IN THE SUPREME COURT OF FLORIDA

NO. 73362

DAVID EUGENE JOHNSTON

Petitioner,

v.

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

Respondent.

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, see Johnston v. State, 497 So. 2d 863 (Fla. 1986), and the legality of Mr. Johnston 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. Johnston to raise the claims presented herein. See, e.g., Downs v. Dugger, 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 Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, supra; see also Fla. R. App. P. 9.140(f):

> (f) Scope of Review. The court shall review all rulings and orders appearinng in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

This court therefore 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. Johnston's capital conviction and sentence of death and of this Court's appellate review process. Mr. Johnston's claims are of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986)(case of error that prejudicially denies fundamental constitutional rights, Florida Supreme Court will revisit a matter previously settled); 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). See also Fla. Stat. section 90.104(3)(1987)("Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights even though such errors were not brought to the attention of the trial judge."); Robson and Mello, Ariadne's Provisions: A "Clue Of Thread" To The Intricacies Of Procedural Default, Adequate And Independent State Grounds, And Florida's Death Penalty, 76 Calif. L. Rev. 87, 132-136 (1988); Mello, Facing Death Alone: The Post-Conviction Attorney Crisis On Death Row, 37 Am. U. L. Rev. 513, 535-537 (1988).

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 Mr. Johnston's claims.

This and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, Wilson v. Wainwright, supra; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); Beggett v. Wainwright, 229 So. 2d 239, 242 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). See also Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Powe v. State, 216 So. 2d 446, 447-48 (Fla. 1968).

Mr. Johnston's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Johnston's petition includes a request that the Court stay his execution (presently scheduled for January 17, 1989). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State

(No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Johnston's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

CLAIM I

THE COURT AND PROSECUTOR MISINFORMED THE JURY THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING DECISION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

From the beginning of voir dire through to the final instructions, the trial court misled the jury concerning the significance attached to its sentencing verdict. See Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985). In Florida's trifurcated capital sentencing scheme, a jury's sentencing recommendation is to be accorded great deference. However, in this case, the trial judge, prosecutor, and defense attorney all improperly and inaccurately minimized the jury's role, and its sense of responsibility, in violation of the eighth and fourteenth amendments to the United States Constitution.

The death sentence imposed upon Mr. Johnston is constitutionally unreliable because the jurors were repeatedly instructed by the trial judge and told by the prosecutor that the sentencing decision was not their responsibility but was the sole responsibility of the court. These inaccurate statements of the jury's role increased the likelihood that the jury would

recommend death, and in turn, increased the likelihood that Mr. Johnston would be sentenced to death by the court. As the United Supreme Court held in Caldwell v. Mississippi, 475 U.S. 320, 105 S. Ct. 2633 (1985), the eighth amendment requires that a death sentence be set aside when it is imposed under these circumstances. See also, Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986)("[e]very jury instruction error" which makes it less likely that a Florida jury will recommend life deprives the capital defendant of the "presumption of correctness" attaching to the jury's life recommendation).

In Caldwell the Supreme Court reviewed the propriety of a prosecutor's closing argument informing the jury in the penalty phase of a capital trial that its decision was not final because it was subjected to automatic review by the state supreme court. 105 S. Ct. at 2638. The Court held that such an argument constituted a "suggestion[] that the sentencing jury . . . shift its sense of responsibility to an appellate court," id., 105 S. Ct. at 2640, and that

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

105 S. Ct. at 2639. When a jury has been so relieved of "'the truly awesome responsibility of decreeing death for a fellow human,' . . . there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences . . ." Id. at 2640. Accordingly, the eighth amendment's "'need for reliability in the determination that death is the appropriate punishment in a specific case,'" Caldwell, 105 S. Ct. at 2640 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)), is violated when a death sentence is imposed under such circumstances.

While Caldwell dealt specifically with an argument that diminished the jury's sense of responsibility because of the availability of appellate review, it is plain that any comment to the jury "that mislead[s] the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision," Darden v. Wainwright, ___ U.S. ___, 106 S. Ct. 2464, 2473 n.15 (1986), is equally violative of the eighth amendment. Caldwell, supra; see also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986).

Thus, Caldwell error occurs if the jury is made "to feel less responsible than it should for the sentencing decision." Adams, supra. As a settled matter of law in Florida, "[b]ecause it represent[s] the judgment of the community as to whether the death sentence is appropriate, the jury's recommendation is entitled to great weight." McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). It may be rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The jury's role in determining the appropriateness of the death penalty is "critical". Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986). Yet, the jury presiding over Mr. Johnston's case was "left with a false impression as to the significance of their role in the sentencing process." Caldwell, supra, n.7; Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc). This false impression "created a danger of bias in favor of the death penalty." Mann at 1458. Thus if the jury is not informed of the substantial deference which must be given by the judge to its sentencing recommendation, it is necessarily made "to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 106 S. Ct. at 2473 n.15. Such unconstitutional factors infected the proceedings resulting in Mr. Johnston's sentence of death.

During the course of jury selection, the trial judge, the attorney for the State and even defense counsel repeatedly explained to the prospective jurors that their sentencing decision would be advisory only, that the Court did not have to follow their recommended sentence and that the imposition of sentence was solely the function of the Court.

The Florida Supreme Court has cautioned that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation . . . [t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986)(citations omitted).

The transcript of the proceedings is rife with misleading statements, misinterpretation of the law and erroneous jury instructions. Indeed, in instructing the jury at the very outset of the trial the Court stated: "The Court is not bound to follow the advice of the Jury. Therefore, the jury does not impose the punishment of a verdict of murder in the first degree is rendered. The imposition of punishment is the function of the court and is not the function of the jury." (R. 15). This statement was made before the entire venire. This instruction is given twice to the jury panel at the beginning and close of the penalty phase (R. 15, 1098-99).

On the basis of these comments, reasonable jurors could well have believed that they had very little responsibility for the sentence that would be imposed. Having been repeatedly told that the jury's sentencing recommendation was advisory only, that the trial court had no obligation whatsoever to follow that recommendation, and that the responsibility for sentencing was solely with the court, the jurors were led to believe that they were not in any way responsible for the sentence that was to be imposed.

The court "cannot say that [its efforts to minimize the jury's sense of responsibility for Mr. Johnston's sentence] had no effect on the sentencing decision . . . ." Caldwell, 105 S. Ct. at 2646. See also, Mann v. Dugger, supra. Mr. Johnston's case is not one in which the only reasonable sentence would have been death. The Florida Supreme Court has emphasized that "[w]e cannot know" whether "the result of the weighing process by . . . the jury . . . would have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). This is so because

> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . .'

Id. (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)). In short, in Mr. Johnston's case, the Caldwell errors discussed herein cannot be said to be "harmless". Accordingly, this Court "cannot say" that the judge's efforts to minimize the jury's sense of responsibility for Mr. Johnston's sentence had no effect on the jury's sentencing recommendation or, in light of the deference that must be given to such recommendations, on the judge's sentencing decision.

The State made amply clear to the jurors the jurors' miniscule role in the sentencing process by illuminating the fact the jurors' role was only to be that of an "advisory" body; that the sentencing was solely the court's responsibility: not theirs. The record is replete with this language used by the State and defense counsel and the Court, and the jurors could not help but feel their responsibility in making a recommendation to the court was diminished; that it had little significance in determining the final sentence.

The following are record quotes of the voir dire colloquy involving the sworn jurors:

Juror 1: Mary Gandee

MR. AYRES: This would be a separate proceedings after the evidentiary portion of the trial if a verdict of murder in the first degree is returned.

JUROR GANDEE: Right, okay.

MR. AYRES: After hearing the aggravating and mitigating circumstances, then this jury by a majority vote would render an advisory sentence to the Court, to Judge Powell in this case. Do you understand that?

JUROR GANDEE: Yes.

