IN THE SUPREME COURT OF FLORIDA

NO. 73067

ROBERT ANTHONY PRESTON,

Petitioner,

v.

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

Respondent.

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

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

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

Counsel for Petitioner

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Preston's capital conviction and sentence of death. See Preston v. State, 444 So. 2d 939 (Fla. 1984). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Preston to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1984); 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. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Preston's capital conviction and sentence of death, and of this Court's appellate review. Mr. Preston'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. Preston's claims.

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Preston's petition includes a request that the Court stay his execution (presently scheduled for September 27, 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 424 (Fla. 1986), 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. Preston'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 this Court to enter an Order staying his execution, and, thereafter, grant Habeas Corpus relief.

C. THE CIRCUMSTANCES SURROUNDING THE PREPARATION OF THE INSTANT PETITION

The Governor of Florida, without any warning to counsel, issued a death warrant almost immediately upon this Court's issuance of its mandate affirming the denial of relief on Mr. Preston's Rule 3.850 action. As the Court is aware, Mr. Preston's was not the only death warrant issued by the Governor during this time period: the Governor had issued nine death warrants applicable at the same time.

Mr. Preston's undersigned counsel, on September 19, 1988, filed with the Court an application for leave to file a petition for writ of error coram nobis, and also forwarded to the Court a letter describing the difficult circumstances under which Mr. Preston's pleadings have been prepared. In the letter counsel explained:

> A death warrant has been signed against Mr. Preston and his execution has been scheduled for September 27, 1988. No warning was provided by the Governor's office that a death warrant would be signed in this case. The Supreme Court has directed that oral argument in Mr. Preston's case be scheduled for September 20, 1988.
>
> The Governor had signed nine (9) death warrants, all applicable during the same time period. (Two of these inmates were granted stays of execution last week.) The Office of the Capital Collateral Representative ("CCR") has thus had to litigate what in my opinion is an untenable number of death warrants, and has had to fulfill commitments for the litigation of a number of other non-warrant capital cases (evidentiary hearings, the investigation and filing of pleadings, briefing deadlines, etc.) all during this same period of time. The present circumstances have created obvious difficulties for the Courts and the State, as well as for the office of the CCR in its

> efforts to provide effective representation to its capital clients. Cf. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).
>
> During this time period, I have been required to represent five (5) clients under death warrant (one was granted a stay last week, Hall v. State, No. 73,029 (Fla. 1988)), assist with two others, conduct four evidentiary hearings in non-warrant cases, and submit a number of briefs, memoranda, and pleadings to various courts. These circumstances have made it impossible for me to file Mr. Preston's pleadings with this Court, or to serve the State, as soon as I originally thought viable.
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> In sum, although I have endeavored to prepare, file, and serve Mr. Preston's pleadings as expeditiously as possible, the circumstances discussed herein, have made it impossible for me to file them any sooner than this date.
>
> My intent in providing this letter has been to inform the Court of these circumstances and to respectfully request the Court's understanding and indulgence. . . .

(See Appendix to Application for Leave to File Petition for Writ of Error Coram Nobis, App. E). Counsel again apologizes and begs the Court's indulgence for the fact that the present circumstances have made it impossible for him to prepare and file Mr. Preston's habeas corpus petition as soon as was originally hoped. (Although counsel had provided a general outline of the coram nobis and habeas corpus issues to the State, counsel submits that the circumstances attendant to the litigation of Mr. Preston's actions have created difficulties for both parties -- the defense and the State -- as well as the Court.)

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Robert Preston asserts that his convictions and sentence of death were obtained and then affirmed through this Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States

Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.[1]

III. CLAIMS FOR RELIEF

CLAIM I

MR. PRESTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE STATE'S DELIBERATE SUPPRESSION OF MATERIAL, EXCULPATORY EVIDENCE, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

A. THE STATE'S SUPPRESSION OF EVIDENCE

Keys bearing the name "Marcus Morales" were found in the ash tray of the victim's car on the morning that the murder at issue occurred. Although defense counsel made appropriate Brady requests, the name Marcus Morales was not contained in the State's witness lists and no reference to the keys bearing that name was made in any of the discovery materials provided by the State (See, e.g., R. 2210-11, 2230, 2279).

Trial counsel learned of the existence of these keys in the middle of trial, quite by accident, and far too late to effectively use the information. The matter first arose during the State's case-in-chief, while Fred Roberts, a police officer who assisted in processing the victim's car, was testifying as to his inventory of items removed from the car. One of these items was "a key ring identified by a tag as belonging to Marcus Morales with two keys" that had been found in the car's ashtray (R. 684). Taken by surprise, defense counsel interrupted the direct examination and interjected, "Identified as what?" (Id.)

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[1]The references herein designated "PC [page no.]" refer to the record on appeal of the trial court's denial of Mr. Preston's Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. The trial court's denial of Mr. Preston's Rule 3.850 Motion was affirmed by this Court in Preston v. State, 13 F.L.W. 341 (May 26, 1988).

Trial counsel attempted to adjust to this abruptly discovered evidence in his subsequent cross-examination. Officer Roberts testified on cross-examination that he had made no effort to find out who Morales was and what his keys were doing in the car (R. 691). Another investigator, Lieutenant Martin Labrusciano, testified that he did not check his files for a Marcus Morales (R. 1212). As subsequent witnesses testified, defense counsel asked each if they knew of Morales. All said "no" (See R. 719, 945, 1085, 1112, 1119, 1372, 1380).

The defense raised the constitutional violation, see Brady v. Maryland, 373 U.S. 83 (1963), and discovery violation, see Roman v. State, ___ So. 2d ___ (Fla. 1988), engendered by the State's suppression of Marcus Morales' keyring as grounds for a new trial. The court asked whether anyone knew who Morales was, and the prosecutor, at the time, answered "no" (R. 2987). Defense counsel and the court both agreed that had the defense known about the keys prior to trial, the defense would have found out who Morales was, and would have investigated this issue (R. 2996). However, the court denied Mr. Preston's motion for a new trial, holding he had failed to demonstrate the materiality of the keys (R. 2998).

Trial counsel could not demonstrate the materiality of the Marcus Morales evidence because of the State's efforts to withhold it. By the time a State's witness fortuitously blurted out the information, trial was already underway. Defense counsel from that point on made every effort to determine the identity of Marcus Morales and the nature of his involvement in the offense, but it was simply too late.

Evidence uncovered since the trial demonstrates the materiality of the withheld Marcus Morales evidence and the magnitude of the constitutional and discovery violation engendered by the State's suppression of such evidence. It is now apparent that Marcus Morales lived in the immediate area at

the time, that he was a drug dealer, and that he was the frequent companion of Scott Preston, the brother of Robert Preston (See PC 1281). This information alone would have been critical to the case, and could have been developed and effectively employed by the defense had the State not deliberately withheld "Marcus Morales." There is much more, however: the state successfully withheld evidence indicating that Scott Preston, the brother of Robert Preston, himself committed the offense for which Robert Preston was convicted and sentenced to death, and that in all likelihood Scott Preston was in the company of Marcus Morales at the time (See PC 1263-78). The investigation of the withheld "Marcus Morales" evidence would have led to more exculpatory evidence. Of course, the circumstances under which trial counsel learned of "Marcus Morales" (in the middle of trial) precluded any such investigation.

