ORIGINAL

IN THE SUPREME COURT OF FLORIDA

WILLIAM LANAY HARVARD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 67556

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
18th Judicial Circuit of Florida,
In and For Brevard County

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Assistant Public Defender

MICHAEL A. MELLO
Assistant Public Defender

Counsel for Appellant.

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SUMMARY OF ARGUMENT

1. The sentencing judge explicitly found, at the hearing on August 26, 1985, that at the time of Mr. Harvard's trial, he believed that his consideration of mitigating factors was strictly limited to those enumerated in the statute. The sentencing judge further found that he "certainly carried out [his] responsibilities on the basis of that premise at the time of Mr. Harvard's trial." This restricted consideration of mitigating factors violated this Court's mandate in Jacobs v. State, 396 So.2d 713 (Fla. 1981) and Perry v. State, 395 So.2d 170 (Fla. 1981), holding that such a "mistaken belief [by a judge] that he could not consider nonstatutory mitigating circumstances," Jacobs, 396 So.2d at 713, would violate Lockett v. Ohio, 438 U.S. 586 (1978), by precluding an individualized capital sentencing determination as required by the eighth and fourteenth amendments. The lower court's refusal nevertheless to grant relief was based on its view that Lockett should not be given retroactive effect. Such a holding overlooks the fundamental nature of the violation and the consistent retroactive application of Lockett by this Court and the United States Supreme Court.

2. The capital sentencing statute was applied unconstitutionally in Mr. Harvard's sentencing trial due to what this Court has recently termed a "misunderstanding of law ... on the part of trial counsel [and] the trial judge," Francois v. State, 470 So.2d 687, 689 (Fla. 1985). At the time of his trial, June,

1974, trial counsel and the trial judge reasonably but "unintentionally misinterpret[ed]," Armstrong v. State, 429 So.2d 287, 293 (Fla. 1983) (McDonald, J., joined by Ehrlich, J., dissenting), the statute as precluding the presentation and consideration of mitigating evidence unrelated to the seven statutory mitigating factors. Accordingly, counsel failed to investigate and present any of the powerful available independent evidence of nonstatutory mitigating circumstances: Mr. Harvard's background, early life, good character, positive and loving relationships with family members and other people, positive values and attitudes, productive and reliable work record, and potential for rehabilitation. Similarly, as already noted, the trial judge failed to consider the mitigating features that inhered in the guilt phase evidence but which did not fall within the confines of the statutory mitigating circumstances. See point 1, supra. Further, the trial judge's misunderstanding of law was communicated through instructions to the jury, precluding as well the jury's consideration of these mitigating features. Because of the misunderstanding of law by trial counsel and the trial judge, therefore, Mr. Harvard was denied a fully individualized sentencing procedure, in violation of the eighth amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978).

3. Mr. Harvard has stated valid and substantial claims for relief due to the denial of effective assistance of counsel in his sentencing proceeding. In his Motion to Vacate, Mr. Harvard has shown in detail that each of the four defects in counsel's

performance -- his failure to investigate and prepare to defend against a prior conviction which was the critical aggravating circumstance, his failure to obtain an appropriate evaluation of Mr. Harvard's capacity at the time of the offense despite the willingness of the court to order such an evaluation, his own closing argument which diminished the jury's sense of responsibility for its advisory verdict, and his failure to object to prosecutorial argument which invited a death sentence to avoid the possibility of early parole through future legislative action -- was non-strategic and unreasonable. Further, he has shown that each of these defects was so prejudicial as to "undermine confidence in the outcome," Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 2068 (1984), of his sentencing procedure. Neither on the face of the Motion to Vacate, nor upon inspection of the files and records in the case, could the Circuit Court have conclusively found that the facts underlying these claims were not true. Accordingly, the Circuit Court committed reversible error when it held that Mr. Harvard's claims of ineffective assistance of counsel were legally insufficient and thus did not require an evidentiary hearing. See Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). See also O'Callaghan v. State, ___ So.2d ___, 9 Fla. L. W. 525 (Fla. December 13, 1984); Le Duc v. State, 415 So.2d 721 (Fla. 1982).

4. The penalty phase instructions violated the eighth amendment in four respects. First, they failed to inform the jury that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt and of proving that death

is the appropriate penalty. Second, the instructions impermissibly allocated to Mr. Harvard the burden of proof. Third, the instructions failed to inform the jury that even after weighing the aggravating and mitigating circumstances, it still was required to determine whether death was the appropriate penalty in this case. Fourth, the instructions failed to inform the jury about the role played by mitigating circumstances in Florida's capital sentencing scheme. These errors constitute fundamental error and are therefore cognizable in these collateral review proceedings.

5. The capital sentencing statute is being unconstitutionally applied in two additional respects. Condemned people are being executed by means of electrocution which, in light of the evolving standards of decency in the past decade, now amounts to cruel and unusual punishment. People are being condemned arbitrarily and discriminatorily -- on the basis of factors, such as race, which are barred from consideration in the sentencing process.

STATEMENT OF THE CASE

William Harvard was convicted of first degree murder and sentenced to death for the killing of his ex-wife, Ann Bovard. This Court affirmed Mr. Harvard's conviction and sentence. Harvard v. State, 375 So.2d 833 (Fla. 1978). Justice Boyd and Justice Hatchett dissented as to the propriety of the death sentence. Id. A timely petition for rehearing and an application for relief pursuant to Gardner were filed. On November 2, 1978 the Court issued an Order denying rehearing and vacating the death sentence pursuant to Gardner v. Florida, 430 U.S. 349 (1977). 375 So.2d at 835. This Court's mandate was issued on December 5, 1978. Certiorari was denied on May 14, 1979. Harvard v. Florida, 441 U.S. 956 (1979).

The resentencing hearing was held on February 9, 1979. R 68-159.[1] The trial judge resentenced Mr. Harvard to death on August 22, 1979, without filing findings of fact. R 1-37. On May 16, 1980 the trial judge issued his findings of fact, R 38-46, after having previously sent proposed findings of fact to both parties. SR 7-15.

Mr. Harvard's death sentence was affirmed by this Court on April 5, 1982 and rehearing was denied on June 27, 1982. Harvard

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[1] In referring to the trial record, Appellant will use the following abbreviations:

"OR"	Original Record on Appeal
"OT"	Original Transcript (6 volumes)
"OP"	Original Penalty Phase Transcript
"OS"	Original Sentencing Transcript
"R"	Record on Appeal, Gardner remand
"SR"	Supplemental Record on Appeal
"PSR"	Supplemental Record on Appeal dealing with Pyschiatric Exhibit

v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983), reh. denied, 460 U.S. 1017 (1983).

On January 19, 1984 arguments were heard before the Board of Executive Clemency. On August 8, 1985 the Governor of Florida signed a death warrant requiring Mr. Harvard to be executed between noon on Thursday, August 29, 1985 and noon on Thursday, September 5, 1985. Mr. Harvard's execution is presently scheduled for September 4, 1985, at 7:00 a.m.

On Thursday, August 22, 1985, Mr. Harvard filed the present motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, together with a supporting Appendix and an Application for Stay of Execution. The following grounds for relief were presented by Mr. Harvard's Motion to Vacate Death Sentence:

> Mr. Harvard was denied an individualized and accurate capital sentencing determination due to the unconstitutional application of the Florida capital sentencing statute which was reasonably interpreted at the time of Mr. Harvard's trial, in June, 1974, to restrict consideration of mitigating circumstances to only those circumstances narrowly set out in §921.141(6) with the result that significant, relevant mitigating features of the case were not investigated, presented or considered in the determination of whether Mr. Harvard should be sentenced to die, in violation of the sixth, eighth and fourteenth amendments.

Motion to Vacate, ¶ 16, at 12.

> The penalty phase jury instructions in this case denied Mr. Harvard due process of law by failing to inform the jury that the State bears the burden of proving the existence of aggravating circumstances beyond a reasonable doubt, and of proving that death is the appropriate punishment.

Motion to Vacate, ¶ 17, at 39.

> The penalty phase jury instructions, by stating that if the jury found the existence of an aggravating circumstance it was then to determine "whether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances," OT 957, impermissibly

allocated the constitutionally prescribed burden of of proof. Arango v. State, 411 So.2d at 174.

Motion to Vacate, ¶ 18, at 43.

The penalty phase instructions in this case denied Mr. Harvard due process of law by failing to inform the jury that even after weighing the aggravating and mitigating circumstances it still was required to determine whether death was the appropriate penalty in the case before it.

Motion to Vacate, ¶ 19, at 46.

The penalty phase jury instructions in this case denied Mr. Harvard due process of law by failing to inform the jury about the role played by mitigating circumstances in Florida's capital punishment scheme.

Motion to Vacate, ¶ 20, at 49.

Mr. Harvard was denied a fair sentencing proceeding, in violation of sixth, eighth, and fourteenth amendment safeguards, because he was unprepared and unable to meet the evidence tendered in support of the aggravating circumstance concerning his prior conviction of a felony involving the use of violence. This deprivation was the result of two factors: the trial court's unprecedented application of Florida's then-new capital sentencing statute to allow introduction of the facts underlying the prior conviction, in addition to the judgment of conviction, in the sentencing proceeding; and the ineffectiveness of Mr. Harvard's trial counsel in meeting those facts due to lack of investigation and preparation before trial, coupled with the failure to move for a continuance during trial once those facts had been admitted.

Motion to Vacate, ¶ 21, at 51.

Mr. Harvard was deprived of his right to effective assistance of counsel at his sentencing proceeding as a result of counsel's failure to obtain an appropriate psychiatric evaluation, or to object to the court's failure to order an appropriate psychiatric evaluation.

Motion to Vacate, ¶ 22, at 71.

Mr. Harvard was deprived of the effective assistance of counsel at his sentencing proceeding herein as the result of counsel's closing argument to the jury, which affirmatively harmed Mr. Harvard by diminishing the jury's sense of responsibility for determining the appropriateness of Mr. Harvard's sentence.

Motion to Vacate, ¶ 23, at 75.

> Mr. Harvard was denied an individualized and accurate capital sentencing determination, in violation of eighth and fourteenth amendment safeguards, by the prosecutor's plea to the jury to sentence Mr. Harvard to death in order to avoid the possibility that the legislature might change the mandatory period of imprisonment required before Mr. Harvard could be eligible for parole under a life sentence, from what was then twenty-five years to as little as six months. In the alternative, and only if the court determines that this error cannot be treated as fundamental error, Mr. Harvard was deprived of the effective assistance of counsel at the sentencing proceeding by virtue of counsel's failure to object to this argument by the prosecutor and to request a new sentencing proceeding in light thereof.

Motion to Vacate, ¶ 24, at 78.

> The death penalty in Florida has been imposed in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the capital sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following: the race of the victim, the place in which the homicide occurred (geography), and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates the eighth and fourteenth amendments to the United States Constitution and requires that Mr. Harvard's death sentence, imposed during the period in which the death penalty was being applied unconstitutionally, be vacated.

Motion to Vacate, ¶ 25, at 82.

> The execution of a condemned person by electrocution amounts to cruel and unusual punishment, in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution.

Motion to Vacate, ¶ 26, at 85.

The Circuit Court heard argument with regard to the application for a stay of execution and the motion to vacate on Monday, August 26, 1985, in Sanford, Seminole County, Florida. At the

conclusion of the arguments, the lower court denied the motion to vacate and the stay, and directed the prosecutor to prepare an order. Notice of appeal was filed on August 26, 1985.

This appeal is brought pursuant to Rule 9.140(g), Fla.R.App.P., which sets the following standard of review:

> Unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing.

STATEMENT OF RELEVANT FACTS

1. The Original Trial and Sentencing

The present case involves the death of Ann Bovard on February 16, 1974. She had died as a result of a single shot from a shotgun while she had been stopped, sitting in her car at 2:00 a.m.

Ms. Bovard had divorced Mr. Harvard two months previously, after a marriage that had lasted about one and a half years, including a separation of about eight months. The separation and divorce had been emotionally difficult for both of them, with each pulling pranks and harassing one another. Nevertheless the divorce was final in December, 1973.

Mr. Harvard at the time was self-employed in a growing business as a dental cabinetmaker and equipment distributor, a line of work that Mr. Harvard had been in for a decade. It is in connection with that business that Mr. Harvard met Ralph Baggett, who was the prosecution's main witness in this case. He had taken on Baggett as a helper in the business a few weeks before the death of Ms. Bovard. Baggett was a teenage drifter with no

money and no place to stay because he had been kicked out of his house by his parents. In return for his help Mr. Harvard had given Baggett the use of a car, a place to stay and some spending money.

As will be set out below in more detail, at trial Baggett testified, in essence, that he had met Mr. Harvard on the evening of February 15th while Mr. Harvard was going into work at his shop. Mr. Harvard wanted Baggett to work, but Baggett had been drinking, distraught over a girlfriend, and was in no condition to work. So they then went to the beach to drink and, picking up six packs on the way, they sat in the car drinking at the beach next to a bar. When the bar closed, they began to drive away and as they were doing so Mr. Harvard spotted Ms. Bovard leaving the bar. He testified that they drove out of the parking lot behind Ms. Bovard and followed her down the main highway.

Eventually, Baggett said, Mr. Harvard pulled up next to her, she slowed down and pulled to the side of the road. He said that Mr. Harvard drove up next to Ms. Bovard, picked up a shotgun and pointed it out the window at her. Baggett said that then Mr. Harvard yelled, "bitch," that he (Baggett) grabbed the barrel of the gun and pulled it down, and then the gun discharged. Baggett admitted committing perjury on a number of occasions prior to trial, failing the three polygraph examinations he had taken, and giving at least four different stories, the later of which was his trial testimony. As discussed below, the remainder of the evidence at trial consisted principally of testimony concerning the acrimony and incidents growing out of the ending of the marriage.

