IN THE SUPREME COURT OF FLORIDA

WILLIE JASPER DARDEN Petitioner, v. LOUIE L. WAINWRIGHT, Secretary Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida, Respondents.	Case No. 67555 CAPITAL CASE Execution is Imminent, Scheduled for Wednesday, September 4, 1985, 7:00 a.m.

PETITION FOR WRIT OF HABEAS CORPUS
AND FOR OTHER RELIEF

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WILLIE JASPER DARDEN Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida, Respondents.	CASE NO. _____ PETITION FOR WRIT OF HABEAS CORPUS AND FOR OTHER RELIEF

Petitioner, Willie J. Darden, an indigent proceeding in forma pauperis, by his undersigned counsel petitions this Court to issue its writ of habeas corpus pursuant to Fla.R.App.P. 9.030 (a) (3) and Fla.R.App.P. 9.100.

Willie J. Darden states that he was sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and under the Constitution and laws of the State of Florida because he was denied the effective assistance of counsel in the preparation, briefing and argument of the direct appeal from his conviction and sentence of death.

In support of this petition, in accordance with Fla.R.App. P. 9.100(e), Willie J. Darden states as follows:

I.

JURISDICTION

This is an original action under Fla.R.App.P. 9.100(a). This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3), and Article V, Section 3(b)(9), Fla. Const.

As described more fully below, Mr. Darden was denied the effective assistance of appellate counsel before this Court at the time of his direct appeal. Since the claim of ineffective assistance of counsel stems from acts and omissions before this

Court, this Court has jurisdiction. Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

The extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substitute appeal. Nevertheless, this and other Florida Courts have consistently recognized that the Writ must issue where the constitutional right of appeal is completely thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, No. 67190, slip op. (Fl.Sup.Ct. August 15, 1985); McCrae v. Wainwright, 439 So.2d 768 (Fla. 1983); State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Ross v. State, 287 So.2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So.2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for a writ of habeas corpus. Baggett, supra, 287 So.2d at 374-75; Powe v. State, 216 So.2d 446, 448 (Fla. 1968). Petitioner demonstrates below that the inadequate performance of his appointed appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

In particular, Petitioner will show that the trial court below impermissibly found and considered the statutory aggravating circumstance that the capital felony herein was heinous, atrocious, or cruel. This 1974 finding is utterly without foundation, and under the facts of this case, there is even now no precedential support for the finding. Appellate counsel failed to raise the claim on appeal (See Section IV, A, 2, a, page 23, infra), if it had been raised, the application of the aggravating circumstance would have been invalidated by this Court (see Section IV, B, 1, page 26, infra), and consideration of this invalid aggravating circumstance so infected the balancing process at sentencing that resentencing is required (see Section IV, B, 3).

Petitioner will also show that the trial judge erred at sentencing by not instructing the jury that aggravating circumstances required state proof beyond a reasonable doubt. The court also incorrectly instructed the jury that the Petitioner had the burden to prove that mitigating circumstances outweighed aggravating circumstances. The trial court's sentencing findings suffered from the same constitutional infirmities. These errors were not raised on direct appeal, an unreasonable omission of appellate counsel. (See Section IV, A, 2, b, page 25, infra). Had the error been raised in this Court, the fundamental error would have been recognized, see Section IV, B, 2, page 38, infra. As will be shown, the error was prejudicial, and requires resentencing. See Section IV.

II.

FACTS UPON WHICH PETITIONER RELIES

Mr. Darden was sentenced to death in January, 1974, thirteen months after the Florida death penalty statute became effective. The trial judge had been on the bench for one year. Mr. Darden's appeal to this Court was concluded upon denial of rehearing in April, 1976. The procedural aspects of trial and sentencing are contained in later sections of this petition.

No issue regarding the propriety of the death penalty in Mr. Darden's case was raised by appellate counsel or addressed by this Court. This Court directly addressed only one point on appeal: whether the prosecutor's closing arguments "were so inflammatory and abusive as to have deprived the Appellant of a fair trial," Darden v. State, 329 So.2d 287, 289 (Fla. 1976), and that question was limited to whether the mean-spirited, inflammatory, and unethical closing arguments affected guilt, not sentence.

Two justices, Sundberg, J., and England, J., dissented from this Court's affirmance of Mr. Darden's conviction and sentence of death. Their dissent, in addition to holding that the guilt/

innocence determination was fundamentally tainted by prosecutorial misconduct, recognized that primary area of concern not raised by appellate counsel, and not addressed by the majority: whether the procedures employed for sentencing Mr. Darden to death were tainted:

> When one considers that Darden has been sentenced to die by the court which heard these arguments after recommendation of death by the jury to which they were made, it is evident that every assigned error should be given very careful consideration. . . ."

329 So.2d at 295. Mr. Darden does not seek to relitigate the prosecutorial argument issue. However, the split in this Court over the propriety of the guilt finding is here highlighted in order to demonstrate prejudice arising from appellate counsel's failure to raise any issue regarding the actual sentencing hearing conducted, and the propriety of the death penalty herein. Three aggravating and two mitigating circumstances were found by the trial court.

As this Court has recently recognized, on appeal "the propriety of the death penalty is in every case an issue requiring the highest scrutiny," and appellate counsel must "present his client's case in its most favorable posture." Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. at 3,4-5 (Fla. August 15, 1985). Petitioner's appellate counsel raised no issue regarding the propriety of death in this case. Petitioner's will indicate herein that the trial court's finding of heinous, atrocious, and cruel is totally unsupported, and that this Court would have so held, had it been presented the issue. Furthermore, Petitioner will demonstrate that the question of guilt/innocence was of fundamental importance at sentencing. The Petitioner spoke to the jury three times professing his innocence, in the face of cross-racial identification of him as the perpetrator, and the trial judge found Petitioner's exculpatory testimony to be a mitigating circumstance:

> "In mitigation, after conviction, the Defendant again emotionally and with what

> appeared on its face to be sincerity, proclaimed his innocence
>
> . . .
>
> In mitigation I find the following mitigating circumstances: . . . . The defendant repeatedly professed his complete innocence of the charges.

Without "heinous, atrocious and cruel" there are two statutory aggravating circumstances and two mitigating circumstances remaining which were "found" by the trial judge. One of the mitigating circumstances is the "innocence" issue.

In this posture (two aggravating circumstances/two mitigating circumstances) the second error by appellate counsel raised herein is of particular import: counsel failed to report to this Court that the trial court did not require the state to prove aggravation beyond a reasonable doubt, and the trial court required Petitioner to shoulder the burden of proof on whether sufficient mitigating circumstances existed to outweigh aggravating circumstances. In what can only be described as a very close case, this burden of proof shifting, and relieving, must be considered to be prejudicial.

This petition is organized in three substantive sections. In this section, Petitioner will first outline the "facts" surrounding his conviction, and then outline the defective sentencing procedure. The conviction facts are intended to demonstrate the potential for prejudice which blossomed during the resulting defective sentencing proceedings. In Section IV A, Petitioner shows the unreasonable and unprofessional omissions of appellate counsel. In Section IV B, Petitioner demonstrates the prejudice resulting from counsel's errors. These latter two sections, beginning at pages and , respectively, might best be read first, so that the reader can discern the flagrant fundamental errors involved. Then, a reading of the facts of trial would provide iron-clad evidence that the errors were fundamental and prejudicial.

This case involves the emotionally charged trial of a black man accused of robbery, the murder of a white man, the repeated

shootings of a white teenager, and sexual advances upon a white woman. Mr. Darden testified that he was innocent, and he has steadfastly maintained his innocence since the day of his arrest. Into this powder-keg, the State tossed incendiary argument and explicitly derogatory racial comments. No examination of the sentencing proceeding has been even attempted, and now the State is making preparations to execute Mr. Darden. Petitioner requests that his sentencing hearing be presented to this Court only after the "careful, partisan scrutiny" by appellate counsel, to which Mr. Darden is entitled. Wilson, slip op. at 5. Until such time as his sentencing hearing is dissected, evaluated, and validated, Mr. Darden's rights under the Sixth, Eighth and Fourteenth Amendments will remain unenforced.

A. Facts Upon Which Conviction and Sentence Were Based

1. Testimonial Facts

> "The testimony is going to show I think very shortly when the trial starts the victims in this case were white and, of course, Mr. Darden, the defendant, is black. Can each of you tell me that you can try Mr. Darden as if he was white?"
>
> [C]an you look at this defendant and assure me that you can try him as if he is white? Because the victims will be white. Can you look at the defendant and even though he is black can you try him as if he was white?

(R. 57; 115: State's voir dire).

The State's transparent benevolence during the early stages of Petitioner's trial was soon replaced by explicit mean-spiritedness: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash"; "I wish that I could see [Appellant] sitting here with no face, blown away by a shotgun. . . ." R. 750, 758-59 (closing argument). The majority of this Court believed "overwhelming eyewitness and circumstantial evidence" supported the guilt determination, blunting the prejudicial impact of the prosecutors' closing arguments. The dissent disagreed, being unconvinced that the argument "did not contribute to . . . defendant's conviction." Darden, 329 So.2d at 295.

This Court recited the "facts" underlying Petitioner's conviction:

> Carl's Furniture Store in Lakeland, Florida was robbed on September 8, 1973. During the course of the robbery, the proprietor, Carl Turman, was shot and killed and a neighbor boy, Phillip Arnold, was wounded. Soon afterwards, the Appellant, Willie J. Darden, who was on furlough from the Division of Corrections, lost control of the borrowed automobile he was driving and smashed into a telephone pole some three miles from the site of the murder, assault and robbery. After returning to his girl friend's house in Tampa that night, the Appellant was arrested on a traffic charge, leaving the scene of an accident. Soon thereafter, he was arrested and charged with murder, assault with intent to commit murder, armed robbery, and assault with intent to commit rape. . . .
>
> Both before and during trial, Mr. Darden was identified as the guilty party by Phillip Arnold and by Mrs. Turman, the decedent's wife, who was present and assaulted during the commission of the robbery and murder.

