IN THE SUPREME COURT OF FLORIDA

NO. 73,035

FILED
SEP
CLERK, SUPREME COURT
By ______
Deputy Clerk

JASON THOMAS DEATON,

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

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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. Deaton's capital conviction and sentence of death. See Deaton v. State, 480 So. 2d 1279 (Fla. 1985). 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. Deaton to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (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. Deaton's capital conviction and sentence of death, and of this Court's appellate review. Mr. Deaton'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. Deaton's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Deaton's appellate counsel occurred before this Court. This Court therefore has jurisdiction to entertain Mr. Deaton's claims, 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. Deaton 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. Deaton's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Deaton's petition includes a request that the Court stay his execution (presently scheduled for October 11, 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. Deaton'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, Jason Deaton 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 fourth, 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

THE FAILURE TO PROPERLY INSTRUCT THE JURY THAT JURISDICTION IS AN ELEMENT OF THE CRIME TO BE PROVEN BEYOND A REASONABLE DOUBT WAS FUNDAMENTAL ERROR RENDERING MR. DEATON'S CAPITAL CONVICTION AND SENTENCE OF DEATH CONSTITUTIONALLY VOID.

A. THE FUNDAMENTAL CONSTITUTIONAL ERROR

This Court has recognized that the State of Florida has claimed broader criminal jurisdiction than was recognized at common law or is recognized currently by other states. However,

> [t]his broader jurisdiction nonetheless requires that the prosecution establish beyond a reasonable doubt that essential elements of the offense were committed within the jurisdiction of the State of Florida.

Lane v. State, 388 So. 2d 1022, 1028 (Fla. 1980)(emphasis added).

In Lane, the defendant had been convicted and sentenced to death for a murder which had straddled the Florida-Alabama state line. In that case, the "jury question" of what acts occurred in

which state was subject to inferences tending to show that the offense took place in Alabama and inferences tending to show that it occurred in Florida. This Court reversed and specifically found that the question of jurisdiction was a factual question that was for the jury to resolve by proof beyond a reasonable doubt:

> It is important to recognize that this territorial jurisdictional issue is a factual determination which is within the province of the jury to resolve under appropriate instructions. See Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973). In Conrad the court presented the jury with instructions which, although adequate, were not a model of clarity.
>
> We agree with the weight of authority that this territorial jurisdictional issue must be proved beyond a reasonable doubt. See Annot., 67 A.L.R.3d 988 (1975). A minority view holds that territorial jurisdiction must only be proved by a preponderance of the evidence. See Cauley v. United States, 355 F.2d 175 (5th Cir. 1966); People v. Cavanaugh, 44 Cal. 2d 252, 282 P.2d 53 (1955).
>
> Given the facts in this cause, we find that the jury instructions were too general. Upon any retrial of this cause, specific instructions must be given which require the jury to find beyond a reasonable doubt that either: (1) the fatal blow to the victim occurred in Florida, (2) the death of the victim occurred in Florida, or (3) an essential element of the offense which was part of one continuous plan, design and intent leading to the eventual death of the victim occurred in Florida.

388 So. 2d at 1028-29 (footnote omitted)(emphasis added).

In the present case the State conceded at trial that there was a question concerning where the decedent died, in Fort Lauderdale or somewhere along the way to, or in, Tennessee (R. 970). The State argued that the fatal injuries were inflicted in Fort Lauderdale. The State presented evidence in an effort to show that the decedent was strangled in Fort Lauderdale and that the death resulted therefrom. The factual issue in this case was not only contested -- it was also central.

The defense presented evidence, through the testimony of Mr. Deaton, that the decedent was alive in Tennessee and that his

death was caused by injuries inflicted there. Evidence was presented that the deceased voluntarily drove Mr. Deaton along with others to Tennessee (R. 1082-94). While there, the decedent made sexual advances upon Mr. Deaton. These advances were rebuffed. The decedent then attacked Mr. Deaton with a knife (R. 1100-05). In the course of defending himself, Mr. Deaton strangled the victim. Evidence was also introduced that Mr. Deaton and the deceased had been drinking, in Tennessee, prior to the time of the struggle (R. 1105).

In support of Mr. Deaton's account, the defense presented significant corroborating testimony. First, a medical examiner was called to testify that the condition of the body was not consistent with it having been in a car trunk for the length of the drive from Fort Lauderdale to Knoxville during the end of May (R. 948). Also called by the defense were two witnesses who saw the victim alive in Tennessee on May 29th, after his reported disappearance from Florida on May 28th. These witnesses saw the victim operating the vehicle leased by his firm in the company of the defendant and the others traveling with them (R. 1000-09, 1038-44).

The jury was instructed on self-defense (R. 1344-45) and upon intoxication (R. 1350-51). Clearly the judge recognized that there was a factual issue raised by the defense as to the incidents in Tennessee which required resolution by the jury. However, the jury was never instructed that it must find "beyond a reasonable doubt that essential elements of the offense were committed within the jurisdiction of the State of Florida." Lane, supra, 388 So. 2d at 1028. The elements given to the jury contained no indication that jurisdiction was an element. Instead the jury was told much later in the instruction, "Venue, it must be proved only to a reasonable certainty that the alleged crimes were committed in Broward County, Florida." (R. 1353) (emphasis added). No explanation was given as to what venue

meant. No explanation was given concerning the burden of proof on the essential jurisdictional issue. No statement was made by the Court indicating to the jury that jurisdiction was an essential element of the offense, and therefore that the State bore the burden of proving beyond a reasonable doubt that the offense occurred in Florida. Lane, supra.

The instructions were patent constitutional error under In re Winship, 397 U.S. 358 (1972). Jurisdiction under Florida law is an element of the crime and thus requires proof beyond a reasonable doubt. It is specifically a question of fact for the jury to resolve. The jury here was instructed on none of this. The jury could have concluded that the homicide was not in self-defense but had reasonable doubt as to whether it occurred in Tennessee or Florida. Yet, under the instructions given, the jury could have convicted on less than proof beyond a reasonable doubt on this element. This is impermissible, for a reasonable juror could have understood the charge as not requiring that the State provide proof beyond a reasonable doubt on the essential element of jurisdiction. See Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), citing Francis v. Franklin, 471 U.S. 307, 315-16 (1985).

This Court has steadfastly adhered to the principle that a trial court's failure, especially in a capital case, to instruct fully and accurately on the elements of the crime which the State must establish beyond a reasonable doubt constitutes fundamental error. See Franklin v. State, 403 So. 2d 975 (Fla. 1981); State v. Jones, 377 So. 2d 1163 (Fla. 1979). In Franklin, the error was raised for the first time on direct appeal. The Florida Supreme Court nevertheless considered the merits of the claim, stating that in circumstances where a jury is not instructed on essential elements of the offense, "[t]he 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.

