IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,056

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jennings' amended motion for post-conviction relief. The motion was filed pursuant to Florida Rule of Criminal Procedure 3.850. As originally filed in 1989, the motion was summarily denied. On appeal from that summary denial, this Court remanded the case for Chapter 119 disclosure proceedings to be conducted. Jennings v. State, 583 So. 2d 316 (Fla. 1991). Following the State's disclosure of additional Chapter 119 material, the motion to vacate was amended. The circuit court then determined that an evidentiary hearing was required. After conducting the evidentiary hearing October 30-31, 1997, the circuit court denied relief. This appeal follows.

Citations in this brief shall be as follows:

The record on appeal from the 1986 trial shall be referred to as (R. ___) followed by the appropriate page number.

The record on appeal from the 1989 Rule 3.850 proceedings shall be referred to as (PC-R. ___).

The record on appeal assembled for the interlocutory appeal filed in 1994 and subsequently dismissed by this Court shall be referred to as (IA-R. ___).

The record on appeal from the remand including transcripts of the 1997 evidentiary hearing shall be referred to as (PC-R2. ___).

The supplemental record on appeal shall be referred to as (SPC-R2. ___). Other references will be self-explanatory or

otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Jennings has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural postures. 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, and Mr. Jennings, through counsel, accordingly urges the Court to permit oral argument.

CERTIFICATE OF FONT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

INTRODUCTORY STATEMENT

This is a case of admitted constitutional error. In post-conviction, the State conceded that numerous constitutional errors occurred during Mr. Jennings' trial: 1) a taped statement of a witness describing Mr. Jennings' extreme state of intoxication on the night of the murder was erroneously not disclosed to Mr. Jennings' trial counsel;[1] 2) a letter to the State Attorney from Clarence Muszynski requesting consideration for his assistance in the trial against Mr. Jennings was not turned over to the defense; 2) over objection the penalty phase jury received unconstitutional instructions on the "heinous, atrocious or cruel" aggravating factor [hereafter HAC];[2] and 4) over objection the penalty phase jury also received

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[1]The State's expert, Dr. Burton Podnos, testified that to evaluate Mr. Jennings' mental state at the time of the offense, it was necessary to "draw more information from observation of what happened" (R. 1532-33). Dr. Podnos did find Mr. Jennings to be of impaired judgment (R. 1519). However, he explained that he had insufficient evidence to conclude Mr. Jennings' was under the influence of alcohol and/or LSD on the night of the offense. Dr. Podnos was unaware of the Judy Slocum taped statement. Dr. Podnos' conclusions were based upon Mr. Jennings' "statements" about the facts of the crime (R. 1514, 1537). Thus, Clarence Muszynski's testimony and statement that Mr. Jennings told him, in graphic detail, what happened during the crime was significant to Dr. Podnos' conclusion that Mr. Jennings was not intoxicated or otherwise under the influence of an extreme mental condition or emotional disturbance. In turn, the sentencing judge relied upon Muszynski's account in rejecting the testimony of two (2) defense mental health experts who identified statutory and non-statutory mitigating factors at the penalty phase (R. 3463).

[2]The sentencing judge found HAC present. However, in post-conviction proceedings it was established that evidence was available that the victim was rendered unconscious virtually immediately and "was unconscious from then on" and that this evidence was never presented to the judge or jury (PC-R2 782).

unconstitutional instructions on the "cold, calculated and premeditated" aggravating factor [hereafter CCP].[3]

As to these admitted constitutional errors, the State successfully argued to the circuit court that this Court's affirmance of the summary denial of Mr. Jennings 1989 motion to vacate[4] precluded consideration of the discovery violations discussed therein during the circuit court's review of the 1997 amended motion to vacate. Thus, no cumulative consideration was given, as part of the circuit court's determination, to whether the evidence of other discovery violations and/or ineffective assistance of counsel warranted a new trial or new penalty phase.

As to the jury instructions errors, the State convinced the circuit court to rule that the erroneous HAC instruction was harmless. The State also successfully argued that Mr. Jennings' challenge to the CCP instruction was procedurally barred due to an alleged failure by Mr. Jennings to raise the issue on direct appeal. However, in proceedings held prior to this Court's ruling in Jackson v. State[5], the State had argued that Mr. Jennings' CCP jury instruction challenge was "th[e] same issue [] previously raised on direct appeal" (SPC-R2. 535). In fact, in

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[3]The trial judge found CCP present stating that "[f]rom the initial abduction to the final premeditated act of drowning her, Defendant's acts represented a cold and calculated indifference to the feelings or life of Rebecca Kunash." (R. 3461). However, the State's expert, Dr. Podnos, testified that the offense "started as an impulse" (R. 1513), thus finding that there was no pre-existing plan.

[4]Jennings v. State, 583 So. 2d 316 (Fla. 1991).

[5]648 So. 2d 85 (Fla. 1994).

its Answer Brief on direct appeal, the State specifically addressed the trial court's refusal to give Mr. Jennings' proffered expanded CCP instruction (Answer Brief at 39).

Mr. Jennings was convicted of the murder of Rebecca Kunash. The State's case against Mr. Jennings rested primarily upon the testimony of Clarence Muszynski, a jailhouse informant who claimed that Mr. Jennings gave him a detailed confession to the murder. Muszynski claimed, among other things, that Mr. Jennings said the victim was screaming and trying to scratch him as she was removed from the house (R. 637). Muszynski demonstrated during his testimony how he claimed Mr. Jennings said to have grabbed the victim by the ankles and slammed her head against the curb (R. 637). Muszynski also claimed that Mr. Jennings told him that the victim started coming to while he was raping her (R. 639). The defense sought to suppress Muszynski's testimony by arguing that he was an unlawful agent of the State. Despite a long history of obtaining confessions in jail from fellow inmates, Muszynski in the Jennings case maintained that he obtained Jennings' confession and took it to the State without any expectation of gaining benefit.

The State attempted to corroborate Muszynski's testimony by introducing the prior testimony of another jailhouse informant, Allen Kruger. Kruger was deceased by the time of the 1986 trial. The State contended that Kruger came forward before Muszynski and had alerted the State to Muszynski as a possible witness. Thus the State contended that Kruger's testimony corroborated

Muszynski's. Kruger's failure to testify to the graphic details[6] that marked Muszynski's testimony was explained by the State to have resulted from Kruger's having come forward first, having been removed from that area of the jail, and thus having not been in a position to overhear subsequent conversations between Mr. Jennings and Mr. Muszynski.[7] As to the presence of aggravating circumstances and the absence of mitigating circumstances, the State relied on Muszynski's testimony.[8] As a result, Muszynski's testimony regarding Mr. Jennings' statement was the lynchpin of the State's call for a sentence of death.

Further, the judge relied on Muszynski's testimony as the

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[6]The prosecutor's notes summarizing Kruger's statement indicated that after the victim was dropped from the bedroom window "she was laying there but not dead" (PC-R2. 777). Kruger gave no indication that the victim was thereafter ever conscious or semi-conscious.

[7]Another jailhouse informant, Billy Ray Crisco, was also called by the State to testify. Mr. Crisco, who knew both Muszynski and Kruger, testified that in 1979, Mr. Jennings admitted the homicide to him. Mr. Crisco's testimony was relatively brief; his testimony did not provide the graphic and prejudicial details that characterized Mr. Muszynski's testimony. And Mr. Crisco specifically recalled that the victim was rendered unconscious virtually immediately (See Deposition of Billy Crisco; PC-R2. 800). However, no one asked about this during Crisco's trial testimony and he did not volunteer the information that the victim was rendered unconscious (PC-R2. 782).

In the circuit court proceedings, the State conceded that there were "conflicting statements as to whether or not in fact she was conscious during the entire episode." (IA-R. 27) and acknowledged that resolution of the question of whether the victim was conscious "depends on which version of those facts you believe" (IA-R. 28).

[8]But has since conceded that Muszinski's testimony conflicts with testimony of other witnesses and that factual conclusions as to what to believe happened depends upon "which version of the facts you believe"(IA-R 28).

basis for finding two (2) of three (3) aggravating factors found: "heinous, atrocious or cruel" and "cold, calculated and premeditated." This same testimony was used to refute mitigation, particularly to rebut whether Mr. Jennings' mental state was impaired and whether he suffered from any mental or emotional disturbance. The State's mental health experts told the jury, that to resolve the issue of substantial impairment, they must consider the "account" of what happened (R. 1532-33). Thus, Muszynski's testimony was used to try to establish that Mr. Jennings' recall was too clear and his dexterity at the time of the homicide too nimble for him to have been under the influence of or impaired by alcohol. On this basis, in his sentencing order the judge found no mitigation.

Evidence impeaching Mr. Muszynski, either directly by challenging his motive to testify, and/or indirectly by demonstrating that Mr. Jennings was extremely intoxicated, would have been doubly valuable. Such evidence would have lessened the weight of the thumbs Muszynski placed on the death side of the scales and helped the defense restore thumbs to the life side of the scales that Muszynski's testimony was used to remove. See Stringer v. Black, 503 U.S. 222, 232 (1992).

At the 1997 evidentiary hearing, Mr. Jennings presented evidence of additional discovery violations. This evidence included discovery violations regarding State witness Allen Kruger. Newly disclosed Chapter 119 materials included a summary of a prosecution interview of Kruger prior to the second trial.

This summary reveals that contrary to the State's position in the third trial, Kruger came to light after Muszynski and not before. This version of events was the recollection of the prosecutor from the second trial, the very person who made the written notes summarizing the interview of Kruger. As Mr. Jennings' trial attorney, Mr. Vincent Howard explained, this version contradicts the State's claims at the third trial and would have been helpful, favorable and exculpatory evidence to Mr. Jennings (PC-R2. 1027, 1031-33). The summary of Kruger's statement indicated that Kruger was present when Muszynski questioned Mr. Jennings. Therefore that there were no graphic and highly prejudicial details in Kruger's original statement to the police would have directly impeached Muszynski's testimony that Mr. Jennings told him those graphic and damning details of the homicide. Again, trial counsel testified that the undisclosed summary of Kruger's statement would have been very useful to the defense in impeaching both Kruger and Muszynski. Mr. Howard testified that because this undisclosed information conflicted with the State's evidence at trial about who came forward when with what information, it would have been helpful because it would have provided a basis for him to rebut the state's case with argument such as that Muszynski used Kruger to strengthen his bargaining position. It also would have provided support for Mr. Howard's belief and Mr. Jennings' position that Muszynski was in fact an agent of the state (PC-R2. 1031).

Also in the previously undisclosed notes was a summary of

Mr. Crisco's statement which indicated that the victim was rendered unconscious almost immediately and remained unconscious (PC-R2. 1020). Because neither the State nor defense counsel elicited this testimony from Crisco at trial, the judge and jury were unaware of this discrepancy in the inmate witnesses' stories.

In concluding that these non-disclosures were "not favorable evidence which was suppressed or would have changed the outcome of the trial" (PC-R2. 776), the circuit court failed to conduct the proper analysis required by Lightbourne v. State, 24 Fla. L. Weekly S375 (July 8, 1999) and Young v. State, 24 Fla. L. Weekly S277 (June 10, 1999). Erroneously, no cumulative consideration of these non-disclosures, together with the non-disclosures discussed by this Court in its 1991 Jennings[9] opinion, was made below.

Similarly, after hearing evidence regarding trial counsel's ineffective assistance, the circuit court failed to properly evaluate the claim as required by State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Trial counsel made a note to his file to contact Annis Music regarding testifying, yet he for no reason failed to contact her (PC-R2. 1053-54). As a result, he never learned or presented the fact that, a very inebriated Bryan Jennings, twice spoke to her in the early morning hours before the homicide to

[9]Jennings v. State, 583 So. 2d 316 (Fla. 1991).

try to get her to give him a ride home because he was too drunk[10] (PC-R2. 954-56). Had counsel contact Annis Music, he would have also learned that her husband Patrick Clawson was available to testify. Trial counsel testified that he had wanted to call Mr. Clawson was a witness to Mr. Jennings' intoxicated state, but did not do so because he believed that Clawson was out of the country and unavailable (PC-R2. 1068).[11] Mr. Clawson, who had been with Mr. Jennings and had observed his level of intoxication, was thus not presented to testify (PC-R2. 968).

No consideration was given, by the circuit court, to the cumulative effect on the reliability of Mr. Jennings' death sentence of the numerous State non-disclosures together with trial counsel's deficiencies. Because of the non-disclosures and trial counsel's deficient performance, extra thumbs were placed on the death side of the scales, while available thumbs for the life side of the scales went unplaced there. As a result the outcome of the penalty phase is not constitutionally reliable.

The trial courts' giving, over defense objection, unconstitutionally defective instructions defining two of three aggravators, further exacerbates the unreliability of the proceedings. The jury was never properly apprized of what

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[10]It is clear that Ms. Music's testimony refutes the existence of a heightened premeditation necessary for CCP because is shows that Mr. Jennings was trying to get a ride home at 2:30 a.m.

[11]Annis Music and Patrick Clawson would have both testified to Mr. Jennings' intoxication and thus helped the defense prove a mitigating circumstance that the trial judge specifically found it had failed to establish.

evidence was necessary for the State to prove the HAC and CCP aggravating factors. The prejudicial effect on the jury deliberations of the deficiencies in the instructions was amplified by the fact that evidence relevant to the elements of the aggravating factors was not considered by the jury because of the State's non-disclosures and trial counsel's deficient performance.[12]

[12]An example of the circuit court's improper compartmentalization of the constitutional errors into a series of small harmless errors is the statement made in the course of the circuit court's CCP analysis that "[e]ven if the error was preserved, it was harmless beyond a reasonable doubt given the other aggravators and the finding of no mitigation" (PC-R2. 785). In this analysis, the circuit court overlooked: 1) Dr. Podnos' testimony that the crime began on impulse (R. 1513); 2) the Judy Slocum tape establishing a mitigating circumstance; 3) evidence that trial counsel was ineffective for failing to present a wealth of available mitigating evidence, including the testimony of Annis Music and Patrick Clawson which corroborated Judy Slocum's taped statement; 4) that the jury instruction on HAC was constitutionally defective; and 5) the court's own related conclusion, when addressing Mr. Jennings' Brady claim, that the victim was in fact unconscious.

STATEMENT OF THE CASE

A. Procedural History

Mr. Jennings was charged by indictment on May 16, 1979, in Brevard County, Florida with three counts of first degree murder (even though there was only one deceased), kidnapping, three counts of sexual battery, burglary, and aggravated battery. Trial commenced on February 4, 1980, and concluded on February 11, 1980. Mr. Jennings was found guilty as charged and sentenced to death. On direct appeal, this Court vacated the judgment and sentence and ordered a new trial. Jennings v. State, 413 So. 2d 24, 27 (Fla. 1982).

On June 11, 1982, Mr. Jennings was re-indicted in Brevard County and again charged with three counts of first-degree murder, kidnapping, three counts of sexual battery, burglary, and aggravated battery. Mr. Jennings was convicted and again sentenced to death. This Court affirmed both the convictions and sentence. Jennings v. State, 453 So. 2d 1110 (Fla. 1984). On certiorari review, the United States Supreme Court vacated the judgment and remanded the case in light of Edwards v. Arizona, 451 U.S. 477 (1981). Jennings v. Florida, 470 U.S. 1002 (1985). In turn, this Court remanded for a new trial. Jennings v. State, 473 So. 2d 204 (Fla. 1985).