The evidence relating to Scott Preston, his involvement with Marcus Morales, and the State's Brady and discovery violations with regard to these issues, cf. Roman v. State, ___ So. 2d ___ (Fla. 1988), is detailed in Mr. Preston's Application for Leave to File Petition for Writ of Error Coram Nobis, filed September 19, 1988. In the interests of brevity, that evidence -- evidence withheld by the State at the time of trial (see, e.g., Affidavit of Steven Hagman, Coram Nobis Application, App. F) and evidence which could have been developed had the State even disclosed "Marcus Morales" -- will not be detailed again herein, and Mr. Preston respectfully refers the Court to his Coram Nobis Application and its Appendix in this regard. He notes, however, the following.

In April of 1980, more than one year prior to the trial, the Seminole County State Attorney's Office received a letter from Steven Hagman, an inmate at the Lake Butler Correctional Institution (See Affidavit of Steven Hagman, PC 1268-70). Mr. Hagman informed the State Attorney's Office that Scott Preston, a

fellow inmate at Lake Butler, had confessed to him that he, and not his brother Robert, had abducted and killed Earline Walker (id.). The State knew as early as April, 1980, that Scott Preston had confessed to the murder of Earline Walker, and that he had committed it with another. Of course, the State's law enforcement agents had long known of Marcus Morales' possible involvement (R. 684). The State was much more successful in suppressing the Scott Preston evidence. No witness blurted out that Scott Preston had confessed to the crime, and the defense thus had no idea that such evidence existed. Had trial counsel had the time and opportunity to investigate Morales, he would have learned of Scott Preston's involvement.

Steven Hagman was not the only person to whom Scott Preston confessed: present counsel has uncovered others who knew of Scott's involvement in the offense (see Appendix to Coram Nobis Application, Apps. F, G, H, I). Had the State disclosed the information in its possession to the defense prior to trial, trial counsel could have developed and presented even more compelling evidence of Mr. Preston's innocence to the jury.

John Yazell knew both Bob and Scott Preston from the neighborhood, and was incarcerated with Scott Preston at Lake Butler in 1980. John Yazell's affidavit (App. G) (PC 1272-74), discusses, in detail, how Scott Preston had described his involvement with "a guy named Morales" to Yazell well before Mr. Preston's capital trial:

> Not only has Scott described to me the details of how he robbed, raped, and murdered the "Walker woman," he has also told me about other murders he has done. He says that he likes raping and murdering women. After he got out of jail, he told me that he and a guy named Morales picked up a girl who was hitchhiking Highway 1792 around Altamonte Springs and raped her and killed her. He said they were driving around in a white van that night. This happened, according to Scott, around 1982 or 1983. He never said a name, just she was young 19-20 had cash and weed on her and that he was very worried because the law found her purse the very next day and his prints were all over it. He said

> that he raped her and "cut her up" behind a condo subdivision in Altamonte. . . He gets off on talking about how he has done all these things. He is proud of how the cops have never caught him for killing Earline Walker or any of the other women.

(Id., PC 1275-76).

James MacGeen was also acquainted with the Preston brothers and with Marcus Morales. Scott Preston had also discussed the "Walker Murder" and Morales' involvement with MacGeen:

> Everyone who knew the Preston boys at the time Bob got arrested for murder suspected that Scott either did it himself or was involved in it. Knowing what kind of person Scott was, it was easy to believe that he could and would do that kind of thing. By the same token, everyone that knew Bob couldn't believe that he was capable of such a thing.
>
> I don't just suspect that Scott was involved in the murder -- I know he was, because he told me so several days after Bob was arrested. It didn't surprise me one bit when Scott came by my house right after Bob was arrested and told me that he was involved in the murder and asked me if he could stay at my house so the police wouldn't find him and arrest him. When I told him to get lost, he asked me if I would take him to Ocala instead, so he could hide out. I told him to get lost again. I also wasn't surprised to hear that Marcus Morales' keys were found at the scene of the crime. Morales was a Puerto Rican drug dealer in our neighborhood and he was always hanging around with Scott.

(Affidavit of James MacGeen, PC 1281). (Mr. MacGeen has also provided information regarding one of the State's key witnesses, Donna Maxwell, information which severely undermines the credibility of her trial testimony (see PC 1282)).

The evidence relating to Marcus Morales was material, and highly exculpatory. Had it been disclosed, a wealth of information would have been available to and could have been developed by the defense which would have absolutely undermined the State's wholly circumstantial case at Mr. Preston's capital trial and sentencing proceedings. The withheld "Marcus Morales" evidence alone was sufficient to establish Mr. Preston's entitlement to relief pursuant to Brady v. Maryland; its

relationship to the withheld Scott Preston evidence places Mr. Preston's entitlement to relief beyond question.[2]

The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the state's withholding of evidence such as that discussed herein renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 105 S.Ct. 3375 (1985); Arango v. State, 497 So. 2d 1161 (Fla. 1986). A defendant's right to confront and cross-examine witnesses against him is violated by such state action as well. See Chambers v. Mississippi, 93 S.Ct. 1038, 1045 (1973); see also, Giglio v. United States, 405 U.S. 150 (1972). Moreover, counsel cannot be effective when deceived; consequently, Mr. Preston's sixth amendment right to effective assistance of counsel was also violated by the State's suppression. Cf. United States v. Cronic, 466 S.Ct. 648 (1984). The resulting unreliability of a guilt or sentencing determination derived from proceedings such as those in Mr. Preston's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

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[2]Mr. Preston notes here, as he has in his Rule 3.850 appeal and his coram nobis application, that although Mr. Preston has continuously sought disclosure of public records (as is his entitlement pursuant to Fla. Stat. Section 119.01, et seq.), the State to this day continues to withhold its files, citing no recognized exemption precluding disclosure. He respectfully urges the Court to relinquish jurisdiction and grant an evidentiary hearing for the reasons set forth herein, and to direct the State to disclose its files as Florida's public records' law clearly mandates. See Tribune Co. v. Public Records, 493 So. 2d 480 (Fla. App. 1986).

Counsel for Mr. Preston made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence).

The Bagley materiality standard is met, and reversal required, once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S.Ct. at 3833. Such a probability undeniably exists here.

Moreover, the State's discovery rules violation in this case is also clear, and relief in that regard was and is clearly warranted. See Roman, supra. In this regard, the State simply cannot carry its burden of demonstrating that the discovery violation -- the failure to disclose "Marcus Morales" -- was harmless beyond a reasonable doubt. Id.

