IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF
Appellant

v.

CASE NO: 91,913

STATE OF FLORIDA
Appellee

/

APPELLANT'S INITIAL BRIEF ON THE DENIAL OF 3.850 RELIEF IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Huff's motion for postconviction relief. The action was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied all the claims of relief except one. The circuit court granted an evidentiary hearing on one limited claim. The following symbols will be used to designate references to the record in the instant case.

"R."—Record on direct

"TTR"- Record of the trial transcript.

REQUEST FOR ORAL ARGUMENT

Mr. Huff has been sentence to death. The resolution of the issues involved in this action will determine whether he lives or dies. This court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Huff, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

i. Course of the Proceedings and Disposition in Court Below

On June 2, 1980, James Roger Huff, Appellant, Defendant below was indicted by the Sumter County Grand Jury. He was charged with two counts of Murder in the First Degree. Huff went to trial represented by Stan Cushman in October 1980. Huff was convicted and sentenced to death on November 6, 1980.

In 1983, the Florida Supreme Court reversed the conviction, vacated the death sentences, and remanded the case for a new trial. ***Huff v. State,*** 437 So.2d 1087 (Fla. 1983).

In the re-trial, Mark Hill and Carla Pepperman represented Huff. The trial commenced May 1, 1984. A jury verdict of guilty was rendered. No mitigation was introduced in the penalty phase. Huff was given two death sentences. The Florida Supreme Court affirmed the convictions and sentences on August 28, 1986. ***Huff v. State,*** 495 So.2d 145 (Fla. 1986).

Huff filed his first Motion to Vacate Conviction and Sentence With Special Request To Amend on December 2, 1988. R. 1-107. The trial court struck this motion. R. 110-111. A Renewed Rule 3.850 motion and Motion for Rehearing were filed. R. 112-192. The Circuit Court denied the motion. R. 213.

The Florida Supreme Court remanded this case back to the Circuit Court for consideration of the Rule 3.850 Motion, ***Huff v. State,*** 569 So. 2d 1247 (Fla. 1990). On September 12, 1991, the Circuit Court entered an Order Denying Defendant's Motion for Post-Conviction Relief. R. 392-397.

Huff appealed this ruling on January 24, 1992 R. 443.

On September 7, 1993, the Florida Supreme Court issued the mandate sending the matter back to the Circuit Court. R. 449-458.

On November 8, 1996, an Amended Motion to Vacate Judgment and Sentence was filed. R. 1422-1659 The motion was 238 pages long and was supplemented with a twenty page Correction to Amended Motion filed November 12, 1996. R. 1680-1679

Ultimately, on December 23, 1996, the Circuit Court conducted a "Huff" hearing on the 3.850 motion. The purpose of this hearing was to determine which, if any, of the issues raised in Huff's 3.850 motion, required an evidentiary hearing.

At the December 23, 1996 hearing the state successfully argued to the Circuit Court that all but one of the issues raised in the 3.850 motion were procedurally barred, or the allegations of ineffective assistance of counsel were legally insufficient because they were to vague.

The Circuit Court ruled Huff was entitled to an evidentiary hearing only on the issue pertaining to the communication of a plea offer to him. The rest of claims were ruled to be either procedurally barred or legally insufficient.

After the December 23, 1996 hearing the Office of the Capital Collateral Representative (CCR), which had been representing Huff, moved to withdraw. R. 2088-2096. The motion was granted by the Circuit Court. R.2123-2141.

William Eble was appointed on February 27, 1997, to represent Huff at the 3.850 evidentiary hearing on the sole issue pertaining to the communication of a plea offer. R. 2273-2274

On June 5, 1997, Eble filed a Motion To Amend Amended Motion To Vacate Judgement and Sentence. R. 2301-2309.

The gist of Eble's motion was he had reviewed the transcript of the 1984 trial and discovered numerous instances of deficient performance by Huff's trial counsel. Eble filed an Amended Amended Motion to provide the court with the specificity the court previously ruled the CCR amended 3.850 motion lacked when the court originally ruled the claims were legally insufficient. R. 2301-2309.

On June 30, 1997, the Circuit Court denied Eble's motion. R. 2310-2313

On August 8, 1997, the evidentiary hearing was held on the conveyance of the plea agreement issue.

On October 30, 1997 the Circuit Court entered its Final Order Denying Defendant's Amended 3.850 Motion and Related Supplemental Pleadings. R. 2374—2420.

A Notice of Appeal was timely filed.

Subsequently, William Eble was permitted to withdraw from the case and on November 24, 1998, the Circuit Court appointed Frederick W. Vollrath to represent Huff under the Capital Registry Act of 1998.

ii. <u>Statement of Facts:</u>

(a) The issues raised in the 3.850 Motion to Vacate Judgment and Sentence can briefly be described as follows:

1. Various state agencies failed to comply with the public record act.
2. Huff's mental state prevented him from making a knowing and intelligent waiver of his Miranda Rights.
3. Huff was not advised of his right to appointed counsel.
4. Statements allegedly made by Huff were improperly admitted.
5. Trial counsel failed to convey a plea offer to Huff.

6. Trial counsel failed to properly prepare the crime scene expert.
7. Trial counsel failed to adequately challenge the qualification of the state's experts who testified to the significance of tire tracks found at the murder scene.
8. Trial counsel failed to adequately investigate the issue of crime scene contamination.
9. Trial counsel failed to object to the "jocular bantering" in the courtroom.
10. Trial counsel failed to object when on at least three occasions Huff was absent from the courtroom during the trial.
11. Trial counsel failed to object when the trial judge was absent during the questioning of courtroom spectators about an incident which occurred in the courtroom.
12. Trial counsel failed to adequately impeach the testimony of Dr. Rojas who testified to the lack of evidence of a head injury to Huff.
13. Trial counsel failed to move to recuse the State Attorney's office for the Fifth Judicial Circuit from prosecuting Huff's case.
14. Trial counsel failed to object on numerous occasions to matters occurring in the courtroom.

15. Trial counsel "stipulated to the expertise of the states' witness".

16. Trial counsel failed to obtain the vanity mirror from the victim's car.

17. Trial counsel failed to adequately cross-examine the medical examiner.

18. Trial counsel failed to develop other suspects and alternate crime scenes.

19. Trial counsel failed to adequately present testimony helpful to Huff to the jury.

20. Trial counsel failed to get sufficient time between the guilty verdict and the sentencing to properly prepare for the sentencing phase.

21. Huff's right to confrontation was violated with regard to Sheriff Johnson's testimony.

22. Huff's right to remain silent was commented on.

23. The prosecution systematically excluded death scrupled jurors.

24. The state gave Sheriff Johnson a monetary reward for his testimony.

25. The state failed to disclose the existence of a twenty-four hour tape dispatch.

26. The testimony of the witnesses relating to the cause and location of the victims' deaths and the trajectories of bullets were not true.

27. The medical examiners testimony was inadequate and misleading.

28. The state presented testimony that purposely misled the jury in presenting testimony concerning one of the victims' injuries.

29. An agent for the state of Florida threatened a vital defense witness.

30. The state with held from the defense the existence of a second separate crime scene.

31. Trial counsel failed to investigate and present evidence.

32. Trial counsel knew about evidence with held or falsely presented by the state and rendered deficient performance.

33. Huff was innocent of First Degree Murder and innocent of the death penalty.

34. Huff's constitutional rights were violated by the Florida Rules of Professional Conduct, which generally prohibit counsel from interviewing jurors.

35. The unconstitutionality of the aggravating circumstances as delineated in F.S. 921.141.

36. The cumulative effect of the errors warrant a reversal of the conviction even if no single issue does.

37. Huff's constitutional rights were violated when the court and counsel for the state engaged in misconduct that interfered with the jury's ability to be impartial.

38. During the voir dire the trial judge and prosecutor denigrated the jury's role in the penalty phase of a murder trial.

39. The record of Huff's trial proceeding was incomplete in a way, which prevented the Florida Supreme Court from conducting meaningful appellate review.

40. During the trial the prosecutor's choice of words during the trial prejudiced Huff.

41. During the trial the trial judge absented himself from the proceedings therefore violating several of Huff's rights.

42. The court denied the public the right of access to the proceedings and compromised Huff's right to a fair trial.

43. The state used its preemptory challenges in a racially discriminatory way.

44. The aggravating circumstance of cold, calculating, and premeditated is unconstitutional.

45. The evidence taken as a whole was insufficient to convict Huff.

46. Huff's rights were violated when he was out of the courtroom during certain critical stages of his trial.

47. The trial court erred in allowing the opinion testimony of certain witnesses who were not experts.

48. An assistant state attorney who lacked constitutionally conferred jurisdiction to prosecute conducted the trial.

49. The jury pre-qualification procedure was done in a racially discriminatory manner, and Huff was not present when this selection process began.

50. The heinous, atrocious and cruel aggravator is unconstitutional.

51. The trial court erroneously considered non-statutory aggravating circumstances.

52. The pecuniary gain aggravator was misapplied.

53. Huff was incompetent to waive his right to a penalty phase.

54. Huff presented an inventory of all the evidence that could have been presented had he not elected to waive the presentation of mitigating evidence before the jury and judge.

55. The Sumter County Sheriff's office violation the public records law in failing to provide all of the records relevant to Huff's case.

56. The trial court erred by failing to properly and timely impose a written sentence and relied on facts not in evidence to sentence Huff.

57. The security measure undertaken in the presence of the jury violated various rights of Huff when the jurors saw Huff handcuffed and manacled to a Pinellas County Deputy Sheriff.

58. The trial judge was mistaken as to the law in imposing the death penalty.

59. That Huff was denied effective representation of post conviction counsel because of the "under-funding" and post conviction counsel's excessive case load.

(b) The issues raised in Elbe's Motion to Amend Amended Motions to Vacate Judgment and Sentence can briefly be described as follows R. 2301-2309:

1. Defense counsel put on a witness, Francis Carstairs. Ms. Carstairs testimony was not necessary to prove anything in the defense case. On cross-examination she provided testimony helpful to the prosecution.

2. Defense counsel called William Vokmar, who testified the shirt seen in a photograph of the Huff shortly after the discovery of the

bodies was not the same shirt Vokmar saw Huff in shortly before the discovery of the bodies. This testimony bolstered the prosecutions theory of the case that Huff killed his parents, left the scene of the crime, and then returned.

3. The defense called former Wildwood police officer Terry Overly as a defense witness. Overly was to testify to the contamination of the crime scene and the poor police procedures. The defense team failed to adequately prepare the witness. They didn't file a motion to prevent the "bad character" evidence against Overly from coming in on cross-examination. They didn't take advantage of an offer from the state to present the "bad character" evidence prior the defense examination of Overly. The result was a devastating cross-examination in the presence of the jury.
4. The defense recalled a state witness, Harris Rabon. The defense solicited from Rabon; (a) he went over the crime scene with a metal detector (one of the defense theories was the crime scene was poorly preserved and investigated, (b) Huff requested an attorney, (c) Rabon had been instructed not to let Huff wash his hands.

5. The defense called Bud Stokes from the Sumter County Sheriffs office. Defense counsel had Stokes testify that Huff had no money on him, but did have a set of keys, and Huff said he was hit on the head but he (Stokes) didn't call any medical assistance. On cross Stokes said Huff wasn't very specific about where he was struck. Stokes saw no evidence of a head injury. The Sumter County Sheriff's office called a lot of attorneys to get one for Huff after he requested one.
6. Judson Spence was called by the defense and testified he had known Huff for ten years and had never known him to carry a gun or a large knife. On cross he admitted he had never been to Huff's house or even in his automobile. The state was then able to re-emphasize to the jury that two witnesses testified to the fact Huff had asked about obtaining a gun permit and admitted owning a .38.
7. The defense called Father Paddox, an Episcopalian priest. Father Paddox testified the day after Huff's arrest that he observed him and saw a knot the size of a quarter on Huff's head. But, when the state asked if Huff told him how he had gotten it Huff's lawyer objected on the grounds of priest-penitent privilege.

The priest would have testified that Huff told him he and his parents where kidnapped and Huff was struck on the head and when he woke up he found his parents dead. Instead the jury was left with the impression that the answer would have been harmful to Huff.

8. Al White was called as a defense witness. He was a crime scene expert the defense found during the course of the trial. Due to ill preparation of the witness by the defense team he was not permitted to testify.

9. The defense team failed to properly investigate the case and failed to prepare the witnesses for trial.

10. The defense team failed to provide their expert witness A.L. White the necessary information on which to base his opinion. The defense team presented the witness to the jury with disastrous results.