Similarly, in Robles v. State, 188 So. 2d 789 (Fla. 1966), another case involving a trial court's failure to instruct on the elements of the crime, this Court explained:

> We hold that since proof of these elements was necessary in order to convict appellant . . ., the court was obligated to instruct the jury concerning them, whether or not requested to do so.

Id. at 793 (emphasis added)(citations omitted). See also State v. Jones, supra, 377 So. 2d at 1165 (failure to instruct on elements of offense constitutes fundamental error).

The same analysis applies here: the trial court's failure to instruct on the essential element of jurisdiction, Lane, supra, was fundamental constitutional error, and deprived Mr. Deaton of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Taylor v. Kentucky, 436 U.S. 478 (1978); Sandstrom v. Montana, 442 U.S. 510 (1979). The trial court here essentially directed the verdict for the State on this central issue although it is settled that "a trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelming the evidence may point in that direction." Rose v. Clark, 106 S.Ct. at 3101, 3106 (1986), citing United States v. Martin Linen Supply Company, 430 U.S. 564, 572-73 (1977). The trial court wholly relieved the State of its burden of proof; this is classic fundamental error of the type classically condemned by this and the United States Supreme Court:

> 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. 9151, 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)(emphasis added). Furthermore, under the eighth amendment's heightened due process scrutiny, see 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. As the United States Supreme Court recently held,

> Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand.

Mills, 108 S. Ct. at 1867. Here, the "improper ground" was the trial court's failure to instruct on a critical, essential element, contested by the evidence, which the State was required to prove beyond a reasonable doubt. Relief is now appropriate.

B. THE CLAIM SHOULD NOW BE HEARD BECAUSE IT IS FOUNDED UPON A FUNDAMENTAL ERROR.

This claim is premised upon fundamental error of constitutional magnitude. See Franklin, supra; Jones, supra; Robles, supra. As such it was cognizable on direct appeal and is cognizable, on the merits, in this habeas corpus action: the law has been long-settled that fundamental constitutional error cannot be waived and 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. 3d DCA 1983); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966). The error should now be

corrected.

This claim is also now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Lane, supra. Lane was settled precedent at the time of Mr. Deaton's appeal. The claim virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborated presentation -- counsel only had to direct this Court to the issue. The Court would have done the rest, based on long-settled Florida and federal constitutional standards. See, e.g., Lane, supra.

No tactical decision can be ascribed to counsel's failure to urge the claim. No impediment precluded review of this issue -- it was properly litigated before the lower court. See Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1986). However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Deaton of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. This Court should now issue its writ of habeas corpus, and grant Mr. Deaton the relief he seeks, for appellate counsel was patently ineffective.

C. CONCLUSION

No right is more fundamental than the right to a jury determination on the question of whether the State has proven guilt beyond a reasonable doubt. In re Winship. That is precisely the right denied to Mr. Deaton by the trial court's instructions in this case. The claim involved substantial factual jury questions arising from the evidence at Mr. Deaton's trial, and the trial court's failure to instruct the jury that it

was the State which bore the burden of proof, beyond a reasonable doubt, on a disputed element of the offense. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Deaton's conviction and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

CLAIM II

MR. DEATON WAS DENIED HIS RIGHT TO COMPULSORY PROCESS AS WELL AS HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL GUILT-INNOCENCE AND SENTENCING DETERMINATION BECAUSE THE TRIAL COURT ALLOWED MR. DEATON'S CODEFENDANT, KERRY HALL, TO REFUSE TO TESTIFY REGARDING CRITICAL, EXCULPATORY INFORMATION OF WHICH MR. HALL HAD FIRST-HAND KNOWLEDGE, AND BECAUSE OF THE TRIAL COURT'S REFUSAL TO PERMIT CONSIDERATION OF CODEFENDANT HALL'S PRIOR ACCOUNT, AN ACCOUNT WHICH EXCULPATED MR. DEATON, AT TRIAL AND SENTENCING.

On Saturday, April 28, 1984, in the middle of Mr. Deaton's trial, defense counsel received a telephone call from Kerry Hall, Mr. Deaton's co-defendant. Mr. Hall "indicated that he had evidence that would clear my client if [defense counsel] could only talk to him." (R. 822). Thereupon, without notifying Mr. Hall's attorney, defense counsel went to see Mr. Hall in the county jail armed with a tape recorder. In his taped statement to defense counsel, "Mr. Hall stated that Jason Deaton killed Mr. Campanella in Tennessee in self-defense pursuant to a sexual assault upon Mr. Deaton." (R. 823). Mr. Hall told defense counsel that he would testify to the facts he knew which established what really had occurred when Mr. Campanella died.

In addition to this, Mr. Hall provided defense counsel with names and addresses of other witnesses. Mr. Hall explained that

these witnesses would testify "that they saw Mr. Campanella alive and well in Tennessee on the 29th and the 30th." (R. 824). After this conversation, defense counsel did contact the witnesses Mr. Hall provided him. These witnesses verified that they had seen Mr. Campanella alive and well in Tennessee in the company of Messrs. Deaton and Hall and the three girls traveling with them (R. 824-25). Later these witnesses were brought down from Tennessee and testified in Mr. Deaton's behalf explaining under oath that Mr. Campanella was alive and well in Tennessee in the company of Messrs. Deaton and Hall (R. 1000-08, 1038-45).

Defense counsel then sought to present Mr. Hall's critical testimony. However, Mr. Hall pursuant to the advice of his court-appointed counsel, invoked his Fifth Amendment privilege and refused to testify. Defense counsel thereupon contended that his client, Mr. Deaton, was being denied due process because he could not present the exculpatory evidence available from codefendant Hall. In this regard, defense counsel relied on the tape recording reflecting Hall's exculpatory account. The court declined to rule in Mr. Deaton's favor regarding either Hall's testimony <u>or</u> the introduction of the tape recorded account. Notwithstanding the fact that the tape recording clearly reflected that Hall's account was classically exculpatory, the Court did not allow the tape's introduction (R. 1185). (The Court's erroneous ruling in this regard was that Mr. Deaton was not prejudiced because "[t]here is no proof that is what he would say if he testified though." [R. 1184].)

The court erred, and its error deprived Mr. Deaton of a bedrock constitutional right guaranteed even to a misdemeanant -- the right to present a defense.

The court's ruling rendered meaningless the effort to adequately present a defense (including the two witnesses from Tennessee whose account undeniably corroborated the account presented by the tape). Obviously, Hall was <u>the</u> crucial defense

witness. The State's and trial court's refusal to take any of the actions which would have overcome the bars to the presentation of Hall's account (e.g., immunity), and, more importantly, the court's refusal to allow the introduction of the tape recording, deprived Mr. Deaton of his rights to a fundamentally fair and reliable capital guilt-innocence and sentencing determination.

