IN THE SUPREME COURT OF FLORIDA

NO. 73609

IAN LIGHTBOURNE

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

Hitchcock / Caldwell
HHC /

LARRY HELM SPALDING
Capital Collateral Representative

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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. This is the only petition for habeas corpus review that Mr. Lightbourne has asked this Honorable Court to consider. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, see Lightbourne v. State, 438 So. 2d 380 (Fla. 1983)(Overton, J., dissenting and McDonald, J., dissenting from sentence), the constitutional propriety of this Court's decision on Mr. Lightbourne's motion to vacate judgment and sentence, Lightbourne v. State, 471 So. 2d 27 (Fla. 1985) (Overton, McDonald, and Shaw, JJ., dissenting), and the legality of Mr. Lightbourne's sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Lightbourne to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1984); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy

errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs, supra. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Lightbourne's and sentence of death, a sentence of death which has troubled reasonable jurists in this case in this Court. Mr. Lightbourne's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Lightbourne's claims.

With regard to ineffective assistance, the challenged acts and omissions of Mr. Lightbourne's appellate counsel occurred before this Court. This Court therefore has jurisdiction to

entertain Mr. Lightbourne's claims, Knight v. State, 394 So. 2d at 999, and, as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance of counsel claims, Mr. Lightbourne will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

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

B. REQUEST FOR STAY OF EXECUTION

A stay of execution is appropriate when a petitioner's case is "debatable among jurists of reason." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Mr. Lightbourne's case is unique in this regard -- reasonable jurists have differed on the disposition of this case, and on the propriety of Mr. Lightbourne's sentence of death, ever since this death sentence was imposed. Mr. Lightbourne's case was affirmed on direct appeal by a divided court. See Lightbourne, supra, 438 So. 2d at 392 (Overton, J., dissenting; McDonald, J., dissenting on death

sentence). The denial of Mr. Lightbourne's motion to vacate was affirmed by the slimmest of margins, 4-3. See Lightbourne, supra, 471 So. 2d at 29 (Overton, McDonald, and Shaw, JJ., dissenting). Mr. Lightbourne's federal habeas petition was affirmed by yet another divided court. See Lightbourne v. Dugger, 829 F.2d 1012 (11th cir. 1987); see also id. at 1027 (Anderson, J., dissenting).

This case has troubled reasonable jurists in the past. This case should trouble reasonable jurists now. Mr. Lightbourne demonstrates in this petition that his sentence of death is unconstitutional and that at a minimum, a stay of execution is appropriate in order for the Court to fully consider the important claims presented in this petition.

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 Marek v. Dugger (No. 73,175, Fla., Nov. 8, 1988); Gore v. Dugger, (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

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

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Ian Lightbourne asserts that his and sentence of death was obtained in violation of his rights as guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

CLAIM I

THE SENTENCING COURT'S REFUSAL TO ALLOW MR. LIGHTBOURNE TO PRESENT MITIGATING EVIDENCE VIOLATED HITCHCOCK V. DUGGER AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A capital sentencer may not be precluded from considering "any relevant mitigating evidence." Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio; 438 U.S. 586 (1978). Mr. Lightbourne's counsel sought to have the jury consider the mitigating evidence that had been collected in a presentence investigation report detailing Mr. Lightbourne's family background and personal history. The trial court, however, refused to allow Mr. Lightbourne to present as evidence those relevant portions of the presentence investigation (R. 1179).

The "Social History" section was particularly important for the jury to determine whether there existed "any aspect of [the] defendant's character or record and any of the circumstances of the offense that the defendant profered [sic] as a basis for a sentence less than death." (R. 188)(jury instructions). It provided:

> III. SOCIAL HISTORY
>
> A. Parents:
>
> The subject was born illegitimately in Nassau, New Providence, Bahama to the union of Walter Lightbourne age 54 and Nayomi (Anderson) Neely age 52.

Subject has had almost no relationship with his father inasmuch as his father separated from the family when he was approximately two or three years old. His father presently resides at [redacted] Bronx, New York ([redacted] The subject's father is presently employed as a chauffeur and has had almost no contact with the defendant during the separation. The subject's mother presently resides at Dumping Ground Corners, Nassau, Bahama and has little formal education. She is self-employed owner of a small confectionery store in Nassau.

B. Early Childhood

The subject was raised in a lower socioeconomic home environment in Nassau, the seventh in a group of nine children.

Siblings:

Half-sister Florine Neely Maultsby age 33, resides [redacted] Jacksonville, Florida.

Half-brother Stanford McNeil age 30, resides at [redacted] Nassau, Bahama.

Half-brother Tom Michael Jones age 29, resides [redacted] Jacksonville, Florida.

Half-brother Frederick Brown age 25, resides [redacted], Nassau, Bahama.

Half-brother John Brown age 24, resides [redacted], Nassau, Bahama.

Sister Margaret Lightbourn age 22, resides [redacted] Nassau, Bahama.

Sister Brenda Lightbourn age 20, resides [redacted] Jacksonville, Florida.

Half-sister Karen Callender age 17, resides with mother in [redacted] Nassau, Bahama.

Half-brother Ricardo Brown age 14, resides with mother in [redacted], Nassau, Bahama.

C. Marital Status:

The subject claims to be single but admits that he has fathered one child, [redacted], with [redacted] born January 2, 1981. This

child has been placed up for adoption by the mother. An adoption hearing is scheduled for May 1, 1981.

Subject claims also that he has fathered two male children in the Bahamas by [redacted] to whom he has never been married. He states that the children are approximately age three.

D. Residence:

At the time of arrest, the subject had taken up temporary residence at the Friendly Village Inn located on Highway 27 west of Ocala. Prior to that time he had been living in a small trailer located on the Elsam Farm property where he was employed. This was furnished to him by the farm manager. Previous to that time he had stayed at the Dixie Motel in Ocala for approximately five to six months with a girlfriend, Cathleen Gifford.

E. Education:

The subject reportedly attended first to fifth grade at Saint Joseph's Catholic School in Nassau, Bahamas. He then attended public schools and subsequently graduating from R.M. Bailey High School in Nassau, Bahama with average grades. He admits that he had been suspended on two occaions, [sic] once for a three day period during his ninth grade for taking drugs and again was suspended in the tenth grade for one week for his use of drugs. He denies any grade failures.

It should be noted that Social History including his education has been verified through his sister Florine Maultsby, however further verification from Bahamian authorities has been requested and will be submitted to the court upon receipt of same.

F. Religion.

Lightbourne was raised in the Catholic Church and was a member of the Saint Joseph's Catholic Church in Nassau, Bahama. He was active in the church choir but admits that he has not attended any church since his arrival in the United States.

