -- he had dated Mr. Byrd's sister and, although he denied it, he was cross-examined on whether the sister came back with a bruise on her neck, on her arm and on her right leg and whether she had accused Mr. Shad of having raped her (R. 329).

The United States Supreme court has ruled that due process and the right to a fair trial may be breached when a prosecutor engages in improper comment. United States v. Young, 470 U.S. 1, 7-8 (1985). The Court noted:

> Nearly a half century ago this court counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . " Berger v. United States, 295 U.S. 78, 88 (1935). The court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.
>
> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have

> tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that
>
> > '[it] is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'
> >
> > ABA Standards for Criminal Justice 3-5.8(b)(2nd Ed. 1980)(footnotes omitted).

Id.

In Young, the Court noted that the prosecutor may breach the constitutional guarantee when he implies he has more information than had been presented to the jury.

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U.S. at 88-89.

470 U.S. at pp. 18-19. See also United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991).

In Brown v. Borg, 951 F.2d 1011, 1014 (9th Cir. 1991), the federal court held that prosecutorial misconduct in state criminal proceeding will be grounds for issuance of a writ of habeas corpus unless the prosecutor can show that the error was

harmless beyond a reasonable doubt. "A new trial is required if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury" (noting that this is equivalent to the Chapman harmless error test, citing U.S. v. Bagley, 473 U.S. 667, 669 n.9 (1985)).

In penalty phase closing argument, the prosecutor said:

> What do the facts and the law compel you to do? I must bring up at this time the other people because that is important. The law sets out to punish people equally for their participation in crimes if their conduct is, in fact, equal to other individuals involved in the same crime. What will happen to James Endress, we know not. He is set for trial. He will go through virtually the same thing that Mr. Byrd has been through. A jury will be determined to find out whether he is guilty or innocent. He is looking at the same penalty if he is convicted.
>
> What about Ronald Sullivan? Do you think that Ronald Sullivan was given consideration because he deserved it? He was not. The case against Ronald Sullivan was very weak. He would not have been convicted because up until he told the police in our office what happened, the only evidence against Ronald Sullivan was that statement that he made on October 28th, that he made a silencer. We don't know if a silencer was used in the crime because the murder weapon was never found. He has though subjected himself to life in prison and he will serve -- he is on a violation of parole, now. He will serve time on that violation of parole. He will be out, as Mr. Buckine correctly told you during final arguments, he will be out on probation but as sure as I am standing here, he will violate that probation and he will go to prison for life.

(R. 1331-1332)(emphasis added).

There are several blatant falsehoods contained in that argument. The prosecutor knew full well that by the time he made the deal with Sullivan, the case against Sullivan was anything but weak. Sullivan had "confessed" to almost everyone he ran into in the jail during that time. Also of course by then the State could have used Mr. Byrd's and Mr. Endress' statements against Sullivan. Further, the prosecutor knew that he was going to take care of the parole violation so that Mr. Sullivan would spend little or no time in jail. Not so coincidentally, after Mr. Sullivan did violate his probation for second degree murder, the State recommended that his life sentence be reduced to 10 years.

The knowing use of false testimony is forbidden. "As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Likewise, a prosecutor cannot convey false argument to a jury in closing.

Appellate counsel's failure to raise this on direct appeal was deficient performance. It was the result of ignorance of the law and/or oversight. As a result, Mr. Byrd was prejudiced when the Florida Supreme Court failed to address this meritorious issue.

I. MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Mr. Byrd's federal proceedings, the State has asserted:

> The petitioner claims that after he confessed on October 28, 1981, and was jailed, the police officers "initiated an interrogation" of his on October 30, 1981, in violation of his right to counsel. The petitioner has continued that his October 30, 1981 statement was therefore not admissible. The admissibility of a defendant's statement is an issue which could have and should have been raised on direct appeal. Cave v. State, 529 So.2d 293, 295 (Fla. 1988) (claim that trial court improperly admitted a confession is cognizable only on direct appeal). The State's post conviction court thus properly found this claim to be procedurally barred. (R. 410). The State appellate court affirmed this finding. Byrd v. State, supra, 597 So. 2d at 254.
>
> The petitioner has failed to demonstrate cause for his procedural default. Petitioner has claimed that his trial counsel was ineffective for not having raised and preserved this issue. See petition at p. 51. However, the record reflects that trial counsel did argue and preserve this issue. (DR. 692-698, 696).

Response to Federal Habeas Petition 112-13.

In the early morning hours of October 28, 1981, Mr. Byrd was arrested on charges of first-degree murder. At 8:31 a.m. that same day, a Criminal Report Affidavit was filed with the Clerk of the Circuit Court. A copy of the affidavit was provided to Mr. Byrd. This affidavit gave notice of the charge -- first degree murder -- and stated the facts which gave rise to the charge.