Mr. Leonard Martin testified that he was a cabinet maker and was a business partner of Mr. Harvard whom he had known for two years. OT 110. Martin said that he had observed Mr. Harvard and the deceased argue in the past and knew they had separated because they were not getting along. OT 113. Mr. James Bertholf testified that he had observed Mr. Harvard and Ms. Bovard in a fight. OT 186. Mr. William Braithwaite testified that he had known Mr. Harvard for seven or eight months, OT 496, and that, at Mr. Harvard's request, he had followed Ms. Bovard on two separate occasions. OT 503. He also stated that he heard Mr. Harvard express a desire to see his ex-wife dead. OT 507. Braithwaite had been arrested in Tampa and brought back in chains to testify, OT 538-39, and told the prosecutor that he would say anything the prosecutor wanted, as long as they helped him with his legal problems, OT 539. Ms. Kathleen Plouffe testified that she received a threatening letter addressed to Ann Bovard. OT 583. Agent Robert Holland testified that latent fingerprints on the letter matched Mr. Harvard's prints. OT 604.

The only direct evidence presented by the prosecution as to the death of Ann Bovard was the testimony of Ralph Baggett. Baggett testified that he had first met Mr. Harvard at the Dobbs House restaurant, through Pat Bevis, Mr. Harvard's girlfriend, about a month before this incident. OT 356. He had worked for Mr. Harvard for three weeks. OT 357.

He testified that on Friday, February 15th he and Mr. Harvard worked until 3:00 p.m. OT 363. At about 9:00 p.m. he had an argument with his girlfriend at the Dobbs House and was very upset. OT 362-63. Baggett stayed there talking to his

girlfriend until about 11:30 p.m. OT 363-64. He saw Mr. Harvard leave and then he went back towards the shop. OT 364-65. Mr. Harvard caught up with him and they went and got two six packs of beer and sat in the car on Cocoa Beach, near the Sandspur Bar. OT 365. They stayed there for an hour to an hour and a half and then they left and began to follow Ms. Bovard's car back to Merritt Island. OT 367. Baggett said that before they pulled onto Citrus Boulevard, Mr. Harvard shouted at him to get into the back seat. OT 369. Baggett got into the back seat and Mr. Harvard pulled a shotgun into the front seat. OT 370. His testimony was that Ms. Bovard came to a complete stop off the side of the road, OT 372, their car was barely moving and they came up beside her about one or two feet away. OT 372, 373.

Baggett said that Mr. Harvard put the gun on the top of the door. OT 372. Baggett stated that he grabbed the gun and that a split second after his hand reached the gun, Mr. Harvard yelled "bitch" and the gun discharged. OT 370, 374. Baggett then got back into the front seat. OT 373.

Baggett admitted that he had told the police several prior inconsistent stories. The reason he lied, he said, was because he thought he had caused the gun to go off by grabbing it. OT 387. Baggett testified that he had taken three different polygraph examinations and had failed them. OT 409. He still lied under oath after failing the polygraphs. OT 410. He stated that when he and Mr. Harvard met near the cabinet shop on the night in question, Mr. Harvard had wanted to go to the shop to work but that Baggett had said he was too upset to work. OT 417, 420.

Baggett said that he was intoxicated that night. OT 399. Baggett also testified that it was the police who convinced him that he did not cause the gun to go off when he grabbed it. OT 459-63.

The defense put on no evidence in the guilt-innocence phase. OT 694. The jury returned a verdict of guilty of first degree murder. OT 890. The prosecution's case in the sentencing phase consisted of testimony about a 1969 incident in Jacksonville involving Mr. Harvard's prior wife and his children. The prosecution's first witness was Betty Ann Phillips, Mr. Harvard's first wife. OP 7. They were married in 1960 and were divorced in 1969. OP 8. In the spring of 1969, they were separated and she had begun divorce proceedings. OP 9-10. She was staying at her sister's house. OP 11. She testified that Mr. Harvard shot her at her sister's house during an argument over their children. OP 12. Mary Jane Sweat, Ms. Phillips' sister, verified the shooting incident on March 14, 1969. OP 35-36.

The defense called Lavetta LaMontagne, Mr. Harvard's sister. OP 53. She testified that Ms. Phillips had often left the children with their grandmother for days or weeks at a time just because she did not want to be bothered with them. OP 54. She testified that she saw the children right after the altercation and they were dirty, underweight, and appeared to be malnourished. OP 53-54. Ms. Phillips had only visited the children once in six or seven years. OP 55.

Mr. Harvard testified in his own behalf. OP 62. He testified that he had been sentenced to serve only three months in the county jail and had successfully completed nine months probation on that prior offense. OP 62-63. A week or two prior to

the 1969 incident his oldest daughter had told him how his wife had started seeing another man and how the children could not eat until after his wife and her boy friend had eaten. OP 64. He went to an attorney in an attempt to obtain custody of the children. OP 65.

He testified that he went to talk to his wife about custody. OP 66. There was no one home and he went in a side door. OP 66. The children's clothing was disheveled, there was dirt on the walls and clothing, ashes and coke bottles were scattered throughout. OP 67. He began to collect the children's clothing in order to remove them from that environment. OP 67. Ms. Phillips and her sister then drove up and came inside. OP 67-68. There was an argument which escalated and someone grabbed Mr. Sweat's gun from on or in a bureau and it went off. OP 67-68. He then took his children to his mother's house, OP 69, in whose custody they have remained.

Mr. Harvard also testified concerning the present offense. He testified that Ralph Baggett may have felt that Mr. Harvard had offered him something to kill his ex-wife. OP 74-75. Ann Bovard had caused an argument with Pat Bevis, Mr. Harvard's girlfriend, at the Dobbs House where she worked. OP 75. On the morning of February 15th, he took Pat home and awakened Ralph and told him of the incident between Pat and Ann. OP 76. He testified that Baggett felt himself to be something of a protector of Pat and when Mr. Harvard told Baggett about the argument, Baggett said "Damn it. We have got to do something about that." OP 76. Mr. Harvard said he would like to get her (Ms. Bovard) "out of his hair." OP 76. He testified that Baggett responded, "Would

you be willing to give the Chrysler." Mr. Harvard responded, "That and probably more." OP 77.

Mr. Harvard testified that on the evening in question he had stopped Baggett on the highway and asked him to go to the shop to work. OP 77. They went to the shop and Baggett felt he could not work because he was so upset about his girlfriend and because he had been drinking. OP 77. Then they left and were driving, drinking, and talking. OP 77. They stopped near the Sandspur bar to drink and while there Mr. Harvard saw Ms. Bovard's car and pointed it out to Baggett. OP 78. They drove away from the bar and Ms. Bovard passed them on the way back to town. OP 78. They had stopped at one point and Baggett had laid down in the back seat, feeling the effects of the alcohol. OP 79. Mr. Harvard's shotgun was laying on the floor in the back seat, because he had been planning to go hunting. OP 79.

Mr. Harvard testified that as he was passing Ms. Bovard, he slowed to warn her not to go to Dobbs House again and make trouble with Pat. As he slowed next to her, Baggett raised up and fired into the car. OP 78. Baggett then said, "Let's get out of here." OP 78. They left and Baggett later threw the gun in a canal. OP 80.

The final defense witness was William Braithwaite who testified that Ms. Bovard had approached him at one time about buying marijuana. OP 153. This led Mr. Harvard to think of planting marijuana on her. OP 152-53. The defense then rested. OP 156.

The prosecution presented rebuttal evidence. Henry Gillespie stated that he and Mr. Harvard attempted to sell marijuana

to Ms. Bovard in order to have her arrested. OP 161. Steve Kindrick of the Brevard County Sheriff's Department testified that on the driver's side of Ms. Bovard's car 10% of the glass was on the ground and 90% was scattered throughout the car. OP 167. He stated that the car was a standard shift and was in third gear when they found it. OP 165. He also testified that there were fourteen bags of marijuana, a syringe, a bottle of Talwin and a spoon in the back seat of Ms. Bovard's car. OP 167.

2. The Gardner Resentencing

The prosecution presented no new evidence at the resentencing hearing held pursuant to the Gardner remand. R 72.

Mr. Harvard presented the testimony of Charles Hess, Mr. Harvard's attorney for the prior 1969 Jacksonville offense, and Mr. Harvard testified. Mr. Harvard also introduced a transcript of the preliminary hearing for the Jacksonville offense and a prior psychiatric report.

Mr. Hess was Mr. Harvard's attorney in 1969 in Jacksonville. R 73-74. He testified that there were significant inconsistences between the testimony in the 1969 preliminary hearing and the 1974 penalty trial testimony of Mr. Harvard's former sister-in-law, Ms. Sweat, and Ms. Phillips in that they did not say anything about Mr. Harvard putting his foot in Ms. Phillips' back and in fact in 1969 she did not even remember being shot. R 78-79. Mr. Harvard then proffered the testimony of Mr. Hess concerning the fact that Ms. Sweat could not have seen the alleged shooting of Ms. Phillips. R 93-96. The trial judge denied the proffer of this testimony. R 92-93. Mr. Hess testified that Mr. Harvard pled guilty to aggravated assault as to Ms. Sweat and

that all the other charges were dropped, R 104; there was no negotiated plea in that case. R 104. Mr. Harvard also introduced a preliminary report of a psychiatric examination which took place after the 1969 incident. R 111.

Mr. Harvard testified that there were misquotations in the way his statement was set out in the presentence investigation report. R 118. He testified that he had never directly threatened the deceased. R 121. He had gone to the coffee shop where his girlfriend worked and she had told him that his ex-wife had come in the previous night and started an argument. R 123-24. He stated that he did not take a gun to the Sweat trailer during the 1969 incident, R 128, and had only gone there to remove his children because of his deep concern for their welfare. R 128. He stated that he was wrestling with Ms. Phillips to get his child away from her when the gun discharged. R 128-29. He reiterated that Baggett had shot his ex-wife. R 134.

I.

MR. HARVARD WAS DENIED A FAIR, RELIABLE, AND INDIVIDUALIZED SENTENCING DETERMINATION BY THE TRIAL JUDGE'S NOW-ADMITTED FAILURE TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES

In the course of arguments before the Circuit Court on Monday, August 26, 1985, the trial judge, <u>for the first time</u>, explictly stated that <u>he</u> interpreted Florida Statute §921.141(7) at the time of Mr. Harvard's trial as limiting consideration of mitigating evidence to the circumstances enumerated in the statute. These were followed by statements reflecting the judge's view that in sentencing Mr. Harvard he did not consider

any evidence dealing with nonstatutory mitigation.[2] At this writing, the transcript of the hearing is unavailable to counsel and thus transcript references or quotations cannot be furnished to this Court -- such references will be furnished by supplemental pleading as soon as available. However, based on counsels' recollection, the transcript will reveal as clearly as could be stated by the judge that he believed his consideration of mitigating circumstances to be limited exclusively to those set out in the statute, as did every "reasonable jurist" at the time, and that he therefore did not consider any of the nonstatutory mitigating features of the case. The sentencing judge's view was confirmed in his order denying the Motion to Vacate:

> The Court accepts as true the factual premise underlying this claim: that reasonable lawyers and judges at the time of Mr. Harvard's trial could have mistakenly believed that nonstatutory mitigating circumstances could not be considered. The Court certainly carried out its responsibilities on the basis of that premise at the time of Mr. Harvard's trial.

(Order denying Motion to Vacate).

On the basis of these developments, it is now apparent that the trial judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances," Jacobs v. State,

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[2] As Mr. Harvard alleged in his Motion to Vacate, notwithstanding trial counsel's failure to present nonstatutory mitigating evidence (addressed infra), there were nonstatutory mitigating features associated with the guilt phase evidence, including but not limited to the domestic nature of the offense and its relation to the intense emotional strife between Ms. Bovard and Mr. Harvard, the effects of Mr. Harvard's heavy consumption of alcohol at the time of the offense, the uncertain role of Baggett in the offense, and Mr. Harvard's responsible functioning as a father to his children. Motion to Vacate, at 36-37.

396 So.2d 713, 718 (Fla. 1981), and that Mr. Harvard was sentenced in direct violation of the eighth amendment. Just as in Eddings v. Oklahoma, 455 U.S. 104 (1982), "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact, rather he found that as a matter of law he was unable even to consider the evidence." Id. at 113 (emphasis in original). Thus, "the limitations placed by [the trial court] upon the mitigating evidence [it] would consider violated the rule in Lockett [v. Ohio, 438 U.S. 586 (1978)]." Id. (footnote omitted). Accord, Jacobs v. State, supra; Perry v. State, 395 So.2d 170, 174 (Fla. 1981). See also Songer v. Wainwright, ___F.2d___, No. 85-3064 (11th Cir. August 16, 1985) (en banc) (unanimously granting the writ of habeas corpus under identical circumstances, holding that "[t]he critical and dispositive fact here is that the state trial judge did misinterpret the law and thus failed to consider any nonstatutory mitigation at the time of imposing the sentence of death").

Accordingly, the disposition of this case is squarely controlled by this Court's decisions in Perry and Jacobs, for there has been a violation of the most closely enforced eighth amendment mandate -- that the capital sentencing determination be individualized -- creating a risk that is "incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605. This Court must "remove any legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered ...," Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring), "[i]n order to ensure that the death penalty was not erroneously imposed." Id. at 118.

