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IN THE SUPREME COURT OF FLORIDA

NO. 72231

MARVIN EDWIN JOHNSON,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

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

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I. INTRODUCTION

Mr. Marvin Johnson's jury recommended that he be sentenced to life imprisonment. The trial court, without saying why the jury was unreasonable, sentenced Mr. Johnson to death. Four members of this Court agreed with the trial judge in 1981. Three other members of this Court believed there was a reasonable basis for the jury recommendation, and dissented from the affirmance of the death sentence. The federal district court judge who heard the case agreed with the dissenters -- "[I]f this Court had been in the position of initially reviewing the application of Tedder, the conclusion would likely have been that, in considering its application to the spectrum of Florida murders generally, this was not one for which execution was appropriate." Johnson v. Wainwright, No. TCA 82-0875, slip op. at 53 (N.D. Fla. 1985). Thus, at least eleven (11) persons believe there was a rational and reasonable basis for the jury's recommendation (at least seven jurors and four Justices or Judges), and ten (10) persons believe the jury was wrong (at most five jurors, the trial judge, and four members of this Court). Notwithstanding the irony of this near equipois, Mr. Johnson teeters upon execution April 13, 1988, at 7:00 a.m.

In this Petition, Mr. Johnson will show that the override in this case was in fact improper and that had appellate counsel provided effective assistance on appeal this Court would not have sustained death. In particular, appellate counsel unreasonably and without any tactic or strategy failed to challenge the finding of and the weight accorded to the statutory aggravating circumstances by the trial court. Counsel could have demonstrated that, under Florida law and under the circumstances of this case, a life sentence or resentencing was necessary, because the relevant aggravating factors were not sufficient to render the jury recommendation unreasonable. See Claim III, infra. Counsel also unreasonably failed to reveal to this Court,

and to advocate before this Court, that there was a reasonable basis for life, that the trial court did not write otherwise, and that _Tedder_ was violated. _See_ Claim II, _infra_. Instead, appellate counsel presented this Court with arguments already rejected by the Court -- that the override statute was unconstitutional. This was unreasonable and prejudicial conduct.

There are two other compelling reasons the override should be reversed. First, the sentencing judge restricted his consideration of the mitigating circumstances to the statutory list, and this Court's opposite conclusion about his actions in 1981 was predicated upon (a) appellate counsel's failure to present to the Court the facts from the record which show the restriction and (b) this Court's then adherence to the "mere presentation" standard. _See_ Claim I, _infra_. A reasonable attorney presentation, and the application of current (and proper) law, reveals the restriction and demands a life sentence. Second, jury override law as it is now applied by this Court requires that the issue be revisited and that relief be granted, because current override law recognizes as correct the dissenters' view that there was a reasonable basis for life, and acknowledges that overrides cannot be sustained when the sentencer holds a restricted view of proper mitigation. _Zeigler v. Dugger_, No. 71,463 (Fla. April 7, 1988).

Two other issues should have been but were not presented to this Court upon direct appeal. The State's case was one "eyewitness." His testimony -- the sole basis for conviction, aggravation and death sentence -- was the product of one of the most suggestive identification procedures imagineable. Trial counsel litigated the issue, lost, and appellate counsel did not present the issue to this Court, through no reasonable tactic or strategy. Second, the trial and sentencing in this case was before a jury drawn from a venire from which roughly 16.7 percent of the eligible jurors in Escambia County could simply "opt out."

Women with children were automatically excluded. Mr. Johnson was entitled to have mothers on his panel, and this Court should have been presented with this issue.

II. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Johnson's capital convictions and sentences of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Johnson to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson;

Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Johnson's capital convictions and sentences of death, and of this Court's appellate review. Mr. Johnson's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Downs, supra; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Johnson's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Johnson's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Johnson's claim, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently

recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Johnson will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

B. REQUEST FOR STAY OF EXECUTION

Mr. Johnson's petition includes a request that the Court stay his execution (presently scheduled for April 13, 1988). As will be shown, the issues presented are substantial and warrant a stay. This court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert.

denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Johnson's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Johnson asserts that his capital convictions and sentences of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

IV. LEGAL/FACTUAL BASIS OF CLAIMS FOR RELIEF

CLAIM I

THE TRIAL COURT'S OVERRIDE WAS AFFIRMED PURSUANT TO A RESTRICTED VIEW OF WHAT THE EIGHTH AMENDMENT REQUIRES IN CAPITAL SENTENCING PROCEEDINGS, AND THAT ERROR MUST BE CORRECTED IN LIGHT OF HITCHCOCK v. DUGGER, 107 S. Ct. 1821 (1987).

> JUDGE: (Interposing) To limit the aggravating -- to broaden the aggravation or, in this case, the mitigating circumstances would keep -- would tend to make arbitrary or unlimited the decision of the Court and too much discretion there, and that's one thing that they struck down the earlier statement on it because it was capricious and arbitrary and not limited at all. It is limited now.

(R. 1593).

> [T]here are no mitigating circumstances, as enumerated in subsection (6) . . . .

(Sentencing Order, R. 1766).

By the slimmest of margins, this Court sustained the above-quoted trial court's override of a jury recommendation of life. Petitioner believes it could not be clearer that the trial court's override was based upon an unconstitutionally restrictive view of the Florida capital sentencing statute,[1] and that, in light of Hitchcock, resentencing is required. Petitioner candidly acknowledges, however, that the record at first blush contains some confusing passages and colloquies which, if taken out of context, suggest that, contrary to the trial court's express language in his sentencing order, the court may have considered nonstatutory mitigation. If the record, particularly in an override situation, leaves any ambiguity about whether the sentencing judge considered factors which would support a lesser sentence, then resentencing is required. It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605, that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). Reading the record in proper context, there is no ambiguity that the sentencer restricted consideration. If ambiguity exists, however, resentencing is required.

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1. In Hargrave v. Duggger, __ F.2d __ (11th Cir. 1987), the Court noted that Mr. Johnson's case was one of those revitalized by Hitchcock:

> The State argues that Hargrave cannot establish prejudice because claims such as his have been rejected many times by this Court, citing Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986), [and Straight, Songer, Thomas, Alvord, etc.] Since these decisions were rendered, however, the United States Supreme Court overturned a death sentence imposed on a Florida defendant based on a Lockett claim similar to Hargrave's. Hitchcock has breathed new vitality into claims based on the exclusion of nonstatutory mitigating factors, and Hargrave would be prejudiced if he were not allowed to now raise such a claim.

A. THE RECORD REVEALS THE TRIAL JUDGE'S RESTRICTION

1. The Court Findings

The trial court's findings set out in the sentencing order reflect wholesale judicial limitation. Its title -- FINDINGS OF FACT UNDER SECTION 921.141(5) and (6), FLORIDA STATUTES, 1977, sets the tone (R. 1719). The judge first noted his responsibility to weigh "the aggravating and mitigating circumstances" (R. 1759). He considered the evidence in aggravation, strictly adhering to the statute (R. 1719-22, 1759-63).

> The following is a statement of the findings of fact as to each aggravating circumstance contained in subsection (5) of section 921.141;

(R. 1719, 1959). When he turned to the matter of mitigation, he prefaced his findings with the remark that:

> The following is this Court's findings of fact in mitigation in accordance with Section 921.141 (6), F.S. 1977:

(R. 1722-23)(emphasis supplied). He then listed, seriatim, only the statutorily mandated criteria provided in Section 921.141(6), as they existed in 1978 R. 1722-3). The final paragraph of his override order concludes:

> The Court finds that after weighing the aggravating and mitigating circumstances in this case, sufficient aggravating circumstances exist, as enumerated in subsection (5) of the statute and set forth in these findings of fact, for the imposition of the death penalty; and that there are no mitigating circumstances, as enumerated in subsection (6) and set forth in these findings of fact, to weigh against the aggravating circumstances and facts set forth, *supra*.
>
> Alford v. State, 307 So. 2d 433 (Fla. 1975), certiorari denied, 96 S.Ct. 3227, 428 U.S. 912, 49 L.Ed. 2d 1221, rehearing denied, 97 S. Ct. 191, 429 U.S. 873, 509 L.Ed. 2d 155.

(R. 1723, 1766)(emphasis supplied).[2]

The sentencing order standing alone so plainly reflects a constrained use of nonstatutory mitigation that under post-Hitchcock review, a reduction of Mr. Johnson's sentence or a reversal for resentencing should be automatic. Cf. Morgan v. State, 515 So. 2d at 976. ("[T]he Court in its order sentencing appellant to death, examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to nonstatutory mitigating evidence")(emphasis supplied); Riley v. Wainwright, 12 F.L.W. at 459. ("In sentencing Defendant to death, the judge explained: 'The only mitigating circumstance under Florida statute is the fact that the defendant had no prior criminal conviction'" [Original emphasis]). The trial court's express reliance on

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2. This Court's recent opinion in Zeigler v. Dugger, No. 71,463 (April 7, 1988), explains why Mr. Johnson must win. This Court noted that the Zeigler judge's findings overriding the jury recommendation gave "no reference to nonstatutory mitigating circumstances," slip op. at 3, and the judge overrode:

> After considering all of the evidence and weighing it in my mind and the testimony and the culpability, all the requirements the statute imposes of mitigating, you know, aggravating and mitigating circumstances. I listed them.

Id. In Mr. Johnson's case, the override gave "no reference to nonstatutory mitigating circumstances," and, as the judge agreed, this was because the judge could only consider the statutory factors:

> MR. KERRIGAN: Your Honor, if you'll refer to the sentencing portion, the advisory sentencing portion, and the findings of death portion -- and I think it's sub-paragraph two and three -- you'll note that it's -- the specific language requires the jury to make its findings based upon the aggravatiing and mitigating circumstances as enumerated by statute; and in your findings supporting the death penalty, you are limited by statute to those aggravating and mitigating circumstances.
>
> JUDGE: That's right.

(R. 1590-92)(emphasis supplied). This is just like Zeigler.

Alford v. State in the findings belies any assertion that the judge had not disregarded any of the mitigating circumstances (R. 1768). Indeed, Alford was the outdated road map that he used as a guide to his ultimate death sentence. See footnote 1, supra. The Alford process was constricted to considering only the mitigating circumstances "as enumerated" in the statutory list. This Court in Alford emphasized that "the most important safeguard provided by Fla. Stat. Section 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." 307 So. 2d at 444. Alford was straightforward in its teaching: the statutorily enumerated circumstances "must be determinative of the sentence imposed." Id. Accordingly, the trial judge's near total reliance on Alford in this case highlights the constitutional violation that occurred.

2. Judge Comments and Voir Dire

The judge told the jury that he would "instruct [them] on the factors in aggravation and mitigation that [they] may consider" (R. 1565). When introducing the statutory list, he stated: "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence" (R. 1566). Turning later to the jury's "duty to determine whether or not sufficient mitigating circumstances exist[ed] to outweigh the aggravating that [they] found to exist" (R. 1567), the court stated that "some of the mitigating circumstances [they] may consider, if established by the evidence, are these" (R. 1567).[3] He then proceeded to list only those factors set forth in the statute (R. 1568). The judge said absolutely nothing to the jury regarding nonstatutory mitigating evidence and how it could play a role in their deliberations, as

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3. As is explained, infra, the word "some" was used because the Court refused to instruct on other statutory mitigating circumstances.

was the law at the time. This Court has not hesitated to acknowledge that the instruction routinely given to the juries at the time this case was tried unlawfully limited a jury's ability to consider anything in mitigation not specifically set forth in the statute itself. See for example Foster v. State, 12 F.L.W. 598 (Dec. 11, 1987); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986)("the record shows that [the judge] instructed the jury only on the statutory mitigating circumstances" [original emphasis]).

The jurors were given their first restrictive view of mitigation during the voir dire. The prosecutor, without comment, correction, or additions from the judge or defense counsel, read the jury the statutory list of the aggravating and the mitigating circumstances and explained that in order to render an advisory verdict they would be required to weigh the one set of circumstances against the other (R. 709-11). At a later point defense counsel herself repeated this same statutory list of mitigating circumstances without making any reference to nonstatutory factors (R. 738). After this, the parties' standard question to prospective jurors was whether they would be capable, if there were a guilty verdict, of weighing the two sets of circumstances against each other and rendering an advisory verdict (R. 742, 755, 756, 771).

After the first panel of prospective jurors was excused and a new panel was brought in, the prosecutor again read the same statutory list and said no more (R. 889-90). Following this, the standard question was simply whether the jurors would be able to weigh out the two lists (R. 895, 898, 900, 901, 908, 913, 916, 920, 924, 935, 938, 940, 944).

3. Unlimited Evidence, If Relevant to Statutory Mitigation, Was Admissible

The trial court was amenable to the introduction of any evidence, so long as it was probative of the statutory criteria. These statutory criteria were the framework within which the sentence was to be determined. At the start of the penalty

phase, the defense challenged the constitutionality of Section 921.141 in light of Lockett. The colloquy between counsel and the Court on this issue is particularly instructive on the judge's perspective on nonstatutory mitigation. First, counsel correctly pointed out that on its face, Section 921.141 (2) & (3) violated Lockett by restricting the actual determination of the sentence to a consideration of only statutory circumstances. The pertinent record excerpts follow:

> JUDGE: (Interposing) I think we're wasting time on that issue, sir. Let's get to something that's pertinent, please.
>
> MR. KERRIGAN [Defense Counsel]: Your Honor, the advisory sentence portion of Chapter 921.141 fails to specify -- ground number two, Your Honor -- that the defendant may introduce any evidence of mitigating circumstances relevant and material to the issue of sentencing notwithstanding the failure of those mitigating circumstances to be enumerated by 921.141. The problem is, Your Honor -- if you'll look at the statute -- it specifically notes that your finding of death in that provision of the statute and the jury's recommendation must be limited to the mitigating and aggravating circumstances enumerated by statute. And for that reason the statute is unconstitutional.
>
> JUDGE: Let me read the law. (Off the record discussion.)
>
> MR. KERRIGAN: Your Honor, if you'll refer to the sentencing portion, the advisory sentencing portion, and the findings of death portion -- and I think it's sub-paragraph two and three -- you'll note that it's -- the specific language requires the jury to make its finding based upon the aggravating and mitigating circumstances as enumerated by statute; and in your findings supporting the death penalty, you are limited by statute to those aggravating and mitigating circumstances.
>
> JUDGE: That's right.

(R. 1590-92)(emphasis supplied). While the judge believed that the statute restricted mitigation, he conceded that Section 921.141(1), permitted some relaxation of the rules of evidence. Counsel argued that relaxation of these rules did not cure the Lockett infirmity:

> JUDGE: Well, doesn't the statute provide that any probative evidence may be received, sir?
>
> MR. KERRIGAN: It does in the former part of the statute, but Your Honor, in the findings of death and in the advisory sentence by the jury, they are limited to those enumerated by statute. It's our position that the statute, therefore, as construed in virtually all of these cases, Your Honor, has limited aggravating and mitigating circumstances in the findings portion of the advisory sentence by the jury and in the findings portion of the statute relative to the decision by the Court. Therefore, _the only way that that can be cured is for the Court to instruct that the statute has to be interpreted as to allow an unlimited number of mitigating circumstances that the jury finds from all of the evidence presented during the sentencing phase and through their recollection of the testimony and other matters brought before them in the course of the trial_. It is our position that that does not render the statute constitutional, but in the light of the interpretation of _Proffitt_ and in light of _Lockett versus Ohio_, _you have to instruct the jury that the mitigating circumstances are not those -- are not limited to those in the statute but that the aggravating circumstances are so limited_.[4]

(R. 1592)(emphasis supplied). Without argument from the state and based on his "independent research," the judge unhesitatingly found that "the statute is clearly constitutional" and denied the defendant's motion. He explained his decision using the then-prevailing reasoning:

> JUDGE: (Interposing) To limit the aggravating -- to broaden the aggravating or, in this case, the mitigating circumstances would keep -- would tend to make arbitrary or unlimited the decision of the Court and too much discretion there, and that's one thing that they struck down the earlier statute on it because it was capricious and arbitrary and not limited at all. _It is limited now._

(R. 1593)(emphasis supplied).

