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No. 67,524

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IN THE
Supreme Court of Florida

TED HERRING,

Appellant,

—vs.—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

PAGE

PAGE

PAGE

STATUTES:

IN THE

Supreme Court of Florida

Case No. 67,524

TED HERRING,

Appellant,

—VS.—

STATE OF FLORIDA,

Appellee.

SUMMARY OF ARGUMENT

Ted Herring comes before this Court under a sentence of death. Few defendants have deserved that sentence as little as he does. He comes before this Court the victim of a variety of legal errors committed by the trial court, which first sentenced him to death and has now denied his Rule 3.850 petition. He is also the victim of a series of legal blunders committed by his counsel at the sentencing hearing; these blunders simply denied him a fair opportunity to present a case in support of a sentence of life imprisonment.

Herring's case raises the issue, in the starkest possible terms, of whether the Florida capital sentencing scheme can be applied consistently and evenhandedly. There has been no consistency in its application to Ted Herring. He stands convicted of shooting a store clerk during a convenience store robbery. In February, 1985, one year after this Court affirmed Herring's conviction, it decided the appeal of Carl Allen Caruthers, who also stood convicted of shooting a clerk during a convenience store robbery. The facts of the two cases cannot be distinguished: both men sought only to rob their victims, and fired their guns when the clerks made sudden and unexpected movements. This Court found the death sentence imposed upon Caruthers to be disproportionately severe in relation to other sentences imposed. It also found two aggravating circumstances that were deemed applicable to Herring's case to be inapplicable to Caruthers' case. This court vacated Caruthers' death sentence and ordered that a sentence of life

imprisonment be imposed. Caruthers is now serving that life sentence. Herring remains sentenced to die.

At his sentencing hearing Herring was represented by a lawyer who had never before tried a capital case. In the space of a two hour hearing, that lawyer committed a stunning variety of errors. He neglected to offer or seek out mitigating evidence on Herring's behalf; instead, the defense case consisted solely of the testimony of Herring's mother. He failed to object when the prosecution offered irrelevant and highly inflammatory evidence that surely would have been excluded upon proper objection. He was unable to cite precedents to the trial court in support of positions he advocated. He demonstrated remarkable ignorance of the rules of evidence. This level of ineptitude might have been excused in a lawyer defending his first misdemeanor case. It cannot be excused in a lawyer who stands between his client and the death penalty.

This case is a severe test of the fairness and rationality of Florida's capital sentencing scheme. That scheme rests on certain basic assumptions. It assumes that the carefully drawn statutory criteria—the aggravating circumstances—will enable trial judges to differentiate those meriting the death sentence from those deserving the lesser sentence of life imprisonment. It assumes that defendants will be vigorously represented, so that the mitigating circumstances available to them will be put before the judge and jury. In Ted Herring's case, these assumptions failed. Had the system worked properly, he would not be before this Court under a sentence of death. He asks this Court to vacate that sentence.

STATEMENT OF FACTS

On May 29, 1981, at approximately 3:20 a.m., Norman Dale Hoeltzel, a clerk at a Seven-Eleven store in Daytona Beach, Florida, was shot and killed during a robbery at the store. His body was discovered fifteen minutes later by two men who entered the store. (Supp. at 398; 399)[1] The Medical Examiner concluded that the cause of death had been a bullet wound to the head, that the victim was shot twice, that both shots were fired within approximately one minute, and that the first shot was lethal. (Supp. at 481-82) There were no witnesses to the crime and the police never recovered the murder weapon. (Supp. at 496; 527)

1 References to the transcripts of Herring's trial, found in the First Supplement to the Transcript of the Record on Appeal, are indicated by the abbreviation "Supp." followed by the page(s). "R.O.A." refers to the Record on Appeal.

Two Daytona Beach police officers arrested Ted Herring while he was in possession of a stolen car on the morning of June 12, 1981. (Supp. at 11) Herring was taken to the stationhouse, where he was interrogated for approximately eight hours. (Supp. at 12-14)

Although they questioned him initially about the stolen car, the police broadened their interrogation to include a number of convenience store robberies. Three police officers conducted the examination, at times simultaneously. (Supp. at 23-25; 498-503; 527-37; 542-47; 549-52) At some point during the examination the police began to suspect that Herring had committed the May 29 robbery and homicide, and their questioning later focused on these two crimes, despite their failure to renew the *Miranda* warnings read to Herring earlier in connection with his possession of a stolen vehicle. (Supp. at 519; 533; 543)

After nearly eight hours of constant interrogation, Herring, outside the presence of counsel, confessed to the robbery and homicide. (Supp. at 34-46; 64-68; 642-43) The confession was tape-recorded. Herring stated that he entered the Seven-Eleven store and, after asking for a pack of cigarettes, drew his gun and demanded money. Herring told the police that he panicked and shot the clerk twice in the head when the clerk made a sudden move. Herring stated: "I shot him, you know, by mistake, but I meant to just put the gun to his head not for it to go off." (Supp. at 128) (A171)[2]

In February 1982, Herring was tried for armed robbery and first-degree murder arising out of the May 29, 1981 incident. *State of Florida v. Herring*, Case No. 81-1957-CC. The jury returned a verdict of guilty on both counts on February 25, 1982. (R.O.A. at 70; 71)

The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. It lasted approximately two hours. The State's case was very brief. It offered Herring's prior armed robbery conviction and a probation officer's testimony that Herring had made a racially inflammatory remark to her concerning the victim. (Supp. at 777-78) The State presented no other evidence.

In Herring's defense, his counsel offered only the testimony of Herring's mother, whose direct examination constitutes only three pages of transcript. (A172-A175) Counsel presented no other evidence of Herring's character nor any other evidence in mitigation.

2 "A" refers to the Appendix submitted herewith.

The jury returned an advisory sentence of death by an eight-to-four vote. (R.O.A. at 72)

The Honorable S. James Foxman followed the jury's recommendation and sentenced Herring to death on March 1, 1982. The trial judge found that four aggravating circumstances and two mitigating circumstances applied and that the aggravating circumstances outweighed the mitigating circumstances. (A158-A164) The aggravating circumstances found by the trial judge were:

(1) That the defendant had been previously convicted of another capital offense or a felony involving the use or threat of violence to some person;

(2) That the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of the crime of robbery;

(3) That the crime for which the defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; and

(4) That the crime for which defendant was to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(A165-A167) The two mitigating circumstances found by the trial judge were:

(1) The age of the defendant at the time of the crime;

(2) The defendant's difficult childhood, *i.e.*, that the defendant was raised without a father, that he was hyperactive, had learning disabilities, and had trouble in school.

(A167-A168)

This Court affirmed Herring's conviction and sentence on February 2, 1984, with Justice Ehrlich dissenting as to the application of the cold, calculated and premeditated aggravating circumstance. *Herring v. State*, 446 So.2d 1049 (Fla. 1984), *cert. denied*, ___ U.S. ___, 83 L. Ed.2d 330, 105 S. Ct. 396 (1984). On November 5, 1984, the United States Supreme Court denied Herring's petition for certiorari, with Justices Brennan and Marshall dissenting. *Herring v. Florida*, ___ U.S. ___, 83 L. Ed.2d 330, 105 S. Ct. 396 (1984).

On April 2, 1985, Herring filed the Motion to Vacate Judgment and Sentence ("Motion to Vacate") pursuant to Fla. R. Crim. P. 3.850 which is the subject of the present appeal. (A1-A104) The

Motion to Vacate was filed in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida, before Judge S. James Foxman. The State's Answer was filed on July 11, 1985. (A138-A157) On July 24, 1985, Judge Foxman denied the Motion to Vacate without hearing argument or taking evidence. (A158-A164) This appeal follows.

ARGUMENT

I.

A REVERSAL OF HERRING'S DEATH SENTENCE WITH INSTRUCTIONS TO IMPOSE A LIFE SENTENCE IS REQUIRED BY THIS COURT'S DECISION IN *CARUTHERS v. STATE*

In *Caruthers v. State*, 465 So.2d 496 (Fla. 1985), this Court reversed a death sentence and instructed the trial court to impose a life sentence on the basis of a factual record virtually identical to the record here. The material facts of *Caruthers* were that (1) a convenience store clerk, who had known the accused, was found dead behind the store counter, with the cash register open, and (2) after his arrest, the accused confessed to the robbery and homicide, claiming that he shot the clerk three times after the clerk made a sudden movement. 465 So.2d at 497-498. On the basis of this record, this Court concluded that the imposition of the death penalty was disproportionate under Florida law. *Id.* at 499.

Ted Herring is entitled to the same result. If his death sentence is allowed to stand in the face of *Caruthers*, that sentence will violate Florida law and the United States Constitution, both of which require that the death penalty be applied consistently and evenhandedly.

Because of the remarkable similarities between the facts of this case and those of *Caruthers*, the analysis undertaken by this Court in *Caruthers* is fully applicable here. This analysis reveals that the same errors committed by the trial court in that case were made here. *First*, the trial court committed fundamental error by imposing a death sentence that was disproportionate when compared with the other capital felony cases in Florida in which the death penalty has been imposed. *Second*, the cold, calculated and premeditated aggravating circumstance was erroneously applied. *Third*, the witness elimina-

tion/avoidance of arrest aggravating circumstance was erroneously applied. *Fourth*, two aggravating circumstances were impermissibly based upon the same fact. The *Caruthers* decision mandates reversal of Herring's death sentence.

A. The Constitutional Requirements of Consistency and Fairness in Capital Sentencing Proceedings and Florida's Requirement of Proportionality in Imposing the Death Penalty Require That Herring's Death Sentence be Reversed With Instructions to Impose a Life Sentence

The Constitution requires consistency in the imposition of death sentences. *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976). The U.S. Supreme Court has continually emphasized its pursuit of the "twin objectives" of "measured, consistent application and fairness to the accused." *Spaziano v. Florida*, ___ U.S. ___, 82 L. Ed.2d 340, 352, 104 S. Ct. 3154, 3162 (1984), *quoting Eddings v. Oklahoma*, 455 U.S. 104, 110-111, 71 L. Ed.2d 1, 10-11, 102 S. Ct. 869, 875 (1982).

The constitutional requirement of consistency in capital sentencing has two components. First, the state's underlying capital sentencing statute must be carefully drafted to ensure that the sentencing authority is given adequate information and guidance. *Gregg v. Georgia*, 428 U.S. at 195, 49 L. Ed.2d at 887, 96 S. Ct. at 2935. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189.

Second, a sentencing statute, even if constitutional on its face, must be applied evenhandedly:

> If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.

Spaziano v. Florida, ___ U.S. at ___, 82 L. Ed.2d at 352, 104 S. Ct. at 3162-3163, *citing Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 2743 (1983); *Furman v. Georgia*, 408 U.S. 238, 294, 33 L. Ed.2d 346, 447, 92 S. Ct. 2726, 2754 (1972) (Brennan, J., concurring). Even a carefully designed statute violates the Eighth and Fourteenth Amendments if applied in such a fashion that the cases in which the death penalty is imposed are indistinguishable from the cases in which it is not.

Similarly, Florida law forbids the imposition of death sentences that are disproportionate when compared with other capital felony cases in which the death penalty is imposed. In *State v. Henry*, 456 So.2d 466, 469 (Fla. 1984), this Court recognized that proportionality review "is a feature of state law" which has been cited with approval in *Profitt v. Florida*, 428 U.S. 242, 259, 49 L. Ed.2d 913, 926-927, 96 S. Ct. 2960, 2969-2970 (1976).

Despite the startling similarities between *Caruthers* and the case at bar, Caruthers' death sentence has been reversed as being disproportionate while Herring's death sentence still stands. The only meaningful differences between the present facts and those in *Caruthers* weigh in Herring's favor: Herring had never met the store clerk before, unlike Caruthers, who was known to his victim; and the clerk was shot twice in *Herring*, three times in *Caruthers*. In February 1984, this Court affirmed Herring's death sentence. In February 1985, this Court vacated the death sentence imposed on Caruthers and instructed that he receive a sentence of life imprisonment. If the Florida death penalty statute can permit two diametrically opposite results to flow from the same set of facts, then that statute is surely being applied in an arbitrary and capricious fashion.

B. Under *Caruthers v. State* Two Statutory Aggravating Circumstances Were Erroneously Applied

This Court's *vacatur* of Caruthers' death sentence was based, in part, upon a finding that the trial court erroneously found two statutory aggravating circumstances: that the murder was committed in a cold, calculated and premeditated manner, and that it was committed for the purpose of avoiding or preventing a lawful arrest. The sentence imposed on Herring was also based, in part, on these two aggravating circumstances. As such, it too must be vacated.

1. *The Trial Court's Finding That the Murder Was Committed In a Cold, Calculated and Premeditated Manner Was Erroneous and Was Arbitrary and Capricious In Violation of the Eighth and Fourteenth Amendments*

The ninth aggravating circumstance enumerated in Florida's capital sentencing statute is that:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Fla. Stat. Ann. § 921.141(5)(i) (West 1985) (hereinafter "heightened premeditation aggravating circumstance"). The degree of premeditation required before this aggravating circumstance may be applied is greater than that necessary to establish premeditation for conviction in the guilt/innocence phase of a capital felony trial. *Preston v. State*, 444 So.2d 939 (Fla. 1984). The heightened premeditation aggravating circumstance is limited to cases in which "the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." *Id.* at 946. Consequently, "[p]roof of this aggravating circumstance requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction." *Maxwell v. State*, 443 So.2d 967, 971 (Fla. 1983). *Accord*, *Washington v. State*, 432 So.2d 44, 48 (Fla. 1983) ("This aggravating circumstance inures to the benefit of the defendant as it requires proof beyond that necessary to prove premeditation."); *Combs v. State*, 403 So.2d 418 (Fla. 1981), *cert. denied*, 456 U.S. 984, 72 L. Ed.2d 862, 102 S. Ct. 2258 (1982).

