IN THE SUPREME COURT OF FLORIDA

NO. 69608

NOLLIE LEE MARTIN

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
APPLICATION FOR STAY OF EXECUTION
PENDING DISPOSITION OF
PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

MICHAEL A. MELLO
Assistant Capital Collateral
Representative

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
225 W. Jefferson Street
Tallahassee, Florida 32301
(904) 487-4376

Counsel for Petitioner

INTRODUCTION

This first petition for writ of habeas corpus raises seven issues. The first is that Mr. Martin is presently mentally incompetent to be executed. (See Appendix A: "Mr. Martin does not understand the connection between his impending death and the crime for which he was sentenced to death.") The constitutional right not to be executed when mentally incompetent is now clear. Ford v. Wainwright, 106 S.Ct. 2595 (1986). Far less clear is the requisite procedural mechanism that will reliably vindicate and remedy the right. No procedure exists in Florida. The vexing procedural question is presently being debated within the Florida Bar, with an eye toward developing a proper remedy to enforce the right. This Court may and should await the fruits of that Bar debate, and also should receive input from mental health professional organizations, before resolving the procedural question. A stay should issue in Mr. Martin's case pending such resolution.

The second claim is that Mr. Martin received ineffective assistance of counsel on his direct appeal. Several meritorious claims were not presented to this Court at that time.

The third claim is that the jury instructions on sanity unconstitutionally shifted the burden of proof. In a case where the decisive issue was sanity, this jury instruction was fundamental error.

The fourth claim is that the trial court incorrectly and prejudicially misinstructed the jury regarding the consequences of their verdict and regarding their role in the sentencing process.

The fifth claim is that the advisory jury was misled into believing that its sentencing considerations were limited to the factors enumerated in the capital statute.

The sixth claim is that there has never been a specific finding that this is anything other than a pure felony murder

case. The death sentence therefore violates Cabana v. Bullock, 106 S.Ct. 689 (1986).

The seventh claim raised in this petition is that Mr. Martin was sentenced to death by a system unconstitutionally skewed on the basis of race. This, of course, is the same claim presently pending before the United States Supreme Court in McCleskey v. Kemp, 106 S.Ct. 3331 (1986), and Hitchcock v. Wainwright, 106 S.Ct. 2888 (1986).

Since the time the United States Supreme Court granted certiorari in Hitchcock and McCleskey, that Court has granted stays of execution in several cases raising the identical claim. In Davis v. Wainwright, No. A-224 (U.S. September 23, 1986) and Hardwick v. Wainwright, No. A-225 (U.S. September 23, 1986), the Court, by a vote of 7 to 2, granted stays pending the filing and disposition of certiorari petitions. Earlier, in Berry v. Phelps, 55 U.S.L.W. 3114 (August 6, 1986), the Court granted a stay pending filing and disposition of a petition for writ of certiorari. Berry involved a successor habeas corpus petition, and the only issue raised in the stay request was the McCleskey/Hitchcock claim. The stay was granted despite the "procedural default" and "abuse" status of Berry. See also Messer v. Kemp, 106 S.Ct. 3342 (July 8, 1986) (order granting stay of execution pending timely filing and disposition of certiorari petition; successor habeas); Wingo v. Blackburn, 55 U.S.L.W. 3127 (August 5, 1986) (stay pending timely certiorari petition); Watson v. Blackburn, No. 85-5082 (September 4, 1986) (stay granted by Supreme Court; successor habeas; McCleskey claim only issue raised in stay application); Moore v. Blackburn, No. A-30 (September 11, 1986) (stay granted by Supreme Court pending appeal to Fifth Circuit; second successor habeas; only issues in stay application were McCleskey and ineffective assistance of counsel raised for the third time on habeas); Celestine v. Blackburn (September 12, 1986) (stay ordered by United States

District Court, Western District of Louisiana; second successor habeas); McCleskey only issue in stay application); Glass v. Blackburn (September 11, 19860 (stay granted by Supreme Court; McCleskey one of several issues raised); Brodgon v. Blackburn (September 11, 1986) (stay granted by Supreme Court in successor habeas; McCleskey the principal issue in application); Riles v. McCotter, No. 86-2738 (September 16, 1986) (stay ordered in successor habeas by United States District Court, Southern District of Texas; State's motion to vacate denied by Fifth Circuit on September 16, 1986); Rault v. Blackburn, September 17, 1986 (stay granted by Supreme Court in successor habeas; McCleskey only issue raised).

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). The Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(7), (9), Fla. Const.

This is Mr. Martin's first such application.

CLAIM I

This Court has repeatedly and consistently held that challenges to Florida's statutory procedure authorizing a non-adversarial executive determination of competency to be executed is a claim properly brought in an original proceeding before this Court. In Alvord v. State, 459 So.2d 316, 317 (Fla. 1984), this Court noted that Alvord "petitions for a writ of extraordinary relief and requests that this Court require a judicial determination of his competency to be executed." This Court held: "this Court has jurisdiction under the all writs provision of Article V, Section 3(b)(7), of the Florida Constitution." Id. This Court rejected Alvord's claim solely on its merits.

Similarly, in Adams v. Wainwright, 484 So.2d 580 (Fla. 1986), the petitioner filed an original proceeding in this Court

seeking a stay of execution on the ground that he was incompetent to be executed. This Court noted "we have jurisdiction" and rejected the claim solely on its merits. And in Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), the petitioner filed a "petition for habeas corpus, as well as a separately filed petition for issuance of this court's writ of extraordinary relief, [requesting]...a hearing be held to determine whether he is competent to be executed." The Court found that this issue had been adversely decided against the claimant in several recent decisions, and therefore rejected the issue, again, solely on its merits. Similarly, in Goode v. Wainwright, 448 So.2d 999, 1000 (Fla. 1984), the Court had "for consideration a petition for writ of habeas corpus wherein petitioner asks that the sentence of death be stayed until his sanity is determined." The Court in Goode conducted a detailed analysis of the merits of the claim, rejecting the contention that the statutory process set forth in Fla. Stat. sec. 922.07 was unconstitutional because due process was not provided through a judicial determination of competency in an adversary proceeding. The Court held, solely on the merits, that Hysler v. State, 136 Fla. 563, 187 So. 261 (1939), was no longer applicable given the present statutory process that places in the executive branch the authority to determine competency to be executed. Cf. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984) (competency claim brought in habeas corpus proceeding and in appeal from denial of relief pursuant to Rule 3.850; claim treated solely on its merits).

CLAIM II

This Court has long held that ineffective assistance of appellate counsel is a claim properly brought in a habeas corpus proceeding. See, e.g., Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1986).

CLAIM III

This claim goes to the core of the trial process and therefore constitutes fundamental error.

CLAIM IV

This claim was raised on direct appeal, and Mr. Martin asks the Court to revisit it here. See Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986).

CLAIMS V AND VI

These claims go to the core of the trial process and therefore constitute fundamental error.

CLAIM VII

Mr. Martin challenged the racially discriminatory application of Florida's capital system in his first motion to vacate judgment and sentence, brought pursuant to Fla. R. Crim. P. 3.850. In his Rule 3.850 motion filed in Circuit Court in 1984, Mr. Martin asserted that the death penalty in Florida was being administered and applied in a manner that discriminated on the basis of race:

> The death penalty has been imposed in Florida in an arbitrary, discriminatory manner -- on the basis of factors which are barred from consideration in the sentence determination process by the Florida death penalty statute and the United States Constitution. These factors include the following: the race of the victim, the place in which the homicide occurred (geography), and the sex of the defendant. The imposition of the death penalty on the basis of such factors violates the eighth and fourteenth amendments to the United States Constitution and requires that Mr. Martin's death sentence, imposed during the period in which the death penalty was being applied unconstitutionally, be vacated.
>
> A. This claim presents precisely the same question that has been previously presented to and rejected by the Florida Supreme Court, most recently in State v. Washington, ____ So.2d ____, 9 F.L.W. 296 (Fla. July 10, 1984). For that reason, we

> will not burden the Court with detailed restatement of the allegations made therein. For the Court's reference, however, we have included those allegations in the separate appendix (Appendix II) filed with this motion and by reference incorporate them herein. That appendix also includes the scholarly, statistical studies and "qualitative" studies and research that form the basis for Mr. Martin's claim.
>
> B. Briefly, Mr. Martin's claim is that the death penalty has been applied in Florida in violation of both the eighth amendment and the equal protection clause of the fourteenth amendment, for it has been imposed on the basis of race and other arbitrary factors. This fact is shown by a number of independent scholarly studies, using different data bases and different methodologies, that each reach the same result: race is a determinative factor in the imposition of the death penalty in Florida, especially race of the victim as compared with the race of the defendant. These studies meet and exceed the legal standards (2 or 3 standard deviations) for setting out a prima facie case under the equal protection clause, and the proffered qualitative evidence concerning the history and vestiges of race-based discrimination in Florida further meets the standards for a prima facie claim under settled jurisprudence. These allegations together with the supporting evidence, require that a hearing be held to present the evidence in an adversary context and to provide respondent the opportunity to rebut the prima facie case. If there are questions to be raised regarding the studies, they should be raised at an evidentiary hearing where they may be explored with the experts. The allegations and evidence presented by Mr. Martin set out a prima facie case for relief and under such circumstances he is entitled to a hearing on the question at which he may prove his claim. The Court should consider this course notwithstanding the Florida Supreme Court's prior decisions on the merits of the issue. See Ford v. Wainwright, 451 So.2d 471, (Fla. 1984) (holding that this claim must be presented in the first instance to the trial court).

Motion to Vacate Judgment and Sentence, No. 77-1675CF. He moved for an evidentiary hearing and for the appointment of experts, both of which were denied. Mr. Martin pursued the claim on appeal to this Court.

This Court has recognized that in habeas "in the case of error that prejudicially derives fundamental constitutional rights . . . this Court will revisit a matter previously settled

by the affirmance of a conviction or sentence." Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986) (emphasis added). The Court in Kennedy declined to revisit an issue raised in Kennedy's direct appeal -- death qualification of Kennedy's jury -- but the nature of the issue involved here is quite different.

Unlike the petitioner in Stewart v. State, No. 69,338 (Sept. 25, 1986), Mr. Martin did timely raise this claim in the proper forum: A Rule 3.850 motion. Unlike Stewart, Mr. Martin simply asks this Court to revisit an issue previously raised in the proper proceeding. This Court's Kennedy opinion makes clear that this is the proper office of habeas.

This claim goes to the core assumption of the system under which people are sentenced to die in Florida: That it actually operates in a fair and unbiased way. Few issues could be more basic. Violent crime undermines the sense of order and shared moral values without which no society could exist. We punish people who commit such crimes in order to reaffirm our standards of right and wrong. But if the punishment itself is administered in a way skewed by race, it fails its purpose and becomes like the crime that triggered it, just another spectacle of suffering -- all the more terrifying and demoralizing because this time the killer is organized society itself, the same society on which we depend for stability and security in our daily lives. No matter how much an individual criminal may "deserve" his punishment, the manner of its imposition robs it of any possible value, and leaves us ashamed instead of reassured.

Before this Court addresses the broader factual or legal questions posed by Mr. Martin's constitutional claim, however, it should remand this case for development of a full factual record. Difficult constitutional issues arising on a complex factual background ought not be resolved until the relevant facts have been clearly presented. The evidentiary record in this case -- as it presently stands -- is not a satisfactory predicate for

determining the important constitutional questions about discriminatory application of the death penalty, an issue of consummate significance to the administration of justice in our State. Since the discovery and hearing that Mr. Martin sought in his Rule 3.850 proceeding were denied by the trial court and have not occurred, the record does not contain examination of the data forming the foundation of Mr. Martin's claim.

Further, habeas lies because only this Court can provide relief. This Court has rejected the merits of 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). The Court in Henry relied upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978). The Court also rejected the claim 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); Bundy v. State, 490 So. 2d 1258, (Fla. 1986); 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). The state trial courts are bound by this Court's precedent rejecting this claim, holding that the same evidence presented below is insufficient to warrant evidentiary consideration.

STATEMENT OF THE CASE

Mr. Martin was indicted by the State of Florida on August 4, 1977, for his role in the first degree murder, robbery, kidnapping, and sexual battery of Patricia Greenfield. He entered a plea of not guilty and filed a notice of intent to rely on the defense of insanity.

Mr. Martin was tried before a jury. The jury returned a verdict of guilty as to all counts in the indictment. The jury recommended, and the judge imposed, a sentence of death. The Supreme Court of Florida affirmed the conviction and sentence. Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 103 S. Ct. 1508 (1983).

Mr. Martin's motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 was denied without an evidentiary hearing. The denial was affirmed by this Court. Martin v. State, 455 So.2d 370 (Fla. 1984).

Mr. Martin then filed a petition for writ of habeas corpus in federal district court, which was summarily denied. A divided panel of the court of appeals affirmed. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1986). The United States Supreme Court denied certiorari, over the dissents of Justices Blackman, Brennan and Marshall.

CLAIM I

CONDEMNED PRISONERS OF QUESTIONABLE MENTAL COMPETENCY MAY NOT BE EXECUTED WITHOUT FIRST HAVING THEIR COMPETENCY DETERMINED THROUGH AN ACCURATE AND RELIABLE FACT FINDING PROCEDURE.

Factual Basis For Relief

Nollie Lee Martin is presently incompetent to be executed, or at least there are reasonable grounds for believing so. A recent psychiatric evaluation has shown that, as a result of a worsening psychosis, Mr. Martin does not accurately perceive the connection between his crime and his pending execution. Although

Mr. Martin did not appear to suffer such an impairment in his understanding when he was previously evaluated (in 1983 and 1984), he was at those times noted to be suffering from psychosis and organic brain damage -- either of which alone or both of which acting together can cause profound misperception of reality such as the one he now experiences. Finally, even though at trial the court found that Mr. Martin did not suffer from any legally sufficient illness or disorder, that determination was based upon the testimony of experts who found that Mr. Martin was feigning mental illness, but who also explained that if Mr. Martin were truly brain damaged, their findings -- which led them to conclude he was competent and sane -- could be wrong. Since then, further and more accurate evaluation has revealed unequivocal evidence that Mr. Martin is significantly brain damaged. Thus, the previous trial court finding cannot now be relied upon as having fairly and accurately resolved present questions concerning Mr. Martin's mental status. In light of these circumstances, Mr. Martin's present inability to understand the connection between his crime and his punishment raises, at the very least, a substantial doubt about his present competency.

On November 3, 1986, a psychiatrist, Dr. Dorothy Lewis, evaluated Mr. Martin's present mental status. Having seen him previously -- in December, 1983 and in April, 1984 -- Dr. Lewis was familiar with his mental functioning. Although she had on these prior occasions found Mr. Martin to be psychotic and brain damaged, on November 3 she found that Mr. Martin's condition had "changed appreciably." As she explained,

> At the beginning of our interview, which lasted for over two hours, Mr. Martin seemed to be coherent. Mr. Martin appeared with bandages on both arms extending from his wrists almost to his elbows. He explained that he had cut his arms with a razor blade during the previous night. He then asked me whether or not I could prove that what was happening to him was real, and not a dream. At first, I thought that he was simply speaking metaphorically; however, it became clear that Mr. Martin had a tenuous hold on

> reality and was not sure what was real and what was not.
>
> When I asked Mr. Martin whether he knew why he was in prison and why the Governor had signed his death warrant, he replied that he did. He then went on to reveal the following elaborate delusional system: Mr. Martin asserted that it was impossible for him to have killed anyone. He believed that, "The spirits of Karen, and Linda, and Josephine-their minds are using people to plot against me." (Karen and Linda and Josephine are 3 girls who died in a fire that Mr. Martin was accused of setting.) Mr. Martin went on to say, "I believe that the spirits of the people who died in North Carolina are plotting to kill me." Mr. Martin is convinced that the spirits of these girls have conspired to torture him and to influence his behavior and the behavior of Governor Graham.
>
> I will not burden you with the elaborate details of Mr. Martin's delusional system. Suffice it to say that Mr. Martin is more psychotic than he was several years ago when I first saw him. At that time, he had been experiencing threatening auditory hallucinations and visual hallucinations; however, this is the first time he has evidence such an organized delusional system. If he goes to his death at this time, he will do so convinced that he is the victim of a nefarious plot.

Letter to Michael Mello, dated November 6, 1986. See Appendix A. Because Mr. Martin's delusional system has led him to believe that "the spirits of the people who died in North Carolina" have caused everything to occur in relation to his conviction in Florida -- the appearance that he participated in the crime, his conviction and sentence of death for it, and the warrant for his execution -- Dr. Lewis concluded that "Mr. Martin does not understand the connection between his impending death and the crime for which he was sentenced to death." See Appendix A.

Mr. Martin's present incompetency plainly fits within the criteria that define incompetence at the time of execution. As Justice Powell explained in his concurring opinion in Ford v. Wainwright, 106 S.Ct. 2595 (1986), if a condemned person cannot "perceive[] the connection between his crime and his punishment," or if he "cannot connect his execution to the crime for which he

was convicted," id. at 2609, he is incompetent and cannot be executed under the Eighth Amendment. Mr. Martin believes that if he is executed, he will be "the victim of a nefarious plot" to kill him. He will not be executed for a crime that he knows he committed; rather, he will be executed because the spirits of three deceased people have caused him to be convicted, sentenced to death, and now scheduled for execution for a crime that they have made others believe he committed. In his mind there is no connection between his impending execution and any crime that he was responsible for.

Although Mr. Martin did not appear to suffer from such an impairment in his understanding when he was previously seen by Dr. Lewis in 1983 and 1984, he was then noted by Dr. Lewis -- as well as other mental health professionals -- to be suffering from psychosis and organic brain damage. Either of these disorders, or both acting together, can cause the kind of misperception of reality that he now suffers.

In December, 1983, Dr. Lewis conducted an extensive psychiatric evaluation of Mr. Martin. On the basis of a six-hour interview with Mr. Martin, interviews with members of his family, and a review of various family members' psychiatric records, Dr. Lewis found that Mr. Martin suffered from a manic-depressive psychosis and from significant brain damage:

> Mr. Martin does not fit neatly into a single diagnostic category. His intense fluctuating moods from high (i.e. running down the street in a dress; blasting his stereo and dancing on his car; writing 25-30 letters a day to unknown women) to suicidally depressed, coupled with a strong family history of manic depressive illness suggest that he too suffers from a manic depressive psychosis. [The] [a]uditory and visual hallucinations and paranoia [experienced by Mr. Martin], often considered characteristic of schizophrenia, can also occur in manic depressive illness.
>
> In addition there is strong evidence of psychomotor [temporal lobe] epileptic disorder characterized by multiple episodes of deja vu, strong olfactory hallucinations, and episodes of behaviors for which his

> memory is clouded or absent (e.g. finding himself on a boat with no knowledge of how he got there; being told he shouted and threw things and having no memory for the acts).
>
> Finally, there is clear evidence of significant damage to the left parietal area of his brain, manifested by right sided weakness and muscle atrophy as well as corticospinal tract damage on the right. It is likely that the same brain injury causing the right sided weakness and ... Babinski sign is responsible for creating an epileptic focus.

