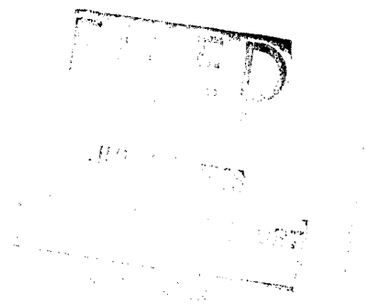
IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE WILLIAMS, Petitioner, vs. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO. 69,085 CAPITAL CASE



PETITION FOR A WRIT OF HABEAS CORPUS
AND FOR EXTRAORDINARY RELIEF

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I. INTRODUCTION

The Petitioner, FREDDIE LEE WILLIAMS, is imprisoned under a sentence of death rendered after a jury recommendation of 8 - 4 for the death penalty. See Williams v. State, 437 So.2d 133 (Fla. 1983) (Overton, Justice, concurring in part, dissenting in part)[1]. This Petition challenges the sentence of death based upon several claims of ineffective assistance of counsel on appeal and under the vehicle of a "direct" habeas petition. The facts are set forth more fully below. Attached to this Petition as an appendix is the Initial Brief of Appellant (Petitioner) in the direct appeal to this Court. References to the Record on Appeal will be made by "R" followed by the appropriate page number. References to the appendix attached hereto will be made by "A" followed by the appropriate page number.

II. JURISDICTION

This Court's jurisdiction derives from the Constitution of the State of Florida, Article V, Section 3(b)(1), (7), and (9), and Rule 9.030(a)(3), Florida Rules of Appellate Procedure, and in Article I, Section 16, of the Constitution of the State of Florida.

A writ of habeas corpus has been justly labeled "the great writ" because of its historic role as a guarantor of liberty. See, generally, Allison v. Baker, 152 Fla. 274, 11 So.2d 578 (1943). For this reason, both the State and the Federal Constitutions explicitly provide for the writ. Florida Constitution, Article V, Section 3(b)(9); Article I, Section 13; United States Constitution, Article I, Section 9, Clause 2. "Essentially, it is a writ of inquiry, an issue to test the reason or grounds of restraint or detention." Allison, 11 So.2d 579. Under our constitutional system, detention which violates the State or Federal Constitution is illegal, and reviewable by writ of habeas corpus. Infringement of the Fourteenth Amendment to the United States Constitution, and Article I, Sections 9 and 14 of the State Constitution, is

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[1]Mr. Justice Overton dissented in Petitioner's case to the imposition of the death penalty after conducting a proportionality review.

therefore properly cognizable in this Court under Article V. Petitioner has applied for an original writ in this Court because of the fundamental nature of the jurisdictional claim. Petitioner presents both "direct" habeas issues in this petition, as well as basing the habeas petition on claims of ineffective assistance of appellate counsel.

Petitioner contends that his appellate attorney was ineffective for failing to raise several issues on direct appeal to this Court when those issues were cognizable, and for inadequately and improperly raising several issues in that direct appeal. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). This Court has jurisdiction over claims of ineffective counsel on appeal. Article V, Section 3(b)(1), and (9), Constitution of the State of Florida, Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), as well as jurisdiction to consider "direct" habeas issues.

III. FACTUAL BASIS FOR RELIEF

The facts presented in the guilt phase of the Petitioner's trial are generally set forth in this Court's opinion in Williams v. State, 437 So.2d 133-134 (Fla. 1983):

> "The victim was Mary Robinson, Williams's long time girlfriend. On the night of the murder, the victim went to her sister's house and there received a number of upsetting telephone calls from Williams. After these calls, the victim and her sister went to Jai-Alai and returned to the Williams-Robinson apartment around 11:00. The sister left; Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were already present.
>
> Earlier that evening, Williams had borrowed a neighbor's handgun, telling him that he was going gambling. He testified that he left the gun on the dresser in a bedroom at home when he went out and that upon his return, the victim staggered towards him, already shot. He called the police and an ambulance. He also testified he did not want the police to find the weapon in his possession since he was on parole; he thus went into the bedroom and took the pistol from the dresser and threw it outside under a bush.
>
> The State's case revolved around long standing domestic arguments between Williams and the victim and in particular Williams's anger over the victim supposed taking a shower that night, a sign he took to mean that the victim was cleaning up after being with a boyfriend." 437 So.2d 133-134.

In the Petitioner's brief in the direct appeal to this Court,[2] Appellate counsel for the Petitioner in discussing the appropriateness of the death penalty, represented to this Court that the Trial Court found two aggravating circumstances and no mitigating circumstances (A-27). This Court in its opinion relied upon that representation by appellate counsel in this Court's opinion affirming the death penalty in discussing Petitioner's argument that the death sentence was proportionally improper in this case. This Court, relying upon Petitioner's appellate counsel's representation of no mitigation circumstances being found in the trial court stated in its opinion:

> "Upon finding two aggravating circumstances and nothing in mitigation, the trial court imposed a sentence of death." 437 So.2d 133 at 134 (Emphasis added)."

This court later in its opinion, again relying on appellate counsel's representation that no mitigating factors were found by the trial court, stated:

> "The trial court correctly found two aggravating circumstances and nothing in mitigation. We have compared this case to similar cases and have concluded the death sentence is appropriate." 437 So.2d 133 at 137 (Emphasis added)."

However, a review of the trial court's oral recitation of findings as to mitigating and aggravating factors at the Petitioner's sentencing hearing (R-857), and a review of the later findings of fact in the written sentencing order entered by the Court (R-1369-1372) demonstrates that the trial court, in fact, did find the existence of the non-statutory mitigating circumstances. The Trial Court merely found that this finding of non-statutory mitigating circumstances did not offset the aggravating circumstances. The trial court stated orally at Petitioner's sentence:

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[2]Petitioner was represented by the Public Defender in the trial court and by court appointed counsel on the direct appeal. Petitioner's attorney herein did not represent him at trial or on the direct appeal to this court.

> "At the penalty phase trial, the Petitioner presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstance." (Emphasis added). (R-859).

The trial court made the same statement in its written findings in support of the death penalty (R-1371-1372). Petitioner's appellate counsel failed to realize that the trial court had found the existence of the non-statutory mitigating circumstances presented by relatives and friends of the Petitioner. Instead of presenting his proportionality argument on the death sentence from the standpoint of an aggravation/mitigation score of 2-0 as he did, the appellate counsel should have formulated his argument from the standpoint of an aggravation/mitigation score of 2-1. Petitioner's appellate counsel approached the entire proportionality argument and the entire death penalty argument in its brief under the erroneous assumption that no mitigating circumstances were found by the trial court.

Additionally, substantial evidence at the Petitioner's trial showed that he had been drinking alcoholic beverages prior to the homicide. This evidence was presented through the testimony of Mr. Peterson (R-249, 262); Rosa Lee Jones (R-318); Arthur Wilson (R-432); and the Petitioner himself (R-632, 633, 635, 638). No blood alcohol test of the Petitioner was taken after the homicide. However, the evidence showed the victim herself was also intoxicated at the time of her death (R-513). Petitioner's appellate counsel in his brief failed to argue anywhere the additional non-statutory mitigating circumstance that the Petitioner had been drinking prior to the homicide.