11. When Huff's brother took the stand for the defense he testified that others often drove his mother's car and that he was paying for his Huff's defense. When the state tried to cross exam the brother on what Huff said happened defense counsel raised a series of objections that such questions were "outside the scope". Again,

the jury was left with the impression that the answer would be unfavorable to Huff, when in fact it would have been helpful.

12. Eble presented a list of at least 14 instances in which the deficient performance of defense counsel in preparing for Huff to take the witness stand is apparent. This deficient performance included but was not limited to: encouraging Huff to be argumentative with the prosecutor; eliciting testimony Huff requested an attorney; instructing Huff he did not have to answer questions that were "outside the scope"; Defense counsel making loud arguments at the bench so it was apparent to the jury he was trying to keep out evidence; Hill failed to object to the prosecutor resuming his question after an objection with the phrase, "before Mr. Hill's last objection"; failing to object to the prosecutor asking one witness to testify to the credibility of another witness; continuously objecting to questions asked by the prosecutor of witnesses when the answers would have been favorable to the defense, indicating a lack of preparation or knowledge of the case; asserting attorney-client privilege to prevent Huff from explaining matters without knowing if the privilege even applied.; instructing his Huff in the

presence of the jury not to answer a question based upon attorney-client privilege.

(c) **The evidentiary hearing held on August 8, 1997.**

On August 8, 1997, an evidentiary hearing on Huff's 3.850 motion took place before Judge Richard Tombrink on the sole issue of the, "The Defendant's Amended 3.850 Motion which alleges that counsel for Defendant Huff during the retrial in this case failed to apprise Defendant Huff of a plea offer and discuss the merits of plea offer with Defendant Huff as contained in the motion." R. 148

James Martin Brown was the assistant state attorney who prosecuted Huff in his retrial. R. 130. He testified he had the authority to engage in plea negotiations in first degree murder cases but not conclude them.

Brown testified the state never was presented with any formal offer to plead from the defense and the state attorneys' office never offered anything to the defense. R. 190.

Arthur T. Blundell was an investigator with Lake Investigation Agency. Blundell was shown State's Exhibit A, R. 32 which had the signature of Huff, Blundell as a witness, and a Deputy K.N. whose last name Blundell could not make out. Blundell had no independent recollection of the document but acknowledged the signatures. R 193-195.

At the hearing on August 8, 1997, Blundell did not have a specific recollection of communicating with Huff, or being present with Hill or Robuck (from the law firm representing Huff), when they communicated to Huff a plea offer from the state that would have allowed Huff to plead to two consecutive life sentences to two second degree murders. R. 199.

Bundell could not independently remember when the document was executed or if the signature was Huff's. R. 200.

He could not remember any particular meeting with Huff in which the document would have been signed. R. 200

He could not remember where the meeting took place. R. 200

The document bears a date of March 19, 1984, but the signatures were not dated. R. 200-201.

Bundell did not recall any offers being made by the state. R. 204.

Bundell did not remember any specific conversation with Huff. R. 204. Bundell did not remember any conversation taking place where the attorneys identified to Huff a specific reason as to why he should or should not accept or offer a plea in the case. R. 206

Jeffery Mark Pfizer testified he was an assistant state attorney from August 1978 to July of 1985. In 1984 he was assigned as second chair in the retrial of Huff. R. 210.

Pfister said he had a specific recollection that Huff was offered life or lifes to first or second-degree murder before the trial. R. 211 These plea activities took place before the letter of March 23, 1984, in which Judge Huffstetler, the trial judge, rejected all plea offers except to first degree murder with a penalty phase to begin after the plea. R. 213-214.

Pfister said the state offered a deal for life to Huff and it was rejected. R. 217

Huff contends his rejection of the plea agreement was based on representations made to him by his lawyers as to what they were prepared to show at trial. After the initial rejection of the state's plea offer, and Huff's counter offer, Huff became concerned the lawyers representing him where not properly prepared. There still was no crime scene expert, which Huff believed was absolutely essential to his defense.

The case was set for trial on May 1, 1984. By April 23, 1984, Huff was convinced his trial lawyers had not properly prepared the case because of the lack of a crime scene expert. He made an offer through his lawyers that he would plead to life, with certain conditions.

Both the defense and the state stipulated to a change of venue to St. Petersburg, Florida. A continuation was not considered.

The trial court focused the evidentiary hearing on the narrow issue of: "Counsel for defendant Huff during the retrial of this case, failed to apprise Defendant Huff of a plea offer and to discuss the merits of that plea offer with Defendant Huff." R. 225.

Leslie Robert Huffstetler, Jr., was the presiding judge at the re-trial in May 1984. He identified a letter written by him dated March 23, 1984, (R. 125) but he did not recall the facts and circumstances leading up to the writing of the letter. R. 261

Huffstetler had no independent recollection of the status of plea negotiations at the time he wrote the letter.R.261

Huffstetler could not recall if a plea offer was conveyed to him by the defense or not around April 23, 1997. R. 263, and couldn't say whether it happened or it didn't happen. R. 264.

Horance Danforth Robuck, Jr. testified he was one of the attorneys that was hired to represent James Roger Huff. He recognized the document, which was labeled Defendant's Exhibit A (R.96) as the Plea Agreement and Waiver of Right to Appeal form. Robuck could not remember when the form had been filled out or when his hand written notes were made to the file. R. 276.

Robuck was asked if he recalled a conversation with Huff when the form was signed by Huff.

The form (R.96) stated Huff would enter a plea of guilty but only because it was in his best interest. He would be adjudicated guilty. He would receive two consecutive life sentences, and he would be ordered to D.O.C. and be placed either in Lake Correctional Institution or a minimum-security facility and not have to go back through Lake Butler. R.278

Robuck said he did not specifically recall having a conversation with Huff about the plea. R. 281

Robuck said if Huff had agreed to plead as outlined in the plea form he would have communicated that to the State of Florida's representatives. R.283

Robuck does not remember to whom he communicated the plea offer. R. 285.

Robuck does not know if Mark Hill conveyed the plea offer to anyone. R. 285

The plea offer would have been conveyed by phone to the state and possible the judge. R.287

Robuck was shown State's Exhibit A. (R.32) He was asked if he recalled the state's plea offer being communicated to Huff. The state's

offer which would have been conveyed would have allowed a no contest plea, two consecutive life sentences for second degree murder and an estimate from his (Huff's) counsel, that he would only serve eight years on those two consecutive lifes if he pled . R. 290

Robuck did not specifically recall conveying that offer to Huff. R. 290

Robuck does not specifically recall Huff rejecting the offer. R. 290

Robuck does not recall Huff ever saying he (Huff) would only plead to manslaughter for time served. R. 290

Robuck remembers sitting down with Huff and discussing the case. He does not remember discussing plea agreements with Huff. R. 300.

Mark Hill testified the document he presented Huff with did have a specific plea offer in it and specifically talks about it being revoked if he didn't take it. R. 316-320

Hill could not remember if a plea offer had actually been made to Huff by the state. He couldn't say he remembered a plea agreement but he couldn't say it didn't happen. R. 322-323

Hill has no recollection of ever talking with Huff about the desirability of pleading to two second-degree murders and life sentences. R. 324. Hill can not remember the communication of a plea offer to the state. R. 336

Hill could not remember if he was the source of the information written on Document #4, (R. 32) stating under what conditions Huff would plead. R. 340

The document showed the plea agreement was changing from a no contest plea to a guilty plea. R. 341.

Hill said he doesn't ever recall receiving a an offer from the state but he can not say one didn't exist. R. 351.

Huff took the stand and testified that sometime from late February to March of 1984 his attorneys came to him with a plea offer and Hill told him that he had an offer from the State for two second degrees, eight to fourteen years, credit for time served, plus statutory gain time. R. 379

Huff said he took the offer to mean that he would have the statutory gain time come off the eight to fourteen years. Huff said he talked with the attorneys and they all discussed the plea agreement. Huff asked about the crime scene expert the defense was suppose to have.

Huff says they never discussed any of the case's weaknesses. Hill told him they were working on something to impeach Sheriff Johnson's testimony that Huff had confessed to him. R. 379-381

Huff said he rejected the plea agreement and said he would take time served. R. 333.

Huff said he wrote on the bottom of the plea form that he would accept no plea because that would show he was animate about not taking a plea and get the state to offer manslaughter for time served.

About a week before trial Huff testified that he was becoming distressed over the fact he did not yet have a crime scene expert, his attorneys did not seem prepared and he was concerned about putting his family through another trial.

Huff said he was willing to do a plea agreement. He agreed he would enter a plea of guilty without having to actually admit he did it. He testified his attorneys told him he could enter a guilty plea on the bases that it was in his best interest. It was at this time Huff and his attorneys discussed the other condition he wanted in order to plea guilty.

Huff said he wanted to be placed in a facility in Lake County so he could be near his family. He also wanted to be placed in a medium/minimum security prison without being reprocessed through Lake Butler so he could work his way toward parole. R. 387-390.

Huff said he didn't know if the plea offer was conveyed to the State Attorney. He knows the judge wrote a letter rejecting a plea to anything but first degree murder. The plea would be immediately followed by a penalty phase. R. 389-91.

When Huff's attorneys presented him with the plea offer to life they did not advise him to take it or not take it. The attorneys did not discuss with him their examinations of the facts, circumstances, pleadings and the law and advise him as to whether they though he should take or reject the deal. R. 402-404

Horace Danford Robuck testified he could not remember if there was ever a time when he and Mark Hill met together with Huff about one week before the trial in this case when Huff told him that he had changed his mind and had decided to go ahead and plead. R. 436

SUMMARY OF THE ARGUMENT

ARGUMENT I:

The Circuit Court abused its' discretion in failing to find Huff's trial counsel rendered ineffective assistance of counsel by failing to adequately advise him of the posture of his case so Huff could knowingly and intelligently weight the advisability of accepting the states' plea offer, which would have allowed him to plead to life. The Circuit Court also abused its discretion in failing to find Huff's trial counsel rendered ineffective assistance of counsel by failing to convey Huff's plea offer to the state.

ARGUMENT II:

The Circuit Court abused its discretion in failing to hold an evidentiary hearing on the claims Huff raised in his 3.850 motion before denying the motion. The Circuit Court only granted an evidentiary hearing on the issue of the conveyance of the plea offers, which are the subject of Argument, I.

The court denied an evidentiary hearing on all the rest of the issues raised in the 3.850 motion. The Circuit Court found they were either procedurally barred or legally insufficient. The 3.850 motions raise issues that required an evidentiary hearing, if true. The Circuit Court failed to

attach any portions of the record to affirmatively show Huff was not entitled to an evidentiary hearing.

This court should remand this case back to the Circuit Court with directions to conduct an evidentiary hearing on the issues raised.

ARGUMENT III:

The Circuit Court abused its discretion in failing to consider the motion of then newly appointed counsel, William Eble, to supplement and enhance the previously filed 3.850 by adding details the Circuit Court found lacking and thereby legally insufficient.

This court should remand this case back to the Circuit Court with directions to consider the details raised in Eble's motion and determine if the inclusions of the additional details would have required an evidentiary hearing.

ARGUMENT I

THE TRIAL COURT ABUSED ITS' DISCRETION IN FAILING TO FIND HUFF'S COUNSEL FAILED TO ADEQUATELY ADVISE HIM ON THE PLEA OFFER AND COUNSEL FAILED TO CONVEY THE PLEA OFFER FROM HUFF TO THE STATE PRIOR TO TRIAL.

Huff alleged in his 3.850 motion that his attorneys failed to communicate a plea offer to him and to discuss the advisability of accepting the offer. R. 1410.

Huff has the burden of proof that the allegations contained in his petition for postconviction relief are true. He must prove these allegations by a preponderance of the evidence. ***See generally Jackson v. State,*** 452 So. 2d 533, 537, (Fla. 1984); ***In re Alvernaz,*** 830 P.2d 747 (Cal. 1992)

Huff's allegations are located in paragraphs 8-10 of Claim V, on pages 22-23 of the Defendant's Amended Motion. Huff accuses his attorney's of providing him ineffective assistance of counsel by:

(a) Failing to tell him about a plea offer and (b) failing to discuss whether it was advisable to accept the offer.

Six witnesses testified at the evidentiary hearing on August 8, 1997:

James Martin Brown-the prosecutor.

Arthur T. Blundell-an investigator working with Huff's defense team.

Jeffery Mark Pfister-an assistant state attorney with the prosecution team.

Leslie Robert Huffstetler, Jr.- the presiding judge.

Horance Danforth Robuck, Jr., - one of Huff's lawyers.

Mark J. Hill, -the led trial attorney for Huff.

