IN THE SUPREME COURT OF FLORIDA

NO. 69563

WARDELL RILEY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida, and
R. L. Dugger, Superintendent, Florida State Prison,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION AND/OR APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Wardell Riley, a black male, was convicted and sentenced to death in 1976 for the killing of a white person. Mr. Riley was a family person, married for six years with two young daughters, was a hard worker, was not in need of money, had attended college classes, had never been convicted of a crime, and was in the process of applying to become a police officer. He was, by all accounts, incapable of committing the offense in this case -- incapable, but convicted and sentenced to death solely upon the testimony of one purported eyewitness. No fingerprints, contraband, statements, scientific evidence, or weapons connected Mr. Riley to the robbery/murder. He was arrested at home, after an evening out with his wife, and he voluntarily told the police of his innocence. He testified to his innocence. He steadfastly maintains that he is innocent, and reasonable jurists have in fact disagreed on whether the state proved his guilt. At best, one cannot consent to "execution of anyone on such weak evidence." Riley v. State, 366 So.2d 19, 23 (Fla. 1978) (Boyd, J., dissenting from affirmance of conviction because the evidence "simply does not constitute a sufficient basis to overcome the presumption of innocence.")

The "offender" simply does not square with the offense, which is only one of several troubling issues which plague confidence in the outcome of these death proceedings. The first legal issue presented herein involves the core principle that a capital sentencer may not be precluded from considering evidence of any sort at sentencing. The jury which recommended the death sentence was effectively instructed that the myriad mitigating factors in Mr. Riley's background could not be considered in their recommendation on punishment, a recommendatin which was, by law, afforded great weight by the trial judge. Because the controlling Eighth Amendment principles regarding mitigation evidence seem routine now, it sseems incredible that a person

could come this close to execution without correction of the error. However, our current knowledge and practice is different than that at Mr. Riley's sentencing and resentencing. Since this Court has recently amended its position that the jury sentencing instructions given here are proper, and since the very issue presented here is now under active consideration by the United States Supreme Court in Hitchcock v. Wainwright, No. 85-6756, a stay of execution and reconsideration of this issue is proper.

The second issue is related to the first, and has similarly been the subject of changing law in this court and in the federal courts. The sentencing judge himself failed to consider copious evidence of nonstatutory mitigating circumstances, thereby denying Mr. Riley a reliable and individualized sentencing determination. Again, recent relevant decisions here and in the federal courts control, and Hitchcock's result will be definitive.

The third issue is also one that involves law in a state of flux. Mr. Riley claimed in post-conviction proceedings that the death penalty had been administered in Florida on the basis of impermissible factors, such as the race of the victim. This Court denied the claim on the merits, citing its own Hitchcock opinion. This issue is also presented in Hitchcock, now pending review in the United States Supreme Court, and a stay of execution and reconsideration of this claim by this Court within the parameters of the forthcoming decision is proper.

II. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court.

See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The three issues presented were previously ruled upon by this Court in this case, and Petitioner requests that this Court revisit the claims in light of errors of constitutional magnitude the prior treatment of the claims: "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986).

III. FACTS UPON WHICH PETITIONER RELIES

Look at Songer, Hitchcock, Lucas, Harvard, . . . Mr. Riley's case is fatally out of step with the law this Court is writing and citing. Correction of arbitrariness in state executions is this Court's mandate, tradition, and hallmark. Comparing what law controls to what law was applied reveals that Mr. Riley's death sentence "struck like lightning": he was simply in the wrong place at the wrong time, which, it is to be hoped, is not a fortuity which must inevitably and forever be his death knell.

CLAIMS I AND II

MR. RILEY WAS DENIED A RELIABLE INDIVIDUALIZED SENTENCING DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Riley cannot be executed since his death sentence is the product of "Lockett/Eddings impure" preclusion of sentencer consideration of abundant mitigating circumstances which, upon proper consideration, might have resulted in a sentence less than death. All the participants in Mr. Riley's 1976 sentencing proceeding believed (and the jury was instructed) that the only proper considerations justifying a recommendation and sentence of life were those embodied in the mitigating circumstances specifically itemized in the Florida death penalty statute. The "law of the case," previously articulated by the Florida Supreme

Court, is "that the jury in this case was properly instructed at the sentencing hearing." Riley v. State, 413 So.2d 1173, 1174 (Fla. 1982). See also Riley v. Wainwright, 433 So.2d 976 (Fla. 1983) ("the jury was properly instructed at sentencing") (state habeas corpus proceeding). Because the Florida Supreme Court has recently acknowledged that the very same sentencing instructions are indicative of unconstitutional restriction of sentencer consideration of mitigating circumstances, and because the Florida Supreme Court has acknowledged that during the time when Mr. Riley's jury sentencing recommendation and final sentencing occurred, reasonable attorneys and jurists (much less, jurors) believed that restriction on mitigation was required, the properly instructed issue must be reconsidered in Mr. Riley's case. The unconstitutional instructions produced an unreliable recommendation, and a defective sentence, which is the basis for Claim I.

Claim II involves the trial judge who a.) relied on the defective jury recommendation, and b.) who believed himself that he could not consider nonstatutory mitigating circumstances. The record reveals these infirmities, they have been ruled against, and the law has recently changed -- changes that save Mr. Riley's life. This is the basis of Claim II.

A.

THE FLORIDA DEATH PENALTY STATUTE AT THE TIME OF THE JURY RECOMMENDATION AT SENTENCING, AND RESENTENCING, OPERATED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY ENFORCING THE "MANDATORY LIMITATION" THAT ONLY THOSE MITIGATING CIRCUMSTANCES "ENUMERATED IN THE NARROW STATUTORY LIST" COULD BE CONSIDERED

As will be thoroughly discussed in "Legal Basis for Relief," infra, the Florida Statute operated in an unconstitutional manner at the time of the "critical" jury recommendation proceeding in Mr. Riley's case, and, in this case, at resentencing. In 1972

Florida enacted a capital sentencing statute that confined consideration of mitigating circumstances to a narrow statutory list. See, e.g., Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) (holding the statutory language was clear in using "words of mandatory limitation" to confine consideration to a nonexpandable "list" of mitigating factors, and thus "other matters have no place in [the capital sentencing] proceeding"). Accordingly, though on its face the Florida statute may not have clearly restricted consideration of mitigating factors at the time of Proffitt v. Florida, 428 U.S. 242 (1976), in its operation the statute clearly confined consideration of mitigating factors in precisely the same manner as the Ohio statute struck down in Lockett v. Ohio, 438 U.S. 586 (1978). It was not until after Lockett that another view was recognized. Mr. Riley's jury sentencing recommendation proceeding occurred after the Cooper decision but before Lockett. The face of the state court record demonstrates that his sentence was affected by the statutory restriction, for all parties followed the "mandatory limitation" of the statute. (Claim I).

This same limitation affected resentencing in April, 1979. (Claim II). First, as required, the sentencing judge accorded "great weight" to the (we now know) unconstitutional jury recommendation, thereby infecting the sentence ab initio. Second, after Lockett, the Florida legislature amended the death penalty statute to encompass "any mitigating circumstances, statutory or non-statutory. 1979 Fla. Laws, Ch. 79-353." Barclay v. Florida, 103 S.Ct. 3418, 3430, n.2 (1983) (Stevens, J., concurring). The amended statute became law in July, 1979, and was thus not applied to Mr. Riley's resentencing, which occurred in April, 1979. Allegiance to strict and defective applicatino of the lame duck statute is apparent in the resentencing proceeding and in the trial judge's order which is tellingly tied solely to statutory mitigation.

B.

THE RECORD DEMONSTRATES THAT THE UNCONSTITUTIONAL MITIGATION PRECLUSION INFECTED MR. RILEY'S SENTENCING PROCEEDINGS, AND UNTENABLY CONTRIBUTED TO HIS SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

1. The Jury

Beginning with voir dire, the prosecutor enlightened the jury regarding that which was axiomatic to the lawyers and the judge:

> The Court gives instructions on what are and what are not mitigating or aggravating circumstances.

(R. 282)

> Now, the Court will instruct you as to what are aggravating and mitigating circumstances .... [Y]ou ought to have certain guidelines.

(R. 377)

"What are mitigating circumstances" was defined when the trial court instructed the jury as follows:

> The mitigating circumstances which you may consider if established by the evidence are these:

(R. 1320). The seven meager statutory mitigating circumstances were then read. The trial judge indicated that he would provide the jury with written jury instructions which set "forth the mitigating and aggravating circumstances." (R. 1345) In closing argument the prosecution discussed "the mitigating circumstances" to see if "they exist" (R. 1326), and then checked off the statutory list.

In sentencing Mr. Riley to death in 1976, the trial judge stated "I have seached in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case." (S.R.2) (emphasis added). In finding only one (statutory) mitigating circumstance applicable, the judge explained:

> The only mitigating circumstance under Florida statute is the fact that the

Defendant had no prior criminal conviction.

(S.R.2) (emphasis added).

The judge and jury were simply following the law in 1976. However, there was significant nonstatutory mitigating evidence presented for the jury's consideration whichh by law went unconsidered: Wardell Riley himself. Virtually nothing about Mr. Riley fit into the statute. Mr. Riley was twenty-six years old and had been married to Martha Riley for six years. This was not in the statute. He had two daughters, ages two and four, whom both Martha and Wardell worked hard and regularly to support. This was not in the statute. Martha had worked for the State Division of Family Services for some time. Wardell was a good and dependable worker, who was cordial with customers and fellow employees. These items were not in the statute.

Wardell was in the process of becoming a police officer, and he had taken about a year of college courses. This was not in the statute. In short, Wardell was a good, non-violent, hard-working, bright, ambitious family person, whose "background and character" suggested that he could advance himself and benefit others, making life imprisonment a viable option for sentencers. The jury was not allowed to consider this.

One other important nonstatutory mitigating circumstance was kept from the jury: lingering doubt about guilt. Wardell's background alone could cause a juror to have such doubts, which may be the most important mitigating circumstance known. One dissenter in the Florida Supreme Court would have not only changed the sentence, but would have vacated the conviction for insufficiency of the evidence. A juror who felt even a bit of Justice Boyd's hesitancy could not "consider" that hesitancy as mitigation, because: this was not in the statute.

2. The Judge

In January, 1979, before the statute was amended, the

Florida Supreme Court remanded Mr. Riley's case, on other grounds,

> "for the sole purpose of allowing the trial judge to reconsider the imposition of the death sentence .... in accordance with Section 921.141 as construed in this opinion."

366 So.2d at 22. (emphasis added). "As construed" included the following restrictive view of the statute:

> The one mitigating factor found to exist in this case was appellant's lack of any significant history of prior criminal activity. All other mitigating factors in Section 921.141(6) were properly found to be absent.

