ORIGINAL

NO. 65875

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

JAMES DUPREE HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

FILED
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PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF FLORIDA

JAMES DUPREE HENRY, Petitioner, vs. LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.	)	CASE NO. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, JAMES DUPREE HENRY, through his undersigned counsel respectfully requests this Honorable Court to issue its writ of habeas corpus, and in support thereof states:

1. Jurisdiction of this Court is invoked pursuant to Article V, Sections 3 (b) (1), (7), (9), Florida Constitution and Rule 9.030 (a) (3), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE

2. The Offense

Mr. Henry was charged with the first degree murder of Z. L. Riley. The death occurred during the commission of a robbery at Mr. Riley's apartment in March of 1974. Mr. Riley's apartment had been ransacked and he had been laid on his bed and tied. The cause of death was, essentially, that the deceased had swallowed his tongue because a rag placed around his mouth as a gag had apparently pushed against his tongue while he was lying on his back. The medical examiner analogized the cause of death to an epileptic victim swallowing his tongue during a seizure (T 218).[1] The deceased also had some bruises and lacerations that were unconnected to the cause of death, were "quite superficial" and which were unclear as to the time of their occurrence (T 210, 220, 223) (Testimony of Medical Examiner). Mr. Henry was arrested three days later (T 231) and gave a custodial statement

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1 "T" designates references to the Trial Transcript, and "R" designates original Record on Appeal.

to the police in which he admitted the robbery of Mr. Riley, though he stated that he did not know that Mr. Riley had died until being told so by the police (T 247).

3. The Trial

Mr. Henry was indicted for first degree murder and trial by jury began on June 24, 1974. Though the indictment charged premeditated murder (R 1), in accord with Florida law, such an indictment included the theory of felony murder, and the prosecution proceeded on that theory. The jury rendered a general verdict of guilty and the case proceeded to the sentencing trial on the same day.

During the sentencing trial, the prosecution was allowed to admit evidence that Mr. Henry had resisted arrest by shooting the arresting officer and was permitted to present evidence of criminal charges made against Mr. Henry, though Mr. Henry had entered pleas to less severe offenses. Because this evidence involved offenses for which there had been no convictions entered, defense counsel objected to the introduction of the evidence as not being encompassed by the statutory list of aggravating circumstances. The judge overruled these objections because it was his intention to allow "generally charged" evidence. Mr. Henry presented testimony of friends concerning his character and helpfulness (T 393-400).

The case was then submitted to the jury. The trial judge charged the jury as follows:

> [Y]ou will render an advisory sentence to the Court based upon the following matters:
>
> Whether sufficient aggravating circumstances exist for you to recommend the Death Penalty or Life Imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following:
>
> [listing of the aggravating factors as they are set out in the statute]
>
> In considering mitigating circumstances, you shall consider all factors which are mitigating including but not limited to the following:
>
> [listing of the mitigating factors as they are set out in the statute]

> Your advisory sentence must be the recommendation of a majority of your number. That is, seven or more of you must agree upon the recommendation you submit to the Court.

(T 410-413) (emphasis supplied).

During its deliberations the jury inquired whether "there [is] any way of a prisoner getting out of prison in less than 25 years, some way other than parole when sentenced to life imprisonment" (T 414). The judge reread the instruction that one sentenced to life imprisonment is "required to spend no less than 25 calendar years before being eligible for parole...." Id.

By a 7 to 5 vote the jury reached an advisory verdict recommending the death sentence (T 416). The judge immediately imposed the death sentence (T 423).

4. The Direct Appeal

Mr. Henry appealed his conviction and death sentence to this Court. In a per curiam, 4 to 2 decision the Court upheld Mr. Henry's conviction and death sentence. In ruling upon the death sentence the Court quoted the trial judge's findings of fact and concluded that "[w]e find that the judgment and sentence of the lower court in this cause is in accordance with the justice of the cause." Henry v. State, 328 So.2d 430, 432 (Fla. 1976). The United States Supreme Court denied certiorari. Henry v. Florida, 429 U.S. 951 (1976).

5. The Post-Appeal Proceedings

Mr. Henry filed a motion to vacate his judgment and sentence, pursuant to Fla.R.Crim.P. 3.850, in the Circuit Court. This motion was denied on November 19, 1979 and affirmed by this Court on November 27, 1979. Henry v. State, 377 So.2d 692 (Fla. 1979).

Mr. Henry then, on November 27, 1979, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida. The federal district court granted the petition for writ of habeas corpus insofar as the death sentence and ordered that a new penalty trial be held, and denied relief as to all other grounds. Respondent Wainwright then appealed, and Mr. Henry filed a cross-appeal. The court of appeals affirmed the district court's

order granting the writ of habeas corpus. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) (Unit B). The Supreme Court granted certiorari and remanded the cause for further consideration in light of Engle v. Isaac, 456 U.S. 107 (1982). Wainwright v. Henry, 457 U.S. 1114 (1982). The previous judgment was adhered to on remand by the court of appeals. Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982) (Unit B). Wainwright again applied for certiorari. The Supreme Court granted certiorari and remanded for further consideration in light of Barclay v. Florida, 103 S.Ct. 3418 (1983). Wainwright v. Henry, 103 S.Ct. 3566 (1983). On December 13, 1983, the court of appeals reversed the district court's order insofar as it had granted the writ of habeas corpus and affirmed the denial of habeas corpus relief on the issues raised by Mr. Henry on his cross-appeal. Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983) (Unit B). The Supreme Court denied certiorari on June 25, 1984. Henry v. Wainwright, 104 S.Ct. 3564 (1984).

On August 21, 1984, the Governor signed a Death Warrant for Mr. Henry, effective from noon September 13, 1984 through noon September 20, 1984. His execution has been scheduled for September 20, 1984 at 7:00 a.m. No stay of execution has been ordered.

On September 10, 1984, Mr. Henry filed a motion for post-conviction relief in the Circuit Court pursuant to Rule 3.850.

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GROUNDS FOR ISSUANCE OF THE WRIT

MR. HENRY'S DEATH SENTENCE IS DISPROPORTIONATE AND THEREFORE UNCONSTITUTIONAL

Before this Court is a case that is, by its wholly open-ended sentencing process, unique in the history of capital cases that have come before this Court since the post-Furman reinstatement of capital sentencing. Mr. Henry comes before you now, fully mindful of the doctrine of finality, but nevertheless seeking justice, for his death sentence was imposed by fundamentally unjust and unreliable means. He asks and prays for this Court to closely examine those means. They are at odds in a very basic way with the standards this Court has sternly set to achieve the goal of accurate and fair selection of those who should die from the many who would live. No case that has come before this Court case has included the errors or the compoundment of errors that infected the selection of Mr. Henry to die. Nor is it likely that any case ever will. At the same time, there could be no case where it would be clearer that the accumulation of errors actually affected the sentence ultimately imposed -- for Mr. Henry was sentenced to die most certainly as a result of that accumulation. It is this Court that can correct what went wrong, address the issue of fundamental fairness, and for the interests of justice strike the balance in this case on the side of equity.