G. Interests and Activities.

Describes his leisure pursuits as traveling and riding horses. He denies belonging to any clubs or organizations and states that he drinks beer or wine on occasions. Subject admits that he has used "Downer," since approximately

age nine and has taken cocaine often. States that he usually smokes approximately ten to twelve marijuana cigarettes per day when available. He admits that in 1973 he took approximately 42 valiums which caused him to hallucinate.

H. Military History:

The subject has never served in the military forces.

I. Health:

The defendant can be identified as a 21 year old negro male, dark complexion, black hair and brown eyes, height five feet five inches, weight 135 pounds, slender body build and has small scar over bridge of nose. [redacted]

J. Employment:

At the time of arrest, the subject was unemployed. He had verifiably been employed with Elsam Farm working for Mr. Richard Maloney, trainer from September 1980 until December 31, 1980 as an exercise rider. He was dismissed from this employment after being drunk and not showing up for work.

Prior to that time, he had worked for Mr. Joe O'Farrell of the Ocala Stud Farm as a groom from August 1979 until September 1980. He had left this position for more salary and to ride as an exercise rider for Mr. Maloney at Elsam Farm.

He had previously been employed with the Ocala Stud Farm as an exercise rider after being allowed into the country on a temporary visa on August 22, 1977. He was employed in this capacity until December 16, 1977, at which time he left to return to the Bahamas because of reported loss of passport.

During the reported return to the Bahamas, he claims to have worked as an electrician for Cedric Poitier for approximately nine months.

K. Economic Status:

> Subject denies any assets such as cash, savings, property, or real estate and denies any outstanding liabilities.

Elsewhere the presentence investigation contained the following:

> Mrs. Paloma Hart, states that she has known the defendant for approximately eleven months. She described him as always being, "a sweet person" and "a nice type person". She indicated that the defendant was "never rowdy" and stated that the defendant has never been mean to her or threatened her. She indicated they had dated a couple of times during the time she has known him and feels that he is, "a good friend".
>
> * * *
>
> Mrs. Florine Maultsby, the defendant's sister, verified most of the defendant's early childhood. She states the defendant was "quite a little boy when he was growing up, never gave my Momma any trouble. He was a good church member and he was an altar boy for eight years. He was also a good student and he graduated from high school in 1977". She states that when he was approximately 16 he was in a fight with an older boy when her brother hit him with a brick and went to court where the judge gave him three or four lashes. Claims that the defendant never had any further trouble with the law until now.
>
> Ms. Maultsby stated that she does not feel her brother to be the type person who would kill anyone in cold blood. She feels her brother is a victim of circumstances in that he was "in the wrong place at the wrong time".

There is no question but that the background information that counsel sought to introduce through the presentence investigation was relevant mitigating evidence. This court has in fact consistently recognized that the kind of information that would have been available to the jury through consideration of the presentence investigation of Mr. Lightbourne's background was classically mitigating. For example, a deprived childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor"); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)(jury

could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"). Evidence that a defendant "was kind, good to his family and helpful around the home," constitutes mitigation. Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). Evidence of substance (alcohol and drug) abuse constitutes mitigation. See Holsworth, supra, 522 So. 2d at 354 (evidence defendant "had a drug problem" properly considered by jury in mitigation particularly where other evidence indicated he was "generally a quiet, nonviolent person."); Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988)(history of alcoholism mitigation which jury should be able to consider); Norris v. State, 429 So. 2d 688, 698 (Fla. 1983)(evidence that defendant had "a drug abuse problem" was mitigation for the jury to weigh). Evidence of a defendant's employment history and efforts to better himself is mitigation. Holsworth, supra, 522 so. 2d at 354 ("Jury may have considered in mitigation appellant's employment history and positive character traits as showing potential for rehabilitation and productivity within the prison system").

None of the mitigation contained in this report reached the jury. The jury knew nothing of Mr. Lightbourne's family history, the poverty, the neglect and the abandonment by his father, and the hardships associated with his upbringing. The jury also did not have the history of drug and alcohol abuse. The jury was denied this mitigating evidence by the judge's erroneous ruling -- that the evidence was inadmissible hearsay. The jury thus heard absolutely nothing to indicate that a life sentence would have been appropriate in this case. This occurred despite the court's obvious belief that Mr. Lightbourne bore the burden of proof on the existence of mitigation (R. 177). When counsel

sought to have the jury hear what was contained in the presentence investigation report the following transpired:

> BY [DEFENSE COUNSEL]: The other thing, I'd like the factual portion of the PSI to go back.
>
> BY [PROSECUTOR]: Your Honor, the PSI --
>
> BY THE COURT: No, it's all hearsay. I'm not going to do that.
>
> BY [PROSECUTOR]; It's not subject to evidence in court.
>
> BY THE COURT: You want to hear what Mr. O'Farrell said about it?
>
> BY [DEFENSE COUNSEL]: The factual portion.
>
> BY THE COURT: Oh, you want the good part but not the confidential part?
>
> BY [DEFENSE COUNSEL]: That's my first request.
>
> BY THE COURT: First of all, for the record, you have a copy of the PSI and the confidential portion thereof?
>
> BY [DEFENSE COUNSEL]: Yes.
>
> BY THE COURT: The request is denied on the basis that it's hearsay and -- hearsay, and not subject to Cross Examination or amounts -- and is establsihed facts.
>
> BY [DEFENSE COUNSEL]: That ruling would be the same whether I request the entire PSI or the factual portion?
>
> BY THE COURT: You want the whole thing?
>
> BY [DEFENSE COUNSEL]: That will be my next request, based on the Court's previous ruling that the factual portion is hearsay.
>
> BY THE COURT: Well, the whole thing is hearsay. I have to be consistently correct.

(R. 1179-80). Cf. Tthompson v. Dugger, 515 So. 2d (Fla. 1987) (ordering resentencing where counsel precluded from arguing non-statutory mitigation.)

The ruling was erroneous. Florida law (and the eighth amendment, see Hitchcock, supra) allows the introduction of hearsay by the State at the penalty phase so long as the defendant has an opportunity to rebut it. Fla. Stat. 921.141. The statute imposes no such limitation, however, on the capital

defendant. The statute specifically does not require that the State be afforded an opportunity to rebut. (In any event, there can be no question here that the State had an ample opportunity to rebut.)

