IN THE SUPREME COURT OF FLORIDA

NO. 73360

AMOS LEE KING, JR.

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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PRELIMINARY STATEMENT

Mr. King's petition presents significant constitutional questions, involving issues predicated upon significant changes in the law and/or fundamental constitutional error, as well as questions involving the denial of Mr. King's rights to effective assistance of counsel on direct appeal. Mr. King's petition presents claims involving fundamental eighth amendment sentencing errors: precisely the type of issues which are subject to no procedural impediment. **See**, e.g., Phillips v. Duqaer, 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. King's petition presents claims challenging the fundamental reliability and fairness of his sentence of death. The claims are subject to no procedural bar.

There is, however, a serious problem in Mr. King's case. As discussed in Mr. King's Rule 3.850 motion, copies of which have been provided to the Court,[1] the signing of Mr. King's death warrant accelerated the filing period applicable to his Rule 3.850 action by one year and seven months. This death warrant came with no warning, and was absolutely unexpected. Given these

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[1]Mr. King's Rule 3.850 motion and request for rehearing were denied by the Circuit Court late on the afternoon of Monday, November 28, 1988, and Notice of Appeal was timely filed. Mr. King's appeal of the denial of Rule 3.850 relief is now before this Court. The introduction to that pleading provides a detailed discussion of the untenable circumstances under which Mr. King's case has been litigated. In the interests of brevity, that discussion is not repeated again herein, but is incorporated, and Mr. King respectfully refers the Court to his Rule 3.850 motion in this regard

circumstances and those discussed in the Rule 3.850 motion,[2] this petition is a far cry from the professionally responsible pleading which Mr. King, and this Court, deserve. It is untenable to force anyone to litigate actions with stakes such as these under these circumstances. Mr. King has, however, attempted to present habeas corpus claims before this Court. Counsel apologizes to the Court for the fact that this pleading is wanting in many respects. There is nothing counsel can say to undo the fact that Mr. King has been short-changed.

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. King's sentence of death. Jurisdiction in this

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[2] For example, the fact that co-counsel in Mr. King's case, Timothy Schroeder, suffered a stroke last week, the fact that Mr. King's undersigned counsel has litigated seven other death warrants during the same period of time as Mr. King's, the fact that counsel did not even have Mr. King's transcripts at the time this unforeseen (and unwarranted) death warrant was signed, the fact that this Governor has issued such unprecedented numbers of death warrants that no attorney at the Office of the Capital Collateral Representative can any longer be deemed "effective." It may well be that the courts will no longer show any concern for circumstances such as these (as reflected by the reasons used by the circuit court to deny the Rule 3.850 motion, **see** Appellant's Motion for Stay of Execution on Appeal of Denial of Motion for Fla. R. Crim. P. 3.850 Relief), and that the task of administering Florida's capital post-conviction system has been abdicated to the Governor. We hope that this is not the case, but whatever the case may be one thing remains clear: Mr. King has not been afforded the effective representation to which he is entitled in these proceedings, **see** Spalding V. Dugger, 526 So. 2d 71 (Fla. 1988), and the adversarial testing process has not functioned properly in Mr. King's case -- as the Circuit Court's dismissal of Mr. King's substantial Rule 3.850 motion makes clear.

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. Wainwriaht, 498 So. 2d 938 (Fla. 1987); Fitzpatrick v. Wainwriaht, 490 So. 2d 938 (1986); Rilev v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. King to raise the claims presented herein. See, e.g., Downs v. Duqqer, 514 So. 2d 1069 (Fla. 1987).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 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. King's sentence of death and of this Court's appellate review process. Mr. King'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 fundamental eighth amendment reliability requirements, as well as on 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. Wainwrisht, 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. Wainwrisht, supra, 498 So. 2d at 939 (habeas relief appropriate where counsel fails to present clear claim of reversible error): Fitzpatrick v. Wainwrisht, supra, 490 So. 2d at 939-40 (habeas relief where counsel failed to appeal erroneous trial court ruling). Cf. 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. King's petition includes a request that the Court stay his execution (presently scheduled for November 30, 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. Wainwrisht, 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): Kennedv v. Wainwrisht, 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. King's 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.

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, *Amos* Lee King asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

CLAIM I

THE TRIAL COURT ALLOWED THE STATE TO INACCURATELY AND UNCONSTITUTIONALLY MINIMIZE THE JURY'S SENSE OF RESPONSIBILITY FOR THEIR SENTENCING DECISION, INSTRUCTED THE JURY IN A WAY WHICH GAVE THE COURTS IMPRIMATUR TO THE STATE'S MISINFORMATION, AND ERRONEOUSLY REJECTED DEFENSE COUNSEL'S REQUEST THAT THE JURY BE ACCURATELY AND COMPLETELY INSTRUCTED REGARDING ITS ROLE IN THE CAPITAL SENTENCING PROCESS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The first thing that the venire from which Mr. King's jury was ultimately selected heard from the trial judge was that

> the final decision as to what punishment shall be imposed rests solely with the Court.

(R. 848). The first thing that the jury panel who actually deliberated Mr. King's fate heard from the trial judge, immediately after they were sworn, was, again, that the "final decision" as to sentencing was "solely" the court's responsibility (R. 1217).

The prosecution adopted and elaborated on this theme, informing the jury throughout the proceedings that it was the judge, and not they, who bore the responsibility for the

sentencing decision, and affirmatively encouraged them to rely on the judge to assume that responsibility. The prosecutor assuaged the concerns of those venire members who were troubled by the awesome responsibility involved in the capital sentencing determination by encouraging them to lay the responsibility for their ultimate sentencing decision directly on the trial judge's doorstep, asking the venire whether they

> understood that the responsibility does not lie on your shoulders except to make a recommendation, that the responsibility to sentence Mr. King lies squarely on that man's [Judge Federico's] shoulders and you should not feel responsible for sentencing Mr. King?