Appendix to App. H at pp. 10-11 (Report of Dr. Dorothy Lewis).

One month later, in January 1984, a psychologist, Dr. Theodore Blau, conducted a psychological evaluation of Mr. Martin which included administration of a neuropsychological test battery known to be reliable in the detection of organic brain damage. Dr. Blau concurred with Dr. Lewis that Mr. Martin suffered from both psychosis and brain damage:

> Mr. Martin is a very seriously disturbed person.... [His] thinking is so disorganized that it will be seen as bizarre or fragmented. His ideas will often be illogical, and hallucinations and unsystematic delusions can be expected....
>
> Thinking is tangential in his efforts to deal with situations he does not understand.... He has periods of flagrant psychosis, and he certainly suffers a thinking disorder. There is a persistent emotional lack of control, and he suffers severe depression.
>
> Although there is evidence of diffuse damage in both hemispheres [of his brain], the primary areas of dysfunction which result in major neuropsychological deficit are in the left hemisphere. Damage can be expected to be found to the structures responsible for the functional system served by the left frontal lobe (posterior), the left sensory-motor area, and the left parietal lobe, with some parieto-occipital involvement. This brain damage may be of a deteriorative nature, and has probably existed for a long time, and continues to develop. Ventricular or sulcal enlargement can be expected on CT scan.
>
> Behavioral deficiencies associated with this type of brain damage will include distortion of tile sensation, poor attention, inability to understand situations or to carry out behavior. He will tend to be confused, and to misunderstand ideas. He will have lapses and distortions of memory and a great

> variation in ability to act and respond in logical ways. He will tend to have difficulty expressing himself adequately. Strength, control, and accuracy on the right side will be poorer than the left in spite of the fact that Mr. Martin is righthanded.
>
> He is likely to show very poor planning ability and poor organizational skills. He will have great difficulties evaluating his own behavior. Decisions will be slow or impulsive but rarely appropriate. Mr. Martin has severe neuropsychological dysfunction.

Appendix to App. H at pp. 4-5 (Report of Dr. Theodore Blau).

Neurological assessment of Mr. Martin in April, 1984 confirmed as well the presence of psychosis and brain damage. As Dr. Jonathan Pincus, a neurologist, reported,

> I believe that this man has a significant psychiatric disorder. I believe he has a depression of psychotic proportion. There is a family history of depression as well. In addition, he has marked evidence of brain damage. There is decreased coordination of the left side of his body and weakness of the right side of his body which shows up very well in the rapid alternating movements. In addition hyperreflexia and a right Babinski are undeniable signs of neurological impairment as is a loss of graphestehsia on the right hand. His inability to remember more than 2 numbers backward and inability to skip and marked tremor are all further signs of neurological dysfunction.

Appendix to App. H at p. 3 (Report of Dr. Jonathan Pincus). In a related consult, Dr. Vernon Mark, the head of Harvard Medical School's department of neurosurgery, read a CAT scan of Mr. Martin's brain, which had been conducted in 1977 before trial. Further confirming that Mr. Martin suffered from brain damage, Dr. Mark reported

> This is an abnormal scan in a twenty-eight (28) year old man. There is significant enlargement of the right lateral ventricle, probably indicating a loss of brain substance in the central or inner portion of the right cerebral hemisphere.

Appendix to App. H (Letter from Dr. Vernon Mark).

Both psychosis and organic brain damage can cause the person suffering from these disorders to have delusions such as the delusion now experienced by Mr. Martin. As seen in Mr. Martin, a

delusion is "[a] false personal belief based on incorrect inference about external reality and firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 356 (3d ed. 1980) [hereinafter "DSM III"]. As further noted in DSM III, "Direct evidence of psychotic behavior is the presence of ... delusions ... without insight into their pathological nature." Id. at 367. Moreover, the "essential feature" of some forms of brain damage "is the presence of delusions that occur in a normal state of consciousness...." Id. at 114 (describing the Organic Delusional Syndrome). While "[t]he nature of the delusions is variable and depends, to some extent on the etiology[,] ... [s]ome individuals with temporal lobe epilepsy have an interdictal [between seizures] Organic Delusional Syndrome that is almost indistinguishable from schizophrenia." Dr. Lewis found "strong evidence of a psychomotor [temporal lobe] epilepsy disorder" in Mr. Martin.

When Mr. Martin was evaluated in 1983 and 1984, he did not appear to be experiencing organized delusions. Dr. Blau noted that he likely experienced "unorganized delusions," but there was no evidence at that time of his experiencing organized delusions. Nevertheless, as DSM III makes clear, such delusions are common features of both psychosis and brain damage. Moreover, because psychosis, especially manic-depressive psychosis, and brain damage frequently result in episodic -- rather than continuous and undifferentiated -- manifestations, delusions, as well as other signs of these disorders, may be present at some times and not at others. See DSM III at 114-15, 216. Thus, the appearance of Mr. Martin's delusional system now, even though it was not present in 1983-84, is consistent with the disorders from which he suffers.

For these reasons, neither Mr. Martin nor his attorneys can

be faulted for not having raised his incompetency at some earlier stage in his legal proceedings. Certainly he suffered from psychosis and brain damage during such times. However, these disorders had not previously manifested themselves in the fashion of an organized delusional system that interfered with his understanding accurately why he was to be executed. Such a course is entirely consistent with these disorders. Thus, the failure to raise Mr. Martin's competency before now cannot be deemed a waiver -- nor, if the Court is concerned about this, can it be taken as a sign that the delusion presently experienced by Mr. Martin is not real (to him). See Ford v. Wainwright, 734 F.2d 538, 539-40 (11th Cir. 1984) (explaining, in granting stay of execution, that there can be no abuse of the writ where the failure to raise the competency claim previously was not warranted by the features of the petitioner's illness). Accord In re Gary Alvord (Executive Order No. 84-202) (governor's stay of execution for condemned person whose competency to stand trial had been litigated but whose competency to be executed had not been raised until nine years after his trial). Of course this latter concern could not, in any event, be resolved fairly on the face of an allegation. This is particularly so in a case like Mr. Martin's, where the underlying disorders which have produced his present incompetency have been diagnosed for several years, and the course of those disorders is entirely consistent with the appearance of heretofore unseen delusions.

Even if the facts revealed that Mr. Martin suffered this delusion continuously, from 1983 on, there is substantial doubt that the failure to raise his competency in an earlier proceeding can be deemed a waiver. The reason is that Ford has established as absolute prohibition: it has commanded the states not to execute the incompetent. Accordingly, the incompetency of a condemned person deprives the state of the power to carry out his execution, in much the same way the incompetency of a criminal

defendant deprives the state of the power to try him. Cf. Adams v. Wainwright, 764 F.2d 1372 (11th Cir. 1985) (trial competency not waivable). Execution competency is a jurisdictional prerequisite and thus cannot be waived.

For this reason, the Ford decision is a "change in law" as defined in Witt v. State, 387 So. 2d 922 (Fla. 1980). The Court in Witt explained that relitigation as a "change in law" would be permitted as to

> those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment.

Id. at 929. That is what Ford did: It placed a category of people -- the incompetent -- beyond the constitutional reach of capital punishment.

While Mr. Martin's current delusional system quite clearly appears to make him incompetent to be executed, and the recent appearance of such an organized delusion is consistent with the disorders from which he suffers, there remains one other concern about the facial validity of Mr. Martin's claim of present incompetency: whether there has been a sufficient change in his condition since trial -- where he was determined to be competent -- to overcome any possible presumption that he remains competent. As Justice Powell explained in his concurring opinion in Ford v. Wainwright,

> [P]etitioner does not make his claim of insanity against a neutral background. On the contrary, in order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.

106 S.Ct. at 2610.

This concern is met in two ways in Mr. Martin's case. First, as already demonstrated, his condition plainly has changed since trial, and indeed, since his state and federal collateral proceedings in 1984. Second, even though Mr. Martin was determined to be competent to stand trial, that determination was based upon testimony of experts who found that Mr. Martin was feigning psychosis, but who also explained that if Mr. Martin were truly suffering from brain damage, their findings -- which led them to conclude he was competent and sane -- could be wrong. Since then, further evaluation of Mr. Martin, as described above, has been conducted and has revealed unequivocal evidence that he is significantly brain damaged. Because this new evidence has been developed through more accurate and more comprehensive evaluation of Mr. Martin, and because it has never been considered by a judge or jury in determining Mr. Martin's mental status, previous findings respecting Mr. Martin's competency or sanity cannot now be relied upon as having fairly and accurately resolved present questions concerning Mr. Martin's competency.

Before Mr. Martin's trial, seven experts evaluated his competence to stand trial and his sanity. Three found that he was both competent and sane, while three found that he was either incompetent or insane or both. Those who found Mr. Martin competent and sane believed that he was feigning symptoms of psychosis. Those who found him incompetent or insane believed he was truly psychotic. However, those who found that Mr. Martin was feigning psychosis indicated that their findings as to competence and sanity could be wrong if Mr. Martin suffered from organic brain damage. While all six of the experts -- who were psychiatrists and psychologists -- observed some symptoms associated with brain damage, they all concluded that he did not suffer brain damage, because the seventh expert -- a neurologist -- had examined Mr. Martin and reported that he did not suffer

from brain damage.

That neurologist, Dr. Russell Wilson, performed a neurological examination and two laboratory tests, an electroencephalogram and a computerized axial tomography (CAT scan). The neurological examination revealed some indications of neurological damage: There was an "impaired ability to recognize numbers written in the palm of his [Mr. Martin's] right hand compared to that on the left. Position sensation was also impaired on the right.... In the lower extremities position sensation was poor with the left great toe, normal with the right. Vibratory perception was also diminished at the left ankle compared to the right." Appendix to App. H at 2. (Neurological Evaluation, August 30, 1977, by Dr. Russell Wilson). Further, the C.A.T. scan of Mr. Martin's brain "revealed a slight ventricular asymmetry, with enlargement on the right side." Id. Despite these findings, however, Dr. Wilson concluded, "I find no evidence of any significant neurological problem on examination or on subsequent tests. I believe that the mild ventricular asymmetry is not of any physiological significance." Id.

On the basis of Dr. Wilson's conclusions, all of the remaining experts who evaluated Mr. Martin ruled out brain injury as a potential cause for his behavior, even though each had observed some signs of organic damage in his examination of Mr. Martin:

(1) Dr. I. W. Scherer, a psychologist who found Mr. Martin to be feigning psychosis, observed some signs of neurological damage in Mr. Martin's slowness of speech, in his lack of spontaneity, and in a tremor in his right arm. See R. 104-106; Deposition of Dr. Scherer, March 15, 1978, at 66-70. Dr. Scherer also administered psychological tests to assist in the detection of brain damage. These tests, the Bender-Gestalt, and the Wechsler memory test, demonstrated as well that Mr.

Martin suffered from severe brain damage. Deposition, at 71-72; R. 119, 123-124, 3932. However, Dr. Scherer rejected the results of these tests, as well as the "soft" signs of neurological damage that he had seen in Mr. Martin's behavior, and concluded that Mr. Martin did not suffer from brain damage.

(2) Dr. Scherer's conclusion was based upon his belief that Mr. Martin was not cooperating in the psychological testing, Deposition at 71-76; R. 103-104, 118, 123-124, 3919 and 3935-3936, and that one of the psychological tests which demonstrated brain damage in Mr. Martin (the Bender-Gestalt) was not a reliable test for detecting brain damage. R. 1119, 3927. Of greatest significance to Dr. Scherer, however, was that the neurological assessment by Dr. wilson revealed no brain damage, R. 106, because he believed that a proper neurological examination should pick up brain damage. Deposition, at 64-65. When Dr. Wilson's assessment of Mr. Martin revealed no organic damage, therefore, Dr. Scherer felt confident that he had properly ruled out brain damage as a cause of Mr. Martin's behavior or as a factor to be considered in assessing Mr. Martin's legal liabilities. See R. 106. Indeed, Dr. Scherer felt so confident about his conclusion that Mr. Martin did not suffer from brain damage that he then concluded that Mr. Martin was feigning mental illness. As he testified in his deposition, the only that that would make him question these conclusions would be hard evidence that Mr. Martin in fact was brain-damaged: "If you went to a neurologist and the guy found he had a tumor on the brain or something, I might think twice about whether this is due to organic or psychogenic position." Deposition of Dr. Scherer (Volume 2), March 21, 1978, at 29.

(3) As did Dr. Scherer, Dr. Blackman, a psychiatrist who found Mr. Martin to be feigning psychosis, also saw some possibility of brain damage upon his assessment of Mr. Martin. This was suggested to Dr. Blackman by the tremor in Mr. Martin's

right arm, and by Mr. Martin's history of traumatic head injuries. Deposition of Dr. Blackman (Volume 2), March 17, 1978, at 35, 57; R. 3864-3865. To determine whether these matters were indicative of brain damage, Dr. Blackman would have sent Mr. Martin for a neurological examination and for neurological testing, as was done when Mr. Martin was sent to Dr. Wilson. R. 3864-3865. Thus, when Dr. Wilson reported that there was no brain damage, Dr. Blackman felt confident in ruling out such damage as a factor in the assessment of Mr. Martin's legal capacity. Upon ruling out brain damage, Dr. Blackman concluded, as had Dr. Scherer, that Mr. Martin was feigning signs of mental illness. Deposition of Dr. Blackman (Volume 2), at 57; R. 413, 3841-3842, 3864-3865.

(4) Along with Dr. Scherer and Dr. Blackman, the third expert who concluded that Mr. Martin was feigning signs of serious mental illness and was not genuinely suffering from any illness that interfered with his legal capacities, was another psychiatrist, Dr. Antonio Fueyo. Similar to Dr. Scherer and Dr. Blackman, Dr. Fueyo also felt that he had to rule out brain damage before he could reach his conclusion, for in his deposition Dr. Fueyo testified that a person could suffer from an "organic impairment" that would cause legal insanity. Deposition of Dr. Fueyo, March 16, 1978, at 6. Accordingly, Dr. Fueyo considered and ruled out brain damage in Mr. Martin's case. R. 3820. As Dr. Fueyo testified in his deposition, the basis for his conclusion was that no brain damage had been detected in the neurological assessment by Dr. Wilson or in the psychological testing by Dr. Scherer:

> Q. Is it true, Doctor, that sometimes one can have brain damage which would not appear, even complete neurological workup, such as the one done by Dr. Wilson or in clinical tests, such as the ones done by Drs. Levin and Scherer?
>
> A. No, your first part of the question is true. There are certain brain damages that do not appear in the neurological

> examinations, but this is the reason, I mean, that the psychological testing is done. If there is an organicity, there would be symptoms that would show it as an organicity of the memory judgment and in affect, it would be indicative of certain disturbances of the individual organicity terms.

Id. at 41-42.

(5) The remaining three experts -- Dr. Vaughn, Dr. Barnard and Dr. Levin -- all concluded that Mr. Martin suffered from a serious mental illness, Schizophrenia, which substantially compromised his capacity to waive his fifth amendment rights, to stand trial, or to be held legally accountable for his actions. See, generally, R. 1099-1148, 3580-3734, 4370-4386 (testimony of Dr. Vaughn); R. 158-228, 4290-4322 (testimony of Dr. Barnard, including the introduction of the report of Dr. Levin). Even though these experts reached such conclusions, they too observed signs of brain damage in Mr. Martin's behavior and history, and thus considered the possibility that Mr. Martin suffered from brain damage. On the basis of Dr. Wilson's neurological assessment, however, they too ruled out that possibility. See R. 203, 3708. Illustrative of the closeness of this issue was the opinion of Dr. Barnard, who reached this conclusion despite his belief that Mr. Martin presented a general "clinical picture of a brain syndrome," R. 198, and that Dr. Scherer's psychological testing had left genuine doubt about whether Mr. Martin suffered brain damage:

> A. I was telling you a while ago about the schizophrenic and how basically he has got a mixed appearance and can look as though he has got an antisocial personality or a psychopathic personality, but if he has got disturbance in his orientation to some degree, he has got a memory deficit. His [Mr. Martin's] general level of intellectual functions are down and his judgment by some of the tests I gave him and he has got a liability [sic] of affect. These all fall in the general category of a clinical picture of a brain syndrome. The schizophrenic can mimic this at times because you can have the same kind of disturbances in schizophrenia that you do with organic brain syndrome.
>
> Q. The practical effect could be the same?

> A. Yes. he has had some head injuries in the past and he has had difficulty with some blackouts. He has abused alcohol and drugs so he may well have some psychological indications of brain function. I think his dilemma is that his results on the psychological tests with the psychologists were not valid. We in essence don't know if he does or he doesn't.

R. 198. Nevertheless, Dr. Barnard, R. 203, as did Dr. Vaughn, R. 3708, relied on Dr. Wilson's neurological assessment in ruling out the possibility that Mr. Martin suffered from brain damage.

Since Mr. Martin's trial, he has been provided further evaluation by Dr. Lewis, Dr. Blau, Dr. Pincus, and Dr. Mark. See supra. Because of the central importance of brain damage in Mr. Martin's case, all of these evaluations have sought, in part, to determine whether Mr. Martin suffers from brain damage. With resounding clarity, all four experts have concluded that Mr. Martin does suffer from significant brain damage. Their opinions are more trustworthy than Dr. Wilson's opinion for five reasons:

First, while Dr. Wilson sought "evidence of [a] temporal lobe abnormality which might explain [Mr. Martin's] explosive behavior," Appendix to App. H at 2, he found none on clinical examination and was "unable to obtain any history of any rage-type reactions" that would provide such evidence. Id. at 1-2. Dr. Lewis, however, obtained just such a history on the basis of Mr. Martin's experience of "multiple episodes of deja vu, strong olfactory hallucinations, and episodes of behaviors for which his memory is clouded or absent...," Appendix to App. H at 10, and found such evidence on clinical examination on the basis of "hard" neurological signs of brain injury that "likely... creat[ed] an epileptic focus." Id. at 10-11.