The heightened premeditation aggravating circumstance has been held inapplicable to cases in which the evidence established that the victim was killed "intentionally and deliberately," but nothing more. *Maxwell v. State*, 443 So.2d at 971. Rather, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders." *McCray v. State*, 416 So.2d 804, 807 (Fla. 1982). Although this Court in *McCray* also observed that "this description is not intended to be all-inclusive," *id.*, there is nothing in *McCray* or in any other case construing Section 921.141(5)(i) to suggest that this aggravating circumstance may be found in any capital felony case unless there is substantial evidence

that the killer first devised a plan to commit the murder and thereafter put that plan into effect.

Applying the foregoing body of law in *Caruthers*, this Court found that the cold, calculated and premeditated aggravating circumstance had been erroneously applied, concluding that the operative facts, (1) that three shots were fired, and (2) that Caruthers and the victim knew each other, failed to establish beyond a reasonable doubt "a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." 465 So.2d at 498-499. The present case is even less compelling than *Caruthers*: Herring did *not* know the store clerk, and the clerk was shot only twice.

Nothing in this case even suggests premeditation, heightened or otherwise. Herring undertook to rob a convenience store, as he had done on prior occasions. In his confession, which was the product of eight hours of interrogation by the police, he stated that the clerk's sudden movement caused him to panic and fire his gun. He stated that he shot the clerk "by mistake," "out of fear," and in response to what he perceived to be a threatening movement by the clerk. (A170-A171) The State offered no evidence that contradicted Herring's version of the shooting. There is thus no evidence of reflection. The evidence demonstrates that the gun was fired thoughtlessly, as a reflex reaction rather than a planned act.

Moreover, there was no evidence that the homicide was preconceived. In fact, the record shows that the contrary was the case. In confessing to the crime for which he was sentenced to death, Herring also confessed to four other armed robberies in which no one was hurt and his gun was never fired. (A176-A183) His refusal to use his gun in these other cases demonstrates forcefully that he had no intention of using it in the present case, and that he did so only as a responsive act.

The trial court's error is further apparent from an examination of the cases in addition to *Caruthers* in which the application of Section 921.141(5)(i) has been rejected by this Court. In several cases, this Court has rejected the application of the heightened premeditation aggravating circumstance despite evidence of "a . . . lengthy . . . series of atrocious events." In *Preston v. State*, 444 So.2d 939 (Fla. 1984), after robbing a convenience store, the murderer kidnapped the store clerk, forced her to walk a mile and a half at knifepoint, after which the murderer cut the clerk's throat "by severing the jugular veins, trachea and main arteries of the neck. In addition, the victim

was stabbed numerous times about her body and a cross mark was cut into her forehead." 444 So.2d at 945. This Court rejected the applicability of this aggravating circumstance despite evidence which created

> an obvious picture of a woman being forced at knifepoint this considerable distance speculating as to her fate and undoubtedly cognizant of the likelihood of death at the hands of her abductor. Clearly, the victim must have felt terror and fear as these events unfolded.

Id. at 946. This Court concluded that "[t]he type of facts previously held to justify a finding of 'cold, calculated and premeditated manner' within the meaning of subsection (i) simply do not exist here." *Id.* at 947. *See Drake v. State*, 441 So.2d 1079 (Fla. 1983), *cert. denied sub nom. Florida v. Drake*, ____ U.S. ____, 80 L. Ed.2d 832, 104 S. Ct. 2361 (1984) (heightened premeditation aggravating circumstance rejected where victim was first kidnapped; later raped, using her bra to tie her hands behind her back; and finally killed, being stabbed repeatedly in the lower chest and abdomen); *Harris v. State*, 438 So.2d 787 (Fla. 1983), *cert. denied*, ____ U.S. ____, 80 L. Ed.2d 563, 104 S. Ct. 2181 (1984) (Section 921.141(5)(i) held inapplicable notwithstanding evidence that the victim, a 73 year old woman, was killed after bitter and lengthy struggle—record showed that blood was splattered throughout the victim's home, indicating that the victim tried to escape assailant while being stabbed and beaten; and the autopsy revealed victim had suffered numerous defensive wounds to arms, hands, and shoulders).

The finding of heightened premeditation has also been repeatedly rejected where the facts strongly suggest that the killer had planned the homicide in advance. In *McCray v. State*, 416 So.2d 804, 805 (Fla. 1982), the murderer first stole several boxes of rifles from the victim's van, and later, after taking them to the edge of a wooded area, returned to the victim's van where the killer yelled, "this is for you, you motherfucker," and shot the victim three times in the abdomen. *See Peavy v. State*, 442 So.2d 200 (Fla. 1983) (elderly victim stabbed several times and apartment ransacked by accused, who, prior to murder, accompanied victim to his apartment by helping him with groceries); *King v. State*, 436 So.2d 50 (Fla. 1983), *cert. denied*, ____ U.S. ____, 80 L. Ed.2d 1461, 104 S. Ct. 1690 (1984), (victim first struck on the head with a blunt instrument and thereafter shot in the head).

Moreover, this Court has overturned two other cases in which the lower courts' findings as to the applicability of this aggravating circumstance bear material similarities to the case at bar. In *White v. State*, 446 So.2d 1031 (Fla. 1984), this Court rejected the applicability of the heightened premeditation aggravating circumstance where the evidence established that White had robbed a convenience store, in the course of which he shot and killed a customer; shot the store clerk twice, paralyzing him permanently from the neck down; and attempted to shoot two other persons who came into the store. In *Cannady v. State*, 427 So.2d 723 (Fla. 1983), the killer first abducted a hotel employee and later shot and killed him. Despite the fact that the victim had been shot five times, this Court found that during his confession the defendant explained that he shot the victim because the victim jumped at him. *Id.* at 730. This Court concluded: "These statements establish that [the defendant] had at least a pretense of a moral or legal justification, protecting his own life". *Id.* The same conclusion can be applied to the facts of this case, inasmuch as Herring, in his confession, stated that he had shot the clerk "by mistake," "out of fear," and in response to what he perceived to be a threatening movement. (A170-A171)

There was no more of a showing of heightened premeditation in this case than there was in any of the cases cited above in which this Court held Section 921.141(5)(i) inapplicable. Indeed, there is less evidence of premeditation here than there is in many of those cases. Unlike the victims in *Preston* and *Drake*, the store clerk here was not abducted. Unlike the victims in *Preston*, *Drake*, *Harris* and *Peavy*, the store clerk was not subjected to prolonged agony or an aggravated battery. Unlike the victims in *Preston*, *Drake*, *Harris* or *Cannady*, the store clerk was shot only twice, not shot or stabbed 5 or 8 or more times. Like the homicides in *Cannady* and *Caruthers*, the shooting was the result of a move by the victim which was perceived to be threatening. Like all of the foregoing cases, there was no evidence of a scheme or plan made in advance to commit a murder.

On appeal in this case, this Court affirmed the trial court's ruling as to the applicability of this aggravating circumstance. *Herring v. State*, 446 So.2d 1049, 1057 (Fla. 1984), *cert. denied*, ____ U.S. ____, 80 L. Ed.2d 330, 105 S. Ct. 396 (1984). Justice Ehrlich dissented from this finding, stating:

> I do not . . . agree that the record supports a finding of heightened premeditation sufficient to characterize the murder

> as cold, calculated and premeditated. The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in Section 921.145(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps the constitutionality, as applied, of Florida's death penalty statute.

Id. at 1058 (Ehrlich, J., dissenting).

Justice Ehrlich's concerns were well-founded. Indeed, one year later, when this Court decided *Caruthers*, it embraced his reasoning in rejecting the application of this aggravating circumstance:

> The cold, calculated and premeditated factor applies to a manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder. The State did not establish this factor beyond a reasonable doubt under the circumstances of this case.

465 So.2d at 498-99 (citations omitted).

Because this case is factually indistinguishable from, and no more grievous than, *Caruthers* and the many other cases in which Section 921.141(5)(i) has been held inapplicable, its application here is arbitrary and capricious. That aggravating circumstance was aimed at a level of premeditation substantially in excess of that which was sufficient to convict a defendant of first degree murder. With the continued application of that circumstance to the case at bar, it would be no longer possible to draw an intelligible line between the two levels of premeditation. There would then be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," *Gregg v. Georgia*, 428 U.S. at 188, 49 L. Ed.2d at 883, 96 S. Ct. at 2932, a result that would plainly violate the Eighth and Fourteenth Amendments. Accordingly, the application of Section 921.141(5)(i) must be held erroneous.

2. *The Trial Court's Finding That the Murder Was Committed for the Purpose of Avoiding or Preventing a Lawful Arrest or Effecting an Escape from Custody Was Constitutionally Impermissible*

The sixth aggravating circumstance enumerated in Florida's capital sentencing statute is that

> [t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Fla. Stat. Ann. § 921.141(5)(e) (West 1985) (hereinafter "avoidance of arrest aggravating circumstance"). The trial court found this aggravating circumstance applicable, (A166) and this finding was affirmed on appeal, *Herring v. State*, 446 So.2d at 1057. The trial court's application of this circumstance was erroneous under Florida law and arbitrary and capricious in violation of the Eighth and Fourteenth Amendments.

In construing Section 921.141(5)(e), this Court has stated that "this aggravating circumstance is applicable primarily in the situation where a defendant kills a law enforcement officer in an effort to avoid arrest or effect escape. It may also be applicable when the factfinder determines that the *dominant* motive for the murder was the elimination of witnesses." *Herzog v. State*, 439 So.2d 1372, 1378 (Fla. 1983) (emphasis supplied). For the witness elimination motive "to support a finding of the avoidance of arrest circumstance when the victim is not a law enforcement officer, 'proof of the requisite intent to avoid arrest and detection must be very strong.' " *Armstrong v. State*, 399 So.2d 953, 963 (Fla. 1981), *quoting Riley v. State*, 366 So.2d 19, 22 (Fla. 1978), *after remand*, 413 So.2d 1173 (Fla. 1982), *cert. denied*, 459 U.S. 981, 74 L. Ed.2d 293, 103 S. Ct. 317 (1982). "[I]t must clearly be shown that the dominant or only motive for the murder was the elimination of witnesses." *Oats v. State*, 446 So.2d 90, 91 (Fla. 1984).

In *Caruthers*, this Court, applying these principles, found that the avoidance of arrest aggravating circumstance was erroneously applied by the trial court. This Court ruled that the facts that three shots were fired by Caruthers and that he knew the victim could not serve as a basis for the application of this aggravating circumstance. The Court's reasoning is self-evident: the State simply failed to establish that "the dominant or only motive for the murder was the elimination of witnesses."

No such showing was made here either. The evidence relied upon by this Court in affirming this finding was that the clerk was shot twice, once while he was standing, and again after he had fallen to the floor; and that Detective Varner, one of the interrogating officers, testified that Herring stated to him that he "shot [the clerk] a second time to prevent [the clerk] from being a witness against him." *Herring v. State*, 446 So.2d at 1057. Both of these aspects of the State's case are suspect, and both, even if proved, fail to establish witness elimination or avoidance of detection as the dominant or sole motive for the killing.

First, the evidence is equivocal on the issue of whether the clerk was shot a second time as he lay on the floor. Dr. Arthur Botting, the pathologist who performed the autopsy on the victim's body, could not formulate an opinion as to whether the victim was shot twice in rapid succession or was shot a second time after he dropped to the floor. He did, however, testify that the victim died within moments of being shot. (A184)

Second, Herring steadfastly maintained that the victim was shot "by mistake," "out of fear," and because he made a sudden movement. (A170-171) Herring never stated that witness elimination or avoidance of arrest was ever contemplated.

Third, Detective Varner's testimony that Herring told him that he fired the second shot "to prevent [the clerk] from being a witness against him, at which time he stated he observed his body twitch," (A185) is uncorroborated and implausible. Herring gave a highly detailed confession to the police. That confession was tape-recorded, and the tape lasts 29 minutes. Nowhere in that taped confession does Herring state that he shot the clerk to prevent him from testifying. That additional detail appears *only* in Detective Varner's account of an earlier, *unrecorded* conversation between him and Herring. It is the only admission which the State attributed to Herring that is not tape-recorded. The only taped reference to the second shot contradicts Detective Varner; in the tape, Herring stated that it was fired "out of fear." (A170-171) The only taped statement bearing on witness elimination as a motive came, not surprisingly, from Detective Varner:

> WHITE: Detective Varner, you got any questions for him?
> VARNER: Yes. One question. Were you in any fear at any time since you hadn't conspired to perpetrate this robbery, that this guy might have shot you in the process of the robbery?

> HERRING: Yea', well, I was, I was scared.
> VARNER: *Eliminate any witnesses.*
> HERRING: I was scared, you know. I was really scared. You know what I'm saying. In fact, you know—.

(A186) (emphasis supplied). Detective Varner's taped comment was purposely injected into the confession; it was not prompted by Herring's preceding statement. It is obvious that Varner made the same interjection when testifying at trial about his conversation with Herring.[3]

Fourth, Herring, in the course of the police interrogation, freely admitted to committing four other armed robberies of gas stations and convenience stores. (A176-183) He never attempted to hide his identity during any of these robberies. Indeed, as a consequence he was identified in line-ups by victims in three of these robberies. Nor did he ever attempt to harm the clerks and attendants who had seen him face to face.

This Court has held that before the avoidance of arrest aggravating circumstance can be applied, "proof of the requisite intent to avoid arrest and detection must be very strong." *Riley v. State*, 366 So.2d 19, 22 (1978), *after remand*, 413 So.2d 1173 (Fla. 1982), *cert. denied*, 459 U.S. 981, 74 L. Ed.2d 293, 103 S. Ct. 31 (1982). The underlying proof here is by no means "very strong"; indeed, it is so weak that to execute a man in reliance upon it would amount to a clear miscarriage of justice. Varner's testimony, which is the only supporting evidence the State can muster, is substantially undercut by the far more reliable evidence of the tape recordings. Furthermore, Varner's testimony, even if believed, is insufficient to establish that witness elimination was the *dominant* motive of the shooting. This Court has rejected the application of this aggravating circumstance in cases

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3 On another occasion during trial, Varner was caught putting his words into Herring's mouth and admitted doing so. Under direct examination at trial the following exchange occurred:

> GRAZIANO: Would you tell the jury what he told you?
> VARNER: The defendant stated that he had observed the—He had done a surveillance on the Seven Eleven store, 205 South Ridgewood.
> GRAZIANO: Excuse me, Officer. Did he use the word "surveillance"?
> VARNER: No, ma'am.
> GRAZIANO: Do you recall what terminology he used?
> VARNER: Checked it out.