As required by Rule 3.130 of the Florida Rules of Criminal Procedure, Mr. Byrd appeared before a judicial officer for his

First Appearance within twenty-four hours of his arrest, and was advised of the charges against him and of his Sixth Amendment right to counsel. Pursuant to Fla. R. Crim. P. 3.130(c)(4), for a defendant to waive his right to counsel he must execute a written waiver at his First Appearance. However, Mr. Byrd expressed his desire to be represented by counsel.

On October 30, 1981, subsequent to Mr. Byrd's First Appearance, law enforcement officers initiated a custodial interrogation of Mr. Byrd. Miranda warnings were given orally at that time (R. 740). However, no valid waiver of Mr. Byrd's Sixth Amendment right to counsel could be obtained under these circumstances.

The Sixth Amendment guarantees an accused the right to legal representation once adversarial proceedings have been initiated. Massiah v. United States, 377 U.S. 201 (1964); Traylor v. State, 596 So.2d 957 (Fla. 1992); Owen v. State, 596 So.2d 985 (Fla. 1992).

> That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." United States v. Ash, 413 U.S. 300, 209, 93 S.Ct 2568, 2573, 37 L.Ed.2d 619 (1973). Indeed the right to counsel
>
> > "embodies a realistic recognition of the obvious truth that the

> average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938).
>
> Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," United States v. Ash, supra, 413 U.S., at 310, 93 S.Ct., at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, supra, 388 U.S., at 224, 87 S.Ct., at 1930.
>
> Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings "is far from a mere formalism." Kirby v. Illinois, 406 U.S., at 689, 92 S.Ct., at 1882. It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Ibid.

United States v. Gouveia, 467 U.S. 180, 188-89 (1984).

Here, Mr. Byrd's Sixth Amendment right to counsel attached when he appeared at his First Appearance hearing and was advised of the charges against him and of his right to counsel. Traylor

v. State, 596 So.2d 957 (Fla. 1992); Owen v. State, 596 So.2d 985 (Fla. 1992)(Defendant's Sixth Amendment right to counsel attaches when defendant in custody, haled before a magistrate and charged with the particular crime at the initial appearance). Once the Sixth Amendment right has attached, statements obtained from an accused without counsel's knowledge and presence are constitutionally admissible evidence only if there has been a valid waiver of the right to counsel. This waiver requirement was discussed by the United States Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977). There, as here, judicial proceedings had been initiated and the right to counsel invoked. As to the waiver the Court held that "the State must prove 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. [458] at 464." Further, "courts indulge in every reasonable presumption against waiver." Brewer, 430 U.S. at 405.

The United States Supreme Court has further explained:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance."
>
> * * *
>
> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner

> that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry, 447 U.S., at 276, 100 S.Ct., at 2189 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 484-485, 487 (1985).

Here the police interrogated Mr. Byrd on October 30, 1981, after the Sixth Amendment right to counsel attached and had been invoked. This interrogation occurred as a result of police initiation.

In Michigan v. Jackson, 475 U.S. 625, 632, 106 S.Ct. 1404, 1409 (1986), the United States Supreme Court declared:

> [A]fter a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment---the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Thus,

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, **any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid**.

Jackson, 475 U.S. at 636 (emphasis supplied). The Court in Jackson extended Edwards' bright-line rule to post-arraignment custodial interrogations. Mr. Byrd was apprised of his Sixth Amendment right to counsel during his judicial First Appearance. He expressed his assertion of that right. Thereafter, law enforcement initiated custodial questioning. Under Jackson, the resulting statements were plainly obtained in violation of the Sixth and Fourteenth Amendments.

This principle was reaffirmed in Patterson v. Illinois, 487 U.S. 285 (1988), where the United States Supreme Court explained that, once the Sixth Amendment right attaches and the accused has expressed a desire for counsel, the police are "barred" from approaching the accused. See also, Minnick v. Mississippi, 111 S.Ct. 486 (1990). It is immaterial whether or not the accused has actually consulted with his attorney; it was Mr. Byrd's right to have counsel present when the State initiated this interrogation. Minnick.

Formal judicial proceedings during which Petitioner had expressed the desire for counsel had taken place before the October 30th statement was obtained. The State had committed itself to prosecute. The adverse positions of government and defendant had solidified. The Sixth Amendment right to counsel

had attached and the State was obligated to honor Mr. Byrd's right to counsel.

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Maine v. Moulton, 474 U.S. 159, 170-71, 106 S.Ct. 477, 484 (1985)(emphasis supplied).