Interestingly, this case arose in Escambia County, as did the case of Vernon Cooper, and it was in Mr. Cooper's case that

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4. As _Hitchcock_ has made clear, sentencer or appellate court knowledge of the existence of _Lockett_ does not ensure _Lockett_-pure proceedings.

this Court expressed the reasoning followed by the trial judge in Mr. Johnson's case. See Cooper v. State, 336 So. 2d 1133 (Fla. 1976). The Cooper court also reasoned that although "the rules of evidence are to be relaxed," it nevertheless was required "that evidence bearing no relevance to the issues was to be excluded." Id. at 1139 (emphasis supplied). Relevance was clearly but unconstitutionally explained: "The sole issue in a sentencing hearing . . . is to examine in each case the itemized aggravating and mitigating circumstances." Id. The trial judge in Johnson abided by the limited interpretation given the statute by this Court in Cooper. This Court explained: "Evidence concerning other matters have no place in that proceeding . . . [because] such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia. [supra]" Id. Cooper also cited subsections 921.141(3), (6) and (7) as continuing "words of mandatory limitation [that] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. n.7.

The trial judge thus correctly applied the law as it was then interpreted by this Court -- Cooper. This meant that although the rules of evidence were relaxed, evidence was required to be probative of statutory factors. The judge declined to instruct the jury on any but the statutory "list" of circumstances (a legislative "list" which Cooper said could not be "expand[ed]" by the courts, id. at 1139). Additionally, the judge refused to give any additional instruction regarding any broadening of the statute, because it was contrary to the dictates of Furman:

> MR. KERRIGAN: Your Honor, is the Court ruling that the mitigating circumstances that the defendant may offer in the sentencing portion of the trial is limited to those enumerated by statute?
>
> JUDGE: I told you that you can offer any evidence that's probative as to whether he

should be electrocuted or not, sir. That's clearly provided for and I'm going to do that. I'm going to charge the jury -- not in that sense, but I'm going to list the aggravating and mitigating circumstances as provided for in the statute.

MR. KERRIGAN: You do not intend to charge the jury that matters of character may be considered, for example, or of his --

JUDGE: (Interposing) No, because the jury will consider character in their determination if you offer evidence of character.

MR. KERRIGAN: Your Honor, what I'm asking you is are you saying that we are limited in what evidence can be introduced or are you saying that you are not going to instruct the jury that these other factors can be considered mitigating --

JUDGE: (Interposing) What I said is you're not limited --

MR. KERRIGAN: (Interposing) Okay.

JUDGE: In the evidence because the statute clearly calls for all probative evidence. Now, I'm not going to admit any non-probative evidence.

MR. KERRIGAN: I understand. But you do not intend to instruct the jury --

JUDGE: (Interposing) I don't know. We have not gotten to the trial -

MR. KERRIGAN: (Interposing) Fine.

(R. 1593-4).

The parties clearly functioned under what was then the skewed notion that under Florida law "probative" or "relevant" evidence might be admissible under a separate section of 921.141, but that actual findings as to mitigation had to be pigeon holed into the statute itself (R. 1613). For example, the parties referred to a mental health expert's testimony solely in terms of its applicability to one specific statutory subsection:

MR. KERRIGAN: Now, Your Honor, I would advise the Court in regard to our motion for expert witness fees and for a continuance, two things. Number one, Your Honor is well familiar, I know, with Ron Yarbrough, a very capable psychologist.

JUDGE: I know him very well.

> MR. KERRIGAN: After the defendant was found guilty by the jury, I immediately attempted to locate an expert in the field of psychology or psychiatry and, as you know, it's not easy to find people to come to the jail at night and commence any kind of evaluation. I did that to assist the Court and the jury pursuant to the mitigating circumstances enumerated in paragraph "E" and "F", and I think that's indicated in our motion as "B" and "F" respectively--
>
> JUDGE: (Interposing) I'm not sure where -- oh, you mean parts of 921.141?
>
> MR. KERRIGAN: Yes. "B" provides the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. "F", the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> We're presented in this case with a denial of guilt by the defendant. We proceeded after the determination of guilty by the jury to have him examined, and Dr. Yarbrough and I met with the defendant last evening until the early hours of the morning. He conducted the preliminary tests that he'd like to, of course, advise the Court about and the jury. Those preliminary indications, Your Honor, are that the defendant may have, in fact, evidence which would be admissible under sub-paragraph "E". I do not think under sub-paragraph "F". And that provision is, again, under extreme mental or emotional disturbance.

(R. 1619-20). See Messer v. Florida, 834 F.2d 890 (11th Cir. 1987). (Similar language in reference to psychological testimony reflects limitation on mitigation.) The judge restricted himself.

4. Charge Conference

At the charge conference following the presentation of the penalty phase evidence, the parties continued to discuss aggravation and mitigation solely in terms of statutory designation. Evidence was "probative" or "relevant" only to those statutory subsections. The discussion focused on whether "all" or "some" of the aggravating and mitigating circumstances, should be read to the jury:

> JUDGE: All right, gentlemen. In the beginning, I'm going to tell that "The State

and the defendant have presented evidence relative to what sentence you should recommend to the Court. You're instructed that this evidence, when presented -- you've already heard was presented in order that you may determine, first, whether or not sufficient aggravating circumstances exist," et cetera. Second, "whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances. I'll now instruct you on the factors in aggravation and mitigation that you may now consider." And that's -- I'm going to stop there at that page.

"It is your duty to advise the Court as to what punishment," et cetera. And then we get to "A". I'm going to give them "A", "B", "C", "D". All right, I'll give "E", but advise them that there is no evidence ---

MR. JOHNSON: (Interposing) Your Honor, may I make a comment?

JUDGE: Yes. It sounds ---

MR. JOHNSON: (Interposing) You're making findings for the jury ---

JUDGE: (Interposing) I know that.

. . . .

MR. YETTER: No, I don't think the defendant would agree to that, Your Honor. I think the jury is entitled to know all the aggravating circumstances.

JUDGE: Let the record show that the Court feels that it is obligated by the law to charge the jury on the law that applies to the case, and I find that subdivision "E" and "F" does not apply to the facts in the case. Now, I'm not sure about the others so we'll talk about those. "G" -- I don't think that applies either, does it?

(R. 1640-42).

MR. JOHNSON: Your Honor, if I may say one thing. On page seventy-six of the standard instruction, it says very clearly, "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence." And I think it's their responsibility to determine if the evidence establishes any one of these particular aggravating circumstances. They are the judges of the facts.

MR. KERRIGAN: Oh, you mean the jury's going to do it.

JUDGE: Well, that's true. Part of the charge says, "However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist." It's surely not clear. Okay. One final time, I'll resolve the issue, and I'm not going to hear any argument thereafter. I'm going to give them all.

(R. 1643-46).

Unable to reach an agreement as to which aggravating factors should be read to the jury, the judge simply decided that he would charge on all. Then he turned his attention to mitigating factors:

JUDGE: There's some evidence in the record that doesn't support others that you want, too. That's all right. I'm going to give "H". <u>And I'm concerned now with "A" now on the mitigating circumstances</u>. The defendant has no significant history of prior criminal activity." I have to give it to them and <u>let them decide whether that's a mitigating circumstance or not or whether it's true or not</u>.

(R. 1646).

MR. KERRIGAN: Well, again, Judge, that may have all been very relevant even for a defense or a prosecution in the case in chief, but it's prejudicial now and this so called mitigating instruction just draws attention to the fact that he has a significant prior record.

JUDGE: <u>If you don't want me to give it, all right</u>. The question is "has no significant history of prior criminal activity."

MR. KERRIGAN: It just draws attention to it.

MR. JOHNSON [prosecutor]: Your Honor, I request that you instruct on <u>all mitigating circumstances</u>.

JUDGE: I am not, not necessarily ---

MR. JOHNSON: (Interposing) Okay. Well, that's my request.

JUDGE: Just like I did in the other one, sir.

MR. JOHNSON: Well, the other one, the only one we're deleting is pecuniary gain, which the Supreme Court has held ---

JUDGE: (Interposing) No question about that. Well, let me look at the rest of it. There are several others that don't apply either. "That the victim was a participant in the defendant's conduct or consented to the act." Obviously, that doesn't apply, but that's a mitigating circumstance if they want to find that because he shot the man, he was a participant in the defendant's conduct - I'll give it.

MR. KERRIGAN: Judge, our position is that we'd like to tell you which mitigating circumstance we think there's some evidence to support, have you instruct the jury on that, and then instruct the jury they may consider all aspects of the original testimony about the case, the defendant's -- any evidence offered by the defendant if they find it mitigating. In other words, a broad instruction on mitigating circumstances and delete those that are obviously not applicable.

JUDGE: Tell me which ones you don't want me to give first, and then I'll hear the other side. You don't want me to give "A" ---

MR. KERRIGAN: (Interposing) "A" or "C".

JUDGE: How about "D"?

MR. KERRIGAN: "D" is not applicable because he was not an accomplice according to the undisputed testimony.

JUDGE: You don't want me to give that?

MR. KERRIGAN: Well, Judge, I don't think that you can give it. He wasn't an accomplice --

JUDGE: (Interposing) I know that. Obviously, he was not. But I'm asking you now which ones -- sometimes you want all of them and sometimes he wants all of them and sometimes you don't want them all. I want you to make up your mind.

MR. KERRIGAN: We want "E", Judge.

JUDGE: Yes, certainly.

MR. KERRIGAN: "F".

JUDGE: Yes.

MR. KERRIGAN: And "G".

JUDGE: Okay.

MR. KERRIGAN: And we cite as authority for the mitigating circumstances not being limited to statute, both Lockett and Elledge, which is at 346 So.2d 998.

JUDGE: "A", "C" and "D" they don't want me to give, Mr. Johnson.

MR. JOHNSON: Your Honor, in imposing a death penalty we're trying to reach some type of uniformity between all defendants. The Court is to be guided by each of these statutory aggravating circumstances. They're also to be guided by the statutory mitigating circumstance although the defense can put on any evidence which might go in mitigation of the sentence. So for there to be some type of uniformity, every jury deciding the fate of a defendant in a death penalty case should be instructed on each of these mitigating factors.

JUDGE: I'm going to give "A" because they're to listen to all evidence including that that they had in the case in chief.

MR. JOHNSON: I would request each of them, Your Honor.

JUDGE: Well, I know that. I'm going to give "C" and "D" also; "E", "F" and "G".

MR. KERRIGAN: We would request, therefore, Your Honor, that -- it appears you're going to give all the instructions -- that you advise the jury that "Here are some of the mitigating circumstances that you may consider but that this by no means or in no way exhausts or limits the mitigating circumstances you may find from the other testimony." Our concern is that---

JUDGE: (Interposing) I didn't say -- I'm not going to say that. I'm going to say, "Some of the mitigating circumstances.

MR. KERRIGAN: Your Honor, will you instruct the jury that they may consider all of the testimony presented in the course of the trial and comment thereon as mitigating, if the case may be, or if they find that it's mitigating? In other words, will you instruct the jury that they may consider every aspect of the case, all the testimony, reasonable inferences to be drawn from the testimony, and if they find mitigating circumstances therein, that they are to consider that?

MR. JOHNSON: Your Honor, that's more or less part of the standard instruction --

JUDGE: (Interposing) I know it is.

MR. JOHNSON: "Your verdict should be based upon the evidence which you have heard while

trying the guilt or innocence of the defendant" ---

JUDGE: (Interposing) And you can call attention to it if you wish ---

MR. JOHNSON: (Interposing) And evidence presented to you in these proceedings.

MR. KERRIGAN: Well, Judge, by naming these mitigating circumstances which obviously don't apply to this case ---

JUDGE: (Interposing) I said, "some".

MR. KERRIGAN: Okay. By naming the mitigating circumstances, though, it highlights those and they're clearly inapplicable to the case. And what we would ask the Court to do is to instruct the jury that this is not all of the mitigating circumstances; that they may consider all of the testimony during the course of the trial.

JUDGE: You may argue that, sir, because I've already charged them to consider all the -- and that's what I'm preliminarily telling them -- to consider all the evidence; and that goes back to the original charges, too, you see.

(R. 1645-52).

Despite defense counsel's three very specific requests for a constitutional instruction on nonstatutory mitigation evidence, the judge totally rejected the instruction. The requests were:

MR. KERRIGAN: Judge, our position is that we'd like to tell you which mitigating circumstance we think there's some evidence to support, have you instruct on that, and then instruct the jury they may consider all aspects of the original testimony about the case, . . . any evidence offered by the defendant if they find it mitigating. In other words, a broad instruction on mitigating circumstances. . . .

MR. KERRIGAN: We would request . . . that you advise the jury that "Here are some of the mitigating circumstances that you may consider but this by no means or in no way exhausts or limits the mitigating circumstances you may from from the other testimony.

MR. KERRIGAN: And what we would ask the Court to do is to instruct the jury that this is not all of the mitigating circumstances; . . .

(R. 1646-51).

5. <u>Charge to the Jury</u>

Examining the charge the court gave the jury provides a good indication of the judge's own mindset. If he was not disposed to expand the jury's options as to mitigation, it follows that his own approach was to adhere to the statute. The judge had earlier stated that he intended to adhere to the "standard instruction," <u>see</u> R. 1608, and it turned out that he did so, religiously. The pertinent portions of the charge follow:

> CHARGE TO JURY BY JUDGE FRYE:
>
> Ladies and gentlemen of the jury, the State and the defendant have presented evidence relative to what sentence you should recommend to the court. You are instructed that this evidence when considered with the evidence you have already heard was presented in order that you may -- might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.
>
> I'll now instruct you on the factors in aggravation and mitigation that you may consider.
>
> * * *

(R. 1565).

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence.
>
> * * *

(R. 1566).

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances that you found to exist. <u>Some of the mitigating circumstances which you may consider, if established by the evidence, are these</u>:
>
> That the defendant has no significant history of prior criminal activity;
>
> That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;

> That the victim was a participant in the defendant's conduct or consented to the act;
>
> That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
>
> That the defendant acted under extreme duress or under the substantial domination of another person;
>
> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> Then you may consider the age of the defendant at the time of the crime.

(R. 1567-68).

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.
>
> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court. Your verdict must be based upon the finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based upon these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.
>
> In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict must be -- may be rendered upon the finding of a majority of the jury. 5/

---

5. Informing the jury that they could not return a recommendation of life unless a majority of them so voted was clearly error. See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983); Patten v. State, 467 So. 2d 975 (Fla. 1985); Bush v. State, 461 So. 2d 936 (Fla. 1984). It is pertinent here in that it is providing a way of determining that the vote for life was at least seven to five and not six to six. See R. 1659-60 (foreman announced verdict stating: "So say a majority of our members.") The jury poll was to determine only that the verdict was one upon which a majority had agreed. This, in turn, raises the question of how it is that "virtually [seven] [un]reasonable person[s] could differ" and conclude that life was indeed the appropriate penalty in this case. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

6. Trial Judge Statement at Sentencing

The issue of whether the trial court had considered nonstatutory mitigation was, incorrectly, decided by this Court on direct appeal. The majority's total discussion of the issue was: "The trial court made it perfectly clear at the sentencing hearing that it had not restricted itself solely to the statutorily enumerated mitigating circumstances." Johnson v. State, 393 So. 2d at 1079. When four members of this Court stated that the trial judge had not restricted himself to statutory mitigation, they did so with a pre-Hitchcock view of Lockett law,6/ and without the benefit of any briefing by counsel. That ruling ostensibly is based on a single reference in the State's brief, which, when placed in the context provided above, reveals the State was wrong.

In recounting the events at sentencing, the State quoted a colloquy between defense counsel and the trial judge which took place just after the trial court read the sentencing order into the record. The State's brief set out the following segment of the transcript:

> JUDGE: Certainly. I want to announce that I find that after weighing the aggravating and mitigating circumstances in this case, sufficient aggravating circumstances exist, as enumerated in subsection 5 of the statute and set forth in these findings of fact, for the imposition of the death penalty; and that there are no mitigating circumstances, enumerated in subsection 6 and set forth in these findings of fact, to weigh against the aggravating circumstances as set forth above (R. 1766).
>
> * * *
>
> [Portion omitted from original.]

