IN THE SUPREME COURT OF FLORIDA

NO. 72466

NORMAN PARKER,

Petitioner,

v.

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

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

JULIE NAYLOR
Staff Attorney

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

Counsel for Petitioner

I. 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. Parker's capital conviction and sentence of death. See Parker v. State, 456 So. 2d 436 (Fla. 1984). 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. Parker 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. Parker's capital conviction and sentence of death, and of this Court's appellate review. Mr. Parker'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., 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. Parker's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Parker's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Parker'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; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Parker will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ.

Mr. Parker's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Parker's petition includes a request that the Court stay his execution (presently scheduled for June 22, 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. Parker'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.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Norman Parker asserts that his convictions and his sentence 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.

III. CLAIMS FOR RELIEF

CLAIM I

MR. PARKER WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Parker was arrested in Washington, D.C. on August 23, 1978, in connection with the shooting of a man in a local bar. He was arraigned for that crime on August 24, 1978, and counsel was appointed on that same date.

On August 29, 1978, Detectived Pontigo and Lopez from the Metro-Dade (Miami) Police Department travelled to Washington to interrogate Mr. Parker (ROA, Vol. II, pp. 5-6). Dade County had filed a detainer for Mr. Parker in regards to the Miami Homicide with the Washington, D. C. authorities on August 25, 1978.

Detective James Greenwell of the Washington, D. C. Police Department transported Mr. Parker from the district jail to the U.S. Attorney's Office where Pontigo and Lopez had arranged to

conduct their interrogation of Mr. Parker (ROA, Vol. II, pp. 6, 23-24). While in route to the U. S. Attorney's Office, Mr. Parker reminded Detective Greenwell of the previous court-appointment of an attorney, and asked if he could have that attorney present for the interview with the Miami detectives. Detective Greenwell told Mr. Parker in response not to worry about it, that it would be straightened out later (ROA, Vol. II, p. 24). Again, before entering the interview room, Mr. Parker informed Greenwell that he desired to see his attorney. Again, Greenwell's response was that those matters could be straightened out in the interview room (Id.). Moreover, Greenwell then told Mr. Parker that he should talk to the detectives, because he could help himself by doing so (ROA, Vol. II, p. 25). At this point, it was Mr. Parker's belief that he was going to be interrogated with respect to the Washington, D.C., offense for which he had already been arrested and arraigned, and for which counsel had already been appointed (ROA, Vol. II, p. 25).

Upon Mr. Parker's entry into the interrogation room, Detective Pontigo advised him of his constitutional rights, and had him sign a waiver form (ROA, Vol. II, p. 7). Greenwell was present when Mr. Parker signed the waiver, and himself signed the form as a witness, along with Detectives Pontigo and Lopez.

Det. Pontigo then asked Mr. Parker if he was represented by an attorney, and he replied that he was and gave the attorney's name. However, Mr. Parker told Pontigo that he did not want his attorney present during questioning if the questions involved only the Dade County case, and not the D.C. case (ROA, Vol. II, p. 9). Mr. Parker gave this response because he belived the Metro-Dade officers were there to discuss his escape from the Opa Locka work release center (ROA, Vol. II, p. 25). He was under the impression because when Lopez and Pontigo introduced themselves to him, they said, "We have your parole papers," and "Why did you leave?" (ROA, Vol. II, p. 26). This belief is

confirmed by Det. Pontigo, who testified that the first thing they talked about was Mr. Parker's escape from Dade County (ROA, Vol. II, p. 11). The focus of the interrogation, however, soon moved to the Miami homicide, and several incriminating statements were elicited. These statements were used against Mr. Parker at his trial, and in fact became central to that proceeding.

It is beyond dispute that the fifth, sixth and fourteenth amendments to the United States Constitution prohibit compelled self-incrimination and the extraction of statements in violation of the right to counsel. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) held that custodial interrogation must be preceded by advise to the accused that he/she has the right to remain silent and the right to the presence of an attorney. 384 U.S. at 479, 86 S. Ct. at 630. After such advise is given, if the accused indicates he/she wishes to remain silent, interrogation must cease; if he/she indicates a desire for counsel, interrogation must cease until counsel is provided. Id. at 474, 86 S. Ct. at 1627.

In Edwards v. Arizona, 101 S. Ct. 1880 (1981), a bright line test was developed. After an accused has invoked his right to have counsel present during custodial interrogation, no further interrogation can take place until counsel is provided, unless the accused himself/herself initiates it. A valid waiver of the right to counsel cannot be established merely be showing that the accused responded to police-initiated custodial interrogation, even if further advice of rights is given. Id., 101 S. Ct. at 1884-5. Of course, there is no question here as to whether Mr. Parker initiated the interrogation -- he clearly did not.

The law today is Michigan v. Jackson, 106 S. Ct. 1404, 1409 (1986):

> [A]fter a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment--the constitutional right to the assistance of

> counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Thus,

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Jackson, 106 S. Ct. at 1411 (emphasis supplied).

Norman Parker had the right to have counsel present at the interrogation by Pontigo and Lopez. His right was violated, and under Edwards or Jackson, he is entitled to relief. The discussion below explains his entitlement to relief under the authority of both Edwards and Jackson and the cognizability of this issue in the instant proceedings.

A. EDWARDS V. ARIZONA AND INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Under Edwards v. Arizona, 451 U.S. 477 (1981), once an accused invokes his right to have counsel present during custodial interrogation, not only must interrogation immediately cease, see Miranda, supra, Michigan v. Mosely, 423 U.S. 96, 104 (1975), but it may not be reinitiated by law enforcement without counsel present:

> . . . [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

> communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85 (citations omitted)(emphasis added).

There is no question here but that Norman Parker invoked his right to counsel prior to the interrogation at issue. He had initially invoked it at his arraignment on the Washington, D.C., charges, and had had counsel appointed. Detectives Greenwell, Pontigo, and Lopez were all aware that Mr. Parker had invoked his right, and had had counsel appointed, but nevertheless initiated interrogation and procured a waiver. Their actions in obtaining the statements, and the subsequent admission of the statements at trial, violated Edwards.

The violation of Mr. Parker's fifth, sixth and fourteenth amendment rights was even more stark, however: Mr. Parker again asserted his right to counsel immediately prior to the interrogation, but the invocation was again ignored. Again, all interrogative efforts should have ceased at that point, and not been reinitiated until counsel was notified. Law enforcement initiated the interrogation, procured Mr. Parker's waiver, and elicited statements.

It matters not that Mr. Parker formally waived his rights after the interrogation was initiated. Under Edwards, the waiver is invalid:

> a valid waiver of that right cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards, 451 U.S. at 484. Nor does it matter that the accused executes a written, rather than an oral waiver:

> In Edwards . . . we rejected the notion that, after a suspect's request for counsel, advise of rights and acquiescence in police-initiated questioning could establish a valid waiver . . . . written waivers are insufficient to justify police-initiated interrogation after the request for counsel in a Fifth Amendment analysis . . .

Michigan v. Jackson, 106 S. Ct. 1406, 1410-11 (1986).

This issue was raised on Mr. Parker's direct appeal as a violation of both Miranda and Edwards. Although Edwards did not exist at the time of the pretrial suppression hearing, it was issued before Mr. Parker's initial direct appeal brief was filed. While Mr. Parker's direct appeal was pending, but before oral argument, the United States Supreme Court decided Solem v. Stumes, 465 U.S. 638 (1984), which held that Edwards would not be retroactively applicable to cases pending on collateral review at the time it was issued. Stumes, supra. Mr. Stumes was appealing a federal district court's denial of his petition for a writ of habeas corpus to the Fifth Circuit at the time Edwards issued, and thus it was not retroactively applied to his case Id.

