IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
ST. JOHNSCOUNTY, FLORIDA

CASE NO. CF01-844, DIVISION 56

RONALD HELMS

Defendant-Petitioner,

v.

STATE OF FLORIDA

Respondent.

DEFENDANT HELMS'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

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IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR ST. JOHNS COUNTY

RONALD HELMS,
Petitioner

vs. **Case Number CF01-644**

STATE OF FLORIDA,
Respondent
_____/

PETITIONER RONALD HELMS'S MOTION UNDER RULE 3.850
FLORIDA RULES OF CRIMINAL PROCEDURE

This motion is filed by Ronald Helms ("Helms") pursuant to Rule 3.850, Florida Rules of Criminal Procedure to set aside his judgment, conviction and life sentence.

1. THE JUDGMENT OR SENTENCE UNDER ATTACK AND THE COURT WHICH RENDERED THE SAME.

The judgment dated December 5, 2002, filed with the clerk on December 12, 2002, recorded in the official records of the clerk of the court, St. Johns County, Florida, at book 267, pages 99-107, inclusive, adjudicating Helms guilty of one count of sexual battery, in violation of Florida Statutes, § 794.011(2)(a), one count of lewd or lascivious exhibition in violation of Florida Statutes, § 800.04(7)(a) and (c), and two counts of lewd or lascivious conduct in violation of Florida Statutes, §

800.04(6)(a) and (b), as to which Helms was sentenced to life imprisonment on the sexual battery, and fifteen years on each of the remaining counts, concurrent to the life sentence and concurrent to each other. Additionally, Helms was ordered to pay $508 of various costs as part of that judgment and sentence. Separately Helms was declared to be a sexual predator pursuant to Florida Statutes, § 775.21 on December 12, 2002, by an order filed on December 12, 2002 and recorded in the official records of the clerk of the court, St. Johns County, Florida at book 266, page 776. The judgment and sentence and sexual predator order were imposed by Circuit Court Judge Robert K. Mathis in the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida.

2. WHETHER THERE WAS AN APPEAL FROM THE JUDGMENT OR SENTENCE AND THE DISPOSITION THEREOF.

The judgment and sentence were appealed to the Fifth District Court of Appeal, State of Florida, appeal number 5D02-3990, which affirmed the judgment and sentence by a *per curiam* decision without written opinion on March 30, 2004 in *Helms v. State*, 871 So.2d 246, (Fla. 5th DCA 2004) (table of cases). The mandate was rendered April 16, 2004.

3. WHETHER A PREVIOUS POSTCONVICTION MOTION HAS BEEN FILED, AND IF SO, HOW MANY.

No previous post-conviction motion has been filed.

4. IF A PREVIOUS MOTION OR MOTIONS HAVE BEEN FILED, THE REASON OR REASONS THE CLAIM OR CLAIMS IN THE PRESENT MOTION WERE NOT RAISED IN THE FORMER MOTION OR MOTIONS.

There has been no previous post-conviction motion.

5. THE NATURE OF THE RELIEF SOUGHT.

Helms requests that the judgment and sentence and sex predator order be vacated and set aside.

GROUNDS FOR MOTION

1. Helms Was Denied His Right to Trial by Jury and Due Process under Article I, Sections 9, 16 and 22, of the Florida Constitution and the Due Process Provision and Sixth Amendment to the United States Constitution by the Court's Consideration of and Response to a Jury Question and Communication to the Jury Without Helms Being Present, and Helms's Was Denied Effective Assistance of Counsel under Article I, Section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution by Helms's Trial Counsel's Purported Waiver of Helms's Right to Be Present.

2. Helms Was Denied Effective Assistance of Counsel under Article I, Section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution by Helms's Trial Counsel's Failure to Move to Exclude Helms's Statement to Detective Pope on the Basis That the Statement Was Inadmissible Hearsay Because it Was Not Incriminating.

3. Helms Was Denied Effective Assistance of Counsel under Article I, Section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution by Helms's Trial Counsel's Failure to Move to Suppress Helms's Confession on the Basis That it Was Obtained in Violation of Helms's Right to Counsel under Article I, Sections 9 and 16, and the Fifth and Sixth Amendments to the United States Constitution, Because Helms Invoked His Right to Counsel During Custodial Questioning by Detective Pope, and on the Ground That it Was Not Freely and Voluntarily Given.

4. Helms Was Denied Effective Assistance of Counsel under Article I, Section 16, of the Florida Constitution and the Sixth Amendment to the United States Constitution by Helms's Trial Counsel's Failure to Move to Suppress the Introduction of the Computers Seized from His Residence and the Contents Thereof on the Basis That it Was Seized Without a Warrant Without His Consent, in Violation of Helms's Right to Be Free from Unreasonable Search and Seizure under Article I, Section 12, of the Florida Constitution and the Fourth Amendment to the United States Constitution.

5. Helms Was Denied Effective Assistance of Counsel under Article I, Section 16, of the Florida Constitution and the Sixth Amendment to the United States

Constitution by the Trial Court's Prohibiting Helms from Conferring with Counsel During a Recess Which Occurred Between Cross-examination and Redirect Examination and by His Trial Counsel's Failure to Object.

6. Helms Is Entitled to a New Trial under Article I, Section 9 of the Florida Constitution and the Due Process Clause of the United States Constitution Based on Newly Discovered Evidence - A Witness Has Come Forward Who Accepts Responsibility for the Pornography on the Computer Which Was Introduced at Trial Against Helms.

STATEMENT OF FACTS

GROUND ONE - DEFENDANT NOT PRESENT AT CRITICAL STAGE OF TRIAL

The jury retired to begin their deliberations Wednesday, October 30, 2002 at 2:10 p.m. [TT-890][1] About an hour and a half into their deliberations, the jury produced a question, whereupon the court and counsel assembled without the defendant being present. [TT-892] The question appears to have been:

> May we watch the videotapes or transcript from the CP interviews? [May we have] Markers for the board? [May we have the] Depositions of the children?

[TT-892]

The Court expressly acknowledged the absence of the defendant and stated:

> Now, I - - we can wait until your client gets up here and I can bring the jury out and say, "Sorry, none of these things were introduced into evidence and they cannot go into you," or I can write on their question - - answer the same thing and send in to them with the markers, whichever you prefer.