B. APPELLATE COUNSEL'S INEFFECTIVENESS

As discussed, trial counsel vigorously protested when he learned, in the middle of trial, of the State's suppression of the "Morales" evidence, and asserted the resultant constitutional and discovery violations as grounds for his motion for new trial. This issue was therefore preserved, and ripe for appeal.

Appellate counsel had several duties in this regard. At a minimum, she should have raised on direct appeal the Brady and discovery violation issues which were apparent from the record. See Preston, supra, 13 F.L.W. at 341 (Holding that Brady

issue should have been raised on direct appeal). Appellate counsel should also have investigated the Morales matter in order to demonstrate its materiality to this Court, and should have requested that the Court relinquish jurisdiction during the direct appeal process for the evidentiary hearing which has never been held on this claim. Even on the basis of the appellate record then before the Court, Mr. Preston's entitlement to relief was plain, for, "[g]iven this trial's circumstantial nature, [the reviewing Court could not] say beyond a reasonable doubt that the state's failure to disclose ["Marcus Morales"] . . . did not contribute to the conviction." Roman, supra, slip op. at 4, citing, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellate counsel, instead, did nothing, and Mr. Preston's conviction and sentence of death were affirmed without this Court ever having reviewed the merits of this substantial constitutional claim. Appellate counsel's failure in this regard was flatly unreasonable, and deprived Mr. Preston of his constitutional right to the effective assistance of appellate counsel. It was in fact because of appellate counsel's failure that Mr. Preston has never been heard on this critical claim: the Circuit Court denied a hearing at the time of trial; this Court was not briefed on the issue on direct appeal; the Rule 3.850 Circuit Court denied a hearing, holding that the claim should have been presented on direct appeal; and, this Court affirmed, Preston, 13 F.L.W. at 341-42, relying on that same analysis. A capital defendant has thus never been heard on a claim involving significant exculpatory evidence and the State's failure to disclose such evidence, because of his appellate lawyer's deficiencies. This is patent ineffective assistance: appellate counsel's deficient performance is obvious with regard to this preserved claim (a claim vehemently litigated before the trial court). The Court should now grant relief. See Roman, supra, citing DiGuilio. Alternatively, the Court should

relinquish jurisdiction, and allow evidentiary development, thus allowing Mr. Preston the opportunity to establish the evidence entitling him to relief which no court has yet allowed.[3]

The appellate level right to counsel comprehends the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S. 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases cannot cure the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged

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[3]For example, during the Rule 3.850 Circuit Court proceedings, Mr. Preston filed a petition for a writ of habeas corpus ad testificandum in order to produce Marcus Morales and adduce his testimony. The request was never granted.

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

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here completely failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), the issue discussed herein "leaped out" on even a casual reading of the record, but was incomprehensibly ignored. As in Matire, appellate counsel's failure here was ineffective. As in Matire, Mr. Preston is entitled to relief. See also, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Preston's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Preston must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the above discussion demonstrates, Mr. Preston can. He is therefore entitled to a new appeal, and thereafter, relief; at a minimum, the Court should relinquish jurisdiction to the Circuit Court in order to afford him the opportunity to establish his claim in the proper evidentiary forum.

CLAIM II

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE IMPRISONMENT MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING, CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND THUS RENDERED MR. PRESTON'S SENTENCE OF DEATH FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Mr. Preston's jurors were consistently misinformed as to the required vote for a recommendation of life imprisonment. Although they were correctly instructed that a majority of their number was required to recommend a sentence of death, this same majority instruction was erroneously applied to a life recommendation as well -- as instructed, Mr. Preston's jury could not return a recommendation of life imprisonment unless a majority of them so voted, an illegal restriction of their function under the law. See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983).

After the conclusion of argument, and immediately prior to their sentencing deliberations, the jurors were instructed:

> Your decision may be made by a majority of the Jury. The fact [that a] determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily.

(R. 2029) (emphasis supplied). This error was repeated in the verdict form:

> We, the jury, by a vote of the concurrence of a majority of _____ jurors recommend to the Court that the defendant be sentenced to LIFE IMPRISONMENT.

(R. 2734) (emphasis supplied).

The prosecutor did nothing to correct this fundamental misstatement of the law. Indeed, the trial court's erroneous instructions, supported as they were by the verdict forms which

the jurors took into the jury room, could not be deemed to be ameliorated here by a later correct instruction. Cf. Harich v. State, supra. The jury was in fact sent back to deliberate with a final instruction:

> When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your Foreman and returned to the Court.

(R. 2030) (emphasis supplied). As forementioned, according to the instructions, both "form[s] of recommendation," both that for death and that for life imprisonment, required a majority vote of the jury (See R. 2734).

In Harich, supra, this Court condemned that part of the then standard penalty phase instruction which incorrectly indicated that a majority of the jury was required to recommend life, as it had done before in Rose. The death sentence in Harich was upheld only because, as his jury had returned a nine to three recommendation of death, there was no indication that they had had difficulty achieving a majority consensus. The Harich court found that there was nothing in the record to indicate that the jury was confused by the improper instruction or that the appellant was prejudiced thereby.

It is apparent from the record that Mr. Preston's jury, unlike Mr. Harich's, did have substantial difficulty reaching a verdict, and did so only by the narrowest of margins -- 7-5. Following the completion of the sentencing phase instructions, the jury deliberated for some time, then sent two questions to the judge. First, the jury asked: "Is it possible for a judge or parole board to give Mr. Preston credit for any years he has served in jail towards his 25 years for murder?" (R. 2032). Second, the jury asked: "There are five counts of which three are capital. Will they be served consecutively, 75 years, or concurrent, not more than 25 years?" (R. 2032). The Court answered the two questions in writing (R. 2032-35). The jury's

questions show that the jury was seriously considering the recommendation of a life sentence and was struggling during the deliberations. Thus, the error actually mattered in Mr. Preston's case, unlike in Harich, supra, and mattered in a way that could have been determinative of the sentence ultimately imposed. Even with the erroneous instruction, the jury was within one vote of a life recommendation. In Mr. Preston's case, the erroneous instruction was simply not a minor or technical error. It went to the heart of the death sentencing process: but for the erroneous instruction, the jury's verdict could well have been for life imprisonment. The error was therefore by no means harmless beyond a reasonable doubt.

Thus, unlike Harich, the erroneous instruction here was determinative of the outcome. The error went to the very core of the accuracy of the jury's findings.

In this case, the instruction was prejudicial, and denied Mr. Preston the protections afforded under the Tedder standard. The jury "represent[s] the judgment of the community as to whether the death sentence is appropriate." McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). There thus may be "no denigration of the jury's role" in capital sentencing. Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).

Mr. Preston may well have been sentenced to die only because his jury was misinformed and misled. Such procedures violate the eighth and fourteenth amendments, for they create the substantial risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction encouraged Mr. Preston's jury to reach a death verdict for an impermissible reason -- its

incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643. The instruction created the clear danger that one of the jurors may have changed his vote to death in order for a majority verdict to be reached -- not because of equivocation as to the appropriate penalty, but because of a belief that a majority vote had to be reached (the record here clearly supports such an inference). The instruction, like an improper "Allen charge," falsely pressured the jurors to reach a verdict. A verdict on life or death should not be the product of such unreliability.

