IN THE

SUPREME COURT OF FLORIDA

No. 64,728

HENRY PERRY SIRECI,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court
of the Ninth Judicial Circuit,
In and For Orange County, Florida

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Justice Division of the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida. In the Brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used to designate references to the record in this cause:

"V" Record on Appeal of Motion to Vacate Judgment and Sentence Pursuant to Rule 3.850;

"R" Record on Direct Appeal to this Court;

"S" Transcript of Advisory Sentencing Proceeding;

"T" Transcript of the Trial on Guilt/Innocence;

"C" Transcript of Hearing on Motion for Continuance.

STATEMENT OF THE CASE

Henry Sireci was convicted of murder and sentenced to death for the killing of Howard Poteet. The facts of the case and the evidence presented at trial are set out in this Court's opinion on direct appeal affirming Appellant's conviction and sentence. Sireci v. State, 399 So.2d 964, 966-67 (Fla. 1981).

On direct appeal to this Court in 1981, Appellant argued that Florida's death penalty statute on its face violated Lockett v. Ohio, 438 U.S. 586 (1978) and that the trial court erred in denying a continuance. Both claims were based solely on information and evidence available in the trial record. This Court denied both claims, along with others raised by Appellant. 399 So.2d at 968-69, 972. The United States Supreme Court denied certiorari. Sireci v. Florida, ___U.S.___, 102 S.Ct. 2257 (1982).

Appellant filed the present claim for postconviction relief pursuant to Fla. R. Crim. P. 3.850 on September 8, 1982, before the Honorable Judge Joseph Baker. Judge Baker held an evidentiary hearing. At the hearing, Appellant's trial counsel testified that, as Judge Baker phrased it in his subsequent order, "at the time of the hearing on the sentencing of the defendant, [trial counsel] was familiar with the law of the state, and he felt he was legally limited to proof of mitigating factors listed in [the statute]. Counsel testified that because of his then understanding of the law of Florida, [he] did not investigate, develop, or proffer evidence of mitigating factors other than those listed" in the statute (V. 865-66). Appellant

introduced thirteen affidavits from family members, friends, co-workers, employers and other people who know Appellant well, showing what counsel would have found had he undertaken such an investigation.

Further, trial counsel testified about his inability effectively to cross-examine the state's "surprise witness," Donald Holtzinger. See 399 So.2d at 968-69. Because the trial court denied a motion for continuance, trial counsel testified, he was unable to impeach Holtzinger's testimony. At the hearing below, Appellant developed evidence that Holtzinger had reason to believe he would benefit at his own sentencing on one of his felony convictions if he were to testify against Appellant.

Also, trial counsel testified about a comment on silence that occurred during Appellant's trial. This Court on direct appeal held the issue foreclosed because counsel failed to object at trial. See Appendix D. When asked why he did not object, trial counsel said he "can't even recall with certainty hearing the answer or the question" (V 40).

Finally, Appellant asserted in the court below that the death penalty in Florida is being administered and applied in a manner that discriminates on the basis of race (V 105-25, 172-299, 301-06, 322-24, 542-47, 630-32, 659-722). He moved for an evidentiary hearing and for the appointment of experts, both of which were denied. Nevertheless, Appellant proffered statistical analyses of Florida's system of capital punishment, including an early draft of the study conducted by Stanford Professors Gross and Mauro.

Judge Baker carefully and extensively considered, though ultimately rejected, Appellant's claims (V 863-897). Timely rehearing was filed, to which Judge Baker responded in a detailed order denying rehearing (V 906-920). This appeal followed.

ARGUMENT

ISSUE I

APPELLANT WAS DENIED A FAIR AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BY THE PRECLUSION OF EVIDENCE OF NONSTATUTORY MITIGATING FACTORS AS A RESULT EITHER OF THE OPERATION OF STATE LAW OR THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant was deprived of an individualized capital sentencing determination by his trial counsel's failure to investigate or present to the sentencer relevant mitigating evidence. The cause for this deprivation was either the state of the Florida law at the time of Appellant's trial, which appeared to limit the consideration of mitigating factors exclusively to those set out in the statute, or, alternatively,the fact that Appellant was denied the effective assistance of counsel. Regardless of the cause, it remains that Appellant did not receive what is mandated by the eighth amendment -- a reliable, individualized sentencing determination. Appellant proved his claim at an evidentiary hearing in the court below through the testimony of defense counsel and through affidavit testimony by members of Appellant's family and friends.

At the core of Appellant's claim is an unavoidable dilemma posed by Florida capital sentencing law at the time of his trial. The dilemma begins with Cooper v. State, 336 So.2d 1122, 1139 (Fla. 1976), where this Court seemed to hold that mitigating

circumstances were limited to the list enumerated in the capital statute. Two years later, in Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court said that mitigating circumstances cannot be limited to the statutory list. Appellant's trial occurred after Cooper but before Lockett. His trial counsel, relying on the law as stated in Cooper, did not investigate or present nonstatutory circumstances. The dilemma is that if counsel's reliance upon Cooper as limiting mitigating factors is deemed to be reasonable, then the Florida statute was unconstitutional as applied under Lockett; if, on the other hand, counsel's reliance upon Cooper were deemed unreasonable, then counsel was ineffective in failing to investigate and present the significant, existing nonstatutory mitigating evidence. Under either prong of the dilemma, Appellant was denied an individualized sentencing consideration, and under either prong Appellant has stated a claim for relief.

It is important to note why this issue is different from the Lockett challenge raised on direct appeal. On direct appeal, Appellant argued that on its face Florida's statute violated Lockett during the period between Cooper and Songer. That issue was properly raised on direct appeal, because resolution of such a facial challenge did not require development or examination of information or evidence outside of the original trial record. By contrast, the issue now raised challenges the application of the statute to Appellant's particular case. This sort of "as applied" attack is properly brought in a postconviction proceeding because, like a claim of ineffective assistance of counsel, it requires exploration of facts outside the original trial record:

whether counsel in fact felt and acted limited by Cooper; what nonstatutory mitigating evidence was not investigated and why. Precisely these issues were addressed and developed at the evidentiary hearing held below. Appellant's claim is thus cognizable in a Rule 3.850 proceeding.

A. The Cooper/Lockett Prong of the Dilemma

Perhaps the most firmly settled and closely enforced eighth amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized. Today it is clear that this mandate means that there can be no restriction, either expressly by statute, Lockett v. Ohio, supra, or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979), upon the consideration of relevant mitigating factors by judge or jury. The settled nature of this mandate places its critical importance beyond question for it is at the heart of that which is required of the capital sentencing process. See Stanley v. Zant, 697 F.2d 955, 960 n. 3 (11th Cir. 1983). See generally, Hertz and Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317, 326, 332 (1981).

Appellant will show that the statute in effect at the time of his trial could reasonably be read, and was being reasonably read by judges and attorneys alike, as precluding nonstatutory mitigating circumstances in a manner identical to that considered in Lockett. He will then show that this potential for unconstitutional application did actualize in his case: his

counsel did in fact rely on Cooper and as a result substantial mitigating evidence was never investigated, developed or presented.

1. The Florida Statute, Post-Cooper but Pre-Songer, was Capable of and was Reasonably Being Construed in a Manner Violative of Lockett

The issue presented requires examination of the history of Florida capital sentencing law. This history falls into three distinct periods: (1) from the enactment of the post-Furman statute until the decision in Cooper v. State, during which the Florida courts interpreted and applied the mitigating circumstances provision of the statute in a manner which was ambiguous; (2) from the Cooper decision in 1976 to the decision in Songer v. State in 1978, when the law appeared to limit the sentencer to the statutory list of mitigating circumstances (Appellant's trial occurred during this period); and (3) from the decision in Songer to the present, when the courts properly applied the mitigating circumstances provision in a nonexclusive manner, as required by Lockett.

The starting point is the statutory language itself. The modern Florida death penalty statute was enacted in 1972, in the wake of Furman v. Georgia. Three separate provisions of the statute appeared on their face to limit consideration of mitigating factors to only those expressly set out in the statute. Section 921.141(2), Florida Statutes (1975) directed that the jury consider:

> (a) whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) based on these considerations, whether defendant should be sentenced to life or death.

(emphasis added). The same direction was given to the judge in Section 921.141(3) to consider mitigating circumstances "as enumerated in subsection (7)" and to make written findings "based upon the circumstances in subsections (6) and (7)." Subsection 921.141(6) [referred to as above as subsection (7)], states that mitigating circumstances "shall be the following: [list of specific factors]." Accordingly, from a plain reading of the statute, it appears that consideration of mitigating factors by judge and jury was limited to only those specifically set out in the statute.

In the years following the statute's enactment, this Court indicated repeatedly that the mitigating circumstances provision was exclusive. At times the Court's construction was implicit in its decisions, e.g., Alford v. State, 307 So.2d 433, 444 (Fla. 1975), and at other times it was explicit, approving in one case the decision of a sentencing judge who considered only the mitigating circumstances "itemized" in the statute. See Henry v. State, 328 So.2d 430, 431-32 (Fla.), cert denied, 429 U.S. 951 (1976).

In State v. Dixon, 283 So.2d 1 (Fla. 1973), for example, the landmark decision interpreting the statute, the Court's emphasis was on the consideration of statutory mitigating factors. The

opinion refers frequently to "the" mitigating circumstances and includes in such references only the statutorily enumerated circumstances and specifically refers to "the mitigating circumstances provided in Fla.Stat. 921.141 (7), F.S.A." in describing the weighing process. Id. at 9. In dissent Justice Ervin's opinion also specifically acknowledges the limitation on consideration of mitigating circumstances contained in the statute. Id. at 17.

In 1976, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), examined the facial validity of the Florida statute and concluded that it satisfied eighth amendment requirements by guiding the discretion of the sentencing authorities through its provisions for balancing aggravating and mitigating circumstances. In the course of reviewing the statute, the Court suggested that the mitigating circumstances provision of the statute was open-ended, 428 U.S. at 250 n. 8, curiously ignoring state case law to the contrary. It may have been that the Supreme Court was sending the Florida courts a message: For your statute to be constitutional, it must be open-ended.

But one week after Proffitt was announced this Court, in Cooper v. State, seemed to declare that the Florida statute did indeed restrict mitigating factors to those set forth in the statute. 336 So.2d 1133, 1139 & n. 7 (Fla. 1976), cert denied 431 U.S. 925 (1977). Cooper had proffered among other factors his stable employment history as a mitigating circumstance relevant to his character. The sentencing judge, however, prohibited the introduction of such testimony into evidence at

the penalty trial. This Court held the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute is "to examine in each case the itemized aggravating and mitigating circumstances." Id. at 1139 (emphasis added). The Court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in Furman." Id. at n. 7 (emphasis in original). The Court underscored that these were words of "mandatory limitation", id., thus leaving no doubt as to its interpretation of the statute. With regard to the specific nonstatutory mitigating factor before the Court, it commented that "employment is not a guarantee that one will be law-abiding", and then expressed its specific holding:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand that list.

Id. (emphasis added) A plain and fair reading of the opinion in Cooper was thus that consideration and presentation of mitigating factors was strictly limited to only those specifically set out in the statute.

In the two years following the Cooper decision, this Court adhered to its suggestion of the mitigating circumstances provision as exclusive. See, e.g., Gibson v. State, 351 So.2d 948, 951 & n.6 (Fla. 1977); Barclay v. State, 343 So.2d 1266, 1270-71 (Fla. 1977). More importantly, Cooper was the law that

guided the various actors in Appellant's case, particularly his defense counsel. It was not until almost two years later that the clarifying decision in Lockett was announced.