(R. 914)(emphasis added). This was not an isolated comment -- the prosecution repeatedly informed the venire that the sentencing decision was **not** their responsibility (see, e.g., R. 873, 914, 916), that their responsibility was only to make a **"recommendation" (see id.; see also** R. 1165, 1185, 1188), that the judge could "follow that recommendation or . . . reject that recommendation" as he saw fit (see, e.g., R. 1057, 1188), and that the "ultimate decision" was "up to the judge and no one else." (R. 1188).

Defense counsel strongly objected to the State's continuing diminishment of the jury's role and dilution of its responsibility:

> MR. LUNDY [PROSPECTIVE JUROR]: It's a big responsibility.
>
> MS. MC KEOWN [PROSECUTOR]: It is, it is. But do you understand that the responsibility does not lie on your shoulders except to make a recommendation, that the responsibility to sentence Mr. King lies squarely on that man's shoulders and that you should not feel responsible for sentencing Mr. King?
>
> How about the rest of you folks? I can understand where the jury would feel that, would feel some sort of responsibility. Do you understand --
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> MR. HARRISON [DEFENSE COUNSEL]: Pardon me. I hesitate to interrupt. May we approach the bench again?

(Whereupon, the following proceedings were had out of the hearing of the jury:)

MR. HARRISON: Your Honor, I object to the statement counsel has made to the effect this jury should not feel responsible for sentencing in this case. The Florida statute provides that they are to provide you with an advisory sentence and this Court is limited as I understand the law in terms of its ability to override a jury recommendation of life or the Court is limited in terms of the findings the jury places on the proceedings to some extent.

All I'm saying is for counsel to be up here saying these folks shouldn't feel responsible -- I'm not saying it is that blatant. It certainly implies less responsibility. In this case it requires more jury responsibility. I just think it is wrong. I think counsel should be restrained from harping on this issue they are not responsible for what they do in this case.

MS. MC KEOWN: Judge, they are not responsible for the sentence that is imposed in this case. I don't feel that should be a burden laid upon them. I think they have to understand their recommendation is important. I certainly emphasized this thought in my entire voir dire. To say they are responsible for the sentence is not the law, it is not appropriate.

THE COURT: I think it has been stressed to the jury that it is a solemn responsibility and a very serious matter, that is their recommendation. I don't think it has been minimized at all, Harrison. I'm going to watch for that. We don't want to minimize their role either because it is a serious responsibility and I don't think the way the question was or statement was worded mitigated their responsibility. So, as to that particular statement I'm going to overrule the objection.

MS. MC KEOWN: Thank you.

(Whereupon, the folowing proceedings were had in open court:)

MS. MC KEOWN: My last question -- I don't know if you had a chance to respond to that. I don't know if I can correctly reword that question again. Do I need to have the court reporter read it back, do you recall?

(Whereupon, the pending question was read by the court reporter.)

Of course, the court was flat wrong -- the jury was never told that they had *any* responsibility for sentencing, much less a

"solemn" one -- in fact, they had just been told that they had no responsibility, that the responsibility did not lie on their "shoulders" at all, but rather "squarely on that man's [Judge Federica's] shoulders." The court nevertheless found that such statements did not minimize the jury's responsibility, overruled the defense objection, and allowed the question to which the defense had objected to be again read back to the jury (R. 916).

With the court's approval, the State of course continued to diminish the role of the jury, constantly reminding them that their function was merely to make a recommendation, which the judge was free to follow or not follow as he saw fit. (See, e.g., R. 1057, 1165, 1185, 1188). Finally, in its closing argument, the prosecution again reminded the jury that they should not feel any responsibility for their sentencing decision:

> Don't let the defense make you feel responsible . . . for Amos Lee King's fate . . . Don't let anyone put a monkey on your back.

(R. 1696).

Defense counsel had earlier requested the court to instruct the jury in a manner consistent with Florida law as stated in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its progeny. Counsel specifically requested the following instruction:

> Ladies and Gentlemen of the jury, you should understand that while your advisory sentence is not strictly binding upon the trial judge, it is nevertheless entitled to great weight and can be rejected by me only in certain limited circumstances. Therefore you should expect your sentencing recommendation to be given most serious consideration by this Court.

(R. 357). That requested instruction was denied, and the jury was instructed as follows:

> 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 . . .

(R. 1720).

The instruction requested by trial counsel was, of course, an accurate statement of Florida law. 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, as this Court has explained:

> Appellant's eighth point is that the trial court erred in giving the jury's recommendation of death great weight than that to which it was entitled. In instructing the jury, the trial court stressed that the jury recommendation could not be taken lightly and would not be overruled unless there was no reasonable basis for it. In its sentencing order the judge noted he was imposing the sentence "independent of, but in agreement with" the jury recommendation. There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell V. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Garcia v. State, 492 So. 2d 360, 366 (Fla. 1986); see also Brookings V. State, 495 So. 2d 135 (Fla. 1986); Wasko V. State, 505 So. 2d 1314 (Fla. 1987); Ferry V. State, 507 So.2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate and is a misstatement of the law.