The Sixth Amendment to the United States Constitution guarantees that all criminal defendants will have the right to fairly present a defense. In Faretta v. California, 422 U.S. 806, 818 (1975), the United States Supreme Court explained:

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice--through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. (emphasis supplied).

The Sixth Amendment makes specific reference to the right of compulsory process as a means of insuring the criminal defendant's right to defend. As the United States Supreme Court recently explained:

> As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. ___, ___ (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, e.g., Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself.
>
> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends

> of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." United States v. Nixon, 418 U.S. 683, 709 (1974).
>
> The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:
>
> > "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967).

Taylor v. Illinois, 108 S. Ct. 646, 652 (1988).

At Mr. Deaton's trial, defense counsel sought to present the account of Mr. Deaton's codefendant, Kerry Hall, who was a critical witness. The case came down to a question of whether the jury believed Mr. Deaton and the two witnesses who claimed to have seen Mr. Campanella alive and well in Tennessee, or the three young runaway girls who had been traveling with Mr. Deaton and Hall. The trial court's ruling essentially directed the verdict for the State on that critical credibility determination. As a result, Mr. Deaton was denied the right to meaningfully present a defense. Mr. Deaton was denied his Sixth Amendment right to compulsory process, see Washington v. Texas, 388 U.S. 14 (1967), as well as his right to a fundamentally fair trial. See

Chambers v. Mississippi, 410 U.S. 284 (1973). The trial court's ruling affected the sentencing proceeding as well, and, in that regard, the Eighth Amendment was also violated. See Green v. Georgia, 442 U.S. 95 (1979); see also Lockett v. Ohio, 438 U.S. 586 (1978)(Eighth Amendment violated when capital defendant is not allowed to present any aspect of his background or the circumstance of the offense indicating that a death sentence would not be appropriate). The trial court's errors "precluded the development of true [and essential] facts" and "perverted the jury's deliberations concerning the ultimate question of whether in fact [Jason Deaton was guilty of capital murder and should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). In short, Jason Deaton was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Accordingly, his conviction and sentence must be reversed and a new trial ordered.

Chambers v. Mississippi, Washington v. Texas, and Green v. Georgia make Mr. Deaton's entitlement to relief apparent: aside from the question of Hall's testimony, the tape recording itself was clearly admissible, for a trial court's evidentiary ruling cannot overcome a criminal defendant's right to present a defense. Thus, whether at trial, Washington; Chambers, or capital sentencing, Green, the fifth, sixth, eighth and fourteenth amendments are violated when a codefendant provides an exculpatory out-of-court account but that account is not admitted because of a trial court's evidentiary rulings, whether the evidentiary rulings are proper or not. There is absolutely no principled distinction between Mr. Deaton's case, Washington, Chambers, or Green.

This claim involves fundamental constitutional error, error which deprived Mr. Deaton of the most fundamental of constitutional rights: the right to present a defense:

> [T]he Constitution guarantees criminal defendants "a meaningful opportunity to

> present a complete defense" . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.

Crane v. Kentucky, 106 S. Ct. 2142, 2146 (1986)(emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973), and Washington v. Texas, 388 U.S. 14 (1967). Here, in not allowing defense counsel to at least present Hall's tape recorded account, the trial court

> creat[ed] an artificial barrier to the consideration of relevant . . . testimony . . . [and] the trial judge reduced the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972). This was fundamental error, which can be heard by petition for writ of habeas corpus, and which should now be corrected.

Of course, the error was cognizable on direct appeal as well, and was apparent from any review of Mr. Deaton's trial and sentencing transcript. Appellate counsel should have presented it, and was ineffective in not doing so. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

For either reason, relief is now appropriate.

CLAIM III

MR. DEATON WAS SUBSTANTIALLY PREJUDICED BY INTRODUCTION OF IMPERMISSIBLE PROPENSITY EVIDENCE, AND BY THE INTRODUCTION OF EVIDENCE AND JUDGE COMMENT CONCERNING HIS REFUSAL TO PROVIDE A HANDWRITING EXEMPLAR, IN VIOLATION OF HIS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL, AND UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The State had obtained the victim's credit card receipts from stores which had been contacted during the course of law enforcement's investigation. Witnesses from Tennessee testified that the receipts were signed by Mr. Deaton's co-defendant, Kerry Dean Hall (R. 101, 104, 467, 544, 594). The state nevertheless attempted to demonstrate that Mr. Deaton was also involved in Kerry Dean Hall's credit card fraud. This was grossly

impermissible evidence: it involved prior offenses, committed by a co-defendant, but used to prove that Jason Deaton was guilty of murder. Moreover, even if Mr. Deaton himself had committed and been convicted of committing the prior offenses, the evidence would still have been patently inadmissible: it was, at best, blatant propensity evidence.

The State then introduced testimony that Mr. Deaton had refused to provide handwriting exemplars under court order to do so. Mr. Deaton refused to provide the sample under the erroneous advice of counsel that the refusal to give the handwriting samples could not be introduced into evidence.

Thereafter, the State repeatedly injected into the proceedings Mr. Deaton's "refusal" to follow the court's order:

> Q Now, did there come a time when you had occasion to do something in this case of the State of Florida versus Jason Thomas Deaton?
>
> A Yes, sir.
>
> Q And when would that have been, Carl?
>
> A On or about April 2nd, I believe, it was I received a court order to take the handwriting exemplars of Jason Deaton.
>
> Q And did there come a time when he came into your office?
>
> A Yes, under court order on or about the 4th of April.
>
> Q And what happened? What did you say to him?
>
> A He entered my office. I asked him to sit down. At this point I advised him that he was here under court order to give me samples of his handwriting solely for the purpose of examination and comparison and I advised him that this was an order signed by the judge and lawful in the State of Florida and he stated to me that he would refuse to give any type of handwriting whatsoever.
>
> Q And who was present now when he refused to give any handwriting exemplars?
>
> A Mr. Rich, his attorney and then, at a later moment, you came in.
>
> Q Now, the person who refused to give the handwriting exemplars, do you see him in the

courtroom today?

A Yes, sir.

Q Could you point him out for the record, please?

A He is the gentleman sitting next to Mr. Rich, wearing the blue, three-piece suit. You are standing right above him now.

(Testimony of Carl J. Lord, R. 880-81).

The sole purpose of Carl Lord's testimony was to inflame the jury: Mr. Deaton, according to this "evidence", had something to hide. The "evidence", however, was absolutely devoid of <u>any</u> probative value, since the handwriting identification that the State desired was in fact made by the State's very next witness, Robert Foley. Prior to his "identification" even Foley was allowed to testify that Mr. Deaton had refused to comply with the court order (R. 893).