Id. at 288 (emphasis added).

The eyewitness identifications at trial were indeed damaging to Petitioner, but they were in fact anything but conclusive. The identifications this Court discussed occurred in the following manner. First, with respect to Mrs. Turman, she told officers immediately after the offense that "she could not remember what the subject looked like or what he was wearing." See police report, attached as Appendix O; see also R. 232, 236). However, a few days later, and the day after her husband's funeral, Mrs. Turman was asked to come to a preliminary hearing. She was the sole witness. (R. 46). She was in a state of shock. (R. 257-58).

Mrs. Turman was taken to a tiny courtroom with one black male sitting at defense table. (R. 221). The prosecutor walked over to Petitioner, pointed at him, and said, "Is that the man that did it?" (App. P):

> THE COURT: Ask her to identify.
> Mr. MARS: Yes sir.
> Q. Can you see this man sitting here?
> [objection overruled]

. . . .

Q. Is this the man that shot your husband?
A. Yes, Sir.

(R. 49-50). As will be seen, her descriptions at trial of the assailant lent no credence to her prompted identification.

Mr. Arnold provided the second identification. He had seen the assailant very briefly before he himself was shot. Several days after the incident, while Mr. Arnold was still in the hospital with his mouth wired shut, police showed him six photographs. As Mr. Arnold testified, the purpose of looking at the photographs was "[t]o identify the person that shot me and Mr. Turman." (R. 448). He immediately excluded four of the photographs, which "just didn't look like him at all." (R. 449). He then wrote on a piece of paper the following information:

"Both of these two look a little like him!"
DID HE HAVE A MUSTACHE?
"I don't think so!"
WHA TYPE SHIRT WAS HE WEARING?
"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

(R. 455, 475, App. O).

Mr. Arnold then picked out of the two photographs that looked "a little like him," the only one which had a name: Petitioner's photograph bore a white tag which revealed his name, "Darden." (R. 453, 477). At trial, Mr. Arnold could not remember the day he looked at the photographs, said the array was viewed in the afternoon when in fact it occurred in the morning, and stated that none of the photographs had had names on them.

These are the identifications that convicted Petitioner. The tenuousness of these identifications, and the general unreliability of the identifiers' testimony, is illustrated by subsequent trial testimony.

The testimonial descriptions of the man who shot Mr. Turman and the man who wrecked his automobile several miles down the road are consistently inconsistent. Mrs. Turman emphasized that the man who came in the store that day and robbed her was <u>very</u> clean shaven. (R. 225, 237). James Stone, who witnessed the

wreck on Highway 92 which allegedly occured after the killing, and who stopped to see if he could help, testified that Willie Darden had a gray moustache that day (R. 318). Phillip Arnold, who admittedly only saw the man for 20-25 seconds (R. 494) and even during that period was not keeping his eyes on the man every minute (R. 497), in his pretrial deposition indicated that the man who shot him had no hair on his face (R. 498), but at trial, after Mr. Stone gave his testimony, couldn't say for sure whether or not the man had a moustache because "it was a very thin one" (R. 497). Arnold also indicated that the man had an unusually long face (R. 443): Mrs. Turman testified that the man's face was the type of fat face consistent with a heavyset person (R. 237).

The various descriptions given by Mrs. Turman are internally inconsistent and confused: she initially told one of the investigating officers that it would be hard for her to identify the man because she was scared to look while the crime was in progress and at one point covered her face with her hands so she would not have to see (R. 240, 280). She told that same officer that the man was the same height as herself, 5'6'' (R. 288). In her pretrial deposition, she testified that the man was 5'8'', "maybe" 6' (R. 256). Phillip Arnold testified that the Man was very close to his own height, 6'2''(R. 495). When Mrs. Turman gave her initial description to Deputy Neill, she could not remember whether or not the man wore glasses (R. 227), but at trial she was adamant in her recollection that the man was definitely not wearing glasses (R. 227, 235).

The various descriptions of the clothes worn by the man who shot Mr. Turman and the man who wrecked his car on Highway 92 are equally conflicting. Mrs. Turman could not remember the color of the shirt worn by the man in the store, but was sure that it was a pullover, a t-shirt, with a stripe around the neck and bottom (R. 227). Phillip Arnold testified that the man was wearing a dull colored knit shirt with a ring around the collar (R. 443). Mr. Stone testified that when Willie Darden got out of his car

after the wreck, he was wearing a plain white shirt with buttons down the front, which were open, and which he took off after he got out of the car (R. 313).

The only physical characteristic which every witness who saw both men could agree on was that they were "colored." The testimony of Officer Neill, who ultimately arrested Mr. Darden in Tampa, is particularly telling: when asked if the man he arrested, Mr. Darden, fit the physical description given by Mrs. Turman of the man who killed her husband, Neill replied "Yes. The dark colored automobile, the time element, the car crash. . . just lead me to believe this possibly was him" (Pretrial hearing of 1/9/73, p.82). It is clear that this "physical description" given by Mrs. Turman would have fit any black man unfortunate enough to have been anywhere near the scene in Lakeland that day.

The various descriptions of the car seen at or leaving the scene of the crime were even more conflicting than the multitudinous physical descriptions of the perpetrator. Mrs. Turman told Officer Neill at the scene that she saw a black car. (R. 272). Mrs. Hill, a neighbor who came out of her house after hearing shots, saw a green car leaving the scene (R. 299). Deputy Elliot, one of the first officers to report to the scene, testified that a Mr. Douglas, who had witnessed the wreck in front of the Lakeland Lounge on Highway 92, told him that the car involved in the wreck was maroon (Pretrial hearing of 1/9/74, p. 34). Elliot also testified that several unidentified witnesses who were on the scene when he arrived told him that the suspect had left in a maroon car (Id). While there are certain colors which, depending on their intensity and value, are easily confused with each other, particularly from a distance, green and maroon occupy opposite ends of the color spectrum and are too distinctive to be confused. Deputy Al Brady, who responded to the accident scene, impounded the car, and later examined it, testified that the car which ran off the road in front of the

Lakeland Lounge was greenish gold in color (R. 426). It seems apparent that any car driven through the area by a 'colored' man at the appropriate time would have fit the description.

The only other evidence even remotely connecting Petitioner to the scene was a pistol found submerged in water thirty-nine feet from where Petitioner wrecked his automobile. So remote was this pistol that this Court did not mention it. It could not be connected to the offense (R. 347). No fingerprints, blood samples, confessions, or any other evidence was presented.

Petitioner testified as the only witness for the defense. He admitted he was on furlough from prison, and was driving his girlfriend's car in Lakeland shortly after 4:00 p.m. on September 8, 1973, when his car broke down. (R. 571). Two police officers helped him push the car out of the street and a woman who lived nearby, Mrs. Christine Bass, called two service stations for him but to no avail. (R. 573). Finally, however, Mr. Lawhorn came out of the real estate office in whose parking lot appellant was stranded, and helped Mr. Darden fix the car's broken battery cable. (R. 575).

Petitioner continued on his way, but a short time later had more car trouble which required stopping at a service station. (R. 574). These delays put Petitioner behind schedule as he was to attend a wedding that evening in Tampa. (R. 575).

In his haste, Petitioner was apparently driving too fast and ran his vehicle off the rainy highway. (R. 576). After he was arrested, Petitioner requested a lie detector test and a lineup. (R. 590-591, 653-657). He denied any involvement in the incident at the Turman's Business. (R. 593, 598).

On cross examination, he described in great detail his activities during the early part of the day on September 8, 1973. (R. 610-619). He explained that a man named Roy had paid him ten dollars to take him to Lakeland, Florida between 3:30 p.m. and 3:45 p.m. (R. 614-617). It was during Petitioner's return to Tampa that he twice had car trouble and eventually was involved

in an accident. (R. 619, 624, 634). He estimated that he had left Lakeland at 5:30 o'clock p.m. and concluded that the accident occurred a few minutes before 6:00 o'clock p.m. (R. 640). He arrived at his girlfriend's house before 6:45 p.m. (R. 64).

In sum, at the close of the evidence, the prosecution's case for conviction was a doubtful one and depended, in overwhelming measure, upon the jury's acceptance of the identification testimony of the State's two principal witnesses, and upon juror rejection of Petitioner's testimony. With this uncertainty, the summations to the jury took on particular importance.

2. Closing Argument "Facts"

The State's argument at guilt/innocence contained little if any relevant guilt/innocence issues. The crucial guilt/innocence issue, identification, was quickly dispatched.

The State had early on set up its argument. During voir dire (after asking the jury if they would promise to treat Petitioner "just like a white person"), the State asked potential jurors if they would disregard the knee jerk reaction that "they all look alike to me":

> [D]id you hold to the old wives tale that all blacks look alike? Do any of you believe that?

(R. 114). The State sprung this trap later in closing:

> Ladies and gentlemen, that's eyewitnesses. You have heard Mr. Maloney stand before you and tell you how good fingerprint testimony is, how good tire tracks are. Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness.

(R. 747).