The role of the Florida sentencing judge, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also

Adams v. Wainwright, 804 F.2d 1526, 1529 (1987). 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. King's jury, however, was led to believe that its determination meant nothing, as the "sole" and "final" responsibility lied "squarely on that man's [Judge Federico's] shoulders," and not theirs, and that Judge Federico was free to impose whatever sentence he wished, irrespective of their own collective decision.[3]

Here the proposed jury instruction was offered to provide the jurors with accurate information regarding their role at sentencing and the awesome responsibility which the law would call on them to discharge. See, e.g., Garcia v. State, 492 So. 2d 360 (Fla. 1986). The instruction would have explained to the jury the effect of Tedder on the weight given its recommendation. An instruction which explains that great weight shall be given to the sentencing recommendation simply provides the jury with accurate information. The need for such accurate information was particularly great here, in light of the egregiously (and unconstitutionally) inaccurate information imparted by the State.

The question presented to the United States Supreme Court in California v. Ramos, 463 U.S. 992 (1983), for example, was whether it was constitutional to instruct a capital sentencing jury as to the governor's power to commute a life sentence.

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[3] Ironically, Judge Federico was also the trial judge in Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988) (en banc).

There the capital defendant had successfully argued to the California Supreme Court that the governor's commutation power was irrelevant to the sentencing determination. Ramos claimed that presenting such information to the jury diverted its attention from the issue of whether there were aggravating circumstances which outweighed the mitigating circumstances.

The United States Supreme Court rejected Ramos' claim:

> [T]he Briggs Instruction does not limit the jury to two sentencing choices, neither of which may be appropriate. Instead, it places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case.
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> . . .
>
> In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of person eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible . . . factors in the process of selecting . . . those defendants who will actually be sentenced to death." Zant v. Stephens, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983)(footnote omitted).

Id. at 1007, 1008 (footnote omitted).

Thus Mr. King's requested instruction could not be rejected as irrelevant. It would have presented accurate information to the jurors by explaining their role in the sentencing process and the importance of their recommendation. Cf. Garcia, supra, 492 So. 2d at 367 ("It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi. . . and Tedder v. State. . ."). The requested instruction would have made it clear that the jury's

recommendation was not simply a straw poll used by the court to gauge public reaction to the crime. The instruction's purpose was to make clear that the recommendation had great and considerable weight -- it had legal effect. It would have insured that the jury did not entertain the mistaken impression, an impression deliberately fostered by the State, that the judge was free to ignore their recommendation.

The State's responsibility-diminishing comments, to which trial counsel strenously objected, violated the eighth and fourteenth amendment precepts of Caldwell v. Mississippi, 472 U.S. 320 (1985). At issue in Caldwell was the prosecutor's misrepresentation of the availability of appellate review. In Caldwell, the deciding vote was cast by Justice O'Connor, who explained her position in a separate opinion. According to her, Ramos authorized a capital sentencing court to provide to a jury accurate information regarding post-sentencing procedures. This, Justice O'Connor believed, would be proper in order to enhance the reliability of the sentencing determination. She found error in Caldwell, however, because the information provided by the prosecutor was misleading:

> In telling the jurors, "your decision is not the final decision . . . [y]our job is reviewable," the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate. In fact, under Mississippi law the reviewing court applies a "presumption of correctness" to the sentencing jury's verdict. 443 So.2d 806, 817 (1983)(Lee, J., dissenting). The jury's verdict of death may be overturned only if so arbitrary that it "was against the overwhelming weight of the evidence," or if the evidence of statutory aggravating circumstances is so lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict." Williams v. State, 445 So.2d 798, 811 (Miss.1984)
>
> Laypersons cannot be expected to appreciate without explanation the limited nature of appellate review, especially in light of the reassuring picture of

> "automatic" review evoked by the sentencing court and the prosecutor in this case. Ante at 2637-2638. Although the subsequent remarks of the prosecutor to which Justice REHNQUIST refers in his dissent, infra, at 2648, may have helped to restore the jurors' sense of the importance of their role, I agree with the Court that they failed to correct the impression that the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate. See ante, at 2645, n.7. I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that "the death penalty may [have been] meted out arbitrarily or capriciously" or through "whim or mistake." California v. Ramos, supra, at 999, 103 S.Ct., at 3451; id., at 1013, 103 S.Ct. at ---; Eddings v. Oklahoma, 455 U.S. 104, 1119, 102 S.Ct. 869, 879, 71 L.Ed.2d 1 (1982)(concurring opinion.

Caldwell, 472 U.S. at — , 105 S.Ct. at ___

Thus under Caldwell the question is not only whether the jury was mislead by being given inaccurate information but also whether over objection they were denied additional information which accurately explained the post-verdict process. In Mr. King's case, fundamental Eighth Amendment error was committed not only when the State was allowed, over defense objection, to provide inaccurate and misleading information to the jury, but also when defense counsel's request that the jury be explicitly told that the sentencing judge must afford its recommendation great weight was refused. As a result an unacceptable risk was created that the death penalty may have been meted out arbitrarily or capriciously, and Mr. King's sentence of death should have been reversed.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments and instructions such as those at issue in Mr. King's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640; 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 its responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for anv ultimate determination of death will rest with others presents an intolerable danser that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless 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. King's 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. King's jury's view of its role.

The prosecutorial comments at issue here are identical to those found violative of the eighth amendment in Mann, supra. See id., 844 F.2d at 1455; see also id. at 1459 (Clark, J., specially concurring). Moreover, here also, as in Mann, "the judge himself stated that the final sentencing decision rested 'solely with the judge of this Court,'" and thereby "put the court's imprimatur on the prosecutor's previous misleading statements." Id., 844 F.2d at 1458; cf. Adams, supra, 804 F.2d at 1531. Thus, here also, "[b]ecause the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, [Mr. King's] sentence is invalid under the eighth amendment." Mann, 844 F.2d at 1458.