Prior to the advisory sentencing hearing after the guilt phase of Petitioner's trial, Petitioner's trial counsel objected to the introduction of the information charging a prior assault using a gun on the same victim in the instant case, Mary Robinson (R-763-776). Petitioner objected to the introduction of the

information, arguing that only the record of conviction should be allowed (R-776). The defense attorney argued that by allowing the information into evidence, the jury would be aware of a prior alleged attack on the same victim which would constitute an improper non-statutory aggravating circumstance being injected into the sentencing jury's determination (R-763). Defense counsel argued:

> "But the problem I have is that Rick [the prosecutor] intends to introduce the information in one of the crimes or in both of the crimes. One of the crimes was against Mary Robinson, and that injects a totally new and different element that is not contemplated in the aggravating circumstances. And the rule or the statute specifically states that the aggravating circumstances shall be limited to the following. And I think you are bringing in something entirely different when you talk about prior acts of violence against the deceased." (R-763).

The defense also objected to the introduction of the information charging the defendant with a prior assault with a firearm on a person named Winman Esters (R-762-777). The defense offered to stipulate to the fact that the Petitioner was convicted of two aggravated assaults, merely eliminating the names of the victims in those two assaults (R-763-764). The defense counsel strenuously argued that the jury would then consider repetitive prior attacks on this particular victim and women in general as non-statutory aggravating factors. The defense counsel argued:

> "But for the State to be able to introduce that [the Informations themselves] and for the jury to go back and say, 'hey, he's hurt this girl before', it is not one of the listed aggravating circumstances, and is prejudicial and inflammatory. The defense objects to any of the circumstances surrounding those two prior offenses coming into evidence." (R-763-766).

The Petitioner's objections to the introduction of the two prior informations, despite defense counsel's offer to stipulate to the two prior convictions themselves, was overruled by the trial court (R-769). These matters were not raised as issues on appeal by Petitioner's appellate counsel although properly perserved. The issues were not even mentioned or referred to by Petitioner's appellate counsel.

Significantly, the prosecutor represented to the court and to defense counsel that, although he would introduce the informations charging the Petitioner with aggravated assaults on Mary Robinson and Winman Esters, he would not bring in testimony as to the facts surrounding those two prior incidents. The prosecutor represented to the Court:

> "I could, you know, bring in testimony as to how he shot Winman Esters in the neck, which happens to be very similar to our shooting here, except Winman survived; and how he shot this girl before when she broke up with him, and then he hunted her down and shot her. But I don't intend to get into all that. Basically, I think I just need to show -- all I intend to show is that on such and such a date he was charged in information number such and such with the crime of aggravated assault against one Winman Esters, and on such and such a date he was convicted of that; and the same thing showing that he was charged with aggravated assault on Mary Elizabeth Robinson and convicted of it." (Emphasis added) (R-786).

The Trial Court did admit into evidence the two informations charging the prior assaults against Mary Robinson and Winman Esters against the Petitioner over the continued objections of trial defense counsel (R-779-782).

Despite the prosecutor's representation that he would present no further evidence other than the two informations themselves concerning the prior assaults, he questioned the Petitioner in detail on cross-examination during the sentencing phase concerning the prior incident involving Mary Robinson (R-804-805).

After the jury had been deliberating just 13 minutes, it came back with a question:

> "Was Winman Esters [the other victim named in a prior assault conviction of Petitioner] male or female? Was he or she shot?" (R-841-842).

During the prosecutor's argument to the jury during the sentencing phase, the prosecutor argued to the jury that "this particular offense involves the use of a firearm and the same victim that he had been convicted of shooting once before." (R-819). The prosecutor also argued that the Petitioner had a tendency to shoot people (R-819), inferring he would shoot people

and women again if he did not receive the death penalty. Other than the Informations and judgments and sentences, the prosecutor presented no other evidence of the facts surrounding the prior assault.

During the sentencing phase, the prosecutor also argued that the Petitioner was himself a "cold, calculated type of person to whom this aggravating circumstance [that of a cold, calculated, premeditated manner of murder] should apply" (R-823).

Prior to argument and presentation of evidence during the sentencing phase, defense counsel moved to prohibit the State from arguing to the jury the existence of the statutory aggravating circumstances that the offense was "especially wicked, evil, atrocious or cruel" (R-806), or from arguing to the jury that the offense was committed in a "cold, calculated, premeditated manner" (R-810). Defense counsel argued that as a matter of law the facts simply did not support any argument of those two aggravating circumstances to the jury, and that to allow such argument of unfounded aggravating circumstances could sway jurors to vote for the death penalty basing their vote on being mislead into believing that aggravating circumstances were proven when they were not, under the law. Defense counsel stated:

> "However, it is equally true that I have no way of knowing what they [the jury] are going to consider back there in the jury room, and it is very possible that one or two may be on the fence and they would decide that since the State was able to urge that this was especially heinous, atrocious or cruel, that they would recommend the death penalty; where as if the court ruled that it was not, according to the law, a crime that qualified as being especially heinous, atrocious or cruel, the State would not be able to argue it. And it could completely change the nature of their recommendation." (R-809).

Defense argued that since there was no evidence in the record to support argument of these two statutory aggravating circumstances that it would be improper for the prosecutor to be able to argue their existence to the jury as a matter of law to mislead the jury in making the advisory recommendation (R-771-773; 806-814). Defense counsel's objections were overruled by the court (R-814).

Pursuant to the trial court's prior ruling, the prosecutor argued over defense objection that the aggravating circumstance that the offense was "atrocious, heinous or cruel" existed (R-821), and that the offense was committed in a "cold, calculated premeditated manner" (R-821-822).

This Court pointed out in its opinion in the Petitioner's direct appeal that his conviction was based entirely on circumstantial evidence. 437 So.2d 133 at 134-135. Significantly, both during the guilt and innocence phase of his trial and later during the sentencing phase when Mr. Williams testified, he adamantly denied he had committed the killing stating that someone else must have. In fact, Petitioner himself called the police to report he had found the victim shot, and Petitioner was not arrested for the killing until several days later. Petitioner showed concern for the victim's welfare when the police arrived. During the voir dire, the prosecutor told the jury evidence of guilt was not at issue in the penalty phase (R-98). During Petitioner's testimony at the penalty phase, his defense attorney (in the jury's presence) told Petitioner not to say he was innocent because that issue had already been decided (R-803). The trial court, in discussing the evidence during the sentencing phase, commented:

> "The defendant testified he went into the apartment and found Mary Elizabeth Robinson dead. He then telephoned Ada Mae Robinson. However, there is very strong evidence showing that the defendant committed the murder." (R-860).