[TT-892]

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[1] References to TT refer to the trial transcript followed by the pertinent page number of the transcript.

Trial counsel disregarded the Court's question about waiting for the defendant to be present and proceeded to discuss the problem with the Court. The discussion included how to deal with the fact that the depositions, although not admitted into evidence, were extensively used to impeach the State's key witnesses.

Ultimately the decision was made to instruct the jury as follows:

> These items were not introduced into evidence and, therefore, cannot be provided or considered during deliberations.

[TT-894]

The Court then addressed defense counsel and expressly asked defense counsel if they were waiving the defendant's presence for this purpose:

> THE COURT: Okay. Are you waiving your client's presence for this purpose?
>
> MR. STEINBERG: For right now we will, Judge, yeah.

[TT-894]

The Court proceeded to answer the jury's questions without the defendant ever being present.

There was a second question from the jury about witness testimony, and Helms was present for the response to that question, but it was followed later by a third question came from the jury sometime before 4:54 p.m. The *record* is unclear

whether the defendant was present or not. The record does not show the defendant being present and the defendant and his family's recollection is that he was not present.[2]

This third question was:

> We only have Ricky's affidavit. Can we have the other children's affidavits. If there is not, we would like the testimonies of the children, Steven, Ryan, Amber, Ricky and Mr. Phillips.

[TT-899]

It was decided that the court reporter would prepare a transcript of the requested testimony and it would be produced the following morning and given to the jury. The requested testimony was testimony of prosecution witnesses only. [TT-900-901]

The Court instructed the jury that this would be done the following morning [TT-902-903], and the court resumed the following morning with the assembly of the jury for this purpose, without the presence of counsel or the defendant. [TT-910] The jury deliberated from 9:04 a.m. March 31, 2002 until 4:17 p.m. that day, at which point it returned a guilty verdict on counts one, three, four and five, and not guilty on

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[2] There was an intervening question from the jury for which the defendant was present. The question at issue here was the third question from the jury.

count two. [[TT-912-913]

Helms had an absolute right to be present during every critical stage of his trial, including any question from or response to the jury during deliberations, and his counsel could not waive his right to be present.

GROUND TWO - ADMISSION OF DEFENDANT'S STATEMENTS DENYING GUILT

Helms was told to come to the St. Johns County Sheriff's Office and taken there by a Sheriff's deputy about 11:15 p.m. February 13, 2001. [TT-393][3] Probable cause already existed for Helms's arrest on the charges in this case at the time he was taken to the Sheriff's Office for questioning based on the statements of the accusers that had been given to the Child Protection Team in Green Cove Springs, Florida the day before. St. Johns County Detective Mark Alan Pope had seen these interviews. [TT365-368] Helms was interrogated for almost four hours, until 3:00 a.m. at which time he was told he was under arrest on the current charges. A written statement [TT-417] was taken and later a short audio tape recorded statement [TT-427] was taken from Helms. At no time during his interrogation and in neither formal statement did Helms admit any crime. [TT-492; TT-483]

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[3] The transcript at that point says 12:50 p.m. This is clearly a typographical error in the transcript. The interview took place just before midnight. The detective's own written report details that the interview began at 11:15 p.m. Also the correct time is found at TT-464.

Nevertheless, the State introduced Helms's statements against him into evidence at trial and made his statements a focus of the state's case. The sworn written statement, tape recorded statement and a transcript of the tape recorded statement [TT-428] were all admitted into evidence and with the jury during their deliberations. Detective Pope was examined at great length on every detail of Helm's exculpatory statement. [TT-393-428][4] Because of the emphasis placed by the State on the Defendant's denials, the defense was forced to focus much of its cross-examination of Detective Pope on Helms's statements. [TT-441-448; TT-464-470; TT-476-484] The State focused its redirect examination of Detective Pope on Helms's statements. [TT-486-489] The Defense on re-cross-examination had to return to the statements [TT-490-492], even though Detective Pope conceded that:

> [DEFENSE COUNSEL] Okay. And Mr. Helms consistently denied what he was being accused of, right?
>
> [DETECTIVE POPE] Yes, he did.

[TT-492] Detective Pope had previously characterized Helms's taped statement as "total denial." [TT-483]

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[4] Ironically the only portion of the statements which the trial Court excised and did not allow the jury to hear was the one portion which the State argued was an implied admission of guilt, which was when Helms broke down and began crying and told Detective Pope he "felt he needed counseling and he just wanted to end it all." [TT-434]

The State focused its rebuttal closing arguments on Helms's exculpatory statements, ridiculing the denials:

> My point is this and it's simple, folks, and it's common sense: Alan Helms is denying, denying, denying, denying. And he said he was scared. He said he didn't do it.
>
> Does it make sense? Does it sound like a denial to you, "To the best of my knowledge, the best of my memory, I didn't touch anybody. I didn't - - I didn't participate . . .

[TT-862]

Helms's defense counsel filed no pretrial motion to exclude Helms's exculpatory statements nor did counsel object during trial although the law is clear that exculpatory statements of a defendant are inadmissible hearsay whether sought to be admitted by the defense or state.

GROUND THREE - FAILURE TO MOVE TO SUPPRESS STATEMENTS ON THE BASIS THAT HELMS INVOKED HIS RIGHT TO COUNSEL AND THAT THE STATEMENTS WERE INVOLUNTARY

Helms repeatedly invoked his right to counsel during his interrogation but his requests for counsel were ignored. Helms's trial counsel was put on notice of Helms's invocation of his right to counsel, but neglected to raise the issue before the Court in a motion to suppress.

Helms was *de facto* under arrest, although he was not advised of that fact, he was clearly not free to leave and did not feel free to leave. He was told that he had to come to the Sheriff's Office to be questioned and was taken to the Sheriff's Office by a deputy sheriff very late at night.[5] [TT-393] This procedure bespoke custodial interrogation.