As the State was very well aware, neither of Mr. Deaton's "refusals" meant anything: a sample was never required to identify Mr. Deaton's handwriting. As Foley later explained during his testimony, he relied on two of Mr. Deaton's waiver of rights forms and an arrest form in a misdemeanor case to make the comparison. In fact, he had already established a set of standards, as the Assistant State Attorney admitted at the bench.

MR. HANCOCK: Okay. It is my understanding that the Defense will now stipulate that I have the standards of the Defendant, Jason Deaton, in State Exhibit BBBB and he was arrested on May 26th, '83. We also have the standards when he was brought back from Tennessee, 7/25/83 and that is, in fact, his signature that he signed and those are his standard prints.

MR. RICH: And you are just going to use this for comparison?

MR. HANCOCK: I am not going to introduce those.

. . . .

MR. HANCOCK: Because we have to - Detective Foley has the signature. We have to compare the signature with the handwriting of the letters that he wrote.

(R. 890-91).

The testimony of Lord and Foley concerning Mr. Deaton's "refusals" was purely gratuitous. It was, in fact, blatantly inadmissible evidence. The evidence was devoid of any probative value. To state the obvious, its absolute non-value was far outweighed by its substantial undue prejudicial effects.

Simply put, the State's experts possessed much more than sufficient standards to make the identification. Defense counsel, in fact, stipulated to the authenticity of the State's standards. Mr. Deaton's case thus involves more than prosecutorial overkill; it involves blatant unconstitutionality.

The Assistant State Attorney in his closing arguments forcefully and convincingly returned to the "refusal":

> It is not reasonable what he says. <u>And why wouldn't he give samples of his handwriting to the State Attorney's Office? He refused to do that. What's he trying to hide?</u>

(R. 1254)(emphasis supplied). The fact that the "refusal evidence" was introduced <u>solely</u> to unduly prejudice the jury could not be clearer. (It is noteworthy that the State was aware that the accused's "refusal" was based on his attorney's advice.)

These gross improprieties rendered Jason Deaton's capital trial and sentencing proceedings fundamentally unfair and unreliable. Because of the advice of his defense counsel, and because the court allowed the State's efforts to unduly prejudice this jury to go unchecked, a blistering closing argument was presented on the basis of "evidence" that never should have been admitted. Mr. Deaton was denied a fundamentally fair trial and

capital sentencing determination.[1]

The undue prejudice resulting from the introduction of patently impermissible propensity, bad act, bad character, and grossly inflammatory evidence did not stop there. As discussed in the introductory paragraph to this claim, grossly inadmissible propensity evidence concerning credit card fraud was introduced and affirmatively used by the State. Similarly, impermissible evidence concerning other crimes and bad acts was paraded before the jury throughout the course of Mr. Deaton's capital proceedings (see, e.g., R. 95; 165-66). The grossest "bad character" evidence of all involved the State's efforts to present the accused's purported homosexual acts as a basis upon which the jury should convict and then impose death.

---

[1]Mr. Deaton's case is analogous to Merritt v. State, 573 So. 2d 573 (Fla. 1988). There, the defendant escaped from custody while being transported from Virginia, where he was serving time, to Florida, for prosecution on charges involving an unrelated offense. The State introduced evidence of flight at trial and this Court reversed:

> Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. See Straight v. State, 397 So.2d 903, 908 (Fla.), cert. denied, 452 U.S. 1022 (1981); State v. Young, 217 So. 2d 567 (Fla. 1968), cert. denied, 396 U.S. 853 (1969); Daniels v. State, 108 So. 2d 755 (Fla. 1959); Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920). However, flight alone is no more consistent with guilt than innocence. See Whitfield v. State, 452 So. 2d 548 (Fla. 1984).

Id. at 574. In Merritt, as here, there was insufficient evidence that the defendant's flight/refusal was to avoid prosecution: "Such an inference would be the sheerest of speculation." Merritt, supra. Likewise, Mr. Deaton's "refusal" was by no means evidence of consciousness of guilt, but was an action based on his reliance on counsel's advice. It was "sheer speculation" for the jury to infer guilt. It was constitutionally impermissible for the State to argue as it did.

The State's efforts did not stop at the guilt-innocence phase--they infected the penalty phase as well. This deprived Jason Deaton of an individualized and reliable capital sentencing determination, and abrogated the most rudimentary precepts of Eighth Amendment jurisprudence. The State's efforts in Mr. Deaton's case "pervert[ed] the jury's deliberations concerning the ultimate question[s] of whether [Jason Deaton] in fact [was guilty of first degree murder and should be sentenced to die.]" Smith v. Murray, 106 S. Ct. 266, 2668 (1986). This was fundamental error: the claim should now be heard and relief should now be granted. Moreover, the above discussion makes plain that appellate counsel was ineffective in failing to properly urge this compelling, significant claim on direct appeal. Relief is appropriate on this basis as well.

In sum, Jason Thomas Deaton was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Relief is more than proper.

CLAIM IV

EVIDENCE WAS INTRODUCED AND USED AT MR. DEATON'S CAPITAL PROCEEDINGS WHICH WAS OBTAINED AS A RESULT OF A PATENTLY ILLEGAL SEIZURE, AND APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL, IN VIOLATION OF MR. DEATON'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. Deaton was arrested in Oak Ridge, Tennessee, on Wednesday, June 8, 1983. He was arrested because he and Kerry Dean Hall were occupying a 1982 Chrysler Cordoba with a Florida license tag (ZMC 175). An NCIC check on the license tag number showed that it was listed as a stolen vehicle. As a result the police stopped the vehicle and arrested Mr. Deaton, a passenger in the car (R. 114-120).

The entry in the NCIC regarding the Chrysler Cordoba had been made by Detective Richard Rice of the Fort Lauderdale Police Department. On May 31, 1983, Detective Rice was contacted

by the father of Santi Campanella, who reported that his thirty-eight-year-old son along with the vehicle he was driving were missing (R. 125-27). Detective Rice testified that "I immediately put out a BOLO which stands for be on the lookout, APB, so to speak, with Fort Lauderdale Police Department. I also had it put out over teletype which went nationwide." (R. 125-26). As is obvious, Detective Rice had absolutely no probable cause to support a full-blown arrest. The arresting officer, accordingly, also wholly lacked probable cause.

After his arrest, Mr. Deaton made various statements to the police which were introduced against him. Counsel filed a pretrial motion challenging the admissibility of these statements. There counsel argued:

> The written and oral statements were obtained from the Defendant in violation of the Defendant's right to be free of unreasonable searches and seizures guaranteed by the Fourteenth, Fourth Amendments of the United States Constitution and by Article 1, Section 12 of the Florida Constitution (1968), Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1973); Brown v. Illinois, 422 U.S. 590 (1975).