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6. See Hargrave v. Dugger, 832 F.2d 1528, 1531-1533 (11th Cir. 1987)(en banc) (analyzing Lockett, its predecessors and its progeny, the Court concluded that a Lockett claim had been unavailable for all practical purposes to persons tried and sentenced before 1978. Court then found "Hitchcock has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors. . . .") Id. at 1533. See also Messer v. Florida, 834 F.2d 890, 891-94 (11th Cir. 1987); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

> MR. KERRIGAN: The Alford case specifically ignores the language of the December 21st opinion in Songer versus State and, that is, Alford depends upon the mitigating circumstances solely confined to the statute. I just wish to alert you to that.
>
> JUDGE: Yes. I know that and I understand that. And the Court has not disregarded any of the mitigating circumstances that were offered in evidence, either at the penalty phase or during the trial itself. For example, in your argument, sir, I know that you or Mr. Rankin, one of the two, mentioned that probably one of the mitigating circumstances was that he didn't kill everybody else in the store. Well, I don't think that's a mitigating circumstance at all, sir. It just does not aggravate the circumstances any more than was done. The fact that he didn't murder everyone in the store certainly cannot be called a mitigating circumstance -- no way. My point is, I've considered that really, sir, and I reject that argument (R. 1767-68).

Brief of Appellee at 32-33 (emphasis added). This off-the-cuff comment by the trial judge, almost obscure in the midst of other overwhelming evidence, is the only record evidence that even remotely suggests that the judge's consideration of mitigation evidence might not have been limited, and even it is ambiguous -- again the judge discussed the statutory list (it just does not "aggravate") and opined that the evidence discussed showed only the absence of aggravation. But when this remark is read in the context of the array of other comments, and along with the instructions given to the jury and his sentencing order, it is obvious that the trial judge did indeed employ an unconstitutionally restrictive use of nonstatutory mitigation. The indicia this Court now uses in deciding Hitchcock claims establishes that an unlawfully limited sentencing hearing occurred. The false impression resulting from the trial court's remark that he "had not restricted [him]self solely to the statutorily enumerated mitigating circumstances" becomes apparent when examined in the context of the other critical record evidence. Justice O'Connor, concurring in Eddings, supra, 455 U.S. at 119, wrote that where there is "any legitimate basis for

finding ambiguity concerning factors actually considered by the trial court," resentencing is required. See also Magwood v. Smith, 791 F.2d 1438, 1448 (11th Cir. 1986) (federal court must intervene when evidence of existence of mitigating factors was so overwhelming that trial court's rejection of their existence was patently erroneous. A perspicacious review of this record in the hue of Hitchcock reveals a trial judge who limited himself to statutory mitigation in determining the propriety of overriding the jury's life recommendation. At the sentencing hearing, the judge, at most, applied the now discredited "mere presentment" standard. See Songer v. State, 365 So. 2d at 700. Considering nonstatutory mitigation evidence only to the extent that it might relate to a specific statutory mitigating circumstance was precisely the error found in Lockett and the error now governed by Hitchcock.

B. THERE WAS MITIGATING EVIDENCE IN THE RECORD

On direct appeal, this Court described the offense as follows:

> Gary Summitt, an employee of Warrington Pharmacy and an eyewitness to the robbery and the murder, testified that while working at the pharmacy on the evening of June 7, 1978, he went to the back of the store to ask the pharmacist, Woodrow Moulton, a question. There he saw the defendant Johnson holding a gun on Moulton who was at the pharmacy safe putting articles in a bag and he heard Johnson order Moulton to put certain drugs and money from the safe into the bag. After obtaining the drugs and money, Johnson started towards the front of the store. Moulton then grabbed a gun from behind the prescription counter. There was an exchange of gunfire, and Moulton continued to fire at Johnson until his gun was empty. No longer able to defend himself, Moulton stood up with his hands in the air. Johnson then walked up to within a foot and a half of the defenseless pharmacist, said, "You think you're a smart son-of-a-bitch, don't you?," and shot him in the chest.

Johnson v. State, 393 So. 2d 1069, 1071 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S. Ct. 364 (1981).

On these facts Marvin Johnson was convicted of robbery and first degree murder (R. 1463). The trial then proceeded to the penalty phase (R. 1470). The jury, which was to recommend a life sentence, first heard the State's case. This consisted of the introduction of evidence of Mr. Johnson's conviction for a 1964 Georgia robbery to which he pled guilty (R. 1474-75), and of another 1976 Tennessee armed robbery conviction (R. 1477-81). Evidence of Mr. Johnson's escape from a medium security Tennessee prison on November 15, 1977, while he was serving a twenty-year sentence on this second offense, was also introduced (R. 1486, 1507). The State also recalled their sole eyewitness to the incident in order to have him reiterate his trial testimony concerning the actual robbery and homicide (R. 1493-1503).

The defense neutralized the testimony in aggravation, and presented some evidence of Mr. Johnson's background and personality. Evidence of Mr. Johnson's personality, his deprived childhood, his good deeds and close family ties comprised a substantial case upon which a jury could reasonably recommend life. Ronald C. Yarbrough, a clinical psychologist, conducted a 2.5 hour diagnostic interview of Mr. Johnson on the eve of his sentencing trial (R. 1509-10). This included a very minor review of family history and the administration of selected parts of a series of projective tests (WAIS, M.M.P.I., Rorschach). The reason for conducting these tests "was to determine whether or not there might have been any particular emotional factors that have perhaps been involved in [Mr. Johnson's] decision making or what occurred in this instance" (R. 1511). The test results were sufficient to allow Yarbrough to draw some strong hypotheses (R. 1510-12).

The testing was intended to "predict [] Marvin's behavior under a variety of different circumstances." (R. 1511-12). His "intellectual functioning in a non-stressful situation, his approach to decision making, his . . . -- common sense and

whether he could perceive social consequences over time" were looked at (R. 1512). "Personality patterns" and "impulse control" were tested (R. 1512). And lastly Yarbrough tested Mr. Johnson's ability to "think [] in a non-structured situation where there might be non-emotional and then emotional stimuli." (R. 1512). Based on the above, Yarbrough did arrive at some results (R. 1512):

> A. Marvin -- let me try to break things down into a couple of categories of information. One is his general ability to think and perceive and integrate information to use in decision making and the other is <u>the personality factors that would perhaps be Marvin's basic personality; and then we have some information which would suggest that we can make a differential response between Marvin's personality under extreme stress</u>.

(R. 1512-13).

> One of the other things the M.M.P.I. showed is that <u>he is relatively free of conflicts and probably doesn't have significant anxiety until he gets in a very serious situation or serious difficulty</u> . . . He reported during the M.M.P.I. phase of the evaluation that he frequently finds himself in good moods and he can't explain it; so that <u>he experiences feelings that he doesn't have a cognitive</u> --<u>or, his head doesn't always know what his belly or his heart is going to do</u>.
>
> I then took Marvin from this sort of check list approach with true-false questions into the <u>non-structured part of the personality evaluation</u>. . . . [T]he importance of the ink blots) . . . [is] to look at the factors behind his perception and behind his decision-making and thinking processes.

(R. 1517-18).

> <u>Again, we've got a guy who's bright, in the high average range of intelligence; and we're seeing that strong emotional stimulation causes an impulsive immediate response and a very inadequate response to the stimulus</u>. The task is to tell me what you see, and he didn't tell me much. . . . <u>The emotional stimuli seemed to flood Marvin, and when he is in an extremely demanding emotional situation, he breaks down his normal mode of thinking, even processing information, decision-making; and I hypothesize that he also breaks down his normal mode of responding with behavior</u>.

* * *

> Again, his emotional response is so strong that he does no integration of information.

(R. 1520). Under cross-examination, Yarbrough agreed that "as a hypothetical," if Mr. Johnson were involved in a robbery where "someone else decided to pull a gun on him, . . . this would be a highly stressful situation" where "his ability to think, make decisions, and probably his behavior" would "deteriorate [] very rapidly. . . . " (R. 1524).

Cross-examination continued:

> Q. He would either respond by trying to take that person's life or to escape, is that correct?
>
> A. As I said, I would anticipate <u>from my preliminary evaluation</u> that he would choose to respond with a fight or flight response. He would respond dramatically, and it would break down from his prior way of perceiving the situation. I think he probably, <u>if he were involved in a criminal activity, that he probably would have done some reasonable planning, and if the plan went wrong, then his stress factors would break down his normal way of responding.</u>

(R. 1525).

Based primarily on Yarbrough's hypothesis, counsel argued that the injury Mr. Johnson may have suffered when shot by the victim could have impaired his rationality at the time of the homicide.

Mr. Johnson's sister and daughter testified as to his early life and family ties. While a young boy, and after Marvin's parents divorced, he and his sister lived with their blind father, in extreme hardship (R. 1528-30). The family home had electricity but no indoor toilet, no hot running water or no television. A modest amount of farm labor provided a meager family income (R. 1526). Marvin left school in the tenth grade and began working (R.1526). Evidence was presented as to the adverse effect his execution would have on members of his family (R. 1526-28).

Defense counsel attempted to introduce religious testimony regarding the immorality of the death penalty. The state objected and the evidence was rejected by the trial judge (R. 1507-09, 1530-31). The case then moved on to the state's closing argument where the prosecutor asserted that several aggravating and no mitigating circumstances were present (R. 1543-52). He improperly argued that there was no way to predict that Marvin Johnson would not "kill again" if he were merely incarcerated for 25 years (R. 1552).

Defense counsel, in their closing arguments, stressed that the awesome punishment, the ultimate punishment of death for the most serious crime is "a punishment not just different in degree but in kind." (R. 1555-56). It is nonretractable (R. 1556). As regards the facts of the crime, counsel emphasized that the assailant did not harm the sole eye witness and that for this, he deserved some "consideration" (R. 1560-61). Counsel mentioned that Mr. Johnson "has no crime of hurting people." (R. 1561-62). Counsel returned to the facts of the case and reiterated that the victim shot first (R. 1562).

Following the judge's instructions (R. 1565-72) and the jury's deliberations (R. 1659-60), a majority of the jurors returned a verdict recommending a sentence of life (R. 1659-60). At the sentencing trial, counsel argued the following in mitigation:

> (1) No evidence indicated any intent by the robber to harm or kill when entering the store or while committing the robbery (R. 1731).
>
> (2) The robber used deadly force only after, according to the state's theory, being shot at when leaving and after being wounded by the pharmacist who became the murder victim (R. 1748).
>
> (3) That the fatal exchange was mitigated by the fact that the robber had been wounded and in pain and did not premeditate but reacted spontaneously to being shot (R. 1757).
>
> (4) That the robber did not attempt to harm the two other persons he knew to be in the store, one of whom he knew had seen him and could probably identify him (R. 1758). (R. 1732).

(5) That his background was of a family suffering extreme hardship during his early years due to a blind father and a mother who worked to provide a very meager existence for the family (R. 1734).

(6) That Johnson's siblings and his children care for him and offered evidence of Johnson's good prospects for rehabilitation in prison (R. 1734).

(7) That the robber's injury could have impaired his rationality at the time of the homicide, a statutory mitigating factor (R. 1758).

(8) That the attorneys and court might not know and realize all of the mitigation the jury found under the facts (R. 1741).

(9) That the homicide would not have occurred if the victim had not initiated the actual use of deadly force in attempting to kill the fleeing robber (R. 1748).

(10) The evidence at sentencing by an expert psychologist that Johnson was not psychotic but was subject to emotional "flooding" produced by stressful stimuli that caused his normal rationality to "deteriorate dramatically" due to his emotional undevelopment (R. 1520-1521).

(11) That there had been nothing shown by the prosecution upon which to base a conclusion that the jury had reached an arbitrary or capricious decision for life imprisonment in view of the facts of the case (R. 1749).

Despite this evidence the trial judge overrode the jury's recommendation of a life sentence. His sentencing order only addressed the aggravating and mitigating circumstances listed in Section 921.141(5) & (6), Florida Statutes, and his findings as to each (R. 1772-75).

C. LOCKETT ERROR OCCURRED

This Court's own review of the life override was distorted by constitutional error only recently brought to light in the wake of Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821 (1987). The override order was approved in 1980 under pre-Hitchcock principles and assumptions then enshrined in Florida law. In 1980, "mere presentment" of nonstatutory mitigation, along with a jury instruction then regarded as constitutional, was sufficient to show proper trial court consideration of mitigation evidence.

Songer v. State 365 So. 2d 696, 700 (1978) cert. denied 441 U.S. 956 (1979). This rule has now been totally rejected. As this Court unequivocally stated in Downs v. Dugger:

> We thus can think of no clearer rejection of the 'mere presentation' standard reflected in prior opinions of this Court, and conclude that this standard can no longer be considered controlling law. Under Hitchcock, the mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of the evidence may not be weighed during the formulation of an advisory opinion or during sentencing.

514 So. 2d. at 1071. Accord Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Sept. 3, 1987); Foster v. State, 12 F.L.W. 598 (Dec. 11, 1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Waterhouse v. State 13 F.L.W. 98 (Feb. 19, 1988); Magill v. Dugger, 824 F.2d at 890-94 (11th Cir. 1987). These cases acknowledge that the presentation of non-statutory mitigating evidence is meaningless if the jury or judge is precluded or fails to consider it. As the Supreme Court stated in Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982), "[t]he sentencer, and the court of Criminal Appeals on review, 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." Consequently, in Morgan v. State, 515 So. 2d 975 (Fla. 1987), this Court found such an omission like the one in Mr. Johnson's case controlling for evaluating Mr. Morgan's Hitchcock claim:

> Nowhere in [the judge's] order is there any reference to any non-statutory mitigating evidence proffered by the appellant. The state argues that there is no evidence that the trial court refused to consider such non-statutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that non-statutory mitigating factors were not taken into account by the trial court, as required by Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), and now Hitchcock.

Hitchcock, Lockett, and Eddings mandate that the presentation and consideration of mitigating circumstances which might call for a sentence of less than death must be completely unfettered. The fundamental change in this Court's perception of the mandate of the eighth amendment which has occurred since this case was tried and first reviewed requires revisitation of the propriety of the override under current standards, and requires either a reduction of MR. Johnson's sentence to life in prison, or a new sentencing hearing. See for example Downs v. Dugger, 514 So. 2d 1070. (Hitchcock issue properly presented and relief granted in second habeas corpus and third state-court post-conviction action because it involved "a substantial change in the law [requiring reconsideration of] issues raised on direct appeal . . ."); see also, Thompson v. Dugger, supra; Riley v. Wainwright, supra; Morgan v. State, supra; McCrae v. State, supra.

Unrestricted sentencer consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind" has heretofore been considered a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(emphasis supplied). Today, "[t]here is no disputing" the rule of Skipper v. South Carolina, [106 S. Ct. 1669, 1670], and the force of the Lockett v. Ohio, [438 U.S. 104], constitutional mandate, that a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider mitigating evidence. Based on the explicit limiting language of the sentencing order, the judge's instruction to the jury, and his statements during the charge conference, "it could not be clearer [that] the sentencing judge [] refused to consider, evidence of nonstatutory mitigating circumstances." Hitchcock v. Dugger, 107 S. Ct. at 1824. The trial court's one impromptu remark that he had "not disregarded

any of the mitigating circumstances," does not dispel the otherwise overwhelming record evidence that demonstrate that he completely limited himself to the statutory mitigation circumstances. Harvard v. State, 486 So. 2d 537, 538-39 (Fla.), cert. denied, 107 S. Ct. at 215 (1986); see also Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985)(en banc). Here, as in McCrae v. State, 510 So. 2d 874, (Fla. 1987), "it is true that some general background testimony was presented," but the McCrae Court "was not convinced, however, that it was given serious consideration by the [trial] court." Id. at 880. Similarly, in Booker v. Dugger, 13 F.L.W. 33 (Jan. 15, 1988), At the trial Booker was not limited in his introduction of mitigation evidence. However, the prosecutor told the jury that the only mitigating circumstances which they should consider were those listed in the statute, and the court gave the jury substantially the same instruction on aggravating and mitigating circumstances which was deemed erroneous in Hitchcock. It is now well established that Hitchcock dictates that "the mere opportunity to present nonstatutory mitigating evidences does not meet constitutional requirements if the judge believes . . . that some of the evidence may not be weighed . . . during sentencing." The same situation occurred in the case at bar. At best the judge tolerated the "mere presentment" of some nonstatutory mitigating circumstances, but he obviously balked at the notion that this evidence was entitled to its own independent weight and consideration in determining the ultimate sentence.