Pursuant to a change of venue, the third trial commenced in Bay County, Florida, on March 24, 1986, and concluded on March 27, 1986. The jury returned a verdict finding Mr. Jennings guilty of the three counts of first degree murder (this despite

the fact that there was one deceased), kidnapping, one count of sexual battery, and burglary of a dwelling.

The penalty phase was conducted on April 7 and 8, 1986. Over objection, the penalty phase jury was given the then standard jury instructions regarding the "specially wicked, evil, atrocious, or cruel" and "cold, calculated, and premeditated" aggravating circumstances (R. 1699). Mr. Jennings requested special jury 6instructions defining the elements of the "cold, calculated and premeditated" and "heinousness, atrocious or cruel" aggravating factors. The trial court denied those requests (R. 1646-53). Mr. Jennings also raised specific challenges to the adequacy of the jury instructions (R. 1648). These challenges went to the actual wording of the instructions not solely to the applicability of these factors to the case. For example, trial counsel argued that in order for the jury to understand the "heinous, cruel and atrocious" aggravator, the interpretation given in Dixon v. State, 283 So. 2d 1, 9 (1973), was necessary (R. 1648). The trial court noted that the word "heinous" might be confusing to the jurors, but ultimately denied Mr. Jennings' request that the proposed instructions be given (R. 1651). Mr. Jennings' counsel similarly argued that additional guidance was necessary as to "cold, calculated, and premeditated" aggravating circumstance. However, the trial court rejected that argument and request also. Thus, Mr. Jennings' jury was never advised of the limitations on these aggravating factors. Mr. Jennings' trial counsel timely filed the following proposed HAC

instruction:

> **In considering whether the crime committed by the defendant was especially heinous, atrocious or cruel, you are instructed that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile, and that cruel means designed to inflict a high degree of pain with utter indifference to, or even, enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the consciousness or pitiless crime which is unnecessarily torturous to the victim.**

(R. 3443).

And further proposed this CCP language:

> **The alleged aggravating circumstances, that the capital felony is a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, was not intended by the legislature to apply to all cases of premeditated murder. Rather, this circumstance exists where facts show, beyond a reasonable doubt, that there was a particularly lengthy, methodical or involved series of events, or a substantial period of reflection and thought by the perpetrator.**

(R. 3444).

Over objection, the penalty phase jury was instead given the then standard jury instructions regarding the aggravating circumstances of "especially wicked, evil, atrocious or cruel" and "cold, calculated and premeditated"(R. 1699). The jury recommended a sentence of death.

On April 25, 1986, the trial court imposed a sentence of death finding three aggravators: 1) committed in the course a felony, 2) HAC, and 3) CCP.

In support of HAC the sentencing court made the following factual recitation arising from the testimony of Muszynski:

> **In the course of events, he lifted Rebecca by her legs,**

brought her back over his head, and swung her like a sledgehammer onto the ground fracturing her skull and causing extensive damage to her brain. While she was still alive, Defendant took her into the canal and held her under the water until she drowned.

In support of CCP, the sentencing court made the following recitation arising from the testimony of Muszynski:

> **At that time he made a conscious decision to enter her room and did so. Rebecca Kunash offered no threat to the Defendant. From the initial abduction to the final premeditated act of drowning her, Defendant's acts represented a cold and calculated indifference to the feelings or life of Rebecca Kunash.**

On his third direct appeal this Court affirmed both the verdicts of guilt and sentence of death. Jennings v. State, 512 So. 2d 169 (Fla. 1987). During the appeal challenges were raised as to the adequacy of the jury instructions on the aggravating circumstances. Point XIII of the Appellant's Initial Brief dealt exclusively with the trial court's denial of all the jury instructions requested by Mr. Jennings in arguing that "[d]efense counsel filed numerous written requests for special jury instructions at the penalty phase" (Initial Brief at 67). Further the Initial Brief argued:

> **The information received by Appellant's jury in the form of instructions on the law to be followed in making a penalty recommendation was far from adequate to avoid the infirmities in this death sentence that inhered in death sentences imposed under the pre-Furman statute. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the jury's recommendation to the trial judge that the death penalty be imposed. LeDuc v. State, 365 So.2d 149 (Fla. 1978).**

(Initial Brief at 68).

Following a specific example of how the heinous, atrocious

and cruel aggravator should have been instructed, the Initial Brief argued that:

> The instructions should have been given as requested. The jury, having no definition, was left to speculate as to the meaning of that factor...Thus errors of such magnitude as the failure to define the aggravating circumstances and the weighing process of aggravating against mitigating in the instructions to the jury at the penalty phase of Appellant's trial requires either reduction of the sentence to life imprisonment or no less than a new penalty recommendation be obtained.

(Initial Brief at 69-70).

The State's Answer Brief did not contest that Mr. Jennings' argument in Point XIII of his Initial Brief concerned proposed instructions for factors other than the heinous, atrocious and cruel aggravator. The State specifically responded to the proposed language of Defendant's Requested Penalty Phase Instruction #4 (R. 3444), by stating, "Appellant argued the need for a lengthy period of reflection in regard to this aggravating factor in closing before the jury (R 1685)" (Answer Brief, Case No. 68,835 at 39). This was in reference to the proposed jury instruction on the cold, calculated and premeditated aggravator. Thus, the State at that time of the direct appeal, understood that the instruction on the CCP aggravator was being challenged.

The State argued that the trial court's failure to give the proposed instruction on CCP was not error:

> In Florida, the trial judge imposes the death sentence. Therefore, even if the jury instructions are later found to be inadequate, the death sentence should be affirmed, because the trial judge, utilizing the guidelines designed by the legislature, must still determine whether the ultimate penalty is warranted. This is a valid measure to assure that the Florida death penalty is applied in a manner that avoids

> **arbitrary and capricious infliction of the death penalty. Proffitt.**

(Answer Brief at 39-40).

This Court rejected Mr. Jennings' arguments in Point XIII without discussion. Jennings, 512 So. 2d at 176.

Mr. Jennings' Initial Brief on direct appeal also argued in Point XVI that:

> **The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, 446 U.S. 420 (1980); Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J. concurring in part and dissenting in part).**

(Initial Brief at 98-99).

The State's Answer Brief responded by citing to Proffitt v. Florida, 428 U.S. 242 (1976) which refers to Florida "as a valid example of a capital sentencing scheme which provides specific and detailed guidance" (Answer Brief at 59).

This court rejected Mr. Jennings' argument in Point XVI without discussion. Jennings, 512 So. 2d at 176.

On October 23, 1989, Mr. Jennings filed his motion to vacate pursuant to Rule 3.850 in circuit court. The Rule 3.850 motion included a Brady v. Maryland[13] claim premised on a previously undisclosed tape recording of a material witness, Judy Slocum, describing Mr. Jennings' intoxication on the night of the homicide. According to the undisclosed tape recording, Mr. Jennings was "loaded." He was too drunk to drive and "he

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[13]373 U.S. 83 (1963).

seemed to have a childish mind" (PC-R2. 312). Ms. Slocum reported having to drive Mr. Jennings home because he busted his zipper and was too drunk to drive.

Mr. Jennings also presented a Brady claim premised upon the State's failure to disclose to the defense impeachment evidence regarding Clarence Muszynski, a witness for the State who claimed that Mr. Jennings confessed to him while they were both incarcerated. The State had failed to disclose a letter Muszynski had written seeking consideration for his assistance against Mr. Jennings.

Additionally, Mr. Jennings claimed he received ineffective assistance at both the guilt and penalty phases of the trial. Mr. Jennings also presented claims premised upon Maynard v. Cartwright, 486 U.S. 356 (1988), that his jury at the penalty phase received inadequate instructions regarding the "heinous, atrocious or cruel" and the "cold, calculated and premeditated" aggravating circumstances. Mr. Jennings additionally argued that the State had failed to comply with Chapter 119 by not disclosing all requested public records.

The State filed its Response on October 25, 1989 and on October 26, 1989, the circuit court permitted oral argument. In that argument the State conceded that a discovery violation as to the Judy Slocum tape had occurred, but argued that the disclosure violation was harmless error. After hearing argument, the circuit court summarily denied relief. Mr. Jennings' timely motion for rehearing was denied January 24, 1990. A timely

notice of appeal was filed February 21, 1990.

On June 13, 1991, this Court affirmed the circuit court's summary rulings on the merits of the claims except as to Mr. Jennings' claim that he had not received all the public records to which he was entitled. A remand for further Chapter 119 proceedings was ordered. Jennings v. State, 583 So. 2d 316, 319 (Fla. 1991). As to the challenge regarding the adequacy of the jury instructions on the "heinous, atrocious and cruel" and "cold, calculated, and premeditated" aggravators, this Court said the issues were procedurally barred because they "either were raised or should have been raised on direct appeal." Id. at 322, fn. 3.

On remand, the circuit court ordered disclosure of some of the Chapter 119 materials not previously disclosed (SPC-R2. 370). However, the circuit court found other material not to be public record but ordered that one file of the "nonpublic" record be disclosed because "it is possible that the notes of witness interviews could contain Brady material" (SPC-R2. 372).

On July 2, 1992, Mr. Jennings filed his First Supplement to Amended Motion to Vacate Judgment of Conviction and Sentence. In this motion, Mr. Jennings argued that a change in law required the circuit court to revisit the issue of whether the instructions regarding the HAC and CCP aggravating circumstances violated the Eighth Amendment.

On July 31, 1992, the State filed a Response in which it argued that the jury instruction error was harmless as to the

"heinous, atrocious or cruel" aggravating factor. This argument included the statement that, "[t]here are two remaining aggravating factors and there is no mitigation" (SPC-R2. 535).

As to CCP, the State argued that the claim was barred because "this same issue has been previously raised on direct appeal" (SPC-R2. 535). This argument included the statement that, "[t]he Defendant challenged the sufficiency of the evidence to support this aggravator and argued the instruction was vague in his direct appeal" (SPC-R2. 536).

On October 23, 1992, Mr. Jennings filed a motion for summary judgment in the circuit court as to the challenge regarding the adequacy of the jury instructions defining the HAC and CCP aggravating circumstances. Mr. Jennings argued that the law was clear that his capital sentencing was tainted with Eighth Amendment error and thus warranted a summary judgment of relief.

On January 28, 1993, this Court issued its opinion in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), finding that the standard jury instruction on "heinous, atrocious and cruel" was erroneous and that in that case the error of giving the jury the standard instruction over objection was not harmless. While Mr. Jennings' summary judgment motion was still pending, this Court on March 4, 1993, rendered its decision in James v. State, 615 So. 2d 668 (Fla. 1993). In James, this Court granted Rule 3.850 relief in a 1986 case where defense counsel had objected to the adequacy of the standard jury instruction on "heinous, atrocious or cruel" and where this Court could not find the error harmless.

On April 21, 1994, this Court issued its opinion in Jackson v. State, 648 So. 2d 85 (Fla. 1994), finding that the standard jury instruction on "cold, calculated and premeditated" was unconstitutional. A week later at the circuit court oral argument on Mr. Jennings' motion for summary judgment filed in this case, the State acknowledged that the Jackson decision was a problem. Nonetheless, the State argued that though trial counsel had adequately challenged the jury instruction on that aggravator, the issue was not adequately raised on direct appeal and alternatively, that the error was harmless (IA-R. 26, 46).

During this oral argument, the State conceded that it had presented "three different witnesses that testified to different statements the Defendant made about how he killed this girl. And they are conflicting statements as to whether or not in fact she was conscious during this entire episode" (IA-R. 27). The State nevertheless contended that the Eighth Amendment error was harmless because the sentencing court had found that the victim regained consciousness "at some point during this sequence of events" (IA-R. 59). The State also argued harmlessness relying upon the sentencing judge's finding of no mitigation. The State argued:

> **The biggest issue that we have is that it's one thing for the defense to attempt to present evidence of mitigation and to argue mitigation, it's another for them to actually show that it exists.**

(IA-R. 64).

After the oral argument, on May 14, 1994, the summary

judgment motion was denied (SPC-R2. 597).

After this Court dismissed an interlocutory appeal of that summary judgement order, further Chapter 119 proceedings occurred in circuit court. The circuit court authorized depositions to be conducted in order to ascertain whether full Chapter 119 compliance had occurred. The State unsuccessfully sought a writ of prohibition to prohibit the taking of these depositions. The circuit court proceedings ultimately resulted in disclosure of additional Chapter 119 materials.

On April 4, 1997, Mr. Jennings filed his Second Amended Motion to Vacate Judgment and Sentence, which included his claims arising from the disclosure of Chapter 119 materials (PC-R2. 354). The Second Amended Motion also included Mr. Jennings' claim that Florida's electric chair was unconstitutional (PC-R2. 415). On May 5, 1997, the State filed its Answer with an accompanying Appendix, which included some previously non-record material (PC-R2. 451-579). On May 15, 1997, the State filed an amendment to its answer, which had attached non-record handwritten notes that had been omitted from its previously filed Appendix (PC-R2. 631-35).

On July 11, 1997, a Huff[14] hearing was held. At this hearing, the State conceded the necessity of an evidentiary hearing as to some of Mr. Jennings' allegations. For example, as to the allegation that notes from an interview of Mr. Kruger contained exculpatory evidence which the State failed to disclose

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[14]Huff v. State, ____ So. 2d. _____(Fla. 199_).

to defense counsel, the State said "I suppose as to that issue that there may be a need to put Michael Hunt on the stand" (PC-R2. 58). Michael Hunt was the person who interviewed Mr. Kruger and had made the notes in question. Similarly, the State conceded an evidentiary hearing on the allegations regarding its failure to disclose other suspects information (PC-R2. 69). And the State suggested an evidentiary hearing on the ineffective assistance of counsel claims may be necessary (PC-R2. 51, 55). As to the electric chair claim, the State argued that whatever the outcome in Jones, the decision in that case would control the issue (PC-R2. 490, 107).

On August 7, 1997, the circuit court entered an order finding that an evidentiary hearing was warranted on two aspects of the Brady allegations and on the ineffective assistance of counsel claim (PC-R2. 679-80). The evidentiary hearing was held on October 30-31, 1997. Thereafter, the parties submitted closing arguments in memoranda form. As to the electric chair claim, the State asserted that "[t]he Jones decision established the law of this state as to this claim, and is binding precedent that bars relief" (PC-R2. 769).

On March 18, 1998, the circuit court entered an order denying all relief (PC-R2. 770). No cumulative analysis of any kind was conducted by the circuit court. Mr. Jennings sought rehearing. The circuit court denied the request for rehearing, and notice of appeal was filed.

B. Statement of the Facts

At trial, the most damaging evidence presented by the State was the testimony of Muszynski, a four-time convicted felon and former cellmate of Mr. Jennings (R. 623-684). Muszynski testified in great detail, about a statement purportedly made to him by Mr. Jennings while they were both in the Brevard County Jail. This testimony included a physical demonstration of the manner in which Mr. Jennings allegedly picked up the victim by her legs and swung her over his head in order to bang her head into the pavement several times (R. 634-39). Muszynski also claimed that Mr. Jennings reported that the victim was conscious at various times during the offense and that she struggled and tried to scratch him (R. 637, 639). The sentencing court specifically relied upon this testimony as credible evidence establishing the exact manner in which the homicide occurred.