The law enforcement officers claimed that after they initiated their interrogation, Mr. Byrd orally waived his right to counsel. On this point Jackson is dispositive: written waivers are insufficient to justify police-initiated interrogations after a request for counsel or after the critical stage right to counsel has attached. Jackson, 475 U.S. at 635. See also, Edwards v. Arizona, 451 U.S. 477, 484 (1981); Minnick v. Mississippi, 111 S.Ct. 486 (1990). Here, of course, there was no written waiver. Under Fla. R. Crim. P. 3.130(c)(4), Florida has recognized the need for extra care in preserving the right to counsel by requiring a written waiver of the Sixth Amendment right to counsel. However, even if the absence of a written waiver is not controlling on this claim, it is now well settled that no "waiver" can be established by the mere fact that Mr. Byrd eventually responded to the questioning in the absence of counsel even after being Mirandized. See Brewer v. Williams, 430 U.S. 387 (1977); Edwards, 451 U.S. at 484 n.8; Jackson, 475 U.S.

at 635 n.9; Minnick. The fact that the police initiated the October 30th interrogation is the controlling fact. The resulting statements were clearly and unequivocally obtained in violation of the Sixth and Fourteenth Amendments, and was not admissible at Mr. Byrd's trial. They should have been suppressed

Mr. Byrd's rights under the Sixth and Fourteenth amendments were violated by the State's introduction of his October 30th statements to the police. Mr. Byrd's trial was unconstitutionally tainted by this error.

Furthermore, to the extent that this Sixth Amendment issue was not raised and argued by Mr. Byrd's appellate counsel, Mr. Byrd received ineffective representation under Kimmelman v. Morrison, 477 U.S. 365 (1986). By 1981, the Supreme Court in Edwards v. Arizona, 451 U.S. 477 (1981), had established a bright-line rule precluding police-initiated questioning once the Sixth Amendment right to counsel has attached. As the State has recognized in federal court, appellate counsel should have raised this meritorious issue. Mr. Byrd was prejudiced when this Court failed to address this meritorious issue on direct appeal and grant a new trial.

J. THE TRIAL COURT'S FAILURE TO ASSURE MR. BYRD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In federal habeas proceedings, the State has asserted: "with respect to the petitioner's absence from the in camera proceedings, said allegations were first raised in the petitioner's motion for postconviction relief. The State

postconviction Court found this claim procedurally barred, as it could have been raised on direct appeal" (Response to Federal Habeas at 127).

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). See also, Francis v. State, 413 So.2d 493 (Fla. 1982); Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

Mr. Byrd was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death on separate, distinct, and "critical" occasions. Moreover, Mr. Byrd never waived his right to be present. However, during his involuntary absences, important matters were attended to, discussed and resolved.

At one point, during an in-camera proceeding, not only was Mr. Byrd expressly excluded, but so was his lead attorney, Mr. Johnson. This arose after the prosecutor had attempted to elicit testimony from a defense witness that the witness had offered to testify for the State in numerous cases, including Mr. Byrd's, in exchange for having his 99-year sentence reduced to probation (R.

1064-1068). After several initial questions, the following had occurred in front of the jury:

Q [BY MR. OBER]: Okay. Did you also tell me last Friday that you would testify for the State of Florida against Wade Byrd?

A [BY MR. GARCIA]: No, I didn't.

Q You didn't say that to me?

A No, sir.

Q And didn't you say that in consideration that you wanted the State to drop the ninety-nine-year sentence and give you probation?

A No, sir.

Q You never said that? You didn't want any consideration for your testimony?

A Against Milford Byrd?

Q Yes, sir.

A No, sir.

Q You didn't say that?

A No, sir.

Q I didn't tell you that I wasn't going to deal with you whatsoever and you could go back and serve your ninety-nine years in prison?

A He is lying, sir.

MR. JOHNSON: I object to this.

Q (By Mr. Ober) I am lying?

A Yes, sir, you are.

MR. JOHNSON: Your Honor, may I have a ruling from the Court?

THE COURT: What grounds?

MR. JOHNSON: He is testifying and it's irrelevant and not covered, beyond the scope of direct examination.

THE COURT: You went into his term of imprisonment and this is to this witness's credibility. I overrule it.

(R. 1067-1068).

Defense counsel moved for a mistrial on the basis that the prosecutor was offering testimony and insinuating that he in fact had told Mr. Garcia that he would make no deals with him (R. 1087-1088). The defense offered to call Mr. Donerly, Mr. Garcia's attorney, to testify that in fact Mr. Ober had indicated he might deal with Mr. Garcia (R. 1089).

The Court had agreed to hear testimony after concluding with the witnesses for that day (R. 1094). In open court but outside the presence of the jury, defense counsel restated his motion as follows:

MR. BUCKINE: I have made a Motion for Mistrial based on the fact that during the time that the prosecutor was cross-examining Mr. Garcia, he used impeaching facts, or questions insinuating impeaching facts, the proof of which is nonexistent, which it is the Defense's position that it is impermissible according to the law in the State of Florida, and more specifically I defer to the record, in asking Mr. Garcia that he would not deal with him concerning any matter, when it was the Defense's position we were led to believe that that was not, in fact, what had occurred in this out of court conference where Mr. Ober and Mr. Garcia had been present, and those impeaching facts or statements were in fact, made.

We were at that time led to believe that other facts contrary to what Mr. Ober used for his impeaching questions were, in fact, stated and given then, and the persons, as

> the Defense understood it, to be present were Mr. Donerly, as counsel for Mr. Garcia, Mr. Garcia and Mr. Ober. And I am not aware -- the Defense is not aware of any other persons present and we would want to have the version of what occurred in that transaction given to this Court by Mr. Donerly, who is a Public Defender for this Circuit and who is an Officer of this Court.
>
> That is the bases (sic).