Second, Dr. Wilson had no neuropsychological testing done. Of the available diagnostic tools for detecting organic disorders, however, these tests have proven to be the most valid and reliable diagnostic instrument available. See Filskov and

Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, and Snow, The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976). They are far more accurate than clinical assessment by a neurologist, even when that assessment is supplemented by CAT scan and electroencephalogram (EEG), as was done here by Dr. Wilson. Id.; see also Golden, Validity of the Halstead-Reitan Neuropsychological Battery in a Mixed Psychiatric and Brain-Injured Population, 45 J. of Consulting and Clinical Psychology 1043 (1977). Against this background, the unreliability of Dr. Wilson's conclusion that there was "no evidence of any significant neurological problem," Appendix to App. H at 2, comes into sharper focus, for Dr. Blau's neuropsychological testing of Mr. Martin showed "evidence of severe brain disorder which has existed for a long period of time...." Appendix to App. H at 5.

Third, the neurological examination by Dr. Pincus was, standing alone, far more reliable than the examination by Dr. Wilson. Dr. Wilson examined Mr. Martin "in both arm and leg chains," Appendix to App. H at 1, which plainly compromised his ability to conduct an adequate evaluation -- noting, for example, at one point that Mr. Martin's gait was normal "in view of the restraining devices present." Id. at 2. The effect of Mr. Martin's restraints was quite apparent when Dr. Pincus examined him without restraints and found, contrary to Dr. Wilson that his "tandem gait was poor because he couldn't balance on his left foot." Appendix to App. H at 3. Moreover, Dr. Pincus picked up far more signs of significant neurological damage than Dr. Wilson picked up -- e.g., the "decreased coordination of the left side of his body... and inability to skip." Dr. Wilson could have observed these only if Mr. Martin's restraints had been removed.

As Dr. Lewis observed in the cover letter to her report, because Dr. Wilson did not remove Mr. Martin's restraints, "[H]e did not measure muscle strength or gait. Furthermore, the few tests Dr. Wilson did perform revealed impaired sensory modalities on the right. Had he removed the man's chains, he would also have found severe motor impairment as well."

Fourth, while Dr. Wilson observed in the CT scan of Mr. Martin's brain an enlargement of the right ventricle, he found that it "[was] not of any physiological significance." Appendix to App. H at 2. Dr. Vernon Mark, on the other hand, characterized it as a "significant enlargement... probably indicating a loss of brain substance...." Appendix to App. H. While Dr. Wilson could be right and Dr. Mark wrong, it is unlikely, given Dr. Mark's experience as chief of the neurological service at Harvard Medical School, that he would be wrong.

Fifth, although Dr. Wilson's evaluation included an EEG that was "within normal limits," Appendix to App. H at 2, Mr. Martin has since had another EEG that was not normal. This one, called a "quantitative EEG" (because analyzed by a computer), revealed "moderate to severe abnormalities in brain function." Appendix to App. H. This finding is of much greater significance than Dr. Wilson's finding, for "[t]he EEG may be normal in the presence of organic brain disease." I. H. Kaplan and B. Sadock (eds.) Comprehensive Textbook of Psychiatry 92 (4th ed. 1985). However, if it is abnormal, an EEG is of extraordinary weight in confirming the presence of brain damage. See D. Blumer (ed.), Psychiatric Aspects of Epilepsy 191-92 (1984).

Accordingly, there can be little doubt that Mr. Martin does suffer from brain damage and that Dr. Wilson was wrong in concluding before trial that he did not. Moreover, the effect of his error on the accuracy of the trial court's findings concerning Mr. Martin's mental status was erroneous. Dr.

Wilson's conclusion was relied on by all the other experts in ruling out brain damage as a factor in assessing Mr. Martin's mental status. The three experts who found that Mr. Martin was feigning psychosis explained that if Mr. Martin were indeed suffering from brain damage, their findings -- which led them to conclude that Mr. Martin was competent and sane -- could be wrong. And upon these expert's findings, the trial court determined that Mr. Martin was competent to stand trial.

Although the new evidence of Mr. Martin's organic brain damage has never been considered by a fact-finder in determining Mr. Martin's competency, it is plain -- on the basis of the considerations entering into his competency determination at trial -- that this evidence would have great weight upon a competency determination. For this reason, the previous finding of competence to stand trial cannot now be relied upon as having fairly and accurately resolved present questions concerning Mr. Martin's competency.

In light of all these circumstances -- Mr. Martin's present delusional state with respect to why he is to be executed, the strong likelihood that his present state is a manifestation of his underlying psychosis and brain damage, and the substantial reasons to give no deference to the trial court's prior determination of trial competency -- Mr. Martin's present inability to understand the connection between his crime and his punishment raises, at the very least, a substantial doubt about his present competency.

Legal Basis for Relief

Dr. Dorothy Lewis concluded that "Mr. Martin does not understand the connection between his impending death and the crime for which he was sentenced to death." See Appendix A. Mr. Martin submits that under any reasonable definition of the term, he is incompetent to be executed.

Mr. Martin's argument will proceed in three parts. First, he will discuss the evolution of Florida's treatment of execution competency prior to the decision in Ford v. Wainwright, 106 S.Ct. 2595 (1986) where the United States Supreme Court held for the first time that execution of the insane violates the Constitution. Second, Mr. Martin will analyze the Ford opinions. Third, Mr. Martin will suggest that this Court should not adopt procedures for determining execution competency without input from the Florida Bar and from mental health professional organizations and that, in the meantime, condemned prisoners of questionable mental competency cannot be executed.

A. Evolution of the Florida Law Prior to Ford v. Wainwright.

The common law prohibition against execution of the insane "bears impressive historical credentials." Ford, 106 S.Ct. at 2600. The Florida law exemption of the insane from execution predates the enactment of Fla. Stat. Sec. 922.07. As early as 1927, this Court had held that any person condemned to die who "is found to be insane" shall be "committed until his return to sanity is duly determined." Ex parte Chesser, 93 Fla. 291, 111 So. 720, 721 (1927). This Court in Chesser further explained that the determination of execution competency is a matter that falls within the expertise and the authority of the courts to examine, for "it is the trial court's judgment that is being executed by administrative officers under executive warrant; and

...the trial court has the power by appropriate procedure to order a stay of the execution of its judgments... The trial court has control of its processes of conviction." Id, 111 So. at 721. The court thus was required to decide the question of "the sanity of the defendant after the judgment and sentence of conviction." Id. Similarly, in Hysler v. State, 136 Fla. 563, 187 So. 261 (1939), the Court held that an application for a stay of capital punishment on the ground of insanity after conviction "should be

addressed to the trial court so that court could inquire into and adjudicate the question of the petitioner's sanity or insanity since the judgment of conviction. This was the only method by which an insane person could be protected from execution." Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984).

"After Hysler the legislature enacted Sec. 922.07, Fla. Statutes, setting forth the procedure to be followed when a person under sentence of death appears to be insane." Goode, 448 So.2d at 1001. The proceeding provided by the statute was ex parte within the executive branch. The statute provided that when the governor was informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person. The Governor must notify the psychiatrists in writing that they are to examine the convicted person to "determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him." Fla. Stat. Sec. 922.07 (1). As to the examination itself, it was to take place with all three psychiatrists present at the same time. Defense counsel and the prosecutor "may be present at at the examination." And if the convicted person has no counsel, the trial court "shall appoint counsel to represent him." Id. However, no hearing was to be held and no provision was made for any adversary activity by counsel on behalf of the client. Consistent with these provisions, the present Florida Governor has a "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under sentence of death is insane." Goode, 448 So.2d at 1001.

Following enactment of Fla. Stat. Sec. 922.07, the question arose whether the statutory procedure entirely superceded the common law right to judicial determination of execution competency. Several Florida death row inmates asserted that a judicial determination of competency was still necessary to

protect rights to due process and to avoid the imposition of cruel and unusual punishment, notwithstanding the statutory procedure. In Goode v. Wainwright, this Court specifically rejected the contention that the statutory process as set forth in Section 922.07 was unconstitutional because due process was not provided through a judicial determination of competency in an adversary proceeding. The Court held that Hysler v. State was no longer applicable given the present statutory process that places in the executive branch the authority to determine competency to be executed. See Alvord, 459 So.2d at 318; Goode, 448 So.2d at 1001-02; Ford v. Wainwright, 451 So.2d at 472. The United States Court of Appeals for the Eleventh Circuit agreed. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985); Goode v. Wainwright, 731 F.2d 1482 (11th Cir. 1984).

In Ford v. Wainwright, the United States Supreme Court held, for the first time, that a condemned prisoner who is mentally incompetent cannot be put to death and that unless the state provides an accurate and reliable adversarial procedure for determining competency, federal district courts must hold de novo evidentiary hearings to resolve claims of incompetency.

B. The Ford v. Wainwright Decision

In Ford v. Wainwright, a majority of the Court declared that the Eighth Amendment's prohibition of cruel and unusual punishment bars the execution of an inmate who is insane. Seven Justices also agreed in finding constitutionally inadequate Florida's statutory procedure for determining whether an allegedly incompetent condemned prisoner is sane enough to die. But a clear majority failed to coalesce regarding the sort of procedure that must be afforded.

Justice Marshall cited two bases for holding, for a five Justice majority, that the Constitution forbids the execution of a condemned inmate who is incompetent: the weight of common law

condemning such a practice, and the fact that no state presently permits the execution of incompetent prisoners. The underlying rationale for the rule may not be entirely clear, but "whether its aim be to protect the condemned from fear and pain without comfort or understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." Ford, 106 S.Ct. at 2602.

> It is clear that the ancient and humane limitations upon the state's ability to execute its sentences has as fair a hold upon the jurisprudence of today as it had century's ago in England. The various reasons put forth in support of the common law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to live. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or diety is still vivid today. And the intuition that such an execution simply offends humanity is imminently shared across the nation.

Id. at 2602.

Justice Marshall, joined at this point by three other members of the court, went on to find at least three constitutional problems with Florida's scheme for determining competency in this context. The first was the due process problem in the statute's failure to include the prisoner in the truth seeking process. The Court has often stressed in capital cases that the fact finder must have before it all possible relevant information about the accused, and "it would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has to be found."

Another problem was that the competency procedure denied the inmate any chance to challenge or impeach the state appointed experts' opinions, thereby imposing a risk that the ultimate

finding will be distorted. "Cross examination of the psychiatrist, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth and sanity disputes by bringing to light the bases for each experts belief, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report."

But the "most striking defect" in the procedure was that it placed the decision entirely within the executive branch, whereas the delay of execution due to insanity traditionally was not a matter of executive clemency or judicial discretion, but was mandated by law. In order to provide redress for those with claims of incompetency and to encourage accuracy of fact finding, Justice Marshall concluded that it is crucial that "the adversary presentation of relevant information be as unrestricted as possible". This does not necessarily mean that a full trial on sanity is required. Rather, the state must adopt an appropriate means of enforcing the rule against execution incompetency, perhaps similar to the procedure used to determine whether the defendant is competent to stand trial.

Justice Powell, concurring in part and in the result, agreed that the Eighth Amendment prohibits the execution of an incompetent and that Florida's statutory procedure was insufficient. For Justice Powell, the main problem was that the defendant was deprived of an opportunity to be heard. However, Justice Powell "would not require the kind of full scale" 'sanity trial' that Justice Marshall appears to find necessary." Rather, Justice Powell favored a less formal procedure employing perhaps a neutral person or board that would receive submissions from the inmates counsel. Justice Powell also undertook to answer a question not addressed by the majority: the meaning of "insane"

in this context. Justice Powell suggested that the term is limited in reach; it refers only to those prisoners who are "unaware of the punishment that they are about to suffer and why they are to suffer it."

Concurring in the result in part and dissenting in part, Justice O'Connor, joined by Justice White, saw no Eighth Amendment bar to the execution to the incompetent. She reasoned that the Florida procedure created a protected liberty interest but failed to provide even minimal procedural protection required by due process. Like Justice Powell, she considered the basic flaw in the procedure to be the lack of an opportunity for the defendant to be heard on the subject of his alleged insanity.

Justice Rehnquist, joined by former Chief Justice Burger, dissented, seeing nothing wrong in permitting the determination of a prisoner's insanity to be made by the executive. The Eighth Amendment, Justice Rehnquist argued, does not prevent the execution of an insane prisoner.

C. The Unsettled Questions After Ford and the Need for Input From the Florida Bar and From Mental Health Professionals

The Supreme Court's decision in Ford left a myriad of subtle and complicated issues in its wake. The initial questions involve who may raise such a claim and how, who evaluates the initial claim and by what standard, the degree of due process to be afforded, and the role psychiatrists play in that evaluation. Psychiatric participation involves both legal and ethical considerations, because heated debate surrounds the role of psychiatrists and other mental health professionals in these insanity inquiries. These are subtle and nuanced questions of law, psychiatry and public policy, and they have generated much scholarly debate. See Ward, Competency For Execution: Problems in Law and Psychiatry, 14 Fla.St.U.L.Rev. 35 (1986); Note, The Eighth Amendment and the Execution of the Presently Incompetent,

32 Stan.L.Rev. 765 (1980); Note, Insanity of the Condemned, 88 Yale L.J. 533 (1979). Resolution of such questions should occur only after careful study by the legal and the mental health professions.

On July 2, 1986, seven days after the United States Supreme Court issued its decision in Ford, Attorney General Jim Smith urged Governor Bob Graham and legislative leaders to call a special session of the Florida Legislature to formulate a new way of dealing with death row inmates insanity claims. See Appendix D. Smith said that the state should set up a system "not controlled by the executive branch" to assess a condemned inmate's mental capacity. Id. One week later, Attorney General Smith reiterated this request and proposed legislation "in an effort to bring Florida into compliance with the Ford decision." Id. The Attorney General's proposed legislation is attached in Appendix D to this petition. The Governor declined to call a special session of the Legislature.

At the behest of this Court, the appropriate response to the Ford decision is a question presently under intensive study by two committees of the Florida Bar. At its regular meeting on September 4, 1986, and at the special request of Bar President Joe Reiter and President-elect Ray Ferrero, the Individual Rights and Responsibilities Committee has taken up the issue. The committee recommended that the Bar take the position that procedures for determining incompetency to be executed are more appropriately addressed by court rule rather than statutory enactment and that an adversarial proceeding is a minimum requirement of due process of law. The Committee considered as a proposed rule the provision found at Appendix E. The Individual Rights and Responsibilities Committee, after extensive discussion of various aspects of the proposed rule, voted to study the issue further and to vote by mail ballot. The proposed rule underwent several stages of revision. See, e.g., Appendix F. The

resulting proposed rule, found at Appendix G and incorporated by reference herein, was circulated to the membership of the Committee for final ratification on November 7, 1986. By contrast, members of a subcommittee of the Bar Criminal Rules Committee recommended to the Rules Committee that the appropriate response to the Ford decision ought to be legislative. The Board of Governors of the Bar may take up the matter at its November 15, 1986 meeting, but the Board is not expected to resolve the matter or to adopt any specific proposals at that time.

Thus, the Florida Bar is in the midst of carefully considering this matter. The Bar's input would be helpful to resolution of the questions left unanswered by the Ford decision.

Similarly, this Court should permit input by mental health professional organizations. The United States Supreme Court in Ford received amicus curiae briefs from the American Psychiatric Association, the American Psychological Association, and the Florida Psychological Association. These amicus briefs, which are attached as Appendix B and Appendix C and are incorporated by reference herein, dealt solely with the unreliability of Florida's statutory procedure for determining execution competency. The briefs address the procedures necessary for an adequate psychiatric examination and ultimate determination of competence to be executed. As the the American Psychological Association and the Florida Psychological Association noted in their motion to file brief amici curiae, "the APA contributes amicus briefs to this Court only where the APA has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA and FPA wish to inform the Court about the methodologies of psychological examinations and the need for and use of expert testimony in post-sentencing competency proceedings. APA and FPA believe this important and relevant information will not be provided by the parties and will be of assistance to the Court in deciding this case."

This Court should find such briefing similarly helpful. This is so because heated debate surrounds the role of psychiatrists and other mental health professionals in these insanity inquiries. The amicus briefs in Ford suggest that many of the problems arise out of the lack of procedural safeguards and the imprecision of the statutorily mandated procedures. One contributing factor is the absence of a coherent, intelligible, or workable standard of competency for the psychiatrists to apply. Another arena of debate is the dubious reliability of psychiatric examinations performed in a prison setting. The ultimate question, perhaps, is whether and to what extent psychiatrists ethically may participate at all in such proceedings. See generally Radelet and Barnard, Ethics And The Psychiatric Determination Of Competency To Be Executed, 14 Bull. Am. Acad., Psychiatry and the Law 37 (1986). See Appendix I.

Should this Court be inclined to resolve the procedural questions in this case, Mr. Martin asks the Court to fashion procedures based on the amicus briefs in Ford and upon the proposal before the Individual Rights and Responsibilities Committee of the Bar. But Mr. Martin respectfully suggests that the Court not decide these difficult questions until all information is in, from the Bar and from the mental health professionals.

Execution of the mentally incompetent is prohibited by the federal Constitution and by positive Florida law. Mr. Martin submits that he is incompetent to be executed. At present, there are no procedures for determining execution competency. Mr. Martin may not be executed until those procedures do exist and until he may avail himself of them to prove his incompetence to be executed.

CLAIM II

MR. MARTIN WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL

Factual Basis of Relief

In Fitzpatrick v. Wainwright, 490 So.2d 938, 939 (Fla. 1986) this Court recognized that the failure to present "one point" on appeal could rise to the level of ineffective assistance. In this case, at least two crucial and meritorious claims were not raised on direct appeal.

1. Presence at Critical Stages of Trial.

Mr. Martin was not present during the individual voir dire on pretrial publicity, inquiry which spans six volumes of the trial record. Mr. Martin never waived his presence on the record.

At the beginning of the individual voir dire on pretrial publicity, the following exchange took place between Richard Lubin, Mr. Martin's trial attorney, and the court:

> MR. LUBIN: Yes. For the purpose of the Voir Dire that we will be conducting, I discussed this with my client and we will waive his presence for the purpose of the individual Voir Dire.
>
> THE COURT: For the Voir Dire?
>
> MR. LUBIN: Just for the individual questioning of witnesses.
>
> THE COURT: I see. You don't think it would be helpful to have him here in case they had seen him on television or whatever media?
>
> MR. LUBIN: Well, I think in the unlikely possibility they would not have heard of the case but would recognize his face when he did come in and we have general Voir Dire, I think that will take care of that.
>
> THE COURT: All right.

R. 1213. Thereafter, as veniremembers came forward in groups of four or five, the court instructed:

> Now the defendant is not present. He is not in the courtroom and you are not going to see him at this time. The lawyers have agreed to waive his presence. In other words, they have said it is not necessary for him to be here, and accordingly, he is not here.