In light of his damaging testimony, the credibility of Muszynski was pivotal. Particularly since as the State has conceded, other witnesses gave conflicting evidence. The State specifically pointed out that "the[re] are conflicting statements as to whether or not in fact she was conscious" (IA-R. 27). As the State conceded, to resolve the question of what actually happened, the jury was required to make a credibility determination. The state noted "[w]ell, it depends on the which version of those facts you believe" (IA-R. 28).

At trial, defense counsel cross-examined Muszynski about two motions for post-conviction relief that Muszynski had filed in

1981 and 1982 (R. 657-67). Muszynski admitted that in his motions for post-conviction relief he had alleged complete and total insanity at the time of each offense and each trial. Muszynski admitted that his insanity claims were made under oath and were signed before a notary public. Muszynski denied knowing that he was swearing to the truth of the contents of the motion by his signature. Muszynski also had alleged in one motion that he had been confined in a Houston mental ward less than one month prior to his 1979 trial. He claimed that he hallucinated and was treated with Thorazine while hospitalized. On the stand at Mr. Jennings' trial, Muszynski stated that the allegations in the motions were completely false (R. 657-67).

Mr. Jennings sought to introduce the post-conviction motions into evidence, but the trial court refused to allow him to during the State's case-in-chief (R. 678). At the close of the defense case-in-chief, defense counsel once again proffered the written motions for introduction into evidence. The State objected contending that the motions contained much irrelevant material and were not proper impeachment. After hearing argument, the trial court refused to allow the evidence to be introduced (R. 1122-28). At the penalty phase proceeding, the defense and the State each called two mental health experts to testify. The State's mental health experts found longstanding existence of personality disorder. One of the State's experts, Dr. Podnos, further stated that "impaired judgment was indicated in Mr. Jennings" (R. 1519). The State's other mental health expert, Dr.

Wilder, agreed with this assessment (R. 1569). Dr. Wilder found that Mr. Jennings' mental impairment rendered him "more immature than your standard twenty year old" (R. 1597). The essential disagreement between the testimony of Drs. Wilder and Podnos, and that of defense experts Drs. Gutman and McMahon, was over the question of whether or not Mr. Jennings' personality disorder together with his consumption of alcohol and/or LSD "substantially" impaired his ability to conform his conduct to the requirements of law or constituted "extreme" emotional disturbance. Compare, e.g., R. 1448 with R. 1551.

Dr. Michael Gutman, a psychiatrist presented by defense counsel, testified that Bryan Jennings suffered from a long-term personality pattern with character behavior disorders. Dr. Gutman defined a passive-aggressive personality as causing one to sabotage one's own efforts to succeed, namely by self-destruction. Dr. Gutman was of the opinion that the amount of alcohol consumed by Mr. Jennings combined with his personality disorders resulted in a substantial impairment of Mr. Jennings' ability to conform his conduct to the requirements of law and that Mr. Jennings suffered from some mental disturbance (R. 1365-66, 1370-71, 1376). Dr. Elizabeth McMahon, a clinical psychologist presented by defense counsel, found that Bryan Jennings was immature, impulsive, had little insight and many underlying sexual problems (R. 1411-47). Dr. McMahon was of the opinion that Jennings suffered from personality and character disorders as well as emotional disturbance (R. 1452). Dr.

McMahon's opinion was that Mr. Jennings' ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense (R. 1447-50).

Dr. Burton Podnos, a psychiatrist testifying for the state, concluded that Mr. Jennings suffered from a long-term personality disorder marked by poor impulse control (R. 1512). As a result, Dr. Podnos found that Mr. Jennings had "impaired judgment" (R. 1519). Dr. Podnos acknowledged that Mr. Jennings reported alcohol consumption and LSD ingestion on the night of the offense. Dr. Podnos recognized that Mr. Jennings' lack of impulse control would become more pronounced under the influence of the hallucinogen LSD (R. 1528). However, in order to determine whether that happened, the doctor asserted it was necessary for him to consider "observation[s] of what happened" (R. 1532-33). Based on what had been "related to [him] about the offense", Dr. Podnos did not find substantial impairment (R. 1533). However, he explained that his conclusion would be different, "if he [Mr. Jennings] were under a substantial dose of alcohol and hallucinogens" (R. 1533).

Dr. Lloyd Wilder, another psychiatrist testifying for the state, also found that Mr. Jennings suffered from personality disorder. Dr. Wilder acknowledged that "poor judgment" and "impulsive behavior"marked Mr. Jennings' disorder (R. 1569). Dr. Wilder also indicated that Mr. Jennings had told him about his alcohol consumption and LSD ingestion. However, Dr. Wilder did not find that sufficient evidence existed proving that Mr.

Jennings was significantly impaired by alcohol and drugs (R. 1584). Dr. Wilder indicated that his opinion concerning substantial impairment would be subject to change in the event the defense brought forth adequate evidence of alcohol consumption and observations of behavior reflecting intoxication (R. 1571, 1577). As it was, Dr. Wilder "found nothing that would make me think [Mr. Jennings' capacity to appreciate the criminality of his conduct] was impaired" (R. 1551).

Mr. Russell Schneider testified during the penalty phase that Mr. Jennings had consumed at least a gallon and a half of beer just hours prior to the offense and that Mr. Jennings was still drinking at the bar where the witness left him at 2:30 a.m. (R. 1618).

Ms. Catherine Music testified that Mr. Jennings clearly appeared intoxicated at 5:00 a.m. (less than an hour after the offense according to the state's theory at trial). She indicated that Mr. Jennings had difficulty walking and stumbled against the walls leading to his bedroom and that she had reported to Mr. Jennings' mother that Mr. Jennings was too intoxicated to be driving (R. 1613-15).

In addition, Commander Jerome Hudepohl of the Brevard County Sheriff's Homicide Division, who searched the car utilized by Mr. Jennings on May 11, 1979, testified to the presence of multiple empty beer cans in the car.

However, on the basis of Muszynski's testimony, the State's mental health experts and the trial judge in sentencing

discounted this evidence. No mitigation was found to have been established by the defense (R. 3463).

The State presented the testimony of Allen Kruger at Mr. Jennings' trial. Kruger, like Muszynski, had been in jail with Mr. Jennings following his arrest. Kruger was deceased at the time of the third trial. The State presented his testimony from the second trial. The State contended that Kruger came forward before Muszynski (PC-R2. 738). This contention was used by the State to argue that Kruger corroborated Muszynski and thus lent credibility to Muszynski. Such an argument was dependent upon Kruger being separate and distinct from Muszynski rather than being Muszynski's agent. Such argument provided the State with the crucial explanation for why Kruger's testimony did not provide the graphic detail of Muszynski's and why Kruger's testimony provided no evidence that the victim was conscious.

At the 1997 evidentiary hearing, the State called Michael Hunt, the trial prosecutor at Mr. Jennings' second trial, to testify. Mr. Hunt had no involvment with the case at the time of the initial investigation, only at the second trial. Mr. Hunt testified that the notes (C-43 and C-44)[15] were made during his interview of Kruger on May 20, 1982 (PC-R2. 1154). These notes were intended as a written summary of Kruger's statement to Mr.

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[15]This denomination is in reference to pages 43 and 44 of the notes contained in envelope C of the State's withheld 119 records which the circuit court ordered disclosed to Mr. Jennings following this Court's remand in 1991 (SPC-R2. 372). Again, the contents of envelope C were ordered disclosed because the court found "[i]t [] possible that the notes of witness interviews could contain Brady material" (SPC-R2. 372).

Hunt (PC-R2. 1162-63). According to Mr. Hunt's summary of Kruger's statement, Kruger came to light after Muszynski. Mr. Hunt testified that to the best of his knowledge Muszynski was in fact the first person to come to light (PC-R2. 1156). Thus this information contradicted the State's claim at the third trial. Therefore, according to trial counsel at the third trial, Vincent Howard, this information was exculpatory and helpful.[16]

The summary of Kruger's statement also indicated that Kruger was present when Muszynski questioned Mr. Jennings and that they were cellmates. According to Mr. Howard, the absence of details from Kruger's original statement to the police would have been of more significance had this information been disclosed since this information would have impeached Muszynski's claim that Mr. Jennings provided very graphic and damning details of the homicide (PC-R2. 1034). Mr. Hunt recalled that Kruger and Muszynski spoke with each other about what Mr. Jennings told

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[16]Mr. Hunt did recall that there was an indication that Sargent Writtenhouse at the Brevard County Jail had contact with Muszynski (PC-R2. 1163). Mr. Hunt also recalled that Detective Wayne Porter received direction from the State Attorney's Office to go talk to Muszynski (PC-R2. 1164).

Wayne Porter was called as a witness by the State. On cross-examination, Det. Porter recalled that he had been directed by the State Attorney's Office to go talk to Kruger (PC-R2. 992). The State Attorney's Office knew that Kruger needed to be talked "either through a correctional officer or through a note." (PC-R2. 992). Det. Porter knew of Sargent Writtenhouse from the jail; but, could not recall if Sargent Writtenhouse had any contact with either Kruger or Muszynski—"it's certainly possible." (PC-R2. 993). Det. Porter indicated that in the interviews he personally conducted, he interviewed Kruger before Muszynski, but he did not know whether another law enforcement officer had contact with Muszynski before Det. Porter first interviewed Kruger. (PC-R2. 995).

them:

> No, sir, In fact, they were fairly close, in that Mr. Kruger, at the time, was in his mid 70's and at the time he testified in the second trial, I believe he was eighty years old, but Mr. Muszynski was a trustee at the jail, and he kind of looked after Mr. Kruger who was referred to as Pop, and including getting Mr. Kruger out of his cell to allow him to walk up down the cat walk, and Mr. Muszynski was a trustee and had the responsibility for cleaning the area or mopping floors, so the relationship, as I understood it, was somewhat friendly indifference to this elderly person who was incarcerated with Mr. Muszynski.

(PC-R2. 1159-60).

According to Mr. Howard, neither the summary of Kruger's statement to Mr. Hunt nor its content was disclosed to him (PC-R2. 1027). Mr. Howard found the summary of the statement to Mr. Hunt to be favorable, exculpatory evidence which would have helped him impeach Kruger's testimony "because it would imply that Mr. Muszynski provided the details to Kruger" (PC-R2. 1034-35).

The State contended at trial that Kruger came forward voluntarily four days before Muszynski (See R. 901-20). Mr. Howard testified that having the summary of Kruger's statement to Mr. Hunt would have been very useful at trial:

> ...because...if I could tie Kruger in with Muszynski in almost a quasi-conspiracy-type theory, it would, in my opinion, at least have the potential for damaging Mr. Kruger's credibility at trial, and, as I've said before, since he [Kruger] wasn't there [at the trial] that became a little more difficult.

(PC-R2. 1033).

Mr. Howard testified that the information contained in Hunt's summary of Kruger's statement showed a relationship

between Muszynski and Kruger which would have been very useful for impeaching the credibility of Kruger, who could not be cross-examined because he was a dead at the time of the third trial:

> I think it would in the following way. At our trial, a letter was introduced from Mr. Jennings to a person named Rick, and Rick is Rick Muszynski. Clarence was his first name, but they called him Rick. In that letter, Mr. Jennings, which was allegedly authored by Mr. Jennings and had what the State determined to be the fingerprints of Mr. Jennings on it, he made statements that seemed to imply that -- they seem to imply that he's guilty, because he's concerned about the fact that Pops is going to tell the prosecutor something about him, and the prosecutor is then going to reveal that to the Court. My understanding from the investigation was that Allen Kruger was known as Pops. He was the oldest of the witnesses in the case.
>
> If there had been a -- if you prefer, a conspiracy between Kruger and Muszynski, then I think that raises two concerns. Number one, was Kruger or Muszynski's testimony concocted? Here they talk about testifying or this note indicates that they had discussed testimony as opposed to the statement that Jennings made. Muszynski was heavily impeached, in my opinion, because of his attempt to gain favor for himself by his own testimony, and I do not recall that we were able to severely impeach Mr. Kruger in that matter, yet there had been this conversation and it had been emphasized, then, at least potentially the jury would see that Muszynski was trying to -- or Muszynski was able to influence Kruger to try and gain some benefit for himself by giving a statement against Jennings. I do not believe that Mr. Andrews went into that in the testimony, and, as I say, no cross examination of the deceased was made...
>
> ...at the bottom of Page C-43, there is a notation that says, "Admit no agency [proof], parenthesis M.U.S. asking Q's and the sign for of, defendant or D."
>
> There has always been a potential argument or theory that Muszynski was a plant and that he was a government agent. To my recollection, we did not pursue that theory, and part of the problem that we had was that we had no proof of factual background, and the State denied that he had been an agent.
>
> Their position was that Muszynski was trying to help himself as he had done in other cases. We had determined he was a professional jailhouse witness, if you prefer. He had testified in several other cases.

> **We did not have that information about Kruger. I don't know -- I think the State, in their response, characterized that phrase, "Admit no agency proof," as being subject to various interpretations, and I would have to agree with that. I do not know what that means, but it would indicate to me that whoever took this note was concerned about the prospect of Muszynski being a State agent, or at least that argument being raised.**
>
> **Q Well, does that tie into the note that Muszynski had advised someone to approach Kruger?**
>
> **A Yes, I think it does, because over here, "W came to light after Rick Muszynski told B.C.S.O. of his presence," would indicate that Muszynski was obviously feeding information to the police.**

(PC-R2. 1029-31). According to Mr. Howard, the undisclosed summary of Kruger's statement could have tied the two individuals together and revealed that the damning evidence was concocted by them in order to help Muszynski gain favor with the State (PC-R2. 1029).

It was known at that time of trial that Muszynski had filed motions seeking post-conviction relief in his criminal cases on the basis of insanity. Muszynski admitted at Mr. Jennings' trial that these allegations were false (PC-R2. 1042). A court file in Kruger's criminal case reflects that Kruger had also raised mental competency issues in 1979 (PC-R2. 1166).

Muszynski and Kruger were relied upon by the State's experts to contest the mitigation presented by Mr. Jennings (PC-R2. 1037). Mr. Howard testified that the State's experts concluded, on the basis of Muszynski's statements, that Mr. Jennings was not that drunk or intoxicated or under the influence of drugs (PC-R2. 1037). As a result, Mr. Howard attempted to impeach Muszynski.

This included trying to demonstrate that the physical evidence did not support many of the graphic details that Muszynski provided. For example, there was no broken glass (Muszynski said Mr. Jennings broke the glass out of the window to gain access to the bedroom); contrary to Muszynski's claim there was no evidence of strangulation; contrary to Muszynski's claim there were no scratch marks on Mr. Jennings (supposedly the victim regained consciousness and started screaming and scratching Mr. Jennings' arms); contrary to Muszynski's claim there was no blood on the front curb (supposedly Mr. Jennings bashed the victim's head on the front curb) (PC-R2. 1037-38). Mr. Howard testified he would have used the undisclosed summary of Kruger's statement to impeach Kruger and Muszynski.