The State's non-record and unsupportable assertions of the efficacy of eyewitness testimony were inherently prejudicial. Eyewitness testimony is roundly criticized as bad, and cross-racial identification, as here, is the worst. Barkowitz, P., and Brigham, J., Recognition of Faces: Own Race Bias, Incentive, and Time Delay, 12 Journal of Applied Social Psychology, 4:255

(1982); Brigham, J., Maass, A., Accuracy of Eyewitness Identifications in a Field Setting, 42 Journal of Personality and Social Psychology 673 (1982). Having shored up its own case, the State proceeded to crack Petitioner's credibility through a litany of totally irrelevant arguments.

a. Convict/execute Petitioner because of incompetence of correctional personnel

Prosecutor McDaniel, the second of the state's attorneys to sum up to the jury, argued repeatedly and at length that the jurors should not limit themselves to consideration of Appellant's guilt or innocence of the crimes charged in the indictment, but should convict and execute him because the State Division of Corrections, which had authorized Appellant's weekend furlough, could not be trusted to keep him in prison under any other circumstance. "As far as I am concerned," McDaniel began, "there should be another Defendant in this courtroom ... and that is the Division of Corrections, the prisons" (R. 749). He continued:

> As far as I am concerned ... this animal was on the public for one reason. Because the Division of Corrections turned him loose, lets him out, lets him out on the public. Can't we expect him to stay in a prison when they go there? Can't we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" (R. 749).
>
> * * *
>
> I wish that person or persons responsible for him being on the public was in the doorway instead of [the murder victim]. I pray that the person responsible for it would have been in that doorway and any other person responsible for it, I wish that he had been the one shot in the mouth. I wish that he had been the one shot in the neck, instead of [Phillip Arnold].
>
> Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." (R. 749-50).
>
> * * *
>
> There is one person on trial, not the Polk County Sheriff's Office, not the Hillsborough

> Sheriff's office, but he and his keepers, the Division of Corrections." (R. 765).

Mr. McDaniel's last words to the jury repeated this theme: "I cannot help but wish that the Division of Corrections was sitting in the chair with him [the defendant]. Thank you." (R. 781)

These inflammatory comments bore no rational relationship to the question of Petitioner's guilt or innocence of the crimes with which he was charged in the indictment, and did not relate to punishment.

The purpose for the diatribe was singular: execute Petitioner because incompetent correctional officials will "let him loose." Death is "the only way that I know that he is not going to get out on the public. Its the only way I know." (R. 753).

b. Prosecutors' opinions/beliefs

Both prosecutors also engaged in blatantly improper argument by placing in issue their own opinions and beliefs and those of their office. Mr. White, who spoke first, was responsible for the most flagrant example of this. He concluded his argument to the jury with the following words:

> I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life. (R. 748).

Mr. McDaniel repeatedly offered the jury his opinion that Petitoner was not a man worthy of belief. Since Petitioner's defense consisted largely of his own alibi testimony, the prejudice from such remarks is manifest. McDaniel's statements included the following:

a. Petitioner testified that he had asked for a lie detector test. In discussing that testimony, McDaniel said: "I don't believe anything he says...." (R. 770).

b. Petitioner testified that his alibi was the truth.

McDaniel attacked this testimony in the following way: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." (R. 755)

c. Petitioner testified that he remembered the precise times of several events that occurred during the day of the murder. These statements were a crucial part of his testimony for, if true, they established that he could not have been in the Turman furniture store at the time of the crime. McDaniel's response: "I couldn't even tell you right now what day I put a witness on the stand this week." (R. 769).

d. Petitioner testified that he stopped at a service station after his automobile accident, seeking assistance -- testimony that was confirmed by one of the State's own witnesses. Yet McDaniel recounted Petitioner's testimony and said: "That's what he says. I don't know that he stopped at any.... I guarantee you he was not going back to the scene of the accident until he had gotten home." (R. 765)

c. Prosecutorial expertise

The prosecutors informed the jury that <u>they</u> knew a lot more about what was going on than the jury; that, based upon their expertise, eyewitness identification cases were "the best;" that the defense was using age-old tricks <u>taught</u> <u>them</u> by the very prosecutor speaking, who had been a defense lawyer for seven years, and that generally the jury could rely on the State for knowledge and truth. For instance:

> The Defense Attorneys, which I am proud to say that I was about seven years.... (R. 756).
>
> [The defense attorney] will try the Polk County Sheriff's office; he will try the Polk County Sheriff's office; and he will try me. And he will try Mr. White. <u>I guarantee that, because he has notes I gave him many years ago</u>. (R. 749).
>
> Ladies and gentlemen, the best kind of evidence in the world is a man that saw it happen, an eyewitness. (R. 747).
>
> I don't know how they're going to get around

this. (R. 757) (Eyewitness identification).

Of particular note is the prosecutor's explaining to the jury that Petitioner testified the way he did because he was able to hear all the State's witnesses who preceded him:

> You couldn't hear Mr. Darden until yesterday, after he heard all of the other witnesses. (R. 767).
>
> But he [Petitioner] heard every word everybody said and I assure you, if we hadn't been able to prove the accident, they would never had admitted it." (R. 764).

The prosecutor's patriarchal attitude surfaces throughout the argument, and the jury was constantly reminded to look to the State for the truth: "I want to thank you for your time. I assure you that it was necessary under the circumstances." (R. 749).

d. Improper appeal to emotions

The State voiced contempt and hatred for Petitioner, and urged the jury to do the same. The jabs began early in the summation: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." (R. 750). The State never let up.

McDaniel's repeated expression during summation, of his wish that Petitioner had been maimed or killed, further contributed to the denial of Petitioner's constitutional right to a fair trial. Over and over again, the prosecutor made comments like the following:

> I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him [Appellant] sitting here with no face, blown away by a shotgun, but he didn't.... I wish someone had walked in the back door and blown his head off at that point." (R. 125-26).

McDaniel returned to this theme when he described the five times that the alleged murder weapon had been fired. He explained that this left one bullet in the chamber. "[Petitioner] didn't get a chance to use it. I wish he had used it on himself." (R. 133). He made a similar comment in

describing Petitioner's automobile accident: "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." (R. 134). Finally, while discussing the claim that Petitioner had changed his appearance between the date of the crime and that of the trial, McDaniel gratuitously commented that "[t]he only thing he hasn't done that I know of is cut his throat." (R. 136).

B. Facts With Respect To Sentencing

1. Evidence at Sentencing

The only additional evidence at sentencing was a statement by Petitioner. First, the trial judge recounted for the jury a conversation had in their absence:

> We have talked with Mr. Darden. . . . He has advised me that he told you already all he knew about this case on his testimony before. That you did not choose to accept his testimony, that he is presently emotionally upset, he does not know anything else that he could add. . . .

(R. 892). Later, Mr. Darden did make a statement to the jury:

> I have never in my life carried a gun or a knife or any other type of weapon on my person.
>
> I have never in my life shot no one or robbed anyone. When I took that stand yesterday, I had nothing to hide from you peoples. I don't have anything to hide from you today.
>
> I have told you the truth so help me God.
> . . .

(R. 906).

2. Instructions/Findings At Sentencing

The jury instructions regarding sentencing covered eight pages. See Appendix B. Those parts relevant to this proceeding concern the fact that the court did not assign a standard of proof respecting aggravating circumstances, and shifted the burden of proof to Petitioner to demonstrate that mitigating circumstances outweighed aggravating circumstances. The instructions, in pertinent part, are:

> [I]t is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon:
> 1. Whether sufficient aggravating

> circumstances as hereinafter enumerated, exist.
>
> Second, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweigh the aggravating circumstances found to exist; and
>
> Three, based on these considerations, whether the Defendant should be sentenced to life or death.

(R. 898-99).

> You must first find that [aggravating circumstances] do exist, and if you find they do exist from the testimony, then you shall consider them.

(R. 901).

> If you find that sufficient aggravating circumstances exist, and that they are not outweighted by the mitigating circumstances, then you should return a sentence recommending imposition of the death penalty.

(R. 904).

The court had indicated earlier that the "brief three page charge" defined "your duties and responsibilities and what you can consider. . . ." (R. 892).

The trial court's findings are reproduced in Appendix C, and those parts immediately relevant to claims raised herein are:

> In mitigation, after conviction, the Defendant again emotionally and with what appeared on its face to be sincerity, proclaimed his innocence. . . .
>
> I find from the evidence and the record the following aggravating circumstances:
>
> (1) The capital felony was committed by the Defendant, WILLIE JASPER DARDEN, while he was under sentence of imprisonment.
>
> (2) The capital felony was committed by him while he was engaged in the commission of a robbery.
>
> (3) The captial felony was especially heinous, atrocious and cruel.
>
> In mitigation I find the following circumstances:
>
> (1) The Defendant is the father of seven children.
>
> (2) The Defendant repeatedly professed his complete innocence of the charges.

III.

NATURE OF RELIEF SOUGHT

Petitioner seeks a stay of execution so that he can pursue a new appeal. If necessary to prove his claim of ineffective assistance of appellate counsel, he also requests an evidentiary hearing by special magistrate or otherwise, to resolve any disputes as to issues of fact. Finally, Petitioner seeks the vacation of his death sentence.

IV.

BASIS FOR WRIT

A. Right to Effective Assistance of Counsel on Appeal -- Counsel's Unreasonable Omissions Herein

1. Standards

a. General

The appellate-level right to counsel also comprehends the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S.Ct. 830, n. 6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1985) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae". Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the lay person, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835, n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also, Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case.").