R. 1218. See also, e.g., R. 1252, 1265, 1278-79, 1496, 1499AA, 1513-14, 1565, 1620-21, 1659, 1712, 1756-57, 1790, 1838, 1865, 1904, 2053. The judge did not invariably give the instruction. But even in the rare instances when he did not, it is evident from the judge's introductions of persons present that Mr. Martin was not present. See, e.g., R. 1430. Several veniremembers would have been good candidates for peremptory exclusion. See, e.g., R. 1317-19, 1332, 1342, 1372-73, 1378, 1499YY-1499JJ, 1511-1513, 1550-57, 1564, 1812-26, 2037-38. Trial counsel apparently felt authorized to exercise peremptories in the absence of his client, R. 1561, although none were actually exercised at that time. Forty challenges for cause were exercised. R. 2080. Mr. Martin never subsequently ratified his absence.

Mr. Martin's argument will proceed in three steps. First, he will show that voir dire is a critical stage requiring the defendant's presence. Second, he will demonstrate that -- at a minimum -- the Constitution requires the defendant's presence at all critical stages absent a personal, knowing and voluntary waiver. Mr. Martin continues to maintain that presence in a capital case is nonwaivable, although he recognizes that this Court has held otherwise. Third, Mr. Martin will show that failure to object at trial was no bar to raising the issue on direct appeal.

This Court made explicit in Francis v. State, 413 So.2d 1175 (Fla. 1982), that voir dire is a critical stage. In Francis this Court

> reversed defendant's conviction because the trial court had proceeded with the jury selection process in his absence. Because we were unable to assess the extent of prejudice, if any, which Francis might have sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised, we concluded that his involuntary absence without waiver by consent or subsequent ratification was reversible error. We specifically determined that the record did not affirmatively demonstrate that Francis knowingly waived this right or that he

acquiesced in his counsel's actions.

Peede v. State, 474 So.2d 808, 813 (Fla. 1985). The Court in Francis stressed the special need for the defendant's presence during voir dire:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In the present case, we are unable to assess the extent of prejudice, if any, Francis sustained by not being present to consult with his counsel during the time his peremptory challenges were exercised. Accordingly, we conclude that his involuntary absence without waiver by consent or subsequent ratification was reversible error and that Francis is entitled to a new trial.

Francis, 413 So.2d at 1178-79. Subsequent cases reaffirmed this holding in Francis. In Johnson v. State, 463 So.2d 207, 211 (Fla. 1985), the Court stated that "in Francis the defendant's presence during the exercise of peremptories was deemed important because of the aid the accused could have given his counsel." And Herzog v. State, 439 So.2d 1372, 1375 (Fla. 1983), explained that Francis had "emphasized that the arbitrary nature of peremptory challenges requires the defendant's presence to consult with counsel during the time of the exercise."

Thus, Francis makes clear that voir dire is a critical stage. The question then becomes whether presence may be waived. Once again, Francis provides the answer: Such a right must be knowingly and intelligently waived on the record before the defendant can be removed from the courtroom. Reversing the

conviction in Francis, the Court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustamonte, 412 U.S. 218, 83 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Francis, 413 So.2d at 1178. By contrast, in Peede v. State, the Court held there had been an effective waiver when

> Peede personally asked to be excused from trial on several occasions. The trial court told Peede that it would be in his best interest to be involved in the trial and denied his request. At one point, during the cross-examination of Geraldine, Peede interrupted the proceedings and disrupted the courtroom. Because of his outburst, he was escorted out of the courtroom until the cross-examination of Geraldine was completed. He was then brought back into the courtroom and remained there until the lunch recess, at which time he again requested to voluntarily absent himself from the trial. The court declined at that time to rule on Peede's personal request. After lunch, Peede's counsel advised the court that Peede had told him that he did not want to be present during the remainder of the trial and that he would physically resist being brought back into the courtroom. The court then took a short recess and, accompanied by counsel and the court reporter, continued the proceedings at the county jail. Peede advised the court that he was not ill, but he just did not want to return to trial. The court extensively questioned Peede as to whether he was knowingly and voluntarily waiving his presence at trial. Peede made it abundantly clear that he fully understood the significance of his waiver and that his absence was voluntary.

Peede, 474 So.2d at 811.

Mr. Martin recognizes that Peede held that presence at critical stages can be knowingly and voluntarily waived. The record here shows that no such waiver occurred in Mr. Martin's

case. Further, Mr. Martin respectfully maintains that presence is nonwaivable. The United States Court of Appeals for the Eleventh Circuit has indicated that a capital defendant's right to be present is so fundamental that it cannot be waived. In Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), the State contended that Hall was not absent during any critical stages of the trial. The Eleventh Circuit stated:

> We are concerned about two matters: (1) the circumstances surrounding Hall's absence during the trial court's discussion with the jury concerning items of evidence during the jury's deliberations, and (2) the effect of our recent holding that a defendant may not waive his presence in a capital case announced in Proffitt v. Wainwright, 685 F.2d 1227, 1256-58 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983), cert. denied, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698. Precedent in this circuit suggests that Hall's absence during discussions with the jury may constitute error. United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial.

Id. at 775 (emphasis added).

The Eleventh Circuit reasoned, in its initial opinion in Proffitt, that "until the Supreme Court expressly overrules its decisions in Diaz [v. United States, 223 U.S. 442 (1912)] and Hopt [v. Utah, 110 U.S. 574 (1884)], however, we are bound by the rules established in those cases that a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d at 1258. The court in Proffitt, id., did indicate that if there were to be a departure from that rule it would have to be predicated on the knowing-and-voluntary-waiver requirement established in the noncapital context through Illinois v. Allen, 397 U.S. 337 (1970) and Johnson v. Zerbst, 304 U.S. 458 (1938). On rehearing, the Proffitt court noted that it "need not decide the issue of whether presence at a capital trial ever is waivable for here, even if we assume the right to presence may be waived, no knowing and voluntary and, therefore, effective waiver was made." See 706 F.2d at 312.

The final question is whether the absence of a trial level objection would have precluded direct review. It would not have done so. This is so for the reasons stated by the Eleventh Circuit in Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985):

> [P]etitioner has a persuasive argument that he had good cause for his failure to comply with the Florida rule requiring a contemporaneous objection at trial. That rule is designed to encourage counsel to bring out objections in the proceedings at the point where they are best understood and most efficiently considered. It would be anomalous, however, to apply the rule to bar habeas corpus review where the constitutional inquiry relates to the defendant's, as opposed to his lawyer's, failure to exercise his rights knowingly. We cannot fault the defendant for failing to assert an objection when his attorney - the individual on whom he depended to preserve his rights - arranged for him to be removed from the courtroom. The same cannot be said, however, of petitioner's failure to assert the claim while represented by new counsel on direct appeal.

In sum, Mr. Martin was absent during critical stages of his capital trial, a fact evident on the face of the trial transcript. Failure to raise this issue on direct appeal constituted ineffective assistance of counsel.

2. Burden Shifting Jury Instruction.

This aspect of the claim is discussed at Claim III, infra, which is incorporated by reference herein.

Legal Basis for Relief

The appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional ... assistance ... [which is] necessary in a legal system governed by complex rules and procedure..." Lucey, 105 S.Ct. at 8355 n.6. An indigent, as well as "the rich man, who appeals of right, [must] enjoy the benefit of counsel's examination into the

record, research of the law, and marshalling of arguments on his behalf...." Douglas v. California, 372 U.S. 353, 358 (1962) (equal protection right to counsel on appeal).

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation on appeal fell below an acceptable standard." The Court, upon Mr. Barclay's new appellate record, briefing, and argument, reversed Barclay's death sentence, and ordered that a life sentence be imposed. Even more recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome...." Harris v. Wainwright, 473 So.2d 1246 (1985).

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

This principle is now embodied in this Court's eighth amendment jurisprudence. This Court recently outlined counsel's special duties in capital cases and the reasons for their attachment.

> [T]he basic requirement of due process in our adversarial legal system is that a defendant

> be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). This Court specifically recognized the power of an advocate to unearth latent defects in complex death penalty proceedings:

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

Id. (emphasis added).

CLAIM III

> THE FLORIDA SANITY PRESUMPTION AND CONDUCT OF TRIALS IN WHICH SANITY IS AT ISSUE UNLAWFULLY RELIEVES THE STATE OF ITS BURDEN OF PROOF, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Every day, as a matter of practice and as a matter of firmly established state law, Florida follows a procedure for trying insanity cases which ignores the centerpiece of constitutional protections afforded the accused -- the presumption of innocence. The framework within which insanity issues are decided in Florida commits unlawful burden-shifting by expressly placing on the defendant the burden of persuasion on the issue of insanity.

No constitutional guarantee is more guarded than the presumption of innocence, and none keeps faith more with the "fundamental value determination of our society" that "it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970). This "bedrock, axiomatic and elementary [constitutional] principle" . . . "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." Winship, 397 U.S. at 364. The lofty language invoked by the courts when the innocence presumption is at stake is not just rhetoric. The constitutional mandate has been consistently enforced by the United States Supreme Court. The Due Process Clause

> prohibit[s] the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis v. Franklin, 105 S. Ct. 1965, 1970 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

Florida has strayed from the constitutional path. While it has declared that insanity is an element of a criminal offense, Yohn v. State, 476 So. 2d 123, 128 (Fla. 1985), in the same breath it unlawfully requires the burden of persuasion on the issue to be shifted to the defense. Yohn, id. ("In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the State to prove sanity beyond a reasonable doubt just like any other element of the offense.") This Court previously struck down a Florida statute it found created an irrebuttable presumption of sanity, in State ex rel. Boyd v. Green, 355 So. 2d 785 (Fla. 1978), but has continued to approve of a procedure requiring a rebuttable presumption on the same issue to be imposed on the defendant. Yohn; Holmes v. State, 374 So. 2d 944 (Fla. 1979). It is a presumption the Due Process Clause does not permit.

Francis v. Franklin, 105 S. Ct. 1965 (1985), was decided the same term as Yohn and was apparently not considered by this Court when it approved the rebuttable presumption of sanity. In Francis, the Court declared unconstitutional an instruction on "the dispositive issue of intent" in a malice murder case, which advised the jury a "person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." Id. at L.Ed.2d 351. The mandatory presumption (though rebuttable) was found by the Court to unconstitutionally relieve the state of its burden of proof of every essential element of a crime.

We do not contend that the Constitution requires the state to make sanity an essential element of a criminal offense, for which the prosecution must carry the burden of persuasion. There is no such requirement yet. Patterson v. New York, 432 U.S. 197 (1977); Leland v. Oregon, 343 U.S. 790 (1950). But Florida has expressly chosen to make sanity an element of a criminal offense, Yohn, and the Due Process Clause controls the rest.

The Florida rebuttal presumption framework for resolving sanity issues was utilized to convict Nollie Martin, and it affected his defense with a vengeance. The state had it easy in Nollie Martin's trial. On the sole issue being tried -- sanity -- it was relieved of its burden of proof when the jury was told the presumption of innocence did not apply to its consideration of Mr. Martin's mental state at the time of the crime. The procedure by which the jury would transfer to Mr. Martin the burden of proving innocence was established during jury selection, reinforced by the order of presenting proof, and was finally imprinted by the closing instructions.

The presumption of innocence on the mental state issue vanished as the trial began. The jury was told the order of proof would be, first, the state's showing Mr. Martin committed the acts comprising the crimes charged; the defense would then

present evidence of insanity, which the state would be permitted to rebut. That is exactly the manner in which the case was tried before the jury. This "shifting burden" procedure for trying the insanity issue set the stage for the instructions to come.

The jury was instructed, as required under Florida law, that it was to presume Mr. Martin was sane even though sanity is an element of the offense, and that it was the the defense burden to overcome that presumption. The relevant instruction reads:

> Insanity may be permanent, temporary or may come and go. It is for you to determine the question of the sanity of the defendant at the time of the alleged commission of the crime. Until the contrary is shown by the evidence, the defendant is presumed to be sane, however, if the evidence tends to raise a reasonable doubt as to his sanity, the presumption of sanity is overcome.

[T.Tr. 4146]. It continues:

> If the evidence presented tends to raise a reasonable doubt as to the sanity of the defendant at the time of the alleged offense, the state must prove beyond a reasonable doubt that the defendant was legally sane at the time of the commission of the alleged offense. It is sufficient as to the defense of insanity if the evidence raised in the mind of the jurors a reasonable doubt as to the sanity of the defendant at the time of the alleged crime and if you have a reasonable doubt as to sanity at the time it is your duty to find him not guilty by reason of insanity.

[T.Tr. 4147].

The instruction is indistinguishable from the mandatory rebuttable presumption condemned in Francis, and tells the jury exactly what Florida law requires of them: to presume sanity. To decide this claim:

> The analysis is straightforward. 'The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.' Id. at 514, 99 S.Ct. 2450. The court must determine whether the challenged portion of the instruction creates a mandatory presumption, see id., at 520-24, 99 S.Ct. 2450, or merely a permissive inference, see Ulster County Court v. Allen, 442 U.S. 140, 157-63 (1979). A mandatory presumption

> instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts but does not require the jury to draw that conclusion.

Francis, 105 S.Ct. at 1971 (emphasis added).

There is no constitutionally significant difference between a conclusive and rebuttable presumption:

> A mandatory presumption may be either conclusive or rebuttable. A conclusive presumption removes the presumed element from the case once the state has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted. See Sandstrom v. Montana, 442 U.S. 510, 517-18, 99 S.Ct. 2450 (1979).

Francis, 105 S.Ct. at 1971 n.2 (emphasis added). Both are constitutionally intolerable if they are mandatory, and Florida's instruction is.

The mechanics of trying an insanity issue in Florida require the state to prove as "predicate facts" only that the defendant engaged in the act of committing the crime; the "sanity" element of the offense is then presumed. The Constitution does not permit this tinkering with the innocence presumption; there is no way around it: Florida's insanity law violates due process.

The conviction can be saved only if the burden-shift was harmless beyond a reasonable doubt. Rose v. Clark, 106 S. Ct. 3101 (1985). It was not. Harmless error is to be determined by "consideration of the entire record." United States v. Hestine, 461 U.S. 499, 509 n.7 (1983). "[T]he inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose, 106 S.Ct. at 3109, (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983)). Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), refined the harmless error inquiry to a consideration of

whether (1) "the evidence of the defendant's guilt was overwhelming; and (2) [whether] the instruction concerns an element of the crime not at issue in the trial." Brooks, 762 F.2d at 1390.

There can be no doubt sanity was directly in issue at trial on all counts. The jury was presented with a stark choice between the state and defense explanation of Mr. Martin's bizarre conduct. The defense presented lay and expert testimony that the crimes resulted from a profound mental illness rendering Mr. Martin incapable of acting sanely. The defense rested unequivocally on that theory at closing argument, abandoning other explanations of innocence and expressly admitting "we all know" Mr. Martin was involved in the crimes. [T 4011]. The State said Mr. Martin was faking insanity, and its experts so testified.

The evidence of "guilt" on the sanity question was evenly balanced. The State and defense both presented highly credentialed mental health experts to address the question.

To support Mr. Martin's sole defense of insanity at the time of the offense, the defense called Dr. Rufus Vaughn, a psychiatrist, who diagnosed Mr. Martin's symptoms as those of a paranoid schizophrenic. (R 3655). After his first examination he prescribed thorazine to alleviate some of the symptoms. (R 3652-54).

The defense was supported through cross-examination of the state lay witnesses during the state's case-in-chief. Those witnesses testified Mr. Martin at the time of the crime looked "crazy," had a "blank look," [T 3058], and looked "scary," his eyes were "set back in his head" [T 3074-75, 3088]. A relative testified about his shy, withdrawn nature, that he was a "loner" in his youth, and that he had received childhood injuries.

The state presented three witnesses in rebuttal. Doctors Antonio Fueyo and Lionel Blackman concluded that Mr. Martin knew

right from wrong at the time of the offense (R 3755, 3845), though both opinions were modulated. Dr. Fueyo testified Mr. Martin committed the crime while under the influence of an emotional disturbance. [T 3773]. Dr. Blackman admitted Mr. Martin was mentally ill. [T 3855]. They diagnosed Mr. Martin as a sociopath or psychopath. (R 3766-67, 3850). Dr. Isidor Scherer, a psychologist, had no opinion as to Mr. Martin's sanity at the time of the offense, but he opined his tests indicated that Mr. Martin was either faking mental illness or suffering from extreme psychosis. (R 3912, 3935). All of this, of course, was based on the assumption that Mr. Martin was not brain damaged, an assumption we now know is wrong. See Claim I, supra.

The jury was thus forced to choose between the competing theories of Mr. Martin's mental state: was he insane or just faking? They were never told whether the defense had "overcome the presumption of sanity or that the state had to be put to its imposed burden. They went back to the jury presuming Mr. Martin sane. The instruction could have done nothing but tip the balance to convict on this evenly-weighted testimony. The sanity presumption was particularly prejudicial in lending unlawful credence ot the state's theory Mr. Martin was "faking." Of course he was faking. The judge told them Mr. Martin was presumed sane. With the aid of the instruction, the insanity defense was rejected, and Mr. Martin was convicted.

More than a meritorious claim that Mr. Martin's due process rights were violated, the foregoing presents a claim of fundamental error -- "a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent," Murray v. Carrier, ___ U.S. ____, 106 S. Ct. 2639, 2650 (1986). We recognize that this is an issue that could have been raised on direct appeal and that ordinarily habeas corpus "is not properly used for purposes of raising issues that could have been raised on appeal." Kennedy v. Wainwright, 483 So. 2d

424, 426 (Fla. 1986). However, we recognize that there is an exception to this rule where fundamental error is apparent from the face of the record. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965) ("[w]e decide this matter on habeas corpus without relegating the petitioner to Criminal Rule No. 1 . . . because of the fundamental error appearing on the face of the sentence which renders it void"). For this reason, we urge the Court to address the merits of this claim and grant Mr. Martin the new trial that justice requires. In the alternative, we ask that the court address the claim as one of ineffective assistance of appellate counsel, which unquestionably can be brought in a habeas corpus proceeding. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

Mr. Martin's claim that the jury instructions in his case shifted the burden of proof to him on the issue of intent -- when intent was the only material issue in dispute in his case -- raises a claim of fundamental error. In Stewart v. State, 420 So. 2d 862 (Fla. 1982), this Court cited with approval the test utilized by the district courts of appeal to determine whether an instruction which omits an element of the offense amounts to fundamental error. They "have held that fundamental error occurs only when the omission is pertinent or material to what the jury must consider to convict." Id. at 863. Thus, if the omitted element is "not at issue," the error is not fundamental. By the same token, if the omitted element is at issue, the error is fundamental.