On Mr. Preston's appeal of the denial of his Rule 3.850 motion, this Court held that this issue should have been raised on direct appeal. See Preston, supra, 13 F.L.W. at 342. Clearly, in this case, unlike Harich, supra, the error was prejudicial. The issue had been raised in Rose, supra and Harich, supra. Appellate counsel's failure to present the claim here was unreasonable performance. See Johnson (Paul) v. Wainwright, supra. Counsel's unreasonable performance deprived Mr. Preston of his sixth and fourteenth amendment rights to the effective assistance of counsel, for the discussion above makes clear that Mr. Preston could have (and has now) demonstrated prejudice. Cf. Matire, supra; Wilson, supra. Mr. Preston is therefore entitled to the habeas corpus relief he now seeks.

1. New Law: Mills v. Maryland, 108 S. Ct. 1860 (1988)

The United States Supreme Court's recent decision in Mills v. Maryland, 108 S. Ct. 1860 (1988), provides a new standard of review for constitutional claims such as the instant. Under Mills, in determining whether a particular instruction misled the jury, a court must determine how a reasonable juror would have understood the instruction. Mills v. Maryland, 108 S. Ct. 1860, 1866-67 (1988), citing Francis v. Franklin, 471 U.S. 307 (1985),

and Sandstrom v. Montana, 442 U.S. 510 (1979). In the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, 108 S. Ct. at 1866-67 (footnotes omitted).

The special danger of an improper understanding of jury instructions in a capital sentencing proceeding is that such an improper understanding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting

> Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mr. Preston's case, a "substantial possibility" exists that the jury understood its instructions to require a majority verdict for life. The penalty phase instructions repeatedly emphasized that the jury must reach a majority verdict. A reasonable juror could certainly have understood these instructions to require a majority verdict. The jury was thus misled and misinformed to a degree which the eighth amendment does not countenance. See Mills v. Maryland, supra; Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).[4]

Mr. Preston's jury had substantial difficulty reaching a verdict, and did so only by the narrowest of margins (7 to 5), and only after requesting to be reinstructed by the Court. The risk of "a possibility that a single juror" could understand the instructions given to require a majority vote for either life or death and "consequently require the jury to impose the death penalty", see Mills, 108 S. Ct. at 1870, actualized here. A "substantial possibility" thus exists that the jury relied on its incorrect instructions and was effectively precluded from considering the factors before it calling for a life sentence. Id. Mills represents a significant change in the law which

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[4]Mr. Preston also submits that Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), represents a substantial change in law mandating post-conviction merits review of claims such as the instant -- involving misinformation being imparted to capital sentencing jury. Cf. Downs v. Dugger, supra. However, given this Court's prior holdings, see, e.g., Combs v. State, 525 So. 2d 853 (Fla. 1988), Mr. Preston will not take the Court's time by detailing this aspect of his claim at length herein.

announced a substantially different standard of review for this type of eighth amendment claim. The new constitutional standard announced in Mills is as "new" and as "substantial" as Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987). Because Mills represents a substantial change in eighth amendment law, this claim is independently cognizable in the instant proceedings, without regard to the ineffectiveness of appellate counsel. See Downs, supra; Thompson, supra. However, for each of these reasons relief is now appropriate.

CLAIM III

MR. PRESTON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S ERRONEOUS USE OF UNCONSTITUTIONAL MISINFORMATION TO AGGRAVATE THE OFFENSE AND REBUT MITIGATING CIRCUMSTANCES, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In sentencing Mr. Preston to death, the trial court used what it perceived as a prior conviction of a "felony . . . on the charge of resisting an officer with violence" in 1974 (R. 2816). As the record makes clear, however, Mr. Preston was not convicted of such a felony: rather, he was charged with resisting arrest without violence, a misdemeanor (see R. 2053-54, 2913).

The trial court's fundamentally erroneous misuse of this prior charge (altering a misdemeanor into a felony and basing aggravation thereon) resulted in a fundamentally unfair and unreliable death sentence, one based on "misinformation of a constitutional magnitude," and thus one imposed in violation of Mr. Preston's rights under the eighth and fourteenth amendments. See Zant v. Stephens, 462 U.S. 879, 887-88 (1983); United States v. Tucker, 404 U.S. 443, 447-49 (1972); Burgett v. Texas, 359 U.S. 109, 115; see also Johnson v. Mississippi, 108 U.S. ___ (1988); cf. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

Again, on the Rule 3.850 appeal, this Court held that this issue should have been raised on direct appeal. See Preston, supra, 13 F.L.W. at 342. Mr. Preston's appellate counsel simply failed to act as an advocate in this regard. This claim was a classic example of eighth amendment error. There simply was no reason not to urge this claim.[5] Mr. Preston's sixth, eighth, and fourteenth amendment rights to the effective assistance of appellate counsel were violated. Relief is now appropriate.

CLAIM IV

MR. PRESTON'S RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND A RELIABLE CAPITAL SENTENCING DETERMINATION WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY WITH REGARD TO HIS PRIMARY DEFENSE TO THE CAPITAL CHARGES FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the course of his capital trial, Mr. Preston relied primarily on a single defense: that he was temporarily insane at the time of the offense. To this end, defense counsel presented, inter alia, the testimony of Robert Preston regarding his long-term habitual use of heavy narcotics, particularly PCP, for the eight to nine years immediately preceding his arrest. (See R. 1451-65). The defense also presented the expert testimony of Dr. Rufus Vaughn, M.D., a psychiatrist with professional expertise in pharmacology and drug abuse. Dr. Vaughn testified that at the time of the offense, Mr. Preston was suffering from acute organic brain syndrome, a mental defect or disease caused by his abuse of PCP (R. 1580-86). Dr. Vaughn's opinion was that because of this condition, Mr. Preston was at the time of the offense unable to

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[5]Of course, this Court on direct appeal reviewed penalty phase issues as part of its independent review function, but as this Court made clear in Wilson, supra, that independent review does not cure the harm created by ineffective assistance by appellate counsel.

understand and comprehend the natural consequences of his actions, incapable of differentiating between right and wrong, and unable to control his actions or comprehend their consequences (R. 1580-82). In sum, it was Dr. Vaughn's testimony that Mr. Preston was legally insane at the time of the offense (R. 1584).

In rebuttal of the testimony and evidence supporting the insanity defense, the State presented the testimony of Dr. Robert Kirkland, M.D. Dr. Kirkland disagreed with the specific conclusion of Dr. Vaughn with respect to Mr. Preston, but agreed that PCP is "an extremely dangerous drug" which causes altered states of perception, time distortion, hallucinations, blackouts, and psychosis. (See R. 1619-25). Dr. Kirkland also testified that long-term use of PCP could distort the user's perception to such a degree that he or she would be rendered incapable of distinguishing right from wrong (R. 1633).