Helms statements were not freely and voluntarily made, but were coerced by psychological pressure and lengthy questioning late into the night, starting at 11:15 at night and continuing until 3:00 a.m. when he was formally placed under arrest. [Detective Pope's Narrative Report, CR Number 01-044278] During the interrogation became extremely upset, and broke down and cried and told Detective Pope he could not go on with his life. Detective Pope thought Helms was suicidal. [Detective Pope's Narrative Report, CR Number 01-044278]

Helms's counsel was aware of the circumstances of his custodial interrogation but did not bring the matter to the attention of the Court by a motion to suppress and never challenged the voluntariness of the statements before they were admitted against Helms at trial, either on the basis of his invocation of his right to counsel or on voluntariness grounds.

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[5] The transcript contains a typographical error at p. 393. The time is shown as 12:50 p.m. but the testimony was 11:15 p.m. The correct time is found at TT-464.

GROUND FOUR- SEIZURE OF THE COMPUTERS AND IMAGES ON THE COMPUTERS

The State engineered Helms removal from his own residence then once he was gone [TT-466], came to his residence and asked permission of his wife, Ruth Helms, for permission to search for evidence. Ruth Helms consented to the search. [TT-372-374] No effort was made by the State to obtain Ronald Alan Helms permission to search the residence, although he was readily available - indeed he was staying with his son-in-law, a deputy sheriff [TT-391], and had the State asked Helms for permission, he would have denied permission.

During the search, Detective Pope and other law enforcement officers seized two computers which were taken to the FDLE for examination. [TT-375] Without obtaining any search warrant to examine the content of the computers, the FDLE used special software to make a duplicate of the entire hard drive of both computers, and then examined those hard drives in a search for pornographic images. The FDLE removed a number of obscene or pornographic images from one of the computers. [TT-563-568]

The FDLE examined the contents of the computers without obtaining consent from either Ruth Helms or defendant Helms and without any search warrant.

The pictures were extremely inflammatory - some of which may qualify as

child pornography and may not legally be reproduced in this record - and were introduced into evidence at trial against Helms and taken into the jury room during deliberations. The State argued that these pictures corroborated the claims of the accusing children that Helms's had shown the children pornography on the computer before suggesting that they engage in sexual activity. [TT-549-555]

Counsel for Helms was aware of these circumstances but failed to file any motion to suppress this evidence, either on the ground that the initial search was illegal because Helms was first removed from the premises then consent obtained from his wife only, or on the ground that the subsequent search of the computers was done without any lawful authority.

GROUND FIVE - PROHIBITION ON CONSULTATION WITH COUNSEL DURING RECESS PRIOR TO REDIRECT EXAMINATION

Helms was cross-examined at length on many subjects, particularly his own exculpatory statements to Detective Pope. At the conclusion of the cross-examination, the Court announced a recess. The Court, as was its custom, *sua sponte* instructed Helms that he could not speak with anyone during the recess. Helms responded to this instruction by asking if this included his own counsel, and the Court told him that he could not speak to his counsel during the recess.

THE COURT: You have a very long redirect?

MR. STEINBERG: Judge, I think I need a break myself, please.

THE COURT: All right. We'll take a recess until 11:00 o'clock, ladies and gentlemen. Let you get a cup of coffee.

Please don't discuss the case among yourselves or with anyone in your presence. Jury's in recess until 11:00 o'clock.

Mr. Helms, you can't talk to anybody about the case because you're on the stand.

THE WITNESS [DEFENDANT HELMS]: Not even my lawyer?

THE COURT: Nope.

MR. LEE [DEFENSE CO-COUNSEL]: You Honor, I know - - can I get him a cup of coffee - -

THE COURT: Sure, you can do that. He just can't talk to you about the case.

MR. LEE: Thank you, Judge.

THE COURT: You don't have to stay there, you just can't talk to anybody.

[TT-765]

Helms's counsel did not object on the record.

Helms's counsel proceeded to redirect Helms after the recess but was unable

to speak to Helms and find out what answers he had given in response to his lengthy cross-examination he thought were confusing or misleading because he had not been given an opportunity to clarify or elaborate. [TT-770-774]

In fact, Helms strongly desired to discuss his redirect testimony with his lawyer, which is why he asked the Court for clarification of its order. Had he had the opportunity to do so, he would have explained to his counsel that many of his answers to the State were incomplete and needed elaboration, instead, his counsel was left in the dark and unable to effectively rehabilitate him on his relatively short redirect, a redirect that was short not because there was no need to rehabilitate Helms, but because of the danger of attempting to do so without first conferring with Helms.

This issue was raised on direct appeal. [Helms's Initial Appeal Brief, Appeal Case Number 5D02-3990, pages 19-21] The State made numerous alternative arguments in response in its answer brief, including waiver arguments and arguments that the record did not show that either Helms or his counsel in fact desired to confer or if so, what effect such conference could have had. [State's Answer Brief, Appeal Case Number 5D02-3990, pages 23-27] The Fifth District Court of Appeal issued a per curiam affirmance without written opinion, therefore because the State argued waiver and failure to preserve the issue for review, the issue is not barred from relitigation in this post-conviction motion.

GROUND SIX - NEWLY DISCOVERED EVIDENCE

Attached hereto as Exhibit A, is the affidavit of a newly discovered witness, who explains that he downloaded the pornography in question that was found on Helms's computer. This witness was not available at the time of the trial, because he had not disclosed his conduct to anyone in the defense camp prior to trial. At the time of trial this witness was a juvenile and counsel for Helms would not have been able to interview him.

MEMORANDUM OF LAW

1. HELMS WAS DENIED HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS UNDER ARTICLE I, SECTIONS 9, 16 AND 22, OF THE FLORIDA CONSTITUTION AND THE DUE PROCESS PROVISION AND SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE COURT'S CONSIDERATION OF AND RESPONSE TO A JURY QUESTION AND COMMUNICATION TO THE JURY WITHOUT HELMS BEING PRESENT, AND HELMS'S WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HELMS'S TRIAL COUNSEL'S PURPORTED WAIVER OF HELMS'S RIGHT TO BE PRESENT.

It is *per se* reversible error for a trial court, however innocently, to respond to a request from a jury without the defendant being present:

> We now hold that it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Ivory v. State, 351 So.2d 26 (Fla. 1977); *accord*, *Curtis v. State*, 480 So.2d 1277 (Fla. 1985).