James Roger Huff-the Defendant

Of the six witnesses only two had any definite recollection-James Roger Huff and Jeffery Mark Pfizer. Pfizer said the state made an offer to the defense, which would have allowed Huff to plead to life terms. Huff testified an offer was made to him for two life sentences and he rejected it because his defense team told him they had a crime scene expert who would testify at trial as to the contamination of the crime scene. They also told him they had information through which they would impeach Sumter County Sheriff Johnson. Johnson was going to testify Huff told him he had shot his parents in the face. R. 381-383

Huff testified when it became apparent the defense lawyers were not going to have a crime scene expert he told his attorneys he would plead guilty to the murders in exchange for life sentences and other considerations.

The other four witnesses could not swear any particular events took place because thirteen years had passed from the time of the trial May 1, 1984 to the time of the evidentiary hearing on August 8, 1997.

The best they could do was say they had no recollection of certain events taking place. They could not say for certain the events did or did not take place.

That state of the record at the hearing is such that between the testimony of the witness, and the documents introduced at trial, a plea offer was certainly made by the state at some point to Huff. The offer would have allowed him to plead to two life sentences.

This plea offer from the state was rejected by Huff.

The unequivocal testimony from Huff is that as he got closer to trial he was of the opinion his lawyers were unprepared for trial. He testified when he realized his lawyers would not be prepared he offered through them to plead to the charges under certain conditions. R. 385-391

There is no evidence his attorneys ever conveyed the plea offer to the state.

The evidence establishes Huff's attorneys never suggested to him his case had problems that might warrant a careful consideration of entering a plea for life based on the state's offer of life terms.

The law is not complicated.

In ***Strickland v. Washington,*** 466 U.S. 668 (1984) the United States Supreme court said that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. ***Strickland*** requires Huff to plead and demonstrate: 1) unreasonable attorney performance and 2.) prejudice.

In ***Young v. State,*** 608 So.2d 111 (Fla. 5th DCA 1992) the District Court held as follows:

"Appellant must prove his counsel failed to communicate a plea offer or misinformed him concerning the penalty he faced, that had he been correctly advised he would have accepted the plea offer, and that his acceptance of the State's plea offer would have resulted in a lesser sentence.

Huff's trial counsel failed him prior to trial in two ways regarding the plea offer.

(1) Huff's trial counsel failed to advise him of the weaknesses in his case and the advisability to seriously consider the plea offers for life sentences.

Defense counsels' obligation to Huff did not end with simply presenting the plea offer to Huff. They had an affirmative obligation to advise him of "all pertinent matters bearing on the choice of which plea to

enter and the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the defendant." ***Fla.R.Cr. Proc. 3.171 (2)(A)(B).***

Deciding whether to accept a plea offer is solely within the province of the client following consultation with counsel. Huff was unable to decide the advisability of accepting the state's offer because defense counsel failed to discuss whether it was advisable to accept the offer in light of the weaknesses of the case.

In ***Boria v. Keane,*** 83 F.3d 48 (2nd Cir. 1996), the District Court said the law also requires that the choice of the defendant to accept the offer, reject the offer, or counter offer must be based on all pertinent matters bearing on the choice and the primary person to provide the pertinent matters in regards to the legal position of the case is the attorney.

The Circuit Court did not find that trial counsel met their burden to adequately advise Huff on the plea offer. The Circuit Court simply found there was no plea offer to be considered by Huff in the first place. This finding took place despite the undisputed testimony of Huff and Pfister that a plea offer was made by the state and the documentary evidence of a plea offer.

The evidentiary hearing showed:

1) One former assistant state attorney, Pfister, testified an offer was made by the state to plead to life.

2) Huff testified an offer of life was brought to him and he rejected it.

3) Nobody else could say for certain that a plea offer was not made. They could only say they didn't recall one being made due to the passage of time.

4) The paper trail supports the testimony of Huff and Pfister. The paper trial shows:

(a) the existence of a plea offer, R 32

(b) the rejection of a plea offer, R. 32

(c) the court rejecting a plea offers to anything except first degree murder to be followed by the penalty phase. R. 125

(d) an offer by Huff to plead guilty for life under certain circumstances. R. 96

It was an abuse of discretion by the court to find no plea offer existed.

(2) The failure to advise a client of a plea offer "constitute(s) a gross deviation from accepted professional standards." ***United States ex. Rel. Caruso v. Zelinsky,*** 689 F.2d 435, 438 (3d Cir. 1982). See also ***United States v. Rodriquez,*** 929 F.2d 747, 753 (1st Cir. 1991); ***Johnson v.***

Duckworth, 793 F. 2d 898, 902 (7th Cir.), ***cert. denied,*** 479 U.S. 937 (1986); ***Beckam v. Wainwright,*** 639 F.2d 262, 267 (5th Cir. 1981).

An attorney's failure to communicate a plea offer to his client constitutes unreasonable conduct under prevailing professional standards. ***United States v. Blaylock,*** 20 Fd. 3d 1458, 1466 (9th Cir. 1994); ***Strickland v. Washington,*** 466 U.S. 668 (1984).

Defense counsel is required to inform a criminal defendant of all plea offers under ***Fla. R. Cr. Proc. 3.171(2)(A).***

It should be equally true that the defense counsel has an obligation to convey any plea offer from the defendant to the state.

The Circuit Court found even if the state had made a plea offer Huff would have refused it. There is nothing in the record to support that finding. The record shows Huff made a counter offer through his attorneys to the state. The attorneys failed to convey the counter offer to plea to the state. There is nothing in the record to support the finding by the Circuit Court that if the state had accepted the terms of a plea offered by Huff he would then have turned around and rejected it.

Huff was prejudiced by his attorney's failure to fully discuss the weaknesses in his case so Huff could properly weight and consider the initial

offer of the state. Huff was prejudiced by his attorney's failure to convey Huff's offer to plea to the state about a week before trial.

Had either event occurred Huff would be serving life and not be under a death sentence.

ARGUMENT II

THE TRIAL COURT ABUSED ITS' DISCRETION BY FAILING TO PROVIDE HUFF WITH AN EVIDENTIARY HEARING ON THE ISSUES RAISED IN HIS 3.850 MOTION.

On October 27, 1997, the Circuit Court entered an ordering denying Huff's 3.850 motion in its entirety. Only one of Huff's 3.850 issues was given an evidentiary hearing. This was the issue in Claim V, paragraphs 8-10 in which Huff claimed his counsel was ineffective in failing to convey a plea offer to Huff and to discuss it thoroughly with him.

The failure to grant the relief requested on this issue is dealt with in Argument I of this brief.

The trial court erroneously denied all the other relief requested in the 3.850 motion without an evidentiary hearing.

The trial court ruled none of the other issues raised in the 3.850 motion required an evidentiary hearing because they were either procedurally barred or were so vague and insufficient as to be virtually meaningless and thus legally insufficient.

This court in ***Manuel Valle v. State of Florida,*** No. 88,203 Florida Supreme Court December 11, 1997 again stated that under rule 3.850 a movant is entitled to an evidentiary hearing unless the motion and record

conclusively show that the movant is entitled to no relief. ***Harich v. State,*** 484 So.2d 1239, 1240 (Fla. 1986) A claim of ineffective assistance of counsel requires a defendant to meet the standards set forth in ***Strickland v. Washington,***466 U.S. 668 (1984). Strickland requires a defendant to show both (1) that counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. Id. At 686.

As to the deficiency requirement, a reviewing court must determine whether, in light of all the circumstances, counsel's acts or omissions fell outside the wide range of professionally competent assistance. ***Id***. At 690. In weighting the prejudice prong, the reviewing court must determine whether there is a reasonable probability that but for the deficiency, the result of the proceeding would have been different. Id at 695.

In ***Roberts v. State of Florida,*** No. 87,438 Florida Supreme Court June 6, 1996, this court said that rule 3.850(d) requires that in those instances where the denial of a 3.850 hearing is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order.

This court said the failure to attach portions of files and records are not reversible error in some instances if there is sufficient reference to pages

of the record citing ***Goode v. State,*** 403 So.2d 931, 932 (Fla. 1981) In ***Roberts*** this court said that the trial court's order saying "having considered the Motion (to Vacate Judgment and Sentence), the state's Answer thereto, the files and records in the cause, and arguments of counsel, and being otherwise fully advised in the premises" alone was insufficient when "no records or files were attached, no citation to the portions of the record that the judge relied upon in denying relief, nor any explanation for the bases of the court's ruling. Thus, we can only speculate as to the court's bases for denying the motion."

In ***Lemon v. State,*** 499 So.2d 923 (Fla. 1986) this court held that since the files and records did not conclusively show the defendant not entitled to no relief, a full and fair evidentiary hearing was required to resolve an issue on a 3.850 motion.

The trial judge in Huff's case found in his order that Huff's motion for postconviction relief must meet all of the procedural requirements of ***Fla. R. Crim. P.*** 3.850(c) (6). The court found the claim is not subject to summary denial unless it is conclusory in nature and unsupported by allegations of fact, ***Jenkins v. State,*** 633 So.2d 553 Fla. 1st DCA 1994); ***Mann v. State*** 622 So2d 595 (Fla. 3d DCA 1993). These cases are specifically applicable to claims alleging ineffective assistance of counsel claims. ***Roberts v. State,***

568 So.2d 1255 (Fla. 1990); ***Kennedy v. State,*** 547 So.2d 912, 913, (Fla. 1989), which held a defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel detrimental to the defendant."

These line of cases were referred to in the court's order of October 27, 1997, as the "Specific Fact Cases".

The court then cited in support of its' order a line of cases holding the law in Florida will not allow a postconviction motion to be used as a second appeal, and claims that were, or could have been, raised on direct appeal are not cognizable in a motion filed pursuant to ***Fla. R. Crim.P. 3.850*** . The Circuit Court cited ***Zeigler v. State,*** 654 So.2d ll62 (Fla. 1995); ***Oats v. Dugger,*** 638 So.2d 20 (Fla. 1992); ***Chandler v. Dugger,*** 634 So. 2d 1066 (Fla 1994); ***Lopez v. Singletary,*** 634 So.2d 1054 (Fla. 1993); ***Koon v. Dugger,*** 619 So.2d 246 (Fla. 1993); ***Johnson v. State,*** 593 So2d 206 (Fla. 1992) ***cert denied*** 113 S.Ct. 119, 121, 121 L.Ed.2d 75 (1992); ***Kight v. Dugger,*** 574 So.2d 1066 (Fla. 1990); ***Medina v. State*** 573 So.2d 293 ***cert***

denied 116 S.Ct. 2505, 135 L.Ed. 2d 195 (1996) ***Swafford v. Dugger,*** 569 So.2d 1264 (Fla. 1990); ***Roberts, supra.*** ***Agan v. State,*** 560 So.2d 222(Fla. 1990); ***Kennedy, supra.*** And ***Huff v. State,*** 541 So.2d at 1129, n.1 (claims, including a Brady claim, which 'could have and should have been raised on direct appeal or in prior motions for postconviction relief: are procedurally barred. ***See also, Fla. R. Crim. P. 3.850 (c)***; ***Bolender v. State,*** 658 So.2d 82 (Fla. 1995), ***cert denied,*** 116 S.Ct.12. Moreover, Florida law does not allow the use of a different argument to relitigate the same issues that have been raised on appeal. ***Ziegler, supra;*** ***Turner v. Dugger,*** 614 So.2d 1075 (Fla. 1992) ***; Medina, supra.*** ***Quince v. State,*** 477 So2d 535 (Fla. 1985), ***cert denied,*** 475 U.S. 1132, 106 S.Ct. 1662, 90 L.Ed.2d 204 (1986). Allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings may not be used a second appeal. ***Lopez, supra; Kight, supra.; Medina, supra.***

These line of cases was referred to by the court as the "Procedural Bar Cases"

Huff raised 42 claims in his 3.850 motion. The court denied an evidentiary hearing on all but one claim and to the extent the Circuit Court denied the evidentiary hearings the Circuit Court erred.

Claim I: Huff claimed that governmental agencies failed to adequately comply with ***Florida Statute 119***, public record requests . The court erroneously ruled the government agencies had complied. There is nothing attached to the order to support this finding.

Claim II: Huff claimed his emotional state precluded him from making a knowing and intelligent waiver of his Miranda rights. The trial court erroneously ruled this claim was procedurally barred. The court cited as grounds that Huff raised this issue in point IV at page 27 of his Initial Appellate Brief. There is no point IV at page 27 of the Initial Appellate Brief attached to the order. Nor, is there an explanation of the how Point IV at page 27 related to the 3.850 claim for relief. We can only speculate as to the courts basis for denying the claim.

Claim III: Huff claimed he was not sufficiently advised of his rights to appointed counsel and that the Defendant's Motion to Suppress his confession should have been granted. The court erroneously ruled this claim was procedurally barred. The court makes reference to Point IV of the brief on direct appeal. No point IV is attached to the order. There is no explanation of how IV relates to the 3.850 claim for relief. We can only speculate as to the courts basis for denying the claim.

