IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
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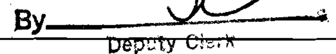

NO. 73281

LEO ALEXANDER JONES,

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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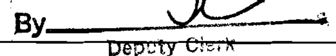

LEO ALEXANDER JONES,

Petitioner,

v.

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

PRELIMINARY STATEMENT

Mr. Jones' petition presents significant constitutional questions, involving issues predicated upon significant changes in the law which were unavailable to Mr. Jones at the time of his capital trial and sentencing, direct appeal, or earlier proceedings. Mr. Jones' petition also presents claims of fundamental constitutional error, and claims involving egregious eighth amendment sentencing errors: precisely the type of issues which, as this Court has recognized, are subject to no procedural impediment. See, e.g., Scull v. State, 13 F.L.W. 545 (Fla. September 8, 1988); Phillips v. Dugger, 515 So. 2d 227, 228 (Fla. 1987)(Barkett, J., dissenting)(Defendant cannot "waive" the "need for reliability [in capital sentencing determination]. Thus, I cannot agree that a procedural bar, resting as it does on the concept of waiver by default, permits the courts of any state to affirm a death sentence that bears the indicia of unreliability."); cf. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(claims challenging fundamental reliability of death verdict subject to no procedural impediment). As will be demonstrated below, Mr. Jones' petition presents claims challenging the fundamental reliability and fairness of his capital conviction and sentence of death. The claims are subject to no procedural bar.[1]

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[1] Of course, Fla. R. Crim. P. 3.851 is inapplicable to Mr. Jones' case. Florida Governor Bob Martinez issued a death warrant against Mr. Jones on September 12, 1988, and Mr. Jones' execution was scheduled for November 10, 1988: i.e., less than sixty (60) days from the date the warrant was signed. By its terms therefore Rule 3.851 does not apply to this case. See id. ("When a death warrant is signed for a prisoner and the warrant sets the execution for at least sixty days from the date of signing, all motions and petitions for any type of post-conviction or collateral relief shall be filed within thirty days

in the law which were unavailable to Mr. Jones at the time of his

capital trial and sentencing, direct appeal, or earlier proceedings. Mr. Jones' petition also presents claims of fundamental constitutional error, and claims involving egregious eighth amendment sentencing errors: precisely the type of issues which, as this Court has recognized, are subject to no procedural impediment. See, e.g., Scull v. State, 13 F.L.W. 545 (Fla.

Notwithstanding the fact that Rule 3.851 is inapplicable to Mr. Jones' case, it was undersigned counsel's intention to file Mr. Jones' pleadings as expeditiously as possible. As counsel explained in a pleading regarding Mr. Jones' case recently filed with the Court, a pleading intended to inform the Court of the circumstances under which Mr. Jones' case was being litigated:

> BILLY H. NOLAS, as counsel for LEO ALEXANDER JONES, petitioner, respectfully submits the following statement regarding the filing of post-conviction pleadings on Mr. Jones' behalf and herein also respectfully requests that the Court reschedule oral argument in Mr. Jones' case. In support thereof, counsel respectfully submits as follows:
>
> A. <u>STATEMENT REGARDING FILING OF PETITIONER'S POST-CONVICTION PLEADINGS</u>
>
> 1. Leo Alexander Jones is an indigent Florida capital prisoner, currently incarcerated at the Florida State Prison, Starke, Florida. Florida Governor Bob Martinez issued a death warrant against Mr. Jones, and Mr. Jones' execution is presently scheduled for November 10, 1988.
>
> 2. Prior to the signing of a death warrant, Mr. Jones was represented by volunteer <u>pro</u> <u>bono</u> <u>publico</u> counsel, Mr. Robert Link, Esq., in his state court post-conviction proceedings. However, the high costs associated with providing professionally adequate representation to an indigent post-conviction capital litigant made it impossible for Mr. Link to continue with Mr. Jones' representation.[2]
>
> 3. Mr. Jones is indigent and, once Mr. Link withdrew, was without counsel. As a consequence, the Office of the Capital Collateral Representative (CCR) was required

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[2]The footnote explained:

This is not an unusual circumstance. Many attorneys who were willing to undertake <u>pro</u> <u>bono</u> <u>publico</u> representation of Florida capital post-conviction petitioners prior to the creation of the Florida Office of the Capital Collateral Representative have since determined that such efforts would no longer be possible. Since the Office of the Capital Collateral Representative (CCR) must represent all indigent capital prisoners in post-conviction proceedings, <u>see</u> Fla. Stat. section 27.702 (1987), many of the attorneys who had undertaken pro bono

with the Court, a pleading intended to inform the Court of the circumstances under which Mr. Jones' case was being litigated:

BILLY H. NOLAS, as counsel for LEO ALEXANDER JONES, petitioner, respectfully submits the following statement regarding the filing of post-conviction pleadings on Mr. Jones' behalf and herein also respectfully requests that the Court reschedule oral argument in Mr. Jones' case. In support thereof, counsel respectfully submits as follows:

to undertake Mr. Jones' representation. See Fla. Stat. section 27.702 (1987). Larry Helm Spalding, Florida Capital Collateral Representative, thereafter assigned Mr. Jones' case to Billy H. Nolas, an attorney with the CCR office.

4. Fla. R. Crim. P. 3.851 is inapplicable to Mr. Jones' case: his execution was not set "for at least sixty days from the date of signing" of his death warrant. See Rule 3.851. Nevertheless Mr. Jones, who has asserted his innocence of the instant offense, has urged and in fact directed counsel time and again to file his post-conviction pleadings expeditiously. Counsel has also desired to file Mr. Jones' pleadings as expeditiously as possible, and those efforts which counsel has been able to undertake towards reviewing and digesting the thousands of pages which comprise the record in this case have demonstrated that there exist significant, viable issues in this action which should be presented to this Honorable Court.

5. However, contrary to Mr. Jones' directions, and contrary to counsel's intentions, to date it has been absolutely impossible for counsel to prepare any professionally responsible pleadings on Mr. Jones' behalf. This inability is due to no tactic, and is directly contrary to counsel's own intentions. Neither is this inability due to any fault on the part of counsel or Mr. Jones. Rather, counsel's inability has been due to circumstances absolutely beyond counsel's or counsel's client's control: the Florida Governor's recent actions in issuing untenable numbers of death warrants.

6. This Court is well aware of the fact that the Governor can literally cripple CCR's efforts through the signing of unprecedented numbers of death warrants. See, e.g., Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Spalding v. Dugger, issued in June of 1988, is in fact a good point of reference. At the time the applications at issue in that action were filed, nine death warrants were outstanding. That number of death warrants was then an unprecedented number, and almost crippled the office of the CCR's efforts to provide even a semblance of effective representation to its capital clients. Since then, the Governor has made it clear that what we then believed to be unique, unprecedented action has now become the norm. Fourteen (14) death warrants had been issued in September and October, 1988. The then unprecedented number of nine death warrants outstanding at any one time. see
inapplicable to Mr. Jones' case: his execution was not set "for at least sixty days from the date of signing" of his death warrant. See Rule 3.851. Nevertheless Mr. Jones, who has asserted his innocence of the instant offense, has urged and in fact directed counsel time and again to file his post-conviction pleadings expeditiously. Counsel has also desired to file Mr. Jones' pleadings as expeditiously as possible, and those efforts which counsel has been able to undertake towards reviewing and digesting the thousands of pages which comprise the record in this case have demonstrated that there

investigation, research, and preparation. Untenable actions by the executive -- the issuance of such high numbers of death warrants -- make capital collateral counsels' efforts to <u>effectively</u> investigate, research, prepare, and present a capital case virtually impossible. CCR's staff of nine attorneys has barely been able to keep up. In this regard, it should be noted that work on non-warrant cases does not stop simply because of our responsibilities in under-warrant actions: six evidentiary hearings involving CCR clients were scheduled in September; six were and are scheduled in October; and five are already scheduled for November; additionally, CCR has filed over fifty substantive briefs and pleadings during this period of time. Under these circumstances it is readily apparent that the Governor's frenzied issuance of death warrants has had a detrimental effect: clients who are under-warrant suffer, as well as those who are not under warrant.[3]

7. The Governor's warrant-signing actions have had a direct effect on Mr. Jones' case. Contrary to Mr. Jones' directions and counsel's intentions, it has been impossible for counsel to prepare any pleadings on Mr. Jones' behalf prior to the Court's October 25, 1988, oral argument date. Undersigned counsel was responsible for seven death warrant capital cases in September and early October, and is currently responsible for four such cases. Counsel was responsible for three non-warrant evidentiary hearings in September, two in October, and is currently responsible for three of the five already scheduled in November. Additionally, counsel has been responsible for preparing and filing approximately twenty-five (25) substantive briefs and pleadings, conducting arguments in various courts, and undertaking efforts to investigate, research, and prepare for a number of other capital proceedings during this period of time.

8. Counsel respectfully represents to the Court that he has barely kept up with the under-warrant cases alone, and the

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[3]The footnote explained:

No attorney can be expected to effectively litigate more than one capital case involving a death warrant at a time. Under the untenable circumstances created by Governor Martinez's warrant-signing policies, CCR's attorneys have had to litigate anywhere between two (2) and, as in undersigned counsel's case, seven (7) death warrants during the same time period. Since early September, CCR's attorneys and staff have been forced to

has barely been able to keep up. In this regard, it should be noted that work on non-warrant cases does not stop simply because of our responsibilities in under-warrant actions: six evidentiary hearings involving CCR clients were scheduled in September; six were and are scheduled in October; and five are already scheduled for November; additionally, CCR has filed over fifty substantive briefs and pleadings during this period of time. Under these circumstances it is readily apparent that the Governor's frenzied issuance of death warrants has had a detrimental effect: clients who are under-

> represenation afforded clients such as Mr. Jones, who has urged counsel to file as soon as possible, has suffered.
>
> 9. Counsel has attempted to devote as much time as possible to Mr. Jones' case, while not ignoring the needs of clients whose executions were scheduled before Mr. Jones'. Under these circumstances, however, counsel has been unable to file any pleadings on Mr. Jones' behalf as expeditiously as counsel desired.
>
> B. REQUEST TO RESCHEDULE ORAL ARGUMENT
>
> 10. Given the circumstances discussed above, counsel cannot file any professional, responsible pleading on Mr. Jones' behalf prior to the Court's October 25, 1988, oral argument date. Counsel therefore respectfully prays for the Court's indulgence, and respectfully urges that the Court reschedule Mr. Jones' oral argument.
>
> C. CONCLUSION
>
> 11. Undersigned counsel has the utmost respect for this Honorable Court, and has consistently undertaken every reasonable effort to comply with the Court's deadlines. Under the circumstances discussed herein, however, professionally responsible compliance with the Court's October 25, 1988, deadline is not possible. It is counsel's hope that the court will understand the untenable conditions under which CCR counsel have been forced to practice, and that the Court will not ascribe to Mr. Jones any intention to unduly delay. There is no such intention on the part Mr. Jones or of counsel. The circumstances have been beyond counsel's or Mr. Jones' control.[4]
>
> WHEREFORE, counsel for Mr. Jones respectfully requests that this Honorable Court reschedule oral argument in the instant action, and that the Court grant all other and further relief which may be deemed just and proper.

The circumstances discussed therein have only become worse. Since the filing of that pleading, Governor Martinez signed three (3) additional death warrants. Counsel has investigated,

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[4]Footnote 4 explained:

much time as possible to Mr. Jones' case, while not ignoring the needs of clients whose executions were scheduled before Mr. Jones'. Under these circumstances, however, counsel has been unable to file any pleadings on Mr. Jones' behalf as expeditiously as counsel desired.