As Mr. Martin's argument on the merits of this issue makes clear, his sanity at the time of the offense -- and thus whether he had "the requisite intent," State ex rel. Boyd v. Green, 355 So. 2d at 793 -- was not only "at issue," but was the only issue for the jury to decide in reaching a verdict on guilt or innocence. Under Stewart's teaching, therefore, instructional error on this element must be fundamental error. Whether the

state was relieved of its burden to prove the material element of an offense by the instruction's omission of the element or by a burden-shifting presumption, the effect is the same: the state had not been required to prove the material element of the offense beyond a reasonable doubt, as the Due Process Clause so plainly requires. See In re Winship, 397 U.S. at 364. Accordingly, if the Court determines that the instruction did shift the burden of proof on insanity to Mr. Martin in violation of the requirements of due process, his claim must be treated as presenting fundamental error.

The only Florida case to consider an instructional issue similar to the issue raised by Mr. Martin confirms this analysis. In Snook v. State, 478 So. 2d 403 (Fla. 3d DCA 1985), the court held that that it was not fundamental error for the trial court to instruct the jury in a way that placed the burden of proving insanity on the defendant. The court reasoned that although this instruction was subsequently disapproved in Yohn v. State, 476 So. 2d 123 (Fla. 1985), it was not fundamental error, because "it is well-settled that it is not a denial of due process to place the burden of proving this defense on the defendant in a criminal case." 478 So. 2d at 405. As we have shown in our discussion of the merits of Mr. Martin's claim, this reasoning is wrong, since sanity and intent are synonymous in Florida. Thus an instruction which presumes sanity unless rebutted unconstitutionally shifts the burden to the defendant to negate an element of the offense. Though its reasoning on the merits is flawed, Snook nonetheless makes clear that if an instruction violates due process by placing the burden of proof on the defendant, it is fundamental error.

The fundamental quality of the burden-shifting instruction in Mr. Martin's case can be appreciated even more when it is viewed from the perspective of the federal habeas corpus courts. As this Court knows, the federal courts will not review the

merits of federal habeas claims if those claims have been the subject of a procedural default in the state courts, unless "cause" for the default and "prejudice" accruing from the underlying constitutional error can be shown. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Even if cause and prejudice cannot be shown, however, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ. . . ." Murray v. Carrier, 106 S.Ct. at 2650.

A constitutional violation raises a concern over "actual innocence" if it "serve[s] to pervert the jury's deliberations concerning the ultimate question" before it. Smith v. Murray, ___ U.S. ____, 106 S. Ct. 2661, 2668 (1986). To demonstrate this concern, the habeas petitioner must show "'a fair probability that . . . [in the absence of the constitutional violation] . . . the trier of the facts would have entertained a reasonable doubt of his guilt.'" Kuhlmann v. Wilson, ___ U.S. ____, 106 S. Ct. 2616, 2627 n.17 (1986) (plurality opinion). Only a plurality of the Court would apply the "actual innocence" requirement in the context of deciding whether to hear a successive habeas petition. Id. at 2624-27. However, their discussion of the requirement is nonetheless instructive. This "fair probability" determination requires "reference to all probative evidence of guilt or innocence," id. at 2627 n.17 (emphasis in original), including "'evidence . . . alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial. . . .'" Id. When analyzed in these terms, Mr. Martin's burden-shifting instruction "probably resulted in the conviction of one who is actually innocent. . . ."

As noted, the only issue for the jury to decide in determining guilt or innocence was whether Mr. Martin was insane at the time of the offense. The evidence as to this critical

issue was in equipoise. It is in just such a situation that "the fact-finder must know at the outset . . . how the risk of error will be allocated. . . ." Santosky v. Kramer, 455 U.S. 745, 757 (1982). The burden-shifting instruction here allocated that risk entirely to Mr. Martin. He was required to rebut the presumption that he was sane, and if his proof of insanity failed -- in the view of the jury -- to rebut that presumption, he would lose -- even though the jury might be in error.

While on this basis alone one could conclude that, had the state rather than Mr. Martin borne the risk of factfinding error, there is a "fair probability" Mr. Martin would have been found not guilty, such a conclusion is unavoidable when the evidence which has "become available only after trial," Kuhlmann, 106 S.Ct. at 2627 n.17, is taken into account. As previously noted, the after-discovered evidence has shown marked evidence of brain damage in Mr. Martin. It was the absence of just such evidence that permitted the experts for the state to conclude that Mr. Martin was faking psychosis and was sane. Had such evidence been before the jury, therefore, the validity of the state's experts' conclusions -- by their own admission -- would have been in doubt. Under these circumstances, had there been no presumption of sanity to overcome, there is a strong likelihood that the state could not have shown beyond a reasonable doubt that Mr. Martin was sane. Constitutional error can be no more fundamental than this.

Notwithstanding, if the Court decides it cannot reach the merits of this issue in the current procedural posture of Mr. Martin's case, it should determine that Mr. Martin was deprived of effective assistance of counsel on appeal and should, accordingly, permit a new appeal.

In failing to raise the burden-shifting instruction, Mr. Martin's appellate counsel failed to act within "the range of professionally acceptable performance." Wilson v. Wainwright,

474 So. 2d at 1163. In Wilson counsel failed to raise the sufficiency of the evidence to support a jury finding of premeditation in a first degree murder case where the issue was "apparent from the cold record." Id. The decision not to raise this issue "[could] not be excused as mere strategy or allocation of appellate resources," because the "issue [was] crucial to the validity of the conviction and [went] to the heart of the case."

The decision not to raise the burden-shifting instruction issue in Mr. Martin's case was precisely the same kind of decision about the same kind of issue. To be sure, there were some differences. The challenge to this instruction required raising an issue that had not been preserved by objection at trial -- but a fundamental error in the instructions, such as this, can be raised for the first time on appeal. See State v. Jones, 377 So. 2d 1163, 1164-65 (Fla. 1979); Franklin v. State, 403 So. 2d 975 (Fla. 1981). Moreover, the challenge to this instruction required a challenge to the well-settled presumption of sanity in Florida. However, such a challenge was ripe at the time Mr. Martin's opening brief was filed in May 1981. In State ex rel. Boyd v. Green, supra, this Court had already held that an irrebuttable presumption of sanity relieved the state of its burden to show "the requisite intent" to commit the crime charged, in violation of due process. 355 So. 2d at 793-94. The decisions in Sandstrom v. Montana, 442 U.S. 510 (1979); Patterson v. New York, 432 U.S. 197 (1977); and Mullaney v. Wilbur, 421 U.S. 684 (1975), provided the basis for extending that ruling to a rebuttable, burden-shifting presumption of sanity. In Yohn v. State, this Court noted that in Patterson the Supreme Court held "that it is not unconstitutional to place the burden on a defendant to prove he was insane at the time of the commission of the offense." 476 So. 2d at 126. Patterson's holding, however, was limited to those states which do not define insanity as "the inability to intend." The affirmative defense in Patterson was

like "insanity" in Wisconsin, where, as this Court explained in State ex rel. Boyd v. Green, "a finding of insanity 'is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his act.'" 432 U.S. at 206-07. However, in a state like Florida, where insanity negates intent, State ex rel. Boyd v. Green, supra, Patterson would require that the state prove sanity beyond a reasonable doubt and would allow no presumption of sanity. Thus, the burden-shifting instruction issue in Mr. Martin's case was as ripe for presentation on appeal as was the sufficiency issue "apparent from the cold record" in Wilson.

In addition, the failure to raise this issue "compromises the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Wilson, 474 So.2d at 1163. We have shown that the burden-shifting instruction error was so fundamental that it "probably resulted in the conviction of one who is actually innocent." As in Wilson, "[t]o have failed to raise so fundamental an issue . . . must undermine confidence in the fairness and correctness of the outcome." Id. at 1164. Accordingly, Mr. Martin deserves at the very least a new appeal in which he can present the merits of this issue.

CLAIM IV

THE TRIAL COURT INCORRECTLY AND PREJUDICIALLY MISINSTRUCTED THE JURY REGARDING THE CONSEQUENCES OF THEIR VERDICT AND REGARDING THEIR ROLE IN THE SENTENCING PROCESS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Factual Basis for Relief

"[Mr. Martin's] defense at trial was insanity." Martin v. State, 420 So. 2d 583, 584 (Fla. 1982) (emphasis added). The testimony on this central issue was partisanly fragmented. The

jury was prejudicially misinformed by the trial court regarding a) what would happen to Mr. Martin if the defense testimony was accepted and he was found not guilty by reason of insanity, and b) what would happen to Mr. Martin if he was convicted but the judy did not want him to be executed because of, inter alia, his mental condition. The jury, which in fact had other options, was left with the incorrect belief that in order to keep an "insane" Mr. Martin "off the streets," there was no choice but to convict him and sentence him to death. This misinformation violated the sixth, eighth, and fourteenth amendments.

A. The Jury Was Misinformed About the Consequences of a Not Guilty By Reason of Insanity Finding.

1. Trial.

During voir dire, defense counsel correctly stated the law and asked the jurors if they could follow it. The question was met by a speaking objection that counsel had misstated the law, an objection sustained by the Court, and an objection which was later incorrectly validated by specific jury instructions.

a. The Sustained Objection.

While selecting the jury, defense counsel naturally asked what the jurors' views were regarding the defense of insanity and the result of a verdict of not guilty by reason of insanity. The following occurred:

> MR. LUBIN: What I believe I said was, if there is evidence presented raising a doubt of insanity, a reasonable doubt, and the State does not prove beyond and to the exclusion of every reasonable [sic] that he is sane, will you find him not guilty by reason of insanity.
>
> MR. LEEMON: Yes.
>
> MR. LUBIN: Ma'am?
>
> MISS TOMBARI: I would have to.
>
> MR. LUBIN: Mr. Rosenberg?
>
> MR. ROSENBERG: Yes.
>
> MR. LUBIN: Mr. Woods?

MR. WOODS: Yes.

MR. LUBIN: In the back, Mrs. Zerkin?

MRS. ZERKIN [Juror]: I assume there is a sentence that goes along with that.

MR. LUBIN: That's the next thing. I'm glad you raised that. His Honor will instruct you very carefully and very definitely about what happens to a person who is found not guilty by reason of insanity. He will instruct you where that person goes and so forth and so on.

Will you accept His Honor's instructions as you would with all the other instructions and believe him when he tells you what is going to happen to this person? Will you?

MRS. ZERKIN: Of course.

MR. LUBIN: All of you? So you would not hesitate if you felt that the person was truly not guilty by reason of insanity in returning that verdict just because you were concerned that you didn't know all about where the man was going to be sent? If His Honor instructs you, you will believe him and accept it?

MRS. ZERKIN: Of course.

MR. LUBIN: Do you know what I am getting at?

MRS. HOWARD: Yes.

MR. LUBIN: You would not hesitate to return that verdict because of your concern?

MRS. HOWARD: That he might be sent out on the streets?

MR. LUBIN: Right. Would you?

MRS. HOWARD: No.

MR. LUBIN: And His Honor instructs you that in fact that will not happen --

MISS VITUNAC: Objection, Your Honor. That is not the instruction.

THE COURT: That is not the instruction. Objection sustained.

MR. LUBIN: As I said, Your Honor, your instructions would govern and mine are only an interpretation.

MISS VITUNAC: I object to that statement to the jurors as being entirely misleading.

THE COURT: I sustained it.

MISS VITUNAC: Thank you.

MR. LUBIN: Will you follow His Honor's instructions as to what happened?

MRS. HOWARD: Yes, sir.

MR. LUBIN: Will you all follow the Court's instructions as to what happened?

Prematurely, but upon court command, defense counsel backed away from his correct statement of the law, trusting that the court would ultimately instruct correctly and the jury would "follow the Court's instructions as to what happens." This blind faith proved ill-advised.

b. The Jury Instruction.

Defense counsel requested that the trial court correctly instruct the jury regarding the result of the verdict of not guilty by reason of insanity. The then standard jury instruction was refused by the trial court who preferred to give "his own" instruction (R 3883-85) which was:

> Now a person who is found to be not guilty by reason of insanity may be committed by the Court to the custody of the Department of Health and Rehabilitative Services of our State if the Judge determines that that person presently meets the criteria used for involuntary hospitalization as set forth in our law.
>
> These criteria are; he must be mentally ill and because of his mental illness is likely to injure himself or others if allowed to remain at liberty or is in need of care or treatment and lacks the sufficient capacity to make a responsible application on his or her own behalf, or the Court may order that the person receive out-patient treatment or the Court may discharge the person or the Court may give him into the care of his family or friends on their giving satisfactory security for the care of the person.
>
> If the person is committed to the Department of Health and Rehabilitative Services, as I just indicated, the Court or the judge retains jurisdiction of the person and makes any decision concerning the person's continued hospitalization or release.

(R 4168-69) (emphasis added). This instruction left the jury with only "mays" instead of "shalls," an incorrect statement of the law, and one with potentially result-producing consequences:

for jurors concerned about an "insane" person being "out on the streets," an instruction that that person "may" be released destroys the chance of reasonable consideration of that person's expert evaluations.

2. Direct Appeal

This properly preserved issue was raised on direct appeal to this Court, see Appellant's brief, p. 44, and this Court found "no merit in any of the points raised." Martin v. State, 420 So. 2d at 585. The ramifications of this issue and Petitioner's good faith belief that this Court's denial of other claim on appeal reflects substantial error of constitutional dimensions, provide the basis for Petitioner's request that this issue be revisited, as explicated in "Legal Basis for Relief," infra.

B. The Jury Was Prejudicially and Incorrectly Left to Speculate About Whether Petitioner Would Serve Any Time in Prison If the Jury Recommended Life Instead Of Death

Once the jurors resolved the guilt/innocence issue, they were left under Florida law with the decision to recommend either life imprisonment or death. As this Court has held, a Florida jury recommendation is a critical part of the Florida death penalty scheme, and the recommendation must receive great weight in the trial court's imposition of sentence. Again, the issue in this case was Petitioner's mental condition. The jurors were, if provided correct information, left to decide whether this potentially mentally person was to life for a minimum of twenty-five years in prison before becoming even eligible for parole consideration.

That was and is the law. The jury was told otherwise by the trial judge:

> MR. LUBIN: In this case, however, we have a provision where it is without eligibility for parole and His Honor will instruct you on that. Can you accept that as the truth?
>
> MR. WHITMER: Yes, I can and I hope that it

is.

MR. LUBIN: Is there anybody who does not accept that as the truth? Okay.

THE COURT: Mr. Lubin, maybe I can just set that matter at rest. That happens to be the law, what Mr. Lubin just said. The only that can change that would be a decision by the Florida legislature changing that law.

But unless the legislature changes it, that is the law and there is no possibility for parole in those cases except in the event the legislature might modify it. Now, it is not the case in other sentences and the Parole Board can release prior to the time that the judge sentences the individual.

Thus, the jury was left with no guarantee at all -- the jurors were told that the law might change (in essence, the Florida death penalty statute might change) with regard to life, with no later instruction that "death" would ever be changed by the legislature.

The only opinion for a concerned juror was "death." The decision on "life" was left to some greater authority -- the legislature -- thereby diminishing the juror's sense of responsibility.

This is fundamental eighth amendment error.

Legal Basis for Relief

A. The Jury Was Prejudicially Misinformed About the Consequences of a Not Guilty By Reason of Insanity Finding

The United States Supreme Court has repeatedly held that the guilt/innocence, as well as the sentencing proceeding, of a capital case must be conducted so as to remove any hint that the conviction and sentence were unreliably obtained. Risk of an unwarranted conviction "cannot be tolerated in a case in shich the defendant's life is at stake." Beck v. Alabama, 100 S. Ct. 2382, 2389 (1980). In this case, the "risk" is that Mr. Martin was convicted because the jury was incorrectly instructed regarding the central issue in the case: not guilty by reason of insanity.

The jury instructions in this case produced an intolerable

risk that Mr. Martin was convicted because the jury was led to believe there was no other option. As noted above, the trial court refused to instruct upon the correct law, then contained in Fla. Std. Jury Instr. (Crim.) 2.16, p. 48. As argued on direct appeal, this Court's decision in Roberts v. State, 335 So. 2d 285, 288-89 (Fla. 1976), was the law:

> The jury was instructed as to the possibility that the defendant might be given probation or parole following a guilty verdict. Yet they must have been left wondering as to the consequences of a verdict of not guilty by reason of insanity. The efforts by counsel for both sides to supply partially accurate information as to those consequences must have served further to confuse the jury. The trial judge should have reduced this confusion by charging the jury in the manner requested by appellant's trial counsel.
>
> But we decline to limit our holding to the facts of this case. In so doing we expressly adopt the so-called "Lyles rule," which is followed in an increasing number of state jurisdictions. In Lyles v. United States, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), appellant was indicted for robbery, grand larceny and unauthorized use of a motor vehicle, and he relied on a defense of insanity. After dismissal of the grand larceny charge by the prosecution, the jury returned a verdict of guilty on the other two counts. On appeal, the United States Circuit Court of Appeal for the District of Columbia Circuit had to consider the propriety of this charge given by the trial judge:
>
> > 'If a defendant is found not guilty on the ground of insanity, it then becomes the duty of the Court to commit to St. Elizabeths Hospital, and this the Court would do. The defendant then would remain at St. Elizabeths Hospital until he is cured and it is deemed safe to release him; and when that time arrives he will be released and will suffer no further consequences from this offense.'
>
> In an opinion co-authored by the present Chief Justice of the United States, the Circuit Court of Appeal took the position urged by appellant's counsel in the case at bar:
>
> > 'This point arises under the doctrine, well established and sound,that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the

> nature or extent of it, or in probation. But we think that doctrine does not apply in the problem before us. The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reasons of insanity. Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such commonly understood meaning. . . . It means neither freedom nor punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others. We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.'

Here, the jury was instructed regarding what the trial judge "may" do upon a verdict of not guilty by reasons of insanity. As the state conceded before this Court on direct appeal, the trial court modified the Florida Standard Jury Instruction in this regard; but, the State contended, the use of "may" instead of "shall" was an "innocuous change in terminology." Appellee's Brief, p. 48. Innocuous indeed.

Beck v. Alabama, 100 S.Ct. 2382 (1980), teaches otherwise. It must be remembered that "not guilty by reason of insanity" was one of three possible verdicts, guilty and not guilty being the other two. A proper instruction on not guilty by reason of insanity was critical -- the defendant was entitled to have the jury instructed that a judge had to perform certain functions upon that verdict, not that the judge could choose to or not to perform. The jury was left with no accurate knowledge about its third opinion, and this violated the eighth and fourteenth amendments.

> [W]here the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the 'third option' of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, 100 S.Ct. at 2389.