In *Williams v. State*, 488 So.2d 62 (Fla. 1986), the Florida Supreme Court once again affirmed that any violation of the *Ivory* rule that falls within the scope of Rule 3.410, Florida Rules of Criminal Procedure, is *per se* prejudicial and reversible error.

One of the two incidents in Helms's case involved a violation of Rule 3.410.

The jury asked for and received testimony. This incident was subject to the *per se* standard of *Ivory* and *Williams*.

Prior to *Curtis* and *Williams*, *supra,* the Fifth DCA held that the absence of the defendant from a jury response is subject under certain circumstances to harmless error. *Villavicencio v. State*, 449 So.2d 966, 968-969 (Fla. 5th DCA 1984). The first incident in Helms's case involved a request for deposition transcripts. The second incident involved a request for affidavits and if they were not available, the testimony of several prosecution witnesses. We would argue that both instances come within the scope of Rule 3.410, but in any event the second instance clearly does.

Moreover the error could not be harmless in Helms's case, because the trial court's response to the jury request to have testimony read back to them was to provide the jury with a *transcript* of the requested testimony. This is error under Florida law and indeed the same error had been committed by the same trial judge before. *Janson v. State*, 730 So.2d 734 (Fla. 5th DCA 1999).[6]

The error was not harmless because it was only the transcripts of *prosecution*

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[6] The error in *Janson* was providing the transcript to the jury. *Janson* did not involve the absence of the defendant during the response to the jury. On the facts of *Janson* the court found the error to be harmless error because the evidence was overwhelming and unrebutted. The evidence in Helms's case was rebutted by Helms and the testimony of the child witnesses was called into doubt by their inconsistency and the lack of truthfulness of the witnesses.

witnesses that the jury asked for and was provided, allowing the jury to focus exclusively on the prosecution case. In any event, under *Ivory, Curtis* and *Williams*, the error is *per se* reversible.[7]

Although the reported Florida cases focus on Rule 3.410, the gravamen of the harm is the denial of the defendant's constitutional right to be present at all critical stages of his criminal trial.

The constitutional right to presence is rooted in the Confrontation Clause of the Sixth Amendment, *e.g., Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), but the Supreme Court has recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. In *Snyder v. Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just

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[7] If this issue is examined under the harmless error standard, it should be examined under the *direct appeal* harmless error standard, which places the burden *on the state* to prove that the error was harmless beyond all reasonable doubt, because had Helms's trial counsel acted effectively, he would have preserved the error for direct appeal by a timely objection, in which event the direct appeal harmless error standard would have applied. This is the prejudice suffered from Helms's counsel's ineffectiveness on this issue as it relates to standards of review.

hearing would be thwarted by his absence, and to that extent only." *Id.,* at 105-106, 108, 54 S.Ct., at 332, 333; see also *Faretta v. California,* 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 2533, n. 15, 45 L.Ed.2d 562 (1975). Florida Courts have held that for Sixth Amendment right to counsel purposes, response to a jury question is a critical stage of the trial proceedings. *Wilson v. State*, 764 So.2d 813, 816 (Fla. 4th DCA 2000) ("Discussing and responding to a jury's question during deliberations obviously constitute a critical stage, coming so close to the time when the jury will render a verdict ;"). Because it is a critical stage clearly the *defendant* must be present and unless voluntarily absented himself, which was not the case here, it was structural error to continue without him.

Helms's counsel was ineffective for failing to object to the Court proceeding in Helms's absence to respond to the jury's questions. The law on this issue was well settled at the time of this trial. To fail to protect Helms's trial right in the face of well settled precedent falls outside the realm of reasonable competence guaranteed by the Sixth Amendment and Article I, Section 16 of the Florida Constitution. By failing to object, Helms was deprived of the ability to raise this issue on direct appeal. Had it been properly preserved by trial counsel and then raised on appeal, Helms would have been entitled to a new trial under *Ivory, Curtis* and *Williams*, therefore establishing

the prejudice prong of the *Strickland* standard.[8]

2. HELMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HELMS'S TRIAL COUNSEL'S FAILURE TO MOVE TO EXCLUDE HELMS'S STATEMENT TO DETECTIVE POPE ON THE BASIS THAT THE STATEMENT WAS INADMISSIBLE HEARSAY BECAUSE IT WAS NOT INCRIMINATING.

The State admitted in its case in chief Helms's oral, written and tape recorded statements given in response to police interrogation. In all of these statements, Helms denied committing the charged offenses. It was error to admit such statements, and ineffective assistance of counsel to not object to the admission.

> Exculpatory statements made by a defendant who chooses not to testify at trial constitute inadmissible hearsay not within any of the exceptions to the hearsay rule. *Watkins v. State,* 342 So.2d 1057 (Fla. 1st DCA), *cert. denied,* 353 So.2d 680 (Fla.1977); *Logan v. State,* 511 So.2d 442 (Fla. 5th DCA 1987); *Fagan v. State,* 425 So.2d 214 (Fla. 4th DCA 1983); *Lowery v. State,* 402 So.2d 1287 (Fla. 5th DCA 1981). Such statements cannot be offered against an accused during the state's case-in-chief, because "[a] witness may not be impeached before he has testified." *Erp v. Carroll*, 438 So.2d 31, 35 (Fla. 5th DCA 1983); *Giddens v. State,* 404 So.2d 163, 164 (Fla. 2d DCA 1981); *Ehrhardt, Florida Evidence,* § 608.1 (2d ed. 1984).

Moore v. State, 530 So.2d 61 (Fla. 1st DCA 1988).

The State admitted Helms's purely exculpatory denials into evidence in its case

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[8] For a more complete discussion of the fundamental principles applicable to Helms's ineffective assistance of counsel claim, see the argument in Ground Two, *infra.*

in chief. This in turn forced Helms to take the witness stand to explain the State's insinuation that his denials were not believable or somehow less than complete. The State focused its examination of the case agent, Detective Pope, on Helms's denials, and focused its rebuttal closing argument on ridiculing his denials.