Another point of similarity between this case and Booker is that it was through defense counsels' efforts in both cases that the trial judges were first made aware of Lockett and the relevance of nonstatutory mitigation evidence. The Florida Supreme Court concluded that the only question in Booker was whether the Hitchcock error was harmless.

Unfettered sentencer consideration of all mitigating evidence is at the heart of the eighth amendment's mandate that a capital sentence be individualized. Lockett v. Ohio, 438 U.S. 586. Therefore, even if the court's sentencing order were viewed as ambiguous, Mr. Johnson's sentence would still be flatly unconstitutional. A man simply cannot be sent to his execution when there is uncertainty as to whether his sentence was individualized -- i.e., when we do not know whether the mitigating factors in his background were fairly considered. Cf. Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); see generally, Woodson v. North Carolina, 428 U.S. 280 (1976).

The error was not harmless. Since Hitchcock, this Court now looks at the totality of the circumstances to determine whether the judge or jury were constrained by a preclusive interpretation of mitigating circumstances. The Florida Supreme Court has at times applied a per se reversal rule and at other times a harmless error rule to Hitchcock violations. As to the latter, the question reduces to one of whether there was evidence of nonstatutory mitigation of such degree that it might have affected either the jury's recommendation or the trial court's own consideration. Delap v. Dugger, 513 So. 2d 659 (1987). As to the former, Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) where the Court reversed, stating "we have no alternative," even though the Court did not mention a single non-statutory mitigating circumstance and did not conduct a harmless error analysis.

The disagreement amongst members of this Court as to how to deal with Hitchcock errors persists. In Booker v. Dugger, 13 F.L.W. 33 (Fla. 1988), the defendant's position was that

> even though evidence concerning his mental and emotional condition did not rise to the level of statutory mitigating circumstances, with the proper instructions, the jury would have found it sufficient to recommend against death, and the judge would have accepted the jury's recommendation.

Id. Five members of the Court found Hitchcock error but did not vote to reverse. The two remaining justices agreed that when there is non-statutory mitigating evidence, there must be a resentencing. Any other result would be predicated upon "sheer speculation." Delap v. Dugger, 513 So. 2d at 664 (Barkett, J., Kogan, J., dissenting). See also Demps v. Dugger, 514 So. 2d 1092 (1987).

In Skipper v. South Carolina, 476 U.S. ___, 106 S. Ct. 1669, 1673 (1986), answering an argument that the excluded evidence was cumulative and harmless, the United States Supreme Court said it could not "confidently conclude" that the evidence "would have had no effect upon the jury's deliberations." The Supreme Court vacated the death sentence because the excluded mitigation "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand." Id.

> Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the eighth amendment requires that the defendant be able to present [and have considered] any relevant mitigating evidence that could justify a lesser sentence.

Sumner v. Shuman, ___ U.S. ___, 107 S. Ct. 2716, 1727 (1987). When there is some nonstatutory mitigating evidence in the record that "could justify a lesser sentence," Hitchcock error can never be harmless. Id. This Court has said itself that the failure to consider nonstatutory mitigation "affects the sentence in such a way as to render the trial fundamentally unfair." Riley v. Wainwright, 12 F.L.W. 457, 458-59. See also, Morgan v. State, 515 So. 2d 975 (Fla. 1988) (the fact that the judge did not take into account any evidence of non-statutory mitigating circumstances "may not be considered harmless [error] in light of the close nature of the jury recommendation vote. . . . Under

such, and other circumstances, the failure to consider non-statutory mitigating factors cannot be termed harmless error.")

This close life override case leaves no room for harmless error. As in McCrae and Zeigler, the trial court limited itself in its consideration of mitigation when it overrode. And as in McCrae, "[t]his finding, based on the record, is sufficient to require a new sentencing hearing." Id. at 880. Even if the life recommendation itself does not provide the Hitchcock-error harm, the fact that "there was some nonstatutory mitigating evidence that the court could have considered," does provide the harm. Foster v. State, 12 F.L.W. 598 (December 11, 1987). Life imprisonment is proper.

CLAIM II

EVEN THOUGH THE TRIAL COURT AND FOUR MEMBERS OF THIS COURT DISAGREED WITH THE JURY'S RECOMMENDATION, THERE WAS A REASONABLE BASIS FOR IT, AS THIS COURT'S SUBSEQUENT CASE LAW HAS REVEALED, AND HAD APPELLATE COUNSEL EFFECTIVELY PRESENTED THE TEDDER ISSUE, THERE IS A REASONABLE PROBABILITY THAT THE RESULT ON APPEAL WOULD HAVE BEEN DIFFERENT.

In 1980, four former Justices of this Court determined under then existing law that the jury override in this case was proper. Johnson v. State, 393 So. 2d at 1074. "This case does present an unusual split among the justices of the Florida Supreme Court. . . ." Johnson v. Wainwright, No. TCA 82-0875, slip op. at 27 (N.D.C. Fla. 1985). Petitioner does not herein attempt to relitigate the appeal issue, but argues: (1) that he is entitled to application of new law from this Court, including changes in this Court's acceptance of factors that make jury recommendations "reasonable," and (2) that appellate counsel ineffectively presented the override issue. As will be shown, neither the proper substantive nor the proper procedural override law was followed, and the death penalty in this case violates the eighth and fourteenth amendments.

A. THE RULES FOR OVERRIDES -- TEDDER[7]

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific, reliable, procedural parameters, and only so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 104 S. Ct. 3154, 3166 (1984). Courts must monitor and apply the "significant safeguard[s]" built into the override procedure, and ensure reliable, consistent application of that procedure. If the jury override here, and the method through which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Id. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments.

The United States Supreme Court upheld the constitutionality of the jury override provision of Florida's capital sentencing statute because of the "significant safeguards the Tedder standard affords a capital defendant in Florida," and because the Court was "satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Spaziano, 104 S. Ct. at 3165. The first safeguard under Florida law is that the trial judge can override a jury's verdict of life only when "the facts suggesting

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7. Appellate counsel argued in this Court that the override procedure was unconstitutional per se, but acknowledged that this Court had decided otherwise. The claim that Tedder had not been followed was a poorly presented afterthought, contained in a reply brief. This was unreasonable -- and topsy-turvy. Florida Tedder law should have taken top billing, with the constitutional issue simply being preserved.

a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Under the Florida Supreme Court's recent interpretations of the Tedder standard, a trial judge may not override a jury's verdict of life when there is a "reasonable basis" for that verdict.

To decide this substantive issue, a capital sentencer must search the factual record to determine if anything was shown that could have "been the basis for the jury's recommendation under the facts of the case." Hawkins v. State, 436 So. 2d 44, 47 (Fla. 1983) (family background); Shue v. State, 366 So. 2d 387 (Fla. 1978) (family relationships); Jacobs v. State, 396 So. 2d 713, 717, 718 (Fla. 1980) (worth of defendant as human being and as parent); Phippen v. State, 389 So. 2d 991, 994 (Fla. 1980); Kampff v. State, 371 So. 2d 1007, 1010 (Fla. 1979); Taylor v. State, 294 So. 2d 648, 652 (Fla. 1974). A jury life recommendation magnifies that duty to actually consider as mitigating and non-statutory factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply when a jury recommendation for a life sentence has been made. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).

In fact, the judge considering an override must weigh aggravating circumstances "against the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). The overriding judge must make findings that explain why the jury was unreasonable, why no reasonable person could differ, and why death is proper. Neither this procedure, nor the substantive "no reasonable juror" determination, occurred in the trial court.

B. THE PROCEDURAL RULES FOR OVERRIDES WERE NOT FOLLOWED

The trial court did not follow the procedure required by Tedder. Under Tedder, before an override can be sustained, the judge must explain in his or her sentencing order why the jury

was unreasonable in recommending as it did. The judge made no comment about the jury recommendation when sentencing Mr. Johnson to death. It follows that the judge made no determination of why the jury recommendation was not entitled to great weight. The override did not provide procedural rectitude in this capital case.

The Court's Findings of Fact recited that "notwithstanding the recommendation of a majority of the jury, the Court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death" (R. 1719). The Tedder standard was not mentioned, and, in fact, the jury was not again mentioned. The judge found five statutory aggravating circumstances, of which only three were sustained by a majority of this Court on direct appeal. The judge then considered only statutory mitigation, weighed statutory aggravation and mitigation, and imposed death. No findings regarding unreasonableness of the jury were found, contrary to override law. Appellate counsel failed to reveal this.

C. THERE WAS A REASONABLE BASIS FOR LIFE

Under the law as it now exists, if a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Ferry v. State, 507 So. 2d at 1376. See also Hansbrough v. State, 509 So. 2d at 1086 ("a reasonable basis for the jury to recommend life" cannot be overridden); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987); Wasko v. State, 505 So. 2d at 1318; Duboise v. State, 12 F.L.W. at 109 (if a "fact could reasonably have influenced the jury," override is improper). Dubois v. State, 13 F.L.W. 79 February 12, 1988) (Court found no mitigating factors, nevertheless reasonable basis for jury recommendations of life existed). Valid mitigating circumstances did exist in the case at bar, therefore, the override was improper and its arbitrary affirmance

by the Florida Supreme Court violated the eighth and fourteenth amendments.[8]

Three justices discussed what reasonable persons could have found:

> SUNDBERG, Chief Justice, concurring in part and dissenting in part.
>
> I concur in so much of the majority opinion as affirms the conviction in this case, but I must respectfully dissent from that part which affirms the sentence of death.
>
> Because the jury recommended the imposition of a life sentence, the standard to be applied in determining whether to sustain the trial judge's death sentence is that "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla.1975). After a complete review of the circumstances surrounding this criminal episode as cataloged in the majority opinion, I believe reasonable persons could clearly differ over whether this homicide is so set apart from the norm as to call for imposition of the death penalty. Conceding, as must any person, that all murders are unwarranted and anathema to any civilized society, nonetheless our capital punishment statute reserves the death penalty for those acts which are so flagrantly vile, cruel and outrageous as to set them apart from other capital felonies.
>
> From the seminal case upholding our capital punishment statute we are taught:
>
>> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.
>
> State v. Dixon, 283 So. 2d at 1, 7 (Fla.1973) (emphasis added).
>
> . . . . .
>
> Thus, it [Sec. 921.141, Fla. Stat.] again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes.

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8. Current law is reflected in Zeigler. See footnote 2, supra.

Id. at 8 (emphasis added).

. . .

What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9 (emphasis added).

and finally:

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

Id. at 10.

I submit that notwithstanding the existence of four aggravating circumstances and the absence of any statutory mitigating circumstances, in light of the totality of the circumstances here present the jury could and did quite reasonably conclude that life imprisonment is the appropriate sentence. See Neary v. State, 384 So.2d 881 (Fla. 1980). There is nothing about the actual homicide itself to set it apart from the norm of murders-a single gunshot to the chest with death ensuing instantly. And the circumstances surrounding the criminal episode-the fusillade of pistol shots initiated by the victim and the apparent conscious act of the appellant to spare the two other occupants of the premises from kidnaping or murder support a reasoned judgment by the jury in favor of a life sentence. Hence, I would affirm the convictions but vacate the death sentence with directions to impose a sentence of life imprisonment without eligibility for parole until the expiration of twenty-five years. OVERTON and McDONALD, JJ., concur.

McDONALD, Justice, dissenting.

I would affirm the conviction but dissent from the imposition of the death sentence.

I disagree with the statement that from the totality of the circumstances the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person could differ. Prior to the shooting the defendant had completed his crime of

robbery and was leaving. The victim initiated the shooting. I do not condone the acts of the defendant thereafter in the slightest, and there is ample evidence to support premeditated murder, but I feel that there may be factors which would justify the jury's recommendation of mercy. The testimony of the psychologist could lead one to believe that the defendant's apparent malevolent act against the victim was in fact an unplanned reaction to being fired at. He directed no overt act of hostility or harm at the witness Summitt, whose subsequent testimony at trial was primarily responsible for Johnson's conviction, nor did he attempt to harm any other occupant of the store. Since he apparently showed some mercy the jury could have felt it should also. The proper sentence in this case is life imprisonment.

> OVERTON, J., concurs.

Johnson v. State, 393 So. 2d at 1075-76 (emphasis added).[9]

In fact, the dissenters were correct. Juror Pearl S. Middlecoff, commenting later on the jury deliberations, stated:

> Johnson went in with the intention of getting drugs, not with the intention of shooting Moulton. If Moulton hadn't shot him, he would probably be alive today . . . I put myself in Johnson's position. I probably would have done the same thing. I think the judge was very much out of place.

Pensacola News Journal, March 2, 1986, p. 9A. There were many many other reasonable bases for life in the record as well. For example, Mr. Johnson must have been in great pain and distress if, as the State argued, the victim shot him. The agony from being shot could certainly have affected, judgment, premeditation and intent. In addition, there was the psychological evidence

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9. In denying Mr. Johnson's Petition for Writ of Habeas Corpus, United States District Court Justice Hoeveler, in his "[c]onclusion" to the denial, wrote:

> Indeed if this Court had been in the position of initially reviewing the application of Tedder, the conclusion would likely have been, that, in considering its application to the spectrum of Florida murders generally, this was not one for which execution was appropriate.

Id. at p. 53.

which supports the idea that the assailant "went off the page and did this out of rage" (see R. 1733). The expert testimony was that Mr. Johnson "doesn't have significant anxiety until he gets in a very serious situation or . . . difficulty." (R. 1517, 1521). "[S]trong emotional stimulation [of Mr. Johnson] causes an impulsive immediate response and a very inadequate response to the stimulus. . . . [I]n an extremely demanding emotional situation" Mr. Johnson's "normal mode of thinking, even processing information, decision-making . . . [and] normal mode of responding" "breaks down" or "deteriorates rapidly" so that he can no longer function rationally (R. 1520-21). The expert hypothesized that "in a criminal activity, [Mr. Johnson] probably would have done some reasonable planning, and if the plan went wrong, then his stress factors would break down his normal way of responding (R. 1525). It is obvious that the robber's plan in the case at bar went quickly and dramatically awry.

The robber probably felt that he had safely completed the theft when suddenly the victim stunned him him by shooting him. If there was premeditation in this case, it had to be short-lived since the robber's actions were initially to avoid violence (see R. 1739). Cf. Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) ("evidence . . . suggests the conclusion that the commission of the death act was probably upon reflection of not long duration.") Again, the assailant's rationality might have been impaired due to his having been shot and his being in pain, and due to the fact that he had but a few fleeting moments before selecting a course of action (see R. 1757-58). See Taylor v. State, 294 So. 2d at 652 n.3.

Additionally, there was some reference to Mr. Johnson's "record of narcotics use and problems, and this [crime] was to get drugs" (R. 1734). Halsworth v. State, 13 F.L.W. 138, 141 (February 26, 1988) (history of drug and alcohol use properly considered by jury in mitigation along with other nonstatutory

mitigating factors); Waterhouse v. Dugger, 13 F.L.W. 98, 99 (February 19, 1988) (jury should have been allowed to consider evidence that defendant suffered from alcoholism and was under the influence of alcoholism on night of murder); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (jury override improper due in part to defendant's "drinking problems" and history of alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987) (Florida Supreme Court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder', along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987) (intoxication and drug dependency may mitigate recommended sentence); Amazon v. Stat, 487 So. 2d 8, 13 (Fla.), cert. denied, 107 S. Ct 314 (1986) ("history of drug abuse" one factor rendering jury override improper); Roman v. State, 475 so. 2d 1228, 1235 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986) (alcoholism and organic brain syndrome justified jury instruction on statutory mitigating factor of substantial mental impairment); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985) (history of drug abuse among factors rendering jury override improper and mental illness can be mitigating factor even though not severe enough to satisfy 921.141 (6)(b).