B. REQUEST TO RESCHEDULE ORAL ARGUMENT

10. Given the circumstances discussed above, counsel cannot file any professional, responsible pleading on Mr. Jones' behalf prior to the Court's October 25, 1988, oral

researched and filed seven (7) additional substantive pleadings since that time. In fact, it was impossible for undersigned counsel to turn his attention to Mr. Jones' case until after the execution of another of counsel's clients was stayed just days ago. See Woods v. Dugger (M.D. Fla. November, 1988). Of necessity, given the circumstances discussed herein, counsel relied on the inapplicability of Rule 3.851. However, undersigned counsel sincerely apologizes to the Court for his inability to file Mr. Jones' petition earlier, and herein expresses his gratitude for the Court's rescheduling of Mr. Jones' oral argument.

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 Jones v. State, 440 So. 2d 570 (Fla. 1983), and the legality of Mr. Jones'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); Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); Fitzpatrick v. Wainwright, 490 So. 2d 938 (1986); Riley v. Wainwright, 517 So. 2d 656 (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. Jones to raise the claims

ago. See Woods v. Dugger (M.D. Fla. November, 1988). Of necessity, given the circumstances discussed herein, counsel relied on the inapplicability of Rule 3.851. However, undersigned counsel sincerely apologizes to the Court for his inability to file Mr. Jones' petition earlier, and herein expresses his gratitude for the Court's rescheduling of Mr. Jones' oral argument.

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, supra, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional questions which go to the fundamental fairness and reliability of Mr. Jones's capital conviction and sentence of death and of this Court's appellate review process. Mr. Jones'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. 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 Wilson v. Wainwright, supra, 474 So. 2d at 1165 (Court's independent review authority is "no substitute for the careful partisan scrutiny of a zealous advocate [whose] . . . unique role . . . is to discover and highlight possible error . . . "); Johnson v. Wainwright, supra, 498 So. 2d at 939 (habeas relief appropriate where counsel fails to present clear claim of reversible error); Fitzpatrick v. Wainwright, supra, 490 So. 2d at 939-40 (habeas relief where

1977); Wilson v. Wainwright, supra, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional questions which go to the fundamental fairness and reliability of Mr. Jones's capital conviction and sentence of death and of this

Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Evitts v. Lucey, 469 U.S. 387 (1985).

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 pled here, is warranted in this action. As this petition shows, habeas corpus relief would be more than proper on the basis of the claims presented below.

B. REQUEST FOR STAY OF EXECUTION

Mr. Jones's petition includes a request that the Court stay his execution (presently scheduled for November 10, 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); Copeland v. State, Nos. 69,429 and 69,482 (Fla. Oct. 16, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986). See also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

Mr. Jones' claims are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Leo Alexander
to correct constitutional errors such as those pled here, is warranted in this action. As this petition shows, habeas corpus relief would be more than proper on the basis of the claims presented below.

B. REQUEST FOR STAY OF EXECUTION

Mr. Jones's petition includes a request that the Court stay

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.

CLAIM I

MR. JONES' SENTENCE OF DEATH RESTS ON THE UNCONSTITUTIONAL AUTOMATIC APPLICATION OF AN AGGRAVATING CIRCUMSTANCE, AND ON THE OVERBROAD APPLICATION OF AN AGGRAVATING CIRCUMSTANCE, AND IS THEREFORE FUNDAMENTALLY UNRELIABLE AND UNFAIR, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In sentencing Mr. Jones to death, the trial court found that "the defendant was previously convicted of another capital felony or of a felony involving . . . violence." In support, the judge's sentencing order explained:

> CONCLUSION:
>
> There is aggravating circumstance under this paragraph. The Defendant has been convicted of a felony of Battery on a Law Enforcement Officer and Murder in the First Degree. As a juvenile he was committed for the unlawful shooting of another innocent person.

(R. 207 [Sentencing Order][emphasis added]). The same construction was provided by the judge's oral, on-the-record pronouncements at the time of sentencing (R. 1643).

This, of course, is flatly unconstitutional: as reflected by the record, the Court "found" this aggravating circumstance on the basis of the very "murder in the first degree" offense for which Mr. Jones was to be sentenced.[5] Such an automatic application of aggravating circumstances abrogates a capital defendant's right to a reliable capital sentencing determination: a court is not allowed to base an aggravating circumstance on the very murder for which the defendant was sentenced. Cf. Sumner v.

CLAIM I

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In sentencing Mr. Jones to death, the trial court found that

Shuman, 107 S. Ct. 2716 (1987). As the Supreme Court recently explained in a far less egregious setting:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the [illegible]

death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the

the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

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

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Lowenfield v. Phelps, 108 S. Ct. 546, 554-55 (1988).

and the Georgia and Florida schemes discussed
in the cases of Gregg, supra, and Proffitt, supra:

"While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and

This Court, of course, did not have the benefit of Lowenfield[6] at the time of Mr. Jones' direct appeal. Although it ordered appellate counsel to brief sentencing issues attendant to aggravating circumstances, and although it reviewed the application of this factor, see Jones v. State, 440 So. 2d 570, 578 (Fla. 1983), the Court never spoke to this issue. The fundamental error presented herein thus remained uncorrected.[7] What the sentencing order, and the court's oral pronouncements at the time of sentencing reflect, however, is that the sentencing court believed that it could use this first-degree murder conviction to aggravate this sentence of death. On the facts of this case, the Respondent cannot show, beyond a reasonable doubt, see State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), that the sentencing judge would have found this aggravating circumstance but for his erroneous construction. This type of fundamental eighth amendment error affected the very reliability of Mr. Jones' sentence of death, Sumner v. Shuman, supra; Lowenfield, supra, and thus cannot be characterized as harmless beyond a reasonable doubt.

This Court's recent opinions, reversing sentences of death in far less egregious settings than that involved in the finding herein at issue, make plain Mr. Jones' entitlement to relief. In Lamb v. State, 13 F.L.W. 530, 531 (1988), the Court stated:

> We recently held in Perry v. State, 522 So. 2d 817, 820 (Fla. 1988), that it is "improper to aggravate for a prior conviction

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[6]We respectfully submit that Lowenfield represents a significant change in law, and that therefore the Court should apply it to Mr. Jones' case. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). However, even if Lowenfield is not considered as such, relief remains appropriate for Mr. Jones' sentence of death is fundamentally unreliable.

[7]Counsel will not belabor the point herein; however, there can be little doubt that Mr. Jones' appellate counsel (who happened to also be the trial attorney) rendered ineffective

application of this factor, see Jones v. State, 440 So. 2d 570, 578 (Fla. 1983), the Court never spoke to this issue. The fundamental error presented herein thus remained uncorrected.[7] What the sentencing order, and the court's oral pronouncements at the time of sentencing reflect, however, is that the sentencing court believed that it could use this first-degree murder conviction to aggravate this sentence of death. On the facts of

> of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being sentenced." See also Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

(emphasis added). The Court explained the distinction in Perry, 522 So. 2d at 820:

> In Wasko [v. State, 550 So. 2d at 1317, 1318], the defendant was convicted of armed robbery, attempted sexual battery, and first-degree murder. The trial court there, as here, used the contemporaneous felonies in aggravation. On review, this Court distinguished contemporaneous felony convictions based on acts against the murder victim from contemporaneous convictions resulting from violence against multiple victims or in separate incidents which are combined in one trial. The Court then held it improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being sentenced. We believe this is the proper interpretation, and to the extent it is in conflict with Hardwick v. State, 461 So. 2d 79 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2369, 86 L.Ed.2d 267 (1985), we recede from that decision.

(emphasis added).

In Patterson, this Court found the same error to have occurred and corrected it even though the defendant had not raised it. See 513 So. 2d at 1263. There can be no doubt that based on the above set of cases, this Court erred in affirming this particular aggravating circumstance on Mr. Jones' direct appeal. If it violates the eighth amendment and Florida's capital sentencing statute to aggravate a death sentence on the basis of crimes committed during a single criminal episode against a single victim, it abrogates any reliability that can be ascribed to a sentence of death when such a sentence is aggravated by the very fact of conviction on the capital murder itself.

522 So. 2d at 820:

> In Wasko [v. State, 550 So. 2d at 1317, 1318], the defendant was convicted of armed robbery, attempted sexual battery, and first-degree murder. The trial court there, as here, used the contemporaneous felonies in aggravation. On review, this Court distinguished contemporaneous felony convictions based on acts against the murder victim from contemporaneous convictions resulting from violence against multiple

entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948).[8]

Neither this, nor any other Court, will ever know the extent to which this fundamental error affected the sentencing judge's ultimate determination regarding the applicability of this aggravating factor or the appropriateness of the death sentence itself. Cf. Nibert v. State, 508 So. 2d 1 (Fla. 1987). Mr. Jones' sentence is therefore fundamentally unreliable, and relief is appropriate.[9]

CLAIM II

MR. JONES' CAPITAL CONVICTION AND SENTENCE OF DEATH WERE FOUNDED ON A RELIANCE ON IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE, EVIDENCE SPECIFICALLY PRESENTED AND ARGUED TO THE JURY AT TRIAL AND SENTENCING, AND EVIDENCE SPECIFICALLY RELIED UPON BY THE COURT ITSELF IN SENTENCING MR. JONES TO DEATH, IN VIOLATION OF BOOTH V. MARYLAND, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This case presents a more pervasive and extensive violation of Booth v. Maryland, 107 S. Ct. 2529 (1987), then any other reported decision rendered by this Court. The eighth amendment

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[8]This principle is identical to the one applied in the capital sentencing context. See Presnell v. Georgia, 439 U.S. 14, 18 (1978).

[9]Moreover, Mr. Jones respectfully submits that the sentencing court's reliance on uncharged offenses, convictions subsequently reversed and vacated, and juvenile offenses (see, e.g., R. 207 "Although the shooting and resisting arrest with violence charges that were lodged against the Defendant when he was a juvenile were not reduced to felonies because of the Defendant's age, nevertheless, that incident is mentioned here as being supportive of the aggravating circumstances found to exist.") as "being supportive" of this aggravating circumstance is similarly improper, especially when considered in light of the other errors discussed herein. In light of this Court's recent pronouncements, see, e.g., Garron v. State, No. 67,986 (Fla., May 19, 1988), and the discussion presented above, Mr. Jones urges

Neither this, nor any other Court, will ever know the extent to which this fundamental error affected the sentencing judge's ultimate determination regarding the applicability of this aggravating factor or the appropriateness of the death sentence itself. Cf. Nibert v. State, 508 So. 2d 1 (Fla. 1987). Mr. Jones' sentence is therefore fundamentally unreliable, and relief is appropriate.[9]

violations in Mr. Jones' case are, in fact, far, far more pervasive than those at issue in Booth v. Maryland itself.

The Court did not have the benefit of Booth at the time of Mr. Jones' direct appeal. As a consequence, although independently reviewing the penalty phase of Mr. Jones' trial, the Court affirmed. Recently, however, the Court explained Booth's applicability to a Florida sentencing proceeding and granted relief in a case in which counsel failed to object to the introduction of improper victim impact evidence, writing:

> Scull raises one final issue on appeal. He alleges that the trial judge considered in his sentencing a victim impact statement (VIS) contained in the presentence investigation report (PSI). In doing so, Scull argues, the court violated the principles subsequently enunciated by the United States Supreme Court in Booth v. Maryland, 107 S.Ct. 2529 (1987). The VIS involved here contained pleas from Mejides' mother and Villegas' sister, detailing the torment each family has suffered since the murders and requesting that Scull receive the death penalty. They were somewhat less detailed and articulate than the VIS in Booth, but essentially they operate in the same way. They both injected irrelevant material into the sentencing proceedings.
>
> We believe that it was error for the trial judge to consider these statements. However, the record is unclear as to whether the judge considered the VIS in his sentencing or whether he merely examined it without actually considering it for purposes of ordering a sentence of death. We further note that counsel made no objections to consideration of the statements. Because such statements are usually contained in a PSI, it is unreasonable to expect judges to excise those portions of the report that are not proper for consideration. Under Booth, it is error to admit the VIS into evidence before the sentencing or advisory jury. Similarly, it is error for a sentencing judge to consider those statements as evidence of aggravating circumstances. However, when a judge merely sees a victim impact statement contained in a presentence investigation report, but does not consider the statements for purposes of sentencing, no error has been committed.