At the evidentiary hearing, evidence was received regarding Billy Ray Crisco, another witness at the third trial that testified that Mr. Jennings confessed to him. A note in the State Attorney's file indicated that Crisco had stated that according to Mr. Jennings' statement to him the victim "was rendered unconscious by striking her head very shortly after the offense occurred" (PC-R2. 1017). The note also provided information regarding Crisco's probation officer. Mr. Howard testified that had he known of this information, he would have pursued it at trial: Crisco's statement that the victim was rendered unconscious immediately contradicted Muszynski's testimony and was relevant under case law to the HAC aggravator. Mr. Howard indicated that such evidence should have been

presented to Mr. Jennings' jury (PC-R2. 1047-48). Mr. Howard would also have pursued the information about Crisco's probation officer to establish the bias and suggest that he was possibly benefiting from his testimony (PC-R2. 1019). Finally, Mr. Howard indicated that he would have given Crisco's statement that Mr. Jennings had said "he couldn't help it" to the mental health experts to assist then in their evaluations of Mr. Jennings (PC-R2. 1022).

Later on cross-examination, Mr. Howard admitted that he had been mistaken about not knowing this information and acknowledged that the information contained in Crisco's statement had in fact come out during his deposition of Crisco (PC-R2. 1098). Judge Lober, in his order denying relief, made the correct finding that Mr. Howard did not elicit from Crisco at trial that the victim had been rendered unconscious at the beginning of the offense (PC-R2. 782). Yet, Mr. Howard had argued to the penalty phase jury that HAC did not apply because the victim had been rendered unconscious immediately (R. 1684).

Also not disclosed by the State at the time of Mr. Jennings' trial was a letter from Clarence Muszynski to the State Attorney requesting a price for his cooperation and testimony against Mr. Jennings.[17] The price was an appointment of counsel:

Dear Mr. Wolfinger:

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[17]Allegations based on this letter were presented in Mr. Jennings' 1989 Motion to Vacate, but its non-disclosure at trial was found not to have undermined confidence in the outcome of the trial or penalty phase.

I was interviewed and left a calling card by Wayne D. Porter, Investigator for your Office in reference to a murder case of a six year old child which had been sexually abused.

In order for me to be able to communicate with your office for any possible assistance you may require of me I would appreciate if you would have an attorney appointed for me so that I will not infringe on any of my Fifth Amendment rights, being a layman, and that all discussions would be handled through said attorney representing me.

Hoping this arrangements suits your purposes, I remain,

Sincerely yours,

/s/

Clarence Muszynski

(Def. Exh. 23).

At the evidentiary hearing in October of 1997, Mr. Jennings' trial counsel testified that he was never provided a copy of this letter even though had made a request for Brady material (PC-R2. 1091). This letter is a material written statement by a State witness. The letter from Muszynski, an inmate at Avon Park, requested an attorney in exchange for his testimony against Mr. Jennings (PC-R2. 1092). This certainly reflected upon Muszynski's motives and bias. Trial counsel testified that he would have used the letter to impeach Muszynski if it had been disclosed (PC-R2. 1091-92).

Muszynski's testimony was that Mr. Jennings had confessed to committing this crime. Muszynski's testimony was in fact the State's theory of how the crime occurred and why Mr. Jennings should die. The two mental health experts called by the State relied upon the veracity of Muszynski's testimony in concluding

that Mr. Jennings could not have been intoxicated in light of his recall and in light of his activity, as reported by Muszynski (PC-R2. 1037).

The State possessed an undisclosed tape of an interview with Judy Slocum concerning Mr. Jennings' condition on the night of the offense.[18] The tape was presented at the 1997 hearing on the basis that it must be considered cumulatively with the other constitutional deprivations in the case in the determination to be made of whether Rule 3.850 relief was warranted. The contents of the tape are as follows:

> **Sheriff's Department: This is June 6, 1979. Statement being taken from Judy Slocum. It concerns Brevard County Sheriff's Department Case No. 17880. The statement beginning 1640 hours. Judy, would you state your name, please?**
>
> **Slocum: Judy Slocum.**
>
> *** * ***
>
> **Sheriff's Department: Judy, I call your attention to May 11, 1979 and ask you if on that evening, early that morning, if you were at the John Barleycorn Bar on Merrit?**
>
> **Slocum: Yes I was until about 2:30.**
>
> **Sheriff's Department: And while you were there did you have an occasion to see Bryan Jennings?**
>
> **Slocum: Yes, I did.**
>
> **Sheriff's Department: When you first saw Bryan how was he dressed?**

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[18]Allegations based on this tape were presented in Mr. Jennings' Motion to Vacate filed in 1989. At that time, the circuit court found that by itself, the State's failure to disclose the tape was insufficient to undermine confidence in the outcome.

Slocum: He had on a pair of shorts and a pullover shirt with a ribbon on it.

Sheriff's Department: Did you take him anywhere that night?

Slocum: Yes I did. I took him home to change clothes because he had busted the zipper in his shorts and then I took him back to Barleycorn.

Sheriff's Department: How did you take him home?

Slocum: In his car. In his mother's car.

Sheriff's Department: Do you know what kind of car that is?

Slocum: Actually, no, I know it's a yellow car.

Sheriff's Department: And you drove him home in his car?

Slocum: Right.

Sheriff's Department: Waited in the car while he went in and changed?

Slocum: Yes.

Sheriff's Department: And that took about how long?

Slocum: Approximately ten minutes, no more than ten.

Sheriff's Department: And this was at what time?

Slocum: Uh, one, one fifteen.

Sheriff's Department: And what is the last time that you saw Bryan Jennings?

Slocum: At 2:30 when I left to go home.

Sheriff's Department: And he was still at the John Barleycorn at that time?

Slocum: He sure was.

Sheriff's Department: And, what was his physical condition?

Slocum: He was much loaded.

Sheriff's Department: Was he drunk?

Slocum: Yeah. That's why he asked me to drive him home to change clothes.

Sheriff's Department: Because he knew he had too much to drink.

Slocum: Right.

*** * ***

Sheriff's Department: Okay. Tell me, if you can your opinion of Bryan Jennings. You've already told me that he was pretty loaded. What was his mental state that night?

Slocum: He seemed to have a childish mind and the way he talked and some of his actions.

Sheriff's Department: Can you describe them for me?

Slocum: He was, he had a really short temper and you know, he just ...

Sheriff's Department: Did he seem to get mad over nothing?

Slocum: Yes.

Sheriff's Department: Did he exhibit any signs of being violent when he would lose his temper?

Slocum: Not really violent.

Sheriff's Department: Well, tell me what he would do?

Slocum: Well for example there were a couple of guys who were shooting pool and the game wasn't even over and he just slammed his stick down on the table and just walked to the other side of the bar and there was no obvious reason why he did it.

Sheriff's Department: About what time did this happen?

Slocum: I have no idea.

Sheriff's Department: Was that before or after you took him home?

Slocum: This was before.

Sheriff's Department: Before?

Slocum: Um, hmm.

Sheriff's Department: After you took him home and brought him back, well let me back up and start that over again. When you first saw him, I think you said he was wearing a pair of cutoff blue jeans and a pullover shirt?

Slocum: Uh, huh.

Sheriff's Department: And when you took him home what did he change into?

Slocum: A pair of long legged jeans and the same shirt.

Sheriff's Department: The same, he didn't change his shirt?

Slocum: No.

(PC-R. 310-14; Def. Exh. 2).

The State neither provided Judy Slocum's name to defense counsel as a material witness nor disclosed the contents of her statement. Mr. Howard testified that he was never provided Judy Slocum's statement by the State (PC-R2. 1048).

There was additional evidence of Mr. Jennings' extreme intoxication which trial counsel failed to discover. Mr. Howard testified that he had a note in his file that he needed to speak to Annis Music Clawson. Included with this note was a phone number for Annis Music Clawson, with the word "appearance" and a line drawn to the name "Cathy Music" (PC-R2. 1053-54). Catherine Music testified at trial regarding Mr. Jennings' physical appearance at 5:00 a.m. on the morning of the homicide, however, Mr. Howard never contacted Annis Music Clawson and thus failed to learn what relevant information she had about Mr.

Jennings' appearance (PC-R2. 1054).

Annis Music testified at the evidentiary hearing that Mr. Howard never contacted her about her knowledge regarding the events of the morning of May 11, 1979 (PC-R2. 952). She had spoken to Mr. Jennings twice on the night in question: once at midnight to tell him and her fiancé, Pat Clawson, that she was not going to be getting off work and so she would not be able to meet them at the bar (PC-R2. 954) and again at 2:30 a.m. when Pat Clawson called back to see if she was ever going to make it and she told him that she had to work until 4:00 (PC-R2. 955). In the second phone call, Annis explained that she also spoke to Mr. Jennings. Mr. Jennings told her that "he was getting very drunk and that he didn't think he'd be able to drive home, and, if I would just stop by the bar on the way home and if his car was there, pick him up and bring him home" (PC-R2. 955). Mr. Jennings' voice sounded "[s]lurred" (PC-R2. 956). She got off work and went home at 4:00 a.m., but did not speak to or see Mr. Jennings again until between 5:00 and 6:00 a.m. when he returned home:

> Well, he came in and he was very wide-eyed and, obviously, very intoxicated. He couldn't walk down the hall without banging into the walls, and we talked to him and he really couldn't talk to us, he just said that I'm going to my room. He went to his room and was only there for a few minutes, then he came back out.

(PC-R2. 956-57).

Regarding whether she could tell if he was doing any drugs in addition to the alcohol, she stated, "I couldn't say for sure because I wasn't there. But, just by the way he looked,

it could have been more than alcohol" (PC-R2. 958). Her testimony would have gone also to showing that there was Mr. Jennings' had no pre-existing plan to kill – but rather that Mr. Jennings' tried to get her to give him a ride home.

Mr. Howard testified that he had failed to contact Pat Clawson because of his belief that Clawson was in the military and unavailable (PC-R2. 1068). Had Mr. Howard called Annis Music Clawson, as his notes indicated he was requested to do, he would have additionally learned about Pat Clawsons' whereabouts because Annis Music was married to Clawson at the time (PC-R2. 970).

At the 1997 hearing, Patrick Clawson testified as to his recollection of Bryan Jennings' condition earlier that evening at 2:30 a.m.:

> He was pretty inebriated. He was -- I can't remember who he was with, I remember a gentleman with a beard, He has his arm around him and they were standing there, and I had told him that Annis wasn't getting off until 4:00, and I was going to head on home, and he was pretty inebriated at the time.

(PC-R2. 968). Clawson testified Mr. Jennings' trial attorney never contacted him. He also offered that "it was my understanding the [Jennings] snuck in the child's window and pulled her out that way, and I just thought that the way I saw him at 2:30, that was kind of a stretch to me" (PC-R2. 969).

There was an additional witness as to Mr. Jennings' intoxication presented at the hearing below, Mr. Floyd Canada. Mr. Howard testified that he knew of Mr. Canada at the time of trial but decided not to call Mr. Canada due to some available impeachment. Mr. Howard testified however that if he had had the

other information, such as the Slocum tape, his decision about Canada might well should have been different:

> **[T]he Slocum statement is unimpeached and unrebutted, and it does establish a degree of intoxication with approximately three hours of the commission of the crime, which is much higher than the other people do. It is consistent to an extent with Mrs. Music's testimony, and I don't have the problem that I did with Canada. In retrospect, I probably should have taken a chance with Canada and let the State try to chew him up and just gone ahead and put him on any way...**

(PC-R2. 1136-37). Cumulative consideration must be given to Floyd Canada's deposition which was admissible at penalty phase or in any event could have been provided to the mental health experts (PC-R2. 1139).

Mr. Howard testified additionally that he had a note to his file to "[a]sk for L.S.D. expert" (PC-R2. 1060). Dr. Wilder and Dr. Podnos, the State's experts, related in their testimony that Mr. Jennings had indicated that he had taken two hits of blotter acid (R. 1519, 1570). Despite having made the decision to seek such an expert, Mr. Howard failed to make the request. Mr. Howard testified at the evidentiary hearing:

> **What an L.S.D. expert could have done, and probably should have been used to do, would have been to, by hypothetical, explain the effects of the drug on the central nervous system, on the reactions and behavior of the individual, and to support the testimony of our psychiatric experts as to his diminished or impaired capacity to form specific intent. To that extent looking at my performance personally, I should have called the expert.**

(PC-R2. 1090-91).

Dr. Henry Dee, a clinical neuro-psychologist, evaluated Bryan Jennings during post-conviction proceedings and testified

at the evidentiary hearing (PC-R2. 889). Dr. Dee considered materials provided by post-conviction counsel in arriving at his conclusion (PC-R2. 889). Dr. Dee reviewed the Mr. Jennings' case including the materials that were either not disclosed by the State or were not discovered by the defense attorney. Dr. Dee also interviewed Mr. Jennings and did an extensive neuro-psychological assessment (PC-R2. 906). Finally, he consulted with a neuro-pharmacologist, an expert in toxicology, "to help me understand the level of intoxication that might be present" (PC-R2. 907).

Dr. Dee noted in Mr. Jennings' case the critical importance of consulting with a neuro-pharmacologist about issues involving L.S.D.:

> Q You've indicated that you consulted with Dr. Lipman, is it -- in your opinion, is that -- I guess what I'm asking is how significant was that consultation to you in analyzing Mr. Jennings, and how important, and how necessary?
>
> A I think it was essential to my understanding of the effects of the intoxicants. Dr. Lipman was far more schooled than anyone else I know, and I value his opinion greatly and appreciate the fact that I had an opportunity to consult with him.

(PC-R2. 928-29).

Dr. Dee concluded that Mr. Jennings' mental state at the time of the offense was significantly impaired:

> Well, Mr. Jennings, from my test results, showed evidence of cerebral damage of unknown etiology. This would have affected him both during the time of the offense and before, and after, and still.
>
> The most common cerebral is showing some sort of insult to injury, disease, with the increased impulsivity or memory impairment certainly showed that,

and I don't think that's in controversy, all the experts say the same thing about that, and I just have objective tests that verified that.

I think, in addition, there was intense intoxication involved, with some fairly devastating results in his ability to control his behavior or understand what was going on adequately, and less I think from the test results but more from -- perhaps even through common sense evaluation of Mr. Jennings, what have you, it's clear that he was suffering from some serious mental disorder. This is not the act of some simple psychopath or sociopath, it's simply, you know, without conscious. This is the kind of desperate act that's done by someone, in my opinion, who must be terribly disturbed, and almost anyone could come to that conclusion.

(PC-R2. 909-10).

When asked about the significance of the statement of Judy Slocum to his conclusions about Mr. Jennings intoxicated state at the time of the offense, Dr. Dee explained that the statement was very important:

Well, I think her statement in conjunction with several of the other witnesses is very important because he was obviously drinking quite heavily. He was drinking that day and that evening, and that is something he has told everyone.

There is also corroboration by several of the witnesses that were with him that evening, who saw him that evening, and departed from him that evening, all of them were saying -- they had various ways of phrasing it, but he was very intoxicated. Some witnesses say he was staggering, fell against the wall, glassy eyes, dilated eyes, seems to be more than alcohol. A number of them say he was in an advanced state of intoxication, and Dr. Lipman was quite helpful in addressing the level of intoxication that was present from the testimonies of the witnesses not from Mr. Jennings, and, by his determination, he was in a very bad state of intoxication, to which he had the effects of L.S.D. which are contained in his statements to various experts, including myself, such that -- this is a man who was terribly impaired. Indeed his level of intoxication was dangerously high, and probably somebody who wasn't used to ingesting alcohol

might have even been lethal, and when you add to that the effects of the hallucinogen -- this was a man who was terribly impaired at the time of the offense.

(PC-R2. 910-11).