The sixth amendment guarantees to all criminal defendants in Mr. Lightbourne's situation the right to defend:

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice -- through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Faretta v. California, 422 U.S. 806, 818 (1975)(emphasis supplied). In Hitchcock v. Dugger, Lockett v. Ohio, 438 U.S. 586 (1978), and Skipper v. South Carolina, 106 S. Ct. 1669 (1986), the United States Supreme Court made it clear that under the eighth amendment a criminal defendant can not be precluded from presenting evidence of mitigating circumstances -- the capital defendant's right to defend in the penalty phase is the right to present, and to have the jury consider, mitigating evidence. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

The United States Supreme Court has not hesitated to reverse where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional right to present a defense. See, Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 106 S. Ct. 2141 (1986). This Court should not hesitate to allow Mr. Lightbourne that which the eighth amendment requires: a reliable, individualized, and meaningful capital sentencing determination. This fundamental right is a right which this Court has consistently upheld. See Riley, supra, 517 So. 2d at 659 ("If the jury's recommendation, upon which the judge must

rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."); Thompson, supra; Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988)(error to preclude jury's consideration of employment history and witness' testimony of defendant's relationship with her and of his good character); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(capital defendant has right to have sentencing jury actually weigh non-statutory mitigation).

Presentation of evidence in mitigation during the penalty phase of a capital trial is every bit as crucial as presenting a defense during the guilt phase of a trial. The statute makes clear that the usual hearsay rules do not apply in the penalty phase of a capital trial. Thus the legislature recognized that mitigation may be established through hearsay.

Given the circumstances involved in this case, there can be little doubt that the proceedings resulting in Mr. Lightbourne's death sentence were fundamentally unfair. The prosecutor obviously used the dearth of evidence in mitigation to argue that Ian Lightbourne deserved the death penalty. The court found a failure "to establish by evidence" mitigation on behalf of Mr. Lightbourne. But the failure to present mitigation was due not to its lack, but to the trial court's rulings.

The Circuit Court's erroneous ruling should have been raised on appeal. Trial counsel clearly was precluded from presenting mitigating evidence; under Lockett this was error.[1] Appellate counsel's failure to urge this significant claim was patent

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[1]Petitioner respectfully submits that this claim is properly before the Court on its merits, given the Court's recent rulings that Hitchcock represents a substantial change in law. See Downs, supra; Thompson, supra. In any event, this claim presents a clear instance of ineffective assistance of counsel on appeal -- precisely the type of issue warranting habeas corpus relief. See Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1985); Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986).

ineffective assistance. Lockett is basic eighth amendment law. Counsel's failure to argue obvious error under Lockett must have been premised on ignorance. Had counsel but pointed this Court to the issue, resentencing would have been required -- applicable law mandated reversal.

As has been explained:

> To make a successful claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)... Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. The standard for ineffective assistance is the same for trial and appellate counsel. Peoples v. Bowen, 791 F.2d 861 (11th Cir.), cert. denied ___ U.S. ___, 107 S.Ct. 597, 93 L.Ed.2d 597 (1986).

Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987). The result of the proceedings here would have been different -- given the eighth amendment error reflected in this record, the Court would have reversed. This is especially true in a case such as this, a case concerning which reasonable jurists have been consistently divided.

Where deficient performance has been shown on the part of appellate counsel, the question is whether "there was more than a reasonable probability that the outcome of the appeal would have been different." 811 F.2d at 1439. See also, Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986). Here, unquestionably Mr. Lightbourne's appellate counsel's performance was deficient. He failed to present this clear claim of eighth amendment error to the Court on appeal. Trial counsel litigated the trial court's refusal to admit the presentence investigation report before the lower court. The claim was apparent in the record. Trial counsel even listed the trial court's error refusal in the Statement of Judicial Acts to Be Reviewed (R. 220). Had appellate counsel raised this issue, resentencing would have been

ordered. The trial judge's rulings denied Mr. Lightbourne's rights to due process of law, to a reliable and individualized capital sentencing determination, and to effective assistance of counsel. Appellate counsel rendered prejudicially ineffective assistance. Mr. Lightbourne's sentence of death is inherently unreliable and fundamentally unfair. A meaningful sentencing preceeding should now be ordered.

CLAIM II

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. LIGHTBOURNE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Immediately upon the return of the jury's sentencing recommendation, the trial judge asked the State if it had "a sentence already prepared" (R. 1500). The prosecutor then provided the judge with "Findings of Fact" which the State had already prepared. The judge immediately signed and entered those findings as his own. Defense counsel inquired whether the judge was familiar with the contents of the presentence investigation -- the judge responded that he was (R. 1501), and then read the prosecutor's previously drafted "Findings of Fact" into the record (R. 1503-07).

The fundamental precept of this Court's and the United States Supreme Court's modern capital puunishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. To this end, this court has mandated that capital sentencing judges conduct a reasoned and independent sentencing determination. This court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v.

Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):

> [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 so. 2d 1257 (Fla. 1987)(emphasis added).

In this case the trial court did not prepare his own findings. He delegated that responsibility to the State. The judge here simply signed the sentencing order prepared by the State in advance of the jury's recommendation. In fact, the record here reflects that no independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge. The sentencing order was not prepared at the judge's direction. The State had it ready before the jury's recommendation was even in. The record reflects that the judge barely even read it before it was signed.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. In a number of cases, the issue has been presented where findings of fact were issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death

sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the 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.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30. The Van Royal judge prepared his own sentencing order. Mr. Lightbourne's judge did not.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), this Court was presented this very issue. The Court ordered a resentencing, emphasizing the importance of the trial judge's independent weighing of aggravating and mitigating circumstances. In Mr. Lightbourne's case, as in Patterson, the trial judge failed to engage in any independent weighing process; here, as in Patterson, the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order,

> independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, supra, 513 so. 2d at 1261.

The Patterson court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." 513 So. 2d at 1262. This constitutes sentencing error. This is exactly what transpired in Mr. Lightbourne's case.

Here, the trial court denied Mr. Lightbourne's right to an individualized and reliable sentencing determination by failing to conduct the independent weighing which the law requires. He signed "Findings of Fact" prepared by the State and read those "Findings" as his own into the record. The trial judge here never exercised independent judgment. This Court has made it clear in Dixon, supra, Van Royal, supra, and Patterson, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances, and (b) not delegate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility: simply relied on the State's "Findings of Fact". A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in totally relying on the State's "Findings" and in failing to provide any independent consideration to the mitigation set forth in the presentence investigation specifically relied upon by the defense.