Id. The Court also noted that "Appellant's principal argument to us is that a death sentence is not warranted for his crime, . . . and second because the statutory mitigating circumstances outweigh in significance the statutory aggravating factors." Riley v. State, supra at 21.

Upon resentencing, the trial judge followed the Florida Supreme Court order. "Section 921.141 as construed" had not been amended, and the trial judge restricted consideration to the statute. The prosecutor argued to the trial court that the Florida Supreme Court's opinion set forth what could be considered:

> We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider.

(Tr. 36).

The trial court agreed, after examining "the" mitigating circumstances:

> As to the mitigating circumstances: 1. The defendant has no significant history of prior criminal activity (Section 921.141(6)(a) Florida Statutes). There are no other mitigating circumstances.

(D. 20).

The judge relied on an improper jury recommendation and followed an unconstitutional statute. But the judge was, in fact, following the then Florida law, as had the critical

advisory jury upon whose recommendation the judge was required to rely. On appeal to the Florida Supreme Court after resentencing, Mr. Riley rightly urged that the statutory mitigating circumstances were only exemplary, but that neither the jury nor the judge believed matters outside the "list" could be considered in mitigation. About the jury, Mr. Riley said:

> The defendant's jury was not so instructed [about unlimited mitigation]. (R. 1320). However, this Court has held that the instructions provided the jury do not impermissibly restrict consideration of mitigating evidence. Ruffin v. State, ___ So. 2d ___ (Fla. 1981) (Case Nos. 55, 684; 56,741, Opinion filed March 26, 1981); Peek v. State, ___ So.2d ___ (Fla. 1980) (Case No. 54, 226, Opinion filed October 30, 1980). While the defendant does not waive the contrary contention under the Eighth and Fourteenth Amendment requirements set forth in Lockett v. Ohio, supra, this point will not be belabored in this brief. But see Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978) (Lockett requires that trial judge must clearly instruct the jury about mitigating circumstances and option to recommend against death).

Initial Brief of Appellant on Resentencing, p.22, n.4. The Court held that with regard to all matters, "[t]here is no question that the jury was properly instructed at the sentencing hearing." See also Riley v. State, 433 So.2d 976 (Fla. 1983) ("We have already determined that the jury in this case was properly instructed at the sentencing hearing.") About the judge, Mr. Riley said: "The record before this Court demonstrates that the trial judge thusly restricted his consideration because he deemed the mitigating circumstances to be circumscribed by the provisions of Section 921.141 (6), Florida Statutes." Appellant's brief, p.26. The Florida Supreme Court rejected this contention.

Florida law has since evolved to a necessary but curious point. Now, the fact that the trial judge instructs the jury only on the statutory list is evidence that the trial judge believed himself or herself bound by the list. Lucas v. State,

490 So.2d 943 (Fla. 1986). Mr. Riley should have the benefit of this new and required constitutional analysis of his previously presented claims.

The evidence the trial judge believed "precluded" was powerful. The trial judge heard all the jury had heard, and more. At Mr. Riley's resentencing hearing, extensive evidence in mitigation was presented. Dr. Colin Turnbull, Professor of Anthropology at George Washington University, first presented testimony in the defendant's behalf. During the course of a two year research study of rehabilitation and security in the state prison systems of Georgia and Florida, Dr. Turnbull had had occasion to meet and establish a relationship with Mr. Riley. (Tr. 8). From many hours of interviews and weekly correspondence, Dr. Turnbull was able to draw the conclusion that the defendant could positively contribute to prison society and could be a constructive member of society when released. (Tr. 8-13). In support of this conclusion, Dr. Turnbull identified specific factors which established Wardell Riley's likelihood for ordered social behavior.

The first factor centered upon Mr. Riley's family. (Tr. 11). Dr. Turnbull explained that, unless one develops a sense of mutual responsibility and obligation within the family as a child, there is little chance of obtaining, as an adult, an inner emotional sense of responsibility. (Tr. 11). Through pertinent discussions with the defendant and his family, Dr. Turnbull was able to identify a strong emotional sense of responsibility on the part of Mr. Riley. (Tr. 11-12). Mr. Riley continually exhibited concern to Dr. Turnbull for his family's welfare, and while refusing to accept favors for himself, would request small favors such as holiday cards for members of his family. (Tr. 11-12).

Dr. Turnbull further explained that Mr. Riley's strong emotional stability is augmented by his educational background

and his intellectual abilities which enable Mr. Riley to understand the social processes of reciprocal obligation. (Tr. 12). Mr. Riley exudes an ability to adjust to situations with which he does not agree. (Tr. 12). For an example, Dr. Turnbull pointed to Mr. Riley's acceptance of and attempt to understand prison rules no matter how personally distasteful. (Tr. 13).

And the final significant factor which convinced Dr. Turnbull that Mr. Riley would place social interests above self-interests is Mr. Riley's strong religious background which gives Mr. Riley a sense of purpose. (Tr. 13). Dr. Turnbull had observed a variety of incidents during which Mr. Riley evinced a strong concern for the interests of others over his own. For example, on the preceding Christmas, Dr. Turnbull had offered to send stationery and books to Mr. Riley; Mr. Riley asked that the gifts instead be sent to another inmate who had not received any Christmas gift. (Tr. 20). On other occasions, Mr. Riley had been able to resolve disagreements between members of a rather violent group of inmates. (Tr. 21). Discussions with prison officials about Mr. Riley and observations of Mr. Riley's interactions with other inmates and prison officers further solidified Dr. Turnbull's conclusion that Mr. Riley affirmatively contributes to the prison environment and could be a constructive member of society. (Tr. 13).

Dr. Turnbull was of the view that the death penalty is a necessity in contemporary society; Dr. Turnbull had met with prisoners whom he believed deserved the penalty of death. (Tr. 15). Due to the foregoing factors, however, Dr. Turnbull concluded that Mr. Riley is definitely not an appropriate individual for execution of the death sentence. (Tr. 11).

On cross-examination, Dr. Turnbull was asked whether he believed Wardell Riley when he continually maintained his innocence. (Tr. 18). Dr. Turnbull responded that his professional abilities were not concerned with that factor and he

lacked sufficient data, but his "personal hunch" was that he was telling the truth. (Tr. 18).

Five members of the defendant's family also spoke before the judge. The witnesses described Mr. Riley as a hard-working, sensitive, family man with a loving wife and two children who visit him whenever possible. (Tr. 22-31). Mr. Riley's mother explained that Mr. Riley had grown up in an impoverished background without a father. (Tr. 31). The family had nevertheless been extremely close, and had spent every Sunday together at church. (Tr. 30-31). All members of the family expressed their faith in Mr. Riley and belief in his innocence. (Tr. 22-31).

Three letters were also introduced into evidence. One letter from the principal of the Calhoun County, Georgia school system reflects that Mr. Riley is from a hard-working family, and was a good student in the public school system. (D. 15). Another letter from a reverend in Morgan, Georgia reflects that Mr. Riley was brought up in a religious, Christian, church-going family. (D. 17).

A letter from an inmate of the state prison system and addressed to Mr. Riley is of particular import. (D. 13-13A). According to the inmate, he had overheard another inmate stating that he and his cousin were responsible for the offense for which Mr. Riley had been convicted. (D. 13A). Many of the facts of the crime were mentioned by this individual, who evidently had been bragging about the fact that someone else had been convicted for his criminal acts. (D. 13A).

The trial court failed to weigh any of this mitigating evidence. (D. 20). Rather, the trial judge only considered the statutory mitigating factor previously found, that the defendant has no history of prior criminal activity. The trial court specifies:

> As to the mitigating circumstances: 1. The defendant has no significant history of prior

> criminal activity (Section 921.141 (6)(a) Florida Statutes). There are no other mitigating circumstances.

(D. 20).

The record before this Court demonstrates that the trial judge restricted his consideration because he deemed the mitigating circumstances to be circumscribed by the then provisions of Section 921.141(6), Florida Statutes.

C.

AS A MATTER OF FACT AND LAW, THE JURY RECOMMENDATION OF DEATH WAS CRITICALLY IMPORTANT

As will be more thoroughly discussed in "Legal Basis for Relief," infra, a Florida capital sentencing jury's sentencing recommendation is a "critical" part of the sentencing process. Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985); Lamadaline v. State, 303 So.2d 17, 20 (Fla. 1974) ("critical factor" and "essential right of the defendant.") A defendant's right to (and the court's need for) a jury recommendation is so important that it cannot be omitted without a knowing and intelligent waiver by the defendant on the record, and even then the court can refuse the waiver:

> There was no jury recommendation because appellant waived his right to have the jury hear evidence on the question of sentence. One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided that the waiver is voluntary and intelligent. Upon finding such a waiver, the sentencing court may in its discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure. State v. Carr, 336 So.2d 358 (Fla. 1976); Lamadaline v. State, 303 So.2d 17 (Fla. 1974).

Palmes v. State, 397 So.2d 648, 656 (Fla. 1981). See also Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

Absent "waiver," and even with waiver, at the judge's option, a person cannot be sentenced to death in Florida without a.) an advisory jury recommendation, which b.) is accorded great

weight by the judge. Thus, at resentencing, the trial court was required to consider the earlier infirm jury recommendation of death, and to give it great weight. Tedder. This trial judge was in fact uniquely inclined to give great weight to the jury recommendation.

At the very outset of the jury sentencing proceeding, the trial judge expressed his view that the standard jury instructions did not emphasize sufficiently the great weight to which the jury's recommendation is entitled. (R. 1310-11). The trial judge suggested that the jury be specifically instructed that he would "give serious consideration to the advisory opinion of the jury." (R. 1314-15). With the agreement of counsel, the jury was so instructed. (R. 1314-15, 1317).

With total candor, the trial court explained to both counsel before the jury sentencing hearing just how he would view the jury recommendation:

> THE COURT: I frankly would give a recommendation of the jury great weight because I agree with the Supreme Court of Florida --- what is the purpose of the legislature calling for an advisory opinion by the jury if they expected a Judge to just automatically disregard it in the absence of some extraordinary or compelling circumstances.

(R. 1314-15). In keeping with this expression of intent, the trial judge precisely adhered to the jury recommendation of death on one count and life imprisonment on the second count. (R. 1470, 1471, 1476).

Significantly, at the sentencing hearing held pursuant to the remand order of the Florida Supreme Court, the trial court in resentencing the defendant to death reaffirmed the deference paid to the jury recommendation:

> I have nothing but compassion for the family of Mr. Riley and for the family of the victim in this case.
>
> However, I still find that the aggravating circumstances outweigh the mitigating circumstances in this case, and that the jury

recommendation of the death penalty was an appropriate recommendation for this crime.

(T. 45). Any error in the jury recommendation proceeding thus affected the ultimate sentence.