Claim IV: Huff claimed that the introduction of statements allegedly made by Huff was in violation of his constitutional rights . The court erroneously ruled this claim was procedurally barred. The court makes reference to Point IV of the brief on direct appeal but fails to attach a copy of point IV. There is little explanation as to how point IV of the direct appeal relates to Claim IV of Huff's 3.850 motion.

Claim V included 14 different issues.

1. Failure to convey the plea offers and discuss it thoroughly. This issue was afforded an evidentiary hearing and was subsequently denied. On this issue the court gave an evidentiary hearing .
2. Huff claimed his trial counsel failed to adequately prepare their crime scene expert. The trial court erroneously ruled the claim was legally insufficient to require an evidentiary hearing.

   The theory of Huff's defense was Huff had been rendered unconscious by someone who had gained entrance to Huff's parent's car. When Huff regained consciousness he found his parents had been shot.

   The defense argued that during the investigation, the law enforcement officers on the scene permitted the crime scene to

become so contaminated that exculpatory evidence of the other man and his companion were destroyed.

To prove this theory of defense, defense counsel cross-examined each law enforcement officer about his activities at the crime scene. After the state rested the defense called Mr. A.L. White. Mr. White was offered as a crime scene expert.

The state requested that Mr. White's testimony be proffered because the state had not deposed him (Trial Transcript Record (TTR) 2427)

The trial court allowed this (TTR 2427) . Mr. White testified to his numerous qualifications starting as an officer with the Kentucky State Police, then as a patrolman with the St. Petersburg Beach Police Department, then with the St. Petersburg Police Department where he went from patrolman to an identification technician and was finally promoted to lieutenant in charge records and identification.

In his 17 years of involvement with law enforcement, Mr. White investigated in excess of 150 felony crime scenes. (TTR 2428-32) and attended more than 2,000 hours of education (TTR. 2433).

He also testified as an expert concerning crime scene investigation techniques on at least six occasions. (TTR 2434)

Mr. White testified that Mr. Huff's attorney had familiarized him with the crime scene, in Mr. Huff's case, and that he had been able to look at several photographs depicting the crime scene. (TTR 2437). From this information, Mr. White testified, in proffer, that in his opinion the crime scene was not properly secured. He then went on to testified to what should have been done. (TTR 2444-24447)

At the end of the proffer the state argued that Mr. White had not been given enough information to render an opinion. (TTR 2455).

The court ruled White did not have sufficient information on which to base an opinion and would not let him testify before the jury. White was excused for the day. (TTR 2479)

Defense counsel then gave additional information to White for his consideration and put him back on the stand the next trial date. His testimony was again proffered. White advised he had read additional information provided him by defense counsel. (TTR 2484-2285. Then during cross-examination it was apparent

that White had only been given the material a short time before his taking the stand to give testimony and either had just skimmed, or not read all, the materials provided to him. (TTR 2502-2503 and 2516 and 2517)

The state renewed its objection (TTR 2605) and the court again sustained the objection (TTR 2607)

White was not allowed to testify because defense counsel did not adequately prepare him.

The trial court in denying an evidentiary hearing on Huff's 3.850 claim states "There has been no showing that the performance of the Defendant's trial counsel was deficient."

The record, to the contrary, shows that defense counsel failed to adequately prepare White as a witness.

3. Huff claimed his trial counsel did not adequately challenge the evidence the State presented in support of its tacit assertion that the only automobile involved was the decedents' Buick. The trial court erroneously ruled the issue was procedurally barred. There is no portion of the record attached to the order to show this claim is procedurally barred.

4. Huff claimed his trial counsel did not adequately challenge the evidence the State presented in support of its tacit assertion that the only automobile involved was the decedents' Buick. The trial court erroneously ruled the issued was procedurally barred. No portions of the records are attached to conclusively show the record refutes the claim .

5. Huff claimed the state's expert witness Dale Nute used a flawed technique for making the microanalysis tire track comparison. The trial court erroneously ruled the issue was both procedurally barred and legally insufficient. There is nothing attached to the order to conclusively show from the record that Huff was not entitled to an evidentiary hearing.

6. Huff claimed the "jocular bantering" in the court between counsel and the court prejudiced his case. The trial court erroneously ruled the issue was procedurally barred because it had been raised on direct appeal in point XI of Huff's initial brief. But, there is no point XI attached to the order and no bases given for the court's ruling.

7. Huff claimed his trial attorneys were ineffective because they did not object to him being absent on at least three occasions when

court was in session. The trial court erroneously ruled the issue was procedurally barred because it was raised in point XVI at page 70 of Huff's initial brief. There is no point XVI attached to the order and no bases given for the court's ruling.

The right to be presence during a capital proceeding is non-waivable. ***Proffitt v. Wainwright,*** 685 F.2d 1227, 1258 (11th Cir. 1982); ***Diaz v. United States,*** 223 U.S. 442 (1912); ***Hopt v. Utah*** 110 U.S. 574 (1884).

There is no indication in the record that there was any wavier, ***Illinois v. Allen,*** 397 U.S. 337 (1970); ***Johnson v. Zerbst,*** 304 U.S. 458 (1938), but rather when the prosecutor pointed out Mr. Huff's absence in one instance, the defense counsel merely stated that he was trying to save time. (TTR 1617-1618)

8. Huff claimed his trial attorneys were ineffective when they failed to object to the judge being absent during part of the trial. The trial erroneously ruled this issue was procedurally barred because the same issue was raised in Huff's initial brief in point XVII but no point XVII is attached to the order. Nor, does the order explain how point XVII bars Huff's 3.850 claim. There arose during the course of the trial an issue where the prosecutor is

alleged to have made a comment of "we got him, we got him" in front of the jury when the prosecutor believed he made a telling point against a defense witness on cross examination.

The defense then moved form a mistrial. (TTR 2276) There was then a debate over what was said by the prosecutor in front of the jury. The defense requested to question the jurors individually about what each had heard and it was denied. (TTR 2276-2294) The defense then requested to interview the spectators as to what they heard. The judge said he wasn't going to remain in the court for the testimony and left the bench. It was not objected to by defense counsel. (TTR 2292) The following morning briefs were filed with the court with the transcripts attached. The judge then ruled. Defense counsel made no objections to this procedure.

9. Huff claimed his trial attorneys were ineffective by failing to rebut the testimony of Dr. Rojas. The trial court erroneously ruled this issue was procedurally barred. The court found Huff's counsel had objected to Dr. Rojas's testimony at trail and therefore preserved it for appeal. But, the court failed to attach

any portion of the record to show the record conclusively showed Huff was not entitled to relief.

10. Huff claimed his trial attorneys were ineffective by failing to move to recuse the State Attorney's office from the case. The trial court erroneously ruled the pleading was legally insufficient. There is nothing attached to the order from the record to support the courts conclusion.

11. Huff claimed his trial attorneys were ineffective because they failed to object to numerous prosecutorial mistakes, failed to object to prosecution's loss of the vanity mirror as evidence, and stipulated to the expertise of state witnesses. The trial court erroneously ruled these issues were legally insufficient. The court in its order outlined the specific complaints raised in Huff's motion. The court only cited to the record one issue involving the car's vanity window when it states Huff raised this in point XII of his initial brief. No point XII is attached to the record.

As to the rest the Circuit Court merely found no prejudice. This is a conclusion. The record did not conclusively show this to be

true. The court attached no copies of the record to its order to show that the claim is conclusively refuted in the record.

12. Huff claimed his trial attorneys should have cross-examined Dr. Shutrze about his autopsy procedure and the physical evidence at the scene. The trial court erroneously ruled the issue was legally insufficient. The trial court made a ruling that there was no showing that Huff met the ***Strickland*** test. But, an evidentiary hearing was needed in order to provide the evidence which would met the ***Strickland*** test.

13. Huff claimed his trail attorneys failed to investigate the existence of other suspects or a secondary crime scene. The trial court erroneously ruled the issue was legally insufficient. Again, what the court did was rule that Huff did not meet the ***Strickland*** test without giving him the opportunity to develop such evidence at a hearing. There is nothing attached to the order to show an evidentiary hearing on the matter was not warranted.

14. Huff claimed his trial attorneys failed to develop that one of the police officers knew Huff had a legitimate source of money to buy some land from the officer, failed to develop he (Huff) had

money coming from a divorce and failed to develop law enforcement had a bias against him. The trial court erroneously ruled the issues were legally insufficient. The court based its ruling on the belief that the police chief's knowledge of Huff's finances would have been hearsay and therefore inadmissible. There is nothing attached to the order to show that the record conclusively showed such information on the part of the police officer would have been hearsay.

Claim VI: Huff claimed his attorneys were ineffective because they failed to obtain a longer delay between receipt of the verdict and the sentencing procedure. The trial court erroneously denied the issue as being legally insufficient.

The jury in Huff's case came back with two verdicts of guilty of first-degree murder, on Friday evening. (TTR 3089-3090) After the jury was polled, discussion was begun to determine when the penalty phase would start the next morning. To the surprise of everyone in the courtroom including defense counsel, apparently, Huff stated 'Mr. Brown, I'll waive the second phase and accept the sentence." (TTR 3093)

Defense counsel did ask for a recess, but the court responded"...but don't prolong it too much." (TTR 3093) The court recessed at 7:08 p.m. for

the rest of the evening (R. 3095), and re-adjourned at 11:15 a.m. the next morning, a Saturday. (TTR 3096). At that time, defense counsel presented a written waiver to the court; and the state objected to the wavier (TTR. 3096) At that time, defense counsel presented a written waiver to the court; and the State objected to the wavier (TTR. 3096). After colloquies between Huff and the court (R.3097-3099 and Huff and the prosecutor (TTR. 3099-3101), the court read a statement, written by Huff, to the jury. (R. 3105)

The penalty phase of a capital trial is literally a life or death matter. Defense counsel had part of one evening and part of the next morning to discuss this waiver with Huff. The record does not show how much time counsel spent with Huff, but it could not have been more than a few hours. The record does show the waiver was made against counsel's advise (TTR 3105).

It is not clear whether a defendant can waive the penalty phase of a capital trial. Florida caselaw indicates that it is proper to waive an advisory jury recommendation. ***State v. Carr,*** 336 So.2d 358. However, many state courts have held that a capital defendant cannot waive challenges to his death sentence. ***See Commonwealth v. McKenna*** 476 Pa. 428, 383 A.2d 174 (1978)('The wavier rule cannot be exalted to a position so lofty as to

require this Court blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen".

It is well recognized that an accused has the "ultimate authority to make certain fundamental decisions regarding the case, whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. ***See Wainwright v. Sykes,*** 433 U.S. 72, 93 n. 1, 97 S. Ct. 2497, 2509 n.1 53 L.Ed.2d 594 (1977)(Burger, C.J., concurring); ***ABA Standards for Criminal Justice*** 4-5-2, 21-2.2 (2d ed. `1980)." ***Jones v. Barns,*** 103 S.Ct. 3308 (1983). However, even these decisions should only be made after full consultation with competent counsel.

The record is clear that there were witnesses present in the courtroom who were prepared to testify on Huff's behalf (TTR 3100). But the record does not disclose who they were or the substance of their anticipated testimony. There is nothing to show if they would have testified to anything beyond what was presented in Huff's first trial.

Huff's brother could have testified that Huff and his parents had a good relationship and that he helped them a lot, especially since his father went blind. Huff had no significant criminal history, Huff had presented no management problems since being on death row, He did not abuse alcohol or drugs when he was out, he had no history of mental illness, was married for

thirteen years, had two children who were teen-agers at the time, and had a stable work history, and had a history of a non-violent life style. Huff had no significant emotional problems, no mental disorder, and no history of anti-social behavior. It is likely he would have presented no problem in general prison population, he would be able to make positive contributions in such a setting, and he was fairly intelligent.

It is not clear whether counsel is under an obligation to present evidence in mitigation to the sentencing court even after his client has waived a jury recommendation.

The cases seem to hold that one who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waivers voluntary and intelligent. Upon finding such a waiver, the sentencing court may in its discretion hold a sentencing hearing before a jury and receive a recommendation or may dispense with that procedure. ***State v. Carr*** 336 So.2d 358 (Fla. 1976) ***Lamadline v. State*** 303 So.2d 17 (Fla. 1981) ***Palms v. State*** 397 So.2d 648, 656 (Fla. 1981). However, counsel presented nothing in mitigation.