This Court has strived over the years since Furman to construct and maintain a fair, just and reliable system of capital sentencing, a system that would accurately and consistently select those defendants upon whom society's ultimate sanction would be applied from the many for whom it is not. To achieve that goal, this Court has demanded strict procedures for the administration of capital sentencing in our State. Among those requirements are restrictions upon the type of evidence that may be offered, insisting on the stringent limitation to statutory aggravating factors; the adoption of a reasonable doubt standard to ensure the accuracy of the reliance upon

aggravating factors, precluding even the consideration of any factors not meeting that standard; adoption of carefully drafted standard instructions to guide the jury in its resolution of the weighty life and death decision, assuring that the jury understand the meaning of the aggravating factors, the need for the prosecution to prove those factors by the fundamental measure of beyond a reasonable doubt, that its deliberations and verdict must rest exclusively on statutory aggravating factors and that at least one such statutory factor must be found for there to be a death verdict, and that the jury be informed of the weighing process demanded of it under our capital sentencing system; the steady deference to the verdict of the jury as the conscience of the community and the insistence that its role not be tainted or derogated; and the mandate that the sentencing judge's decision be as closely limited as the jury's decision.

Mr. Henry's sentencing trial was alien to these strictures. Omitted from the selection of him to die were any of the safeguards so painstakingly sought by this Court in its administration of the penalty of death on behalf of the people of Florida. And the absence of these standards mattered very much.

By close adherence to these standards and the vigilance of its review, this Court has struggled to avoid the wide-open "anything goes" process that characterized the prior capital sentencing schemes in this country. This Court has thereby sought to attain fairness and accuracy in the somber and momentous process of selecting the few who will die at the hands of their government from the many who should not.

This case, unlike any other, represents a throwback to that wide-open process of another era. It is a rare case that has fallen between the cracks of a system crafted to be fair and reliable. And one that requires the safety net that only this Court can provide in order to maintain that fairness and reliability for Mr. Henry and for that system. "Finality" is a goal for the system to achieve, but it is not meant to be an end unto itself so as to prevent the doing of justice for that rare instance where justice must be done. As we will discuss in detail in the following pages, this is that rare case requiring

such intervention by this Court. We will also present below the reasons why this case may have fallen between the cracks and the legal bases of why it should not be allowed to do so. But at bottom we urge that fundamental notions of justice plead for this Court's action, for the selection of Mr. Henry to die was neither fair nor reliable.

A. Introduction: The Need for Proportionality Review

This Court's mandatory review of death penalty cases is designed to assure the consistency among cases in this state and as recognized by Furman v. Georgia, 408 U.S. 238 (1972) and Proffitt v. Florida, 428 U.S. 242 (1976). One aspect of this review process is "to ensure relative proportionality among death sentences which have been imposed statewide. After we have concluded that the judge and jury have acted with procedural regulatory, we compare the case under review with all past capital cases to determine whether the punishment is too great." Brown v. Wainwright, 392 So.2d 1237, 1331 (Fla. 1981). Proportionality review is needed because "we pride ourselves in a system of justice that requires equality before the law. When the facts are the same, the law should be the same." Slater v. State, 316 So.2d 539, 542 (Fla. 1975). This Court's review "guarantees that the reasons present in one case will lead to a similar result to that reached under similar circumstances in another case ... If a defendant is sentenced to die, this Court can review that case in light of other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia can be curtailed and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." State v. Dixon, 283 So.2d 1, 10 (1973).

This Court has, in a number of cases, explicitly stated that it compared cases before it with death sentences imposed in other cases, see Williams v. State, 437 So.2d 133 (Fla. 1983) ("We have compared this case to similar cases"); Menendez v. State, 419 So.2d 312, 315 (Fla. 1983) ("Our function in reviewing a death sentence is to consider the circumstances in light of our other

decisions"); McCray v. State, 416 So.2d 185, 188 (Fla. 1982) (sentence "proportionate to those meted out in similar cases"); Arango v. State, 411 So.2d 172, 174-75 (Fla. 1982) (rejecting argument that sentence was "disparate" when compared to "earlier capital decisions"); Blair v. State, 406 So.2d 1103, 1109 (Fla. 1981) (sentence deemed improper after "comparing this case with others"); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979) ("to impose the death sentence on the appellant would not be consistent with other sentences imposed in similar circumstances"); Meeks v. State, 339 So.2d 186, 192 (Fla. 1976) ("identical crimes committed by people with similar criminal histories require identical sentences"); Provence v. State, 337 So.2d 783, 786 (Fla. 1976) (sentence disproportionate when compared with "other cases"); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) (responsibility of this Court to "review the sentence in light of ... other decisions"); Alford v. State, 307 So.2d 433, 445 (Fla. 1975) (comparing the aggravating and mitigating circumstances with "those shown in other capital cases"); King v. State, 436 So.2d 50, 55 (Fla. 1983); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982); Neary v. State, 384 So.2d 881, 888 (Fla. 1980); McCaskill v. State, 344 So.2d 1276, 1279-80 (Fla. 1977), and with the sentences received by accomplices to the same crime, see Demps v. State, 395 So.2d 501, 506 (Fla. 1981); Gafford v. State, 387 So.2d 333, 337 (Fla. 1979); Downs v. State, 386 So.2d 788, 795 (Fla. 1980); Jackson v. State, 366 So.2d 752, 757 (Fla. 1978); Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977); Witt v. State, 342 So.2d 497, 500 (Fla. 1977); Sullivan v. State, 303 So.2d 632, 638 (Fla. 1974).

Thus, the opinions of this Court indicate that some form of proportionality review occurs in every capital case. Given this, Mr. Henry's death sentence cannot stand for two reasons. Mr. Henry will show, first, that because this Court must examine whether the penalty in a given case was proportionate to other sentences imposed for similar crimes, the apparent failure of this Court to undertake such review in this case denied him due process of law. Second, even if this Court did undertake

proportionality review, this Court appears to exclude non-statutory mitigating evidence from its consideration.

B. The Lack of Explicit Proportionality Review in Mr. Henry's 1976 Appeal

Nothing in this Court's opinion in Mr. Henry's 1976 appeal suggests proportionality review. No comparison was made of the circumstances of Mr. Henry's case with any other case in order to determine whether Mr. Henry's death sentence was too great a punishment, in part because this was an "early case decided after the reenactment of the death penalty statute." Sullivan v. State, 441 So.2d 609, 613 (Fla. 1983).

More importantly, however, this Court has stated that the guarantee of proportionality may be fulfilled without discussing the issue explicitly in every death penalty opinion. In Messer v. State, 439 So.2d 875 (Fla. 1983), the Court noted that it must conduct proportionality review but rejected "the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases."

The answer provided in Messer and Sullivan will not do. Mr. Henry will show that there is a right to proportionality review based on Florida law. That right cannot be deprived without due process of law. The naked assurance that proportionality review is in fact occurring, with no objective evidence to that effect, cannot constitute due process of law.

The state law basis of the right is clear. This Court's cases beginning with Dixon and continuing through Brown and Messer, leave no doubt that this Court has stated that it would review each death penalty to determine whether the penalty was being applied proportionally. A state-created right, here the right to proportionality review, invokes fourteenth amendment due process protections. This Court's assurance of appellate review of the substantive fitness of a death sentence constitutes a material right. Its materiality is not diminished by the fact that it originates in state law. Most importantly, the right may not be denied without due process of law, as defined in the fourteenth amendment to the federal Constitution.