MR. AYRES: All right. The Court then would sentence the defendant to one of two penalties, either life imprisonment or the death penalty. Do you understand that?

JUROR GANDEE: Yes.

MR. AYRES: And do you also understand that the Court is not bound by the jury's recommendation?

JUROR GANDEE: Yes.

MR. AYRES: The jury provides the Court with an advisory sentence. You also understand that the jury does not impose the punishment in this case?

JUROR GANDEE: Yes.

(R. 159).

Juror 2: Bruce Wigle

JUROR WIGLE: Good morning.

MR. AYRES: If you recall, yesterday at the beginning of the trial, Judge Powell gave you a brief presentation to you as to how the trial would proceed. Do you understand that if a verdict of guilty of first degree murder is rendered, as soon as possible, there would be a separate penalty phase of the trial which is a hearing where the aggravating and mitigating factors or circumstances are presented as set out by law, and Judge Powell will instruct you on these matters.

After hearing those matters and the arguments of counsel, then there is a verdict rendered by the majority vote which is an advisory sentence to the Court. Do you understand that, sir?

JUROR WIGLE: Yes, sir.

MR. AYRES: Do you also understand that after receiving the advisory sentence, the Court would then sentence the defendant to one of two things, either the death penalty or life imprisonment?

JUROR WIGLE: Yes, sir.

MR. AYRES: Do you understand that the Court is not bound by the jury's advisory sentence?

JUROR WIGLE: Yes.

MR. AYRES: You understand that the jury is not the one that imposes the sentence in this case?

JUROR WIGLE: Yes, sir.

(R. 187-8)(emphasis added).

Juror 3: Peter Blichfeldt

JUROR BLICHFELDT: Good morning.

MR. AYRES: Mr. Blichfeldt, if you will recall, yesterday, the Court gave you some instructions as to how the trial would proceed in this case. Do you understand that if a verdict of murder in the first degree is returned, then as soon as practicable, there will be a separate penalty hearing? Do you understand that?

JUROR BLICHFELDT: Yes.

MR. AYRES: The same jury would hear the evidence and the aggravating and mitigating circumstances and would receive instructions from the Court as to those factors set out under the law. Do you understand that, sir?

JUROR BLICHFELDT: Yes, sir.

MR. AYRES: After considering that and the arguments of counsel, the jury will render an advisory sentence to the Court as to whether the defendant should receive the death penalty or the penalty of life imprisonment. Do you understand that?

JUROR BLICHFELDT: Yes, sir.

MR. AYRES: All right, sir. Do you understand that the Court would be the one to impose the sentence in this case and that this Court is not bound by the jury's advisory sentence or recommendation?

JUROR BLICHFELDT: Yes, sir.

MR. AYRES: All right. So, you understand that the Court would overrule or

agree whatever advisory sentence that the jury recommended?

JUROR BLICHFELDT: I understand.

MR. AYRES: Do you also understand, therefore, that the jury is not the one that imposes the sentence in this case, but it is the Court?

(R. 216-217)(emphasis added).

Juror 4: Mary Woods

MR. AYRES: Do you understand that the Court is not bound to follow the jury's advisory sentence?

JUROR WOODS: Yes, sir.

MR. AYRES: Do you agree with that?

JUROR WOODS: Yes.

(R. 235).

Juror 5: James Hurd

MR. AYRES: Also the Court would instruct you as to what the aggravating and mitigating circumstances are. Do you understand that after carefully considering the instructions of the Court and the evidence in this penalty phase and considering the aggravating and mitigating circumstances that the jury by a majority vote would render an advisory sentence or recommendation to the Court?

JUROR HURD: Yes.

MR. AYRES: You understand the Court is not bound to follow the jury's recommendation?

JUROR HURD: Yes.

(R. 242)(emphasis added).

Juror 6: Ruby Edwards

MR. AYRES: During the penalty phase, the jury, as I said, would listen to the aggravating and mitigating circumstances that are set out under the law, something the Judge would instruct you about. After hearing those things and the arguments of counsel, then it would be up to the jury by a majority of the vote to recommend a sentence to the Court, a sentence of the death penalty or life imprisonment. Do you understand those things?

JUROR EDWARDS: Yes.

MR. AYRES: Do you understand that this

Court is not bound to follow the jury's advisory sentence?

JUROR EDWARDS: Yes.

MR. AYRES: Do you also understand that the Court, of course, would place great weight upon whatever advisory sentence the jury recommended?

JUROR EDWARDS: Yes.

MR. AYRES: Okay. You understand ultimately it is the Court that imposes the punishment?

JUROR EDWARDS: Yes, sir.

(R. 250-251)(emphasis added).

This juror was the first to hear anything suggesting "great weight" would be given the advisory recommendation. This was, however, immediately followed by the admonition that punishment is ultimately decided by the court. This is an incomplete definition of the Tedder rule and therefore inaccurate and misleading. Moreover, it does not inform the juror just how significant the advisory recommendation is. Without a complete Tedder explanation the term "great weight" has no meaning. As the en banc Eleventh Circuit Court of Appeals stated in Mann: "To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment." In Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), the court held that a trial judge can override a life recommendation only when the facts [are] so clear and convincing that virtually no reasonable person could differ. Mann, supra.

The State commits the same error with the next juror. (The State, as it has with every juror, also makes the erroneous statement that it takes a majority vote for a life as well as a death recommendation. See Claim XII).

Juror 7: Hugo Marzoli

MR. AYRES: If a verdict is returned as to first degree murder, there would be a

separate proceeding shortly thereafter called the penalty phase. Do you understand that?

JUROR MARZOLI: Yeah.

MR. AYRES: It would be at that time that the same jury that decided the guilt or innocence would hear evidence as to any aggravating and mitigating factors that exist under the law. The Court would tell you about those aggravating and mitigating factors and what they are. You will hear evidence as to them at that time, then the jury would make an advisory sentence to the Court as to one of two possible sentences, either the death penalty or life imprisonment where the person would serve twenty-five years before he would be eligible for parole. Do you understand all of that?

JUROR MARZOLI: Yes.

MR. AYRES: Do you understand how the procedure would work, basically?

JUROR MARZOLI: Yes, sir.

MR. AYRES: All right. Do you also understand that the jury, after considering this evidence and the penalty phase instructions by the Court and hearing the arguments of the lawyers, the jury would come back in the courtroom by a majority vote with a recommendation to the Court as to whether the jury recommends the death penalty or life imprisonment?

JUROR MARZOLI: Yes.

MR. AYRES: Do you also understand the Court is not bound to follow the jury's recommendation?

JUROR MARZOLI: Yes.

MR. AYRES: The Court can override that recommendation by the jury.

JUROR MARZOLI: Sure.

MR. AYRES: Okay. For example, the jury could come in and recommend the defendant be sentenced to life imprisonment. The Court could agree or the Court after considering that with great weight by the jury's recommendation could sentence the defendant to the death penalty. Do you understand that is how the procedure works?

JUROR MARZOLI: Yes, sir.

MR. AYRES: Or it could work the other way around, do you understand?

JUROR MARZOLI: Yes.

MR. AYRES: So do you understand the ultimate sentence is up to the Court if a verdict of first degree murder is returned?

(R. 320-323)(emphasis added).

Juror 8: Linda Blakely

MR. AYRES: Do you understand that the same jury present here for the penalty phase will be the jury that will determine the defendant's guilt or innocence?

JUROR BLAKELY: Yes.

MR. AYRES: All right. At the penalty phase, the jury would be presented evidence as to certain aggravating and mitigating factors that are contained under the law. The Court will tell you about those factors, and after that hearing, and hearing the arguments of counsel, this jury will deliberate and come back out and make an advisory recommendation of a sentence to the Court. That will be done by a majority vote. Do you understand those matters?

JUROR BLAKELY: Yes.