Despite counsel's strenuous trial-level objections to the State's misleading comments, and his request for a jury instruction which would have accurately apprised the jury of its true role at sentencing, counsel did not raise this perfectly preserved issue on appeal. Counsel had both compelling state law and federal constitutional bases for the claim, but simply neglected to litigate it. As counsel now states, his omission was based on no tactic or strategy:

> I wish to emphasize that the failure to raise this issue on appeal was not based on a calculated decision to avoid the presentation of this issue to the Florida courts in the hopes of a favorable decision on this claim in some future federal proceeding. In fact there was no strategic or deliberate reason on my part. I was not attempting to secure a tactical advantage by omitting this issue. Neither was I in any way attempting to avoid the presentation of these issues to the

> Florida Supreme Court in the hopes of a more favorable decision from a federal court in the future.

(Affidavit of Baya Harrison [appended hereto]).

This Court addressed Caldwell in the context of prosecutorial misrepresentation of the effect of the jury's verdict in Foster v. State, 518 So. 2d 901 (Fla. 1988). There the Court found the failure of trial counsel to raise the issue on appeal precluded the issue from being presented in a motion for post-conviction relief:

> In his appeal from the denial of his motion for postconviction relief, Foster contends that the conduct of the trial violated Caldwell v. Mississippi, 472 U.S. 320 (1985), in that the jury was told that its role was only to give an advisory opinion, thereby diminishing its sense of responsibility. If there was any validity to this claim, it should have been raised on appeal because Caldwell did not represent a change in the law upon which to justify a collateral attack.

Id., 518 So. 2d at 901. Thus, this Court held that Caldwell was not such a significant change in the law to excuse appellate counsel's failure to raise it. In Mr. King's case, the claim was available and was raised below and properly preserved. Appellate counsel's failure to bring it to this Court's attention thus cost Mr. King his rights to have a claim of clear eighth amendment error reviewed. In this regard, counsel prejudicially ineffective assistance. See Johnson v. Wainwright, 498 So.2d 938 (Fla. 1987) (counsel provided ineffective assistance for not bringing preserved claim of constitutional error to the Court's attention on direct appeal): Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) (ineffective assistance of counsel established because counsel failed to raise on direct appeal preserved claim of error); see also Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979) (ineffective assistance established by counsel's failure to timely litigate claim of error). This Court should now issue its Writ, grant Mr. King a new appeal, and the relief to which the above discussion demonstrates his entitlement.

CLAIM II

THE TRIAL COURT VIOLATED THE PRINCIPLES OF HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), AND LOCKETT V. OHIO, 438 U.S. 386 (1978), WHEN IT PRECLUDED MR. KING FROM PRESENTING, AND THE JURY FROM CONSIDERING, EVIDENCE ESTABLISHING MITIGATING CIRCUMSTANCES AND REBUTTING AGGRAVATING CIRCUMSTANCES, IN DEROGATION OF MR. KING'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

The trial court flatly precluded Mr. King from introducing any evidence relating to his innocence of the first degree murder and involuntary sexual battery of Natalie Brady and the burglary of her home (See R. 261). The evidence actually proffered by Mr. King included, inter alia, the testimony of a hair and fiber expert to the effect that no negroid hairs were found on or about the victim's person, but that hairs of an unknown Caucasoid origin were (see R. 362-374; 400-08); that the knife admitted into evidence was inconsistent with the victim's wounds, and contained no blood of the victim's type (see R. 162, 255); that Mr. King was not in fact present at the scene during the relevant time period (id.); and that the evidence against Mr. King was wholly circumstantial (R. 255). The trial court prohibited the defense from introducing any of this, holding that it was irrelevant to the establishment of mitigating circumstances and therefore inadmissible at the penalty phase (See R. 261, 263).

The State, by contrast, was given free reign to introduce evidence establishing Mr. King's guilt of the crimes for which he had already been convicted, evidence going far beyond -- and sometimes contradicting -- what was presented at Mr. King's original trial. Various State witnesses testified with regard to, inter alia, Mr. King's whereabouts during the relevant time periods (see R. 1259, 1284, 1374-76), the times of the death and

the fire (see R. 1275, 1332-37, 1424), the proximity of the Brady residence to the Work Release Center (R. 1290-92), Mr. King's physical appearance after the time that the offense occurred (R. 1379), the alleged origination of the knife used in the assault on McDonough (R. 1284, 1285, 1292, 1293), and the "similarities" between that knife and the knife allegedly used to stab Mrs. Brady (Id.; R. 1399).

Defense counsel repeatedly objected to the introduction of that evidence, arguing that the State was being allowed to do precisely that which the defense had been precluded from doing (See, e.g., 1293, 1294, 1436, 1437). The State of course argued that all of this evidence was relevant, and the court erroneously agreed (See, e.g., R. 1294-95, 1437-38). This Court, however, refused to grant Mr. King relief on direct appeal. This claim is one of clear fundamental eighth amendment error; Mr. King therefore respectfully urges the Court to revisit this issue, and to grant him the relief to which he is entitled.

B. THE HITCHCOCK/LOCKETT VIOLATION

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original). This Court and the United States Supreme Court have consistently reaffirmed Lockett. See Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). Most recently, the United States Supreme Court did so in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), holding that "the exclusion of [nonstatutory] mitigating . . . renders the death sentence invalid." Id. at 1824 (emphasis added).

Evidence casting doubt on a capital defendant's guilt, even

though that doubt may not be sufficient to support an acquittal, is undeniably evidence relating to the "circumstances of the offense." Lockett, supra. Such evidence is thus relevant to the capital sentencing determination, and therefore may not, consistently with eighth amendment, be precluded from consideration by the capital sentencer. Hitchcock, supra; Lockett, supra.