(R. 1108-1109).

After a discussion over whether Mr. Donerly would be violating his attorney-client privilege, or opening himself up to perjury charges by testifying contrary to the prosecutor, it had been agreed that Mr. Donerly would testify (R. 1111-1118). The Court then ordered:

> THE COURT: All right.
>
> All right, gentlemen. In about five minutes I want Mr. Donerly and Mr. Ober in my chambers along with Mr. O'Connor [Mr. Donerly's attorney] and Mr. Buckine. Then I will make a ruling on it tomorrow. That will be in camera. No one else is invited to be there and then we will see whether we decide tomorrow whether to have an open hearing or whether I will just grant the motion or deny the motion. . . .

(R. 1118)(emphasis added).

At some point, the in-camera hearing was expanded to allow "Sylvia from the newspaper" and the court reporter to attend. Mr. Johnson, the lead defense attorney, and Mr. Byrd were specifically excluded from this hearing. This was a critical phase of trial, and Mr. Byrd never waived his right to be present.

At the hearing, Mr. Donerly testified that the possibility of plea negotiations for the testimony of Mr. Garcia were never firmly cut off (R. 1123-1124). Upon questioning, under oath, Mr. Ober, the prosecutor, admitted that he may have never communicated a cut-off of negotiations to Mr. Donerly or Mr. Garcia (R. 1128-1129). The court ruled that the misrepresentation was intentional on the part of the prosecutor (R. 1132). The Court noted, ". . . I guess you will have to sit and discuss that with Mr. Johnson later on and decide which way you want to go. . . ." (R. 1134). This was the same "Mr. Johnson" who, along with Mr. Buckine, was representing Mr. Byrd and who had been excluded from the in-camera proceeding. Mr. Byrd had also been excluded from the in-camera hearing.

The next day, Mr. Byrd was also not present at the jury instruction conference:

> THE COURT: We are here on the jury instructions' conference. Present is Mr. Lopez, representing the state; Mr. Johnson and Mr. Buckine, representing the Defendant.

(R. 1137). At that time, defense counsel failed to ask for the curative instruction which had been suggested by the judge. Mr. Byrd was also excluded from numerous side bar conferences.

To be valid, a waiver of a constitutional right must be knowing, intelligent and voluntary; in short, intentional. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). A waiver cannot be presumed from a silent record.

It is imperative, as the United States Supreme Court stated in Crain v. United States, 162 U.S. 628, 645, 16 S.Ct. 952, 959, 40 L.Ed. 1097, 1103 (1986), that:

> the record of [defendant's] conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial was taken in the trial court; otherwise, the judgment will be erroneous.

(Emphasis added).

The absence of the defendant during the conduct of critical stages of the trial in the absence of an explicit, knowing, intelligent, and voluntary waiver by the defendant constituted reversible error of constitutional magnitude.

If there is any "reasonable possibility" that Mr. Byrd's rights were prejudiced because of his absence during critical stages of the trial, he is entitled to relief. Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982). There is such a possibility here. Appellate counsel was ineffective for unreasonably failing to ensure Mr. Byrd's presence for all critical proceedings, to Mr. Byrd's substantial prejudice.

K. MR. BYRD'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert.

denied, 109 S.Ct. 1353 (1989). In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 576 So.2d 713 (Fla. 1991); Hall v. State, 541 So.2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and which violated the Eighth Amendment in the same way in which the comments and instructions discussed below violated Mr. Byrd's Eighth Amendment rights. Mr. Byrd is entitled to relief under Mann. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and would violate Eighth Amendment principles.

Caldwell involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which was far surpassed by the jury-diminishing statements made during Mr. Byrd's trial. In Mann, and again in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), the Eleventh Circuit determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding, and that when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. See Mann. Caldwell involves the most essential Eighth Amendment requirements of any death sentence: that such a sentence be

individualized and that such a sentence be reliable. Caldwell, 472 U.S. at 340-41.

At all trials, there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Byrd's case, as in Mann v. Dugger, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call upon them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told that they were the only ones who could determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder.

Mann makes clear that proceedings such as those resulting in Mr. Byrd's sentence of death violate Caldwell and the Eighth Amendment. In Mann, as in Mr. Byrd's case, the prosecutor sought

to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. In Mann, the Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme." 844 F.2d at 1454, thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role in unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least on part on the determination of a decisionmaker that has been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing.

Id. at 1454-55. The significant role of the jury in Florida's capital sentencing scheme was recently underscored by the United States Supreme Court in Espinosa v. Florida. The improper comments and arguments provided to Mr. Byrd's jurors were at least as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are set forth below.