Dr. Dee testified that Mr. Jennings' behavior and demeanor on the night of the offense, based on the reports of the other witnesses, supports a conclusion that he was intoxicated with both alcohol and the hallucinogen, L.S.D.:

> Alcohol is a depressant and it's sulfuric, which makes you fatigued and sluggish and so forth, and I noticed that one of the witnesses indicates that some time around midnight, 11:30 to midnight -- 12:30 it might have been, he seemed to be very sleepy. This report is not repeated, later on he seemed very alert. At another place, drinking, shooting pool and seemed very alert. This, I think, would be pretty adequate evidence of the side effects of lysergic acids, it is a semiopathic substance and it energizes one and at least some of its aspects are very much like that of amphetamines. It energizes people, and that, in a sense, is quite predictable in a person who is using what I think is the most legal pharmacologic, but, if a person is addicted to some substance like alcohol, typically they're going to take something to energize them as well as to stay awake long enough to get as drunk as they get, and typically they'll pair it with other stimulants like amphetamines, sometimes L.S.D., although that's not as fashionable these days, it's cocaine, but amphetamines typically, but you look when you see this intoxication, the apparent effects of the drug are there. The fact that he had been stimulated, alert, walking around, after these profuse amounts of alcohol would suggest that he's using something besides simple alcohol, and I don't mean marijuana, marijuana wouldn't have effect. It, too, is something of a depressant.

(PC-R2. 912-13).

He also testified that it was significant Judy Slocum said Mr. Jennings asked her to drive him home:

> Yes, in the sense that he recognized, apparently fairly early on in what was a very long evening, that he was sufficiently impaired and shouldn't be driving.

> I noticed that that's the reason he got her to take him home, but later on when you look at other depositions and other statements, I think he loses that self principle, and, in fact, becomes more intoxicated and loses the sense that he's sufficiently impaired and should not be driving, because he tells other people that he's going to drive and then tries to elicit them to go with them, so apparently he became more impaired as the evening progressed.

(PC-R2. 913-14).

Dr. Dee also found significance in Annis Music Clawson's report that Jennings asked her to pick him up at the bar at 4:00 a.m.:

> It appeared at that time of the evening, as best I can recall, it was around 12:30, he calls her place of work and arranges to have her pick him up because he says that he's too impaired to drive home. She thinks she gets off at 2:30, would she come by and pick him up. He said that he was going to stay there because he couldn't drive.

(PC-R2. 914).

Regarding Annis Music's observations when she saw Mr. Jennings at about 6:00 a.m., Dr. Dee explained:

> When he got home, he seemed sufficiently intoxicated, but he wasn't particularly responsive to the questions about what he was doing. Went back in his room and within a few minutes was up again and on his way out, so I wouldn't say he was worn out, he was going out to do something else, get a pack of cigarettes he told them, but they were very concerned because he seemed so impaired that he shouldn't be driving, they were quite wary of that.
>
> * * *
>
> By that time, he should have long since passed out, at the rate he was drinking.

(PC-R2. 914-15).

Dr. Dee found, based on his interview and testing, that Bryan Jennings suffers a chronic brain syndrome with mixed

features, including memory impairment and impulsivity (PC-R2. 926). He also found evidence of specific organic brain impairment:

> Oh, yes, his apparent performance on the memory scale, visual memory scale, it was pretty obvious that there was cerebral damage...[t]he question is, what's the etiology, and the explanation is cerebral damage because it's a life-long feature of behavior.

(PC-R2. 927).

Dr. Dee testified:

> Well, he told me that the evening of the crime he had drank six or seven glasses of beer, three hard drinks and six more beers, two microdots of L.S.D. He told me that his recollection of that evening was impaired -- that's not his word, that's mine, in the sense that at some point during the evening as it advanced and began to experience the effects of L.S.D. in addition to the alcohol he suffered -- or experienced what I would call dissociative phenomena, as a matter of fact to use his own words, he said it was like I was outside of myself watching myself. These feelings of unreality are not uncommon in cases of L.S.D. intoxication, in fact, that's the very thing that frightens people the most...he remembered talking in the bar with other people and not hearing what they said, but in some way understanding what they said. He said it was like I was outside. I could understand what was going on, but I really couldn't really hear it.

(PC-R2. 934-35).

SUMMARY OF ARGUMENTS

1. Mr. Jennings was deprived of an adequate adversarial testing at his capital trial when exculpatory evidence was not presented either because the State unreasonably failed to disclose it or because defense counsel unreasonably failed to discover it. Impeachment evidence regarding Allen Kruger did not reach the jury even though it was known by the State. An eyewitness to Mr. Jennings' extreme intoxication was not called

as a witness even though the witness gave law enforcement a taped statement; however, the State has admitted that the statement was not disclosed to the defense. An incarcerated State witness, Clarence Muzsynski, wrote the State prior to agreeing to testify seeking the appointment of an attorney. Information regarding other suspects was not turned over to the defense.

In addition, Mr. Jennings' defense counsel failed to contact Annis Music despite the fact that Mr. Jennings asked his lawyer to talk to her about his appearance the night of the homicide. Patrick Clawson was not called as a witness because of trial counsel's mistaken believe that Clawson was not available. Trial counsel failed to obtain the services of a drug expert despite noting the need to obtain such an expert. Trial counsel failed to present testimony from Billy Crisco that according to his account of Mr. Jennings' alleged statement, the victim was rendered immediately unconscious and remained so until her death. Trial counsel failed to elicit testimony from Catherine Music, a witness he did call, describing Mr. Jennings' appearance shortly after the time of the homicide as "kind of wild looking" and "under the influence of something." Trial counsel failed to learn of, present and impeach Allen Kruger with information in his own court file showing that less than two months before Mr. Jennings purportedly made a statement to him, Mr. Kruger's counsel challenged his competency on grounds of his "delusional thought patterns." Trial counsel also failed to call Floyd Canada, another witness to Mr. Jennings' extreme intoxication.

Giving cumulative consideration to the failure to present the exculpatory evidence, as is required, confidence is undermined in the outcome of Mr. Jennings' capital trial. The unpresented evidence would have established mitigation and negated aggravation. As a result, the outcome is rendered constitutionally unreliable.

2. Over Mr. Jennings' objection, his penalty phase jury received instructions on "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors since declared unconstitutional. Mr. Jennings' preserved his objection to these instructions by raising the issue of the trial court's refusal to give his proffered instructions regarding these aggravating circumstances in his direct appeal. The error is not harmless beyond a reasonable doubt. Therefore, Mr. Jennings' death sentence must be vacated.

3. The circuit court erred in its decision finding that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar precluded collateral counsel from contacting jurors from Mr. Jennings' trial in order to determine whether such contact would uncover evidence of constitutional error in Mr. Jennings' case.

4. This Court must conduct review of the circuit court's *in camera* inspection of possible public records, which the circuit court concluded were neither public records nor possible Brady material.

5. Florida's electric chair constitutes cruel and/or unusual punishment as established by new evidence not previously

available. As a result, Mr. Jennings' sentence, as it appears in the Sentence for Capital Felony, is unconstitutional and must be vacated.

ARGUMENT I

MR. JENNINGS WAS DEPRIVED OF A CONSTITUTIONALLY ADEQUATE ADVERSARIAL TESTING AT HIS CAPITAL TRIAL WHEN THE PROSECUTION FAILED TO DISCLOSE AND DEFENSE COUNSEL FAILED TO DISCOVER AND PRESENT FAVORABLE AND EXCULPATORY EVIDENCE. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE OUTCOME.

A. INTRODUCTION.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> ...a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and >material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985)(quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Mr. Jennings was denied a fair trial because the state withheld crucial evidence from his counsel and his counsel failed to adequately investigate, prepare and present available evidence which negated aggravation and established mitigation.

This Court recently ordered new trials in two (2) Rule 3.850

proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence of innocence using the following analysis:

> **Gunsby raises a number of issues in which he contends that he is entitle to a new trial, two of which we find to be dispositive. First, he argues that the State's erroneous withholding of exculpatory evidence entitles him to a new trial. Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit and to hide the true identity of the murderer.**
>
> *******
>
> **Nevertheless, when we consider the cumulative effect of the testimony presented at the 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.**

State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996)(emphasis added). See Lightbourne v. State, 24 Fla. L. Weekly S375 (Fla. July 8, 1999); Young v. State, 24 Fla. L. Weekly S277 (Fla. June 10, 1999).

Review of Mr. Jennings' claims requires cumulative consideration of all previously pled claims that Mr. Jennings did not receive an adequate adversarial testing because his jury did not hear favorable and exculpatory evidence. Lightbourne v. State, 24 Fla. L. Weekly S375 (Fla. July 8, 1999); State v.

Gunsby, 670 So. 2d at 923; Swafford v. State, 679 So. 2d 736 (Fla. 1996). The claims presented previously must be evaluated cumulatively with the evidence presented below. If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State, 24 Fla. L. Weekly S277 (Fla. June 10, 1999); Kyles v. Whitley, 115 S.Ct. 1555 (1995). As explained in Kyles:

> **The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.**

Kyles, 115 S.Ct. at 1566.

The Court emphasized that:

> **The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item.**

Kyles, 115 S.Ct. at 1567.

Thus, where relevant evidence does not reach the jury either as a result of the State's failure to disclose or as a result of defense failure to discover, relief is warranted where cumulative consideration of all of the evidence which did not reach the jury undermines confidence in the result of the trial. In a capital case, sentencing relief may be warranted where confidence is undermined in the result of the sentencing proceedings, even if confidence remains as to the guilt determination. Young v. State, 24 Fla. L. Weekly S277 (Fla. June 10, 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

B. PROSECUTION'S OBLIGATION TO DISCLOSE.

The Supreme Court made clear in Kyles that due process requires the prosecutor to fulfill his obligation of knowing what material, favorable and exculpatory evidence is in the State's possession and disclosing that evidence to defense counsel:

> **Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.**

Kyles, 115 S.Ct. at 1568. See Strickler v. Greene, 119 S.Ct. 1936 (1999).

Whether the prosecutor knows of all of the undisclosed evidence in the State's possession is irrelevant. If it was in the State's possession and not disclosed, the evidence must be evaluated cumulatively to determine whether confidence in the outcome is undermined:

> **While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of >reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see Brady, 373 U.S. at 87, 83 S.Ct. at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is**

inescapable.

Kyles, 115 S.Ct. at 1567-68.

As this Court has recently noted:

> **[T]he United States Supreme Court found that Brady documents that had to be disclosed included an internal police memorandum, the state attorney notes of his interview with a key person in the factual scenario of the case, and the prosecution's list of cars in a parking lot at mid-evening after the murder."**

Young v. State, 24 Fla. L. Weekly S277, S278.

1. Prosecutor's notes on witness Allen Kruger.

Allen Kruger was a witness for the State at Mr. Jennings' trial. Because he was deceased at the time of the third trial, a transcript of his testimony from the second trial was read to the jury.

At the 1997 evidentiary hearing, Michael Hunt, Mr. Jennings' second trial prosecutor, identified the notes turned over by the court following its *in camera* inspection of documents withheld by the State Attorney's Office, were notes he made during his May 20, 1982 interview of Kruger summarizing Kruger's statement to him (PC-R2. 1152; C-43 & C-44).

Florida Rule of Criminal Procedure 3.220(b) provides in pertinent part that the State "shall disclose" the statement of any person with relevant information to the crime charged. A "statement" includes "any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording". Any doubt about this definition was clarified by this Court in its recent Young opinion when this Court found that

prosecutor's notes of an interview of a key witness was subject to Brady disclosure obligations. Young v. State, 24 Fla. L. Weekly S277, S278-S280.

According to undisclosed summary of Kruger's statement to Hunt, Kruger came to the attention of the State after Muszynski. Michael Hunt's own personal recollection was that Muszynski was the first person to come to light (PC-R2. 1156). However, this version contradicts the State's claim at the third trial[19] and therefore should have been disclosed, as favorable and exculpatory evidence, to Mr. Jennings' trial counsel.[20]

The summary of Kruger's statement further indicated that Kruger was present when Muszynski questioned Mr. Jennings and that they were cellmates. According to the notes, Kruger indicated that he had spoken to Muszynski about what Mr. Jennings had to say before Kruger allegedly overheard Mr. Jennings'

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[19]The circuit court, in denying 3.850 relief found that, "[a]t the third trial, Muszynski testified that Kruger went to the State first" (PC-R2. 776).

[20]In circuit court, the State focused on challenging the factual accuracy of the note and Mr. Hunt's recall (PC-R2. 738). The circuit court then found that that "note appears to be an error on the part of Mr. Hunt" (PC-R2. 776). However, Mr. Hunt testified that he believed Muszynski came forward first. The only other witness on this point, Mr. Porter, testified that he only knewe that he personally interviewed Kruger first, he did not know if some other State agent had contact with Muszynski first (PC-R2. 995). Mr. Porter further testified that he interviewed Kruger after he was told by the State Attorney's Office that he should talk to Kruger but he was unaware of how precisely the State Attorney Office's knew that Kruger should be talked to (PC-R2. 992).

statement (C-44; PC-R2. 1159).[21] Further according to the notes, Kruger was shown written materials by Hunt to "enhance" his memory: "after reading state. could have"(C-44).[22]

The notes of Kruger's statement further indicate that the victim was unconscious. In its closing argument in circuit court however, the State argued that this was insignificant because Kruger's testimony, which was read to the jury in the third trial, was that the victim was unconscious (PC-R2. 739). Undersigned counsel's reading of the testimony was that there was ambiguity. However, if the State maintains that Kruger's testimony was clear that the victim was unconscious, then it should be bound by that position in Argument II herein.

Finally, the prosecutor's notes indicate that as to certain portions of Kruger's story:

"OMIT - NO AGENCY PROOF".

The State argued that the note is "cryptic" and could have "two very different meanings" (PC-R2. 739).

Wayne Porter, called by the State to refute the Brady claim, provided testimony that supported, provided additional proof of, and actually expanded Mr. Jennings' claim. Porter testified that he was notified by the State Attorney's Office that he needed to go talk to

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[21]Of course, this sounds a little like Muszynski was recruiting Kruger.

[22]In its closing argument in circuit court, the State argued that its "position is that it is not improper for the State to allow a witness to refresh his memory from a transcript of his prior statement. Nor is it exculpatory evidence which must be disclosed." (PC-R2. 739). The State's position does not square with Strickler v. Greene, 119 S.Ct. 1936 at 1948 n.21 (1999).

Kruger[23] (PC-R2. 993). Porter recalled that the State Attorney's Office told him to go interview Kruger on June 25, 1979. In 1997, Porter testified that he hoped he would have known if anyone had had contact with Muszynski first, or if, for example, Sgt. Writtenhouse, from the jail, might have made promises or suggestions to either Kruger or Muszynski (PC-R2. 995). But since he did not know what contact had been going on between the State Attorney's office and Muszynski and Kruger via Sgt. Writtenhouse, he was not in a position to know what if any promises had been made or what discussions had occurred (PC-R2. 996).

As to the notes of Kruger's statement, there is no question but that they were not disclosed to trial counsel and constitute impeachment of his testimony.[24] To determine whether relief is warranted, the undisclosed notes must be considered cumulatively with any other evidence that either the State improperly failed to disclose or defense counsel erroneously failed to discover.