At oral argument before this Court, counsel for Mr. Parker inexplicably announced to the Court that his Edwards argument was no longer valid after Stumes, and waived all but his Miranda-based challenge to the admission of the statements. See Parker v. State, 456 So. 2d 436, 441 (Fla. 1984). This Court analyzed the claim solely on the basis of Miranda, and found that Mr. Parker had validly waived his Miranda rights.

Appellate counsel's analysis of Stumes was dead wrong, and prevented this Court from analyzing this claim under the correct Edwards standard, a standard under which Mr. Parker would have been and is entitled to reversal. Solem v. Stumes, supra, was clear in holding that Edwards would not be applied retroactively to collateral review. "At a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions. For purposes of this case, that is all we need decide about Edwards." Id., 104 S. Ct. at 1345 (emphasis added). When Edwards was decided, Mr. Stumes' appeal from the denial of a writ of habeas corpus in the United States District Court was pending before the Fifth Circuit Court of Appeals.

By contrast, Mr. Parker had not even filed his brief on direct appeal when Edwards was decided. Stumes was decided while

Mr. Parker was proceeding on direct appeal, and his conviction was thus not "final". One year later, Shea v. Louisiana, 105 S. Ct. 1065 (1985), confirmed what the Stumes court had already made clear: i.e., that the prohibition against retroactive application of Edwards applies only to decisions which became final before Edwards was issued.

As discussed above, Mr. Parker was and is entitled to relief under Edwards. Edwards was applicable to this claim on direct appeal, and would have been applied by this Court but for appellate counsel's ineffectiveness. This Court must now reach this issue, apply the appropriate standard, and grant Mr. Parker the relief to which he is entitled. Should there be any factual question as to the ineffectiveness of appellate counsel's actions, an evidentiary hearing should be held.

B. MICHIGAN V. JACKSON; NEW LAW

Edwards and Miranda aside, this case involves flagrant and fundamental violations of bedrock sixth amendment principles. Formal judicial proceedings had been initiated against Mr. Parker, he had been arraigned, and the sixth amendment right to counsel had attached. The court had in fact appointed counsel for Mr. Parker at his arraignment. Law enforcement was well aware that Mr. Parker was represented by counsel, but nevertheless proceeded to initiate and then interrogate him without notifying and without the presence of counsel.

The law today is Michigan v. Jackson, 106 S. Ct. 1404, 1409 (1986):

> [A]fter a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment--the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Thus,

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Jackson, 106 S. Ct. at 1411 (emphasis supplied). Norman Parker asserted his right to counsel. Law enforcement nevertheless initiated questioning. Under Jackson, the resulting statements were flatly inadmissible.

The "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' beetween him and the State." Michigan v. Jackson, ___ U.S. ___, 106 S. Ct. 1404, 1408-09 (1986), quoting, Maine v. Moulton, ___U.S. ___, 106 S. Ct. 477, 479 (1986). This sixth amendment right to counsel attaches once adversarial proceedings have commenced. See Jackson, supra at 1408-09; Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964); see also, (Jimmy Lee) Smith v. Wainwright, 777 F.2d 609, 619 (11th Cir. 1985)("Adversarial judicial proceedings were initiated against Smith when he was arrested and charged . . ."), citing, United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 2297 (1984). Consequently, once adversarial proceedings commence, i.e., once the "critical stage" right to counsel is triggered, "the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage . . ." Jackson, supra, 106 S. Ct. at 1409; see also, United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980).

There can be no doubt but that formal judicial proceedings against Mr. Parker had commenced. He had been arrested, and arraigned at a formal proceeding. He had requested and had been appointed counsel. The sixth amendment right to counsel had attached:

> Once the right to counsel has attached and been asserted, the State must of course honor

> it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Jackson, supra, 106 S. Ct. at 1410 n.8 (emphasis supplied), citing, Maine v. Moulton, 106 S. Ct. 477, 479 (1985). The illegalities involved in law enforcement's actions in this case speak for themselves. The State gave no "respect" to Norman Parker's sixth amendment rights. Moulton, supra. To the contrary, the State flouted them.

Of course, after law enforcement initiated their interrogations, Mr. Parker signed waivers. This Court relied on those "waivers" to deny relief on direct appeal. Parker v. State, 456 So. 2d at 441 ("defendant voluntarily waived his Miranda rights and agreed to talk to the Metro-Dade police without his counsel present"). On this point too Jackson is instructive: "[W]ritten waivers are insufficient to justify police-initiated interrogations after a request for counsel," id. at 1410-11, or after the critical stage right to counsel has attached. Id.; see also, Edwards v. Arizona, 451 U.S. 477, 484 (1981). By now, of course, it is also settled that no "waiver can be established by the fact that Mr. Parker eventually responded to the questioning. See Jackson, 106 S. Ct. at 1410 n.9; Brewer v. Williams, 430 U.S. 387 (1977); Edwards, 451 U.S. at 484 n.8.

Michigan v. Jackson has now significantly changed the analysis applied by this Court on direct appeal, and shows why the Court'a analysis can no longer be squared with the federal constitution's guarantees. Michigan v. Jackson is a significant, retroactive change in law -- a change which announced a fundamental constitutional precedent which was unavailable at the time of Mr. Parker's trial and direct appeal proceedings. Mr. Parker's claim is therefore more than properly now brought before

the Court. See Witt v. State, 387 So. 2d 922 (Fla. 1980); 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); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). The issues should now be revisited, for it is now clear that the sixth amendment's guarantees were made barren by the State's extraction of statements from Norman Parker prior to his capital trial. Of course, that is where the sixth amendment's protections are most critically needed:

> [W]hat use is a defendant's right to effective assistance of counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confeses?

Maine v. Moulton, 106 S. Ct. at 485, citing, Spano v. New York, 360 U.S. 315, 326 (1959)(Douglas, J., concurring).

Unlike Edwards, supra, there is no question but that Jackson is, under the prevailing constitutional standards, entitled to retroactive application. Edwards was not given full retroactive effect because it was grounded on Miranda's prophylactic exclusionary doctrine, rather than on a specific Bill of Rights protection. Jackson, on the other hand, is grounded on an essential -- perhaps the most essential -- constitutional right; the sixth amendment right to counsel. Jackson is thus precisely the type of change in law which, under the applicable standards, must be given retroactive application. The Eleventh Circuit has already applied Jackson retroactively to capital sentencing proceedings, see Fleming v. Kemp, 837 F.2d 940 (11th Cir. 1988)(challenged statements introduced at sentencing but not guilt-innocence phase of trial, and currently has before it the question of whether Jackson should apply retroactively to the guilt-innocence phase of capital trials). See also, Collins v. Kemp, Case No. 86-8439 (pending in 11th Cir. on question of retroactivity of Jackson).

Retroactivity analysis and doctrine is premised on the

fundamental principle that every new decision has a different purpose and history, requiring an independent determination of whether it will be retroactive. As the Supreme Court has frequently stated:

> Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. Accordingly as Linkletter and Tehan suggest, we must determine retroactivity "in each case" by looking to the peculiar traits of the specific "rule in question." [citations omitted].

Johnson v. New Jersey, 384 U.S. 719, 728 (1966). See also, Linkletter v. Walker, 381 U.S. 618, 629 (1965); Tehan v. Shott, 382 U.S. 406, 410 (1966); Stovall v. Denno, 388 U.S. 293, 297 (1967).

