IN THE SUPREME COURT OF FLORIDA

NO. 73102.

GREGORY ALAN KOKAL,

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, see Kokal v. State, 492 So. 2d 1317 (Fla. 1986), and the legality of Mr. Kokal's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Kokal 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. Kokal's capital conviction and sentence of death, and of this Court's appellate review. Mr. Kokal'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. Kokal's claims.

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Kokal's petition includes a request that the Court stay his execution (presently scheduled for October 26, 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. Kokal's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in any of the cases cited above. He therefore respectfully urges this Court to enter an order staying his execution, and, thereafter, grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Gregory Kokal 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.

III. CLAIMS FOR RELIEF

CLAIM I

THE TRIAL COURT'S REFUSAL TO EXCUSE FOR CAUSE JURORS WHO HAD EXPRESSED A CLEAR AND UNEQUIVOCAL BIAS IN FAVOR OF THE IMPOSITION OF A SENTENCE OF DEATH DEPRIVED MR. KOKAL OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The most fundamental right guaranteed a criminal defendant is the right to a trial before a fair and impartial jury. See, e.g., Glasser v. United States, 315 U.S. 60, 84-86 (1942); Irvin v. Dowd, 366 U.S. 717, 722-23 (1961); Turner v. Louisianna, 379 U.S. 466, 471-473 (1965); see also Singer v. State 109 So. 2d 7 (Fla. 1959); Luske v. State, 446 So. 2d 1038 (Fla. 1984). To this end, the standard for determining juror impartiality is "whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the

instructions on the law given by the court." Lusk, supra, 446 So. 2d at 1041. Thus,

> if there is a basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on the motion of a party, or by [the] court on its own motion.

Singer, supra, 109 So. 2d at 24.

As this and other courts have repeatedly affirmed, the constitutional guarantees of juror impartiality are particularly crucial in capital proceedings. See, e.g., Stroud v. United States, 251 U.S. 15 (1919); Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968), cert. denied, 397 U.S. 936 (1970); Hill v. State, 477 So. 2d 553 (Fla. 1985); Thomas v. State, 403 So. 2d 371 (Fla. 1981); Poole v. State, 194 So. 2d 903 (Fla. 1967); cf. Witherspoon v. Illinois, 391 U.S. 510, 523 (1968). Thus, in capital proceedings,

> [i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.

Hill, supra, 477 So. 2d at 556 (emphasis added), citing Thomas v. State, supra; see also Stroud, supra; Crawford, supra.

A juror who expresses a predisposition toward the death penalty, and/or an unwillingness recommend a life sentence, cannot sit as a fair and impartial juror, and must be excused for cause upon the motion of the affected party -- i.e., the capital defendant. See Thomas, supra, Hill, supra; compare Witherspoon supra; Witt v. Wainwright, 469 U.S. 420 (1985); Adams v. Texas

448 U.S. 38 (1980). A trial court's failure to excuse such a juror, upon motion of a party, "violate[s] express requirements in the sixth amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, supra, 403 So. 2d at 375.

Several individuals in the venire from which Mr. Kokal's jury was selected expressed such a predisposition for and bias towards the death penalty. For example, prospective juror Thomas stated unequivocally that she believed that anyone convicted of first degree murder should be sentenced to death, under any circumstances:

> THE COURT: All right. Let me ask you if you have strong feelings for or against the death penalty?
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> MRS. THOMAS: I have strong feelings for it.
>
> THE COURT: All right. Let me ask you if you have any personal experience or anyone close to you has had an experience which fosters those strong feelings for the death penalty or a friend murdered or anything like that?
>
> MRS. THOMAS: No, sir, I am a Christian and I base it on the Bible.
>
> THE COURT: All right. What church do you attend?
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> MRS. THOMAS: Trinity Baptist.
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> THE COURT: All right. Now, Mrs. Thomas, let me ask you to assume if you will, and first let me remind you of several instructions I have already given: The law provides that all persons who are convicted of first degree murder are not automatically put to death, do you understand that?
>
> MRS. THOMAS: Yes, sir.
>
> THE COURT: And that if the jury finds the defendant guilty they are then instructed on certain factors that they can look for in the evidence and if they find that the State has proved beyond a reasonable doubt those factors, then they may consider them in support of the death penalty, and then the Court will also tell the jury about certain factors they may look for in support

[sic] life imprisonment; do you understand those instructions?

MRS. THOMAS: Yes, sir.

THE COURT: All right. Now, I want you to assume that you are a juror seated in this trial; I want you to assume that you are in the penalty phase, that is, the second stage of the trial having already found that the defendant is guilty; I want you to assume that you have heard all of the evidence, and you have located certain factors in support of death and you have located certain factors in support of life imprisonment, and based upon your understanding of the law and the evidence, you believe that a proper recommendation to the Court would be life imprisonment, would you have any hesitancy in making that recommendation?

MRS. THOMAS: Do you mean a person whether he is guilty of murder in the first degree?

THE COURT: Murder in the first degree, premeditated first degree murder but the law says the recommendation should be life, will you have any hesitancy in following the law and recommending life as strongly as if you feel the death penalty were appropriate?

MRS. THOMAS: I believe I would.

THE COURT: All right. Let me give you this further advice. now: [sic] The law provides that a jury's recommendation is advisory only, that the judge has the ultimate responsibility to impose the sentence and that the jury's recommendation is advisory only. The Court may accept it and follow it or reject it and impose the sentence that the court feels proper. Now, with that information, does that assist you or does that change your answer in any way to my last question which was if you believe that your recommendation should be life, would you have any hesitancy in making that recommendation?

MRS. THOMAS: If I felt he should get life, I would recommend that, but in my opinion for someone guilty of murder, I believe that they should get the death penalty.

THE COURT: In other words, you strictly believe that if someone is guilty, convicted of murder in the first degree, that is, premeditated murder where someone deliberately and intentionally takes the life of another person that in all circumstances he should be put to death, is that right?

MRS. THOMAS: Yes, sir.

. . .

BY MR. WESTLING [DEFENSE COUNSEL]: Mrs. Thomas, how long have you been a Christian?

MRS. THOMAS: Well, I was saved when I was sixteen but I was raised in a pastor's home.

MR. WESTLING: How old are you now?

MRS. THOMAS: I am nineteen.

MR. WESTLING: So, you have been I guess deeply religious for the last three or four years, is that correct?

MRS. THOMAS: Yes, sir.

MR. WESTLING: Would you characterize yourself as a deeply religious person?

MRS. THOMAS: Well, a Christian is my way of life.

MR. WESTLING: Do you read the Bible every day?

MRS. THOMAS: Yes, sir.

MR. WESTLING: Now, I will have to ask you this: My client is on trial for murder in the first degree; aside from aggravation and mitigation, I want you to tell me do you think that you can say to that Bible, you sit down, I'm not going to look at you, I am going to do what the judge tells me? Can you do that or is that Bible going to creep back into you and are you going to hear an eye for an eye? I have got to know.

MRS. THOMAS: Let me see -- goodness.

MR. WESTLING: This isn't a test; there's no right or wrong answers. I have just got to know because the stakes are somewhat high for Mr. Kokal.

MRS. THOMAS: I understand and I see what you are saying, that I have to put aside all prejudice and I see what you are saying. You know, it's hard to put it aside because according to what I believe, what the Bible says if the evidence is there and he is guilty of murder he should die for it.

MR. WESTLING: Is that what you believe?

MRS. THOMAS: That's what I believe, yes, sir.

MR. WESTLING: And as the judge asked you in his last question, every

circumstances, [sic] if someone has been convicted of murder it's your opinion that they should receive death?

MRS. THOMAS: Yes, sir.

MR. WESTLING: That is all and that is deep-seated in you, is it not?

MRS. THOMAS: Yes, sir.

(R. 278-85)(emphasis added). As the trial court noted (see R. 423) and as this Court recognized, see Kokal, 492 So. 2d at 1320,[1] Ms. Thomas was "Witherspoon excludable" (R. 423), as she indicated that "regardless of the law and facts," she "would always vote to impose death." Kokal, supra, at 1320. The trial court nevertheless denied the defendant's challenge for cause, ruling that Ms. Thomas could be seated for the guilt phase and "replaced with an alternate who can follow the law" at the penalty phase (R. 286).

Mrs. Thomas was not the only venire person predisposed towards the death penalty:

BY MR. WESTLING [DEFENSE COUNSEL]: Mrs. Sutton, when the Court asked you could you recommend life, I perceived a pause and you said you believe you could. When the Court asked you could you recommend death you very quickly said yes, I could. Do you have some doubt whether you could recommend life?

MRS. SUTTON: No, I think if the evidence proved that he was guilty of murder I could go along with that.

MR. WESTLING: Is there any question you could go along with life?

MRS. SUTTON: I prefer not to.

MR. WESTLING: In other words, if you believe he was guilty of first degree murder he should die?