The jury might also have based their recommendation partly on the evidence they had of Mr. Johnson's family background (R. 1526-28), his positive intelligence (R. 1515-1517), and his potential for rehabilitation. See McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). Although the basis for the jury's recommendation cannot be ascertained at this point in time, it is reasonable to assume that they adopted a "practical view" (see R. 1731) of the evidence and rejected heinous, atrocious or cruel as an aggravating circumstance (R. 1730, 1733), and gave the

defendant credit for not injuring any others who were in drug store (see R. 1732-34). In the end they likely concluded that the case fell within the category of "normal capital crimes" (see R. 1732), and that death was inappropriate.

Based on all of the above, it is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and thus] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). In one of this Court's most recent reversals of an override, Perry v. State, 13 F.L.W. 189 (March 18, 1988), the trial court likewise found five aggravating circumstances and no mitigation. This Court reduced the number of aggravating circumstances to two, but still found no statutory mitigating circumstances. Nevertheless, this Court found that the jury had a reasonable basis for recommending a life sentence as there was substantial nonstatutory mitigating evidence. This nonstatutory evidence included "psychological stress" and that the defendant was "good to his family." Id. at 191.

D. DEATH IS DISPROPORTIONATE PUNISHMENT

This Court's proportionality review is an integral part of its mandate in override cases. Thompson v. State, 456 So. 2d 444 (Fla. 1984), reveals the override in this case provided disproportionate punishment. Thompson involved a gas station robbery. The defendant demanded money from the attendant/victim, whereupon the victim stated that he had none, laughed and raised a chair in front of himself. At that point the defendant killed him with one blast of a shotgun then fled the scene. Id. at 445. This court rejected one of the aggravating circumstances (cold, calculated and premeditated) which left remaining two aggravating and no mitigating circumstances. This Court concluded the override was improper because "there were mitigating circumstances on which the jury could have properly relied.

. . ." Id. at 477. This Court cited the psychological evidence of the defendant's limited mental capacity, his egocentric, protective and impulsive personality, primarily motivated by personal survival, [and that Lewis] one who would act immediately and destructively if he sensed his personal survival was at risk, . . . " Id. at 448. In addition this Court noted the evidence that emanated from the defendant's family that he was a good son and father who "attempted to provide for the welfare of his family" and that his father died suffering from mental illness. Id. at 448.

The circumstances surrounding the homicide in the case at bar need no repeating. It can fairly be said, however, that the killing in Thompson was certainly the more egregious of the two. Mr. Johnson's motivation was also one of "personal survival." Like Thompson, who acted destructively when his survival was at risk, id. at 448, the evidence indicated that Mr. Johnson, when under stress, could not function rationally. His normal mode of responding would rapidly deteriorate in an extremely demanding emotional situation. (R. 1520-21). Like Thompson, Mr. Johnson was also able to introduce positive aspects of his upbringing and family background (R. 1526-28). The two cases are far more similar than dissimilar and so too should the final sentences be the same for both.

To reverse the override in Perry and Thompson and not do so in the case at bar would be arbitrary, discriminatory and a miscarriage of justice. See also Shue v. State, 366 So. 2d 387 (Fla. 1978). Shue v. State, 366 So. 2d 387, 389 (Fla. 1978) (evidence of defendant's family background, upbringing and social life were facts warranting imposition of life sentence).

The override procedure in Florida is simply an arbitrary one, as is revealed by a comparison of Mr. Johnson's case with the recent decisions discussed above. The Florida system provides

no rational way for distinguishing those who die from those who do not, and the proof is of recent vintage.

E. TRIAL COUNSEL INEFFECTIVELY PRESENTED THE OVERRIDE ISSUE

The fact that this Court split four to three on the matter of the override is due largely to the ineffectual argument posited by appellate counsel. This Court has acknowledged that "the careful, partisan scrutiny of a zealous 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 [argument]," is crucial to any thorough review of a death penalty case. Wilson v. Wainwright, 474 So. 2d 1165 (Fla. 1985). Appellate counsel's argument on the matter of the override was not "designed to persuade," ibid., and was premised on no combing of the record.[10]

The erudite arguments set out in the initial brief were factually barren. Appellate counsel failed in his initial brief even to argue that the override violated Tedder. There was no discussion of the compelling and reasonable basis for life that the jury could have relied upon. Wilson v. Wainwright, 474 So. 2d at 164 ("The application of case law to the facts before the Court was cursory and totally lacking in persuasive advocacy").

Counsel's reply brief was little better. Counsel argued:

> The jury's recommendation for life imprisonment had a reasonable basis under the circumstances of this case because from the evidence it is clear that the perpetrator of the robbery did not intend to commit murder as part of the robbery. Other, perhaps less obvious, reasons may underlie the recommendation for life which the jury made in this case.

(Appellant's Reply Brief at 10-11) (emphasis added). The brief

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10. Indeed, appellate counsel's exclusive argument was about the unconstitutionality of the override provision, a matter by then already resolved.

did not discuss what "less obvious" reasons there might have been. Counsel made a Lockett argument, but restricted it to discussing residual doubt as a nonstatutory mitigating circumstance. Ibid. at 11. Three members of this Court, left largely on their own, found that the jury had acted reasonably. There is a reasonable probability that an advocate on that one issue could have convinced one other member of the Court, and the result in this case would have been different.

CLAIM III

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING EFFECTIVELY TO CHALLENGE THE STATUTORY AGGRAVATING CIRCUMSTANCES, AND THERE IS A REASONABLE PROBABILITY THAT HAD COUNSEL ACTED REASONABLY, THE RESULT IN THIS CASE WOULD HAVE BEEN DIFFERENT.

In a jury override case in which a trial court finds no mitigating circumstances, appellate counsel's job is twofold. First, counsel must demonstrate that there was mitigation, see Claim I, supra, and that it provided a reasonable basis for life, see Claim II, supra. Failing that, and if there is, in fact, no mitigation, counsel must show that the statutory aggravating circumstances when "weighed against the recommendation of the jury," Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981), do not warrant death. To that end, counsel must show that aggravating circumstances were wrongly found, that they are duplicative, and/or that they are entitled to little weight. Even when statutory aggravation exists, resentencing (or life) is required in a jury override case when aggravating circumstances are invalidated. Consequently, appellate counsel herein was required to attack the finding and weight of five statutory aggravating circumstances. Counsel performed ineffectively.

Counsel devoted two lines (in a reply brief) to this effort. The initial brief did not attack or even address any of the

statutory aggravating circumstances, and the reply brief simply stated:

> The judge's finding that there was a great risk of death to many persons is erroneous. Kampff v. State, 371 So. 2d 1007 (Fla. 1979). The finding of heinous, atrocious and cruel was also erroneous or at most a weak factor under the circumstances of this case. Riley v. State, 366 So. 2d 19 (Fla. 1978).

Reply Brief, p. 16. This complete failure effectively and zealously to reduce the number and weight of aggravating circumstances and thereby to demonstrate reversible error (even absent mitigation) in the override was unreasonable. Aggravation could have been attacked, and its effect lessened. The result, with a life recommendation, would have been different.

A. THIS CRIME WAS NOT HEINOUS, ATROCIOUS, OR CRUEL, AND COUNSEL INEFFECTIVELY PRESENTED THE ISSUE

Appellate counsel's one-sentence attack upon heinous, atrocious, or cruel, was unreasonable. Four Justices affirmed the override, but only three agreed with the trial judge that the offense was atrocious or cruel. Johnson v. State, 393 So. 2d at 1074. Without a plurality on this circumstance, the affirmance of the override was based on a finding of really only three aggravating circumstances. Id. at 1073-74. There is a reasonable probability that one of the three persons in the plurality would have formed a different opinion regarding this aggravating circumstance, upon zealous representation.

Petitioner demonstrates in this argument: 1) that the offense was not atrocious and cruel under this Court's case law; 2) that if the (heinous), atrocious, or cruel statutory aggravating circumstance is sustained here, then the Florida death penalty statute as applied to petitioner is arbitrary and does not provide legitimate criteria for narrowing the class of death-sentenced persons, a matter which the United States Supreme Court is presently considering in Maynard v. Cartwright, No. 87-519; 3) that resentencing, or a life sentence, is required, and

4) that appellate counsel unreasonably failed effectively to challenge this aggravating circumstance.

1. This Offense Was Not Heinous, Atrocious, or Cruel

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

Thus, if Fla. Stat. Sec. 921.141(5)(h) ("heinous, atrocious, or cruel") does not, in application, genuinely narrow, then its application violates the eighth and fourteenth amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, Georgia's similar statutory aggravating circumstance ("outrageously or wantonly vile, horrible, or inhuman . . . involv[ing] depravity of mind or an aggravated battery to the victim"), while valid on its face, Gregg v. Georgia, 428 U.S. 153 (1976), was found unconstitutional in application because there was in fact no narrowing accomplished through its application in Mr. Godfrey's case: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. Mr. Godfrey, like Mr. Johnson, had been convicted of a crime involving a single gunshot wound. Id. at 425.

Section (5)(h) of the Florida Statute must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. at 2742-43. Petitioner will show that one of two constitutional errors exist herein with regard to Section (5)(h). Either (1) heinous, atrocious and cruel does not apply

to the killing of Mr. Moulton, and thus "finding" this circumstance impermissibly and prejudicially infected the jury's and the trial judge's balancing of aggravation and mitigation, as will be argued in this subsection, or (2) if heinous, atrocious and cruel does apply to this victim's death, then the Florida Supreme Court has failed to narrow the application of Section (5)(h), and the section is unconstitutional as written and as applied, as will be argued in subsection 2, infra. See Mello, M., Florida's 'Heinous, Atrocious or Cruel' Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making it Smaller, 13 Stet. L. Rev. at . 523, 528 (1984) (hereinafter "Mello").

It is apparent that the (heinous), atrocious, or cruel aggravating circumstance does not and should not apply in Petitioner's case. In 1973, this Court examined and interpreted section (5)(h), and, in language foreshadowing the United States Supreme Court's opinion in Zant v. Stephens, noted that "[t]he most important safeguard presented in Fla. Stat. section 921.141, F.S.A., is the propounding of aggravating. . . circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So. 2d at 1, 8 (Fla. 1973). Section (5)(h), according to Dixon, includes only "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Id. at 9. The focus is on what the victim experienced, and "the defendant's mindset is [never] at issue." Pope v. State, 441 So. 2d 1073, 1076-78 (Fla. 1983).

In Tedder this Court, citing and Dixon, stated that while "it is apparent that all killings are atrocious, and that appellant exhibited cruelty. . . [s]till, [the Court] believe[s] the legislature intended something 'especially' heinous,

atrocious, or cruel when it authorized the death penalty for first degree murder." Tedder, 322 So. 2d at 910 n.3. The facts in Tedder follow: On January 17, 1974, appellant's wife and mother-in-law were laying a sidewalk outside the trailer where they resided. Appellant and his wife had recently separated. Without advance warning of any sort, appellant stepped from behind a tree and fired a shot in the direction of the women and the appellant's infant son. All fled toward the trailer, where appellant's wife ran with the baby to a back bedroom in order to obtain a shotgun. She succeeded in locking the bedroom door behind her, but while loading the shotgun she heard more shots and the scream of her mother. Appellant then broke open the bedroom door and, gun in hand, took away the shotgun and told his wife to bring the baby and come with him. As they left, his wife saw her mother lying on the floor in a hallway. Id. at 909 (emphasis added). Tedder involved a victim well aware of her impending death, who "fled toward the trailer." Her daughter was actually cognizant of the treachery, heard her mother being shot and screaming, and saw her body after the shots. On the heels of Tedder came Halliwell v. State, 323 So. 2d 557 (Fla. 1975), and this Court again invalidated a finding of heinous, atrocious, and cruel, because "we see nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. The description of the murder was graphic:

> [T]he appellant flew into a rage after the husband of the woman he loved had beaten her. Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising, and cutting the husband's body with the metal bar after the fatal injuries to the brain.

Id. at 561.

The Halliwell assailant attained "a new depth in what one man can do to another, even in death." Id. at 561.

> [S]everal hours after the killing. . . Appellant used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek. It is

> our opinion that when Arnold Tresch died, the crime of murder was completed and that <u>the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances</u>. If mutilation had occurred prior to death or instantly thereafter it would have been more relevant in fixing the death penalty.

<u>Id</u>. (emphasis added).

Certainly a single fatal shot to the chest, as in the case at bar, was far less egregious than the crimes in <u>Tedder</u> and <u>Halliwell</u>, and is undeniably <u>less</u> "shocking in the actual killing than in the majority of murder cases reviewed by this Court." <u>Id</u>. at 561. Even with the assailant's disputed remark to the victim as the circumstantial cornerstone for finding the murder atrocious and cruel, this case cannot be reconciled with the case law extent at the time of the appeal, <u>See</u> <u>Cooper v. State</u> 336 So. 2d 1133 (Fla. 1976), and much case law developed since. Death resulting from a single gunshot, where the victim does not know just before he is shot what his assailant might do, and where he is killed instantly or is rendered unconscious and dies without regaining consciousness, is not a heinous, atrocious, or cruel offense. <u>See</u> <u>McCrae v. State</u>, 416 So. 2d 804, 805-7 (Fla. 1982) (after burglary of van and exchange of gunfire, defendant yelled "[t]his is for you, mother-fucker," before shooting and killing victim," not heinous, atrocious or cruel."); <u>see also</u> <u>Craig v. State</u>, 510 So. 2d 857, 868 (1987)(not heinous, atrocious or cruel because "although fully premeditated, the murders were carried out quickly by shooting"); <u>Jackson v. State</u>, 502 So. 2d 409, 411-412 (1987)("where, as here, a single fatal shot is fired and the victim dies shortly thereafter simply cannot support [sic] a finding of an especially heinous, atrocious or cruel murder"); <u>Melendez v. State</u>, 498 So. 2d 1258, 1261 (1986) (not heinous, atrocious or cruel where "gunshot to the head would have caused instantaneous death"); <u>Jackson v. State</u>, 498 So. 2d 906, 910 (1986)(not heinous, atrocious or cruel where victim killed by

single bullet in his side and "there were no additional acts indicative of . . . cruelty)"; Kokal v. State, 492 So. 2d 1317, 1319 (1986)(not heinous, atrocious or cruel where "death was instantaneous"); Philips v. State, 476 So. 2d 194, 196-197 (1985)("mindset or mental anguish of the victim is an important factor in determining whether [heinous, atrocious or cruel] applies"); Parker v. State, 476 So. 2d 134, 139 (1985)("a pistol shot to the head of the victim does not establish this aggravating circumstance [heinous, atrocious or cruel]"); Bundy v. State, 471 So. 2d 9, 21-22 (1985)(where there was no clear evidence to show victim struggled with abductor, "experienced extreme fear and apprehension, or was sexually assaulted before her death," not heinous, atrocious or cruel); Henderson v. State, 463 So. 2d 196, 201 (1985)(not heinous, atrocious or cruel where "victims died instantaneously from single gunshots to their heads"); Randolph v. State, 463 So. 2d 186, 193 (1985)("finding that the murder was heinous, atrocious or cruel as an aggravating circumstance cannot be supported by the evidence in this case," where state's chief witness testified she overhead defendant tell victim not to try anything and he would not shoot, then heard two gunshots); Parker v. State, 458 So. 2d 750, 754 (Fla. 1985)(not heinous, atrocious or cruel where victim shot and killed "execution style" after being shown body of previously murdered boyfriend since "nothing unusual in the manner or method of effecting the crime."); Kennedy v. State, 455 So. 2d 351, 355 (Fla. 1984)(not heinous, atrocious or cruel where victims killed in shoot-out while attempting to recapture James v. State, 453 So. 2d 786 (Fla. 1984)(physically handicapped victim shot in head while husband pleaded for her life); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984) (not heinous, atrocious or cruel where victim shot in back, wrapped in plastic, placed in trunk, and shot again while still alive); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (not heinous, atrocious or cruel where victim shot

after stumbling upon intruder in house and attempting to take away gun; six additional gunshots inflicted after original); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) ("when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness"); Oats v. State, 446 So. 2d 90 (Fla. 1984)("a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance"); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983)("Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous atrocious, or cruel. . ."), cert. denied, 104 S.Ct. 2400 (1984); Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983)("[s]ince the death was instantaneous following a single shot, this crime cannot be considered especially heinous, atrocious, or cruel."); Middleton v. State, 426 So. 2d 548, 552 (Fla. 1982) (not heinous, atrocious or cruel because "the victim died instantly from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from appellant, and had no awareness that she was going to be shot."), cert. denied, 103 S.Ct. 3573 (1983); Raulerson v. State, 420 So. 2d 567, 571 (Fla. 1982) (not heinous, atrocious or cruel where shoot-out occurred in restaurant between police and defendant). Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982) (not heinous, atrocious or cruel because "[t]here was evidence that the victim was subjected to repeated blows while living; death was most likely instantaneous or nearly so."); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981)("[a]n instantaneous death caused by gunfire, however, is not ordinarily a heinous killing.") cert. denied, 456 U.S. 925 (1982); Maggard v. State, 399 So. 2d 973, 977 (Fla. 1981)(not heinous, atrocious or cruel because "the victim died quickly from a single gunshot blast fire through a window, and there is no evidence that the victim was aware that he was going to be shot."), cert. denied, 454 U.S. 1059 (1981); Lewis v. State, 398