Scull v. State, 13 F.L.W. 545, 547-48 (Fla. Sept. 8, 1988)

independently reviewing the penalty phase of Mr. Jones' trial,
the Court affirmed. Recently, however, the Court explained Booth's applicability to a Florida sentencing proceeding and granted relief in a case in which counsel failed to object to the introduction of improper victim impact evidence, writing:

Scull raises one final issue on appeal. He alleges that the trial judge considered in his sentencing a victim impact statement (VIS) contained in the presentence

As reflected by the clear record in Mr. Jones' case, the judge here "specifically considered," in aggravation of sentence, the very constitutionally impermissible "victim impact" and "worth of victim" evidence which this Court condemned in Scull and the United States Supreme Court condemned in Booth. The jury and judge heard it, and had it argued before them, and, as reflected in the sentencing order, the judge extensively relied on it. Mr. Jones' sentence of death is flatly unreliable, as the sentencing order itself reflects:

> LEST WE FORGET THOMAS J. SZAFRANSKI
>
> Buried in a cemetery not far from this courtroom is the body of Thomas J. Szafranski - police officer.
>
> He is dead not because of who he was but because of what he was.
>
> This twenty-nine year old athlete served in the Jacksonville Sheriff's Office as a patrol officer from April 7, 1975, until his death on May 24, 1981.
>
> During the five (5) years immediately preceeding [sic] his death he was commended and awarded for arresting two (2) burglary suspects who would have otherwise escaped detection; for participating in a police stake-out regarding some stolen property resulting in the arrest of four (4) persons and recovery of the property; for apprehending a residential burglary suspect who had escaped; for assisting an assault victim and then himself being assaulted; for protecting city firemen who were under attack by an unruly crowd; for keeping a man from committing suicide by jumping off the Main Street Bridge; for being a member of the Strategic Weapons and Tactics team; for being injured while arresting a mentally incompetent person; for assisting a rape victim at the home for battered women; and for removing a small child held hostage by a mentally deranged father.
>
> Leo Alexander Jones, when you murdered Thomas J. Szafranski on May 23, 1981, you arbitrarily chose to remove from our midst one of the choicest of young men and public servants.
>
> He had a right to live - but he doesn't.

and the United States Supreme Court condemned in Booth. The jury and judge heard it, and had it argued before them, and, as reflected in the sentencing order, the judge extensively relied on it. Mr. Jones' sentence of death is flatly unreliable, as the sentencing order itself reflects:

> LEST WE FORGET THOMAS J. SZAFRANSKI
>
> Buried in a cemetery not far from this

> In the end, he had an inalienable right to expect more than he got.
>
> Who is the man who would commit this treacherous, unjust, senseless, heinous, and brutal murder?
>
> Who is the man who would deny and rob an innocent, young man of his life, profession, and dreams?
>
> Leo Alexander Jones, a jury of your peers have said that you are that man.

(R. 221-22)(Sentencing Order). The Court's oral, on-the-record pronouncements were the same (R. 1656-58) -- Mr. Jones was sentenced to death for the very reasons condemned in <u>Booth</u> and <u>Scull</u>.[10]

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[10] Earlier in the sentencing order, the sentencing court had written:

> The policeman is a welcome sight to the frightened and fearful child. He is a source of strength to the senior citizen. His presence is desired in a troubled neighborhood. He brings assistance to a disabled motorist. He exemplifies strength and courage to the young. He brings stability to a violenct [sic] and convulsive home. He is lifted up, respected, and admired by countless thousands who recognize their need and reliance upon him. Nevertheless, he does bear the sword against criminals who prey upon the rights, privacy, lives, and property of men and women, boys and girls. Police officers are not a terror to those who obey the law, but are a terror to those whose deeds are criminal.
>
> . . .
>
> In your trial, you have claimed for yourself all rights which you denied to Thomas J. Szafranski on May 23, 1981. You gave him no right of confrontation. You afforded him on right to be heard. You permitted him no defense and you were not willing to give him the benefit of a reasonable doubt. Thereupon, you acted as jury, judge, and executioner when you, from a cold, calculated, and premeditated manner murdered him on May 23, 1981.
>
> You have demanded justice, impartiality, and fairness; yet, you denied these to him.
>
> You were permitted to take your case to a court of law, yet you took his case to the streets of this city.

(R. 221-22)(Sentencing Order). The Court's oral, on-the-record pronouncements were the same (R. 1656-58) -- Mr. Jones was sentenced to death for the very reasons condemned in <u>Booth</u> and <u>Scull</u>.[10]

---

[10] Earlier in the sentencing order, the sentencing court had

Of course, the Presentence Investigation Report (P.S.I.), on which the court specifically relied,[11] provided the very type of information condemned in Booth and Scull:

> BIOGRAPHY OF THE VICTIM, THOMAS JOSEPH SZAFRANSKI
>
> Mr. Szafranski white male, DOB: 11/13/51, grew up in the Orlando, Florida area -

---

(footnote 10 continued from previous page)

> Yes, you even denied him the right to die with dignity.
>
> . . .
>
> When you murdered Thomas J. Szafranski on May 23, 1981, you struck a blow at the very heart of a free and civilized society - and you did so cowardly. You see, it was more than the warm human body of Thomas J. Szafranski upon whom you made an attack. Your criminal attack was an attack upon every fundamental and traditional value which free men everywhere depend upon in order that they can pursue their right to life, liberty, and the pursuit of happiness.
> . . . You fired a bullet in a cold, calculated, and premeditated manner which exploded and penetrated the head and brain of a human being and a fine Jacksonville police officer. You left him trembling and convulsing behind the wheel of his car on a public street.

(R. 219-20 [Sentencing Order]). It should be noted that the "heinous, atrocious, and cruel" aggravating circumstance had been waived by the State.

[11]At sentencing, the court indicated that it was relying on the P.S.I. except for those portions which were specifically rejected on the record. The portions quoted herein were not rejected, but were specifically relied upon, as the sentencing order itself reflects:

> PRE-SENTENCE INVESTIGATION REPORT EVALUATION
>
> A Pre-Sentence Investigation Report was ordered and received by this court. The State and the Defendant have filed their exceptions to it.
>
> All and each part(s) of the Pre-Sentence Investigation Report have been considered by this Court for sentencing the Defendant, Leo Alexander Jones, in this case, which are not inconsistent with the evidence or otherwise specifically and particularly disregarded

> Mr. Szafranski white male, DOB: 11/13/51, grew up in the Orlando, Florida area -

---

(footnote 10 continued from previous page)

> Yes, you even denied him the right to die with dignity.
>
> . . .
>
> When you murdered Thomas J. Szafranski on May 23, 1981, you struck a blow at the

graduating from Bishop Moore High, Diocese of Orlando, Florida in May 1969. Mr. Szafranski received a Bachelor of Science Degree in Journalism on 8/24/74 from the University of Florida. Prior to becoming employed with the Jacksonville Consolidated Sheriff's Office as a policeman he was employed in the Orlando area as a construction worker and school teacher. He came to work for the Jacksonville Consolidated sheriff's office on 4/7/75 and completed the Police Standard and Training Program, receiving a certificate on 7/11/75. While working as a uniform patrol officer Mr. Szafranski increased his educational pursuits by taking Criminal Justice courses at the Florida Junior College from 6/25/76 until 6/15/77 totalling eighteen semester hours.

Mr. Szafranski married in May 1978 and obtained a divorce in August 1979. No children resulted out of this union.

While working as a patrol officer Mr. Szafranski received the following commendations and awards:

On 6/2/76 Mr. Szafranski received a commendation for an arrest that occurred on 5/7/76 when he arrested two burglary suspects who would have otherwise escaped detection.

On 11/30/76 Mr. Szafranski received a commendation for an arrest that occurred on 11/5/76 when he was involved in a police stake out regarding some stolen property that led to the arrest of four suspects and the recovery of the stolen property.

On 9/19/77 Mr. Szafranski received a commendation when he along with other police officers apprehended a suspect who had burglarized a residence and had made an escape on 8/31/77. Mr. Szafranski apprehended the burglar.

On 3/28/78 Mr. Szafranski was injured on the job while assisting a victim who was severely beaten. The assailant after beating the victim then assaulted Officer Szafranski.

On 4/14/78 Mr. Szafranski received recognition for participating in and finishing in the River Run that occurred on 4/1/78.

On 4/29/78 Mr. Szafranski received a commendation when he protected city firemen who were under attack by an unruly crowd on 4/17/78. The firemen were trying to perform their task of putting out a fire while being under attack by a mob of people

area as a construction worker and school teacher. He came to work for the Jacksonville Consolidated sheriff's office on 4/7/75 and completed the Police Standard and Training Program, receiving a certificate on 7/11/75. While working as a uniform patrol officer Mr. Szafranski increased his educational pursuits by taking Criminal Justice courses at the Florida Junior College from 6/25/76 until 6/15/77 totalling eighteen semester hours.

Mr. Szafranski married in May 1978 and obtained a divorce in August 1979. No

the Main Street Bridge. This incident occurred on 7/25/78.

On 9/26/78 Mr. Szafranski received an appreciation award for his efforts while on the SWAT Team otherwise known as the special Weapons and Tactics Team. Mr. Szafranski was the physical fitness director of the SWAT Team. He won the Fitness Award. According to Captain Kenneth Brown of the Jacksonville Sheriff's Office the members of the SWAT Team are composed of the very elite members from the officers of the Jacksonville sheriff's Office. According to Captain Brown a police officer has to be an extremely good officer both physically and mentally in order to be chosen to be a member of this team. Officer Szafranski became a member of the SWAT Team in September 1977 and remained a member up until his death.

On 5/10/79 Mr. Szafranski received a commendation from Sheriff Dale Carson for participating in the 15,000 meter 1979 River Run.

On 1/28/80 Mr. Szafranski was injured while arresting a person that was mentally incompetent.

On 10/20/80 Mr. Szafranski interviewed a rape victim at the Hubbard House and was very sensitive to her needs in getting information for his police report. The Hubbard house sent a letter of commendation regarding Officer Szafranski to Captain K. Brown dated 10/20/80.

On 6/3/81 a letter was sent to Chief V.R. Thomas, Chief of Patrol regarding Officer Tom Szafranski's handling of a delicate hostage situation involving the removal of a small child from the custody of a deranged father who had intentions of harming the child.

Mr. Szafranski is survived by his mother, four brothers, and one sister.

This was the type of eighth amendment violative evidence on which the court relied in sentencing Mr. Jones to death. The jury heard and could not but have relied on it as well: it was presented by the State at trial and sentencing and it was argued (urged) by the State throughout the proceedings. Cf. Scull, supra. It was the reason urged on the jurors as grounds for a capital conviction and sentence of death.

the physical fitness director of the SWAT Team. He won the Fitness Award. According to Captain Kenneth Brown of the Jacksonville Sheriff's Office the members of the SWAT Team are composed of the very elite members from the officers of the Jacksonville sheriff's Office. According to Captain Brown a police officer has to be an extremely good officer both physically and mentally in order to be chosen to be a member of this team. Officer Szafranski became a member of the SWAT Team in September 1977 and remained a member up until his death.