The "third option" here was effectively removed from the jury's consideration -- the jury was not told this option "means neither freedom nor punishment." Roberts, supra. This misinformation tainted the jury verdict, cf. Caldwell v. Mississippi, 108 S. Ct. at 2645; and violated the eighth and fourteenth amendments.

B. The Jury Was Prejudicially and Incorrectly Left to Speculate About Whether Petitioner Would Serve Any Time In Prison If the Jury Recommended Life Instead of Death

The jury which recommended the death penalty was effectively told that Mr. Martin would be "on the streets" at the whim of the legislature if the jury recommended and the trial court imposed life imprisonment. The Court made this statement to the jurors, a matter of fundamental error which may properly be addressed here.

The effect of this court instruction was to remove the sentence of life imprisonment as an alternative to the sentence of death in Mr. Martin's case, and in effect, to given the jury only one real option for sentencing: the sentence of death.

If the jury in Mr. Martin's case had believed that a life sentence was an adequate sentence for him, they very likely would have rested that belief upon the existing law that Mr. Martin would not be eligible for parole under such a sentence until he had served a minimum of twenty-five years in prison.

Life in prison, under the judge's instruction was no opinion at all. If Mr. Martin's sentencing jury believed that death as not an appropriate punishment, but believed as well, that society

needed to be protected from Mr. Martin for at least twenty-five years, the instruction could only convince the jury that under the law the only means of protecting society from Mr. Martin was to sentence him to death. Compare Beck v. Alabama, 447 U.S. 625, 637 (1980).

By analogy to Beck, the instruction "would seem inevitably to enhance the risk of an unwarranted [recommendation of death]." Id. As Beck teaches, if a jury is not given a meaningful option for the exercise of its concern that a particular offense demands severe punishment, yet one less than death, the risk that the jury will impose death, for lack of a satisfactorily severe less-than-death option, is great. Such a risk violates fundamental eighth amendment safeguards, for it creates the "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. In terms relevant here, if the jury might have determined -- on the basis of a weighing of the aggravating and mitigating circumstances, i.e., the individualized factors of Mr. Martin's case -- that a sentence of life imprisonment would suffice, the instruction compelled the jury to reject such a determination in spite of the individualized case factors that called for a life sentence.

In light of California v. Ramos, ___ U.S. ____, 103 S.Ct. 3446 (1983), it may be argued that the instruction did not divert the jury's consideration from the individualized factors in Mr. Martin's case. All the argument did, in Ramos terms, was to "bring[] to the jury's attention the possibility that the defendant may be returned to society," 103 S.Ct. at 3454, thus "invit[ing] the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society." Id. Accordingly, such an argument would not be unconstitutional, for the focus would remain upon the character of Mr. Martin. Id. at 3455-56. Such

an argument must fail, however, because the court's instruction here was critically different from the instruction considered in Ramos. In Ramos the instruction simply informed the jury that while existing law defined a life sentence as one "without the possibility of parole," existing law also permitted the governor to commute such a sentence. Thus, the instructions simply informed the jury -- accurately -- of the meaning of a life sentence and did not unduly invite sentencing on the basis of speculation about what the governor might do in the future:

> The instruction invites the jury to predict not so much what some future governor might do, but more what the defendant himself might do if released into society.

Id. at 3455. In critical contrast, the instruction here unduly invited the jury to speculate about possible future changes in existing law. Existing law required a twenty-five year mandatory term of incarceration, at least. If the jury thought that punishment was adequate, it was giving consideration to Mr. Martin's future dangerousness to the extent permitted by Florida law: whether he would pose too great a risk of dangerousness to allow his possible release in twenty-five years. To invite the jury to speculate about a possible future legislative decision to decrease the twenty-five year mandatory minimum was, in Ramos terms, to "impermissibly inject an element too speculative for the jury's deliberation." Id. at 3459. It was, instead, to

> invite[] the jury to predict . . . what some future [legislature] might do, . . . [rather than] what the defendant might to if released into society [under existing law].

Id. at 3455. The instruction, therefore, created an unconstitutional "risk that the death penalty [would] be imposed in spite of factors which [called] for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605.

Accordingly, the instruction, like the prosecutor's argument in Caldwell v. Mississippi, "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the

determination that death is the appropriate punishment in a specific case.'" 105 S.Ct. at 2645 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). Compare Adams v. Wainwright, supra.

CLAIM V

MR. MARTIN WAS DENIED A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE HIS SENTENCING JURY INTERPRETED FLORIDA'S CAPITAL STATUTE AS LIMITING CONSIDERATION TO THE LISTED FACTORS IN MITIGATION

Factual Basis for Relief

Tried before Songer v. State, 365 So. 2d 696 (Fla. 1970), Mr. Martin suffered the same constitutional harm so many of his contemporaries experienced. Did the Florida capital sentencing statute limit consideration of mitigating factors to its list or did it not? It did in this case, through counsel's advocacy and by way of a contradictory jury instruction. Defense counsel here told the jurors again and again that the statute confined their discretion to a consideration of the narrow statutory list of aggravating and mitigating circumstances -- and extracted promises from the prospective jurors during voir dire that they could and would follow that statutory limit in determining the appropriate sentence. Some examples:

> MR. LUBIN [defense counsel]: Okay. Mr. Sheldon, in Florida there is a bifurcated trial and you heard about that. First we decided guilt or innocence, and if the jury returns a verdict of guilty on first degree murder, we have a whole separate new trial on the issue of penalty and evidence is taken and so forth.
>
> His Honor will instruct you if we ever get to that stage, and I certainly have to ask questions now about it, that there are certain factors that you must base your decision on as to life and death. These are called aggravating and mitigating factors and there is a list, a specified list. It is not just whatever you want to consider or whatever I want you to consider but it is a list, one through six or one through seven on the aggravating and one through six or through seven on the mitigating side.

Aggravating means those factors which militate towards death and mitigating means those which point away from the death penalty. His Honor will instruct you that you have to weigh those factors.

Okay. You hear three on one side or four on the other, and as the triers of the fact, you must weight the aggravating factors as against the mitigating factors and then decide as to whether or not it is your personal belief that the man should live or die. Can you do that?

MR. SHELDON: Yes.

MR. LUBIN: Mr. Wing?

MR. WING: Yes, I think I could.

MR. LUBIN: Miss Kalish?

MISS KALISH: Yes.

MR. LUBIN: Can you all do that? Is there anybody that has any question that they cannot limit their decision to those aggravating and those mitigating factors that the judge instructs you on? Is there anyone?

I am not going to go into them now but there are certain factors. Mr. Whitmer, can you follow those?

MR. WHITMER: Yes, sir.

(R 2224-25) (emphasis added).

MR. LUBIN: Now, His Honor will, as I said, mention to you what the aggravating and what the mitigating factors are. Will you follow those and apply those to your determination if we ever get that far or would you want to apply your own standards for capital punishment when you think it is deserved and when it is not deserved? I would really appreciate your full honesty.

(R 2249) (emphasis added)

MR. LUBIN: Now, His Honor will instruct you I believe at the close of the case, if we reach the second stage, that there are certain aggravating and certain mitigating factors upon which you must base your decision as to life or death. These are statutory and these are the ones you have to weigh.

(R 2433-34) (emphasis added)

MR. LUBIN: . . . do you understand that if we get to that point of the jury deciding that . . . there will be certain aggravating factors and certain mitigating factors you

> will have to consider and the judge will instruct you on what those are? Do you understand that?
>
> MR. WRIGHT: I understand that.
>
> MR. WEIGEL: Yes, I do.
>
> MR. LUBIN: Do you feel you will be able to weigh those factors and consider them or do you feel you might be guided by some personal feelings as to what factors to consider?
>
> MR. WEIGEL: No, I would go by the guidelines.
>
> MR. LUBIN: You, sir?
>
> MR. WRIGHT: I would follow the guidelines.

(R 2800) (emphasis added)

Defense counsel was not alone in instructing the jurors about their limits. The prosecutor was just as explicit:

> MISS VITUNAC [assistant state attorney]: Now, with respect to phase two, the death penalty stage, the judge is going to instruct you on a list of aggravating circumstances to consider and a list of mitigating circumstances to consider.

(R 2648) (emphasis added)

> MISS VITUNAC: . . . His Honor will read you a list as to what the legislature decides are aggravating circumstances and those that they have decided to be mitigating circumstances and it will be your function to listen to the evidence and weigh one against the other to determine whether or not your recommendation should be death or life imprisonment. Will you agree to follow those, whatever they are?
>
> MR. JORDAN: Yes.

(R 2720-21) (emphasis added)

> MISS VITUNAC: Would you weigh the aggravating and mitigating circumstances that His Honor will give you at the close of all the evidence on that issue?
>
> MR. STUCKER: Yes, I would.

(R 2823)

This restrictive view of the scope of permissible mitigating circumstances was at the time the prevailing view both statutorily and indeed as a constitutional imperative to avoid the arbitrary discretion condemned by Furman. The jury was thus

told by the lawyers that it had to "stick to those [mitigating factors] that the legislature has set forth" and to "follow the guidelines," and the jurors pledged to do so.

The jurors were thus ready for the instructions at the penalty trial. Before they heard the evidence the judge explained the factors they were to listen for in the evidence:

> [Y]ou will hear me explain or recite certain aggravating and mitigating circumstances which you are to consider. I will be giving you a list of those actual aggravating and mitigating circumstances to take back with you when you begin your deliberations on this phase of the trial.

(R 4259) (emphasis added)

> At the conclusion of the taking of the evidence and of the argument of the lawyers, you will be instructed on the factors in aggravation and mitigation that you may consider and I am going to do it before as well.

(R 4261) (emphasis added). And specifically as to migigation:

> The mitigating circumstances which you may consider, if established by the evidence, are these: [list of statutory factors]

(R 4263). The judge reminded the jury that he would give them a written list:

> As I said earlier, ladies and gentlemen, I will be sending these aggravating circumstances and mitigating circumstances back with you when you deliberate and I will repeat this charge in major portion following the argument.

(R 4267).

The state's opening argument did not mention mitigation in any fashion. The defense did, drawing a distinction for the jury between the statutory mitigation (T 4268) and the "other mitigating factors which are not listed," explaining they would be contained in "a letter which was sent by a member of Mr. Martin's family," (T 4270) and (apparently) from the testimony of an expert on the "deterrent value" of the death penalty. (T 4270). The charge to the jury would later leave it to their discretion whether they even wanted to consider mitigation not of

statute.

The jury continued to get mixed signals on mitigation during the testimony at the penalty phase. An objection by the state (in the jury's presence) to the deterrence expert's testimony went like this:

> MISS VITUNAC: I object, Your Honor, as to the relevancy of the testimony, and secondly, he is not qualified as an expert because there is no expertise in the element of the death penalty. It does not go to the aggravating and mitigating circumstances.

The defense response confirmed evidence had to do just that to be considered:

> MR. LUBIN: It will tie into that.

(T 4326) (emphasis added).

At the close of evidence, the judge again told the jury that when they retired to deliberate their death decision they "will be getting the [list of] aggravating and mitigating circumstances and the evidence that has been received." (T 4437).

The state again did not refer at all to mitigation in its closing. The defense argument drew a distinction between listed and unlisted mitigation that could do nothing but highlight the unimportance the judge would not read to them. The statutory factors were "mandated" by the Florida legislature, were "very important," and "must be considered in deciding whether or not someone should live or someone should die and these are called the aggravating and mitigating factors and we have been referring to them at various times throughout this trial." (T 4456-57).

While the "very important" statutory mitigation had to be considered, the defense told the jury variously that unlisted factors "can" or "may" be considered but only "if you feel it is a mitigating factor." (T 4479-80).

The defense requested a special instruction to charge the jury that there was no limitation on the mitigating factors. (T 4412). The court modified the instruction to give the jury discretion whether to even consider in mitigation factors not

listed in the statute, saying the instruction had to be "modified probably by, as long as the jury finds that such a factor is mitigating. That has been the theory. I believe that is the law, Miss Vitunac." (T 4412).

The discussion of the proposed instruction during the charge conference shows all participants thought the legislaltively-listed factors were the only "true" mitigation. The jury didn't' even have to consider factors not listed. Their judgment of what was mitigating was to be relegated to second-guessing the Florida legislature but only if they wanted to.

> THE COURT: What the State and I are talking about is, I have the notion that the sense of those decisions, the legislature told you that A through E or whatever it is, are mitigating. There is no question about that. They are mitigating by operation of law.
>
> Now, whether or not other matters may be mitigating is a matter for the jury to decide and the defense is not restricted. In other words, he may argue other things are mitigating and the jury decides whether or not they are. Isn't that the sense of it?
>
> MISS VITUNAC: Yes.
>
> MR. LUBIN: Yes.
>
> THE COURT: Is there some nice way we can say that?
>
> MR. LUBIN: I thought I said it reasonably nicely.
>
> THE COURT: I am not demeaning your instruction.
>
> MR. LUBIN: How about there is no such limitation upon which factors?
>
> THE COURT: However, the jury is the fact finder which determines whether or not a factor is mitigating, if it is not one of the enumerated ones by the statute.
>
> MR. LUBIN: Your Honor, Miss Vitunac mentioned initially when she objected to that one, so the jury knows that they, the jury should reject Professor Zeisel's testimony. I don't think it is necessarily right that they should reject this testimony. I think they should consider his testimony.
>
> THE COURT: That's a question of argument. Defense three.

(T 4413-14).

The instruction emerging from the conference is as confusing and inconsistent as what they had been told throughout the trial. It goes:

> The aggravating circumstances which you may consider are limited to those upon which I will instruct you. However, there is no such limitation upon the mitigating factors which you may consider. However, the jury is the fact finder which determines whether or not a factor is mitigating if it is not one enumerated by the statute.

(T 4491).

The standard instruction was then read to the jury, listing only the statutory aggravation and mitigation, prefaced for each section by the following:

> Now, the aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

(T 4491).

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

(T 4492). Only the statutory list was sent back with the jury. (T 4502).

There was no clear instruction to the jury that mitigation was unlimited, and too many distressing announcements by counsel that it was not. It is clear the jury was never told they were required to consider nonstatutory mitigation, and it is unreasonable to assume they did, given the choice between following their own judgment on what was mitigating and that of the Florida Legislature.

Substantial nonstatutory mitigation was there for the jury to consider and weigh, given accurate instruction to do so. Mr. Martin's brother wrote a letter which was read to the jury making an impassioned plea for mercy, urging the jury their parents were quite ill and Nollie's execution would kill them, too. The letter details the family's strong Christian heritage, the

numerous medical problems suffered by all of them, their love for Nollie, and other family history persuasive to the factfinder. (T 4387-4395). Without the latitude the Constitution requires the jury was also required to stick to the strict statutory standards for weighing the extensive testimony of mental illness. Lockett and Eddings require any infirmity to be considered. Even the State's experts tesified Mr. Martin was mentally ill, and that he was under the influence of an emotional disturbance at the time of the crime. (T 3773, 3855, 3766-7, 3850).

Legal Basis for Relief

This Court recently 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). To an important extent, this Court's resolution of Mr. Martin'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 constitutional issue presented here. In order to make plain that Mr. Martin 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. 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 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. Martin was tried and condemned to die under it.

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 Nollie Lee Martin 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. Martin'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. MARTIN'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. Martin has shown that the jury recommendation was unconstitutionally obtained.

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, as if the jury is instructed to denigrade non-statutory mitigation. 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. Martin's death sentence is unconstitutional.

CLAIM VI

THE FAILURE OF THE JURY FORM TO INDICATE WHETHER THE CONVICTION WAS BASED UPON A FINDING OF ACTUAL INTENT OR ON A PREMEDITATION THEORY, OR MERELY IMPUTED INTENT ON A FELONY MURDER THEORY, COUPLED WITH THE FAILURE OF BOTH THE TRIAL COURT AND THE APPELLATE COURT TO MAKE A FINDING OF ACTUAL INTENT, RENDERS THE SENTENCE OF DEATH INVALID UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Factual Basis for Relief

At Mr. Martin's trial, the jury was instructed on felony murder and premeditated murder. The jury's general verdict did not distinguish between the two theories. Similarly, the jury's advisory sentence was simply an opaque recommendation of death. And the sentencing judge's sentencing findings, while concluding that Mr. Martin was not insane and that he was the dominant force in the crime, did not make a finding of intent. Finally, this Court also has not made such a finding.

Legal Basis of Relief

Under Florida law, a defendant may be convicted of first degree murder even though he neither killed nor possessed a premeditated design to kill. Enmund v. Florida, 458 U.S. 782, 789 (1981); Adams v. State, 341 So. 2d 765, 767-69 (Fla. 1976). Such a defendant, however, may not be sentenced to death. In Enmund v. Florida, the United States Supreme Court held that the eighth amendment to the United States Constitution prohibits the execution of a defendant in the absence of proof that he "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill or intend that a killing take place or that lethal force will be employed..." Id. at 797. More recently, in Cabana v. Bullock,

106 S. Ct. 689 (1986), the Court resolved two Enmund issues, one implicitly and one explicitly. The Court implicitly held that Enmund applies to active participants in the events leading up to and following a homicide if the defendant lacked the requisite intent to kill. Bullock and his accomplice jointly beat the victim (Bullock held the victim's head while the accomplice smashed the victim in the face with a whiskey bottle); although the accomplice was the one who struck the lethal blows, Bullock helped dispose of the body and kept the victim's car. Id. at 693-94. Id. at 693. Significantly, the Supreme Court did not hold that Enmund could not apply to such a case.

The Court went on to resolve a second issue: In whose hands the decision that a defendant possesses the requisite degree of cupability lies when an Enmund claim reaches federal court. The Supreme Court held that federal courts must examine the entire course of the state court proceedings to determine if, at some point in the process, the requisite Enmund finding had been made. The findings may be made by the state's appellate courts as well as by trial courts. Id. at 697. If it has been made, then that finding must be presumed correct by the Federal courts. If it has not, then the federal court can either make the finding itself or "take steps to require the state's own judicial system to make the factual findings in the first instance". Id. at 699. The Supreme Court agreed with Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985) (en banc) that a federal habeas court may make the Enmund finding, but the Supreme Court held "that the state courts should be given the opportunity to address the matter in the first instance." Bullock, 106 S. Ct. 695 n.1. Considerations of comity and federalism make this approach the "sounder one". Id. This Court recently construed Bullock as having "held that the Enmund criteria must be satisfied within the state's judicial process." Tafero v. Wainwright, ___ F.2d ___, ___, slip op. 4863, 4868 (11th Cir. July 28, 1986).