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[1]"Our review of the record reveals that during voir dire of the jury venire, the trial court expressed an intent to seat two jurors . . . who had expressed the view that they could not follow the law . . . regardless of the law and facts, . . . [one] would always vote to impose death for first-degree murder." Kokal, 492 So. 2d at 1320 (noting juror was preemptorily challenged by defense.

MRS. SUTTON: Yes.

MR. WESTLING: You believe that life should not be a possible penalty, is that what you are saying?

MRS. SUTTON: Well, I would have to weigh it very closely.

MR. WESTLING: All right. When you said in answer to my question that you would prefer not to recommend life, why not?

MRS. SUTTON: Well, I think if you are guilty of a crime, I think you should have to pay for a crime.

THE COURT: Let me make this explanation, Mr. Westling: Mrs. Sutton, it may be helpful, let me remind you, the law says that there are two punishments for murder in the first degree; it can be death under certain circumstances or other circumstances it should be life imprisonment. In other words,a person doesn't automatically receive the death penalty for conviction of murder in the first degree. Do you understand that law?

MRS. SUTTON: Yes. What I was saying, if all of the jury were -- I mean I wouldn't split it. In other words, I will go along with the majority.

THE COURT: Let me ask you, though: If you were convinced for example if you were convinced that life imprisonment should be the proper sentence after weighing all of the evidence, would you hold out for your conviction or would you give in to the majority just because they are the majority?

MRS. SUTTON: Repeat that again?

THE COURT: Yes. Let me ask you to assume that you believe on the law and the evidence that the recommendation should be life imprisonment. Everybody else says no, it should be death. Would you give in to the majority simply because they are the majority, or would you stand by your conviction?

MRS. SUTTON: Well, I think I'd stand by my conviction.

THE COURT: All right; thank you. Now, Mr. Westling, you may continue.

MR. WESTLING: Thank you, Your Honor. Mrs. Sutton, if you all found this defendant guilty could you recommend life?

MISS WATSON: Your Honor, I object.

THE COURT: Rephrase your question, please.

MR. WESTLING: Yes, sir. If the defendant were found guilty beyond a reasonable doubt and the facts were presented during the penalty phase, do you feel you could still recommend life as opposed to death?

MRS. SUTTON: Well, if the evidence was that he did it, I still would recommend death, I really would.

MR.WESTLING: If he did it you would want death?

MRS. SUTTON: Yes.

MR. WESTLING: That's all I have, Your Honor.

THE COURT: Miss Watson?

VOIR DIRE EXAMINATION

BY MISS WATSON: Mrs. Sutton, you understand that the thing to do is the right thing?

MRS. SUTTON: Yes, ma'am.

MISS WATSON: And during the penalty phase, if there is a penalty phase he has already been found guilty and the question is discussed, and during that phase the Court will instruct you on mitigating circumstances and aggravating circumstances. Do you think that you could follow the law?

MRS. SUTTON: Yes.

MISS WATSON: And if you find aggravating circumstances if you believe that those outweigh the mitigating circumstances than you should impose the death penalty. Do you think you could follow the law as the judge gives it to you?

MRS. SUTTON: I think so.

(R. 129-33)(emphasis added). Although Mrs. Sutton "thought" she could follow the law, the "law" explained to her by the prosecutor was only that law governing the recommendation of a death sentence (see R. 133); the law governing a recommendation of life was never explained to her. Again, the defense challenged this potential juror for cause, and again, the request was denied (R. 133).

Yet another venire person expressed understanding and belief that death was **"automatically"** appropriate in cases of first degree murder:

> BY MR. WESTLING: Mrs. Stafford, why would you vote to keep the death penalty?
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> MRS. STAFFORD: Well, if a person commits such a crime, you know, to deserve that, then I think he should be punished.
>
> MR. WESTLING: Do you have in your mind the kind of crime that a person would commit that would render him deserving?
>
> MRS. STAFFORD: Taking another person's life, you know, without cause.
>
> MR. WESTLING: Do you feel that if a person takes another person's life that the only penalty in your judgment, proper penalty, would be death?
>
> MRS. STAFFORD: That all depends. Like **I say,** if he takes a person's life without cause and then, you know, when I say cause I mean, you know, it depends whether that person is trying to take his life or *not.*
>
> MR. WESTLING: If you find the defendant guilty and the judge told you this is the law under the circumstances you may recommend death and under these circumstances you may recommend life, would you follow the law or do you feel like death is always the proper sentence?
>
> MRS. STAFFORD: It doesn't necessarily have to be always; I believe that majority rules.
>
> MR. WESTLING: What does that mean?
>
> MRS. STAFFORD: I would base it on all of my feelings but understanding if everybody else feels, you know, those that have heard the circumstances and, you know, what happened and everything to their best knowledge and <u>if everybody agrees that this is it, you know, that he **really** did it and he had no cause to do it or it wasn't in self defense, then I feel that he should be sentenced.</u>
>
> MR. WESTLING: <u>To death</u>?
>
> MRS. STAFFORD: <u>Yes, if he took **somebody** else's life</u>.
>
> MR. WESTLING: And in your judgment would self defense be the only cause?
>
> MRS. STAFFORD: The only reason I would take somebody's life, I couldn't take

somebody's life unless they were trying to take mine.

MR. WESTLING: I don't have anything further.

THE COURT: All right. Mrs. Stafford, let me make this statement concerning the law: The law says that all first degree murders, all persons convicted of first degree murder should not be put to death, only under certain circumstances. Would you follow that law even though you had convicted a man of first degree murder if you believed on the law and the evidence that he should be sentenced to life imprisonment, would you vote for life imprisonment?

MRS. STAFFORD: Yes, I would.

(R. 200-202)(emphasis added). Mrs. Stafford did admit that there were circumstances under which she would recommend a sentence of life imprisonment -- those circumstances, however, in her view were only when some "cause" for the killing was shown, or when it was shown that the killing was "self defense." (See R. 201-202). Of course, under Mrs. Stafford's "circumstances," the death penalty would not be a consideration, as no first degree murder conviction would lie. Again, this venire person was challenged for cause by the defense because of her clearly expressed bias towards death (R. 203). Again, the defendant's challenge was denied. (Id.).

All of the potential jurors discussed herein clearly and unequivocally expresses a "preconceived opinion or presumption concerning the appropriate punishment," Hill, supra, 477 So. 2d at 556. On direct appeal, the Florida Supreme Court, sua sponte, as well as the trial juge at the time of the voir dire, recognized that at least one of these individuals, Ms. Thomas, was irrevocably committed to a death sentence, see Kokal, 492 so. 2d at 1320, and was thus excludable for cause under the applicable law (see R. 423). Counsel, however, was forced to use a "pre-emto[ry] challeng[e]" on this juror. 492 so. 2d at 1320. As to the others, there existed, at a bare minimum, "a reasonable doubt , . . as to whether [they] possesse[d] the state of mind

necessary to render an impartial recommendation as to punishment," Hill, supra, 477 So. 2d at 556,[2] and the trial judge was thus required to excuse them for cause upon the defense's motion as well. See Hill, supra; Thomas, supra, 403 So. 2d at 375. However, the jurors were not excused for cause, forcing the defense to expend its peremptory challenges.

As in Thomas, all of these potential jurors "should have been excused because of a fundamental violation -- the presence of bias against the defendant in the sentencing aspect of a capital case." Id., 403 so. 2d at 375. As in Thomas,

> [t]his bias violated the express requirements in the Sixth Amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by an "impartial jury."

Thomas, 403 So. 2d at 375. As was Mr. Thomas, Mr. Kokal is also entitled to relief. See also Hill, supra, 477 So. 2d at 556.

Because the trial court erroneously refused to grant the defendant's motion and excuse the potential jurors discussed herein for cause, and thus deprived him of his rights to a fair and impartial jury, Mr. Kokal was forced to exhaust his peremptory challenges in order to remove these clearly biased venire persons. (See R. 420, 421, 422). As the United States

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[2]As the United States Supreme Court explained in Wainwright v. Witt, 469 U.S. 412, 425 (1985):

> [t]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" . . . this standard . . . does not require that a juror's bias be proved with unmistakable clarity.

Id. (emphasis added).

Supreme Court and this Court have repeatedly held, "the denial or impairment of the right [to freely exercise peremptory challenges] is reversible error without a showing of prejudice." Swain v. Alabama, 380 U.S. 202, 220 (1965). Accord Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894); Harrison v. United States, 163 U.S. 140 (19___); see also Francis v. State, 413 So. 2d 1175 (Fla. 1982); cf. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). This is so because

> [t]he exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as the race, religion, nationality, occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965).

Francis, supra, 413 So. 2d at 1178-79.

The law is thus crystal clear that the error that occurred here cannot be deemed harmless -- when, as here, a trial court erroneously refuses to dismiss for cause even a single excludable juror, thus forcing the defendant to use peremptory challenges, the defendant is entitled to relief. In Hill, supra, where the trial court refused to dismiss for cause one potential juror who expressed a predisposition towards death, and who thus "did not possess the requisite impartial state of mind," id., 477 So. 2d at 556, this Court found that the error could not be harmless "because it abridged appellant's right to peremptory challenges by reducing the number of those challenges available him." Id.