Courts have consistently affirmed this principle. For example, in Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), cert. denied, 470 U.S. 1087 (1985), the Eleventh Circuit reviewed an ineffective assistance of counsel claim based upon trial counsel's failure to impeach critical State witnesses with their prior inconsistent statements, and found that trial counsel's failure in this regard could have effected the outcome of both the guilt-innocence and penalty phase of the petitioner's trial:

> "The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the guilt/innocence phase, it may have chansed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of the capital trial, we stated:
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> "The fact that jurors have determined guilt bevond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and vet some genuine doubt exists. It may reflect a mere possibility; it mav be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unaninamity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining a doubt which does not rise to reasonable doubt can be expected

> to resist those who would oppose the irremedial penalty of death."
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> Smith v. Balkcom, 660 F.2d 573, 580-81 [5th Cir. Unit B 1981], modified, 667 F.2d 20, cert. denied, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 [1982]. In this case, use of Wesley and Patricia Johnsons' prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Smith, 741 F.2d at 1256 (emphasis added); see also Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984).

The Eleventh Circuit in fact reaffirmed this principle in remanding Mr. King's case for the resentencing which resulted in the instant death sentence. On federal habeas review of Mr. King's original conviction and sentence of death, the Eleventh Circuit found original trial counsel's performance at the sentencing phase constitutionally deficient. Noting that Mr. King's was not a case of "clear guilt," and that "[c]ircumstantial evidence cases are always better canditates for penalty leniency than direct evidence convictions," the court found that

> King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made.

Kina v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

The issue in this case, and Mr. King's entitlement to relief, were and are more than obvious: there can be no doubt that the proceedings resulting in his sentence of death violated the constitutional mandate of Hitchcock V. Duaaer, 107 S. Ct. 1821 (1987), Lockett v. Ohio, 438 U.S. 104 (1978), Skipper V. South Carolina, 106 S. Ct. 1669 (1986), and the mandate of the United States Court of Appeals for the Eleventh Circuit. **See**

King, supra.[4] Mr. King's sentencing jurors were never allowed to hear compelling mitigation which could have demonstrated that a sentence less than death may have been proper. When counsel sought to present it, the trial court simply ordered that he was not to do so. It thus precluded the jury's consideration. As this and the United States Supreme Court have made clear, such judicial actions or instructions, precluding a capital sentencing jury's consideration of evidence in mitigation of sentence, starkly violate the eighth amendment. See Riley v. Wainwright, supra; Thompson v. Dusaer, 515 So. 2d 173 (fla. 1987). See also Skipper v. South Carolina, supra. Mr. King's jurors were unconstitutionally precluded, and relief is proper.

C. INEFFECTIVE ASSISTANCE OF COUNSEL -- UNITED STATES v. CRONIC

The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washinston, 466 U.S. 668, 687 (1984); see also United States v. Cronic, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who

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[4] That mandate was of course binding on the state courts' resentencing in this case. See generally, Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

wishes to testify on his own behalf to do so prior to the presentation of any and all other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); and by a state statute restricting a criminal defendant's right to testify on his own behalf. Fersuson v. Georgia, 365 U.S. 570 (1961).

Here, the trial court's ruling prohibited Mr. King's counsel from introducing relevant and admissible mitigating evidence. More importantly, it prevented the defense from rebuttins any of the evidence adduced bv the State to establish aggravating circumstances. Four of the aggravating circumstances argued by the State were based on contemporaneous crimes -- by presenting evidence that Mr. King committed those crimes, the State attempted to establish the existence of aggravating circumstances. The only way that Mr. King could rebut those aggravating circumstances was by introducing evidence that he did not commit the crimes. The trial court's erroneous, eighth amendment violative rulings thus precluded Mr. King from presenting his defense to a sentence of death. Trial counsel was thus rendered ineffective, Cronic, supra, when the "government" (here represented by the judge) fundamentally interfered with his ability to present a defense, much less his ability to "make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 687. Mr. King's sentence of death therefore violates the sixth, eighth, and fourteenth amendments.

As is obvious, ineffective assistance of counsel claims are classically cognizable in post-conviction proceedings. See, e.g., Johnson v. Wainwright, supra; Groover v. State, 489 So. 2d 15 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Vausht v. State, 442 So. 2d 217 (Fla. 1983); Bertolotti v. State, 13 F.L.W. 253 (Fla. S. Ct. April 7, 1988). In this case it was the trial court's erroneous rulings that rendered counsel ineffective. See Cronic; Strickland, supra. For this reason also the claim is before this Court on the merits; the merits

call for relief.

CLAIM III

MR. KING'S SENTENCE OF DEATH WAS RENDERED FUNDAMENTALLY UNRELIABLE AND UNFAIR BY THE RESENTENCING COURT'S REFUSAL TO FIND MITIGATION WHICH HAD BEEN IN FACT FOUND BY THE ORIGINAL SENTENCING COURT, AND AFFIRMED ON THE ORIGINAL APPEAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby eliminating "arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's findings as to mitigating circumstances. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450.