Because the Mississippi courts had not made the requisite findings in Bullock, the Supreme Court conclued that

> the District Court should be directed to issue the writ of habeas corpus vacating Bullock's death sentence but leaving to the State of Mississippi the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question whether Bullock killed, attempted to kill, intended to kill, or intended that lethal force would be used. If it is determined that Bullock possessed the requisite culpability, the death sentence may be reimposed.

Id. at 700. See also Tafero v. Wainwright, ___ F.2d at ___, slip op. at 4868.

CLAIM VII

> THE DEATH PENALTY IS IMPOSED IN FLORIDA IN AN ARBITRARY, DISCRIMINATORY MANNER -- ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE SENTENCING DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE RACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH, THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND REQUIRES THAT MR. MARTIN'S DEATH SENTENCE BE VACATED.

On October 16, 1986, the United States Court of Appeals for the Eleventh Circuit stayed the execution of Roy Stewart. Judge Hill, concurring, observed:

> I write separately to suggest that, until further instruction by the Supreme Court, execution of death sentences should be stayed. The Court has granted certiorari in McCleskey v. Kemp, ____ U.S. ___, 106 S. Ct. 331, 92 L.Ed.2d 737 (1986) (granting certiorari), and in Hitchcock v. Wainwright, ___ U.S. ___, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986) (granting certiorari). In those cases, the petitioners assert that the people and institutions of Georgia (McCleskey) and of Florida (Hitchcock) are inadequate to constitutionally administer the death penalty. The petitions in those cases somewhat resemble claims of the unconstitutional application of a constitutional law, but they do not assert any particularized, individual, intentional

> discrimination inflicted upon either petitioner. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Rather, the petitions appear to me to assert that "government, created and run as it must be by humans, is inevitably incompetent to administer" the death penalty. See Gregg, 428 U.S. at 228, 96 S.Ct. at 2971, 49 L.Ed.2d 904 (White, J., concurring).
>
> This court rejected petitioners' claims to the writ of habeas corpus so premised. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc). The Supreme Court has granted review of those cases. Should petitioners prevail, execution of the death penalty will be unconstitutional if administration of it be by a government created and run by humans.
>
> While that issue is under consideration by the court, it may well be that all death sentence executions should be stayed.

Stewart v. Wainwright, ____ F.2d ____, slip op. at 248-49 (11th Cir. October 6, 1986).

Factual Basis for Relief

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.

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.

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 (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.

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, 446 U.S. 428, 439 nn. 7, 8 (1980); 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).

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. 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

The United States 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 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 within the categories defined by the included variables, 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).

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. 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.

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.

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:

> 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 Given 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.

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)	(6)
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 Sentence
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.

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."

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. The Baldus 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.

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. Martin would, first, prove 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. Second, Mr. Martin would prove 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 based on a showing 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. The first and third bases 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.

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 this 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.

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.

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.

On the basis of the foregoing facts, Mr. Martin 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.

LEGAL BASES FOR RELIEF

A. SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON THE RACE OF THE VICTIM OR RACE OF THE DEFENDANT VIOLATES THE FOURTEENTH AMENDMENT

In 1972, in Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court struck down the capital punishment statutes of Georgia, Texas and, by implication, all other states including Florida. The opinion of the Court was handed down in a short per curiam, followed by 50,000 words spread over nine separate opinions by the individual Justices. The precise contours of the Court's holding were unclear, but the core concern of the majority was that the statutes at issue in Furman lacked sufficient standards to distinguish who should live from who should die. These statutes invited arbitrary application, but their vice was not simply arbitrariness as an abstract concept. The evil of a system without meaningful standards is that actors within the system are allowed to give legal effect to their racial, gender and class biases. When the law grants broad discretion, it is not surprising that such discretion will be exercised against despised groups: minorities and the poor.

Four years after Furman, the United States Supreme Court

held that newly enacted death penalty statutes, including Florida's, were facially constitutional. The Court said that "on their face these [new] procedures seem to satisfy the concerns of Furman" and that "absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of the case and the likelihood that a jury would impose the death penalty if it convicts." Gregg v. Georgia, 428 U.S. 153, 198 (1976); id. at 225 (White, J., concurring). The Justices declined to strike down the new laws "on what is simply as assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner." Id. at 226.

The guided discretion statutes considered in 1976 thus were approved because they "promised to alleviate" the arbitrariness condemned in Furman. Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1855, 1856, 1858 (1982) (emphasis added). But the final constitutional judgment of these statutes, including Florida's, will depend on whether their actual performance fulfills their promise.

This initial faith in Florida's system was premature. Petitioner's central claim is that his death sentence has been imposed under a statutory scheme which permits, and has in fact resulted in, the unequal imposition of capital punishment based upon the race of the victim and the race of the defendant. Petitioner has proffered evidence establishing that, in the application of Florida's capital sentencing statute, race of the victim and, to a lesser degree, race of the defendant matter in deciding who dies. This persistent disparity in the valuation of white life over black life implicates the fourteenth amendment's guarantees of equal protection and due process.

Petitioner's argument proceeds in three parts. First, Petitioner will show that he has stated a claim and a prima facie case for relief. Discrimination based on the victim's race,

similar to discrimination based on the defendant's race, violates the equal protection and due process clauses; in fact, "race of the victim" discrimination and "race of the defendant" discrimination are not entirely distinct. The language and legislative history of the equal protection clause establish that the framers of the fourteenth amendment intended it to prohibit the administration of criminal justice to punish whites by penalties that were not employed to punish similar crimes against blacks. Further, because the inequalities at issue involve a suspect class (race) and impinge on a fundamental right (life), the Court must apply strict scrutiny review in testing the contested practice. The use of race as an aggravating circumstance cannot be justified by any compelling state interest.

Secondly, Petitioner will show that the prima facie claim he has stated can be satisfied by statistics. Discriminatory intent can be, and frequently is, inferred from statistics demonstrating the disproportionate impact of a disputed practice. Statistical evidence is especially critical in a case such as this, where decision-making discretion is delegated to multiple sequential decision-makers.

Thirdly, Petitioner will suggest that the evidentiary record in this case -- as it presently stands -- is not a satisfactory predicate for determining the constitutional question presented. The relevant facts developed by the studies, though compelling, are necessarily detailed and complex. Since legal judgments on questions of such complexity ought to be shaped only by a full and clear understanding of facts, Petitioner urges the Court not to determine at this time, as a matter of law, such issues as how strong a pattern of racial disparity must be in a capital sentencing system to establish cognizable discrimination, or what the constitutional significance of pervasive race-of-the-victim discrimination should be. Such determinations should be

postponed until Petitioner can provide the Court with a complete picture of just how strong these patterns of discrimination are in the State of Florida, just how random capital sentencing has become, and just how unshakable are the racial disparities.

1. Stating The Prima Facie Case: Discrimination Based Upon The Victim's Race Violates The Equal Protection And Due Process Clauses Of The Fourteenth Amendment

A statute which explicitly adjusted the severity of punishment for a crime according to the race of the defendant or the victim would be a direct violation of the equal protection and due process clauses of the fourteenth amendment. For example, if a statute provided that defendants whose victims were white should be sentenced 20 percent more harshly than defendants whose victims were black, that racial classification would trigger strict scrutiny. The situation should be viewed no differently merely because the racial classification is covert rather than overt. In both situations, the sentencing authority is influenced by racial considerations.

The conceptual distinction between an attack on the facial constitutionally of a statute and a challenge to its administration has no bearing on the scope of the equal protection guarantee. The fourteenth amendment prohibits not only explicit discrimination, but discriminatory administration of a facially neutral law as well. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Petitioner offers to show that Florida's system discriminates on the basis of race of the victim. This Court has never held that such discrimination, if proven, cannot state a claim. Though several Justices, writing separately, have suggested that this may be the case, see Meeks v. State, 382 So.2d 673, 676, 677, 678 (Fla. 1982), the cases themselves have held only that the statistically-based allegations of discrimination presented did not "constitute a sufficient

preliminary factual basis to state a cognizable claim." Sullivan v. State, 441 So.2d 609, 614 (Fla. 1983). Even the separate opinions in Meeks stressed that Meeks had failed to make a sufficient factual showing. See 382 So.2d at 677 (Overton, Alderman & McDonald, J.J., concurring) ("I conclude that the instant figures simply fail to establish a factual basis for the proposition that our death penalty is being applied in a discriminatory manner") (emphasis added); id. at 677 (Sundberg & England, J.J., concurring) ("appellant has failed, even on a preliminary basis ... to present a sufficiently compelling statistical showing of discrimination"). See also Hitchcock v. State, 432 So.2d 42, 43-44 (Fla. 1983); Thomas v. State, 421 So.2d 160, 162-63 (Fla. 1982); Meeks v. State, 382 So.2d 673, 676-77 (Fla. 1980); Adams v. State, 380 So.2d 423 (Fla. 1980); Henry v. State, 377 So.2d 692, 692-93 (Fla. 1979).

However, in Griffin v. State, 447 So.2d 875 (Fla. 1984), the Court said that the claim presented was "insufficient on its face to state a claim for relief," suggest either that race-of-the-victim discrimination is not constitutionally cognizable or that statistics alone cannot make out such a claim. This suggests that statistics could never suffice to state a prima facie claim of discrimination. Mr. Martin will show that discrimination on the basis of race of the victim states a claim and that a prima facie showing of that claim may be made out by statistical disparities. Discrimination based on the victim's race violates the fourteenth amendment for three distinct reasons: (1) the framers of the amendment intended to prohibit discrimination by race of the victim; (2) traditional equal protection principles hold such discrimination unconstitutional; (3) using race of the victim as an aggravating factor in a death case violates equal protection.

Mr. Martin has standing to raise the claim of discrimination based on the race of the victim. Standing depends upon a showing

of injury in fact and a demonstration that the injury will be redressed by a favorable decision. Simon v. Eastern Ky. Welfare Rights, 426 U.S. 26, 38 (1976); Warth v. Seldin, 422 U.S. 490, 505 (1975); L. Tribe, American Constitutional Law 89-93 (1978). Petitioner has been injured by the discrimination of which he complains: he stands to lose his life because ot it. Petitioner's victim was white. If a statute explicitly provided that defendants who kill white victims will receive 20 years but defendants who kill blacks will receive 5 years, is there any doubt that a defendant who received a harsher sentence because his victim was white would have standing to challenge the statute regardless of the defendant's race?

a. The Historical Purposes of the Amendment: Intent of the Framers

One of the purposes behind the fourteenth amendment, adopted in 1868, was to ensure that all Americans would be treated equally before the criminal law. While historians and courts have long debated what the Reconstruction Congress thought about matters such as school segregation, the language and history of the Amendment shows with relative clarity a desire to eliminate the then-pervasive practice of punishing only persons who committed crimes against members of the majority race. Indeed, the test of the clause providing "nor shall any state deprive any person within its jurisdiction of the Equal Protection of the law," speaks more directly to the imposition of criminal sanctions than to any other form of discrimination. The United States Court of Appeals for the Eleventh Circuit squarely held that John Spinkellink, a white man, had standing to raise the race of the victim issue. Spinkellink v. Wainwright, 578 F.2d 582, 612 n. 36 (5th Cir. 1978). The Spinkellink court drew on Supreme Court cases holding that a white defendant has standing to allege that blacks have been illegally discriminated against in jury selection procedures. See Taylor v. Louisiana, 419 U.S. 522, 526 (1975); Rose v. Mitchell, 443 U.S. 545 (1979); Peters v.

Kiff, 407 U.S. 493, 502 (1972). See also Lewis, Mannle, Allen & Vetter, A Post-Furman Profile of Florida's Condemned -- A Question of Discrimination In Terms of the Race of the Victim and a Commend on Spinkellink v. Wainwright, 9 Stetson L. Rev. 1, 42 (1979); but see Britton v. Rogers, 631 F.2d 572, 577 n.3 (8th Cir. 1980) (no standing to raise issue in non-capital case).

The framers of the fourteenth amendment unquestionably intended to proscribe differential punishment based on the race of the victim. Prior to the Civil War, statutes regularly punished crimes less severely when the victim was a black person or a slave. After the war and immediately preceding the enactment of the fourteenth amendment, Southern authorities frequently declined to administer their statutes to prosecute persons who committed criminal acts against blacks. See e.g., Report of the Joint Committee on Reconstruction, at the First Session, Thirty-Ninth Congress, Part II, at 25 (1866) (testimony of George Tucker, commonwealth attorney) (the southern people "have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea"); id. at 209 (testimony of Lt. Col. Dexter Clapp) ("Of the thousand cases of murder, robbery and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons,"); id. at 213 (testimony of Lt. Col. J. Campbell) ("There was a case reported in Pitt County of a man named Carson who murdered a negro. There was also a case reported to me of a man named Cooley who murdered a negro near Goldsborough. Neither of these men has been tried or arrested."). In these cases that were prosecuted, authorities acquitted or accorded disproportionally light sentences to persons who were guilty of crimes against blacks. See e.g., id., Part III, at 141 (testimony of Brevet M. J. Gen. Wagner Swayne)

("I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung [sic] or sent to the penitentiary from crime against a negro, while many cases of crime warranting such punishment have been reported to me."); id., Part IV, at 76-76 (testimony of Maj. Gen. George Custer) ("I believe a white man has never been hung [sic] for murder in Texas, although it is the law. Cases have occurred of white men meeting freedmen they never saw before, and murdering them merely from this feeling of hostility to them as a class.").

The congressional hearings and debates that led to the enactment of the fourteenth amendment are replete with references to this pervasive discrimination, and the Amendment and the statutes enforcing it were intended, in part, to stop it. See General Building Contractors Association, Inc. v. Pennsylvania, 102 S.Ct. 3141, 3146-49 (1982). The United States Supreme Court has recently confirmed this truth: "[i]t is clear from the legislative debates that, in the view of the . . . sponsors [of the Ku Klux Klan Act of 1871], the victims of Klan outrages were deprived 'equal protection of the laws' if the perpetrators systematically went unpunished." Briscoe v. Lahue, 103 S.Ct. 1108, 1117 (1983). The proffered evidence in this case plainly demonstrates a violation of those equal protection clause objectives.

b. Traditional Equal Protection Principles

Even without reference to the Amendment's history, race-of-victim sentencing disparities violate long-recognized equal protection principles that have been applied to all areas of state action. Absent a rational explanation for subjecting one to harsher treatment than another, any disparate treatment of different groups at the hands of the state renders the operation of a law unconstitutional. See United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); F.S. Royster Guano

Co. v. Virginia, 253 U.S. 412 (1920).

Moreover, under well-established equal protection doctrine, even a "rational" explanation would not suffice to protect the state action alleged here, since Petitioner's claim involves a suspect racial discrimination that impinges upon the fundamental right to life, a right explicitly guaranteed by the fourteenth amendment and inherent in the constitutional framework. See e.g. May v. Anderson, 345 U.S. 528, 533 (1953) (a right "far more precious . . . than property rights"); Screws v. United States, 325 U.S. 91, 131-32 (1945) (Rutledge, J., concurring); id. at 134-35 (Murphy, J., dissenting) ("He has been deprived of the right to life itself . . . That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognizable and guaranteed by the Constitution."); Johnson v. Zerbst, 304 U.S. 45 462 (1938) ("fundamental human rights of life and liberty"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("the fundamental rights to life, liberty and pursuit of happiness").

The Supreme Court has made it clear that where either (i) "fundamental rights," such as the right to life or the fundamental right to fair treatment in the criminal justice system, or (ii) "suspect classifications," such as race are involved, discriminatory state action "may be justified only by a 'compelling state interest' ... and ... legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973); see also Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). "There is no single decision of the Court in which a majority of justices specifically recognize a fundamental right to fair treatment in the criminal justice system for purposes of equal protection analysis. However, the Court has established this right through

a series of related decisions ... when the government takes actions that burden the rights of a classification of persons in terms of their treatment in the criminal justice system, it is proper to review those laws under the strict scrutiny standard for equal protection." J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional law 676-77 (1978).

The "fundamental rights" concept originated in Skinner v. Oklahoma, 316 U.S. 535 (1942), a case involving the Oklahoma Legislature's imposition of a punishment of sterilization upon those convicted of certain crimes. In addressing the Oklahoma statute, which made sterilization a permissible sentence after a third felony conviction, while at the same time exempting certain kinds of white-collar felonies (such as financial crimes) from its reach, the Court held that,

> strict scrutiny of the classification which a States make in a sterilization law is essential lest unwittingly or otherwise invidious discrimination are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws .... Where the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Id. at 541.

Skinner thus teaches that only a compelling state interest could justify a sentencing statute that conditions fundamental rights in a discriminatory manner, and that the equal protection clause proscribes arbitrary lines among defendants. Certainly a principle that protects, absent a compelling state interest, the right to procreate applies when the stakes are life and death and when the state action destroys not just one right, but all rights. "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a

specific case.'" Zant v. Stephens, 103 S.Ct. 2733, 2747 (1982) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976); see e.g., Reid v. Covert, 354 U.S. 1, 77 (1957) (capital cases "stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for ... procedural fairness ... "); Williams v. Georgia, 349 U.S. 375, 391 (1955) ("That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant"); see also McGautha v. California, 402 U.S. 183, 311 (1971) (Brennan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 28 (1956).

Moreover, the discrimination in imposition of Florida's capital statutes does not merely affect the fundamental right to life, but employs the paradigm "suspect classification," that of race. Racial classifications are "subjected to the stricter scrutiny and are justifiable only by the weightiest of considerations." Washington v. Davis, 426 U.S. 229, 242 (1976) (citing McLaughlin v. Florida, 379 U.S. 184 (1964). No discriminatory state action is more suspect in the administration of justice than racial discrimination. Those inequalities "not only violate our Constitution and the law enacted under it, but [are] at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128, 130 (1940) (footnote omitted); see also Ballard v. United States, 329 U.S> 187, 195 (1946). "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," Rose v. Mitchell, 443 U.S. 545, 555 (1979), since it destroys "the appearance of justice" and casts doubt on "the integrity of the judicial process," id. at 55-56.

c. Race As An Aggravating Circumstance

In the context of Florida's capital sentencing law a showing of race-of-victim discrimination implicates an additional fourteenth amendment principle as well: the prohibition of race-conscious legislation. See also Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1880). The Supreme Court held in Zant v. Stephens, 103 S.Ct. 2733 (1983), that it would be unconstitutional, in an otherwise valid sentencing system, to:

> attach[] the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example to race, religion, or political affiliation of the defendant.... If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law should require that the jury's decision to impose death be set aside.