In *Moore* the error was found to be harmless, because the jury acquitted on the charged count as to which the State had improperly admitted Moore's police interview in which Moore denied the charge in that count (Moore was convicted on a count unrelated to the exculpatory statement). The jury did not acquit Helms on the conduct he denied in his statement to the police, the State focused on it with the testimony of the case agent and in rebuttal closing, therefore the error was not harmless.[9]

Helms's counsel was ineffective in failing to move to exclude Helms's statements from trial. The benchmark for judging any claim of ineffectiveness of counsel is whether counsel's conduct so undermined the proper functioning of the

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[9] As with Ground One, supra, if this issue is examined under the harmless error standard, it should be examined under the *direct appeal* harmless error standard, which places the burden *on the state* to prove that the error was harmless beyond all reasonable doubt, because had Helms's trial counsel acted effectively, he would have preserved the error for direct appeal by a timely objection, in which event the direct appeal harmless error standard would have applied. This is the prejudice suffered from Helms's counsel's ineffectiveness on this issue as it relates to standards of review.

adversarial process that the trial cannot be relied on as having produced a just result. *Perry v. Leeke*, 488 U.S. 272, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984) and on remand to, 737 F.2d 894 (11th Cir. 1984), related reference, 453 So. 2d 389 (Fla. 1984) and related reference, 587 F. Supp. 525 (S.D. Fla. 1984), judgment aff'd, 737 F.2d 922 (11th Cir. 1984); *Rogers v. Singletary*, 698 So. 2d 1178 (Fla. 1996), reh'g denied, (Sept. 11, 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995), reh'g denied, (June 23, 1995); *Kelley v. State*, 569 So. 2d 754 (Fla. 1990).

In order to prevail, a defendant claiming that his counsel's assistance was so defective as to require reversal has the burden of satisfying both parts of a two-prong test: first, defendant must show that counsel's performance was deficient and second, that the deficient performance had so prejudiced the defense as to deprive defendant of a fair trial. *Perry v. Leeke*, *supra*; *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), on remand to, 650 F. Supp. 801 (D.N.J. 1986), related reference, 215 N.J. Super. 540, 522 A.2d 473 (App. Div. 1987), certification denied, 107 N.J. 642, 527 A.2d 463 (1987); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), related reference, 877 F.2d 698 (8th Cir. 1989), reh'g granted and opinion vacated, 883 F.2d 53 (8th Cir. 1989) and on reh'g, 894 F.2d 1009

(8th Cir. 1990); *Strickland v. Washington*, *supra*; *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), reh'g denied, (Jan. 27, 2000); *Rose v. State*, 675 So. 2d 567 (Fla. 1996), reh'g denied, (June 18, 1996); *Cherry v. State, 659 So. 2d 1069 (Fla. 1995)*; *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994), reh'g denied, (Mar. 14, 1995).

The standard for ineffective assistance of counsel is not how present counsel would have proceeded in hindsight but rather whether there was both a deficient performance and a reasonable probability of a different result. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995)

The complained of error constituted ineffective assistance of counsel under the above standard, because no reasonably competent criminal trial attorney would have committed this error (or any of the errors) complained of in this motion. Certainly this Court can not be confident beyond a reasonable doubt that the outcome of this trial would have been the same but for the complained of errors, singly or cumulatively. Therefore, Helms has satisfied by this motion the two prongs of *Strickland v. Washington*, and is entitled to relief.

3. HELMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HELMS'S TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS HELMS'S CONFESSION ON THE BASIS THAT IT WAS OBTAINED IN VIOLATION OF HELMS'S RIGHT TO COUNSEL UNDER ARTICLE I, SECTIONS 9 AND 16, AND THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HELMS INVOKED HIS RIGHT TO COUNSEL DURING CUSTODIAL QUESTIONING BY DETECTIVE POPE, AND ON THE GROUND THAT IT WAS NOT FREELY AND VOLUNTARILY GIVEN.

Helms repeated and express invocations of counsel during his interrogation by Detective Pope should have resulted in the termination of questioning, and any statement given after his invocation of counsel were subject to suppression. As the United States Supreme Court and Florida courts have made clear, once a defendant has invoked his or her right to counsel, a defendant is no longer subject to police interrogation until counsel has been made available. *See Edwards v. Arizona,* 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Owen,* 696 So.2d 715, 719 (Fla.1997). This rule is the same whether the right to counsel is invoked under either the Fifth or Sixth Amendment. *See Michigan v. Jackson,* 475 U.S. 625, 636, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

> If the individual indicates *in any manner, at any time prior to or during questioning,* that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or

> otherwise . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Fare v. Michael C., 442 U.S. 707, 717, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979) (quoting *Miranda v. Arizona,* 384 U.S. 436, 473-74, 86 S.Ct. 1602,1627-28 (1966)).

Additionally, the circumstances of the questioning, starting late at night and going into the early morning hours, depriving Helms of sleep, combined with the emotional pressure and claims of disbelief by the interrogating officer, constituted coercion and rendered the statements involuntary.

Had Helms's counsel filed a motion to suppress, on the basis of involuntariness, the state would have had the burden of proving by a preponderance of the evidence that none of the factors present in Helms's case in the totality of the circumstances of this interrogation, overcame Helms's will so as to render his statements "involuntary." That question would be answered by considering the factors set forth in *Colorado v. Spring,* 479 U.S. 564, 107 S.Ct. 851, 857, 93 L.Ed.2d 954 (1987), in which the United States Supreme Court states that:

> [T]he traditional indicia of coercion [include] the duration and conditions of detention . . . , the manifest attitude of the police toward [the suspect], his physical and mental state, [and] the diverse pressures which sap and sustain his powers of resistance and self control . . . [The

> issue is whether the suspect's] will [was] overborne and his capacity for self-determination critically impaired because of coercive police conduct.

The record in this case shows sleep deprivation to be one of the critical factors. It is difficult to assess the psychological impact it had on Helms's thinking processes. Combine that with the interrogator's disbelief and persistent questioning, and that the Detective himself testified that Helms broke down and began crying and asking for help, stating that he needed counseling and could not go on with life. [TT-433-434] The Detective understood Helms to be suicidal and he was placed on suicide watch once he was taken to the jail. Given these factors, the State could not meet its burden of proving that the statements were freely and voluntarily given.