An evidentiary hearing was necessary to determine whether Mr. Huff was truly rendered the effective assistance of counsel before making such an ultimate decision to waive the jury recommendation on life or death. If Huff

does have the right to make such a decision, as it appears he does in Florida, the decision should not be made without adequate time to fully explore his options, with assistance of counsel. It is not clear from the record that such assistance was effectively given under the time constraints.

The files and records do not show that Huff is entitled to no relief, and thus an evidentiary hearing is mandated. There is nothing attached to the courts' order to show what advise Huff was given by his lawyers as to the advisability of waiver the jury recommendation of life or death.

Claim VII: Huff claimed his right to confrontation was violated with reference to Sheriff Johnson's testimony. The trial court erroneously denied the issue as being procedurally barred. The grounds was the argument was raised in point XIII of Huff's initial brief. But, there is nothing attached to the order showing what point XIII was or how it related to the claim in the 3.850.

Claim VIII: Huff claimed his right to remain silent was impermissibly commented upon. The trial court erroneously denied the issue as being procedurally barred. The grounds were that the argument was raised in point XVII of the Initial Brief of Appellate. Point XVII is not attached to the order and no showing of what point XVII was, or how it related to the claim in the 3.850 motion.

Claim: IX: Huff claimed his constitutional right against cruel and unusual punishment was violated by the trial court not construing all mitigating circumstances in Huff's favor. The trial court erroneously denied the issue as being procedurally barred because Huff raised the issue in point XVIII of his Initial Brief. A copy of point XVIII was not attached to the order nor did the trial court state how point XVIII was related to the claim in the 3.850.

Claim: X: Huff claimed that the state was systematic in its exclusion of death scrupled jurors by use of its peremptory challenges. The trial court erroneously denied the issue as legally insufficient because Huff waived the sentencing recommendation phase. A capital defendant's sixth and fourteenth amendment rights to an impartial jury are violated by the exclusion of venire members who voice general objections to the death penalty. ***Witherspoon v. Illinois,*** 391 U.S. 510, 522 (1968), but whose views on the death penalty would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. ***Wainwright v. Witt,*** 469 U.S. 412, 414, (1985) quoting ***Adams v. Texas,*** 448 U.S. 38, 45 (1980)

Huff's claim does not involve ***Witherspoon*** excludables, but rather prospective jurors who indicated varying degrees of reservation against the

death penalty. Since they were willing to consider imposing the death penalty in some circumstances, they could not be properly excludable under ***Witherspoon*** and its progeny. These prospective jurors either were not challenged or excused for cause by the court. However, they were systematically excluded from sitting on Mr. Huff's capital trial by the way in which the State used it peremptory challenges. This led to a jury more conviction prone than average, and more prosecution prone. The state, through the unconstitutional use of its preemptory challenges, directed all but one of its strikes against prospective jurors who had indicated some conscious reservations against recommending a death sentence.

The State with its peremptory challenges, did exactly what ***Witherspoon*** forbade, it swept from the jury all who expressed reservations against the death penalty.

This state action violated Mr. Huff's sixth, eighth, and fourteenth amendment rights.

This issue has been discussed as dictum in some recent decisions by the United States Supreme Court but as yet never ruled on by the Court. See ***Gray v. Mississippi,*** 107 S.Ct. 2045, 2056 (1987) ***Ross v. Oklahoma,*** 108 S.Ct. 2273, 2279 (1988)

The United States Supreme Court said, "We think there is nothing arbitrary or irrational about such a requirement which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of impaneling an impartial jury. Indeed, the concept of a peremptory challenge unconstrained by any procedural requirement is difficult to imagine. As pointed out by the dissenters in ***Swain v. Alabama,*** 380 U.S., at 243-44, 85 S.Ct. at 848.

This court has sanctioned numerous incursions upon the right to challenge peremptorily.

See also ***Brown v. North Carolina,*** 107 S. Ct. 423 (1986)(Brennan, J. dissenting from denial of certiorari). One federal district court has squarely addressed the issue, however. The case that follows involved a situation where the state went beyond the ***Witherspoon*** excludables" and used its peremptory challenges to remove every prospective juror who expressed some uncertainty about capital punishment, similar to what occurred in Huff's trial.

The peremptory challenge is not exempt from scrutiny under the Sixth Amendment. The court said, "The prosecutor's historical privilege of peremptory challenge free of judicial control," ***Batson v. Kentucky*** 476 U.S. 79, 91 (1987), is an important right for the state as well as the accused, but it

is certainly no more important than the accused's Sixth and Fourteenth Amendment rights to be tried by an impartial jury. The Supreme Court has repeatedly recognized, and recently reiterated, that "peremptory challenges are a creature of statute and are not required by the constitution." ***Ross v. Oklahoma,*** 56 U.S.L.W. at 4678. Where a constitutional right comes into conflict with the statutory right of peremptory challenges the constitutional right prevails. ***See Gray v. Mississippi,*** 55 U.S.L.W. at 4642.

The prosecution's statutory right to exercise peremptory challenges gave way to the Constitution in ***Batson v. Kentucky,*** 476 U.S. 79 (1986). In ***Batson***, the prosecutor used his peremptory challenges to strike all four black persons on the venire. The Supreme Court held that "although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." ***Batson*** at 89. "The implication of the state's position (in this case) is that it is free to use its peremptory challenges to violate any constitutional command other than the

Equal protection) clause. ***Brown v. North Carolina,*** 479 U.S. at _____ , I respectfully disagree."

The Batson holding cannot mean that the state is prohibited from using its peremptories for racial reasons but permitted to use its peremptories for other unconstitutional reasons so long as the unconstitutional reasons are related to the prosecutor's views concerning the outcome of the case to be tried. The peremptory challenge has traditionally been viewed as a necessary and integral means for assuring that our trial by jury system affords the parties the process they are due. "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.

In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice." ***Swain v. Alabama,*** 380 U.S. 202, 219 (1964), citing ***In re Murchison,*** 349 U.S. 133, 136 (1954)

When used properly, "peremptory challenges are the means to achieve the end of an impartial jury." ***Ross v. Oklahoma*** 54 U.S.L.W. at 4678; when used improperly to exclude all jurors who indicate even the slightest uncertainly about the death penalty, they become the means for violating the

constitution. "'(T)he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." ***Witherspoon,*** at 521-522, n. 20.

Huff was entitled to an evidentiary hearing on the matter because the record did not conclusively refute Huff's claim. In fact the record clearly showed the challenges and exclusions occurred and that Huff did allege facts which supported an evidentiary hearing

Excluding jurors who would be in the slightest way affected by the prospect of the death penalty, or by their views about such a penalty, tips the scales toward death and deprives the defendant of the impartial jury to which he or she is entitled. See ***Adams v. Texas,*** 448 U.S. 38, 50 (1980). No defendant can constitutionally be put to death at the hands of tribunal so selected. ***Witherspoon*** at 522-523.

It concluded that it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment so as to produce a jury that is uncommonly willing to condemn a man to death. But see ***Gray v. Mississippi,*** 55 U.S.W.L. (sic) at 4647 (Justice Scalia dissenting, with whom the Chief Justice, justice white and Justice (sic) O'Connor join.)***Brown v. Rice*** -87-0184-: slip op at 24-26 (W.D.N.C. Aug. 16, 1988)

Brown, suprs said, "as noted in ***McCreee, supra,*** ...It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "Witherspoon excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness". 106 S.Ct. 1766.

As in ***Brown v. Rice*** Huff is simply asking the court to reaffirm the principles of ***Witherspoon*** and hold that the state cannot achieve through its use of peremptory challenges what the constitution prohibits it achieving through challenges for cause. Peremptory challenges are not of constitutional dimension" ***Ross v. Oklahoma,*** 108 S.Ct. 2273, 2278 (1988); citing ***Gray, supra; Swain v. Alabama,*** 380 U.S. 202, 219 (1965); ***Stilson v. United States,*** 250 U.S. 583, 586 (1919). In a situation such as this where a constitutional right to an impartial jury comes into conflict with a statutory right to exercise peremptory challenges, the former prevails. ***Gray v. Mississippi,*** 481 ___, 107 S.Ct. 2045, _____(1987).

The conclusion is inescapable; permitting prosecutors to excuse peremptorily every prospective juror who expresses some reservation about capital punishment directly implicates the concern expressed in ***Witherspoon,*** and the defendant's constitutional right to an impartial jury. The Supreme Court's ruling in ***Batson v. Kentucky,*** 476 U.S. 79 (1986) surely cannot stand for the proposition that it is free to use its peremptory challenges to violate any constitutional command other than those implicating race and the Equal Protection Clause.

When used properly, peremptory challenges are the means to achieve the end of an impartial jury. But when used improperly to exclude all jurors who indicate even the slightest uncertainty about the death penalty, they become the means for violating the constitution. The prosecutor's actions in this case effectively pervaded the impartiality of the jury, which lead to a prosecution prone jury. To allow the state to achieve this through its use of peremptory for cause is clearly prohibited under ***Witherspoon*** and its progeny. It would render the defendant's right to an impartial jury meaningless, and sanction the abusive use of peremptory challenges. ***See Also Moore v. Estelle,*** 670 F.2d 56, 57 (5th Cir. 1982)(Court rejected state's argument that an improper ***Witherspoon*** excludable challenge was harmless

since state went to trial with unexercised peremptory challenges sufficient to have covered any improperly excused jurors.)

This issue was neither objected to at trial, nor raised in Huff's appeal. No tactical decision can be ascribed to counsels' failure to present the claim. This was unreasonable performance. Counsels' failure, a failure which could not have been based upon ignorance of the law, deprived Huff of a mistrial or appellate reversal to which he would have been entitled. ***See Wilson v. Wainwright,*** 474 So.2d at 1164-65.

Huff is entitled to an evidentiary hearing on his claim and a reversal of his conviction.

Claim XI: Huff claimed (1) critical, exculpatory, and impeachment evidence was suppressed by the state (2) the state used "false and misleading evidence and argument, (3) trial counsel failed to investigate and present evidence in challenging the State's case.

The trial court erroneously denied the issues as legally insufficient by holding that sufficient specific facts were not pled. But, the courts own statement of facts which led to the denial set forth enough detail to warrant an evidentiary hearing. The defense alleged the state withheld a 24-hour dispatch tape. The court said Huff did not allege specific enough facts. The

3.850 motion sets forth that the tape had on it a brief conversation between the prosecutor and police officers.

Exculpatory information withheld by the State violates due process of law under the fourteenth amendment. If there is a reasonable probability that the withheld information could have affected the conviction. A new trial is warranted. ***United States v. Bagley,*** 105 S.Ct. 3375 (1985) The prosecution's deliberate suppression of material, exculpatory evidence violates due process. ***Brady v. Maryland,*** 373 U.S. 83 (1967); ***Agurs v. United States,*** 427 U.S. 97 (1976); ***United States v. Bagley, supra.*** Thus, the prosecutor must reveal to the defense any and all information that is helpful to the defense, regardless of whether defense counsel requests the specific information. ***See Bagle, supra.*** It is of no constitutional significance whether the prosecutor or law enforcement is responsible for the non-disclosure.

Where the State suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue. ***Alcorta v. Texas,*** 355 U.S. 28 (1957), the credibilitiy of a State's witness, ***Napue v. Illinois,*** 30 U.S. 264 (1959); ***Giglio v. United States,*** 405 U.S. at 154 or interpretation and explanation of evidence, ***Miller v. Pate,*** 386 U.S. 1 (1967)

Due process, as guaranteed by the United States Constitution, requires that a criminal conviction be reliable. There is a "qualitative difference" between death and imprisonment, and a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in specific cases. ***Woodson v. North Carolina,*** 428 U.S. 280 305 (1976), ***Beck v. Alabama,*** 447 U.S. 625 (1980); ***Lockett v. Ohio,*** 438 U. S. 586, 604 (1978); ***Gardner v. Florida,*** 430 U.S. 349, 357-58 (1977); ***Greg v. Georgia,*** 428 U.S. 586, 604 (1976)

The 3.850 motion alleged that Huff's conviction and sentence of death were rendered fundamentally unfair as a result of the State's presentation of false or misleading evidence to the jury. The Fourteenth Amendment prohibits the knowing use of false evidence or improper manipulation of material evidence to obtain a conviction. The 3.850 motion then cited numerous cases for that proposition including ***Brown v. Wainwright*** 785 F.2d 1457 (11th Cir. 1986)

Huff's conviction, it was alleged in the 3.850, is unreliable because the state knowingly presented false, misleading testimony that was material to questions of guilt and innocence. ***Trodel v. Wainwright,*** 667 F. Supp. 1456, 1458 (1986), affirmed 828 F.2d 671 (11th Cir. 1987).