The effect of a new constitutional rule depends on "particular relations and particular conduct of rights claimed to have become vested, of status, of prior determinations deemed to have finality," and other considerations of public policy. Lemon v. Kurtzman, 411 U.S. 192, 199 (1973). Consequently, if the Court's decision in Jackson is deemed to constitute a new rule, its retroactivity or non-retroactivity cannot be summarily determined by automatic resort to an arguably analogous Supreme Court decision. Rather, the retroactivity of Jackson must be determined independently, using those criteria discussed in Witt, supra. See Witt, 387 So. 2d at 926; Stumes, supra, 465 U.S. at 642; see also Robinson v. Neil, 409 U.S. 505, 507-08 (1973); Brown v. Louisiana, 447 U.S. 323 (1980); Hankerson v. North Carolina, 432 U.S. 233 (1977). A proper consideration of the criteria governing retroactivity demonstrates that Jackson differs materially from Edwards[1] and should be given full

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[1]In Stumes, the Supreme Court analyzed the retroactivity of Edwards by examining the purposes served by its bright line rule in the fifth amendment context. Most importantly, the Court

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retroactive effect.

With respect to the first of the three criteria, Jackson's purpose extends far beyond the articulation of a "prophylactic" rule to be implemented in the setting of custodial interrogation. Instead, Jackson deals with the fundamental right to counsel and that right's relationship to judicial proceedings. Jackson, 106 S. Ct. at 1408-09. The Court held that the assertion of the right to counsel in a formal proceeding precludes any attempt by any State officer to initiate custodial interrogation or otherwise undermine the sixth amendment's assurance. Jackson's purpose is to protect the integrity of the judicial process and to further the mandates of the sixth amendment, not to control the conduct of police officers. As the majority stated in Jackson:

> [T]he reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after [a criminal defendant] has been formally charged with an offense than before . . . . The "Sixth Amendment guarantees the accused at least after initiation of formal charges, the right to rely on counsel as a medium between his and the State."

Jackson, 106 S. Ct. at 1408, citing Maine v. Moulton, 106 S. Ct. at 479. After judicial proceedings have been conducted and/or the sixth amendment right to counsel has been asserted, a person who was simply a "suspect" becomes the "accused", and the sixth amendment right to the assistance of counsel is triggered. This

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noted that Edwards established a prophylactic rule whose sole purpose is to monitor police conduct. The Court examined the history behind Edwards by looking at a long line of fifth amendment cases. This resulted in the Court's conclusion that Edwards should not be fully retroactive. See Stumes, 465 U.S. at 647, 648. However, the Court's conclusion on the retroactivity of Edwards, determined by an examination of Edwards' particular purpose and its unique fifth amendment progeny, can in no way dictate whether Jackson -- a case based on the relationship between the right to counsel, the integrity of judicial proceedings and police misconduct -- should be fully retroactive.

right ensures the fairness, justice, and integrity of the judicial process. It has an importance far beyond "prophylactic" rules governing investigatory police conduct which might violate constitutional rights. Compare, Solem v. Stumes, supra, with Michigan v. Jackson, supra, and Fleming v. Kemp, supra.

The Supreme Court has given full retroactive effect to every other decision protecting the sixth amendment right to counsel where, as here, deprivation of the right would affect the fundamental fairness of the judicial process. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); Arsenault v. Massachusetts, 393 U.S. 5 (1968); McConnell v. Rhay, 393 U.S. 2 (1968).

Nor does the second retroactivity criterion support limiting Jackson to prospective relief. The Court's decision in Jackson was clearly foreshadowed by the long line of cases that held that once the sixth amendment right to counsel has attached, the "police may not employ techniques to elicit information from an uncounseled defendant that might have been proper at an earlier stage of their investigation." Jackson, 106 S. Ct. at 1408-09. See, e.g., Massiah v United States, 377 U.S. 201 (1964); McLeod v. Ohio, 381 U.S. 356 (1965); Kirby v. Illinois, 406 U.S. 682 (1972); Beatty v United States, 389 U.S. 45 (1967); Brewer v. Williams, 430 U.S. 387 (1977); United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton, 106 U.S. 474 (1985). Accordingly, in contrast with Edwards, there simply is no justified reliance on prior law and precedent which requires that the decision in Jackson be limited to prospective application.[2]

Finally, the retroactive application of Jackson would not work any ill-effect on the administration of justice, the third

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[2]This Court has retroactively applied other fundamental constitutional doctrines, see Downs v. Dugger, supra (applying Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), retroactively), which were foreshadowed by and followed from an antecedent precedent. Id. (Lockett foreshadowed Hitchcock.)

consideration to be factored into a retroactivity determination. Given the history of restrictions on custodial interrogations after sixth amendment rights have attached, violations of the right to counsel through interrogations after formal proceedings have generally not occurred because of police reliance on pre-existing rules or law. As Justice Rehnquist points out in his dissent in Jackson, the empirical evidence does not suggest that police commonly deny defendants their sixth amendment right to counsel through improper interrogations. Jackson, 106 S. Ct. at 1413. As a result, the fully retroactive application of Jackson would not jeopardize the states' legitimate interest in finality or "seriously disrupt" the administration of justice by requiring relitigation of issues on the basis of stale evidence. See Allen v. Hardy, ___ U.S. ___, No. 84-6593, slip op. at 5-6 (June 30, 1986).

Mr. Parker has consistently argued that his convictions and sentence of death are unconstitutional because of the admission of improperly obtained statements. It would be a gross miscarriage of justice to permit his convictions and death sentence to stand simply because his arguments were made before Jackson held that they were constitutionally sound and correct. Accordingly, Jackson should be held applicable to the case at bar and the appropriate relief should follow.

As the arguments presented in this petition demonstrate, this issue is squarely before this Court on the merits. The merits demand relief.[3]

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[3]At a minimum, a stay of execution would be proper for the Court to determine the retroactivity of Michigan v. Jackson after full briefing by the parties. See Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987)(stay of execution granted and parties directed to brief the question of whether Lockett is to be applied retroactively). See also Henderson v. Dugger, Case No. 88-54-Civ-OC-16 (FDC, MD, Ocala Div. April 11, 1988)(Order staying execution in light of Collins v. Kemp).

CLAIM II

THE TRIAL COURT'S CONSTITUTIONALLY DEFICIENT FELONY-MURDER INSTRUCTION WAS FUNDAMENTAL ERROR WHICH VIOLATED MR. PARKER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO URGE THIS DISPOSITIVE, CRITICAL CONSTITUTIONAL CLAIM

The State's theory in this case was felony-murder: that the decedent was killed to further a sexual battery committed during the course of a robbery. In his closing argument, the prosecutor at length explained to the jury that the State need not prove premeditated murder but could rest its proof of guilt on felony-murder. (See generally, ROA, Vol. 23, pp. 1211, et seq.) Similar comments had been made to the jurors throughout the proceedings.

The trial court specifically instructed the jury on premeditated murder (ROA, Vol. 23, pp. 1312-13). Immediately after that instruction, the trial court instructed the jury on felony-murder. The trial court's entire instruction on this issue, involving the State's primary theory of prosecution, was as follows:

> The second method of proving first degree murder is by the felony murder rule.

(ROA, Vol. 23, p. 1313).

Nothing in the trial court's instructions defined felony-murder or explained what the elements of felony-murder were. The jury was left to its own devices to discern the elements of the theory of prosecution on which the State substantially and primarily relied.