The Assistant State Attorney's jury-diminishing argument began early on during the voir dire examination:

> I want you to think about that part of it because you will be questioned by both Mr. Johnson and myself about that, but the State of Florida intends to, upon a conviction of First Degree Murder, ask that you make an advisory recommendation. Of course, that sounds and it is overwhelming to some degree, but you are doing that based on guidelines. The legislature has provided for the death

> penalty in the State of Florida, and they have given you certain guidelines, and those guidelines are called aggravating and mitigating circumstances and you take these guidelines and you hear the testimony and there are certain guidelines which we won't go into now, but you see if they exist and you balance those and if the aggravating circumstances outweigh the mitigating then you should make an advisory -- you notice I use the word "advisory." Your recommendation of a sentence is not binding upon the Judge. It is an advisory only and you do that by majority vote. Seven of you could make that decision and then it is ultimately up to Judge Alvarez to decide what the penalty is. We'll go into that in a little more detail, but I wanted to bring that out.

(R. 30-31).

This was only the beginning of the prosecutor's efforts to diminish the jury's sense of responsibility. For example, the prosecutor questioned one juror regarding the death penalty as follows:

> Q Is there anything, Ms. Zwicker, in your background that would prohibit you under the appropriate circumstances, again, you will recall just so there is no mistake and it is unequivocal should you find Milford Byrd guilty of murder <u>we'll ask that you make a recommendation</u> as to a death sentence. That will happen. Is there anything in your background, under the appropriate circumstances - whether those circumstances are appropriate is your decision to make.

(R. 109)(emphasis added).

When he received the answer he wanted, the prosecutor moved on to other jurors to make sure that they too could make "a recommendation."

> Q Under the appropriate circumstances, <u>could you make a recommendation</u> as to a death sentence? Is there anything in your

background that would prohibit you or prevent you from doing that?

(R. 110)(emphasis added).

This type of questioning by the prosecutor went on throughout the voir dire:

Q You understand what we have talked about as far as the death sentence goes and the possibility of that coming into play upon a conviction of First Degree Murder? Is there anything in your background that would prohibit you from making that recommendation under the proper facts?

(R. 141)(emphasis added).

Q Is there anything in your background that would prohibit you, under the appropriate circumstances, of making a recommendation as to a death sentence?

(R. 156).

Q Is there anything we have discussed so far, and that includes any background or any upbringing that you have that would prohibit you, if you believe the facts warrant it, of returning a recommendation of a death sentence? Could you do that if the facts warrant that, in your opinion?

(R. 190).

Q Is there anything in your religious background or upbringing that would prohibit you, as we explained it time and time again, of returning a recommendation as to a death sentence if you felt the circumstances warranted that?

(R. 194).

The record references above show that the prosecutor emphasized the juror's role was to provide a mere recommendation. Thus, even the jurors who may have realized the seriousness of

the situation were lulled into believing that the judge shouldered all the burdens.

The trial judge did nothing to correct this misconception. In fact, he substantially enhanced the error and further diminished the jury's role. Before the penalty phase even began, he instructed the jury:

> Your duty is to determine if the defendant is guilty or not guilty, in accord with the law. It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.
>
> * * *
>
> Ladies and gentlemen of the jury, I will now inform you of the maximum and minimum possible penalties in this case. The penalties are for the Court to decide. **You are not responsible for the penalty in any way because of your verdict.**

(R. 1275)(emphasis added).

The prosecutor began his closing statement in the penalty phase by explaining to the jury that they would "be called upon, after hearing the factors in aggravation and mitigation, to <u>make a recommendation</u> to Judge Alvarez as to whether Mr. Byrd should receive, for the brutal murder of his wife, life imprisonment or if he should be sentenced to death in the electric chair" (R. 1317)(emphasis added). He went on to remind the jury of the questions asked in voir dire: "We have discussed last week, last Monday to be exact, that you could, if the circumstances were proper, make that recommendation and I submit to you that the facts of this case warrant that recommendation." (R. 1318). The

word "recommendation" was used repeatedly during the prosecutor's closing argument (R. 1319, 1321, 1329).

Misinformation as to the jurors' responsibility was also one of the last things the jurors heard from the judge, just as it had been one of the first. While instructing the jurors prior to their sentencing deliberations, the judge (mis)informed them one last time as to their superfluous role:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment should be imposed is a responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1344-45)(emphasis added). Similar role diminishing instructions were provided throughout the proceedings (R. 1345, 1347, 1348). This was a false and misleading statement in violation of Due Process and the Eighth Amendment, and rendered the death sentence fundamentally unfair and unreliable. In fact, the jurors' recommendation and role in the sentencing process is crucial, and their decision is accorded great weight. Sentencing does not rest solely with the court. Espinosa v. Florida.

These instructions, and the trial judge's earlier comments, like those instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements."

Mann, 844 F.2d at 1458 ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, 472 U.S. at 332-33 (emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Byrd's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 472 U.S. at 340-41.

The comments here were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common focused theme: the judge had the final and sole responsibility, while the jurors were told by the judge that they had none (R. 1275). The prosecutor's and the judge's comments allowed the jury to attach less significance to its sentencing verdict, and therefore enhanced the unacceptable risk of the imposition an unreliable death sentence. Mann; Caldwell.