Only now has the trial judge revealed that he indeed believed that consideration was strictly limited to the statutory mitigating factors at the time of Mr. Harvard's trial and that he acted in accord with that belief in determining Mr. Harvard's sentence. It is for that reason that the trial judge's "mistaken belief" is only now before this Court. It has now been for the first time established that Mr. Harvard's death sentence "was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida." Fla.R.Crim.P. 3.850. When this Court on direct appeal undertook its "responsibility to ensure that the trial judge remain[ed] faithful to the dictates of Section 921.141," Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979), it was unaware nor could it have been aware that the trial court "held the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d at 718. Accordingly, since the fact of the judge's actions are only now available and known, the issue is properly before this Court in these proceedings. The trial judge's rejection of the state's argument that the issue could have been raised on direct appeal in 1975 is therefore in full accord with the law.[3]

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[3] It also should be noted that the death sentence in this case directly violated the eighth amendment. As such it involves the most fundamental of errors. An illegal sentence may be challenged at any time. See, e.g., De Santis v. State, 400 So.2d 525 (Fla. 5th DCA 1981); Hicks v. State, 336 So.2d 1244 (Fla. 4th DCA 1976); Johnson v. State, 362 So.2d 465 (Fla. 2d DCA 1978); cf. State v. Rhoden, 448 So.2d 1013 (Fla. 1984) (contemporaneous objection rule does not apply to sentencing). Moreover, this Court has reached questions of a similar nature in post-conviction proceedings, albeit denying the claims under the facts of the particular cases, establishing the jurisdictional basis for the claim. See, e.g., Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) (claim that

The basis given by the lower court for rejecting Mr. Harvard's claim, despite the court's full agreement with Mr. Harvard's factual and legal premises, was, essentially, that Lockett should not be given retroactive effect:

> Notwithstanding that this belief [that the statute limited mitigation] turned out to be contrary to the command of the Eighth Amendment, as it would later be interpreted by the Supreme Court in Lockett v. Ohio, 438 U.S. 586, the Court determines that our system of criminal justice cannot accommodate such a change in the principles of law so many years later.

(Order denying Motion to Vacate) (emphasis supplied). While the judge's hesitation is perhaps understandable, "when a man's liberty is at stake, considerations of due process outweigh those of economics," Land v. State, 293 So.2d 704, 708 (Fla. 1974) --such a balance is much more compelling where a man's life is at stake. Plainly, "[t]here is no doubt today about this question. Lockett is retroactive." Songer v. Wainwright, ___F.2d at ___, slip opinion at 2-3. The retroactivity of Lockett is shown by this Court's decisions in Perry and Jacobs, where reversals were entered in cases tried before Lockett, and by Cooper v. State, 437 So.2d 1070, 1072 (Fla. 1983) ("Lockett did not change the law of Florida").

Therefore, the death sentence must be vacated and the cause remanded for resentencing due to the violation of the eighth amendment principles recognized in Perry and Jacobs.

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statute and jury instructions restricted mitigating factors); Jackson v. State, 438 So.2d 4 (Fla. 1983) (claim that lawyer, instructions and judge were restricted by the statute in considering mitigation); cf. Jacobs v. State, supra (reversing death sentence despite the failure to raise any issue concerning the sentence on appeal).

II.

A HEARING IS REQUIRED TO PERMIT MR. HARVARD TO PROVE THAT HE WAS DENIED A FAIR, RELIABLE AND INDVIDUALIZED CAPITAL SENTENCING DETERMINATION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENT MANDATE OF LOCKETT V. OHIO

In ¶ 16 (at pp. 12-39) of the Motion to Vacate, Mr. Harvard claimed that the capital sentencing statute was applied unconstitutionally in his sentencing trial due to what this Court has recently termed a "misunderstanding of law ... on the part of trial counsel [and] the trial judge," Francois v. State, 470 So.2d 687, 689 (Fla. 1985). At the time of his trial, June, 1974, trial counsel and the trial judge reasonably but "unintentionally misinterpret[ed]," Armstrong v. State, 429 So.2d 287, 293 (Fla. 1983) (McDonald, J., joined by Ehrlich, J., dissenting), the statute as precluding the presentation and consideration of mitigating evidence unrelated to the seven statutory mitigating factors. Accordingly, counsel failed to investigate and present any of the powerful available independent evidence of nonstatutory mitigating circumstances: Mr. Harvard's background, early life, good character, positive and loving relationships with family members and other people, positive values and attitudes, productive and reliable work record, and potential for rehabilitation. Similarly, as we have already demonstrated, the trial judge failed to consider the mitigating features that inhered in the guilt phase evidence but which did not fall within the confines of the statutory mitigating circumstances. See point I, supra. Further, the trial judge's misunderstanding of law was communicated through instructions to the jury, precluding

as well the jury's consideration of these mitigating features. Because of the misunderstanding of law by trial counsel and the trial judge, therefore, Mr. Harvard was denied a fully individualized sentencing procedure, in violation of the eighth amendment principles of Lockett v. Ohio 438 U.S. 586 (1978). Since we have addressed the effect of the trial judge's misunderstanding on his consideration of the mitigating evidence, supra, we will focus on the effect of trial counsel's misunderstanding in this section of our argument.[4]

The Circuit Court denied relief without an evidentiary hearing on this issue because of its view that, notwithstanding the merit of the issue, the retroactive application of Lockett in this case would be intolerable. As we have argued, supra, Lockett must be applied retroactively, and for this reason, the Circuit Court's rationale for denying a hearing must be rejected. Moreover, careful reading of this Court's prior opinions respecting this issue demonstrates that the Circuit Court must be directed to hold an evidentiary hearing. While the Court has

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[4] If the Court should decide that a remand for an evidentiary hearing as to this issue is not warranted, Mr. Harvard urges the Court to consider as well his argument that the jury instructions limited the jury's consideration of mitigating circumstances. While we acknowledge that the Court has generally held that a challenge to jury instructions is not cognizable in a Rule 3.850 proceeding, see Francois v. State, 470 So.2d 689, 690 (Fla. 1985); Armstrong v. State, 429 So.2d 287, 289 (Fla. 1983), there have been exceptions to this rule. See Straight v. Wainwright, 422 So.2d 827, 831 (Fla. 1982). Mr. Harvard's case warrants such an exception in light of the danger that this judge's misunderstanding of law was communicated to the jury. See Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983) (en banc). If the Court reaches the instructional issue, he relies upon the argument herein, as well as the allegations set forth in the Motion to Vacate, at pp. 36-39.

previously been presented with related issues in a number of cases, the Court has consistently recognized -- often in the process of explaining the issue not presented by such cases -- that the capital sentencing statute was capable of unconstitutional application through defense counsel, in precisely the manner complained of by Mr. Harvard, in sentencing trials that were conducted prior to the decision in Lockett v. Ohio on July 3, 1978. Accordingly, the issue should have been the subject of a hearing.

Beginning with the foundation decision in State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court has consistently held that the capital sentencing statute is constitutional on its face and is, thus, capable of constitutional application. However, the Court has never held that the statute is incapable of unconstitutional application.

Accordingly, with respect to the question of the restriction of consideration of mitigating circumstances, the Court has held that "the wording [of the capital sentencing statute] itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive," Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing), and thus, "our law pre-existing Lockett was consistent with the dictates of Lockett," Cooper v. State, 437 So.2d 1070, 1072 (Fla. 1983). But the Court has never held that this facial constitutionality guaranteed that there could be no unconstitutional applications of the statute in

particular cases. To the contrary the Court has recognized that both trial judges and trial lawyers could apply the statute unconstitutionally in particular cases.[5]

Where judges have mistakenly believed that the consideration of mitigating factors was circumscribed by the seven statutory factors, the Court has not hesitated to strike such unconstitutional applications of the statute. See Perry v. State, 395 So.2d at 174 ("exclud[ing] the proffered testimony of Perry's mother on the grounds that it did not fall within the statutory mitigating factors, citing our decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976)[,] [t]he trial judge followed the law as he believed it was being interpreted at the time of trial"); Jacobs v. State, 396 So.2d at 718 ("the trial judge held the mistaken belief that he could not consider nonstatutory mitigating circumstances").

Moreover, while not yet finding such a situation on the facts presented, the Court has indicated that if a defense lawyer determined his client's sentencing trial strategy on the basis of the same mistaken belief about the limited scope of consideration of mitigating circumstances, a new sentencing trial would be required. See, e.g., Francois v. State, 470 So.2d at 689

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5 The Court has also consistently recognized that the "contention that the death penalty is unconstitutionally applied" in a particular case "can properly be raised as a subject for consideration in a proceeding for post-conviction relief." Henry v. State, 377 So.2d 692 (Fla. 1979). See also Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985). For this reason, the Circuit Court rejected, as should this Court, the State's argument that the unconstitutional application of the statute through counsel's misunderstanding of the law should have been raised on appeal. See also Point I, supra.

(record belies the claim that "misunderstanding of law or restriction of consideration of mitigating circumstances on the part of trial counsel or the trial judge" deprived defendant of "a fully individualized sentencing process") (emphasis supplied); Armstrong v. State, 429 So.2d at 290 (since counsel presented nonstatutory mitigating evidence, "there is no support for appellant's present contention that the court's instructions discouraged defense counsel from attempting to present mitigating evidence[;] [i]ndeed, ... it appears that defense counsel correctly interpreted the capital felony sentencing law, which ... was not intended to restrict consideration of mitigating factors;); Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983) (McDonald, J., joined by Overton, J., concurring) (record "belies the assertion that [trial] counsel was in doubt as to the application of such [nonstatutory mitigating] evidence and that Hitchcock's trial was constitutionally infirm"). See also Armstrong v. State, 429 So.2d at 292-293 (McDonald, J., joined by Ehrlich, J., dissenting) (the error here -- "the trial judge limited the jury's consideration of mitigating circumstances to those listed in [the statute], and, presumptively, limited his own consideration" -- "was an unintentional misinterpretation of [the statute] by the judge and all counsel associated with the case") (emphasis supplied).

The Court has not only recognized that the capital sentencing statute is capable of unconstitutional application; it has also recognized that the statute was particularly susceptible to unconstitutional application in sentencing proceedings that took place prior to the decision in Lockett v. Ohio. This point has

been underscored by the decision in Muhammad v. State, 426 So.2d 533 (Fla. 1982). In that case, the appellant argued that defense counsel in his 1975 trial "was ineffective at the sentencing phase of the trial in that he did not present evidence of nonstatutory mitigating considerations based on appellant's character and background." Id. at 538. In response the Court held that this argument was without merit, for "[i]t presupposes that counsel was expected to predict the decision in Lockett v. Ohio...." Id. With this cryptic holding, the Court recognized that when Muhammad's case was tried, in 1975 (one year after Mr. Harvard's sentencing proceeding), counsel who believed that the statutory mitigating circumstances circumscribed the presentation and consideration of mitigating evidence -- though such a belief was even then a "misunderstanding of [Florida] law" -- and determined his sentencing trial strategy on this basis, was nevertheless providing assistance to his client that fell within the "wide range" of reasonableness within which effective counsel can function, Strickland v. Washington, 104 S.Ct. at 2066. The reason for this anomalous-seeming result is that, prior to Lockett, even though the Florida statute did not facially preclude the presentation and consideration of nonstatutory mitigating factors, see Songer v. State, 365 So.2d at 700; Cooper v. State, 437 So.2d at 1072, reasonably effective counsel could nevertheless have arrived at contradictory interpretations of the law. One was that the statutory mitigating circumstances were not exclusive. The other was that they were. And, as Muhammad clearly holds, both interpretations were reasonable.

That there could have been two competing but nevertheless reasonable views of the permissible scope of consideration of mitigating circumstances during the post-Furman[6] pre-Lockett period was a function, not of a deficit in state law, but of the jurisprudential upheaval in federal constitutional law during this period. In Furman, a majority of the Court reversed a death sentence imposed under a discretionary sentencing statute that provided no standards for determining whether a defendant would be sentenced to life imprisonment or death. The five members of the Furman majority issued separate opinions all concurring in the per curiam holding but each stating different reasons. As noted subsequently by Chief Justice Burger in Lockett, 438 U.S. at 599-600,

> Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment. Some States responded to what was thought to be the command of Furman by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases. Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same time to comply with Furman, by providing standards to guide the sentencing decision.

The confusion "engendered" by Furman manifested itself in the Florida legislative process leading to the enactment of the current death penalty in December, 1972. See State v. Dixon, 283 So.2d at 13-14 (Ervin, J., dissenting). And it divided this Court as well, with the Dixon majority holding that "if the

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6 Furman v. Georgia, 408 U.S. 238 (1972).

judicial discretion possible and necessary under Fla. Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and arbitrary, the test of Furman ... has been met," id. at 7, and with the dissenters concluding that the statute still permitted too much discretion to satisfy Furman, id. at 15-19, 23 (Ervin, J., dissenting); id. at 24-27 (Boyd, J., dissenting).

In this period of confusion, with its singular emphasis on the need to control sentencing discretion and with the very real possibility that any statute that allowed sentencing discretion was unconstitutional, reasonable counsel undoubtedly could have believed that the statutory aggravating and mitigating circumstances had to be the exclusive matters for consideration in the sentencing proceeding. Consistent with this view, the Dixon majority declared that "the most important safeguard presented in Fla. Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." 283 So.2d at 8. These circumstances were at the heart of Florida's attempt to respond to Furman, by providing "meaningful restraints and guidelines for the discretion of judge and jury." Id. at 9. As such, and if they were truly to be "determinative of the sentence imposed," reasonable counsel and judges could have concluded, in light of Furman, that these circumstances had to be the only factors which could be considered. Dissenting, Justice Ervin certainly believed that this was the legislative intent, for in criticizing the statute for allowing too much discretion to remain in the sentencing decision, he noted that "[t]he only attempt to eliminate that

discretion is the addition of the lists of aggravating and mitigating circumstances," id. at 15, which he thereafter characterized as exclusive:

> Under the Florida death penalty statute the lists of aggravating and mitigating circumstances are provided as the only circumstances which the trial judge and the jury are to consider in making their decisions.

Id. at 17. Although the Dixon majority never stated their understanding of this matter as explicitly as Justice Ervin, their failure to take issue with Justice Ervin's characterization of the "lists," as well as the apparent consistency of his characterization with the majority's characterization of the statute's "propounding of [specific] aggravating and mitigating circumstances" as the "most important safeguard" in response to Furman, could reasonably have been taken as agreement with Justice Ervin's characterization. Further support for this view could have been found in the majority's frequent reference to "the" mitigating circumstances, including in such references only the statutorily-specified factors, and finally, in the majority's reference to "the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A.," in describing the weighing process. Id. at 9.