Despite counsel's Fourth Amendment claim, the statements were introduced. The record is not clear whether the trial court ever ruled specifically on the Fourth Amendment claim; however, the court did conclude that the statements were admissible (R. 233-34).

The introduction of these statements violated the Fourth Amendment. Mr. Deaton was arrested without probable cause. Under Whitely v. Warden, 401 U.S. 560 (1971), the question of probable cause based upon NCIC information must be judged on the basis of information possessed by the police officer who enters the information into the system. Here, there was no probable cause to believe that the Chrysler Cordoba had been stolen. The fact that a 38 year old man failed to stay in touch with his family and took off in his car hardly gives rise to probable

cause to believe that the car was stolen. Thus even though the Oak Ridge police may have reasonably relied upon the information they obtained from the computer, that reliance does not alter the fact there was no probable cause in the first instance.

Since probable cause for the seizure and arrest in this case was lacking, all evidence obtained as a result of that seizure was tainted by the illegality and hence inadmissible. Wong Sun v. United States, 371 U.S. 471 (1973). In this case, Mr. Deaton's statements and the fruits of his statements (e.g., the discovery of Rita Callahan, Tammy Lambert and Marjorie Shannon) all flowed from the initial illegality, and should have been suppressed. See Dunaway v. New York, 442 U.S. 200 (1979). The introduction of this evidence violated the Fourth Amendment. The resulting conviction and sentence of death were therefore constitutionally infirm. Mr. Deaton was denied his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. This issue was clearly cognizable on direct appeal. Appellate counsel, however, failed to urge it. In this counsel was ineffective, and relief is therefore now appropriate.

Moreover, the Court should now exercise its ends of justice jurisdiction, hear the claim on its merits, and grant relief, see, e.g., Morgan v. State, 515 So. 2d 975 (Fla. 1987), for the reasons set forth herein.

CLAIM V

THE TRIAL COURT'S FINDING OF TWO AGGRAVATING CIRCUMSTANCES, RELYING SOLELY ON MR. DEATON'S UNCORROBORATED OUT-OF-COURT STATEMENTS, VIOLATED MR. DEATON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The alleged statements of Jason Deaton, and only those statements, provided the basis for the trial court's finding of two aggravating factors in support of the imposition of the death penalty. Even the evidence introduced by the State, however, affirmatively contradicted Mr. Deaton's purported words and was

incapable, under any interpretation, of substantiating the circumstances found in aggravation. The trial court, in total disregard of the factual evidence (even as presented by the State), relied exclusively on portions of the statements allegedly given by Mr. Deaton to find two aggravating circumstances. Based solely on these alleged statements, the trial court found:

> H. The capital felony was especially heinous, atrocious, or cruel.
>
> CONCLUSION
> This aggravating circumstance does apply. The evidence is that an electric cord was put around the victim's neck while he was driving the car. Then he was transported to another section of Fort Lauderdale where he was strangled to death. Witnesses testified that the episode of killing Santi P. Campanella took 15 minutes and that the victim begged and pleaded for his life and that he said he would give them anything they wanted if they would let him live. Witnesses also testified that afterwards the Defendant, Jason Thomas Deaton, said that while the victim begged for his life, he tightened the cord until the victim started spitting up blood. The evidence shows that the Defendant laughed and joked about how long it took the victim to die. The Defendant enjoyed unmercifully the pain and suffering the victim was forced to endure. Therefore, this crime was especially conscienceless, pitiless and unnecessarily torturous.
>
> I. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> CONCLUSION
> This aggravating circumstance does exist. The evidence is the day before the Defendant discussed how he would kill the victim by strangulation and even chose his weapon, the electric cord. This crime was a vicious scheme in its origin, operation and execution and was a cold, calculated plan to kill. There was no moral or legal justification whatsoever for the killing.

No other evidence supports or corroborates these aggravating circumstances, nothing more than the defendant's mere words --

Mr. Deaton's own words -- and these often in stark contrast to the proven facts of the case.

The only evidence upon which the trial court could conceivably have relied in finding these two aggravating circumstances came from the testimony of state witnesses Rita Callahan, Tammy Lambert and Marjorie Shannon, who testified regarding statements Mr. Deaton purportedly made before and after the victim's death, in which Mr. Deaton described the victim's death (see R. 293-95, 299-301, 447-48, 454-57, 573, 582-85). Again, the sentencing court relied solely on the defendant's uncorroborated statements.

However, Mr. Deaton's purported description of the manner of the victim's death was contradicted by the testimony of the medical examiner who performed the autopsy on the victim. According to this testimony, the victim died from ligature strangulation (R. 248), the victim was unconscious within thirty seconds (R. 249), and there was no evidence of a struggle (R. 250). Additionally, the medical examiner found no evidence of a significant loss of blood (R. 258), and testified that if the ligature were not relaxed once it was applied, brain death would occur in a matter of minutes (R. 258).

Thus, the references to a prolonged struggle and to blood pouring from the victim's mouth came from Mr. Deaton's statements alone, and were uncorroborated by forensic or other evidence. Based upon this, however, the trial court found two aggravating circumstances.

The use of Mr. Deaton's uncorroborated statements as the sole support for two aggravating circumstances violated fundamental principles regarding the use of confessions or admissions as proof of elements of a crime. It has long been blackletter constitutional law that a defendant's incriminating statements employed as proof of essential facts must be corroborated by other evidence apparent from the record;

otherwise, the use of statements alone is insufficient to support a finding on an element of an offense:

> In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial. They had neither the compulsion of the oath nor the test of cross-examination.
>
> . . . .
>
> [A]n accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and . . . corroboration should be required.
>
> . . . .
>
> [S]tatements of the accused out of court that show essential elements of the crime, . . . necessary to supplement an otherwise inadequate basis for a verdict of conviction, . . . have the same possibilities for error as confessions. They, too, must be corroborated.
>
> . . . .
>
> [E]xculpatory statements . . . may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused. They call for corroboration to the same extent as other statements.
>
> . . . .
>
> [T]he corroborative evidence need not be sufficient, independent of the statements, to establish the _corpus_ _delicti_. It is necessary . . . to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.

Opper v. United States, 348 U.S. 84, 89-93 (1954)(citations omitted). _See also Wong Sun v. United States_, 371 U.S. 471, 488-89 (1963); _United States v. Davanzo_, 699 F.2d 1097, 1100-01 (11th Cir. 1983). Absent corroboration, a defendant's statements are legally insufficient to support a conviction, _cf. Jackson v. Virginia_, 443 U.S. 307 (1979), or, as was the case here, a

sentence of death. See Dixon v. State, 283 So. 2d 1 (Fla. 1983)(aggravating circumstances are necessary "elements" for death sentences which must be proven by the State beyond a reasonable doubt.)