Here, as in Hill, the defendant had requested additional peremptories. (See R. 98, 173). Here also the trial court's erroneous refusal to grant defendant's challenges for cause forced him to exhaust the peremptories which he had been allotted by statute. (See R. 423). Mr. Kokal is thus entitled to the same relief afforded Mr. Hill.

In Hill, susra, the error involved a single juror. In Mr. Kokal's case, this Court expressly found on direct appeal, sua sponte, that at least one of the jurors discussed herein "expressed the view that [she] could not follow the law regarding the imposition of the death penalty" in that "regardless of the law and facts . . . [she] would always vote to impose death for first degree murder." Kokal, 492 so. 2d at 1320. As discussed above, here, in contrast to Hill, there were two additional jurors who "possessed preconceived opinion[s] or presumption[s] concerning the appropriate punishment for the defendant." Hill, 477 so. 2d at 556. All three of these jurors were challenged for cause by Mr. Kokal, and all three challenges were denied by the trial court. The error here is thus even more egregious than that which entitled Mr. Hill to relief. Cf. Thomas, supra.

Errors which deprive a defendant of the right to a trial by a fair and impartial jury are fundamental, and thus may be raised for the first time in collateral proceedings notwithstanding the fact that they could have been, but were not, raised on direct appeal. See Nova v. State, 439 So. 2d 255, 261 (Fla. 3d DCA 1983); cf. O'Neal v. State, 308 So. 2d 569 (Fla. 2d DCA 1975); Dozier v. State, 361 So. 2d 727 (Fla. 4th DCA 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977). Because "[t]he right of an accused to a trial by jury is one of the most fundamental rights guaranteed by our system of government," Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956), and is "the cornerstone of a fair and impartial trial," Nova, supra, 439 So. 2d at 262, citing Florida Power

Corporation v. smith, 202 So. 2d 872 (Fla. 2d DCA 1967), an infringement of that right constitutes fundamental error. Nova, supra. The trial court's refusal to excuse for cause those jurors who expressed a bias towards death was precisely such an error, as it Violated the express requirements in the Sixth Amendment to the United States Constitution and in article I, section 16 of the Florida Constitution, that an accused be tried by 'an impartial jury.'" Thomas, supra, 403 So. 2d at 375; Hill, supra, Poole, 477 So.2d at 556. This issue is thus before this Court on the merits, and the merits demand relief. Hill, supra; Thomas,

Appellate Counsel's Ineffectiveness

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> 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 highlisht 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 derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985)(emphasis supplied).

This Court on direct appeal, without any assistance from appellate counsel, was troubled by the fact "that during voir dire of the jury venire, the trial court expressed an intent to seat two jurors for the guilt phase who had expressed the view that they could not follow the law regarding the imposition of the death penalty," one of whom "would always vote to impose death by first-degree murder," and sua sponte condemned "this notion of seating and substituting jurors." Kokal, 492 So. 2d

1320 (majority opinion of Shaw, J.). Appellate counsel, however, did nothing with respect to this issue. He did not present the clear legal analysis demonstrating that relief was appropriate. He did not inform the court that the trial court had in fact agreed that at least one of these jurors was excludable for cause. Nor did he inform the court that the other jurors had expressed similar preconceptions regarding the propriety of a death sentence for any murder, and that trial counsel's challenges with regard to those jurors were denied as to both the guilt and penalty phase. Most importantly, appellate counsel did not "highlight" the fundamental deprivation of his client's constitutional rights engendered by the trial court's refusal to dismiss the jurors for cause and "present it to the court . . . in such a manner designed to persuade the court of the gravity of the alleged derivations from due process." Wilson, supra, 474 so. 2d at _____. Appellate counsel did nothing, and this Court was thus deprived of the "careful, partisan scrutiny of a zealous advocate." Id. at 1165.

The claim was clearly preserved and ripe for appellate review under Hill and Thomas; counsel had asked for, but was never given, additional peremptory challenges; counsel at trial had moved to strike each of the jurors for cause; the trial court had denied each request: and trial counsel had been forced to expend peremptories on each of the jurors at issue. There simply exists no tactical or strategic reason which can be ascribed to appellate counsel's failure to present this claim. See, e.g., Wilson, supra; Johnson (Paul) v. Wainwright, 498 So. 2d 939 (Fla. 1986)(habeas corpus relief appropriate where counsel fails to urge clear claim of reversible error on appeal). Counsel's ineffectiveness is made even more apparent when this failure to present this claim is considered in the context of the three issues counsel presented in his strikingly weak direct appeal brief. This Court found one issue, a suppression of evidence

claim, "not preserved for appeal by a timely objection at trial," Kokal, 492 So. 2d at 1320; the second issue, involving a challenge to essentially insignificant collateral evidence, was found clearly harmless, id. at 1320; the third, a penalty phase issue, was found by the court to be without merit. Id., 492 so. 2d at 1319. What was available, but ineffectively ignored, was of substantial merit: this claim would have provided Mr. Kokal with relief. The court, sua ssonte, was in fact troubled by circumstances relating to this claim, Kokal, 492 So. 2d at 1320, even without the aid of counsel, See Wilson, supra (Court's independent review of record cannot cure harm caused by counsel's failure to zealously advocate a meritorious claim on direct appeal). There simply was no reason whatsoever for counsel to ignore the claim: the omission could not but have resulted from counsel's ignorance of the law. In any event, counsel's omission was a clear example of prejudicial ineffective assistance, see Johnson (Paul) v. Wainwright, supra, and relief is now appropriate.

Wilson places this Court in the forefront of appellate court scrutiny of attorney advocacy. Undeniably, the appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure . . . ." Lucey, 105 S. Ct. 830, 835 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1985)(equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984).) The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not as "amicus curiae." Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 466 U.S. 648, 654 (1984). Counsel is crucial, not just to spew the legalese unavailable to the layperson, but also to "meet the adversary presentation of the prosecution." Lucev, 105 S. Ct. at 835 n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S. Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982)("unquestionably a brief containing legal authority and analysis assists an appellate court in providing a more thorough deliberation of an appellant's case").

Here, as discussed above, the trial court's refusal to dismiss for cause those jurors who "possessed preconceived opinions or presumptions concerning the appropriate punishment for the defendant," Hill, supra, 477 So. 2d at 556, was per se reversible error, as it deprived Mr. Kokal of his state and federal constitutional rights to a trial before a fair and impartial jury. Hill, supra; Thomas, susra. Had the issue been

raised on direct appeal, Mr. Kokal would have been entitled to a new trial. Thomas; Hill. Trial counsel had objected, had requested additional peremptories, and had exhausted those peremptories which he was granted: the issue was preserved, and ripe for appeal. Appellate counsel nevertheless unreasonably, inexplicably, and ineffectively failed to raise the issue, to Mr. Kokal's demonstrable prejudice.

The United States Court of Appeals for the Eleventh Circuit has found similar appellate attorney conduct to "fall below the wide range of competence required of attorneys in criminal cases," and thus to violate the appellant's sixth amendment right to the effective assistance of counsel. See Matire v. Wainwrisht, 811 F.2d 1430 (11th Cir. 1987). In Matire, the state trial court had allowed, over objection, the trial prosecutor to comment on the defendant's exercise of his fifth amendment right to remain silent. The Eleventh Circuit found counsel's failure to raise the issue, an issue which "leaped upon even a casual reading of the transcript," on direct appeal prejudicially deficient, particularly "[i]n light of the then Florida rules of per se reversal," which created a "near certainty that Matire's conviction would have been reversed." 811 F.2d at 1439. The same analysis applies to Mr. Kokal's case.

As in Matire, supra, Johnson, susra, and Wilson, supra, the adversary process simply did not work in Mr. Kokal's direct appeal, because counsel rendered ineffective assistance. Mr. Kokal was deprived of his sixth, eighth and fourteenth amendment rights to the effective assistance of appellate counsel, and he, like Mr. Matire, Mr. Johnson, and Mr. Wilson, is entitled to habeas corpus relief.

CLAIM II

THE TRIAL COURT'S EXCLUSION FOR CAUSE OF A VENIRE PERSON WHO EXPRESSED OPPOSITION TO CAPITAL PUNISHMENT, BUT WHO ALSO EXPRESSED THAT HE COULD FOLLOW THE LAW AS GIVEN BY THE COURT, VIOLATED WITT V. WAINWRIGHT, 469 U.S. 412 (1985), WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court modified the test of Witherspoon v. Illinois, 391 U.S. 510 (1968), which governs the exclusion of prospective jurors in capital cases on the basis of their views about capital punishment. The Court was careful to state, however, that it "adhere[d] to the essential balance struck by the Witherspoon decision." 469 U.S. at 424 n.5. That "essential balance" prohibits the exclusion for cause of "jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Id. at 420. In other words, opposition to capital punishment alone is not a sufficient basis for disqualification. Something more must be shown.