The State also presented the testimony of Dr. Lloyd Wilder, M.D., who had also examined Mr. Preston prior to trial for purposes of determining his competency to stand trial and his sanity at the time of the offense. Although it was Dr. Wilder's opinion that Mr. Preston was competent to stand trial, he could express no opinion with respect to insanity at the time of the offense (R. 1650).

Upon this evidence, the defense requested that the jury be instructed on the defense of insanity. Pursuant to the Standard Jury Instructions in effect in Florida at the time, defense counsel requested that the jury be instructed, inter alia, that the required "mental infirmity, defect or disease" could result from the use of alcohol or drugs. (See R. 2691; see also R. 1715, 1721, 1735, 1738). The Court denied this and all requested instructions relating to insanity, and thus refused to instruct the jury on Mr. Preston's primary defense (see R. 1751, 2691-92). On appeal, this Court affirmed the trial court's refusal to

instruct the jury with regard to the insanity defense. See Preston v. State, 444 So. 2d at 944.

This Court, however, will revisit issues previously settled on direct appeal in cases of errors that prejudicially deny fundamental constitutional rights. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Mr. Preston submits that this is such a case, and respectfully urges this Court to now revisit this issue. As the following discussion demonstrates, not only was the trial court's refusal to instruct Mr. Preston's jury on his primary defense to the offense charged contrary to state law, but it also deprived him of his fundamental federal constitutional rights to a fair trial and a reliable capital sentencing proceeding.

As recognized by this Court when it approved the Standard Jury Instructions in effect at the time of Mr. Preston's trial, insanity can be caused by the ingestion of intoxicating liquor and/or drugs. This and other state courts have long recognized that insanity may be "super-induced by the long and continued use of intoxicants." Cirack v. State, 201 So. 2d 706, 707 (Fla. 1967); see also e.g., Britt v. State, 30 So. 2d 363, 365 (Fla. 1947)("uncontradicted evidence . . . leads to the conclusion that the accused was at the time of the alleged assault mentally deranged, or temporarily insane and not criminally responsible for his conduct, although that condition was super-induced by the previous use of alcoholic liquor"); cf. Garner v. State, 9 So. 835 (Fla. 1891); Cochran v. State, 61 So. 187 (Fla. 1913).

The law in Florida is clear:

> [A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions...The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate.

Smith v. State, 424 So. 2d 731, 732 (Fla. 1982)(citations omitted)(emphasis supplied). This Court and other Florida courts

have applied the same analysis with regard to a defendant's entitlement to a theory of defense instruction in various contexts. See, e.g., Davis v. State, 254 So.2d 221 (Fla. 3d DCA 1971) (alibi); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981) (voluntary intoxication); Stinson v. State, 245 So.2d 688 (Fla. 1st DCA 1971) (justifiable homicide); Yohn v. State, 450 So.2d 901 (Fla. 1st DCA 1984) (insanity); Bryant v. State, 412 So.2d 347 (Fla. 1982) (withdrawal/independent acts); Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976)(withdrawal).

Florida recognizes, as do the federal courts, that an evidentiary foundation for a defense instruction may be established by any evidence adduced at trial. Compare Mellins v. State, 395 So.2d 1207, 1209 (Fla. 4th DCA 1981) (instruction required when defense "suggested" by cross-examination), and Edwards v. State, 428 So.2d 358, 358-59 (Fla. 3d DCA 1983) (same); with United States v. Stulga, 531 F.2d 1377, 1379-80 (6th Cir. 1976) (evidentiary foundation for defense instruction arising solely from accomplice testimony presented by government); Perez v. United States, 297 F.2d 12, 15-16 (5th Cir. 1961); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).

Moreover, like the federal courts, Florida law demands that trial courts not weigh the evidence, and not impose their perception of the defense in deciding whether the charge is appropriate. Compare, Laythe v. State, supra, 330 So.2d at 114; Taylor v. State, 410 So.2d 1358, 1359 (Fla. 1st DCA 1982) (Defendant entitled to requested instruction regardless of weakness or improbability of evidence adduced in its support); with United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976) ("Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense."); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Strauss v. United States, 376 F.2d 416 (5th Cir. 1967).

Significantly, the Florida standard mandates that the trial court evaluate the sufficiency of the evidence in the light most favorable to the defendant when determining whether to charge on a proffered defense theory. Bolin v. State, 297 So.2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So.2d 452 (Fla. 1974). Florida courts have therefore often found fundamental error in the failure to clearly present the defense and the state's burden to the jury. See Mellins v. State, supra 395 So.2d at 1209 (voluntary intoxication defense negates intent element in specific intent offense; thus, failure to instruct on defense cannot constitute harmless error); Edwards v. State, supra 428 So.2d at 358-59; Bryant v. State, supra, 412 So.2d at 349-50; cf. State v. Jones, 377 So.2d 1163 (Fla. 1979) (failure to instruct on underlying felony in felony murder case).

Under these principles, the facts adduced at Mr. Preston's capital trial were amply more than sufficient to warrant an instruction on his defense of insanity. Especially when taken in the light most favorable to Mr. Preston, Bolin v. State, supra, 297 So.2d at 319, the evidence established much more than "any evidence" supporting an instruction on Mr. Preston's theory of defense. Smith v. State, supra, 424 So.2d at 731-32; Bryant v. State, supra 412 So.2d at 349-50; Laythe v. State, supra, 330 So.2d at 114.

The federal constitution provides the same guarantee. A criminal defendant's due process right to a conviction resting solely on proof of his guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), requires the trial court to adequately charge the jury on a defense which is timely requested and supported by the evidence. United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (S.D. South Dakota, 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). See also, United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); Strauss v. United States, 376 F.2d 416, 419 (5th Cir.

1967); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Perez v. United States, 297 F.2d 12, 13-14 (5th Cir. 1961); United States v. Lofton, 776 F.2d 918 (10th Cir. 1985).

The due process right to a theory of defense instruction is rooted in a criminal defendant's right to present a defense. As a unanimous Supreme Court has written in a similar context,

> "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. [479], at 485 [1984]. . .
>
> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."

Crane v. Kentucky, ___ U.S. ___, 106 S.Ct. 2142, 2146 (1986) (emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257 (1948).

The failure to adequately instruct on a theory of defense is undeniably an error, one of constitutional magnitude, warranting post-conviction relief. See, e.g., United States ex rel. Means v. Solem, supra, 646 F.2d 322; Zemina v. Solem, supra, 573 F.2d 1027; see also, United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States ex rel. Collins v. Blodgett, 513 F.Supp. 1056 (D. Montana, 1981); cf. Dawson v. Cowan, 531 F.2d 1374 (1976).