This Court has long protected the right of indigents to effective appellate representation. More recently, in Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation on appeal fell below an acceptable standard." Several weeks ago, upon Mr. Barclay's new appellate record, briefing, and argument, this Court reversed Barclay's death sentence, and ordered that a life sentence be imposed. Even more recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . ." Harris v. Wainwright, ___ So.2d ___ (Fla. No. 66,523, June 13, 1985, slip at 3).

b. Effective appellate representation in capital cases

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 103 S.Ct. 3308 (1983), the Eighth Amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an evenhanded, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is required. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Justices Stewart, Powell, and Stevens); Proffitt v. Florida, 428 U.S. 242 (1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortiori that enhanced effectiveness is required when the appeal is required by the Eighth Amendment.

Counsel must not only perform adequately in a Sixth and Fourteenth Amendment sense. In a capital case, counsel, to be effective, must provide assistance to the client on the issue that distinguishes capital cases from all others -- death of the appellant.

This principle is now embodied in this Court's Eighth Amendment jurisprudence. A little over a week ago, this Court outlined counsel's special duties in capital cases, and the reasons for their attachment:

> "[Counsel] failed to address the propriety of the death penalty as applied in either his initial brief or his reply brief. . . .
>
> The propriety of the death penalty is in every case an issue requiring the closest scrutiny. . . . [T]he basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice."

Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. 3-4 (Fla. S.Ct. August 15, 1985). This Court specifically recognized the power of an advocate to unearth latent defects in complex death

penalty proceedings:

> "The role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Id. at 5.

2. Specific Unreasonable Omissions of Counsel Herein

"Petitioner must show 1.) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2.) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Id. at 2. In this section, Petitioner will outline counsel's unreasonable omissions.

The general omission complained of is stark: appellate counsel made no challenge to the propriety of the death penalty as applied to Petitioner. None. This is per se unreasonable attorney conduct in a capital case. Wilson, supra. The only mention of capital punishment was contained in a short attack on the statute, see App. A, which this Court rejected without addressing, inasmuch as the statute had been held valid the year before in State v. Dixon, 283 So.2d 1 (Fla. 1973).

There are in fact several significant constitutional irregularities concerning the imposition of death in Mr. Darden's case, irregularities which reasonably effective counsel would

have researched, briefed and argued. Counsel unreasonably failed to raise:

a. The trial court's finding of heinous, atrocious or cruel is not supported by the record.

In Section IV B (1) and (1)(b), infra, Petitioner shows that the trial court's finding of heinous, atrocious or cruel was error. Here, Petitioner will show that appellate counsel's failure to present the error was unreasonable. In Section IV B (3), infra, Petitioner demonstrates that appellate counsel's omission was prejudicial, in a Sixth, Eighth, and Fourteenth Amendment sense.

The inquiry is whether reasonably competent counsel would have raised this issue. Based on the argument's merit, the answer must be yes. See Section IV B (1) and (1)(b), infra. An equally clear indication is the action of this Court, and attorneys practicing before it, with regard to challenges to trial court finding of heinous, atrocious or cruel.

Present counsel has researched all the cases in which this Court (and appellate attorneys) directly addressed a heinous, atrocious and cruel trial court finding. For purposes of the present argument, Petitioner has divided these cases into two categories. First, Petitioner has identified seven cases decided between the time of his conviction (January, 1974) and the denial of rehearing in this Court (April, 1976), wherein the issue was raised and resolved in this Court. see, e.g., Halliwell v. State, 323 So.2d 557 (Fla. 1975) (appellant's brief in Halliwell attached as App. D); Tedder v. State, 322 So.2d 908 (Fla. 1975) (Appellant's brief in Tedder attached as App. E); Alvord v. State, 322 So.2d 533 (Fla. 1975) (appellant's brief in Alvord attached as App. G); Swan v. State, 322 So.2d 485 (Fla. 1975) (appellant's brief in Swan attached as App. I); Slater v. State, 316 So.2d 539 (Fla. 1975) (appellant's brief in Slater attached as App. J); Proffitt v. State, 315 So.2d 461 (Fla. 1975); Taylor v. State, 294 So.2d 648 (Fla. 1974) (appellant's

brief in Taylor attached as App. K).

Second, strictly for comparison purposes, Petitioner has identified twenty-two cases in which the conviction occurred between the time of appellant's conviction and this court's affirmance, where the heinous, atrocious, or cruel circumstance was ultimately raised and addressed in this Court. Enmund v. Florida, 399 So.2d 1362 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Jacobs v. State, 396 So.2d 1113 (Fla. 1981); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Stone v. State, 378 So.2d 765 (Fla. 1979); Harvard v. State, 375 So.2d 833 (Fla. 1977); Ford v. State, 374 So.2d 496 (Fla. 1979); Rutledge v. State, 374 So.2d 975 (1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Foster v. State, 369 So.2d 928 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978) (appellant's brief in Hargrave attached as App. H); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Jackson v. State, 366So.2d 752 (1978); Leduc v. State, 365 So.2d 149 (Fla. 1978); Aldridge v. State, 351 So.2d 942 (1977) (appellant's brief in Aldridge attached as App. F); Gibson v. State, 351 So.2d 958 (Fla. 1977); Elledge v. State, 346 So.2d 998 (Fla. 1977) (appellant's brief in Elledge attached as App. M); Barclay v. State, 343 So.2d 1266 (Fla. 1977); Dougan v. State, 343 so.2d 1266 (Fla. 1977); Funchess v. State, 341 So.2d 762 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

This survey reveals several things. Of fifty death sentences arising between the time of Petitioner's death sentence and this Court's affirmance of it, thirty (60%) involved this Court's treatment of the heinous, atrocious, or cruel issue. In six of these cases, this Court found error on this issue. Halliwell, Cooper, Tedder, Armstrong, Kampff, and Enmund. Petitioner has appended hereto the relevant portions of many of the Appellants' briefs in these cases, demonstrating that counsel were raising the issue. See, e.g., App. D, E, F, H, M.

Of particular impact are Tedder and Halliwell, wherein this

Court reversed the finding of heinous, atrocious, and cruel. These cases occurred before the completion of Petitioner's direct appeal.

This issue was, at the time of Petitioner's appeal, and remains, a much litigated issue. It is an issue which attorneys justifiably and successfully raise. In light of the merit of the issue herein, see Section IV (B) (1) infra. It was clearly error, and unprofessional, for appellate counsel to neglect it.

b. The trial court's treatment of the standard and allocation of the burden of proof was error.

In Section IV B (2), infra, Petitioner shows that the trial court's actions with regard to this claim were error. In Section IV B (3), infra, Petitioner demonstrates that the error, and counsel's failure to raise it on appeal, was prejudicial. Here, Petitioner demonstrates that appellate counsel's failure to bring the issue to this court's attention was an unreasonable omission.

At the time of Petitioner's direct appeal, this Court had recognized that aggravating circumstances were elements of capital murder which "must be proved beyond a reasonable doubt before being considered by the judge or jury." Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Competent counsel would readily see that no such standard of proof was required of the jury, or applied by the trial court, in Petitioner's case. The requirement that the State prove the elements of a crime beyond a reasonable doubt had long been recognized in Florida, Davis v. State, 35 So. 76 (1903), and had been the subject of a well-known and oft cited United States Supreme Court decision decided six years before Petitioner's appeal: In re Winship, 397 U.S. 358, 363 (1970). See also Ivan v. City of New York, 407 U.S. 203, 205 (1972).

In Mullaney v. Wilbur, 421 U.S. 685 (1975), the Supreme Court discussed the implications of In re Winship, and the requirement that no burden of proof negating the elements of offenses be placed on defendants. The Supreme Court noted in Engle v. Issac, 456 U.S. 107 (1982), that impermissible burden shifting had long

been litigated by appellate counsel, and cited over twenty-five examples, Id. at 132, n. 40, of cases occurring before, and during, the pendency of Petitioner's appeal.

In Section IV B (2), infra, Petitioner explains how the jury instructions, and the trial court's sentencing findings, impermissibly shifted the burden to Petitioner to prove that mitigating circumstances outweighed aggravating circumstances. This fundamental error was not raised by appellate counsel, and that omission was unreasonable.

B. Right to Effective Assistance/Prejudice

1. The Trial Court Finding of Heinous, Atrocious, or Cruel is Without Record Support, and the Resulting Death Sentence Violates the Eighth and Fourteenth Amendments

The trial judge recited the facts regarding Mr. Turman's death: "When her husband suddenly appeared at the back door of the store, the Defendant coldly, immediately, and without warning, shot and killed him in the door. Mr. Turman . . . did not even have an opportunity to flee." R. 206, App. A, p. 1. From this, the trial court found "[t]he capital felony was especially heinous, atrocious and cruel." Id. While the quoted judge's sentencing order on its face correctly reveals that this aggravating circumstance is not supported by the record, Petitioner will outline the testimony and proof which demonstrates that the crime against the victim Mr. Turman was not "accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

a. Instantaneous shot

The facts in this case are that the victim was shot in the head instantaneously with his appearance at the scene of a robbery, that he did not know of his precarious position before he was shot, that he was rendered immediately unconscious, and that he died shortly thereafter from extensive brain damage caused from the shot. Mrs. Turman, the victim's wife, and only

witness to the actual shooting, described the manner of death:

> Q. Mrs. Turman, your husband came through the back door in -- or did he come in the back door?
> A. He did not come in the door. He started in. He opened the door and started in. He did not get in.
> Q. He opened the door?
> A. He opened the door.
> Q. All right, was the shot instantaneously at that point?
> A. It was.

R. 268

> A. . . . And about that time, my husband opened the door. When [the assailant] reached across my right shoulder and I screamed, "No, Jim, don't come in," but it was too late. He had already fired the gun and shot my husband. My husband did not have a chance to say a word. . . .
>
> Q. And your husband did not respond?
> A. He did not respond.
> Q. Did [the assailant] say anything to him?
> A. No, sir.