To be sure, Witt did modify the Witherspoon test as to precisely what more must be shown. Applying the standard of Adams v. Texas, 448 U.S. 38 (1980), the Court held as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Witt, 469 U.S. at 419 (emphasis in original)(quoting Adams, 448 U.S. at 45). But in the absence of the showing required by

Witt,[3] a venire member may not be excluded simply because he holds strong views against capital punishment.

Measured by these standards, the exclusion for cause of venireman Davis at Mr. Kokal's trial cannot be upheld. Although Mr. Davis did express his general opposition to capital punishment, he also expressed his willingness to follow the law and instructions given by the judge:

> [THE COURT]: Now, with the knowledge that the judge imposes the ultimate, ultimately imposes the penalty and that you do nothing but make a recommendation, will you be able to recommend death under those circumstances if you believe that it was a proper recommendation under the law?
>
> MR. DAVIS: Well, as far as the law would be concerned, I would be able to but as far as, you know, my belief, I don't think I could be able to.
>
> . . . .
>
> MR. WESTLING [DEFENSE COUNSEL]: Will you do what Judge Harrison tells you you have to do in determining whether or not he is guilty or innocent?
>
> MR. DAVIS: Yes.
>
> MR. WESTLINE: Will you follow that?
>
> MR. DAVIS: Yes.

(R. 152-58). Thus, although Mr. Davis did hold personal beliefs in opposition to the death penalty, he stated that he could under the law recommend death, and clearly explained that he could follow the instructions given by the judge.

The trial judge nevertheless upheld the State's challenge for cause of Davis on Witherspoon grounds, finding not that Mr. Davis' views "would prevent or substantially impair the

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[3] Witt also reiterates that, "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." 469 U.S. at .

performance of his duties as a juror," Witt, supra, 469 U.S. at 419, but rather that,

> I don't think he could put the death penalty out of his mind and I will sustain the challenge for cause.

(R. 159)(emphasis added). That a juror would think about the death penalty of course is not a proper ground for exclusion under Witherspoon or Witt. To the contrary, a juror who does have the death penalty "on his mind" will better appreciate the awesome responsibility which his or her role as a capital sentencer entails, cf. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), and is thus better suited to sit as a juror in a capital case. Id. The trial court did not explain (nor could he have explained) how thinking about the death penalty did or could have "substantially impaired" Mr. Davis' ability to perform his duties as a juror, and his exclusion thus violated the principles of Witherspoon and Witt

The only way to uphold juror Davis' exclusion would be to assume that any individual who has strong principles against capital punishment would automatically be unable to restrain those principles and would therefore be "substantially impaired" in the performance of his duties as a juror. But that is not the law. The very essence of the Withersnoon balance, adhered to in Witt, cries out to the contrary:

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

Witherspoon v. Illinois, 391 U.S. at 514-15 n.7. Adams v. Texas, the decision upon which Witt is based, makes the same controlling point:

> [I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow

> conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

448 U.S. at 44-45, quoting Boulden v. Holman, 394 U.S. 478, 483-84 (1969). The United States Supreme Court has recently again reaffirmed these principles:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCrae, 106 S. Ct. 1758, 1766 (1986).

When, as here, a trial court misapplies Withersnoon and excludes from a capital jury a prospective juror who in fact is qualified to serve, a death sentence imposed by that jury cannot stand. See Grav v. Mississippi, 107 S. Ct. 2045, 2047 (1987); see also Davis v. Alaska, 429 U.S. 122 (1976); cf. Adams v. Washinqton, 403 U.S. 947 (1971), rev'q 458 P.2d 558 (Wash. 1969); Wiqqlesworth v. Ohio, 403 U.S. 947 (1971), rev'q 428 N.E.2d 607 (1969); Harris v. Texas, 403 U.S. 947 (Ohio 1971), rev'q 457 S.W.2d 903 (Tex. Crim. App. 1970). Such a death sentence is flatly unconstitutional. As the Supreme Court made unequivocally clear in Gray v. Mississippi:

> Because the Witherssoon-Witt standard is rooted in the constitutional right to an impartial jury, Wainwright v. Witt, 469 U.S., at 416, 105 S.Ct., at 848, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury is such a right. Id., at 23, n.8, 87 S.Ct., at 828, n.8, citing, among other cases, Tumev v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)(impartial judge). As was stated in Witherspoon, a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death," surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal, 'organized to

convict.'" 391 U.S. at 521, 88 S.Ct., at 521, 88 S.Ct., at 1176, quoting Fay v. New York, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630, 91 L.Ed. 2043 (1947).

Gray v. Mississippi, 107 S. Ct. at 2056-57. This Court agrees:

> The state urges, however, that any error in the granting of cause challenges [of jurors not excludable under Witherssoon] was purely harmless. The argument is made that, since the state used a total of only eight of the eighteen peremptory challenges available to it, the challenged members of the venire would have been excused peremptorily had the trial court refused to grant cause challenges. We do not deny that this harmless error theory has a certain logical appeal. Nevertheless, our analysis of the case law, especially the decision in Davis v. Georsia, 429 U.S. 122, 97 S. Ct. 399, 50 L.Ed.2d 339 (1976), compels us to conclude that the dismissals for cause complained of by Chandler cannot be sanctioned as "harmless error," regardless of whether the state, at trial, could have peremptorily challenged the same jurors.
>
> In Davis the Supreme Court of Georgia acknowledged that one prospective juror had been excluded in violation of the Witherspoon standard. Nevertheless, the court affirmed the conviction and death sentence, reasoning that the exclusion of a single death-scrupled venireman did not deny the petitioner a jury representing a cross-section of the community. In reversing the state court decision the majority opinion of the United States Supreme Court stated flatly:
>
> > Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.
>
> Id. at 123, 97 S.Ct. at 400 (citations omitted, emphasis supplied). As noted in a dissenting opinion by Justices Blackman and Rehnquist and Chief Justice Burger, the plain language of the majority in Davis precludes application of a harmless-error test. Moreover, the Fifth Circuit Court of Appeals has addressed itself to the very situation in the case before us. In Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), the fifth circuit summarized Witherspoon and its progeny, including Davis, as providing inter alia:
>
> 2. No jury from which even one person has been excused on broader

> Withersnoon-type grounds . . . may impose a death penalty or sit in a case where it may be imposed, **regardless** of whether an available peremptory challenge might have reached him.

Id. at 1300. See also Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982).

> Our understanding of these federal court decisions is confirmed by the decision of the Georgia Supreme Court in Blankenship v. State, 280 S.E.2d 623 (Ga. 1981). In earlier decisions, including Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L.Ed.2d 666 (1978), cited by the state here, the Georgia high court had adopted the view that Witherspoon-type error could be harmless when the challenged juror(s) could have been reached by unused peremptory challenges. Upon reexamination of Davis and Burns, the court was forced to reverse its prior position:
>
> > [Having reexamined Davis and Burns,] we now hold that in cases where the death penalty is imposed, the improper exclusion from the initial panel of an otherwise qualified juror in violation of Witherssoon v. Illinois is harmful error regardless of whether the state utilized all of its peremptory strikes.
>
> Blankenship, 280 S.E.2d at 623 (citations omitted).

Chandler v. State, 442 So. 2d 171, 174-75 (Fla. 1983).

Because "the Withersnoon-Witt standard is rooted in the constitutional right to an impartial jury," Gray, supra, 107 S. Ct. at 2056, citing, Witt, 469 U.S. at 416, and "because the impartiality of the adjudicator goes to the very integrity of the legal system," Gray, supra, 107 S. Ct. at 2056, the violation of Witherspoon's principles is the type of fundamental error which under Florida law may be raised for the first time in collateral proceedings. See Nova v. State, susra; O'Neal, supra; Dozier, supra; Clark, supra; Flowers, supra. It is thus properly raised in the instant proceedings, and is before this Court on the merits. The merits demand relief. See Chandler, supra; Davis v. Georsia, 429 U.S. 122 (1976); Gray v. Mississippi, supra; Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979); Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982).

Appellate Counsel's Ineffectiveness

Trial counsel challenged the trial court's dismissal of juror Davis (see R. 159), and this issue was thus preserved for appeal. However, as was the case with the previously discussed claim, appellate counsel unreasonably and ineffectively failed to raise this issue on direct appeal. Had he done so, Mr. Kokal would have been entitled to relief. See Chandler, supra. Again, appellate counsel failed to act as an advocate for his client with regard to a substantial, preserved claim. Cf. Wilson, supra; Matire, a . Again, what counsel did present in the cursory three issues he raised, was a weak substitute for the meritorious claims which were available, but which for no discernible reason were ignored. See Claim I, supra.