2. Judy Slocum's taped statement.

The State has not contested that the taped statement of Judy

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[23]As the circuit court noted in its order denying relief, "Kruger's testimony was that "[the State Attorney's office] didn't seek me out. I volunteered.'" (PC-R2. 776). Porter's contrary testimony constitutes clear impeachmentl of Kruger.

[24]The United States Supreme Court in Strickler, 119 S.Ct. at 1948, explained:

> There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 119 S.Ct. at 1948.

Slocum, taken by law enforcement on June 6, 1979, was never disclosed to Mr. Jennings' trial counsel (Def. Ex. 2; T. 25). This taped statement, played in open court at the 1997 evidentiary hearing, provided a detailed description of Brian Jennings' condition on the night of the homicide.[25] However, the circuit court in denying relief did not correctly consider the effect of the State's withholding of this taped statement. Had the tape been disclosed, trial counsel would have used it to demonstrate Mr. Jennings' extreme intoxication. It would have been given to mental health experts as specific documentation and corroboration of Mr. Jennings' intoxicated condition and it would have been used to impeach State experts who testified that there was no evidence of intoxication. The tape would have been used to impeach Muszynski and Kruger as it provides a basis for arguing that they made up or enhanced their testimony to curry favor with the State. The tape refutes the assertions that Mr. Jennings confessed to conduct inconsistent with intoxication. The tape would have been used to establish mitigating factors and negate aggravating factors.[26]

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[25]The taped statement is quoted verbatim in the Statement of the Case, supra, and is accordingly not quoted again here.

[26]This is particularly significant given the conceded Eighth Amendment error present as to the jury instructions on two aggravating circumstances. The instructions failed to contain limiting language which required findings of heightened premeditation and intent to torture. Evidence of intoxication would have undermined contentions that heightened premeditation and/or intent to torture were present. Further the Slocum taped statement provides strong evidence of extreme intoxication, a mitigating circumstance otherwise not found by the sentencing judge.

3. Muszynski's letter to the State Attorney.

Trial counsel testified that he was never provided a copy of Muszynski's letter to the State Attorney (Def. Ex. 23; PC-R2. 1091).[27] This evidence should have been disclosed pursuant to Brady. See Strickler v. Greene, 119 S.Ct. at 1948 n.21. The state's failure to disclose this favorable impeachment evidence was not properly considered cumulatively by the circuit court (PC-R2. 773). Relief is warranted.

4. Other suspects information.

Introduced at the hearing was a series of field notes identifying other suspects and other incidents, which may have been related to the homicide for which Mr. Jennings stood trial (Def. Ex. 11-16). One of the State investigators, Mr. Porter, testified that the leads contained in these field notes were not eliminated in the sense that he actually determined that each person identified as a suspect was eliminated as a suspect (PC-R2. 1003). Mr. Howard testified that neither the documents nor the information contained therein was disclosed before or during trial. Mr. Howard testified that the documents were of significance and he would have investigated from the leads they provide and sought to present any evidence consistent with and supportive of the defense at trial (PC-R2. 1044-47).

C. DEFENSE COUNSEL'S OBLIGATION TO INVESTIGATE AND PRESENT.

To the extent that the State argues or attempts to transfer

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[27]This letter was quoted verbatim in the Statement of the Case, supra, and accordingly is not set forth again here.

their obligation "to learn of any favorable evidence known to others acting on the government's behalf", Kyles at 1567, to the defense attorney by saying that trial counsel should have discovered the information, the Brady claim is thus merely converted into an ineffective assistance of counsel claim. State v. Gunsby, 670 So. 2d 920, 921-22 (Fla. 1996)("To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington"); Smith v. Wainwright, 799 F. 2d 1442 (11th Cir. 1986). Trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence that negates aggravation. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). Here trial counsel failed to conduct investigation he had himself determined was warranted. Having decided to contact certain fact witnesses, counsel, for no strategic or tactical reason, failed to follow through on his own decisions. A drug expert he had decided to obtain, through neglect, was not contacted. Evidence rebutting aggravation that counsel knew about, for no reason, he failed to present. Available court files containing impeachment evidence were not examined. Counsel failed to act reasonably. As to this claim, the circuit court made no findings but simply concluded "defense counsel rendered competent and effective counsel to this defendant" (PC-R2. 786).

1. Annis Music.

Mr. Howard testified that he had a note in his file indicating "Annis Music, speak to her regarding Mr. Jennings' appearance." Included on the note was a phone number for Annis Music and a line drawn to the name "Cathy Music" (PC-R2. 1053-54). Mr. Howard testified that this note was the result of a conversation with Mr. Jennings about potential witnesses. Yet, Mr. Howard never contacted Annis Music and failed to learn what she had to say which was relevant to Mr. Jennings' case.

The failure to speak to Annis Music, despite explicit instruction from Mr. Jennings, was deficient performance. Annis Music testified at the evidentiary hearing that Mr. Howard did not contact her about her knowledge regarding the morning of May 11, 1979 (PC-R2. 952). She spoke to Mr. Jennings twice on the night in question, once at midnight to tell him and her fiancé, Pat Clawson, she was not going to be getting off work and so would not be able to meet them at the bar (PC-R2. 954). She had a second conversation with them at 2:30 a.m. when Pat Clawson called to see if she was ever going to make it, and she told him no, she had to work until 4:00 a.m. (PC-R2. 955). In the second phone call, she testified that also spoke to Mr. Jennings. She explained that "[h]e told me that he was getting very drunk and that he didn't think he'd be able to drive home, and, if I would just stop by the bar on the way home and if his car was there, pick him up and bring him home" (PC-R2. 955). She stated Mr. Jennings' voice sounded "[s]lurred" (PC-R2. 956). She testified that she got off work and went home at 4:00 a.m., but did not

speak to or see Mr. Jennings again until between 5:00-6:00 a.m. when he returned home:

> Well, he came in and he was very wide-eyed and, obviously, very intoxicated. He couldn't walk down the hall without banging into the walls, and we talked to him and he really couldn't talk to us, he just said that I'm going to my room. He went to his room and was only there for a few minutes, then he came back out.

(PC-R2. 956-57). When asked if it appeared that he was doing any drugs in addition to the alcohol, she "couldn't say for sure because [she] wasn't there, but, just by the way he looked, it could have been more than alcohol" (PC-R2. 958).

Counsel's failure to speak with Annis Music was deficient performance. It was unreasonable not to call the phone number he had been given and ascertain what information that Annis Music had regarding Mr. Jennings' which may have been useful in his case.

2. Patrick Clawson.

Mr. Howard also testified that he failed to contact Pat Clawson because of his belief that Clawson was in the military and unavailable. Had he called Annis Music, as his notes indicated he was requested to do, he would have learned of the location of Clawson, Annis Music's husband at the time. At the 1997 evidentiary hearing, Clawson testified about Bryan Jennings' condition earlier at 2:30 a.m. that evening:

> He was pretty inebriated. He was -- I can't remember who he was with, I remember a gentleman with a beard, He has his arm around him and they were standing there, and I had told him that Annis wasn't getting off until 4:00, and I was going to head on home, and he was

pretty inebriated at the time.

(PC-R2. 968). Clawson testified that Mr. Jennings' trial attorney never contacted him. He also offered that "it was my understanding the he snuck in the child's window and pulled her out that way, and I just thought that the way I saw him at 2:30, that was kind of a stretch to me" (PC-R. 969). Trial counsel's failure to contact a witness he knew had relevant information was deficient performance.

3. Drug expert.

Mr. Howard testified that he had made a note to his file to ?[a]sk for L.S.D. expert" (PC-R2. 1060). Despite having made the decision to seek such an expert, Mr. Howard failed to obtain the assistance of such an expert. Mr. Howard testified:

> **What an L.S.D. expert could have done, and probably should have been used to do, would have been to, by hypothetical, explain the effects of the drug on the central nervous system, on the reactions and behavior of the individual, and to support the testimony of our psychiatric experts as to his diminished or impaired capacity to form specific intent. To that extent looking at my performance personally, I should have called the expert.**

(PC-R2. 1090-91). This was deficient performance that prejudiced Mr. Jennings. The drug expert relied upon by Dr. Dee explained that the energy level possessed by Mr. Jennings after consuming so much alcohol was consistent with the self-report of him taking blotter acid that night. This further supported the presence of statutory mitigation not otherwise found.

4. Billy Crisco's statements.

Billy Crisco was a witness for the State who claimed Mr.

Jennings confessed to him while they were in jail together. In the State's file, disclosed in collateral proceedings, were notes (C-28) regarding statements made by Crisco (PC-R2 1015-22). Chris White, the prosecutor in the circuit court 3.850 proceedings and at the third trial, stipulated that the notes in question were in "my trial preparation notes" and that Mr. Howard never had them (PC-R2. 1023-24). Mr. White asserted however that the information in the notes came out during Mr. Crisco's pretrial deposition. Mr. Howard testified that the information contained in the notes would have been helpful to the defense and should have been presented:

> **There are two things in here. One would be the timing of the unconsciousness, and one would be Bryan's statement that he just -- let me see if I can find it in here -- I might be reading this wrong, down here. He said that if he got life -- that he gave it to a death penalty, did you see that little note down there?**
>
> **It's about half-way down, Mr. McClain, right here. I remember some conversation about that, but it did not come out in the penalty phase. Whether that would have been useful at out particular penalty phase proceeding, I don't know, but I think it would have been very useful information for the mental health experts to have Bryan's state of mind shortly after the offense, in terms of his rationality, and there was some question about that, although nobody found him to be insane, of course.**
>
> **I think that the material concerning the fact that the Defendant said he couldn't help it would be useful on the issue of premeditation and also on the impulsivity of the crime, also, and, in my file, this note does not appear.**

(PC-R2. 1021-22). In addition, Crisco had indicated that the victim was rendered immediately unconscious and remained unconscious. Under Gunsby, Mr. Howard's failure to notice this information, to the extent it was revealed at the deposition, and

present it, converts this claim to an ineffective assistance of counsel claim.

5. Catherine Music.

Mr. Howard testified that he did not receive a "substantial synopsis of an oral statement made by [Catherine Music]"(PC-R2. 1063). The note in question, Mr. Howard testified, would have been significant to the defense. Catherine Music's statement that Mr. Jennings "looked kind of wild looking" would have been presented to the mental health experts and the jury, had Mr. Howard been aware of the statement. The State's position was that this evidence was as equally available to the defense as it was to the State. According to the State, trial counsel knew of Catherine Music's original statement to the police that Mr. Jennings came into the house, "fell against the wall and stated; 'Oh, I'm so drunk.'"(PC-R2. 748) and that the transcript of the first trial showed Catherine Music stating "that the Defendant was under the influence of something and that she had never seen him looking the way he was looking that morning" (PC-R2. 748). Thus, trial counsel's failure to elicit this evidence when Catherine Music testified was deficient performance.

6. Kruger court record.

Mr. Howard testified that he neither obtained a copy of Kruger's court file nor was aware of mental competency issues therein alleged to exist at the time of the alleged confession to Kruger by Mr. Jennings (PC-R2. 1039). Mr. Howard testified that the court file "contain[ed] information that I think would have

been very significant" (PC-R2. 1039). In the Kruger court case files, Mr. Kruger's mental competency on April 30, 1979, less than two months before his first statement to law enforcement regarding Mr. Jennings' statements to him, was challenged. The court file contained the representation that Kruger suffered from "delusional thought patterns" (PC-R2. 1040). Obviously, the court file was public record equally available to the State and the defense. The State possessed this information at the time of trial, but argued that because it was public record, it had no obligation to disclose it (PC-R2. 747). Mr. Jennings' trial counsel failed to avail himself of the public record. Trial counsel provided deficient performance in failing to discover the Kruger court file and the impeachment evidence contained therein. Mr. Jennings' jury was unaware of this impeachment information (PC-R2. 1039-42).

7. Floyd Canada.

Floyd Canada told the State that Jennings "staggered etc. pretty bad ... 1 step forward 2 [steps] backward" (C-54). The time was 5:00 a.m. Mr. Howard testified that he was aware of Mr. Canada as a potential witness. Mr. Howard did not call Mr. Canada because Mr. Canada had on occasion made statements not particularly helpful to the defense (PC-R2. 1069). However, had he had other evidence, his analysis of Mr. Canada would have been different:

> **[T]he Slocum statement is unimpeached and unrebutted, and it does establish a degree of intoxication with approximately three hours of the commission of the crime, which is much higher than the other people do.**

> It is consistent to an extent with Mrs. Music's testimony, and I don't have the problem that I did with Canada. In retrospect, I probably should have taken a chance with Canada and let the State try to chew him up and just gone ahead and put him on any way....

(PC-R2. 1136-37).

D. CONFIDENCE IS UNDERMINED IN THE OUTCOME.

Mr. Jennings did not receive what due process, as Kyles explains, guarantees:

> [A] fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 115 S.Ct. at 1566. Under Lightbourne, Young, Gunsby and Kyles, the question is, regardless of who failed to carry out their constitutional obligation (the prosecutor or the defense counsel), is the verdict obtained in the absence of the undisclosed (to the jury) exculpatory evidence one "worthy of confidence."

Kyles, 115 S.Ct. at 1566.

As to the reliability of Mr. Jennings' sentence of death, the starting point must be the findings in support of the death sentence. Three aggravating factors were found, and no mitigating factors were found to have been established. The aggavators found were: 1) HAC, 2) CCP, and 3) in the course of a felony. The evidence which the jury did not hear, because either the State improperly failed to disclose it or because defense counsel improper failed to discover and present it, negates or at a minimum undermines the weight of the aggravating factors, while establishing mitigating factors which previously were found not to be established. See Hildwin, 654 So. 2d at 110 (prejudice found where at trial four aggravator and no mitigators were found); Rose, 675 So. 2d at 570 (prejudice found where at trial three aggravators and no mitigators found).

1. Prosecutor's notes re: Kruger.

The notes of Kruger's May 20, 1982 statement provides impeachment of Muszynski's testimony that Kruger went to the State first (PC-R2. 776). According to Mr. Howard, the summary of the statement to Mr. Hunt was favorable and exculpatory evidence which would also have helped to impeach Kruger's testimony "because it would imply that Mr. Muszynski provided the details to Kruger" (PC-R2. 1034). The State contended at the trial that Kruger came forward voluntarily four days before Muszynski (See R. 901-920). Mr. Howard testified that having the summary of Mr. Kruger's statement to Mr. Hunt would have been very useful at trial:

> **"...because...if I could tie Kruger in with Muszynski in almost a quasi-conspiracy-type theory, it would, in my opinion, at least have the potential for damaging Mr. Kruger's credibility at trial, and, as I've said before, since he wasn't there, that became a little more difficult"**

(PC-R2. 1033).

Mr. Howard testified that the information contained in Mr. Hunt's summary of Kruger's statement revealed a relationship between Muszynski and Kruger and that that information would have been very useful to him in his efforts to impeach both Muszynski and Kruger. The absence of details in Kruger's original statement would have been especially significant because it would have impeached Muszynski's claim that Mr. Jennings provided very graphic and damning details of the homicide.

Muszynski's testimony was the sentencing judge's basis for finding HAC and CCP. In circuit court, the State conceded that

the testimony of Muszynski, Kruger and Crisco conflicted by stating that the conclusions as to what happened depended upon "which version of those facts you believe" (IA-R. 28). Thus, because Muszynski's version was the most aggravating and the one used to justify finding HAC and CCP, evidence tending to impeach Muszynski was material favorable evidence which trial counsel would have presented.