Later in the examination the prosecutor, Ms. Graziano, admonished Detective Varner, saying "It's very important, officer, you understand, that we wish to hear exactly what the Defendant told you." (A187)

where the motive of witness elimination was far more apparent than it is here.

In *Armstrong v. State*, 399 So.2d 953 (Fla. 1981), the victims were shot and "after the initial shooting, were layed [sic] out prone and then 'finished off.' " *Id.* at 963. In *Menendez v. State*, 368 So.2d 1278 (Fla. 1979), the victims were in a submissive position at the time they were shot. In both cases this Court ruled that although it was possible to infer that witness elimination or avoidance of arrest was the object which motivated the killers to commit the murders, the evidence was insufficient to prove beyond a reasonable doubt the requisite intent to avoid arrest and escape detention. Each of these cases contained strong evidence that the motive of witness elimination had prompted the killings: in *Armstrong*, the Court found that it was also "possible to infer that the robbers used their guns in order to increase their chances of departing the [victim's] ranch with their lives." 399 So.2d at 963; in *Menendez*, the murderer had committed an execution-style killing. 369 So.2d 1278. This Court nevertheless refused to apply the avoidance of arrest aggravating circumstance. Given these precedents, that circumstance is surely inapplicable here.

The State's evidentiary burden is necessarily very high at the sentencing phase of capital felony cases. As a result of that burden, the avoidance of arrest aggravating circumstance frequently has been held to have been erroneously applied in circumstances where it was possible to infer from the facts that witness elimination was the killer's dominant motive but where such an inference was not proved beyond a reasonable doubt. As in *Armstrong* and *Menendez*, this aggravating circumstance has been held inapplicable where there was testimony stating that the murder was committed to eliminate a "snitch," *Demps v. State*, 395 So.2d 501, 505 (Fla. 1981), *cert. denied*, 454 U.S. 933, 70 L. Ed.2d 239, 102 S. Ct. 430 (1981); where the killer transported the victim's body to a desolate area and where he set it afire, *Herzog v. State*, 439 So.2d 1372, 1379 (Fla. 1983); and where the murderer had known the victim for a number of years and eliminated the only witness who could testify against him, *Rembert v. State*, 445 So.2d 337, 340 (Fla. 1984). The evidence of witness elimination as the sole or dominant motive for the killing here is far less compelling than in those cases, and in this case there is substantial evidence of other reasons for the act which resulted in the store clerk's death.

The application of this aggravating circumstance to the facts of this case is therefore without precedent in Florida law. The precedents that do exist make clear that the avoidance of arrest circumstance is inapplicable. Its application here is thus an arbitrary and capricious use of Florida's capital sentencing statute, and is plainly unconstitutional.

3. *The Trial Court Impermissibly Applied Both the Heightened Premeditation and the Witness Elimination Aggravating Circumstances on the Basis of the Same Aspect of the Shooting*

In *Provence v. State*, 337 So.2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969, 53 L. Ed.2d 1065, 97 S. Ct. 2929 (1977), the Florida Supreme Court recognized that the statutory aggravating circumstances that (1) the homicide was committed in the course of a robbery,[4] and (2) the crime was committed for pecuniary gain,[5] may not *both* be applied in the weighing process absent unusual circumstances. The Court reasoned:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, [these two aggravating circumstances] refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the *same aspect* of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Id. at 786 (emphasis in original).

In *Caruthers*, this Court noted that the trial judge, applying the reasoning of *Provence*, had found that because the heightened premeditation and witness elimination aggravating circumstances, both of which were found applicable, were based upon "essentially

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4 Fla. Stat. Ann. § 921.141(5)(d) (West 1985).

5 Fla. Stat. Ann. § 921.141(5)(f) (West 1985).

the same circumstances and conclusions," *both* could not be factored into the balancing process. The trial court's reasoning in *Caruthers* is fully applicable here.

Both the heightened premeditation and avoidance of arrest aggravating circumstances were based on precisely the "*same aspect* of the . . . crime": the firing of a second shot. Consequently, the trial court impermissibly based two statutory aggravating circumstances upon one isolated consideration. For the reasons which are set forth immediately below, this consideration alone requires a new sentencing.

4. *A Reversal of Either the Heightened Premeditation or Avoidance of Arrest Aggravating Circumstance Requires That Herring's Death Sentence Be Vacated*

The trial court found two mitigating circumstances:

(1) The age of the defendant at the time of the crime;

(2) The defendant's difficult childhood, *i.e.*, that the defendant was raised without a father, that he was hyperactive, had learning disabilities, and had trouble in school.

(A168)

Under Florida's capital sentencing scheme, the aggravating circumstances must be weighed against the mitigating circumstances. This Court stated in *State v. Dixon*:

> [T]he procedure to be followed by the trial judges and juries is 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.

283 So.2d 1, 10 (1973).

In *Elledge v. State*, 346 So.2d 998 (Fla. 1977), this Court considered whether a death sentence must be vacated and remanded where the judge had impermissibly taken into account in the weighing process a nonstatutory aggravating circumstance where both aggravating and mitigating circumstances were present. The Court found that Florida's statutory sentencing scheme mandated remand in this circumstance. The Court reasoned:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.

Id. at 1003.

Because the trial court here found two mitigating circumstances, a finding that even one of the aggravating circumstances, discussed *supra* at 7-18, was erroneously applied requires that Herring's death sentence be vacated. *See, e.g., Elledge v. State, supra*; *Randolph v. State*, 463 So.2d 186 (Fla. 1984) (Randolph entitled to reconsideration of his sentence where two of three statutory aggravating circumstances erroneously applied and two mitigating circumstances exist).

II.

HERRING WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING HEARING

Herring's attorney at the sentencing hearing had never before tried a capital case. He has not tried one since. His inexperience and ineptitude were devastating to Herring's case and all but eliminated Herring's chances of obtaining a sentence of life imprisonment. The defense he presented in support of his client's life consisted of calling Herring's mother to the stand; she was forced to admit that she would say anything to help her son. *No other evidence* was presented on Herring's behalf, although much was available to counsel, and more would have been available had he conducted any meaningful investigation. His failure to present an adequate defense was matched by his failure to challenge the introduction of highly prejudicial and clearly inadmissible evidence by the prosecution. His performance fell below even the most lenient standards of adequate representation, and Herring is at the very least entitled to proper representation and a new sentencing hearing.

The trial court found that "[t]he trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentencing hearing." (A163) After reciting the rule that "allegations of ineffective assistance of counsel, especially in capital cases, require a hearing," the court concluded that the record conclusively demonstrated that "Defendant is not entitled to relief,

and the motion may be denied without an evidentiary hearing." (A163) Given the strong presumption in Florida law in favor of evidentiary hearings, the trial court's decision was a clear abuse of discretion.

The trial court's reasoning in rejecting Herring's claims of ineffective assistance of counsel was erroneous in several respects. *First*, the court applied an incorrect legal standard in examining Herring's contentions. *Second*, the court made factual findings on several issues without any supporting evidence. *Third*, the court improperly made factual findings about the value of excluded evidence and the impact of evidence which had been erroneously admitted. *Fourth*, the court ignored a substantial body of law cited by Herring in support of his allegations.

There is ample support in the record for an order granting Herring a new sentencing hearing. Relief has repeatedly been granted in similar cases where counsel's professional deficiencies were less numerous and varied than those alleged here. Many of the actions and inactions of Herring's sentencing counsel, taken individually, justify the relief sought. Cumulatively, they unquestionably denied Herring a fair hearing.

A. The Trial Court Applied the Incorrect Standard in Denying Herring's Ineffective Assistance of Counsel Claims

A criminal defendant will be found to have been denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments when his counsel's performance is deficient and it is prejudicial. *Strickland v. Washington*, 466 U.S. 688, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984). Counsel's representation will be deemed "deficient" when it has fallen "below an objective standard of reasonableness." 466 U.S. 688, ____, 80 L. Ed.2d 674, 693, 104 S. Ct. 2052, 2065. Counsel's performance will be held to be "prejudicial" when his errors are so serious "as to deprive defendant of a fair trial, a trial whose result is reliable." *Id.*

To establish that he was deprived of effective assistance of counsel, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." 466 U.S. 688, ____, 80 L. Ed.2d 674, 697, 104 S. Ct. 2052, 2068. Rather, it need only be shown

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id.

In *Wilson v. Wainright*, Nos. 67,190, 67,204 (Supreme Court of Florida, Aug. 15, 1985), this Court, in finding the defendant's counsel on appeal ineffective, stated:

> We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which appellant will receive adequate representation.

Slip op. (Lexis) at 4. These observations capture the essence of a court's task in analyzing claims of ineffective assistance of counsel under *Strickland*: to determine whether counsel's alleged deficiencies, if proved, were sufficient to "undermine confidence in the outcome" of the proceeding, *i.e.*, whether, but for the deficiencies, there was a *reasonable probability* that the death penalty would not have been imposed.

In reviewing Herring's claims, the trial court considered only whether Herring would *in fact* have been spared a death sentence but for counsel's deficient representation. (A162-A163) After acknowledging that counsel's representation was deficient in numerous respects, the court dismissed Herring's claims on the basis of a determination that counsel's deficiencies would not have altered the sentence imposed. *Id.* The trial court thus did what *Strickland* instructs trial courts *not* to do, and what this Court recognized was impossible for courts to do in *Wilson*: rule on the basis of a determination as to the outcome of the proceeding rather than after performing a careful analysis of the fairness of the proceedings.

In *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985), the Fifth Circuit reversed a denial of habeas corpus precisely because a magistrate had applied *Strickland* incorrectly, stating:

> '[A] defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome of the case.' The [Supreme] Court found this 'outcome-determinative' standard imposed too heavy a burden on defendants, and that its use was not appropriate. Instead, 'the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.'

Id. at 1178-79 (citations omitted) (emphasis in original). Thus, like the magistrate in *Nealy*, the trial judge committed reversible error by imposing "too heavy a burden" on Herring in summarily denying his ineffective assistance of counsel claims.

B. Herring is Entitled to an Evidentiary Hearing on His Ineffective Assistance of Counsel Claims

This Court has frequently emphasized, in connection with claims of ineffective assistance of counsel, that "[t]he law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records of the case conclusively show that the movant is entitled to no relief." *See, e.g., O'Callaghan v. State*, 461 So.2d 1354, 1355 (Fla. 1984); *LeDuc v. State*, 415 So.2d 721 (Fla. 1982). Rule 9.140(g) of the Florida Rules of Appellate Procedure provides, in connection with summary denials of petitions under Fla. R. Crim. P. 3.850, that "[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the case remanded for an evidentiary hearing." This Court need not look beyond the trial court's order summarily denying Herring's Rule 3.850 petition to find that the trial court's determination was erroneous. In *Meeks v. State*, 382 So.2d 673, 676 (Fla. 1980), this court held that in reviewing Rule 3.850 claims, the trial judge must "either attach that portion of the case file or record which conclusively shows that the prisoner is entitled to no relief or grant an evidentiary hearing." The trial court failed to do this despite numerous specific references to the record in support of Herring's ineffective assistance of counsel claims in his Motion to Vacate.

In *Vaught v. State*, 442 So.2d 217 (Fla. 1983), this Court held that it was an error for the trial court to refuse to conduct an evidentiary hearing where Vaught alleged "a pattern of egregious and blatant incompetence" which included "a failure to conduct pretrial preparation, research, and investigation and concluded with a claim of failure to present available mitigating evidence." *Id.* at 219. Notwithstanding Herring's similar allegations relating to his sentencing counsel's incompetence, which are amply supported by the record, the trial court refused to conduct a hearing. The trial court refused to do so despite its acknowledgment that "it is very difficult to go back and determine whether trial counsel's actions or inactions amounted to effective assistance of counsel." (A159) A review of counsel's deficiences, *which are apparent from the face of the record*, demonstrate that a hearing on Herring's claims is mandatory under Florida law.

1. *Sentencing Counsel Failed to Present Strong Evidence of Herring's Mental and Emotional Condition Which He Had in His Possession*

At the sentencing hearing, counsel had *in his possession*, but made no effort to introduce, psychological reports from St. Luke's Hospital in New York City documenting the results of psychological examinations of Herring when he was 12 years of age. (A113-A117) In these reports, Herring was diagnosed as mentally retarded, suffering from "neurological dysfunction," and a "psychoneurotic disorder." (A114) The reports also reflect that Herring was emotionally disturbed, unable to function in school, and deprived of emotional support at home. (A114) Such evidence, while perhaps not sufficient for invoking the insanity defense, was sufficient for a finding under Section 921.141(6)(b) that Herring was under an extreme mental and emotional disturbance at the time of the homicide.

Despite the strong connection between this evidence and a critical statutory mitigating factor, the trial court concluded that the failure to introduce the psychological reports did not constitute a professional deficiency. (A160) In support of this finding, the court observed that the reports were done when Herring was 13,[6] that the defense established Herring's learning disabilities and psychological problems through the testimony of his mother and the reports were therefore cumulative, that the mother failed to keep appointments with his counselor, and that the reports indicated that Herring was of dull normal intelligence. (A160)

None of these reasons justifies counsel's failure to introduce the reports and argue that his client's extreme mental and emotional disturbance constituted a strong mitigating factor. The passage of time is of no consequence. A mentally retarded, emotionally disturbed individual is not cured with the mere passage of time. Neither does the fact that Herring's mother testified about his mental and emotional problems justify counsel's failure in this regard. She was forced to admit on cross-examination that she did not understand the significance of her son's low IQ and that she did not know whether it was at or below normal. (A188) The reports of independent experts, not prepared for the purpose of this litigation, would obviously have had far greater probative value than the testimony of Herring's mother, who possessed no expertise and had the strongest possible

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6 The reports reflect that Herring was 12 at the time he was examined. (A113)

interest in the outcome. Moreover, the documents could attest to facts about which Herring's mother could not testify: specific details about the nature of Herring's organic mental and emotional disease. The trial court's finding that the psychological reports were cumulative is clearly erroneous.