Given Furman's constitutional imperative to control sentencing discretion and Florida's response to Furman, which reasonable judges and lawyers could have understood as seeking to control discretion by providing "lists of aggravating and mitigating circumstances ... as the only circumstances which the trial judge and the jury [were] to consider in making their decision," Dixon, 283 So.2d at 17 (Ervin, J., dissenting),

counsel acting within the "wide range" of reasonableness accorded effective counsel, certainly could have believed that the statutory mitigating circumstances were the only factors that could be considered in mitigation in order for the statute to be constitutional under Furman. Accord, Muhammad v. State, supra, 426 So.2d at 538.

On the other hand, reasonable counsel also could have interpreted the statute as this Court has. Since the section of the statute listing the aggravating circumstances provided that "[a]ggravating circumstances shall be limited" to the enumerated factors, and the section listing the mitigating circumstances provided only that "[m]itigating circumstances shall be" the enumerated factors, the language of the statute itself could have been read as not limiting the consideration of mitigating factors to the statutory circumstances. Songer v. State, 365 So.2d at 700. See also Proffitt v. Florida, 428 U.S. 242, 250 n.8 (1976). Certainly the Dixon majority did not say anything explicitly contrary to such a view. Moreover, Furman's concern for the control of discretion could still have been met under this view, as the Court has explained in Peek v. State, 395 So.2d 492, 496-497 (Fla. 1981):

> [T]he instruction on mitigating circumstances [which tracked the language of the statute], when read in conjunction with the express limitation on consideration of aggravating circumstances [which also tracked the language of the statute], advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty

> will be applied in a consistent and rational manner. Were we to sanction an instruction which established no effective guidance for the jury in considering circumstances which may mitigate against death, we would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would "not guide sentencing discretion but [would] totally unleash it." Lockett v. Ohio, 438 U.S. at 631, 98 S.Ct. at 2975, 57 L.Ed.2d 973 (Rehnquist, J., concurring in part and dissenting in part).

After Dixon, beginning in 1975, a growing body of this Court's decisions -- all of which were announced well after the conclusion of Mr. Harvard's advisory sentencing proceeding on June 24, 1974[7] -- began to demonstrate, at least as a matter of Florida law, that the former view (that the statutory mitigating circumstances were exclusive) was wrong. See Songer v. State, 365 So.2d at 700 (citing cases). However, some of the Court's decisions even during this period were subject to a misconstruction that supported the former view. See Perry v. State, 395 So.2d at 174 (citing Cooper v. State, 336 So.2d 1133 (Fla. 1976)). Moreover, there were still no United States Supreme Court decisions to provide resolution of the underlying federal constitutional dilemma initiated by Furman.

In 1976, the Supreme Court resolved part of that dilemma in a series of cases addressing the constitutionality of five states' post-Furman capital sentencing statutes. The Court upheld those statutes that provided for individualized sentencing but that channelled sentencer discretion by means of legislatively defined sentencing criteria, see Proffitt v. Florida, 428 U.S. 242 (1976) (opinion of Powell, Stewart, & Stevens, J.J.);

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[7] Sentence was actually imposed on October 4, 1974.

id. at 260-61 (White & Rehnquist, J.J., & Burger, C.J., concurring); Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Powell, Stewart, & Stevens, J.J.); id. at 220-22 (White & Rehnquist, J.J., & Burger, C.J., concurring); Jurek v. Texas, 428 U.S. 262 (1976) (opinion of Powell, Stewart, & Stevens, J.J.); id. at 279 (White & Rehnquist, J.J., & Burger, C.J., concurring), and invalidated those that eliminated sentencer discretion entirely by making the death penalty mandatory in certain classes of cases. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (plurality opinion). As we have noted, Furman's focus on limiting the discretion of judges and juries in imposing the death penalty had resulted in these two divergent paths to remedy the defects associated with too much sentencing discretion. Obviously, in 1976, Florida's choice to guide discretion rather than to eliminate it turned out to have been the correct choice.

But while the 1976 decisions resolved this part of the Furman dilemma, the other part remained: how much discretion could be allowed the sentencer under a guided-discretion statute? Must the statutory aggravating and mitigating factors be exclusive, or as this Court would later explain in Peek v. State, supra, could they be only directory? As Chief Justice Burger subsequently noted in Lockett,

> The mandatory death penalty statute in Woodson was held invalid because it permitted no consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense." Id., at 304.... The plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed

> "relevant" in capital sentencing or what degree of consideration of "relevant facets" it would require.

438 U.S. at 604 (emphasis in original).

Only with its decision in Lockett would the Court "face[] ... those questions," id., as to mitigating circumstances and "conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. (footnotes omitted) (emphasis in original).

As the foregoing discussion demonstrates, there simply was no federal constitutional support for the view that the scope of consideration of mitigating circumstances even could be, much less must be, unlimited, until the decision in Lockett. Because of this, Florida counsel, who failed to present evidence of non-statutory mitigating factors because of a Furman-engendered view that the scope of mitigating circumstances had to be limited, were reasonable. Muhammad v. State, 426 So.2d at 538. Counsel could not reasonably have "[been] expected to predict the decision in Lockett...." Id. And even though another reasonable view of the Florida capital sentencing statute during the pre-Lockett period was the view that the scope of mitigating circumstance consideration was unlimited, Muhammad stands for the proposition that both of these views were reasonable during the post-Furman pre-Lockett interval.

With these principles articulated, Mr. Harvard can now demonstrate by reference to the pleadings herein and the Court's previous dispositions of the issue, that he is entitled to an evidentiary hearing and that the trial court erred in denying a hearing. Four reasons compel this conclusion.

First, as we have already made clear, Mr. Harvard's challenge is not to the constitutionality of the statute, but rather, to the constitutionality of the statute solely as it was applied in this case through trial counsel's and the trial judge's reasonable "misunderstanding of law." Thus, cases in which defendants have sought to characterize Florida's pre-Lockett law as in conflict with Lockett -- thereby challenging the constitutionality of the Florida statute prior to Lockett -- are inapposite. These include, e.g., Cooper v. State, 437 So.2d 1070 (Fla. 1983); Hitchcock v. State, 432 So.2d 41, 43 (Fla. 1983); Armstrong v. State, 429 So.2d 287, 289-290 (Fla. 1983); Songer v. State, 365 So.2d 696 (Fla. 1978) (on rehearing). Moreover, cases in which defendants have argued that their lawyers reasonably believed that Florida law precluded the presentation of nonstatutory mitigating circumstances, see, e.g., Songer v. State, 463 So.2d 229, 230-231 (Fla. 1985); Jackson v. State, 438 So.2d 4, 6 (Fla. 1983), are equally inapposite. Such challenges have been directed to constitutional infirmities on the face of the statute and in this Court's decisions construing the statute, and thus must fall, because "neither the wording of section 921.141 nor our previous decisions precluded the introduction of nonstatutory mitigating evidence." Songer, 463 So.2d at 231 (emphasis

supplied).[8] Mr. Harvard does not challenge herein this Court's view that Florida law "pre-existing Lockett was consistent with the dictates of Lockett." Cooper, 437 So.2d at 1072. Only a misunderstanding of Florida law by counsel and trial judge --caused by the unsettled principles of federal law during the six-year period between Furman and Lockett -- and the result of that misunderstanding -- the denial of Mr. Harvard's critical right to an individualized sentencing determination -- are at

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[8] Mr. Harvard has argued the foregoing distinction between Songer and Jackson on the one hand, and his case on the other, because he believes that it is a principled distinction. The focus of the claims in those cases, as framed by the Court, was that reasonable counsel could have believed that prior to Lockett, Florida law precluded the consideration of nonstatutory mitigating circumstances. Since Mr. Harvard has argued that federal constitutional law in the post-Furman vacuum, rather than Florida law, reasonably could have been understood to preclude the consideration of nonstatutory mitigating circumstances, Mr. Harvard has thus focused the "blame" for counsel's misunderstanding on federal law rather than, as in Songer and Jackson, on state law.

This is the only analysis that can reconcile the Court's decisions in Muhammad on the one hand, and Songer and Jackson on the other. Muhammad holds that counsel was resonable in believing that he could not present nonstatutory mitigating evidence. But Songer and Jackson hold that counsel was not reasonable in believing that Florida law precluded the presentation of nonstatutory mitigating evidence and, therefore, in failing to present such evidence for that reason. The only way to reconcile these cases, therefore, is to hold that counsel was reasonable in believing that federal law precluded consideration of such evidence, but unreasonable in believing that state law precluded consideration of such evidence.

If this analysis is too tenuous, then the plain meaning of Songer and Jackson is that they have overruled Muhammad. In this event, counsel was not reasonable in believing -- for whatever reason -- that the consideration of mitigating factors was limited to the statutory circumstances. Counsel was, accordingly, ineffective. If the Court proceeds in this fashion, Mr. Harvard is nevertheless entitled to an evidentiary hearing, for has pled Strickland-type ineffective assistance in the alternative. See Motion to Vacate, at pp. 34-35.

issue here. As we have already demonstrated, this Court is familiar with and has recognized the validity of an unconstitutional-as-applied-in-this-case challenge concerned with trial counsel's or the trial judge's misunderstanding of the law respecting the scope of consideration of mitigating circumstances.

Second, as we have demonstrated as well, during the six-year interval between Furman and Lockett, the Florida capital sentencing statute was particularly susceptible to unconstitutional application in a particular case. This was especially so during the earlier part of this period, when Mr. Harvard's case was tried. In June, 1974, when his sentencing proceeding took place, the belief that the federal constitutional principles underlying Furman required that the statutory lists of aggravating and mitigating circumstances be exclusive, had its greatest support. At that time none of this Court's decisions, that would gradually demonstrate thereafter that relevant nonstatutory mitigating factors could be considered, had been decided. Accordingly, Mr. Harvard was sentenced at a time when there was the greatest risk of unconstitutional application of the capital sentencing statute.

Third, the risk of unconstitutional application of the statute became a reality in Mr. Harvard's case. As the affidavit of James R. Dressler, Mr. Harvard's trial counsel, established, at the time of Mr. Harvard's sentencing proceeding he believed that to comply with Furman, the statute could permit only the consideration of evidence relevant to the statutory aggravating and mitigating circumstances. See Appendix A to the Motion to

Vacate. Because of this belief, Mr. Dressler did not present any mitigating evidence; nor did he argue the mitigating features -- other than the residual doubt about guilt -- associated with the evidence introduced in the first phase of Mr. Harvard's trial. As he explained it,

> 9. My investigation and preparation for the penalty phase of Mr. Harvard's trial, as well as my presentation of evidence and argument in that proceeding, were based upon this understanding of the Florida capital sentencing statute. Because of this understanding, however, I could find no mitigating evidence to present on behalf of Mr. Harvard. While I had discovered evidence of a mitigating nature, I discovered none that was relevant to the seven statutory mitigating factors. Accordingly, I felt I had no option but to re-argue the doubt about Mr. Harvard's guilt in the hope that, notwithstanding the guilty verdict, a majority of the jurors would be sufficiently troubled that they would recommend a sentence of life imprisonment.
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> 10. I have no doubt that I would have introduced and argued nonstatutory mitigating evidence on behalf of Mr. Harvard had I not been convinced that such evidence was deemed irrelevant by the Florida statute. In preparing for the guilt-innocence phase of the trial, I had undertaken substantial investigation of Mr. Harvard's good character in anticipation of using his reputation as to certain character traits as a defense against the murder charge. In particular, I had interviewed a number of Mr. Harvard's business associates and former employees (many of whom were dentists or other professionals), his minister, his mother, and his oldest daughter. Ultimately, I decided not to present this evidence in the guilt-innocence trial in order to prevent the State's introduction of Mr. Harvard's previous felony conviction in Jacksonville. But in the sentencing trial, the evidence of that conviction was nonetheless admitted in great detail in the State's case-in-chief. Notwithstanding this development, I remained convinced that I was still precluded --by the statutory definition of which mitigating circumstances were relevant -- from presenting the favorable evidence of Mr. Harvard's character about which I knew.

> 11. There simply was no other reason for me not to present this evidence. I did not see then -- nor do I see now -- any inconsistency in a sentencing strategy that focused the jury upon doubt about Mr. Harvard's guilt and urged them to consider as well mitigating aspects of his life and character, as bases for recommending life instead of death.
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> 12. I believe also that but for my belief that the statute limited consideration of mitigating circumstances, I would have further investigated and prepared evidence in mitigation, beyond the general reputation evidence which I had prepared for use in the guilt phase of the trial. I believe, therefore, that I would have investigated, prepared, and presented evidence and argument pertaining to Mr. Harvard's good character, as well as to other nonstatutory mitigating factors such as his life history, productive work history, and strong potential for rehabilitation, had I not believed that such evidence was deemed irrelevant under the then-new capital sentencing statute.

Appendix A, at 2-4.

Mr. Dressler's explanation of the determinative role played by his belief concerning the permissible scope of consideration of mitigating circumstances is wholly supported by the trial record. In contrast to other cases which have presented this issue, Mr. Dressler neither presented nor argued any nonstatutory mitigating factors despite his knowledge of the availability of such factors. Accordingly, the record is wholly consistent with, indeed affirmatively supports, the conclusion that the statute was unconstitutionally applied through Mr. Dressler's "misunderstanding of law" at the time of Mr. Harvard's sentencing proceeding. Cf. Francois v. State, 470 So.2d at 689; Hitchcock v. State, 432 So.2d at 44 (McDonald, J., joined by Overton, J., concurring); Armstrong v. State, 429 So.2d at 290.

Finally, Mr. Harvard suffered substantial prejudice as a result of counsel's misunderstanding of law.[9] Cf. Sireci v. State, 469 So.2d 119, 121 (Fla. 1985) (McDonald, J., joined by Overton, J., specially concurring). Under the circumstances of Mr. Harvard's case, the prejudice inquiry is not even a close question. This is so because no evidence or information concerning Mr. Harvard's life and character was considered in sentencing him. Nevertheless, his was a close case regarding sentencing. Even without knowledge of Mr. Harvard's life, the jury vote was split by a narrow vote of eight to four, the trial judge expressed the closeness of the question (OS 12), and two justices dissented over the propriety of the death sentence in this case.