Mr. Preston's conviction was derived from a constitutionally defective proceeding, for the trial court's refusal to instruct left Mr. Preston virtually defenseless, see, Crane, supra, and relieved the State of its burden to prove his guilt. By taking the insanity issue from the jury's province, the trial court effectively directed a verdict for the State on the primary issue raised by the defense, see, Rose v. Clark, 106 S.Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), and deprived Mr. Preston of his right "to raise a reasonable doubt in the jurors' minds." Zemina v. Solem, supra, 438 F.Supp. at 470 (S.D. South Dakota 1977), affirmed, 573 F.2d

1027 (8th Cir. 1978). The trial court therefore violated Mr. Preston's fundamental right to have the state put to its burden, In re Winship, supra, and to have the jury determine whether that burden had been met. In not instructing the jury on the defense of insanity the court effectively

> 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).

Moreover, in Florida, when the defense produces evidence of insanity, the burden shifts to the State to disprove the defense beyond a reasonable doubt.

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the United States Supreme Court held that jury instructions which shifted the burden of persuasion on an essential element of an offense unconstitutionally relieved the State of the burden to prove guilt beyond a reasonable doubt. Following Mullaney, numerous courts have found errors of constitutional magnitude when criminal defendants were forced to bear the ultimate burden on an element of the offense, as defined by state law. See Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. Unit B, 1981); Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979); cf. Sandstrom v. Montana, 442 U.S. 521 (1979).

The constitutional principles established by Mullaney permit the State to ask that criminal defendants come forward with some evidence of a defense negating an element of the crime, before the burden shifts to the State to disprove that defense beyond a reasonable doubt. Mullaney, supra, at 701-03; Simopoulos v. Virginia, ___ U.S. ___, 103 S.Ct. 2532, 2535 (1983); see generally, Holloway v. McElroy, supra 632 F.2d at 620-28 (analysis of constitutional caselaw respecting the State's burden to prove guilt beyond a reasonable doubt).

Florida's law of defenses follows this approach, and followed this approach on the issue of insanity at the time of Robert Preston's capital trial. Under Florida law, once evidence is presented which tends to support a defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. See, Yohn v. State, 476 So.2d 123, 126 (Fla. 1985)("State has the burden to prove beyond a reasonable doubt that a defendant was sane at the time of the offense when the defense of insanity has been raised"); Bolin v. State, 297 So.2d 317 (Fla. 3 DCA, 1974). Although a specific instruction on the State's burden to disprove the defense may not be required, the instructions, taken as a whole, must fairly present the jury with the theory of defense and the State's burden to prove guilt beyond a reasonable doubt. See Yohn, supra; Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980), rehearing denied, 448 U.S. 910 (1980); Spanish v. State, 45 So.2d 753 (Fla. 1950); Bolin, supra; McDaniel v. State, 179 So.2d 576 (Fla. DCA 1965). The State is therefore required to prove that a defense does not raise a reasonable doubt. See Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983) (voluntary intoxication); State v. Bobbitt, 389 So.2d 1094, 1098 (Fla. 1st DCA 1980) (self-defense); McCray v. State, 483 So.2d 5 (Fla. 4th DCA 1983) (entrapment); Bryant v. State, 412 So.2d 350 (Fla. 1982) (withdrawal); Yohn v. State, supra (insanity). In short, where as here the defense meets its burden of production, and thereby establishes the defense as a material issue, the State must disprove the defense in order to establish the elements of the offense. See, e.g., Graham v. State, 406 So.2d 503 (Fla. 3d DCA 1981).

The trial court's refusal to provide an instruction on Mr. Preston's primary defense therefore denied him his right to a conviction resting on proof of his guilt beyond a reasonable doubt on the offense as defined by state law, i.e., under the State's burden to disprove his defense. See Stump v. Bennett,

398 F.2d 111 (8th Cir. 1968); Holloway v. McElroy, supra; Mullaney v. Wilbur, supra; cf. In re Winship, 397 U.S. 358 (1970).

Furthermore, under the due process clause, "the State may not place the burden of persuasion ... upon the defendant if the truth of the 'defense' would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d at 625. The trial court did more than place the ultimate burden on Mr. Preston. It took from the State any burden at all on the issue. Thus, because the insanity defense as defined by Florida law, Yohn, supra, negates material elements of the offense of murder, Mr. Preston has established a clear abrogation of his constitutional rights. Only if the State bears the burden of proving beyond a reasonable doubt every element of the offense can a conviction meet the due process standards of Mullaney and In re Winship. This burden was never met, because the trial court removed the issue of Mr. Preston's sanity at the time of the offense from the jury's consideration. Cf. Yohn, supra, 476 So. 2d at 128("Since Florida law leaves to the jury the decision as to whether there has been sufficient evidence of insanity presented to rebut the presumption of sanity, it is crucial that the jury be clearly instructed"). In effect, the trial court created more than a presumption of guilt on those elements, Sandstrom v. Montana, supra, 442 U.S. at 526, it directed the verdict for the State.

"[A] trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelmingly the evidence may point in that direction." Rose v. Clark, supra, 106 S.Ct. at 3106, citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). The trial court relieved the State of its burden of proof. Such a deprivation of a capital defendant's constitutional rights cannot be allowed to stand. Potts v. Zant, 734 F.2d 526, 530 (11th Cir.

1984) reh. denied with opinion, 764 F.2d 1369 (1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1386 (1986); Holloway v. McElroy, supra 632 F.2d 605; see also, Tennon v. Ricketts, supra, 642 F.2d 161.[6]

In the context of the heightened reliability requirements mandated in capital cases, Gardner v. Florida, supra, 430 U.S. at 357-58 (opinion of Stevens, J.); Woodson v. North Carolina, 428 U.S. 280 (1976); Potts, supra; the failure to present the jury at Mr. Preston's trial with an instruction on his sole defense, although he adduced much more than sufficient evidence to warrant the charge, requires that he be granted the relief he seeks in the instant proceedings.

This case is one of those rare habeas corpus actions where the ends of justice call on the Court to reconsider an issue previously disposed of adversely to the petitioner on direct appeal. For the reasons set forth herein, Mr. Preston urges the Court to reconsider the claim, and to grant habeas corpus relief.

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[6]Moreover, the Supreme Court's analysis in Beck v. Alabama is also relevant. In Beck v. Alabama, 447 U.S. 625 (1980), the Supreme Court held that a sentence of death may not be constitutionally imposed when the jury is not permitted to consider a verdict of guilt on a lesser-included, non-capital offense. The court reasoned that the failure to give an instruction on a lesser included offense enhances the risk of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Id. at 637; see also Anderson v. State, 276 So.2d 17, 18 (Fla. 1973). The necessity for such instructions is predicated upon the greater reliability requirements demanded by the Court in capital proceedings. Gardner v. Florida, 430 U.S. 349 (1977); see also, Potts v. Zant, supra, 734 F.2d at 530.