Appellate counsel failed to argue to this court that residual possible, albeit not necessarily reasonable, doubt concerning Petitioner's guilt should preclude the appropriateness of the death penalty, especially in a circumstantial rather than direct evidence situation as in the instant case.

Petitioner's appellate counsel did not raise any of the above issues as grounds for reversal of the Petitioner's death

sentence in the direct appeal to this court.

IV. NATURE OF RELIEF SOUGHT

Mr. Williams seeks immediate relief in the form of reversal of his death sentence and imposition of a life sentence with the mandatory 25 year incarceration sentence without eligibility of parole, or the Court's order granting a new trial, or a new appeal, or a new sentencing hearing.

V. BASIS FOR RELIEF

A. THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH SENTENCE ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY HIS APPELLATE COUNSEL IN AFFIRMATIVELY REPRESENTING AND ARGUING IN PETITIONER'S BRIEFS THAT NO MITIGATING CIRCUMSTANCES WERE FOUND BY THE TRIAL COURT TO WEIGH AGAINST THE FINDING OF TWO AGGRAVATING FACTORS WHEN, IN FACT, THE TRIAL COURT FOUND THE EXISTENCE OF ONE MITIGATING CIRCUMSTANCE, RESULTING IN AN IMPROPER AND INADEQUATE PROPORTIONALITY ARGUMENT TO THIS COURT.

The failure of appellate counsel to render effective assistance of counsel on direct appeal is a firmly established vehicle for habeas corpus relief in this court. See Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984); Downs v. Wainwright, 476 So.2d 654 (Fla. 1985). The criteria for proving ineffective assistance of appellate counsel is:

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

Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). See also Evitts v. Lucey, 105 S.Ct. 830 (1985).

During Petitioner's direct appeal to this court, see Williams v. State, 437 So.2d 133 (Fla. 1983), his appellate counsel incorrectly represented to this Court that the trial court found two aggravating circumstances but no mitigating circumstances. See Petitioner's brief, page 27 (A-37). Appellate counsel's whole

proportionality argument was geared around the fact that no mitigating circumstances were found and the appellate argument was so presented in the brief in that posture. This Court, relying on appellate counsel's representation, stated in its opinion upholding the death penalty the significance that no mitigating circumstances were found. This Court stated:

> "The trial court correctly found two aggravating circumstances and nothing in mitigation." (Emphasis added). 437 So.2d 133 (Fla. 1983).

Furthermore, this Court in comparing Mr. Williams's case to other cases under proportionality review stated:

> "Likewise, Williams cites Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), as examples where this court has reduced a sentence of death to one of life even after the jury recommended death. These cases are inapposite, however. In Blair, the trial court improperly included several aggravating factors; since there was a mitigating factor, this court vacated the death sentence. In Kampff all of the trial court's findings of aggravating factors were found to be in error; since there were at least two mitigating factors the sentence of death was improper. Finally, in Halliwell, the sole aggravating circumstance was found not to apply; the presence of numerous mitigating factors warranted the reduction of the sentence from death to life imprisonment. While all three of these cases involved a domestic dispute, as does the instant case, the rationale for the overturning of the death sentence in each was error in the aggravation/mitigation equation, and not the fact of the domestic dispute...." (Emphasis added). 437 So.2d 133 at 137.

This court in distinguishing the instant case from the decisions in Blair v. State, supra, Kampff v. State, supra, and Halliwell v. State, supra, found it significant that no mitigating factors were found to exist. However, it is false that the trial court did not find the existence of one mitigating factor. In fact, the trial court did find the existence of the catch-all non-statutory mitigating factor of any other relevant evidence pertaining to the character of the Petitioner. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Because of appellate counsel's blatant ineffectiveness and sloppy reading of the record on appeal, he failed to present this extremely important factor for this court's consideration in its

proportionality review. This is especially significant in light of Justice Overton's dissent in Mr. Williams's case where he found, even based upon the incorrect aggravating/mitigating score that a proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for 25 years. See 437 So.2d 133 at 137-138 (Overton, Justice, concurring in part, dissenting in part).

In the trial court's written findings of fact in sentencing order, it stated:

> "At the penalty phase trial, the defendant presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstance." (R-1371-1372). (Emphasis added).

Additionally, the trial court in its written pronouncement of sentence of death also made reference to the finding of the non-statutory mitigating circumstance, merely holding that said circumstance did not offset the aggravating circumstances the trial court was finding (R-859).

The first component to be satisfied in a claim of ineffective assistance of counsel has been met in that the particular act or omission of the lawyer has been shown to be outside the broad range of reasonably competent performance under prevailing professional standards. It is clear that a lawyer, especially in a death penalty case (as well as all other cases), at a minimum must carefully read the findings relating to aggravating and mitigating circumstances. Appellate counsel must be careful to recognize and note punctuation, grammar and sentence structure in reading and interpreting the Record on Appeal, especially in a case such as the instant one where appellate counsel was different than trial counsel. (Cf. State v. Ross, 447 So.2d 1380 (Fla. 4th DCA 1984) citing the well settled rule of statutory construction requiring that a statute's terms be construed according to their plain meaning). Here, it is clear that appellate counsel was extremely sloppy and derelict in this duty. Appellate counsel

obviously merely gleamed over the findings as to aggravating and mitigating circumstances and, to the great detriment of the Petitioner, represented to this court in the briefs that no mitigating circumstances were found when, in fact, the non-statutory mitigating circumstance was found. Appellate counsel clearly should have been on notice of this. As stated above, it is noteworthy that appellate counsel in the instant case was not the trial counsel. Appellate counsel must be relied upon to carefully read each and every word of the transcript of the record in a death penalty case, especially those portions relating to the imposition of the death penalty. A careful reading of the trial court's written and oral pronouncement concerning non-statutory mitigating circumstances clearly discloses that the trial court found the existence of that mitigating circumstance. However, appellate counsel, because of ineffectiveness and failure to adequately review the record, merely assumed incorrectly to the tremendous detriment and prejudice of the petitioner that no such finding was made. The first prong of the ineffective assistance of appellate counsel requirement has clearly been met.

The second prong of the criteria for proving ineffective assistance of counsel is that the deficiency of that performance compromised the appellate process to such a degree as to undermine a confidence in the fairness and correctness of the appellate result. Wilson v. Wainwright, supra. This prong has also been met without question.

This Honorable Court in the majority opinion upholding the death penalty distinguished three cases which are otherwise indistinguishable from the instant case based on an assumption that no mitigating circumstances were found by the trial court: Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); and Halliwell v. State, 323 So.2d 557 (Fla. 1975). This Court distinguished those three cases for Petitioner's merely because there was a finding of at least one mitigating factor. As

this Honorable Court can now see, in all fairness to the Petitioner, the trial court did find the existence of one mitigating factor in the instant case, the non-statutory catch-all mitigating circumstance. This renders the Blair, Kampff, and Halliwell cases now indistinguishable from the instant case. Again, Justice Overton in his dissent in Petitioner's case even without even considering this non-statutory mitigating factor found those three cases to require a reduction in Petitioner's sentence to life imprisonment under a proportionality review.