Under Caldwell, the central question is whether the prosecutor's comments minimized the juror's sense of responsibility. See Mann, 844 F.2d at 1456. If so, the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Eleventh Circuit found that the prosecutor misled, or at least confused, the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Byrd's case, it is obvious that the jury was equally misled by the prosecutor, and the prosecutor's persistent misleading and jury minimizing statements were not adequately remedied by the trial court. In fact, the trial court compounded and reinforced the error.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Espinosa v. Florida. Thus, intimations and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she sees fit irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Espinosa ("Florida has essentially split the weighing process in two"). The jury's sentencing verdict may be overturned by the judge only

if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Byrd's jury, however, was led to believe that its determination meant very little and that the judge was free to impose whatever sentence he wished.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," and that therefore prosecutorial arguments which tended to diminish the role and sense of responsibility of a capital sentencing jury violated the Eighth Amendment. Id., 472 U.S. at 328-29. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 472 U.S. at 340. The same vice is apparent in Mr. Byrd's case, and Mr. Byrd is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Byrd's case inject into the capital sentencing proceeding. There is also the unacceptable risk of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of

responsibility" creates. Id. at 330. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 472 U.S. at 331-32. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why

> those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis supplied). When this occurs, as it did in this case, the unconstitutionally unacceptable risks of unreliability and bias in favor of the death penalty also unconstitutionally infect the trial judge's sentence. The Supreme Court in Espinosa v. Florida held, "if a weighing states decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Id. The Court reasoned:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, [], just as we must further presume that the trial court followed Florida law, [], and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, [], and the result, therefore, was error.

Id. [citations omitted]. By the same logical process, when comments and instructions diminishing the role and responsibility of the jury create a constitutionally unacceptable risk of unreliability and bias in favor of the death penalty directly affecting the jury's decision, then the trial court's decision is also indirectly infected with the error because the court gives great weight to the jury's recommendation. Cf. Espinosa. Thus,

Eighth Amendment error occurs at both levels of Florida's sentencing scheme.

Caldwell and Mann teach that given comments such as those provided to Mr. Byrd's capital jury the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Caldwell, at 341. This the State cannot do. Here the significance of the jury's role was minimized and the comments at issue created a danger of bias in favor of the death penalty. Had the jurors not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation in the record provided more than a "reasonable basis" which would have precluded an override. See Hall v. State, 541 So.2d 1125 (Fla. 1989); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). The Caldwell violations here assuredly had an effect on the jurors, an error infecting the sentencing judge as well because of the great weight he must give the juror's verdict. Espinosa. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received concerning is role and responsibility. This case also presents a classic example of a case where Caldwell error cannot be deemed to have had "no effect" on the verdict or upon the court's sentence. Espinosa.

Longstanding Florida case law established the basis for raising this issue on appeal. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case constituted reversible error); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Appellate counsel had no strategic reason for her failure to raise this issue. It resulted from ignorance of the law and thus constituted prejudicially deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel's failure was deficient performance under Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), which clearly prejudiced Mr. Byrd. No tactical decision can be ascribed to counsel's errors. Counsel's failure could only have been based upon ignorance of the law, and deprived Mr. Byrd of the effective assistance of counsel and his Sixth and Eighth Amendment rights. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Byrd was denied a reliable individualized sentencing before a jury which was never told about the full weight to be given its sentencing decision. Mr. Byrd was deprived of the effective assistance of appellate counsel. Accordingly, Mr. Byrd was denied his Sixth, Eighth and Fourteenth Amendment rights.

L. THE WRITTEN JURY INSTRUCTIONS FAILED TO CORRESPOND TO THE ORAL INSTRUCTIONS AND AS A RESULT THE JURY WAS INCORRECTLY INSTRUCTED ON AN IRRELEVANT AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MR. BYRD'S EIGHTH AND FOURTEENTH AMENDMENTS.

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstance present is different, and that this difference reasonably justifies "the imposition of a more severe sentence". Zant v. Stephens, 462 U.S. 862 (1983).

The narrowing function of an aggravating circumstance requires that such a circumstance be capable of objective determination. The aggravating circumstance must be described in terms that are interpreted and applied understandably. It must provide guidance and direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. The Supreme Court, in fact, has ruled that an aggravating circumstance cannot stand when it is so vague that it fails to adequately channel the sentencing decision and thus allows for "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Zant, 462 U.S. at 877. See also Espinosa v. Florida.

At the Instruction Conference during the penalty phase, the State advised the trial court that it was going to proceed on three aggravating circumstances. These included the crime (1)

was committed for financial gain, §921.141(50(f), Fla. Stat.; (2) was especially wicked, evil, atrocious, or cruel, §921.141(5)(h), Fla. Stat.; and (3) was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, §921.141(5)(i), Fla. Stat. (R. 1286).

These were the three aggravating circumstances on which the state presented argument to the jury (R. 1327-30). These were also the three aggravating circumstances on which the jury was orally instructed by the trial court (R. 1345).