In this case, with ample evidence supporting an insanity instruction, the trial judge's failure to instruct violated the principles of Beck v. Alabama, supra. See Hopper v. Evans, 456 U.S. 605 (1982) (lesser-included offense instructions mandated when supporting evidence is elicited). Supporting evidence on insanity was elicited here. Mr. Preston was thus denied his due process right to a reliable verdict in a capital case. Beck v. Alabama, supra; Hopper v. Evans, supra; see also Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982); Potts v. Zant, supra.

CLAIM V

MR. PRESTON'S SENTENCE OF DEATH VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT "DIRECTED" THE JURY TO FIND AN AGGRAVATING CIRCUMSTANCE, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The trial court instructed the jury that an aggravating circumstance applicable to Mr. Preston's case was that "the Defendant has been previously convicted of . . . another felony involving the use of violence to some person" and that "the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person" (R. 2026) (emphasis supplied).

Due process forbids a trial court from directing a jury finding in the State's favor. See Rose v. Clark, 106 S.Ct. 3101, 3106 (1986). The court did just that in its instructions regarding this aggravating circumstance. In Florida, the state bears the burden of proving aggravating circumstances beyond a reasonable doubt. See State v. Dixon, 283 So. 2d 1 (Fla. 1973). The court's instruction here, however, relieved the State of its burden of proof at the penalty phase. Even in non-capital cases, this is patently impermissible. See Rose v. Clark, 106 S.Ct. at 3106; United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). In a capital case, this is flatly intolerable. Beck v. Alabama, 447 U.S. 625, 637 (1980). It is therefore obvious that, in Mr. Preston's case, the eighth amendment was violated.

Moreover, the trial court's aggravating circumstance instructions deprived Mr. Preston of an individualized sentencing determination from the jury, See Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985)("[e]very error in instructions which makes it less likely that the jury will recommend a life sentence . . . deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's [life]

verdict . . ."), and resulted in a jury penalty verdict which was simply not reliable. There can be little doubt that, had this 7-5 jury which expressed obvious reservations concerning the death verdict it would eventually reach been properly instructed on this question, a life verdict would have been highly probable, if not certain. The constitutional violation presented herein therefore may well have resulted in the death sentence of a defendant who was "innocent" in the only sense relevant to the eighth amendment -- i.e., in the death sentence of a defendant against whom the imposition of such a sentence was simply not appropriate. In short, the court's directed verdict "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Robert Preston should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Consequently, this Court should reach the merits, and correct the fundamental error presented herein.

This Court held that this issue should have been raised on direct appeal on Mr. Preston's appeal of the denial of his motion for Rule 3.850 relief. See Preston, supra, 13 F.L.W. 241. As in Matire, supra, this issue "leaped out" from the record, but was unreasonably ignored by appellate counsel. See also Wilson, supra. As in Matire, Johnson and Wilson, Mr. Preston, too, is now entitled to relief, for appellate counsel's failure to urge this claim was prejudicially ineffective assistance.

CLAIM VI

MR. PRESTON WAS DEPRIVED OF HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSABLE VICTIM IMPACT INFORMATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Booth v. Maryland, 107 S. Ct. 2529 (1987), the United States Supreme Court concluded that evidence concerning the personal characteristics of the victim or the impact of the crime

on the victim's family has no place in capital sentencing proceedings. Id., 107 S. Ct. at 2535. In Booth, such evidence had been introduced at the penalty phase of the petitioner's trial through a "victim impact statement." The Court found the introduction of this evidence 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 expressly the considerations paraded before the jury by the State at Mr. Preston's trial and sentencing proceedings. 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. Preston's case are flatly "inconsistent with the reasoned decision making" required in capital cases. Booth, supra, 107 S. Ct. at 2536.

Throughout the proceedings which resulted in Mr. Preston's conviction and sentence of death, the prosecution focused the jury's attention on the personal characteristics of the victim, and the impact of her death on her family, friends, and the community. This information, and the prosecutor's arguments, were introduced for one reason -- to obtain a capital conviction and a sentence of death because of who the victim was. This was patently unfair, and violated Mr. Preston's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination. See Booth, supra.

The prosecution's efforts in this regard commenced early on, at the very beginning of trial, when the State called the victim's mother to testify about the victim's church work (See R. 498-99). The prosecution then highlighted this testimony during its closing argument at the guilt-innocence phase of trial (See R. 1803, 1887). According to this argument, the victim's background and personal characteristics made the crime even worse than it would normally be, as it would be more "terrifying to a woman of Ms. Walker's background" (R. 1804). Her background, of

course, was that of a "religious person, [who] had worked with the ministry" (R. 1887).

Of course, at sentencing the victim's religious background and her relationship to her family, friends, and the community became an even more important feature of the State's case. At that point, in its argument to the jury, the State "need[ed] to bring Earline Walker into this case" (R. 1988). The State did "bring her into the case at [that] point" (id.), explaining to the jury how "cheerful" she normally was, how "concerned" about people she had been, how she was involved in various "ministries" and church work, and how she "went through life giving pleasure" to all who knew her, all the while "having sad moments" (Id.). The State exhorted the jury to sentence Mr. Preston to death because of who Earline Walker was, what she did, and the impact of her death on others (e.g., those close to her). This is precisely what Booth prohibits.

The arguments of the prosecutor in this case involved precisely what the Booth Court prohibited. Consideration should not be given to the victim's personal characteristics or the impact of the capital offense on the victim or victim's family when the sentencers are called on to decide whether the death penalty should be imposed. 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 her 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 the capital sentencing judge and jury violates the eighth amendment because such factors "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in

an arbitrary and capricious manner." Booth, supra, 107 S. Ct. at 2533. Similarly, it is constitutionally impermissible to rest a sentence of death on evidence or argument whose purpose is to compare the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987)(en banc)(Johnson, J., concurring in part and dissenting in part). "Worth of victim" and "comparable worth" evidence and 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, as interpreted in Booth, 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. Preston's capital jury and judge were called on to do.

The key question then 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 prosecutorial misconduct involved in Mr. Preston's case. (It is noteworthy in this regard that the jury voted for death by the slimmest of margins, 7 - 5.) Accordingly, Mr. Preston is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentencers' consideration.

Booth represents a significant change in constitutional law, announced by the United States Supreme Court, which was not available to Mr. Preston at the time of trial or direct appeal. This claim is thus cognizable in the instant proceedings. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034 (Fla. 1984); Edwards v. State, 393 So. 2d 597 (Fla. 3d DCA 1981), review denied, 402 So. 2d 613 (Fla. 1981); Witt v. State, 387 So. 2d 922 (Fla. 1980).