The importance of effective assistance of appellate counsel in arguing the inappropriateness of a death sentence in a particular case is no better shown than in the trilogy of cases involving former Florida death row inmate Elwood Barclay. Barclay's first death sentence was upheld by this Court in Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). The following year this court remanded for the trial court to conduct a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978). After the Gardner hearing, the trial court again sentenced Barclay to death. This court again upheld the death sentence, Barclay v. State, 411 So.2d 1310 (Fla. 1981), which the United States Supreme Court also affirmed in Barclay v. Florida, 103 S.Ct. 3418 (1983). Following the United State Supreme Court's affirmance, Barclay filed a petition for habeas corpus with this court. Shortly thereafter, the Governor signed a death warrant on him. After considering the petition, this court held that Barclay's appellate counsel had a conflict of interest in representing both Barclay and a co-defendant and that he had rendered ineffective assistance of appellate counsel. This court stayed Barclay's execution and granted Barclay a new appeal. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984). Despite the fact that this court had on two prior occasions upheld Barclay's death sentence, after he finally received effective assistance of appellate counsel on appeal

concerning the appropriateness of the death penalty in his case, this court reversed and reduced that sentence to one of life imprisonment with no eligibility for parole for a minimum of 25 years. See Barclay v. State, 10 F.L.W. 299 (Fla. June 7, 1985).

It is clear that in conducting a proportionality review in light of the existence of the one non-statutory mitigating factor in Petitioner's case now clearly requires a reversal of the Petitioner's death sentence comparing Petitioner's case to Blair, Kampff, and Halliwell. The ineffectiveness of Mr. Williams's appellate counsel obviously so effected the fairness and reliability of the proceeding that confidence in the outcome was undermined. See Strickland v. Washington, 466 U.S 668 (1984). Failure of appellate counsel to raise this issue infected the entire approach in which he made his argument on this issue. The prejudice component of the ineffective assistance of counsel claim has clearly been met.

Furthermore, a comparison of Petitioner's case with a subsequent case, Ross v. State, 474 So.2d 1170 (Fla. 1985), again shows the certainty of the inappropriateness of the death penalty in the instant case. In Ross, the appellant was convicted of the murder of his wife who was killed by a combination of strangulation and drowning. Like Mr. Williams in the instant case, Ross denied the killing. Furthermore, like the instant case, the jury recommended the death sentence and the trial court imposed the death sentence. The appellate court upheld the trial court's finding that the homicide was especially heinous, atrocious or cruel, but found that the trial court improperly failed to find mitigating circumstances. It is significant that this court found the existence of the mitigating circumstance of alcohol abuse notwithstanding that Ross, himself, stated that he was "cold sober" on the night of the murder (474 So.2d 1170 at 1174). Nevertheless, this Court reversed Ross's death sentence and imposed the sentence of life imprisonment.

In the instant case, the only two aggravating circumstances were "status" circumstances not relating to the crime itself. In Ross, the aggravating circumstance was, in fact, related to the commission of the offense itself. Furthermore, in the instant case, although again not argued by appellate counsel, it was obvious that the Petitioner as well as the victim had been drinking alcoholic beverages at or around the time of the homicide. In fact, the victim in the instant case had a .155 alcohol reading indicating she was under the influence of alcohol (R-513). Another domestic murder case wherein this Court reversed the death sentence notwithstanding making a finding that the aggravating circumstances outweighed the mitigating circumstances that is much more aggravated than the instant case is Herzog v. State, 439 So.2d 1372 (Fla. 1983). Of course, the Ross case and the Herzog case were rendered after the Petitioner's case was decided. However, those two cases are still relevant in an analysis of the appropriateness of the Petitioner's death penalty, the ultimate penalty.

Since appellate counsel was obviously ineffective and since this ineffectiveness resulted in prejudice to the certainty and reliability of the appellate process, Petitioner would request that this Court reduce his sentence to life imprisonment with no chance of parole for a minimum of 25 years, or grant him a new sentencing hearing, or grant him a new appeal, or grant him a new trial.

B) THAT APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ARGUE OR RAISE IN THE DIRECT APPEAL AS TRIAL COURT ERRORS: 1) IMPROPER PROSECUTORIAL ARGUMENT SUGGESTING THAT IF THE JURY DID NOT IMPOSE THE DEATH SENTENCE, THE PETITIONER WOULD SHOOT SOMEONE AGAIN; 2) THAT THE PETITIONER HAD A REPUTATION FOR SHOOTING PEOPLE, ESPECIALLY WOMEN, INJECTING A NON-STATUTORY AGGRAVATING FACTOR INTO THE JURY'S AND JUDGE'S SENTENCING CONSIDERATION; 3) IMPROPER PROSECUTORIAL ARGUMENT THAT THE JURY COULD FIND THE EXISTENCE OF THE STATUTORY AGGRAVATING FACTORS OF A COLD, CALCULATED AND

PREMEDITATED MANNER OF MURDER BY FINDING THAT THE PETITIONER HIMSELF WAS A "COLD, CALCULATED TYPE OF PERSON TO WHOM THIS AGGRAVATING CIRCUMSTANCE SHOULD APPLY"; 4) IN ADMITTING THE TWO INFORMATIONS CHARGING PRIOR AGGRAVATED ASSAULTS LISTING THE NAMES OF THE SAME VICTIM THE PETITIONER WAS CONVICTED OF KILLING IN THE INSTANT CASE, MARY ROBINSON, AS WELL AS THE NAME OF ANOTHER PERSON NOT INVOLVED IN THE INSTANT CASE, WINMAN ESTERS.

Prior to the advisory sentencing hearing after the guilt phase of Petitioner's trial, Petitioner's trial counsel objected to the introduction of the information charging a prior assault using a gun on the same victim in the instant case, Mary Robinson (R-763-776), as well as objecting to the introduction of the information charging the Petitioner with the prior assault on a person named Winman Esters (R-762-777). The Petitioner argued that by injecting the names of these two victims into the jury's deliberations in the sentencing phase would inject a non-statutory aggravating circumstance not contemplated by the legislature (R-763-766). The defense counsel specifically stated:

> "But for the State to be able to introduce that [the Informations themselves] and for the jury to go back and say, 'hey, he's hurt this girl before', it is not one of the listed aggravating circumstances, and is prejudicial and inflammatory. The defense objects to any of the circumstances surrounding those two prior offenses coming into evidence." (R-763-766).

Furthermore, despite the prosecutor's representation to the trial court that he would not bring out any facts relating to the two prior assaults on Mary Robinson and Winman Esters, the prosecutor nevertheless cross-examined the Petitioner in the sentencing phase as to the prior assault on Mary Robinson (R-786; 804-805).

During the prosecutor's argument to the jury during the sentencing phase, he stated to the jury "this particular offense involves the use of a firearm and the same victim that he had been convicted of shooting once before" (R-819). The prosecutor also argued that the Petitioner had a tendency to shoot people (R-819),

inferring he would shoot people, specifically women, again if he did not receive the death penalty.