In the original penalty phase, the trial court found that Amos King's age at the time of the offense to be a mitigating factor. On direct appeal, the Florida Supreme Court affirmed Mr. King's capital sentence, and the finding of age as a mitigating factor by the trial court. King v. State, 390 So. 2d 315 (Fla. 1980). On resentencing, however, Judge Federico was "not reasonably convinced that any mitigating circumstances exist[ed]" (R. 478), and thus did not find age to be a mitigating factor. No reason was provided by the trial court, or by this Court, as to why a mitigating circumstance already found in this case was rejected on resentencing. Cf. State v. Dixon, 283 So. 2d 1

(1973). In fact, there was nothing in the record to reflect that this factor had been previously inappropriately found.[5]

Under the procedure outlined in Dixon, supra,

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. section 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

Dixon, supra, 283 So. 2d at 9. One such mitigating circumstance was **"found"** by Mr. King's original sentencer. It was not found by his second sentencer, upon the presentation of identical proof: Mr. King's age at the time of the offense was obviously the same at the second sentencing as at the first. Judge Federico's refusal to find age as a mitigating factor thus denied Mr. King's eighth amendment rights. Collateral estoppel and law of the case[6] precluded the resentencing judge from rejecting, on the same proof, mitigation already found.

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[5] In this regard, it should be noted that during the course of the resentencing proceedings the State urged the court to rely on the previous findings, and this Court's affirmance, of aggravating circumstances. The trial court then relied on those findings.

[6] As courts have explained, the

> . . . law of the case principle [is] "a matter of sound judicial practice, [under which] a court generally adheres to a decision in a prior appeal in the same case unless one of three 'exceptional circumstances' exists: 'the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" Id. 222 Ct.Cl. at ---, 612 F.2d at 521 (quoting White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967)). Since none of these exceptions was present, our initial determination was thus "impervious to challenge on subsequent appeals." Id. 222 Ct.Cl. at ---, 612 F.2d at 520.

Northern Helex Company v. United States, 634 F.2d 557, 561 (U.S. Court of Claims, 1980). None of the exceptions applied to Mr. King's case.

The concept of collateral estoppel is not new.

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S., at 87, 37 S.Ct. at 69.

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 1194 (1970)(emphasis added).

A mitigating circumstance is an issue of ultimate fact. Once that fact has been found in favor of a capital defendant, it cannot be found against him in a future lawsuit. This is synonomous to receiving a harsher sentence upon retrial absent additional evidence at sentencing. That clearly flies in the face of due process. Neither the double jeopardy provision nor the equal protection clause impose an absolute bar to a more severe sentence on reconviction, if events subsequent to the first sentence, relevant to the character of the defendant, make such a sentence appropriate. Absent such new conduct on the part of a defendant, a harsher sentence would constitute a "flagrant violation of the Fourteenth Amendment." North Carolina v. Pierce, 395 U.S. 711, ___ (1969).

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id., 2080.

> In Pearce the Court held that "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal" would be "a violation of due process of law"--that due process requires

> that vindictiveness play no part in the sentence imposed after a new trial. **Id.** at 724, 89 S.Ct. at 2080. The Court concluded that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing **proceeding**." **Id.** at 726, 89 S.Ct. at 2081 (emphasis added).

United States v. Mathis, 579 F.2d 415 (1978).

Judge Federico articulated no new conduct on the part of Amos King that would negate the finding of his age as a mitigating circumstance. Consequently, it was a violation of due process and the eighth amendment to find that circumstance contrary to Mr. King on resentencing. Age should be reinstated as a mitigating factor, and Mr. King should be remanded for a new sentencing wherein that factor can be weighed against proper aggravating factors. In this regard there can be no doubt that the resentencing court's refusal to find age as a mitigating factor was far from harmless error. On appeal of the resentencing determination, this Court struck an aggravating circumstnace. It nevertheless declined to order resentencing because its review of the record and trial court's findings disclosed no mitigating factors. However, mitigating factors had in fact been previously found and then sustained by this Court. Had Mr. King's age not been improperly rejected as mitigation, the law would have required reversal. See, e.g., Elledge V. State, 346 So. 2d 998 (Fla. 1977). Mr. King was clearly prejudiced.

As discussed herein, this Court erred in its review and disposition of aggravation and mitigation circumstances on appeal of the resentencing. Relief should now be granted. Moreover, appellate counsel provided prejudicially ineffective assistance in failing to properly litigate this claim of fundamental eighth amendment error. Relief should be granted on this basis as well.

See Johnson v. Wainwriaht, supra. Mr. King respectfully urges tha the Court issue its Writ of habeas corpus.

CLAIM IV

MR. KING'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED BY THE SENTENCING COURT'S REFUSAL TO ALLOW ACCURATE EVIDENCE AND TO PROVIDE INSTRUCTIONS REGARDING THE CONSEQUENCES OF THE JURY'S VERDICT, IN CONTRAVENTION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The eighth and fourteenth amendments require that a sentencer in a capital case not be precluded from considering, in mitigation, any aspect of a defendant's character or record, or any circumstance of the offense that a defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). Excessively vague sentencing standards were condemned in Furman v. Georgia, 408 U.S. 238 (1972), and it is well recognized that in order to pass constitutional muster, a death penalty 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 (1983). Moreover, as discussed in Claim I, supra, accurate information regarding the consequences of a capital sentencing verdict must not be withheld from a capital sentencing jury. California v. Ramos; Caldwell v. Mississippi.

To that end, defense counsel for Mr. King attempted to present information to the jury that the 25-year minimum mandatory term on a life sentence meant exactly that: that the defendant would indeed serve at least 25 years before being paroled. During voir dire, when defense counsel first tried to provide the jurors with this accurate information, he was instructed by the court that he could not ask questions to the effect that 25 years meant at least 25 years minimum mandatory service before parole (R. 1124).

The subject next arose when the defense attorney informed the judge that he wanted to call Mr. Harry Dodd, the Executive Director of the Florida Parole and Probation Commission, as a witness. Counsel wanted to know whether he would be allowed to call Mr. Dodd (R. **1403-04**). Counsel then summarized for the court Mr. Dodd's anticipated testimony concerning Mr. King's future eligibility for parole (R. **1405**). The court's ruling at that time was that defense counsel could call any witnesses he wanted, but that the anticipated testimony regarding parole would be **"irrelevant"** (R. **1407**).