Lockett held that a death penalty scheme must not prevent the sentencer from "considering any aspect of the defendant's character and record or any circumstances of his offense as an independent mitigating factor", 438 U.S. at 607, even if such factor not be enumerated in the statutory list. In December, 1978, this Court handed down Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing). Songer had argued that the Court's earlier decision in Cooper had stated explicitly that mitigating circumstances were limited to the factors enumerated in the statute and thus that the statute violated Lockett. However, this Court explained that its earlier decision in Cooper should not be read as limiting mitigating circumstances but merely as affirming the trial judge's customary right to exclude irrelevant evidence. Id. The Court then explicitly construed the mitigating circumstances provision as nonexclusive, and explained that the language of the statute reflected a legislative intent[1] to permit the sentencer to consider any mitigating circumstances proffered by the defendant.[2]

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[1] Several months after the Songer decision, the Florida Legislature amended the statute and deleted the language upon which the Cooper court had relied in concluding that mitigating circumstances wece restricted to the factors identified in the statute. 1979 Fla. Law ch. 79-353. The Cooper Court had based its conclusions about legislative intent on the statutory language specifying that the sentencer must consider mitigating circumstances "as enumerated." Accordingly, the amendments demonstrated a then new legislative intent to provide that mitigating circumstances were not restricted to the statutory factors.

[2] The Songer Court based its conclusions about the mitigating circumstances standard employed in earlier cases on a review of

It is important to examine what Songer did not hold. Songer concluded only that it was reasonable to read Cooper as non-exclusive; Songer did not hold that it was unreasonable to read Cooper any other way, i.e., as being exclusive. This Court has recognized the ambiguity in the Florida statute and the wide-spread belief among lawyers and judges that the mitigating circumstances were limited to those in the statute. Perry v. State, 395 So.2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). In Perry and Jacobs, death sentences were vacated because the sentencing judge either refused to admit evidence of a nonstatutory mitigating character or refused to consider in mitigation evidence that went to a nonstatutory

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seven of its earlier decisions. Citing these decisions, the Court explained that it had repeatedly approved a trial court's consideration of mitigating circumstances not included in the statutory list. 365 So.2d at 700. The cases cited in Songer, however,do not support the Court's conclusion; these cases provide no more guidance than did Cooper itself. See Hertz and Weisberg, 69 Cal. L. Rev. at 356-59. In each of the decisions cited in the Songer opinion, the mitigating circumstances that the trial judge and jury had considered were factors enumerated in the statute. The possibility of considering nonstatutory mitigating factors was never mentioned in six of the seven decisions cited in Songer. In the seventh, Washington v. State, 362 So.2d 658 (Fla. 1978) this Court rejected the defendant's claim that a nonstatutory factor had not been considered and noted that "while we do not foreclose consideration of such factors in mitigation in an appropriate case, we do not believe the appellant's actions are compelling here". Id. at 67. Thus, the Washington decision did not "approve ... a trial judge's consideration of circumstances in mitigation which are not included in the statutory list". Songer, 365 So.2d at 700. At most, the Washington decision reserved the question for a future time. The ambiguous cases cited in Songer must be compared to the very clear opinion in Cooper. Any fair reading of Cooper reveals that it construed the mitigating circumstances listed in the statute as exclusive. The language in the Cooper opinion --"mandatory limitation", "we are not free to expand the list [of legislatively proscribed mitigating factors]" -- requires no speculation to understand its meaning.

factor. This Court noted in both cases that the trial judge had incorrectly interpreted Cooper. In those cases judges reasonably misread Cooper; in Appellant's case counsel misread Cooper. Likewise, in Muhammad v. State, 426 So.2d 533 1983), the Court held that counsel could not be "expected to predict the decision in Lockett." This is a recognition that the Florida statute could have been seen as limiting the consideration of mitigating circumstances prior to Lockett.

Similarly, the United States Court of Appeals for the Eleventh Circuit has twice observed that Cooper clearly held that the mitigating circumstances were limited to those in the statute. In Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982) the court explicitly noted that Cooper held that mitigating circumstances were limited to those in the statute, and further noted that the seminal case concerning the Florida statute, State v. Dixon, also lent support to an interpretation that the mitigating circumstances were limited to those in the statute. Id. at 1248 n. 30. In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) the court again stated that Cooper specifically held that the mitigating circumstances were limited to those in the statute, and that the Lockett was "a direct reversal of this view...." Id. at 812.

During the period of time when Appellant's trial took place (between the Cooper and Lockett decisions), therefore, there was a fatal ambiguity concerning the admissibility of mitigating evidence outside the statutory list. During that period it was reasonable for counsel, as well as courts, to interpret that law as explicitly limiting the consideration of mitigating factors to

only those set out in the statute. That this unconstitutional interpretation actually worked to Appellant's grave prejudice is the basis of this claim.

2. The Potential Restriction on Mitigation in the Florida Law Actualized in Appellant's Case.

It is evident that in the post-Cooper/pre-Lockett period, during which Appellant was tried, the Florida law was at best ambiguous, and was quite reasonably construed by the bench and bar as narrowly restricting the evidence in mitigation that could be considered. The ambiguity with which Cooper infected the statute resulted in denial to Appellant of the individualized sentencing required by Lockett. The statute's ambiguity prejudiced this case in two general respects. First, the Cooper limitation pervaded every part of this case, beginning with counsel's investigation. Secondly, Appellant will show that the perceived Cooper limitation resulted in dramatic nonstatutory mitigating evidence not being developed by counsel and not being presented to the sentencer.

a. Cooper as Understood by Defense Counsel

Judge Baker held an evidentiary hearing on this issue, during which Appellant's trial attorney testified and was cross-examined at length. Following this hearing, Judge Baker made several findings of fact, by which this Court is bound unless clearly erroneous. Judge Baker found (1) that "the law of Florida on the admissibility of a defendant's evidence in mitigation at the time of Mr. Sireci's sentencing hearing on November 5, 1976, was as stated by the Florida Supreme Court in Cooper" (V. 875); (2) that "at the 3.850 motion hearing, Cooper

v. State was the law that defense [counsel] testified he followed and was bound by when he said he did not try to develop nonstatutory mitigating evidence. The trial judge was also bound by it and appears to have consistently followed Cooper" (V. 876); (3) "in their motion for rehearing, defense counsel makes this observation, which seems a fair one: 'The Florida Supreme Court has recognized the widespread belief among lawyers and judges [after Cooper] that the mitigating circumstances were limited to those in the statute';" trial counsel's reading of Cooper was "neither an uncommon interpretation, nor an implausible one" (V 910).

These findings by Judge Baker are amply supported by the record. Appellant's trial counsel specifically testified that he felt he was limited to the mitigating factors listed in the Florida statute (V 22-23, 30-31, 41-43, 64-65)[3]. He said "the statute I considered legally limited me to those mitigating factors that were set out in the Florida Statutes ... I felt constrained by the statute not to put any (nonstatutory mitigating evidence) on ... I felt constrained by the statute itself" (V 22, 22-23). Trial counsel stated that he told Appellant that he was limited to presenting evidence or argument concerning the statutory mitigating factors (V 30-31, 65). Counsel testified that he felt the prosecutor could properly argue that the statutory list was exclusive and that any objection to such

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[3] This factual development places this case in sharp contrast to Hitchcock v. State, 432 So.2d 42, 45 (Fla. 1983) and Armstrong v. State, 429 So.2d 287, 292 (Fla. 1983), where the assertions were unsupported by facts. Here, because Judge Baker held an evidentiary hearing, we need not speculate: counsel testified he reasonably relied on Cooper.

argument would have been groundless (V 31); the same was true of the judge's instructions (V 31). Counsel did attempt to introduce some non-statutory mitigating evidence "through the side door" (V 40), but,

> in all fairness I probably would have gotten other, or attempted to get other mitigating factors through other witnesses had I not felt some constraint by the statute...[But] because I felt constrained by the statute, not to put any on [,] I didn't explore it (V 42).

Thus, it is indisputable that trial counsel felt that he was limited to the mitigating factors listed in the statute. All of his discussions with Appellant occurred within this framework. All of his investigation and preparations were within these parameters. He "didn't explore" anything beyond this.

This case is similar to Fair v. Zant, 715 F.2d 1519 (11th Cir. 1983). In Fair, Georgia case law had provided that defendants had an absolute right to withdraw guilty pleas at any time prior to filing of sentence. "In accordance with these precedents, Fair's counsel advised him that Georgia law permitted him to withdraw," id. at 1521, such a plea; the trial judge also stated that a plea could be withdrawn under such circumstances. Fair entered a plea but was subsequently not allowed to withdraw it. The Georgia Supreme Court held that its guilty plea rules did not apply to death cases. The federal court granted habeas corpus relief, finding that the trial judge's statement to Fair vitiated the voluntariness of the plea.

As in Fair, Appellant's counsel planned his case "in accordance with [the] precedents" in Florida, the pivotal one being Cooper. The available evidence of relevant nonstatutory

mitigating circumstances was not investigated or presented at Appellant's sentencing trial because of defense counsel's reasonable belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the statute.

b. The Nonstatutory Mitigating Evidence Not Investigated or Presented

Appellant has shown (1) That there was, because of Cooper, a potential that Florida's capital statute would in individual cases be applied in a manner unconstitutional under Lockett; and (2) that such potential actualized in this individual case, i.e., defense counsel did in fact follow Cooper and curtail his investigation and presentation accordingly. This is all Appellant need show: having made out a Lockett violation, it is not necessary to make an additional showing of prejudice. See Hertz & Weisberg, 69 Cal. L. Rev. at 360-64.

But even if a showing of prejudice is necessary, that showing has been amply made in this case. Because trial counsel reasonably believed that he could not present evidence unrelated to the mitigating factors enumerated in the statute, he did not investigate the availability of such evidence on behalf of Appellant. As proffered by affidavits in the court below, Judge Baker found that had such investigation been undertaken, counsel would have discovered

> Sireci's rejection by family and society while he was a child. A severe automobile accident is recalled in which Sireci received a serious head injury at 16, and a change in his personality was observed at that time. Some of the affiants noted that Sireci came to find out his paternity was questionable, leading him to change his name to Butch Blackstone. Sireci was described by some as a good worker, a good

> employee, a good husband and a good father to two children. There was a record of his successful completion of probation on a conviction for unarmed robbery about six years before this offense (V 876).

This finding by Judge Baker is correct. The available non-statutory mitigating evidence shows a consistent pattern of rejection and abuse. Neither Appellant nor his family were accepted in the community in which he grew up (Statements of Virginia Wilson (V 326), Peter Sireci (V 335), Dominick Sireci (V 340), and David Lowe (V 344)). David Lowe, a close childhood friend, stated that

> Roscoe, Illinois was a very tight knit farming community. Henry was never really accepted there. He was an Italian kid from Chicago who never fit into this small overwhelmingly Scandinavian farming area. Henry was always trying to get people to like him. I was friends with Henry and I know that several people told my mother not to let me associate with Henry. (Statement of David Lowe (V 344)).

In addition to being considered an outsider, Appellant's family was poorer than and ethnically different from the rest of the community. His father, a carpenter, was often unemployed. As his sister stated,

> Our family was poorer than other people in the area. We were treated as if we lived on the other side of the tracks. This community attitude followed Henry into school, where he was teased because he did poorly in school and because he was taller than anyone else. (Statement of Virginia Wilson (V 326)).