CLAIM III

THE DEATH PENALTY IS IMPOSED IN FLORIDA ON THE BASIS OF IMPERMISSIBLE, ARBITRARY AND DISCRIMINATORY FACTORS, INCLUDING RACE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner was sentenced to death pursuant to a death penalty scheme in Florida which arbitrarily and discriminatorily selects its targets based on the unconstitutional factor of race. In this section, Petitioner will present the evidence which demonstrates that the death penalty has in fact been administered in Florida in an arbitrary and discriminatory manner. In Section IV, infra, Petitioner will present the eighth and fourteenth amendment law which unequivocally condemns this evidence and its effect. This claim was previously denied on the merits. Riley v. State, 433 So.2d 976 (Fla. 1983).

Despite the eighth amendment's requirement that sentencing discretion be suitably directed and limited, and the Florida death penalty statute's provision to comply with that mandate through the use of an exclusive list of aggravating circumstances, the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. Death sentences are still imposed in Florida, for example, because the victim was a white person instead of black person, because the defendant is black instead of white, because the homicide was committed by chance in a county where the death penalty is much more frequently imposed rather than in a county which seldom imposes the death penalty, or because the defendant is a man instead of a woman.

Not only does the imposition of death sentences on the basis of these factors violate the eighth amendment's requirement

of carefully channeled sentencing discretion, but it also violates the thirteenth amendment and the due process and equal protection guarantees of the fourteenth amendment by its reliance upon constitutionally impermissible, irrelevant factors. See Zant v. Stephens, 462 U.S. 862, 885 (1983). Certainly there can be no dispute that the consideration of race (of the defendant or the victim) in the course of deciding a capital sentence violates the thirteenth and fourteenth amendments' mandates abolishing slavery and all badges of slavery and requiring the equal treatment of all people without regard to consideration of race. Likewise, the fourteenth amendment's requirement of equal protection indisputably forbids the differential treatment of people on the basis of their sex or race, or on the basis of totally irrelevant considerations such as geography.

That death sentences are imposed on the basis of these factors is not typically a simple matter to demonstrate. Juries and judges do not usually tell us that the real reason they have recommended or imposed death in particular cases are among these constitutionally impermissible factors. Accordingly, circumstantial evidence must be relied upon to demonstrate the determinative role these factors play in the course of capital sentencing decisions in this state. Statistical evidence is, therefore, the form of circumstantial evidence which must be examined in relation to this claim.

The best developed statistical evidence available at this time with respect to the imposition of the death penalty in Florida has focused upon only one constitutionally impermissible factor: the race of the victim. Taking into account all publicly available data respecting the imposition of the death penalty in Florida, this evidence persuasively demonstrates that the race of the victim is a determinative factor in the imposition of the death sentence in Florida.

(1) This evidence is drawn primarily from a study by

Professors Samuel R. Gross and Robert Mauro, published as Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicidal Victimization, 37 Stanford L. Rev. 27 (Nov. 1984). As will be seen, however, a number of other well designed studies have reached the same conclusions, and they are also taken into account herein.

(2) The study by Professors Gross and Mauro focused upon all homicides in Florida during the 5-year period, 1976-1980. The data for the study were drawn from two sources: Supplementary Homicide Reports (SHR's) that local police agencies file with the Uniform Crime Reporting Section of the FBI, and the Death Row, U.S.A., a periodic publication of the NAACP Legal Defense and Educational Fund (LDF) which has become the standard reference source for current data on death row inmates. See Enmund v. Florida, 458 U.S. 782, 795 nn.18, 19 (1982); id. at 818 n.34 (O'Connor, J., dissenting); Godfrey v. Georgia, supra, 446 U.S. at 439 nn. 7, 8; Greenberg, Capital Punishment As A System, 91 Yale L.J. 908, 909 n.7 (1982). The Supplementary Homicide Reports provided data on virtually all homicides which occurred during the 1976-1980 period -- 3501 homicides -- while Death Row U.S.A. provided data on the homicides for which someone was eventually sentenced to death -- 130 death sentences. Florida's reporting rate for known homicides was over 98% for this period. The data available for each homicide through these sources were the following: (a) the sex, age and race of the victim(s); (b) the sex, age and race of the suspect(s) or defendant(s); (c) the date and place of the homicide; (d) the weapon used; (e) the commission of any separate felony accompanying the homicide; and (f) the relationship between the victim(s) and suspect(s) or defendant(s).

(3) Because of the previous documentation that the race of the victim was a determinative factor in capital sentencing decisions in Florida, see, e.g., Bowers and Pierce,

Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980), Gross and Mauro analyzed whether the race of the victim was on the basis of the data they had gathered, a determinant in capital sentencing.

(a) Initially, Gross and Mauro determined that a large proportion of homicide victims in Florida during this 5-year period were black -- 43%. On this basis, one would expect that nearly half of the death sentences imposed for homicides -- approximately four out of every ten death sentences -- would be imposed for homicides involving black victims. However, the data dramatically contradicted this expectation. Instead, only one out every nine death sentences imposed was imposed for a black victim homicide; the other eight were imposed for white victim homicides. Based upon this extremely strong correlation between white victim homicides and death sentences, Gross and Mauro examined the data to determine whether any nonracial factor might explain the strength of this relationship.

(b) Six nonracial factors were examined for their individual and cumulative impact upon the death sentencing determination: (1) the commission of a homicide in the course of another felony; (2) the killing of a stranger; (3) the killing of multiple victims; (4) the killing of a female victim; (5) the use of a gun; and (6) the geographical location of the homicide. While five of these six factors were correlated -- with varying degrees of strength -- with the imposition of the death sentence, none explained away the consistently high correlation between white victims and death sentences. Regardless of the presence of one or more of the nonracial factors highly correlated with the death sentence, the homicides which involved, in addition, white victims, were much more likely to result in death sentences.

(i) The commission of a separate felony accompanying the homicide was highly predictive of an eventual

death sentence: 22.0% of felony homicides resulted in death sentences, while only 0.9% of nonfelony homicides resulted in death sentences. The felony circumstance thus increased the likelihood of a death sentence by a factor of nearly 24. Within either of these categories of homicide, however, white victim homicides were far more likely to result in death sentences. Of the felony homicides involving white victims, 27.5% resulted in death sentences, while only 7.0% of such homicides involving black victims resulted in death sentences. Of the nonfelony homicides involving white victims, 1.5% resulted in death sentences, while only 0.4% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a felony or not, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(ii) The killing of a stranger was also highly predictive of an eventual death sentence: 9.7% of the homicides in which the defendants and victims were strangers to each other resulted in death sentences, while only 2.3% of the homicides in which the the defendants and victims were acquainted with each other resulted in death sentences. The "stranger" factor thus increased the likelihood of a death sentence by a factor of four. Within either of these categories, however, white victim homicides were far more likely to result in death sentences, particularly when the "stranger" factor was present. Of the "stranger" homicides involving white victims, 14.5% resulted in death sentences, while only 1.2% of such homicides involving black victims resulted in death sentences. Of the "nonstranger" homicides involving white victims, 3.7% resulted in death sentences, while only 1.0% of such homicides involving black victims resulted in death sentences. Thus, when the "stranger" aggravating factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person

killing a black victim. When the "stranger" factor was not present, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(iii) The killing of multiple victims was also highly predictable of an eventual death sentence: 18.3% of the homicides in which there were multiple victims resulted in death sentences, while only 3.2% of the homicides in which there were single victims resulted in death sentences. The multiple victim factor thus increased the likelihood of a death sentence by a factor of nearly six. Within either of these categories, however, white victim homicides were more likely to result in death sentences. Of the multiple victim homicides involving white victims, 20.4% resulted in death sentences, while only 11.1% of such homicides involving black victims resulted in death sentences. Of the single victim homicides involving white victims, 5.5% resulted in death sentences, while 0.7% of such homicides involving black victims resulted in death sentences. Thus, when the multiple victims aggravating factor was present, a person killing white victims was two times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(iv) The killing of a female victim was also predictive of an eventual death sentence: 7.2% of the homicides in which a woman was killed resulted in death sentences, while only 2.5% of the homicides in which a man was killed resulted in death sentences. The female victim factor thus increased the likelihood of a death sentence by a factor of nearly three. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the female victim homicides involving white victims, 19.8%

resulted in death sentences, while only 1.6% of such homicides involving black victims resulted in death sentences. Of the male victim homicides involving white victims, 4.4% resulted in death sentences, while 0.6% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a female or male victim, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(v) The killing of a victim in a rural county was also predictive of an eventual death sentence: 5.1% of the rural homicides resulted in death sentences, while only 3.4% of the urban homicides resulted in death sentences. The geography factor thus increased the likelihood of a death sentence by a factor of nearly two. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the rural homicides involving white victims, 8.5% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the urban homicides involving white victims, 5.8% resulted in death sentences, while 0.8% of such homicides involving black victims resulted in death sentences. Thus, where the rural factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was seven times more likely to be sentenced to death than a person killing a black victim.

(vi) Unlike the other nonracial factors, the killing of a person with a gun was not predictive of an eventual death sentence: 3.0% of the homicides in which the victim was killed with a gun resulted in death sentences, while 5.1% of the homicides in which the victim was killed by another means resulted in death sentences. The "gun" factor thus made it somewhat less likely for the defendant to be sentenced to death.

Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the "use of a gun" homicides involving white victims, 5.3% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the "other means" homicides involving white victims, 8.7% resulted in death sentences, while 1.1% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide was committed by use of a gun or other means, a person killing a white victim was nearly eight times more likely to be sentenced to death than a person killing a black victim.

(vii) In order to account for the possibility that some combination of the nonracial aggravating factors might explain away the strong race-of-the-victim pattern they were seeing -- which had not been explained by an examination of the factors individually -- Gross and Mauro examined Florida death cases on a "scale of aggravation." This scale examined the cumulative effects of the three aggravating factors which Gross and Mauro had found most strongly predicted death sentences: the commission of the homicide in the course of a felony, the commission of the homicide against a stranger, and the commission of a multiple victims homicide. Their results can best be shown by the following table showing the percentage of death sentences in each category:

Number of Major Aggravating Circumstances

	0	1	2-3
White Victim	1.0% (10/1044)	7.0% (36/511)	28.2% (68/241)
Black Victim	0.3% (4/1251)	1.4% (5/363)	7.5% (5/67)

Cases with two or three aggravating circumstances were combined into one category because there were too few cases with all three aggravating circumstances to provide meaningful analysis of a distinct category. The pattern of racial disparities displayed

in this table (as in the previous analyses) is consistent and strong. The magnitude of these disparities can be evaluated, in part, by considering the right-hand column, which includes the most aggravated homicides. The majority of the death sentences, almost 60%, were among those cases. Death sentences were not the rule for these homicides, but they were given in a fair proportion of those cases that had white victims -- in over 25% of such cases. But even within this highly aggravated set of cases, death sentences for black victim homicides were quite rare: they occurred about one-fourth as often as among white victim homicides -- in only 7.5% of such cases.