The jury was obviously very strongly swayed by the introduction of these non-statutory aggravating circumstances by the trial court and the prosecutor. After the jury had deliberated only 13 minutes, it came back with its only question:

> "Was Winman Esters [the person mentioned in one of the aggravated assault convictions] male or female? Was he or she shot?" (R-841-842).

The jury was obviously misled by the prosecutor in the prosecutor's argument that they could consider as an aggravating circumstance that the Petitioner would shoot someone again, especially women, if he were not given the death penalty, as well as the argument that the Petitioner had a reputation of shooting people, especially women. This misleading argument was further aggravated by the prosecutor's interjection of facts not supported in the record through his leading cross-examination of the Petitioner during the sentencing phase after his representation to the court that he would not elicit facts concerning these incidents.

Petitioner's trial counsel made objections to these matters and preserved same for appellate review. Nevertheless, the Petitioner's appellate counsel failed to raise these issues in his direct appeal to this court.

This court has in several instances in the past held that in evaluating the propriety, reliability and legal efficiency of the sentencing jury's recommendation, it would consider whether or not the sentencing jury was somehow "misled" by closing argument of counsel. For example, in Francis v. State, 473 So.2d 672 (Fla. 1985), this court, in effect, nullified the legal propriety of the sentencing jury's recommendation of life imprisonment finding that defense counsel in that case had "misled" the sentencing jury during his closing argument by giving a sermon appealing to Christian sentiments only a week from Easter.

The trial court during the sentencing phase, was allowed to improperly argue that the Petitioner was himself a "cold, calculated type of person to whom this aggravating circumstance [that of a "cold, calculated, premeditated manner of murder] should apply" (R-823). This is a potently improper argument that improperly misled the jury, and appellate counsel was ineffective in failing to raise this issue on appeal. This statutory aggravating factor applies to the commission of the offense itself and not to a general characteristic of a defendant. McCray v. State, 416 So.2d 804 (Fla. 1982). To be allowed to argue the existence of that aggravating factor by reference to a person's supposed general trait is improper and unsupported in the law. This error, not raised by appellate counsel, prejudiced the Petitioner.

By allowing introduction in this case of the two informations and by allowing the prosecutor's references to the prior killing and the prosecutor's inference that the Petitioner would shoot someone again if he did not receive the death penalty, the prosecutor engaged in improper influence on the jury that requires either a new sentencing hearing before a new jury or imposition of a life sentence with no chance of parole for 25 years. The prosecutor, in effect, predicted that the Petitioner would shoot someone again if he did not receive the death penalty. This argument has been condemned in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 104 S.Ct. 1430 (1984). See also Harris v. State, 438 So.2d 787 (Fla. 1983), cert. denied, 104 S.Ct. 2181 (1984). The prosecutor herein argued outside of the evidence presented, especially since no evidence outside of the mere informations and judgment and sentence were introduced.

Florida law clearly limits aggravating circumstances to those enumerated in the statute. Thus, "the specified statutory circumstances are exclusive; no others may be used for that purpose". Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). The fact

that the trial court allowed the jury to consider these non-statutory aggravating factors in its deliberations was prejudicial error. Furthermore, trial counsel preserved these matters for appellate review. Elledge v. State, 346 So.2d 998 (Fla. 1977), is not dispositive of this issue because in that case the appellant made no objection to the evidence concerning prior incidents. Furthermore, in Elledge, unlike the instant case, there was competent evidence in the form of testimony by a person who had knowledge of the prior convictions of Elledge. In the instant case, the prosecutor was allowed to invite the jury to speculate as to the factual scenario of those incidents, without any evidence whatsoever other than the naked informations and judgments and convictions of the circumstances of the prior aggravated assaults. Furthermore, while the Petitioner was charged by information with assault with intent to commit killings, he was only convicted in both of those cases of simple aggravated assault without any mention of a firearm being involved in either case. The prosecutor inflamed the jury by improper comments without any factual basis in the record to support those arguments.

As a related matter, had appellate counsel raised this issue, this court would have had to consider same in conducting its proportionality argument in determining that the jury was misled by the prosecutor in arriving at its eight to four recommendation of the death sentence by being able to improperly present argument and unsupported evidence concerning these non-statutory mitigating factors.

Appellate counsel acted outside the range of reasonably competent performance under prevailing professional standards by failing to raise these matters in the direct appeal. Viewed both alone and in conjunction with the other failings of appellate counsel in presenting errors to this Court at the same time of making argument concerning the proportionality claim so tainted the fairness and reliability of that proceeding that confidence in the

outcome is undermined. Strickland v. Washington, 466 U.S. 668 (1984); Downs v. Wainwright, 476 So.2d 654 (Fla. 1985). For this reason, habeas corpus relief should be granted.

C) THAT HABEAS CORPUS RELIEF SHOULD BE GRANTED ON THE BASIS: 1) THAT THIS COURT SHOULD RECONSIDER WHETHER RESIDUAL "UNREASONABLE BUT POSSIBLE" DOUBT AS TO GUILT SHOULD BE CONSIDERED AS PART OF THIS COURT'S REVIEW OF THE APPROPRIATENESS OF THE DEATH PENALTY IN LIGHT OF LOCKHART V. MCCREE, 106 S.Ct. 1758 (1986), IN A CIRCUMSTANTIAL EVIDENCE CASE SUCH AS THE INSTANT CASE; AND 2) THAT APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE AND ARGUE AS AN APPELLATE ISSUE THE CONSIDERATION OF RESIDUAL "UNREASONABLE BUT POSSIBLE" DOUBT AS TO GUILT AS ONE OF THE FACETS OF THE APPROPRIATENESS OF THE DEATH PENALTY.

Unlike many death penalty cases, Petitioner's conviction in the instant case was based entirely on circumstantial evidence. State v. Williams, 437 So.2d 133 at 134-135. Significantly, both during the guilt and innocence phase of his trial and later during the sentencing phase when Petitioner testified, he adamantly denied he had committed the killing stating that someone else committed the homicide. In fact, Petitioner himself called the police to report he had found the victim shot, and Petitioner was not arrested for the killing until several days later. The victim and the Petitioner had lived together on and off for about 18 years in a familial relationship. Despite the fact that he was on parole, he remained at the scene. In fact, he showed concern for the victim's welfare when the police arrived at the scene.

During the voir dire, the prosecutor told the jury that evidence of guilt was not at issue in the penalty phase (R-98). During Petitioner's testimony at the penalty phase, his defense attorney (in the jury's presence) told Petitioner not to say he was innocent because that issue had already been decided (R-803). The trial court, in discussing evidence during the sentencing phase, commented that the evidence was "very strong" showing that the

Petitioner committed the murder. The trial court did not, as it could not, state that the evidence "conclusively" showed the Petitioner committed the killing. Nevertheless, this was a circumstantial evidence case.