Mr. Deaton's sentence of death is thus based on constitutionally insufficient evidence. Opper; Jackson. The State presented no "substantial independent evidence" to corroborate what was used from Mr. Deaton's statements to establish aggravation. On the contrary, the State's evidence directly contradicted the statements' account. The court's findings regarding the two aggravating circumstances herein at issue were flatly improper; since those findings were based solely on Mr. Deaton's statements, they were simply unsupported by legally "sufficient" evidence. Jackson; Opper. Excluding the statements, there was no evidence in the record or the trial court's order upon which a "rational trier of fact could have found [the two aggravating circumstances] beyond a reasonable doubt." Jackson, 443 U.S. at 319. Due process, and the eighth and fourteenth amendments were thus violated. Since it cannot be confidently concluded that a death sentence based on the improper finding of two aggravating factors nevertheless remains proper after the exclusion of such circumstances from the equation, Nibert v. State, 508 So. 2d 1 (Fla. 1987), relief is appropriate. Moreover, mitigation was found in Mr. Deaton's case. The constitutional impropriety of two aggravating circumstances therefore requires resentencing. See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977).

This Court, as is the case in all capital cases, see Wilson v. Wainwright, supra, reviewed the evidence supporting and the propriety of the aggravating circumstances and resulting death sentence on direct appeal in Mr. Deaton's case. This Court nevertheless allowed this death sentence to stand, although two of the three aggravating circumstances found were based upon

constitutionally insufficient evidence. In fact, appellate counsel challenged each of these aggravating circumstances. The Court, however, notwithstanding its own independent review and appellate counsel's challenge did not correct the errors.

Mr. Deaton respectfully submits that the Court fundamentally and prejudicially erred in its disposition of these issues on direct appeal. Corrective action should now be taken, lest an improper and unreliable death sentence be allowed to stand. Habeas corpus relief should be granted.

CLAIM VI

MR. DEATON'S SENTENCE OF DEATH WAS BASED UPON CONSIDERATION OF WHOLLY IMPROPER AND UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCES AND APPELLATE COUNSEL INEFFECTIVELY FAILED TO ADEQUATELY RAISE THIS ISSUE ON DIRECT APPEAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The prosecutor presented testimony and argument that Mr. Deaton showed "no remorse" for the offenses on which he was to be sentenced. Obviously, this "evidence" and argument was used to "aggravate" the offense. The jury heard it and was asked to recall during the state's penalty argument how the defendant, according to the three runaway girls, had "joked" about the homicide (R. 1395).

The prosecutor then specifically called the sentencing judge's attention to the lack of remorse:

> I don't know if the Court received the letters, numerous letters from the family and so forth, but I don't think the Defendant in this case which the Court cannot take into consideration, but I don't think that Mr. Deaton at any time whatsoever has shown any remorse for the crime he did. He has the trial, he laughed during the trial. He told certain jokes during the trial and even after the death of Mr. Campanella, when Mr. Campanella was begging and pleading for his life, he told the three witnesses that testified how, in fact, how funny it was and what a joke it was. He laughed when the victim was begging for his life and I think he should receive the same consideration that

> he gave Mr. Campanella and the State contends and still contends that Mr. Deaton believes in capital punishment because he did it on Mr. Campanella and the State would respectfully ask that a sentence of death be ordered in this case, Your Honor.

(R. 1420-21). (The argument also violated Booth v. Maryland, a claim discussed in later portions of this petition.)

The sentencing court relied upon the State's assertion of lack of remorse to sentence Mr. Deaton to death. In its Sentencing Order, the trial court specifically referred to "evidence [which] shows that the Defendant laughed and joked," stating that this evidence justified imposition of a death sentence (Supplemental Record, p. 2). Additionally, during the sentencing hearing, the trial court stated that the death penalty is "limited to the most heinous and wanton of crimes for which the inflicters display little or no remorse" (R. 1423).

The prosecutor also presented and relied heavily upon patently unconstitutional evidence concerning Mr. Deaton's alleged involvement in other criminal activity and other socially unacceptable behavior (e.g., homosexuality). Considerable attention, in fact, was focused on the State's claim that Mr. Deaton was a male prostitute (R. 1128). The prosecutor intertwined these improprieties with the unconstitutional "no remorse" testimony, and used the bad character and comparable worth evidence and argument in order to show that Jason Deaton should be sentenced to death. Again, the jury and the judge relied on the State's propensity and "no remorse" evidence and argument when sentencing Mr. Deaton to death.

Since the Court's decision in Mr. Deaton's direct appeal, it has specifically barred the use of lack of remorse as evidence of an aggravating circumstance. In its decision in Robinson v. State, 13 F.L.W. 63 (Fla. Jan. 28, 1988), this Court explained:

> We vacate Robinson's death sentence because we agree with Appellant that the state impermissibly argued a nonstatutory aggravating factor and injected evidence calculated to arouse racial bias during the

penalty phase of his trial.

> During closing argument at the penalty phase, the prosecutor stated to the jury: "One thing to know about Dr. Krop's testimony is the Defendant suffers from antisocial tendencies. He has a total indifference to who he's hurt, as to killing Beverly St. George. He really doesn't care that much. He showed no remorse, according to Dr. Krop."
>
> Defense counsel immediately objected and correctly pointed out that the prosecutor was improperly arguing a nonstatutory aggravating circumstance. The trial court denied the subsequent motion for a mistrial.

Slip op., pp. 8-9 (emphasis supplied).

The situation here is virtually identical and calls for equal application of the law. The introduction of evidence of lack of remorse, argument based upon that evidence, and reliance by the sentencing jury and judge on such evidence was clear eighth amendment error. This Court should have reversed Mr. Deaton's sentences of death on direct appeal. It should now take corrective action on the basis of Robinson.[2]

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors violated the Eighth and Fourteenth Amendments. Since mitigation was found, the error cannot be considered harmless, see, e.g., Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), and, accordingly, Mr. Deaton's sentence of death should not be allowed to stand.

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[2]Mr. Deaton submits that appellate counsel rendered prejudicially ineffective assistance by failing to properly raise this claim on direct appeal; had counsel done so the Court would have doubtless granted relief, as it did in Robinson. Additionally, this claim calls into question the very propriety of Mr. Deaton's sentence of death, and should therefore be reviewed at this juncture. See, e.g., Wilson, supra; Dozier, supra. Finally, the Robinson decision constitutes a change in law issued by this Court. The claim should now be heard on that basis, see Witt v. State, 387 So. 2d 922 (Fla. 1980), as well as on the basis of the fact that it calls into question the constitutionality and fundamental fairness of Mr. Deaton's sentence of death. Relief is now proper.