In Franklin v. State, 403 So.2d 975 (Fla. 1981), the Florida Supreme Court held that the failure to instruct fully and accurately on the elements of felony murder, including the underlying felony, was fundamental error. Accord. State v. Jones, 377 So.2d 1163 (Fla. 1979). In Franklin, the error was raised

for the first time on direct appeal. Nevertheless, the Court held that where a conviction is sought on the "dual theories of premeditation and felony murder and there is error because the trial judge fails to instruct on the underlying felony, the conviction can stand only if the error is harmless.... The reviewing court must be satisfied beyond a reasonable doubt that the failure to so instruct was not prejudicial and did not contribute to the defendant's conviction." Franklin, 403 So. 2d at 976.

In Mr. Parker's case, instructions on robbery and sexual battery, the underlying felonies, were given. However, the jury was never instructed how to find felony murder from these felonies. During the instruction conference, the instruction on felony murder was discussed:

> MR. WAKSMAN [PROSECUTOR]: that the death occurred as a consequence of while the defendant was engaged in the commission of or attempt to commit. then I have a blank, and I have penciled in sexual battery and robbery.

(ROA Vol. 22, pp. 1105). However, as discussed above, the only instruction actually given was: "the second method of proving first degree murder is by the felony murder rule." No reasonable juror could be expected to discern the elements of felony murder from such an instruction. The jurors were left to their own devices to define what felony murder was. In failing to define and to instruct on the elements necessary for felony murder the trial court violated Franklin, and Mr. Parker's rights to a fundamentally fair and reliable capital jury trial.

After instructions, the jury returned a general verdict of guilt which did not indicate what theory it relied upon. The jury could well have convicted, and probably did convict, Mr. Parker on the "felony-murder" theory, as the prosecutor time and again urged. Yet, the jurors knew nothing of the elements of felony-murder, for the trial court gave them no such instruction. The jury, not knowing the elements, could not have determined

whether those elements were proven beyond a reasonable doubt. Mr. Parker's conviction therefore stands in stark violation of the most rudimentary of due process rights. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); cf. Bryant v. State, 412 So.2d 347 (Fla. 1982).

Furthermore, under the eighth amendment's heightened due process scrutiny, Beck v. Alabama, 447 U.S. 625 (1980), the trial court's fundamental error in its instructions to the jury simply cannot be allowed to stand.

At sentencing, the harmful effects of the felony-murder instruction were compounded. The jury was called on to determine whether "the murder for which it had convicted Mr. Parker was committed while the 'defendant was engaged in' a robbery or sexual battery." The jury was also called on to determine whether the murder was committed for pecuniary gain. The jury's deliberations with regard to these issues was substantially infected by misleading, arbitrary, capricious, and unreliable factors -- the wholly deficient felony-murder instruction.

The errors herein at issue are classic examples of fundamental constitutional error, as this Court has made explicit. See Franklin, supra; Jones, supra. As such, the issue must be determined on the merits and relief must be granted at this time -- fundamental constitutional error must be corrected whenever the issue is presented -- whether on appeal or in post-conviction proceedings. See, e.g., Dozier v. State, 361 So. 2d 727, 728 (Fla. 4th DCA 1978); Flowers v. STate, 351 So. 2d 387 (Fla. 1st DCA 1977); Nova v. State, 439 So. 2d 255, 261 (Fla. 3rd DCA 1983); Cole v. State, 181 So. 2d 698 (Fla. 3rd DCA 1966).

Moreover, Mr. Parker is entitled to relief on this claim because counsel's failure to urge it on direct appeal was an omission reflecting grossly ineffective assistance. No contemporaneous objection bar applied to the issue -- since it involved fundamental error, it was perfectly cognizable on direct

appeal. Counsel however failed to raise this most central constitutional instructional infirmity in Mr. Parker's capital felony murder prosecution and conviction. The claim was obvious; had it been raised, relief would have been granted. Counsel's omission in failing to urge it was prejudicially ineffective.

The appellate level right to counsel also comprehends the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S.Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional... assistance...necessary in a system governed by complex laws and rules and procedures...." Lucey, 1056 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. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So.2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

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

> 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 (emphasis supplied).

In Mr. Parker's case, counsel's unreasonable failure to raise this obvious issue was a glaring omission which infected the direct appeal process with unreliability. The failure to raise this issue cannot be deemed a "tactical" decision. See Wilson v. Wainwright, supra; Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The failure was inexcusable. This court would doubtlessly have reversed had this error been brought to its attention, as it did in Franklin v. State, supra. Habeas corpus relief is proper.

The prosecution's case against Mr. Parker was premised on the felony murder rule. There was, in fact, never any reliance on premeditation. In its opening statement, the State explained to the jury what it intended to prove at trial. It relayed that the testimony would show that Julio Chavez kept repeating over and over "don't hurt her" (ROA, Vol. 16, p. 21). The State went on, "Eventually Mr. Parker, for whatever his reason was, picks up a pillow, puts it to Julio's back. His partner says, muffle the sound, and he puts the gun into the pillow, and everybody hears the shot. From that point on, Julio no longer says leave her alone. Take what you want. Don't bother her." (ROA, Vol. 16, p. 21). This is what the State rested its case on, that Julio Chavez was shot to facilitate the sexual battery of his girlfriend which was perpetrated during the course of yet another

felony -- robbery. This was a classic felony murder case.

This theme was repeated by the prosecution throughout the course of the proceedings. In closing arguments the prosecutor spoke briefly about premeditation, and then laid out his theory:

> I have another way to also prove to you that he's guilty of first degree murder. I do not have to prove both.
>
> When you look at the Indictment, it will say, "Or did kill him from a premeditated design, or while engaged in the commission of a felony."
>
> Was a felony going on? Mr. Velayos [defense counsel] called it a horrendous act. I don't think it is a doubt in anybody's mind that four people got robbed that night. No doubt about it. Even if you say it wasn't him, four people got robbed that night.
>
> The Judge is going to tell you, robbery is a felony.
>
> One person got raped that night, and she's going to tell you sexual battery is a felony.
>
> Now, did somebody get killed during a felony? Well, Julio got shot before Julio's girlfriend got raped, and what was Julio doing before? Leave her alone. Don't bother her. Don't touch her. Take what you want. Leave her alone. Boom, he's dead. Nobody is telling Norman Parker what to do anymore with Silvia.
>
> Was that killing done in the furtherance of the sexual battery? Was that killing done so that nobody was going to bother Norman Parker while he was committing a felony? Was that killing done so there would be one less person to stop him from getting away with the goods that they told you about? That's felony murder, folks.
>
> If the gun went off accidentally, it would be felony murder, because Her Honor will tell you, there's no need for the State to prove premeditation, if we're going on a felony murder theory.
>
> You heard what Silvia said when she was being raped, the gun was to her head. If a gun goes off accidentally, during the commission of a felony, and the person is dead, it is felony murder.
>
> That's not what happened to Silvia, but Julio was killed while this man was committing a robbery and a rape. That's felony murder.

> We have shown you two different ways to prove first degree murder. There's only one thing you cannot do, and that's to convict him twice of felony murder. Only once, even though I have shown it to you two different ways.
>
> You'll get a verdict form that says, first degree murder. It won't say by premeditation or by felony murder. It will say first degree murder. One will say guilty, and you will get another one that will say not guilty. I only have to prove it one way.

(ROA, Vol. 23, p. 1224-26).

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> We have shown you two different ways to prove first degree murder. There's only one thing you cannot do, and that's to convict him twice of felony murder. Only once, even though I have shown it to you two different ways.
>
> You'll get a verdict form that says, first degree murder. It won't say by premeditation or by felony murder. It will say first degree murder. One will say guilty, and you will get another one that will say not guilty. I only have to prove it one way.

(ROA, Vol. 23, pp. 1224-26). The judge, however, never explained to the jury what felony murder was -- the jurors were left to their own devices.