Here, as in Matire, the issue "leaped out upon even a casual reading of the transcript," and involved per se reversible error. Id., 811 F.2d at 1438. As in Matire, appellate counsel's failure here was patently ineffective, and Mr. Kokal is entitled to the same relief afforded Mr. Matire. See also Wilson, supra; Johnson v. Wainwrisht, 498 So. 2d 938 (1987). The "adversarial testing process" failed during Mr. Kokal's direct appeal, because counsel failed. Matire, 811 F.2d at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984). Mr. Kokal is entitled to habeas corpus relief and a new appeal.

CLAIM III

THE TRIAL COURT REFUSED TO DISMISS FOR CAUSE CERTAIN JURORS WHO EXPRESSED AN UNWILLINGNESS TO CONSIDER THE DEATH PENALTY BUT SUA SPONTE DISMISSED OTHERS WHO EXPRESSED SIMILAR CONCERNS, ON THE BASIS OF THEIR RACE, THEREBY VIOLATING MR. KOKAL'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AND HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

One of the venire persons at Mr. Kokal's trial expressed during voir dire a certain reluctance with regard to the death penalty:

> THE COURT:. . . . All right. Now, let me ask you if you have any strong feelings for or against the death penalty?
>
> MRS. BABCOCK: Well, I will have to say I have feelings against the death penalty.
>
> THE COURT: All right. If we had to vote tomorrow in the State of Florida to either get rid of the death penalty of [sic] keep it, how would you vote?
>
> MRS. BABCOCK: I would vote against it.
>
> THE COURT: . . . you have heard it in the courtroom you believe that the appropriate recommendation by the jury should be death. Would you be able to make that recommendation to the Court even though you are opposed to the death penalty?
>
> MRS. BABCOCK: I don't think so.
>
> THE COURT: All right. Let me ask you to tell us if you are able to, are there circumstances under which a crime would be so terrible that you would be able to recommend death?
>
> MRS. BABCOCK: Well, I think there are circumstances where society needs to be protected from individuals, but I don't think that's the way it should be, by death. I think there should be something like true life imprisonment, that's the key to that kind of a person, away from society.
>
> THE COURT: May I assume from your answer that your answer to me would be no, that there are no circumstances so terrible that you would recommend death?
>
> MRS. BABCOCK: Right.

THE COURT: Let me ask you to examine this question, now: Assume if you will that you and the other jurors are in the first stage of the trial; you are now deliberating the evidence and the law; you know this, that if you find a verdict of guilty the defendant will be exposed to the death penalty. The judge has the ultimate responsibility and it is he who says either life or death. Based on that evidence and that law, you believe that the verdict should be guilty of murder in the first degree, will you be able to return that verdict knowing that the defendant might be or would be exposed to the death penalty and might receive it?

MRS. BABCOCK: That is hard to say because that's, you know, deciding guilt OK innocence, you are deciding whether or not the person is guilty.

(R. 185-86). The State challenged Mrs. Babcock for cause under Witherspoon, with the following result:

MISS WATSON: Yes, Your Honor: The State will move to exclude Mrs. Babcock for cause based on the fact that she could not under any circumstances vote to impose the death penalty under WITHERSPOON.

THE COURT: All right. I will seat Mrs. Babcock during the guilt phase; she will be replaced with an alternate during the penalty phase. That will be an alternate who has stated that he is able to follow the law.

(R. 188; see also Kokal, 492 So. 2d at 1320).

Another juror expressed concerns substantially identical to Mrs. Babcock's:

THE COURT: All right, sir. I want you to assume, if you will, that you are a juror seated in the penalty phase of this trial which means that you and the other jurors have already found the defendant guilty of murder in the first degree: I want you to assume that you have heard further evidence and further instructions of law, and that based upon your understanding of the law and the evidence, you believe that a proper recommendation to the Court should be death. Would you be able to make that recommendation?

MR. ASHLEY: I don't know until it happens.

THE COURT: Well, I want you to assume that you believe that it would be, that you have a duty to recommend death, would you be able to comply with what you believe to be your duty?

MR. ASHLEY: I still won't know that until it happens because I never did before and I wouldn't want to say yes, and I don't know what I would do.

THE COURT: I really don't understand your answer, Mr. Ashley. Would you explain it for me, please?

MR. ASHLEY: As far as what I'm trying to say, when it happened, I don't know just what I'd do. I don't think I could say to just take somebody's life, I just don't feel like I could handle that but I feel like if somebody take somebody's life, for me to be part of the taking of somebody's life, I don't know if I could handle it or not.

THE COURT: Even though you believe it was proper, you don't know if you could handle it or not?

MR. ASHLEY: Yes, sir.

THE COURT: All right. Let me see if I can assist you. I will remind you that I have previously instructed you and the other jurors that the judge has the ultimate responsibility for imposing the sentence . . . . The jury can recommend death and I can impose life if in my view of the law and the evidence it supports that or the jury can recommend life and I may reject it and impose death if my view of the evidence and the law support that sentence. Now, with that explanation, does that help you any further in answering my question?

MR. ASHLEY: If you're wrong, I would say you're wrong, but what happened to him, that's up to you.

THE COURT: All right, sir. I thank you for that answer. But that doesn't help me. Does that mean that since you are leaving it up to me, does that mean that you would be able to recommend death if you believed it to be a proper recommendation?

MR. ASHLEY: No, but I could say guilty and leave it like that.

THE COURT: Then, you would not vote either way, is that right?

MR. ASHLEY: For death. I'd vote for life or something like that but not for death.

THE COURT: You would never vote for death?

MR. ASHLEY: I don't think so.

THE COURT: You would never vote for death under any circumstances?

MR. ASHLEY: I don't know that.

(R. 267-69). The State also challenged Mr. Ashley for cause (R. 270). Although Mr. Ashley was, if anything, less disinclined to recommend death than Mrs. Babcock, the court dismissed him upon the State's motion (R. 271). The court's expressed reasons for dismissing Mr. Ashley, who expressed the same concerns as Mrs. Babcock, are troubling:

THE COURT: All right. Mr. Ashley, if you will stand right outside of the door and await further instructions, please.

(Whereupon, Mr. Ashley exits chambers.)

THE COURT: Miss Watson?

MISS WATSON: Your Honor, I will challenge him for cause.

THE COURT: All right. Mr. Westling?

MR. WESTLING: Judge, I object. He hasn't said he can't render a verdict of death. He told us that he doesn't know. I think that that intimation would perhaps qualify him for a preemptory challenge down the road but I don't think that he would qualify to be excluded as a matter of law.

THE COURT: I will excuse the juror for cause. My perception of the juror is that he is a mature black individual who, in the judgment of the Court, was defiant. uncooperative, did not want to do anything but **equivocate and, therefore, he will be excused.**

MR. WESTLING: Judge, can I ask the Court is the challenge granted because the witness should be excluded as a matter of law, or because of his attitude?

THE COURT: Oh, he **should be excluded as a matter of law; he was not clear.** This is just his demeanor that I was describing along with his answers. Yes, he should be excluded as a matter of law.

MR. WESTLING: All right. Thank you, sir.

(R. 270-71). The trial court's actions in this regard were bizarre. The answers given and the concerns expressed by Mr. Ashley and Mrs. Babcock were substantially similar -- if

anything, Mr. Ashley evidenced less bias toward life than did Mrs. Babcock. Nevertheless, although Mrs. Babcock was clearly excludable under Witherspoon (See R. 423; Kokal, supra, 492 So. 2d at 1320), the court declined to dismiss her for cause, while granting the State's motion as to Mr. Ashley, whose excludability under Witherspoon was much less clear than was Mrs. Babcock's. The only real difference between the two was their race, and the conclusion that the trial court's disparate treatment of the two otherwise identical jurors was based on race is inescapable.

Due process and equal protection forbid such distinctions: "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 106 S. Ct. 1712, 1717 (1986).

In Turner v. Murray, 106 S. Ct. 1683 (1986), the United States Supreme Court held:

> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999, 103 S. Ct. 3446, 77 L.Ed.2d 1171 (1983). We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'" Caldwell, supra, at ___, 105 S.Ct., at 2647 (O'CONNOR, J., concurring in part and concurring in judgment)(citation omitted). In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized.

Turner, 106 S. Ct. at 1688.

This Court also is especially viligant with respect to even the appearance of racial bias, and is likewise unwilling to accept the risk:

> Racial prejudice has no place in our system of justice and has long been condemned by this Court. E.g., Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Hussins v. State, 129 Fla. 329, 176 So. 154 (1937). Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter the criminal justice process has required its unceasing attention. McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1775, 95 L.Ed. 2d 262 (1987):
>
> . . .
>
> We emphasize that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding.

Robinson v. State, 520 So. 2d 1, 7-9 (Fla. 1988), citing, Turner v. Murray, 476 U.S. 1, 106 S. Ct. 1683 (1986); see also Peek v. State, 488 so. 2d 52 (Fla. 1986).