Social ostracism exacerbated tensions within the family itself, particularly tension between Appellant and his father. Irene Lowe, a neighbor and close friend of the family, described the source of these tensions:

> Henry always had a lot of problems with his family. This mostly came from the fact that his father never accepted him. His Dad did not care for him and was always standoffish towards him. He could never please his father. His father constantly criticized him and never gave him a kind word. He always treated the other children better than Henry. Henry's father had a very bad temper and he got upset with Henry quicker than with the other kids (V 347).

David Lowe confirmed that

> Henry had problems with his father from childhood. Henry's father got upset very easily; especially with Henry. He was always screaming at Henry. His father rarely spoke to Henry in a normal tone of voice. The other children were treated very differently from Henry. They were not subjected to the same kind of harsh treatment. If he and his brother, Dominick, ever got into any sort of trouble, Henry was always blamed for it (V 344).

His father was cold and emotionally distant (Statements of Virginia Wilson (V 326) and Peter Sireci (V 336)).

The rejection he received, from both parents, was evident to people outside the family. His employer, Carl Liebovich, stated:

> Henry had tremendous psychological and emotional problems due to family background. His parents even told me once that they wished he had not been born. His parents attitude towards him caused him tremendous mental problems (V 333).

Viva Voy, a neighbor and co-worker of his mother also noticed this attitude:

> When I worked with his mother, she was constantly criticizing him and almost seemed to hate him. I never felt like he got any support from his parents (V 350).

Thus, the hostile attitude toward Appellant could have been documented both in his family and in the community where he grew up. Instead, there was no evidence presented concerning the rejection he experienced.

There was also no mention during the trial of the fact that Appellant had suffered a near fatal auto accident at the age of 16. The dramatic effect on his behavior was noted by his family and others.

> At age 16, Henry was involved in a severe auto accident. His jaw was broken in several places, his chin was split open, numerous bones in his face were broken, and he had a great gash across his forehead. Henry's foot was totally mangled. He was unconscious off and on for two weeks and was on the critical list during this period.
>
> The doctors did not know if if he was going to live or die. He had to eat through a straw for months and could not walk for several months.
>
> After the accident, Henry's behavior changed dramatically. When you talked to him after the accident he often seemed like he wasn't there. He seemed to develop psychological problems and his temperament seemed to change after the accident. Everything seemed to bother him after the accident (Statement of Laura Sireci (V 342)).

Family members and friends documented his dramatic change in behavior following the accident (Statements of Peter Sireci (V 335), Irene Lowe (V 347), Viva Voy (V 350), Marlin Lowe (V 352), and Wanda Evans (V 354).

> After the wreck, he seemed to become quieter, and seemed to almost crawl inside of himself. (Statement of Peter Sireci (V 335)).

The effect of the accident was noted by others:

> Henry was involved in a bad auto accident when he was 16 and acted differently afterwards. He would do unusual things. Sometimes it would seem like he didn't understand what was going on after the accident. He seemed to develop psychological problems after the accident. (Statement of Marlin Lowe (V 352)).

After the accident, any minor problem would bother Appellant more (Statement of Laura Sireci (V 342)). Appellant received permanent damage to his foot from this accident, which prevented him from joining the military as he wished. (Statement of David Lowe) (V 344)) . The accident and the resulting behavioral change were never brought out at trial.

Appellant's problems with family continued when he tried to create a family of his own. As his friend, David Lowe, stated:

> Henry and his first wife, Nancy, were both very young when they married. She had also been cast out from her family. It seemed like they were both escaping their family situations (V 344).

Appellant's brother also described the impact of his ill-fated first marriage:

> My brother's first marriage was also very hard on him. He and his wife were both very young when they got married. They had a baby that was born dead. My brother was very upset about this for quite a while. My mother also interfered in their marriage which caused them additional problems. Sometimes it seemed like my mother enjoyed getting Henry into trouble. She has always belittling him. (Statement of Dominick Sireci (V 340)).

His sister Virginia also discussed his efforts to help their brother, Peter (V 326). In addition, Appellant often helped his friend Bill Lowe work in his garage (Statements of David Lowe (V 344) and Irene Lowe (V 347)). His generous nature was summarized by his friend, David Lowe:

> Henry was always a giving person. He would go out of his way to help people to like him (V 344).

Several persons were also available to testify concerning Appellant's non-violent nature (Statements of David Lowe (V 345), Irene Lowe (V 347), Wanda Evans (V 354), Viva Voy (V 350), Marlin Lowe (V 352), and Henry Aurand (V 331)).

It is true that Appellant, testifying on his own behalf at the penalty phase, did testify about a few of these subjects. His testimony did bring out that his father was not his real father, that he left home young, and that his mother had called him a liar (V 40) (S 49-53, 59-60).[4] But at that time he was addressing a jury that had just convicted him of capital murder. His credibility, in pleading for his own life, could not have been high. Had a number of persons, comparatively disinterested in the outcome, informed the sentencer of the full array of Appellant's qualities as a person, the sentencer might well have concluded that this person does not deserve to die. Further, the evidence would have been more focused and specific. It was vaguely brought out at trial, for example, that Appellant was a good worker. But now we have an affidavit from Appellant's employer saying that he was one of the best workers that had

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[4] This evidence was also brought out by a state's witness whom the prosecutor called to rebut mental mitigating circumstances (S 15). Also, defense counsel incorporated some of these facts in a hypothetical question posed to a defense psychiatrist (S 78-80). But because the hypothetical question was without factual predicate its force was sharply diminished. Similarly, counsel's brief mention of the matter in closing argument (S 115) occurred in an evidentiary vacuum.

Further, it is important to note that much of the critical nonstatutory mitigating evidence never reached the jury by any source. For example, the near-fatal auto accident, and the dramatic personality change it wrought, never came out.

ever worked at his plant; that he would work the longest hours; that his boss would hire Appellant back today, despite the murder charge for which Appellant now sits on Death Row (V 333).

This evidence would have allowed the jury to see Appellant as a human being. It would have suggested that Appellant's personality and motivation could be explained, at least in part, by his stormy and unhappy personal history and would have shown that there was a Henry Sireci worth saving. It is thus precisely the kind of evidence the United States Supreme Court had in mind when it wrote Lockett and Eddings. "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." Eddings, 455 U.S. at 115. The Lockett Court was concerned that unless the sentencer could "consider compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants would be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It could have made the difference between life and death in this case.

3. Ineffective Assistance of Counsel Imposed by State Action

The Cooper limitation did more than violate Lockett. The limitation also implicated the right to effective assistance of counsel, though not in the sense described in Knight v. State.

The operation of the statute worked to restrict the consideration of mitigating factors and thus inhibited counsel's performance through state action.

Because it was the Court's action, in publishing Cooper and in allowing it to remain intact for two years, that induced counsel to be ineffective, Appellant need not make a showing of prejudice. Specific cases of ineffective assistance and prejudice fall along a continuum based, in part, upon the degree to which the state is responsible for the resulting deficiencies of defense counsel and calibrated to the degree of prejudice which must be shown before a new sentencing is mandated. At one pole are cases where a state procedure places a disability upon counsel that pervades his entire conduct of the defense. Cases at this extreme of the spectrum include Geders v. United States, 425 U.S. 80 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); Herring v. New York, 422 U.S. 853 (1975) (statute barred final summation by defense counsel); Glasser v. United States, 315 U.S. 60 (1942) (defendants with conflicting interests); Powell v. Alabama, 287 U.S. 45 (1932) (counsel denied adequate opportunity to confer with defendants and to prepare for trial).

In these cases, defense counsel was appointed but prevented by agents of the state or by operation of state law from discharging functions vital to effective representation of the clients. The state-created procedures in these cases were what impaired the accused's counsel from fully assisting and representing him. Because these impediments "constitute direct state interference with the exercise of a fundamental right, and

because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate." United States v. DeCoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (en banc). Reversal in such cases is required, without need of showing prejudice, for the reasons discussed in Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

The issue raised by Appellant is similar to a claim of ineffectiveness of counsel caused by a conflict of interest, because in both "counsel suffered under a disability ... that subtly pervaded his entire conduct of the defense." Stanley v. Zant, 697 F.2d at 962. Claims involving "extrinsic" ineffectiveness, such as impermissible external pressures interfering with counsel's representation, are more easily confronted by courts than are claims of "intrinsic ineffectiveness", such as Knight v. State, where criminal defendants assert on appeal that counsel's actual performance was inadequate, that specific acts or omissions by the attorney rendered his representation ineffective. Claims of "extrinsic" ineffectiveness are easier for courts to confront because they involve "some discernible fact that involves no real possibility of a conscious exercise of attorney judgment that might be labeled a tactical decision. These claims are also generally devoid of the court-feared possibility that a defendant and the defense attorney are colluding to raise such a claim." Stratzella, Ineffective Assistance of Counsel Claims: New Uses, New Problems, 19 Ariz. L. Rev. 443, 458 (1977). This is so, in part, because "the conclusion of ineffectiveness or effectiveness is easily drawn once a certain and definable fact is either established or not established ... what remains for

decision is a factual determination not unlike those frequently confronted by the courts in a host of other contexts: was there a coercive atmosphere inhibiting counsel's representation?" Id.

At the other pole of the ineffective assistance continuum are cases in which counsel was not impeded by state action. This Court has adopted a four-pronged test for determining whether an attorney, unimpaired by state action, has met the constitutionally mandated standard for the effective assistance of counsel. Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). These standards are not applicable to the present situation, where counsel's belief that he was limited to the statutory mitigating circumstances stemmed from an ambiguity or directive in the statute and a plain reading of the existing case law. The test in Knight was taken directly from the plurality opinion in United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979). The court in DeCoster analyzed claims of a denial of effective assistance of counsel as falling along a continuum described above. 624 F.2d at 201. The stringent test adopted in Knight was only designed for those cases at one end of the continuum: where counsel's performance, "is untrammelled and unimpaired by state action." 624 F.2d at 202. DeCoster utilizes a completely different analysis, which is wholly consistent with the analysis of "extrinsic" ineffectiveness, supra, where state action presents a "structural or procedural impediment" to the full benefit of the effective assistance. Id.

This Court has implicitly recognized the inappropriateness of the Knight test where such external interference is involved. Valle v. State, 394 So.2d 1004 (Fla. 1981). In Valle the Court

found a denial of effective assistance in both the trial and penalty phases due to the trial court's failure to give the defendant adequate time to prepare. The Court reached this result without any reference to the Knight test and even though counsel had been diligent. The Court did not require a substantial omission on counsel's part nor did it apply the "outcome determinative" test of Knight. The Court found a showing of "prejudice" solely from counsel's inability to interview all the trial phase witnesses and adequately to investigate potential mitigating evidence. The Valle opinion was issued only two days after Knight and thus the two must be considered together in analyzing the law in this area.

As discussed in the preceeding sections, the denial of individualized sentencing occurred in this case. Counsel made no attempt to investigate and present nonstatutory mitigating evidence. This failure was not based upon any tactical or strategic decision upon counsel's part. It was based instead on counsel's reasonable belief that he was limited to the statutory mitigating circumstances. At the time of his trial, Cooper was the law of the state, the most recent pronouncement on the question, from the State's Highest Court. It cannot be questioned that Cooper could reasonably be read to prohibit presentation of nonenumerated factors. Counsel's reasonable reliance upon Cooper implicated the statute in a denial of effective assistance of counsel.

B. The Ineffective Assistance of Counsel Prong of the Dilemma

Should the Court reject Appellant's Cooper/Lockett claim, then it must resolve a rather difficult, though analytically more traditional, ineffective assistance issue. This analysis follows the test enunciated in Knight v. State. If the state's reading of Cooper is correct, then defense counsel in Appellant's case either grossly miscomprehended the law or failed to present the one plausible defense to the death sentence. Therefore, if Cooper is not seen as reasonably influencing counsel's performance, then the sixth amendment right to effective counsel was denied.