This error has permeated this proceeding. In the appeal of the denial of Mr. Lightbourne's Rule 3.850 motion, the Court rejected Mr. Lightbourne's claim that he received ineffective assistance of counsel at the penalty phase because the trial judge had the presentence investigation available at the time of sentencing. This Court held that the matters Mr. Lightbourne claimed should have been presented were cumulative to those contained in the presentence investigation. However, the presentence investigation report was typed and issued on April 30, 1981. The penalty phase and sentencing occurred on May 1, 1981. Obviously, the State's "Findings of Fact" were prepared in advance of the May 1st sentencing. The judge did not himself independently weigh the mitigation in the presentence investigation, and could not through the State indirectly weighed that mitigation.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Lightbourne'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. See, Dixon, supra. 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. See Patterson, supra. 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. 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. Lightbourne of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Moreover, this Court then erroneously relied upon the trial judge's supposed independent weighing to reject Mr. Lightbourne's claim of ineffective assistance of counsel at the sentencing phase. Accordingly, confidence in the outcome of that decision is undermined as well.

Mr. Lightbourne's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. He respectfully urges that the error be corrected now.

CLAIM III

MR. LIGHTBOURNE WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THE TRIAL COURT INSTRUCTED THE JURY ON AGGRAVATING CIRCUMSTANCES THAT WERE DUPLICITOUS.

> A trial judge has the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 19820; Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977)); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979). A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case.

At trial, the jury was instructed on the "duplicated" aggravating circumstances of a crime committed for pecuniary gain and a crime committed while in the commission of a burglary. The State argued that the jury could find both circumstances. In addition the State argued to the jury that the crime was heinous, atrocious or cruel because it was done to eliminate a witness (R. 1142). This argument made the heinous, atrocious or cruel aggravator duplicitous of the avoiding or preventing a lawful arrest aggravator, which was also argued by the State (R. 1140) and found by the judge in the "Findings of Fact" (R. 176).

The prosecutor's argument encouraged the jury to construe the instructions as permitting "doubling":

> Fourth, that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of or an attempt to commit or flight after committing, or attempting to commit any robbery, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb. I would suggest, Ladies and Gentlemen, by the verdict that you brought in last Saturday you have already determined that the crime for which the Defendant is to be sentenced was committed during the commission of a burglary and/or sexual battery, and I would suggest that in your discretion that is an applicable aggravating circumstance.
>
> Fifth, that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Recall, Ladies and Gentlemen, the testimony of Theophilus Carson with regard to this Defendant's statement about why he killed Nancy O'Farrell. Because she could identify him, because she could come to court and testify against him about his crimes against her property, vis-a-vis burglary, and his crimes against her person, vis-a-vis the sexual battery. I would suggest to you, Ladies and Gentlemen, that in your discretion you could find that this Defendant committed the murder to prevent a lawful arrest of this Defendant for his other crimes against her, and I would suggest that in your discretion you can find that to be an aggravating circumstance.

Next, that the crime for which the Defendant is to be sentenced was committed for pecuniary gain. What does pecuniary mean. It means -- doesn't necessarily mean money; it means for the gain of anything of value. You have found by your verdict, Ladies and Gentlemen, that this Defendant was there committing a burglary. You have testimony that he took personal property of Nancy O'Farrell, and we have testimony that he obtained cash from her and other articles; pecuniary gain. You have found by your verdict, Ladies and Gentlemen, that the -- that the Defendant is guilty of murder, the felony murder of burglary. I would suggest, Ladies and Gentlemen, that in your discretion you may find that to be an aggravating circumstance.

* * *

Next, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Now, the Court will tell you, Ladies and Gentlemen, that heinous means extremely wicked or shockingly evil. It will tell you that atrocious means outrageously wicked and vile, and it will tell you that cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; or pitiless. Now, note, Ladies and Gentlemen, that the instruction is that the crime was especially heinous, atrocious or cruel, not heinous, atrocious and cruel. It's disjunctive.

I honestly believe that cruel, in the meaning that we find it here in the infliction or the enjoyment of watching someone suffer through pain, may not be applicable here. Whatever type of mental suffering Nancy A. O'Farrell went through prior to her death, whatever else you may think, may not find its way into the meaning of cruel in this sense, but I have no problem, Ladies and Gentlemen, with you finding that the crime was heinous or atrocious. The whole idea of taking someone's life merely because they can

> identify you is as shockingly wicked and vile and evil as anything you can imagine. You may find that it was cruel in the sense that it was pitiless. I would suggest, Ladies and Gentlemen, that you may very well find in your discretion that that aggravating circumstance is applicable here.

(R. 1459-62).

As to these aggravating circumstances the judge instructed:

> Fourth, that the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of or an attempt to commit or flight after committing, or attempting to commit any robbery, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.
>
> Next, that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> Next, that the crime for which the Defendant is to be sentenced was committed for pecuniary gain.
>
> * * *
>
> Or, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others, or pitiless.

(R. 1489-90).

This Court on direct appeal found no improper doubling in the finding of "pecuniary gain" and "while engaged in a burglary," because the jury could have found the latter circumstance on the basis that the homicide occurred in the course of a sexual assault. However, since that decision by this Court, new law has been rendered by the United States Supreme Court. See Mills v. Maryland, 108 S. Ct. 1860 (1988).

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. 586, 605 (1978)), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). See also Godfrey v. Georgia, 446 U.S. 420 (1980)(condemning overly broad application of aggravating factors). The United States Supreme Court has recently explained that the question is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 316 (1985). In Mills the court found eighth amendment sentencing error the sentencing jury could have read the instructions in an erroneous and improper fashion. Here the jury was erroneously instructed on duplicitous aggravating circumstances and urged to construe them in a duplicitous fashion. Since the jury's recommendation had to be followed unless unreasonable, the question is whether there is a "substantial probability" that the jury based its recommendation on an improper doubling of the aggravating circumstances. Mills, supra. Here based on the instructions and prosecutor's arguments the jury very likely did improperly double aggravating factors.

To permit trial judges the opportunity to charge juries on aggravating factors that are duplicitous without alerting the jurors to this fact is to tolerate a capital sentencing that is skewed to death rather than to life. In this instance, the application of Section 921.141, Fla. Stat. was unconstitutional. Rather than "genuinely narrow[ing] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983), the statute's application here broadened the class and enhanced the likelihood of a death recommendation due to the overlapping aggravating circumstances which pertained to the same aspect of Mr. Lightbourne's case.

The judge never cautioned the jury that "the procedure to be followed [was] not a mere counting process of X number of aggravating circumstances and Y number of mitigating

circumstances. . . ." He did not tell them that the procedure they were to follow required "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. . . ." State v. Dixon, 283 So. 2d 1, 10 [Fla. 1973]).

Based on what they had and knew, the jury probably perceived their function as the largely pro forma performance of a mathematical task.