Here, there existed no discernible distinction between the two jurors other than their race. The trial court's attempt to explain his reasons for excluding one juror and not the other in fact reflected the apparent racial bias brought to bear on the court's reasoning. The appearance that race was used as a factor, standing alone, is enough to warrant relief. See Turner v. Murray, supra; cf. Gray v. Mississippi, 107 S. Ct. 2045 (1987)(only legitimate basis for excluding jurors pursuant to Witherssoon is the juror's failure to meet the Witherspoon/Adams/Witt test), In Mr. Kokal's case, however, the record reflects a great deal more than the appearance that race was used as a factor in the trial court's exclusion of one, but not the other, similarly situated juror. Cf. Supra; Robinson, supra.

The risk that race played a part in the trial judge's distinction between these two jurors, see Robinson, supra, is here too great to tolerate, and Mr. Kokal's conviction and sentence must be overturned. As this Court made clear in Peek:

> Trial judges not only must be impartial in their own minds, but also must convey the image of impartiality to the parties and the

> public. Judges must make sure that their statements, both on and off the bench, are proper and do not convey an image of prejudice or bias to any person or any segment of the community. This type of conduct is required of our judiciary befcause "every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (Fla. 1930). We write about this incident to emphasize the need for all judges to be constantly vigilant about their comments and demeanor both inside and outside the courtroom to assure that their impartiality may not "reasonably be questioned." Code of Judicial Conduct, Canon 3C(1).

Peek, supra, 488 So. 2d at 56.

Because this issue implicates the right to a fair and impartial jury, it is fundamental error which is appropriately brought in the instant proceedings. See Nova, supra; cf. O'Neal, supra; Powers, a ; Dallas v. Wainwright, supra. Moreover, because this claim involves essential equal protection and due process rights, the Court should grant relief at this juncture pursuant to its habeas corpus jurisdiction.

Inefffective Assistance of Counsel

As with Claims I and II, supra, this claim was preserved for appellate review: trial counsel objected, and the trial court denied the objection. The claim was apparent from the record and involved clear constitutional error -- Mr. Kokal's rights to trial by a fair and impartial jury were denied on the basis of the trial judge's racially based distinctions. Counsel's failure to urge the claim was prejudicial ineffective assistance and, pursuant to the sixth, eighth, and fourteenth amendments, Mr. Kokal is entitled to habeas corpus relief. See Wilson, supra; Johnson , supra; Matire, supra. This issue should now be fairly determined, and relief should now be granted.

CLAIM IV

THE PROSECUTOR IMPROPERLY PRESENTED AND ARGUED AND THE SENTENCING JUDGE AND JURY IMPROPERLY CONSIDERED MR. KOKAL'S PURPORTED LACK OF REMORSE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In closing argument at the penalty phase of Mr. **Kokal's** trial, the prosecutor argued to the jury:

> It's a cold, calculated and cruel thing to go and tell a friend later that you wasted a guy for a buck, that dead men don't tell lies. It's a cold thing to say I'm going to do it again tomorrow because Gregory Kokal is going to make it in this world, one way or another. That is the mind of a person who has no, absolutely no feeling of guilt for what he's done.
>
> Not only did it not bother him, but he was going to do it again. Ladies and gentlemen, I submit to you that when the defendant took the stand you saw that lack of remorse about it because he just didn't care, there was no sorrow in his voice at all as he sat there and told you that he didn't do it.

(R. 893).

The prosecutor had begun this no-remorse theme in his closing argument at the guilt phase:

> Now, talk about no remorse, you watched him on the stand. Does that look like a man troubled about this? No, he was kind of cocky.
>
> . . .
>
> He was cocky. That wasn't a man upset about what he had seen, and I submit to you that is the same Gregory Kokal, the one who talked to Gene Mosley that night being cocky, then Gene Mosley told you it's true, he knows about that because that question was asked, but he's not lying. He doesn't lie. He bragged and said they're not going to catch me. That is the personality you are looking at, ladies and gentlemen.

(R. 819). Defense counsel objected to this improper argument, but his objection was overruled. (Id.)

Since the Court's decision in Mr. **Kokal's** direct appeal, it has specifically barred the use of lack of remorse as evidence of

an aggravating circumstance. In its recent decision in Robinson v. State, 520 So. 2d 1 (Fla. 1988), this Court explained:

> We vacate Robinson's death sentence because we agree with Appellant that the state impermissibly argued a nonstatutory aggravating factor and injected evidence calculated to arouse racial bias during the penalty phase of his trial.
>
> During closing argument at the penalty phase, the prosecutor stated to the jury: "One thing to know about Dr. Krop's testimony is the Defendant suffers from antisocial tendencies.
>
> He has a total indifference to who he's hurt, as to killing Beverly St. George. He really doesn't care that much. He showed no remorse, according to Dr. Krop."
>
> Defense counsel immediately objected and correctly pointed out that the prosecutor was improperly arguing a nonstatutory aggravating circumstance. The trial court denied the subsequent motion for a mistrial.

520 So. 2d at 5-6 (emphasis supplied).

The situation here is virtually identical and calls for equal application of the law. The introduction of evidence of lack of remorse, argument based upon such evidence, and reliance by the sentencing jury and judge on such evidence was clear eighth amendment error. Booth v. Maryland, 107 S. Ct. 2529 (1987); see also, Zant v. Stephens, 462 U.S. 862 (1983). such factors have nothing to do with the character of the offender or circumstances of the offense, and thus deny a capital defendant an individualized and reliable capital sentencing determination -- precisely what the eighth amendment forbids. Booth, supra; Stephens, supra.

Had appellate counsel raised this issue on direct appeal, Mr. Kokal would have been entitled to the same relief as Mr. Robinson. Appellate counsel's failure to raise the issue was thus fundamentally and prejudicially ineffective. cf. Matire, supra; Wilson, supra.

Based upon the change in law announced in Robinson and Booth, based upon the fact that this error is fundamental in

nature, and because appellate counsel rendered ineffective assistance by failing to urge this claim on direct appeal, the claim should now be heard and habeas corpus relief should be granted.

CLAIM v

MR. KOKAL'S CAPITAL SENTENCING JURY WAS REPEATEDLY MISINFORMED AND MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 370 (1985), ADAMS V. DUGGER, 816 F.2D 1443 (11TH CIR. 1987), MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988) (EN BANC), AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. MR. KOKAL'S CLAIM

Throughout the course of the proceedings resulting in Mr. Kokal's sentence of death, the jurors at his trial were misinformed, misled, and misinstructed. The jurors were consistently signalled that their recommendation was of little importance, that the appropriateness of sentencing the defendant to death had been and would be determined by better authorities than the jurors, and that any other questions regarding the appropriateness of sentencing the defendant to death would be disposed of by yet another much more qualified authority -- the judge, who was free to disregard their advisory decision.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the United States Supreme Court held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's sentencing decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to explain that the jury's decision would be reviewed with a presumption of correctness, the United States Supreme Court held that the jury was erroneously

led to believe that the ultimate responsibility for the death sentence rested elsewhere, a misleading impression which diminished the jurors' sense of responsibility and violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the prosecutor's improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's sentence of death. Caldwell, 105 S. Ct. at 2645, citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc).

The diminution of jury responsibility which occurred here is as significant as that in Caldwell. Here, in fact, the trial judge himself directly misinformed the jury as to their true role at sentencing, by informing the jury, individually and collectively, that it was he, the trial judge, and not they, the jury, that bore the ultimate and final responsibility for the sentencing decision. (See, e.g., R. 120, 121, 860, 910). Whatever decision the jury might arrive at, according to the trial judge, he was free to ignore their decision and impose whatever sentence he "believed:' appropriate (Id.)

This unconstitutionally inacurrate and misleading portrait of the Florida capital sentencing scheme was among the first things the members of the panel from which Mr. Kokal's jury was selected heard. At the first stage of voir dire, where venire persons were questioned regarding their views on the death penalty and extra-judicial knowledge of the case, the court and the prosecutor provided a jury-diminishing perception of the capital sentencing process and the jury's minimized role.

During his initial instructions on the death penalty, the

Court explained to the venire: ". . . it's up to the jury to make a recommendation to the Court. Now the recommendation is not binding on the Court, meaning the judge, the judge has the ultimate responsibility to sentence the defendant. . . " (R. 12--21).

Voir dire was by individual sequestration and while there were many examples of the trial judge and prosecutor making comments that diminished the jurors' sense of responsibility (R. 152, 161, 167, 182, 259, 268, 280, etc.), the pertinent examples were those made to individuals who ultimately served on the jury. For example, to Juror No. 9, Mr. Matthews, the Court said:

> At the second stage of the trial the jurors. . . must then make a recommendation to the Court. It is an advisory recommendation, nothing but a recommendation as to whether the defendant should get life imprisonment with no parole for twenty-five years, or death.
>
> The Court may reject it or accent it because it is the Court's responsibility to imsose a sentence.

(R. 253)(emphasis added). Although a general statement was provided to the panel from which the jurors were selected, early in voir dire, that the judge would give great weight to their recommendation, this was far from sufficient to cure the harm. As in Caldwell itself, the general accurate statement of the law in Mr. Kokal's case was far from sufficient to cure the harm resulting from the court's and prosecutor's persistent jury-diminishing remarks.