Plainly the humanizing character evidence that was excluded from the process could have changed the balance in favor of life. We have set forth this evidence in detail in the Motion to Vacate. It was humanizing and personalizing (evidence of his early life and background), as well as profoundly demonstrative of Mr. Harvard's worth, and thus, need to be spared from the ultimate punishment (evidence of good character, positive and loving relationships with family members and other people, positive values and attitudes, productive and reliable work record, and potential for rehabilitation). See Motion to Vacate, at pp. 22-33. The "character" of a person about to be sentenced for a capital offense, his worth as a human being and his fitness

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9 As Mr. Harvard argued in his memorandum in support of his stay application, however, because of the underlying eighth amendment/Lockett violation, no showing of prejudice need be made in order for Mr. Harvard to prevail. See pp. 12-14 of the memorandum in support of the application for a stay of execution, filed in the lower court.

to live, are the crucial questions at the penalty phase of a capital case. Evidence bearing on the kind of person Mr. Harvard is would have allowed the jury to see him as a human being. It would have suggested that his personality and motivation could be explained, at least in part, by his personal history and would have shown that there was a Bill Harvard worth saving. It is thus precisely the kind of evidence the United States Supreme Court had in mind when it wrote Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982). The Lockett Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants would be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S.at 304. This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It could have made the difference between life and death in this case.

For these reasons, Mr. Harvard's case should be remanded for an evidentiary hearing with respect to the unconstitutional application of the capital sentencing statute in his sentencing trial due to his attorney's misunderstanding of law.

III.

THE TRIAL COURT ERRED IN DENYING WITHOUT AN EVIDENTIARY HEARING, MR. HARVARD'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

In paragraphs 21-24 of the Motion to Vacate (pp. 51-82), Mr. Harvard stated valid and substantial claims for relief due to the denial of effective assistance of counsel in his sentencing proceeding. As the pleading of those claims amply demonstrated, Mr. Harvard set forth facts which, if true, entitled him to relief under the applicable principles of Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984). Neither on the face of the Motion to Vacate, nor upon inspection of the files and records in the case, could the Circuit Court have conclusively found that these facts were not true. Accordingly, the Circuit Court committed reversible error when it held that Mr. Harvard's claims of ineffective assistance of counsel were legally insufficient and thus did not require an evidentiary hearing. See Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). See also O'Callaghan v. State, ___So.2d___, 9 Fla. L. W. 525 (Fla. December 13, 1984); Le Duc v. State, 415 So.2d 721 (Fla. 1982).

The most persuasive support for Mr. Harvard's position on appeal is the pleading of his claims in the Rule 3.850 motion itself. There, he has shown in detail that each of the four defects in counsel's performance was non-strategic and unreasonable. Further, he has shown how each of these defects was so prejudicial as to "undermine confidence in the outcome," Strickland v. Washington, 104 S.Ct. at 2068, of his sentencing proceeding. Because of limitations of time and page length, Mr. Harvard will briefly summarize the Rule 3.850 allegations herein.

However, he urges the Court to review the allegations as well, for it is the detailed factual texture in the Rule 3.850 motion that, he believes, is the most persuasive support for his position on appeal.

Before reviewing the four specific claims of ineffective assistance, the Court must first have an overview of Mr. Harvard's sentencing proceeding. This is necessary, because

> [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland v. Washington, 104 S.Ct. at 2064. From such a perspective, the most striking feature of Mr. Harvard's sentencing proceeding is that, because of the defaults of counsel, it was not "individualized," as that term has come to be understood in modern death penalty jurisprudence. In making the determination whether death or life is the appropriate sentence for a particular person, the eighth amendment requires that the sentencer make an "individualized" determination -- focused wholly upon the character of the individual, and the circumstances of the crime. See Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2744 (1983) and cases cited therein. In making this determination, the jury and judge must be

> free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized,

California v. Ramos, ___U.S.___, 103 S.Ct. 3446, 3456 (1983).

Counsel's defective performance fundamentally deprived Mr. Harvard of such a sentence determination process. First, counsel presented no evidence concerning Mr. Harvard's character. The reason for this default was not that Mr. Harvard had no mitigating character evidence available, or that there was negative character evidence that would become admissible if he presented character evidence. Rather, the sole reason was counsel's misunderstanding of the law -- of the legal relevance and legal admissibility of character evidence -- at the time of the sentencing proceeding. Counsel believed that the law did not permit the introduction of character evidence, and so decided not to put on what he knew to be very good character evidence. See pp. 33 - 37 supra. Second, because of counsel's misunderstanding, the evidence presented at the sentencing proceeding focused entirely on two matters: Mr. Harvard's prior conviction for aggravated assault and residual doubt about Mr. Harvard's guilt of the offense for which he had just been convicted (based upon Mr. Harvard's testimony, presented for the first time in the penalty phase, that Ralph Baggett, not he, had fired the gun that killed Ms. Bovard). As we will demonstrate in more detail infra, however, defense counsel was unprepared to meet and ameliorate the evidence of the prior conviction -- as he could have done had he been adequately prepared -- and the failure to do this was pivotal in the sentence determination process, for the view of that offense as intentional, rather than impassioned, was critical to the judge's determination that death was the appropriate sentence. Third, counsel had the opportunity to develop what we now know was available evidence of "mental mitigation,"

when his request for the appointment of a psychiatrist to evaluate Mr. Harvard's mental state at the time of the offense was granted -- too late for presentation in the jury proceeding, but in time for presentation to the judge. Inexplicably, however, counsel permitted the evaluations by the two court-appointed psychiatrists to focus wholly upon competency to be sentenced. And fourth, during closing argument, counsel affirmatively allowed the jury's sentence determination process to be infected by a diminished sense of responsibility for the determination of an appropriate sentence, and passively allowed that process to be infected by speculation about whether the Legislature would change the mandatory minimum for a life sentence --all of which seriously diverted the jury from its task of determining an appropriate and appropriately individualized sentence for Mr. Harvard.

Viewed in context, therefore, defense counsel's defective performance deprived Mr. Harvard of his fundamental constitutional right in capital sentencing: to require the jury and judge to understand him and know him -- in the context of his entire life and in the context of the homicide for which he had been convicted -- and to determine his sentence solely upon the basis of these matters. Accordingly his conduct "so undermined the proper functioning of the adversarial process that the [sentencing] trial cannot be relied upon as having produced a just result." Strickland, 104 S.Ct. at 2064.

From the perspective of counsel's specific defaults, Mr. Harvard alleged the following:

(1) Counsel failed to take the steps necessary to prepare to confront the crucially significant evidence underlying Mr. Harvard's 1969 conviction for aggravated assault.[10] See Motion to Vacate, ¶21 (pp. 51-71).

(a) Performance. Prior to trial, Mr. Harvard's counsel, James Dressler, knew that Mr. Harvard had been convicted of aggravated assault in Jacksonville in 1969 and had been sentenced to three months in jail and one year on probation for that offense. Further, from conversations with Mr. Harvard and cursory review of the preliminary hearing transcript in that case, he knew that the underlying facts involved Mr. Harvard's attempt to remove his children from his estranged wife's custody, during the course of which, Mr. Harvard shot his wife and his sister-in-law in the head. Finally, he knew that the State could characterize the incident as involving two intentional, attempted homicides, but that Mr. Harvard characterized it as a tumultuous and emotional domestic struggle during which he unintentionally and accidentally shot the two victims.

Mr. Dressler knew at that time that the new capital sentencing statute would permit the State to introduce the judgment of conviction for this offense in order to prove the (5)(b) aggravating circumstance.[11] However, he was absolutely convinced that the State would not be allowed to prove the facts

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[10] In the preceding discussion of counsel's overall ineffectiveness, Mr. Harvard first noted that counsel failed to present any evidence of nonstatutory mitigating circumstances. This matter -- because it involves an unconstitutional application of the capital sentencing statute due to counsel's reasonable misunderstanding of law -- was treated separately supra.

[11] Fla. Stat. § 921.141(5)(b).

underlying the conviction because the the law had never permitted such proof except in situations unrelated to the issues in the capital sentencing trial. Accordingly, as Mr. Dressler explained in his affidavit (Appendix A to the Motion to Vacate), "I had not investigated those facts nor even prepared to utilize those facts [that he knew from his review of the preliminary hearing transcript and conversations with Mr. Harvard] for confrontation purposes." Appendix A, at 5.

When the State prepared to proffer witnesses to establish the underlying facts of the Jacksonville offense, therefore, Mr. Dressler objected. But this objection was overruled. Accordingly, when Mr. Dressler first realized that he must confront the underlying facts of the Jacksonville offense, he had undertaken no preparation to impeach the evidence presented by the State, and he had undertaken no investigation that would have permitted him to convince the jury that the Jacksonville offense was an unintentional passion-evoked crime, rather than an intentional, calculated attempt to kill.

Moreover, this state of unpreparedness was not the result of a reasonable strategic decision that made the preparation for impeachment and investigation of affirmative defenses unnecessary. As the Supreme Court counseled in Strickland v. Washington, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 104 S.Ct. at 2066. Until the trial judge's ruling that the underlying-facts evidence would be admissible, Mr. Dressler's decision not to investigate those facts was reasonable under all the circumstances. See Motion to Vacate, ¶ 21D, at

57-58 (showing the reasonableness of his belief that the facts could not be admitted and thus, of his decision not to prepare to meet the facts). However, when the trial judge ruled that the underlying-facts evidence would be admitted, Mr. Dressler's reasonable basis for not investigating suddenly vanished. He had no reasonable basis upon which to decide that investigation and preparation were, at that point, unnecessary. Nor has he tried to suggest that there was such a reasonable basis. In his state of shock at being overrued, he simply "did not think to move for a continuance in order to prepare to meet this evidence." Appendix A, at 5. As he has further stated in his affidavit,

> Had I even expected that the underlying facts of the prior conviction might be introduced against Mr. Harvard, I would have prepared to try those facts -- as one prepares to try any other facts -- by undertaking investigation and discovery, by preparing for cross examination, particularly through the use of prior inconsistent statements, and by preparing affirmative defenses. In my state of surprise, I thus tried to confront the facts of the Jacksonville offense in a state of preparedness that I would never have found acceptable had I been given notice that I had to confront such facts.

Appendix A, at 5.

Accordingly, Mr. Dressler failed to provide reasonably effective assistance of counsel from the point at which his objection to the admission of the underlying-facts evidence was overruled. At that point, he had undertaken none of the preparation that he would have undertaken had he known that those facts would be admitted, and he made no effort to get the time necessary to undertake such preparation. Because of his failure to move for a continuance, therefore, Mr. Dressler failed to provide reasonably effective assistance of counsel.

(b) Prejudice. Without adequate preparation, Mr. Dressler was unable to challenge the State's evidence, which demonstrated that Mr. Harvard intended to murder his former wife and sister-in-law. This evidence was the critical evidence utilized by the sentencing judge to resolve any doubt about whether death was an appropriate sentence. See OS 12-14. It was used by this Court in a similar fashion on direct appeal. See Harvard v. State, 375 So.2d at 834-835. And it has been used by this Court in other cases to demonstrate why death was proportionate for Mr. Harvard notwithstanding the other circumstances of the homicide. See Lemon v. State, 456 So.2d 885, 888 (Fla. 1984); King v. State, 436 So.2d 50, 55 (Fla. 1983). In short, this evidence was the evidence upon which Mr. Harvard was sentenced to death instead of life.

With adequate investigation and time for preparation, however, Mr. Dressler could have presented a defense case in response to the State's evidence that would have substantially undermined the view of the Jacksonville offense as intentional, attempted homicides. As demonstrated in the Rule 3.850 motion, the defense case could have shown that the Jacksonville offense was not deliberate and intentional but rather was an irrational, non-deliberative act produced by emotional upheaval, marital strife for which Mr. Harvard's former wife was at least partially responsible, and Mr. Harvard's special vulunerability to irrational, uncontrolled episodes of aggressive behavior when intoxicated and simultaneously put under great stress by a person upon whom he had become dependent. Such a case could have been presented through impeachment of the State's two main witness

(the former wife and the sister-in-law), whose characterizations of the incident at the preliminary hearing in 1969 were far more consistent with a non-deliberate impassioned outburst than with an intentional attempted homicide (as their 1974 testimony had characterized the incident); through impeachment of the former wife's 1974 testimony -- denying that she had men over in the presence of the Harvard children -- by her 1969 testimony admitting such incidents; through the testimony of Mr. Harvard's daughter concerning the former wife's infidelities and mistreatment of the children, which she had communicated to Mr. Harvard before this incident, and in response to which, he became very upset; and through expert psychiatric and psychological testimony, that would have demonstrated an underlying emotional disturbance that seriously compromised Mr. Harvard's ability to control his anger and aggressive impulses under the circumstances of the 1969 offense. See Motion to Vacate, ¶ 21F, at 60-70.

Given the critical relation between the evidence of the Jacksonville offense and the determination to sentence Mr. Harvard to death, and given that, even without the presentation of a credible "defense" to that offense, the jury recommended death by only an eight-to-four vote, and two justces of this Court believed death to be an inappropriate sentence, Harvard v. State, 375 So.2d at 835 (Boyd and Hatchett, J.J., dissenting as to propriety of death sentence),

> there is a reasonable probability that, absent the errors [of counsel], the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, 104 S.Ct. at 2069.

(2) Counsel failed to obtain an appropriate psychiatric evaluation, or to object to the Court's failure to order an appropriate psychiatric evaluation of Mr. Harvard. See Motion to Vacate, ¶ 22, at (pp. 71-75).