What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Lightbourne's capital sentencing proceeding unreliable. Rather than channelling sentencing discretion to avoid arbitrary and capricious results, and narrowing the class of person eligible for death, Zant v. Stephens, 462 U.S. at 877, the duplication or "doubling" instructions worked just the opposite.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Lightbourne's trial and death sentence, as Mills, supra, makes clear. 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). Mills demonstrates that this court's analysis in direct appeal was erroneous.

Mr. Lightbourne's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. The error should now be corrected, by means of habeas relief.

CLAIM IV

THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR WAS UNCONSTITUTIONALLY APPLIED TO MR. LIGHTBOURNE'S CASE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Recently, the United States Supreme Court explained:

> [O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McClesky v. Kemp, ___ U.S. ___, 107 S. Ct. 1756, 1774 (1987) (emphasis added).

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstance present is different, and that this difference reasonably justifies the imposition of a death sentence.

In the present case the jury instructions provided only limited guidance regarding the heinous, atrocious or cruel aggravating circumstance. The trial court then found the homicide to have been especially heinous, atrocious or cruel, making no factual findings and specifically stating only:

> (D), that the crime for which the

> Defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; pitiless.

(R. 1505). The Florida Supreme Court then affirmed on appeal, applying the same general analysis.

Moreover, the prosecutor at Mr. Lightbourne's trial argued that while the homicide may not have been cruel, it was "heinous" or "atrocious" because it was committed in order to eliminate a witness:

> Next, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Now, the Court will tell you, Ladies and Gentlemen, that heinous means extremely wicked or shockingly evil. It will tell you that atrocious means outrageously wicked and vile, and it will tell you that cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others, or pitiless. Now, note, Ladies and Gentlemen, that the instruction is that the crime was especially heinous, atrocious or cruel, not heinous, atrocious and cruel. It's disjunctive.
>
> I honestly believe that cruel, in the meaning that we find it here in the infliction or the enjoyment of watching someone suffer through pain, may not be applicable here. Whatever type of mental suffering Nancy A. O'Farrell went through prior to her death, whatever else you may think, may not find its way into the meaning of cruel in this sense, but I have no problem, Ladies and Gentlemen, with you finding that the crime was heinous or atrocious. The whole idea of taking someone's life merely because they can identify you is as shockingly wicked and vile and evil as anything you can imagine. You may find that it was cruel in the sense that it was pitiless. I would suggest, Ladies and Gentlemen, that you may very well find in your discretion that that aggravating circumstance is applicable here.

(R. 1461-62). Thus, according to the prosecutor's argument, the same factual basis supported this aggravating circumstance as

that which supported the aggravating circumstance regarding witness elimination.

The issue raised by Mr. Lightbourne's claim is identical to that raised in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Under the Cartwright decision, Mr. Lightbourne is entitled to the relief he seeks.

Oklahoma's application of its "heinous, atrocious, and cruel" aggravating factor was patterned on the Florida Supreme Court's application of its counterpart in Florida. See generally Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987). The United States Supreme Court struck down Oklahoma's application of that circumstance because of the same infirmity presented here.

Maynard v. Cartwright did not exist at the time of Mr. Lightbourne's trial, sentencing, and direct appeal. Moreover, at the time, every decision of the Florida Supreme Court, the United States Supreme Court, see, e.g., Proffitt v. Florida, 423 U.S. 1082 (1976), and the Eleventh Circuit had affirmed the constitutionality of the application of this aggravating circumstance. Cartwright now compels a different result, and the ends of justice require that the merits of Mr. Lightbourne's claim now be fully and properly adjudicated. Cartwright substantially altered the standard pursuant to which this aggravating factor was affirmed on Mr. Lightbourne's direct appeal. Like Hitchcock v. Dugger, Cartwright represents a substantial change in law. See generally, Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Morgan v. State, 515 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). Just as Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), fell within Witt's analysis because it altered the standard of review which the Florida Supreme Court had previously applied to a class of constitutional claims, see Downs v. Dugger, supra, Cartwright has also altered the standard of review. The claim should now be properly determined.

Moreover, the 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. Lightbourne's eighth amendment claim is subject to no procedural bar. What Mr. Lightbourne has presented to this Court involves an error of fundamental magnitude no less 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). Cf. Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty"). Mr. Lightbourne's claim should therefore be revisited because Cartwright is new law, altering this Court's, and the United States Supreme Court's prior holdings regarding Florida's "heinous, atrocious, or cruel" aggravating circumstance. The ends of justice require that the claim be heard.

Mr. Lightbourne was denied the most essential eighth amendment requirement -- his death sentence is constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which the sentencer's weighing process was "perverted", i.e., the error directly affected the sentencer's consideration "concerning the ultimate question whether in fact [Ian Lightbourne should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

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).

While the language recited in Proffitt was utilized in Mr. Lightbourne's case, no sentencer ever made factual findings establishing the heinous, atrocious, or cruel aggravating circumstance. The jury was told by the prosecutor that "heinous, atrocious, or cruel" meant "witness elimination." The trial judge made no factual findings whatsoever. The Florida Supreme Court then engaged in the very type of appellate review condemned in Cartwright: the Court recited facts to support this aggravating circumstance, but gave it no narrowing construction. The prosecutor, in fact, urged that the jury could find this aggravating factor without finding that murder was unnecessarily cruel to the victim (R. 1461).

An almost identical scenario occurred in Cartwright: the jury found the murder to be "especially heinous, atrocious, or cruel," and the state appellate court affirmed. There the state court concluded that the limiting language contained in Dixon, supra, and adopted in Oklahoma, requiring a finding that the homicide was unnecessarily torturous to the victim before the

heinous, atrocious or cruel circumstances applied, could be disregarded. The Tenth Circuit found that the aggravating circumstance without the Dixon limiting construction was too broad. Under such circumstances, the United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion.

In Mr. Lightbourne's case, the limiting language approved in Proffitt was ignored and the crime was found to be heinous, atrocious, and cruel without a factual basis. The failure to follow the Dixon and the Proffitt limitations rendered 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. Lightbourne's case. 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, 108 S. Ct. at 1858-59.

In Mr. Lightbourne'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. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Finally, the Florida Supreme Court did not cure the unlimited discretion exercised by the jury and trial court by its recitation of facts. Under Cartwright, Mr. Lightbourne is entitled to relief.