So. 2d 432, 434, 434 (Fla. 1981)("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murder, it as a matter of law is not heinous, atrocious, or cruel; here, the victim died instantaneously."); Williams v. State, 386 So. 2d 538, 543 (Fla. 1980)("appellant's crime does not rise to the level of 'especially heinous, atrocious, or cruel', [where victim] died almost 'instantaneously' from her gunshot wounds."); Fleming v. State, 374 So. 2d 954, 958, 959 (Fla. 1979)("the murder was committed by a single shot . . . the victim was killed instantaneously and painlessly, without additional facts which make the killing 'heinous' within the statutorily-announced aggravating circumstance."); Kampff v. State, 371 So. 2d 1007, 1010 (Fla. 1979)("directing a pistol shot straight to the head of the victim does not tend to establish [heinous, atrocious or cruel] . . . We hold that the trial judge erred in finding that the murder was especially heinous, atrocious or cruel."); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978)("[t]here was nothing atrocious done to the victim, however, who died instantly from a gunshot to the head.") cert. denied, 459 U.S. 981 (1982); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1978)("this murder was not in [the heinous, atrocious or cruel category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing 'heinous. . .'"), cert. denied, 431 U.S. 925 (1977); Sims v. State, 444 So. 2d 922 (Fla. 1983) (heinous, atrocious or cruel) improper; apparently instantaneous death). See also collected cases in Mello, supra, 536 n.56.

This Court has "upheld application of [the heinous, atrocious and cruel] factor where victims were killed instantaneously or nearly instantaneously when, before the death occurred, the victims were subject to agony over the prospect that death was soon to occur." Preston v. State, 444 So. 2d 939, 945 (Fla. 1984). In Preston, after the defendant robbed the

store, he forced the victim at knife-point to accompany him on a one and a half mile journey, during which she was "speculating as to her fate and undoubtedly cognizant of the likelihood of death. . . ." Id. at 946 and cases cited. In the case at bar it is obvious that the victim had virtually no expectation of his impending death which followed the cessation of the shooting almost immediately.

This Court has refused to uphold findings of heinous, atrocious, or cruel even in situations where the killer confronted by the victim with the murder weapon, and the victim was keenly aware of the imminent possibility of death. In Gorham v. State, 454 So. 2d 556 (Fla. 1984), the appellant forced his victim, at gunpoint, to stand with his face to the wall during a robbery. During the course of the robbery, the victim was shot twice in the back and died within seconds as a result. The trial court based its finding of heinous, atrocious, or cruel on the fact that the victim had been in apprehension of death and had been shot in the back, indicating a lack of resistance. This Court reversed that finding, holding that

> [t]here was evidence disproving any possibility of prolonged and tortuous captivity and no evidence whatsoever that the victim apprehended certain death more than moments before he died. While the murder was of course a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.'"

Id. at 554, quoting Dixon v. State, 283 So. 2d at 9. Johnson's victim, like Gorham's, had little if any presentiment of his death. The assailant's purported remark at most probably left the victim wondering for a moment just what was being contemplated by the assailant. And then he was shot.

In Blanco v. State, 452 So. 2d 520 (Fla. 1984), this Court refused to uphold the trial court's finding of heinous, atrocious, or cruel where the victim had appeared by chance in the room where the intruder was menacing another resident of the house, the victim's niece. The victim was shot and killed in the

ensuing scuffle. There, the victim was aware of the presence of the gun, as it was the subject of the struggle which ultimately lead to his death, and consequently must have been "subject to the agony of the prospect that death would soon occur," Preston, supra, or at least was very likely soon to occur. Yet this Court still found that the murder was not within the ambit of Dixon's requirement that the "capital felony . . . [be] . . . accompanied by such additional acts as to set the crime apart from the norm of capital felonies," id. at 9, before a finding of heinous, atrocious, or cruel is appropriate. The victim sub judice had no more notice of his fatal position than did the victim in Blanco.

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

Petitioner requests the opportunity to present this issue to the court in an orderly, judicious manner. Heinous, atrocious,

or cruel should not have figured in the balancing of aggravating and mitigating circumstances.

2. The Application Of This Statutory Aggravating Circumstance Is Arbitrary

Should this Court determine that heinous, atrocious or cruel does apply to the facts herein, Petitioner contends that that statutory aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. 2733, 2742 (1983). In short, the statute is unconstitutional on its face, because this Court has not "sufficiently narrowed the heinous, atrocious or cruel circumstance so as to bring it within the ambit of constitutional acceptability." Mello, supra at 529. Petitioner cannot, given the circumstances of this warrant, list and discuss the decisions in this Court which apply this section (5)(h) in "virtually every type of capital homicide," id. at 533, but incorporates the exemplary and in-depth analysis of the problem explicated in the Mello article. Since the time of the Mello article, Professor Richard A. Rosen has updated the summary and has come to the same conclusions: "The incoherency of the standard applied by the Florida Supreme Court is readily evident." Rosen, R., "The 'Especially Heinous' Aggravating Circumstance in Capital Cases -- The Standardless Standard," 64 N.C.L. Rev. 942, 974 (1986) Professor Rosen's analysis should likewise be regarded as incorporated herein by specific reference.

The United States Supreme Court is currently considering the very issue raised by petitioner's case and by the Mello and Rosen articles. If heinous, atrocious or cruel applies to Mr. Johnson's crime, then it is indeed a standardless standard, and it fails genuinely to narrow. In Maynard v. Cartwright, No. 87-519, the petitioner sought and was granted certiorari from the tenth circuit's en banc decision, in which the court had relied heavily on the Rosen article in finding Oklahoma's especially heinous, atrocious or cruel" statutory aggravating circumstance

unconstitutional. That circumstance is just like Florida's. What is clear from the Cartwright en banc decision is that if Florida finds Mr. Johnson's case "atrocious or cruel," then the eighth amendment has been violated. Maynard v. Cartwright, 822 F.2d 1477, 1489-90 (10th Cir. 1987). It is important to note that the Oklahoma courts are closely tied to the Florida courts on this issue, and consequently the review of Oklahoma by certiorari directly affects Florida. See Cartwright v. Maynard, 802 F.2d 1203, 1217 (10th Cir. 1986)("Oklahoma has clearly adopted the unnecessarily torturous element through its wholesale adoption of the Florida Supreme Court's construction of 'heinous, atrocious or cruel' in State v. Dixon . . . ."). With that in mind, the following question upon which the United States Supreme Court granted certiorari in Cartwright is of critical importance here:

> Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance "especially heinous, atrocious, or cruel" in an unconstitutional manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim in reviewing death sentences in which that aggravating circumstances has been found.

Within this "question presented," petitioner in Cartwright has submitted the following argument:

> The definition of "especially heinous, atrocious, or cruel" should not be limited to those situations where the victim has suffered physical or mental torture; the wording of the phrase itself makes it appropriate for the sentencer to consider the manner of the killing and the attitude of the killer.

The pending United States Supreme Court's consideration of application of the exact same aggravating circumstance in Cartwright is reason enough for this Court to stay Mr. Johnson's execution, should this Court conclude that (heinous), atrocious, and cruel does apply in Mr. Johnson's case.

3. Resentencing Is Required

In Lewis v. State, 398 So. 2d 432, 438-39 (1981), aggravating circumstances that the sentencer found were rejected by this Court. The case was remanded for reconsideration so that the remaining circumstances could be weighed against the jury's recommendation:

> The jury recommended a sentence of life imprisonment. The trial court judge's sentencing findings contain a discussion of each of the statutory mitigating circumstances and a statement that none of them are applicable to the facts of this case. However, the jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.ED. 2d 973 (1978)); Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed. 2d 1060 (1979). Since three of the trial court's four aggravating circumstances have been found to be erroneous, we remand the case for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury.

See also Randolph v. State, 463 So. 2d 186 192-193 (Fla. 1985) (resentencing required in light of Supreme court determination that only one valid aggravating circumstance was present). The Court has also remanded when two aggravating circumstances survived review. The sentencing balancing process is not a matter of see-saw equilibrium, but "rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . . Dixon, 283 So. 2d at 10.

It cannot be said that the reduction in the number or the weight of aggravating circumstances does not require resentencing, or a life sentence. A fair review of aggravatin versus recommendation in this case requires life.

Mr. Johnson was also denied even-handed appellate review as required by State v. Dixon, 283 So. 2d 1. Reversal is proper:

> Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

Id. at 10. A comparison of this case with others factually similar reveals that in this instance that the review standard failed to operate properly. Historically, it appears that juries consistently recommend a life sentence in situations where the eventual homicide victim initiated or escalated the use of deadly force, see Taylor v. State, 294 So. 2d 648, 649, 652 (Fla. 1974); Chambers v. State, 339 So. 2d 204, 207 (Fla. 1976); Thompson v. State, 328 So. 2d 1, 3 (Fla. 1976); McCaskill v. State, 344 So. 2d 1276, 1277 (Fla. 1977), a factor not advanced by appellate counsel.

In McCaskill, supra, this Court was faced with a situation similar to the facts presented in the case at bar. There, following the perpetration of a robbery, the robbers were pursued by two patron/victims one of whom was armed with a chair and who was ultimately killed by a shotgun blast originating from the automobile in which the robbers were fleeing from the scene. This Court found that McCaskill and his co-defendant's death sentences could not stand in comparison with life sentences given in similar cases. Likewise under the Tedder standard the Court could not ignore the jury's recommendation for life. With regard to the former finding the Court said:

> The imposition of life sentences in similar cases is not absolutely controlling. Were they to be ignored, however, our death penalty statute, Section 921.141, Florida Statutes, could not be upheld under the requirements of Proffitt v. Florida, supra, and Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

Id. at 1280.

It is well-established that appellate comparison of cases is both a constitutional and statutory requirement. This review is not vitiated simply because the trial court was able to find, and this Court was later able to approve of, the existence of statutory aggravating circumstances. This Court has interpreted the law to require a jury life recommendation to be followed where there is a relevant factual basis upon which reasonable persons could have so concluded. That this is true in light of the Tedder standard is best evidenced by this Court's opinion in Malloy v. State, 382 So. 2d at 1190 (Fla. 1979). From the facts as stated by the Court in Malloy and given pre-existing case construction of the aggravating circumstances set forth in Section 921.141(5), Florida Statutes, five aggravating circumstances were presented by the facts surrounding Malloy's double murder convictions. Notwithstanding these five aggravating circumstances and the absence of any statutory mitigating circumstances, this Court citing, inter alia, to McCaskill and Tedder, reversed Malloy's dual death sentences for imposition of life sentences in accordance with the jury's recommendation. The key factor in Malloy's sentence reversal stemmed from this Court's ability to find a reason for the jury's life recommendation. Just as this court is bound by its decisions upholding sentences of death where the circumstances of the crime and the character of the offender are similar to those presented in any given case under review, id. at 1197 (Boyd, J., concurring in part and dissenting in part), likewise, where reductions of death sentences have been ordered such as in Taylor, Thompson, Chambers, McCaskill, and Malloy, supra, this Court is bound to follow their precedential value and reduce the penalty in the instant case since the circumstances are so similar.

4. Counsel was Ineffective

The appellate level right to counsel also encompasses the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105. S.Ct. at 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. at 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S.Ct. at 835 n.6. Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S.Ct. at 2574, 2588 (1986); United States v. Cronic, 466 U.S. at ;648, 657 n.20 (1984), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d at 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d at 1116 (1981).

Moreover, as this Court has explained, its "independent review" of the record in capital cases neither can cure nor undo the harm caused by appellate counsel's deficiency:

> 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. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The

basic requirement of due process" therefore, "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." Id. at 1164.

Appellate counsel failed to act as an advocate for his client regarding heinous, atrocious or cruel. With regard to this issue, no "advocacy" in any true sense was provided to Mr. Johnson on direct appeal. The "adversarial testing process" failed to work. See Matire v. Wainwright, 811 F.2d at 1430, 1438 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. at 668, 690 (1984). To prevail on his claim of ineffective assistance of appellate counsel Mr. Johnson must show deficient performance and prejudice. Matire v. Wainwright, 811 F.2d at 1435. Mr. Johnson has.

B. THE AUTOMATIC AGGRAVATING CIRCUMSTANCE OF ROBBERY SHOULD HAVE BEEN STRICKEN OR AFFORDED LITTLE WEIGHT

If there is no mitigation, the issue in an override case is the strength of the aggravating circumstances. The jury at guilt/innocence was instructed upon premeditated and felony murder, and returned a general verdict. As the State argued, "the robbery itself is an aggravating circumstance at sentencing." (R. 1466). Thus, one of the aggravating circumstances sustained by this Court was a fact intimately intertwined with the offense. This Court has often discounted the effects of aggravating circumstances that are directly related to or inherent in the offense. Appellate counsel was ineffective in this case for failing to argue so as to ameliorate the aggravating weight of felony murder.

While it is not necessary for this Court to so find in order for Mr. Johnson to demonstrate ineffectiveness in an override context, Mr. Johnson also contends that counsel was ineffective for not challenging as per se unconstitutional the finding of an

automatic aggravating circumstance. The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 56 U.S.L.W. 4071 (January 13, 1988), and the discussion in Lowenfield illustrates the constitutional shortcomings in Mr. Johnson's capital sentencing proceeding. In Lowenfield, the petitioner was convicted of first degree murder under a Louisiana statute which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital

> offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 4075 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon the same non-legitimate narrower -- felony-murder. The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Johnson's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but robbery is nevertheless an offense for which "a sentence of death is grossly disproportionate and excessive punishment." Coker v. Georgia, 433 U.S. at 591, 592 (1977). With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance met constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Johnson's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing Cole v. Arkansas, the United States Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18. Neither the Florida Supreme Court, nor any other court, can "affirm" based on premeditation when it cannot be said that the conviction was obtained based upon premeditation. Felony-murder could have been the basis for the jury's verdict, and Mr. Johnson is entitled to relief.

C. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT ARGUING THE MINIMAL WEIGHT OF THE REMAINING AGGRAVATING CIRCUMSTANCES

The fact that Mr. Johnson was under sentence of imprisonment and that he had been previously convicted, at least overlapped, and, to a certain extent, this was one statutory aggravating circumstance. Appellate counsel should have so argued.

CLAIM IV

MR. JOHNSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN COUNSEL FAILED TO REVEAL THAT THE RECORD IS INCOMPLETE REGARDING THE TRIAL COURT'S RULING UPON A CRUCIAL MOTION TO SUPPRESS, AND WHEN COUNSEL COMPLETELY FAILED TO RAISE ON DIRECT APPEAL THE DENIAL OF THE MOTION TO SUPPRESS AN IMPERMISSIBLY SUGGESTIVE SINGLE PHOTOGRAPH IDENTIFICATION.