(viii) Gross and Mauro further examined the possibility that some combination of the nonracial aggravating factors might explain away the strong race-of-the-victim pattern they had seen in examining individual nonracial factors by conducting a multiple regression analysis. As Gross and Mauro described it,

> Multiple regression is a statistical technique for sorting out the simultaneous effects of several causal or "independent" variables on an outcome or "dependent" variable. Multiple regression analysis produces a mathematical model of the data that includes estimates of the effects of each independent variable on the dependent variable, controlling for the effects of the other independent variables. This technique can be used to test for racial discrimination in a set of sentencing decisions by designating the sentencing choice as the outcome variable in a model that includes the racial characteristic of interest as a causal variable along with the legitimate variables that might explain these decisions. If the racial variable has a statistically significant effect on the outcome variable in this model (that is, an effect that would be unlikely to occur by mere chance), that demonstrates that the racial characteristic is associated with these outcomes in a way that cannot be explained by the legitimate variables that are included in the model.

37 Stanford L. Rev. at 75-76. The results of the regression analysis confirmed in every respect the pattern previously shown by the data: "Multiple logistic regression (or "logit") analysis

reveals large and statistically significant race-of-victim effects on capital sentencing in . . . Florida. . . . After controlling for the effects of all the other variables in our data set, the killing of a white victim increased the odds of a death sentence by an estimated factor of . . . about five in Florida. . . ." Id. at 83.

(c) Because of the critical role of appellate review in the capital sentencing process -- "to avoid arbitrariness and to assure proportionality," Zant v. Stephens, 462 U.S. at 890 -- there is at least the possibility that the racially discriminatory sentencing patterns which Gross and Mauro found at the trial level could be rooted out by careful appellate review. To examine this possibility, Gross and Mauro compared the racial patterns of death sentences that have been affirmed by the Florida Supreme Court to the racial patterns of all reported homicides. As with all reported homicides, however, Gross and Mauro found the race of the victim emerged in just as strong a pattern among affirmed death sentences as it had among homicides for which death was imposed in the trial courts. As before, affirmed death sentences were far more likely for white victim homicides, 2.2% (39/1803), than for black victim homicides, 0.4% (6/1683) -- a ratio of nearly six to one. Also, as before, this disparity persisted when controlling for three aggravating factors most highly predictive of death sentences:

Percentage of Death Sentences
by Race of Victim
Affirmed Death Sentences Only

	Felony Circumstance		Relationship of Suspect to Victim		Number of Victims	
	Felony	Non-Felony	Stranger	Non-Stranger	Multiple Victims	Single Victim
White Victim	10.1% (35/346)	0.3% (4/1272)	4.9% (23/469)	1.3% (16/1227)	7.1% (7/98)	1.9% (32/1705)
Black Victim	3.9% (5/128)	0.1% (1/1468)	0% (0/257)	0.4% (6/1337)	7.4% (2/27)	0.2% (4/1656)

Again, as before, the race-of-victim disparity persisted when Gross and Mauro controlled for the cumulative and simultaneous effects of the nonracial aggravating factors:

Percentage of Death Sentences by
Level of Aggravation and Race of Victim
Affirmed Death Sentences Only

Number of Major Aggravating Circumstances

	0	1	2-3
White Victim	0.1% (1/1044)	2.7% (14/511)	10.0% (24/241)
Black Victim	0.1% (1/1251)	0.8% (3/363)	3.0% (2/67)

Accordingly appellate review has not eliminated, or even diminished in a significant way, the racially-based imposition of the death sentence in Florida.

(4) The Supreme Court has recently made clear that "a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a[n] [intentional discrimination] lawsuit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence." Bazemore v. Friday, ___ U.S. ___, 54 U.S.L.W. 4972, 4975-76 (July 1, 1986). Thus, "[w]hile the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.'" Id. at 4975. Gross and Mauro have addressed the matter of "omitted variables" as well.

> For a legally permissible sentencing variable that is absent from our data to substantially change the estimated size of the effect of the victim's race on capital sentencing the variable would have to satisfy three conditions: (1) it must be correlated with the victim's race; (2) it must be correlated capital sentencing; and (3) its correlation

with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis. For example, let us assume that it is appropriate to consider homicides that are committed at night as more aggravated than those committed during the day. For this variable to explain the victim-based homicides are more likely to have occurred at night than black-victim homicides, that night-time homicides are in fact more likely to result in the death penalty than day-time homicides, and that the effect of the time of the homicide on capital sentencing persists after controlling for the felony circumstance of the homicide, the number of victims, the relationship of the victim to the killer, and the other variables that we have already considered. Moreover, the magnitude of the effect of the time of the killing on capital sentencing would have to be quite large -- comparable to the magnitude of the racial effect it is offered to explain.

Given these requirements it is reasonable to accept the observed patterns as valid descriptions of the systems of capital sentencing that we studied unless some plausible alternative hypothesis can be stated that explains how some legitimate sentencing variable that we did not consider, or some combination of such variables, could account for these patterns. No such hypothesis is apparent. It is true that in the period that we studied white-victim homicides in each state were generally more aggravated than black-victim homicides, but we have considerable data on the level of aggravation, and the racial pattern that we observed is apparent in each state after controlling for the several aggravating factors in our data. Data on omitted aggravating factors could only explain the observed racial disparities if they were to show that black-victim cases were systematically less heinous that white-victim cases <u>within the categories defined by the included variables</u>, for example, among felony killings of strangers, using guns. This does not seem likely. Similarly, it is almost certain that homicides with weak evidence of the suspect's guilt are less likely to result in death sentences than those with strong evidence. But for data on the strength of the evidence to undercut our findings they would have to show that, within the levels of aggravation identified by our analysis, black-victim cases had systematically weaker evidence than white-victim cases. In the absence of any empirical evidence of such a pattern, and there is none, it must be considered improbable -- especially considering the magnitudes of the racial effects we found.

Finally, the criminal record of the suspect

> undoubtedly has an effect on the chances of a death sentence. Moreover, we know that black defendants in general are more likely to have serious criminal records that white defendants, and we can safely assume that this general relationship applies to the homicide suspects in our study. This association, however, explains very little. after controlling for level of aggravation, the race of the suspect is not a significant predictive variable, and the principal racial pattern that we did find -- discrimination by race of victim -- persisted when we controlled for the race of the suspect. Indeed, we were careful to make sure that the effect of the race of the victim could be determined separately from any possible race-of-suspect effect. To assert that the criminal records of the <u>suspects</u> might account for determination by the race of the <u>victim</u> one would have to suppose that, controlling for the nature of the homicide and for their relationship to the victims, the killers of whites, regardless of their own race, were more likely to have serious criminal records than the killers of blacks. We know of no empirical or logical basis for such a supposition, and it seems unlikely that any unforeseen effect of this type could be large enough and consistent enough to have the power to explain the racial patterns that we have reported.
>
> In sum, we are aware of no plausible alternative hypothesis that might explain the observed racial patterns in capital sentencing, in legitimate non-discriminatory terms.

37 Stanford L. Rev. at 100-02 (footnotes omitted).

(5) The reliability of the Gross-Mauro study is confirmed not only by its own design and results, as the preceding discussion shows, but in two other ways as well. First, confirmation is by a comparison of the results found in Florida with those of the other seven states included in the Gross-Mauro study; these were Georgia, Illinois, Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas. A similar pattern of race-of-victim based discrimination was found in each state. Second, confirmation is by a comparison of the Gross-Mauro study to other studies of Florida's imposition of the death penalty.

(6) Gross and Mauro make the comparison to other Florida studies extensively, at pages 43-45 and 102 of their article, and are able to demonstrate the strength of their study

thereby. No matter what the methodology of the study or what number of variables the study has examined, each has come to the same conclusion in Florida as well as other states: the race of the victim is unquestionably a major determinant in the decision to impose death.

(a) In a study examining an earlier period of the application of the death penalty statute in Florida -- in its first five years -- William Bowers and Glenn Pierce focused upon the probability of receiving the death sentence in Florida by race of offender and victim. Bowers and Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 1980 Crime and Delinquency 563 (October 1980). The following table illustrates their findings:

Probability of Receiving the Death Sentence in Florida, for Criminal Homicide, by Race of Offender and Victim (from effective date of post-Furman death statute through 1977)

Offender/Victim Racial Combinations	(1) Estimated Number of Offenders	(2) Persons Sentenced to Death	(3) Overall Probability Of Death Sentence
Black kills white	240	53	22.1%
White kills white	1,768	82	4.6%
Black kills black	1,922	12	.6%
White kills black	80	0	0%

The authors analyze this data as follows:

> In Florida, the difference by race of victim is great. Among Black offenders, those who kill Whites are nearly 40 times more likely to be sentenced to death than those who kill Blacks. The difference by race of offender, although not as great, is also marked.

Id. at 595. To attempt to account for legitimate factors which might explain these results, Bowers and Pierce examined the data at specific, discretionary stages within the judicial process and examined a specific kind of murder (felony-murder). The strength of the race-of-victim discrimination remained:

(i) In examining the likelihood of

moving from one stage to the next in the judicial process for the various offender/victim racial categories, Bowers and Pierce again found the racial pattern to be clear and consistent. The table below shows that the racial patterns identified in the over-all probability of receiving a death sentence (shown in the preceding table) also exist at the significant decision-making stages of the criminal justice process.

Charges, Indictments, Convictions, and Death Sentences in Florida for Criminal Homicides, by race of Offender and Victim (from effective date of post-Furman statute through 1977) Conditional Probability of Moving between Successive Stages

Offender/Victim Racial Combinations	First Degree Indictment Given Indictment	First Degree Charge Given First Degree Indictment	Death Sentence Given First Degree Charge	Overall Probability of a Death Sentence Give Indictment
Black kills white	92.5%	43.0%	47.0%	18.7%
White kills white	66.6%	37.0%	29.0%	7.1%
Black kills black	36.6%	19.4%	19.6%	1.4%
White kills black	42.9%	15.0%	0%	0%

Id. at 578.

(ii) In evaluating the processing of felony and non-felony type murder cases by race of the offender and the victim, Bowers and Pierce found the results of this analysis also to be consistent with those disproportionate racial patterns previously identified. Thus, even in a felony-type murder, a white can kill a black with zero probability of receiving the death sentence.