However, the written jury instructions, which were sent into the jury room with the jurors (R. 1349), also contained a completely new and foreign statutory aggravating circumstance not included in the oral instructions: that "the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws" (R. 1902).

It is impossible to know what effects this instruction had on the jury. The jury was left to its own devices to determine the meaning of this new aggravating circumstance. However, its erroneous submission to the jury undermines confidence in the jury's recommendation of death, and resulted in the denial of Mr. Byrd's rights under the Eighth and Fourteenth Amendments. Espinosa v. Florida.

Appellate counsel failed to read the record and learn of this error. This was deficient performance which prejudiced Mr. Byrd. Mr. Byrd is entitled to habeas relief.

CLAIM III

NEWLY DISCOVERED EVIDENCE THAT MR. BYRD'S CODEFENDANT RECEIVED A LIFE SENTENCE SHOWS THAT MR. BYRD'S DEATH SENTENCE IS DISPROPORTIONATE AND INVALID UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ACTIONS BY THE STATE SINCE MR. BYRD'S TRIAL ARE ALSO NEWLY DISCOVERED EVIDENCE OF DEALS MADE BY THE STATE FOR TESTIMONY.

Since Mr. Byrd was convicted in July of 1982 his co-defendant, equally as culpable as Mr. Byrd, was sentenced to life imprisonment. Also since the time of Mr. Byrd's trial the State Attorney has rewarded key witnesses for their testimony. All of these actions show that Mr. Byrd's conviction and sentence of death are disproportionate to the sentence of the co-defendant and that the State had made certain "deals" for testimony, unrevealed at trial.

Mr. Byrd's co-defendant James Endress was tried separately. At Mr. Endress' trial he was sentenced to life imprisonment. The Florida Supreme Court has held that a co-defendant's life sentence should be considered even when that life sentence was imposed after the imposition of a death sentence. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992); Witt v. State, 342 So. 2d 497, 500 (Fla. 1977).

Several months after Mr. Byrd's trial the State attorney provided a job recommendation for Regina Schimelfining, a critical state witness. This valuable recommendation was provided as a reward for Ms. Schimelfining's testimony at Mr. Byrd's trial.

In this letter the State Attorney, Manuel A. Lopez stated:

> Miss Schimelfining was very cooperative in providing information which led to the arrest and in one instance, conviction of several persons who were charged with a very brutal murder. Without her assistance, the cases would have been much weaker.

(See Attachment 1). The prosecutor provided Miss Schimelfining with this letter as a reward or benefit for testimony against Mr. Byrd. The credibility of her testimony is seriously undermined by this letter. The jury and sentencing judge was not able to consider the reward's Ms. Schimelfining was receiving for her testimony.

In Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979) the Florida Supreme Court held that to be defined as newly discovered, the facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." The trial court or trial counsel could not have know that Mr. Endress would receive a life sentence. Mr. Byrd was sentenced to death on August 13, 1982. (R. 1663). The jury had recommended death on July 26, 1982. (R. 1350). Mr. Endress was not sentenced to life until October 20, 1983, well over a year after Mr. Byrd's trial. The exercise of diligence could not have revealed to counsel that Mr. Endress would be sentenced to life imprisonment. Also the evidence of benefits received by Ms. Schimelfining are is newly discovered since it could not have been know to trial counsel, at the time of trial, with any diligence. Hallman v. State, 371 So. 2d 482, 485 (Fla.

1979). The letter was not written until October 28, 1982, almost three months after the trial. The prosecutor did not reveal this benefit for Ms. Shimelfining before Mr. Byrd's trial. All of this evidence is newly discovered under the Florida Supreme Court's definition.

This evidence, presented to a jury on retrial would probably result in Mr. Byrd's acquittal of the death penalty. The probability standard set out in Jones v. State, 591 So. 2d 911, 915 (Fla. 1991) is applicable to where the issue is whether a life or death sentence should have been imposed. Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992). Under the probability standard a new trial must be granted if the new evidence is of such a nature that it would probably produce an acquittal at retrial. Scott, Jones. Had a sentencing court known that Mr. Endress was sentenced to life imprisonment and that key witnesses were being rewarded for their testimony it would not have sentenced Mr. Byrd to death.

The testimony at trial was that Mr. Endress procured the gun, made a silencer for the gun, and actually shot and strangled Mrs. Byrd. (R. 409, 411, 420-21). Mr. Endress is the most culpable for the death of Mrs. Byrd or at least equally culpable with Mr. Byrd, yet he received a life sentence. The jury probably would have found Mr. Byrd's death sentence inappropriate had it had the opportunity to factor in Mr. Endress' life sentence.

The Florida Supreme Court has repeatedly and consistently held that it is proper to consider the disparate treatment of co-defendants. Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988). This is proper even when the co-defendant is sentenced subsequent to the defendant. Witt, Scott. The evidence shows that Mr. Endress was equally or more culpable for the Mrs. Byrd's death than Mr. Byrd. On the grounds of proportionality, disparity and fundamental fairness grounds the sentence of death imposed on Mr. Byrd should be set aside. No sentencer has been provided vehicle to consider Mr. Endress' life sentence or the evidence of benefits received by state witnesses in violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Mr. Byrd's sentence of death violates the Eighth and Fourteenth Amendments and must be vacated.