MR. AYRES: Do you understand that the Court is not bound to follow the jury's advisory sentence?

JUROR BLAKELY: Yes, sir, I understand that.

MR. AYRES: Do you understand that the Court could override the jury's recommendation?

JUROR BLAKELY: Oh, yes.

MR. AYRES: In a first degree murder case, there are only two possible penalties, that being the death penalty or life imprisonment which is twenty-five years before being eligible for parole. Do you understand that?

JUROR BLAKELY: Yes.

MR. AYRES: Okay. Do you understand the Court will place great consideration on the jury's recommendation, but the ultimate sentence would be up to the Court.

JUROR BLAKELY: Yes.

(R. 352-53)(emphasis added).

Juror 9: Alan Turner

MR. AYRES: Do you understand that the purpose for that, the penalty phase, that is for the jury to receive evidence as to aggravating and mitigating factors that are

set out under the law? Then the jury will make a recommendation to the Court of one of two sentences, the death sentence or a sentence of life imprisonment with twenty-five years before the person is eligible for parole. Do you understand that?

JUROR TURNER: Yes.

MR. AYRES: All right. Do you understand that this advisory sentence the jury would recommend as to the penalty is not something the Court is bound by? Do you understand the Court can overrule that?

JUROR TURNER: Yes.

MR. AYRES: All right, sir. You also understand the Court, of course, would give that advisory recommendation great weight and the determination as to the sentence is up to the Court?

JUROR TURNER: Yes.

(R. 362)(emphasis added).

This incomplete and misleading definition of the law by the State is exacerbated by, of all people, defense counsel:

MS. WARREN: The Judge is aware of what everybody thinks, so do you understand that whatever you recommend is just a recommendation.

JUROR TURNER: Yes.

(R. 366)(emphasis added).

This statement stood virtually uncorrected and the harm uncured. This juror undoubtedly failed to appreciate the magnitude of his responsibility. "Great weight" means little if anything when it is preceded by a statement that the recommendation is just that and no more. Adams, supra; Mann, supra.

Juror 10: Sybil Evett

MR. AYRES: Okay. It would be at that penalty phase that the jury would hear evidence of aggravating and mitigating factors that are set out under the law and the Court will tell you about those and you would consider those in deciding what sentence to recommend to the Court. Do you understand those things?

JUROR EVETT: Yes.

MR. AYRES: Do you understand that after considering these things, the jury by a majority vote would recommend to the Court

either that the defendant be sentenced to the death penalty or that the defendant be sentenced to life imprisonment?

JUROR EVETT: Yes.

MR. AYRES: Do you also understand, ma'am, that this Court is not bound to follow the jury's recommendation; that the Court can override the jury's recommendation and the Court will decide what the appropriate sentence would be to impose?

JUROR EVETT: Why is that?

THE COURT: That is the law.

JUROR EVETT: Okay.

THE COURT: The Court will pay great weight to the jury's advisory sentence, but the Court does have the power under the law to override it either way. If the jury says the Court should impose the death penalty, the Court could impose a life sentence. The Court which is me, I as the Judge in a case have the power to sentence, not the jury. Do you understand?

JUROR EVETT: Okay.

THE COURT: Can you accept that without wondering too much into the whys and wherefores?

JUROR EVETT: I understand.

(R. 369-371)(emphasis added).

In this instance, not only does the State misrepresent the law to the juror but the Court also enforces the misconception of who wielded the power thereby diminishing this juror's appreciation of her significant role. Indeed, she could not understand how a judge could override the jury's recommendation and said so. As the Court stated to the juror, "The Court which is me, I as the judge in a case have the power to sentence, not the jury." (R. 370-371)(emphasis added).

Juror 11: Diane Helgerud

MR. AYRES: Do you understand that in a first degree murder case, there are only two possible sentences in Florida, and that is the death penalty or life imprisonment with a twenty-five year minimum before the person could become eligible for parole?

JUROR HELGERUD: Yes.

MR. AYRES: All right. Now, do you understand that the recommendation that the jury would give to the Court would be one of two sentences, and that is something that the Court is not bound by, but this Court can overturn that or override that jury's recommendation?

JUROR HELGERUD: Yes.

MR. AYRES: So the jury could recommend the death penalty and the Court could impose life, or vice versa.

JUROR HELGERUD: Yes.

(R. 382)(emphasis added). Not only does the State not mention "great weight" to this juror, but once again defense counsel compounded the error by stating: "Now, of course, the sentence is only an advisory sentence because the Judge makes the final decision." (R. 385)(emphasis added). Here then is yet another juror who surely could not comprehend the critical role a juror plays in the sentencing process:

Juror 12: Judith Everhart

MR. AYRES: Do you understand that under our system, if there is a verdict of guilty of murder in the first degree, then a short time thereafter, a separate proceedings is held which is the penalty phase, and the same jury that determines the guilt or innocence would also hear the evidence as to the aggravating and mitigating factors that are set out under the law, and the jury weighs the aggravating and mitigating factors and then would make a recommendation to the Court as to either life or death? Do you understand that is how the procedure works?

JUROR EVERHART: Yes.

MR. AYRES: Do you also realize the Court is not bound to follow the jury's recommendation?

JUROR EVERHART: Yes.

MR. AYRES: The Court could override the jury's recommendation. It is up to the Court to impose the ultimate sentence in this case. Do you understand that?

JUROR EVERHART: Yes.

MR. AYRES: All right. Would you tell me generally how you feel about the death penalty? Are you opposed to it or are you in favor of it?

JUROR EVERHART: I am in favor of it.

MR. AYRES: All right.

JUROR EVERHART: I don't know how I would feel if I had to sentence someone.

MR. AYRES: Okay. You realize the Court is the one that would do the actual sentence?

(R. 409-410)(emphasis added).

For the fifth time the State failed to mention "great weight" in the context of its voir dire. The message to the entire jury was clear -- the judge was solely responsible for sentencing and the jury was merely to make a recommendation. For the third time, defense counsel buttressed the misconception by stating that "the recommendation to the judge is just that, just a recommendation, as he is not required to follow that. . . ." (R. 413)(emphasis added).

It is extremely important to keep in mind this was an individualized voir dire. Many jurors never heard even the incomplete Tedder reference with its "great weight" language. Those who were correctly charged, were nevertheless reminded that the recommendation was only advisory. Without exception each juror was told that sentencing was solely a duty of the Court and the jury was "not to be concerned" with it.

What is even more egregious, however, is the fact that the court never instructed the jury as a whole that their advisory sentence would carry "great weight". Indeed, the court neither gave the Tedder instruction nor corrected the confusion wrought by the voir dire. There were no accurate instructions, no corrections by the court, no mention of the jury's having great responsibility, nor any mention of the requirement necessary for a jury override provided as an integral part of the jury's working knowledge.

At the very start of the penalty phase the court simply stated: "As I said earlier, the final decision as to what punishment shall be imposed rests solely with me as 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. 1098-99)(emphasis added). That is all the court says. The State in its closing argument fortifies the impression that all the power is in the judge's hand, the jury having none: "And, also, remember that as we talked about at the beginning of the trial, the jury isn't responsible for the sentence that is ultimately imposed in this case or any other case. That's up to the Court." (R. 1187-1188). This is a false and misleading statement for two reasons. The jurors' recommendation and role in the sentencing process is critical and crucial. Its impact on a sentence is such to preclude an override by the court. Sentencing does not rest solely on the court. Second, the statement that the sentence in this case is like the sentence in any other case is blatently untrue. "Death is different." That passage and principle has been echoed countless times by the United States Supreme Court and countless other authorities. The trial court failed to correct this distorted interpretation of the law the State conveyed to the jury.