There are certain fundamental responsibilities that constitutionally effective counsel must fulfill. In the context of a capital sentencing proceeding, the need for an independent investigation derives from the unique nature and purpose of the sentencing stage in capital trials. Counsel's independent investigation of evidence in mitigation of punishment is not merely indispensable to the trial of state-law issues of life or death; it is a constitutional imperative since the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. at 304; Accord, Eddings v. Oklahoma, supra.

D. Conclusion

The central fact of this case is that Appellant did not receive an individualized sentencing proceeding. The question is why. Lockett was violated either because at the time of trial the Florida death penalty statute prohibited the introduction and consideration of nonstatutory mitigating evidence or because his trial counsel ineffectively believed that the law operated in such a manner at the time of trial. In either event, trial counsel believed that the Florida death penalty statute flatly prohibited the introduction and consideration of nonstatutory mitigating circumstances, with the result that Appellant was denied precisely what the Constitution demands. Appellant has demonstrated a claim for relief under either theory.

ISSUE II

SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AMENDMENT.

In 1972, in Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court struck down the capital punishment statutes of Georgia, Texas and, by implication, all other states including Florida. The opinion of the Court was handed down in a short per curiam, followed by 50,000 words spread over nine separate opinions by the individual Justices. The precise contours of the Court's holding were unclear, but the core concern of the majority was that the statutes at issue in Furman lacked sufficient standards to distinguish who should live from who should die. These statutes invited arbitrary application, but their vice was not simply arbitrariness as an abstract concept. The evil of a system without meaningful standards is

that actors within the system are allowed to give legal effect to their racial, gender and class biases. When the law grants broad discretion, it is not surprising that such discretion will be exercised against despised groups: minorities and the poor.

Four years after Furman, the United States Supreme Court held that newly enacted death penalty statutes, including Florida's, were facially constitutional. The Court said that "on their face these [new] procedures seem to satisfy the concerns of Furman" and that "absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of the case and the likelihood that a jury would impose the death penalty if it convicts." Gregg v. Georgia, 428 U.S. 153, 198 (1976); id. at 225 (White, J., concurring). The Justices declined to strike down the new laws "on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." Id. at 226.

The guided discretion statutes considered in 1976 thus were approved because they "promised to alleviate" the arbitrariness condemned in Furman. Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1855, 1856, 1858 (1982) (emphasis added). But the final constitutional judgment on these statutes, including Florida's, will depend on whether their actual performance fulfills their promise.

This initial faith in Florida's system was premature. Appellant's central claim is that his death sentence has been imposed under a statutory scheme which permits, and has in fact resulted in, the unequal imposition of capital punishment based

upon the race of the victim and the race of the defendant. Appellant has proffered evidence establishing that, in the application of Florida's capital sentencing statute, race of the victim and, to a lesser degree, race of the defendant matter in deciding who dies. This persistent disparity in the valuation of white life over black life implicates the fourteenth amendment's guarantees of equal protection and due process.

Appellant's argument proceeds in three parts. First, Appellant will show that he has stated a claim and a prima facie case for relief. Discrimination based on the victim's race, similar to discrimination based on the defendant's race, violates the equal protection and due process clauses; in fact, "race of the victim" discrimination and "race of the defendant" discrimination are not entirely distinct.[5] The language and legislative

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[5] At present, 51 percent of the inhabitants of death row are white. Five percent are Hispanic and the remaining 44 percent are black. Since roughly half the people arrested and charged with murder each year are white, it would appear at first glance that the proportion of whites and blacks on death row are about those that would be expected from a fair system of capital sentencing. But what studies like those proffered by Appellant show is how such seemingly equitable racial distribution is actually the product of racial discrimination, rather than proof that discrimination has been overcome.

The explanation for this apparent paradox is that the judicial system discriminates on the basis of race of the victim. Each year, according to the FBI crime figures, about the same number of blacks and whites are arrested for murder, and the totals of black and white murder victims are also about equal. But our murders are segregated: whites tend to kill whites and blacks tend to kill blacks. While blacks who kill whites tend to get harsher sentences -- and more death sentences -- there are relatively few of them, and so their absolute effect on the number of blacks sent to death row is limited. On the other hand, the far more numerous black murderers whose victims were also black are treated fairly leniently in the courts and are only rarely sent to death row. Because these dual systems of discrimination operate simultaneously, they have the overall effect of keeping the numbers of blacks on death row roughly proportionate to the number of blacks convicted of murder -- even

history of the equal protection clause establish that the framers of the fourteenth amendment intended it to prohibit the administration of criminal justice to punish whites by penalties that were not employed to punish similar crimes against blacks. See Appendix B. Further, because the inequalities at issue involve a suspect class (race) and impinge on a fundamental right (life), the Court must apply strict scrutiny review in testing the contested practice. The use of race as an aggravating circumstance cannot be justified by any compelling state interest.

Secondly, Appellant will show that the prima facie claim he has stated can be satisfied by statistics. Discriminatory intent can be, and frequently is, inferred from statistics demonstrating the disproportionate impact of a disputed practice. Statistical evidence is especially critical in a case such as this, where decisionmaking discretion is delegated to multiple sequential decisionmakers.

Thirdly, Appellant will suggest that the evidentiary record in this case -- as it presently stands -- is not a satisfactory predicate for determining the constitutional question presented. The relevant facts developed by the studies, though compelling, are necessarily detailed and complex. Since legal judgments on questions of such complexity ought to be shaped only by a full and clear understanding of facts, Appellant urges the Court not to determine at this time, as a matter of law, such issues as how strong a pattern of racial disparity must be in a capital

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while individual defendants are being condemned, and others spared, on the basis of race. The result is an illusion of fairness.

sentencing system to establish cognizable discrimnation, or what the constitutional significance of pervasive race-of-the-victim discrimination should be. Such determinations should be postponed until Appellant can provide the Court with a complete picture of just how strong these patterns of discrimination are in the State of Florida, just how random capital sentencing has become, and just how unshakable are the racial disparities.

A. Stating The Prima Facie Case: Discrimination Based Upon the Victim's Race Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment

A statute which explicitly adjusted the severity of punishment for a crime according to the race of the defendant or the victim would be a direct violation of the equal protection and due process[6] clauses of the fourteenth amendment. For example, if a statute provided that defendants whose victims were white should be sentenced 20 percent more harshly than defendants whose victims were black, that racial classification would trigger strict scrutiny. The situation should be viewed no differently

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[6] Appellant's claim is predicated on both due process and equal protection. Though much of his analysis focuses on equal protection, he has stated a due process violation as well. Appellant contends that the Florida system allows for an impermissible value judgment by the actors within the system -- that white life is more valuable than black life -- and, as a practical matter, that the Florida system allows for a double standard of sentencing. Certainly such allegations raise life and liberty interests for Appellant. Further such allegations speak not only to the rationality of the process (equal protection and eighth amendment concerns); they speak also to the values inherent in the process. It is the integrity and "fairness" of the process that is being questioned by Appellant's contention, not simply the mechanics or structure of the process. Thus, Appellant's allegation of an impermissible process speaks fundamentally to due process interests.

merely because the racial classification is covert rather than overt. In both situations, the sentencing authority is influenced by racial considerations.

The conceptual distinction between an attack on the facial constitutionally of a statute and a challenge to its administration has no bearing on the scope of the equal protection guarantee. The fourteenth amendment prohibits not only explicit discrimination, but discriminatory administration of a facially neutral law as well. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Appellant offers to show that Florida's system discriminates on the basis of race of the victim. This Court has never held that such discrimination, if proven, cannot state a claim. Though several Justices, writing separately, have suggested that this may be the case, see Meeks v. State, 382 So.2d 673, 676, 677, 678 (Fla. 1982),[7] the cases themselves have held only that the statistically-based allegations of discrimination presented did not "constitute a sufficient preliminary factual basis to state a cognizable claim." Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983). See also Hitchcock v. State, 432 So.2d 42, 43-44 (Fla. 1983); Thomas v. State, 421 So.2d 160, 162-3 (Fla. 1982); Meeks

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[7] But even the separate opinions in Meeks stressed that Meeks had failed to make a sufficient factual showing. See 382 So.2d at 677 (Overton, Alderman & McDonald, J.J., concurring) ("I conclude that the instant figures simply fail to establish a factual basis for the proposition that our death penalty is being applied in a discriminatory manner") (emphasis added); id at 677 (Sundberg & England, J.J., concurring) ("appellant has failed, even on a preliminary basis ... to present a sufficiently compelling statistical showing of discrimination").

v. State, 382 So.2d 673, 676-77 (Fla. 1980); Adams v. State, 380 So.2d 423, 425 (Fla. 1980); Henry v. State, 377 So.2d 692, 692-93 (Fla. 1979).

However, the recent statement in Griffin v. State, ___So.2d___, 9 FLW 97, 97 (Fla. 1984), that the claim presented was "insufficient on its face to state a claim for relief," suggests either that race-of-the-victim discrimination is not constitutionally cognizable or that statistics alone cannot make out such a claim. Judge Baker, in his order below, seemed to hold that statistics could never suffice to state a prima facie claim of discrimination. The judge characterized his holding in this way: "a mere showing that the class of persons who have been sentenced to die is statistically disparate ... is insufficient as a basis for any relief in this case" (V 911). Thus, Judge Baker rejected the claim on its face, as a matter of law without reference to the quality of the statistics actually offered by Appellant.

Appellant will show that discrimination on the basis of race of the victim states a claim and that a prima facie showing of that claim may be made out by statistical disparities.[8] Discrim-

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[8] Appellant has standing to raise the claim of discrimination based on the race of the victim. Standing depends upon a showing of injury in fact and a demonstration that the injury will be redressed by a favorable decision. Simon v. Eastern Ky. Welfare Rights, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975); L. Tribe, American Constitutional Law 89-93 (1978). Appellant has been injured by the discrimination of which he complains: he stands to lose his life because of it. Appellant's victim was white. If a statute explicity provided that defendants who kill white victims will receive 20 years but defendants who kill blacks will receive 5 years, is there any doubt that a defendant who received a harsher sentence because his victim was white would have standing to challenge the statute regardless of the defendant's race?

ination based on the victim's race violates the fourteenth amendment for three distinct reasons: (1) the framers of the amendment intended to prohibit discrimination by race of the victim; (2) traditional equal protection principles hold such discrimination unconstitutional; (3) using race of the victim as an aggravating factor in a death case violates equal protection.

1. The Historical Purposes of the Amendment: Intent of the Framers

One of the purposes behind the fourteenth amendment, adopted in 1868, was to ensure that all Americans would be treated equally before the criminal law. See Appendix B. While historians and courts have long debated what the Reconstruction Congress thought about matters such as school segregation, the language and history of the Amendment shows with relative clarity a desire to eliminate the then-pervasive practice of punishing only persons who committed crimes against members of the majority race. Indeed, the text of the clause providing "nor shall any state deprive any person within its jurisdiction of the Equal Protection of the law," speaks more directly to the imposition of criminal sanctions than to any other form of discrimination.