The real danger in our society of convictions which are based on circumstantial evidence is that the convicted person may, in fact, be innocent, but that the circumstances showing innocence are not "reasonable". An "unreasonable hypothesis" of actual fact could and, in fact, does occur in everyday life. Although it may not be reasonable, it is certainly "possible" that someone other than the Petitioner killed Mary Robinson in the instant case. Petitioner would strongly suggest to this Court that in cases such as the instant case wherein guilt is proven by circumstantial evidence alone, this Court, the trial court, and the sentencing jury should be able to consider the issue of residual doubt as a non-statutory mitigating circumstance at least in determining what sentence is appropriate. A person could wrongfully be convicted and condemned in a circumstantial evidence case.

Petitioner would acknowledge that the position of the Florida Supreme Court in this matter has been to preclude consideration of possible but unreasonable doubt as a consideration in analyzing the appropriateness of the death penalty. This Court stated in Buford v. State, 403 So.2d 943, 954 (Fla. 1981):

> "A convicted defendant cannot be 'a little bit guilty'. It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy."

That position was reaffirmed in Burr v. State, 466 So.2d 1051 (1985). However, it is respectfully submitted that while a jury may find that they are 95% certain, especially in a circumstantial evidence case, of a defendant's guilt, there may be some residual doubt that would justify the sentencing jury, the trial court, or this Court in not imposing the ultimate, irrevocable penalty of death. Petitioner would respectfully submit that it is not a

matter of a defendant being "a little bit guilty". It is rather a matter of the jury and the court being allowed to recognize the frailty and possibility of error of human beings. Even if a jury is 99% certain that a person is guilty and the only 1% residual doubt is caused by unreasonable but possible doubt about guilt, this is a justification for not imposing the ultimate penalty.

State prosecutors, during voir dire and argument to juries in criminal cases, routinely argue that they should be held to no higher burden of proof than only "reasonable doubt". Prosecutors tell the jury that a "possible" but unreasonable doubt is not adequate to acquit a criminal defendant.

This Court should reconsider its prior ruling on this matter in Buford and Burr in light of the Supreme Court of the United States's decision in Lockhart v. McCree, 106 S.Ct. 1758, 90 L.Ed.2d 137 (U.S. 1986), decided on May 5, 1986. In that case, the majority noted the legitimacy of the consideration by the jury of residual doubts about a defendant's guilt in considering the appropriateness of the death penalty:

> "Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase. The dissenting opinion in the Court of Appeals also adverted to this interest:
>
> '[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or 'whimsical' doubts... about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility...to some degree would eliminate the influence of such doubts.' 758 F.2d, at 247-248 (J. Gibson, J., dissenting) (citations omitted).
>
> JUSTICE MARSHALL'S dissent points out that some States which adhere to the unitary jury system do not allow the defendant to argue 'residual doubts' to the jury at sentencing. But while this may justify skepticism as to the extent to which such States are willing to go to allow defendants to capitalize on 'residual doubts,' it does not wholly vitiate the claimed interest...." (Emphasis added).

The right to present mitigating evidence is limited only by evidentiary notions of relevance. Lockett, 438 U.S. at 604

n.12; Stanley . Zant, 697 F.2d 955, 960 (11th Cir. 1983), cert. denied, 104 S.Ct. 2667 (1984). The Court in Lockett did not specify, however, whether the applicable standard of relevancy would be the local relevancy rule prevailing in the jurisdiction in which the capital case is tried or whether Lockett relevancy is a Federal standard drawn from the Eighth Amendment.

The issue of how to define relevancy was resolved in Green v. Georgia, 442 U.S. 95 (1979), which held that the due process clause bars trial judges from applying local evidentiary rules to exclude the Lockett-type mitigating evidence in capital cases. The trial court in Green had applied Georgia's hearsay rule to exclude a hearsay statement. The Supreme Court held, as a constitutional matter, that the State was required to allow the statement into evidence. Quoting from Chambers v. Mississippi, 410 U.S. 284, 302 (1972), the Court reasoned that "in these unique circumstances the hearsay rule may not be applied mechanistically to defeat the ends of justice". 442 U.S. at 97. Thus, the relevancy standard for mitigating evidence at the penalty phase in a capital trial derives from the Eighth Amendment.

The notion that doubt about guilt is a relevant factor to be considered in mitigation at the penalty phase of a capital trial is not novel. One of the most fearsome and awesome aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a belief that stems from common sense and long-standing fundamental notions of justice. Justice Marshall, dissenting from the denial of certiorari in a Florida capital case, has reasoned:

> "Implicit in the Florida Supreme Court's decision is an assumption about the equation of finality and truth that transgresses law and intuition alike. For our legal system is no pretender to absolute truth. in two important ways, the fact finding process falls short of that ideal. First, the beacon of the truth-seeking process in criminal cases is not absolute certainty, but

the 'reasonable doubt' standard, which has eluded definition by the courts for centuries. See 9 J. Wigmore, Evidence §2497 (Chadbourn rev. 1981). Attempts at such a definition typically, and often erroneously, include phrases such as 'significant doubt, not trivial doubt,' Holland v. United States, 209 F.2d 516, 522 (CA10), aff'd 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), and 'substantial real doubt," Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). Although a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the 'reasonable doubt' standard merely attempts 'to exclude as nearly as possible the likelihood of erroneous judgment.' Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979). Hence, 'beyond a reasonable doubt' cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds.

Moreover, no instruction can prevent the possibility of human error. '[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened.' In re: Winship, 397 U.S. 358, 370, 90 S.Ct. 1608, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Accordingly, the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous. Every jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence. If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness. Thus, the 'reasonable doubt' foundation of the adversary method attains neither certainty on the part of the fact finders nor infallibility; and accommodations to that failing are well established in our society. See also Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

. . .

I have written before to describe the subjective personal horror that must face a juror who contemplates sentencing a man to die without being sure of his guilt. Heiney v. Florida, supra, ___ U.S., at ____, 105 S.Ct. at 306, ___. But there is an additional point to be made: that permitting the consideration of lingering doubt at sentencing is objectively a rational and consistent element of our system of criminal justice. Like post-conviction remedies in light of new evidence, the conscience of the jury serves to protect against irremediable errors arising in that gray area known as 'reasonable doubt'. And when the stakes are life and death, the Constitution forbids the closure of that safety valve, as surely as it forbids the preclusion of other considerations suggesting that a convicted defendant should not die. See Eddings v Oklahoma, supra.

The defendant who has been condemned to die will not reap the benefits of post-conviction remedies designed to compensate for jury fallibility when the basis for such

> relief arises long after conviction. His only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty. The State of Florida would wrest from the jurors their only way of expressing their lingering doubts about their verdict, and from the defendant his only hope of vindication."

Burr v. Florida, 106 S.Ct. 201, 202-203 (1985) (Marshall, J., dissenting from denial of certiorari).