On 5/10/79 Mr. Szafranski received a

> is a void, a void with his friend, a void with his family. You're not to take this sympathy into consideration and we're asking you not to, but that fact is there. We are in more than a murder trial of an individual. Mr. Greene hit on it, and I just want to touch on it briefly. We are in the trial of a premeditated, mean, vicious killing of a police officer. We live in a society where we have a very very small element, a group of people called the police who in a mass of -- in Duval County, six hundred thousand, a mass of society, is the symbol of order, is the symbol of our rights to live in our homes and feel secure, of our rights to work in our places of business and then go to and about and to and from without fear. That is the function of the police power of the police presence in a community, and it is very very small. It is the symbol of society's determination to live free from fear, to live orderly, to have property and to own it and to be safe. That policeman is society's symbol, pitifully few numbers, but he's the symbol of everything we stand for, for the advances we make, and he is the representative of society out there on that street. And when a human being lays in wait and with premeditation assasinates, kills and murders a policeman, he reaches down and he tears at the heart of society itself. He tears at the heart of what we are as a people when he kills our symbol of order and of security and of safety.

(R. 1461-62)(emphasis added).

The State argued that Leo Jones should die because the victim was a police officer of good character who would be missed by his family (including his "family" of fellow police officers) and friends (E.g., R. 1461-62). These same considerations were urged as a basis for conviction (Id.). In the words of the prosecutor:

> Tom Szafranski was a human being and he was senselessly murdered, cowardly act, murdered by an assassin laying in wait. Tom Szafranski was twenty-eight years old. Tom Szafranski had every right of every other human being to live a full life, to raise a family, to be productive, to have friends, to have loved ones, to grow old, to have children. He had every right to do those things, and he's dead.

(R. 1542-43)(emphasis added).

The argument regarding the victim's good character lead into

> a premeditated, mean, vicious killing of a police officer. We live in a society where we have a very very small element, a group of people called the police who in a mass of -- in Duval County, six hundred thousand, a mass of society, is the symbol of order, is the symbol of our rights to live in our homes and feel secure, of our rights to work in our places of business and then go to and about and to and from without fear. That is the function of the police power of the police presence in a community, and it is very very small. It is the symbol of society's determination to live free from fear, to live

> I told you that this was more than the killing of a policeman. But were it not -- and to use Mr. Fallin's words -- had he been a deliveryman, still, the value that our society places on the life of an innocent person going about their business is such that we must come to the courtroom and we must bring it to you as representative [sic] of our society to seek a proper punishment for that crime. Now, were Tom Szafranski not a policeman, the appropriate sentence in this case would be death under the facts and circumstances. <u>But he is a policeman, he was a policeman, and that gives us an added dimension to this case</u>. He's dead. <u>Tom Szafranski is dead because he was a policeman. That's why he's dead. He elected to be a public servant, he elected to be a -- participate in the protection of society, and he is dead for that reason, because he elected to wear a uniform and to be a policeman. Tom Szafranski was not hurting a soul on May the 23rd. Tom Szafranski was on an mission of mercy, helping a child in that murderer's own neighborhood and performing his duty when he was just -- just insane -- inhumanely gunned down.</u>

(R. 1543)(emphasis added).

Finally, the good character of the victim and the fact he was a police officer "on a mission of mercy" was used to set up the final improper argument: that the jurors themselves would not be safe from attack if the victim was not avenged by the execution of Leo Jones:

> Now, that night, May the 23rd -- you've heard the sheriff testify, and I touched upon it in the closing argument the other day, but when you think about a police force, as I said before, <u>the symbol of society's determination to be safe, to be secure in their homes, to be secure in their property</u>, that we had less than a hundred policemen representing society that night in Jacksonville, Florida. Eight hundred forty square miles. Almost six hundred thousand people, and less than a hundred uniformed people out there to protect and maintain the security of the people of this community. <u>You bet you pose a threat to pulling those people out, and it's -- it's sad to say about our society, but if you pull those hundred people out we would have chaos, we would have anarchy. The symbol of orderly society, every free society, is a well-disciplined, well-trained police department</u> that

must bring it to you as representative [sic] of our society to seek a proper punishment for that crime. Now, were Tom Szafranski not a policeman, the appropriate sentence in this case would be death under the facts and circumstances. But he is a policeman, he was a policeman, and that gives us an added dimension to this case. He's dead. Tom Szafranski is dead because he was a policeman. That's why he's dead. He elected to be a public servant, he elected to be a -- participate in the protection of society, and he is dead for that reason, because he elected to wear a uniform and to be a

people, one per approximately six thousand citizens out there that night. The representatives of society, the front line, the thin line of society. Tom Szafranski, policeman, shot and killed because he was a policeman, a member -- a representative of our society doing a job and, as I said before, on an mission of mercy that night.
. . .

The courts have adopted the procedures for the jury to follow, for the prosecutors to follow, for the defense lawyers to follow, for the police to follow in getting the case here. We have a system and we have the laws by which Tom Szafranski, policeman, can be avenged.

(R. 1544-45)(emphasis added).

In the prosecutor's final appeal he spoke to the same impermissible considerations:

> And you have got two things: You have got a human being, twenty-eight year-old man in the prime of his life, performing the duties of a policeman, and you have got a double duty to return a verdict of death in this case. Nothing else is appropriate. And as a representative of the people of the State of Florida, I ask you to return it. I don't like to talk about death, I don't like it any more than you do, but I know my duty and I ask you to do yours. Thank you.

(R. 1558)(emphasis added). The message here (received by the jury and the judge) was crystal clear: the victim's character was the reason why Leo Jones should be sentenced to die. The State even presented "evidence" in this regard -- Sheriff Carson was allowed to testify, at sentencing, as to how police officers viewed themselves as an extended "family", how the murder of a police officer affected that "family" in this instance, and even how the murder affected other officers' families:

> It's just a like [sic] a normal family. And when one of the family dies the whole family operation is disrupted. It's -- there's a closeness there. When we -- at the actual scene law enforcement pretty well stops as far as anything else is concerned. Everything is concerned about the death of the brother officer, or the officers especially from that zone will converge on the scene. They're needed there, of course.
> . . .

The courts have adopted the procedures for the jury to follow, for the prosecutors to follow, for the defense lawyers to follow, for the police to follow in getting the case here. We have a system and we have the laws by which Tom Szafranski, policeman, can be avenged.

(R. 1544-45)(emphasis added).

In the prosecutor's final appeal he spoke to the same

> secondary, and it has a terrific effect not only on the police officers themselves but on their families. When they go home the wives talking, how did it happen, could it have happened to you. It's almost a paralyzing effect on a short-term basis.

(R. 1502-3)(emphasis added).

The court also went beyond consideration of the victim's family and expanded his consideration to the families of all law enforcement officers:

> The killing of a police officer disrupts the law enforcement family personally and in their professional duties. Fear for the safety of the officers permeates the department as well as individual families, and particularly so, when the threat of death or bodily harm by sniper in ambush is a present reality - all of which impairs proficiency and stirs tension. Performance drops.

(R. 1645)(emphasis added).

This record is in fact replete with Booth eighth amendment error. The record, in fact, speaks for itself, and Mr. Jones urges the Court to consider it in its totality, for in its totality it reflects as plain and egregious a violation of Booth v. Maryland as any case could have.

At a capital sentencing, Booth v. Maryland, 107 S. Ct. 2529, 2535 (1987), requires the exclusion of evidence of "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics." The logic of Booth applies equally to situations where it is argued that the impact of the crime upon the family warrants the defendant's execution or where it is argued that the victim's good character makes the homicide more repugnant.

The victim's family in Booth "noted how deeply the [victims] would be missed," id. at 2531, explained the "painful, and devastating memory to them," id., spoke generally of how the crime had created "emotional and personal problems [to] the

The court also went beyond consideration of the victim's family and expanded his consideration to the families of all law enforcement officers:

> The killing of a police officer disrupts the law enforcement family personally and in their professional duties. Fear for the safety of the officers permeates the department as well as individual families, and particularly so, when the threat of death or bodily harm by sniper in ambush is

the introduction of a victim impact statement. The Supreme Court found the introduction of this information to violate the eighth amendment's mandate that any capital sentence be reliable. 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."

In Booth the Court stated: "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, supra, at 2532. The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." See also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Court in Booth noted that a state statute such as the one there at issue "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801 (1982)." Booth, supra, at 2533. 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." Booth, supra; cf. Zant v. Stephens, supra, 462 U.S. at 885. As the Booth court explained: "Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Id. Thus the Booth 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
impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action."

In Booth the Court stated: "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, supra, at 2532. The

extensive degree) and relied upon by the jury <u>and judge</u> in Mr. Jones' case. Here, as in <u>Booth</u>, the victim impact information "serve[d] no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." <u>Id</u>. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," <u>Gardner v. Florida</u>, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames "is inconsistent with the reasoned decision making" required in a capital case. <u>Booth</u>, <u>supra</u> at 2536.

The <u>Booth</u> court concluded the decision to impose a death sentence could not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." <u>Id</u>. at 2534. To permit such information to be injected into the sentencing process would violate the eighth and fourteenth amendments because there would be no "'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.' <u>Godfrey v. Georgia</u>, 446 U.S. 420, 433 (1980)(opinion of Stewart, J.)." <u>Booth</u>, <u>supra</u>, 107 S. Ct. at 2534. This principle was abrogated in Mr. Jones' case.[12]

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[12] A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which <u>may</u> mislead the jury into imposing a sentence of death, <u>Caldwell v. Mississippi</u>, 472 U.S. 320, 105 S. Ct. 2633 (1985), <u>Wilson v. Kemp</u>, 777 F.2d 621, 626 (11th Cir. 1985), <u>reh</u>. <u>denied</u>, 784 F.2d 404 (11th Cir. 1986), and a defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." <u>Wilson</u>, 777 F.2d at 21, <u>quoting</u> <u>Drake v. Kemp</u>, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc); <u>see also</u> <u>Potts v. Zant</u>, 734 F.2d 526 (11th Cir. 1984). In short, a sentencing proceeding is flatly unreliable when the jurors are misled as to their role in the sentencing proceeding or as to the matters which they must consider in making their determination of what is the proper sentence under the circumstances. <u>Wilson</u>; <u>Caldwell</u>.

The prosecutor in this case, however, provided textbook examples of improper argument. He urged the jury and judge to consider matters that are not appropriate for deciding whether a

crime and the defendant." <u>Id</u>. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," <u>Gardner v. Florida</u>, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames "is inconsistent with the reasoned decision making" required in a capital case. <u>Booth</u>, <u>supra</u> at 2536.

The <u>Booth</u> court concluded the decision to impose a death

As stated, both the jury and judge relied on improper victim impact evidence in sentencing Mr. Jones to death. Cf. Scull, supra. Mr. Jones' sentence violates Booth. 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, 2646 (1985). That burden can be carried only 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. In a case involving such extensive and pervasive violations of the eighth amendment, the State cannot carry this burden with regard to the errors at issue in Mr. Jones' case. Accordingly, Mr. Jones is entitled to a new sentencing proceeding at which evidence of victim impact will be precluded from the sentencer's consideration.[13] This case presents gross, fundamental eighth amendment error. Mr. Jones respectfully urges that the Court correct it.