R. 207-208. Ms. Turman further testified that after the assailant left, she went to her husband:

> "Q. What was your husband's condition at that time, Mrs. Turman?
> A. At that time, I tried to talk to him and there was no response; and the blood was running from his head, his mouth, and his nose; and I also saw his brains coming out.
> Q. Mrs. Turman, was he alive at that time?
> A. Yes, sir.
> Q. Did he ever respond?
> A. He never responded.

R. 278.

Immediately after Mr. Turman was shot, Phillip Arnold kneeled down over him. He testified that Mr. Turman's body was just lying in water outside the back door of the store, and that "his head was bleeding real bad and all." (R. 432). A pathologist testified that Mr. Turman had been shot one time "between the eyes and the forehead," that this was the cause of death and that the bullet "had extensively damaged the brain." (R. 415). He testified that there were no other bruises or injuries, and that another physician had declared Mr. Turman dead at 11:05 p.m., the night of the incident. (R. 416-417).

The State's very theory was that Mr. Turman was killed

without warning. In a highly objectionable argument, the State stressed the instantaneous killing of Mr. Turman:

> "Mr. Turman, not knowing anything happened, not knowing what was going on. I wish he [Turman] had had a shotgun in his hand when he walked in the back door and blown his face off. I wish that I could see him sitting there with no face, blown away by a shotgun, but he didn't. He had no gun. He had no chance. . . . [he] opened the door and he shoots him between the eyes.
>
> . . .
>
> [H]er husband was already lying there with the bullet in his forehead between his eyes. She knew, or should have known it was murder on the spot.

(R. 759-60).

b. Mr. Turman's death was not heinous, atrocious, or cruel.

In Zant v. Stephens, 103 S.Ct. 2733 (1983), the United States Supreme Court recognized that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: to circumscribe the class of persons eligible for the death penalty." Id. at 2743. In order to "minimize the risk of wholly arbitrary and capricious action," Id. at 2741, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty." Id. at 2742-43.

Thus, if Fla. Stat. Sec. 921.141(5)(h) ("heinous, atrocious, or cruel") does not, in application, genuinely narrow, its application violates the Eighth and Fourteenth Amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, Georgia's similar statutory aggravating circumstance ("outrageously or wantonly vile, horrible, or inhuman . . . involv[ing] depravity of mind or an aggravated battery to the victim"), while valid on its face, Gregg v. Georgia, 428 U.S. 153 (1976), was found unconstitutional in application, because there was in fact no narrowing accomplished through its application in Mr. Godfrey's case: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. Section (5)(h) of the Florida

Statute must "genuinely narrow the class of persons eligible for the death penalty." Stephens, 103 S.Ct. at 2742-43.

Petitioner will show that one of two constitutional errors exist herein with regard to Section (5)(h). Either (1) heinous, atrocious and cruel does not apply to the killing of Mr. Turman, and thus its "finding" impermissibly and prejudicially infected the trial judge's balancing of aggravation and mitigation, or (2) if heinous, atrocious and cruel does apply to this victim's death the Florida Supreme Court has failed to narrow the section's application, and the section is unconstitutional as written and as applied. See Mello, M., Florida's 'Heinous, Atrocious or Cruel' Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making it Smaller, 13 Stet.L.Rev. 523, 528 (1984) (hereinafter "Mello"). It was incumbent on appellate counsel to raise these fundamental issues.

With respect to the first issue, it is apparent that the heinous, atrocious, or cruel aggravating circumstance does not and should not apply in Petitioner's case. In 1973, this Court examined and interpreted section (5)(h), and, in language foreshadowing the United States Supreme Court's opinion in Zant v. Stephens, noted "[t]he most important safeguard presented in Fla. Stat. section 921.141, F.S.A., is the propounding of aggravating. . . circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So.2d 1,8 (Fla. 1973). Section (5)(h), acording to Dixon, includes only "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Id. at 9.

Appellate counsel did not raise any issue concerning the appropriateness of the death penalty as applied to this case. The only issue raised with regard to the death penalty was "the alleged unconstitutionality of the sentencing provisions of

Florida Statutes Section 921.141," Darden, 329 So.2d at 288, issues put to rest in Dixon. Included in appellate counsel's general omission was the failure to raise the matter of heinous, atrocious, or cruel, and its absence.

"The propriety of the death penalty is in every case an issue requiring the closest scrutiny." Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. at 3 (Fla. Sup. Ct. August 15, 1985). Had appellate counsel examined this Court's language in Dixon, and the facts of Mr. Turman's death, a successful challenge to heinous, atrocious, or cruel should reasonably have been forthcoming. "[I]nadequacy of research and briefing" kept this Court from addressing the issue, and Sixth, Eighth, and Fourteenth Amendment rights were compromised.

As noted, Petitioner's appeal was pending from January, 1974, through April, 1976. During this window of opportunity, several important and controlling developments surface on the heinous, atrocious, or cruel front. First, many other appellants raised, and this court addressed, this very heinous, atrocious, or cruel issue. see, e.g., Halliwell v. State, 323 So.2d 557 (Fla. 1975) (appellant's brief in Halliwell attached as App. D); Tedder v. State, 322 So.2d 908 (Fla. 1975) (Appellant's brief in Tedder attached as App. E); Alvord v. State, 322 So.2d 533 (Fla. 1975) (appellant's brief in Alvord attached as App. G); Swan v. State, 322 So.2d 485 (Fla. 1975) (appellant's brief in Swan attached as App. I); Slater v. State, 316 So.2d 539 (Fla. 1975) (appellant's brief in Slater attached as App. J); Proffitt v. State, 315 So.2d 461 (Fla. 1975); Taylor v. State, 294 So.2d 648 (Fla. 1974). Second, under these controlling cases, it should have been unmistakably clear, to alert counsel, that the capital offense herein was not heinous, atrocious, and cruel.

First came Tedder v. State, 322 So.2d 908 (Fla. 1975), and this Court, citing and building on Dixon, 322 So.2d at 910, recognized that while "it is apparent that all killings are

atrocious, and that appellant exhibited cruelty. . . [s]till, we believe the legislature intended something 'especially' heinous, atrocious, or cruel when it authorized the death penalty for first degree murder." Tedder, 322 So.2d at 910, n. 3. This court described the offense:

> On January 17, 1974, appellant's wife and mother-in-law were laying a sidewalk outside the trailer where they resided. Appellant and his wife had recently separated. Without advance warning of any sort, appellant stepped from behind a tree and fired a shot in the direction of the women and the appellant's infant son. All fled toward the trailer, where appellant's wife ran with the baby to a back bedroom in order to obtain a shotgun. She succeeded in locking the bedroom door behind her, but while loading the shotgun she heard more shots and the scream of her mother. Appellant then broke open the bedroom door and, gun in hand, took away the shotgun and told his wife to bring the baby and come with him. As they left, his wife saw her mother lying on the floor in a hallway.

Id. at 909 (emphasis added).

Tedder involved a victim well aware of her impending death, who "fled toward the trailer." Her daughter was actually cognizant of the treachery, heard her mother being shot and screaming, and saw her body after the shots. Mr. Darden's counsel apparently did not see, or saw little significance in, this Court's finding that the killing was not "especially heinous, atrocious, or cruel," a finding made despite the fact that the Tedder assailant "allow[ed] his injured victim to languish without assistance or the ability to obtain assistance." Id. at 910.

On the heels of Tedder came Halliwell v. State, 323 So.2d 557 (Fla. 1975), and this Court again invalidated a finding of heinous, atrocious, and cruel, because "we see nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. The description of the murder was graphic:

> [T]he appellant flew into a rage after the husband of the woman he loved had beaten her. Appellant grabbed a 19-inch breaker bar and

> beat the husband's skull with lethal blows and then continued beating, bruising, and cutting the husband's body with the metal bar after the fatal injuries to the brain.

Id. at 561.

Petitioner's counsel here should certainly have realized, and informed this Court, that a single fatal shot to the head, unsuspected by the victim, was less heinous than the crimes in Tedder and Halliwell, and is undeniably less "shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. In addition, counsel should have read with acute interest and optimism that this Court does not deem events after the victim's death relevant to the determination of heinous, atrocious, or cruel. The Halliwell assailant attained "a new depth in what one man can do to another, even in death." Id. at 561.

> [S]everal hours after the killing. . . Appellant used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek. It is our opinion that when Arnold Tresch died, the crime of murder was completed and that the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggaravating circumstances. If mutilation had occurred prior to death or instantly thereafter it would have been more relevant in fixing the death penalty.

Id. (emphasis added).

Without doubt, the death of Mr. Turman epitomizes a non-heinous, atrocious, or cruel killing, as that statutory aggravating circumstance has been interpreted by this Court. With the claim swirling around him, Petitioner's counsel said nothing to this Court. What he could have said, and what other appellants have won on, is that death resulting from an unsuspected gunshot, where the victim is killed instantly or is rendered unconscious and dies without regaining consciousness, is not a heinous, atrocious, or cruel offense. Trawick v. State, No. 57,077 (Fla. Sup. Ct. May 16, 1985) (victim shot in back after being forced at gunpoint to face wall during robbery; died thirty-six hours later); Parker v. State, 458 So.2d 750 (Fla.