Furthermore, no court could determine, without a hearing, why the evidence was not introduced. The trial court has assumed that Herring's counsel made a tactical decision not to introduce the reports. (A160-A161) We are prepared to prove that the reason for this failure was gross negligence and lack of preparation. There is no evidence in the record to intimate, let alone conclusively establish, that the psychological reports were not introduced because of anything other than professional incompetence. Only after an evidentiary hearing would the court have any basis to determine whether counsel intentionally or negligently chose not to use the evidence. The court's reasoning on this claim only serves to underscore the need for an evidentiary hearing.[7]

In *Holmes v. State*, 429 So.2d 297 (Fla. 1983), this Court found that counsel's failure to present available evidence of defendant's mental and emotional condition in support of mitigation constituted ineffective assistance of counsel. 429 So.2d at 300. The Court observed that the defendant's counsel at sentencing made no reference to reports of two court-appointed psychiatrists who suggested that defendant may have been in some kind of disturbed state at the time of the murder. *Id.* Noting that "[a] psychological disturbance at the time of the capital felony may be relevant in mitigation even though it is not a sufficient ground for invoking the insanity defense," the Court concluded that "defense counsel's representation during the proceedings on sentencing [were] substantially deficient and measurably below the standard for competent counsel." *Id.* at 300-301. The Court further found that "under the circumstances the deficiency was so substantial as to have probably affected the outcome of the proceedings on the question of sentencing." *Id.*

In *Holmes*, as in the case at bar, the trial court dismissed the defendant's Rule 3.850 petition without a hearing. This Court found

7 The court's other two findings pertaining to this claim—the mother's failure to keep appointments and an indication in the reports that Herring possessed dull normal intelligence—do not warrant exclusion of the evidence either. The trial court seems to suggest, on the basis of these findings, that the failure to introduce the reports was a trial tactic. There is no basis for such a finding in the record.

it unnecessary to remand *Holmes* for an evidentiary hearing to determine whether a new sentencing was necessary, concluding that counsel's deficiency was sufficiently prejudicial to warrant a new sentencing hearing. 429 So.2d at 300. The same result is warranted here.

2. *Herring's Sentencing Counsel Failed to Investigate Adequately or to Present Other Readily Available Evidence In Mitigation*

Other than calling to the stand Herring's mother, who was forced to admit upon cross-examination that she was willing to say anything to help her son, (A189) Herring's counsel presented no evidence in mitigation. Had he undertaken even a cursory investigation of his client's background, which he made no attempt to do, he would have obtained other documentary and testimonial evidence regarding Herring's mental disabilities. This evidence included a psychological report describing Herring's psychological and emotional problems, and character witnesses who were ready and willing to testify.

Among the reports counsel failed to locate is a psychological examination performed while Herring was a resident at the Wiltwyck school, a facility for emotionally disturbed boys. (A121-A122) The report details his psychological and emotional problems and also touches upon some of his positive qualities: that he was positively motivated to achieve, and that he was found to have potential for "good social interactive relationships" with proper therapy. The report also provides details regarding Herring's IQ. (A121-A122) It reflects that Herring was tested as having a Full Scale IQ of 72, which is in the borderline mentally retarded range.

In Herring's Rule 3.850 petition, there were presented the affidavits of several persons who, although never contacted, would have testified on his behalf. Each of them could have presented a far more sympathetic view of Herring than what emerged at either the trial or the sentencing hearing. The affidavit of James Breen, who taught Herring when he was at the Wiltwyck school, describes Herring's nonviolent, nonaggressive, vulnerable character traits. (A126-A127) Juan Ortega, a child care worker at Wiltwyck when Herring was there, describes Herring as a boy who tried to make a difficult job easier for him. (A128-A129) Herring's younger sister, Gwendolyn Myers, who attended the trial, describes her brother as a protective person who cared for her when their mother was in the hospital, and

with whom she attended church while growing up. (A130-A131) Julia White, Herring's godmother, attests to Herring's problems in growing up in a very difficult environment, because "he was so naive," but that he was a "loving, affectionate child" who sought "lots of attention and affection." (A132-A133) Joan Swillings, a neighbor, indicates that Herring was "a nice boy" who was always eager to please. (A134-A135) Despite the ready availability of these witnesses, counsel made no inquiry regarding potential character witnesses or other evidence which might be offered in mitigation.

On the basis of these uncontroverted exhibits, Herring argued below that his counsel failed to investigate adequately or to present a substantial body of readily available evidence in mitigation. The trial court rejected these assertions, while conceding that they were "perhaps the most difficult to analyze." (A160) Such observations underscore the court's error in denying a hearing: without a supporting evidentiary record, these claims are impossible to analyze. Left uncontroverted, they mandate a new sentencing hearing.

To be deemed minimally competent, a defense counsel must "conduct a reasonable amount of pretrial investigation." *Washington v. Strickland*, 693 F.2d 1243, 1251 (5th Cir. 1982), *rev'd*, 466 U.S. 688, 80 L. Ed.2d 674, 104 S. Ct. 2052, *aff'd on remand*, 737 F.2d 922 (11th Cir. 1984). *See Stanley v. Zant*, 697 F.2d 955, 963, *cert. denied sub nom. Stanley v. Kemp*, ___ U.S. ___, 81 L. Ed.2d 372, 104 S. Ct. 2667 (1984); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098, 76 L. Ed.2d 364, 103 S. Ct. 1798 (1983). The Sixth Amendment mandates that counsel adequately prepare for the sentencing phase of a capital case, which requires "an exhaustive investigation for potential mitigating evidence." *King v. Strickland*, 714 F.2d 1481, 1490 (11th Cir. 1983), *vacated*, ___ U.S. ___, 81 L. Ed.2d 358, 104 S. Ct. 2651, *aff'd on remand*, 748 F.2d 1462, *cert. denied*, ___ U.S. ___, 85 L. Ed.2d 301, 105 S. Ct. 2020 (1985). When counsel neglects to present available evidence in mitigation, the defendant is deprived of a fair sentencing hearing. *See id.*

In *King*, the Eleventh Circuit held that where a criminal defendant convicted of murder is represented at sentencing by counsel who neglects to conduct a thorough investigation for potentially mitigating evidence and who fails adequately to prepare for this stage of the trial, the defendant has been denied effective assistance of counsel in violation of the Sixth Amendment. After its decision in *Strickland v. Washington*, 466 U.S. 688, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1982), the Supreme Court vacated the judgment of the Eleventh Circuit in

King and remanded the case for further consideration, based on *Strickland*. *Strickland v. King*, ___ U.S. ___, 81 L. Ed.2d 358, 104 S. Ct. 2651 (1984). Applying the principles announced in *Strickland*, the Eleventh Circuit adhered to its earlier decision, finding counsel's failure "to search carefully for mitigating evidence," both deficient and prejudicial. *King v. Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984). The Circuit Court emphasized that where counsel's failure to present "available character witnesses as mitigating evidence" is not "a strategic decision taken after reasonable investigation," a criminal defendant has been denied the Sixth Amendment right to counsel. *Id.*

The Eleventh Circuit has also emphasized the obligation of counsel, in preparing for a sentencing proceeding, to search thoroughly for mitigating evidence, and in particular for character witnesses who may be willing to testify as to the defendant's character and background. *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985). In *Tyler*, the Circuit Court, recognizing that "a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase" of a capital case, further observed:

> The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted in this case was thus robbed of the reliability essential to assure confidence in that decision.

Id., at 745.

Before examining the substantive worth of the evidence, a court is thus required to make a threshold determination whether counsel made the requisite investigation. No such finding can be made without a hearing on the matter.

Moreover, the court's findings that "[t]he psychological reports would have been cumulative to the mother's testimony," and that "the testimony of defendant's former teachers . . . was of doubtful value," (A160) are clearly erroneous. The Supreme Court has repeatedly emphasized that an integral aspect of the constitutional requirement of fairness in capital sentencing proceedings is that the sentencer be adequately informed about the individual to be sentenced. In *Lockett v. Ohio*, 438 U.S. 586, 606, 57 L. Ed.2d 973, 990-91, 98 S. Ct. 2954, 2968 (1978), the Supreme Court held that a

statute which restricted the sentencer's consideration of mitigating evidence violated the Constitution. The Court underscored the importance of *Lockett* in *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 71 L. Ed.2d 1, 10-11, 102 S. Ct. 869, 876-877 (1982) finding that evidence of, among other things, severe emotional disturbance is particularly relevant, especially when the accused is a youth. In *Eddings*, the accused was 16 at the time he committed the murder for which he was convicted. The psychological reports deemed cumulative by the trial court reflect that Herring, who was 19 at the time of the shooting, was psychologically immature for his age and an emotionally disturbed youth. (A118-A120)

By failing to search for and present the readily available mitigating evidence, counsel excluded from the sentencer's consideration substantial evidence of the existence of "compassionate or mitigating factors stemming from the diverse frailties of humankind," and, instead created the risk that Herring would be regarded as a member of the "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed.2d 944, 961, 96 S. Ct. 2978, 2991 (1976). The trial court's concession that the relatives' testimony "may in some way have helped the Defendant," trivializes the overriding importance of such evidence: its presentation could have made the "critical difference" between life and death for Ted Herring. *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983), *cert. denied sub nom. Stanley v. Kemp*, ____ U.S. ____, 81 L. Ed.2d 372, 104 S. Ct. 2667 (1984).

3. *Herring's Sentencing Counsel Failed to Contest the Existence of the Heightened Premeditation Aggravating Circumstance*

In its closing argument at sentencing, the State argued, *inter alia*, that the cold, calculated and premeditated aggravating circumstance was applicable. (A190) Herring's counsel never rebutted this argument. Counsel also failed to point out (1) that in his confession Herring stated that he shot the clerk "by mistake," in response to what he perceived to be a threatening movement, and "out of fear," thus without time for reflection, (A170-A171); (2) that it was undisputed that the two shots were fired in the same time frame, (A184); and (3) that under Florida law this aggravating circumstance has been

found applicable only where "the facts show a particularly lengthy, methodic or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." *Preston v. State*, 444 So.2d 939, 946 (Fla. 1984). Had sentencing counsel familiarized himself with the applicable law, these arguments would have been obvious.

In *Holmes v. State*, 429 So.2d 297 (Fla. 1983), this Court found that counsel's concession as to the applicability of a statutory aggravating circumstance constituted ineffective assistance of counsel which mandated reversal of the death sentence. There, the defendant's counsel conceded the existence of a "questionable aggravating circumstance." *Id.* at 300. Here, Herring's counsel did not challenge the State's assertion of an aggravating circumstance which, for the reasons set forth at 8-12, *supra*, was plainly inapplicable.

The trial court's reasoning for rejecting this claim—that defendant denied "that he shot the store clerk" and claimed that "another person murdered the clerk," (A162-A163)—misses the point. The issue is whether counsel zealously and effectively marshaled every available argument in support of his client. By failing to contest the heightened premeditation aggravating circumstance, counsel offered no response to a critical prosecution argument. In *Wilson*, *supra*, this Court found appellate counsel ineffective for failing to

> raise or discuss any issue relating to the sufficiency of the evidence to support the jury's finding of premeditation . . . . This issue was sufficiently apparent from the cold record that the two dissenting justices raised [it] in their separate opinions.

Slip op. (LEXIS) at 3. (citation omitted). The Court concluded that

> [t]he decision not to raise the issue cannot be excused as mere strategy or allocation of appellate resources. This issue is crucial to the validity of the conviction and goes to the heart of the case.

Id. at 4.

The failure of Herring's counsel to rebut the applicability of the heightened premeditation aggravating circumstance is no more excusable than appellate counsel's failure to raise a premeditation issue in *Wilson*. Like the dissenting justices referred to above, Justice Ehrlich recognized from "the cold record" that the heightened premeditation aggravating circumstance was erroneously applied. *Herring v. State*, 446 So.2d at 1058 (Ehrlich, J., dissenting as to application of

heightened premeditation aggravating circumstance). Moreover, a correct determination of this issue goes "to the heart" of Herring's death sentence; if the aggravating circumstance was erroneously applied, Herring would have to be resentenced under Florida law. *See* discussion *supra* at 17-19.

4. *Counsel's Lack of Skill and Knowledge Undermined the Reliability of the Proceeding*

"Representation of a criminal defendant entails certain basic duties." *Strickland v. Washington*, 466 U.S. 688, ____, 80 L. Ed.2d 674, 694, 104 S. Ct. 2052, 2065, 104 S. Ct. 2052, 2065 (1984). Counsel has, among other things, an affirmative "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*, *citing Powell v. Alabama*, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170-171, 53 S. Ct. 55, 63-64 (1932). At a minimum, therefore, counsel must know the law and appear in court equipped with the relevant legal support for his positions.

In *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983), *cert. denied sub nom. McKaskle v. Vela*, 464 U.S. 1053, 79 L. Ed.2d 195, 104 S. Ct. 736 (1984), a habeas corpus petitioner sought relief on the ground that his counsel's lack of skill and knowledge resulted in actual and substantial disadvantage to him, and that consequently, he was denied effective assistance of counsel. The Fifth Circuit agreed, finding that by making only general objections to the admissibility of inadmissible testimony, and by failing to object to inadmissible, inflammatory testimony, counsel committed fundamental errors that were constitutionally intolerable. In reaching this conclusion, the Court observed that counsel's errors revealed his ignorance of "basic rules" of procedure, 708 F.2d at 962, finding it unacceptable that counsel "did not follow the most elementary blackletter rules of procedure found in bar review materials, beginner trial manuals and basic books on Texas procedure . . . ." *Id.* at 964.