Probability of Receiving the Death Sentence in Florida Felony and Non-felony Murder by Race of Offender and Victim (from effective dates of post-Furman death statutes through 1977)

	Felony-Type Murder			Nonfelony-Type Murder		
	(1)	(2)	(3)	(4)	(5)	(
Offender/ Victim Racial Combination	Estimated Number of Offenders	Persons Sentenced to Death	Probability of Death Sentence	Estimated Number of Offenders	Persons Sentenced to Death	Overall Probability of Death Sentenc

Black kills white	143	46	32.3%	97	7	7.2%
White kills white	303	65	21.5%	1,465	17	1.2%
Black kills black	160	7	4.4%	1,762	5	0.3%
White kills black	11	0	0.0%	69	0	0.0%

Id. at 599.

(b) The conclusions reached in other studies of the racially-biased application of Florida's death sentence concur with those described above:

(i) M. Radelet and G. Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc. Rev. 587 (1985), in which the authors studied data on 1,419 defendants indicted for homicide in Florida between 1973 and 1977, and concluded that "the criminal justice system is disproportionately severe on homicides against whites and by blacks, and this bias is evident at every stage of the criminal justice process."

(ii) L. Foley and R. Powell, The Discretion of Prosecutors, Judges and Juries in Capital Cases, 7 Crim. J. Rev. 16 (Fall 1982), analyzed all first-degree murder indictments in 21 Florida counties during 1972-78, and concluded that "defendants in capital cases in Florida receive differential treatment due to their attributes and the attributes of their victims."

(iii) L. Foley, Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (unpublished study), concluded that "males and offenders accused of murder of a white victim were . . . much more likely to receive the death penalty than females and those accused of murder of a black victim."

(iv) M. Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Sociological Rev. 918

(1981), examined the homicide indictments in 20 Florida counties between 1976 and 1977, and concluded that "relative equality in the imposition of the death penalty appears mythical as long as prosecutors are more likely to obtain first-degree murder indictments for those accused of murdering white strangers than for those accused of murdering black strangers."

(7) Finally, the validity of the Gross-Mauro study is confirmed by the results recently made known in a study of the imposition of the death penalty in Georgia. Professors Baldus, Woodworth, and Pulaski have recently completed a massive study of a large sample of Georgia cases (1066) in which the defendants were convicted of murder or manslaughter. The Baldus study was the subject of an evidentiary hearing in the lower court in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc). The Supreme Court has recently granted certiorari to review this issue in McCleskey. 106 S.Ct. 3331 (1986). This study examined the relation between more than 400 factors -- concerned with defendants' and victims' backgrounds, the defendants' criminal records, the circumstances of the homicides, and the strength of the evidence of the defendants' guilt -- and the imposition of the death penalty. Professor Baldus and his colleagues found, as did Gross and Mauro in the Georgia part of their study, that the race of the victim was an extraordinary and strong determinant in death sentencing. Two findings of the Baldus study in particular, however, provide strong confirmation of the validity of the study conducted by Gross and Mauro -- both in Georgia and in Florida. As reported by Gross and Mauro, these findings are the following:

> First, the Baldus study establishes that data on the defendants' criminal records have little or no impact on the pattern of discrimination by race of victim in capital sentencing in Georgia. Second, the study demonstrates that the magnitude of the race-of-victim effect that we found in Georgia would not be reduced if we were able to control for additional variables concerning the level of aggravation of the homicides and

> the strength of the evidence against the defendants. The study reports a logistic regression model on the odds of a death sentence, which is comparable to several of our own, as well as many larger regression analyses that include numerous additional control variables. Comparisons between these larger models and the smaller one reveals two important facts: (1) the race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

37 Stanford L. Rev. at 103-04 (footnotes omitted). Accordingly, while there is no "Baldus-type" study of Florida, it appears that the Gross-Mauro study of Florida, in combination with other Florida studies, is just as reliable as such a study would be if it were available, based on the experience in Georgia.

F. Florida's history of race discrimination also supplements the showing of the statistically disparate imposition of death sentences on the basis of race. If provided the opportunity, Mr. Riley will prove: (a) that Florida has had a longstanding history of de jure racial segregation and discrimination in virtually all areas of public life, which did not completely end, statewide, until 1971, with the end of de jure school segregation; and (b) that the effects of de jure race discrimination continued beyond the end of de jure discrimination, and have continued to be reflected in the present, in the unemployment levels of black people, the disproportionate concentration of black people in lower paid and lower status jobs, the median level of black family income in comparison to white family income, and the disproportionately low numbers of black students in the institutions of higher education in Florida. These historical facts give rise to an inference of purposeful discrimination as the explanation for the strongly disparate application of the death penalty on the basis of the victim's race, and the defendant's race, a predicate for

fourteenth amendment analysis. The fourteenth amendment equal protection claim may be raised by evidence 1) that "[t]he impact of the official action. . . bears more heavily on one race than another. . ." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); 2) that the particular decision made affords state actors broad discretion, which is relevant because of "the opportunity for discrimination [it]. . . present[s] the state, if so minded, to discriminate without ready detection." Whitus v. Georgia, 385 U.S. 545, 552 (1967); and 3) that there has been historical discrimination. One (1) and three (3) have been shown, and it is abundantly clear that capital sentencing systems in general, and Florida's in particular, are characterized by a broad "range of discretion entrusted to a jury," which affords "a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 90 L. Ed. 2d at 35 (1986).

While race-of-victim studies have been much more exhaustively pursued, there have been preliminary studies focusing upon other arbitrary determinants of capital sentencing -- geography, sex of the defendant, and occupation of the victim. These studies have shown precisely what the pre-Gross/Mauro and pre-Baldus studies showed with respect to the race of the defendant and the race of the victim: that these factors also arbitrarily and discriminatorily play a determinative role in the process of capital sentencing. While these studies have not been developed to the same extent as the others, the subsequent experience with race-of-victim studies indicates that the opportunity should be provided to further develop these studies, in light of the strength of their preliminary figures -- showing a high degree of influence upon the imposition of the death sentence.

(1) With respect to the factor of geography, the death penalty is nearly two and one-half times more likely to be imposed

in the panhandle than in the southern portion of the state; the northern and central regions fall about midway between these two extremes. The probability that such differences could occur by chance, given evenhanded disposition of the death penalty and comparable offenses committed across the state, is extremely low, well beyond accepted standards of chance variation -- .002. See Bowers and Pierce, supra. When Bowers and Pierce (the researchers conducting the investigation of geography and the death penalty) controlled for the felony-murder aggravating factor, the geographic disparities not only failed to disappear, but instead, increased -- to a ratio of four to one between the panhandle on the one hand and the northern and souther regions (collectively) on the other, and to a ratio of two to one between the central region on the one hand and the northern and southern regions (collectively) on the other. Id. at 603-05. These regional disparities persisted when potential capital cases were followed from arraignment through final sentencing, Id. at 616-19, and after appellate review by the Florida Supreme Court, Id. at 623-25. Disparities such as these simply should not occur and cannot be tolerated under a system which must "assure consistency, fairness, and rationality in the evenhanded operation of state law." Proffitt v. Florida, 428 U.S. 242, 260 (1976). Moreover, there can be no plausible hypothesis to explain this disparity, for it is not plausible that the character of homicides or defendants varies significantly from region to region within a state. Plausibly, what do vary are the attitudes of sentencers from region to region, but that cannot -- under a unitary, evenhanded state law -- be allowed to mean the literal difference between life and death among defendants.

(2) On the basis of a 21-county study concerning all cases from 1972 through 1978 in which first-degree murder indictments were returned, a study conducted by Professor Linda A. Foley and Richard Powell, of the University of North Florida

(referred to supra), the sex of the offender also appears to determine significantly the imposition of the death penalty in Florida. In this study, Foley and Powell sought to ascertain the variables which have a statistically significant influence on three critical stages of the capital prosecution process in Florida: the prosecutor's decision whether to go to trial or dismiss charges, the jury's sentence recommendation, and the judge's sentencing decision. Their findings demonstrate the influence of the sex of the defendant on the capital sentencing process to a greater degree of statistical significance than the threshold of statistical significance required by the Supreme Court in Castaneda v. Partida, 430 U.S. 482 (1977):

> The fourth factor influencing the trying of a case is an attribute of the defendant: sex (p .0179). A female defendant is much more likely to have her case dismissed than is a male defendant. . . . It should be remembered that the relationships between this attribute and other factors (e.g., circumstances of the case) have been removed statistically. Therefore, this attribute is influencing the prosecutor's decision separately from any of the legal factors which might be related to it (at least those legal factors examined in this study).
>
> * * * * * *
>
> According to the log linear analysis, both the jury and the judge are significantly influenced by the sex of the offender. . . (.0001). In both decisions females . . . are less likely to receive the death penalty. However, the analysis of covariance controls for the impact of many other predictor variables,thus the level of significance for . . . [this] . . . variable[] is reduced. . . . [Nonetheless] the sex of the offender still influences the decision of both parties [to a statistically significant degree (p .0491, p .0255), after the analysis of covariance].

7 Crim. J. Rev. at 19-21.

(3) While the sex of the defendant has not been studied even to the degree that geography has, this factor shows a strong enough correlation with the imposition of death sentences that further opportunity for evidentiary consideration is

certainly warranted.

H. On the basis of the foregoing facts, Mr. Riley submits that the imposition of the death penalty in Florida is still in violation of the eighth and fourteenth amendments -- having changed superficially, but not in substance, from the discriminatory, arbitrary imposition of death so firmly condemned in Furman v. Georgia.

IV. LEGAL BASIS FOR RELIEF

CLAIMS I AND II

MR. RILEY WAS DENIED A RELIABLE INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

The Florida Supreme Court has of late written much, and much differently, about Mr. Riley's Lockett claim. In a case strikingly similar to Mr. Riley's, the Court directly addressed the "Cooper/Lockett" problem, and granted an appellant a second resentencing, after his first resentencing had occurred without a new jury recommendation:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he thought section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to the presentation of evidence by both the state and the defense at the sentencing proceeding. Moreover, in arguing to the jury defense counsel stated:
>
> > As the judge will explain to you, the law is very specific in spelling out what you may consider in making your decision. You may not go outside the aggravating and mitigating circumstances in reaching your decision. . . . But you may not

> go outside the specifically enumerated aggravating and mitigating factors.
>
> Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empanelled jury.

Lucas v. State, 490 So.2d 943 (Fla. 1986). As demonstrated in this section, Harvard and Lucas present examples of recent and correct resolutions of issues earlier raised by Petitioner but rejected, and Petitioner is entitled to unhurried and studied resolution of his claim within the parameters of Florida's changing law. To an important extent, this Court's resolution of Mr. Riley's claim should be controlled by the forthcoming decision by the United States Supreme Court in Hitchcock v. Wainwright, No. 85-6756, which presents the precise constitutional issue presented here. In order to make plain that Mr. Riley presents the same claim which Mr. Hitchcock has under review, much of what follows comes directly and verbatim from Mr. Hitchcock's United States Supreme Court brief, with the permission of Mr. Hitchcock's counsel. A photocopy of that brief is submitted as an Appendix hereto.