If there was any doubt of the thrust of the State's case, the trial judge, in her sentencing order made the specific finding that the murder was committed in the course of both armed robbery and sexual battery.

> (d) Whether the capital felony was committed while the defendant was engaged in the

> commission of, or an attempt to commit, or the flight after committing any robbery or sexual battery.
>
> FINDING: The evidence at trial, specifically the testimony of the three surviving victims, shows that NORMAN PARKER, JR. murdered Julio Chavez in the course of committing both an Armed Robbery and a Sexual Battery. While the robbery was in progress, and the four victims had been forced to strip naked and lie face down on a bed, the defendant proceeded to rape at gunpoint the only female victim, Silvia Arana. Apparently because her boyfriend, Julio Chavez, began to protest, and therefore became an impediment to the fulfillment of the defendant's criminal desires, the defendant shot Julio Chavez in the back. Although the evidence further supports a finding that the Murder was committed during a Robbery, the Court specifically does not so find since the factors supporting such a finding merge into the next discussed Aggravating Circumstance.

(ROA, Vol. 2, p. 445.)

This was a felony-murder case. Despite this, as discussed above, no instruction was given to the jury on the elements of felony murder.

> The constitutional standard recognized in [In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368] was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . . ." In subsequent cases discussing the reasonable-doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves. See, e.g., Ivan v. City of New York, 407 U.S. 203, 204, 92 S. Ct. 1951, 1952, 32 L.Ed.2d 659; Lego v. Twomey, 404 U.S. 477, 486-87, 92 S.Ct. 619, 625-26, 30 L.Ed.2d 618; Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335. In short, Winship presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307 (1979).

It is incomprehensible that a jury can be convinced "beyond a reasonable doubt of the existence of every element of the offense" if they have not been instructed as to what the elements are. But that is exactly what we are faced with in Mr. Parker's case.

The Florida Supreme Court has consistently held that it is fundamental error for a trial court to fail to properly instruct on the elements of felony murder in a felony murder case. In State v. Jones, 377 So. 2d 1163, (Fla. 1979), the Court explained:

> In the present case, there was a complete failure to give any instruction on the elements of the underlying felony of robbery. This was fundamental error. It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony. Robles v. State.

Id. at 1165.

In Robles v. State, 188 So. 2d 789 (Fla. 1966), an insufficient instruction on the elements of burglary, the underlying felony, was given. The court said:

> The jury is left to its own devices as to what constitutes breaking and entering and as to the character of the felonious intent that is required. As to the precise intent that appellant was alleged to have, these instructions fail to identify the felony that he allegedly intended to commit or even define the term "felony," in the abstract. It is true that the court agreed to give such instructions and the defendant's trial counsel agreed to prepare same but failed to do so. But this failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues. We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so. Canada v. State, Fla.App.1962, 139 So.2d 753; Motley v. State, 1945, 155 Fla. 545, 20 So.2d 798; Croft v. State, 1935, 117 Fla. 832, 158 So. 454; 32 Fla. Jur. "Trial," sec. 186.

Id. at 793 (emphasis added). See also Ingram v. State, 393 So. 2d 1187 (Fla. App. 1981). Here, the constitutional infirmity was

far worse: the trial court failed to define felony murder at all and wholly failed to explain to the jury what the elements of felony murder were.

Neither can the constitutional ills herein at issue be deemed harmless beyond a reasonable doubt -- the State's case here was felony murder. There exists no reasonable basis upon which a gravely deficient felony murder instruction in such a case can be deemed "harmless". Harmless error analysis has never been applied to faulty felony murder instructions in prosecutions founded upon or primarily founded upon felony murder. Cf. Jent v. State, 408 So. 2d 1024, 1031 (Fla. 1982).

Florida's courts, in fact, have consistently recognized that the failure to instruct on the elements of felony murder in a felony murder prosecution involves prejudicial, fundamental error. See, e.g., Brown v. State, 12 FLW 300 (Fla. 3rd DCA 1987). The error is compounded a hundredfold where, as here, felony murder is not even defined. In a jury trial, the primary finders of fact are, of course, the jurors. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

Moreover, under the constitutional standard, if there is any chance that Mr. Parker's jurors relied on felony-murder, then Mr. Parker's conviction must be set aside:

> And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)." Leary v. United States, 395 U.S. at 31-32, 89 S.Ct. at 1545-1546. See Ulster County Court v. Allen, 442 U.S., at 159-60, n.17, 99 S.Ct. at 2226, and at 175-176, 99 S.Ct., at 2234 (POWELL, J., dissenting); Bachellar v. Maryland, 397 U.S., at 570-571, 90 S.Ct. at 1315-1316; Brotherhood of Carpenters v. United States, 330 U.S., at 408-409, 67 S.Ct. at 782; Bollenbach v. United States, 326 U.S., at 611-614, 66 S.Ct. at 404-405.

Sandstrom v. Montana, 442 U.S. 510, 526 (1979). Here, there exists every reasonable likelihood that the jurors relied on the

flawed instruction, as the State urged them to do.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.
>
> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges to responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right to jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Duncan v. State of Louisiana, 391 U.S. 145, 155-56 (1968).

The failure to adequately instruct a jury on the elements of the offense charged is as egregious as a directed verdict; such errors remove central issues from their rightful place in the jury's domain and deny the accused the right to a verdict as to his guilt or innocence provided by the jury. See Rose v. Clark, 106 S. Ct. 3101, 3106 (1986). Such instructional deficiencies,

> created an artificial barrier to the consideration of relevant . . . testimony . . . [and reduce] the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972). The deprivation of a capital criminal defendant's right to a jury verdict simply cannot be deemed "harmless" and much less so "harmless beyond a reasonable doubt." As the Supreme Court has explained:

> Of course, as the Government argues, in a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v. United States, 156 U.S. 51, 105, 15 S.Ct. 273, 294, 39 L.Ed. 343 (1895); Carpenters v. United States, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., supra, 430 U.S. at 572-73. Thus,

> [a] defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 U.S. 73, 95, and n.3, 103 S.Ct. 969, 982, and n.3, 74 L.Ed.2d 823 (1983) (POWELL, J., dissenting); cf. Beck v. Alabama, 447 U.S. 625, 645, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); id., at 22, 99 S.Ct., at 239 (POWELL, J., dissenting).

Cabana v. Bullock, 106 S. Ct. 689, 696 (1986).

Accordingly, Mr. Parker's conviction and sentence of death stand in violation of the fifth, sixth, eighth and fourteenth amendments, and habeas corpus relief is more than proper for all of the reasons discussed herein.

CLAIM III

MR. PARKER WAS DENIED HIS FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES ALTHOUGH MR. PARKER HAD MADE NO RECORD WAIVER OF SUCH INSTRUCTIONS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO URGE THESE CLAIMS ON DIRECT APPEAL

In Brown v. State, 206 So.2d 377 (Fla. 1968), the Florida Supreme Court interpreted Fla. Stat. Section 919.16 to require a trial judge to instruct a jury on every lesser offense necessarily included in the offense charged. This is true even though the proof might satisfy the trial judge that the more serious offense was charged. The Court went on to note that the accused there was entitled to an instruction on larceny because that offense is necessarily included in the crime of robbery. Accord. State v. Washington, 268 So.2d 901 (Fla. 1972); Rayner v. State, 273 So.2d 759 (Fla. 1973); Harris v. State, 438 So.2d 787 (Fla. 1983). As the Court explained in Harris, a trial court's failure to instruct on lesser included offenses is not subject to harmless error analysis -- such errors are fundamental and per se harmful.