Defense counsel later called Mr. Dodd and proffered his testimony. The testimony was that Mr. Dodd was the **"top** administrative person for the Parole Commission of Florida" **(R. 693)**. Having reviewed the Department of Corrections Inmate File on ***Amos*** Lee King, he could state that under Commission rules, Mr. King would not be eligible for consideration for parole until after **24** and a half years had expired **(R. 1533-39)** and that after that, Mr. King's salient factor score would be very high on the scale (R. **1543)** which would put Mr. King at a range where it would be unlikely that he would obtain early parole (R. **1544**). This range would in fact have to be met before Mr. King would be paroled (R. **1545**). Mr. Dodd explained that his testimony was accurate under the present status of the law and procedure (R. **1549**). The court found this all very **"enlightening,"** but ruled that he would not allow the testimony to go to the jury (R. **1550**).

At the instruction conference, defense counsel requested that one of the jury instructions be modified to include the word **"consideration,"** so as to read "without possibility of parole consideration for **25** years." The Court again refused (R. **1652-53**).

Finally, defense counsel indicated that he wanted to argue to the jury that a life sentence without possibility of parole

for 25 years does not mean to suggest that Mr. King would be paroled after 25 years (R. 1655-56). The Court's response was that if counsel did so argue, the court would let the State argue that the law could change and Mr. King could be out sooner than 25 years (R. 1656).

In a similar case, the United States Supreme Court held that under the eighth amendment it was proper for such information (accurate information regarding the result of the jury's sentencing verdict) to be presented to the jury. In California v. Ramos, 463 U.S. 992 (1983), a capital case, the Supreme Court reversed a state court decision disallowing a jury instruction that stated that the Governor "is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime." Id. at 995-96. In so holding, the Ramos Court found that the matter at issue was relevant to the question of capital sentencing, and that it did not run afoul of relevant constitutional safeguards.

> The Briggs instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or arsument resardins the Governor's Dower to commute a life sentence.

Id. at 1004 (emphasis added).

Likewise, Mr. King here should not have been precluded from offering accurate information concerning parole, through the testimony of Mr. Dodd.[7] Similarly, counsel should not have been precluded from presenting his argument. The requested instruction was constitutionally appropriate as well. It was a violation of the eighth amendment not to allow the jury to hear this accurate information: the result was an unreliable sentencing proceeding, and the eighth amendment was violated in this case.

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[7] The State was of course aware of the parole guidelines, and was free to cross-examine and rebut Mr. Dodd's testimony.

Although he litigated this issue before the trial court, Mr. King's counsel rendered prejudicially ineffective assistance in failnig to properly litigate this issue in direct appeal. See Johnson v. Wainwrisht, supra. Habeas corpus relief is appropriate.

CLAIM V

THE TRIAL COURT'S ADMISSION OF UNCONFRONTABLE, UNREBUTTABLE RANK HEARSAY AT MR. KING'S SENTENCING PROCEEDING VIOLATED HIS FUNDAMENTAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. King urged this claim on his direct appeal. The Court, however, declined to grant relief on this significant constitutional claim at that time. The claim involves clear, fundamental error. Mr. King therefore respectfully urges that the Court now reconsider, and grant habeas corpus relief.

At Mr. King's resentencing, the State's key witness, Detective Manuel Pendakos, testified at length regarding out of court statements made to him by others. For example, Pendakos provided detailed testimony regarding Mr. King's movements in and out of the correctional center on the night in question (R. **1259-61**); Mr. King's encounters with correctional Officer McDonough, and Mr. King's physical appearance during those encounters (R. **1284-89**); the appearance of the victim when she was initially found at the scene (R. **1263**); the actions of the firemen who reported to the scene (R. **1267, 1273**); the identity and origination of the "knitting dowels" found at the scene (R. **1276, 1279**); the origination of the knife recovered at the correctional center (R. **1292, 1293**; and the opinions and conclusions of experts involved in the original investigation, including the Medical Examiner (R. **1274-75, 1296**), arson experts (R. **1267**), and serologists (R. **1289**). All of this information had been supplied to Pendakos by others, most of whom did not even appear at the resentencing proceeding.

None of the testimony could be effectively rebutted by defense counsel. As all of the testimony was twice and sometimes thrice removed hearsay, and defense counsel of course had no opportunity to confront and cross examine the declarant. Defense counsel repeatedly objected, but the trial court adopted the State's bizarre position that such hearsay was admissible in capital sentencing proceedings, and overruled the objections. (See, e.g., R. 1261, 1277, 1293, 1307).

Of course, neither the State's nor the court's interpretation of Florida's capital sentencing scheme was accurate or correct: while Fla. Stat. 921.141 does allow for the admission of evidence which might not be admissible at other criminal proceedings under the state evidence code, the statute also specifically provides that the defendant must be "accorded a fair opportunity to rebut any hearsay statements." Fla. Stat. 921.141(1). Of course, hearsay statements such as those admitted here, with often-unidentified declarants two and three times removed, are simply unrebuttable, and thus not admissible under the statute. In any event, the admission of such statements at capital sentencing violates the sixth and eighth amendment to the United State's Constitution -- a state statute, of course, may not allow what the Constitution prohibits.