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[13] Since this claim is based on a substantial change in law, Booth v. Maryland, and since the "tools" on which it could be based were unavailable earlier, see Reed v. Ross, 468 U.S. 1 (1984), it is now properly brought, and no bars to a review of the merits, and relief, apply. However, if this Court finds that the "tools" for making this claim earlier existed, we respectfully submit that clear ineffective assistance of counsel is demonstrated, e.g., Kimmelman v. Morrison, 106 S. Ct. 2574 (1986), by counsel's failure to object, and to present the error on appeal. In any event, the introduction of victim impact

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, 2646 (1985). That burden can be carried only 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. In a case involving such extensive and pervasive violations of the eighth

CLAIM III

THE SENTENCING COURT BASED ITS FINDINGS ON AGGRAVATING CIRCUMSTANCES AND REBUTTED MITIGATING CIRCUMSTANCES ON THE USE OF PSYCHIATRIC REPORTS AND EVALUATIONS OF MR. JONES WHICH WERE INTRODUCED PRETRIAL SOLELY ON THE ISSUE OF COMPETENCY, AND THE COURT ALLOWED THE STATE TO IMPEACH MR. JONES' TRIAL TESTIMONY BY USE OF THOSE REPORTS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

> Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," it protects him as well from being made the "deluded instrument" of his own execution.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981)(citations omitted).

Leo Alexander Jones was made the "deluded instrument" of his own death sentence. He was sentenced to death on the basis of his own statements, and on the partial findings, made during a psychiatric examination conducted by Dr. Miller solely on the question of competency prior to trial. The trial court, however, allowed the State to impeach Mr. Jones' trial testimony by using these reports, and then specifically relied on the reports -- reports never introduced at sentencing -- in order to find aggravating circumstances and rebut mitigating circumstances. The violation of Mr. Jones' fifth, sixth, eighth and fourteenth amendment rights in this case was shockingly simple: 1) Mr. Jones exercised his State-created right to a pretrial psychiatric examination on the issue of competency; 2) he spoke to a court-appointed psychiatrist (Dr. Miller); 3) he presented Dr. Miller's limited account, pretrial, solely on the question of competency, and he subsequently exercised his right not to present an insanity defense and not to introduce any evidence derived from the pretrial psychiatric evaluations at trial or sentencing; 4) the sentencing court nevertheless relied on the evaluations to

ALLOWED THE STATE TO IMPEACH MR. JONES' TRIAL TESTIMONY BY USE OF THOSE REPORTS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," it protects him as well from being made the

Florida law promised that the pretrial evaluations would be privileged and confidential, see Parkin v. State, 238 So. 2d 817 (Fla. 1970); Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); McMunn v. State, 264 So. 2d 868, 870 (Fla. 1st DCA 1972); see also Fla. R. Crim. P. 3.216, and that the evaluations would not be introduced on any issues other than those regarding which Mr. Jones "opened the door." Parkin, supra. Mr. Jones "opened the door" only on the pretrial question of competency. Notwithstanding the fact that the federal constitution promised that Mr. Jones would not be sentenced to death "by the simple, cruel expedient of forcing it [words] from his own lips," Estelle v. Smith, 451 U.S. at 462, citing Columbe v. Connecticut, 367 U.S. 568, 581-82 (1961); see also, Parkin, supra, 238 So. 2d at 820-21; McMunn, supra, 264 So. 2d at 870, the trial court used the evaluations to sentence Mr. Jones to death, and allowed the State to use the contents of the reports -- reports which Mr. Jones had not introduced at trial -- to impeach Mr. Jones' testimony. The procedures resulting in Mr. Jones' death sentence simply cannot be squared with the Due Process Clause, the privilege against self-incrimination, the Confrontation Clause, the right to counsel, the eighth amendment, or Florida state law, and resentencing is proper.

The errors were and are substantial and fundamental in nature. On direct appeal in this case, however, the Court affirmed the trial court's sentencing order (and thus accepted the errors) as its own. The Court failed to correct plain sentencing error. Mr. Jones respectfully urges that corrective action now be taken.

B. THE PROCESS BY WHICH MR. JONES WAS FIRST DELUDED, AND THEN SENTENCED TO DEATH

McMunn v. State, 264 So. 2d 868, 870 (Fla. 1st DCA 1972); see also Fla. R. Crim. P. 3.216, and that the evaluations would not be introduced on any issues other than those regarding which Mr. Jones "opened the door." Parkin, supra. Mr. Jones "opened the door" only on the pretrial question of competency. Notwithstanding the fact that the federal constitution promised that Mr. Jones would not be sentenced to death "by the simple,

Dr. Ernest Miller was appointed to conduct the evaluation. Dr. Miller conducted the evaluation, found Mr. Jones to be competent, and prepared a report to that effect. A hearing was held prior to trial solely on the question of Mr. Jones' competency. Dr. Miller testified. The trial court found Mr. Jones competent to stand trial.

Mr. Jones' counsel made no further mention of the evaluations or the reports -- he introduced no mental health defenses either at trial (insanity) or at sentencing. However, during the State's cross-examination of Mr. Jones at trial, the State was allowed to use the contents of the reports as impeachment -- this was error.[14]

An even greater, fundamental error, however, occurred at sentencing. There, although Mr. Jones had introduced no mental health mitigating evidence, had not used the reports, and had not called Dr. Miller to the stand, the sentencing court expressly used and relied on the pretrial competency evaluation to establish aggravating and rebut mitigating circumstances. As the sentencing court's order explained:

> There is no impairment to his memory or reasoning functions. He is alert, responsive, lucid, and oriented.

(R. 204 [Sentencing Order][Rebutting mitigation]).

> The psychiatric report received into evidence at the competency hearing which substantiates the testimony presented by the psychiatric experts was that on May 23, 1981, the Defendant was precisely oriented as to time, place, and situation. He was alert, responsive, and lucid with no impairment of his memory or mental functioning.

(R. 213 [Sentencing Order][Finding "Cold, Calculated, Premeditated" aggravating factor]). Similar statements were made by the court, on-the-record, at the time of sentencing. These

and prepared a report to that effect. A hearing was held prior
to trial solely on the question of Mr. Jones' competency. Dr. Miller testified. The trial court found Mr. Jones competent to stand trial.

Mr. Jones' counsel made no further mention of the evaluations or the reports -- he introduced no mental health defenses either at trial (insanity) or at sentencing. However, during the State's cross-examination of Mr. Jones at trial, the

statements, inter alia, reflect that the sentencing court's actions in this case resulted in precisely the constitutional error which Parkin and Estelle v. Smith forbid.

Significantly, we also now know that the sentencing court's reliance on the competency evaluation in justifying a sentence of death was a factually misplaced reliance. As Dr. Miller himself testified at a Rule 3.850 evidentiary hearing held after Mr. Jones' trial, see Jones v. State, No. 70,836 (Fla. June 23, 1988), his evaluation regarding penalty phase mental health issues -- an account not introduced by counsel, or anyone, at the time of trial -- was far from the blanket statement supporting aggravation and rebutting mitigation which the sentencing court considered it to be. Rather, Dr. Miller's account - which he was never asked about at sentencing -- was that significant mental health mitigating evidence existed in this case (See Rule 3.850 ROA, pp. 140-71 [Testimony of Dr. Miller]). Under these circumstances, the sentencing court's misplaced reliance solely on Dr. Miller's competency evaluation was truly a fundamental constitutional error which "precluded the development of true facts," resulted in the consideration of misleading ones, and "pervert[ed] the sentencer's consideration on the ultimate question of whether [Leo Alexander Jones should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

Florida law, of course, provided Mr. Jones (an indigent criminal defendant) with the right to a court-appointed expert on the issue of competency or sanity. See, e.g., State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984). Mr. Jones, through counsel, asserted that right. Florida law promised and assured Mr. Jones that the results of such an evaluation would not be used against him unless he "opened the door" by introducing a

Significantly, we also now know that the sentencing court's reliance on the competency evaluation in justifying a sentence of death was a factually misplaced reliance. As Dr. Miller himself testified at a Rule 3.850 evidentiary hearing held after Mr. Jones' trial, see Jones v. State, No. 70,836 (Fla. June 23, 1988), his evaluation regarding penalty phase mental health issues -- an account not introduced by counsel, or anyone, at the

28 (Fla. 1974); McMunn v. State, 264 So. 2d 868, 869-70 (Fla. 1st DCA 1972); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); Hamilton, supra. That promise was well-established at the time Mr. Jones was tried. Parkin (Fla. 1970); Jones (Fla. 1974); McMunn (Fla. 1st DCA 1972). As stated, Mr. Jones introduced no mental health defense at trial and sentencing.

Moreover, Florida law promised and assured that even if Mr. Jones were to introduce an insanity defense and/or the court-appointed experts' testimony, the statements he made to the court-appointed experts respecting the offense would remain confidential and would not be used against him or disclosed unless the statements themselves were first elicited by the defense. Parkin, 238 So. 2d at 820 ("[T]he Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview; however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense."); Jones, 289 So. 2d at 728 (Once defense introduces insanity defense, "the State would call the psychiatrist as a witness and elicit from him his opinion as to the sanity of the defendant, so long as the questions did not elicit from the psychiatrist what the defendant had told him about [the offense.]"); McMunn, 264 So. 2d at 870 ("An inquiry directed to court-appointed psychiatrists by the State must be limited to insanity or sanity . . ." Using the statements made to the psychiatrist against the defendant would be "a device for extracting a confession from a defendant . . . no less effective than the use of thumbscrews, racks and third degree," and "would transgress the defendant's constitutional

time Mr. Jones was tried. Parkin (Fla. 1970); Jones (Fla. 1974); McMunn (Fla. 1st DCA 1972). As stated, Mr. Jones introduced no mental health defense at trial and sentencing.

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792 F.2d 1516, 1518-19 (11th Cir. 1986) citing, Parkin v. State. Here, however, Mr. Jones' statements were used against him.

Similarly, the federal constitution assured Mr. Jones that the defense evaluations, and any statements he may have provided during such evaluations, would not be used against him, unless he "opened the door" on the issue. See Estelle v. Smith, 451 U.S. at 462-63; Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Parkin, supra, 238 So. 2d at 820 (citing privilege against self-incrimination); Jones, supra, 289 So. 2d at 728 (citing fifth amendment); see also Hamilton, 448 So. 2d at 1008-09.

The sentencing court flouted the legal promise. It specifically relied on the evaluation to sentence Mr. Jones to death. Such procedures can be squared with neither the Due Process Clause, nor the fifth, sixth, and eighth amendments.

C. MR. JONES IS ENTITLED TO THE RELIEF HE SEEKS

The constitutional errors in this case are obvious. The procedures employed in sentencing Mr. Jones to death were flatly unconstitutional, and prohibited by the fifth, sixth, eighth, and fourteenth amendments. See, e.g., Estelle v. Smith, supra; Parkin v. State, supra; Jones v. State, supra. Simply put, due process and fundamental fairness are abrogated by such practices, as is the fifth amendment:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Estelle v. Smith, 451 U.S. at 462 (citations omitted)(emphasis in original).

during such evaluations, would not be used against him, unless he "opened the door" on the issue. See Estelle v. Smith, 451 U.S. at 462-63; Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Parkin, supra, 238 So. 2d at 820 (citing privilege against self-incrimination); Jones, supra, 289 So. 2d at 728 (citing fifth amendment); see also Hamilton, 448 So. 2d at 1008-09.

The sentencing court flouted the legal promise. It

undeniably used the evaluation to rebut statutory mitigating circumstances. For either reason, Mr. Jones' death sentence abrogates the Constitution. Therefore, as explained in Proffitt v. Wainwright, such constitutional errors would not be cured even by a sentencing judge's statement that the psychiatric report was considered "for the limited purpose of ascertaining whether it supported . . . psychiatric mitigating circumstances." 685 F.2d 1227, 1255 (11th Cir. 1982). The errors in Mr. Jones' case are obviously much more egregious than those in Proffitt.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Gardner v. Florida, 430 U.S. 360 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake,'" Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) (O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983). Mr. Jones submitted himself to an evaluation which, without any notice, became central to his death sentence: without any warning the competency evaluation was misused to become a key instrument in this sentence of death. Mr. Jones was made the "deluded instrument" of his own execution, Estelle v. Smith, 451 U.S. at 462-63, in the very sense condemned by the United States Supreme Court and by this Court. Id.; see also Parkin, supra; Jones, supra.