The 3.850 motion then specifically stated that the false evidence and testimony related to the cause and location of Norman and Genevieve Huff's deaths and the trajectories of bullets. According to the state, both victims were killed in the car found at the crime scene. However, testimony presented to the jury in support of this theory was not true the 3.850 motion alleged. The 3.850 went on to allege the state knowingly put on false and misleading evidence to secure a conviction.

The 3.850 further alleged the autopsy conducted by Dr. Shutze, the medical examiner, was inadequate at best, and misleading at worst. Due to the failure of the pathologist to shave the area of the wounds, it is difficult to determine angels of entry and exit, particularly in the head wounds. Furthermore, the autopsy lacked a detailed description of the trajectory of the bullets, once they had entered the bodies. This could have been accomplished had sections been taken of the wounds. In like manner, the description of the lacerations was perfunctory. Had it been done according to professional standards, it is highly likely that the character of the lacerations could have been adduced. Additionally, there was nothing in the photographs of the injuries to indicate scale. Moreover, Dr. Shutze's testimony regarding the order in which the decease were shot was mere speculation; one cannot determine the order in which the injuries were

sustained with any degree of accuracy. Nor is it possible to detail the victim's body movements as they are being shot. An independent pathologist would state that due to the nature of Genevieve Huff's injuries and the amount of bleeding that would have insured, it is highly unlikely that she was shot in the vehicle. Similarly, it is questionable whether Norman Huff was shot inside of the automobile.

The 3.850 motion went on to allege that the State purposely misled the jury in presenting testimony concerning Norman's injuries. For example, Chief Ed Lynum, Investigator Mabry Williams, Investigator Jerry Thompson, and Trooper Greg Matthews each testified that the victim's 1978 Buick Sedan ran over Norman Huff's foot. Trooper Matthews testified that the offending tire was the right rear tire of the Buick (TTR 1493). Although x-rays were taken of the deceased, none were taken of Norman Huff's foot. Curiously, the pathologist made no mention of broken bones in Norman Huff's feet. An examination of Norman Huff's shoes reveals that they showed no sign of having been run over by a 1978 Buick four-door sedan.

The 3.850 motion also made allegations that former Sheriff Johnson received a special consideration for his testimony.

The 3.850 motion alleged that he state had threatened a vital defense witness to get her to recant her previously favorable testimony for the

defense by threatening her son would be prosecuted to the fullest extent of the law, or alternatively, that he would receive lenient treatment by the state if she cooperated with the state on his charges.

In 1979, the witness's son was charged with grand theft and burglary of a conveyance in Sumter County, Florida, and convicted. On May 1, 1980, the witness gave a statement, under oath, in which she recounted on April 20, 1980, that she recalled seeing several individuals in a white Buick with a dark maroon or red interior come to her place of employment. The witness stated there were three persons seated in the front seat; an older white male was seated in the passenger seat, an older white woman was in the middle, and a younger man was driving.

She related in great detail a description of the driver---one which was consistent with her positive identification of Jim Huff as the driver. The witness provided a detailed account of the business transaction that occurred—that the driver purchased two beers and a cola with a twenty dollars bill. The witness noticed that the driver was visibly shaken as he handed her the money. Even more importantly, the witness recalled that there was a fourth unidentified passenger seated in the back of the car. The individual was sitting on the far side of the vehicle.

After seeing a photograph of Jim Huff in the newspaper, the witness related what she had seen to a neighbor. The witness, however, was hesitant to approached the authorities. The neighbor spoke to law enforcement officers about what her friend had witnessed.

When interviewed on April 29, 1980 by investigating officers, the law enforcement officer vouched for the witness' credibility. He told other law enforcement officers that the witnesses' account was consistent with the facts.

On March 15, 1984, the State of Florida filed a Violation of Probation against the witnesses son, charging him with failure to live and remain at liberty without violating any law. The basis of the violation was an arrest in January of 1984 for a criminal charge that had yet to be resolved.

State officials threatened, coerced, or otherwise induced the witness to renounce her previously truthful, exculpatory, sworn testimony and precluded the witness from presenting such truthful testimony in exchange for lenient treatment for her son's pending criminal charges and/or under threat that her son would be prosecuted to the fullest extent of the law.

Law enforcement officers suspected that there was another crime scene involved in the homicides. This scene was processed and investigated. Beer cans, a soda can, and tire tracks were found at this site. Latent

fingerprints were developed and found not be Jim Huff's fingerprints. Trial counsel could have argued that the unidentified prints corroborated Huff's theory of defense that other persons had attacked him and his parents.

At the scene in which the bodies were found, there was evidence that had been processed and similarly, the fingerprints were not identified as belonging to Jim Huff or the investigating officers.

These allegations as outlined in the 3.850 are not conclusively rebutted by the record and Huff should have been granted an evidentiary hearing on the issues.

Claim XII Huff claimed he is innocent of First Degree Murder and is innocent of the death penalty. The trial court erroneously denied the issues as procedurally barred because the same issue was raised in point VII of at page 44 of Huff's initial brief. The order does not have point VII attached to the order and the record does not conclusive show Huff is not entitled to a hearing on the issue.

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. ***Sawyer v. Whitley,*** 112 S.Ct. 2514 (1992). In ***Sawyer,*** the court

found where a death sentenced individual establishes innocence, his claims must be considered despite procedural bars.

The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. ***Johnson v. Singletary,*** 612 So.2d 575 (Fla. 1993); ***Jones v. State,*** 591 So.2d 911 (Fla. 1991). The Florida Supreme Court has recognized that innocence of the death penalty also constitutes a claim. ***Scott (Abron) v. Dugger,*** 604 So.2d 465 (Fla. 1992)

Claim XIII Huff claimed that various constitutional rights were violated by the Florida Rules of Professional Conduct which generally prohibit counsel from interviewing jurors. The trial court erroneously denied the issue as legally insufficient. The 3.850 motion alleged that ***Florida Rule of Professional Responsibility 4-3.5(d)(4)*** provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror about the trial.

The specific allegation was that the obvious friendliness between the judge and assistant state attorney during the trial tainted the jury. It claimed that throughout Huff's capital murder trial, the judge and assistant state attorney engaged in jocular banter about everything from church pews to

fried chicken. The allegations were that the judge was taking pictures throughout the trial with his camera.

The 3.850 claimed this all had an adverse affect on the jury and the only way to determine how they were affected would be by asking them , but the rules ethical rules of the bar prevent it.

The court should have granted 3.850 relief.

Claim XIV Huff claimed that his constitutional rights were violated by ***Florida Statute F.S. 921.141*** on the aggravating circumstances. The trial court erred in finding his claim was procedurally barred because it was raised on direct appeal in point XIX. There is nothing that is attached to the order to show what point XIX is, nor is their any statement from the court as to what the relationship is between the claim and point XIX.

Claim XV Huff challenged the constitutionality of Florida's sentencing scheme. The trial court erred in finding his claim was procedurally barred because this issues was raised in point XIX on direct appeal. There is nothing attached to the order to show the record conclusively shows Huff is not due an evidentiary hearing. There is nothing in the order to show the relationship between the issue raised in point XIX and the claim made in the 3.850.

Claim XVI Huff claimed if no single error constituted a bases for relief then the cumulative effect of the errors did. The trial court erred in finding his claim was procedurally barred because it was raised on direct appeal in Huff's initial brief in point XVII . Point XVII is not attached to the order and there is nothing in the order which elaborates on the relationship between point XVII of the initial brief and the claim in the 3.850.

Claim XVII Huff claimed the court and counsel for the State engaged in misconduct that interfered with the jury's ability to be impartial. The trial court erred in finding his claim was procedurally barred because it was raised in point XI of the Huff's initial brief. Point XI is not attached to the order and there is nothing in the order which elaborates on the relationship between point XI of the initial brief and the claim in the 3.850.

Claim XVIII Huff claimed that he had newly discovered evidence. The trial court erred in finding his claim was legally insufficient.

Claim XIX Huff claimed that during voir dire the trial judge and prosecutor denigrated the jury's role in the penalty phase of the murder trial. The trial court erred in finding this claim legally insufficient and refuted by the record. No such portions of the record were attached to the order.

Claim XX Huff claimed that the record of Huff's trial proceeding is "incomplete in a way which prevented the Florida Supreme Court from conducting meaningful appellate review". The trial court erred in finding this claim was procedurally barred. There is nothing attached to the order to show the record conclusively demonstrates that Huff is not entitled to hearing on his claim.

Claim XXI Huff claims the prosecutor's choice of words during the trial prejudiced Huff. The trial court erred in finding the claim was legally insufficient and refuted by the record. The trial court did not attach any portions of the record to show the record conclusively showed Huff was not entitled to a hearing on his motion.

Claim XXII Huff claimed the trial judge absented himself, "during the proceedings" therefore violating several of the defendant's constitutional rights. The trial court erred in finding that the claim was procedurally barred because it was raised in Huff's initial brief in point XVII at page 76. There is no portion of the record attached to show that the record shows conclusively that Huff is not entitled to any relief. There is no elaboration on the connection between point XVII in the initial brief and the claim in the 3.850.

Claim XXIII Huff claimed that the court denied the public the right to access to the proceedings and compromised Huff's right to a fair trial. The trial court erred in finding the claim was legally insufficient. There is no portion of the record attached to the order to show the record conclusively shows Huff is not entitled to a hearing on his 3.850 motion.

Claim XXIV Huff claimed the state used its peremptory challenges in a racially discriminatory way. The trial court erred in finding this claim legally insufficient. There is no portion of the record attached to show Huff is conclusively not entitled to relief . In summary, Huff in his 3.850 claim stated that the prosecution used it challenges to challenge African-Americans in an unconstitutional manner. Huff stated his counsel failed to make a record of the racial composition of the jury and therefore was ineffective in preserving the issue.

An evidentiary hearing is necessary to determine if Huff is entitled to relief.

Claim XXV Huff challenged the constitutionality of the cold, calculated, premeditated aggravator. The trial court erred in finding the claim was procedurally barred because the issue was raised in point XVII of Huff's initial brief. The order fails to attach a copy of point XVII of Huff's

brief or elaborate on the relationship between point XVII of the brief and the claim in the 3.850 motion.

Claim XXVI Huff challenged the sufficiency of the evidence against him. The trial court erred in finding the claim was procedurally barred because it was raised in point VIII of Huff's initial brief. Point VIII of Huff's initial brief is not attached. There is no elaboration on the relationship between point VIII of Huff's initial brief and his claim in his 3.850 motion.

In his 3.850 motion Huff claimed that the alleged statements of James Huff, and only those statements, provided the basis for the jury's conviction for two counts of first degree murder and for the finding of the aggravating factor of cold, calculating, and premeditated in support of the imposition of the death penalty. The evidence introduced by the state was incapable of substantiating the conviction and circumstances found in aggravation. In total disregard of the factual evidence (even as presented by the state), the trier of fact relied exclusively on statements attributed to Huff to convict him of murder and to find a factor in aggravation of sentence.

The 3.850 claimed that no other evidence supports or corroborates the conviction, nothing more than mere words—purportedly. Huff's own words—and these in stark contrast to the proven facts of the case.

The 3.850 motion alleged that during the guilt/innocence phase of the trial, state's witness Sheriff Ernie Johnson was called to testify about an alleged conversation which he had with James Huff, in which Huff "confessed" to shooting Genevieve and Norman Huff. Similarly, Harris Rabon ostensibly overhead Huff state "I did it".

The 3.850 stated the "evidence" that Huff killed the two decedents was uncorroborated by the forensic evidence. It is upon this evidence that the jury convicted Huff.

The use of Huff's alleged uncorroborated statements as the sole support for the conviction of two counts of first degree murder and the aggravating factor violated fundamental principles regarding the use of confessions or admissions as proof of elements of crime. It is blackletter constitutional law that a defendant's incriminating statements employed as proof of essential facts must be corroborated by other evidence apparent from the record. ***Opper v. United States,*** 348 U.S. 84 (1953; ***Wong Sun v. United States,*** 371 U.S. 471, 488 (1963); ***United States v. Davanzo,*** 699 F.2d 1097 (11th Cir. 1983) Absent corroboration, a defendant's statements are legally insufficient to support a conviction. ***See Jackson v. Virginia,*** 443 U.S. 307 (1979) and a sentence of death. An extrajudicial confession of

guilt will not support a conviction of a criminal offense. ***Dawson v. State,*** 139 So.2d (1962).

The 3.850 motion made the same argument for the use of the evidence to show aggravating circumstances.

Claim XXVII Huff challenged the sufficiency of the evidence against him. The trial court erred in finding the claim was procedurally barred because it was raised in point VIII in Huff's initial brief. Point VIII of Huff's initial brief is not attached. There is no elaboration on the relationship between point VIII of the initial brief and the 3.850 claim.