Rather than correct the State, the court instead ignored every aspect and principle of Tedder in total contravention of Caldwell, supra; Adams, supra and Mann, supra. In its charge to the jury the court gives the following instructions:

JURY CHARGE

> THE COURT: All right. 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 myself as Judge of this court.
>
> However, it is your duty to follow the law that will now be given to you, and to 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. 1098-99)(emphasis added).

These are the court's final words on the subject. The argument is best summed up by quoting verbatum the decision of the en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1440:

B.

> In reviewing Caldwell claims, our task is twofold. First, we must determine whether the prosecutor's comments to the jury were such that they would "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine "whether the trial judge in this case sufficiently corrected the impression left by the prosecutor." McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987).
>
> When a trial court does not correct misleading comments as to the jury's sentencing role, the state has violated the defendant's eighth amendment rights because the court has given the state's imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law. See Tucker v. Kemp, 802 F.2d 1293, 1295 (11th Cir. 1986) (en banc), cert. denied, ___ U.S. ___, 107 S.Ct. 1359 (1987). When a trial court does make some attempt to correct the prosecutor's misleading comments, the question becomes whether the corrective statement would, in the mind of a reasonable juror who had been exposed to the misleading comments, correct the misapprehension that the comments would induce. Because our focus is ultimately on the trial court's actions, our mode of review is similar to that used to review claims based on erroneous jury instructions. Cf. Lamb v. Jernigan, 683 F.2d 1332, 1339-40 (11th Cir. 1982) (court must consider effect of erroneous instruction on reasonable juror "in light of the remainder of the charge and the entire trial"), cert. denied, 460 U.S. 1204, 103 S.Ct. 1276 (1983).
>
> In this case, the comments by the prosecutor were such that they would mislead or at least confuse the jury as to the nature of its sentencing responsibility under Florida law. It bears emphasizing that the prosecutor in Caldwell stated only that the jury's verdict would be "automatically reviewable." Technically, this statement was an accurate statement of Mississippi law--

death sentences are automatically reviewed by the Supreme Court of Mississippi under Miss. Code Ann. sec. 99-19-105. The mischief was that the statement, unexplained, would have likely been misunderstood by the jurors as meaning that their judgment call on the appropriateness of a death sentence did not really matter. We are faced with a similar situation here. The prosecutor repeatedly told the jury that its task was to render an "advisory" recommendation. As with "automatically reviewable" in Caldwell, this characterization is technically accurate, at least in the sense that the Florida death penalty statute contains the term "advisory". However, the danger exists that the jurors, because they were unaware of the body of law that requires the trial judge to give weight to the jury recommendation, were misinformed as to the importance of their judgment call. The danger is particularly strong here, because nothing in the common meaning of the term "advisory" would suggest to the layman that the trial judge would in any way be bound by the recommendation; indeed, the common meaning of the term would suggest precisely the contrary.

Moreover, here the prosecutor stated to the jurors twice that the burden of imposing the death penalty was "not on your shoulders." He repeatedly told the jurors that the responsibility for imposing sentence rested with the trial judge. Additionally, we note that the prosecutor suggested to the jurors that the trial judge, because of his position as a legal authority, was more able than the jury to make the appropriate sentencing decision. As the Supreme Court noted in Caldwell, this kind of suggestion induces jurors, who are "placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice," to delegate wrongly their sentencing responsibility. Caldwell, 472 U.S. at 333, 105 S.Ct. at 2641-42. We conclude that the prosecutor's statements, considered together, misrepresent the nature of the jury's critical role under the Florida capital sentencing scheme. Such comments, if uncorrected, would undoubtedly minimize a juror's sense of responsibility, thus creating "a danger of bias in favor of the death penalty." Adams, 804 F.2d at 1532.

Turning to the second prong of our inquiry, we conclude that the trial judge's comments did not correct the false impression left by the prosecutor. The trial court specifically denied defense counsel's request that the jury be properly informed as to its role. Moreover, the judge himself stated that the final sentencing decision rested "solely with the judge of this court." The trial judge expressly put the court's imprimatur on the prosecutor's previous

misleading statements by saying to the jurors that "[a]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."

The only potentially corrective statement by the court came when the court instructed the jurors that they should proceed with "due regard to the gravity" of the matter and should "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment." This statement, we conclude, did not cure the harm posed by the court's other actions. The statement would do little if anything to change a juror's misapprehension about the effect of the jury's decision; it only instructs the jurors that they should approach their task with care and deliberation. At best, it likely left some jurors confused as to their proper role. We therefore conclude that the court's actions, as considered by a reasonable juror who had been exposed to the prosecutor's misleading comments, did not correct the false impression created by those comments. Cf. Caldwell, 472 U.S. at 340 n.7, 105 S.Ct. at 2645 n.7 (prosecutor's later statements did not retract or undermine the misimpression created by the earlier statements). Because the overall effect of the court's actions was to diminish the jury's sense of responsibility with regard to its sentencing role, petitioner's sentence is invalid under the eighth amendment.

Mann, supra at 1456-58.

A stay of execution is proper given the disposition of Dugger v. Adams, which is presently pending before the United States Supreme Court. In this regard, the Florida Supreme Court has written:

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

Darden v. Dugger, 13 F.L.W. 196, 197 (Fla. March 14, 1988). This is the first opportunity that Mr. Johnston has had to present this claim to this Court. Caldwell v. Mississippi, 472 U.S. 320 (1985), did not exist at the time of Mr. Johnston's direct appeal. Neither did Dugger v. Adams, 108 S. Ct. 1106 (1988), in which certiorari was granted to determine the very issue presented in Mr. Johnston's Rule 3.850 motion. When Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was pending on certiorari before

the United States Supreme Court, Florida's courts granted stays of execution to litigants raising Hitchcock claims pending the issuance of the Hitchcock decision. See, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). The logic behind this approach made, and makes, perfect legal and moral sense: a human being should not be put to his death while the very legal principle which will establish whether or not his execution would be proper is to be determined in but a few weeks or months. As Hitchcock determined the question (favorably) for Mr. Riley, Adams will determine it for Mr. Johnston. A stay is proper.

Mann v. Dugger, 844 F.2d 1440 (11th Cir. 1988)(en banc), also did not exist at the time of Mr. Johnston's direct appeal. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," and explained:

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

Id. Mr. Johnston should be granted relief under Mann and Adams, as the record of Mr. Johnston's trial and sentencing (in its entirety) reflects. A stay of execution should be granted in this case until the United States Supreme Court finally determines whether Mr. Johnston should receive the relief to which he is entitled under Mann and Adams. Logic compels no less.

Courts have recognized the power of this logic and granted stays of execution to post-conviction litigants who, like Mr. Johnston, have presented claims based on Adams and/or Caldwell. In State v. Way, the Circuit Court entered a stay of execution, and while summarily denying several claims, reserved ruling on Mr. Way's Caldwell claim, citing Darden v. State, supra, and Adams v. Dugger, supra. (Order, State v. Way, No. 83-8179-B, Circuit Court of the Thirteenth Judicial Circuit). In State v. Parker, another post-conviction case in which a death warrant was pending and which raised a Caldwell claim, the Circuit Court issued a stay of execution on June 1, 1988. The court also held that an evidentiary hearing was required. (Order, State v. Parker, No. 78-11151-A, Circuit Court of the Eleventh Judicial Circuit).

Courts have repeatedly found it proper and just to issue stays of execution for litigants raising Caldwell claims. Mr. Johnston is similarly entitled to a stay of execution so that his Caldwell claim and the propriety of his death sentence can be determined in light of the United States Supreme Court's forthcoming decision in Adams. As courts before whom Adams and/or Caldwell claims were presented have held:

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

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

Petitioner is presently scheduled to be

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

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

The constitutional vice of the misinformation condemned by the Caldwell Court is not only the substantial unreliability it injects 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.

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, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also

> recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the 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.