Due process protections apply, because Florida law recognizes a right to proportionality review. This right is cognizable under the fourteenth amendment of the Constitution of the United States, which must be satisfied whenever the government places in jeopardy a substantial interest in life, liberty or property. Once a state confers this right upon a prisoner, for whatever reason, the state cannot then deprive him of the entitlement without offering him due process of law. Modern due process decisions have long since established that a state-created right, once created, is protected by the due process clause of the fourteenth amendment. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (state-created liberty right); Board of Regents v. Roth, 408 U.S. 564 (1972) (state-created property right). Each of these decisions makes clear that an expectation of receiving some benefit will, if sufficiently founded in state law, constitute a protectible interest. Among the sorts of rights commanding due process protection, although originating in state law, are rights of "potential litigants [to make] use of established adjudicating procedures." Logan v. Zimmerman, 455 U.S. 422, 429 (1982) (state-created right to administrative forum); Hicks v. Oklahoma, 447 U.S. 343 (1980)(state-created right to jury determination of criminal sentence).

Given that Florida law recognizes a substantive right to proportionality review, that right cannot be deprived except by due process of law; for fourteenth amendment purposes, the materiality of the right is not diminished by the fact that it originates in state law and that its precise contours are still in the process of development by this Court. The United States Supreme Court has "repeatedly held that state [law] ... may create ... interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment," Vitek v. Jones, 445 U.S. 480, 488 (1980). "Once a State has [created a right of this sort] ... due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" Id. at 488-89. For "the touchstone of due process is the protection of the individual against arbitrary

action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1978). Thus it is that "an arbitrary disregard of a [state-created right] ... is a denial of due process of law." Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

Having shown that the due process clause does cover the state-created right to proportionality review, it follows that the federal Constitution sets the measure of the process due. This principle reflects the Supreme Court's rejection of the right-privilege analysis which in another day operated to deny constitutional protection to many interests well-founded in state law. See Board of Regents v. Roth, 408 U.S. at 571 & n.9. Once a constitutionally protected interest is identified, here the right to proportionality review, the extent of procedural protection must be ascertained. To this end, the Court in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), employed a balancing process that weighs three factors: the private interest that will be affected by the government action at issue, the public interest in limiting the fiscal and administrative burdens of additional procedural safeguards, and the probable effect such safeguards will have on reducing the risk of erroneous decisions. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Dixon v. Love, 431 U.S. 105, 112-15 (1972); Davis v. Page, 714 F.2d 512, 515-18 (11th Cir. 1983) (en banc).

In taking the measure of these factors in a death penalty case, a court must also account for eighth amendment jurisprudence. The past decade's decisions make clear that the extraordinarily weighty individual interest at stake justifies heightened due process protections, so that safeguards which might suffice in less sensitive contexts will not meet the mark here. Weighed according to these guidelines, the procedural safeguards established by Florida law, as applied in this case, fall well short of the constitutional minimum.[2]

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[2] A caveat is in order. Mathews v. Eldridge provides the proper analysis and identifies the interests at issue when deciding the process that is due. But Mathews and its progeny tell us nothing about the merits, nothing about resolution of those interests when life is at stake. This death-sentenced petitioner is asserting the most important secular claim that can be put forward -- the right to life. We have found no case in which this right has been taken by the state with anything less than the fullest measure of due process of law. On their

The procedure adopted by this Court does not accord Petitioner the process to which he was due because if proportionality review actually does take place, it is invisible. The procedure adopted by this Court in Messer is simple: sub silentio analysis of the proportionality issue and a clear rejection of the assertion that "in our written opinions we must explicitly compare each death sentence with past capital cases." Messer v. State, supra.

A balancing of the Mathews v. Eldridge factors shows why due process requires more. The individual defendant's interest is awesome: the possibility that his death sentence is comparatively excessive. The state's interest here is nonexistent. There would be no discernible additional cost, either of time or fiscal resources, in this Court's making explicit the proportionality analysis it says occurs anyway in all capital cases.

The risk of error, moreover, is immense. This is so because determining what constitutes a "similar case" is extremely difficult. See, e.g., Baldus, Pulaski, Woodworth and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980). To a degree perhaps unequaled in any other area of law, capital cases implicate the perspectives and attitudes of the individual, be he judge or attorney, reflecting upon them. These cases "emerge from society's continuing wrangling over the moral and social justification for capital punishment." Brown v. Wainwright, 392 So.2d at 1333. It is difficult to minimize the magnitude of the inquiry which the concept of comparative excessiveness requires. Lockett teaches that the decision to impose the death penalty in one case, and not in another, may be justified by factual circumstances relating to the offense itself or to the character or record of the offender. As a consequence of Lockett, how one classifies "other cases" in terms of the particulars of the

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merits, the welfare benefits cases, the Social Security cases, the job interests cases, need not be distinguished. They distinguish themselves.

offense and the characteristics of the defendant, so that one can compare the death sentence under scrutiny with sentences imposed in "similar" cases, is crucial to the proportionality inquiry.

But it is because this Court is at the center of the "thunderous emanations of this great debate" over the death penalty, Brown v. Wainwright, 392 So.2d at 1333, it must give reasons, in its published opinions, for the results it reaches in death cases. To be sure, a court's first obligation is to decide the case before it. But the highest state court, in passing on the proportionality of a death sentence, must do more. It must explain that result to the parties. It must resolve legal issues in a reasoned manner, one that lends itself to review by the United States Supreme Court. It must provide reasoning to those who look to its published opinions for guidance.

In the American system of government, a court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a rational and logical basis for its decision. Reasoned justification must be at the core of judicial decisions; only thus will a court's decision have legal quality despite the inevitable value choices involved. The requirement that a court be principled arises from the apparent anomaly of judicial supremacy in a democratic society. If the judiciary really is "supreme," in the sense that it may impose its value choices on the majority, then the society is not democratic. But under our system the judiciary is limited: the central limitation is that the judicial process "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved ... [resting] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles apply." H. Wechsler, Principles, Politics and Fundamental Law 21 (1963). This quality sets courts apart from democratically-elected legislatures, because "no legislature or executive is obligated by the nature of its function to support its choice of values" by reasoned explanation. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959).

In capital cases, the need for principled resolution rises to the level of constitutional necessity. The Supreme Court, in upholding the constitutionality of Florida's capital sentencing scheme, relied upon the vigilance of this Court's "guarantee" that "the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." Proffitt v. Florida, 428 U.S. at 251. The appeal procedure was thus seen as an integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In the Proffitt Court's view, review by this Court serves as a final check against the arbitrary imposition of death sentences, for it is a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

The Proffitt Court believed that this Court would undertake "responsibility to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the fairness and reliability of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

From this it follows that courts, and especially state appellate courts reviewing capital cases, must justify their results by reasoned explanation. But reasoned explanation that only occurs in the privacy of judges' chambers will have little meaning. In order to satisfy its responsibilities, this Court must, in its opinions, explicate the real grounds of its decisions. Summary disposition of an issue as fundamental as proportionality review, an issue of genuine difficulty, means that in effect the Court is "decreeing value choices in a way that makes it quite impossible to speak of principled determina-

tions or the statement and evaluation of judicial reasons, since the court has not disclosed the grounds on which its judgments rest." H. Wechsler, supra at 28.