The United States Court of Appeals for the Eleventh Circuit squarely held that John Spinkellink, a white man, had standing to raise the race of the victim issue. Spinkellink v. Wainwright, 578 F.2d 582, 612 n. 36 (5th Cir. 1978). The Spinkellink court drew on Supreme Court cases holding that a white defendant has standing to allege that blacks have been illegally discriminated against in jury selection procedures. See Taylor v. Louisiana, 419 U.S. 522, 526 (1975); Rose v. Mitchell, 443 U.S. 545 (1979); Peters v. Kiff, 407 U.S. 493, 502 (1972). See also Lewis, Mannle, Allen & Vetter, A Post-Furman Profile of Florida's Condemned -- A Question of Discrimination In Terms of the Race of the Victim and A Comment on Spinkellink v. Wainwright, 9 Stetson L. Rev. 1, 42 (1979); but see Britton v. Rogers, 631 F.2d 572, 577 n. 3 (8th Cir. 1980) (no standing to raise issue in non-capital case).

The framers of the fourteenth amendment unquestionably intended to proscribe differential punishment based on the race of the victim. Prior to the Civil War, statutes regularly punished crimes less severely when the victim was a black person or a slave. After the war and immediately preceding the enactment of the fourteenth amendment, Southern authorities frequently declined to administer their statutes to prosecute persons who committed criminal acts against blacks.[9] In these cases that were prosecuted, authorities acquitted or accorded disproportionally light sentences to persons who were guilty of crimes against blacks.[10]

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9 See, e.g., Report of the Joint Committee on Reconstruction, at the First Session, Thirty-Ninth Congress, Part II, at 25 (1866) (testimony of George Tucker, commonwealth attorney) (the southern people "have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea"); id. at 209 (testimony of Lt. Col. Dexter Clapp) ("Of the thousand cases of murder, robbery and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons,"); id. at 213 (testimony of Lt. Col. J. Campbell) ("There was a case reported in Pitt County of a man named Carson who murdered a negro. There was also a case reported to me of a man named Cooley who murdered a negro near Goldsborough. Neither of these men has been tried or arrested.").

10 See, e.g., id., Part III, at 141 (testimony of Brevet M.J. Gen. Wagner Swayne) ("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung [sic] or sent ot the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me."); id., Part IV, at 76-76 (testimony of Maj. Gen. George Custer) ("I believe a white man has never been hung [sic] for murder in Texas, although it is the law. Cases have occurred of white men meeting freedmen they never saw before, and murdering them merely from this feeling of hostility to them as a class.").

The congressional hearings and debates that led to the enactment of the fourteenth amendment are replete with references to this pervasive discrimination, and the Amendment and the statutes enforcing it were intended, in part, to stop it. See General Building Contractors Association, Inc. v. Pennsylvania, ____U.S.____, 102 S.Ct. 3141, 3146-49 (1982). The United States Supreme Court has recently confirmed this truth: "[i]t is clear from the legislative debates that, in the view of the . . . sponsers [of the Ku Klux Klan Act of 1871], the victims of Klan outrages were deprived 'equal protection of the laws' if the perpetrators systematically went unpunished." Briscoe v. Lahue, ____U.S.____, 103 S.Ct. 1108, 1117 (1983). The proffered evidence in this case plainly demonstrates a violation of those equal protection clause objectives.

2. Traditional Equal Protection Principles

Even without reference to the Amendment's history, race-of-victim sentencing disparities violate long-recognized equal protection principles that have been applied to all areas of state action. Absent a rational explanation for subjecting one to harsher treatment than another, any disparate treatment of different groups at the hands of the state renders the operation of a law unconstitutional. See United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

Moreover, under well-established equal protection doctrine, even a "rational" explanation would not suffice to protect the state action alleged here, since Appellant's claim involves a

suspect racial discrimination that impinges upon the fundamental right to life, a right explicitly guaranteed by the fourteenth amendment and inherent in the constitutional framework.[11]

The Supreme Court has made it clear that where either (i) "fundamental rights," such as the right to life or the fundamental right to fair treatment in the criminal justice system,[12] or (ii) "suspect classifications," such as race are involved, discriminatory state action "may be justified only by a 'compelling state interest' ... and ... legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973); see also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

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11 See, e.g., May v. Anderson, 345 U.s. 528, 533 (1953) (a right "far more precious . . .than property rights"); Screws v. United States, 325 U.S. 91, 131-32 (1945) (Rutledge, J., concurring); id. at 134-35 (Murphy, J., disenting) ("He has been deprived of the right to life itself . . . That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution."); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("fundamental human rights of life and liberty"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("the fundamental rights to life, liberty and the pursuit of happiness").

12 "There is no single decision of the Court in which a majority of justices specifically recognize a fundamental right to fair treatment in the criminal justice syustem for purposes of equal protection analysis. However, the Court has established this right through a series of related decisions ... when the government takes actions that burden the rights of a classification of persons in terms of their treatment in the criminal justice system, it is proper to review those laws under the strict scrunity standard for equal protection." J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 676-77 (1978).

The "fundamental rights" concept originated in Skinner v. Oklahoma, 316 U.S. 535 (1942), a case involving the Oklahoma Legislature's imposition of a punishment of sterilization upon those convicted of certain crimes. In addressing the Oklahoma statute, which made sterilization a permissible sentence after a third felony conviction, while at the same time exempting certain kinds of white-collar felonies (such as financial crimes) from its reach, the Court held that,

> strict scrutiny of the classifications which a State makes in a sterilization law is essential lest unwittingly or otherwise invidious discrimination are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws .... Where the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Id. at 541.

Skinner thus teaches that only a compelling state interest could justify a sentencing statute that conditions fundamental rights in a discriminatory manner, and that the equal protection clause proscribes arbitrary lines among defendants. Certainly a principle that protects, absent a compelling state interest, the right to procreate applies when the stakes are life and death and when the state action destroys not just one right, but all rights.[13]

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[13] "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Zant v. Stephens, 103 S.Ct. 2733, 2747 (1982) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see, e.g., Reid v. Covert, 354 U.S. 1, 77 (1957) (capital cases "stand on quite a different footing than other offenses. In such cases the law is

Moreover, the discrimination in imposition of Florida's capital statutes does not merely affect the fundamental right to life, but employs the paradigm "suspect classification," that of race. Racial classifications are "subjected to the stricter scrutiny and are justifiable only by the weightiest of considerations." Washington v. Davis, 426 U.S. 229, 242 (1976) (citing McLaughlin v. Florida, 379 U.S. 184 (1964)). No discriminatory state action is more suspect in the administration of justice than racial discrimination. Those inequalities "not only violate our Constitution and the laws enacted under it, but [are] at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted); see also Ballard v. United States, 329 U.S. 187, 195 (1946). "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," Rose v. Mitchell, 443 U.S. 545, 555 (1979), since it destroys "the appearance of justice" and casts doubt on "the integrity of the judicial process," id. at 55-56.

3. Race As An Aggravating Circumstance

In the context of Florida's capital sentencing law a showing of race-of-victim discrimination implicates an additional fourteenth amendment principle as well: the prohibition of

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especially sensitive to demands for ... procedural fairness . . . .."); Williams v. Georgia, 349 U.S. 375, 391 (1955) ("That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant"); see also McGautha v. California, 402 U.S. 183, 311 (1971) (Brennan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 28 (1956).

race-conscious legislation. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880). The Supreme Court held in Zant v. Stephens, ___U.S.___ 103 S.Ct. 2733 (1983), that it would be unconstitutional, in an otherwise valid sentencing system, to:

> attach[] the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant.... If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law should require that the jury's decision to impose death be set aside.

103 S.Ct. at 2747. Yet, in a real sense, that is precisely what the State of Florida has authorized and what the proffered evidence shows Florida juries and prosecutors have in practice done: "attached the aggravating label" to the race of the victim.

4. Conclusion: Race of the Victim Matters Constitutionally

At bottom, Judge Baker's concern seemed to be that subtle racial bias pervades every "human institution" (V 1110; 890), that race-consciousness is an "unhappy thing" (V 890) but an inescapable fact of American life. This concern is not insubstantial; to some extent all of our official choices and institutions are not immune from the defect asserted by Appellant. But the infliction of death by official choice is different from any other choice, and things we may tolerate (albeit grudgingly) in other areas of life are simply intolerable when the issue is life or death. That higher standards of "due process", of clarity and rationality, must be required for this ultimate sanction has been the cornerstone of death penalty jurisprudence since its incep-

tion. Because death is by far the worst punishment, then the requirements of "due process" and "equal protection" for death may reasonably be set higher than similar requirements for other punishments.

On all three of the above-stated grounds, evidence of discrimination based on the race of the defendant and race of the victim, if proven, would establish a violation of the fourteenth amendment.

B. Proving the Prima Facie Case: Intentional Discrimination Under the Fourteenth Amendment May Be Proven By Statistical Evidence.

To state a claim under the equal protection clause of the fourteenth amendment, a plaintiff must make a prima facie showing that a state statutory scheme purposefully discriminates against one group over another. Personnel Administrator v. Feeney, 442 U.S. 256, 271-74 (1979). A prima facie case of purposeful unconstitutional classification can be shown either by the statute's specific language or, if a law is neutral on its face, by the statute's disproportionate effect on different groups. Crawford v. Board of Education, ___U.S.___, 102 S.Ct. 3211, 3221 (1982). Once that prima facie case is made, the burden shifts to the state to justify its classification either under a rational basis test or, if the classification is "suspect" or infringes upon a fundamental right, under a test requiring the state to show that the statute is precisely tailored to serve a compelling governmental interest. Plyer v. Doe, 102 S.Ct. 2382, 2394-95 (1982).

The necessity of showing intent does not mean that Appellant must identify an intentional discriminatory act or malevolent actor, see United States v. Texas Educational Agency, 579 F.2d 910, 913-14 & nn.5-10 (5th Cir. 1978), cert. denied, 443 U.S. 915 (1979), or that racial discrimination was the primary or dominant purpose, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266. All that is required is a showing that discrimination "has been a motivating factor in the decision," id, and that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because,' not merely 'in spite of,' its adverse affects upon an identifiable group." Personnel Administrator v. Feeney, 422 U.S. 256, 279 (1979).

An equal protection challenge to the racially discriminatory application of a capital sentencing statute may be based on statistical evidence of disproportionate impact which gives rise to an inference of discriminatory intent on the part of the decisionmaker.[14] Thus, "discriminatory intent need not be proven by direct evidence. Necessarily an invidious discriminatory purpose may often be inferred from the totality of the relevant factors, including the fact, if it is true, that the law bears more heavily on one race than another." Rogers v. Lodge, ____U.S.____, 102 S.Ct.____, 3276 (1982); see also Washington v.

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[14] Judge Baker correctly reasoned that "the legal system does not guarantee equality in results ... the equality that the courts have striven to create is an equality of procedure" (V 891) (emphasis in original) . But examination of a system's results often tells us much about the genuine operation of its procedures and of the assumed success of those procedures in dealing with certain evils.

Davis, 426 U.S. 229 (1976). The Supreme Court has recognized the value and validity of statistical analysis in cases of this sort: "our cases make unmistakably clear that statistical analysis have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." Teamsters v. United States, 431 U.S. 324, 338-39 (1977).

Two features of Appellant's claim make it particularly amenable to proof by statistics. First, the capital sentencing process is complex and involves a number of decisionmakers. The presence of multiple decisionmakers appropriately triggers judicial reliance upon disparate impact evidence as the best evidence of discriminatory intent:[15]

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[15] See Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 162 (8th Cir. 1981); Fisher v. Proctor and Gamble Mfg. Co., 613 F.2d 527, 543-44 (5th Cir. 1980). But see Meeks v. State, 382 So.2d at 678 (Adkins, J., dissenting)("the imposition of the death penalty ultimately requires the concurrence of the trial judge, the Florida Supreme Court, and the Governor's Executive Clemency Board. To be successful, the defendant must show that all of these officers participated in intentional or purposeful discrimination").