In summary the 3.850 claim was that Huff's uncorroborated statements were used as the sole support for his conviction and the aggravating circumstance violated fundamental principles regarding the use of confessions or admissions as proof of elements of a crime.

It is black letter constitutional law that defendant's incriminating statements employed as proof of essential facts must be corroborated by other evidence apparent form the record. ***Opper v. United States*** 348 U.S. 84 (1954). Absent corroboration, a defendant's statements alone are legally insufficient to support a conviction. ***Jackson v. Virginia,*** 443 U.S. 307 (1979), and a sentence of death.

Aggravating circumstances are necessary elements for death sentences which must be proved by the state beyond a reasonable doubt.

The 3.850 contended that the Florida homicide statute ***Florida Statute 782.04,*** requires that the state prove the unlawful killing of a human being from premeditated design or that the killing was committed by a person engaged in the perpetration of certain enumerated crimes, (i.e. felony murder). The 3.850 contended the state could not prove the threshold issue—that an unlawful killing of a human being had occurred.

The motion stated the state did not prove by substantial evidence the elements of murder. The motion claimed the state had failed to show any premeditation on Huff's part.

Such allegations, if true, and not brought out by defense counsel would constitute ineffective counsel and entitled Huff to relief. He should have been given an evidentiary hearing.

Claim XVIII Huff stated Huff's absence from critical stages of the proceedings prejudiced his guilt/innocence phase and penalty phase and violated the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. The trial court erred in finding this claim was procedurally barred because it was raised in point XVI on page 70 of Huff's initial brief. No such point is attached to the order. There is no showing the

record conclusively refutes Huff's claim. There is no elaboration as to the relationship between point XVI of the initial brief and Huff's 3.850 claim.

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. ***Feretta v. California,*** 422 U.S. 805, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A capital defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution. See. E.g., ***Drope v. Missouri,*** 420 U.S. 162 (1975); ***Illinois v. Allen,*** 397 U.S. 337 (1970) and ***Proffitt v. Wainwright,*** 685 F.2d 1227 (11th Cir. 1982), by Florida constitutional and statutory standards, ***Francis v. State,*** 413 So.2d 1175 (Fla. 1982), and Rule 3.180 of the Florida Rules of Criminal Procedure. See also, ***Coney v. State,*** 653 So. 2d 1009 (Fla. 1995)

A capital defendant has "the constitutional right to be present at the stages of the his trial were fundamental fairness might be thwarted by his absence." ***Francis,*** 413 so.2d at. 1177. This right derives in part from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. ***Proffitt,*** 685 F.2d at 1256.

Claim XXIX Huff claimed the trial erred in allowing individuals lacking the proper qualifications to testify as experts. . The trial court erred in finding the claim procedurally barred and/or legally insufficient. The

court failed to attach any portion of the record to the order to show that these issues could have, or where raised in Huff's initial brief.

The scope of expert testimony is clearly defined. The Florida Evidence Code provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to the evidence at trial.

Fla. R.E. 90.702 Expert testimony may not be used to fill in the gaps left by an absence of evidence on the issue to be determined. ***Flanagan v. State,*** 586 So.2d 1085 (Fla. App.1 1991), decision approved in part, 625 So.2d 827 (Fla. 1993); ***Arkin Construction Company v. Simpkins,*** 99 So2d 557(Fla. 1957).

Claim XXX Huff claimed that the trial was conducted by an Assistant State Attorney lacking constitutionally-conferred jurisdiction to prosecute. The court erred in finding this claim was procedurally barred, failed to allege prejudice, and was legally insufficient. There is nothing attached to the order which shows on the record that Huff was conclusively not entitled to an evidentiary hearing on his claim.

Claim XXXI Huff claimed that the jury was pre-qualified in a racially discriminatory manner, and that Huff was not present. The trial court erred in finding this claim procedurally barred and legally insufficient. There is nothing attached to the order to affirmatively show that Huff is not entitled to an evidentiary hearing on his claim.

Claim XXXII Huff challenged the constitutionality of the heinous, atrocious and cruel aggravator. The trial court erred in finding this claim procedurally barred because the claim was raised in Huff's initial brief in point XVIII. There is nothing attached to the order which shows the record affirmatively refutes Huff's claim. He is entitled to an evidentiary hearing on the matter. There is nothing in the order which elaborates as to the arguments used in point XVIII of the initial brief and the claim in the 3.850.

The bases for aggravator was that each of the victims was aware that he or she was going to be killed and that the killer was going to be their son. (TTR 3793, 3796) Neither of these arguments form a legal bases for finding an aggravating circumstance.

As to Genevieve Huff, the court found that she was conscious and suffered pain (R. 3797). None of the facts support this aggravating factor were present in this case.

In ***Lewis v. Jeffers,***110 S.Ct. 3092 (1990), the Supreme Court held that the Eighth Amendment requires sufficient evidence to exist in the record to support a finding that a particular aggravating circumstance is present. In Huff's case, there is insufficient evidence under ***Lewis*** to support the death sentence. It should be vacated.

In Florida, the state has the burden of proving aggravating circumstances beyond a reasonable doubt. ***Hamilton v. State,*** 547 So.2d 630 (Fla. 1989). In ***Proffitt v. Florida,*** 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's limiting instruction of the "heinous, atrocious, or cruel" aggravating circumstance stating:

The Florida Supreme Court has recognized that while it is arguable" that all killings are atrocious...(s)till, we believe that the legislature intended something ' especially' heinous, atrocious or cruel, when it authorized the death penalty for first degree murder. "***Tedder v. State,*** 322 So.2d at 910. As a consequence, the court has indicated this statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." ***State v. Dixon,*** 283 So.2d, at 9. See Also, ***Alford v. State,*** 307 So.2d 433, 445 (1975); ***Halliwell v. State*** 323 So.2d. 557, at 561 (Fla. 1975) . We cannot say that the provision, as so construed, provides

inadequate guidance to those charged with the duty of recommending or imposing sentence in a capital case. ***Proffitt,*** 428 U.S. at 255-56.

It is not the extent of the wounds per se, rather, it is the extent of suffering and the intent of the perpetrator that are relevant to whether this aggravating factor can be found. The trial court did not address either of these elements in relation to Norman Huff, and consequently, this aggravator is not supported by the evidence. As to Genevieve huff, no reliable evidence supported the finding of this aggravator.

The Supreme Court of Florida has held it must be proven beyond a reasonable doubt that the victim was conscious when the acts were being inflicted to support a finding of heinous, atrocious, and cure. (HAC) ***Rhodes v. State,*** 547 So.2d 1208 (Fla. 1989); See also, ***Kearse v. State,*** 662 So.2d 677 (Fla. 1995) (HAC not shown where medical examiner could not definitively say that the victim was conscious, but rather she may have immediately gone into shock following the first wound.)

Florida law says simply because a victim is alive during an attack does not establish that he was conscious. An unconscious victim cannot suffer the "unnecessarily tortuous" trauma required for a finding of the heinous aggravating factor. The state has the burden of proof to establish beyond a reasonable doubt that a victim is in fact conscious during an attack.

The court only found that Norman Huff was aware that he was about to be killed and perpetrator was his son. The court also made these finding in reference to Mrs. Huff.

Even if these finding were true they do not constitute a bases for finding the death penalty is warranted.

A qualified medical examiner would say, within a reasonable degree of medical certainly, that the order in which the wounds were inflicted cannot reliably be determined in this case, nor can it be reliably determined that Genevieve Huff experienced the amount of pain found by the trial court. No competent evidence exists in the record to support this aggravating factor.

In addition to suffering, the state must prove that Huff intended to torture his victims. ***Porter v. State,*** 564 So.2d 1060 (Fla. 1990). This did not occur in the trial below. There is no evidence and the court did not find that Huff intended to torture the victim. None of the elements required for finding of the heinous, atrocious, and cruel aggravating factors are present. None were proven beyond a reasonable doubt.

Claim XXXIII Huff accused the trial court of error for considering non-statutory aggravating circumstances. The trial court erred in finding this claim procedurally barred and refuted by the record. There is no portion of the record attached to the order. There is insufficient elaboration of the connection between point XVIII of Huff's initial appeal and the 3.850 claim to show it is procedurally barred.

Claim XXXIV Huff claimed the inapplicability of the pecuniary gain aggravator. The court erred in finding this procedurally barred because it was raised in point XVIII of Huff's initial appeal. There is no portion of the record attached to the order. There is no elaboration in the courts orders as to the relationship between point XVIII and the 3.850 claim to affirmatively refute Huff's entitlement to an evidentiary hearing.

In its sentencing order, the trial court relied on the testimony of several witnesses and evidence not presented at Huff's second trial. (TTR 3790-3791). The trial court improperly took judicial notice of the entire court file from the first trial over defense objections (TTR 3096-3097)

Testimony given at the first trial may not be relied upon in the second trial unless the party introducing it at the second trial shows the witness' unavailability. ***See, Fl. R. Cr. Pr. 3.640(b).*** such a showing must be made so as to preserve a criminal defendant's right to cross-examine a witness

against him. The state made no such showing, and judicial reliance on such testimony and evidence amounted to constitutional error.

The Florida Supreme Court has repeatedly held that this aggravator must be proven beyond a reasonable doubt, for it to be applicable. ***Scull v. State,*** 533 So. 2d. 1137, 1142 (Fla. 1988); ***Peek v. State***, 395 So.2d 492, 499 (Fla. 1980); ***Rogers v. State,*** 511 So.2d 526, 534 (Fla. 1987)

The evidence fails to support a finding of this aggravating circumstance . To find this aggravating circumstance the state must prove beyond a reasonable doubt that financial gain was the primary motive for the killings. ***Scull v. State, supra.*** This aggravator applied only "where the murder is an integral step in obtaining some sought-after specific gain." ***Hardwick v. State,*** 521 So.2d 1071, 1076 (Fla. 1988)

The court's determination in Huff's case finds no support in the law or evidence. No facts upon which to base this aggravating circumstances remain once the evidence whose admission violates Huff's constitutional rights is eliminated.

Even considering evidence erroneously relied upon by the judge, there is insufficient evidence to support this aggravating circumstance. There is no finding that Huff knew the contents of his parents' will.

The trial court erroneously found this aggravating circumstance to exist, and applied an erroneous standard of proof. To the extent trial counsel failed to object, Huff did not receive effective assistance of counsel.

Claim XXXV Huff claimed he was incompetent to waive his right to a penalty phase. The trial court erred in finding he was competent was completely refuted by the record. Following the jury's verdicts of guilty on both counts, Huff stated that he wished to forego the penalty phase. The court granted a brief overnight recess, but the next morning, Huff again stated that he wished to proceed to sentencing. An attorney associated with Huff's attorneys, but who did not represent Huff, and who had never before met Huff, represented to the court that Huff was not under the influence of alcohol and fully understood the ramifications of foregoing the penalty phase. This alone is sufficient basis for finding the alleged wavier invalid.

An accused must "knowingly and intelligently" forego the traditional benefits associated with the right to counsel. ***Johnson v. Zerbst,*** 304 U.S. 458, 464-65 (1938); ***Feretta v. California,*** 422 U.S. 806 (1975). One such benefit of the right to counsel is the right to have counsel's advise after reasonable investigation, of what mitigating information is available. The record does not disclose that Huff ever "knowingly and intelligently" waived

his right to counsel or to the presentation of mitigating evidence." The role of defense counsel is to negate aggravators and present mitigators.

Faretta requires a heightened level of understanding and cognition to effectively waive counsel. ***Starr v. Lockhart,*** 23 F.3rd 1280 (8th Cir. 1984). Huff did not make any knowing and intelligent wavier of this right. The colloquy required under ***Faretta*** is extensive, including the Court's inquiry into the depth of the defendant's understanding of trial procedure, experience with the criminal justice system, and strong caveats against foregoing counsel. ***Faretta*** at 2527 (fn 3, 2). Case law has consistently interpreted ***Faretta*** as requiring a court to conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel. ***Raulerson v. Wainright,*** 732 F.2d 808 (11th Cir. 1984)

Huff in his 3.850 motion presented to the court detailed circumstances that warranted the court holding a hearing to determine if Huff was legally capable of waiving his right to a penalty phase.

Claim XXXVI Huff inventoried all the evidence that could have been presented had he not elected to waive the presentation of mitigating evidence before the judge and the jury. The trial court erred in finding this claim was legally insufficient to warrant an evidentiary hearing to determine if Huff in

fact had sufficient mitigating circumstance to outweigh the aggravating circumstances such as to warrant the death penalty.