CLAIM V

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. LIGHTBOURNE'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The sentencing court also unconstitutionally found that the crime was committed in a cold, calculated and premeditated manner. The record reflects that the concerns of Maynard v. Cartwright, 108 S. Ct. 1853 (1988), discussed supra, similarly apply to the overbroad application of this aggravating circumstance. As the record in its totality reflects, the jury was never given, and the sentencing court and the Florida Supreme Court on direct appeal never applied, an adequate limiting construction required by Maynard v. Cartwright.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and as applied in this case, in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

This aggravating circumstance was added to the statute subsequent to the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). The constitutionality of this aggravating circumstance has yet to be reviewed by the United States Supreme Court. The United States Supreme Court, however, has set standards governing the function of aggravating circumstances:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 77 L.Ed 2d 235, 103 S. Ct. 2733 (1983). The Court went on to state that:

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

Id. at 2742-2743. Thus, it is evident that certain aggravating circumstances can be defined and imposed so broadly as to fail to satisfy eighth and fourteenth amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing death be narrowly limited. Gregg v. Georgia, 428 U.s. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman as one requiring that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

428 U.S. at 189.

The manner by which Florida (like most states) has attempted to guide sentencing discretion is through the propounding of aggravating circumstances. The United States Supreme Court has held that the aggravating circumstances must channel sentencing discretion by clear and objective standards:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by "clear and objective standards" and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

It is well established that, although a state's death penalty statute may pass constitutional muster, a particular

aggravating circumstance may be so vague, arbitrary, or overbroad as to be unconstitutional. People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976). In People v. Superior Court (Engert), supra, the California Supreme Court struck down an aggravating circumstance that a homicide was "especially heinous, atrocious, and cruel, manifesting exceptional depravity" as unconstitutionally vague and violative of due process, on its face, under the California and United States Constitutions. In Arnold, supra, the Georgia Supreme Court struck down as unconstitutionally vague, under the United States Constitution, an aggravating circumstance that applied when the homicide "was committed by a person who has a substantial history of serious assaultive criminal convictions." 224 S.E.2d at 391-92. The Court held this aggravating circumstance to be unconstitutional under traditional "void for vagueness" standards. 224 S.E.2d at 391. The Court went on to note the special scrutiny (for possible vagueness) required under a death penalty statute.

> This doctrine [vagueness] has particular application to death penalty statutes after Furman v. Georgia, supra, where, if anything is made clear, it is that a wide latitude of discretion in a jury as whether or not to impose the death penalty is unconstitutional.

224 S.E.2d at 391-92.

Section 921-141(5)(i), on its face and as applied, has failed in two respects to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied to virtually every type of first degree murder. This aggravating circumstance has become a "catch-all" aggravating circumstance. Secondly, even where principles have been developed for applying the (5)(i) circumstance, those principles have not been applied with any consistency.

Section 921.141(5)(i), is unconstitutionally vague. Even the words of the aggravating circumstance provide no true indication as to when it should be applied. This is precisely

the flaw which led to the striking of aggravating circumstances in People v. Supreme Court (Engert), supra, and Arnold v. State, supra, and Maynard v. Cartwright, supra.

It is well established that a statute, especially a criminal statute, must be definite to be valid. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

> No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

306 U.S. at 453.

Definiteness is essential to the constitutionality of a statute. The danger of indefiniteness is not simply the lack of notice to the defendant but also the possibility of arbitrary and discriminatory application of the statute:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . .

Grayned v. City of Rockford, 407 U.S. 104, 109 (1972).

The United States Supreme Court has reemphasized that the danger of arbitrary enforcement, rather than actual notice, is actually the more important aspect of the vagueness doctrine. Kolender v. Lawson, 461 U.S. 352 (1983); Smith v. Goguen, 415 U.S. 566, 574 (1974). The need for definiteness is dramatically heightened in the context of capital sentencing. The United States Supreme Court has recognized that death is different from any other punishment which can be imposed and calls for a greater degree of reliability due to its severity and finality. See e.g., Lockett v. Ohio, 438 U.S. 536, 605-06 (1978).

The aggravating circumstance here at issue requires a finding that the homicide,

> was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes.

The requirement of commission in a "cold, calculated, and premeditated manner" gives little guidance as to when this factor should be found. While the word "premeditated" may be meaningful, the adjectives "cold" and "calculated" are vague, subjective terms directed to emotions. See, e.g., Webster's New Twentieth Century Unabridged Dictionary (Second Edition).

This aggravating circumstance has been applied in such a way as to allow it to be applied to virtually any premeditated murder. Moreover, the few originally limiting principles developed by the Florida Supreme Court have been applied in such an inconsistent manner as to render this circumstance arbitrary and capricious. The Florida Supreme Court has discussed this aggravating factor. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, the Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

408 So. 2d at 1032. The Court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. Although the Florida Supreme Court has attempted to require more in this aggravating circumstance than simply premeditation, it has never defined what this circumstance requires. Consequently, this circumstance has been applied in an arbitrary and capricious manner. In Herring v. State, 446 So. 2d 1049 (Fla. 1984), the Court upheld this aggravating circumstance,

where the defendant robbed a store, and then fired a shot, in response to:

> what he believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor.

446 So. 2d at 1057. The Court upheld this aggravating circumstance where the shooting began in response to a perceived threat to the defendant. However, in McCray v. State, 416 So. 2d 804 (Fla. 1982), the Court struck this aggravating circumstance in a robbery-murder situation where the killing had far less provocation than in Herring, supra. In McCray the defendant had stolen several boxes of guns from the victim's van, and was able to get away. 416 So. 2d at 805. He then returned to the victim's van and yelled "This is for you, . . . " and shot the victim three times in the abdomen. Id. McCray did not involve any threat, or perceived threat to the defendant and three shots, designed to kill, were fired. Indeed, in McCray the defendant had escaped from all danger yet this factor was struck. Herring involved a perceived threat, yet the factor was upheld in a similar robbery-murder. The facts in McCray would more logically fit under this circumstance than those in Herring. The inconsistency is clear.

This circumstance has also been arbitrarily applied in cases where the victim was abducted, and then killed. In three cases, the Court relied heavily upon this aspect of the offense in upholding the aggravating circumstance. Hill v. State, 422 So. 2d 816 (Fla. 1982); Smith v. State, 424 So. 2d 726 (Fla. 1983); Justus v. State, 438 So. 2d 358 (Fla. 1983). Yet, in three other cases where there was an abduction the Court struck this aggravating factor. Mann v. State, 420 So. 2d 578 (Fla. 1982); Cannady v. State, 427 So. 2d 723 (Fla. 1983); Preston v. State, 444 So. 2d 939 (Fla. 1984).