103 S.Ct. at 2747. Yet, in a real sense, that is precisely what the State of Florida has authorized and what the proffered evidence shows Florida juries and prosecutors have in practice done: "attached the aggravating label" to the race of the victim.

d. Conclusion: Race of the Victim Matters Constitutionally

At bottom, it may well be that subtle racial bias pervades every human institution, that race-consciousness is an unhappy thing but an inescapable fact of American life. This concern is not insubstantial; to some extent all of our official choices and institutions are not immune from the defect asserted by Petitioner. But the infliction of death by official choice is different from any other choice, and things we may tolerate (albeit grudgingly) in other areas of life are simply intolerable when the issue is life or death. That higher standards of "due process", of clarity and rationality, must be required for this ultimate sanction has been the cornerstone of death penalty jurisprudence since its inception. Because death is by far the worst punishment, then the requirements of "due process" and

"equal protection" for death may reasonably be set higher than similar requirements for other punishments.

On all three of the above-stated grounds, evidence of discrimination based on the race of the defendant and race of the victim, if proven, would establish a violation of the fourteenth amendment.

2. Proving The Prima Facie Case: Intentional Discrimination Under The Fourteenth Amendment May Be Proven By Statistical Evidence.

To state a claim under the equal protection clause of the fourteenth amendment, a plaintiff must make a prima facie showing that a state statutory scheme purposefully discriminates against one group over another. Personnel Administrator v. Feeney, 442 U.S. 256, 271-74 (1979). A prima facie case of purposeful unconstitutional classification can be shown either by the statute's specific language or, if a law is neutral on its fact, by the statute's disproportionate effect on different groups. Crawford v. Board of Education, 102 S.Ct. 3211, 3221 (1982). Once that prima facie case is made, the burden shifts to the state to justify its classification either under a rational basis test or, if the classification is "suspect" or infringes upon a fundamental right, under a test requiring the state to show that the statute is precisely tailored to serve a compelling governmental interest. Plyer v. Doe, 102 S.Ct. 2382, 2394-95 (1982).

The necessity of showing intent does not mean that Petitioner must identify an intentional discriminatory act or malevolent actor, see United States v. Texas Educational Agency, 579 F.2d 910, 913-14 & nn. 5-10 (5th Cir. 1978), cert. denied, 443 U.S. 915 (1979), or that racial discrimination was the primary or dominant purpose, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266. All that is required is a showing that discrimination "has been a motivating factor in the decision," id, and that "the

decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because,' not merely 'in spite of,' its adverse affects upon an identifiable group." Personnel Administrator v. Feeney, 422 U.S. 256, 279 (1979).

An equal protection challenge to the racially discriminatory application of a capital sentencing statute may be based on statistical evidence of disproportionate impact which gives rise to an inference of discriminatory intent on the part of the decisionmaker. Thus, "discriminatory intent need not be proven by direct evidence. Necessarily an invidious discriminatory purpose may often be inferred from the totality of the relevant factors, including the fact, if it is true, that the law bears more heavily on one race than another." Rogers v. Lodge, 102 S.Ct. at 3276 (1982); see also, Washington v. Davis, 426 U.S. 229 (1976). The Supreme Court has recognized the value and validity of statistical analysis in cases of this sort: "our cases make unmistakably clear that statistical analysis have served an will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." Teamsters v. United States, 431 U.S. 324, 338-39 (1977).
See Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 162 (8th Cir. 1981); Fisher v. Proctor and Gamble Mfg. Co., 613 F.2d 527, 543-44 (5th Cir. 1980). But see, Meeks v. State, 382 So.2d at 678 (Adkins, J., dissenting) ("the imposition of the death penalty ultimately requires the concurrence of the trial judge, the Florida Supreme Court, and the Governor's Executive Clemency Board. To be successful, the defendant must show that all of these officers participated in intentional or purposeful discrimination").

Petitioner maintains that the results of the system operating as a whole serves as the appropriate framework for assessing discrimination. The principal authority on this point is Furman v. Georgia. All of the justices in Furman who

discussed patterns of imposition of death sentences did so in terms of overall outcome; none focused on the influence of any particular stage of the decision-making process. Neither have the lower court opinions following Furman, which have discussed the fourteenth amendment claim made here. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). In one early reference to this issue, the former fifth circuit expressly said that the evidence "need not identify an intentional discriminatory act or malevolent actor in the defendant's particular case. See United States v. Texas Educ. Agency, 579 F.2d 910, 913-14, nn. 5-7 (5th Cir. 1978)." Jurek v. Estelle, 593 F.2d 672, 685 n. 26 (5th Cir. 1979), vacated and affirmed on other grounds, 623 F.2d 929 (5th Cir. 1980) (en banc).

If jury decisions are influenced by racial factors, prosecutorial decisions will be as well. It would ignore that common sense assumption to view these decision points in isolation. It would also mask discrimination: by anticipating the unequal treatment cases will receive from juries, based on the racial makeup of the defendant and victim, prosecutorial charging decisions may well reduce the apparent impact of jury discrimination, though in that process the impact is no less real. Were Petitioner's claim based upon the statements or actions of a single decisionmaker, of course that alone would not be sufficient and Petitioner would bear the burden of showing the controlling influence of that factor on the process and the outcome of the system generally. United States v. Texas Education Agency, supra, 579 F.2d at 913. But it clearly is not: it is based on an overall, pervasive showing of stark racial discrepancies in the Florida capital sentencing system. Against such showing, it is the state's burden to establish that Petitioner was somehow insulated from the system at some level. That showing has not been, and cannot be, made in this case.

Two features of Petitioner's claim make it particularly amenable to proof by statistics. First, the capital sentencing process is complex and involves a number of decision-makers. The presence of multiple decision-makers appropriately triggers judicial reliance upon disparate impact evidence as the best evidence of discriminatory intent:

> [f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of the mind of the actor. For normally the actor is presumed to have intended the consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed emotion.

Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring). As the United States Court of Appeals for the Fifth Circuit asserted in assessing an equal protection challenge to school board procedures analogous to Petitioner's challenge here: "the most effective way to determine whether a body intended to discriminate is to look at what it has done." United States v. Texas Ed. Agency, 579 F.2d 910 (1978).

The second factor suggesting that this is the sort of claim provable by statistics is that the capital sentencing decision involves discretion. Where decision-makers use discretion in acting, the opportunity to discriminate is so great that the result of those decisions (the disparate impact) is sufficient to support an inference of discriminatory intent. See generally J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 528-29 (1978). See also Baur v. Bailer, 647 F.2d 1037, 1042 (10th Cir. 1981); Reynolds v. Sheet Metal Workers Local 102, 498 F. Supp. 952, 963-64 (D. DC 1980). In Yick Wo, the Supreme Court emphasized that the ordinance at issue there

> confer[red], not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent ... as to persons .... The Power given [to the decision-makers]

> is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

Yick Wo v. Hopkins, 118 U.S. AT 366-67. Equal protection violates based on statistical showings, which fall short of the extreme pattern demonstrated in Yick Wo, were condemned in the jury cases precisely "[b]ecause of the nature of the jury-selection task." Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266 n. 13 (1977). That task rests on a subjective process that presents at every juncture "the opportunity to discriminate" such that "whether or not it was the conscious decision on the part of any individual jury commissioner." The courts have been confident, when presented with a showing of disparate impact, in concluding that "[t]he result bespeaks discrimination." Alexander v. Louisiana, 405 U.S. 625, 632 (1972); see also Hernandez v. Texas, 347 U.S. 475, 482 (1954); Norris v. Alabama, 294 U.S. 587, 591 (1935). "[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing," Castaneda v. Partida, 430 U.S. 482, 494 (1977) (citing Washington v. Davis, 426 U.S. at 241).

Thus because the sentencing system here involves multiple decision-makers, each with substantial discretion and each involved in a governmental process which has the most severe impact on individual life and liberty, the required prima facie showing of discriminatory intent can, and must be, made out by a demonstration of significant racial disparities resulting from the discretionary process. This is precisely what Petitioner has offered to demonstrate.

3. The Evidence in this Case: A Sufficient Preliminary Factual Showing and the Need for an Evidentiary Hearing

a. The Quantitative Evidence

There is an ever increasing volume of evidence demonstrating the discriminatory and arbitrary application of the death penalty in Florida. Most recently, Standford Professors Gross and Mauro found, as had Bowers and Pierce, Radelet and Vandiver, and Linda Foley before them, that race matters in deciding who dies in Florida. In evaluating the evidence of discrimination and arbitrariness, using different methodologies and gathering data from different sources, reach persistent and consistent conclusions. The similarity of the results of these independent studies gives further corroboration to their conclusions, beyond even the meticulous controls incorporated into each study.

b. The Qualitative Evidence: Placing the Statistics in Historical Context

The statistics presented by Petitioner do not appear in a vacuum; they are a product of racial attitudes developed and ingrained over two hundred bitter years.

This history has been often well told, by historians and, directly or inadvertently, by court opinions. Jerrell Shofner, department chair and professor of history a the University of Central Florida and former president of the Florida Historical Society, has written extensively on the subject and would testify at an evidentiary hearing. See also R. Kluger, Simple Justice 59, 132, 218, 276, 289, 327, 561, 724, 728, 734 (1980); F. Read and L. McGough, Let Them Be Judged: The Judicial Integration of the Deep South 196-97 (1978). See also McLaughlin v. Florida, 397 U.S. 184 (1964) (invalidating state statute prohibiting interracial cohabitation); Debra P. v. Turlington, 474 F. Supp. 244, 251 & n. 13 (M.D. Fla. 1979), aff'd in pertinent part, 644 F.2d 397, 407 & n. 15 (5th Cir. 1981) (taking judicial notice of history of school segregation); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965) (invalidating state statute authorizing arrest of

persons seeking service at "whites only" establishments); Dowdell v. City of Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (county's discriminatory allocation of municipal services); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (Discrimination in classification of police officers). See also State ex rel. Virgil Hawkins v. Board of Control, 93 So.2d 354 (Fla. 1957); Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956). Petitioner does not deem it necessary to argue the point, but merely to note it.

c. The Need for an Evidentiary Hearing and Findings of Fact

When confronted with this issue in the past, this Court has consistently held that the individual defendants raising the claim had not made a "preliminary factual showing" sufficient to warrant a hearing. See Sullivan v. State, 441 So.2d at 614 (listing cases). Petitioner is not certain what the Court means by this. If it means that race-of-the-victim discrimination does not state a claim or that statistics cannot make a prima facie showing of a claim of discrimination, then Petitioner's response is in the prior sections of this petition. But if it means that the statistics presented in each of these cases were insufficient, then Petitioner respectfully asks the Court to clarify the initial showing a defendant must make to obtain an evidentiary hearing on this issue.

In defining the quantum of proof necessary to make a preliminary factual showing, the procedural posture of the case is crucial. Petitioner does not claim that the evidence proffered so far means that he wins his claim on the merits; he only asserts that the studies and qualitative data are sufficient to state his claim and to require further evidentiary development. Surely one need not conclusively prove his claim before he is entitled to a hearing on the claim; that would be too heavy a burden to impose. Requiring too much proof initially

from a claimant would defeat valid claims of discrimination before validity is discerned. Further, allowing proof of the prima facie claim with statistics does not unduly burden the state. The state, in rebuttal, can dispute the validity of the proffered statistics or present affirmative proof of its own. To the extent that state-held data, beyond that available to Petitioner, is necessary to resolve the issue, the state should be required to produce such data.

Petitioner has stated a prima facie claim of constitutional magnitude. Petitioner has come forward with a sufficient preliminary factual showing, and so the burden shifts to the state to "dispel the inference of intentional discrimination." Castaneda v. Partida, 430 U.S. at 497. Mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut Petitioner's prima facie case. Id. at 499 n. 19; Alexander v. Louisiana, 405 U.S. 625, 633 (1972). The state must introduce evidence to support its explanations. Castaneda, 430 U.S. at 499 n. 19. It "does not seem unreasonable to require the State to produce similar statistical evidence to rebut petitioner's claim. The State has available to it the information and files on its murder cases as well as a staff or researchers to compile such rebuttal evidence. The State with all its resources should be able to compile such information." Lewis, Mannle, Allen & Vetter, A Post-Furman Profile of Florida's Condemned -- A Question of Discrimination in Terms of Race of the Victim and a Comment on Spinkellink v. Wainwright, 9 Stetson L. Rev. 1, 41 (1979). This, of course, requires an evidentiary hearing and factfinding. And to the extent that the state does dispute the factual allegations made by this indigent Petitioner, funds may be necessary to allow him to respond to the state's rebuttal.

At some point, there must be a hearing and factfinding on this issue. Petitioner meets the criteria for obtaining a hearing

in federal court, see Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), and in fact one district court held a full two-week evidentiary hearing on this very issue in the McCleskey case. See McCleskey v. Zant, No. C-81-2434A (N.D. Ga 1983). But Petitioner believes that a hearing in state court is far more appropriate. It is our statute and it should be our courts that guarantee its application in an evenhanded manner.

Before this Court addresses the broader factual or legal questions posed by Petitioner's constitutional claim, however, it should remand this case for development of a full factual record. Difficult constitutional issues arising on a complex factual background ought not be resolved until the relevant facts have been clearly presented. The evidentiary record in this case -- as it presently stands -- is not a satisfactory predicate for determining the important constitutional questions about discriminatory application of the death penalty, an issue of consummate significance to the administration of justice in our state. Since the discovery and hearing that Petitioner sought were denied by the trial court and have not occurred, the record does not contain examination of the data forming the foundation of Petitioner's claim.

It is time to stop and take stock of the system under which people are sentenced to die in Florida. Petitioner's claim challenges the core assumption of that system: that it actually operates in a fair and unbiased way.

A disproportionately high number of people on death row are there for killing white people. This means that something in the system is very awry. Petitioner's statistics show this did not occur by chance. "What is your explanation? And can you go on living with such a system?" C. Black, Capital Punishment, 101 (2d ed. 1982) (emphasis in original).

B. SYSTEMATIC DISCRIMINATION IN CAPITAL SENTENCING BASED UPON RACE OF THE VICTIM OR RACE OF THE DEFENDANT ALSO VIOLATES THE EIGHTH AMENDMENT

The fundamental teaching of Furman v. Georgia, 408 U.S. 238 (1972) is that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be ... wantonly and ... freakishly imposed." Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring). That teaching has been consistently adhered to by the Supreme Court in its subsequent capital decisions. See, e.g., Zant v. Stephens. 456 U.S. 410, 413 (1982); Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Coker v. Georgia, 433 U.S. 584, 593-97 (1977); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976).

Unlike the fourteenth amendment's requirement of equal protection, the eighth amendment's prohibition against arbitrariness does not require a finding of intentional discrimination. Similarily, a showing of disparate impact in this case is a "badge of slavery" and therefore violative of the thirteenth amendment as well. The thirteenth amendment abolished slavery and badges of slavery. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The systematic underevaluation of black life in the criminal justice system clearly is a badge of slavery. Further, the thirteenth amendment does not require a showing of discriminatory intent. Though the Supreme Court has reserved the question, see General Bld'g Contractors Ass'n v. Pennsylvania, ____ U.S. ____, 102 S.Ct. 31141, 3150 n. 17 (1982); City of Memphis v. Greene, 451 U.S. 100, 126-27 (1981), the legislative history of the amendment shows that a disparate impact can constitute a badge of slavery. See generally E. McPherson, The Political History of the United States of America During the Period of Reconstruction (1871).

The opinions in Furman v. Georgia, 408 U.S. 238 (1972), which focused on the unequal imposition of the death penalty,

specifically disallowed any reliance on a finding of invidious intent. Justice Douglas said "[o]ur task is not restricted to an effort to divine what motives impelled these death penalties." 408 U.S. at 253 (Douglas, J., concurring). Justice Stewart "put ... to one side" the question of intentional discrimination. 408 U.S. 310 (Stewart, J., concurring). And Justice White even assumed the capricious pattern of death sentencing he found resulted from "a decision largely motivated by the desire to mitigate the harshness of the law." 408 U.S. at 313 (White, J., concurring).

Furman's central holding found Georgia's capital statute unconstitutional solely because it "permit[s] this unique penalty to be ... wantonly and ... freakishly imposed." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. at 309-10 (Stewart, J., concurring)). That means the eighth amendment prohibits not only death sentences that are imposed "because of" race, but also sentences that are allowed to stand "in spite of" persistent racial disparities in the imposition of the penalty. Personal Administrator v. Feeney, 422 U.S. at 279. No showing of intentional misconduct, therefore, is required.

That is consistent with the law of the eighth amendment in other contexts, where the touchstone of the eighth amendment is effects, not intentions. See Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (Brennan, J., concurring); id. at 345-46 (plurality opinion). "The prohibition against cruel and unusual punishment contained in the Eighth Amendment ... is not limited to specific acts directed at selected individuals...." "The result, not the specific intent, is what matters; the concern is with the 'natural consequences' of actions or inaction." Roecki v. Gaughan, 459 F.2d 6,8 (1st Cir. 1972).

> An intent to punish may be one element in deciding whether there has been an eighth amendment violation, since the state of mind

> or purpose of a government official bears on the question of whether imposition of the punishment is a necessary or rational means to a permissible end. However, wrongful intent is not a necessary element for an eighth amendment violation. If the physical or mental pain that results is cruel and unusual, it is a violation of the eighth amendment regardless of the intent or purpose of those who inflict it.

Spain v. Procunier, 600 F.2d 189, 197 (9th Cir. 1979); see also Bel v. Hall, 392 F. Supp. 274, 276 (D. Mass. 1975) ("the personal good faith of the defendants is irrelevant to their obligation to eliminate unconstitutional conditions"). The most that has been required in any eighth amendment context is a showing of "deliberate indifference" to deprivations of constitutional magnitude. Estelle v. Gamble, 429 U.S. 97, 105 (1976).

The standard of proof to establish an eighth amendment claim and an equal protection claim are thus different; the latter requires proof of intent while the former does not. The evidence to be presented on both issues, however, might well be similar, as the same patterns of statistical disparity may be proffered ve both claims.

Thus, Petitioner has stated a claim under the eighth as well as the fourteenth amendment.

CONCLUSION/RELIEF SOUGHT

Petitioner respectfully requests that this Court enter a stay of execution and order a retrial, resentencing or a new direct appeal. In the alternative, Mr. Martin requests the Court to await the decisions in Hitchcock and McCleskey, and then to analyze the discrimination claim presented here under the parameters articulated by the United States Supreme Court, and vacate Mr. Martin's death sentence, after evidentiary development of the claim, if necessary.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

MICHAEL A. MELLO
Assistant Capital Collateral Representative

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

BY: _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Joy Shearer, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, #204, West Palm Beach, Florida 32014, and by hand delivery to the Office of the Attorney General, The Eliot Building, 401 South Monroe Street, Tallahassee, Florida 32301, this 12th day of November, 1986.

_____
MICHAEL A. MELLO