The gravamen of Mr. Johnston's claim is based on the fact that his jury was substantially misled and misinformed, by the trial prosecutor's comments and arguments, and the court's comments at trial and sentencing, as to its proper role and function at sentencing. As the above paragraphs explicate, under Florida's capital sentencing statute, the jury has substantial responsibility for the sentencing decision. See Mann v. Dugger, 844 F.2d at 1450-51, 1454-55. Although the jury's sentencing verdict is sometimes referred to as "advisory" or as a "recommendation," a Florida jury's role at the sentencing phase of a capital trial is critical. See Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985); Mann v. Dugger, supra; see also Dubois v. State, 520 So. 2d 260 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Combs v. State, 525 So. 2d at 860-61 (Barkett and Kogan, JJ., specially concurring). 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. In fact, the judge's role 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 So. 2d 1526 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. 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. Johnston's sentencing jury, however, was so misled throughout the entire proceedings. The jury was brainwashed into believing that it was the judge, not they, who had the "responsibility" for the "final decision" with regard to punishment. As in Caldwell, the responsibility-diminishing remarks herein "were quite focused, unambiguous, and strong." 105 S. Ct. at 2645. But the comments here went a step further -- they were much more systematic than those in Caldwell, and they were made by both the prosecutor, the judge, and defense counsel.

Caldwell teaches that, given comments such as those provided by the judge, prosecutor, and even defense counsel to Mr. Johnston's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden here.

In as much as defense counsel supported and reinforced this

erroneous notion they rendered ineffective assistance of counsel. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). A stay of execution and Rule 3.850 relief are warranted.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Johnston's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Johnston of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. Habeas relief is appropriate.

CLAIM II

THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. JOHNSTON'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IN LIGHT OF MAYNARD V. CARTWRIGHT.

The record indicates that the trial judge failed to define heinous, atrocious or cruel for the jury. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Knight v. State, 394 So. 2d 997 (Fla. 1981)(failure to charge on elements of underlying felony and on results of a verdict of insanity). In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the Supreme Court held that the use of the aggravating circumstance in a capital case that the killing was "especially heinous, atrocious, or cruel" violated the eighth amendment in the absence of a limiting construction of that phrase which sufficiently channels the sentencer's discretion so as to minimize the risk of "arbitrary and capricious action." The fact that the state appellate court found and recited facts sufficient to support the jury finding does not cure the constitutional problem flowing from the jury's unfettered discretion. Id. at 1859.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's construction of this aggravating circumstance on the premise that this provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 255-56. In Maynard v. Cartwright, Oklahoma had adopted the unnecessarily torturous element through its wholesale adoption of Florida's construction of heinous, atrocious or cruel set out in Dixon. However, as occurred here the jury was not instructed on the interpretation to be given the words of art, "heinous, atrocious or cruel."

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine

narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). Accordingly, Mr. Johnston's death sentence was obtained in violation of the eighth and fourteenth amendments, and must be vacated.

In Mr. Johnston's case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed the jury that the seventh aggravating circumstance the jury could consider was whether the crime "was especially wicked, evil, atrocious or cruel." (R. 1216). The judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

Even though the Florida Supreme Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the court found that "heinous, atrocious and cruel" applied to Mr. Johnston's case (R. 1248).

The court, however, did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June, 1988. Cartwright did not exist at the time of Mr. Johnston's trial, sentencing or direct appeal and it substantially alters

the standard pursuant to which Mr. Johnston's claim must be determined. As did Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Cartwright also represents a substantial change in the law that requires Mr. Johnston's claim to be determined on the merits pursuant to Rule 3.850.

A new precedent involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render any ensuing sentence arbitrary and capricious. Id. For this reason also Mr. Johnston's eighth amendment claim is properly before the court. What Mr. Johnston has presented involves errors of fundamental magnitude no less serious than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957)(overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963)(error found fundamental "in view of the imposition of the supreme penalty").

Mr. Johnston was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which an error of constitutional dimension directly affected the sentencer's

consideration "concerning the ultimate question whether in fact [David Johnston should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Given such circumstances, the Supreme Court has explained that no procedural bar can be properly applied. Id. Beyond all else that Mr. Johnston discusses herein, the ends of justice require that the merits of the claim now be heard and that relief be granted.

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

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

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

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Johnston's case. The jury was simply instructed that one of the aggravating circumstances to consider was whether the crime was "especially wicked, evil, atrocious, or cruel" (R. 1216). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. Nevertheless, on direct appeal, the Supreme Court affirmed. The sentencer failed to apply any limiting construction as did the Florida Supreme Court.

The deletion of the Proffitt limitations renders the

application of the aggravating circumstance in this case subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Johnston's case; the identical factual circumstances upon which relief was mandated in Cartwright are present here, and the result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
>
> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).
>
> Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other

cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

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

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

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

Second, the conclusion of the Oklahoma court that the events recited by it

> "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, supra (emphasis added).

In Mr. Johnston's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Similarly, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Counsel failed to object to the oral instruction and failed to proffer adequate instructions defining heinous, atrocious and cruel. This failure was ineffective assistance. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Finally, the error of unlimited discretion exercised by the jury and trial court was not cured on direct appeal. As in Cartwright, Mr. Johnston is entitled to post-conviction relief.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Johnston's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should similarly correct this error.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That fundamental error must now be corrected by habeas relief.

CLAIM III

THE STATE'S REMARKS AND ARGUMENT TO THE JURY AT SENTENCING AND THE COURT'S INSTRUCTIONS SHIFTED THE BURDEN OF PROOF TO MR. JOHNSTON TO ESTABLISH THAT MITIGATING CIRCUMSTANCES OUTWEIGHED AGGRAVATING CIRCUMSTANCES THEREBY DEPRIVING HIM OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING AND TO DUE PROCESS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In the capital sentencing context, no right is more fundamental than the right to a reliable and individualized determination of whether a death sentence should be imposed. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, 462 U.S. 862 (1983). 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), 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).

As part of the procedure necessary to ensure a reliable capital sentencing result in Florida, 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 <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances</u>.

Arango v. State, 411 So. 2d 172, 174 (1982). Shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975) and State v. Dixon, 283 So. 2d 1 (Fla. 1973). Arango, 411 So. 2d at 174.

In Mr. Johnston's case, the instructions provided to the

jury at the penalty phase did in fact shift the burden to Mr. Johnston to establish that the mitigating circumstances outweighed the aggravating circumstances. However, in Mr. Johnston's case, this instructional error was compounded and magnified by the State's argument that Mr. Johnston had the duty at the penalty phase to produce evidence establishing mitigating circumstances. This procedure violated Mr. Johnston's most

The resulting death sentence must be vacated.

In his preliminary instructions at the penalty phase before any evidence was presented, the judge told the jury:

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

(R. 1099)(emphasis added).

In the prosecutor's closing argument at the penalty phase, he stated:

> Now, if you find that the aggravating circumstances exist, the State has proven them beyond a reasonable doubt, then your next duty is to determine if mitigating factors exist. And if they do exist, then you must determine if these mitigating factors outweigh the aggravating factors in the case.

(R. 1195)(emphasis added). Moments later he rehearsed the same point.

> And I believe the Court is going to tell you that the first thing you must do is you must look to see if the State has proven the existence of any of the aggravating factors beyond a reasonable doubt. And if the State has, then you must see if there has been evidence presented to you to your satisfaction, that mitigating circumstances exist, and that they outweigh the aggravating circumstances. And I submit to you the important part of that definition is the mitigators have to outweigh the aggravators.

(R. 1201)(emphasis added).

In its final charge at the penalty hearing the court repeated its earlier instruction, underscoring that which the prosecutor had just told the jury.

> However, it is your duty to follow the law that will now be given to you, and to 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. 1215)(emphasis added). The same order was repeated later:

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

(R. 1217)(emphasis added).