This factor has also been arbitrarily applied in cases involving unexpected confrontations with police officers. In

Washington v. State, 432 So. 2d 44 (Fla. 1983), the Florida Supreme Court struck this circumstance. The defendant had been attempting to sell stolen guns when he was confronted by a deputy sheriff. 432 So. 2d at 46. The defendant drew a pistol on the deputy and ordered him to freeze. The deputy spun and the defendant shot him four times. The court held that the evidence was insufficient to support this circumstance. 432 So. 2d at 48. Conversely, in Johnson v. State, 438 So. 2d 774 (Fla. 1983), the court upheld this aggravating factor, although the defendant therein also had an unexpected confrontation with a police officer. The defendant was in the act of fleeing from an offense. Two deputies responded to the call. The Florida Supreme Court summarized the events as follows:

> In the meantime another deputy, Theron Burnham, radioed that he had seen a suspect on the road in question. On arriving in the area Allison and Darrington stopped their car facing Burnham's car. He fired two shots at the deputies and tried to escape across an open field. Allison and Darrington then found Burnham's body in the drainage ditch; he had been shot three times.

Id. There was absolutely no evidence as to what had preceded the shooting of the officer. There was no evidence to exclude the possibility of a confrontation with the deputy. Indeed, that is the most logical inference. In fact, the defendant could not have known he was going to confront a deputy. However, the Florida Supreme Court upheld this circumstance.

The arbitrariness of this aggravating circumstance is further compounded by the Florida Supreme Court's failure to provide a guiding interpretation to the phrase "without pretense of moral or legal justification." The Florida Supreme Court has never attempted to define the phrase or explicitly determine when it applies and when it does not. The Court has only referred to this language in one case. Cannady v. State, 427 So. 2d 723 (Fla. 1983). In Cannady the defendant abducted the night auditor

of a hotel and drove him to a remote area and shot him. 427 So. 2d at 725.

The Court analyzed this factor as follows:

> We find that the state failed to prove beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life.
>
> The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification . . .
>
> Thus, the unlikelihood that the victim threatened or jumped appellant had the appellant's shooting the victim five times are insufficient facts to prove premeditation beyond that necessary to sustain a conviction for premeditated murder. We therefore find that the court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So. 2d at 730-31. It is important to note that this case involved an abduction and shooting of a robbery victim. Again can a defendant's poverty constitute a pretense of moral justification?

The Court has failed to apply this aspect of Cannady in numerous cases, where it seemingly would apply. Indeed, it has failed to apply it where the facts are far less egregious than in Cannady. In Johnson v. State, 442 So. 2d 193 (Fla. 1984), the court upheld the application of this factor. The Court stated:

> On December 4, 1979, Terrel Johnson went to Lola's Tavern in Orange County to redeem a

> pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar and fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the men's room at the end of the bar, intending to tie them up with an electrical cord. The customer lunged at Johnson and Johnson began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun which was kept under the bar. As he was wiping the bar surface to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not according to Johnson, "to see him dead," but to "stop his suffering."

442 So. 2d at 194-95. Thus, in Johnson, there was a pretense of moral justification identical to the motivation for the shooting in Cannady; the victim lunged at him. Additionally, Johnson did not involve the additional heightened premeditation of abducting the victim. Yet the Court upheld this circumstance.

In Herring, supra, the pretense of moral justification should also have applied under Cannady. Nevertheless, the court upheld this aggravating factor with the following analysis:

> In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance.

427 So. 2d at 1057. See also, O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983); Jones v. State, 440 So. 2d 570 (Fla. 1983). Thus, the "without pretense of moral or legal justification" aspect of this circumstance has never been defined and has been arbitrarily and capriciously applied.

This aggravating circumstance has been erratically and inconsistently applied just as the aggravating circumstance at

issue in Cartwright v. Maynard, 822 F.2d 1477 (1987), affirmed sub nom. Maynard v. Cartwright, supra, was unconstitutionally applied. This aggravating circumstance as applied does not genuinely narrow the class of persons eligible for the death penalty. Zant v. Stephens, supra. The vagueness of this circumstance also renders it capable of arbitrary and capricious application. Maynard v. Cartwright, supra. The original limits imposed by the Florida Supreme Court have been applied so inconsistently that this circumstance has failed to narrow the class of persons eligible for death. This inappropriate application of the circumstance was noted by now Chief Justice Ehrlich, of the Florida Supreme Court:

> We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in Section 921.141(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Herring v. State, supra, 446 So. 2d at 1058 (Ehrlich, J.).

The vague wording of (5)(i), and its arbitrary application allows for its application in all premeditated murders. Thus, the court and jury in the State of Florida now have the unbridled and uncontrolled discretion to apply the death penalty in any first degree murder case, whether it is based upon a theory of premeditated murder or felony murder. Because of the inclusion of subparagraph (i), the burden was improperly shifted to the defendant to establish that a life sentence was proper.

Maynard v. Cartwright requires that a limiting construction be applied by the sentencer (through jury instructions and channeled judicial application), and that a limiting construction be provided by the appellate court. That did not take place here. Relief is appropriate.

CLAIM VI

ARGUMENT, INSTRUCTION AND COMMENT BY THE PROSECUTOR AND COURT THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN IAN LIGHTBOURNE'S SENTENCE OF DEATH DIMINISHED HIS CAPITAL JURY'S SENSE OF RESPONSIBILITY FOR THE AWESOME CAPITAL SENTENCING TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, AND MISLED AND MISINFORMED THEM AS TO THEIR PROPER ROLE, IN VIOLATION OF MR. LIGHTBOURNE'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

Presently pending before the United States Supreme Court is Dugger v. Adams, 108 S. Ct. 1106 (1988), previous history in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), modifying on rehearing Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). (Oral argument in Dugger v. Adams was conducted on November 1, 1988.) Also pending before the United States Supreme Court is the Florida Attorney General's petition for writ of certiorari in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc). Certiorari has not been granted in Mann, and the en banc Eleventh Circuit's opinion has not been disturbed.[3]

This claim has been presented to this Court in other cases in habeas corpus proceedings. See, e.g., Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987); Preston v. State, 528 So. 2d 896 (Fla. 1988); Daugherty v. State, 533 So. 2d 287 (Fla. 1988); Jones v. Dugger, 533 So. 2d 290 (Fla. 1988). In those cases, this Court

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[3]Given the pendency of Adams before the United States Supreme Court, that Court granted a stay of execution in Preston v. Florida, No. A-216 (1988), a case involving a Caldwell claim presented by a Florida litigant during the pendency of a death warrant, and has held Mr. Preston's case pending a decision in Adams. Similarly, the United States Supreme Court has held a number of other capital cases presenting Caldwell claims pending a decision in Adams: Ford v. Dugger, No. 88-5582 (1988); Grossman v. Florida, No. 88-5136 (1988); Harich v. Dugger, No. 88-5126 (1988); Spisak v. Ohio, No. 88-5169 (1988).

denied relief on the claim, relying upon its view of the [non]applicability of Caldwell v. Mississippi, 472 U.S. 320 (1985), to the Florida capital sentencing scheme. While acknowledging that this Court has previously held that "Caldwell is inapplicable in Florida," Daugherty, 533 So. 2d at 288; see also Combs v. State, 525 So. 2d 853 (Fla. 1988); Grossman v. State, 525 So. 2d 833 (Fla. 1988), Mr. Lightbourne respectfully urges the Court to reconsider its prior holdings and grant the relief he seeks herein. At a minimum, Mr. Lightbourne respectfully submits that a stay of execution is appropriate given the United States Supreme Court's impending decision in Adams.