The on the scene, suggestive single suspect photographic identification procedure utilized in this case has no equal. Immediately after the offense, police officers arrived at the scene. A distraught, hysterical, crying, frightened, "shook-up" purported eyewitness was encountered (R. 190). The witness, Gary Summitt, gave a brief description of the assailant. In the witness's presence, one officer asked another officer if he had a picture of Mr. Johnson. The officer went to his automobile, returned with a photograph, and the witness was told "look at this and tell me if this is the person" (R. 175). According to the officers, the witness was shown several pictures of only Mr. Johnson. The witness heard the officers say "it is who they figured it was" (R. 181), that the person in the photograph had been "robbing drugstores around in the area" (R. 178), and that the FBI had been trailing him (R. 181). The witness said the man in the picture was the robber. This is the evidence that convicted Mr. Johnson.

Pretrial, an identification suppression hearing was conducted, but the record does not reflect when and how the judge ruled. The evidence revealed that the identification procedure utilized was impermissibly suggestive, and that it created an irreparable risk of misidentification. The issue was unreasonably not presented on appeal.

A. THE LAW

Judd v. State, 402 So. 2d 1279 (Fla. 4th DCA 1981), reversed a conviction of robbery based upon an impermissibly suggestive photographic lineup. In Judd, the Court wrote:

> To avoid the hazard of misidentification, the Court fashioned a two-prong test to evaluate allegations of an impermissibly suggestive pre-trial identification procedure. The first step of the inquiry is a factual determination of whether the police employed an unnecessarily suggestive procedure to obtain the out-of-court identification. If the procedure is found to have been too suggestive, the second step is to ask whether, in light of all of the circumstances, there was a substantial likelihood of misidentification. In this respect, a number of factors may be considered. Among them are the opportunity of the witness to observe the criminal at the time of the crime the witness' degree of attention; the accuracy of the witness' prior description of the criminal; his degree of certainty at the confrontation; and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977); Grant v. State, 390 So. 2d 341 (Fla. 1980).

402 So. 2d at 1280-81. In Manson v. Brathwaite, 432 U.S. at 116, the United States Supreme Court held that that the showing of a single photograph is highly suggestive and that the suggestivity is unnecessary absent compelling circumstances. See also Nassar v. Vinzant, 519 F.2d. 798, 801 (1st Cir 1975). (Single photo identificatons present so serious a danger of suggestiveness as to require that they be given careful scrutiny. . . . ") Similarly, the manner in which photographs are shown can be suggestive. For example, it is improper for a police officer to direct the attention of a witness to a particular photograph, see United States v. Trivette, 284 F. Supp. at 720 (D.D.C. 1968) (impermissibly suggestive where detective asked: "Is that the man?", when defendant's picture was shown), or for the police to make any other type of "suggestive comments" in the course of an

identification procedure. See Bundy v. State, 455 So. 2d at 330, 343 (Fla. 1984) and authorities cited.

B. THE IDENTIFICATION IN THIS CASE WAS UNRELIABLE

Applying these principles to the case at bar, it is crystal clear that the procedure surrounding the photographic identification was overwhelmingly suggestive. The pertinent parts of the transcript set out below constitute a perfect example of that which Manson v. Brathwaite, its predecessors and progeny, are intended to prevent -- identification procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute the denial of due process of law.

At the hearing on the defendant's motion to suppress identification, Gary Summitt, the State's sole identification witness, described what happened moments after the assailant left the pharmacy:

> A. I went back--I called--dialed the operator and I said, "Get me the police, this is an emergency," and she got the police on the line right away, and I told them, I said, "There's been a robbery, send an ambulance--and a shooting." I said, "Send an ambulance and the police to 4111 Barrancas Avenue, Warrington Pharmacy," and she said, "Okay, they're on their way," like that and then she asked--started asking me, she goes, "What happened?" And I just said, you know, "There was a robbery." And she said, "Well, what did he look like? Now, was--did you see him leave?" Or, "How many people were there?" And I told her, "One." She said, "What did he look like? and gave a description.
> Q. Okay, what description did you give, sir?
> A. I said he was white; about thirty, thirty-five years of age; he was medium build; and about six foot, maybe a little more; he had a beard and he had reddish--light, reddish hair, almost like blondish-reddish hair; he had a green shirt with a design on it and dark pants.
> Q. Okay, then what did you proceed to do?
> A. Then, I just stayed on the line. She kept me on the line and then in just a couple of minutes, the police arrived and she said--

(R. 174-75).

* * *

[SUMMITT]: But then, when he came there, then I got off the line and he started asking me questions, you know, like--you know, the same thing she was asking me, "What did he look like? and all that.
MS. WILLIAMS:
Q. Okay, were you at any time shown a photograph or some photograph?
A. Yes, I was.
Q. Okay, and when was that?
A. This was after I gave the description and there was, I think, a couple more officers that came or something, and they were trying to revive Mr. Moulton, but--what I thought was several photographs--he said--then after I gave the description, they said, "Look at this and tell me," you know, "if this is the person."
THE COURT: At the same time, that same evening, you mean?
THE WITNESS: Yes, Yes.

THE COURT: Oh, okay. Okay.
MS. WILLIAMS:
Q. Okay, how--this was after the police arrived that you saw this photograph.
A. (WITNESS NODS HEAD AFFIRMATIVELY).
Q. Approximately how long after the police arrived?
A. I don't know. I really couldn't say.
Q. Okay, would it be within fifteen minutes, could you say that, or within thirty minutes?
A. Give or take fifteen minutes, you know, something like that.
Q. And you indicated that you had given a description to one of the officers, is that correct?
A. Uh-huh.
Q. Alright, and then you were shown a picture?
A. Well, I believe--to me, I was shown more than one picture.
Q. Okay.
A. I thought there were several pictures shown to me.
Q. Okay, you tell the Judge what you remember about the pictures, what you were shown.
A. Alright, the first picture I saw, that was--that was the person 'cause that surprised me because, you know, I--I just didn't realize that they would have a picture of the person that robbed me. He showed me another one and it was the same person, but a profile. And I think there was another picture of the same person with short hair. It looked like he had been in prison. And then I saw--the last one I looked at wasn't him at all. It was somebody else.

(R. 175-77). (Emphasis supplied.)

* * *

Q. Okay, what happened after you were shown the pictures?
A. They just asked me some more questions.
Q. Okay, do you remember hearing any conversation after that?
A. I think I heard one officer say, "We figured this was--
THE COURT REPORTER: This was what?
THE WITNESS: Oh, I'm sorry.
THE COURT: Sir, did he say it to you or you said - - -
THE WITNESS: (INTERPOSING) No.
THE COURT: - - - or you overheard him say it
THE WITNESS: I overheard him say to one of them, he said "We figured this might have been him because he'd been running, you know, robbing drugstores around in this area - - in Florida, or something like that."

(R. 177-178). (Emphasis supplied.)

* * *

Q. Okay, do you - - after you identified the photographs at the pharmacy, do you remember somebody saying that the FBI has also been trailing him?
[SUMMITT]: Yes. I think it was the same night, I believe. One of the officers, I can't recall who it was, said the FBI had been after him, like, I think, six months or something like that.
Q. Okay, and do you remember someone saying that is who they figured it was?
A. I believe one of the officers said that.

(R. 181). (Emphasis supplied.)

* * *

MS. WILLIAMS: Okay, I have no more questions.

CROSS EXAMINATION BY MR. JOHNSON:

(R. 182).

* * *

Q. Okay, Gary, is there any doubt in your mind that the photograph that you identified is the person who committed the robbery?
A. No doubt whatsoever.

(R. 185).

* * *

Q. My question was to you, would you explain to the Court about how certain you are that that person that you viewed in the photograph is the person who is the robber?
A. Okay. And then when this guy came in and, you know, I saw him real good and everything, and then when the police came in, they asked me the description and all like that. I guess in the back of my mind, you know, I was thinking he must just, you know, be some - -

> somebody around, you know, that they don't probably know who he is or whatever. And then they showed me the picture of him and it just startled me because right off the bat, that's - - that was him. You know, I said, "That's him," you know, I was kind of - - how did they have a picture of him?
> Q. Were you certain at that time that that was the person?
> A. Yes.
> Q. Are you still certain at this time that that was the person?
> A. Positive.
> Q. Okay, and how long was it from the time that the robbery was committed and Mr. Moulton was shot 'til you viewed that photograph, sir?
> A. From the time of the beginning of the robbery to seeing the photograph?
> Q. (ATTORNEY NODS HIS HEAD AFFIRMATIVELY).
> A. Maybe thirty minutes, maybe; not any longer than that, I don't think.
> MR. JOHNSON: Okay, thank you, sir, that's all I have.

(R. 186-87).

* * *

> REDIRECT EXAMINATION BY MS. WILLIAMS:
>
> Q. Mr. Summitt, <u>after you identified one of those photographs, were you also told that the person you identified was an escapee from a Tennessee prison?</u>
> A. <u>I remember hearing that, but I can't recall if it was that night or later</u>.
> Q. Okay, "later", do you mean the next day?
> A. The next day, whatever.

(R. 189-90). (Emphasis supplied.)

* * *

Joseph Penton, a member of the Escambia County Sheriff's office, testified regarding the night of the incident:

> A. I was the duty investigator for crime scene persons that night. At approximately eight o'clock, I was advised by radio that there had been a robbery and a shooting at the Moulton - - or at the drugstore in Warrington. I left - - was just leaving the office - - had just gotten into my automobile in front of the sheriff's office and started in route to the drugstore on Barrancas. As I reached St. Mary and Pace, they put out a description.
> Q. Okay, what was the description, sir?
> A. It was a white male, six foot or taller, approximately two hundred pounds, middle to late thirties, with light brown hair, and red-colored beard. I think that - - -
> Q. (INTERPOSING) Okay, and what came to your mind after you heard that description?

A. When they put the description out, I had been made aware or had been aware of a fugitive that had come to our attention through a bulletin. The man we had originally been made aware of back in January of '78 in a bulletin put out from south Florida. The man was a fugitive from Tennessee, I think, escaped prisoner. We had - - our office had received information via many agencies through the previous six months up until this time. The man's name was Marvin Johnson. This description fit the descriptions we had on Marvin Johnson. I went to the store or continued on to the store; on arriving at the store, the deputies were there. I think Deputy Tom Lewis was standing at the door. Investigator Ed Smith had already arrived and was inside the store. Deputy Lewis let me in the store. I went in. Investigator Smith was talking to a young man, later identified as Gary Summitt in the store at that time.

Q. And what did Mr. Smith say to you, if anything, Ed Smith?

A. He was - - like I say, he was talking to a young man, later identified as Gary Summitt, about the robbery. I walked in. He stopped just briefly, looked to see who was coming in the store. They had stopped all traffic in and out of the store at that time. He looked at me. I walked on to the counter. I asked Mr. Summitt briefly about the description again and he repeated the same description that they had put out on the radio.

Q. Okay, did <u>Officer Smith</u> look at you and ask you if you had any pictures?

A. After - - at that time, <u>he asked me if I had any pictures</u> and I said, "Yes, I have one."

Q. Okay, and did you hear him ask Gary anything?

A. He - - -

THE COURT: (INTERPOSING) What, now, I'm sorry?

MS. WILLIAMS: I'm sorry.

Q. Sir, did you hear him ask Gary Summitt anything after - - did you hear Ed Smith ask Gary Summitt anything?

A. Right at that time?

Q. Uh-huh.

A. I didn't note a specific question. Like I say, they were discussing - - I took it they were discussing the robbery as I walked in.

Q. Uh-huh.

A. <u>He turned and asked me about a picture and I said I had one</u>. He turned around and he told Gary, he said something about, "Can you identify the man if you see some pictures?" "Do you think you could identify the man?"

Q. Uh-huh.

A. Gary indicated that he could, so I turned and went to my automobile and got - - -

Q. (INTERPOSING) Okay, did you do something

before you went and got the picture?
A. Before I went and got the picture?
Q. (ATTORNEY NODS HEAD AFFIRMATIVELY).
A. No, I don't think so.
Q. Okay, so you went and got the picture from your automobile, is that correct?
A. Right.
Q. Then what did you do?
A. I returned to the store and showed the picture to Gary.
Q. Okay, before you showed the picture to Gary, did you ask Gary Summitt to give you a description as well?
A. I had done that before I went to get the picture.
Q. Okay. So, Officer Smith asked you if you had any pictures, is that correct?
A. Uh-huh.
Q. And you first wanted to hear Gary Summitt give you a description?
A. Uh-huh.
Q. And then you went to the car and got the photograph, is that correct?
A. (WITNESS NODS HEAD AFFIRMATIVELY).
Q. Then you proceeded back into the pharmacy?
A. I went back into the store, yes.
Q. Okay, what happened?
A. I showed - - no, I handed Gary the picture. He took it and studied it. He said, "Yes," he said, "this is the man," and he said, "with the exception," he said, "his hair was shorter than what it appears in this picture. His beard is trimmed up neater and shorter than what the picture shows."

(R. 194-97). (Emphasis supplied.)

* * *

Q. Okay, what is this picture?
A. This picture is a picture that I had or one just like it of Marvin Johnson.

(R. 198).

* * *

THE COURT: Okay. Now, that's marked into evidence now.

(R. 198).

* * *

Q. Okay, did you show Mr. Summitt any other pictures?
A. No, I did not.

(R. 199).

[CROSS EXAMINATION BY MR. JOHNSON]:

Q. And then you got a description from Gary Summitt after you got to the robbery, is that true?

A. Yes, sir. Yes, sir.

(R. 200).

* * *

Q. Okay, and do [sic] you have any opinion in your mind as to who the person was he was describing at that point in time?
A. Yes, sir.
Q. And who was that?
A. Marvin Johnson.
Q. And is that the reason you went and got that - - that photograph?
A. Yes, sir.
Q. Did you have any other photographs with you at that time that resembled the photograph of Marvin Johnson?
A. No, sir, nothing close.
Q. Okay, and then Gary Summitt identified that photograph, is that correct?
A. Yes, sir, he did.
Q. Was - - how long from the time that you handed the photograph to him did it take him to identify it?
A. It was probably four or five seconds, at least. He took it and looked at it. He didn't just - - I didn't just hold it up. He took it and studied it, and he said - - like I say, it was probably at least four or five seconds and he said, "Yes," he said, "This is the man," and then he indicated his hair is shorter, up along here than what it shows, and the beard is trimmed up neater than what it shows here.
Q. Did he vacillate in his identification at all?
A. No, sir.
Q. Was he positive in his identification at that time?
A. He was. I asked him, I said, "Are you sure?" and he said, "Yes, sir."

(R. 201-02).

* * *

Q. Approximately 8:15 the picture was shown to him?
A. Yes, sir.
Q. And the robbery occurred about what time, sir?
A. Approximately eight o'clock.
MR. JOHNSON: Okay, thank you. That's all.

(R. 203).

* * *

Vernon Smith, an investigator for the Escambia Sheriff's office also testified as follows:

A. I arrived at the Warrington Pharmacy within three minutes of the time the dispatch was dispatched. . . . Within approximately five more minutes, Officer Joe Penton arrived

> at the scene. I had already had a chance at this time to talk with Officer Lewis who was on the scene and also with Gary Summitt.
> Q. Okay, would you please tell the Court your conversation with Mr. Summitt?
> A. Yes, ma'am. He was disturbed, frightened to a certain extent. I asked him to settle down. He went back behind the counter and I asked him to describe to me what happened. His first remark back to me was that "I have already told the radio room. I have already told the other officers." I said, "Well, sir, just settle down and tell me what happened." . . .

(R. 205).

* * *

> About this time, Joe Penton walks in. <u>I asked Joe, I said, "Joe, do you have a picture of Marvin Johnson with you?" Joe says, "Yes,</u>" or Joe said at that point, "Let me hear what you've got to say." <u>Joe went back to his car and came back in. Joe produced a picture of Marvin Johnson</u> and when he produced a picture of Marvin Johnson, Mr. Summitt immediately got highly excited and said, "That's the one. That's him. That's him." I may be a little confused, Your Honor, on the notebook part of Mr. Penton going back out.

(R. 207). (Emphasis supplied.)