Appellant maintains that the results of the system operating as a whole serves as the appropriate framework for assessing discrimination. The principal authority on this point is Furman v. Georgia. All of the justices in Furman who discussed patterns of imposition of death sentences did so in terms of overall outcome; none focused on the influence of any particular stage of the decisionmaking process. Neither have the lower court opinions following Furman, which have discussed the fourteenth amendment claim made here. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) ; Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). In one early reference to this issue, the former fifth circuit expressly said that the evidence "need not identify an intentional discriminatory act or malevolent actor in the defendant's particular case. See United States v. Texas Educ. Agency, 579 F.2d 910, 913-14, nn.5-7 (5th Cir. 1978)." Jurek v. Estelle, 593 F.2d 672, 685 n.26 (5th Cir. 1979), vacated and affirmed on other grounds, 623 F.2d 929 (5th Cir. 1980)(en banc).

If jury decisions are influenced by racial factors, prosecutorial decisions will be as well. It would ignore that common sense assumption to view these decision points in isolation. It would

> [f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of the mind of the actor. For normally the actor is presumed to have intended the consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed emotion.

Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring). As the United States Court of Appeals for the Fifth Circuit asserted in assessing an equal protection challenge to school board procedures analogous to Appellant's challenge here: "the most effective way to determine whether a body intended to discriminate is to look at what it has done." United States v. Texas Ed. Agency, 579 F.2d 910 (1978).

The second factor suggesting that this is the sort of claim provable by statistics is that the capital sentencing decision involves discretion. Where decisionmakers use discretion in acting, the opportunity to discriminate is so great that the

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also mask discrimination: by anticipating the unequal treatment cases will receive from juries, based on the racial makeup of the defendant and victim, prosecutorial charging decisions may well reduce the apparent impact of jury discrimination, though in that process the impact is no less real. Were Appellant's claim based upon the statements or actions of a single decisionmaker, of course that alone would not be sufficient and Appellant would bear the burden of showing the controlling influence of that factor on the process and the outcome of the system generally. United States v. Texas Education Agency, supra, 579 F.2d at 913. But it clearly is not: it is based on an overall, pervasive showing of stark racial discrepancies in the Florida capital sentencing system. Against such showing, it is the state's burden to establish that Appellant was somehow insulated from the system at some level. That showing has not been, and cannot be, made in this case.

result of those decisions (the disparate impact) is sufficient to support an inference of discriminatory intent.[17] In Yick Wo, the Supreme Court emphasized that the ordinance at issue there

> confer[red], not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent ... as to persons .... The Power given [to the decisionmakers] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

Yick Wo v. Hopkins, 118 U.S. at 366-67. Equal protection violations based on statistical showings, which fall short of the extreme pattern demonstrated in Yick Wo, were condemned in the jury cases precisely "[b]ecause of the nature of the jury-selection task." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266 n.13 (1977). That task rests on a subjective process that presents at every juncture "the opportunity to discriminate" such that "whether or not it was the conscious decision on the part of any individual jury commissioner." The courts have been confident, when presented with a showing of disparate impact, in concluding that "[t]he result bespeaks discrimination." Alexander v. Louisiana, 405 U.S. 625, 632 (1972); see also Hernandez v. Texas, 347 U.S. 475, 482 (1954); Norris v. Alabama, 294 U.S. 587, 591 (1935). "[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination

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[17] See generally J. Nowak, R. Rotunda & J. Young, Handbook on Consitutional Law 528-29 (1978). See also Baur v. Bailer, 647 F.2d 1037, 1042 (10th Cir. 1981); Reynolds v. Sheet Metal Workers Local 102, 498 F.Supp. 952, 963-64 (D. DC 1980).

raised by the statistical showing," Castaneda v. Partida, 430 U.S. 482, 494 (1977)(citing Washington v. Davis, 426 U.S. at 241).

Thus because the sentencing system here involves multiple decisionmakers, each with substantial discretion and each involved in a governmental process which has the most severe impact on individual life and liberty, the required prima facie showing of discriminatory intent can, and must be, made out by a demonstration of significant racial disparities resulting from the discretionary process. This is precisely what Appellant has offered to demonstrate.

C. The Evidence in this Case: A Sufficient Preliminary Factual Showing and the Need for an Evidentiary Hearing

1. The Quantitative Evidence

There is an ever increasing volume of evidence demonstrating the discriminatory and arbitrary application of the death penalty in Florida. Most recently, Stanford Professors Gross and Mauro found, as had Bowers and Pierce, Radelet and Vandiver, and Linda Foley before them, that race matters in deciding who dies in Florida. In evaluating the evidence of discrimination and arbitrariness, one factor is striking: the various studies done independently, using different methodologies and gathering data from different sources, reach persistent and consistent conclusions. The similarity of the results of these independent studies gives further corroboration to their conclusions, beyond even the meticulous controls incorporated into each study.

2. The Qualitative Evidence: Placing the Statistics in Historical Context

The statistics presented by Appellant do not appear in a vacuum; they are a product of racial attitudes developed and ingrained over two hundred bitter years.[18] The trial judge recognized that "the legal system in this country and this state cannot claim to have been above invidious discrimination" (V 893), that "race and gender are matters about which there are prevalent preconceptions, misconceptions and invidious discrimination pervading our society" and that "these prejudices exist and will continue" (V 890). Judge Baker took notice of the fact that when minorities speak out against systematic discrimination suffered by large segments of society, they have overwhelming evidence of a history of invidious discrimination in the courts, as well as other institutions of society" (V 893-94). He explained that

> Law enforcement officers, prosecutors and judges are predominantly white, male and middle or upper-middle class in income. Juries are not proportionately representative of minorities or poor persons. Not only are there disparities of race, age, gender and economic opportunities in those who commit and are victimized by murder, but the disparities are increased by those who police, prosecute, convict and sentence in murder cases (V 913).

Though Judge Baker acknowledged the "existence of prejudice about race and sex among prosecutors, who decide when to seek the death penalty, jurors who convict and advise the judges who sentence" (V 891), he concluded that this cannot invalidate Florida's

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[18] Such historical background evidence obviously bears on Appellant's claim of a pattern of discrimination. See Arlington Heights, 429 U.S. at 266.

system of capital punishment (V 890). Appellant disagrees with Judge Baker's analysis of the legal significance of this discrimination, but he agrees with Judge Baker's frank recognition of the problem.

This history has been often and well told, by historians[19] and, directly or inadvertently, by court opinions.[20] Appellant does not deem it necessary to argue the point, but merely to note it, as did Judge Baker.

3. The Need for An Evidentiary Hearing and Findings of Fact

When confronted with this issue in the past, this Court has consistently held that the individual defendants raising the claim had not made a "preliminary factual showing" sufficient to warrant a hearing. See Sullivan v. State, 441 So.2d at 614 (listing cases). Appellant is not certain what the Court means by this. If it means that race-of-the-victim discrimination does

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19 Jerrell Shofner, department chair and professor of history at the University of Central Florida and former president of the Florida Historical Society, has written extensively on the subject. Three of his essays are reproduced in Appendix C. See also R. Kluger, Simple Justice 59, 132, 218, 276, 289, 327, 561, 724, 728, 734 (1980); F. Read and L. McGough, Let Them Be Judged: The Judicial Integration of the Deep South 196-97 (1978).

20 See, e.g., McLaughlin v. Florida, 397 U.S. 184 (1964) (invalidating state statute prohibiting interracial cohabitation); Debra P. v. Turlington, 474 F. Supp 244, 251 & n. 13 (M.D. Fla. 1979), aff'd in pertinent part, 644 F.2d 397, 407 & n. 15 (5th Cir. 1981) (taking judicial notice of history of school segregation); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965) (invalidating state statute authorizing arrest of persons seeking service at "whites only" establishments); Dowdell v.City of Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (county's discriminatory allocation of municipal services); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (Discrimintion in classification of police officers). See also State ex rel. Virgil Hawkins v. Board of Control, 93 So.2d 354 (Fla. 1957); Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956).

not state a claim or that statistics cannot make a prima facie showing of a claim of discrimination, then Appellant's response is in the prior two sections of this brief. But if it means that the statistics presented in each of these cases were insufficient, then Appellant respectfully asks the Court to clarify the initial showing a defendant must make to obtain an evidentiary hearing on this issue.

In defining the quantum of proof necessary to make a preliminary factual showing, the procedural posture of the case is crucial. Appellant does not claim that the evidence proffered so far means that he wins his claim on the merits; he only asserts that the studies and qualitative data are sufficient to state his claim and to require further evidentiary development. Surely one need not conclusively prove his claim before he is entitled to a hearing on the claim; that would be too heavy a burden to impose. Requiring too much proof initially from a claimant would defeat valid claims of discrimination before validity is discerned. Further, allowing proof of the prima facie claim with statistics does not unduly burden the state. The state, in rebuttal, can dispute the vaidity of the proffered statistics or present affirmative proof of its own. To the extent that state-held data, beyond that available to Appellant, is necessary to resolve the issue, the state should be required to produce such data (see, e.g., V 304-05).

Appellant has stated a prima facie claim of constitutional magnitude. Appellant has come forward with a sufficient preliminary factual showing, and so the burden shifts to the state to "dispel the inference of intentional discrimination." Castaneda

v. Partida, 430 U.S. at 497. Mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut Appellant's prima facie case. Id. at 499 n. 19; Alexander v. Louisiana, 405 U.S. 625, 633 (1972). The state must introduce evidence to support its explanations. Castaneda, 430 U.S. at 499 n. 19. It "does not seem unreasonable to require the State to produce similar statistical evidence to rebut petitioner's claim. The State has available to it the information and files on its murder cases as well as a staff of researchers to compile such rebuttal evidence. The State with all its resources should be able to compile such information." Lewis, Mannle, Allen & Vetter, A Post-Furman Profile of Florida's Condemned -- A Question of Discrimination in Terms of Race of the Victim and A Comment on Spinkellink v. Wainwright, 9 Stetson L. Rev. 1, 41 (1979). This, of course, requires an evidentiary hearing and factfinding. And to the extent that the state does dispute the factual allegations made by this indigent Appellant, funds may be necessary to allow him to respond to the state's rebuttal.

At some point, there must be a hearing and factfinding on this issue. Appellant meets the criteria for obtaining a hearing in federal court, see Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), and in fact one district court has held a full two-week evidentiary hearing on this very issue in a Georgia case. See McClesky v. Zant, No. C-81-2434A (N.D. Ga 1983).[21] But Appellant

[21] Clearly a federal district court possesses the authority and power to hold such a hearing. The "power of inquiry in federal habeas corpus is plenary ... In every case [the district judge] has the power, constrained only if his sound discretion, to receive evidence bearing upon the appellant's constitutional

believes that a hearing in state court is far more appropriate. See Jones v. State, ___So.2d___, 9 F.L.W. 47, 48 (Fla. 1984). It is our statute and it should be our courts that guarantee its application in an evenhanded manner.

Before this Court addresses the broader factual or legal questions posed by Appellant's constitutional claim, however, it should remand this case for development of a full factual record. Difficult constitutional issues arising on a complex factual background ought not be resolved until the relevant facts have been clearly presented. The evidentiary record in this case --as it presently stands -- is not a satisfactory predicate for determining the important constitutional questions about discriminatory application of the death penalty, an issue of consummate significance to the administration of justice in our state. Since the discovery and hearing that Appellant sought were denied by the trial court and have not occurred, the record does not contain examination of the data forming the foundation of Appellant's claim.