This Court's disposition of proportionality review in capital cases must appear to be, as well as be, based on reason. "For any well functioning governance, it is as important that decisions seem appropriate as well as that they are appropriate. This is especially true for the courts, which are supposed to dispense even-handed justice.... [An] aspect of treating a rational being rationally is to explain to him through reasons why a decision that adversely affects his interests has been reached. The litigants in a legal case, especially the losing ones, have an important stake in reasoned justification." Greenwalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 999 (1978). The public as well must know that justice is dispensed on a principled basis. "It is vital that courts assure not only litigants but all concerned with the integrity of the judicial process that decisions are grounded on sound bases." Id.

Perhaps most importantly, sub silentio proportionality review stunts the growth of the law. Future parties and counsel cannot know which cases to which Petitioner's case was compared, nor will they know what variables were deemed by this Court as being similar and which were different. Judicial resolution of issues without opinion, or with opinions that are murky and unenlightening as to the true basis for decision, render more difficult the tasks of parties, other courts and this Court itself. Parties will be unable to brief the issue to this Court, because the law will not appear in published opinions. By contrast, if this Court's holdings are formulated in terms of reason, then other courts will be able to perceive what this Court regarded as similar cases to be treated the same way. That guidance will be necessary for the lower courts attempting to understand the law laid down by this Court; it will also be significant when this Court subsequently looks to its own precedents in its examination of related cases.

Perhaps it is true that this Court conducts a reasoned

comparison of similar cases to determine if the penalty is appropriate in a given case. Perhaps that was done in Mr. Henry's case. No one outside of the Court can know, because nothing in the opinion suggests such review was undertaken. Due process in silence is not the due process of law guaranteed by the fourteenth amendment.

C. Lack of Consideration of Nonstatutory Mitigating Circumstances in Proportionality Review

This Court's 1976 opinion in Mr. Henry's appeal said nothing about proportionality review. But in Ford v. State, 374 So.2d 496 (Fla. 1979), in the course of its discussion of the appropriateness of the aggravating and mitigating circumstances found to exist in that case, this Court stated:

> We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilylankoff. Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court in Proffitt v. State, supra, is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us. In this case the process compels the inescapable conclusion that the proper sentence is the death penalty.

Id. at 503 (emphasis added). This passage shows that to the extent that this Court does undertake proportionality review, it excludes from that review mitigating evidence not within the statutory list "duly enacted by the representatives of our citizenry." Such exclusion would render this Court's review unconstitutional.

Had this sort of limitation of non-statutory mitigating circumstances occurred at the judge/jury sentencing phase of the proceeding, then the procedure would clearly have run afoul of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), which held that a death penalty scheme must allow the sentencing authority to consider and give independent mitigating weight to mitigating factors in addition to those listed in the applicable capital sentencing statute. The Ohio death penalty statute at issue in Lockett did not permit the

sentencer to give independent mitigating weight to factors, not specified in the statute, such as Lockett's character, age or prior record; the sentencer could only consider these factors insofar as they shed light on one or more of the mitigating circumstances listed in the statute. The Lockett Court held that the eighth and fourteenth amendments require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604. This holding was firmly grounded in the fact that death is different from any other punishment possible under our Constitution: "The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in non-capital cases." Id. at 606. This "uniqueness" cannot in any way be limited in advance by the capital punishment statute: a statute that prevents the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the eighth and fourteenth amendments." Id. at 605.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court held that trial and appellate courts as well as the legislature, may not limit the sentencer's consideration of non-statutory mitigating evidence. The Supreme Court reversed the sentencing judge's and the appellate courts' refusal to consider non-statutory evidence in mitigation, stating that "by holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Id.

The use of non-statutory mitigating evidence must, of course, be considered within the context of Florida's capital punishment scheme approved in Proffitt v. Florida. Justice

Stevens, concurring in Barclay v. Florida, 103 S.Ct. at 3431-32, recently elucidated his view of the role of non-statutory mitigating circumstances in Florida's capital sentencing procedure. That procedure involves two stages. At the threshold stage, the sentencing judge makes a determination, guided by the specific statutory instructions, (1) whether there is at least one valid aggravating circumstance and (2) whether any of the statutorily enumerated mitigating circumstances exist, and if so, whether they outweigh the statutory aggravating circumstances. If the statutory aggravating circumstances outweigh the statutory mitigating circumstances, then the defendant passes the threshold and enters "the narrow class of persons who are subject to the death penalty." 103 S.Ct. at 3431. Passing the threshold does not, however, mean that death is an appropriate penalty. The second stage of the inquiry thus is whether "it is nonetheless not appropriate to impose the death penalty." Id. The penalty will not be appropriate in cases where "even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." 103 S.Ct. 3432 (emphasis in original).

Thus, the sentencer must give all mitigating factors, statutory and non-statutory, independent mitigating weight. The issue then becomes whether, for purposes of this Court's proportionality review, the "sentencing" done at the trial level is significantly different from the sentence "review" conducted by this Court. Certainly in some contexts the two tasks are different. See, e.g., Brown v. Wainwright, 392 So.2d at 1331, 1332. But so far as proportionality is concerned, the two are functionally identical. This is so for at least four reasons.

First, the question asked by this Court in conducting its sentencing review is the same question asked of the trial judge in determining sentence: under the facts of the case at hand, should this defendant receive the most extreme penalty possible under our law? The Supreme Court in Lockett and Eddings recognized that failure to consider non-statutory mitigating evidence distorts the sentencer's ability to decide who should die. Such

exclusion would similarly distort this Court's analysis when it "compares the case under review with all past capital cases to determine whether or not the punishment is too great." Brown v. Wainwright, 392 So.2d at 1331. A death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses. This comparison is impossible by this Court, as it is by the sentencing court, if non-statutory mitigating circumstances are not considered.

Second, the fundamental interest in reliability identified in Lockett and Eddings is as true of this Court's review as it is of the initial sentence. Broad sentencer consideration of the "independent mitigating weight" of those aspects of "character, record and offense that the defendant has proffered in mitigation helps to ensure the reliability required in the procedure for imposing the death sentence." 438 U.S. at 605. Similarly, the Court in Proffitt v. Florida repeatedly stressed that this Court's review of a capital sentence is an essential element in the constitutional imposition of the death penalty precisely because it safeguards against arbitrary and capricious sentences. 428 U.S. at 253. In approving the facial constitutionality of the Florida statute in Proffitt, the Court emphasized this Court's role as an independent evaluator of the sentence in a system that attempted to "assure that the death penalty will not be imposed in an arbitrary or capricious manner." Id. at 252, 253. To the "extent that any risk ... [of arbitrary or capricious sentencing] exists, it is minimized by Florida's appellate review system." Id. at 253. The statute is constitutional in large measure because this Court had undertaken to conduct "the type of proportionality review mandated by the Georgia statute" approved in Gregg and because in Florida, "death sentences are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances." 428 U.S. at 259, 253. This review assures defendants that their sentences are reliable, that their's was not an aberrant decision to impose death under circumstances which are disproportionally unworthy of capital punishment.

Third, in Gardner v. Florida, 430 U.S. 349, 361 (1977), the Court held that an omission from the appellate record of information used to impose a death sentence rendered "a capital sentencing procedure ... subject to the defects which resulted in the holding of unconstitutionality in Furman." Can less be said of this Court's refusal to consider non-statutory mitigating evidence, evidence which must be given independent mitigating weight at the sentencing stage?