In its findings as to this matter, the court stated:

> In summary, I find that three aggravating factors exist and no mitigating factors exist which would outweigh them consequently.[sic]

(R. 1251)(emphasis added).

The jury was essentially told that it was the defendant's duty to shoulder the burden of proof and persuasion as to the existence of mitigating evidence necessary to outweigh the evidence of aggravating circumstances. This placed on Mr. Johnston the burden of proof as to whether he should live or die.

This unconstitutional burden-shifting violated Mr. Johnston's 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). The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. The instructions "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [David Johnston should be sentenced to death]." Smith v. Murry, 106 S. Ct. 2661, 2668

(1986)(emphasis in original). Reasonable jurors could interpret the instructions as creating a presumption in favor of death unless the defense presented evidence of mitigation and established that the mitigating circumstances outweighed the aggravating circumstances. Mills v. Maryland, 108 S. Ct. 1860 (1988). The application of this unconstitutional standard at the sentencing phase violated Mr. Johnston's rights to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading or capricious factors. See Arango, supra; Dixon, supra.

There was mitigating evidence before the jury -- evidence which the jury might not have considered due to the State's argument and the court's instructions. The court once told the jury that in order to find the existence of an aggravating circumstance, they had to be convinced beyond a reasonable doubt of its existence (R. 1218), As to one particular mitigating circumstance he told the jury that they need only be "reasonably convinced" of its existence (R. 1218). But the court also told them that the mitigating circumstances had to "outweigh" the aggravating circumstances (R. 1215, 1217). Such an instruction at best could only leave the jury confused as to the quantum of proof and the burden of persuasion. This confusion and concomitant uncertainty as to the reliability of the jury's verdict is sufficient to render it constitutionally vulnerable.

In the capital sentencing context, courts must guard against the special danger that a jury's understanding of arguments and instructions could result in a failure to consider factors calling for a life sentence. Mills v. Maryland, 108 S. Ct. 1860, 1865 (1988); Jackson, supra, 837 F.2d at 1474. As the Mills Court explained:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty

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

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

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

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

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

Precluding a jury from considering evidence of mitigating circumstances denies a capital defendant the right to an individualized sentencing determination. When a jury does not understand what evidence can be considered, the jury's consideration is precluded:

> A jury which does not understand that the evidence and argument presented to it can be considered in mitigation of punishment cannot give a capital defendant the individualized sentencing hearing which the Constitution requires.

Peek v. Kemp, 784 F.2d 1479, 1488 (11th cir. 1986). Such a misunderstanding may "skew[] the jury towards death and mis[lead] the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence." Id. Any "reasonable possibility" that the jury will so misunderstand what it can consider in mitigation violates the Constitution:

> The Constitution requires that there be no reasonable possibility that a juror will misunderstand the meaning and function of mitigating circumstances, i.e., that the law recognizes the existence of circumstances which in fairness or mercy may be considered as extenuating or reducing the punishment.

Peek, 784 F.2d at 1494.

In Mr. Johnston's case, much more than a "substantial possibility," Mills, supra, or "reasonable possibility," Peek, supra, exists that the jury did not understand what evidence could be considered in mitigation and under what circumstances.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. Mr. Johnston is entitled to post conviction relief as a result.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Johnston's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Johnston of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

CLAIM IV

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

In Florida, the "usual form" of indictment for first-degree murder is to "charg[e] murder . . . committed with a premeditated design to effect the death of [the victim]." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). See sec. 782.04, Fla. Stat. (1987). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-

murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

Mr. Johnston was charged with first-degree murder in the "usual form": i.e., murder "from a premeditated design to effect the death of" [the victim] in violation of Florida Statute 782.04." (R. 1918). An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

In this case, it is likely that Mr. Johnston was convicted on the basis of felony murder rather than premeditated murder. That felony murder was most likely the basis for the conviction is a conclusion easily extrapolated from several sources. The State set the stage for a felony murder conviction in its opening argument to the jury (See R. 445-459). The State's evidentiary presentation was geared to prove that the murder occurred in the course of a burglary. This again was the overriding theme in the State's closing argument (See R. 953-990). The prosecutor told the jury that in order to convict Mr. Johnston of felony murder, the State need not "prove premeditation" (R. 956). The court charged the jury on both alternatives, i.e., premeditation and felony murder (R. 1001-02), and subsequently recharged them on this same matter (R. 1017-19). At the charging conference before the penalty phase began, the court noted that the theory (i.e. premeditation or felony murder), upon which the jury based its verdict was unknown. The former appears overwhelmingly as the basis for the verdict in light of the evidence and theory relied on by the State throughout the trial. Just before the parties presented arguments at the penalty phase, the court denied defense counsel's motion to compel the State to elect between the two theories since it was pertinent as to the matter of

"aggravation" (R. 1187-88).

The prosecutor, in his closing argument at the penalty phase, told the jury:

> The next aggravating circumstance, number three, is that the crime for which the defendant is to be sentenced was committed while he was engaged in the crime -- in the commission of the crime of burglary. And I would submit to you that if you recall the evidence that was presented during the trial, there was ample evidence to prove beyond every reasonable doubt that at the time the defendant committed the homicide in this case, he was engaged in the commission of a burglary. And I would submit to you that that aggravating factor has been proven beyond every reasonable doubt, and that it does exist in this case.

(R. 1190). The court thereafter charged the jury that as a third possible aggravating circumstance, they could consider whether "the crime for which the defendant is to be sentenced, was committed while he was engaged in the crime of burglary" (R. 1216).

The court itself found as one of the three aggravating circumstances that "a capital felony for which the defendant [was] to be sentenced, was committed while the defendant was engaged in the commission of a burglary of the victim's dwelling" (R. 1248). On direct appeal the Florida Supreme Court upheld this aggravator. Johnston v. State, 497 So. 2d at 871.

If felony murder was the basis of the conviction, as it appears to be, then the subsequent death sentence is unlawful because it is predicated upon an automatic finding of a statutory aggravating circumstance -- the very felony, i.e. burglary, that formed the basis for conviction. Cf. Stromberg v. California, 283 U.S. 359 (1931). Automatic death penalties imposed upon conviction of first-degree murder violate the eighth and fourteenth amendments. Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, the felony murder formed the basis for the conviction as well as a statutory aggravating circumstance. This is apparent from the court's findings at sentencing: "Second, a

capital felony for which the defendant is to be sentenced, was committed while the defendant was engaged in the commission of a burglary of the victim's dwelling. This is an aggravated circumstance." (R. 1248). The sentencer was allowed to return a death sentence automatically upon a finding of guilt of felony murder. As the present sentencing scheme operates every felony-murder involves, by necessity, the finding of a statutory aggravating circumstance. This fact, under the particulars of Florida's statute, violates the eighth amendment since an automatic aggravating circumstance is created which does not narrow. Zant v. Stephens, 462 U.S. 862, 876 (1983)("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ."). In short, if Mr. Johnston was convicted of felony murder, he then faced an automatic statutory aggravation. This system is too circular and capricious to meaningfully differentiate between who should live and who should die. More importantly, it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 108 S. Ct. 546 (1988). The discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Johnston's capital sentencing proceeding. In Lowenfield, the petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of

murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 554-55 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute satisfies the eighth amendment. As applied in this case, however, the operation of Florida law failed to provide constitutionally adequate narrowing at either phase because the conviction and the aggravation were predicated upon the same factor, i.e. felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This

> and to the extent it is in conflict with Hardwick v. State, 461 So. 2d 79 (Fla. 1984), cert. denied, 471 U.S. 1120, 1056 S. Ct. 2369, 86 L.Ed.2d 267 (19850, we recede from that decision.

Id. at 820 (emphasis added).