* * *

> Q. So, you indicated that Officer Penton showed him a photograph and that the - - Gary Summitt immediately got excited and identified him?
> A. When Officer Penton arrived, Officer Penton talked to mr. Summitt prior to him going back to his car to secure his notebook where he had the picture at, I'm presuming.
> Q. Uh-huh.
> A. Officer Penton will have to testify to that. But after Officer Penton was satisfied with what Mr. Summitt was saying to him, Officer Penton produced a photograph This photograph I recognized as being an old photograph of Mr. Johnson and Mr. Summitt backed against the wall. He put his hands in the air. He said, "That is the person I saw."

(R. 208-09).

* * *

> CROSS EXAMINATION BY MR. JOHNSON:
>
> Q. Investigator Smith, you stated that Gary Summitt had given a description to you once you arrived upon the scene, is that correct?
> A. That's correct, yes, sir.
> Q. And after Joe Penton arrived, you told

him to go get a picture - - or asked him if he had a picture of Marvin Johnson, is that correct?
A. Yes, sir, that's correct.
Q. So, you suspected from the description that Gary Summitt gave you that the robber was, in fact, Marvin Johnson, is that correct?
A. No, sir, whenever the radio room was dispatching the description of this white male, that is whenever [sic] I suspected it was Marvin Johnson.

(R. 210).

* * *

A. Yes, sir, a white male, described as being by hisself, with reddish-type hair, six foot to six foot one, and he had shot somebody. I had attended several intelligence briefings where - - that a person of this description had been known to rob places with this type of a method of operation. That's whenever I told the radio room to get Joe Penton now, get ahold of Lieutenant Rose, get ahold of Steve Dunn. We're probably going to know who this person is.
Q. So, <u>did you immediately form the opinion in your mind that the robber was, in fact, Marvin Johnson</u>?
A. <u>He was a likely suspect, yes, sir</u>.
Q. So, then you went to the scene, is that correct, sir?
A. Yes, sir.
Q. And after obtaining other information from Gary Summitt, you also obtained a description of him, is that correct?
A. That's correct.
Q. And was that generally the same description as you had previously heard over the radio?
A. That is correct, yes, sir.
Q. And then after Investigator Penton arrived, you say he also got a description of Marvin Johnson - - or got a description of the robber from Gary Summitt?
A. Before Joe would produce the photograph for me, he says - - and he started talking with Gary Summitt. At this particular time, <u>I had already satisfied myself that Marvin Johnson was the most likely suspect. Then, Joe goes back out to the car. Then he comes back to Gary again and he said, "Is this the subject?"</u>
Q. <u>Okay, and Gary identified that photograph, is that correct</u>?
A. <u>Yes, sir, he did</u>
Q. Was he very positive in his identification?
A. I thought to the point to where it scared him when he seen the picture. He backed away from the counter and said, "That's the man. That's the man." He lost his composure and he started crying.

(R. 211-12). (Emphasis supplied.)

It is obvious that the identification procedure that occurred in this case was recklessly suggestive in that it was calculated to cause instant verification, which it did. Because it was so likely to create mistaken identification, it was improper. It may be that not all confrontation procedures mandate automatic exclusion of the out-of-court identification. In such a situation, the confrontation evidence could be admissible if, despite its suggestive aspects, the out-of-court identification possesses certain features of reliability. Alternatively the identification procedure may have been impermissibly suggestive, but the courtroom identification have an independent source. Manson v. Brathwaite, supra, 432 U.S. at 113. In the instant case, the record demonstrates that the photographic show-up was plainly improper and suggestive. Whether an "independent source" existed for the courtroom identification was never properly determined.

This is because the two-part analysis as to admissibility of an out-of-court identification must be made by the motion judge in the first instance. See generally State v. Walker, 429 So. 2d 1301, 1304, 1306 (Fla. App. 4 Dist. 1983) (appellate court could not vitiate judgment of trial judge where ruling was supported by precedent); Baxter v. State, 355 So. 2d 1234, 1238 (Fla. 1978) ("determinations of threshold trustworthiness" must be made by trial judge who must consider totality of circumstances surrounding extrajudicial identification and appellate court can then review to determine whether trial judge erred). In the case at bar, the trial judge never made findings of fact as to why he was denying the motion to suppress. In fact, his order was not filed until Feb. 12, 1979, exactly one month after the override order sentencing Mr. Johnson to death. Without specific findings by the trial/motion judge, an appellate court is without a record to review for error. This Court cannot fill the void left by the

trial judge, and could not uppon direct appeal. This Court cannot conduct its own analysis as to whether the improper out-of-court identification so impermissibly tainted the in-court-identification thereby rendering it unreliable. "Reliability is the linchpin in determining the admissibility of identification testimony" Manson, 432 at 114, but it has a factual predicate, the determination of which is for the trial judge to make, and in this case that was not done.

In Manson v. Brathwaite, the facts were as follows: Glover, a trained black undercover state police officer, purchased heroin from a seller through the open doorway of an apartment while standing for two or three minutes within two feet of the seller in a hallway illuminated by natural light. A few minutes later Glover described the seller to another police officer. The other police officer, suspecting from the description that the defendant might be the seller, left a police photograph of him at Glover's office. Glover viewed it two days later and identified it as the picture of the seller.

The Supreme Court criticized the single-photograph display, see Manson, 432 U.S. at 116 citing Simmons v. U.S. 390 U.S. at 383, but concluded that the "corrupting effect" of the identification was not outweighed by the "indicators of Glover's ability to make an accurate identification." Id. Those indicators were that the officer who left the photograph at Glover's office was not present when Glover first viewed it two days after the event, thus there was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone there was no coercive pressure to make an identification arising from the presence of another. The identification therefore was made in circumstances allowing care and reflection.

The facts in the case at bar are far more egregious than those in Manson v. Brathwaite. Here the eyewitness Summitt

testified that he saw four photographs, three of which depicted Mr. Johnson (R. 177). Unlike the officer in Manson, Summit was not alone at the time he made his identification, but was in the presence of several law enforcement officers. "Coercive pressure" was rampant and there were no "circumstances allowing care and reflection." One officer, in Summit's presence, asked another officer whether he had "a picture of Marvin Johnson with [him]" (R. 207). See also R. 195, 196, 210. The second officer testified that then he went to his cruiser and retrieved, one photo only of Mr. Johnson (R. 207). When he returned to the pharmacy, he showed it to Summit and said: "Look at this and tell me . . . if this is the person", or "Is this the subject?" (R. 175, 212). The other officer in Manson "suspected" who the drug seller might be. Similarly, in this case an officer testified that he had "satisfied himself" even before the photo display, that Mr. Johnson had been the one who committed the offense. The difference between the two cases, was that in this case the officer conveyed his own suspicion to the eyewitness as to Mr. Johnson's culpability (R. 210-12). Another suggestive aspect of the procedure in this case, not present in Manson, was that one of the three displayed photographs of Mr. Johnson was a "prison" photograph (R. 176-77). Following these blatant suggestions, if Summitt had any lingering doubt as to the soundness of his identification, it was likely dispelled when he heard the police say that "[w]e figured this might have been him because he'd been . . . robbing drugstores around in this area -- In Florida . . . " (R. 178, 181). Moreover, Summitt admitted hearing the police say that "the FBI had been after [Mr. Johnson] . . . six months. . . . " and that he was "an escapee from a Tennessee prison." (R. 189-90).

"It is deeply ingrained in human nature to agree with the expressed opinions of others--particularly others who should be more knowledgeable--when making a difficult decision." Manson

v. Brathwaite, supra, 432 U.S. at 134 (Marshall, J. with whom Brennan, J. joins, dissenting) and authorities cited. Based on the above facts, it is no wonder Summit so readily reinforced the officers' shared opinion that the offense was committed by Mr. Johnson.

C. APPELLATE COUNSEL WAS INEFFECTIVE

Although appellate counsel wrote that in the present case "the crucial issue [was] identification," he could not have more understated the matter of the suggestive photographic procedure. He wrote:

> Additionally, a significant factor affecting the accuracy of the identification made by Gary Summitt was the fact that a photograph of appellant was shown to him by the officers under circumstances which indicated to Mr. Summitt that the authorities suspected appellant of perpetrating the crime.

(Initial Brief of Appellant, pp. 31, 36).

> The additional fact of the officers showing single photographs of appellant to the eyewitness shortly after the crime was, according to Dr. Miller, very significant as to the accuracy of the identification.

(Id. at 32).

Indeed the photographic show-up was "very significant" which is why trial counsel vigorously challenged the improper procedure employed by the police. The identification procedure was grossly suggestive, and it provided the only evidence of consequence in the case. It was patently unreasonable not to present the issue on appeal. This claim required no elaborate presentation.

The prejudice caused by counsel's major misstep is manifest. An irrefutable opportunity to have this Court declare the photographic show-up as improper was patently lost. Identification by a single eyewitness was the critical factor leading to Mr. Johnson's conviction. If the out-of-court identification, which was overwhelmingly suggestive, tainted the

latter in-court identification so as to render the likelihood of mistaken identification great, which it must have, then there was a denial of due process and right to counsel. Mr. Johnson's thus is entitled to have his conviction reversed. In order to determine whether an independent source exists for the courtroom identification, this case must be sent back to the trial judge for the appropriate findings. At least full briefing, and a new appeal, is required.

CLAIM V

THE AUTOMATIC EXEMPTION OF MOTHERS FROM THE JURY VENIRE VIOLATED MR. JOHNSON'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Mr. Johnson was prevented from having women with children serve on his jury during his capital trial in December, 1978. At the time of Mr. Johnson's trial, Florida law provided an automatic exemption from jury service upon request for any pregnant women and for women with children under age 15. Fla. Stat. Sec 40.01(1)(1977). During voir dire, at least two women were so excused, without regard to any consideration, other than the whim of the potential juror. For example, potential juror Britt was excused simply for the asking:

> JUDGE: Mrs. Britt, you have minor children at home, do you?
> JUROR: Yes, sir. My youngest is eight.
> JUDGE: Do you have anybody at home that can take care of them if you are not excused tonight?
> JUROR: I think I could possible make arrangements. I would have to get somebody close because there would be no way my sister in Pace could get them to school.
> JUDGE: If by chance you were chosen on the jury, I can promise you you will have to remain overnight, but you would definitely have an opportunity to contact someone, if you want to. Do you think you can make arrangements if we do that?
> JUROR: Yes.
> JUDGE: Mrs. Britt, you have a right to be exempt from jury duty if you want to. If you ask for it, I will excuse you. If you don't want to exercise your exemption, you may not and I will leave you here and let you be considered. It is up to you, ma'am.

JUROR: I would really rather not.
JUDGE: Okay, Mrs. Britt. If you will, come up here and talk to Mrs. Kemp and she will explain to you what to do. She is exempt, Mrs. Kemp.
(Whereupon, said juror was excused and left the courtroom.)

(R. 704-705); see also potential juror Mrs. Stevenson ("Judge: I think she is entitled to the exemption. It is not necessary to stipulate to anything." (R. 654)). Nothing other than being a mother was required.

This Court is attuned to discrimination on the basis of sex, whether that discrimination is hidden in seemingly legitimate tools like peremptory challenges, see Slappy v. State, 13 F.L.W. 184 (Fla. 1987), whether that discrimination is contained in seemingly legitimate or rational laws like inheritance statutes, and whether that discrimination is occurring under this Court's own roof, in the day-to-day operations of the courts in Florida over which this Court rules. See In Re: Gender Bias Study Commission, Supreme Court Order entered June 9, 1987. Thus, this Court has held that Fla. Stat. sec. 40.013(4), which excuses from jury service "expectant mothers and mothers who are not employed full-time with children under 15 years of age, upon request . . .," violates the equal protective clause of the fourteenth amendment. See Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982). However, because this Court has in the past believed "that mothers with young children do not comprise a constitutionally significant class," Hitchcock v. State, 413 So. 2d 741, 745 (Fla. 1982), convictions challenged upon sixth amendment "fair cross-section" grounds have been sustained, notwithstanding the fourteenth amendment constitutional infirmity in Section 40.013(4). How the statute can be unconstitutional under the fourteenth amendment, and yet not produce constitutional convictions is simple -- it cannot so operate. Mr. Johnson's conviction and sentence must be vacated.

In Anthony, supra, this court was on the right track:

> Although section 40.013(4) is not being challenged in this proceeding on sixth amendment grounds, we note that courts look with disfavor on broadly drawn automatic exemptions from jury service. In Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed. 2d 579 (1979(, the United States Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home and family life. In Lee v. Missouri, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed. 2d 736 (1979(, the Court ordered that the Duren decision be retroactively applied to all juries sworn after the 1975 ruling in Taylor v. Louisiana, 419 U.S. 522, 95 S.CT 692, 42 L.Ed. 2d 690 (1975), which set out the basic constitutional guidelines for jury selection.

Anthony, 418 So. 2d at 206. The Court went on to hold that the statute violated the equal protection clause of the fourteenth amendment.

Five months before Anthony, this Court had also cited Duren, but in a pure sixth-amendment fair cross-section analysis, and concluded that the same statute provides "only a limited exemption" of persons not "compris[ing] a constitutionally significant class." Hitchcock, 413 So. 2d at 745. The Court has continued to abide by Hitchcock, but with scant analysis. See Henderson v. State, 463 So. 2d 196, 201 (Fla. 1985) ("The sixth amendment was not involved in [Anthony] and we do not read it as announcing any right of defendants that would support appellant's [Sixth Amendment] argument here."); Parker v. State, 456 So. 2d 436, 442 (Fla. 1984) (Anthony "concerned denial of equal protection . . .")

The application of this statute requires relief, regardless of whether Mr. Johnson bases his claim on sixth or fourteenth amendment law. Counsel should have presented this issue on apeal, and it is such a fundamental error that this Court should address it now. First, the fourteenth amendment requires relief. Mr. Johnson need not be a member of the affected class in order to object to discrimination in the selection of his jury. Peters v. Kiff, 407 U.S. 493 (1972). Since the statute violates the

fourteenth amendment, and since Mr. Johnson has standing to complain of its application to him, then, ipso facto, his conviction and death sentence must be reversed because of fourteenth amendment error. The sixth amendment analysis is equally simple, it just requires that the court recognize that Hitchcock was an incorrect decision -- women with children are a constitutionally significant group.

Women comprise a recognizable class. Duren V. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522, 531 (1975). This Court did not explain in Hitchcock why women with children somehow left the class of "women", and the Court did not explain why mothers were any more or less "significant" than women without children. There can be no reasonable explanation. Of course, women with children are an important and distinctive group -- they were excluded to begin with because of real, supposed, and forced "characteristics." While it is true that the reasons for the law are challengeable, it is plain that mothers do have legitimate and substantial class characteristics, and that their exclusion from jury pools violates the sixth amendment.

According to the 1980 Census of Escambia County in 1980, females over eighteen years old with children under eighteen years old represented 16.7% of the total county population. While the statute is limited to mothers with children under age 15, the census data does not include pregnant women, so it is fair to assume that the operation of the statute in Escambia County at the time of his trial was such that around 16% of the population was, or could instantly be excluded from, the venire. In a fair cross-section sixth amendment analysis, it is only required that there be disproportionality in jury venire membership among discrete classes of individuals in the community. There was.

CONCLUSION

Mr. Johnson respeectfully requests that this Court stay his execution. He also requests that a new appeal be ordered. In addition, he requests that his conviction and sentence be vacated.

Respectfully submitted,

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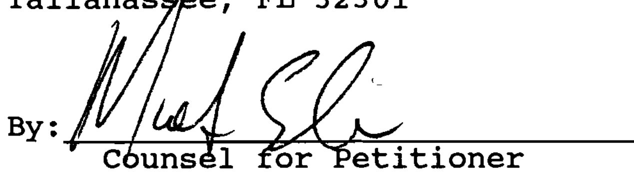
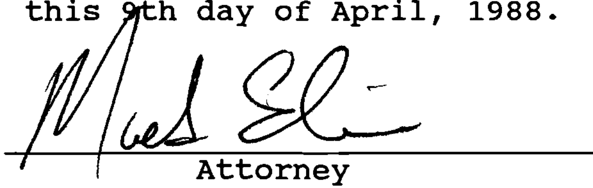


By: ______________________
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by hand delivery to Mark Menser, Assistant Attorney General, Department of Legal Affairs, 111-29 North Magnolia Street, Tallahassee, FL 32301, this 9th day of April, 1988.



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Attorney

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