In this case, Herring was represented by an attorney who had never tried a capital case, and who did not even represent Herring at trial. At the sentencing hearing, Herring's counsel exhibited both a general ignorance of the rules of evidence and criminal procedure as well as a lack of familiarity with relevant legal principles on numerous issues central to the outcome of the proceeding. Although the trial court agreed that counsel's representation was deficient in many respects, it concluded, without the benefit of an evidentiary hearing, that these deficiencies were not "serious" or "substantial." (A160-A162)

a. Counsel's Lack of Skill Resulted In the Admission of Highly Prejudicial Testimony

As discussed more fully *infra* at 42-43, early in the sentencing proceeding, the State sought to introduce the inflammatory testimony of a probation officer as to certain statements made by Herring in the course of a custodial interrogation. The probation officer's testimony that Herring stated that the store clerk's death meant that "there was one less cracker," (A200-A201) was admitted over defense counsel's general objections, on the theory that the testimony constituted permissible evidence of lack of remorse. (A191)

Counsel did not support his objections with the abundance of support which a prepared lawyer would have had ready to present to the judge.[8] Moreover, he declined to review *Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 72 L. Ed.2d 862, 102 S. Ct. 2257 (1982), the case upon which the trial court stated he would rely in making the critical determination whether the probation officer would be permitted to testify. (A192) The following exchange typifies the lack of zeal displayed by Herring's counsel throughout the hearing:

> THE COURT: Could one of you get me 399 So.2nd 964? That deals with lack of remorse.
>
> MR. QUARLES: Is it in that report you have there? With *Maggard* in it? That's 399?
>
> THE COURT: It should be in here. Lack of remorse under *Sireci v. State*. 399 So.2nd 964. Can be presented to argue aggravating factors. The eight [sic] criteria heinous, atrocious, and cruel.
>
> Do you all want to see that case, now, before I make a decision?
>
> MR. QUARLES: I don't.

(A192)

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8 As discussed *infra* at 42-47, the probation officer's testimony was inadmissible (1) because Herring was not given *Miranda* warnings prior to the custodial interrogation, *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed.2d 359, 101 S. Ct. 1866 (1981), and (2) because the State failed to notify the defense that it would seek the introduction of this testimony, *Smith v. Estelle*, 602 F.2d at 699 (5th Cir. 1979), *aff'd*, *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed.2d 359, 101 S. Ct. 1866 (1981); Fla. R. Crim. P. 3.220. Counsel failed to cite either the *Smith* case, which the Supreme Court decided only nine months prior to Herring's sentencing, and which was dispositive as to the inadmissibility of the probation officer's testimony, or Rule 3.220 of the Florida Rules of Criminal Procedure, which would also have served as a basis for excluding the testimony.

Had he glanced at the case he would have seen that it held evidence of lack of remorse relevant *solely* to the heinous, atrocious and cruel aggravating circumstance. No evidence supporting that circumstance was ever presented, and even the State conceded it was inapplicable. *See* discussion *infra* at 44. Had counsel pointed out the limited relevance of lack of remorse evidence, the trial court would have been obliged to exclude it.

The trial court recognized that counsel's representation was deficient in this respect, stating: "The defense now claims [counsel] did not object for the right reasons or cite proper case law. This contention may be correct in light of *Sireci v. State*, 399 So.2d 964." (A161) The court nonetheless concluded that counsel's deficiency was not "substantial and serious" because he did object and because the State had not yet conceded that the murder was heinous, atrocious and cruel. (A161) Yet at the proceeding the court indicated that it was uncomfortable with the testimony and explicitly requested from Herring's counsel legal authority to back up counsel's general objections. Counsel utterly failed to support his objections at that point. (A192) Furthermore, if it was obvious to the State that the heinous, atrocious and cruel aggravating circumstance did not apply, it should have been obvious to the trial court. That the State had not yet made this concession was irrelevant.

There can be no excuse for sentencing counsel's inability to cite with specificity fundamental rules of Florida criminal procedure and major recent Supreme Court cases in a capital sentencing proceeding. Nor can counsel's indifference to the authority upon which the trial court was going to rely in making a critical evidentiary ruling be justified.

As discussed *infra* at 42-43, the prejudicial nature of the testimony was overwhelming. Because counsel's deficient representation resulted in a clearly erroneous evidentiary ruling, and because that error could have been the impetus for Herring's death sentence, the reliability of the proceedings was undermined. Both elements of the *Strickland* test have therefore been met.

b. Counsel's Ignorance of the Rules of Evidence Resulted In the Erroneous Admission of Highly Prejudicial Testimony

The State cross-examined Dorothy Myers, Herring's mother, extensively about why Herring moved to Florida from New York. (A193-A194) The State thereby managed to elicit evidence of Herring's connection with persons involved in illegal narcotics activity in New York City. The highly prejudicial nature of the evidence thus brought to the judge and jury's attention is obvious: they were permitted to infer that Herring had been involved to some unknown degree in drug dealings before coming to Florida, and that the danger arising from this involvement had prompted his move. Despite the prejudicial nature of the testimony, Herring's counsel was silent as the questioning proceeded. He failed to object to this line of questioning even though it was beyond the scope of counsel's direct examination, and was solely intended to elicit evidence of an unenumerated aggravating circumstance, namely, prior criminal activity which had not resulted in a conviction.

Florida's sentencing scheme bars the State from introducing any evidence other than evidence which relates to one of the nine aggravating circumstances enumerated in the sentencing statute. Fla. Stat. Ann. § 921.141(5) (West 1985). *See e.g.*, *Elledge v. State*, 346 So.2d 998 (Fla. 1977); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979). With regard to prior criminal activity, the State is restricted to the introduction of evidence that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat. Ann. § 921.141(5)(b) (West 1985). Florida law clearly limited the State's examination of the witness to questions relating to criminal activity falling within the confines of Section 921.141(5)(b). The State went far beyond this statutory limitation by extracting evidence tending to show that Herring was involved in illegal narcotics activity.

Moreover, it is settled law in Florida that "[c]ross-examination regarding an irrelevant criminal incident constitutes reversible error." *Sneed v. State*, 397 So.2d 931 (Fla. 5th Dist. Ct. App. 1981). In *Sneed*, the defendant's grand theft conviction was reversed because on cross-examination, the State improperly questioned the defendant about a prior assault conviction. Similarly, in *Cummings v. State*, 412 So.2d 436 (Fla. 4th Dist. Ct. App. 1982) the State's cross-examination as to how many "crimes" the defendant had committed was held reversible error. *See also Pack v. State*, 360 So.2d 1307 (Fla. 2d Dist.

Ct. App. 1978); *Henry v. State*, 356 So.2d 61 (Fla. 4th Dist. Ct. App. 1978). By intentionally engaging in this type of cross-examination, the State violated this basic rule of Florida criminal law.

A timely objection on either ground would have kept this evidence out. Any lawyer knowledgeable about Florida's capital sentencing statute or the basic rules of Florida criminal law would have made such an objection. Herring's counsel apparently lacked this knowledge, and his blunder allowed the court and jury to hear evidence that was devastatingly prejudicial.

The trial court found that Mrs. Myers' testimony that she sent Herring to Florida two years prior to the trial "opened the door" to this line of questioning. (A161) That conclusion is simply incorrect. The direct testimony of Herring's mother was entirely innocuous: in describing her son's life history, she noted that he had moved from New York to Florida two years earlier. This simple narrative did not in any sense "open the door" to the admission of highly prejudical and irrelevant evidence of Herring's involvement in narcotics trafficking. Indeed, in *Sneed, supra,* the Court rejected the State's argument that the defendant had "opened the door" to the cross-examination in connection with his assault conviction by testifying as to certain facts concerning that charge on direct, holding that "irrelevant, prejudicial material" may not be elicited on cross-examination, and that the State's cross-examination cannot extend beyond "germane and plausibly relevant testimony." 397 So.2d at 933.

Because the Florida capital sentencing scheme bars the introduction of evidence of criminal activity other than certain criminal felony convictions, the State's cross-examination was neither "germane" nor "plausibly relevant". Fla. Stat. Ann. § 921.141(5)(b) (West 1985). The statutory restriction would be meaningless if it could be circumvented as easily as the trial court has suggested. This patently inadmissible evidence was carefully elicited by the prosecutor to inflame the jury. A minimally competent attorney would have objected strenuously to the line of questioning because of its irrelevance and its inflammatory nature. Herring's counsel sat in silence as the cross-examination continued.

c. Counsel's Ignorance of the Rules of Evidence Resulted In the Exclusion of Mitigating Evidence

In his closing argument, Herring's counsel attempted to read to the jury poems written by his client. Because he had not offered these poems in evidence, the trial court excluded them. (A195)

Any minimally competent trial lawyer knows that before evidence may be cited in argument it must be offered and admitted. Under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed.2d 973, 98 S. Ct. 2954 (1978), which gives defense counsel great latitude in the introduction of mitigating evidence, these poems were certainly admissible. Once properly introduced, they could have been cited in closing.

The trial court acknowledged that "counsel did not correctly try to introduce the poems," stating: "Initially counsel tried to 'sneak' in the poems. He was caught and prevented from doing it." (A162) The trial court then concluded that counsel's error did not constitute a professional deficiency. (A162) To the contrary, it would be hard to imagine a more fundamental type of "unprofessional error". Moreover, the error was symptomatic of the thoughtless, unprepared and unskilled representation Herring was accorded at the sentencing hearing.[9]

d. Counsel's Lack of Preparation Resulted In the Exclusion of Relevant Mitigating Evidence

At a critical stage in the sentencing hearing, Herring's counsel attempted to introduce evidence that the imposition of a death sentence would be disproportionate in this case in view of several factually similar capital felony cases in which the death penalty was not imposed.[10] The trial judge, unsure as to the admissibility of such

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9 The trial court also observed:

> Had he introduced the St. Luke's Hospital report containing the poems, it would have shown the poems were not original but rather based on popular songs. Also the second page of the report again indicates that the mother of the defendant was not keeping appointments.

(A162)

The fact that the poems were based on popular songs does not detract from their humanizing character. Contrary to the trial court's opinion, the poems are precisely the kind of evidence the Supreme Court had in mind in *Lockett* and its progeny as essential to the fundamental fairness of the capital sentencing proceeding.

Additionally, the court's observation that the hospital report reflected that Herring's mother did not keep appointments only raises the question of whether counsel consciously made a strategic decision not to introduce the evidence. Obviously, counsel's reference to the poems in his closing indicates that he either intended but neglected to introduce the poems into evidence at the hearing, or that he did not know he was required to do so to use them in closing argument. In either event counsel was plainly inept.

10 The evidence counsel sought to introduce consisted of the testimony of the defense counsel in three other capital felony cases in the same jurisdiction as to factually similar homicides in which life sentences were imposed.

evidence, asked counsel to explain why the comparative evidence should be admitted. In this regard, the following exchanges took place:

> MR. QUARLES: They relate to number eight in the jury instructions in mitigating circumstances. Any other aspects of the Defendant's character, record or any other circumstance of the offense. I feel like the law in the State of Florida is that there should—There is a comparative type test and certainly—
>
> THE COURT: Do you have any support for that proposition?
>
> MR. QUARLES: I can't cite the Court any. I just feel certain there is.

(A196)

The judge, uncomfortable with the proposed evidence, again asked counsel to explain his theory, stating:

> THE COURT: In other words, if the Defense can put on any aggravating or mitigating portion, they can come in with all the sentences in this county in death cases, capital cases and say, look at these and compare this to the present case.
>
> Is that what you're saying? *I want some guidance.*

(A197) (emphasis supplied).

Counsel's reply was unresponsive, stating only:

> I'm suggesting in this case, that I present Mr. Jacobson and Mr. Bevis and Judge Clayton.

(*Id.*)

Prior to ruling on the evidentiary question, the judge made one final attempt to elicit from counsel any authority to support the introduction of the evidence, making the following inquiry:

> Do you have any specific law that says that in the penalty phase, that you can show other sentences before the Court, not related to the particular case, in other words, not a co-defendant? Do you have any law? Any cases?

(A197)

Again, counsel failed to provide the court with any authority, stating: "My contention is that it's related. But, I agree, it's not a co-defendant situation. I do not have any cases." (A197). The court

then ruled the evidence inadmissible.[11] Counsel's responses to the court's queries reflect that counsel had only a vague knowledge of what the applicable law was and had no authority in hand to support his argument. (A196-A198)

There is abundant legal support for the introduction of the testimony. In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed.2d 973, 98 S. Ct. 2954 (1978), the Supreme Court held that a defendant has a constitutional right to offer virtually any mitigating evidence at the sentencing phase of a capital felony trial. Additionally, the constitutional requirement of consistency in sentencing justifies the introduction of comparative evidence, inasmuch as a given death sentence could hardly be regarded as "consistent" if life sentences are imposed in factually similar circumstances. *See, e.g., Spaziano v. Florida*, ___ U.S. ___, 82 L. Ed.2d 340, 104 S. Ct. 3154 (1984); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed.2d 1, 102 S. Ct. 869 (1982); *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976). Finally, the general principle that proportionality is a feature of Florida law is well-settled. *See State v. Henry*, 456 So.2d 466, 469 (Fla. 1984). *See also Proffitt v. Florida*, 428 U.S. 242, 259, 49 L. Ed.2d 913, 926, 96 S. Ct. 2960, 2969-2970 (1976). Counsel cited none of this authority to the trial court.

Had counsel been armed with this body of precedent, the court would have likely admitted the evidence. The evidence would have constituted a strong argument in favor of a life sentence under Florida law. Counsel's failure to persuade the trial court to allow the evidence severely prejudiced Herring's case.

The trial court's conclusion that this evidence was inadmissible, (A162) is erroneous. Moreover, the inability of counsel to make any arguments whatsoever in support of the admissibility of this evidence despite the court's repeated prodding is indicative of counsel's lack of preparation in representing Herring.

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11 Later in the proceeding, after the court rejected the evidence and suggested to petitioner's counsel that he make an oral proffer of the rejected testimony to preserve his objection, counsel declined to do so, stating: "I'm sorry. If I knew what the law was, I would feel confident in doing that. But, I'm not." (A198).

e. Counsel Instructed the Jury to Disregard a Significant Statutory Mitigating Circumstance

During his closing argument, in discussing the applicability of certain mitigating circumstances, Herring's counsel reviewed the statutory mitigating circumstances for the jury. In doing so he stated:

> MR. QUARLES: The other one that Ms. Graziano talked about, that Dale Hoeltzel was a participant in the crime, certainly doesn't apply. He did not, Ted Herring did not have an accomplice. That does not apply. *The age of the Defendant is one. That certainly does not apply.*

(A199). (Emphasis supplied.)