CLAIM VII

MR. DEATON WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONCERNING THE VICTIM'S FAMILY BACKGROUND AND OTHER CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Deaton was charged with the murder of Santi P. Campanella. Throughout the proceedings, the State elicited information about the victim's background in an effort to demonstrate that the victim was a sterling member of the community and had various other qualities deserving of the jury's admiration. The evidence and State arguments based thereon were obviously introduced and used for one purpose--to obtain a capital conviction and sentence of death because of who the victim was. This was patently unfair, and violated Mr. Deaton's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination. At sentencing, the State's efforts involved an obvious attempt to impermissibly aggravate the homicide and better justify a death sentence.

The State's efforts in this regard are apparent throughout the record. During voir dire, for example, one of the jurors indicated he was from Rhode Island and had known of the Campanella family because they were well known and respected throughout the state:

> MR. HANCOCK [the prosecuting attorney]: And could you tell me a little bit about yourself, your employment, where you are from and your hobbies?
>
> MR. REILLY: Well, I live here 18 years. I have been - Rhode Island.
>
> MR. HANCOCK: Did you know the name of Campanella?
>
> MR. REILLY: Very well. It's well known in the State of Rhode Island.
>
> MR. HANCOCK: Did you know the father, Santi, at all or just know the name?

MR. REILLY: Not personally. I probably know met some because I was in wholesale with contractors in Rhode Island, construction work.

MR. HANCOCK: They did a lot of the roads up there and so forth?

MR. REILLY: Yes, but I was in with building, so I very might possibly have met some of the family, I don't know. I had kitchen design. I had retail and wholesale.

MR. HANCOCK: Is there anything about you knowing the name, Campanella, that would create any bias or prejudice for or against the State or for or against Mr. Deaton?

MR. REILLY: Possibly bias or prejudice if you wish and I would be against Mr. Deaton. I have to be honest.

MR. HANCOCK: The family had a good name up there in Rhode Island?

MR. REILLY: As far as I know, unless there was something hidden that I never knew.

(R. 1562-63).

MR. HANCOCK: Okay. The one thing that kind of concerns me is that you know the Campanella family.

MR. REILLY: The name.

MR. HANCOCK: I mean the name. You know, he is entitled to a fair trial just as well as the State and if you think it is going to create any bias against him, then you would not be a fair and impartial juror.

MR. REILLY: I feel I might, you know, lean - I'm sorry. I am from Rhode Island.

MR. HANCOCK: Okay.

MR. REILLY: So is my wife.

MR. HANCOCK: Thank you very much.

MR. REILLY: Thank you.

(R. 1565-66).

These discussions occurred in open court in the presence of the entire venire. (The trial court had denied defense counsel's pretrial request for individual voir dire.)

The first several witnesses called by the prosecution were business associates of the victim. They related that Mr. Campanella had been the Executive Vice President of Campanella

Corporation and that he lived in Rhode Island with his wife and two children (R. 47-76). One of these witnesses explained that Mr. Campanella "was a very good family man who used to phone his wife and children at least twice a day I would say, including his father if it was for business or whatever." (R. 71). These early witnesses were used to paint a portrait of the good citizen, Mr. Campanella, and to emphasize the great loss occasioned by his death. Of course, later, the picture drawn of Mr. Campanella as a good citizen would be contrasted to the picture which the State had sought to create regarding the vilified defendant, Mr. Deaton.

A later witness, Tammy Lambert, was theatrically used by the prosecution to remind the jury of the family's loss--to bring home to the jury the family's grief. Ms. Lambert testified that she was traveling with the defendant when the body was disposed of in Tennessee. She claimed that when she saw the body she started crying and exclaimed that she hoped the victim didn't have a family (R. 461). Ms. Lambert's was a chilling statement directing the jury's attention back to the family the jury already knew Mr. Campanella had.

In his guilt phase closing argument the prosecutor returned to this theme:

> You heard from some of the preliminary witnesses that knew Mr. Campanella; the boat captain, Theresa Barnett. They all said he was a family man. He had two kids, used to call twice a day to his family, to his wife and father. . . .

(R. 1244-45).

The prosecutor also discussed Tammy Lambert's testimony:

> She said one thing that was important. She said she saw the body and she said and started crying and she said that she said, I hope he didn't have a family because she was wrong because he did have a family. . . .

(R. 1250).

After the jury's recommendation of death was received, the

court ordered the preparation of a presentence report. This report, which was provided to the court before the imposition of sentence, contained a victim impact statement. This statement noted that the victim was deceased and further provided:

> Victim's Statement: Victim's father, Santi Campanella, Sr. stated, "Let the Court decided what he should receive. He deserves worse than the electric chair for what he did."

It was on such statements, "evidence", and comments that the judge and jury relied when deciding whether Jason Deaton should be sentenced to death. As discussed herein, the prosecutor argued for death on the basis of what the Eighth Amendment prohibits. Mr. Deaton'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 prosecutor urged Mr. Deaton'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, 462 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 jury by the State at Mr. Deaton'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. Deaton's case are flatly "inconsistent with the reasoned decision making" required in capital case. Booth, supra, 107 S.Ct. at 2536.

The prosecutor here began early on focusing the jury's and the judge's attention on the victim's family. The effort continued throughout the proceedings. The summations at guilt-innocence and sentencing drove the unconstitutional theme home.

The arguments of the prosecutor in this case involved precisely what the Booth Court prohibited. Consideration should not be given to the impact on the victim's family when deciding whether the death penalty should be imposed (or whether a defendant should be convicted of a capital offense). This is so because there is no "justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." Booth, supra, 107 S.Ct. at 2534. The death sentence should not be imposed because of the victim's or his family's "assets to their community." 107 S.Ct. at 2534 n.8.

In short, the presentation of evidence or argument concerning "the personal characteristics of the victim" before a capital sentencing 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 arguments 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 jury to return a sentence of death because of who the victim was. But this is precisely what Mr. Deaton's capital jury and judge were called on to do.

Consistent with Eighth Amendment law, this Court recently noted that victim impact statements "inject[] irrelevant material into the sentencing proceedings," and thus held that it is error for a trial judge to consider such statements. Scull v. State, No. 68,919 (Fla. September 8, 1988), slip op. at 9. The court further held that, "[un]der Booth, it is error to admit [victim impact statements] into evidence before the sentencing or advisory jury," and that such statements should not be considered as evidence of aggravating circumstances. Id., slip op. at 9-10. Such error occurred during Mr. Deaton's capital sentencing proceedings.