The sixth amendment to the United States Constitution provides a defendant with the right to confront the witnesses against him. The right of confrontation is made binding on and applicable to the states by virtue of the Due Process Clause of the fourteenth amendment. See Pointer v. Texas, 380 U.S. 400, (1965)). The primary interest secured by the Confrontation Clause is the right of cross-examination. Douslas v. Alabama, 380 U.S. 415, 418 (1965). The sixth amendment also preserves the right of the defendant to have compulsory process for obtaining favorable witnesses. Washinston V. Texas, 338 U.S. 14, 19 (1967). In this instance, Mr. King's fundamental sixth amendment

rights were violated when the trial court denied his right to confrontation and cross-examination by allowing, over objection, a critical state's witness to testify to inadmissible hearsay. See Alford v. United States, 282 U.S. 687 (1931). Other, impermissible hearsay was admitted at the resentencing as well, and the record in its entirety reflects clear sixth and eighth amendment violations.

None of the witnesses who supplied the statements and evidence to which, for example, Detective Pendakos ultimately testified could be confronted or cross-examined by Mr. King. In Alford, supra, the Supreme Court, in recognizing that cross-examination is a matter of constitutional right, stated:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.

Alford, 282 U.S. at 692 (citations omitted).

The admission of unrebuttable, unconfrontable hearsay at Mr. King's sentencing proceeding was fundamental error which unquestionable contributed to his sentence of death. This deprived Mr. King of his sixth and eighth amendment rights, see Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1987). The error was by no means harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Satterwhite v. Texas, 108 S.Ct. 1840 (1988). Mr. King is entitled to the relief he seeks, and urges that the Court issue its writ of habeas corpus.

CLAIM VI

THE RESENTENCING COURT RELIED ON NON-RECORD "EVIDENCE", EVIDENCE WHICH MR. KING HAD NO OPPORTUNITY TO REBUT, WITHOUT ANY NOTICE TO MR. KING THAT SUCH "EVIDENCE" WOULD BE CONSIDERED, IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At this time of his resentencing, Mr. King presented evidence in mitigation regarding the facts that he had been a

model prisoner, that he had not been a problem for the correctional authorities, and regarding his religious faith and the way his faith had affected his behavior and outlook on life since his incarceration on death row. This evidence was presented through the testimony of ministers who were familiar with Mr. King's behavior and who had had contact with him since his incarceration. This was in fact the primary evidence in mitigation reflected in the resentencing record. The resentencing court, however, rejected and refused to consider this evidence solely on the basis of the fact that at one point during the resentencing proceedings Mr. King had declined to appear in court -- the proceedings were delayed by two hours. Mr. King's counsel explained to the resentencing court, in chambers, that Mr. King had not appeared in court because he had been mistreated by his jailers. During the in-chamber conference, Mr. King's counsel described the problems with the jail officials as follows:

> As we understand it, he has expressed the feeling that he was not being treated appropriately at the facility. That is that he was being brought out to come to court at 6:00 a.m. in the morning and just having to sit and sit in a cell with a whole bunch of other people and a lot of them weren't real clean and all that. He felt it made him look bd to come into court.

(R. 1230-31). Although this was counsel's only discussion of this issue on the record -- counsel was obviously not aware that the court would eventually use Mr. King's non-appearance to sentence him to death -- the fact of the matter is that there exists substantial evidence that Mr. King was in fact being mistreated by his jailers, both while in the jail and while being transported for judicial proceedings at his resentencing. In this regard, petitioner respectfully urges that this Court relinquish jurisdiction and order an evidentiary hearing in order for the record regarding this claim to be properly made.

Without any warning to counsel or Mr. King and without

providing any opportunity for Mr. King to rebut, the court at the time that it imposed sentence and rendered its findings suddenly used this [non]"evidence" in order to sentence Mr. King to death. In the words of the court

> As appears in the record of this sentencing proceeding, defendant was a disciplinary problem as recently as two days ago. On Tuesday, November 5, 1985 this Court was advised by the defendant through a message sent to the bailiffs that he was dissatisfied with his treatment at the Pinellas County Jail and refused to come to Court for the balance of his trial. The Court was compelled to order the jail to produce Mr. King for trial, forcibly if necessary, and the trial was delayed until Mr. King arrived at the Courthouse.
>
> This incident is cited not as any aggravating circumstance but to indicate this Court's belief that there has been no change in defendant's character.

(R. 478). This was used to rebut the mitigating evidence regarding Mr. King's good conduct while incarcerated which the resentencing court had itself just earlier referred to (R. 478).

The resentencing court's actions denied Mr. King his rights under the fifth, sixth, eighth and fourteenth amendments and Gardner v. Florida, 430 U.S. 349 (1977). As stated, no warning was given to Mr. King that this evidence would be used against him and no opportunity was provided to Mr King to rebut. The fact that this evidence was used to rebut mitigating circumstances does not undermine Mr. King's entitlement to relief; to the contrary, it is precisely because non-record evidence which Mr. King had no opportunity to confront was used to rebut the mitigation which Mr. King presented at the resentencing that relief under the eighth amendment is appropriate. See Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

This claim involves clear, fundamental eighth amendment error, error which was not corrected by this Court during the appellate review process. In this regard Mr. King respectfully urges that the Court grant him the relief to which he is entitled

by issuing its Writ of habeas corpus. Moreover, in failing to properly present this claim during the direct appeal of Mr. King's resentencing appellate counsel rendered prejudicially ineffective assistance. Again, relief is appropriate. Mr. King therefore respectfully urges that the Writ issue.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, *Amos* Lee King, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents questions of fact, Mr. King urges that the Court relinquish jurisdiction to a trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to his claim, including, inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. King urges that the Court grant him habeas corpus relief, or, alternatively, a new appeal, for all of the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL/HAND DELIVERY to Robert Krauss, Assistant Attorney General, Department of the Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, Florida 33602, this 29th day of November, 1988.

Billy H Wolfe
Attorney