(a) Performance. From his very first contact with Mr. Harvard, Mr. Dressler believed that he should be evaluated by a psychiatrist to assess his mental and emotional functioning at the time of the homicide. But Mr. Harvard did not want to pursue such an investigation, and Mr. Dressler accepted that decision. During the advisory sentencing proceeding, however, Mr. Dressler decided he could no longer be bound by Mr. Harvard's decision, and he requested that a psychiatrist be appointed to evaluate Mr. Harvard's functioning at the time of the offense. When two psychiatrists were eventually appointed in response to Mr. Dressler's request -- prior to the sentenicng proceeding before the trial judge (following the jury recommendation) -- the psychiatrists were ordered only to evaluate Mr. Harvard's competency at the time of the sentencing proceedings and not his capacity at the time of the offense. Thereafter, the appointed psychiatrists examined Harvard only for the purpose of determining his competency. Despite this substantial deviation from counsel's request for examination, Mr. Dressler registered no objection to the order of the court or to the scope of the evaluation conducted by the psychiatrists.

Mr. Dressler's failure to obtain the psychiatric evaluation of Mr. Harvard that he thought was necessary, or his failure to object to the court's apparent decision not to provide such an

examination, constitutes unreasonable performance by counsel. In his affidavit, Mr. Dressler declared that he "can think of no reason why I would have permitted this course of events apparently (so far as the record reflects) without objection." Appendix A, at 7. Mr. Dressler, therefore has suggested there was no strategy reason underlying this course of events; moreover, no reasonable strategy basis for such a course of events can be inferred. Appendix A, at 7. Counsel's failure to obtain an evaluation that he deemed critical -- or alternatively, his failure to register his objection to the court's denial of such an examination -- constitutes ineffective assistance of counsel. Compare O'Callaghan v. State, 9 Fla. L. W. at 525.

(b) Prejudice. Had an appropriate evaluation been undertaken, Mr. Dressler would have been able to demonstrate the mitigating circumstance set forth at Fla. Stat. § 921.141(6)(b), as construed in State v. Dixon, 283 So.2d at 10. See Motion to Vacate, ¶ 21, at 74-75. Because the sentencing decision before the jury in this case was quite close (a recommendation of death by and eight-to-four vote), and because the trial judge based his imposition of death upon a record in which he found no underlying statutory mitigating circumstances, OS 9-10; R 43-44, "there is a reasonable probability that, but for counsel's unprofessional errors [as described herein], the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. at 2068.

(3) Counsel's closing argument affirmatively harmed Mr. Harvard by diminishing the jury's sense of responsibility for determining the appropriateness of Mr. Harvard's sentence.

Performance. One of the themes of Mr. Dressler's argument in the sentencing proceeding was that the jury was involved in a useless endeavor in recommending any sentence. See generally OT 933-948. Mr. Dressler argued that the jury was involved in a useless endeavor, in part because Florida's death penalty statute was (in his opinion) unconstitutional, OT 935, 936-937, and in part, because the trial judge did not have to follow the jury's recommendation in imposing sentence, and the Florida Supreme Court would thereafter automatically review even the trial judge's sentencing decision. Mr. Dressler expressed this latter reasoning as follows:

> You are here only to recommend. You are here to make, really, what I consider to be a useless recommendation because the court doesn't have to follow it....
>
> He [referring to Justice Dekle of the Florida Supreme Court] was talking about the fact that, regardless of the inflamed emotions of the jury, the court who had been sitting on the case and heard murder cases has the final say-so. And then, not only that, regardless of what this Court does, the court sentences Mr. Harvard to death, there is an automatic review by the Supreme Court -- automatic. They are supposed to look at it because, again, they want to make sure that the inflamed emotions of the jurors no longer sentence a man to die....
>
> Yet they [the prosecution] say, "put this man in the electric chair" and it is a decision that you ultimately don't have but it's a decision that you're going to make tonight...

OT 940-941, 943, 946.

This argument had the effect of diminishing the jury's sense of responsibility for determining an appropriate sentence for Mr. Harvard. See Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985). At the time that he made this argument, Mr. Dressler knew that such an argument had the effect of diminishing the jury's sense of responsibility for its decision-making. Appendix A, at 8. He also knew that similar arguments had been condemned for this reason by the Florida Supreme Court when made by a prosecutor. Id. See, e.g., Blackwell v. State, 76 Fla. 124, 70 So. 731, 735-736 (1918); Pait v. State, 112 So.2d 380, 383-384 (Fla. 1959). Moreover, Mr. Dressler has been unable to provide any strategy reason for making this argument. As he declared in his affidavit,

> Other than the confusion created by the new statute, and my dismay at the improprieties by the prosecutor that I believed the Court had erroneously tolerated, I can think of no reasons why I would have made such argument. I certainly would not make such an argument today.

Appendix A, at 8.

(b) Prejudice. As recently noted in a related context by the Supreme Court, such an argument can lead the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 105 S.Ct. at 2639. Because such an argument has this effect, in Caldwell where the prosecutor made the very same argument Mr. Dressler made here, the Court held that "it is constitutionally impermissible to rest the death sentence on a determination made by a sentencer" whose responsibility for the determination of an appropriate sentence has been so

diminished. Id. Accordingly, in a case like Mr. Harvard's, where the sentencing decision rested upon a closely divided recommendation by the jury for death, a nonstrategic argument by counsel that has the effect of relieving the jury from its "awesome burden" of determining whether death is an appropriate sentence, constitutes prejudice under Strickland's test of prejudice.[12]

(4) Counsel failed to object to an argument by the prosecutor that invited the jury to sentence Mr. Harvard to death, even if they believed life to be an appropriate sentence, to avoid the possibility that the Legislature might reduce the twenty-five year mandatory minimum on a life sentence, thereby leading to Mr. Harvard's possible parole before he had served twenty-five years in prison.[13]

(a) Performance. In the rebuttal portion of his closing argument in Mr. Harvard's sentencing proceeding, the prosecutor argued as follows:

> [Mr. Dressler] mentioned to you that part of the law, as it stands now, is that parole is not permitted until twenty-five years has been served in prison. Let me caution you that, if you responded to his argument at all in your minds, that the legislative act sets that up and that's the way it is now. But tomorrow,

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12 In the Circuit Court, the State argued that Caldwell is distinguishable, because this argument, when made by the defense attorney, has the opposite effect (i.e., increases the jury's sense of responsibility) of the argument when made by the prosecutor. Such an argument is illogical and not supported by Caldwell. Caldwell was concerned with the effect of such an argument -- when uncured by the court -- on the jury. Under Caldwell's analysis, which attorney makes the argument is immaterial.

13 Mr. Harvard raised this issue as an ineffective assistance issue and as fundamental error. The fundamental error argument follows the ineffective assistance argument herein.

> the next legislative session, or two years from now, next year, that can be changed by the legislature, new law enacted, you all know that would permit parole of this defendant or any other defendant under these circumstances at any set time within, six months, two years, five years, anything the legislature decides to put in the law. So, keep that in mind.

OT 953. The effect of this argument by the prosecutor was to invite the jury to sentence Mr. Harvard to death -- in spite of a determination that death was not warranted in his case -- on the basis of an extremely speculative factor unrelated to the assessment of Mr. Harvard's character or the circumstances of the offense.

If the jury in Mr. Harvard's case believed that a life sentence was an adequate sentence for him, they very likely rested that belief upon the notion that Mr. Harvard would not be eligible for parole under such a sentence until he had served a minimum of twenty-five years in prison. Judge McGregor had instructed the jury that a sentence of life imprisonment required a defendant to serve no less than twenty-five calendar years before becoming eligible for parole. See OT 954. Since there was no objection to the argument by the prosecutor -- that the twenty-five year minimum could be reduced to six months at any time by the legislature -- and Judge McGregor gave no curative instruction as to this argument, in light of this argument, the jury may well have considered that the option of life imprisonment was not really an option if Mr. Harvard might be released so quickly. Such an inference would have been quite reasonable, where as here, "the prosecutor's remarks were quite focused, unambiguous, and strong." Caldwell v. Mississippi, 105 S.Ct. at

2645. Accordingly, if Mr. Harvard's sentencing jury believed that death was not an appropriate punishment, but believed as well, that society needed to be protected from Mr. Harvard for at least twenty-five years, the prosecutor's argument could well have convinced the jury that the only means of protecting society from Mr. Harvard was to sentence him to death. Compare Beck v. Alabama, 447 U.S. 625, 637 (1980).[14] To permit a death sentence to rest on such reasoning is to "impermissibly inject an element too speculative for the jury's deliberation." California v. Ramos. 103 S. Ct. at 3459.

No objection was made to the argument of the prosecutor by Mr. Dressler. Moreover, as declared by Mr. Dressler in his affidavit, Appendix A, "I cannot explain why I did not object to this argument." Mr. Dressler recognized the argument as highly improper and prejudicial, because of its invitation to the jury to base its sentence upon sheer speculation, rather than an individualized sentencing determination. Id. Nevertheless, he failed to object to the argument. There simply can be no reasoned basis to fail to object to such a highly prejudicial, constitutionally impermissible argument.

(b) Prejudice. Because the prosecutor's argument created an unconstitutional risk that the jury sentenced Mr. Harvard to death -- by only an eight-to-four vote -- not

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[14] Thus, the argument was similar to that roundly condemned by this Court in Teffeteller v. State, 439 So.2d 840, 844-45 (Fla. 1983), where "[t]he intended message to the jury was quite clear: unless the jury recommended the death penalty, the defendant, in due course, will be released from prison and will kill again...." Both arguments urged the jury to view death as the only real option and thus created the risk that death was imposed in spite of facts calling for life.

because death was an appropriate punishment on the circumstances of the offense and the character of Mr. Harvard, but because death appeared to be the only genuine alternative open to the jury, "there is a reasonable probability that, but for counsel's unprofessional error[], the result of the proceeding would have been different." Strickland v. Washington, 104 S.Ct. at 2068. Compare Teffeteller v. State, supra ("[w]e cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death").

(c) Fundamental error. Because the prosecutor's argument was itself unconstitutional, in that it urged the jury to base its recommendation on considerations that were "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" Caldwell v. Mississippi, 105 S.Ct. at 2645 (quoting Woodson v. North Carolina, 428 U.S. at 305), the Court should treat the merits of the prosecutorial argument issue as fundamental error. In analogous cases in which the prosecutor's argument similarly diverted the jury's concern to the defendant's possibility of release or parole, the Court has found fundamental error and reversed, despite the absence of objection. See, e.g., Grant v. State, 194 So.2d 612 (Fla. 1967); Burnette v. State, 157 So.2d 65 (Fla. 1983). See also Pait v. State, 112 So.2d 380, 385-]86 (Fla. 1959) (finding prosecutorial argument that diminished the jury's sense of responsibility for its verdict to be fundamental error), cited with approval in Teffeteller v. State, 439 So.2d at 845.

Accordingly, the Court should, at this point in the proceedings, rule that an evidentiary hearing must be held on Mr. Harvard's claims of ineffective assistance of counsel and remand for that hearing. Mr. Harvard's entitlement to such a hearing is similar to, and just as clear as, the defendant's entitlement to a hearing in O'Callaghan v. State, ___So.2d___, 9 F.L.W. 525 (Fla. December 13, 1984). There, upon the basis of a similar pattern of alleged ineffective assistance of counsel, the Court held that an evidentiary hearing was required.[15]

IV.

THE PENALTY PHASE JURY INSTRUCTIONS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

After the presentation of evidence and argument at the penalty phase of Mr. Harvard's case, the jury was instructed as follows:

> Going now to Section 921.141 in the Florida Statutes, pertinent portions there are as follows: After hearing all the testimony, the jury shall deliberate and render an advisory sentence to the Court based on the following matters: a) whether sufficient aggravating circumstances exist as enumerated in subsection

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15 The claim in O'Callaghan was described as follows:

> O'Callaghan alleges, in part, that his counsel's motion for a psychatric examination of O'Callaghan was granted, but that O'Callaghan's counsel never had the examination conducted; that O'Callaghan's counsel called no witness in mitigation or for any purpose at the sentencing hearing; that O'Callaghan's counsel never contacted O'Callaghan's parents prior to trial; that if his parents had been contacted, his counsel would have discoverd that O'Callaghan suffered a harsh and alienating childhood, serious physical and psychological abuse as a child, a serious drug problem as a teenager, and had a family history of mental illness; and that a mental health professional's affidavit asserts he exhibits likely evidence of brain damage and mental illness.

F.L.W. at 525-526.

> (6) below -- I will read that in a moment -- and whether sufficient mitigating circumstances exist, as enumerated in subsection (7) below, which outweigh the aggravating circumstances found to exist and based on these considerations, whether the defendant should be sentenced to life or death.
>
> Going now to subsection (6) where the aggravating circumstances are enumerated -- and ladies and gentlemen, these matters that I am about to bring to your attention should be the focus of your deliberations during this period of deliberations that you will have

OT 955 (emphasis added).

. . .

> [The court then read the listed aggravating and mitigating circumstances]

. . .

> Ladies and gentlemen, with those standards, so far as aggravation and mitigation are concerned, present in your mind, I would ask that you commence your deliberation at this time, advising you that there must be a concurrence of a majority of your number, meaning seven or more for either advisory sentence authorized by law.

OT 957 (emphasis added). A similar instruction had been given prior to the presentation of the evidence at the penalty phase. OT 899-904

These instructions violated the eighth amendment in four respects. First, they failed to inform the jury that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt and of proving that death is the appropriate penalty. See Motion to Vacate, ¶ 17 (pp. 39-43). Second, the instructions impermissibly allocated to Mr. Harvard the burden of proof. Id., ¶ 18 (pp. 43-46). Third, the instructions failed to inform the jury that even after weighing the aggravating and

mitigating circumstances, it still was required to determine whether death was the appropriate penalty in this case. Id. ¶ 19 (pp. 46-48). Fourth, the instructions failed to inform the jury about the role played by mitigating circumstances in Florida's capital sentencing scheme. Id. ¶ 20 (pp. 49-51). These errors constitute fundamental error and are therefore cognizable in these collateral review proceedings.