Mr. Preston acknowledges this Court's holding in Grossman v. State, 525 So. 2d 833 (Fla. 1988). There, the Court noted that, "[t]here is nothing in the Booth opinion which suggests that it should be retroactively applied to the cases in which victim impact evidence has been received without objection." 525 So. 2d at ___. Since the issuance of Grossman, however, the United States Supreme Court rendered its decision in Mills v. Maryland, 108 U.S. 1860 (1988). There, one of the issues presented concerned the retroactive application of Booth. Because the majority of the Court reversed the sentence of death on other grounds, it did not reach the Booth issue. However, the dissenting opinion which represented the views of four members of the Court did address the Booth claim. The dissenters accepted the retroactivity of Booth and went on to discuss why they would deny relief on the merits in that case. See Mills, supra, 108 S. Ct. at 1872. (Rehnquist, C.J., dissenting)(reaching merits of unobjected-to Booth error in case tried prior to issuance of Booth). Of course, the fact that Booth does represent a retroactive change in law is supported by the fact that every eighth amendment decision issued by the United States Supreme Court has been given retroactive application due to the significance of the stakes involved in such cases. Booth involves both retroactivity and novelty. See Reed v. Ross, 468 U.S. 1 (1984). The legal bases of the claim were unavailable at

the time of Mr. Preston's trial and direct appeal, for no decision from the United States Supreme Court issued prior to Booth applied Booth's concerns to a capital sentencing context.

Moreover, Mr. Preston's claim involves a classic instance of a constitutional error which "perverted the jury's deliberations concerning the ultimate question of whether [Robert Preston should have been sentenced to die]." Smith v. Murray, supra, 106 S. Ct. at 2668. Under such circumstances, no type of procedural bar can apply, for the ends of justice mandate that the merits be heard. See Smith v. Murray, supra; Moore v. Kemp, supra, 824 F.2d 847 (en banc). Finally, although Mr. Preson submits that the claim should now be heard because Booth represents a significant, retroactive change in law, see Downs v. Dugger, supra, he alternatively respectfully submits that if the Court deems the claim not cognizable, appellate counsel rendered ineffective assistance in failing to urge the claim.

The claim is before the Court on the merits, and because the State cannot carry its burden of showing that the prosecutor's reliance on victim impact did not influence the jury or judge, the merits call for relief.

CLAIM VII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. PRESTON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In Arango v. State, 411 So. 2d 172 (Fla. 1982), the Florida Supreme Court held that a capital sentencing jury must be

> told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Arango, supra, 411 So. 2d at 174(emphasis added); accord, State v. Dixon, 283 So. 2d 1 (Fla. 1973). The Florida Supreme Court has, in fact, held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon. Arango, supra.

Mr. Preston's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Preston's sentencing jury was specifically and repeatedly instructed that Mr. Preston bore the burden of proof on the issue of whether he should live or die.

The penalty instructions provided by the court explained:

> You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 1929).

> [I]t is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 2026).

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 2027).

The instructions, and the standard upon which the court based its own determination violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Preston on the central

sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Preston's eighth and fourteenth amendment rights. See Mullaney, supra. See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Preston's rights to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See, Jackson, supra; Arango v. State, 411 So. 2d 172 (Fla. 1982); State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also, Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. The instructions and argument, and the sentencing court's own application of the improper standard, "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Robert Preston should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original).

The trial court's instructions allowed the jury and the court to sentence Mr. Preston to death without ever requiring the State to prove that death was the appropriate sentence. Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption and showed that the mitigating circumstances outweighed the aggravating circumstances. Mr. Preston was deprived of rights which, even in any ordinary misdemeanor, are mandated as a matter of fundamental fairness. See, In re Winship, 397 U.S. 358 (1970). Mr. Preston's death sentence resulted from a proceeding at which the "truth-finding function" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). His sentence of death therefore violates the eighth and fourteenth amendments.

This issue would have resulted in reversal of Mr. Preston's sentence of death, see Arango, supra; Mullaney, supra, had appellate counsel presented it on direct appeal. Appellate counsel's failure in this regard deprived Mr. Preston of his rights to the effective assistance of appellate counsel. See Matire, supra; Wilson, supra. The claim required no elaborate presentation: all appellate counsel had to do was direct the Court to the error.

The ineffective assistance of appellate counsel aside, this issue is now cognizable in the instant proceedings on another basis as well -- Mills v. Maryland, 108 S. Ct. 1860 (1988), discussed in preceding sections, represents a significant change in the constitutional law announced by the United States Supreme Court which now governs resolution of this claim.[7] Under Mills, the focus of a jury instruction claim is the manner in which a reasonable juror could have interpreted the instructions. Mills v. Maryland, 108 S. Ct. at 1813. The gravamen of Mr. Preston's claim is that the jury was told that death was presumed appropriate once aggravating circumstances were established, i.e., unless Mr. Preston proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty while at the same time understanding, based on the instructions, that Mr. Preston had the ultimate burden to prove that life was appropriate.

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[7]Moreover, this claim represents the imparting of misinformation to a capital sentencing jury, thus presenting Caldwell's concerns as well. Although Mr. Preston respectfully submits that Caldwell represents a significant change in law, he recognizes this Court's earlier rulings, see Combs, supra, and therefore will not detail this aspect of the claim herein. Mr. Preston, however, respectfully urges the Court to reconsider its Combs analysis.

Affirming indisputable principles regarding the heightened reliability required in capital sentencing proceedings, the Eleventh Circuit has found a presumption such as the one employed here to violate the eighth amendment. Jackson v. Dugger, 837 F. 2d 1469 (11th Cir.), cert. denied, 43 Cr. L. 4051 (1988). The Eleventh Circuit's holding is particularly significant in light of Mills v. Maryland, supra. There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The Mills Court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States,

> 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted).

The effects feared by the Jackson and Mills courts are precisely the effects resulting from the burden-shifting instruction given in Mr. Preston's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills, supra. Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (1973), in considering the appropriate penalty. There is a "substantial possibility" that this understanding of the jury instructions by a jury which deliberated at great lengths and recommended death by the narrowest of margins (7-5) resulted in a death recommendation despite factors calling for life. Mills, supra. Again, the risk that a single juror could interpret the instruction in this manner and thus vote for death despite the existence of factors calling for a sentence of life is

constitutionally unacceptable. Id. That risk actualized here, and Mr. Preston's sentence of death must be therefore be vacated.

As stated, Mills represents a substantial change in law, Thompson v. Dugger, supra, for it alters the standard of review attendant to this claim. As also discussed herein, appellate counsel was ineffective for failing to urge this claim. For either reason, relief is now appropriate.

CONCLUSION

Petitioner, Robert Anthony Preston, herein has established his entitlement to habeas corpus relief. Because this case presents certain issues of non-record fact, Mr. Preston respectfully urges that the Court relinquish jurisdiction to a trial court in order for Mr. Preston to present the facts attendant to his claims in an evidentiary forum. For the reasons discussed herein, Mr. Preston respectfully urges that the Court issue its Writ of habeas corpus vacating and setting aside his unconstitutional capital conviction and sentence of death.

WHEREFORE, Petitioner respectfully urges that the Court grant habeas corpus relief and all other and further relief which the Court may deem just and proper.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
Staff Attorney

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

By: Billy H Nolas
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by HAND DELIVERY/U.S. MAIL, to Margene Roper and/or Sean Daly, Assistant Attorneys General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 20th day of September, 1988.

Attorney