Several Federal courts of appeal, including the Eleventh Circuit, have recognized doubt about guilt as relevance and a valid mitigating factor. In Smith (John E.) v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), the court reasoned that:

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real." 660 F.2d at 580 (Emphasis in original).

Again, in Smith (Dennis) v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), the court reiterated that "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.'"

Similarly, in Chaney v. Brown, 730 F.2d 1334 (10th Cir.), cert. denied, 105 S.Ct 601 (1984), the court concluded that the prosecutor's withholding of evidence in a capital case was a violation of Brady v. Maryland, 373 U.S. 83 (1963), because such evidence could have affected the jury's imposition of the death penalty insofar as:

> "The evidence withheld here is mitigating evidence because it relates to the circumstances of the offense as a whole, and tends to support inferences...that Chaney may not have personally killed the victims."

Several State courts of last resort have also recognized doubt about guilt to be a relevant and valid mitigating factor. For example, in Blankenship v. State, 308 S.E.2d 369 (Ga. 1983), the issue before the Georgia Supreme Court was the scope of evidence admissible in mitigation and whether limitations that the

trial court had placed on mitigating evidence were permissible. The court dealt only with the exclusion of evidence of doubt about guilt at the sentencing phase, finding this dispositive of the case. The defense attorney had attempted to introduce doubt about guilt evidence: blood under the rape-murder victim's fingernails that was neither her's nor the defendant's, and Negroid hair in the victim's pubic hair -- the defendant was white. The Georgia Supreme Court decided first that as a matter of State law the evidence of doubt about guilt had to be admitted, and then noted that "[i]ndeed, a reading of the pronouncements of the United States Supreme Court appears to impart to [this result] a Constitutional tenure." Id. at 371. See also Alderman v. State, 327 S.E.2d 169 (Ga. 1985).

In People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal.Rptr. 605 (1964), the California Supreme Court accepted the proposition that "a jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving [a] defendant's guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty." 390 P.2d at 387-88. And in People v. District Court, 596 P.2d 31 (Colo. 1978), the Colorado Supreme Court held that Colorado's death penalty statute was unconstitutional, in part because "if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all." Id. at 35.

The Model Penal Code regards residual doubt about guilt as a mitigating factor of such power that its presence does not simply serve to add to the balancing test of aggravating and mitigating factors, but rather serves to exclude, as a matter of law, imposition of a death sentence:

> "Death Sentence Excluded: When a defendant is found guilty of murder, the court shall impose sentence for a felony of the first degree [i.e. a non-capital offense] if it is satisfied that:
> '(f) although the evidence suffices to

> sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.'" ALI, Model Penal Code §210.6(1) (official draft, 1980) (emphasis added).

The comments to this section say:

> "This provision is an accommodation to the irrevocability of the capital sanction. Where doubt about guilt remains, the opportunity to reverse a conviction on the basis of the new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." ALI, Model Penal Code §210.6(1), comment 5 (revised comments, 1980).

Though the Florida Supreme Court holds doubt about guilt to be irrelevant as a matter of law, lingering doubt about guilt appears to have figured in the decisions of the juries in at least two Florida capital cases: Jaramillo v. State, 417 So.2d 257 (Fla. 1982), and Dobbert v. Florida, 432 U.S. 282 (1987).

Annibal Jaramillo was convicted in Dade County in 1981 of a particularly vicious double murder. Despite the brutality of the crimes, Jaramillo's death-qualified jury was unanimous in its recommendation of life. See Brief of Petitioner, appendix B, at 3b, Spaziano v. Florida, 104 S.Ct. 3145 (1984). Nonetheless, the trial judge disregarded this recommendation and imposed two consecutive sentences of death. After Jaramillo had spent fifteen months on death row, the Florida Supreme Court voted six to one that the State's evidence was legally insufficient to support the guilty verdicts. Jaramillo had been convicted solely on the basis of circumstantial evidence. Rather than order a new trial, however, the Supreme Court ordered his immediate release. See 417 So.2d at 258. See also Katzenbach, Colombian convicted of 2 murders freed, Miami Herald, July 19, 1982, at 1-D, col. 3. It is extremely plausible that the jury entertained doubts about Jaramillo's guilt and thus, as a safeguard, refused to impose death for a savage double murder.

A related issue arose in the Dobbert case Dobbert was convicted of, and executed for, first degree murder of his daughter. At Dobbert's trial, much evidence was introduced concerning Dobbert's violence towards his children. The conviction of first

degree murder, however rested solely on the testimony of his 13 year old son. Dobbert's death-qualified jury voted, ten to two, to recommend life. The trial judge nevertheless rejected this recommendation and sentenced Dobbert to death. Dobbert's son later recanted his trial testimony when he reached adulthood; the son stated in an affidavit that his trial testimony was the result of hypnotism, thorazine, and his attempt to please the staff at the children's home where he lived. Dobbert v. Florida, 105 S.Ct. 34, 34-35 (1984) (Brennan, J., dissenting from the denial of certiorari)[3]. Today, young Dobbert's testimony would be excluded per se as inherently unreliable because it was the product of hypnosis. Bundy v. State, 471 So.2d 9 (Fla. 1985). As in the Jaramillo case, the jury may have entertained some doubt that Dobbert committed a horrible premeditated murder, and used the life recommendation as a safeguard against an erroneous death penalty.

Ernest Dobbert is not the only person who was sent to his death despite lingering doubt about his guilt of a capital offense. Two recent reports show that the number of death sentences imposed on possibly innocent defendants -- defendants who nevertheless had been found guilty 'beyond a reasonable doubt' -- is astonishingly high.

During debate in the United States Senate on S. 1765, a bill that would have created a Federal death penalty, Senator Howard Metzenbaum introduced a list of 48 men who had been sentenced to death since the beginning of this century and who were later found to be innocent. In nearly half of these cases, the men were spared only when the real killer(s) confessed. Some of these people went to their deaths before the confessions arrived

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[3]When the Florida Supreme Court affirmed Dobbert's death sentence against a successive post-conviction attack, Dobbert v. State, 456 So.2d 424 (Fla. 1984), two Justices dissented. These Justices were so deeply concerned about the problems with the son's testimony and its implications for doubt about Dobbert's guilt that they would have taken this issue on its merits despite the failure of trial, appellate, and post-conviction counsel to raise the issue. Those Justices were most troubled by the fact that Dobbert's son had been hypnotized, an issue not raised by the parties. 406 So.2d at 432.

which cleared their names. See Congressional Record (Feb. 9, 1984).

In a totally circumstantial evidence case which is the instant one, this Court should consider residual doubt in consideration of the appropriateness of the death sentence. Furthermore, appellate counsel's failure to raise or argue this issue in his direct appeal either directly or in conjunction with his proportionality argument constituted ineffective assistance of counsel. For these reasons, this Petition should be granted.