A. THE EMERGENCE OF LOCKETT IN FLORIDA'S STATUTE

1. Introduction: The Lockett Mandate Of Individualized Capital Sentencing

Since Lockett, it has become plain that the most fundamental Eighth Amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. Lockett invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating circumstances concerning the defendant and his crime created the constitutionally "unacceptable risk that the death penalty will be imposed in

spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605 (plurality opinion). The Court has consistently demanded adherence to the Lockett principles.

Therefore, today "[t]here is no disputing," Skipper v. South Carolina, 106 S.Ct. at 1670 (1986), the force of the constitutional mandate. "What is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

2. Florida's Response to Furman: Limiting Mitigation By Statute

The constitutional necessity of individualized sentencing in capital cases was not, however, initially so clear. The nine separate opinions in Furman v. Georgia, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with the Eight Amendment." Lockett, 438 U.S. at 599. States responded differently. Those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman," Lockett, 438 U.S. at 599 n.7, and as a consequence some included provisions to limit the mitigating factors that could be considered. See e.g., Lockett, id.; State v. Richmond, 144 Ariz. 186, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 889, cert. denied, 434 U.S. 878 (1977); People v. District Court, 586 P.2d 31, 33 (Colo. 1978).

a. The 1972 Florida Statute

Florida was among those states that followed the "reasonable" view that Furman required restriction of the mitigating factors. Prior to Furman, in March, 1972, the Florida

Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be considered during the sentencing proceeding." Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973). Furman supervened and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered, but after intense debate over the meaning of Furman, the Florida Legislature chose the Governor's proposal, consisting of a modified version of the Model Penal Code. The statute that emerged restricted discretion by listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection [(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection [(6)]"; then, "[b]ased on these considerations, whether the defendant should be sentenced to life or death." Sections 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. Through an undetected transcription error in the hurried special session, the words "limited to" were inadvertently dropped from the separate subsection listing mitigating factors. See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. at 358 n.199. Nevertheless, the statute's embodiment of the "reasonable" view that Furman required mitigation to be limited was clear, for in actually determining the sentence the jury and judge were explicitly restricted to consideration of the factors "as enumerated" in the statute. "Thus the enumerated circumstances are intended to be

the exhaustive list of sentencing considerations." Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U. L. Rev. 108, 139 (1974).

b. Implementation Of The Statute By The Florida Court

The statute was first construed in the seminal case of State v. Dixon, 283 So.2d 1 (Fla. 1973), which emphasized that its primary mechanism for satisfying Furman was the itemization of specific aggravating and mitigating circumstances so as to restrain sentencing discretion. The opinion referred frequently and invariably to "the" mitigating circumstances citing the statutorily enumerated factors. For example, the court spoke of "the mitigating circumstances provided in Fla. Stat. 921.141(7), F.S.A." in describing how the sentence was to be decided. 283 So.2d at 9. The dissent likewise specifically noted the limitation on consideration of mitigating circumstances to those contained in the statute. Id. at 17 (Ervin, J., dissenting). Dixon's understanding of the exclusive nature of the statutory mitigating circumstances continued to be reflected in the court's opinions.

The Florida court's next express pronouncement on the subject came in 1976. A few days after Proffitt it squarely faced the question whether the statute permitted consideration of evidence of nonstatutory mitigating factors and said with uncommon clarity that the statute strictly barred such consideration. Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), In Cooper the Florida court affirmed the exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list,

emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original). Accordingly, "[t]he sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list." It was not until after Lockett that another view was recognized.

c. The Florida Supreme Court And Lockett

There was, at the very least, tension between Cooper et al. and Lockett. After Lockett, the Florida Supreme Court decided Songer v. State, 365 So.2d 696 (Fla. 1978). Said Songer: "Obviously, our construction of Section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." Id. at 700. Both the holding of Cooper affirming the preclusion of nonstatutory mitigating character evidence, and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by Furman, was said to be "not apropos to the problems addressed in Lockett." Id. Cooper was said to have been concerned only with whether the mitigating evidence was "probative," not whether the evidence fell outside the statutory list of mitigating factors. Id.

3. The Pre-Lockett Florida Statute (and, as here, post-Lockett, pre-amendment) Was Unconstitutional

A state court is, of course, free to interpret state

statutes as it pleases. Its interpretation, once rendered, is binding upon the federal courts. E.g., Wainwright v. Stone, 414 U.S. 21 (1973). A state court may change its interpretation of statutes to meet constitutional demands, id., and by such reconstruction save the facial constitutionality of an otherwise unconstitutional statute. Id.; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). But all of this speaks to the future. A state court cannot unmake history by rewriting it. Thus, the "remarkable job of plastic surgery" that the Songer court performed on the statute and on its own prior construction of the statute does not "serve[] to restore constitutional validity" to sentences imposed under the earlier, unconstitutional procedure. Shuttlesworth v. Birmingham, 394 U.S. 147, 153, 155 (1969).

Commentators have noted that the Songer decision represents an attempt to do just this: to evade the mandate of Lockett and save the constitutionality of prior Florida death sentences by a shift having no "fair and substantial support" in state law. See Hertz & Weisberg, supra, at 351. Their view is confirmed, implicitly but consistently, by judicial decisions which leave no legitimate doubt that the pre-Songer statute was applied restrictively to preclude any consideration of any mitigating circumstances not expressly enumerated in it. The Eleventh Circuit has recognized the exclusion of nonstatutory mitigating circumstances decreed by Cooper. See, e.g., Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc); Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982); Ford v. Wainwright, 696 F.2d 804, 812 (11th Cir. 1983) (en banc); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983). The United States Supreme Court has noted the change in Florida law that removed restrictions on consideration of mitigating factors in 1978 after Lockett. And courts in other states that had viewed their statutes as identical to Florida's before Lockett had also read those statutes as limiting

mitigating consistently with Cooper.

For a time, Florida Supreme Court decisions in post-conviction cases raising Lockett claims were consistent only in denying relief under all circumstances: the Court held on a case-by-case basis that Lockett either had or had not changed Florida's law depending upon the results that would flow from these respective conclusions. It is only within the last year, after the Eleventh Circuit's en banc decisions in Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) and Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), that the Florida court has directly addressed the problem.

In Harvard v. State, 486 So.2d 537 (Fla. 1986), the trial judge (who also heard Harvard's post-conviction motion) "expressly found that 'reasonable lawyers and judges . . . could have mistakenly believed that nonstatutory mitigating circumstances could not be considered,'" and that "'[t]he court certainly carried out its responsibility on the basis of that premise at time of Mr. Harvard's trial.'" Id. at 539. A divided Florida Supreme Court agreed and found Harvard's death sentence to have been "imposed in violation of Lockett." Id. In Harvard, the Florida court further found "no factual dispute" concerning the allegation that Harvard's trial lawyer had also believed that Florida law precluded consideration of nonstatutory mitigating circumstances and so had failed to develop and present mitigating evidence at the sentencing hearing. It rejected a claim of ineffective assistance of counsel on these facts because, "given the state of the law at the time," counsel's conduct "reflects reasonable professional judgment." Id. at 540.

Thus, "[a]lthough the Florida statute approved in Proffitt [may not have] . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 606-607

(emphasis supplied), it is no longer disputable that the statute did operate in precisely that manner, at least between the dates of Cooper and Songer. The United States Supreme Court's "assum[ption] . . . [in Proffitt] that the range of mitigating factors listed in the statute was not exclusive," id. at 606, was undercut only a few days later by the unmistakable holding in Cooper. And Cooper's authoritative construction of the statute - which, of course, "fixes the meaning of the statute" for federal constitutional purposes "as definitely as if it had been so amended by the legislature," Winters v. New York, 333 U.S. 507, 514 (1949); see, e.g., Wainwright v. Stone, supra - rendered that statute unconstitutional under Lockett at the time that Mr. Riley was tried and condemned to die under it, in April of 1976, and upon resentencing.

That, without more, should suffice to invalidate his death sentence. The execution of a death sentence imposed pursuant to a federally unconstitutional statute would be inconceivable. This is why, having invalidated the Ohio death penalty statute in Lockett, the United States Supreme Court vacated all death sentences imposed under it in cases pending there, Roberts v. Ohio, 438 U.S. 910 (1978), and companion cases, id. at 910-11; Adams v. Ohio, 439 U.S. 811 (1978), and the Ohio Supreme Court subsequently ordered them all to be set aside, and the condemned inmates resentenced to imprisonment.

This makes sound practical sense. Picking and choosing among inmates sentenced to die under the same unconstitutional statutory regime - upsetting the death sentences of some but not of others, as the Florida Supreme Court is now doing - makes no sense at all. As one Justice of the Florida court has pointed out:

> [I]t seems fundamentally unfair to me for one person to go to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered.

Jackson v. State, 438 So.2d at 7 (McDonald, J., dissenting).

The uncorrected application of the pre-Songer Florida statute is indeed "fundamentally unfair," for it calls into question the accuracy of sentencing decisions made during its tenure. In many cases its effect may have been subtle or invisible on the face of the record, though it operated powerfully at many levels, constraining the lawyers, the jury, the judge, and even review by the Florida Supreme Court. Given the radical inconsistency of the then-prevailing Florida law, with the basic mandate of the Eight Amendment as construed in Lockett, it is impossible to deny that "the risk that the death penalty will be [inflicted upon Wardell Riley and others similarly situated] . . . in spite of factors which may call for a less severe penalty" is very high. Lockett v. Ohio, 438 U.S. at 605. The United States Supreme Court has emphasized that such a risk "is unacceptable and incompatible with the . . . Eighth Amendment[]." Id. Considering the consequences of erroneous decisions on a matter so grave as the imposition of society's ultimate punishment, the price of rectifying the risk of error by vacating Mr. Riley's death sentence and others of like vintage "would surely be well spent." Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion).

B. MR. RILEY'S CLAIM IS CONTROLLED BY, AND HE MUST RECEIVE THE BENEFIT OF, LOCKETT, EDDINGS, LUCAS, HARVARD, HITCHCOCK, AND SONGER.

If either the recommending jury or the judge were precluded from considering (while hearing) evidence in mitigation, resentencing is required. The trial judge must rely upon the jury recommendation which, if it is unconstitutionally derived, destroys capital sentencing reliability in violation of the Eighth and Fourteenth Amendments. The judge must also consider nonstatutory mitigation, and if he or she is "precluded," the

same constitutional violation is extant. Mr. Riley will first show that the jury recommendation was unconstitutionally obtained, and second that the trial court's own findings were improperly restrictive, either or both resulting in a unconstitutional sentence of death.

1. Mr. Riley's Improperly Instructed Advisory Jury Spoiled the Reliability of the Sentence Imposed. (Claim I)

Mr. Riley's advisory jury was instructed pursuant to what this and other courts have said responsible jurists and attorneys believed the Constitution and the Florida Statute required at the time -- restrictive mitigaton. Everyone was wrong, and Mr. Riley is saddled with a death sentence.