This death sentence is fundamentally unfair, and wholly unreliable. Mr. Jones is entitled to the relief he seeks.[15]

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[15]Counsel, in failing to urge this claim in 1981-83 rendered ineffective assistance. In any event, since the claim involves fundamental eighth amendment error which rendered Mr. Jones' death sentence unconstitutionally unreliable, see Smith v.

by a sentencing judge's statement that the psychiatric report was considered "for the limited purpose of ascertaining whether it supported . . . psychiatric mitigating circumstances." 685 F.2d 1227, 1255 (11th Cir. 1982). The errors in Mr. Jones' case are obviously much more egregious than those in Proffitt.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the

CLAIM IV

MR. JONES' SENTENCING JURY WAS REPEATEDLY MISINFORMED AND MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO <u>CALDWELL V. MISSISSIPPI</u>, 105 S. CT. 2633 (1985), <u>ADAMS V. DUGGER</u>, 816 F. 2D 1443 (11TH CIR. 1987), AND <u>MANN V. DUGGER</u>, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Throughout the course of the proceedings the jurors at Mr. Jones' trial were consistently misinformed, misled, and misinstructed. The jurors were never accurately or properly informed that the sentencing judge was bound to give great deference to their life recommendation, or that in fact judicial overrides are seldom affirmed by the Florida Supreme Court. <u>See</u> <u>Tedder v. State</u>, 322 So. 2d 908, 910 (Fla. 1975); Radelet, <u>Rejecting the Jury</u>, 18 U. Cal. Davis L. Rev. 1409 (1985). To the contrary, the jurors were affirmatively informed that their recommendation was of little importance, that the appropriateness of sentencing the defendant to death would be determined by a better authority than the jurors, and that any questions regarding the appropriateness of sentencing the defendant to death would be disposed of by another much more qualified authority -- the judge, who was free to disregard their advisory decision under any circumstances.

<u>Caldwell v. Mississippi</u>, 472 U.S. 320, 105 S. Ct. 2633 (1985), held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. The prosecutor in <u>Caldwell</u> 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

RESPONSIBILITY FOR SENTENCING, CONTRARY TO <u>CALDWELL V. MISSISSIPPI</u>, 105 S. CT. 2633 (1985), <u>ADAMS V. DUGGER</u>, 816 F. 2D 1443 (11TH CIR. 1987), AND <u>MANN V. DUGGER</u>, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Throughout the course of the proceedings the jurors at Mr. Jones' trial were consistently misinformed, misled, and misinstructed. The jurors were never accurately or properly

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), cert. granted, 108 S. Ct. 1106 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

The diminution of jury responsibility which occurred here is more egregious than ths than that in Caldwell. Here the trial court directly misinformed the jury as to their true role at sentencing, repeatedly informing every person on the panel from which Mr. Jones' jury was selected that it was he, the trial judge, and not they, the jury, who bore the ultimate and final responsibility for the sentencing decision (E.g., R. 136, 142, 144, 149, 476, 477, 1475, 1476, 1488, 1496, 1571-77). Whatever decision the jury might arrive at, according to the trial jude was free and reinforced the responsibility-diminishing theme established by the court (E.g., R. 517, 518, 523, 562, 563, 565, 619, 621, 624, 629, 1557, 1558). Those who were ultimately selected to serve on Mr. Jones' jury heard this inaccurate and misleading information again, during closing argument and in the judge's sentencing instructions, as the law which they were solemnly sworn to uphold. Significantly, the jury was also given an "advisory sentence" form, which provided them inaccurate and misleading information.

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

things the members of the panel from which Mr. Jones' jury was selected heard from the judge and prosecutor. At the first stage of voir dire, the court and the State explained their jury-diminishing perception of the capital sentencing process and the jury's minimized role.

Early in voir dire, the judge explained to the jury their role:

> THE COURT: Ladies and gentlemen, in this case the defendant, Leo Alexander Jones, is charged with murder in the first degree which carries the maximum sentence of death or life imprisonment. If a verdict of guilty of murder in the first degree is rendered by the jury in this case, then as soon as practical thereafter evidence will be presented to that same jury as to any matters relevant to the sentence. Aggravating and mitigating circumstances will be included in that evidence for the jury's consideration. The State will present arguments for the death penalty; the defense will present arguments against the death penalty. Then the jury will render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment. This advisory sentence will be by the majority vote of the jury. The Judge then sentences the defendant to death or life imprisonment, he is not required to follow the advice of the jury. The imposition of punishment is the function of the judge of this Court, and not the function of the jury. Thus, the jury does not impose punishment if a verdict of guilty of murder in the first degree is rendered. However, because such a verdict of guilty of murder in the first degree could lead to a sentence of death, your qualifications to serve as jurors in this case depends upon your attitude towards your capability of rendering a verdict of guilty that could result in a death sentence. The Court will now explain to you the standard by which your qualification to serve as a juror in this case is to be measured . . .

(R. 475-77)(emphasis added).

The State took up this responsibility-diminishing theme, making certain the jurors understood that it was the judge, and not the jury, who was responsible for sentencing:

> MR. AUSTIN: Now, I have to go a little

jury's minimized role.

Early in voir dire, the judge explained to the jury their role:

> THE COURT: Ladies and gentlemen, in this case the defendant, Leo Alexander Jones, is charged with murder in the first degree which carries the maximum sentence of death or life imprisonment. If a verdict of guilty of murder in the first degree is rendered by the jury in this case, then as soon as

any other case, it is a two-part trial. It is what we call a bifurcated trial or a two-part trial, and in that sense there would be a trial and the jury would go out and deliberate and come back with a verdict of guilty or not guilty. If they come back with not guilty it's all over, but if they come back with a verdict of guilty of first degree murder, then they have a duty and the State and the defense would put on additional matters, if there is a phase, and then you would come back and make a recommendation to the Judge of death or life imprisonment with a mandatory twenty-five years. Do you understand that procedure as to how it will go?

> JURORS COLLECTIVELY: Yes.

(R. 516-517)(emphasis added).

> MR. AUSTIN: Do you understand that if you find the defendant guilty, that Judge Soud will impose the sentence, that you merely recommend. So you may not have a chance the second time, you understand that, that if you can find him guilty you are exposing him to the death penalty; do you understand that? Now, knowing that, could you vote and find the defendant guilty if you believe he's guilty beyond a reasonable doubt? Could you do that, ma'am?

> JUROR HUNT: Yes.

(R. 518)(emphasis added)(See also R. 523-24).

The theme advanced by the State diminished even further the jury's perception of their role. This theme mirrored and accentuated that presented by the trial court, that the role of the jury was merely advisory, and the ultimate sentencing was to be done by the court alone:

> MR. GREENE: Now, as the Court told you and as you heard Mr. Austin speak of it, this is a first degree murder, that is, the defendant if convicted is facing one of two punishments: The electric chair, that is, death by electrocution sentence, or a sentence of life imprisonment with the requirement that he serve a minimum of twenty-five years in the state penitentiary. Now, as such Mr. Austin told you the trial is split into two parts, and in the first part the jury determines whether or not the defendant is guilty or innocent, having listened to the evidence and seeing the documents, the pictures, whatever, tangible evidence may come in, and listen to the law

matters, if there is a phase, and then you would come back and make a recommendation to the Judge of death or life imprisonment with a mandatory twenty-five years. Do you understand that procedure as to how it will go?

JURORS COLLECTIVELY: Yes.

(R. 516-517)(emphasis added).

MR. AUSTIN: Do you understand that if you find the defendant guilty, that Judge

> The second phase of the trial is that assuming that you return a verdict of first degree murder, that if you find the defendant guilty of first degree murder in the second phase of the trial you would make a recommendation to the Judge, that is, you would recommend whether or not you or a majority of you feel that the defendant should be sentenced to life imprisonment or death. Now, that's only a recommendation and the Court within the guildelines of the law and -- there is a lot of law that we don't need to go into, but within the guidelines of the law the Court can impose the sentence it feels is appropriate, and the Court will consider your recommendation but doesn't necessarily have to follow it. Do each of you understand that? Miss Hunt, Miss Ruford?

(R. 562, 563)(emphasis added). Throughout the voir dire and later proceedings, in fact, the prosecutors and trial court referred to the jury's penalty phase determination as merely a recommendation, which could be accepted or rejected by the judge as he saw fit (*E.g.*, R. 562-63; 565; 619; 620-21; 624; 639). Then, during his instructions, the trial judge made it clear that he had *sole* responsibility over the sentencing decision. The court and prosecutor here almost systematically diminished Mr. Jones' capital jurors' sense of responsibility for the awesome capital sentencing task that the law would call on them to perform. *Cf*. *Caldwell*, *supra*.

The jury was charged thusly:

> Five. Your duty is to determine if the defendant is guilty or not guilty in accord with the law. It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.
>
> . . .
>
> I would like now to inform you of the maximum and minimum possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendant in accordance with these instructions.

death. Now, that's only a recommendation and the Court within the guildelines of the law and -- there is a lot of law that we don't need to go into, but within the guidelines of the law the Court can impose the sentence it feels is appropriate, and the Court will consider your recommendation but doesn't necessarily have to follow it. Do each of you understand that? Miss Hunt, Miss Ruford?

(R. 562, 563)(emphasis added). Throughout the voir dire and later proceedings, in fact, the prosecutors and trial court

court again diminished the role of the jury, telling the jurors that they were now to render an advisory opinion (R. 1488-89).

Later in his instructions, the judge repeated the now familiar and erroneous legal principle provided to the jury:

> Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the judge of this Court. However, 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. 1495)(emphasis added).

In closing argument at the penalty phase, the State again reiterated this theme: that the jury's role was not important (R. 1557-58).

The most blatant violation of the precepts enunciated in Caldwell occurred after closing arguments in the penalty phase. The court charged the jury with instructions that were riddled with references to the advisory role of the jury. The court stated to the jury that they would recommend a sentence but that the sentencing decision was solely the responsibility of the court. The court relegated the jury to a less than secondary role, reducing it's responsibilities again and again. The jury was then specifically instructed:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree.
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the Court, and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to
>
> Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

> <u>Your advisory sentence should be based</u> upon the evidence that you have heard while trying the guilt or innocence of the defendant, and evidence that has been presented to you in these proceedings . . .

(R. 1571, 1572)(emphasis added)(<u>See</u> <u>also</u> R. 1573; 1574-77).

Neither the advisory sentence form (provided to the jury), nor the jury instructions that were given prior to penalty phase deliberations accurately instructed the jury as to their proper role: that their sentencing decision was entitled to great weight and deference if supported by a rational basis. Neither the Court, nor the prosecutor, ever appraised the jury, verbally or in writing, of the important role they played in the sentencing decision.

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 or she 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. <u>See</u> <u>Tedder v. State</u>, 322 So. 2d 908, 910 (Fla. 1975); <u>Brookings v. State</u>, 495 So. 2d 135 (Fla. 1986); <u>Garcia v. State</u>, 492 So.2d 360 (Fla. 1986); <u>Wasko v. State</u>, 505 So. 2d 1314 (Fla. 1987); <u>Ferry v. State</u>, 507 So.2d 1373 (Fla. 1987); <u>Fead v. State</u>, 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 is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as
Neither the advisory sentence form (provided to the jury), nor the jury instructions that were given prior to penalty phase deliberations accurately instructed the jury as to their proper role: that their sentencing decision was entitled to great weight and deference if supported by a rational basis. Neither the Court, nor the prosecutor, ever appraised the jury, verbally or in writing, of the important role they played in the

State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, supra, 804 F.2d at 1529. 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. 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. Jones' 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. Jones' 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. 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," McGautha v. California, 402 U.S. 183, 91971), might find a diminution of
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. 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. Jones' jury, however, was led to believe that its determination meant

> 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 responsibility for any ultimate determination of death will rest with others presents an intolerable danger 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 give in.