Finally, Judge Tjoflat has persuasively argued that a state court conducting proportionality review must inherently act as a "resentencer":

> To the extent such a court takes into account sentencing decisions occurring between the trial court's original sentence and its review of that sentence in ensuring proportionality, the court must be acting as a resentencer because it is considering sentencing standards about which the original sentencer could not have known. In addition, a state supreme court may act as a resentencer when it reverses a sentence of death even though the record fully supports the trial court's imposition of such sentence. In doing so, the court is promulgating a new sentencing norm which is contrary to the norm the trial court applied. Finally, such a court may act as a resentencer in cases like Ford. In such cases, the court reimposes the death penalty in circumstances different from, and less egregious than, those on which the trial sentencer relied. The court does this by applying a sentencing norm that the the trial sentencer did not need to consider.

Ford v. Strickland, 696 F.2d 804, 837 (11th Cir. 1983) (Tjoflat, J., concurring).

Accordingly, the failure to consider non-enumerated mitigating factors in assessing the proportionality of a death sentence, violates significant procedural mandates of the eighth and fourteenth amendments

D. Proportionality in this Case

It is of utmost importance in this case that this Court review the proportionality of the sentence and make its review explicit. The robbery, the underlying felony for the conviction, does not distinguish this case, where the death sentence has been upheld, from the many such cases where it is not imposed. The eighth amendment demands rational, objective bases for distinguishing between those very few cases where death is imposed as punishment from the vast majority of cases where it is not. Yet

this Court's opinion is silent as to why it deemed Mr. Henry's offense to be among "the most aggravated" of robbery-murder cases so as to justify the death sentence. McCaskill v. State, 344 So.2d at 1280. The failure of this Court to make such a determination or to make it explicit has resulted in standardless, non-individualized, application of the capital sentencing statute. "[T]he facts of [this] case itself [do] not distinguish the murder from any other murder." Zant v. Stephens, 103 S.Ct. at 2743.

Mr. Henry's death sentence is disproportionate, both in itself and in comparison to other death sentences meted out in this state. This is so in two respects. First, this death sentence is factually disproportionate, in the sense that the facts of this crime are not death-worthy as compared to the facts of other Florida capital cases. Second, this sentence is legally disproportionate, in the sense that legal errors occurred in this case which, had they occurred at a time allowing Mr. Henry to take advantage of this Court's settled capital jurisprudence, would have mandated resentencing in Mr. Henry's case.

(1) Factual Disproportionality

The facts aggravating Mr. Henry's case to capital murder consisted of these components: the circumstances of the murder of Z. L. Riley; the circumstances of Mr. Henry's shooting of Officer Ferguson while resisting arrest; and informations for prior offenses which charged greater offenses than those for which Henry had actually been adjudicated. These events must be analyzed separately.

(a) The Shooting of Officer Ferguson

At the sentencing phase of Mr. Henry's trial, the prosecutor called as his only witness Officer Ronald Ferguson, the arresting officer who testified that Henry had taken the officer's gun and wounded him in an attempt to avoid arrest. This incident occurred three days after the homicide of Z. L. Riley. Mr. Henry's counsel objected to this testimony on the ground that it constituted a nonstatutory aggravating circumstance, which it clearly did. See Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983); Henry v.

Wainwright, 661 F.2d 56 (5th Cir. 1981). But the trial judge overruled the objection. At the close of the hearing, the judge instructed the jury as follows:

> You will render an advisory sentence to the court based upon the following matters:
>
> Whether sufficient aggravating circumstance exist, or sufficient mitigating circumstances exist for you to recommend the death penalty or life imprisonment.
>
> In considering aggravating circumstances, you shall consider all factors which are aggravating including, but not limited to, the following: ...

(T 410).

The shooting of Officer Ferguson was central to the imposition of the death sentence in this case. Officer Ferguson was the only witness called by the state at the penalty phase. He testified in detail (T 386-390). Even on a cold record, his testimony was powerful and, at times, emotional:

> Q. Did he continue to pursue you?
>
> A. Yes, sir.
>
> Q. (Whereupon at this point the witness began to lose his composure) All right. Regain your composure. Tell me, what happened next?

(T 389). The prosecutor made an impassioned argument to the jury that Henry had "stood in front of a police officer with a loaded pistol, and in the face of his begging 'don't shoot me, don't shoot me' nevertheless, fired a bullet directly into his chest" (T 402). The shooting of Officer Ferguson was a fact prominently emphasized in the trial court's order sentencing Mr. Henry to death. Henry v. State, 328 So.2d 430, 431 (Fla. 1976). And in arguing to the Governor and Cabinet against clemency, the prosecutor stressed:

> The young officer arrested James Dupree Henry, plainclothed, a fine young man, charged him with this offense. He made the mistake of trying to do it alone and James Dupree Henry by surprise attacked the officer and took his gun away from him. He shot him twice. As the officer ran, he dropped the man with the second shot and walked up to him and as the officer looked up at him and begged him not to shoot any more, James Dupree Henry fired the third shot into him. The officer was in critical condition for many weeks in the hospital.

Executive Clemency Proceedings at 12 (September 14, 1977).

And again, at the second clemency proceeding, before Governor Graham, the prosecutor argued:

> His apprehension is a demonstration of his vicious character par excellance. A detective, who I know rather well by the name of Ron Ferguson from the Orlando Police Department who is a refined fellow, well spoken, looks a lot like the Attorney General was out staking out Z. L. Riley's house, really didn't expect him to come back, but sure enough he showed up. Ferguson walked up, the gun in holster, plain clothes and said, "Mr. Henry I'd like you to come with me to the police station we need to talk about a murder." He answered in street language that he wasn't going 'no place with nobody' and he attacked Ferguson, dragging Ferguson back into the front seat of Ferguson's car. Ferguson fought with him, had his handcuffs out, was trying to handcuff him, Ferguson was eye-gouged by Henry and in the process of the eye-gouging incident Henry got a hold of Ferguson's gun. He backed up, held the gun on Ferguson and said, "You drive this car." Again using street language. Ferguson said, "I'm not driving you anywhere."
>
> Ferguson is an intelligent man, at this point was very much afraid. He decided the only way he could defuse the incident and perhaps save his own life was to flee. So Detective Ferguson ran. He ran as hard as he could. There was a fence near by, Ferguson scaled the fence, jumped it and ran and the first thing he knew is a shot went off. Henry had fired at him with own service revolver. The first shot missed. The second shot rang out and Ferguson was shot through the side. Ferguson was able to keep running, somewhat slowed at this point. He looked back and here was James Dupree Henry scaling the fence, running after him with the service revolver. Another shot was fired, that one missed. Three shots -- one hit so far. Henry caught Ferguson from behind and began bludgeoning him in the back of the head as he ran holding his side with the pistol. The pistol went off in the middle of the beating, that bullet striking no one. Ferguson went to the ground -- Henry stands over Ferguson, Ferguson says, "Please don't shoot me, please don't shoot me." Henry takes aim. Ferguson sees him take aim. Ferguson moves, the gun goes off striking Ferguson in the collarbone for the second hit. The bullet, plunging deep into Ferguson's chest. Ferguson looked up and saw Henry pulling back the trigger for the last shot which surely would have done it except for the fact this was a chief special and held but five shots. The gun clicked. Ferguson again, despite his injuries which were great, got up, tried to run, got hit in the head again, went down, was crawling and that was the last time that Ferguson saw Henry.