The trial judge, in his written findings, found that Herring's age at the time the crime was committed was a mitigating circumstance. (A168) Herring's counsel nevertheless told the jury to disregard it. Not only did he fail to argue a factor that tended to mitigate the sentence; he dismissed it as without significance. This omission once again demonstrates counsel's failure to marshal arguments in support of Herring's cause.

The trial court's disposition of this issue is utterly unsatisfactory. It adopts the State's contention that "the court reporter inserted the word 'not' by error during transcription." (A162). Such a finding is directly contrary to the requirement under Florida law that Rule 3.850 petitions be dismissed only where the record conclusively shows that Herring is entitled to no relief. In disposing of this issue, the trial court, *sua sponte*, altered the record to support its conclusion. The trial court's approach thus makes a mockery of the requirement of the hearing requirements of Rule 3.850.

III.

THE TRIAL COURT'S APPLICATION OF A NON-STATUTORY AGGRAVATING FACTOR IN SENTENCING HERRING TO DEATH ENTITLES HERRING TO A NEW SENTENCING HEARING

Florida's capital sentencing scheme specifically provides that the factors which serve as a basis for imposing a death sentence "shall be limited to" nine enumerated aggravating circumstances. Fla. Stat. Ann. § 921.141(5) (West 1985). This Court has recognized, in enforcing Florida's death penalty statute: "[W]e must guard against any unauthorized aggravating factor going into the equation which might

tip the scales of the weighing process in favor of death." *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977). *See Lucas v. State*, 376 So. 2d 1149, 1153 (Fla. 1979); *see also Proffitt v. Florida*, 428 U.S. 242, 251, 49 L. Ed.2d 913, 922, 96 S. Ct. 2960, 2966 (1976).

The trial court relied on a non-statutory aggravating circumstance in sentencing Herring to death, and quite candidly acknowledged that reliance. In dismissing Herring's Rule 3.850 petition, the trial judge made quite clear why he imposed the death sentence:

> The Defendant not only initially gave conflicting stories to the police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. *Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to a sentence as well.*

(A162-A163) (Emphasis supplied.)

The trial judge committed a fundamental error by allowing a non-statutory aggravating factor—Herring's perceived perjury—to govern his ultimate determination as to the propriety of imposing the death sentence. The trial judge failed to confine his analysis to the statutory aggravating circumstances. Such a failure has consistently been held to constitute reversible error in a variety of contexts. *E.g.*, *Miller v. State*, 373 So.2d 882, 885 (Fla. 1979) (error to consider accused's incurable and dangerous mental illness as a non-statutory aggravating circumstance); *Menendez v. State*, 368 So.2d 1278, 1282 (Fla. 1979) (consideration of aggravating factors outside of statute erroneous); *Mikenas v. State*, 367 So.2d 606, 610 (Fla. 1979) (error to consider substantial history of nonstatutory criminal activity as an aggravating circumstance); *Riley v. State*, 366 So.2d 19 (Fla. 1978) (consideration of lack of remorse as an aggravating circumstance erroneous); *Provence v. State*, 337 So.2d 783 (Fla. 1976) (error to consider pending criminal charges or accusations in sentencing defendant). Consequently, this error by itself entitles Herring to a new sentencing hearing.

IV.

HERRING IS ENTITLED TO A REVIEW ON THE MERITS OF HIS REMAINING CLAIMS UNDER RULE 3.850

This Court has frequently stated that, with certain exceptions, matters that either were or could have been raised on direct appeal are not subject to collateral attack. *See, e.g., Johnson v. Wainwright*, 463 So.2d 207, 210 (Fla. 1985); *Booker v. State*, 441 So. 2d 148 (Fla. 1983); *Magill v. State*, 386 So.2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927, 67 L. Ed.2d 359, 101 S. Ct. 1384 (1981). Relying on this general principle, the trial court refused to consider any of Herring's claims other than his ineffective assistance of counsel claims. (A159)

Although the Supreme Court has approved the imposition of such procedural default rules by state courts, *e.g., Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977), state courts are still bound to apply their waiver rules in an evenhanded manner to ensure fairness and consistency in capital sentencing proceedings. *Cf. Spaziano v. Florida, supra*; *Gregg v. Georgia, supra*; *Furman v. Georgia, supra*. Because Florida courts have applied Florida's procedural default rule inconsistently, frequently reviewing on the merits issues that concededly were or could have been raised in appeal, its application here would be arbitrary and capricious. Accordingly, Herring is entitled to a review on the merits of each of the claims below that the trial court ruled had been waived.[12]

An examination of this Court's decisions reviewing appeals from dismissals of Rule 3.850 petitions demonstrates the frequency with which this Court has considered the substantive merits of claims subject to the procedural default rule. In *Demps v. State*, 416 So.2d 808 (Fla. 1984), this Court reviewed the merits of the appellant's claim that two aggravating circumstances were erroneously applied despite the fact that it had previously considered the claims on direct appeal. In *Hall v. State*, 420 So.2d 872 (Fla. 1982) this Court ruled on the merits of appellant's claim that an aggravating circumstance had been erroneously applied in an appeal from a denial of a Rule

12 Certain issues that were raised below—points V, VI, VII and VIII *infra*—are fundamental errors and are therefore not subject to the procedural default rule. *See* discussion *infra* at 56-61.

3.850 petition even though the claim could have been but was not raised on direct appeal. *See also Douglas v. State*, 373 So.2d 895 (Fla. 1979) (court reviewed merits of double jeopardy claim in appeal from dismissal of Rule 3.850 petition—issue not raised on direct appeal); *Straight v. Wainwright*, 422 So.2d 827 (Fla. 1982), (court reviewed merits of claim that jury instruction defective in appeal from dismissal of Rule 3.850 petition—issue not raised on direct appeal). None of these opinions provides an explanation as to why the Court departs from the procedural default rule to consider the merits of the claims reviewed.

The failure of the Florida courts to apply procedural default rules consistently has undermined the fairness of Florida's capital sentencing procedures.[13] Because the Florida courts have so often declined to apply these rules and addressed post conviction claims on their merits, fairness requires that Herring's claims be accorded similar treatment. He is therefore entitled to a full review of his claims which he either raised or could have raised in his direct appeal.

A. The Admission of the Probation Officer's Testimony Was a Constitutional Error

At the penalty phase of Herring's trial, the court, over Herring's objections, permitted Mary White, a probation/parole officer, to testify as to statements made to her by Herring during a post-arrest interview. After a proffer by the State, the court permitted the testimony on the theory that Herring's statements reflected his lack of remorse. Relying on *Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 72 L. Ed.2d 862, 102 S. Ct. 2257 (1982), the trial court concluded that evidence of lack of remorse is admissible at the penalty phase in capital felony cases because it bears on the heightened premeditation and "heinous, atrocious and cruel" aggravating circumstances.

13 The arbitrary application of the procedural default rule also has an adverse collateral effect on state prisoners who ultimately seek federal habeas corpus relief. In the Eleventh Circuit, if the state court finds a procedural default has occurred, a showing of cause and prejudice must be made before the federal court will review the merits of the claim. *E.g., Darden v. Wainwright*, 699 F.2d 1031, 1034 (11th Cir. 1983); *Lowery v. Estelle*, 696 F.2d 333, 342 (11th Cir. 1983). If, however, the state court reviews the substantive merits of the claim asserted, such a showing need not be made, regardless of whether the procedural default rule could have been applied by the state court. *Id.*

White's testimony was erroneously admitted in violation of Florida's capital sentencing scheme and the Fifth, Sixth, Eighth and Fourteenth Amendments. *First*, in *Pope v. State*, 441 So.2d 1073 (Fla. 1983), this Court recognized that because evidence of lack of remorse bears no relation to any statutory aggravating circumstances, such evidence was inadmissible at sentencing. *Second*, the trial court's reliance on *Sireci* was misplaced because even prior to *Pope*, evidence of lack of remorse was held admissible *only* to prove the applicability of the heinous, atrocious and cruel aggravating circumstance. Here, there was no evidence as to the applicability of this aggravating circumstance, as the State conceded. *Third*, Herring's statements were the product of a custodial interrogation, and because Herring was not given any *Miranda* warnings prior to the interrogation, the probation officer's testimony was unconstitutionally admitted. *Fourth*, the State's failure to give Herring notice that it intended to introduce those statements violated both Florida state law and the federal constitution as it resulted in unfair surprise and prevented Herring from preparing an adequate defense to counter this evidence.

Moreover, the State cannot plausibly argue that the introduction of this testimony constituted "harmless error". White's testimony was highly inflammatory. The State, recognizing the devastating impact this testimony would have on the jury, introduced virtually no other evidence at the sentencing phase of Herring's trial. Because the admission of this testimony tainted Herring's sentencing, his death sentence must be vacated.

1. White's Testimony Was Highly Inflammatory

In the course of the State's examination of White at the sentencing hearing, the following exchange occurred:

> Q. At that time, did Mr. Herring express to you any feelings regarding that particular offense?
>
> A. He indicated to me that the young man got what he deserved due to the fact that, him trying to play hero. And that it was just one less cracker.
>
> MR. QUARLES: I'm sorry?
>
> THE COURT: Repeat it.
>
> A. He indicated that the guy got what he deserved due to him trying to play hero. And that, it's just one less cracker.
>
> MR. QUARLES: I'm sorry. The last word?

> THE COURT: Ma'am, you need to speak up.
>
> A. One less cracker.
>
> MR. QUARLES: Okay.
>
> Q. Miss White, the term "cracker", is that your term or the term that Mr. Herring used?
>
> A. That was his term.
>
> MS. GRAZIANO: I have no further questions.

(A200-A201)

The force of this testimony cannot be overemphasized. Herring is black. All of the members of the jury were white. Recognizing the impact it would undoubtedly have on an all-white jury, the State deemed it unnecessary to present any evidence other than Herring's prior robbery conviction at the sentencing phase of Herring's trial. With the introduction of this racial epithet, the state had proved all that it needed to secure a death sentence.

2. White's Testimony Was Admitted In Violation of Florida's Sentencing Statute

Under Florida's capital sentencing scheme, the State, in arguing for the imposition of a death sentence, may only present evidence bearing upon the nine statutory aggravating circumstances. Fla. Stat. Ann. § 921.141(5) (West 1985). This Court stated in *Elledge v. State*, 346 So.2d 998 (Fla. 1977): "[W]e must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." *Id.* at 1003. *See also Lucas v. State*, 376 So.2d 1149, 1153 (Fla. 1979).

In *Pope v. State*, 441 So.2d 1073 (Fla. 1983), this Court ruled the admission of evidence of lack of remorse at the sentencing phase improper in all circumstances. The Court found that by adding the heightened premeditation aggravating circumstance to the sentencing statute in 1979 the legislature had narrowly circumscribed "the mental and emotional attitudes of the murderer . . . which may be weighed in the sentencing process." *Id.* at 1078, n.2. The defendant's state of mind *at the time of the homicide* (and not afterward) is therefore the relevant issue at sentencing. This Court in *Pope* thus found evidence of lack of remorse not relevant to any of the statutory aggravating circumstances.

The sole basis on which White's testimony was offered and admitted was that it demonstrated Herring's lack of remorse. Under

Pope, that basis is insufficient. Because the evidence of Herring's supposed lack of remorse did not bear on any of the statutory aggravating circumstances, its admission violated Florida law.

3. White's Testimony Was Admitted on the Basis of an Erroneous Application of *Sireci v. State*

As discussed above, *Pope* held evidence of lack of remorse irrelevant to any of the statutory aggravating circumstances and thus overruled *Sireci*. However, even if *Sireci* were good law, the trial court's reliance on it here was misplaced.

In *Sireci*, the Court noted that while "lack of remorse" could not be regarded as an aggravating circumstance, it was admissible for the limited purpose of showing that the murder was heinous, atrocious and cruel. 399 So.2d at 971-72. The Court in *Pope* observed that lack of remorse had never been admitted in "those situations where there were no independent grounds for finding the murder especially heinous, atrocious or cruel." 441 So.2d at 1078.

> Where death has been instantaneously inflicted on an unsuspecting victim, or where the manner in which the victim was murdered has not exceeded the atrocity inherent in any murder, this aspect of the aggravating factor has not been found to apply, regardless of the defendant's mental and emotional perceptions of the event.

Id. The *Pope* Court thus observed that the admission of evidence of lack of remorse had always been recognized as erroneous where this aggravating circumstance was not in issue.

In the case at bar, the record was barren of any independent grounds for finding the murder "especially heinous, atrocious or cruel." Indeed, in summing up to the jury, the State *conceded* that there was no such evidence, stating, "I suggest to you that [the murder] was not especially heinous, atrocious, and cruel." (A202) The record amply justifies the State's concession. The clerk was shot twice and died in less than one minute. The manner in which the store clerk was killed simply did not exceed "the atrocity inherent in any murder." *Pope*, 441 So.2d at 1078. In light of the State's concession, not even *Sireci* justified the admission of White's testimony.

4. The Trial Court Erred In Admitting White's Testimony Because Herring Was Not Given *Miranda* Warnings Prior to His Interview With Her

In *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed.2d 359, 101 S. Ct. 1866 (1981), the Supreme Court held that the use of psychiatric testimony at the sentencing phase of the defendant's capital murder trial was unconstitutional because the defendant had not been given any *Miranda* warnings prior to the pretrial psychiatric examination. The Court held that defendant Smith's Fifth Amendment right against compelled self-incrimination was violated because "[t]he considerations calling for the accused to be warned prior to custodial interrogation" were fully applicable to a pretrial psychiatric examination. *Id.* at 467, 68 L. Ed.2d. at 371, 101 S.Ct. at 1875. The Court found that the custodial psychiatric examination was no different from any other "official interrogation" in which the accused would be confronted with "inherently compelling pressures." *Id.*

The Court further held that Smith was denied his Sixth Amendment right to effective assistance of counsel as the result of the introduction of the psychiatric testimony into evidence because the examination "proved to be a 'critical stage' of the aggregate proceedings against [him]." *Id.* at 470, 68 L. Ed.2d at 374, 101 S.Ct. at 1877. Because defense counsel was not notified as to the scope of the examination, the Court concluded that the accused "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 470-71, 68 L. Ed.2d at 374, 101 S.Ct. at 1877.