2. Judy Slocum taped statement.

This statement provided specific and graphic evidence of Mr. Jennings' intoxication less than three hours before the offense was committed. It was the absence of this type of evidence that the State's mental health experts relied upon in concluding that Mr. Jennings was not impaired. The Slocum statement establishes the presence of a mitigating factor. Buford v. State, 570 So. 2d 923 (Fla. 1990). Further, the level of intoxication is evidence that would have refuted the evidence in support of the CCP aggravator. Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995). The intoxication described by Judy Slocum also impeaches Muszynski; a high level of intoxication is inconsistent with Muszynski's claims of what Mr. Jennings' remembered and the agility with which he functioned according to Muszynski's version of events.[28]

3. Muszynski's letter.

The undisclosed Muszynski letter, as trial counsel

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[28]Again, the State noted that Muszynski's version was at odds with the testimony of the other witnesses who claimed Mr. Jennings had made incriminating statements (IA-R. 27-28).

testified, would have opened doors to further impeach Muszynski. Clearly, trial counsel attempted to extensively impeach Muszynski. He sought to show that the physical evidence did not support Muszynski's version of what happened. He showed that Muszynski had lied under oath before. He showed a history of testifying to jailhouse confession in exchange for consideration. Yet, the sentencing judge relied upon Muszynski's version of the events for finding two aggravators and no mitigators. Additional impeachment may have pushed the jury into the realm of reasonable doubt as to the story Muszynski was peddling. Certainly in conjunction with the notes from Kruger's statement and Judy Slocum's taped statement, Muszynski's testimony is undermined. And as a result, aggravation is negated while mitigation is established.

4. Annis Music.

The failure to contact Annis Music regarding Mr. Jennings' appearance on the morning of the homicide precluded trial counsel from learning of the wealth of important information Annis Music possessed. Her conversations with Mr. Jennings earlier in the morning provided both evidence of intoxication (otherwise not found to have been established) and negation of the CCP aggravating factor. Her observation of Mr. Jennings' appearance near the time of the homicide corroborated Catherine Music's testimony and provided documentation of Mr. Jennings' intoxication the State's mental health experts found lacking. In conjunction with Judy Slocum's taped statement, Mr. Jennings'

extreme intoxication is undeniable. Cumulative consideration requires the removal of a thumb from the death side (CCP) and the addition of thumbs (mitigating factors) to the life side. Together with the Slocum tape, Annis Music's testimony further impeaches Muszynski.

5. Patrick Clawson.

The failure to contact Annis Music also cost Mr. Jennings the presentation of Patrick Clawson's testimony. Mr. Clawson's testimony confirms and corroborates the Slocum tape and Annis Music's recollection. In so doing, it further impeaches Muszynski's version of the facts, negates aggravation and establishes mitigation otherwise not found to be present.

6. Drug expert.

Trial counsel's failure to obtain the assistance of a drug expert further prejudiced Mr. Jennings. Dr. Henry Dee, during the evidentiary hearing, noted the critical importance of consulting with a neuro-pharmacologist about issues involving L.S.D.:

> **Q You've indicated that you consulted with Dr. Lipman, is it -- in your opinion, is that -- I guess what I'm asking is how significant was that consultation to you in analyzing Mr. Jennings, and how important, and how necessary?**
>
> **A I think it was essential to my understanding of the effects of the intoxicants. Dr. Lipman was far more schooled than anyone else I know, and I value his opinion greatly and appreciate the fact that I had an opportunity to consult with him.**

(PC-R2. 928-29). Such an expert, especially with the testimony of witnesses to Mr. Jennings' behavior that morning (Judy Slocum,

Annis Music, and Patrick Clawson), would have been able to establish the existence of statutory mitigation.

7. Crisco's statement.

Trial counsel testified that he should have presented the jury with Crisco's indication that the victim was rendered unconscious immediately and remained unconscious until her death. Such evidence would either have negated the presence of the HAC or at least reduced its weight. In addition, trial counsel testified that Crisco said Mr. Jennings' reported that "he couldn't help it." (PC-R2. 1022). This should have been presented to the mental health experts in order to strengthen the evidence of mental health mitigation.

8. Catherine Music.

Catherine Music did testify at trial, but some of the crucial details of her description of Mr. Jennings' appearance and condition were never presented. The State asserted below that this was the fault of trial counsel's failure to present the evidence, not the State's failure to disclose. Whatever the reason, Catherine Music's description of Mr. Jennings, that he "looked kind of wild looking," which supports and corroborates the Slocum tape, Annis Music' recollection, and Patrick Clawson's recall was not presented. Equally corroborative were her statements, also unpresented, that Mr. Jennings "fell against the wall and stated; 'Oh, I'm so drunk'" and that "the Defendant was under the influence of something and that she had never seen him looking the way he was looking that morning." (PC-R2. 748).

Cumulative consideration of the allegations herein leads one to the inescapable conclusion that thumbs should have been removed from the death side of the scale, while other thumbs should have been placed upon the life side of the scale. Confidence must be undermined in the reliability of the outcome given the wealth of evidence that should have been presented but was not presented for one impermissible reason or another.

9. Kruger court record.

Trial counsel's failure to obtain Kruger's criminal court files on the case for which he was then incarcerated was prejudicial and therefore the impeachment evidence contained within those public records never reached the jury.

10. Floyd Canada.

The jury also did not hear Floyd Canada's description of Mr. Jennings' intoxication. Mr. Canada's statement further corroborates Judy Slocum, Annis Music, Catherine Music, and Patrick Clawson.

E. CONCLUSION.

The evidence that the jury did not hear provided observations that confirmed what Mr. Jennings reported. He was extremely intoxicated, under the influence of LSD, he was substantially impaired and mentally or emotionally disturbed on the night of the homicide. The evidence also negated a pre-existing plan. Considered together with the evidence from the undisclosed and undiscovered witnesses, this evidence establishes that Mr. Jennings was extremely intoxicated. This evidence

constitutes what the State's mental health expert identified as missing in the case. Finding of statutory mitigation was thus precluded because this evidence was neither produced, presented nor considered. This evidence impeaches Muszynski's description of how the murder happened and thereby substantially weakens the State's evidence in aggravation. Confidence in the reliability of the outcome is undermined.[29]

ARGUMENT II

MR. JENNINGS' PENALTY PHASE JURY RECEIVED INSTRUCTIONS REGARDING TWO AGGRAVATING CIRCUMSTANCES WHICH THIS COURT HAS SINCE DETERMINED WERE DEFECTIVE DUE TO THEIR FAILURE TO ADVISE THE JURY OF THE NECESSARY ELEMENTS OF THE AGGRAVATING CIRCUMSTANCES. MR. JENNINGS OBJECTED TO THE INSTRUCTIONS, PROPOSED CURATIVE INSTRUCTIONS, AND RAISED HIS CHALLENGES ON DIRECT APPEAL. THUS UNDER THIS COURT'S PRIOR DECISIONS, MR. JENNINGS HAS CORRECTLY RERAISED HIS CHALLENGES IN POSTCONVICTION PROCEEDINGS. THE ERROR IS NOT HARMLESS BEYOND A REASONABLE DOUBT AND MR. JENNINGS IS ENTITLED TO A RESENTENCING.

A. INTRODUCTION.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Jennings' jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So.

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[29]Mr. Jennings does assert that confidence in the guilt verdict is undermined by the non-disclosure of the other suspects.

2d 221, 224 (Fla. 1988). This Court has explained that, [w]hen an instruction excludes a fundamental and necessary ingredient of law required to substantiate the particular crime, such a failure is tantamount to a denial of a fair trial." Chicone v. State, 684 So. 2d 736, 745 (Fla. 1996). Mr. Jennings' jury received no instructions regarding the elements of the two most serious aggravating circumstances. Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992). Sentencing discretion was not channeled and limited in conformity with law. Godfrey v. Georgia, 446 U.S. 420 (1980). Because Mr. Jennings was sentenced to death based on a finding that his crime was "heinous, atrocious and cruel" and "cold, calculated and premeditated," but the jury did not have the benefit of the proper limiting definitions or elements of those two aggravating circumstances, Mr. Jennings' sentence violates the Eighth and Fourteenth Amendments.

1. HAC.

This Court has discussed the limiting construction placed upon "heinous, atrocious or cruel" on a number of occasions. This Court has indicated that before this aggravating factor can be found the State must prove beyond a reasonable doubt that a capital defendant actually intended to inflict a high degree of pain or otherwise torture the victim. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d

160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977)(the presence of a mental or emotional disturbance may explain and negate heinous, atrocious, or cruel aggravating circumstances).

This Court in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), acknowledged that the standard jury instruction defining "heinous, atrocious, or cruel" given during Mr. Hitchcock's 1988 resentencing was inadequate to inform the jury of what the State must prove beyond a reasonable doubt to establish the presence of this aggravator. Mr. Hitchcock had "requested an expanded instruction on th[e] aggravator, objected when the court denied his request, and raised the issue on appeal." 614 So. 2d at 484. This properly preserved the issue for review. The error was not harmless even though the sentencing court had found three other aggravators: 1) committed while under sentence of imprisonment;

2) committed during a sexual battery; and 3) committed to avoid or prevent arrest. The error was not harmless even though:

> **According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered and went to bed.**

Hitchcock, 614 So. 2d at 484 (Grimes, J., dissenting).

Subsequently, this Court in James v. State, 615 So. 2d 668 (Fla. 1993), held that challenges to the adequacy of the standard jury instruction defining HAC could be presented in Rule 3.850 proceedings where "a specific objection on that ground [had been] made at trial and [was] pursued on appeal." 615 So. 2d at 669. During his 1982 trial, Mr. James had "objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received." 615 So. 2d at 669. Accordingly, Mr. James was authorized to re-present his challenge to the jury instruction in Rule 3.850 proceedings given that claim had since been found to be meritorious. The error was found by this Court not to be harmless, even though HAC had been struck on direct appeal leaving four other aggravators which this Court had affirmed "to be weighed against no mitigator." 615 So. 2d at 669. The four other aggravators were: 1) prior conviction of violent felonies; 2) committed during a burglary and robbery; 3)

committed for the purpose of avoiding arrest; and 4) cold, calculated and premeditated. James v. State, 453 So. 2d 786, 792 (Fla. 1984).

Mr. Jennings' jury was given the instruction over objection that this Court found deficient in Hitchcock and James. Mr. Jennings' jury did not receive the narrowing constructions necessary to provide adequate guidance as this aggravator. As the State conceded in circuit court, this was error.

2. CCP.

This Court held that "calculated" consists"of a careful plan or prearranged design." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). It held that "premeditated" refers to a "heightened" form of premeditation that is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). And it held that "coldness" is reflected by a "deliberate plan formed through calm and cool reflection." Santos v. State, 591 So. 2d 160, 163 (Fla. 1992). This court has explained that:

> To avoid arbitrary and capricious punishment, this aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." [Citation.] Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must apply to murders more coldblooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder.

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). Thus, this Court established the elements of CCP that the State must prove

beyond a reasonable doubt.

In Jackson, this Court stated that:

> A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open ended discretion which was held invalid. . . The [United States] Supreme Court has found HAC-type instructions unconstitutionally vague because a person of ordinary sensibility could fairly characterize almost every murder as outrageously wantonly vile, horrible and inhuman. [A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is especially heinous.
>
> The premeditated component of Florida's standard CCP instruction poses the same problem. Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed that:
>
> > Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator.

Jackson, at 9 (internal citations omitted)(emphasis added).

Mr. Jennings' jury received the standard jury instruction regarding the "cold, calculated, and premeditated" aggravating circumstance (R. 1699). The instruction given simply advised the jury of the statutory language; it did not contain any of this Court's limiting constructions regarding this aggravator, and as this Court has previously ruled was defective.

The instruction was given over objection. As the State

conceded in circuit court the instruction given on CCP was deficient. The failure to advise the jury of the narrowing constructions was error.

B. PRESERVATION.

This Court has ruled that capital defendants may raise in 3.850 proceedings claims of error that are based upon either facts or law which were not previously available. In addressing challenges to the adequacy of jury instructions at the penalty phase, this Court has established rules for determining whether a specific claim is cognizable in 3.850 proceedings. Challenges to jury instructions on HAC and CCP must be preserved in order for those claims to be cognizable in 3.850 proceedings.

1. HAC.

As noted above, this Court in James found that capital defendants could challenge the adequacy of their jury instruction on HAC in 3.850 proceeding where they had preserved the issue at trial and on direct appeal. The State conceded in circuit court that Mr. Jennings had preserved his challenge to the jury instruction on HAC. In 1992, the State filed an Answer to the First Supplement stating: "The State of Florida does not contest the allegation that the jury instruction on >heinous, atrocious and cruel' was unconstitutionally vague. Nor does the State contest the allegation that this error was properly preserved." (SPC-R2. 527). At the Huff hearing in 1997, the Assistant State Attorney asserted: "As to heinous, atrocious and cruel my research indicated it was preserved and that it was raised

properly at trial and it was argued on appeal." (PC-R2. 98). In its written Answer filed in 1997, the State acknowledged that error had occurred, but argued the error was harmless. "It is the State's position that while the instruction on heinous, atrocious or cruel given in the instant case was unconstitutionally vague, and was properly objected to, such error was harmless." (State's Answer; PC-R2. 483).

2. CCP.

As to CCP, the State's position below changed over time. Before this Court's opinion in Jackson ruling that the standard jury instruction given at Mr. Jennings' trial was deficient, the State argued that Mr. Jennings' claim was "barred . . . because this same issue has previously been raised on direct appeal. See Jennings v. State, 512 So. 2d 169 (Fla. 1988), and Point XVI of the Defendant/Appellant's brief on appeal to the Florida Supreme Court at p. 98." (Answer to First Supplement; SPC-R. 535).[30] In its Answer to the First Supplement, the State repeated this position on the next page: "The Defendant challenged the sufficiency of the evidence to support this aggravator and argued the instruction was vague in his direct appeal." (SPC-R2. 536). This was the State's position in July of 1992.

After the Jackson opinion declared the CCP instruction deficient, this Court held that, "[c]laims that the CCP instruction is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal." Crump v. State, 654 So. 2d 545, 548 (Fla. 1995). In Bush v. State, 682 So. 2d 85, 88 (Fla. 1996), this Court quoted Crump in finding a procedural bar in a successor 3.850 motion. Thus, this Court applied the James preservation rule to deficient

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[30]In the Initial Brief on direct appeal, Mr. Jennings argued at page 98: AThe statute, further, does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute.@ The instruction given to Mr. Jennings' jury contained only the statutory language. Over objection, the trial court refused to provide the jury with this Court's narrowing construction of the statutory language.

CCP jury instructions. To be cognizable in 3.850 proceedings, the capital defendant must have challenged the CCP instruction at trial and on direct appeal.

After this Court's position in this regard became clear, the State in Mr. Jennings' case presented a different argument against Mr. Jennings' CCP claim. In the Answer filed in 1997, the State said, "[t]he State agrees that the instruction here was unconstitutionally vague, and agrees that counsel for the Defendant preserved his objection at trial. However, the Defendant has failed to properly preserve the issue because he failed to argue it on appeal in Claim XIII of Defendant's brief." (PC-R2. 485).