Executive Clemency Proceedings at 19-20 (May 17, 1979)

Ferguson's testimony was compelling and powerful But, as cases decided only months after Mr. Henry's make clear, the admission of this evidence was error which, under controlling

legal principles articulated by this Court subsequent to Mr. Henry's appeal, would mandate resentencing. It was error for two reasons. First, "the events surrounding [the Ferguson shooting] cannot reasonably be said to be part of the res gestae of the [Riley] murder. It is only conduct surrounding the capital felony for which the defendant is being sentenced which may be considered ... " Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977). The Ferguson shooting occurred three days after the Riley killing. See Mines v. State, 390 So.2d 332, 333, 337 (Fla. 1980) (events two to six hours after homicide not within res gestae).

Second, the evidence about the Ferguson incident was a non-statutory aggravating circumstance, and thus admission of that evidence was error. This evidence clearly bore no relevancy to any of the circumstances enumerated in the statute. In fact, the trial court in its order denying Mr. Henry's motion to vacate characterized it as "evidence of non-statutory circumstances." (Record of Motion to Vacate 89). The federal courts recognized this as well. Henry, 721 F.2d at 991; 661 F.2d at 56.

Moreover, the error in admitting into evidence this non-statutory aggravating evidence was not harmless. In reviewing the effect of a trial court's treatment of non-statutory aggravating circumstances, this Court applies a harmless error rule [sometimes referred to as the "Elledge rule" from Elledge v. State, 346 So.2d 998 (Fla. 1977)] which essentially requires affirmance of the death sentence despite the erroneous finding if the judge found no mitigating circumstances to be present and requires vacation of the sentence if mitigating factors were found. This "Elledge rule" is applied to errors by trial judges as to characterizing evidence. However, in the situation in this case, no harmless error rule is applied, nor could it be applied with any degree of reliability. The "Elledge rule" is inapplicable where errors occur in the jury sentencing proceedings -- admission of inadmissible evidence, restriction on presentation of evidence, incorrect instructions to the jury, etc. This is so because where an error occurs in the jury proceedings, reviewing courts cannot know what effect the errors had upon the jury's

deliberations -- since the jury issues no written findings and since the weighing nature of Florida's statute requires both an evaluation of the "sufficiency" of aggravating factors and a delicate balancing of all aggravating and mitigating factors. Thus since the effect of the errors on the weighing process cannot be known, there is no reliable or principled way in which a reviewing court can apply a harmless error rule.

Maggard v. State, 399 So.2d 973 (Fla. 1981) is an example. This Court in Maggard upheld one statutory aggravating factor found by the sentencing judge and found "no error in the trial court's conclusion that there are no mitigating circumstances present." Id. at 977. The case was thus appropriate for application of the "Elledge rule," since there was a valid statutory aggravating factor and no factor in mitigation. Yet while this Court recognized the "Elledge rule" to be applicable to errors in the judge's findings, it nevertheless reversed because error occurred in the jury sentencing proceedings:

> But for an additional error committed by the court during the sentencing hearing, we would affirm the sentence since there is at least one viable aggravating circumstance, and no mitigating circumstances.

Id. (emphasis added). The error in Maggard was the admission into evidence before the jury of evidence that was improper under the Florida statute. Maggard makes clear that the "Elledge rule" is inapplicable in review of errors occurring in the jury proceedings,[3] as opposed to judge-only errors.

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[3] Other decisions where errors occurred in the jury proceedings requiring reversal without regard to the "Elledge rule" harmless error test include: Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (nonstatutory aggravating factor evidence and exclusion of evidence); Messer v. State, 330 So.2d 137, 142 (Fla. 1976) (denial of an opportunity to obtain mitigating evidence for the jury sentencing trial, where the trial court stated that he would consider the evidence at the actual sentencing); accord: Miller v. State, 332 So.2d 65 (Fla. 1976) This Florida precedent highlights the aberrant nature of the present case. No decision in Florida has involved the extensive errors in this case and no decision has affirmed a death sentence where errors have been committed in the jury sentencing trial.

Moreover, there is no indication in the present case that the "Elledge rule" was in fact applied. This Court made no finding that there were no mitigating factors present and apparently found to the contrary ("upon considering all the mitigating and aggravating circumstances"), Henry v. State, 328 So.2d 430, 432 (Fla. 1976) -- Henry had presented mitigating character evidence (T 392-401) -- and the sentencing judge found factors in mitigation, though not delineating them

This different treatment in review of jury proceeding error is grounded in the critical status given to the jury in Florida's capital sentencing system. This great, if not controlling, position of the jury is shown by the "exacting standards of Tedder [v. State, 322 So.2d 908 (Fla. 1975)]," Dobbert v. Florida, 432 U.S. 282, 295-96 (1977). As explained by Justice England: "the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice." Chambers v. State, 339 So.2d 204, 209 (Fla. 1976)(England, J., concurring). The jury is thus one third of Florida's trifurcated sentencing scheme -- one of the legs of the three-legged stool that forms the capital sentencing scheme;[4] the capital statute involves a "scheme of checks and balances in which the input of the jury serves as an integral part." Messer v. State, 330 So.2d 142 (Fla. 1976). It is hence because of the important role given to the jury in Florida's capital sentencing scheme that a harmless error rule is not applied to errors in those sentencing procedures before the jury.

Perhaps the most vivid factor demonstrating that the errors were not and cannot be found harmless is the existence of mitigating evidence in the record and the truly hair-thin 7 to 5 margin of the jury's sentencing verdict. It is important to remember that the nature of the Florida capital sentencing system is a weighing process. It is a weighing of the proper applicable statutory aggravating circumstances and a weighing of those circumstances with the factors in mitigation to determine whether

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and finding them in his opinion insufficient to outweigh what he had found in aggravation ("nothing of a mitigating nature to prevent this Court from imposing the death penalty") (R 101).

[4] In this scheme, the jury and judge have distinct roles. In explaining these "respective functions of the judge and jury in death penalty cases," Justice England said "the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason." Chambers v. State, 339 So.2d at 208. This is so because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976).

the death sentence is appropriate.[5] The fact that aggravating factors exist does not require the imposition of the death sentence. The aggravating circumstances must be determined to be sufficient to warrant the death penalty and they must be weighed; and a life sentence may be imposed, even in the absence of mitigating factors.[6]

Considering the vital importance of the jury[7] and the weighing nature of Florida's death process, five jurors voting for life cannot be ignored. A change of a vote would have drastically altered the ultimate penalty. See Rose v. State, 428 So.2d 521 (Fla. 1983)[8] The life vote of five jurors demonstrates as a matter of law that the error cannot be found harmless -- there was doubt as to whether the death sentence was appropriate, considering all "aspects of [Henry's] character and record and circumstances of the offense," Lockett v. Ohio, supra, 438 U.S. at 605. Reasonable persons did differ on the fate of

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5 "It must be emphasized that the procedure to be followed by the trial judges and juries not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

6 Under the Florida sentencing scheme, the first inquiry for the jury is whether the aggravating circumstances found to exist are themselves "sufficient" to warrant the death sentence. The standard jury instructions provide that the jury should initially determine "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty" and after listing the statutory aggravating circumstances the jury is charged that "If you do not find that there existed sufficient of these aggravating circumstances ... it will be your duty to recommend a sentence of life imprisonment." (Emphasis supplied). Florida Standard Jury Instructions in Criminal Cases, 76, 78 (2d ed. 1976). See also Fla. Stat. § 921.141(2) (1973). It is only after the jury finds statutory aggravating factors and then finds that they are sufficient to justify death that the jury turns to consideration of mitigating factors. Thus, even where aggravating circumstances are found to exist, if they are not "sufficient" a life sentence must be imposed, regardless of whether mitigating factors exist. Cf. Alford v. State, 322 So.2d 533, 540 (Fla. 1975).