This holding was more recently affirmed in Lamb v. State, 13 F.L.W. 530-31 (Fla. 1988):

> Lamb challenges the sentence arguing that his contemporaneous conviction for burglary with assault does not support a finding that he has been previously convicted of a violent felony. We agree. We recently held in Perry v. State, 522 So. 2d 817, 820 (Fla. 1988), that it is "improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of a 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).

Although the aggravating circumstance in the case at bar was not the same as in Wasko, Lamb or Perry, the principle and rationale of this trilogy is nevertheless applicable with the same force in the case at bar. In either situation there was improper and unconstitutional duplicity in order to broaden and to aggravate rather than to narrow and diminish the likelihood of the imposition of the death penalty.

This analysis cannot be sidestepped by any appellate finding of premeditation: first, it cannot be said that the jury found premeditation; second, neither the Florida Supreme Court, nor any other court, can affirm a premeditation finding, since there is insufficient evidence on which to base such a finding. If one or the other basis for the conviction results in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg v. California, supra. Consequently, if a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), a Florida Supreme Court, or any other court's finding of premeditation does not cure those collateral reversible

consequences.

The jury did not specifically find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above language from Cole v. Arkansas, the Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18.

Neither the Florida Supreme Court, nor any other court, can "affirm" based on premeditation when it cannot be said that the conviction was obtained based on premeditation. Here, felony-murder could have been -- and most probably was -- the basis for the conviction, therefore, under the eighth and fourteenth amendments, Mr. Johnston's sentence of death should not be allowed to stand. To the extent that counsel failed to object, this was ineffective assistance. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Post conviction relief must be granted.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Johnston's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which

undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. Habeas corpus relief is appropriate.

CLAIM V

MR. JOHNSTON WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION, AND WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE THE SENTENCING COURT FAILED TO PROVIDE CONSTITUTIONALLY REQUIRED CONSIDERATION TO NONSTATUTORY MITIGATING FACTORS.

The eighth amendment forbids a sentence of death resulting from proceedings in which unfettered and meaningful consideration of all mitigating factors has not been provided by the sentencer. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). See also Eddings v. Oklahoma, 445 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). A sentence of death therefore cannot stand when it appears that the sentencing court limited its consideration of nonstatutory mitigating factors, Harvard v. State, 486 So. 2d 537 (Fla. 1986), when the record reflects that the sentencing court failed to give "serious consideration" to such nonstatutory factors, McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987), when the sentencing order fails to take into account, for its own independent weight, nonstatutory mitigating evidence, Hitchcock; McCrae, or when the sentencing court, "in imposing sentence, expressly weigh[s] only those mitigating factors enumerated in the death penalty statute" Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), citing Hitchcock v. Dugger.

The record of the proceedings resulting in Mr. Johnston's sentence of death was rife with such fundamental eighth amendment errors. On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing

court's finding that certain mitigating circumstances are not present. 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. Mr. Johnston challenged the appropriateness and merits of his death sentence and more specifically the trial court's failure to find any mitigation. However, the Court, pre-Hitchcock, denied relief. See Johnston v. State, 497 So. 2d 863, 871-72 (Fla. 1986). Now, post-Hitchcock,[1] Mr. Johnston properly urges reconsideration of his claim by his petition for a writ of habeas corpus. Downs v. Dugger, supra; Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988). Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988).

During the course of Mr. Johnston's pretrial, trial, and penalty phase proceedings a number of classically recognized statutory and nonstatutory mitigating factors were elicited. The court, however, unconstitutionally restricted its consideration of the mental health mitigating evidence. As reflected in the court's sentencing order and in its pronouncements prior to the imposition of sentence, the court considered and then rejected the ample mitigation relating to mental health because at least with regard to one circumstance it was not "reasonably convinced" the evidence was sufficient to "fit" within the pertinent statutory category (see R. 1249) and implicitly found the same as to the remaining categories (See R. 1249-51). Having reached

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[1]Hitchcock v. Dugger, was also decided well after this Court issued its opinion in Mr. Johnston's initial post-conviction acction. 497 So. 2d 169 (Fla. 1986). Therefore, Mr. Johnston can only now properly invoke this Court's jurisdiction to consider the claim. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(Hitchcock issue properly presented, and relief granted, in second habeas corpus [and third state-court post-conviction action] because it involves "a substantial change in the law [requiring reconsideration of] issues first raised on direct appeal. . ."); see also Riley v. Wainwright, supra (same); cf. Morgan v. State, 515 so. 2d 975 (Fla. 1987).

this conclusion the court thereafter completely ignored the wealth of mental health evidence as bearing on nonstatutory mitigation. See Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987).

The trial court's sentencing order reflects what mitigating evidence was considered in imposing sentence. The order spoke both to the statutory and nonstatutory factors:

> The Court considered each of the following mitigating factors and finds as follows:
>
> 1. The defendant does have a significant history of prior criminal activity. This finding is based upon stipulation of counsel and proof of the two prior felony convictions mentioned above.
>
> 2. Although the evidence showed that the defendant had an argument with his fiance and was angry with a person who had been arrested for shoplifting in the convenience store where she was working, both of these events occurring within an hour or two of the murder, and that the defendant was excited because of these events, I am not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder which would constitute a mitigating factor.
>
> 3. The victim was not a participant in the defendant's conduct nor did she participate in defendant's act.
>
> 4. The defendant was not an accomplice in a murder committed by another in which his participation was relatively minor. The evidence establishes that the defendant was the sole perpetrator of this murder without assistance from anyone.
>
> 5. The defendant did not act under extreme duress or under the substantial domination of another person.
>
> 6. Although there was evidence that the defendant suffered from mental disorder; that he had earlier been diagnosed as schizophrenic; that he had been admitted to mental institutions on a great number of occasions as he was growing up; that he was given to tremendous mood swings on occasions; that he told one of the officers that he had been drinking alcoholic bevergaes and taking LSD prior to the killing, the evidence affirmatively showed that defendant had capacity to appreciate the criminality of his conduct. Immediately following the murder he attempted to make the apartment look as if it

had been burglarized by some unknown intruder prior to his calling the police and reporting the crime. Further, I do not find that his capacity to conform his conduct to the requirements of law was substantially impaired at the time of the killing.

7. Defendant was 23 years of age at the time of the murder. This is not a mitigating circumstance.

8. I have considered the other evidence offered relating to the character of the defendant. Mrs. Corrine Johnston, his stepmother, testified in essence that defendant was the product of a broken home; he was abused, neglected and rejected by his natural mother and several times physically abused by his father; that his father's death when defendant was 18 greatly affected him; that defendant has a very low IQ, did not do well in school and was mentally disturbed despite the mental health treatment he had received.

In summary, I find that three aggravating factors exist and no mitigating factors exist which would outweigh them; consequently, under the evidence and the law of this State a sentence of death is mandated.

(R. 2413-14)(emphasis added). The palpable Hitchcock error involved the evidence relating to mental health and the statutory subsections of Fla. Stat. section 921.141(6)(b)(e) and (f)(1983) in that the court "considered" that evidence as presented solely for the purpose of establishing those three statutory factors, even though the evidence was intended to establish, and did establish, a great deal more. That evidence did not "fit" exclusively within subsections (b), (e) and (f) of the statute. The two generic classes of mitigation are interrelated and overlap and cannot be considered in isolation. Since the court so regarded them, however, the court consequently never "weighed" or meaningfully considered the evidence as nonstatutory mitigation.

Similarly, other substantial nonstatutory mitigating evidence which was included in the record was also ignored. See Harvard, supra (mitigating evidence not limited to evidence adduced at penalty phase; all mitigation included in the record

should be considered by judge at sentencing). These factors, which the court never spoke to, are also discussed below.

The court concluded that the mental health evidence did not establish the presence of the three possible statutory mental health mitigating factors. That was the court's statutory analysis. It is manifest from the court's statement that it did not thereafter consider this same evidence under the "catch-all" nonstatutory factors subsection of the statute then extant and since eliminated.