Helms's counsel was ineffective for not moving to suppress Helms's statements on these grounds.[10]

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[10] *See* the argument on ineffective assistance of counsel in Ground Two, *supra.*

4. HELMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HELMS'S TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE INTRODUCTION OF THE COMPUTERS SEIZED FROM HIS RESIDENCE AND THE CONTENTS THEREOF ON THE BASIS THAT IT WAS SEIZED WITHOUT A WARRANT WITHOUT HIS CONSENT, IN VIOLATION OF HELMS'S RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE UNDER ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

There are two issues here: (1) the State removing Helms from his residence, then obtaining permission to search his residence from his wife alone, without asking him, when Helms would have refused permission had he been asked, and (2) the failure to obtain any consent or search warrant to search the computers that were taken from the residence.

Under both existing Florida law and the recent decision of the United States Supreme Court in *Georgia v. Randolph*, __ U.S. __, 126 S.Ct. 1515 (2005), one spouse cannot consent to a search of jointly occupied premises if the other spouse objects, and this is so even if one spouse consents in the absence of the presence of the other spouse, if the other spouse has previously refused consent.

Although a joint occupant has authority to consent to a search of jointly held premises if the other party is *unavailable*, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest

shared with another. *Silva v. State*, 344 So. 2d 559 (Fla. 1977). A third party may not validly consent to a search when the person against whom the search is directed is present and objects thereto. *Mitchell v. State*, 558 So. 2d 72 (Fla. 2nd DCA 1990); *Pugh v. State*, 444 So. 2d 1052 (Fla. 1st DCA 1984). When consent is refused by the party against whom the search is directed, any subsequent consent by the other joint occupant is invalid even if the person against whom this consent is directed is not physically on the premises when objecting to the search. Thus, for example, defendant's presence at the police station at the time of the search precludes a finding that he was unavailable and negated the authority for obtaining his sister's consent to search his property. *Smith v. State*, 465 So. 2d 603 (Fla. 3rd DCA 1985).

Helms would have refused consent to search had he been asked and he could have been asked. The Sheriff's Office knew where he was - he was staying with his step-son, Deputy Sheriff Oke, who later that same night on instructions of Detective Pope, the same Detective who spearheaded the search of the residence, took Helms to the Sheriff's Office to be questioned about the alleged crimes themselves.

When Detective Pope wanted to ask Helms a question, he knew where he was and how to find him to ask the question, but when he didn't want to ask Helms he simply chose not to do so.

Recall that the only reason Helms was not in his marital home was because the

State had come to the home earlier that day and told Helms he had to leave - that he could not be in the home with his own son, who had made a complaint of sexual abuse against him. Helms was not in his residence when consent was sought only because the State made him leave, and in any event he was not unavailable because he was with a deputy sheriff who was awaiting instructions to take Helms in for questioning.

On these facts the State could not travel on the permission to search engineered from Helms's wife alone. Her consent was invalid.[11]

Second, even had the consent been valid, the consent did not extend to a search of the two computers which were taken from the home. The law required either an express consent to search the contents of the computers or a subsequent search warrant to do so.[12] Neither was obtained.

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[11] The burden would have been on the State to establish the admissibility of the computer and other search evidence, because the State had proceeded without a search warrant.

[12] Some courts have even required a detailed description of the strategy to be employed in a computer search. *See United States v. Hunter,* 13 F.Supp.2d 574, 584 (D.Vt.1998) ("To withstand an overbreadth challenge, the search warrant itself, or materials incorporated by reference, must have specified the purpose for which the computers were seized and delineated the limits of their subsequent search."); *see also United States v. Barbuto,* No. 2:00CR197K, 2001 WL 670930, at * 4-5 (D.Utah Apr.12, 2001) (concluding that computer search exceeded limits of the Fourth Amendment under controlling Tenth Circuit precedent and noting that search "methods or criteria should have been presented to the magistrate before the issuance

For example, in *State v. Washington,* 110 Wash.App. 1012 (Wash.Ct.App. 2002), cited with approval by *Hicks v. State*, __ S0.2d __ (Fla. 2nd DCA 2006), the court held that a laptop computer properly seized incident to an arrest, nevertheless required a separate search warrant before the contents of the hard drive of the computer itself could be searched.

Helms's counsel was aware of these circumstances and was ineffective in failing to move to suppress the results of the search of the residence including the computers and images found on the computers. The images in particular were made a feature of the trial and it cannot be said with confidence beyond a reasonable doubt that the outcome of the trial would have been the same had the images not been admitted. In deciding whether the images were admissible simply under the balancing of prejudice versus probative value, the trial judge found the decision a

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of the warrants or to support the issuance of a second, more specific warrant once intermingled documents were discovered"). The Department of Justice computer search manual requires that a computer search strategy should be provided in the Master Affidavit. (Computer Crime and Intellectual Prop. Sec., Crim. Div., U.S. Dep't of Justice, "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations" (July 2002)). The DOJ manual does recommends the inclusion of a search strategy in the warrant affidavit. ("The third step in drafting a successful computer search warrant is to explain both the search strategy and the practical considerations underlying the strategy in the affidavit . . . The affidavit should also explain what techniques the agents expect to use to search the computer for specific files that represent evidence of crime and may be intermingled with entirely innocuous documents.").

close one. [TT-555] If it were a close decision whether the images were too inflammatory to be admitted in the context of balancing probative value, then it is clear that the images were too inflammatory to be able to say that they had no effect on the outcome of the trial.[13]

5. HELMS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE TRIAL COURT'S PROHIBITING HELMS FROM CONFERRING WITH COUNSEL DURING A RECESS WHICH OCCURRED BETWEEN CROSS-EXAMINATION AND REDIRECT EXAMINATION AND BY HIS TRIAL COUNSEL'S FAILURE TO OBJECT.

Helms was cross-examined at length on many subjects, particularly his own exculpatory statements to Detective Pope. At the conclusion of the cross-examination, the Court announced a recess. The Court, as was its custom, *sua sponte* instructed Helms that he could not speak with anyone during the recess. Helms responded to this instruction by asking if this included his own counsel, and the Court told him that he could not speak to his counsel during the recess.