7 See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

8 Moreover, Mr. Henry's jury was instructed that a 7-5 vote for life was required to impose a life sentence. We now know that only a 6-6 vote is needed for a verdict of life. Rose v. State, 428 So.2d 521 (Fla. 1983). This issue is raised separately in Mr. Henry's Rule 3.850 proceeding filed in Circuit Court on September 10, 1984. Nevertheless, it may have had a controlling effect in this case since the jury was obviously considering a life verdict.

James Dupree Henry. Henry's death sentence, even with the improper jury charges and evidence, clearly rested on a very narrow margin.

Above all, the errors were not and cannot be found harmless because there was mitigating evidence in the record and presented to the jury. The evidence included Henry's relationship with persons in the community and the trust they had in him, the assistance Henry had given to them and others when they were in need, the fact that Henry was entrusted with caring for children and his relationship with children, Henry's family and background, and his sincere remorse.

Thus, the Ferguson shooting was not properly before the jury. It was not within the res gestae of the crime charged. It also was a nonstatutory aggravating circumstance, admission of which was not harmless, and which of itself mandates resentencing.

(b) The Informations Charging Other Offenses

The prosecution also introduced into evidence at the penalty phase, over objection, two informations for prior offenses which charged greater offenses than those for which Henry had actually been adjudicated (T 390-92). The evidence of offenses greater than Henry had been actually adjudicated constituted nonstatutory aggravating factors because he had not been convicted of the greater offense. See, e.g., Cook v. State, 369 So.2d 1251, 1257 (Ala. 1979). This nonstatutory aggravating evidence was argued to the jury by the prosecutor as a basis for imposing the death sentence (T 402-03) and was relied upon by the trial judge in his sentencing order. Henry v. State, 328 So.2d at 431.

As discussed above, this nonstatutory aggravating evidence was not properly considered and, under the Elledge rule, would today mandate sentencing.

(c) The Riley Homicide

When the Ferguson incident and the improper informations are removed from this case, the disproportionality of Mr. Henry's death sentence becomes apparent.

Mr. Henry's case involves an accidental death where no lethal force was employed, but a conviction for first degree murder, and death sentence because that death occurred during the progress of a felony. The death was accidental because it resulted from quite attenuated means. The victim had been bound, laid on his bed and a piece of cloth had been tied around his mouth as a gag. These circumstances logically indicate an attempt to avoid lethal force to the victim by restraining him during the time that the taking would be accomplished. However, the gag apparently pushed up against the victim's tongue. This caused the death when in essence the deceased, an elderly man, swallowed his tongue -- the medical examiner analogized the cause of death to an epileptic seizure victim swallowing his tongue.[9]

Accordingly, the facts of this case strongly indicate that the death was unintended. The attenuated means by which the death occurred do not logically support an inference of intent to cause death, and more strongly demonstrate that the death was wholly unintended and accidental.[10]

The nature of the offense thus clearly does not make Mr. Henry's case proportionate with other cases in Florida where death has appropriately been imposed. This is not a case that is set apart because the defendant was on parole or under sentence of imprisonment, because the offense itself was cold and calculated, because it was for the purpose of avoiding arrest or hindering enforcement of laws, or because it posed a great risk to many persons. Accordingly, this is not an "aggravated" felony murder case.

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[9] Though the deceased also had some bruises and laceration, they had no connection with the death and since it is unclear when they may have actually occurred, they may have happened in the process of typing up the deceased. The lacerations on the deceased's neck were, as characterized by the medical examiner, "quite superficial," had nothing to do with the cause of death, and were made by one or two "scratches" (T 210, 220, 223).

[10] Binding and gagging even more than not showing an intent to kill, actually more logically show an intent not to kill. Restraining someone is contradictory to an intent to kill that person. In fact Mr. Henry's custodial statement to the police indicated that he thought the victim was alive when he left the apartment, and that he did not even know that he had died until he was told by the police (T 247).

If the nature of the offense does not set it apart and the aggravation does not set it apart from the norm, then what does? What makes this case "proportionate" to the many cases where death is not imposed as punishment? Can the mere fact that there was a robbery alone justify the ultimate penalty? The answer is no. Certainly all robbery-murder cases do not result in the imposition of death sentences; in fact only a tiny number of such cases result in death. This Court recognized that in fact in McCaskill v. State, 344 So.2d 1276 (Fla. 1977), finding that life sentences are imposed in robbery-murder cases "in all but the most aggravated cases." Id. at 1280. This point was underscored by this Court's distinction of Sawyer v. State, 313 So.2d 680 (Fla. 1975) where the death sentence had been upheld on the reasoning that "[i]ts aggravating circumstances, however, are distinguishable from those here." Id. Thus, it is settled that death sentences for robbery-murder are very rare -- the exception not the rule -- and that when a death sentence is imposed it is only done in the "most aggravated" cases.

This fact was recognized by the judge who sentenced Mr. Henry to die. Judge DeManio, at the conclusion of the hearing on the Motion to Mitigate Sentence, expressed the difficulty in upholding Mr. Henry's death sentence as compared to others in Florida:

> THE COURT: Unfortunately, I don't feel that the Supreme Court, and I say this most respectfully, has been of much assistance to the lower courts. As I pointed out a moment ago, I have been involved in six or seven -- frankly, I can't remember the exact number at the very momemt -- death penalty cases.
>
> . . .
>
> The Supreme Court has overruled me in Slater. They overruled me in Williams. They overruled me in McCaskill. I don't see any difference in those three cases and in this one I see none whatsoever.
>
> If they decide to affirm me in this one -- it boggles my mind. I see no reason if anything is compelling; to reduce this sentence is to make it consistent with McCaskill, Williams and Slater. That is the most compelling argument I can think of.
>
> But once again I respectfully disagree with the Supreme Court in overruling me, so at this point I am going to stick to my guns in this one, although I am hard pressed to find any rhyme or reason.

(Record of Hearing on Motion to Mitigate Sentence at 38-40).

As discussed previously this case is not one of those "most aggravated" cases; indeed it is not "aggravated" at all. What is it then that makes this case one of those aberrant cases where death is appropriate? What is it that guides sentencers or that guides this Court in the attempt to select which of those rare felony-murder cases are to receive death among the very many that do not? It is a difficult question, but one which the eighth amendment demands be answered.