1985) (victim shot in head after being shown body of previously murdered boyfriend); Gorham v. State, 454 So.2d 556 (Fla. 1984) (victim killed instantly by two gunshots in back after being forced at gunpoint to face wall during robbery); Kennedy v. State, 455 So.2d 351 (Fla. 1984) (victims killed in shootout while attempting to recapture escaped convict); James v. State, 453 So.2d 786 (Fla. 1984) (physically handicapped victim shot in head while husband pleaded for her life); Jackson v. State, 451 So.2d 458 (Fla. 1984) (victim shot in back, wrapped in plastic and placed in trunk, shot again while still alive); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot after stumbling upon intruder in house and attempting to take away gun; six additional gunshots inflicted after original); Herzog v. State, 439 So.2d 1372 (Fla. 1983) ("when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness"); Oats v. State, 446 So.2d 90 (Fla. 1984) ("a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance"); Clark v. State, 4423 So.2d 973, 977 (Fla. 1983) ("Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous atrocious, or cruel. . ."), cert. denied, 104 S.Ct. 2400 (1984); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983) ("[s]ince the death was instantaneous following a single shot, this crime cannot be considered especially heinous, atrocious, or cruel."); Middleton v. State, 426 So.2d 548, 552 (Fla. 1982) (no (5)(h) because "the victim died instantly from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from appellant, and had no awareness that she was going to be shot."), cert. denied 103 S.Ct 3573 (1983); Simmons v.State, 419 So.2d 316,319 (Fla. 1982) (no (5)(h) because "[t]here was evidence that the victim was subjected to repeated blows while living; death was most likely instantaneous or nearly so."); McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (no (5)(h)

because three shots to abdomen); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) ("[a]n instantaneous death caused by gunfire, however, is not ordinarily a heinous killing.") cert. denied, 456 U.S. 925 (1982); Maggard v. State, 399 So.2d 973, 977 (Fla. 1981) (no (5)(h) because "the victim died quickly from a single gunshot blast fire through a window, and there is no evidence that the victim was aware that he was going to be shot."), cert. denied, 454 U.S. 1059 (1981); Lewis v. State, 398 So.2d 432, 434, 434 (Fla. 1981) ("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murder, it as a matter of law is not heinous, atrocious, or cruel; here, the victim died instantaneously."); Williams v. State, 386 so.2d 538, 543 (Fla. 1980) ("appellant's crime does not rise to the level of 'especially heinous, atrocious, or cruel', [because the victim] died almost 'instantaneously' from her gunshot wounds."); Fleming v. State, 374 So.2d 954, 958, 959 (Fla. 1979) ("the murder was committed by a single shot. . . the victim was killed instantaneously and painlessly, without additional facts which make the killing 'heinous' within the statutorily-announced aggravating circumstance."); Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979) ("directing a pistol shot straight to the head of the victim does not tend to establish [(5)(h)]. . . We hold that the trial judge erred in finding that the murder was especially heinous, atrocious or cruel."); Riley v. State, 366 So.2d 19, 21 (Fla. 1978) ("[t]here was nothing atrocious done to the victim, however, who died instantly from a gunshot to the head.") (see, App. N), cert. denied, 459 U.S. 981 (1982); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1978) ("this murder was not in [the (5)(h)] category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing 'heinous. . .'"), cert. denied, 431 U.S. 925 (1977); Cf. Sims v. State, 444 So.2d 922 (Fla. 1983) ((5)(h) improper; apparently instantaneous death).

Here, the evidence shows that Mr. Turman entered the store

during the course of a robbery, began to push the door open, he was immediately shot, and fell. (R. 49, 284). There is no evidence indicating that he was aware of the presence of the intruder or of the danger to his wife. The bullet entered his forehead between the eyebrows, causing extensive brain damage. (R. 415). Mrs. Turman went to her husband after the intruder had left and observed that he was severely injured, and he would not respond to her ministrations. (Id.)

While this Court has "upheld application of this factor where victims were killed instantaneously or nearly instantaneously when, before the death occurred, the victims were subject to agony over the prospect that death was soon to occur," Preston v. State, 444 So.2d 939, 949 (Fla. 1984), such as in the classic 'execution style' murder, here there is no evidence whatsoever that the victim was cognizant of the events then taking place inside the store. To the contrary, it is apparent that the victim had absolutely no expectation of danger, much less of his own impending death, when he approached the doorway.

The Court has refused to uphold findings of heinous, atrocious, or cruel even in situations where the victim has been confronted by the killer with the murder weapon, and is clearly aware of the imminent possibility of death. In Gorham v. State, 454 So.2d 556 (Fla. 1984), the Appellant forced his victim, at gunpoint, to stand with his face to the wall during a robbery. During the course of the robbery, the victim was shot twice in the back and died within seconds as a result. The trial court based its finding of heinous, atrocious, or cruel on the fact that the victim had been in apprehension of death and had been shot in the back, indicating a lack of resistance. This Court reversed that finding, holding that "[w]hile the murder was of course a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.'" Id. at 554, quoting Dixon v. State, 283 So.2d at 9. Darden's victim, unlike Gorham's, had absolutely no presentiment of his death nor

any awareness of the presence of a gun, and had no opportunity to resist. See also Tedder and Halliwell, supra.

In Blanco v. State, 452 So.2d 520 (Fla. 1984), on facts remarkably similar to the instant case, this Court refused to uphold the trial court's finding of heinous, atrocious, or cruel where the victim had appeared by chance in the room where the intruder was menacing another resident of the house, the victim's niece. The victim was shot and killed in the ensuing scuffle. There, the victim was aware of the presence of the gun, as it was the subject of the struggle which ultimately lead to his death, and consequently must have been "subject to the agony of the prospect that death would soon occur," Preston, supra, or at least was very likely to soon occur, yet this Court still found that the murder was not within the ambit of Dixon's requirement that the "capital felony . . . [be] . . . accompanied by such additional acts as to set the crime apart from the norm of capital felonies," Id. at 9, before a finding of heinous, atrocious, or cruel is appropriate. The victim sub judice had no notice of his fatal position.

The only decision found which upholds a finding of heinous, atrocious, or cruel in a non-execution type killing where death was caused by a single gunshot is Harvard v. State, 375 So.2d 833 (Fla. 1977). There, the appellant pulled up next to his estranged wife's car and shot her in the face and neck with a shotgun, resulting in her immediate death. Because the the appellant had lain in wait outside a bar in the early hours of the morning for this victim and then stalked her for miles, and had engaged in a systematic and ongoing pattern of terror and harassment against her prior to the killing, the "additional acts [which] set the crime apart from the norm of capital felonies," as per Dixon, were found to exist. In the instant case, the killing of Turman was clearly spontaneous. If the process of laying in wait for and 'stalking' the victim are indeed those types of "additional acts" contemplated by Dixon, the decision in Harvard upholding a

finding of heinous, atrocious, or cruel is entirely consistent with the above cited line of Florida cases and entirely inconsistent with the trial court's instant application of heinous, atrocious, or cruel to Mr. Darden's case.

Petitioner requests the opportunity to present this issue to the court in an orderly, judicious manner. Without doubt, there is a reasonable possibility that had appellate counsel raised the heinous, atrocious, or cruel issue, this court would have stricken that aggravating circumstance. Petitioner, and this Court, were entitled to unhurried, deliberate, and professional advocacy on behalf of Mr. Darden.

> [W]e will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of the advocate to discover and highlight error and present it to the Court, both in writing and orally, in such a manner designed to persuade the Court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, Nos. 67,190, 67,204, slip op. at 3, (Fla. Sup. Ct. August 15, 1985). The remedy is to now provide "careful, partisan scrutiny" without interference from an impending execution. Heinous, atrocious, or cruel should not have figured in the balancing of aggravating and mitigating circumstances, and there is a reasonably probability that, but for appellate counsel's omission, it would not have on appeal. Petitioner discusses in section IV B (1), infra, how this error prejudicially infected the balancing process.

Should this Court determine that heinous, atrocious or cruel does apply to the facts herein, Petitioner contends that Appellant counsel was ineffective, and prejudicially so, for not informing this Court that this Court has failed, and did fail, to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. 2733, 2742 (1983). In short, the statute is unconstitutional on its face, because this Court has not "sufficiently narrowed the (5)(h) circumstance so

as to bring it within the ambit of constitutional acceptability." Mello, p. 529. Petitioner cannot, under warrant, list and discuss the decisions in this Court applying section (5)(h) in "virtually every type of capital homicide." Id. at 533. Instead, Petitioner has attached as Appendix R hereto, and incorporates, the exemplary and in-depth analysis of the problem as explicated in Mr. Mello's article. Again, the purpose here is not to convince the Court of the correctness of Mr. Mello's position, but rather to point up the serious deficiency by appellant counsel in failing to even broach the subject. Petitioner does not seek an invalidation of the heinous, atrocious, or cruel circumstance; he seeks the opportunity to present it, and then receive relief. Mr. Mello's dissertation accomplishes Petitioner's objectives, and it is accordingly submitted and incorporated.

2. The Trial Judge Failed to Instruct the Jury at Sentencing Regarding the Standard for Proof of Aggravating Circumstances, and Failed to Assign the Burden of Proof on the Issue of Death to the State, Errors Which are Likewise Related to the Judge's Finding of Fact for Sentence, in Violation of the Sixth, Eighth, and Fourteenth Amendments.

The jury instructions relevant to this issue at sentencing are set out in Section II B, supra, and the complete jury instructions are reproduced in Appendix B. The relevant part of the trial judge's sentencing order is also contained in Section II B, supra, and the complete Findings of Fact for Sentencing are reproduced in Appendix C. These instructions/ findings are fundamentally deficient for several reasons, and their inadequacy and incorrectness should have been raised for this Court's consideration on direct appeal.

a. Failure to instruct on, and find, the state's burden to prove aggravating circumstances beyond a reasonable doubt.