Thus the cognizability of Mr. Jennings' challenge to the CCP instruction in 3.850 proceedings turns on whether the State was correct in 1992 (the issue was raised on direct appeal) or 1997 (the issue was not raised on direct appeal). The State's 1997 contention is erroneous; it was simply asserted in order to avoid consideration of the claim on the merits. An examination of the briefs from the direct appeal reveals that the issue was raised.

In Point XIII of his Initial Brief on direct appeal, Mr. Jennings argued:

> **Defense counsel filed numerous written requests for special jury instructions at the penalty phase. (R. 3440-3444) All of the instructions had a basis in the cited case law, and several were not adequately covered by the standard instructions. Over objection, the trial court denied (both orally and in writing) all of the requested instructions.**

(Initial Brief at 67).

Page 3444 of the record is DEFENDANT'S REQUESTED PENALTY PHASE INSTRUCTION #4. It provided:

> **The alleged aggravating circumstances, that the capital felony is a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, was not intended by the legislature to apply to all cases of premeditated murder. Rather, this circumstance exists where facts show, beyond a reasonable doubt, that there was a particularly lengthy, methodical or involved series of events, or a substantial period of reflection and thought by the perpetrator.**

(R. 3444). Thus, Mr. Jennings' specifically cited to his proposed expanded instruction defining CCP in his argument that, "[a]ll of the instructions had a basis in the cited case law, and several were not adequately covered by the standard instructions" (Initial Brief at 67).

The State's Answer Brief on direct appeal addressed Point Thirteen as follows: "Appellant submitted four (4) written instructions at the penalty phase of his trial (R 3441-44). The trial court denied all of the appellant's special requested instructions (R 1653, 3441-44)." (Answer Brief at 38). The Answer Brief then addressed each of the four special requested instructions in turn, explaining why the refusal to grant the requested instruction was not error. As to the fourth requested instruction, the State asserted:

> **Special jury instruction number four (R 3444), was denied because the judge felt that the standard instruction was sufficient to cover the requested instruction (R 1653). Appellant argued the need for a lengthy period of reflection in regard to this aggravating factor in closing before the jury (R 1685).**

(Answer Brief at 39). The Answer Brief then explained that Mr.

Jennings reliance upon Godfrey v. Georgia was misplaced:

> **In Florida, the trial judge imposes the death sentence. Therefore, even if the jury instructions are later found to be inadequate, the death should be affirmed, because the trial judge, utilizing the guidelines designed by the legislature, must still determine whether the ultimate penalty is warranted.**

(Answer Brief at 39).

Clearly, Mr. Jennings' raised the failure to give his expanded instruction #4 regarding CCP. The State at the time understood that the CCP instruction had been raised; it specifically addressed it in the Answer Brief. Under James, Crump, and Bush, the issue having been preserved is now before the Court on the merits.

C. HARMLESS ERROR ANALYSIS.

As to the merits, the State conceded below that the jury instructions on both HAC and CCP were deficient, and thus given in error. The State argued, however, that the error was harmless.

"[I]n a 'weighing' State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 506 U.S. 40, 46-47. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 503 U.S. 222, 232 (1992). "[T]he use of a vague aggravating factor in the weighing

process creates the possibility not only of randomness but also of bias in favor of the death penalty." Stringer at 235-36. The Eighth Amendment requires the state appellate court to "thoroughly analy[ze] the role an invalid aggravating factor played in the sentencing process." Stringer at 230. "When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." Stringer at 232. "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court must actually perform a new sentencing calculus, if the sentence is to stand." Richmond at 49.

This Court has determined that where the jury receives an inadequate instruction failing to give sufficient guidance as to the narrowing constructions of aggravating circumstances this Court must engage in a harmless error analysis and determine that the error was harmless beyond a reasonable doubt. Hitchcock, James, and Jackson. This requires either a determination that the elements of the aggravator, as set forth in the narrowing construction, would have been found beyond a reasonable doubt had the jury been advised of those elements, or a determination that removing the tainted aggravator from the death side of the scales would not have allowed the jury to return a binding life recommendation.

In Walls v. State, 641 So. 2d 381 (Fla. 1994), this Court

found that the jury had received inadequate instructions defining the CCP aggravator. This Court conducted the harmless error analysis by discussing each element of CCP and determining that there was no material issue of fact as to the elements necessary to establish CCP. Accordingly, the error was harmless beyond a reasonable doubt. Similarly, in Archer v. State, 673 So. 2d 17 (Fla. 1996), this Court considered each element of CCP and Determined that there was no material issue of fact as to the elements necessary to establish CCP.

Accordingly, this Court is required to set forth the narrowing constructions of both HAC and CCP, and determine whether had the jury been properly instructed on the elements of each aggravator there was no genuine issue of fact as to the elements necessary to establish before of these aggravators. In conducting this analysis, as the State conceded in circuit court, consideration must be given not to just the evidence that was before the jury in the penalty phase, but also to the evidence presented at the evidentiary hearing regarding matters of which the jury did not hear either due to ineffective assistance of counsel or the State's failure to disclose exculpatory evidence. (PC-R3. 99-100).

If this Court cannot conclude beyond a reasonable doubt that the jury would have been required as a matter of law to find the all of the elements of both aggravating circumstances present, the error before the sentencing jury must be reversed since the record contained evidence upon which the jury could reasonably

have based a life recommendation. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1988) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation.") Mitigation was before the jury, which could have served as a reasonable basis for a life recommendation.

1. HAC.

Here, Mr. Jennings' jury was given a legally invalid circumstances to apply and weigh. The jury was simply asked to apply this circumstance if it believed the murder was evil, wicked, atrocious or cruel. No limiting constructions adopted by this Court were given to the jury. Specifically, Mr. Jennings sought to have the jury advised that the aggravator was meant to cover "the consciousless or pitiless crime which is unnecessarily torturous to the victim." (R. 3443). This would have advised the jury that it must look to Mr. Jennings' mental state of mind in considering this aggravator. See Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994)(finding of HAC struck "[b]ecause we find no evidence in this record that Stein intended to cause unnecessary and prolonged suffering); Bonifay v. State, 626 So. 2d at 1313 ("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel").

Here, the jury was presented with evidence of Mr. Jennings'

intoxication. Such evidence would have provided the jury with a basis for concluding that the State failed to prove that Mr. Jennings had the requisite mens rea for this aggravator. Similarly, the defense called two mental health experts who testified regarding Mr. Jennings' mental condition. Again, this testimony could have provided the jury with a reasonable doubt as to whether the State had carried its burden of proof.

Moreover, this Court has already determined in a case with facts as to this aggravator which were worse, that the giving of the same instruction that was given here over the same objection that was made here cannot be found harmless beyond a reasonable doubt. In Hitchcock, the facts as noted by Justice Grimes were:

> **According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. After wards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered and went to bed.**

Hitchcock, 614 So. 2d at 484 (Grimes, J., dissenting). The result here must be the same. The State's argument below that Hitchcock did not control was simply predicated upon the fact that mitigating factors had been found by the sentencing judge in Hitchcock but not here. (IA-R. 33). A failure to follow Hitchcock would render Mr. Jennings' sentence of death arbitrary and capricious.

2. CCP.

Mr. Jennings' jury was not advised that a pre-existing plan or heightened premeditation was necessary to find this aggravator. The evidence of Mr. Jennings' intoxication certainly went to the issue of whether Mr. Jennings had the capacity for the necessary heightened premeditation. This evidence alone could have reasonably caused the jury to conclude that the State had not carried its burden of proving each element of this aggravator beyond a reasonable doubt. Similarly, the mental health experts called by the defense reasonably could have caused the jury to find that the State had failed to meet its burden of proof.

However, the State's expert, Dr. Podnos, testified that there was no pre-existing plan: "I think it started as an impulse and then it was deliberate." (R. 1513).

Here, it cannot be said that the improper instruction and argument had no effect upon the jury. It cannot be contested that mitigating evidence was presented to the jury that could have provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). Mitigating evidence was presented on Mr. Jennings' behalf at trial which the jury could have accepted: 1) evidence regarding Mr. Jennings' drug and alcohol intoxication; 2) his mental and emotional disturbance at the time of the offense which even the State's experts conceded was present (R. 1519, 1569); 3) Mr.

Jennings' impaired judgment as testified to by the State's expert, Dr. Podnos (R. 1519); 4) the improvement in Mr. Jennings' psychiatric condition at the time of his third trial in 1986; 5) Mr. Jennings' history of alcohol abuse; 6) Mr. Jennings unusual level of immaturity for a twenty year old (R. 1597).

The instructional error detailed herein cannot be harmless beyond a reasonable doubt under these circumstances. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972). Mr. Jennings' death sentence should be vacated and a new sentencing proceeding provided. Improper "extra thumbs" were placed on the death side of the scale. A reversal is required. Stringer v. Black, 112 S. Ct. 1130 (1992).

ARGUMENT III

THE RULES PROHIBITING MR. JENNINGS' COLLATERAL COUNSEL FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DEPRIVES MR. JENNINGS OF ADEQUATE COUNSEL IN THE POST-CONVICTION PROCESS.

During Mr. Jennings third trial, the one at issue in these proceedings, several irregularities occurred in regard to the jury that had been selected. First, several days into trial, a juror came forward to announce that she could not impose death.

The State agreed to let her remain on the jury at the guilt phase to avoid a mistrial however at the commencement of the penalty phase, the State successfully sought her removal (R. 1311-19).

Prior to the commencement of the penalty phase, the trial judge conducted individual examination of the jury to ascertain whether there had been contamination from the media coverage of the trial. Three jurors acknowledged obtaining extrajudicial information regarding Mr. Jennings' previous trials (R. 1324-33). Based on the disclosures made by three jurors, defense counsel objected to one of the three jurors remaining on the jury.

When the jury retired, the remaining alternate was mistakenly sent back to deliberate along with the jury. The mistake was discovered and the alternate was summoned back to the courtroom and dismissed (R. 1703-04).

The jury then sent a note asking the basis for the first retrial and the second retrial (R. 1704). Defense counsel moved for a mistrial because notwithstanding the court's admonition the jury was obviously discussing the prior trials and their outcome (R. 1705). The motion was denied.

At the sentencing hearing, Mr. Jennings moved for a new trial based upon the jury's note. However, the motion was denied (R. 1738).

In post-conviction proceedings, Mr. Jennings collateral counsel was precluded from contacting jurors by Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, in order to investigate whether evidence of reversible error could be discovered. Mr. Jennings'

collateral counsel sought to challenge the rule's effect by seeking a determination whether it could constitutionally be applied in Mr. Jennings' case. Mr. Jennings' counsel noted that a recent study of capital jurors in Florida had reported widespread problems.

The circuit court denied Mr. Jennings' challenge to Rule 4-3.5(d)(4), saying: "There is no allegation that the Defendant has received any reliable information indicating that members of the jury engaged in any misconduct which would justify interviews of jurors" (PC-R2. 680). Having concluded that Mr. Jennings had to have received the evidence before he could have his counsel look for it, the circuit court ruled that Rule 4-3.5(d)(4) did violate Mr. Jennings' constitutional rights (PC-R2. 680).

The circuit court's ruling was error. Mr. Jennings' was provided with attorneys by the State who are members of the Florida Bar and thus precluded from contacting jurors in order to investigate for constitutional error at Mr. Jennings' trial. Had Mr. Jennings' not been incarcerated, he could have contacted the jurors. Had Mr. Jennings not been indigent, he could have hired individuals who were not members of the Florida Bar to contact the jurors.

There can be no doubt that juror interviews do on occasion give rise to claims warranting new trials. Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991). However, Mr. Jennings is being denied access to the tools necessary to uncover the evidence.

The circuit court said he had to uncover the evidence before his attorneys could look for it - an obvious Catch-22. Rule 4-3.5(d)(4) is a barrier to the proper investigation and presentation of legitimate claims for post-conviction relief. Bounds v. Smith, 97 S.Ct. 1491 (1977). Its application here deprived Mr. Jennings due process and equal protection of the law.

ARGUMENT IV

ACCESS TO PUBLIC RECORDS AND/OR BRADY MATERIAL WAS ERRONEOUSLY DENIED BY THE CIRCUIT COURT.

In Jennings v. State, 583 So. 2d 316 (Fla. 1991), this Court remanded for compliance with Chapter 119 of the Florida Statutes. On November 6, 1991, the circuit court issued its order following *in camera* review of the previously withheld public records. At that time, the circuit court found some of the records in question were in fact public records and ordered those records disclosed (SPC-R2. 371). Some records which the circuit court concluded were not public records were found to be "notes of witness interviews [which] could contain Brady material" (SPC-R2. 372). These records were also ordered disclosed and give rise some of the evidence, discussed supra, which supported Mr. Jennings' claims for relief. Still other records were ordered "sealed and remain sealed pending review by the supreme court" (SPC-R2. 372).

Mr. Jennings seeks review of the sealed records by this Court. Not having seen the records, it is difficult to construct

a fact specific argument. Nonetheless, this Court must review the records in light of the arguments made elsewhere in the brief to determine if there is additional exculpatory evidence contained in the undisclosed records. Sometimes exculpatory evidence does not reveal itself as exculpatory at first blush. A thorough understanding of the case is frequently required to recognize the exculpatory value of a particular document or fact. Hopefully, this brief provide the necessary backdrop and will assist this Court in its review of the *in camera* determination made by the circuit court.

ARGUMENT V

FLORIDA'S ELECTRIC CHAIR CONSTITUTES CRUEL AND/OR UNUSUAL PUNISHMENT AND THEREFORE VIOLATES BOTH THE UNITED STATES AND FLORIDA CONSTITUTIONS.

On April 25, 1986, the circuit court ordered that Mr. Jennings "shall be put to death in the manner and means provided by law, to-wit: by electrocution." However, Florida's electric chair constitutes cruel and/or unusual punishment as the photographs of the Allen Lee Davis now establish. These photographs, as well as the events at the executions of Pedro Medina, Gerald Stano, Leo Jones, Judith Buenoano, and Daniel Remeta were not previously available, and thus, constitute new evidence establishing the basis for this claim. At the very least, Mr. Jennings entitled to an evidentiary hearing.

CONCLUSION

Mr. Jennings' conviction and sentence of death were the product of numerous constitutional errors. The State violated

its obligation under Brady. Trial counsel rendered constitutionally deficient performance. The jury received constitutionally defective instructions regarding two aggravating factors over defense counsel's objection. This errors alone were prejudicial to Mr. Jennings. However, these errors did not happen alone; they happened in conjunction with each other, thereby magnifying the prejudicial impact that each had on Mr. Jennings' case. The instructional errors were not harmless beyond a reasonable doubt. The Brady violations and trial counsel's deficient performance certainly when considered cumulatively established that Mr. Jennings did not have the benefit of a reliable adversarial testing. At a minimum, a new penalty phase proceeding must be ordered.

Additionally, Mr. Jennings did not receive all he was entitled to in the post-conviction process. The circuit court conducted an in camera inspection and refused to order disclosure of documents which that court then sealed until review by this Court. Mr. Jennings' was also saddled with State appointed counsel who were precluded by the Rules Regulating the Florida Bar from contacting jurors in order to investigate possible constitutional claims.

Finally, Mr. Jennings' sentence by electrocution constitutes cruel and/or unusual punishment, and is thus, unconstitutional.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by to all counsel of record by United States Mail, first class postage prepaid, on September 7, 1999.

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