(1) Failure to instruct on reasonable doubt

The jury in Mr. Harvard's case was not instructed that the State has the burden of proving aggravating circumstances beyond a reasonable doubt, and of proving that death is the appropriate punishment. These instructions gave the jury absolutely no guidance with respect to which party bears the risk of non-persuasion as to aggravating and mitigating circumstances, nor any guidance with respect to the standard of proof necessary to establish such circumstances. It was only told to "deliberate and render an advisory sentence," OT 955, and that the aggravating and mitigating circumstances "should be the focus of your deliberations." OT 955. It may be true that a reasonable juror arguably could have assumed that the State had to prove matters in aggravation, since it was the State that was seeking death and since aggravating circumstances go to finding death. But the jury had no way of knowing that the State had the burden of proving aggravating circumstances beyond a reasonable doubt. Thus, a reasonable juror could well have concluded that both the State and Mr. Harvard bore a burden of preponderance of the

evidence: each side would present its evidence, and then the jury was to weigh that evidence, with no particular burden (i.e. beyond a reasonable doubt) assigned to the State.

Two years prior to this trial, this Court had made clear that aggravating circumstances were to be proved beyond a reasonable doubt before being considered. Because aggravating circumstances "actually define those crimes to which the death penalty is applicable in the absence of mitigating circumstances ... they must be proved beyond a reasonable doubt before being considered by judge or jury." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The statute expressly requires that certain prerequisite findings of fact be made. Fla. Stat. § 921.141(3). In keeping with this analysis, this Court has long recognized that the State bears the risk of nonpersuasion as to aggravating circumstances. Arango v. State, 411 So.2d 172, 174 (Fla. 1982).

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 "substantially impairs the truth-finding function." Ivan V. 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 correctness of factual conclusions for particular type of adjudication."

Addington v. Texas, 441 U.S. 418, 423 (1979).

The failure to instruct on reasonable doubt fundamentally undermined any confidence in the jury's sentencing recommendation in this case. This requires resentencing even without a showing of prejudice, because the error is a direct violation of the eighth and fourteenth amendments. See Antone v. Strickland, 706 F.2d 1534, 1542 (11th Cir. 1983) (Kravitch, J., concurring). However, the error here was in fact prejudicial.

Prejudice flows from the simple fact that this is not a case that clearly calls for the death penalty. Four members of Mr. Harvard's sentencing jury voted to recommend life imprisonment. And when this Court affirmed Mr. Harvard's sentence, two Justices dissented. Justice Boyd wrote: "I feel application of the death penalty is inappropriate after weighing the aggravating and mitigating circumstances...." Harvard v. State, 375 So.2d 833, 835 (Fla. 1977). He reiterated this in his dissent from the Court's affirmance of the death sentence on Mr. Harvard's appeal from his Gardner resentencing. Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982).

That this omission resulted in prejudice is also demonstrated by the United States Supreme Court's explanation of why the reasonable doubt requirement exists at guilt-innocence trials:

> [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 suffic-

> ient 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 (1895) (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. As Mr. Harvard argued on direct appeal, evidence establishing one of only two of the aggravating factors found in his case -- that the killing was especially heinous, atrocious, or cruel -- was extremely weak and questionable under the law.

(2) Unconstitutional allocation of burden of proof

The instruction that if the jury found the existence of an aggravating circumstance, it then was to determine "whether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances," OT 955, impermissibly 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 postconviction 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).

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 (11th Cir. 1985) (en banc); Tucker v. Kemp, 762 F.2d 1496 (11th 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). By contrast, here, the jury was simply told to "deliberate and render an advisory sentence to the court based on the following matters: a) whether sufficient aggravating circumstances exist...." OT 955. 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." 411 So.2d at 174 (emphasis added). Once again, Mr. Harvard's jury received no such instruction.

In stark contrast to the curative language in Arango, the instruction here did not inform the jury that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt and of proving that death is the appropriate punishment. By not placing the burden on the State, the jury was permitted the entirely reasonable inference that the burden was on Mr. Harvard; the jury could well suppose, absent instructions to the contrary, that a convicted person has the initial burden of proving the existence of mitigating circumstances. As this Court reasoned in an analogous context, when "the jury is never told that the state must prove anything in regard to the [disputed] issue," it "places the burden of proof on the defendant's shoulders...." Yohn v. State, No. 65,504, 10 Fla. L. Week. 378, 380 (Fla. July 12, 1985).

A defendant goes into the capital penalty trial 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 burden 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 Mullaney shifted the burden of proof that the defendant in a homicide case acted in "the heat of passion" from the State to defense. The State of Maine argued that because absence of heat of passion was not a fact necessary to establish a 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 significantly 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. Harvard had been adjudicated guilty of first degree murder and is therefore certain to lose his liberty and his reputation, 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 imprisonment.

Prejudice also follows from the fact, discussed above, that this is not a case that clearly calls for the death penalty. Harvard v. State, 375 So.2d 833, 835 (Fla. 1977)(Boyd, J., dissenting); Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982)(Boyd, J., dissenting).

(3) Failure to tell the jury that it must find death to be the appropriate penalty, even apart from weighing of aggravating and mitigating circumstances

The instruction did not tell the jury that, following the weighing and consideration of aggravating circumstances and mitigating circumstances, the jury must then further decide whether death is the appropriate penalty in this individual case. This defect, as the others, also violated the eighth and fourteenth amendments.

In State v. Dixon, 283 So.2d 1 (Fla. 1973) this Court laid down the fundamental governing principle for aggravating and mitigating factors:

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Id. at 10 (emphasis added).

In his concurring opinion in Barclay v. Florida, 103 S.Ct. 3418 (1983), which elaborated on the Dixon principle, Justice Stevens noted that in Florida the sentencer must make a three-step analysis in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proven beyond a reasonable doubt; (2) that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances; and (3) that death is the appropriate penalty for the individual defendant. In support of steps one and two he relied upon the statutory language. In support of his third step he turned to Florida case law:

> [T]he Florida Supreme Court appears to recognize that, though the first two findings establish a "presumption," that presumption may be overcome. See, e.g, Williams v. State, 386 So.2d 538, 543 (Fla. 1980) (jury's recommendation of life militates against the presumption).

Id. at 3430 n.3. This third step, which was not presented to Mr. Harvard's jury via an instruction, is equally crucial to the jury's determination to recommend a death sentence.

The jury's role in Florida's advisory sentencing proceeding is critical. See e.g., Lamadline v. State, 303 So.2d 17 (Fla. 1974); Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). This is so because a verdict recommending life imprisonment establishes an important set of parameters beyond which the trial judge may exercise his discretion to impose a sentence of death only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

Given the jury's important role in Florida's capital sentencing process, it follows that the rules which are presented to the jury to guide their sentencing decision -- the instructions -- must be carefully scrutinized.

> Every error committed before the jury at a sentencing proceeding will have some conceivable effect on the jury's verdict and thus may affect the jury's determination of the guiding parameters for sentencing in the case. Every error in instruction which makes it less likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment. There may be a case in which a substantively incorrect instruction will mislead the jury to such an extent that the parameters created by the jury's verdict are so far off their proper mark that the instruction alone justifies reversal. An erroneous instruction may also provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors.

Adams, 764 F.2d at 1364.

Justice Stevens, in an opinion respecting the denial of petition for a writ of certiorari in Smith v. North Carolina, 103 S.Ct. 474 (1982), explained why omission of an instruction to the

jury to make the third step in his Barclay analysis -- deciding that death is the appropriate penalty for the individual defendant -- is the type of error comprehended by Adams. The jury instruction at issue in Smith followed this scheme: the trial judge instructed the jury that it had a duty to impose the death penalty if it found: (1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances. He noted that those instructions contain an ambiguity that raises serious doubts that they comply with Lockett v. Ohio, 438 U.S. 586 (1978):

> On the one hand, the instructions may be read as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty. Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries:
>
> First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case." Lockett, supra, 438 U.S. at 601.

103 S.Ct. at 474-475. Amplifying on the constitutional infirmity raised by the latter interpretation of these instructions, Justice Stevens reasoned:

A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In State v. Wood, 648 P.2d 71, 82 (Utah 1982), that court wrote:

> It is our conclusion that the appropriate standard to be followed by the sentencing authority -- judge or jury -- in a capital case is the following:
>
> After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.
>
> These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors, not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion, that the death penalty is justified and appropriate after considering all the circumstances.

Id. Thus, the constitutional infirmity with the instructions at issue in Smith was that a reasonable juror, hearing the instruction, could have felt precluded from making the independent determination that irrespective of aggravating and mitigating circumstances, death is not the appropriate penalty in a given case.

This same infirmity is the heart of the error in the instructions to Mr. Harvard's jury. The jury was told that "based on these considerations," i.e., a weighing of aggravating and mitigating circumstances, OT 955, it was to decide to recommend life or death. The unmistakable import of those instructions is that the sole task of the jury is to tote up the aggravating and mitigating factors, and unless the mitigating factors outweigh the aggravating factors, the advisory sentence will have to be death; certainly a reasonable juror could have understood the instruction in this way. There is no leeway in the instructions for assessing respective substantiality and persuasiveness of these factors, so that even though the aggravating factors are numerically superior to the mitigating factors, the mitigating factors are qualitatively superior, and therefore death is inappropriate.

This instructional error requires resentencing under the principles of Lockett v. Ohio, supra, even without a showing of prejudice; this is so because a Lockett error is a direct violation of the eighth amendment. See Antone, supra. The error here, however, is in fact prejudicial. As discussed above, a reasonable interpretation of these instructions could lead a reasonable juror to conclude that the weighing process is simply a matter of adding up aggravating factors on the one side of the scale and adding up mitigating factors on the other side of the scale, and if the aggravating factors predominate then death is the proper recommendation. State v. Dixon did hold that this should not be the entire process of deliberation, but the jury was not so instructed. The evidence of at least one of the

aggravating factors -- "the capital felony in this case was especially heinous, atrocious, or cruel" -- was weak. Particularly in view of the fact that the jury was not instructed that the State had the burden of establishing the aggravating circumstances beyond a reasonable doubt, the balancing process itself is greatly suspect. The end result is extreme prejudice to Mr. Harvard, because the jurors who voted for death may not have felt that the quality of the aggravating factors made death appropriate, but because of the number of the (perhaps marginally established) aggravating factors, they had no other choice.

Prejudice also flows from the fact that this simply is not a case that clearly calls for the death penalty. Harvard v. State, 375 So.2d at 835 (Boyd, J., dissenting); Harvard v. State, 414 So.2d at 1037 (Boyd, J., dissenting)

(4) Failure to instruct on the function of mitigating circumstances

The failure to instruct the jury on the function and purpose of mitigating circumstances deprived Mr. Harvard of the particularized sentencing consideration required by the eighth amendment. The instruction said nothing more about mitigating circumstances. It did not define the word "mitigating" or explain to the jury the critical function of mitigating evidence in its life or death decision. Nor did the instruction say anything about how the jury should undertake the process of weighing aggravating and mitigating circumstances. Indeed, the instruction told the jury that "the aggravating circumstances ... should be the focus of [its] deliberations." OT 955. These inadequacies are of constitutional dimension, because they mean that the jury

instructions failed to channel the jury's discretion in any meaningful way. Cf. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

The United States Court of Appeals for the Eleventh Circuit has developed a principle which gives practical effect to the continuing requirement of Lockett in the context of sentencing charges.

> The eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose a death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender...."

Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981). The Court went on:

> In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

Id. (footnote omitted).

It is not dispositive that in Mr. Harvard's case the instruction referred to mitigating circumstances. Mr. Harvard's contention goes to the failure of the skeletal instructions to give any substantial meaning to the requirement of Lockett.

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

Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983).

It would have been natural for a reasonable juror in this case to conclude from the instructions that the deciding factor in fixing Mr. Harvard's sentence was whether an aggravating circumstance was proven. The instructions simply failed to inform the jury what to do with evidence in mitigation of a death sentence. As the Supreme Court had observed, "whether a defendant has been accorded his constitutional right depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). Accord Franklin v. Francis, 105 S.Ct. 1965 (1985). The summary instructions given here did not explain the proper depth of inquiry or the delicate balance to be struck in the sentencing decision.

This error requires resentencing even without a showing of prejudice; a violation of Lockett directly violates the eighth amendment. See Antone, supra. However, this error resulted in prejudice. See Gregg v. Georgia, 428 U.S. at 188-189, 192-193. Without proper instruction as to what mitigating circumstances are, and what their role in the weighing process is, the jury's deliberations lacked the absolutely essential guidance required by Gregg.

Prejudice inures from the fact that this simply is not a case that clearly calls for the death penalty. Harvard v. State, 375 So.2d at 835 (Boyd, J., dissenting); Harvard v. State, 414 So.2d at 1037 (Boyd, J., dissenting). Justice Boyd, as a Florida Supreme Court Justice, knew what the role and function of mitigating circumstances is and was able to properly assess them.

Without instructions, the jury could not know any of this. With proper instructions, the vote may have been altered in favor of life for Mr. Harvard.

(5) These errors are cognizable in this proceeding

These instructional errors were not objected to at trial, and therefore they were not raised on direct appeal. These issues are properly cognizable in a Rule 3.850 proceeding, however, because they are fundamental in nature, as going to the heart of the capital sentencing determination.

Fundamental errors may be raised at any time, including post-conviction for the first time. Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). Lack of an objection to a jury instruction is reviewable where fundamental error has occurred. State v. Smith, 240 So.2d 807, 810, (Fla. 1970); Squires v. State, 450 So.2d 208, 211 (Fla. 1984). While "the sufficiency of jury instructions is ordinarily a matter of which review may be had only by specific objection or request at trial followed by argument on appeal," the "presence of 'fundamental error' makes such claims cognizable by collateral attack." Francois v. State, 470 So.2d 687, 689 (Fla. 1985) (emphasis added).

The courts have not undertaken to give an all-inclusive definition of fundamental error. But error going to the foundation of the case or to the merits of the action, id., or error which would result in a miscarriage of justice if not considered, American Surety Co. v. Coblentz, 381 F.2d 185, 188-189 (5th Cir. 1967) is deemed fundamental. See Gibson v. State, 194 So.2d 19, 20 (Fla. 2d DCA 1967).