As the Florida Supreme Court explained, the Harris holding was consistent with the standard set forth in Beck v. Alabama, 447 U.S. 625 (1980). There, the U.S. Supreme Court held that a death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury was not permitted to consider a verdict of guilt on a lesser included offense:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some

> doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:
>
> "[D]eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (opinion of Stevens, J.).
>
> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

The Florida Supreme Court, in Harris, supra, set forth the standard pursuant to which the right to jury instructions on necessarily included lesser offenses can be waived by a defendant. However, the Court held that the waiver must be expressly made by the defendant himself:

> But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Id. at 797 (emphasis in original).

In Mr. Parker's trial, the instruction conference was held

in chambers directly after Mr. Parker testified. After the conference began, the Bailiff came into chambers and asked if the defendant could "go back." Defense counsel stated that he needed to check with Mr. Parker to see if he would waive his presence at conference; he then left the room to check. Defense counsel re-entered chambers and stated "The defendant waives his presence" (ROA, Vol. 22, p. 1101). The rest of the instruction conference then proceeded. During that conference the defense attorney waived an instruction on the lesser included crime of theft (ROA, Vol. 22, p. 1130), lesser includeds under sexual battery (ROA, Vol. 22, p. 1133), and waived robbery without a firearm (ROA, Vol. 22, p. 1150). Mr. Parker was not there. No record waiver from the defendant was had in this case. Mr. Parker was thus denied his rights under Beck and the fifth, sixth, eighth, and fourteenth amendments: "The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given." Harrris, supra, at 932 (emphasis supplied).

Clearly Mr. Parker's rights to instructions on lesser offenses could not have been waived by defense counsel. A valid waiver cannot be had without the accused's express and personal waiver. Harris, supra. There was no such on the record waiver here.

Mr. Parker was thus denied his rights to a fundamentally fair and reliable capital trial and sentencing determination. These issues involve fundamental error which must be resolved at this juncture. These issues also involve ineffective assistance of appellate counsel -- it is inconceivable that counsel failed to urge this obvious, substantial claim and counsel was thus prejudicially ineffective.

Habeas corpus relief is proper.

CLAIM IV

THIS COURT HAS INTERPRETED "COLD, CALCULATED, AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER, AND HAS APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE APPLICATION OF F.S. SECTION 921.141(5)(I) IN THIS CASE VIOLATED DUE PROCESS, AND EX POST FACTO CONSTITUTIONAL PROTECTIONS.

A. OVERBROAD APPLICATION

In Gregg v. Georgia, 428 U.S. 153 (1976) the United States Supreme Court found the Georgia death sentencing scheme to be constitutional on its face. The Court there found sentencing discretion "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189. This was because the statute "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. Contemporaneous with its decision in Gregg, the Court upheld the Florida death penalty scheme for virtually identical reasons. Proffitt v. Florida, 428 U.S. 242 (1976).

Recently, the United States Supreme Court summarized its eight amendment jurisprudence since Gregg and its predecessor (Furman v. Georgia, 408 U.S. 238 (1972)):

> [O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McClesky v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1774 (1987) (emphasis added).

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstance present is different, and that this difference reasonably justifies "the imposition of a more severe sentence." Zant v. Stephens, 462 U.S. 862 (1983).

The narrowing function of an aggravating circumstance requires that such a circumstance be capable of objective determination. The aggravating circumstance must be described in terms that are interpreted and applied understandably. It must provide guidance and direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. The Supreme Court, in fact, has ruled that an aggravating circumstance cannot stand when it is so vague that it fails to adequately channel the sentencing decision and thus allows for "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Zant, 462 U.S. at 877.

The cold, calculated and premeditated aggravating circumstance has been defined as requiring a careful plan or a pre-arranged plan. Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 108 S. Ct. 733 (1988); Mitchell v. State, ___ So. 2d ___ (No. 70,074, Fla., May 19, 1988).

This aggravating circumstance has been applied to contract murders and witness elimination murders, or when the facts show a substantial period of reflection and thought by the killer. Harmon v. State, ___ So. 2d ___ (No. 69,824, Fla. May 19, 1988).

In this case, the trial judge improperly found this aggravating circumstance. The facts show that Mr. Chavez was

shot during a robbery and that possibly he was shot to facilitate the sexual battery of his girlfriend. The facts indicate an unplanned action to silence Mr. Chavez, who was asking the robbers repeatedly not to hurt his girlfriend. Such an action is not to be condoned, but neither does it justify the application of this "heightened" premeditation aggravating factor.

The Florida Supreme Court held that the cold, calculated and premeditated aggravating circumstance was improperly found in Harmon, supra, where the murder occurred in the course of a robbery and was susceptible to conclusions other than finding it was committed in a cold, calculated, and premeditated manner. The testimony at that trial was that the two co-defendants did not discuss killing anyone prior to the robbery, and Harmon's cellmate testified that Harmon told him that when during the course of the robbery the victim spoke his name, he became frightened. Similarly, there was no testimony in Mr. Parker's trial that a killing was planned, and the shot occurred quickly after Mr. Chavez spoke to the robbers. As in Harmon, supra, this shooting was spontaneous and not planned. Thus the aggravating circumstance was overbroadly applied and overbroadly affirmed on direct appeal. The issue should now be revisited and habeas corpus relief should be granted.

B. EX POST FACTO

At the time of the offenses committed herein, the cold, calculated and premeditated aggravating circumstance, F.S. Section 921.141(5)(i), was not in existence. Its application in this case therefore violated Mr. Parker's constitutional rights.

1. The History of Section 921.141(5) and the Court Decisions Interpreting It

Section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the offenses herein. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s. 921.141, Florida Statutes, by adding a new aggravating circumstance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v. State, 366 So. 2d 19 (Fla. 1978) and Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the Florida Supreme Court had clearly found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification did not constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Magill v. State, 386 So. 2d 1188 (Fla. 1980)(revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to Mr. Magill's motion for rehearing on that very point demonstrates that such evidence never supported independently the finding of any of the original eight aggravating factors.

Similarly, in Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley, Menendez, and demonstrated by the revision of Magill, observed that premeditation, which was "cold and calculated and stealthily carried out," was not evidence relevant to any of the original eight aggravating factors in the statute and that an aggravating

factor based on that finding was invalid under Florida law. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, this Court would not allow an aggravating factor based solely on facts showing "a cold, calculated design to kill" to stand as the foundation for any of the original eight aggravating factors.

In Miller v. Florida, 107 S. Ct. 2446, 2451 (1987), the Supreme Court set out the test for determining whether a criminal law is ex post facto. In so doing, the Court, for the first time, harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977) and Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960 (1981):

> . . . As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Miller, supra, at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Parker's case.

2. Section 921.141(5)(i) Is Retrospective

A law is retrospective if it "appl[ies] to events occurring before its enactment." Weaver v. Graham, 101 S. Ct. at 964. The relevant "event" is the crime, which in Mr. Parker's case occurred prior to the legislatively enacted change to sec. 921.141(5). As Miller explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S. Ct at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative

changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451 (citations omitted).

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Parker's trial judge became empowered to consider and apply an additional statutory aggravating factor. As the Court demonstrated in its Riley, Menendez, and Lewis decisions and implied by the revision of its opinion in Magill, under the prior statute, facts solely demonstrating heightened premeditation would never have supported the finding on an aggravating factor. Only after enactment of Chapter 79-353 did such facts take on an independent legal consequence. Section 921.141(5)(i) is therefore retrospective.

3. Section 921.141(5)(i) Substantially Disadvantaged Mr. Parker

Combs v. State, 403 So. 2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital sentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Id. at 421. In arriving at this decision, the Combs court erred because it never conducted a complete and proper analysis of the new law. The Combs court merely observed that the new law limited the use of premeditation at the penalty phase. The court, however, did not examine the challenged provision to determine whether it operated to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v.

Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for enactment of the challenged provision and the change that the challenged provision brought prior to the statute to determine whether the new provision operated to the disadvantage of Mr. Miller. Id. In applying that analysis to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, 97 S. Ct. at 2299) because it substantially disadvantages a capital defendant. Id.

a. The Legislature Intended To Disadvantage Capital Defendants By Enacting A Law Creating A New Aggravating Factor

When the legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address concerns created by this Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based solely on facts showing that a murder was committed in a cold, calculated and premeditated manner.

As explained above, prior to enactment of this legislation, this Court had refused to allow such facts, standing alone, to justify the finding of any of the eight original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

b. The Change Which Sec. 921.141(5)(i) Imposed On The Sentencing Statute In Effect At The Time Of The Offense Operates To The Disadvantage Of A Capital Defendant

The change which the new law brought to the sentencing statute operates to the disadvantage of a capital defendant. In Mr. Parker's case, the jury considered and relied on and the

trial judge applied the new aggravating factor and gave it substantial weight in making the determination that death was the appropriate sentence.

Under the law in effect at the time of the murder in this case, the trial judge would not have been empowered to increase the probability of a death sentence in this manner because Florida sentencing law strictly limits consideration of aggravating factors to those enumerated in the statute. See e.g. sec. 921.141 (5). The Combs court recognized this principle, but failed to give it proper significance for purposes of ex post facto analysis. See Combs v. State, 403 So. 2d at 421. The weight given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or death, as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this issue. Under Miller, this omission is error.

If a disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. See Dobbert v. Florida, 97 S. Ct. at 2299 n. 7. But, the increased exposure to a death sentence identified above is demonstrably not speculative under Florida's capital sentencing procedures. In Miller, the Supreme Court rejected the respondent's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate "definitively that he would have gotten a lesser sentence." Miller v. State, 107 S. Ct. at 2452.

Similar to the Miller defendant, Mr. Parker was subjected to the probability of a more enhanced sentence at trial because of the new law. In this instance, however, the more severe sentence was death instead of life. He was therefore "substantially disadvantaged" by a retrospective law. The change to the capital sentencing statute operates in an additional manner to

substantially disadvantage Mr. Parker.

4. The Change to the Capital Sentencing Statute Alters a Substantial Right

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the jury was allowed to consider and the judge, by operation of the new law, applied an additional statutory aggravating factor.

For the foregoing reasons, the law as applied to Mr. Parker at his sentencing hearing was ex post facto, and his sentence of death is therefore void. Miller v. Florida, 107 S. Ct. 2446 (1987). Since aggravation was found, and mitigation should have been found, reversal is necessary.

5. Mr. Parker's Claim Is Before the Court on the Merits and Relief Should Be Granted

Miller v. Florida did not exist at the time of Mr. Parker's trial and direct appeal. The Miller opinion substantailly changed the ex post facto analysis previously applied to claims such as Mr. Parker's under the federal constitution. Miller v. Florida is a substantial, retroactive change in law sufficient to require that the merits of Mr. Parker's claim be reviewed in this proceeding. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984); Witt v. State, 387 So. 2d 922, 929 (Fla. 19800.

On the merits, the discussion presented above demonstrates that habeas corpus relief would be more than proper in this

action since Mr. Parker was denied his fifth, sixth, eighth, and fourteenth amendment rights.

CLAIM V

MR. PARKER WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL

Mr. Parker was charged with the murder of Julio Chavez, during a drug deal gone bad. During the course of the proceedings, however, the prosecutor repeatedly brought the jury's and judge's attention to the fact that Julio's girlfriend, Silvia Arana, who was also the alleged victim of sexual assault, had no knowledge of any alleged drug use on the part of her boyfriend or his roommates. This began with the opening statement and was repeated during the testimony of David Ortegoza and Diaz, Julio's roommates, as well as Silvia's own testimony.

For example, on direct examination, David Ortegoza was questioned as follows:

> Q. Had anybody ever used any cocaine in her presence, in your house?
>
> A. No, sir.
>
> Q. Did you ever tell her that you were selling cocaine?
>
> A. No, sir.
>
> Q. In your presence, did Luis Diaz ever tell her that he was selling cocaine?
>
> A. No, sir.
>
> Q. In your presence, did Julio Chavez ever tell her he was selling cocaine?
>
> A. I don't know.
>
> Q. I said, in your presence.
>
> A. No, sir.
>
> Q. To the best of your knowledge, she

didn't know what was going on?

A. that's right.

(ROA, Vol. 16, p. 68). Likewise, during direct examination of Silvia Arana, who was a 24 year old nursing student at the time of trial, the following was elicited:

> Q. At anytime, when you were there, was any cocaine ever used in your presence?
>
> A. No.
>
> Q. Did you ever see them sell any cocaine in your presence?
>
> A. No, I did not.
>
> Q. Were you aware at the time that they may have been engaging in the sale of cocaine?
>
> A. No.
>
> Q. Were you using any cocaine?
>
> A. No.

(ROA, Vol. 18, pp. 450-1). Silvia was thus portrayed as a completely innocent young woman, who had no idea of any alleged drug dealing tendencies on the part of her boyfriend, who was also referred to at least once as her fiance, and who was allegedly killed by Mr. Parker.

In the presentence investigation, which the sentencing court reviewed, Silvia made the following statement:

> Victim: Silvia Arana, states that, "he had no right to be living. He took a life and should suffer for it. He deserves something more than life in prison, something more severe. I think he deserves the electric chair."

In the penalty phase, the prosecutor presented the testimony of Julio's father to the sentencing judge:

> MR. WAKSMAN [PROSECUTOR]: Is there anything you would like to say to the Court now, knowing that at this point Your Honor has to determine what the appropriate sentence is?
>
> MR. CHAVEZ [VICTIM'S FATHER]: Well, it is hard for me to express my feelings right now because I am the father of the victim. I am 60 years old.
>
> This is the first time in my life I am in the Courtroom. After these three years there is

> no way to stop the sadness and the cry for my wife and me every single day. I don't think forever there would be happiness in our lives.
>
> This 60 year old that I have, this is the first time I want somebody to be dead. Not only because he killed my son but what I think there are so many good people on the street exposed to people. There are so many children, good people maybe get killed for people like him. I don't hate, but I love human beings and I want the good human beings to be alive.
>
> Your Honor, as I said, it is hard for me to keep talking.

(ROA, Vol. 25, p. 5)

After this statement, the prosecutor also urged that a sentence of death be imposed on the basis of comments in the pre-sentence investigation by Mr. Arana, and noted that Mrs. Chavez was in the Courtroom, but did not wish to speak. Mr. Chavez also made an additional statement in the presentence investigation. There he stated his belief that his son never had any involvement with drugs, that his son had asked his two roommates, Diaz and Ortegoza, to move out if they were going to be involved with drugs, and that they were about to do so. Mr. Chavez also stated that his wife and several of their friends all believed that Mr. Parker should receive the electric chair.

In pronouncing her sentence, the trial court specifically noted that she had "considered the remarks that were made at this [sentencing] hearing..." (ROA, Vol. 25, p. 14).

The type of evidence and State argument described above was obviously introduced and used for one purpose -- to obtain a capital conviction and sentence of death because of who the victims were, and because of the impact left by their loss. This was patently unfair and violated Mr. Parker's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination. In fact, the State's arguments for death involved an obvious attempt to impermissibly aggravate the homicide and justify a death sentence on the basis of

constitutionally impermissible victim impact information.