We again begin with Dixon v. State, 283 So.2d 1 (Fla. 1973). this Court recognized that since the aggravating circumstances "actually define those crimes to which the death penalty is applicable . . . they must be proved beyond a reasonable doubt

before being considered by the judge or jury." Id. at 9. The statute expressly requires that certain prerequisite findings of fact be made, Fla. Stat. Section 921.141 (3), and that the State prove those facts beyond a reasonable doubt. Arango v. State, 411 So.2d 172, 174 (Fla. 1982) ("In Dixon, we held that the aggravating circumstances of section 921.141 (5), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.").

In Petitioner's case, the jury was told neither that the State was required to prove those facts, nor that the burden was "proof beyond a reasonable doubt." The judge did not indicate how his "findings" were made, or who convinced him of them, under what standard. Appellate counsel did not mention the jury instructions, the judge's findings, or the propriety of the sentencing process as applied to Petitioner at all.

This State burden of proof failure renders the sentencing process totally unreliable and fundamentally flawed, errors which reasonably competent counsel should have raised at the time of Petitioner's appeal to this Court. Dixon pinpointed the problem, but the issue predates both Dixon and the Florida Statute. The requirement that the State prove the elements of a crime beyond a reasonable doubt has been recognized in the context of the ordinary criminal trial as a matter of fundamental fairness, In re Winship, 397 U.S. 358, 363 (1970), the absence of which "substsantially impairs the truth-finding function." Ivan v. City of New York, 407 U.S. 203, 205 (1972). This standard of proof must be perceived in terms of the level of confidence which the factfinder should have in the accuracy of his finding:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the the correctness of factual conclusions for particular types of adjudications."

Addington v. Texas, 41 U.S. 418, 423 (1979). The standard is no

stranger to death penalty cases either:

> [An accused] is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing [the] crime. . . . No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them. . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

Davis v. United States, 160 U.S. 469, 484, 493 (1985) (emphasis added).

Similarly, no person should be deprived of life unless the jurors who try him are required to say that the aggravating circumstances, upon which their recommendation of death is largely based, have been proven beyond a reasonable doubt. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves doubt whether the most heinous offenders are the ones being condemned.

Further, the jury herein had received detailed instruction at the first phase of trial about proof of guilt beyond a reasonable doubt. It can be inferred that the jury assumed, from the absence of similar instructions at the penalty phase, that no such requirement applied to the aggravating circumstances and to the determination that death is the appropriate punishment.

This Court will review the entire sentencing process in capital cases, but needs appellate counsel's guiding hand. Wilson v. Wainwright. The trial judge's sentencing order was, and is always, reviewable on direct appeal. Appellate counsel did not mention the sentencing order. State proof beyond a reasonable doubt has long been the rule in Florida, Kimball v. State, 184 So. 847 (Fla. 1939), Vaughn v. State, 41 So. 881 (Fla. 1906); Davis v. State, 35 So.2d 76 (Fla. 1903), and counsel, upon reading the Florida death penalty statute and Dixon, should have directed this Court's attention to the fundamentally defective sentencing order.

The jury instructions were similarly defective, and not

raised by appellate counsel. To the extent that the consequently flawed jury recommendation contributed to the trial judge's flawed sentencing order, appellate counsel was derelict in not raising the derivative error.

The erroneous instructions qua instructions should also have been raised on appeal, for they were fundamental error. When there is "fundamental error which would have mandated reversal on appeal. . . appellate counsel render[s] inneffective assistance of counsel by failing to raise the fundamental error on appeal. . . ." McCray v. Washington, 422 So.2d 824, 827 (Fla. 1982). There is nothing more fundamental than the requirement that the State prove aggravating circumstances beyond a reasonable doubt. Dixon.

The importance of accurate sentencing instructions is heightened in a capital case. This Court informed counsel in 1973 that aggravating circumstances and their proof was "the most important safeguard" involving a "carefully scrutinized judgment of jurors" because they, along with mitigating circumstances, "must be determinative of the sentence imposed." Dixon, 283 So.2d at 8, 7. Absent such safeguards, this Court believed that the rule of Furman v. Georgia, 408 U.S. 238 (1972) would be violated, and, consequently, the Eighth Amendment: discretion in sentencing must "be reasonable and controlled, rather than capricious and discriminatory" for Furman to be satisfied. Dixon, 283 So.2d at 7.

Despite this language, and the historical importance of proof beyond a reasonable doubt, there was no "carefully scrutinized judgement of jurors and judges" in this Court, because appellate counsel ignored the sentencing proceeding. This cannot be effective assistance of counsel.

The failure to require a reasonable doubt standard undermines all confidence in the jury recommendation and the trial judge's findings. This requires resentencing even without a showing of prejudice, because the error is a direct violation

of the Eighth and Fourteenth Amendments. See Dixon; Antone v. Strickland, 706 F.2d 1534, 1542 (Kravitz, J., concurring). However, the error is prejudicial, as is discussed in Section IV (B)(3).

b. Improper shifting of burden to petitioner.

The jury was instructed that if they found the existence of an aggravating circumstance, it was then to determine "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." (R. 898-99; App. B). This instruction impermissably allocated the constitutionally prescribed burden of proof. The Fourteenth Amendment, as interpreted in Mullaney v. Wilbur, 421 U.S. 684 (1975), guarantees that the prosecution bear the burden of proving beyond a reasonable doubt every element of the offense. Florida law is quite clear that aggravating circumstances authorizing imposition of the death penalty are "like elements of a capital felony in that the state must establish them," Arango v. State, 411 So.2d 172, 174 (Fla. 1982); accord State v. Dixon, 283 So.2d at 9, and the federal courts have relied upon this settled state law in rejecting post conviction challenges brought by Florida's death-sentenced capital defendants. See, e.g., Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983) (en banc); Spinkellink v. Wainwright, 578 F.2d 582, 610 (5th Cir. 1978).

The improper allocation of burden of proof issue was clearly available on appeal to diligent counsel. Mullaney was decided in 1975, and while its pronouncements should have been a red flag to Mr. Darden's attorney, the decision itself was presaged by In re Winship, 397 U.S. 358 (1970), and countless decisions analyzing Winship and its impact on the "constitutionality of rules requiring [defendants] to bear a burden of proof." See Engle v. Isaac, 456 U.S. 107, [803], n.40 (1982) (listing twenty-seven such decisions preceeding this Court's affirmance of Petitioner's sentence and conviction.)

In Arango v. State, a materially identical penalty phase

jury instruction was at issue. The challenged instruction in Arango told the jury that if it found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." 411 So.2d at 174. This Court found that the contested jury instruction. "if given alone, may have conflicted with the principles of law enumerated in Mullaney and Dixon." Id. Recent cases leave no doubt that the instruction did indeed violate Mullaney. See Francis v. Franklin, 105 S.Ct. 1965 (1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc); Tucker v. Kemp, 762 F.2d 1480 (1th Cir. 1985) (en banc); Tucker v. Kemp, 762 F.2d 1496 (1th Cir. 1985) (en banc).

In Arango itself, however, this Court found that the burden never shifted. First, the jury in Arango was instructed that "the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed." 411 So.2d at 174 (emphasis added). Second, the Arango jury was instructed that a death sentence could only be given if "the state showed the aggravating circumstances outweighed the mitigating circumstances ." Id. (emphasis added). Mr. Darden's jury received neither instruction. As this Court acknowledged in an analogous context, when "the jury is never told that the State must prove anything in regard to the [disputed] isue," it "places the burden of proof on the defendant's shoulders. . . ." Yohn v. State, No. 65,504, 10 FLW 378, 380 (Fla. July 12 1985).

A defendant goes into the penalty phase with a presumption of life; if the State fails to prove aggravating circumstances, then the sentence must be life. This presumption is rebutted only when the state shows the existence of valid aggravating circumstances beyond a reasonable doubt and shows that death is the appropriate penalty; this latter burder of persuasion, which never leaves the State, entails more than simply a showing of aggravating circumstances. The jury instruction in this case

never put any burden on the state at all, and in fact it allocated to the defense the burden of proving mitigating circumstances.

This error requires resentencing without a showing of prejudice; this is so because the error is a direct violation of the Eighth and Fourteenth Amendments. See Antone v. Strickland, 706 F.2d 1534, 1592 (11th Cir. 1983) (Kravitch, J., concurring). However, the error here is in fact prejudicial. The prejudice resulting from this instruction is parallel to the prejudice which the United States Supreme Court found resulting from a jury instruction at issue in Mullaney v. Wilbur, 421 U.S. 684 (1975). The instruction in Wilbur shifted the burden of proof that the defendant in a homicide case acted in "the heat of passion" from the state to the defense. The state of Maine argued that because the absence of heat of passion was not a fact necessary to establish the crime of murder, this distinguished their case from the case of Winship, supra. The State claimed that the distinction was relevant because in Winship the facts at issue were essential to the establishment of a crime, whereas heat of passion, only a mitigation of murder to manslaughter, did not come into play until the jury had already found guilt of murder. Therefore, the State maintained that the defendant's critical liberty and reputation interests were of no concern, because regardless of the presence or absence of heat of passion the defendant was likely to lose some liberty and was certain to be stigmatized. Mullaney, 421 U.S. at 697. The Supreme Court rejected this argument, noting that this would permit conviction of murder when it was "as likely as not that [the defendant] deserves a siginificantly lesser sentence." Id. at 703. The Court found this result intolerably prejudicial.

An argument that the instruction here is not prejudicial must follow the logic of the State of Maine's argument in Mullaney: that because Mr. Darden had been adjudicated guilty of first degree murder and is therefore certain to lose his liberty

and his reputation, therefore it does not matter which party bore the burden. But parallel to Mullaney, under this burden of proof, a defendant can be given a death sentence when the evidence indicates that it is as likely as not that he deserves life. This is an intolerably prejudicial result given that death is different in kind from life imprisonment-- it is incalculably worse to be sentenced to death than sentenced to life inprisonment.