As noted the jury was in virtually the same boat as the judge and lawyers, only worse -- the jury looked to these participants to learn what to do at the critical sentencing phase. The jury was told the exact same things as the jury in Hitchcock, and the unconstitutionality of Mr. Hitchcock's jury instructions are under serious consideration by the United States Supreme Court. Mr. Riley should receive similar consideration of the exact language used before his jury.

There, as here, the judge informed the jury that the list was exclusive: "The mitigating circumstances which you may consider shall be the following: [reciting the statutory list]". Compare Hitchcock brief, p.21, with Section III, supra. There, as here, the judge restricted himself to consideration of the statutory circumstancers. Id. There, as here, the prosecution told the jury that the statute contained the exclusive list. The similarities between the two cases (and Lucas, Harvard) underscores the constitutional claim. Many Florida capital cases tried during the critical time period were "reasonably," but unconstitutionally, conducted.

The jury was improperly instructed about mitigating

circumstances, in a way that limited consideration of mitigating evidence. New sentencing before a new advisory jury is required. The Florida Supreme Court has recently spoken to the effect improper jury instructions produce:

> The above-mentioned evidence [of mental problems] might very well suggest to the jury that appellant suffers from mental or emotional disturbance. Had the jury been properly instructed that it could consider this specific mitigating factor, it might not have recommended death. A jury recommendation of life is entitled to great weight and may not be overruled unless there was no reasonable basis for it. Richardson v. State, 437 So.2d 1091 (Fla. 1983). Appellant has been prejudiced by the trial court's refusal to give a proper instruction that might have led to a different jury recommendation.

Toole v. State, 479 So.2d 731, 734 (Fla. 1985). When the jury recommendation is colored by error before the jury, resentencing with a jury is required. Lucas, supra; Menendez v. State, 415 So.2d 312, 314 (Fla. 1982).

Of course, even though the jury recommendation is critical not every error in instruction requires resentencing. Adams, 764 F.2d at 1364. Errors that "preclude" or "exclude" from consideration "any information or argument in mitigation" are especially intolerable. See Barclay v. Florida, 103 S.Ct. 3418, 3430, n.2 (1983) (Stevens, J., concurring); compare Spaziano v. Florida, 104 S.Ct. 3154, 3158 (U.S.) ("There is no suggestion in this case that either the jury or the trial judge was precluded from considering any nonrestricting mitigating evidence.") It is not relevant that proper evidence was introduced if the "sentencer" was instructed that the statutory "list" contained "the mitigating evidence to consider," and the evidence presented did not fit in the list. Eddings makes this clear, where the sentencing judge was presented with but believed he could not consider certain mitigating evidence:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant

> mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on appeal, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 102 S.Ct. 869, 877 (1982).

Since the Florida trial judge "owe[s] ... deference to the jury's 'sentence' on the issue whether the death penalty was appropriate," Baldwin v. Alabama, 105 S.Ct. 2727, 2735 (1985), and in fact must give the recommendation great weight, Mr. Riley's death sentence is unconstitutional.

2. The Trial Judge Unconstitutionally Restricted His Consideration Of Mitigating Circumstances To The Statutory List

In this case, the trial judge did not mention nonstatutory mitigation upon resentencing Mr. Riley to death, despite abundant evidence of such mitigation. This is the same judge who instructed the jury that the list was exclusive, and who, through his actions, agreed with the prosecution that one statutory mitigating circumstance was all that applied, based on the remand. When this claim was raised on appeal, it was rejected. The Florida Supreme Court believed that since evidence in mitigation was introduced into evidence, there was no violation.

Mr. Lucas received different treatment this year. The same jury instructions given in this case provided evidence for the Florida Supreme Court to believe Lucas' trial judge felt restricted. Something is happening to Florida law, and Mr. Riley should receive the benefit.

Of course, Lucas is right. "An erroneous instruction may also provide convincing evidence that the judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). Also here, as

in Lucas, the trial judge did not mention nonstatutory mitigation -- the statute was yet to be amended. Mr. Riley deserves the same relief as Mr. Lucas, if arbitrariness in capital sentencing is to be eliminated.

Mr. Riley also deserves the same relief as Ms. Lockett and Mr. Eddings. In Lockett, the trial judge requested and received "detailed information about Lockett's intelligence, character and background" in psychiatric, psychological, and sentencing reports. These reports reflected that Lockett had only minor criminal convictions, was receiving treatment for prior drug abuse, had been minimally involved in the offense at issue, and had a favorable prognosis for rehabilitation. Id. at 594. Since these circumstances were not statutorily enumerated as relevant sentencing factors, however, the trial judge imposed a death sentence "after considering the reports" but recognizing the statutory limitation on factors to be weighed. Id.

The Supreme Court, in holding the Ohio death penalty statute invalid, declared that the capital sentencing arbiter must be permitted to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense...." Id. at 605. The fact that mitigating evidence was presented to the trial judge in Lockett was of little avail where the trial judge deemed himself statutorily precluded from giving independent mitigating weight to this evidence. And identically, in the case at bar, the fact that the trial judge was presented with nonstatutory mitigating evidence is of little benefit to the defendant; the sentencing order establishes that this evidence was not given the requisite "independent mitigating weight." See Mines v. State, 390 So.2d 332 (Fla. 1980).

Mr. Edding's turbulent childhood was before the sentencer who believed himself constrained to not consider it. Resentencing is required.

C. CLAIMS I AND II SHOULD BE ENTERTAINED ON THE MERITS

Despite the fact that the Florida Supreme Court had repeatedly held that the sentencing jury instructions given here were constitutional, Mr. Riley contended on direct appeal of his (re)-sentencing that his jury was erroneously not instructed that the statutory list of mitigating circumstances was not exclusive. Mr. Riley contended that "at all three levels of the Florida capital sentencing structure [jury, judge, and Florida Supreme Court], consideration must be given to all evidence in mitigation...", Appellant's brief, p.22., and that the trial jury was incorrectly instructed. He conceded that the Florida Supreme Court disagreed, but "did not waive the contrary contention under the Eighth and Fourteenth Amendment requirements set forth in Lockett. . . ." Id.

The Florida Supreme Court did not specifically address this Lockett claim on appeal of resentencing. In rejecting a different claim, however, the Court addressed and denied this one: "There is no question that the jury was properly instructed at the sentencing hearing . . . ." A year later, on appeal of denial of post-conviction relief, the Court noted: "We have already determined that the jury in this case was properly instructed at the sentencing hearing. Riley v State, 413 at 1174." The Court then cited its own Hitchcock decision. The Court repeated "that the jury was properly instructed [at sentencing]." Without question, the "rule of the case," pronounced by the Florida Supreme Court, is that there was no defect in the sentencing jurors' instructions. This Court should "revisit" this claim that was raised and ruled upon in the appeal process.

There is no justification for procedurally skirting the issue. This issue was not raised on the first trial appeal -- the instruction given was "the law." As pointed out in the brief

before the United States Supreme Court in Hitchcock, this is not a proper omission for application of the procedural default doctrine:

> The case would be much different, to be sure, if counsel had the tools to challenge state law upon federal constitutional grounds but had elected not to do so as "a tactical decision to forego a procedural opportunity ... and then, when he discover[ed] that the tactic ha[d] been unsuccessful, pursue an alternative strategy in federal court." Reed v. Ross, 468 U.S. at 14. Such conduct by counsel would "seriously implicate... the concerns that... require deference to a State's procedural bar." Id. at 15. But defense counsel's obedience to an explicit rule of state law precluding the consideration of nonstatutory mitigating circumstances prior to the holding in Lockett that such a rule was federally unconstitutional cannot be construed as such a tactical decision. Rather, "we may confidently assume that [it] ... was because [counsel's course of action was]... sanctioned by [controlling state]... law and because [Lockett]... was yet [a year and a half] ... away." Id. at 7.
>
> Prior to Lockett, this Court had plainly implied that a state death penalty statute was permitted and indeed required to provide "standards to guide a capital jury's sentencing deliberations," Gregg v. Georgia, 428 U.S. at 193, in such a way that "the jury's discretion is channeled," id. at 206, and "circumscribed by... legislative guidelines," id. at 207. It had invalidated a "mandatory death penalty statute in Woodsen [v. North Carolina, 428 U.S. 280 (1976)]... because [such a statute]... 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 Woodsen 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 facts' it would require." Lockett, 438 U.S. at 604 (original emphasis). Not until Lockett itself was there any hint that it was beyond the power of a state legislature to guide a capital jury's sentencing deliberations by prescribing what specific characteristics of capital offenses and offenders were to be deemed mitigating.
>
> Plainly, therefore, this is one of those "circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's

> interests," Reed v. Ross, 468 U.S. at 14, and when counsel's obedience to commands of state law whose unconstitutionality was "unknown to him" cannot be attributed to "strategic moves of any sort," id. at 15. Rather, counsel's obedience to the Cooper construction of Florida statutory law before there was a "reasonable basis in existing [federal constitutional] law" to challenge Cooper's proscription of the presentation of nonstatutory mitigating evidence, id. at 15, is just the sort of conformance to apparently valid state procedural rules which is expected of lawyers, see id. at 15-16, and by which "the cause requirement [of Sykes and Engle] may be satisfied" without doing violence ot the concerns of those cases. Reed v. Ross, 468 U.S. at 14.
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> These conclusions are confirmed by an examination of the caselaw during the period between Proffitt and Lockett. In none of the 34 capital cases considered by the Florida Supreme Court during this period does the court's opinion disclose a challenge to the Cooper construction of the Florida statute on grounds which anticipate Lockett. (Other constitutional challenges to the Florida statute do appear in a dozen of these cases.) .... During the same period, only three of 35 reported opinions of the Ohio Supreme Court and the Ohio Court of Appeals reveal challenges to the Ohio statute on the ground that later prevailed in Lockett; and in these three opinions, the challenge is dismissed summarily. (Other constitutional challenges to the Ohio statute were made in all but a half-dozen of these cases.) Id. Claims anticipating Lockett had greater currency in Arizona, where they were raised in two out of 13 cases decided by the Arizona Supreme Court (7 of which raised other constitutional challenges to the Arizona statute), and eventually prevailed in a federal habeas corpus proceeding decided in April of 1978. Id. The emergence of such claims such as Lockett's prior to this Court's Lockett decision itself largely dates from the publication of the Pennsylvania Supreme Court's opinion in Commonwealth v. Moody, 382 A.2d 442 (November 30, 1977); they are solecisms prior to that time.

App., fn. 48.