The Supreme Court's findings and conclusions in *Estelle v. Smith* are fully applicable to this case. Like Smith, Herring was not apprised of his Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel prior to an "official" custodial examination as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602 (1966). Also like *Smith*, statements by Herring in the course of that interview were utilized by the State at the penalty phase in a capital murder case. And like *Smith*, Herring's counsel was never notified as to the scope of Herring's interview with the probation officer before Herring submitted to the interview.

Here, the facts are even more compelling than the facts in *Estelle v. Smith* because Herring was questioned by an officer of the State rather than a psychiatrist. Under these circumstances, it was absolutely essential that Herring be apprised of his Fifth and Sixth Amendment rights and that his counsel be notified as to the inter-

view. Because neither Herring nor his counsel were so apprised, the admission of White's testimony violated Herring's Fifth, Sixth and Fourteenth Amendment rights.

5. The Trial Court Erred In Admitting White's Testimony Because the State Failed to Give Defense Counsel Prior Notice of this Testimony

Prior to the Supreme Court's consideration of Smith's claims in *Estelle v. Smith*, the Fifth Circuit considered, among other arguments, Smith's contention that his death sentence was constitutionally infirm because of the State's surprise use of the psychiatrist as a witness at the sentencing phase of Smith's trial. The Fifth Circuit agreed, finding that the consequences of the psychiatrist's testimony were "devastating," and that the absence of notice prevented Smith's attorneys from effectively challenging this psychiatric testimony and thus denied him due process and violated his Eighth Amendment rights. *Smith v. Estelle*, 602 F.2d 694, 699 (5th Cir. 1979), *aff'd*, *Estelle v. Smith*, 451 U.S. 454, 68 L. Ed.2d 359, 101 S. Ct. 1866 (1981).[14]

Here too, Herring's claims mirror Smith's. Herring's counsel was not apprised that the State intended to introduce the testimony of the probation officer at the sentencing phase of Herring's trial. Furthermore, White's testimony was no less "devastating" here than was the psychiatrist's testimony pertaining to Smith. Like Smith's counsel, Herring's counsel, unfairly surprised by this testimony, was prevented from effectively challenging the probation officer's testimony.[15]

Moreover, the admission of this testimony, without prior disclosure to Herring's counsel of the identity of the probation officer and the substance of her testimony, constituted a clear violation of the Florida law. Rule 3.220 of the Florida Rules of Criminal Procedure requires the disclosure of the identity of "all persons known to the prosecutor" in possession of relevant information regarding the accused as well as any written or oral statements of the accused and the names of any witnesses. Rule 3.220(a)(1)(i), (a)(1)(iii). Sanctions are also imposed for failure to comply with these disclosure requirements. Rule 3.220(j).

14 The Supreme Court did not reach this issue in light of its rulings on the other issues raised by Smith.

15 Indeed, Herring's counsel demonstrated his surprise by asking the witness to repeat the statement twice. (A200-A201)

Herring's trial counsel filed the requisite demand seeking such disclosure prior to trial. (A111-A112) The State, in violation of Rule 3.220, failed to disclose the identity of the probation officer or the substance of her testimony in response to defense counsel's demand. Even when the State made a proffer of White's testimony at the sentencing hearing, it carefully and deliberately avoided disclosing the inflammatory portion of that testimony in making its proffer.[16] (A191) Such tactics should not be tolerated. Their use by the prosecution requires that Herring's sentence be vacated.

B. The Jury Instructions Regarding the Imposition of the Death Penalty Were Constitutionally Inadequate

The Eleventh Circuit has repeatedly emphasized that clear, explicit and unambiguous jury instructions are constitutionally mandated in capital cases. *See, e.g., Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Morgan v. Zant*, 743 F.2d 775 (11th Cir. 1984); *Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983); *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983), *on remand*, 575 F. Supp. 186 (M.D. Ga. 1983), *rev'd on other grounds*, 743 F.2d 764 (11th Cir. 1984), *reh'g en banc denied*, 747 F.2d 710 (11th Cir. 1984) (en banc) ; *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1983), *cert. denied*, 458 U.S. 1111, 73 L. Ed.2d 1374, 102 S. Ct. 3495 (1982). *Accord, Goodwin v. Balkcom*, 684 F.2d 794, 801 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098, 76 L. Ed.2d 364, 103 S. Ct. 1798 (1983); *Chenault v. Stynchcombe*, 581 F.2d 444, 448 (5th Cir. 1978). The discretion which is exercised in making this decision must be controlled by " 'clear and objective standards so as to produce nondiscriminatory application,' " *Goodwin v. Balkcom*, 684 F.2d at 801, *quoting Gregg v. Georgia*, 428 U.S. at 198, 49 L. Ed.2d

16 In *Lucas v. State*, 376 So.2d 1149, 1151 (Fla. 1979), this Court held that the State's noncompliance with Rule 3.220 did not entitle a defendant to have an unlisted witness excluded as a matter of right, but that the witness must be excluded if the defendant is prejudiced by the introduction of the testimony. As demonstrated by foregoing discussion, the inflammatory nature of the testimony coupled with the fact that it was constitutionally inadmissible constitutes such prejudice.

The Court in *Lucas* further noted that the trial judge may only make a determination regarding prejudice after making an adequate inquiry into the circumstances surrounding the State's noncompliance with Rule 3.220. Here, the trial judge made no such inquiry.

Finally, the Court in *Lucas* observed that the defense counsel failed to interpose an objection to the testimony. In this case, Herring's counsel explicitly objected to the introduction of the probation officer's testimony at the time it was proffered.

at 888, 96 S. Ct. 2936, and "such discretion" is not fully accorded the sentencer unless it is exercisable "in an informed manner." 684 F.2d at 801.

The failure of the trial judge to provide clear, precise jury instructions constitutes a substantial denial of a federal constitutional right. *See Spivey v. Zant*, 661 F.2d at 470; *Chenault v. Stynchcombe,* 581 F.2d at 448. In *Spivey v. Zant*, the Eleventh Circuit observed:

> . . . the constitutional requirement of clear sentencing instructions in capital cases derives from the Supreme Court's earlier conclusion that the eighth and fourteenth amendments require that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

661 F.2d at 470, *quoting Gregg v. Georgia*, 428 U.S. at 188-89, 49 L. Ed.2d at 883, 96 S. Ct. 2932. As recognized in *Spivey*, the Supreme Court emphasized the critical need for adequate jury instructions in *Gregg*:

> [T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given . . . . To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision . . . .
>
> It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Spivey v. Zant, 661 F.2d 464, 470-71, *quoting Gregg v. Georgia*, 428 U.S. at 192-93, 49 L. Ed.2d at 885-86, 96 S. Ct. 2934.

The trial judge's sentencing charge failed to provide the clear, precise guidance that is constitutionally mandated. Because the charge was confusing, incomplete and ambiguous, the jury remained

ignorant of how they were to weigh the various factors that bore upon their decision.

The trial judge's jury instruction began with the following remarks:

> THE COURT: Thank you, counsel.
> Ladies and gentlemen of the jury:
>
> It's now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of first degree murder.
>
> As you've been told, the final decision as to what punishment shall be imposed, is the responsibility of the Judge. However, it's your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstance exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstances exist, outweigh the aggravating circumstance found to exist.

(A203)

This portion of the trial judge's jury instructions was deficient in several respects. First, the court failed to define the terms "aggravating circumstance" and "mitigating circumstance" in charging the jury, or explain their nature or function in the sentencing process. The court gave no indication that the aggravating circumstances were factors which distinguished this particular capital felony from most other homicides, and that before an advisory verdict of death could be rendered, the jury had to find the existence of at least one of the statutory aggravating circumstances beyond a reasonable doubt. In *Morgan v. Zant*, 743 F.2d 775 (11th Cir. 1984), the Eleventh Circuit found fault with the jury instruction precisely because the instruction "inadequately clarified the role of aggravating circumstances in the deliberative process." *Id.* at 779.

The trial court also failed to explain that "mitigating circumstances" were any circumstances which "did not justify or excuse the offense, but which, in fairness or mercy, may [have been] considered as extenuating or reducing the degree of moral culpability of punishment." *Spivey v. Zant*, 661 F.2d at 471, n.8. In *Tyler, Morgan, Finney* and *Westbrook*, the charge to the sentencing jury authorized consideration of "mitigating circumstances" but failed to explain the meaning or function of that term. In all of these cases, the Eleventh

Circuit found the jury instruction flawed. In *Morgan*, the Court noted:

> An authorization to consider mitigating circumstances is a hollow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence.

Morgan v. Zant, 743 F.2d at 779, *citing Finney v. Zant*, 709 F.2d at 647 (*quoting Westbrook*). The Court in *Morgan* concluded:

> The instant instruction failed to adequately guide the jury to an understanding of the meaning and function of mitigating circumstances in sentencing deliberation. We reverse on this ground.

Id. Because of the critical importance of these terms in the sentencing scheme, it was unfair to use the terms without explanation, or to assume that a jury would immediately comprehend their nature or function in the sentencing process.[17]

In addition, the court failed to explain the nature of the balancing process. Although the court indicated that the aggravating and mitigating circumstances had to be "weighed" against one another, the court did not clearly explain how the jury was to undertake such an analysis. Notably, the court omitted any reference to Florida's rule that the weighing process is not a mere "mechanical tabulation" of aggravating versus mitigating circumstances. *See Brown v. State*, 381 So.2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118, 66 L. Ed.2d 847, 101 S. Ct. 931 (1981); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L. Ed.2d 295, 94 S. Ct. 1950 (1974). Nor did the court explain to the jury how aggravating circumstances could "outweigh" mitigating circumstances, or vice-versa. The jury was thus left to conclude that the weighing process meant no more than a mechanical tabulation.

17 The court's lack of adequate guidance as to the balancing process is reflected in the instructions pertaining to the weight to be given the aggravating and mitigating circumstances. In addition to the instruction quoted above, the court made the following remarks regarding the weighing process:

> Should you find sufficient aggravating circumstance do exist, it will then be your duty to determine whether the mitigating circumstance exist, that outweigh the aggravating circumstance.
>
> * * *
>
> If one or more aggravating circumstance are established, you should consider all the evidence tending to establish one or more mitigating circumstance.
>
> And give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(A204-A205)

The instructions were also defective because the court provided no explanation or guidance as to the meaning of the particular aggravating or mitigating circumstances which it enumerated. The court made no reference to the salient points of law developed by the Florida Supreme Court in construing these circumstances, such as that the "cold, calculated and premeditated" aggravating circumstance requires a showing of heightened premeditation beyond that required for a first degree murder conviction; that the avoidance of arrest aggravating circumstance requires a demonstration that such was the dominant or sole motive for the capital felony; and that the emotional disturbance mitigating circumstance does not require a showing that the defendant was insane. The meaning of these circumstances is not readily apparent to the layman without some further explanation, and the jury was given no guidance as to their meaning. They were thus left to interpret these circumstances in ways inconsistent with Florida law.

Finally, the trial court failed to state clearly and unambiguously that the statutory mitigating circumstances were not exhaustive. The court's instruction that "[a]mong the mitigating circumstances you may consider if established by the evidence, are . . ." (A204) certainly did not constitute an explicit statement as required under *Lockett* that the jury was free to consider *any* evidence that would justify mercy in petitioner's case. In *Spivey*, the Eleventh Circuit stated:

> [T]he judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

661 F.2d at 471 (citations omitted). *See Chenault v. Stynchcombe*, 581 F.2d at 448 ("the constitutional requirement to allow consideration of mitigating circumstances would have no importance if the sentencing jury is unaware of what it may consider in reaching its

decision"). The judge's jury instruction as to mitigating circumstances fell far below this mark.

The trial judge's jury instructions were constitutionally inadequate. By providing the jury with insufficient guidance as to how to perform their advisory function, the court deprived Herring of a fair sentencing.

C. The Trial Judge Failed to Consider the Proportionality of the Death Sentence in This Case Compared With Other Cases in Which the Death Penalty Had Been Imposed

Under Florida law, it is mandatory that the proportionality of the death sentence, as compared with other capital felony cases in which the death penalty is imposed, be considered. In *State v. Henry*, 456 So.2d 466, 469 (Fla. 1984), this Court recognized that proportionality review "is a feature of state law," which has been cited with approval in *Proffitt v. Florida*, 428 U.S. 242, 259, 49 L. Ed.2d 913, 926, 96 S. Ct. 2960, 2969-2970 (1976). Furthermore, in affirming Herring's sentence on appeal, the Florida Supreme Court observed:

> The use of sentences imposed on other defendants relates to the proportionality of the sentence and is an appropriate element to be considered by the trial judge in imposing sentence upon the defendant. . . .

Herring v. State, 446 So.2d 1049, 1056 (1984), *cert. denied*, ____ U.S. ____, 83 L. Ed.2d 330, 105 S. Ct. 396, (1984). Ironically, this conclusion is bolstered by this Court's recent decision in *Caruthers*, the factually similar case discussed *supra* at 5-19, in which the Court did not merely remand the case for a new sentencing, but found that the death penalty would be disproportionate, and therefore reduced Caruthers' sentence to life imprisonment.

In sentencing Herring, the trial court's adamant refusal to consider whether imposing a death sentence would be disproportionate here was a fundamental constitutional error. The trial court's error has two aspects: (1) the court excluded evidence which should have been admitted as a matter of constitutional law; and (2) it applied an incorrect standard in imposing Herring's death sentence.

1. The Trial Court Erroneously Excluded Evidence Properly Offered By Defendant In Mitigation

In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed.2d 973, 98 S. Ct. 2954 (1978), the Supreme Court held that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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.