Furthermore, as argued in Section IV B (2), infra, the error was particularly prejudicial in Petitioner's case.

3. Prejudice -- Infected Balancing

Most ineffective assistance of counsel claims require, in addition to a showing of unreasonable attorney error, a demonstration of prejudice. Prejudice means a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. 2052, 2068 (1984). Generally, then, state habeas petitioners must show unreasonable omissions by appellate counsel which undermine confidence in the result of the appeal. Petitioner has, and can, demonstrate such undermining. First, however, it is Petitioner's contention that this case involves an exception to the general rule that prejudice must be proven.

a. Petitioner is entitled to a new appeal without a showing of prejudice.

No showing of prejudice is required when Petitioner had "almost sleeping counsel" on the critical issues in the case, or when the attorney omission involves a direct violation of the Eighth Amendment. Petitioner addresses "almost sleeping counsel" first.

Petitioner's attorney raised no issue concerning the propriety of the death penalty in Petitioner's case. "The propriety of the death penalty is in every case an issue requiring the closest scrutiny ... Wilson v. Wainwright, Nos.

67,190, 67,204, slip op. at 3 (Fla.S.Ct. August 15, 1985). "[I]f counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." United States v. Cronic 104 S.Ct. 2039, 2047 (1984). Here, appellate counsel conceded that death was the appropriate punishment for Petitioner.

In such a circumstance, this Court "cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims." Wilson, slip op. at 5. Petitioner is entitled to a new appeal without showing prejudice.

In addition, counsel's failings allowed serious Eighth Amendment claims to go unnoticed. The issues raised herein are fundamental Eighth Amendment issues, requiring a new appeal without a showing of prejudice. See Antone v. Strickland, 706 F.2d 1534, 1542 (Kravitch, J., concurring).

b. Effect of eliminating consideration of heinous, atrocious, or cruel

This killing was not heinous, atrocious or cruel, and competent counsel would have alerted this Court to that reality. If Petitioner must show prejudice from counsel's omissions, this is the clearest.

The trial judge found three statutory aggravating circumstances: 1.) the capital felony was committed by a person under sentence of imprisonment (Petitioner was on furlough); 2.) the defendant had a prior felony conviction for an offense which involves the use or threat of violence to the person, and 3.) heinous, atrocious or cruel. The court found two mitigating circumstances: 1.) that Petitioner was the father of seven children ("I am not standing before you now thinking so much of myself but I am thinking about my seven kids and my wife, whose father has been convicted of a crime and he has no knowledge of, and that's the truth. . . ." (R. 907), and 2.) that Petitioner steadfastly proclaimed his innocence. Effective counsel would

have eliminated one statutory aggravating circumstance, leaving two which reflect upon Petitioner's past, not present, acts.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court recognized that when mitigating circumstances have been found, the invalidation of the finding of a statutory aggravating circumstance requires resentencing.

> Would the result of the weighing process 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 at which the [impermissible factor] shall not be considered.

346 So.2d at 1003. And so it is here.

Of particular importance is the overriding mitigating circumstance -- innocence. The trial court would be left with two statutory aggravating circumstances and two mitigating circumstances. The sentencing balancing process is not a matter of see-saw equilibrium, 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. . . ." Dixon, 283 So.2d at 10. This trial judge was impressed with Petitioner's emotion and apparent sincerity in protesting his innocence. Such lingering, or even "whimsical," doubt is a powerful factor in mitigation. "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. . . . [T]he juror [or judge] entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death." Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981), modified, 677 F.2d 20, cert. denied, 459 U.S. 882 (1982).

Genuine (but not reasonable) doubt is certainly fathomable upon this record. Two justices in this Court were concerned enough about the issue of guilt to dissent, preferring reversal

on guilt to the deadly possibility that rancorous closing argument, rather than hard proven facts, may have supplied the impetus for the jurors' verdict. For the trial judge to join these distinguished jurists in expressing concern, not at the guilt phase, but at the sentencing phase, is hardly unreasonable.

As was thoroughly discussed in Section II A, supra, race played a factor in this trial. Petitioner was to be tried "as if he was white," for the murder of a white man, and the alleged attempted rape of his wife. The eyewitness identifications were cross-racial and far from perfect, and the jury could easily have been frenzied by the prosecutor's oratorical excesses. A sentence even slightly affected by exhortations to put Petitioner on a leash, or blow his face off with a shotgun, must be reevaluated when heinous, atrocious, or cruel is eliminated.

Even without this innocence issue, reversal would be necessary. As Elledge teaches, we cannot know the effect of the faulty aggravating circumstance. Such uncertainty is unacceptable under the Eighth and Fourteenth Amendments.

c. Prejudicial effect of unconstitutional instruction on the standard and placement of burden of proof

Petitioner has already shown that it was error for the trial court not to require (or find) proof beyond a reasonable doubt on aggravating circumstances. It was also unconstitutional to saddle Petitioner with the burden of proving that mitigating circumstances outweighed aggravating circumstances. Assuming (without accepting) that such Sixth, Eighth, and Fourteenth Amendment violations require proof of prejudice, there is prejudice aplenty.

Sentencer awareness of comprehensive, accurate information about the defendant is of course essential to a reliable and individualized sentencing determination, but mere sentencer possession of information is insufficient -- jurors must receive "guidance in decision making," not just information, particularly as to the types of factors that are relevant to the sentencing

decision and the proper means for applying these factors to the determination of sentence. Gregg v. Georgia, 428 U.S. at 192-93, 195. Jury instructions are the indispensable mechanism for providing this type of guidance. Id. at 193-95.

Jury instructions are the indispensable device for ensuring that the jury understands and considers the legal effect of the evidence that it has heard. No (or completely incorrect) advice was provided Petitioner's jury. If the jury felt the evidence and testimony "showed" the existence of a statutory aggravating circumstance (and they were in fact instructed on all but one) they could recommend death even though the circumstance was not proven beyond a reasonable doubt. This is the antithesis of "guidance in decision making."

Worse, the jury may have believed that Petitioner had to convince them to find mitigating circumstances, and that those found outweighed aggravating circumstances. There was no description at all regarding how Petitioner's wife and seven children were to figure in the balance. The family facts are mitigating (the trial judge said so), but the jury was given no, or incorrect guidance, on how to assess the mitigating value, who had to prove it outweighed aggravation, and by what standard of proof the "balance" was to be made.

The trial judge was equally strapped. His order reveals none of the constitutionally required workings of sentencing decisions. Mitigation and aggravation were found (by whatever standard), but how they were balanced and who had the burden is a mystery.

Lax instruction on and application of such fundamental principles cannot be allowed when Mr. Darden's life hangs in the foggy balance. Clarity, not obfuscation, is the hallmark of capital sentencing guidelines. The State, through questionable argument, had unsuitably clouded the issues well before sentencing, and this Court's stamp of approval to patent instructional defects can only add irreparable injury to the

State's intolerable insults.

Petitioner is not an animal deserving a leash with a guard on the other end, the State's contrary descriptions notwithstanding. The State's wish to see Petitioner with his face blown off is similarly devoid of probative value in sentencing. The effect of such exhortations on sentencing, when a jury is, in addition, misguided by the court regarding which standards to apply, is inestimable. This Court, due to appellate counsel's failings, has not examined the effect.

d. Prejudice must be carefully scrutinized

Appellate counsel completely omitted his most important single function in a death case -- to address and advocate the impropriety of the death penalty in this case. Mr. Turman was killed by a single gunshot wound, without warning, and without any knowledge of his precarious situation. There is no evidence of suffering, pain, cruelty, torture, or even apprehension. The trial court found this to be heinous, atrocious and cruel, and this Court understandably did not review the finding:

> [O]ur judicially neutral review of so many death cases . . . is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to pursuade the court of the gravity of the alleged deviations from due process."

Wilson, slip op. at 5. Petitioner seeks an advocate to perform correctly. He does not claim that such an advocate will win, and he does not need to so prove; "Nor can [this Court] predict the outcome of a new appeal at which petitioner will receive adequate representation." Id. It is clear, and enough, that complete confidence in the correctness and fairness of the original appeal, in which his death sentence went unchallenged, has been undermined.

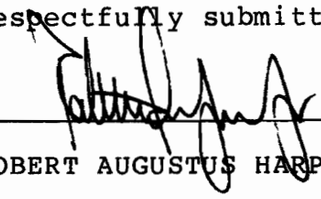
V

CONCLUSION

Obviously, this Court cannot search every record on appeal in every capital case for error. It is the responsibility of effective appellate counsel to present all issues of arguable merit to the appellate court. In this case, counsel failed to fulfill that responsibility. Where the points omitted or improperly and inadequately presented are of indisputable merit -- such as those set forth herein -- and where the difference is between life and death, a case cries out for judicial intervention.

Petitioner therefore requests this Court to issue its writ of habeas corpus, and to direct that Petitioner receive a new trial; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,



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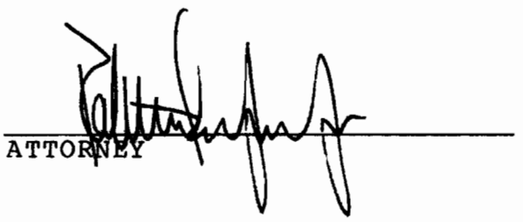
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand to: Richard W. Prospect, c/o Office of the Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, on this 28 day of August, 1985.



ATTORNEY