Mr. Harvard will now show that the errors in his case strike at the very heart of the function of a penalty phase and are, therefore, fundamental.

a. Reasonable Doubt

This issue involves the total omission of any jury instruction on the standard or burden of proof in the penalty trial. See OT 954-958. There likewise was no mention of burden of proof in any of the sentencing judge's findings. See OR 9-10, R 38-46. The result is a complete disregard for the application of a reasonable doubt standard for consideration of aggravating circumstances.

Of the cases finding specific types of error fundamental, one line of cases is particularly analogous to the kind of instructional error alleged by Mr. Harvard. These are cases in which the trial court, in a felony murder case, failed to instruct on the elements of the underlying felony.

In Robles v. State, 188 So.2d 789 (Fla. 1966) this Court reversed a first degree murder conviction on the ground that the instruction on felony murder was erroneous. Recognizing that premeditation is a vital element of the crime of first degree murder, the Court reasoned that the elements of the underlying felony, which must be proved in lieu of premeditation, are "equally vital" and thus the jury must be instructed on those elements as well. This failure to give instructions on the underlying felony when felony murder is charged was also recognized as fundamental error in State v. Jones, 377 So.2d 1163 (Fla. 1979). The essence of the Jones decision is that "[i]t is essential to a fair trial that the jury be able to reach a

verdict based upon the law, and not be left to its own devices to determine what constitutes the underlying felony." See also Franklin v. State, 403 So.2d 975, 976 (1981) (even though prosecution presented evidence sufficient to show premeditation in a case tried on alternative theories of premeditation and felony murder, court's failure to instruct on the underlying elements of the felony is fundamental error).

The failure to instruct on reasonable doubt and the improper allocation of the burden of proof in this case are particularly analogous to Robles and Jones at the guilt/innocence phase of a felony murder case. This is so because the two types of proceedings are parallel; the jurisprudential theory underlying the two is the same in each case. In the felony murder case, as in any criminal trial phase, the burden is first upon the State to establish the elements of the offense charged, and second to meet that burden by proof of those elements beyond a reasonable doubt. Similarly, Florida law is quite clear that aggravating circumstances at a capital penalty phase are "like the elements of a capital felony in that the state must establish them." Arango v. State, 411 So.2d 172, 174 (Fla. 1982). Furthermore, the State bears the burden of establishing the aggravating circumstances beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Therefore, the penalty phase of a capital trial and the guilt phase of every criminal trial are identical in their underlying principles, and what is fundamental error at the trial is logically fundamental error at a penalty phase. That

the specific errors in Mr. Harvard's case strike at the very heart of the penalty phase, and are therefore fundamental, will now be discussed in more detail.

The fifth, eighth and fourteenth amendments require proof beyond a reasonable doubt of any fact or circumstance that is to be used as a basis for the decision to take a person's life. The aggravating circumstances which are necessary to support a death sentence involve factual findings that were not required to be made, and were not made, at the guilt phase of the trial. Due process protections are demanded where "a new finding of fact ... that was not an ingredient of the offense charged" must be made in order to support a particular sentencing outcome. Specht v. Patterson, 386 U.S. 605, 608 (1967). Since the new factual finding is "the basis for a death sentence, the interest in reliability plainly outweighs the State's interest" in utilizing a diminished standard of proof, Gardner v. Florida, 430 U.S. at 359 (plurality opinion), that "'substantially impairs the truth-finding function.'" Hankerson v. North Carolina, 432 U.S. 233, 242 (1977).

The omission of any burden of proof instruction further violated the constitutional rule of Furman v. Georgia, 408 U.S. 238 (1972); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); and Godfrey v. Georgia, 446 U.S. 420 (1980), because the charge failed adequately to guide, channel, and regularize capital sentencing discretion as required by the eighth and fourteenth amendments. The Supreme Court "has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a

correspondingly greater degree of scrutiny of the capital sentencing determination.'" Caldwell v. Mississippi, 105 S.Ct. at 2639. There is thus a unique "need for reliability in the determination that death is the appropriate punishment in a specific case." Id. at 2640. To assure this degree of reliability, the Court's "'priniciple concern' ... regarding the death penalty, [s] the 'procedure by which the State imposes the death sentence.'" Id. at 2645.

Accordingly, the failure to instruct on the reasonable doubt requirement is one of the most serious errors that could have been committed. Proof beyond a reasonable doubt is basic to the fairness of the proceeding, and failure to instruct on the standard of proof is fundamental constitutional error. Findley v. United States, 362 F.2d 921 (10th Cir. 1966); United States ex rel. Castleberry v. Sielaff, 446 F.Supp. 451 (N.D.Ill. 1978). See generally Hankerson v. North Carolina, supra; Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978); cf. Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978). The instructions denied due process. State v. McHenry, 88 Wash.2d 211, 558 P.2d 188 (1977) (en banc). There certainly was no "knowing and intelligent" waiver of such a fundamental right. See Johnson v. Zerbst, 304 U.S. 456 (1938). See also Lamadline v. State, 303 So.2d 17 (Fla. 1974) (Jury trial on penalty is a fundamental).

That the jury instruction constitutes fundamental error, particularly because this is a capital case, is further supported by the principle of Wells v. State, 98 So.2d 795, 801 (Fla. 1957). This Court in Wells reasoned that "where the death penalty has been imposed, we feel it our duty to overlook

technical niceties in the interest of justice." See also Pait v. State, 112 So.2d 380, 386 (Fla. 1959); Williams v. State, 117 So.2d 473, 476 (Fla. 1960); Burnette v. State, 157 So.2d 65, 67 (Fla. 1963).

b. Burden of Proof

The presumption of innocence -- the rule that the prosecution has the burden of proving each element of the offense beyond a reasonable doubt -- is one of the most cherished premises of our justice system. The crucial importance of informing the jury about which party bears the burden of proving a matter at issue was set forth in Mullaney v. Wilbur, 421 U.S. 684 (1975):

> The State has affirmatively shifted the burden of proof to the defendant. The result in a case such as this one where the defendant is required to prove the critical fact in dispute is to further the likelihood of an erroneous murder conviction. Such a result directly contravenes the principle articulated in Speiser v. Randall, 357 U.S. 513, 525-526 (1958):
>
> > "[w]here one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden ... of persuading the factfinder at the conclusion of the trial...."
>
> See also In re Winship, 397 U.S. [358], 370-372 [(1970)] (Harlan, J., concurring).

Mullaney, 421 U.S. at 701.

The parallels between the guilt trial and the penalty trial mean that at the commencement of Mr. Harvard's sentencing trial he was as much entitled to a presumption in favor of life as he was to a presumption in favor of innocence at the commencement of

his guilt/innocence trial. That he was entitled to such a presumption of life is demonstrated by the allocation of the penalty phase burden of proof. Before a death sentence can even be considered by the jury or judge in Florida, the State must prove two elements. Dixon, 273 So.2d at 9. The State must prove, first, that one or more statutory aggravating circumstances exist, and second, that death in the appropriate punishment. Arango, 411 So.2d 474. Proof of aggravating circumstances is a threshold matter of proof -- the burden of which Arango holds must be borne by the State -- before the sentencer can consider whether to recommend or impose a death sentence. See Barclay v. Florida, 463 U.S. 939 (1983) (Stevens and Powell, J.J., concurring). If the State fails to carry this burden, a life sentence must be imposed. Id. at n.4.

Just as the assignment of the burden of proof to the State in the guilt phase of the trial corresponds with the presumption of innocence accorded the defendant, see Sandstrom v. Montana, 442 U.S. 510, 522-524 (1979), the assignment of the burden of proof to the State in the penalty phase corresponds with -- and protects -- the presumption that, before the State satisfies its burden, the proper sentence is life, not death. The error in this case was thus among the most serious of instructional errors that can be committed. That error was fundamental.

c. Consideration of the Death Penalty's Appropriateness, Even Apart From Weighing Aggravating and Mitigating Circumstances, and Failure to Define Mitigating Circumstances

The decisions of the United States Supreme Court have stressed that the constitutionality of a State's death penalty system hinges upon the ability of that system to rationally decide who dies. See, e.g., Caldwell v. Mississippi, 105 S.Ct. at 2645. The two remaining errors in the jury instructions in this case derive their fundamental quality from the fact that they do not accord with the principles of Gregg and its progeny. Gregg established the basic principle that guided discretion is the most fundamental distinction between a death penalty that is constitutional and one that is not. The jury instructions, of course, furnish the calculus by which the guided discretion takes place. If the essential calculus is infected by seriously erroneous instructions, then the end product of that calculus is fundamentally tainted. Fundamental error occurs when a defendant's substantial rights were affected, and from this a manifest miscarriage of justice occurs. United States v. Rojas, 502 F.2d 1042, 1045 (5th Cir. 1974). A capital defendant's most substantial right at the penalty phase is to a correct advisory verdict. This is so because the standard of Tedder v. State, 322 So.2d 908 (Fla. 1975) makes the advisory verdict of life binding on the judge except when "virtually no reasonable person could differ" that a sentence of death is appropriate. 322 So.2d at 910.

The gravity and implications of these two erroneous instructions are discussed at length above. Dixon clearly established that the jury's advisory verdict is not a simple quantitative

balancing of aggravation and mitigation, but is in essence a qualitative assessment of the totality of the circumstances. The failure to instruct the jury that after comparing aggravating and mitigating circumstances it must then make this qualitative assessment is a fatal omission. Fundamental error occurs when an omission in an instruction is pertinent or material to what the jury must consider in reaching its verdict. Stewart v. State, 420 So.2d 862, 863 (1982). Further, because the assessment is qualitative, the failure to instruct on the special role of mitigating circumstances, with an explanation of what they are and how they work into the calculus, is a similarly fatal omission.

In both instances, Mr. Harvard was deprived of a proper jury consideration. Either error alone rises to the level of fundamental error; in concert the errors have insured a serious miscarriage of justice. Fundamental error occurs when the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or to seriously affect fairness or integrity of judicial proceedings. United States v. McMahon, 715 F.2d 498, 500 (11th Cir. 1983).[16]

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[16] Should this Court reject Mr. Harvard's fundamental rights argument, he asserts in the alternative -- relying upon his pleadings in the court below -- that trial counsel should be excused for not raising these issues or, in the alternative, that trial counsel was ineffective in not preserving these claims for appellate consideration.

V.

THE EXECUTION OF A CONDEMNED PERSON BY ELECTROCUTION AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT, IN LIGHT OF EVOLVING STANDARDS OF DECENCY AND THE AVAILABILITY OF LESS CRUEL BUT EQUALLY EFFECTIVE METHODS OF EXECUTION. FURTHER, THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY, DISCRIMINATORY MANNER -- ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCE DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE RACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND REQUIRES THAT MR. HARVARD'S DEATH SENTENCE, IMPOSED DURING THE PERIOD IN WHICH THE DEATH PENALTY WAS BEING APPLIED UNCONSTITUTIONALLY, BE VACATED.

These two issues were raised and fully developed at ¶¶ 25 and 26 of Mr. Harvard's Motion to Vacate Death Sentence, and Mr. Harvard will rely upon and incorporate herein that discussion. These claims have been previously rejected by this Court on the merits. See, e.g., State v. Washington, 453 So.2d 389 (Fla. 1981) (discrimination claim); Booker v. State, 397 So.2d 910 (Fla. 1981) (electrocution claim). Nevertheless, both claims are cognizable in a Rule 3.850 proceeding. Contentions that the death penalty is unconstitutionally applied in Florida "can properly be raised... in a proceeding for postconviction relief." Henry v. State, 377 So.2d 692 (Fla. 1977). Henry involved the discrimination issue, but the electrocution issue is equally an "as applied" challenge and therefore should also be cognizible. And, as Mr. Harvard detailed in his Motion to Vacate, the governing constitutional standards evolve, and in this area the evolution has been brisk. In 1974, at the time of

Mr. Harvard's trial, the constitutional tools for constructing this claim did not exist; it was not until 1976 that the constitutional mode of analysis for eighth amendment claims was established.

Mr. Harvard respectfully asks the Court to revisit these issues.

CONCLUSION

Appellant's sentence must be vacated and remanded to the lower court for resentencing and/or this cause must be remanded for an evidentiary hearing on his motion to vacate death sentence.

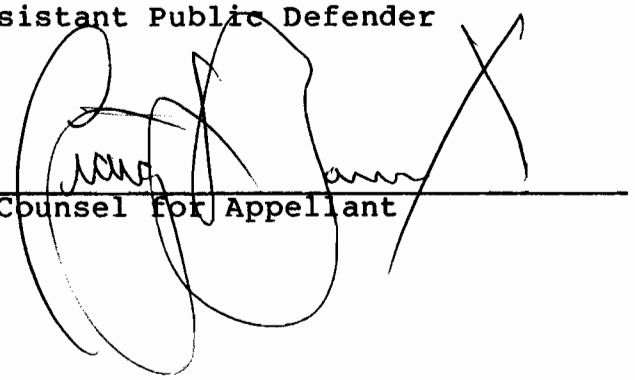
Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150; SunCom 454-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

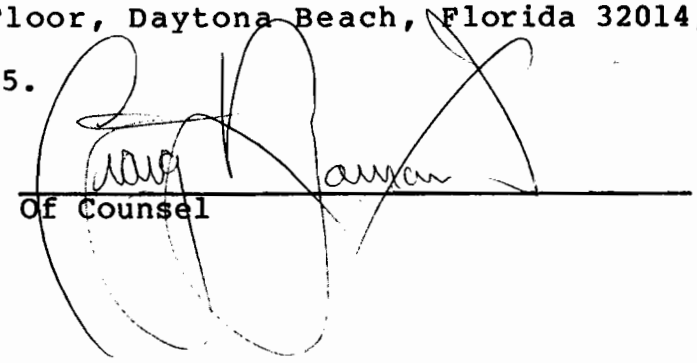
MICHAEL A. MELLO
Assistant Public Defender



BY _____
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing by air courier on Richard Martell, Assistant Attorney General, 125 North Ridgewood, 4th Floor, Daytona Beach, Florida 32014, this 28th day of August, 1985.



Of Counsel