It is time to stop and take stock of the system under which people are sentenced to die in Florida. Appellant's claim challenges the core assumption of that system: that it actually operates in a fair and unbiased way. Violent crime undermines the sense of order and shared moral values without which no society could exist. We punish people who commit such crimes in

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claim." Townsend v. Sain, 372 U.S. 293, 312, 318 (1963). Less clear is when it is an abuse of discretion for a district court not to hold a hearing. This is the issue presently pending before the en banc eleventh circuit in Spencer v. Zant, 715 F.2d 1562, 1577-83 (11th Cir. 1983), rehearing en banc granted ___F.2d___ (December 13, 1983).

order to reaffirm our standards of right and wrong. But if the punishment itself is administered in a way skewed by race, it fails its purpose and becomes like the crime that triggered it, just another spectacle of suffering -- all the more terrifying and demoralizing because this time the killer is organized society itself, the same society on which we depend for stability and security in our daily lives. No matter how much an individual criminal may "deserve" his punishment, the manner of its imposition robs it of any possible value, and leaves us ashamed instead of reassured.

A disproportionately high number of people on death row are there for killing white people. This means that something in the system is very awry. Appellant's statistics show this did not occur by chance. "What is your explanation? And can you go on living with such a system?"[22]

ISSUE III

SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON RACE OF THE VICTIM OR RACE OF THE DEFENDANT ALSO VIOLATES THE EIGHTH AMENDMENT

The fundamental teaching of Furman v. Georgia, 408 U.S. 238 (1972) is that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be ... wantonly and ... freakishly imposed." Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring). That teaching has been consistently adhered to by the Supreme Court in its subsequent capital

[22] The question was originally posed by Professor Charles Black in C. Black, Capital Punishment 101 (2d ed. 1982) (emphasis in original).

decisions. See, e.g., Zant v. Stephens, 456 U.S. 410, 413 (1982); Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Coker v. Georgia, 433 U.S. 584, 593-97 (1977); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976).

Unlike the fourteenth amendment's requirement of equal protection, the eighth amendment's prohibition against arbitrariness does not require a finding of intentional discrimination.[23] The opinions in Furman v. Georgia, 408 U.S. 238 (1972), which focused on the unequal imposition of the death penalty, specifically disallowed any reliance on a finding of invidious intent. Justice Douglas said "[o]ur task is not restricted to an effort to divine what motives impelled these death penalties." 408 U.S. at 253 (Douglas, J., concurring). Justice Stewart "put ... to one side" the question of intentional discrimination. 408 U.S. 310 (Stewart, J., concurring). And Justice White even assumed the capricious pattern of death sentencing he found resulted from "a decision largely motivated by the desire to mitigate the harshness of the law." 408 U.S. at 313 (White, J., concurring).

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[23] Similarily, a showing of disparate impact in this case is a "badge of slavery" and therefore violative of the thirteenth amendment as well. The thirteenth amendment abolished slavery and badges of slavery. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The systematic underevaluation of black life in the criminal justice system clearly is a badge of slavery. Further, the thirteenth amendment does not require a showing of discriminatory intent. Though the Supreme Court has reserved the question, see General Bld'g Contractors Ass'n v. Pennsylvania, U.S. , 102 S.Ct. 3141, 3150 n.17 (1982); City of Memphis v. Greene, 451 U.S. 100, 126-27 (1981), the legislative history of the amendment shows that a disparate impact can constitute a badge of slavery. See generally E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1871).

Furman's central holding found Georgia's capital statute unconstitutional solely because it "permit[s] this unique penalty to be ... wantonly and ... freakishly imposed." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. at 309-10 (Stewart, J., concurring)). That means the eighth amendment prohibits not only death sentences that are imposed "because of" race, but also sentences that are allowed to stand "in spite of" persistent racial disparities in the imposition of the penalty. Personal Administrator v. Feeney, 442 U.S.at 279. No showing of intentional misconduct, therefore, is required.

That is consistent with the law of the eighth amendment in other contexts, where the touchstone of the eighth amendment is effects, not intentions. See Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (Brennan, J., concurring); id. at 345-46 (plurality opinion). "The prohibition against cruel and unusual punishment contained in the Eighth Amendment ... is not limited to specific acts directed at selected individuals...." Gates v. Collier, 501 F.2d 129, 1300-01 (5th Cir. 1974). "The result, not the specific intent, is what matters; the concern is with the 'natural consequences' of action or inaction." Roecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972).

> An intent to punish may be one element in deciding whether there has been an eighth amendment violation, since the state of mind or purpose of a government official bears on the question of whether imposition of the punishment is a necessary or rational means to a permissible end. However, wrongful intent is not a necessary element for an eighth amendment violation. If the physical or mental pain that

> results is cruel and unusual, it is a violation of the eighth amendment regardless of the intent or purpose of those who inflict it.

Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979); see also Bel v. Hall, 392 F. Supp. 274, 276 (D. Mass. 1975) ("the personal good faith of the defendants is irrelevant to their obligation to eliminate unconstitutional conditions"). The most that has been required in any eighth amendment context is a showing of "deliberate indifference" to deprivations of constitutional magnitude. Estelle v.Gamble, 429 U.S. 97, 105 (1976).

The standard of proof to establish an eighth amendment claim and an equal protection claim are thus different; the latter requires proof of intent while the former does not. The evidence to be presented on both issues, however, might well be similar, as the same pattern of statistical disparity may be proffered to prove both claims.

Thus, Appellant has stated a claim under the eighth as well as the fourteenth amendment.

ISSUE IV

APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY HIS COUNSEL'S INABILITY TO CROSS-EXAMINE A KEY STATE'S WITNESS AND WAS DEPRIVED OF DUE PROCESS OF LAW BY THE STATE'S FAILURE TO DISCLOSE POSSIBLE "DEALS" MADE WITH THIS KEY WITNESS.

The state's attorney at trial failed to inform the defense of one of his key witnesses, Donald Holtzinger, until 11:20 a.m. on the opening day of trial -- even though the state had been fully aware of him for four months. Sireci v. State, 399 So.2d at 968. The state may have indirectly informed the defense prior to trial that Holtzinger had information about "the incident in

question"[24], id. at 968-69, i.e. , the Poteet murder, but that information was not terribly important because it was cumulative of evidence adduced from other witnesses at trial.[25] That was not what made Holtzinger a key witness. The point is that the defense had no advance notice of the genuinely crushing aspect of Holtzinger's testimony: Holtzinger testified, at great length, about an alleged plan by Appellant to murder his brother-in-law, David Wilson[26] (T 284-87, 305-06). Though counsel arguably had some vague knowledge about a potential witness named Holtzinger (V 46-48), "the nature of [the testimony] was not known to me at all.... The offer to kill the defendant's brother-in-law came as a total, absolute, completely unadulterated surprise to me" (V 48). Because Holtzinger was the only witness to testify about this alleged attempted murder, his testimony was extremely prejudicial, especially on the issue of penalty. His credibility thus was an essential issue.

Two aspects of the state's handling of Holtzinger render Appellant's death sentence unconstitutionally unfair. First, the state violated the dictates of Giglio v. United States. Second,

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[24] Appellant's trial counsel could not reasonably have been expected to find this out despite the state's discovery violation. When he became Appellant's attorney on September 22, 1976 (R 88), less than a month before trial, he was faced with a list of over seventy prosecution witnesses to investigate (V 49).

[25] Appellant confessed to Holtzinger that he killed Poteet (R 2-283). He also confessed to six other people who testified at trial (T 2-152-65, 194-95, 416-17, 420-21, 434-36, 453, 455-56, 491, 493, 497, 505-06, 598, 605).

[26] This is the same David Wilson whose letter pleading that Appellant's life be spared is found at (V 329).

the trial court erred in denying a continuance to allow the defense time effectively to respond to Holtzinger's devastating testimony.

A. The Giglio Violation

Prosecutorial suppression of an agreement with or a promise to a material witness in exchange for that witness's testimony violates a criminal defendant's due process rights. Giglio v. United States 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The "state must affirmatively correct testimony of a witness who fraudulently testifies that he had not received a promise of leniency in exchange for his testimony." Smith v. Kemp, 715 F.2d 1459 , 1463 (11th Cir. 1983). The issue is properly considered in a Rule 3.850 proceeding. Smith v. State, 400 So.2d 956, 962-63 (Fla. 1981).

Judge Baker, in his order, noted that at the evidentiary hearing Appellant "developed evidence that Holtzinger had three felony convictions at the time he testified at the Sireci trial. Holtzinger also had reason to believe he would benefit at his sentencing on one of his convictions if he were to testify against Sireci" (V 869). Judge Baker found that

> [U]nquestionably, the state violated Fla. R. Crim. P. 2.220 (a) (1) (i) by not giving Holtzinger's name and address as a witness only until the first day of the trial. Holtzinger was an important and significant witness, arguably more so on the sentence that should be imposed than the question of guilt ....
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> . . .
>
> The conduct of the prosecuting attorney on this point is very questionable. It would have been a very simple matter to mention to [defense counsel] that Holtzinger was one of the new witnesses whose name was supplied on the first trial day, and this could have been done before

> calling Holtzinger to the stand. Holtzinger's record and dealings with the prosecutor could have been told to [defense counsel], and [counsel] could have been allowed to interview Holtzinger in advance of his testifying, which is all [counsel] had requested. That would have avoided the only discovery problem in this case.
>
> It doesn't seem to be a great deal to ask of a prosecutor that when he has omitted a material witness from discovery for some reason, and he wants to use that witness, that the prosecuting attorney take the initiative to prevent surprise of defense counsel and possible prejudice to defendant. Late notification of witness is not common, and it is generally from oversight. There is an established procedure for curing such a discovery violation and permitting testimony from the witness. At the time of the trial the prosecuting attorney had all of the information that has since been developed by defense counsel, and the prosecuting attorney could have put this entire issue to rest by offering his information on Holtzinger to [defense counsel] (V 886 879).

The evidentiary hearing revealed that at the time he testified against Appellant at trial, Holtzinger had at least three prior felonies: burglary of a structure (in 1976), burglary of a conveyance (in 1975) and an undetermined charge (in 1974).[27] In his testimony, however, Holtzinger admitted only that he was "serving time for violation of probation" when he met Appellant in the Orange County jail (T 2-279, S 24).

Most importantly, the hearing revealed that when Holtzinger was convicted of burglary in 1976, a habitual offender charge was filed and sentencing was deferred. During this period of deferral, Holtzinger's attorney contacted Appellant's prosecutor about the possibilities of Holtzinger's testifying against

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[27] This information was adduced from Jay Stevens, Holtzinger's attorney (V 68, passim). Trial counsel apparently was aware of the two earliest convictions (T 2-310).

Appellant. Appellant's prosecutor told Holtzinger's lawyer that "if Mr. Holtzinger did testify, that he would agree to write a letter or verbally communicate to the sentencing judge that Mr. Holtzinger had cooperated with the state and had provided some assistance in the course of the Sireci trial" (V 77, 86). Judge Baker seemed to find this testimony credible (V 884). After Holtzinger testified against Appellant, the prosecutor kept his promise and sent a letter to Holtzinger's sentencing judge (V 82-83). Thereafter, Holtzinger was sentenced only to time served on the burglary charge and the habitual offender charge was dismissed (V 70-84). These facts strongly suggest that Holtzinger received favorable treatment in exchange for his testimony against Appellant or at least that the witness was biased because of the pending charges against him.