CLAIM IV

MR. BYRD WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN HE WAS FORCED TO LITIGATE HIS PREVIOUS RULE 3.850 WHEN HIS COLLATERAL COUNSEL WAS DEPRIVED OF ADEQUATE TIME AND ADEQUATE FUNDS.

Between January 1, 1989 and March 22, 1989, the Governor of Florida signed nine (9) death warrants in cases in which CCR was required to represent the capital defendants. Of the nine, six were warrants of thirty (30) days or less in cases in which it was at least the second warrant. Of those six, Mr. Byrd's collateral counsel, Martin McClain, represented three of those capital defendants (Ray Clark, Ian Lightbourne, and Anthony Bertolotti). Of those three, two of those clients were cases in

which Mr. McClain was assigned upon the signing of the warrants. He was thus required to spend all of his time during those warrants reviewing and learning those cases. Mr. McClain also represented Phillip Atkins who had a 3.850 filing date of March 20, 1989.

In addition, Mr. McClain had numerous nonwarrant cases in which he was required to act. He filed posthearing memoranda on Raleigh Porter, James Agan, John Bush and Milo Rose. He filed an Initial Brief in this Court on behalf of John Marek.

Mr. McClain sought and obtained a continuance of Mr. Byrd's evidentiary hearing. However, an order entered March 3, 1989, indicated no additional continuances would be allowed; the hearing would occur March 23, 1989.

Due to the Governor's action in signing death warrants in order to place pressure upon Mr. Byrd's collateral counsel, Mr. Byrd was denied his due process rights to a full and fair proceeding. Collateral counsel did not have adequate time to investigate and prepare. He was unable to interview witnesses in advance of the evidentiary hearing. Counsel, by virtue of his case load, was required to show up and do the hearing cold. He was not able to review material with Mr. Byrd's trial counsel. He was not able to obtain tax records of Mr. LaRussa and Mr. Ober. In short, he was not able to prepare.

This Court has since recognized that under Florida law, CCR must have adequate funds and time to perform its function --

representing death sentenced individuals. In re Rule 3.851, 18 Fla. L. Weekly S553 (Fla. Oct. 21, 1993):

> **Commentary**
>
> This rule is consistent with the recommendation of the Supreme Court on Postconviction Relief in Capital Cases, which was created because of the substantial delays in the death penalty postconviction relief process. The committee was created because of the inability of the Capital Collateral Representative to properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delay in those cases. That committee recognized that, to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction relief proceedings. The committee found that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant. In a number of instances, the courts were not aware of problems concerning representation of a defendant until a death warrant was signed. In other instances, the committee found that, when postconviction relief motions had been filed, they clearly had not moved at an orderly pace and the signing of a death warrant was being used as a means to expedite the process. The committee recommended that specific named counsel should be designated to represent each prisoner not later than 30 days after the defendant's judgment and sentence of death becomes final. To assure that representation, the committee's report noted that it was essential that there be adequate funding of the capital collateral representative and sought temporary assistance from the Florida Bar in providing pro bono representation for some inmates.

Because Mr. Byrd's prior proceedings were conducted in violation of due process and Florida law, this Court must provide Mr. Byrd with a full and fair hearing where he is represented by

counsel who has adequate time and funds to investigate and prepare.

CONCLUSION

This Court should grant habeas corpus relief on the basis of the clear violation of his rights to due process and equal protection of the laws, trial by an impartial jury, his Fifth, Sixth, and Eighth Amendments rights and effective appellate counsel which Mr. Byrd has presented in these proceedings.

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 9th, 1994.

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. McCLAIN
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Appendix A

CLAIM V

WHETHER MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF EVIDENCE OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS INVOCATION OF HIS RIGHT OF SILENCE WAS IGNORED AND A CONFESSION WAS COERCED FROM HIS LIPS AND USED AGAINST HIM BECAUSE HIS COUNSEL FAILED TO PRESENT THE PROPER FACTS, ALONG WITH CASE LAW AND ARGUMENT, TO THE TRIAL COURT.

The State would request that this Court take notice of issue I of the Appellant's brief on direct appeal. Not only did the defendant raise this claim in his brief, but this Court explicitly rejected it in its opinion:

> From our complete review of the record, we find there is sufficient evidence to sustain the trial court's finding that all of the statements made by appellant were voluntarily given.
>
> Byrd, supra, at 473.

As the Appellant raised the issue on direct appeal, the lower court properly foreclosed the Appellant from presenting it as a basis for Rule 3.850 relief. Mikenas, Demps, and Meeks, supra. Again, the defendant cannot relitigate this issue under the guise of ineffective assistance of counsel. Sireci, supra, at 120; Woods, supra, at 83. The State would additionally note that the Appellant, contrary to the representations herein, was not "silent" during his interview. The Appellant, as noted by