It was on these and other similarly improper statements, "evidence", and comments that the judge and jury relied when deciding whether Norman Parker should be sentenced to death. As discussed herein, the prosecutor argued for death on the basis of precisely what the eighth amendment prohibits. The image which the prosecutor sought to paint throughout the proceedings was obvious and obviously unconstitutional: on the one hand there was the victim who would be missed, the victim about whom the fiance knew only good things, and the pain and sorrow suffered by the victim's fiance and parents, contrasted with, on the other hand, the defendant, who had killed before, and who would receive a free ride if he were merely given a life sentence. Such "comparable worth" arguments have been classically condemned. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987) (en banc); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983). Mr. Parker's resulting sentence of death was fundamentally unfair and unreliable, and stands in violation of the eighth and fourteenth amendments.

Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1987), sets the constitutional standard: matters such as those upon which the prosecutors urged Mr. Parker's jury and judge to base their sentencing determination are flatly improper. Booth prohibits consideration in the capital sentencing process of "the emotional impact of the crimes on the [victim's] family."

The victim's family in Booth had "noted how deeply the [victims] would be missed," 107 S.Ct. at 2531, explained the "painful, and devastating memory to them," Id., at 4, and spoke generally of how the crime had created "emotional and personal problems [for] the family members..." Id. This evidence was presented through the introduction of a victim impact statement. The Court found the introduction of this information to be constitutionally impermissible, as it violated the well established principle that the discretion to impose the death

penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983).

The Booth Court therefore held that: "Although this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion." Booth, 107 S.Ct. at 2532. The Court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Booth Court noted that victim impact evidence had no place in the capital sentencing determination, for such matters have no "bearing on the defendant's 'personal responsibility and moral guilt.'" 107 S.Ct. at 2533, citing Enmund v. Florida, 458 U.S. 282, 801 (1982). A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, supra, 4662 U.s. at 885.

The Booth Court explained that wholly arbitrary reasons such as "the degree to which a family is willing and able to express its grief [are] irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Id. at 2534. Thus the Court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Booth, 107 S.Ct. at 2535 (emphasis supplied). But those were precisely the considerations paraded

before the judge and jury by the State at Mr. Parker's trial and sentencing. Since the decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 u.S. 349, 358 (1977)(opinion of Stevens, J.), efforts to fan the flames of passion such as those undertaken by the State in Mr. Parker's case are flatly "inconsistent with the reasoned decision making" required in capital cases. Booth, supra, 107 S.Ct. at 2536.

The eighth amendment impropriety which was the central concern of the Booth Court was exemplified at Mr. Parker's sentencing. The father of the victim, Julio Chavez, was called upon to express his bereavement and to express the pain and sorrow felt by the family because of the son's loss; the fiance expressed similar emotions; the impact of the victim's death was made a prime feature of this capital sentencing trial -- and the Court expressly noted that it relied on such constitutionally impermissible information. This is exactly what the eighth amendment forbids, Booth, supra, for it renders a capital sentencing determination fundamentally unreliable.

The victim's father was articulate and capable of expressing sincere and deep grief. The fiance expressed her own sorrow. However, Booth makes plain that, in a capital sentencing determination, consideration should not be given to the impact on the victim or victim's family when the sentencer is called on to decide whether the death penalty should be imposed.

In short, the presentation of evidence or argument concerning "the personal characteristics of the victim" before the capital sentencing judge and jury violates the eighth amendment because such factors "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth, supra, 107 S.Ct. at 2533. Similarly, it is constitutionally impermissible to rest a sentence of death on evidence or argument whose purpose is to

compare the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also Moore v. Kemp, 809 F.2d 702, 747-50 (11th cir. 1987)(en banc)(Johnson, J., concurring in part and dissenting in part). "Worth of victim" and "comparable worth" evidence and argument have nothing to do with 1) the character of the offender, and/or 2) the circumstances of the offense. See Zant v. Stephens, 462 U.S. 862, 879 (1983). They deny the defendant an individualized sentencing determination, and render any resulting sentence arbitrary, capricious, and unreliable. See generally, Booth supra, 107 S.Ct. at 2532-35. In short, the eighth amendment forbids the State from asking a capital sentencing jury or judge to return a sentence of death because of the impact of the victim's loss. But this is precisely what Mr. Parker's capital jury and judge were called on to do.

The key question then is whether the eighth amendment violations may have affected the sentencing decision. Obviously, the burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Booth, supra; cf. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). That burden can only be carried on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell v. Mississippi, supra, and Booth v. Maryland, supra. The State cannot carry this, or any burden of harmlessness, with regard to the eighth amendment violation in Mr. Parker's case. Accordingly, Mr. Parker is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentencers' consideration.

Appellate counsel should have presented this significant claim. In failing to do so he rendered ineffective assistance. In any event, Booth was unavailable during the litigation of Mr. Parker's earlier proceedings. Booth involves the essential prerequisites to the constitutional validity of any sentence of

death: that such a sentence be individualized and that such a sentence be reliable. Because, under the eighth amendment, a defendant simply cannot "waive" his right to a reliable capital sentencing determination, the claim involves fundamental eighth amendment error. The error should now be corrected. Cf. Kennedy v. Wainwright, supra. Mr. Parker's claim should be determined on the merits and, on the merits, relief should be granted. At a minimum, since the question of the retroactivity of Booth is now pending before the United States Supreme Court, Mills v. Maryland, ___ U.S. ___ (1988), the court should stay Mr. Parker's execution pending the resolution of that central issue in Mills.

CLAIM VI

MR. PARKER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

Mr. Parker was charged with first-degree murder in the following manner: murder from a premeditated design to effect the death of the victim, or while engaged in the perpetration of or in an attempt to perpetrate sexual battery and robbery, in violation of Florida Statute 782.04. Section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

In this case, the State's case for guilt rested entirely on, and the State's arguments almost entirely focused on, felony murder. The jury then returned a general verdict of guilt. Clearly this was a felony murder case.

If felony murder was the basis of Mr. Parker's conviction, as it could not but have been, then the subsequent death sentence is unlawful. This is so because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the

eighth and fourteenth amendments, as was recently made clear by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The evidence at trial, specifically the testimony of the three surviving victims, shows that NORMAN PARKER, JR. murdered Julio Chavez in the course of committing both an Armed Robbery and a Sexual Battery." (R. 445)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Under such circumstances, every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, if Mr. Parker was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

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 shortcoming in Mr. Parker's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under a Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," and aggravation was then based on a similar factor. The United States Supreme Court found that the definition of first degree murder under Louisiana law 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 as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because, unlike the statute at issue in Lowenfield, conviction and aggravation in Mr. Parker's case were predicated upon a 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. Parker'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 armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. No constitutionally valid criteria exist for distinguishing Mr. Parker's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

Lowenfield represents a significant change in eighth amendment jurisprudence. It was unavailable in earlier proceedings. Cf. Downs, supra; Tafero, supra; Witt, supra. The merits of Mr. Parker's claim are therefore before the Court. A stay of execution, and habeas corpus relief, should be granted.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Norman Parker, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief sought herein. Since this action presents certain questions of fact, Mr. Parker requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions. Mr. Parker, alternatively, urges that the Court grant him a new appeal, and that the Court grant all other and further relief which the Court may deem just, proper, and

equitable.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

Julie Naylor
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by (U.S. Mail)(Hand Delivery) to Ralph Barriera, Assistant Attorney General, Department of Legal Affairs, Ruth Rhode Building, 401 NW Second Avenue, Suite 820, Miami, FL 33128, this 23rd day of May, 1988.

_____
Counsel for Petitioner