The Florida Supreme Court, whose mandate controls proceedings in the trial court, remanded the case "for the purpose of allowing the trial judge to reconsider the imposition of the death sentence..." 366 So.2d at 22. The death penalty statute that applied in April, 1979, was the same statute applied in 1976. As subsequent (and recent) decisions from the Florida

Supreme Court vividly illustrate, a request to empanel a new jury because the first jury had been improperly instructed per Lockett would have been in direct conflict with Florida law. As thoroughly analyzed and illustrated in the Hitchcock brief, and incorporated herein, it is only very recently that this Court has squarely addressed and provided relief on this issue.

CLAIM III

THE DEATH PENALTY IS IMPOSED IN FLORIDA ON THE BASIS OF IMPERMISSIBLE, ARBITRARY AND DISCRIMINATORY FACTORS, INCLUDING RACE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. Only this Court can provide relief.

This Court has rejected the claim presented here in a string of cases. The claim is based upon statistical evidence which this Court rejected summarily when it was presented as early as 1979, based upon the then available evidence, in Henry v. State, 377 So. 2d 692 (Fla. 1979), wherein the Court relied upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978), and when it was presented more recently upon much more comprehensive data. See Adams v. State, 449 So. 2d 819, 820-21 (Fla. 1984); Ford v. Wainwright, 451 So. 2d 471, 474-75 (Fla. 1984); Jackson v. State, 452 So. 2d 533, 536 (Fla. 1984); State v. Washington, 453 So. 2d 389, 391-92 (Fla. 1984); Dobbert v. State, 456 So. 2d 424, 429 (Fla. 1984); State v. Henry, 456 So. 2d 466, 468 (Fla. 1984); Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984); Sireci v. State, 469 So. 2d 119, 120 (Fla. 1985); Bundy v. State, ___ So. 2d ____, 11 FLW 294 (Fla. 1984). See Adams v. State, 380 So. 2d 423, 425 (Fla. 1980); Meeks v. State, 382 So. 2d 673, 676 (Fla. 1980); Thomas v. State, 421 So. 2d 160, 162-63 (Fla. 1982); Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983).

Riley v. State, 433 So.2d 976, 979 (Fla. 1983) is part of the string cite. Mr. Riley raised the claim where it was

required: under Rule 3.850. He proffered the Foley study. After trial court summary denial, this Court denied the claim on its merits, citing its own Hitchcock decision (now on certiorari).

There are several recent developments in the law that provide impetus for reevaluation of this Court's prior holdings on this question. First is the Eleventh Circuit Court of Appeals' decision in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) setting forth new standards governing the evaluation of claims concerning the discriminatory application of the death penalty. These new standards disapprove of the reasoning of Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978) -- that the Supreme Court's finding of facial constitutionality of the Florida statute means that as a matter of law "the arbitrariness and capriciousness condemned in Furman have been conclusively removed" -- which, as we will show infra, lies at the base of this Court's rejection of the claim. The intervention of these new standards caused the Eleventh Circuit to reconsider its holdings concerning the application of the death penalty in Florida. The court of appeals remanded a Florida case for reconsideration in light of McCleskey standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1985); cert. denied, 106 S. Ct. 1992, vacated on other grounds, 106 S. Ct. 1964 (1986).

The Supreme Court of the United States has granted certiorari to review McCleskey (see 106 S. Ct. 3331 (order of July 7, 1986, granting certiorari)), and Hitchcock v. Wainwright, 106 S. Ct. 2888 (June 9, 1986) (order granting certiorari). One question presented by Hitchcock's certiorari petition is

> IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

See also 54 U.S.L.W. 3832 (summarizing certiorari issues). Oral arguments were held in these cases on October 15, 1986. Accordingly, the constitutional standards governing the discriminatory application of the death penalty are under active consideration by the nation's highest court.

There is one further intervening decision that effects the consideration of the present case. In Bazemore v. Friday, 106 S. Ct. 3000 (1986), an action under the federal Civil Rights Act concerning employment discrimination, the Court disapproved of the lower court's treatment of multivariate or multiple regression statistical analysis. Id. at 3008-10. The lower court's view in Bazemore of statistical proof of discrimination was the same as the court of appeals in McCleskey and Hitchcock -- that to allege a prima facie claim of discrimination, multivariate analysis must account for all possible variables. This reasoning, by adoption, also has been the reasoning of this Court. See, e.g., Sullivan v. State, 441 So. 2d 609, 614 (Fla. 1983). It is now apparent that such reasoning is erroneous.

Due to these recent developments in the law, this Court should reconsider its prior holdings as to this claim. While these recent developments do not specifically meet the "change of law" test set out in Witt v. State, 387 So. 2d 922 (Fla. 1980), so as to require this Court to change its prior holdings, the developments are significant enough in scope to permit this Court to revisit its prior rulings. Moreover, rulings by the Supreme Court in favor of McCleskey or Hitchcock would most certainly qualify to require reconsideration of the issue under the Witt test. At the least, the active consideration of the issue by the Supreme Court counsels for this Court to hold this case pending those decisions, for they will most certainly establish the constitutional principles governing the resolution of the claim presented here. This is so because this Court has relied upon the standards set by the federal courts in determining whether an

evidentiary hearing is necessary.

In an early case raising this claim of arbitrary application of the death penalty, this Court, though recognizing its appropriateness for post-conviction hearing, ruled that under the court of appeals' rationale of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), an insufficient preliminary showing had been made under constitutional standards to require an evidentiary hearing. Henry v. State, 377 So. 2d 692 (Fla. 1979). Since that time, by citation and incorporation of prior opinions, this Court has continued to adhere to that reasoning. For example, in the recent decision in Harvard v. State, 486 So. 2d 537 (Fla. 1986), the Court relied upon its prior decision in Sullivan v. State, 441 So. 2d 609 (Fla. 1983). The Sullivan decision had in turn relied upon Spinkellink. Sullivan, 441 So. 2d at 614 (also citing Henry v. State, supra). In its decision in Harvard, the Court also relied upon Adams v. State, 449 So. 2d 819 (Fla. 1984), which relied in turn upon Sullivan. Accordingly, at bottom, the Florida resolution of this claim is based upon the federal court's reasoning in Spinkellink, and will depend for its resolution upon the constitutional standards to be considered by the Supreme Court in Hitchcock and McCleskey for the showing of a prima facie case.

The question to be resolved in this case is not whether Mr. Riley has proven discrimination in the application of the death penalty in Florida. Rather, the question at this stage of the proceedings is whether he has hereinafter alleged a prima facie case. In post-conviction proceedings under Rule 3.850, the governing standard cannot be dismissed without evidentiary consideration unless allegations "conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. The Florida standard for summary dismissal, which is based upon the federal standard, Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963), is the same as the federal standard. Since the federal

courts have defined the summary dismissal standards in more detail than have the courts of this state, it is appropriate to look to those standards for guidance. Id. And under those standards, summary denial would be unwarranted. Mr. Riley sets out a prima facie case herein.

2. The death penalty is imposed in Florida on the basis of race of the defendant, race of the victim, sex of the defendant, and place of the crime, in violation of the eighth and fourteenth amendments.

One of the remaining "badges and . . . incidents of slavery," Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), that still infects contemporary American society is the devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter 19th and early 20th centuries, the degradation of black people led to open tolerance for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, Custom, Law and History: The Enduring Influence of Florida's "Black Code", Fla. Hist. Q. 277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983) ("[I]t is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole.'" Vasquez v. Hillery, ____ U.S. ___, 106 S. Ct. 617, 624 (1986) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)). As the allegations presented by this case demonstrate, it has continued to inform the decision to impose

the death sentence for homicide in Florida. Society's most severe criminal sanction is still imposed -- as it historically has been -- significantly less often when the victim of the homicide is black than when the victim is white.

Had this Court's prior rejections of this claim in prior cases been on the basis of evidentiary hearings in the circuit courts, its rulings might have been unremarkable. However, its previous rulings were solely on the basis of the allegations set forth in the pleadings, for the claim has always been summarily denied.

Summary dispositions of this sort are allowed only in two circumstances: if, assuming the truth of the allegations, the petitioner is not legally entitled to relief, Rule 3.850, Fla. R. Crim. P. See also Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Townsend v. Sain, 372 U.S. 293, 307, 312 (1963); or if the allegations are "wholly incredible," see Machibroda v. United States, 368 U.S. at 495-96; Blackledge v. Allison, 431 U.S. 63, 74, 76 (1977). Given the longstanding condemnation of racial discrimination in criminal proceedings, it is not likely that this Court has approved the summary dismissals of this claim on the basis of not being entitled to relief as a matter of law. Surely if the allegations are true -- that death sentences in Florida are imposed in significant part on the basis of racial considerations -- Mr. Riley is entitled to relief. See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Rose v. Mitchell, 443 U.S. 545, 555 (1979); Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring); Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring); Id. at 249-51 (Douglas, J., concurring); Id. at 364-66 (Marshall, J., concurring). Just last term, the Supreme Court emphasized that the Constitution cannot tolerate even the "risk of racial prejudice infecting a capital sentencing proceeding. . . ." Turner v. Murray, ____ U.S. ___, 106 S. Ct. 1683, 1688 (1986) (emphasis supplied). Thus, this

Court's previous approval of the summary dismissals of this claim must have been based upon a view that the "statistical study" relied on was wholly incredible.

In this light, the Court's prior rulings raise the following question for determination: Can the claim that there is systematic race-of-victim and race-of-defendant based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

The question presented here goes to the allegations necessary to state a prima facie case of discrimination or arbitrariness, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima facie case depends solely upon the allegations made by the claimant. If the unrebutted allegations would permit a rational trier of fact to find discrimination or arbitrariness, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. Burdine, 450 U.S. at 254 n.7 ("[t]he phrase 'prima facie case' . . . describe[s] the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." Bazemore v. Friday, 106 S. Ct. at 3009.

Four years after Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court referred to Furman as having

> mandate[d] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976). Four years after Gregg, the Court held that sentencing discretion is "suitably directed and limited" only if a death penalty statute

> channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). In accord with these principles, the Florida death penalty statute has enumerated aggravating and mitigating circumstances to provide the "'specific and detailed guidance'" of sentencing discretion which must be provided. To this end, the statutorily enumerated aggravating circumstances are the only factors which can be considered in support of the imposition of the death penalty. Cooper v. State, 336 So. 2d 1133, 1139 n.7 (Fla. 1976); Purdy v. State, 343 So. 2d 4, 6 (Fla. 1977).

CONCLUSION/RELIEF SOUGHT

Mr. Riley requests a stay of execution, unhurried and judicious consideration of his claims, and a new sentencing proceeding. If this is denied, he requests a stay of execution pending filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing has been forwarded by U.S. MAIL / HAND DELIVERYto Julie Thornton, Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Rhode Building, Florida Regional Service Center, 401 NW 2d Avenue, Suite 820, Miami, FL 33128, this 2th day of November, 1986.

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