D) THAT THE PETITIONER WAS DEPRIVED OF FULL AND MEANINGFUL APPEAL OF THE DEATH SENTENCE ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY APPELLATE COUNSEL IN FAILING TO PRESENT AS AN APPELLATE ISSUE THE ERROR BY THE TRIAL COURT IN ALLOWING THE PROSECUTOR TO ARGUE TO THE JURY THE CONSIDERATION OF TWO AGGRAVATING FACTORS WHICH WERE NOT SUPPORTED IN THE EVIDENCE AND WHICH THE TRIAL COURT LATER FOUND DID NOT EXIST.

Prior to argument and presentation of evidence during the sentencing phase, defense counsel moved to prohibit the State from arguing to the jury the existence of the statutory aggravating circumstances that "the offense was especially wicked, evil, atrocious or cruel" (R-806), or from arguing to the jury that the offense was committed in a "cold, calculated, premeditated manner" (R-810). Defense counsel argued that as a matter of law the facts simply did not support any argument of those two aggravating circumstances to the jury, and that to allow such argument of unfounded aggravating circumstances could sway jurors to vote for the death penalty basing their vote on being misled into believing that those aggravating circumstances were proven when they were not, as a matter of law. The defense argued that the allowance of argument as to those unfounded two aggravating circumstances could completely change the jury's recommendation (R-809).

Pursuant to the trial court's prior ruling, the prosecutor argued over defense objection that the aggravating

circumstances that the offense was "atrocious, heinous or cruel" existed (R-821), and that the offense was committed in a "cold, calculated, premeditated manner" (R-821-822).

Appellate counsel was ineffective in failing to present this error to this court in the direct appeal.

As stated previously, this Court has held that when a jury is misled into making a recommendation in a capital case by improper argument unsupported by the evidence, this court has minimized the legal affect of that jury recommendation. The trial court in its findings in support of the death penalty in fact did reject these two unfounded aggravating factors that the prosecutor was allowed to argue existed to the jury.

When the facts in the record clearly do not support an argument by the prosecutor of the existence of aggravating factors, the prosecutor should not be allowed to make such argument to the jury. In the instant case, the trial court did erroneously allow such argument. Later, in his written and oral pronouncements in support of his imposition of the death penalty, the trial court properly did not find the existence of the two improper aggravating circumstances argued by the prosecutor to the jury: 1) cold, calculated, premeditated murder; and 2) heinous, atrocious murder. Nevertheless, the bell had been rung and the jury obviously swayed by the prosecutor's argument that these two additional aggravating factors existed.

Both the trial courts and the appellate courts have a recognized duty not to abrogate the responsibility for the determination of the existence of aggravating or mitigating factors to the jury. Indeed, in cases wherein this Court has remanded death penalty cases to the trial court for new sentencing proceedings with a jury, it has often considered the propriety of the trial court's findings as to the existence of aggravating or mitigating factors. See Teffeteller v. State, 439 So.2d 840 (Fla. 1983). In those cases, on remand the State would certainly not be

allowed to argue the existence of aggravating factors not found to exist by the court.

In the instant case, the prosecutor further aggravated the situation by arguing that the jury could find the existence of the "cold, calculated, premeditated manner of murder" by merely finding that the Petitioner himself was a "cold, calculated type of person whom this aggravating circumstance should apply" (R-823). This was error by the trial court. Petitioner's appellate counsel was ineffective in failing to raise this issue on appeal. Petitioner was prejudiced by this omission by appellate counsel. For this reason, this Petition should be granted.

E) THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH PENALTY ISSUE DUE TO INEFFECTIVE REPRESENTATION PROVIDED BY HIS APPELLATE COUNSEL IN FAILING TO ARGUE IN APPELLANT'S BRIEFS THE EXISTENCE OF THE ADDITIONAL NON-STATUTORY MITIGATING FACTOR THAT THE PETITIONER HAD BEEN DRINKING ALCOHOLIC BEVERAGES PRIOR TO THE MURDER.

Evidence at the Petitioner's trial showed that he had been drinking alcoholic beverages prior to the homicide. This evidence was presented through the testimony of Mr. Peterson (R-249, 262); Rosa Lee Jones (R-318); Arthur Wilson (R-432); and the Petitioner himself (R-632, 633, 635, 638). No blood alcohol test of the Petitioner was taken after the homicide. However, the evidence showed the victim herself was also intoxicated at the time of her death (R-513). Petitioner's appellate counsel in his brief failed to argue anywhere the additional non-statutory mitigating circumstance that the Petitioner had been drinking prior to the homicide. Petitioner's appellate counsel in his brief failed to argue anywhere the non-statutory mitigating circumstance that the Petitioner had been drinking prior to the homicide.

This Court has consistently held that the issue of possible intoxication is a non-statutory mitigating circumstance that should be considered in evaluating the appropriateness of the

death penalty. See, e.g., Buckram v. State, 355 So.2d 111 (Fla. 1978); Chambers v. State, 339 So.2d 204 (Fla. 1976). Indeed, this Court in Ross v. State, 474 So.2d 1170 (Fla. 1985), found the evidence that the defendant may have been intoxicated at the time of the homicide to exist as a mitigating factor notwithstanding that the defendant in that case himself took the stand and testified that he was "cold sober" on the night of the murder.

While Ross v. State was decided subsequent to Petitioner's case, the other cases cited above do support the recognized principal that possible intoxication of a person constitutes a non-mitigating circumstance to be considered by the sentencing jury, the trial court, and this Court. Appellate counsel was clearly ineffective in failing to present this argument as part of its argument on appeal in support of the inappropriateness of the death penalty. The prejudice to the Petitioner by failure of appellate counsel to raise this issue exists alone as well as when aggregated with the other failures by appellate counsel to present matters as stated above in support of the inappropriateness of the death penalty in this case. For this reason, Petitioner is entitled to relief.

F) THAT PETITIONER WAS DEPRIVED OF A FULL AND MEANINGFUL APPEAL ON THE DEATH SENTENCE ISSUE DUE TO THE CUMULATIVE ERRORS CAUSED BY THE INEFFECTIVE ASSISTANCE ON APPEAL BY PETITIONER'S APPELLATE COUNSEL.

Petitioner would submit that each of the separate grounds of ineffective representation provided by appellate counsel listed above are individually sufficient to undermine the confidence in the fairness and correctness of the appellate result arrived at in the instant case. As can be seen, all of these points above are directed to the death penalty issue.

Additionally, viewed collectively together, these multiple issues as a whole even more so undermine the confidence in the fairness and correctness of the appellate result.

VI. CONCLUSION

This Court should hold appellate counsel ineffective for failing to raise the claims stated above. Furthermore, this Court should entertain this Petition as directed to fundamental errors committed in the trial court and appellate court as part of its continuing jurisdiction in death penalty cases. Petitioner requests as relief reversal of his death sentence and imposition of a life sentence with the mandatory 25 year incarceration without eligibility of parole, or an order granting a new trial, or a new appeal, or a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to the Office of the Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and to Mr. Louie L. Wainwright, Department of Corrections, 1311 Winewood Boulevard, Tallahassee, Florida 32301, this 23rd day of July, 1986.

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