Claim XXXVIII claimed the trial court erred by failing to properly and timely impose a written sentence and relied on facts not in evidence at the sentencing. The trial court erred in finding this claim legally insufficient. There is nothing attached to the order to support the courts finding.

Claim XXXIX Huff claimed the security measures undertaken in the presence of the jury violated several of Huff's rights. The trial court erred in finding this claim was procedurally barred because it had been raised as point XVIII in Huff's initial brief. There is nothing attached to the order to show the record conclusive shows Huff is not entitled to an evidentiary hearing. The is no elaboration to show the relationship between point XVIII of the brief and the claim in the 3.850.

Claim XXXX Huff claimed the trial judge was mistaken about the law. The trial court erred in finding this claim was conclusively refuted by the record. There is nothing attached to the order to show the record conclusive refutes Huff's claim.

The trial court labored under a misapprehension of Huff's eligibility for parole in determining Huff's sentence of death. During Huff's trial, the

prosecutor and judge incorrectly advised the jury that a life sentence was a twenty-five year prison sentence. The court mistakenly understood the meaning of a "life" sentence under Florida law as the equivalent of a twenty-five year prison sentence. In fixing the appropriate punishment the judge did not recognize that a life sentence only guaranteed eligibility for parole after twenty-five years.

Claim XXXXI Huff claimed the attorney client relationship was breached, or a Brady violation occurred, based upon an investigative subpoena requesting long-distance records of his prior attorney. The trial erred in finding this claim legally insufficient.

XXXXII Huff claimed he was denied the effective representation of postconviction counsel because of "under-funding" and postconviction counsel's "excessive caseload". The trial court erred in finding this legally insufficient.

The court was presented with amble evidence at his "Huff" hearing to entitle him to an evidentiary hearing on all of his 3.850 claims.

ARGUMENT III

THE TRIAL COURT ABUSED ITS' DISCRETION BY FAILING TO ALLOW HIS NEWLY APPOINTED COUNSEL, WILLIAM EBLE, TO FILE A SECOND AMENDED 3.850 MOTION WHICH SOUGHT TO CURE THE VAGUENESS GROUNDS THE TRIAL COURT USED FOR DENYING HUFF A HEARING ON ISSUES RAISED IN HIS AMENDED 3.850 MOTION.

On February 27, 1997, the Circuit Court judge appointed William K. Eble, Sr. to represent James Roger Huff. When he took his appointment Eble found the case in the following posture:

(1) On June 2, 1980 Huff was indicted by the Sumter County Grand Jury and charged with two counts of Murder in the First Degree. Huff went to trial represented by Stan Cushman in October 1980. He was convicted and subsequently sentenced to death after a jury recommendation of it to the trial judge.

(2) In 1983, the Florida Supreme Court reversed the convictions, vacated the death sentences and remanded the case for a new trial. ***Huff v. State,*** 495 So.2d 1087 (Fla. 1983)

(3) In the retrial, Huff was represented by new counsel, including Mark Hill and Carla Pepperman.. Trial commenced May 1,

1984 and a jury verdict of guilty was rendered. Again, this time with no mitigation put forth to the jury, Huff was sentenced to death. The Florida Supreme Court affirmed the conviction and sentences in 1986. ***Huff v. State*** 495 So. 2d 145 (Fla. 1986).

(4) Huff filed his first Motion to Vacate Conviction and Sentence With Special Request For Leave To Amend on December 2, 1988. The trial court struck this motion. A Renewed Rule 3.850 Motion and motion for Rehearing were filed within days and summarily denied by the court.

(5) The Florida Supreme Court again remanded this cause back to the Circuit Court for consideration of the Rule 3.850 Motion. ***Huff v. State,*** 569 So.2d 1247 (Fla. 1990). Ultimately, on December, 23, 1996, the Circuit Court conducted a "Huff" hearing on the Amended Motion to Vacate Judgment And Sentence With Special Request For Leave To Amend.

(6) Huff had been represented by no less than five different attorneys throughout the period following his 1984 conviction, including Peter N. Mills from the Office of the Capital Collateral Representative (CCR). On December 23, 1996 the "Huff"

hearing took place to determine what issues required an evidentiary hearing.

(7) At the December 23rd hearing, Huff's pending 3.850 motion was still not verified but the court allowed CCR to supplement the motion with verification at a later date and commenced the hearing. At the hearing, Mr. Mills requested an evidentiary hearing on Claim V alleging ineffective assistance of counsel by Ms. Pepperman and Mr. Hill.

(8) The State successfully argued to the Circuit court that the vast majority of the issues raised in the in the 3.850 claim were either procedurally barred because they were raised on direct appeal, or that CCR had failed to make specific allegations of ineffectiveness. The Circuit Court agreed, and declined an evidentiary hearing on numerous issues finding they were procedural barred and/or legal insufficiency. The only issue granted an evidentiary hearing pertained to the communication of a plea offer to Huff.

After the "Huff" hearing but before the evidentiary hearing actually took place, Eble was appointed to represent Huff for the evidentiary hearing . The Office of Capital Collateral Representative's Motion To Withdraw

due to an unspecified conflict of interest had been granted by the Circuit Court.

Eble received approximately 38 boxes of files on April 17, 1997.

Eble requested and received a 45-day continuance of the evidentiary hearing.

Eble reviewed the trial transcript and determined that the 3.850 motion previously filed in the case by CCR needed to be amended to provide additional enhancing details to the allegations.

The purpose of Eble's request to amend the previously filed 3.850 motion was to provide the very details to the Circuit Court, which the Circuit court said were lacking in the 3.850 motion as filed by CCR and served a bases for the denial of an evidentiary hearing on those issues.

Eble in his motion provided the Circuit Court with a very detailed and specific breakdown of the facts upon which he based his motion.

Eble also advised the court that he had not had time to completely exam the full trial transcript or the volumes of materials provided by CCR and advised the court in his motion that he was requesting (1) a continuance of the evidentiary hearing, (2) a grant of additional time to file a Second Amended motion To Vacate Judgement and Sentence, (3) schedule a "Huff" hearing on the amended motion, (4) enter a court order expanding the

scope of the evidentiary hearing and (5) allow time to take discovery depositions on the newly raised issues. (R. 2301-2309)

The Circuit Court entered an Order Denying Defendant's Second Motion to Amend on June 30, 1997. (R. 2310-2312)

In his order the judge said that the reasons he denied the Second Motion to Amend the court said:

(8) One week before the latest hearing date, Huff's latest counsel filed the instant Motion to Amend the Amended Motion to Vacate Judgment and Sentence. The gist of the Defendant's argument is that Mr. Eble has reviewed the transcript of the 1984 trial and discovered what he considers to be instances of deficient performance by Huff's trial counsel. Huff seeks leave to amend the Amended Motion to specifically plead these additional allegations of ineffective assistance.

(9) It should be noted that in the original Motion to Vacate, and the Correction to the Amended Motion to Vacate, Mr. Huff alleges repeatedly that his trial counsel was ineffective.

(10) Moreover, the trial transcript has been available to the Defendant and his several postconviction counsel for more than a decade. The Court finds that any new examples of alleged

ineffective assistance would be both time-barred, Rule 3.850(b), and an abuse of procedure, Rule 3.850(f), albeit through no fault of Mr. Eble personally.

(11) Finally, the Court is fully aware of the importance of finality in litigation. Four years have passed since the Florida Supreme Court remanded this case with instructions to conduct a Huff hearing, the Defendant seeks to amend his motion yet again. Due to the procedural history of this case, the Court exercises its discretion to deny the Defendant's Motion to Amend the Amended Motion to Vacate."

It is clear from the record that what Eble sought to do was provide the court with the with the details of the ineffective assistance of counsel claims made in the 3.850 filed by the CCR. Eble did not seek to introduce new issues and allegations. Eble sought permission to file an amendment to the 3.850, which would provide the details the Circuit court ruled the CCR 3.850 lacked.

The issues Eble sought to raise were not time barred under ***3.850(b)*** ***3.850 (b)*** states: "Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed

more than 2 years after the judgment and sentence become final in a non-capital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Eble did not raise new grounds in his motion.

Eble sought to provide the judge with the specific allegations the court found lacking in CCR's 3.850 motion directed toward the issue of ineffective assistance of counsel.

The court ruled, (1), the allegations in the CCR's 3.850 motion directed toward the issue of ineffective assistance of counsel were not pled with sufficient specificity to warrant an evidentiary hearing, and then (2), ruled Eble's attempt to furnish the details the court found lacking is time barred.

3.850(f) did not bar the issues Eble sought to raise.

Florida Rule of Criminal Procedure 3.850(f) states:

"Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relieve and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."

Eble's motion simply was not a successive motion. It provided detail the Circuit court found wanting in the CCR's 3.850. There had been no "prior determination on the merits" as 3.850(f) requires to dismiss a "successive" petition.

The Circuit Court did not make a "prior determination on the merits" on a large portion of the CCR 3.850 petition because it found the allegations as set forth lack specificity.

Eble's motion did not raise new grounds. It simply provided the necessary details to the CCR 3.850, which the court said, was lacking.

What the Circuit court should have done was simply accepted Eble's motion as providing details previous lacking in the allegations of the CCR 3.850 and then determined if with the new detailed allegations an evidentiary hearing was warranted.

Eble sought to enlarge the allegation in the CCR ***3.850.***

This court in ***Brown v. State,*** 596 So.2d 1026 (Fla. 1992) held the two year limitation for filing motion to vacate sentence does not and did not preclude enlargement of issues raised in a timely-filed first motion for postconviction relief.

The ***Brown*** case makes it clear that in those cases where the defendant is requesting leave to "supplement," that is, to add more information on an issue initially raised in a timely first motion for postconviction relief, the trial courts should allow such a supplement, even when the motion to supplement is filed beyond the two year time limitation. The matter is not so clear cut when the movant is requesting an amendment which adds grounds not alleged in the original 3.850 motion. We believe that a request to amend a motion, which contains new grounds for relief, should be handled in the same manner that the court would consider a successive motion under the rule.

In ***Preston v. State,*** 528 So.2d 896 (Fla. 1988) the trial court permitted substantial amendments to the original motion, and addressed issues raised in the original amended motion. Other cases, ***Wright v. State,*** 581 So.2d 882 (1991); ***Herring v. State***, 580 So.2d 135 (Fla. 1991), ***Woods v. State,*** 531

So.2d 79 (Fla. 1988), do not appear to restrict the right to amend or supplement.

The same is true in ***Shaw v. State,*** 654 So. 2d 608 (Fla. 4th DCA) 1995); In ***Shaw*** the Fourth District remanded for consideration of the additional issues raised in an amended motion and supplement to the original 3.850 motion. The Fourth District held the amended motion and supplement be considered on the merits because they were filed within the two year time limitation provided for in the rule and were filed prior to a decision on the original motion. ***Nava v. State,*** 659 So.2d 1314 (Fla. 4th DCA 1995); ***Bryant v. State,*** 661 So.2d 951 (Fla. 4th DCA 1995); ***Steel v. State,*** 645 So.2d 59 (Fla. 4th DCA 1994); ***Rozier v. State***, 603 So.2d 120 (Fla. 5th DCA 1992). In ***Rozier*** the Fifth District Court of Appeals granted certiorari relief to a defendant who had filed a motion to amend and/or supplement a 3.850 motion which was denied by the trial court. The 3.850 motion was filed within the two-year limitation period. However, that period had expired prior to the filing of the motion to amend or supplement. The court indicated that the two year time limitation did not preclude enlargement of issues raised in a timely filed 3.850 motion.

The court abused its discretion in failing to grant Eble's motion.

CONCLUSION AND RELIEF SOUGHT

The Circuit Court erred in failing to hold an evidentiary hearing on all the issues raised in Huff's 3.850 filed by the CCR. The Circuit Court erred in failing to allow newly appointed counsel, William Elbe; to amend the original 3.850 filed by the CCR. Huff was entitled to have his timely filed 3.850 motion supplemented to provide additional information.

This court should remand this case back to the Circuit Court with orders to consider hold an evidentiary hearing on all of the issues raised in the 3.850, either as filed by the CCR, or as amended by Eble.

The Circuit Court only granted an evidentiary hearing on the single issue of whether or not the trial attorneys for Huff properly conveyed a plea offer to him. On the facts presented at the evidentiary hearing, the court abused its discretion in finding no plea agreement was offered, and if offered Huff would have rejected it.

This case should be remanded to Circuit Court with orders to afford Huff the opportunity to take advantage of the plea offer of two consecutive sentences of life to murder in the second degree.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been sent by regular United States Mail, postage prepaid this 25th day of March, 1999 to Kenneth Nunnelley, Assistant Attorney General at 444 Seabreeze Blvd. Suite 500 Daytona Beach, Florida, 32118.

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