Id. at 604, at 990, at 2964-2965 (citations omitted) (emphasis supplied). Notwithstanding this constitutional requirement, the trial court excluded testimony of counsel for defendants in other cases in which their clients had received life sentences for crimes of a similar magnitude. This Court affirmed the trial court's ruling on this issue, finding that such evidence was not within the purview of *Lockett*. *Herring v. State*, 446 So.2d at 1056.

The scope of *Lockett* was not, however, as limited as that perceived by this Court in *Herring v. State*. In dissenting from the majority opinion in *Lockett*, Justice Rehnquist found fault with the Court's ruling precisely because the Court found "that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear." 438 U.S. 586, 629, 57 L. Ed.2d 973, 1005, 98 S.Ct. 2954, 2974 (Rehnquist, J., dissenting). *See Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985). Herring sought to offer no more than that explicitly held admissible as of right in *Lockett*: evidence that one of "the circumstances of [appellant's] offense" was that it was indistinguishable from and no more heinous than several other Florida capital felony cases in which the death penalty had not been imposed. In view of the constitutional requirement of consistency in sentencing, it is difficult to conceive of evidence any more relevant to the sentencer's decision.

2. The Trial Judge Applied an Incorrect Standard In Sentencing Herring

As a corollary to the principle of consistency in capital sentencing, the trial court, in imposing sentence, should have considered whether the imposition of a death sentence in this case would be consistent with other cases in which the death penalty has been imposed. This

Court has explicitly stated that the comparison of the facts of this case to other cases in which the death penalty had not been imposed is an "appropriate element to be considered by the trial judge in imposing sentence." *Herring v. State*, 446 So.2d at 1056.

In sentencing Herring, however, the trial court indicated that it would only consider the facts and circumstances of this case without regard to other cases in which the death penalty had been imposed. (A198) The State, in objecting to the evidence proffered by the defense regarding other similar capital felony cases in the same jurisdiction in which the death sentence had not been imposed, argued:

> Your Honor, again, I think that [that evidence] should be precluded. Otherwise, we'll end up retrying all these other cases as well. And this case should be tried on fact and circumstances of this case and not other cases.

(A197) The trial judge agreed, and thereupon excluded the proffered testimony. *Id.*

The trial judge's exclusion of this evidence for the foregoing reason demonstrates that he applied the wrong standard in sentencing Herring. Under both federal and state law, the trial judge is required to balance the facts and circumstances of this homicide against other similar capital felonies. *Gregg v. Georgia*, 428 U.S. 153 , 49 L. Ed.2d 859, 96 S. Ct. 2909 (1976).

The trial court's error in keeping the evidence from the jury was compounded by his refusal to consider the evidence himself, a consideration overlooked by the Florida Supreme Court in *Herring v. State*. The judge's self-imposed limitation as to this evidence was plainly improper in light of the constitutional requirements (1) that the defendant be permitted to offer for the sentencer's consideration any evidence in mitigation which bears on, among other things, "any circumstances of the offense," and (2) that the death sentences be meted out fairly and consistently.

D. During Her Closing Argument at the Sentencing Phase, the Prosecutor Improperly Suggested that Herring Might be Granted Parole if Given Life Imprisonment

During her closing argument at the sentencing phase, in the course of discussing possible mitigating circumstances, the prosecutor said:

> And I will suggest to you, rather than a mitigating circumstance, [appellant's age] should be considered as an aggravating circumstance, because Ted Herring, as he stands before you now, is twenty. *If he gets life imprisonment, he will be up for parole and possibly out on the streets at forty-five. He will be out on the streets to kill and rob again at forty-five.*

(A207) (emphasis supplied). Because the defendant's youth is not listed as an available aggravating circumstance, this comment amounted to a non-statutory aggravating circumstance. *See* Fla. Stat. Ann § 921.141(5) (West 1985). *See Elledge v. State*, 346 So.2d 998 (Fla. 1977); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979).

Additionally, the prosecutor's comments were inflammatory. *See Bush v. State*, 461 So.2d 936 (Fla. 1984) (Ehrlich, J., concurring). A prosecutor may not incite a jury when a defendant's life hangs in the balance. In *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, ____ U.S. ____, 79 L. Ed.2d 754, 104 S. Ct. 1430 (1984), another death penalty case over which Judge Foxman presided, this Court vacated the defendant's death sentence and remanded the case for a new sentencing hearing because of the prosecutor's inflammatory comments during his closing argument to the jury. The prosecutor in *Teffeteller* speculated that, if given life imprisonment, the defendant would be eligible for parole in twenty-five years and if paroled would kill again. This court concluded that "the remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty." *Id.*, at 845. The Court ordered a new sentencing hearing because "we cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase." *Id.* Here, the prosecutor's comments were no different: she told the jury that unless the appellant was sentenced to death, he would "be out on the streets to kill and rob again at forty-five." *Teffeteller* requires reversal.

V.

THE MANNER OF JURY SELECTION VIOLATED HERRING'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

The Sixth Amendment right to trial by jury in criminal cases "is fundamental to the American scheme of justice," which applies to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149, 20 L. Ed.2d 491, 496, 88 S.Ct. 1444, 1447 (1968). *A fortiori*, any defect which undermines impartiality of the jury constitutes a fundamental denial of due process. Under Florida's "fundamental error" doctrine, which permits a post-conviction court to reach a claim which may otherwise be precluded by procedural default, *e.g.*, *Clark v. State*, 363 So.2d 331 (Fla. 1978), the claims which follow are therefore properly before this Court.

1. Herring's Rights Under the Sixth and Fourteenth Amendments Were Violated By the Exclusion of A Prospective Juror For Cause Because of His Views On The Death Penalty

This Court has already rejected Herring's claim that one of the prospective jurors was improperly excluded under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed.2d 776, 88 S. Ct. 1770 (1968). For the reasons set forth in Herring's Motion to Vacate at ¶¶ 155-167, (A90-A95) Herring respectfully requests that the Court reconsider its prior determination of this claim and vacate Herring's conviction and sentence.

2. Herring's Trial Jury Did Not Constitute a Representative Cross-Section of His Community and Could Not Reflect Contemporary Community Attitudes Regarding the Proper Use of the Death Penalty

Herring's trial jury did not constitute a representative cross-section of the community and was incapable of reflecting contemporary community attitudes regarding the appropriateness of the death penalty in Herring's case, because all persons with conscientious or religious scruples against capital punishment were systematically excluded.

Herring is constitutionally entitled to a jury composed of a representative cross-section of the community and capable of reflecting contemporary community attitudes regarding the appropriateness of the death penalty in a particular case. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *cert. granted sub nom. Lockhart v. McCree*, 54 U.S.L.W. 3223 (Oct. 8, 1985).

Jurors with conscientious or religious scruples against capital punishment constitute a distinct and identifiable element of the community in which Herring was tried. *See id.*

During *voir dire*, four jurors with conscientious or religious scruples against capital punishment were systematically excluded from Herring's trial jury: Herbert Guinyard, (A208); Alonzo Corbin, (A209); Anthony Harold, (A210); and Robert Cameron, (A211-A216).

Herring's trial jury was unrepresentative and biased in favor of the prosecution on the issue of Herring's guilt or innocence of the crime with which he was charged, in violation of his rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Herring's Trial Jury Was Biased in Favor of the State on Issues of Guilt or Innocence

As shown above, the State excluded veniremen for cause based upon their conscientious or religious scruples against the death penalty. Jurors *without* conscientious or religious scruples against capital punishment constitute a segment of the community which tends to be biased in favor of the prosecution in resolving issues of guilt or innocence. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *cert. granted sub nom. Lockhart v. McCree*, 54 U.S.L.W. 3223 (Oct. 8, 1985). Exclusion of jurors because of their conscientious or religious scruples resulted in a jury in Herring's case which was conviction-prone and incapable of rendering a fair and impartial verdict on guilt or innocence.

VI.

THE ADMISSION OF HERRING'S CONFESSION INTO EVIDENCE VIOLATED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

Herring's confession, which formed the core of the State's case, should not have been admitted into evidence. At trial the State failed to meet its "heavy burden" under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602 (1966), to prove that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. 436, 475, 16 L. Ed.2d 694, 724, 86 S. Ct. 1602, 1628 (1966). Herring's purported waiver of his rights was ineffective because he was not informed of the nature of the crime about which he was to be interrogated.

At the time he was read his *Miranda* rights, Herring was told only that he was being charged with automobile theft. Immediately thereafter, Herring signed a form commonly used by the Daytona Beach Police Department. This form was admitted into evidence as State's Exhibit 6. (A219) In the eight hours during which Herring was interrogated, the questions ranged far beyond the automobile theft charge for which he was arrested. The police questioned him about a series of armed robberies, and Herring confessed to five robberies of convenience stores. He was also questioned about, and ultimately confessed to, the crime that forms the basis of his murder conviction and death sentence. The police did *not* give Herring separate *Miranda* warnings before questioning him about the armed robberies or the homicide.

To be effective, a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently and voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed.2d 854, 93 S. Ct. 2041 (1973); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed.2d 1461, 58 S. Ct. 1019 (1938). Where a suspect is informed that he is to be charged with a particular offense but is actually interrogated about a separate, unrelated offense, the waiver is not knowing, intelligent and voluntary. *United States v. McCrary*, 643 F.2d 323 (5th Cir. 1981) (waiver not knowing, intelligent and voluntary where suspect unaware of the offense upon which questioning is based). *Accord*, *Commonweath v. Dixon*, 475 Pa. 365, 380 A.2d 765 (Pa. 1977) (waiver of *Miranda* rights ineffective where suspect not informed of nature of charge and accused might believe another charge was focus of interrogation).

In this case, Herring was read his constitutional rights at the time he was found in possession of a stolen automobile, at approximately 11:30 p.m. (A217-A219) There is no indication whatsoever in the record that Herring was told he was suspected of anything other than grand theft. Indeed, there is no indication in the record that the police at that time suspected Herring of any other crime. Thus, Herring could not possibly have waived his rights intelligently, knowingly, and voluntarily; he was unaware that the police would question him about homicide.

Detective White testified that he did not form an opinion as to Herring's complicity in the May 29, 1981 homicide until after Herring had been read his constitutional rights. (A220) When the police began to question Herring about the homicide, they did not recite the *Miranda* warnings again, even though they were now questioning him about an offense completely unrelated to the one for which he had been arrested. No valid waiver was ever obtained with respect to the homicide. Herring did not and could not know when he agreed to talk with the police without an attorney present that he would be questioned about murder. His subsequent confession should have been suppressed.

Herring's confession was the essence of the State's case. No witness placed Herring at the scene of the crime. No gun was found. Without the confession, the State's case could not have survived a motion to dismiss, and would surely not have resulted in conviction. The trial court's failure to suppress the confession was a fundamental error; it unquestionably brought about Herring's conviction.

VII.

THE TRIAL JUDGE UNCONSTITUTIONALLY SURRENDERED TO THE JURY HIS OBLIGATION TO ACT AS FINAL ARBITER OF THE SENTENCE

One claim that was raised initially on appeal but not decided and raised again in Herring's Rule 3.850 petition and again left unresolved was the surrender by the trial judge of his obligation to act as the final arbiter in Florida's capital sentencing scheme. Under Florida's capital sentencing scheme, in the penalty phase of a capital

felony trial, the jury renders an advisory verdict, but the trial judge acts as the final arbiter in imposing sentence. Fla. Stat. Ann. §§ 921.141(2), 921.141(3) (West 1985). The role of the trial judge at this stage of the proceedings is central to the fairness of the sentencing. Florida's sentencing statute requires that if a death sentence is imposed, the trial judge must make written findings as to (1) the sufficiency of the aggravating circumstances in support of a death sentence, and (2) the insufficiency of the mitigating circumstances to outweigh the aggravating circumstances. Fla. Stat. Ann. § 921.141(3) (West 1985). These findings provide the basis for this Court's automatic review of any death sentence. Fla. Stat. Ann. § 921.141(4) (West 1985). *See Mann v. State*, 420 So.2d 578 (Fla. 1982). In *State v. Dixon*, this Court observed:

> The fourth step required by Fla. Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to review the issue of life or death within the framework of roles provided by the statute.

283 So.2d at 8. *See also Magill v. State*, 386 So.2d 1188, 1191 (Fla. 1980), *cert. denied*, 450 U.S. 927, 67 L. Ed.2d 359, 101 S. Ct. 1384 (1981).

In this case, the trial judge decided to defer to the jury's recommendation regardless of the outcome. (*See* Supp. at 829) By doing so the trial judge committed a fundamental error by abandoning a duty imposed by law, and thereby undermined the fairness of the sentencing.

VIII.

HERRING WAS SENTENCED TO DEATH PURSUANT TO AN ARBITRARY AND RACIALLY DISCRIMINATORY CAPITAL SENTENCING SCHEME

Herring was sentenced to death pursuant to an arbitrary and discriminatory capital sentencing scheme that discriminates based on geography, economic status and sex of the defendant, and the occupation and the race of the victim in violation of the Eighth and

Fourteenth Amendments. As set forth in detail in ¶ 147 of his Motion to Vacate, Florida's capital sentencing statute can and has been shown to be applied on the basis of the race of the victim, despite the provision in Florida law limiting the imposition of the death penalty to nine statutorily enumerated aggravating circumstances, and in violation of the U.S. Constitution's mandate that people be treated equally without regard to race and that black homicide victims be accorded the full and equal benefit of all laws for the security of persons. The available statistical evidence discussed in detail in ¶ 147 demonstrates that the race of the victim is a determinative factor in the imposition of the death sentence in Florida. The trial court erred in failing to reach the merits of this claim.

CONCLUSION

The trial court's order should be reversed and Herring's conviction and sentence should be set aside; in the alternative, Herring's death sentence should be vacated with instructions to impose a life sentence; or, in the alternative, Herring's death sentence should be vacated and the case remanded for a new sentencing hearing.

Dated: November 4, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by First Class mail, postage prepaid to Jim Smith, Attorney General of the State of Florida, at 125 East Orange Avenue, Daytona Beach, Fl. 32014, this 4th day of November, 1985.

/s/ Jeremy G. Epstein
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