Holtzinger was a fatal witness, especially on the issue of penalty.[28] Only he testified about the alleged attempt to murder Appellant's brother-in-law. This constituted a highly inflammatory collateral offense and cast a substantially more culpable gloss on Appellant's conduct; it also constituted a powerful nonstatutory aggravating circumstance, i.e., a violent offense for which there had been no charge or conviction (V 856). See Elledge v. State, 346 So.2d 998 (Fla. 1977).

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[28] It does not matter that Holtzinger actually testified during the guilt/innocence phase, because the jury was instructed at the penalty phase that it would consider all the evidence in both phases of the trial (S 11, 48), and the prosecutor urged the jury not to forget "that testimony that you listened to in the first trial." In fact, the prosecutor attempted to call Holtzinger at the penalty phase, but could not because the testimony would only have repeated what the witness had said at the guilt phase (S 23-25).

None of this devastating testimony was in any way attacked because counsel lacked the information necessary to do so.[29] Trial counsel testified below that had he been aware of Holtzinger's history, he would have brought it out (V 33-35). He would have done so because Holtzinger "was such a compelling witness, and such a very hurtful witness, detrimental to our case, I would have grabbed at any straw to winnow away his credibility" (V 35).

B. Denial of a Necessary Continuance

1. State-Imposed Ineffective Assistance of Counsel

Trial counsel said during the trial itself that Holtzinger's testimony came as a "total absolutely complete unadulterated surprise" (T 339) to defense counsel; counsel reiterated at the hearing below that he first became aware of Holtzinger's testimony "after he had started testifying" (V 32). By refusing a continuance, the trial court effectively denied Appellant the right to confront Holtzinger's highly damaging testimony. An apparently identical issue presently is pending before the United States Supreme Court in United States v. Cronic, ___U.S.___, 51 U.S.L.W. 3598 (1983) (granting certiorari in United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982)). The "oral arguments before the Justices [in Cronic] focused primarily on whether the time constraints imposed on the attorney constituted an improper

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[29] Trial counsel testified below that in some sense it was a "strategic" choice not to cross-examine Holtzinger (V 57). But to label the choice "strategic" is meaningless, because it was a decision made in an informational vacuum. The choice was made without full knowledge of Holtzinger's prior record or pending charges (V 58-59). It is somewhat misleading to term this a calculated, reasoned, informed strategy choice.

external constraint on his ability to provide effective assistance." 52 U.S.L.W. 1124; see also id at 3580 (excerpts from oral argument).

Defense counsel was completely surprised by Holtzinger's testimony (T 339, V 32, 48). He testified that he had done "nothing" to prepare to cross-examine him (V 32). He stated that Appellant's prior counsel, Mr. Taylor, had made an offhand comment about "some guy in the jail that was supposed to testify" on the Friday before trial (V 48). However, he did not connect this with Holtzinger, even after receiving his name on a witness list, as his address was listed as General Elevator Corporation and not the Orange County Jail (V 51-53). He testified that he had not come across Holtzinger's name in reviewing any of the discovery (V 47). He testified that he never talked to Holtzinger either before or after he testified (V 56).

As discussed above, there was substantial impeaching evidence that could have been brought out concerning Holtzinger. He was awaiting sentencing on a felony charge with a possibility of a jail sentence at the time of his testimony (V 70-71). He also knew that the fact of his testimony would be communicated to his sentencing judge (V 76-77). He was advised by his attorney that he should cooperate and testify and that he could well benefit from this (V 82). None of this significant impeaching evidence was brought out.

The analysis of this issue must take place under the standards developed in Valle v. State, supra, due to the fact that state action was involved in counsel's inability to cross-examine Holtzinger. The state never revealed the nature of

Holtzinger's testimony and his name was only placed on a witness list the morning of trial. The trial court refused to allow a continuance so that counsel could investigate Holtzinger. Thus, it was due to state action that counsel was unable to cross-examine Holtzinger.

The state's failure to reveal Holtzinger's testimony and the court's failure to continue the trial denied Appellant the effective assistance of counsel.

2. This Continuance Issue Is Itself Cognizable in a 3.850 Proceeding

Appellant argued to this Court on direct appeal that the trial court's denial of a needed continuance deprived him of due process. This Court decided the issue adversely to Appellant. Sireci v. State, 399 So.2d at 968-69. But it did so on the basis of the record of the trial proceeding, a record disclosing little of the prejudice actually suffered by Appellant by denial of the continuance. Because only now, after a evidentiary hearing on the matter, is the record sufficient to allow informed resolution of the claim, this Court should revisit the issue.

A 3.850 motion cannot be used as a "second appeal" for review of issues which were raised on direct appeal. But in deciding whether an issue "was raised", this Court must ask whether the procedural mechanism of direct appeal is such that a particular claim may effectively be raised by that route. Issues which may be resolved on the basis of the trial record should be required to be raised on direct appeal. But when disposition of

an issue involves development of facts outside of the record, then those facts must be developed in a postconviction proceeding and that issue should be cognizable in 3.850.

The continuance question in this case is just such an issue. The evidence presented at the hearing on Appellant's 3.850 motion revealed that Holtzinger may well have received a deal for his testimony against Appellant. These facts, crucial to fair disposition of the continuance issue, were only developed at the hearing below and were not before this Court during the direct appeal. This Court should reconsider the issue in light of these facts.

ISSUE V

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS COUNSEL'S FAILURE TO OBJECT TO A COMMENT ON APPELLANT'S EXERCISE OF HIS RIGHTS TO COUNSEL AND TO REMAIN SILENT, THEREBY WAIVING REVERSIBLE ERROR UNDER FLORIDA LAW.

Appellant's trial counsel failed to object to a comment on Appellant's exercise of his rights to remain silent and to an attorney. Detective Nazurchuk testified concerning the interrogation of Appellant shortly after he was arrested. He told the jury that he read Appellant his rights and that he "requested his attorney" (T 531-32). This Court, on Appellant's direct appeal, held that the issue was procedurally barred because trial counsel failed to object.[30] Such failure to object to clear reversible

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[30] This Court's opinion on Appellant's direct appeal, dated April 9, 1981 and included in Appendix D herein, stated two grounds for denying Appellant's claim based on comment on silence: (1) the "defendant made no objection to the admission of this testimony nor did he move for a mistrial," and (2) any error was harmless. Appellant argued on rehearing that comment on silence is not subject to a harmless error analysis. See Appendix D. This Court agreed and modified its prior opinion so as to "delete its statement that a comment on silence can be harmless error." See

error constituted ineffective assistance of counsel. Because this issue involves a specific omission by counsel, unimpeded by state action, the four-pronged test of Knight v. State, 394 So.2d 997 (Fla. 1981) must be applied.

First, the specific challenged omission of trial counsel was clearly detailed in the Rule 3.850 pleading.

Second, the omission was a substantial and serious deficiency measurably below that of competent counsel. Failure to object to a comment on silence is a substantial deficiency. Further, at the time of Appellant's trial, October 1976, Florida's contemporaneous objection rule had been long established; indeed, the case establishing the rule involved a comment on silence. State v. Jones, 204 So.2d 515 (Fla. 1967). Similarly, the First District Court of Appeal, relying upon Jones, held that a witness's improper reference to a defendant's right to remain silent is waived by failure to object. Clark v. State, 336 So.2d 468, 470-72 (Fla. 1st DCA 1976). See also Clark v. State, 363 So.2d 331 (Fla. 1978). Thus, counsel should have known that a contemporaneous objection was required to preserve this issue.

Appendix D. But when the revised opinion was released (and published in the Southern Reporter), it included the harmless error conclusion and excluded the failure to object ground. 399 So.2d at 970; Appendix D.

So why did counsel not object? He testified at the hearing below that his normal practice is to object to a comment on silence and then to consult with his client as to whether he would move for mistrial (V 37-39). But he could not recall why he did not object to this testimony in this case (V 40).[31]

Numerous cases have held that failures to object or to prevent the admission of improper evidence can amount to ineffective assistance of counsel. See e.g. Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); Boyer v. Patton, 579 F.2d 284 (3rd Cir. 1978); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); United States v. Bosch, 584 F.2d 113 (1st Cir. 1978); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). Boyer v. Patton, supra involved the precise issue here. The court found a denial of effective assistance of counsel and reversed for a new trial, solely because of trial counsel's failure to object to a comment on silence. Thus, it is clear that this failure constituted a substantial deficiency.

The third and fourth prongs of the Knight test are also met here. An objection and a motion for mistrial would have resulted either in an immediate mistrial or an appellate reversal, as a properly preserved comment on silence constitutes per se reversible error without regard to any harmless error test. Clark v. State, 363 So.2d 331 (Fla. 1978). This is clear in the present case when one examines the original appellate opinion and the order on rehearing. See Appendix D. Thus, this deficiency was "outcome determinative" in the truest sense of the term. An

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[31] Trial counsel was unclear as to whether he considered Nazarchuck's statement a comment on silence (V 39).

objection and a motion for mistrial would have resulted in a new trial, without the prejudicial comment. Similarly, the fourth prong of Knight is also met. This deficiency cannot be considered harmless beyond a reasonable doubt, as it denied Appellant a mistrial or appellate reversal and a new trial without the harmful comment.

Thus, Appellant was denied the effective assistance of counsel and his case must be reversed for a new trial.

ISSUE VI

THE REQUIREMENT IN FLORIDA THAT THE JURY BE INSTRUCTED AS TO ALL LESSER-INCLUDED OFFENSES, REGARDLESS OF WHETHER THERE WAS EVIDENCE TO SUPPORT THOSE LESSER OFFENSES, RENDERED THE FLORIDA CAPITAL SENTENCING SYSTEM AS A WHOLE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A system of capital sentencing which includes a requirement that juries be instructed not only upon the offense charged but also upon all lesser-included offenses -- regardless of whether there is an evidentiary basis for such instructions --interjects into that capital sentencing process constitutionally irrelevant considerations. This is so because a system that permits juries to render verdicts on lesser offenses that are not fairly supported by the evidence unleashes those juries to return verdicts on lesser offenses with no guidance and without checks upon the exercise of discretion. The effect of such an unchecked license is to unchannel the process by which the death sentence is meted out, for an unchanneled verdict on a lesser offense is also an unchanneled verdict precluding the death sentence. While

such unguided discretion may work to a capital defendant's advantage as well as to his disadvantage, it is still an arbitrary system. See Hopper v. Evans, 456 U.S. 605, 611 (1982).

Florida has such a system. See Brown v. State, 206 So.2d 377, 381 (Fla. 1968); Killen v. State, 92 So.2d 825, 827 (Fla. 1957); Fla. Stats. §919.16 (1965); Fla. R. Crim. P. 3.490, 3.510, amended at 403 So.2d 979 (1981).

Though at least one other jurisdiction has accepted Appellant's reading of Hopper v. Evans, see State v. Strickland, 298 So.2d 645, 655-56 (N.C. 1983), Appellant acknowledges that to date it has been rejected by this Court on the merits. See Aldridge v. Wainwright, 433 So.2d 988 (Fla. 1983); Jackson v. State, 438 So.2d 4 (Fla. 1983).Appellant respectfully asks the Court to reconsider the question.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to vacate the sentence of death or, in the alternative remand the cause for an evidentiary hearing and findings of fact.

Respectfully Submitted,

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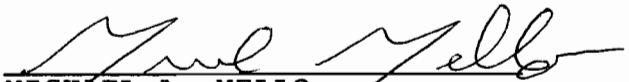
BY 

MICHAEL A. MELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to MARGENE ROPER, Assistant Attorney General, 125 North Ridgewood, 4th Floor, Daytona Beach, Florida, 32014, this 29th day of March, 1984.

Of Counsel