THE COURT: You have a very long redirect?

MR. STEINBERG: Judge, I think I need a break myself, please.

THE COURT: All right. We'll take a recess until 11:00 o'clock,

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[13] Again, for a general discussion of ineffective assistance of counsel, *see* Ground Two, *supra*.

ladies and gentlemen. Let you get a cup of coffee.

Please don't discuss the case among yourselves or with anyone in your presence. Jury's in recess until 11:00 o'clock.

Mr. Helms, you can't talk to anybody about the case because you're on the stand.

THE WITNESS [DEFENDANT HELMS]: Not even my lawyer?

THE COURT: Nope.

MR. LEE [DEFENSE CO-COUNSEL]: You Honor, I know - - can I get him a cup of coffee - -

THE COURT: Sure, you can do that. He just can't talk to you about the case.

MR. LEE: Thank you, Judge.

THE COURT: You don't have to stay there, you just can't talk to anybody.

[TT-765]

Helms's counsel did not object on the record.

Helms's counsel proceeded to redirect Helms after the recess but was unable to speak to Helms and find out what answers he had given in response to his lengthy cross-examination he thought were confusing or misleading because he had not been

given an opportunity to clarify or elaborate. [TT-770-774]

In fact, Helms strongly desired to discuss his redirect testimony with his lawyer, which is why he asked the Court for clarification of its order. Had he had the opportunity to do so, he would have explained to his counsel that many of his answers to the State were incomplete and needed elaboration, instead, his counsel was left in the dark and unable to effectively rehabilitate him on his relatively short redirect, a redirect that was short not because there was no need to rehabilitate Helms, but because of the danger of attempting to do so without first conferring with Helms.

On these facts, Helms is entitled to relief under *Thompson v. State*, 507 So.2d 1074 (Fla. 1987) and *Amos v. State*, 618 So. 2d 157 (Fla. 1993):

> The prosecution advised that "[t]here is case law on it right on point." The trial judge then granted the prosecution's request to prohibit Amos from speaking to his counsel. The prosecutor was correct that there is case law on point, but it is contrary to her position. In *Bova v. State,* 410 So.2d 1343, 1344-45 (Fla.1982), decided almost eight years before this case was tried, we held that
>
> > no matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney. The right of a criminal defendant to have reasonably effective attorney representation is absolute and is required at every essential step of the proceedings. Although we understand the desirability of the imposed restriction on a witness or party who is on the witness stand, we find that to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel. Numerous courts have

reached a similar conclusion.

> We stress that a defendant in a criminal proceeding is in a different posture than a party in a civil proceeding or a witness in a civil or criminal proceeding. Right-to-counsel protections do not extend to civil parties or witnesses and the trial judge's actions in the instant case would have been proper if a civil party or witness had been involved.

(Citations omitted; footnote omitted.) We reaffirmed that holding in *Thompson v. State,* 507 So.2d 1074 (Fla.1987). In *Thompson,* the court denied Thompson consultation with his attorney during a thirty-minute recess requested by the prosecution. While we held in *Bova* that the error was harmless because of the overwhelming evidence of guilt, in *Thompson,* we held: "Had the attorney-client consultation been allowed, defense counsel could have advised, calmed, and reassured Thompson without violating the ethical rule against coaching witnesses." *Thompson,* 507 So.2d at 1075. We found that we could not say that there was no reasonable possibility that the error did not affect the jury verdict. In this case, it was clear error for the court to prohibit Amos from speaking to his counsel during the recess period, and the prosecution precipitated the error by incorrectly advising the court on what the law is on this issue.

Amos v. State, 618 So. 2d 157,161 (Fla. 1993).

Amos and *Thompson* control in Helms's case. Helms has established in this petition that Helms and his counsel desired to consult and has shown the prejudice that resulted from the prohibition against the consultation. The error, as in *Amos* and *Thompson* cannot be said to have been harmless.[14]

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[14] This issue should be examined under the harmless error standard, which places the burden *on the state* to prove that the error was harmless beyond all reasonable doubt, because had Helms's trial counsel acted effectively, he would have

This issue was raised on direct appeal. [Helms's Initial Appeal Brief, Appeal Case Number 5D02-3990, pages 19-21] The State made numerous alternative arguments in response in its answer brief, including waiver arguments and arguments that the record did not show that either Helms or his counsel in fact desired to confer or if so, what effect such conference could have had. [State's Answer Brief, Appeal Case Number 5D02-3990, pages 23-27] The Fifth District Court of Appeal issued a per curiam affirmance without written opinion, therefore because the State argued waiver and failure to preserve the issue for review, the issue is not barred from relitigation in this post-conviction motion.

6. HELMS IS ENTITLED TO A NEW TRIAL UNDER ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BASED ON NEWLY DISCOVERED EVIDENCE - WITNESS HAS COME FORWARD WHO ACCEPTS RESPONSIBILITY FOR THE PORNOGRAPHY ON THE COMPUTER WHICH WAS INTRODUCED AT TRIAL AGAINST HELMS.

Helms's counsel was contacted by a new witness, while preparing this motion. The witness had first spoken to Helms's wife, Ruth Helms, and told her that he had information relevant to the case. Counsel met with the witness, interviewed him and then took a sworn statement from him. That statement is attached hereto as Exhibit

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preserved the error for direct appeal by a timely objection, in which event the harmless error standard would have applied. This is the prejudice suffered from Helms's counsel's ineffectiveness on this issue as it relates to standards of review.

A, and by this reference made a part hereof.

In his statement, the witness states that he is the person responsible for downloading the pornography onto the computer in the Helms's residence which was then introduced in Helms's trial against Helms.

This goes directly to the point the State made with the Ricky Phillips affidavit, which was admitted into evidence after the Court first sustained an objection on relevance grounds:

> [ASSISTANT STATE ATTORNEY]: Now, as a result of being the case agent, did there come a time when you made contact with some neighborhood kids in the neighborhood of - - or neighborhood families where the defendant lived?
>
> [DETECTIVE POPE]: Yes.
>
> Q And what was the purpose of doing that?
>
> A To determine whether there was anyone else that might have downloaded some images off of the Internet from Mr. Helms's computer.