When viewed in the context in which it was made -- an analysis of the Fla. Stat. 921.141(6)(b)(e) and (f) statutory factors -- it is beyond cavil that the court's consideration of the mental health evidence was constrained. In this regard, it is noteworthy that when the court referred to the nonstatutory evidence, it failed to make even a passing reference to this mental health evidence. Ignoring the evidence is tantamount to not weighing it when deciding whether death was the appropriate sentence. See McCrae v. State, supra. Unfettered sentencer consideration of all mitigating evidence is at the heart of the eighth amendment's mandate that a capital sentence be individualized. Hitchcock; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 445 U.S. 104, 113-14 (1982). Therefore, even if the court's sentencing order were viewed as ambiguous, Mr. Johnston's sentence would still be flatly unconstitutional. A man simply cannot be sent to his execution when there is uncertainty as to whether his sentence was individualized -- i.e., when we do not know whether the mitigating factors in his background were fairly considered. Cf. Lucas v. State, 490 So. 2d 943 (Fla. 1986); see generally, Woodson v. North Carolina, 428 U.S. 280 (1976).

Assuming arguendo that the trial court correctly rejected the related mental health evidence which had been before it as insufficient to satisfy the stringent statutory requirements of

Fla. Stat. 921.141(6)(b)(e) and (f), the substantial evidence of Mr. Johnston's mental, emotional and psychological problems still warranted consideration as nonstatutory mitigation. This plainly did not occur. Accordingly, the court's order concluded with a restrictive focus on only the three pertinent statutory factors, and held that no mitigating factors existed to outweigh the three aggravating circumstances (R. 1251, 2414). A wealth of nonstatutory mitigation was available in the form of mental health evidence and deserved consideration. Even if the three statutory factors would not have outweighed the aggravating circumstances, the court's failure to refer to, account for, and seriously consider the mental health evidence as nonstatutory mitigation cannot be deemed harmless beyond a reasonable doubt. See Hitchcock v. Dugger; Downs v. Dugger, supra. As this court has explained, the failure to consider nonstatutory mitigation "affects the sentence in such a way as to render the trial fundamentally unfair." Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987), citing Harvard v. State, supra. See also, Morgan v. State, 515 So. 2d 975 (Fla. 1987); Mikenas v. Dugger, supra; Magwood v. Smith, supra.

Today, "[t]here is no disputing," Skipper, 106 S. Ct. at 1670, the force of the Lockett constitutional mandate: a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider mitigating evidence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). In Mr. Johnston's case, the sentencing court's words show that it constrained its review of the mental health evidence as to how it fit within statutory mitigation only -- the court said virtually nothing that indicated that it had ever considered this same evidence as nonstatutory mitigation. The sentencing court provided Mr. Johnston with an unconstitutionally restricted sentencing proceeding. Cf. Harvard, 486 So. 2d 537; Songer v. Wainwright,

769 F.2d 1488, 1489 (11th Cir. 1985)(en banc).

It is both noteworthy and ironic that the court did not find any mental health mitigation at sentencing and yet relied at least in part on Mr. Johnston's mental health history as the basis for denying his pro se motion to represent himself.

> The trial judge made the proper inquiry in this case and correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of Johnston's mental condition. In fact the court's order denying Johnston's motion for self-representation and counsel's motion to withdraw specifically cited Johnston's age, education, and reports of psychiatrists and past admissions into mental hospitals.

Johnston v. State, 497 So. 2d at 868 (emphasis added). If Mr. Johnston's mental stability was suspect for one purpose, why then was it of no probative value when it really mattered, i.e. whether it provided a reasonable basis for a life sentence.

Defense counsel had indicated at the hearing on their motion to withdraw from further representation of Mr. Johnston, that their "plan [was] to assert the defense of insanity . . . ." and that they could not ethically pursue the defense Mr. Johnston was urging (R. 1275-76). Despite the court's unwillingness to let Mr. Johnston represent himself because he had doubts as to his mental capacity, the court, nevertheless, gave Mr. Johnston carte blanche to determine which defense to pursue.

> And the final thing I want to say is that a client such as you has basic decisions to make in the defense of the case, and the lawyer is obligated to be guided by the client's decision.

(R. 1277)(emphasis added).

Had the court not effectively blocked Mr. Johnston's only viable defense, i.e. insanity, or possibly a lesser finding of guilt based on a so called diminished capacity or depraved or abnormal mind defense, counsel might have "reasonably convinced" the court as to the existence of statutory mitigation even if they might not have prevailed with either of these defenses at the guilt-innocence phase. The trial court's early erroneous

ruling (see Claim VI), however, forced counsel to direct their attention and energy toward a futile exercise of trying to persuade the jury that someone else had committed the offense. The ostensible result was that counsel curtailed expending further energy toward presenting an accurate picture of Mr. Johnston's mental health. They were consequently inadequately prepared to proceed at the penalty phase. Mr. Johnston therefore received unprofessional representation as a result.

Mr. Johnston's claim falls within Hitchcock and this Court's recent applications of the Hitchcock standard. McCrae; Downs; Morgan; Riley. Mr. Johnston's claim is not defeated by the fact that he was sentenced after Lockett. Hitchcock mandates review of the proceedings "actually conducted" and makes the claim cognizable. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs, supra. Moreover, here, as in Riley and Thompson, a pre-Hitchcock denial of relief on direct appeal does not preclude post-Hitchcock collateral review (and relief).

In Eddings v. Oklahoma, 455 U.S. 104 (1982) Justice O'Connor, concurring, wrote:

> In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20 (emphasis added). Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. Here, that is undeniably what occurred. The judge said that statutory mental health mitigating circumstances

were not present and implicitly held that they were not to be considered.

Under Eddings, supra, and Magwood, supra, the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect.

It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. at 605 that "requires us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings, supra at 119.

The eighth amendment errors discussed herein resulted in the sentencing court's failure to consider the key evidence adduced in mitigation. They rendered Mr. Johnston's sentencing proceeding fundamentally unfair, Harvard, 496 So. 2d 537, supra, and deprived him of an individualized sentencing determination. Mr. Johnston submits that the sentencing court violated the eighth amendment in failing to find the three statutory mitigating factors it did consider. However, even if the court's rejection of those factors was justified, the failure to provide any meaningful consideration to the same evidence as nonstatutory mitigating factors simply cannot be deemed harmless beyond a reasonable doubt. Riley; McCrae; Morgan; Downs.

This Court's post-Hitchcock review can only lead to the ineluctable conclusion that the trial court failed to properly consider the mental health evidence as nonstatutory mitigation, that this same evidence provides much more than a mere "reasonable basis" for a life sentence and that Mr. Johnston is therefore entitled to post-conviction relief.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Johnston's

death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Mr. Johnston's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. Habeas relief is appropriate.

CONCLUSION

David Eugene Johnston, through his counsel, urges this court to issue a writ of habeas corpus and grant a stay of execution and the relief he seeks.

To the extent that this action may raise certain questions of fact, Mr. Johnston requests that the Court mandate jurisdiction to the circuit court for resolution of these evidentiary questions. Mr. Johnston alternatively requests that this Court grant him a new trial or appeal for all of the reasons stated in the above document and that the Court grant all other relief which it may deem appropriate.

Respectfully submitted,

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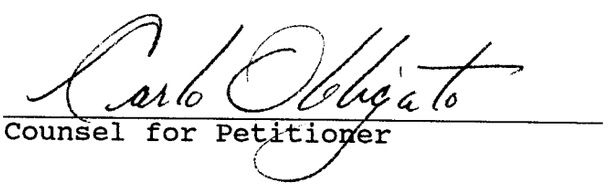

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Robert J. Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida, 33602, this 28th day of November, 1988.

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