2. Legal Disproportionality and Change of Law

Legal errors occurred at Mr. Henry's penalty trial which tainted the essential nature of that proceeding. But Mr. Henry was a victim of timing: Because his appeal was "early," these errors went uncorrected by this Court. And because these errors go to the fundamental nature of what we today think of as a capital penalty phase, this Court should revisit Mr. Henry's case to apply these essential principles here. The standards of Witt v. Wainwright, 387 So.2d 922 (Fla. 1983) are met here. These Witt standards recognize that life or death ought not depend on the fortuity of when the case reached this Court. In a very real sense, Mr. Henry's case is "legally disproportionate" to every other capital case in Florida reviewed under the new statue. In no other case were the errors so fundamental. In no other case were they so pervasive. In no other case did they go so uncorrected by this Court's review.

Mr. Henry's capital sentencing proceeding lacked the one procedural safeguard deemed indispensable: a requirement of finding of at least one statutory aggravating circumstance. "[A] death sentence may not rest solely on a nonstatutory aggravating factor...." Barclay v. Florida, 103 S.Ct. 3418, 3433 (1983) (Stevens, J., concurring) (citing Zant v. Stephens, 103 S.Ct. 2733, 2742-43 (1983)). Moreover, there were no other procedures in Mr. Henry's case that would serve as "checks on arbitrariness," Pulley v. Harris, 104 S.Ct. 871, 880 (1984), so as to substitute for that missing safeguard. The capital sentencing trial was completely open-ended -- the jury was told to consider anything in aggravation specifically without limitation, was not required to find aggravating factors beyond a reasonable doubt or

even told that the state bore the burden of proof, and inadmissible evidence was introduced. This Court has, in the years since Mr. Henry's case came before it, recognized that these errors render a death sentence impermissibly unreliable. Fairness requires that Mr. Henry not die on the basis of a proceeding so infected by these very same errors.

First, as discussed above, admission of the evidence on the Ferguson incident and of other informations constituted improper nonstatutory aggravating circumstances. Under the Elledge rule, those errors were not harmless.

Second, Mr. Henry's jury was not told that it was required to find at least one statutory aggravating circumstance before it could a death verdict. Henry's jury was told only that it should render a sentencing verdict based on "[w]hether sufficient aggravating circumstances exist or sufficient mitigating circumstances exist, for you to recommend the death penalty or life imprisonment," and that, "[i]n considering aggravating circumstances, you shall consider all factors which are aggravating, including but not limited to, [statutory aggravating circumstances]."

The combined effect of first permitting the prosecutor to present anything in aggravation and urging the jury to consider any of it or indeed anything at all, and second permitting the jury to reach a death verdict without explicitly finding a statutory aggravating circumstance, was to create the substantial risk that the jury's verdict did rest "solely on a nonstatutory aggravating factor," and thus wholly undermine one of the two primary requisites of a valid death sentencing scheme, see Zant, 103 S. Ct. at 2745. Under these circumstances there is simply no assurance that "capital punishment [will] be imposed fairly, and with reasonable consistency" as the eighth amendment requires. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

Third, there was nothing else in the process by which the jury cast its decisive hairline vote for death that narrowed or confined its sentencing discretion so as to provide a substitute for the safeguard of finding a statutory aggravating circumstance. The sentencing proceedings in this case may accurately

be characterized as open-ended: (1) the prosecutor was allowed to present any evidence in aggravation without limitation; (2) the jury was permitted and urged to base a death verdict on any of it or indeed anything at all; (3) the jury was not told that the state bore the burden of proving aggravating factors or that aggravating circumstances were required to be proven beyond a reasonable doubt; (4) the aggravating factors were not defined for the jury, they were simply listed from the statute; and (5) as previously discussed, the jury was allowed to base its death verdict solely upon nonstatutory aggravating factors. In short the procedural context presented by Henry involves "permitting the jury to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the jurors might discern ...," Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1982) (Unit B) (emphasis added), and no guidance was given to the jury as to how to reach its verdict, i.e. weighing and burden of proof.

There was thus no substitute for the omission of the requirement that the jury find a statutory aggravating factor. For example, had the evidence been properly limited, as required by Florida law, to only statutory aggravating factors or if the jury had ben properly instructed to rely only upon statutory aggravating factors, as also required by state law, then perhaps it might not have mattered that the jury was not told that it was required to find a statutory factor before it could return a death verdict. Under such circumstances the jury's discretion might have been confined by other safeguards. But there were no such other safeguards in this case.

E. A Note on Finality

Mr. Henry expects the state to argue that the interest of finality of litigation outweighs all else in this case. We will respond in advance to this "look-at-all-the-court-time-this-criminal-has-wasted-already" litany.

This Court should closely examine precisely what happened in this case. The federal courts did not find that Mr. Henry's trial was free of serious error. They found only that these errors, as serious as they were, were solely errors of state law

and thus that it was up to this Court, not the federal courts, to correct them. In this case, as in others recently, the federal court "relied on the review conducted by the Florida Supreme Court." Henry, 721 F.2d at 994, 997. That has in fact been the central message of the recent capital punishment decisions by the United States Supreme Court: It is the responsibility of the state judiciary, not the federal courts, to administer the system of capital punishment.

But this Court in 1976 did not correct the errors that occurred in Mr. Henry's case. That was a period of change on this Court. The statute was very new then and no one, not judges or lawyers, had really settled on meaningful standards for administering the statute. This Court's opinion in Mr. Henry's appeal consisted primarily of quotations from the sentencing judge's order, the same sentencing judge who later agreed that this case was indistinguishable from McCaskill. Five months after this Court decided Mr. Henry's appeal, it announced Provence v. State, 337 So.2d 783 (Fla. 1976), under which Mr. Henry would have received a new sentencing trial. Eight months later, this Court announced Elledge.

Mr. Henry recognizes that legal principles evolve and that not all newly-articulated rules should receive retroactive application. See Witt v. State, 387 So.2d 922 (Fla. 1980). But such change should be glacial, not catastrophic. The fact remains that Mr. Henry's case simply did not receive that which it would have received had it reached this Court only months later than it did.

Mr. Henry's case thus "fell between the stools." This Court did not really review this case in a meaningful way in 1976, but ever since then subsequent courts have in their turn relied upon this Court's 1976 review. Now, only this Court can correct this grisly situation, for only this Court can genuinely appreciate the treatment this case received in 1976 as compared to the treatment it would have received only months later.

All of the federal courts that reviewed Mr. Henry's case on the merits recognized that there was serious error here, but concluded that it was error of state law. Only a state court

can correct it. Had this case come up today, this Court would correct it and mandate the resentencing these facts so urgently require. It should do the same now.

WHEREFORE, petitioner respectfully requests this Honorable Court grant this petition and:

1. Immediately issue this Court's order staying petitioner's execution;

2. Issue its order to show cause to respondent as to why this Court's writ should not be issued;

3. Issue its writ of habeas corpus;

4. Vacate petitioner's sentence of death; and/or

5. Grant such further relief as may be warranted by the justice of this cause.

Respectfully submitted,

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Of Counsel

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Assistant Public Defender

BY _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by Greyhound Bus, to EVELYN D. GOLDEN, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida, 32014 this 13th day of September, 1984.

_____
Of Counsel

V E R I F I C A T I O N

I, CRAIG S. BARNARD, being duly sworn do hereby verify that the facts set out in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

DATED this 13th day of September, 1984.

CRAIG S. BARNARD

SWORN to and SUBSCRIBED before me this 13th day of September, 1984

Florestine Wilson

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Sept. 23, 1986