The judge's initial instruction at the penalty phase was:

> The final decision as to what punishment shall be imposed rests solely with the judse of this Court. I, however, want to tell you that the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 860). Later in this stage of the proceedings, the Judge instructed: "As you have been told, the final decision as to what

punishment should be imposed is the responsibility of the judge" (R. 910).

Even defense counsel supported this unconstitutional view of the sentencing process, echoing and reinforcing the court's diminution of the jurors' sense of responsibility:

> You are here now to render an advisory opinion to the Court.

(R. 898).

> If you recommend to Judge Harrison and if he chooses to follow your recommendation. . .

(R. 903).

Not only were the potential jurors in Mr. Kokal's case informed that they had virtually no responsibility for the sentencing decision, and that no matter what they did the judge would do what he wanted regarding sentencing, those jurors who expressed a fear or hesitancy when confronted with the awesome responsibility of considering a man's fate were encouraged to pass the responsibility to the judge. Those jurors' fears were assuaged by an inaccurate view of the process by which the judge would make the sentencing decision independently and without regard to the jury's decision. (See e.g., R. 152, 161, 167, 182, 259, 268, 280). This is precisely what Caldwell addressed, and condemned.

The jurors that were selected to serve on Mr. Kokal's jury were time and again instructed in conformity with an unconstitutional and inaccurate view of the capital sentencing procedure at voir dire, trial, and sentencing. During guilt/innocence instructions, Mr. Kokal's jury was instructed that "it is the judge's job to determine what a proper sentence would be . . . " (R. 834). At the commencement of the sentencing phase, the jury was instructed that "[t]he final decision as to what punishment should be imposed rests solely with the judge of this Court" (R. 860). Then, after the presentation of evidence, during the final sentencing instructions, immediately prior to

their deliberations, the jurors were once again instructed that the "final decision" as to punishment was the responsibility of the judge (R. 910).

None of the comments and instructions at issue herein accurately portrayed the jury's role in the Florida capital sentencing scheme. The sentencing jury does play a critical role in Florida, and its recommendation is not a nullity which the trial judge may regard or disregard as he sees fit. To the contrary, the jury's recommendation is entitled to great weight, and is entitled to the court's deference when there exists any rational basis supporting it. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookinss v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 so. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.

The role of the Florida sentencing judge, after all, has long been recognized as not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 so. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529; Mann v. Dugger, 844 F.2d 1446, 1454 n. 10 (11th Cir. 1988)(en banc). The jury's

sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Kokal's jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished.

The constitutional vice condemned by the Caldwell court is not only the substantial unreliability that comments such as the ones at issue in Mr. Kokal's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. Accord. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McCautha v. California, 402 U.S. 183, 108 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover,

> they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the reswonsibilitv for any ultimate determination of death will rest with others presents an intolerable danser that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless given in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a stepfurther-- they were not isolated, as were those in Caldwell, but were heard by all of the jurors at each stage of the proceedings. In Mr. Kokal's case the Court itself made most of the statements at issue, and the error is thus even more substantial:

> [B]ecause . . . the trial judge . . . made the misleading statements in this case, . . . the jury was even more likely to have . . . have minimized its role than the jury in Caldwell.

Adams v. Wainwrisht, 804 F.2d at 1531. There can be no doubt that the comments and instructions diminished Mr. Kokal's jury's view of its role, and unconstitutionally misled the jury.

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Kokal's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden in this case. Here, as in Adams, the significance of the jury's role was minimized, and the comments at issue thus "created a danger of bias in favor of the death penalty." Id. at 1532. Mr. Kokal's rights under the eighth and fourteenth amendments were violated, and this Court must now correct these fundamental eighth amendment errors pursuant to Rule 3.850.

Certainly reasonable jurors hearing all of these comments would have concluded that the judge was free to ignore the jury's

sentencing recommendation, and that the jury's recommendation was not of any significance on the ultimate question of whether Mr. Kokal was to live or die. As Mills v. Maryland, 108 S. Ct. 1860 (1988), recently made clear, Mr. Kokal is entitled to relief under the appropriate constitutional standard: since reasonable jurors on the basis of the comments and instructions provided could have been misled into believing that their penalty verdict would be of little or no significance, the eighth amendment mandates that relief be granted.

The eighth amendment errors in this case deprived Mr. Kokal of his rights to an individualized and reliable capital sentencing determination. Under no construction can it be said that the statements and instructions at issue had "no effect" on the jury's sentencing verdict. Caldwell, 105 S. Ct. at 2646: Adams v. Wainwrisht, 804 F.2d at 1531; Mann v. Dugger, susra. The comments and instructions assuredly had an effect. Caldwell, supra; Adams, cf. supra; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc). Moreover, the comments and instructions "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether in fact [Gregory Alan Kokal should be sentenced to die]." Smith v. Murrav, 106 S. Ct. 2661, 2668 (1986). Under these circumstances, no procedural bar impediment exists to the Court's consideration of this claim, See Smith v. Murray, 106 S. Ct. at 2668. Relief is proper.

Of course, Caldwell did not exist at the time Mr. Kokal was tried. Caldwell now demonstrates that Mr. Kokal is entitled to post-conviction relief. See Adams, supra. To the extent that the Court determines that Caldwell is not new law, or counsel should have predicted Caldwell, it was ineffective assistance not to object to the dimunition of the jurors' sense of responsibility. For each of the reasons discussed above, the Court should vacate Mr. Kokal's unconstitutional sentence of death.

B. THE PROPRIETY OF A STAY OF EXECUTION ON THE BASIS OF MR. KOKAL'S CALDWELL CALIM AND THE PENDENCY OF DUGGER V. ADAMS BEFORE THE UNITED STATES SUPREME COURT

Mr. Kokal's petition pleads a compelling claim relief under Caldwell v. Mississiasi, 472 U.S. 320 (1985). See also Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc). The standards pursuant to which Mr. Kokal's claim should be determined are presently pending before the United States Supreme Court in Dugger v. Adams, 56 U.S.L.W. 3601 (March 8, 1988). In this regard, this Court has recently written:

> If this were the first time [the Petitioner] presented this Caldwell [v. Mississippi] claim to this Court, . . . a stay may be warranted.

Darden v. Dugger, 13 F.L.W. 196, 197 (Fla. March 14, 1988). This is the first opportunity that Mr. Kokal has had to present this claim to any Court. A stay is proper, at a minimum, pending the decision in Dugger v. Adams, 56 U.S.L.W. 3601 (March 8, 1988), in which certiorari was granted to determine the very issue presented in Mr. Kokal's Rule 3.850 motion.[4] Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), is also relevant. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing) jury plays an important role in the Florida sentencing scheme," and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that

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*When Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was pending on certiorari before the United States Supreme Court, Florida's courts granted stays of execution to litigants raising Hitchcock claims pending the issuance of the Hitchcock decision. See, e.g., Rilev v. Wainwright, 517 So. 2d 656 (Fla. 1987). The logic behind this approach made, and makes, perfect legal and common sense: a human being should not be put to his death while the very legal principle which will establish whether or not his execution would be proper is to be determined in but a few weeks or months. As Hitchcock determined the question (favorably) for Mr. Riley, Adams will be relevant to the determination in Mr. Kokal's case. A stay is required.

> its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the
>
> nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. March 7, 1988).

Id., 844 F.2d 1452-54. As is demonstrated by the discussion presented above (section A), there is little principled factual or legal distinction between Mr. Kokal's case and Adams or Mann. Under Adams and Mann, Mr. Kokal is entitled to relief. A stay of execution should therefore be granted in this case until the United States Supreme Court finally determines whether Mr. Kokal should receive the relief to which he is entitled under Mann and Adams. Logic compels no less.

Given the pendency of Adams before the United States Supreme Court, tribunals which have been called on to determine Florida litigants' Caldwell claims have not hesitated to order that a stay of execution be entered:

> The appellant has presented nonfrivolous claims which the en banc court is presently considering in Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987), and Harich v. Dugger, 828 F.2d 1497 (11th Cir. 1987). Additionally, the Supreme Court of the United States has granted certiorari in Dugger v. Adams (March 7, 1988).
>
> Accordingly, the petitioner's emergency motion for a stay of execution and certificate of probable cause is granted: the emergency motion for stay of execution pending appeal is granted.
>
> The execution scheduled for March 9, 1988, at 7 a.m., is stayed indefinitely and until further order of this Court.

Tafero v. Dugger, No. 88-5198 (11th Cir. March 7, 1988)(Vance, Kravitch and Hatchett, JJ.).