Id. at 2641-42 (emphasis added).

The comments and instructions here went a step further -- 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. Jones' case the Court itself made some of the [mis]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 . . . minimized its role than the jury in Caldwell.

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

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Jones' 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

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 responsibility for any ultimate determination of death will rest with others presents an intolerable danger 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

penalty." Id. at 1532. Mr. Jones' rights under the eighth and fourteenth amendments were violated, and the Court should now correct these errors and grant Mr. Jones relief.

The eighth amendment errors in this case denied Mr. Jones 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. Wainwright, 804 F.2d at 1531; Mann v. Dugger, supra. The comments and instructions assuredly had an effect. Caldwell, supra; Adams, 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 [Leo Jones should be sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bar exists to the Court's consideration of this claim under these circumstances. See Smith v. Murray, 106 S. Ct. at 2668. Relief is proper.

Caldwell, which did not exist at the time Mr. Jones was tried, now demonstrates that Mr. Jones is entitled to post-conviction relief. See Adams, supra; Mann, supra. To the extent that counsel should have accurately predicted Caldwell, it was ineffective assistance not to object to the dimunition of the juror's sense of responsibility. For each of the reasons discussed above, the Court should vacate Mr. Jones' unconstitutional sentence of death.

At a minimum, Mr. Jones respectfully urges that the Court stay his execution pending the United States Supreme Court's decision in Dugger v. Adams. In the past, this Court did not hesitate in its duty not to allow litigants to be put to death while the very issue which would determine the propriety of their

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. Wainwright, 804 F.2d at 1531; Mann v. Dugger, supra. The comments and instructions assuredly had an effect. Caldwell, supra; Adams, supra; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc). Moreover, the comments and instructions

1987)(granting stay of execution pending decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987)). A similar approach is urged here, for it is respectfully submitted that precedent and fundamental precepts of justice and equal treatment under the law demand no less.

CLAIM V

THE DISRUPTING/HINDERING GOVERNMENTAL FUNCTION/ENFORCEMENT OF THE LAWS AGGRAVATING CIRCUMSTANCE WAS AUTOMATICALLY APPLIED TO MR. JONES WITHOUT CONSIDERATION OF HIS INDIVIDUAL INTENT, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

In the prosecutor's argument to the jury and the court's sentencing findings there is a presumption that the aggravating circumstance that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws automatically applied to Mr. Jones, or to anyone who killed a police officer. At no time was the jury asked to consider, and at no point did the judge's findings refer to, any specific intent by Mr. Jones to hinder the exercise of a governmental function or the enforcement of the law.

The United States Supreme Court has repeatedly held that every capital defendant is entitled to an individualized sentencing determination before a death sentence can be constitutionally imposed. Beginning with Gregg v. Georgia, the case law has established that in capital cases, "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." Gregg v. Georgia, 428 U.S. at 189 n.38 (emphasis added); see also, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Leo Jones was not afforded an individualized determination with regard to the hindering governmental function

CLAIM V

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In the prosecutor's argument to the jury and the court's

The jury was instructed that they could find the following circumstances in aggravation of the sentence to be imposed:

> The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(R. 141-56). The instruction was not limited in any way.

The State argued and the court found the aggravating circumstance that Leo Jones intended to interfere with the governmental function and enforcement of the law. The prosecutor called Sheriff Carson as a witness regarding this aggravating circumstance. Sheriff Carson testified that Leo Jones should be executed because: 1) Jacksonville only has half the national average of police officers on patrol per capita (R. 1499); 2) The crime occurred in a high crime zone (R. 1500-1502); 3) The police force is like a family, <u>see</u> Claim II, <u>supra</u>, and thus when one is killed, it upsets the others (R. 1502); 4) Not only does it upset the officers but it upsets their families. "When they go home the wives talking, how did it happen, could it have happened to you." (R. 1503); 5) It creates stress for the officers (R. 1503); 6) Peoples' attitudes have changed over the years and more officers are being killed (R. 1504); 7) A killing of an officer affects recruitment and creates frustration among officers (R. 1505).

Finally, the Sheriff was allowed to testify that Leo Jones should die because the police officers were upset that another prisoner on death row who was convicted of killing an officer hadn't been executed yet:

> These things go on for a long time in peoples' minds. We can all remember the police officers who were shot, when they were shot and how they were shot, and there's a morale feeling that it is building up and there's a feeling of frustration among police officers.
>
> <u>It's coincidental, but the last police</u>

The State argued and the court found the aggravating circumstance that Leo Jones intended to interfere with the governmental function and enforcement of the law. The prosecutor called Sheriff Carson as a witness regarding this aggravating circumstance. Sheriff Carson testified that Leo Jones should be executed because: 1) Jacksonville only has half the national

and Stewart's killer is still on death row, nothing has happened. It's the -- a frustration of the police officer and it's a morale factor. And it's a morale factor, I think, for everybody.

MR. GREENE: Thank you Sheriff. No further questions.

THE COURT: Mr. Fallin?

MR. FALLIN: No cross-examination.

(R. 1505)(emphasis added).

The reasons offered by the Sheriff, and the State, to justify the execution of Leo Jones had no bearing on the aggravating circumstance they were ostensibly addressing. The prosecutor magnified the effect of the Sheriff's improper testimony by showcasing it in his closing argument and tying it to a theme which was developed throughout the trial: that Leo Jones should die because the victim worked for the jury and the jury would not be safe if Leo Jones was not executed:

> Now, the picture is complete, and Leo Jones, Leo Alexander Jones, sits there before you stripped of that presumption of innocence that we talked about at voir dire in this case, stripped of that presumption, and guilty of murder in the first degree of Tom Szafranski, a police officer who worked for you and he worked for me.

(R. 1350)(emphasis added).

> Ladies and gentlemen, I submit to you the State of Florida has proved its case. We've proved that the man is a murderer, and I submit even worse than that, really, that's possible because he struck a blow at you and me directly. He murdered one of our agents, one of those people that protects us. When that bullet fragment shattered into the head off officer Tom Szafranski, he was striking at us.

(R. 1388-89)(emphasis added).

> Now, that night, May the 23rd -- you've heard the sheriff testify, and I touched upon it in the closing argument the other day, but when you think about a police force, as I said before, the symbol of society's determination to be safe, to be secure in their homes, to be secure in their property,

THE COURT: Mr. Fallin?

MR. FALLIN: No cross-examination.

(R. 1505)(emphasis added).

The reasons offered by the Sheriff, and the State, to justify the execution of Leo Jones had no bearing on the aggravating circumstance they were ostensibly addressing. The prosecutor magnified the effect of the Sheriff's improper

> people, and less than a hundred uniformed people out there to protect and maintain the security of the people of this community. You bet you pose a threat to pulling those people out, and it's -- it's sad to say about our society, but if you pull those hundred people out we would have chaos, we would have anarchy. The symbol of orderly society, every free society, is a well-disciplined, well-trained police department that maintains people's safety so they can be safe from other people and their persons against attack, from being murdered and from being attacked, and secure their property. And you're talking about less than a hundred people, one per approximately six thousand citizens out there that night. The representatives of society, the front line, the thin line of society. Tom Szafranski, policeman, shot and killed because he was a policeman, a member -- a representative of our society doing a job and, as I said before, on an mission of mercy that night.

The judge found the aggravating circumstance that Mr. Jones interfered with the governmental function or enforcement of the laws based solely on evidence that would apply to any killing of a police officer. In the Findings of Fact the court never addressed Leo Jones' intent to interfere with governmental or law enforcement functions and in fact Mr. Jones' intent was never referred to in any way:

> b. WHETHER THE CRIME FOR WHICH THE DEFENDANT IS TO SENTENCED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF ANY LAWS.
>
> FACT:
>
> The duties and governmental functions of the Sheriff of the City of Jacksonville and his sworn deputies are to maintain law and order, keep the peace, prevent crime, apprehend criminals, incarcerate law violators, serve civil process, and maintain jail facilities.
>
> FACT:
>
> The City of Jacksonville, a governmental municipality, covers 840 square miles and has approximately 600,000 people. The ratio of police officers to the population averages 1.6 officers per 1,000 of the population. The national average is 3.2 officers per 1,000 of the population.

well-trained police department that maintains people's safety so they can be safe from other people and their persons against attack, from being murdered and from being attacked, and secure their property. And you're talking about less than a hundred people, one per approximately six thousand citizens out there that night. The representatives of society, the front line, the thin line of society. Tom Szafranski, policeman, shot and killed because he was a policeman, a member -- a representative of our society doing a job and, as I said before, on an mission of mercy that night.

four (4) law enforcement zones and if everyone is working, there are 108 officers in patrol cars on duty at any one time of the day.

FACT:

The intersection of 6th and Davis Streets is located in Zone 3, which includes the downtown, core city, and runs north to Trout River and covers just 20 square miles - only 1/48 of the land surface. The population of Zone 3 is approximately 80,000 people or 2.15 of the total population.

FACT:

On May 23, 1981, during the midnight shift, from 11:00 P. M. to 7:00 A. M. the next morning there were 26 police officers on duty in patrol cars, one of whom was Thomas J. Szafranski, or one officer for every 3,076 of the population.

FACT:

Zone 3 has the highest crime rate per population of any of the zones in the City of Jacksonville. In other words, there is more crime per person in a smaller area of land with a fewer amount of law enforcement personnel available.

FACT:

The killing of a police officer disrupts the law enforcement family personally and in their professional duties. Fear for the safety of the officers permeates the department as well as individual families, and particularly so, when the threat of death or bodily harm by sniper in ambush is a present reality - all of which impairs proficiency and stirs tension. Performance drops.[16]

FACT:

In reality, after 5:00 P. M. on any day until 8:00 the next morning, the police officer is the only available governmental agent available to the people and their needs on a minutes' notice.

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[16] Cf. Claim II, supra.

1/48 of the land surface. The population of Zone 3 is approximately 80,000 people or 2.15 of the total population.

FACT:

On May 23, 1981, during the midnight shift, from 11:00 P. M. to 7:00 A. M. the next morning there were 26 police officers on duty in patrol cars, one of whom was Thomas J. Szafranski, or one officer for every 3,076 of the population.

> CONCLUSION:
>
> There is an aggravating circumstance under this paragraph. The Sheriff of the City of Jacksonville and the sworn police officers, and deputies are a vital function of government and law enforcement. The senseless killing of a police officer disrupts and hinders the lawful exercise of the duties of the Sheriff. It also has an effect on recruiting and maintaining responsible and professional officers who are called to a vocation which necessarily involves the safety and security of the people in the community in which he serves.
>
> The ability to enforce laws depends entirely upon the presence and availability of the police officer in the neighborhood. When he is removed for whatever cause, governmental function and law enforcement is non-existent, impaired, or solely diminished.

(R. 207-210). <u>At no time did the court ever refer to any intention on the part of Leo Jones to disrupt the governmental function or hinder enforcement of the laws</u>. There are simply <u>no</u> findings in this regard. It is clear that the court automatically applied this aggravating circumstance based solely on a particular set of circumstances and would have applied it to any individual who killed a police officer.