The key question is whether the misconduct 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 gross prosecutorial misconduct involved in Mr. Deaton's case. Accordingly, Mr. Deaton is entitled to a new sentencing

proceeding at which evidence of victim impact will be precluded from the sentencers' consideration.[3]

CLAIM VIII

THE JURY WAS MISLED AND MISINFORMED AS TO THE ALTERNATIVES TO A SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Deaton's jury was misled and misinformed. The sentencing court properly instructed the jury that the maximum penalty for the capital offense for which Mr. Deaton was to be sentenced was death, while the minimum was life with a mandatory minimum sentence of twenty-five (25) years (R. 1354). The court also properly instructed the jury that the maximum penalty for robbery with a deadly weapon, Count II of the indictment, was life in prison, while the minimum was probation (R. 1355). The sentencing court, however, improperly and unconstitutionally never instructed the jury that the life sentences could have been imposed consecutively. A reasonable juror, given such instructions, could not but have been left with the erroneous and misleading impression that, in a case involving homicide and armed robbery, it had two alternatives: death or life with a twenty-five year minimum. Mr. Deaton's death sentence therefore violates the standards recently set forth in Mills v. Maryland, 108 S. Ct. 1860 (1988).

Such instructions undeniably render a jury prone towards death. Nothing was told to the jury with regard to the third option (consecutive life sentences). As the United States Supreme Court has held, failing to provide a capital jury with

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[3]Counsel should have urged this claim on direct appeal, and was ineffective for failing to do so. In any event, Mr. Deaton submits that the United States Supreme Court's decision in Booth and this Court's decision in Scull represent significant changes in the law which were unavailable at the time of Mr. Deaton's direct appeal. See Witt v. State, supra. Relief is therefore now appropriate.

the information necessary to properly and fairly render a verdict, "inevitably [] enhance[s] the risk" of an unwarranted sentence of death. Beck v. Alabama, 447 U.S. 633, 637 (1980). The "risk" of an unwarranted death sentence under such circumstances is as intolerable as the risk of an unwarranted conviction which the Supreme Court discussed in Beck. Id. at 633.

The erroneous failure to instruct undeniably placed "artificial alternatives" before the jury, California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury. Caldwell v. Mississippi, ___ U.S. ___, 105 S. Ct. 2633 (1985). Doubtless, the flawed instructions provided the jurors with misinformation of constitutional magnitude, cf. Caldwell, supra, a risk which, in a capital case, is simply intolerable. Beck, supra; Caldwell.

Mills and Caldwell represent significant changes in the law. On the basis of those changes, Mr. Deaton's claim should now be heard and relief should now be granted.[4]

Accordingly, because Mr. Deaton's eighth and fourteenth amendment rights have been violated, he is entitled to the relief he seeks.

CLAIM IX

THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Since the time of Mr. Deaton's trial and direct appeal, the United States Supreme Court decided Maynard v. Cartwright, No. 87-519 (June 6, 1988). Under the Cartwright decision, Mr. Deaton is undeniably entitled to habeas corpus relief.

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[4]Alternatively, Mr. Deaton submits that appellate counsel rendered ineffective assistance in failing to urge these claims on direct appeal.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious, or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Deaton's case. The jury was simply instructed that they could consider as one of the aggravating circumstances whether "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. 1402). The court provided no further definition of this circumstance to guide the jury's deliberations.

In Maynard v. Cartwright, No. 87-519 (June 6, 1988), the jury found the murder to be "especially heinous, atrocious, or cruel," id.., slip op. at 1, and the state Supreme Court affirmed, reciting facts which supported the application of the circumstance. Id., slip op. at 7. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Deaton's case. The result here

should be the same as Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
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> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was not principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).
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> Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:
>
> > "In the case before us, the Georgia Supreme Court has affirmed a sentence of

death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterizes almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue--"especially heinous, atrocious, or cruel"--gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. . . .

Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again

> brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, supra, slip op. at 4-7.

In Mr. Deaton's case, as in Cartwright, what was relied upon by the jury did not guide or channel sentencing discretion. No "limiting construction" was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before the jury and the error was not cured by this Court's review of this aggravating factor on direct appeal. Since mitigation was found, the constitutional error cannot be deemed harmless. See Elledge v. State, supra. Cartwright alters the analysis applied by this Court on direct appeal. Mr. Deaton's claim should therefore now be revisited and relief should now be granted. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). Pursuant to Cartwright, Mr. Deaton is entitled to the habeas corpus relief he seeks..

CLAIM X

MR. DEATON'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

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. Deaton was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

However, it is impossible to determine whether the verdict of guilt in this case rested on premeditated or felony murder grounds. The jury received instructions on both theories, the prosecutor argued both, and a general verdict was returned.

If felony murder was the basis of Mr. Deaton's conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359, 367-68 (1931); Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988), citing Stromberg and Yates v. United States, 354 U.S. 298, 312 (1957). 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 capital felony was committed while the defendant was engaged in the commission of a robbery. (Supplemental Record, p. 2)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. 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. Deaton 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 very similar issue in Lowenfield v. Phelps, 56 U.S.L.W. 4071 (January 13, 1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Deaton's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under a Louisiana statute which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
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> 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 conviction and aggravation 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, there was no legitimate narrowing: Mr. Deaton may very well have been convicted on the basis of the felony murder theory, see Mills, supra, 108 S.Ct. at 1866-67, and then had that conviction aggravated into a sentence of death on the basis of felony murder. Mr. Deaton'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. The same is true of burglary, as Proffitt (burglary felony murder

insufficient for death penalty), and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Deaton's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

The jury did not specifically find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). There is, in fact, no way to determine what the jury found, given the alternative theories presented. See Mill, supra, 108 S. Ct. at 1866. Accordingly, Mr. Deaton's sentence of death may very well have been based upon an unconstitutional automatic aggravating circumstance. Here, felony murder could have been the basis; under the eighth and fourteenth amendments, Mr. Deaton's sentence of death should not be allowed to stand.[5]

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[5]On direct appeal, this Court reviewed the appropriateness of this aggravating circumstance, but nevertheless affirmed. The issue should now be revisited, in light of the change in law announced by the United States Supreme Court in Lowenfield, and relief should now be granted. Alternatively, Mr. Deaton submits that appellate counsel failed to render effective assistance by failing to fully and properly litigate this claim.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail, postage prepaid, first class, to Robert Butterworth, Attorney General, Department of Legal Affairs, c/o Michael Neimand, Bureau Chief, Dade County Regional Service Center, 401 NW Second Avenue, Suite 820, Miami, FL 33128, this 12th day of September, 1988.

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Counsel for Petitioner