Petitioner is presently scheduled to be

> executed on March 9, 1988, at 7:00 a.m. Having reviewed the petition and the State's responsive pleadings, the Court concludes that only Claim II of petitioner's asserted six claims requires further consideration. Claim II presents a claim for relief under Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). This Court is aware that the United States Court of Appeals for the Eleventh Circuit has stayed execution in Tafero v. Dusser, Case No. 88-5198 pending en banc consideration in Mann v. Dugger, 828 F.2d 1498 (11th Cir. 1987), and Harich v. Dusser, 828 F.2d 1497. Tafero presents a Caldwell claim identical to Claim II in the instant petition. Further, the United States Supreme Court has granted certiorari in Dugger v. Adams (March 7, 1988). This Court concludes that a stay is proper pending the Eleventh Circuit's en banc determination of the Caldwell issue in the foregoing cases.

Johnson v. Dugger, TCA 88-40058-MMP (N.D. Fla. March 8, 1988) (Maurice Paul, J.).

In fact, the United States Supreme Court has recently spoken to this very issue. In Preston v. Dugger, United States Supreme Court Case No. A-216 (application for stay of execution pending disposition of petition for writ of certiorari presenting Caldwell/Adams claim filed September 13, 1988), the petitioner requested that his then-scheduled execution be stayed in order for him to properly present his Caldwell/Adams claim. On September 23, 1988, the United States Supreme Court issued a stay of execution on the basis of Mr. Preston's claim:

> The application for stay of execution of sentence of death, presented to Justice Kennedy and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

Preston v. Dugger, U. S. Sup. Ct. Case No. A-216 (Order Staying Execution, Sept. 23, 1988).

The logic behind the need for a stay of execution under circumstances such as those presented herein has persuaded a unanimous United States Supreme Court that a stay of execution is

proper. See Preston v. Dugger, supra. A stay of execution is proper here as well, and Mr. Kokal respectfully urges that the Court stay his execution pending the United States Supreme Court's determination in Adams.

CLAIM VI

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

Since the time of Mr. Kokal's trial and direct appeal, the United States Supreme Court decided Maynard v. Cartwright, 108 S. CT. 1853 (1988). Under the Cartwright decision, Mr. Kokal is undeniably entitled to habeas corpus relief.

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

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

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

The construction approved in Proffitt was not utilized at the jury-sentencing phase of Mr. Kokal's case. The jury was simply instructed that one of the aggravating circumstances was the "capital felony was especially heinous, atrocious, or cruel"

(R. 911). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. The court provided no further definition of this circumstance to guide the jury's deliberations.

In Maynard v. Cartwright, 108 S. CT. 1853 (1988), the jury found the murder to be "especially heinous, atrocious, or cruel," and the state Supreme Court affirmed, reciting facts which supported the application of the circumstance. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Kokal's case. The result here should be the same as Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georsia, 408 U.S. 238 (1972).
>
> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was not principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (white, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).
>
> Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly

vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

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

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

> to warrant the imposition of the death penalty.
>
> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue--"especially heinous, atrocious, or cruel"--gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. . . .
>
> Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, 108 S. Ct. at 1859.

In Mr. Kokal's case, as in Cartwrisht, what was relied upon by the jury, judge, and this Court on direct appeal, did not guide or channel sentencing discretion. No "limiting construction" was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before the jury and the error was not cured by this Court's review of this aggravating factor on direct appeal. This Court reviewed this aggravating circumstance on direct appeal, but nevertheless affirmed. Cartwrisht alters the analysis then applied by this Court and makes clear Mr. Kokal's entitlement to relief. Mr. Kokal's claim should therefore now be revisited and relief should now be granted. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). Pursuant to Cartwrisht, Mr. Kokal is entitled to the habeas corpus relief he seeks.

CLAIM VII

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. KOKAL'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. Kokal's jurors were 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. Kokal's jury could well have believed that they 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).

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but by a simple majority. If a majority does not vote for death, the jury's recommendation is life; thus, if the jury's vote is Split six (6) to six (6), the jury has recommended life, and the defendant is entitled to that verdict. During the proceedings resulting in Greg Kokal's sentence of death, the prosecutors' comments and the judge's instructions deprived him of that right.

During voir dire, the prosecutor informed the prospective jurors that their recommendation as to life or death, should they be seated on the jury, "had to be by a majority." In fact, the prosecutor compared guilt-innocence (at which unanimity was required) with sentencing (where a majority was required).

Echoing the prosecutor's contrast between the guilt-innocence and sentencing verdicts, the trial judge began the sentencing instructions by repeating the erroneous majority vote requirement:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

(R. 913). A few moments later, however, the judge did read at least part of the correct standard jury instruction, that part which advises the a jury that six (6) or more jurors may recommend life. That reference to the proper legal standard was rendered nugatory, however, by the judge's final instruction to the jury, the last instruction the jury received regarding the standard they were to employ in arriving at a verdict. Before retiring to deliberate on Mr. Kokal's life, the jurors were told:

> When seven or more are in asreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman, dated, and returned to this court.

(R. 915)(emphasis supplied). Defense counsel's objection to this erroneous instruction was overruled (id.), and the jury returned a recommendation of death. It is clear that the final instruction regarding the jury's vote, particularly when combined with the reinforcement previously received from the judge and the prosecutor, misled the jury, giving them the erroneous impression that they could not return a valid sentencing verdict if they were tied. Such inaccurate and misleading statements of the law regarding a capital jury's actions, function, and responsibility irrevocably reduce the reliability of the sentencing determination. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

The Florida Supreme Court had, before Mr. Kokal's direct appeal, recognized that such instructions were erroneous, and struck the offensive paragraph read to Mr. Kokal's jury from the standard instructions. Harich v. State, 437 So. 2d 1082 (1983). Rose v. State, 425 So. 2d 521 (Fla. 1982). At trial, counsel

Objected. The issue was thus preserved and ripe for appeal in Mr. Kokal's case, and appellate counsel was prejudicially ineffective for failing to raise it. The prejudice from the incorrect and misleading instruction is patently clear, for the state cannot show that the prosecutors' and judge's misstatements of the law had no effect. Caldwell, supra; see also Mills v. Marvland, 108 S. Ct. 1860 (1988). Caldwell and Mills represents new law, unavailable at the time of trial. Caldwell demonstrates that Mr. Kokal's sentence of death violated the eighth and fourteenth amendments and must be vacated. Because of the new law announced in Caldwell and Booth, and because counsel rendered ineffective assistance on direct appeal, habeas corpus relief should now be granted.

CLAIM VIII

MR. KOKAL 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); Eddinss 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. Kokal'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. Kokal'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. Kokal's sentence of death, the prosecution focused the jury's attention on the personal characteristics of the victim, and the impact of his death on his family and friends. 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. Kokal's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination. See Booth, supra.

The theme of this constitutionally impermissible argument was established during the prosecution's sentencing argument, when the prosecutor "explained" the victim's background and character to the jury:

> The victim in this case, of course, wasn't a Majik Market clerk, but he was a young man, a Sailor who was doing nothing illegal. He was out drinking with some friends. I think the Medical Examiner testified he had a small amount of alcohol in his blood. [There was no testimony to this effect.] He wasn't drunk, he wasn't driving under the influence of alcohol, he wasn't doing anything wrong. He had been seeing his friend, had plans to go back that weekend and see his friend again. Typical normal lifestyle of a normal law-abiding young man who was pursuing a career in the Navy, goes back to Mayport and makes the biggest mistake in his life and that is that he hitchhiked and runs into the defendant in this case and through no fault of his own, through no violation of his and even through no other reason, completely innocent, was robbed and murdered.

(R. 888-889).

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[5] Actually, the testimony was that he, Mr. Kokal, and codefendant O'Kelly had been smoking marijuana.

Then, the prosecutor informed the jury of the effect that the victim's death would have on his friends and family:

> You know, one of the sad things about the crime of murder is that it doesn't just affect the victim in this case, it doesn't just affect the family of the victim, the mother and the father, the brother and sisters, it doesn't just affect friends of the victim, people who knew and loved the victim that he killed . . .

(R. 896).

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 his family's "assets to their community." 107 s. ct. at 2534 n.8.

In short, the presentation of evidence or argument concerning "the personal characteristics of the victim" and the impact on the victim's family 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 or because of the impact of his death on his family. But this is precisely what Mr. Kokal'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. Kokal's case. Accordingly, Mr. Kokal 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. Kokal at the time of trial or direct appeal. This claim is thus cognizable in the instant proceedings. See Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dusser, 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. Kokal 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. Kokal'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. Kokal's claim involves a classic instance of a constitutional error which "perverted the jury's deliberations concerning the ultimate question of whether [Gregory Kokal should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). 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, susra; Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (en banc). Finally, although Mr. Kokal 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 on direct appeal.

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 habeas corpus relief.

CONCLUSION

Petitioner, Gregory Alan Kokal, herein has established his entitlement to habeas corpus relief. Because this case presents certain issues of non-record fact, Mr. Kokal respectfully urges that the Court relinquish jurisdiction to a trial court in order far Mr. Kokal to present the facts attendant to his claims in an evidentiary forum. For the reasons discussed herein, Mr. Kokal 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by (U.S. MAIL) (HAND DELIVERY) to Robert Butterworth, Attorney General, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 26 day of September, 1988.

_____
Attorney