The constitutional mandate of individualized determinations in capital sentencing proceedings has emerged as the central precept of eighth amendment jurisprudence since the original articulation of the standard in <u>Gregg v. Georgia</u>:

> Beginning with <u>Lockett v. Ohio</u>, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a plurality of the Court recognized that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider "<u>as a mitigating factor</u>, any aspect of a defendant's character or record and any of the circumstances of the offense." <u>Id</u>., at 604, 98 S.Ct., at 2965 (emphasis in original). In <u>Eddings v. Oklahoma</u>, 455 U.S. 104, 102 S.Ct 869, 71 L.Ed.2d 1 (1982), a majority of the Court accepted the <u>Lockett</u> plurality's approach. Not only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but "<u>Lockett</u> requires the sentencer to listen" to

called to a vocation which necessarily involves the safety and security of the people in the community in which he serves.

The ability to enforce laws depends entirely upon the presence and availability of the police officer in the neighborhood. When he is removed for whatever cause, governmental function and law enforcement is non-existent, impaired, or solely diminished.

(R. 207-210). At no time did the court ever refer to any

> 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court, by a unanimous vote, invalidated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence on nonstatutory mitigating circumstances." Id., at ___, 107 S.Ct., at 1824. We unequivocally relied on the rulings in Lockett v. Ohio, and Eddings v. Oklahoma, that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence. 481 U.S., at ___ and ___, 107 S.Ct., at 1822 and 1824.

Sumner v. Shuman, 107 S. Ct. 2716, 2722-23 (1987).

In Sumner v. Shuman, the court found automatic aggravation of a capital sentence is unconstitutional. Even a murder committed by a defendant serving a life sentence without parole did not provide an adequate basis for an automatic death penalty:

> The fact that a life-term inmate is convicted of murder does not reflect whether any circumstance existed at the time of the murder that may have lessened his responsibility for his acts even though it could not stand as a legal defense to the murder charge. This Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. See, e.g. Tison v. Arizona, 481 U.S. ____, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); Enmund v. Florida,, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even though it is a life-term inmate or an inmate serving a particular number of years who is involved.
>
> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation.

> evidence before imposing a death sentence. 481 U.S., at ___ and ___, 107 S.Ct., at 1822 and 1824.

Sumner v. Shuman, 107 S. Ct. 2716, 2722-23 (1987).

In Sumner v. Shuman, the court found automatic aggravation of a capital sentence is unconstitutional. Even a murder committed by a defendant serving a life sentence without parole did not provide an adequate basis for an automatic death penalty:

The eighth amendment principle that a death sentence cannot be automatically imposed, without reference to a defendant's individual intent or mens rea, <u>see</u> <u>Enmund</u>, <u>supra</u>; <u>Tison</u>, <u>supra</u>, also applies to the automatic application of an aggravating circumstance. If an aggravating circumstance is so vague that it can be applied to any person without discretion or guidance, it violates the right to individualized sentencing.

In <u>Godfrey v. Georgia</u>, 446 U.S. 420 (1980), the court reversed a death sentence because the Georgia Supreme Court did not apply a limiting construction to a statutory aggravating circumstance:

> 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 characterize almost every murder as "outrageoulsy or wantonly vile, horrible and inhuman."

446 U.S. at 428-29. In <u>Maynard v. Cartwright</u>, 108 S. Ct. 1853 (1988), the Court affirmed the important eighth amendment principle that a particular set of facts, in and of themselves, cannot warrant a death sentence:

> 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.

108 S. Ct. at 1859. The same <u>overbroad</u> standard was applied by the sentencing court in Mr. Jones' case; the eighth amendment was violated here as well.

In <u>Maynard v. Cartwright</u>, <u>supra</u>, the Supreme Court reaffirmed the principle that an otherwise vague aggravating circumstance must be limited to meet eighth amendment

violates the right to individualized sentencing.

In <u>Godfrey v. Georgia</u>, 446 U.S. 420 (1980), the court reversed a death sentence because the Georgia Supreme Court did not apply a limiting construction to a statutory aggravating circumstance:

> In the case before us, the Georgia Supreme Court has affirmed a sentence of

> 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.

108 S. Ct. at 1859.

In the application of the aggravating circumstance of hindrance of governmental function or enforcement of law to Leo Jones, the jury instruction was so vague as to leave the jury with the impression that any killer of a police officer should automatically be aggravated for interfering with the police. No limiting construction was given.

In its Findings of Fact, the trial court then clearly applied only this overbroad interpretation. See Maynard v. Cartwright, supra. The trial court found that regardless of intent, anyone who shoots a policeman should be aggravated for interfering with a governmental or law enforcement function. This automatic application of aggravation regardless of Leo Jones' specific intent violates the eighth amendment.

Previously, this Court has required a showing that: 1) the police officer was engaged in performing a governmental or law enforcement function; 2) the defendant knew what that function was; and 3) the defendant committed the murder specifically to interfere with that function. Tafero v. State, 403 So. 2d 355 (Fla. 1981)(Officer killed after stopping a car and ordering the occupants out after seeing a gun); Antone v. State, 382 So. 2d 1205 (Fla. 1980)(the defendant committed a contract killing to prevent the victim from testifying before a grand jury); Songer v. State, 322 So. 2d 481 (Fla. 1975)(the defendant shot a policeman as he was approaching the car after searching another occupant of the car). In each of these cases the victim was performing a governmental or law enforcement function, the

108 S. Ct. at 1859.

In the application of the aggravating circumstance of hindrance of governmental function or enforcement of law to Leo Jones, the jury instruction was so vague as to leave the jury with the impression that any killer of a police officer should automatically be aggravated for interfering with the police. No limiting construction was given.

deliberate action specifically to interfere with that function. The defendant, in each of those cases, intended to interfere with a governmental function or hinder enforcement of the law. There was no such intent here, and, more importantly, there were no findings by the sentencing court in this regard. None of the requisite findings were made in Leo Jones' case.

There was no individualized finding by the jury or the court that Leo Jones knew what, if any, function the victim was performing or that he had any intent to interfere with that function. Instead there was an automatic application of an aggravating circumstance on a particular set of facts without regard to the defendant's individual intent. The court simply found that any person who kills a police officer automatically interferes with a governmental or law enforcement function.

The automatic application of this aggravating circumstance thus violated Mr. Jones' right to individualized and reliable capital sentencing, and thus the eighth and fourteenth amendments. His sentence of death should not be allowed to stand.

This Court allowed this aggravating circumstance to stand on Mr. Jones' direct appeal. However, at the time, the Court did not have the benefit of Maynard v. Cartwright or Sumner v. Shuman. This Court thus also failed to make the requisite findings necessary to validly apply this aggravating circumstance. Cf. Tison v. Arizona, supra. Mr. Jones respectfully urges that the Court now correct this fundamental eighth amendment error, and order a proper resentencing.

requisite findings were made in Leo Jones' case.

There was no individualized finding by the jury or the court that Leo Jones knew what, if any, function the victim was performing or that he had any intent to interfere with that function. Instead there was an automatic application of an aggravating circumstance on a particular set of facts without regard to the defendant's individual intent. The court simply

CLAIM VI

THE COLD, CALCULATED, PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS OVERBROADLY APPLIED IN MR. JONES' CASE, AND NO LIMITING CONSTRUCTION WAS PROVIDED BEFORE THE JURY, BY THE SENTENCING COURT, OR ON APPEAL, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The concerns of Maynard v. Cartwright, discussed in Claim V, supra, similarly apply to the overbroad application of this aggravating circumstance. As the record in its totality reflects the jury was never given, and the sentencing court and this Court on direct appeal never applied, the limiting construction required by Maynard v. Cartwright. Time constraints make it impossible for counsel to adequately present this claim. Counsel therefore relies on the record, and on the general legal analysis presented in Claim V, supra, and respectfully urges that the Court revisit its affirmance of this aggravating factor on direct appeal in light of the recently issued eighth amendment standards set forth in Maynard v. Cartwright.

CLAIM VII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING, AND ITS APPLICATION OF THIS SAME IMPROPER STANDARD IN IMPOSING SENTENCE, DEPRIVED MR. JONES OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Arango v. State, 411 So. 2d 172, 174 (1982), the Florida Supreme Court held that a capital sentencing jury must be

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

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973). The Florida

supra, similarly apply to the overbroad application of this aggravating circumstance. As the record in its totality reflects the jury was never given, and the sentencing court and this Court on direct appeal never applied, the limiting construction required by Maynard v. Cartwright. Time constraints make it impossible for counsel to adequately present this claim. Counsel

the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon. Arango, supra.

Mr. Jones' sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Jones' sentencing jury was specifically instructed that Mr. Jones bore the burden of proof on the issue of whether he should live or die. According to the instructions given to Mr. Jones' jury, the State needed only to show that aggravating circumstances existed sufficient to justify imposition of the death penalty, at which point it became the defense's burden to show that mitigation existed, and that mitigation outweighed the aggravating circumstances proved by the State, before a life sentence could be recommended. Nowhere was the jury correctly instructed that before a death sentence could be imposed, the State must prove that the aggravating circumstances outweighed the mitigating circumstances. Cf. Arango, supra.

During penalty phase closing argument, the prosecutor informed the jury that the court would instruct them that if mitigating circumstances did not outweigh aggravating circumstances, they would have to impose a penalty of death. He gave this incorrect legal concept to the jury twice:

> The defendant then has to prove, if the State establishes aggravating circumstances do exist, then the burden is on the defendant to come forward with mitigating circumstances that would offset the aggravating circumstances.

(R. 1546)(emphasis added).

> You first consider if the State has proved sufficient aggravating circumstances to recommend death. There are three you can consider. Then consider whether there are mitigating circumstances that outweigh, they must out weigh the aggravation. And if they don't then you can only infer from the instructions that the proper sentence is death. and I would respectfully recommend to

Rather, Mr. Jones' sentencing jury was specifically instructed that Mr. Jones bore the burden of proof on the issue of whether he should live or die. According to the instructions given to Mr. Jones' jury, the State needed only to show that aggravating circumstances existed sufficient to justify imposition of the death penalty, at which point it became the defense's burden to

> dispose of this case, they dispose of any problems that you might have with it.

(R. 1557)(emphasis added).

At the beginning of the penalty phase of the trial, the court told the jury that the mitigating circumstances must outweigh the aggravating circumstances. The jury was erroneously advised that:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you must determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances*, if any.

(R. 1496)(emphasis added).

This misstatement of the burden of proof was repeated by the court, to the jury, during the instructions given immediately prior to penalty phase deliberations. The jury was instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, *and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist*.

(R. 1572)(emphasis added).

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, *it will then be your duty to determine whether mitigating circumstances exist that out weigh the aggravating circumstances*.

(R. 1573)(emphasis added).

The court reiterated the erroneous concept to the jury one

advised that:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you must determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating*

> The clerk in just a moment, when you go to retire on this advisory sentence, will hand you a form developed for the advisory sentence. Briefly, I will read it to you. It is titled Advisory Sentence. And it says, "We, a majority of the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment, find: number one, sufficient aggravating circumstances do or do not exist to justify a sentence of death," and whichever finding there is by a majority you mark which alternative is applicable.
>
> Two, "Sufficient mitigating circumstances do or do not exist which outweigh the aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death." When you have found by a majority that what that finding is, whether it's do or do not exist, whatever alternative expresses your finding, you should so mark.

(R. 1576)(emphasis added).

The error here was compounded when the court provided the "Advisory Sentence" form to the jury, to take with them during penalty phase deliberations.

These instructions violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Jones on the central sentencing issue of whether he should live or die. This unconstitutional shift of burden violated Mr. Jones' due process rights under Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Jones' rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Jackson, supra; Arango v. State, supra; State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury

> and whichever finding there is by a majority you mark which alternative is applicable.
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> Two, "Sufficient mitigating circumstances do or do not exist which outweigh the aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death." When you have found by a majority that what that finding is, whether it's do or do not exist, whatever alternative expresses your finding, you should so mark.