[TT-429]

The relevance of this is that it does matter who downloaded pornographic images onto the computer, because only the person who downloaded the images

would know where to look for them on the computer file directory to see them again, if they were stored on the computer.[15] A typical home computer's storage space is measured in gigabyte units and a standard computer may have 40 to 100 gigabytes of hard drive storage.[16] The effect of this is that the hard drive has the storage space of

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[15] *Addressability of Information* [in Computers] - In location-addressable storage, each individually accessible unit of information in storage is selected with its numerical memory address. In modern computers, location-addressable storage usually limits to primary storage, accessed internally by computer programs, since location-addressability is very efficient, but burdensome for humans.

In file system storage, information is divided into files of variable length, and a particular file is selected with human-readable directory and file names. The underlying device is still location-addressable, but the operating system of a computer provides the file system abstraction to make the operation more understandable. In modern computers, secondary, tertiary and off-line storage use file systems.

In content-addressable storage, each individually accessible unit of information is selected with a hash value, or a short identifier with no pertaining to the memory address the information is stored on. Content-addressable storage can be implemented using software (computer program) or hardware (computer device), with hardware being faster but more expensive option.

Computer Storage, http://en.wikipedia.org/wiki/Computer_storage (April 16, 2006).

[16] A gigabyte (derived from the SI prefix giga-) is a unit of information or computer storage equal to one billion bytes. It is commonly abbreviated GB in writing (not to be confused with Gb, which is used for gigabit) and gig in writing or speech. There are two slightly different definitions of the size of a gigabyte in use: 1,000,000,000 bytes or 109 bytes is the decimal definition used in telecommunications (such as network speeds) and some computer storage manufacturers (such as hard disks and flash drives). This usage is compatible with SI. 1,073,741,824 bytes, equal to 10243, or 230 bytes. This is the definition used for computer memory sizes, and most often used in computer engineering, computer

a small city public library and the analogy holds true for locating something within that hard drive. Unless you know where the book is filed and shelved in the library, you could never find the book. It goes without saying that persons who download pornography from the internet store the images in a file directory that would not be readily apparent, hence the need for the FDLE in this case to use its special software to examine the computer to find such images. It is not simply a matter of opening the My Pictures file in Windows and indeed there was no evidence presented in this case that any pornographic image was found in the My Pictures folder.

Thus the relevance of establishing *who downloaded* the images. Because only the person who downloaded the images could ever hope to find them again, unless he or she had the sophisticated forensic software utilized by the FDLE. If some third person and not Helms downloaded the images, then it would only be such third person or persons with whom he or she shared his knowledge, who could show the images again on the computer.

Therefore, if a third person, and not Helms downloaded the pornography on the computer, the images admitted into evidence not only fail to corroborate the children

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science, and most aspects of computer operating systems.

Gigabyte, http://en.wikipedia.org/wiki/Gigabyte (April 16, 2006).

who accused Helms of showing them pornography, but instead discredits their testimony.

In *Sims v. State,* 754 So.2d 657, 660 (Fla.2000), *cert. denied,* 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000), the Florida Supreme Court reaffirmed its prior holdings that in order to constitute newly discovered evidence meriting a new trial, the evidence must have been unknown by the court, the party, or counsel at the time of trial and could not have been known by the use of due diligence. In addition, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id. See also Melendez v. State,* 718 So.2d 746 (Fla.1998).

Although this is the state of current Florida law, and it is a standard that Helms meets, we submit that the essence of a newly discovered evidence claim is that the conviction is infirm under a *Winship* standard (*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)) and the *Winship* standard places the burden of proof beyond a reasonable doubt on the *State*. Claims based on newly discovered evidence state a ground for state and federal habeas relief because they state an independent constitutional violation occurring in the criminal proceeding, *viz*. the failure of the state to prove the Defendant guilty beyond a reasonable doubt. Chief Justice Warren made this clear in *Townsend v. Sain*, 372 U.S. 293, 317 (1963):

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.
>
> This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-not to correct errors of fact. See, *e.g., Moore v. Dempsey,* 261 U.S. 86, 87-88, 43 S.Ct. 265, 265, 67 L.Ed. 543 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved"); *Hyde v. Shine,* 199 U.S. 62, 84, 25 S.Ct. 760, 764, 50 L.Ed. 90 (1905) ("[I]t is well settled that upon *habeas corpus* the court will not weigh the evidence"); *Ex parte Terry,* 128 U.S. 289, 305, 9 S.Ct. 77, 80, 32 L.Ed. 405 (1888) ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding").

Helms asserts that he is factually innocent of the charges in this case. He has made a colorable showing of his factual innocence, and in light of the newly discovered evidence, this Court cannot be confident that the state could have met its burden of proof beyond a reasonable doubt, therefore Helms is entitled to a new trial.

CONCLUSION

The complained of errors in Grounds One through Six, singly and cumulatively require this honorable Court vacate this judgment. *See Amos v. State*, 618 So. 2d 157, 161 (Fla. 1993) ("While each of these points individually might be found to be

harmless under the harmless error rule, we are unable to hold that they constitute harmless error when taken collectively.") Certainly this Court cannot be confident beyond a reasonable doubt that the outcome of this trial would have been the same but for the complained of errors, singly or cumulatively.

WHEREFORE, based on the foregoing arguments and authorities, RONALD HELMS respectfully requests this Honorable Court vacate his judgement and conviction on counts one, three, four and five and set this case for trial, or in the alternative, order a response from the State and allow a reply to such response from Petitioner Helms, then set this matter for an evidentiary hearing.

Respectfully submitted,

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OATH OF PETITIONER

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.[17]

_____

Ronald Helms

[17] Form of unnotarized oath permitted under Rule 3.987, Florida Rules of Criminal Procedure.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original of this motion was filed by use of a courier who hand delivered it to the clerk's office, felony division, St. Johns County Courthouse, St. Augustine, Florida Monday, April 17, 2006, and that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney,4010 Lewis Speedway, Room 252, St. Augustine, Florida, by hand delivery, this Monday, the 17th day of April, 2006.

_____

William Mallory Kent