As discussed below, there can be no doubt that Mr. Lightbourne is entitled to relief under Mann v. Dugger, 844 F.2d 1446 (11thh Cir. 1988)(en banc). Mr. Lightbourne is undeniably entitled to relief under the Eleventh Circuit panel opinions in Adams as well. Adams and Mann will therefore have a direct effect on the viability of Mr. Lightbourne's sentence of death: if the Supreme Court affirms the Eleventh Circuit's grant of relief in Adams, Mr. Lightbourne's death sentence must be vacated -- the prosecutorial arguments and judicial comments discussed herein violated Mr. Lightbourne's rights to a reliable and individualized capital sentencing determination in the same way as those condemned by the Adams panel and the Mann en banc Court. Given the pendency of Adams before the United States Supreme Court, a stay of execution is more than proper in Mr. Lightbourne's case. See Autry v. Estelle, 464 U.S. 1301, 1302 (1983)(White, Circuit Justice)(granting stay of execution based upon successive federal peition presenting claim related to a claim on which the Supreme Court had granted certiorari); Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986)(petitioner's execution stayed in successive federal habeas action because of pendency of case presenting related claim before Supreme Court);

Tafero v. Dugger, No. 88-5198 (11th Cir. March 7, 1988)(stay of execution granted on the basis of Mann v. Dugger and Harich v. Dugger and because certiorari was granted in Dugger v. Adams); Clark v. State, 13 F.L.W. 548, 549(Fla. Sept. 8, 1988)(Barkett, J., dissenting) (Petitioner's case should be stayed pending United States Supreme Court's decision in Adams). Here, as in Fleming, "[p]rudence dictates that the rush to execution await the Supreme Court's guidance." 794 F.2d at 1484.

In Adams and Mann, relief was granted to capital habeas corpus petitioners presenting Caldwell v. Mississippi claims involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in identical ways in which the comments and instructions discussed below violated Mr. Lightbourne's eighth amendment rights. Ian Lightbourne is entitled to relief under Adams and Mann, for there is no discernible difference between the merits of those two cases and Mr. Lightbourne's case.

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), did not exist at the time of Mr. Lightbourne's trial and direct appeal, see Adams, supra, 816 F.2d at 1495-1501(no eighth amendment basis existed on which a Caldwell claim could be asserted until issuance of decision in Caldwell), and did not exist at the time that Mr. Lightbourne's previous state post-conviction proceedings were conducted. Nor were any precedents then available applying Caldwell's standards to Florida's trifurcated capital sentencing scheme. See Moore v. Kemp, 824 F.2d 847, 852-54 (11th Cir. 1987)(en banc)("[L]ack of clear guidance" from courts at time of filing of first petition concerning claims presented by petitioner in subsequent petition required that petitioner not be charged with knowledge of the legal bases of claims, and that subsequent petition therefore not be dismissed under Rule 9(b).)

The first such case was Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). Adams makes clear that no procedural bars can be applied against Mr. Lightbourne's claim. See Adams, supra, 816 F.2d at 1495-1501. Mr. Lightbourne's case in fact proceeded into the federal system and his first petition -- like the first petitions in Adams, supra, and Tafero, supra -- was filed in the United States District Court before Caldwell v. Mississippi had been issued. See Adams v. Dugger, 816 F.2d at 1494-1496 and n.2 (Petitioner did not abuse the writ by presenting his Caldwell claim for the first time in a second federal habeas petition filed after the issuance of the Caldwell opinion because Caldwell is a "new law" precedent which was unavailable "at the time of filing his first petition."); see also Tafero v. Dugger, No. 88-5198 (11th Cir. March 7, 1988)(stay of execution granted on the basis of a Caldwell claim presented in petitioner's second federal habeas corpus petition; claim had not been presented in initial petition, which was filed before the issuance of the Caldwell opinion). On the basis of Mann v. Dugger and Adams, a stay of execution and relief are warranted.[4]

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[4]There can be no doubt that Mr. Lightbourne's claim is, at a bare minimum, "debatable among jurists of reason," Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), and therefore that a stay of execution is warranted. As discussed in this petition and its accompanying memorandum, the facts of Mr. Lightbourne's case are virtually indistinguishable from the facts of Adams v. Dugger and Mann v. Dugger, supra. The prosecutorial and judicial comments in these cases and Mr. Lightbourne's case are the same. Jurists of reason in the state and federal courts have in fact been divided on this very issue since the issuance of Adams, 804 F.2d 1526. Compare Mann v. Dugger, supra, and Adams v. Dugger, supra (granting federal habeas corpus relief to Florida capital petitioners whose sentences of death were obtained in violation of Caldwell v. Mississippi), with Daugherty v. State, 13 F.L.W. 638 (Fla. Nov. 1, 1988)("[T]his Court has determined that Caldwell is inapplicable in Florida."), and Combs v. State, 525 So. 2d 853 (Fla. 1988)(same). Of course, the pendency of Adams before the United States Supreme Court and of the other cases held pending Adams, discussed above, demonstrates, at a minimum, that this claim is "debatable among jurists of reason," Barefoot, supra, 463 U.S. at 893 n.4, and that a stay of execution is warranted.

This is the first opportunity Mr. Lightbourne has had, post-Caldwell, to present his claim. See, e.g., Adams v. Dugger, supra; Tafero v. Dugger, supra; see also McCorquodale v. Kemp, 829 F.2d 1035, 1036-37 (11th Cir. 1987)(Caldwell represents "new law" requiring merits review in successive federal habeas action involving petitioner whose first petition was filed before issuance of Caldwell opinion).

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial reduction of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Lightbourne's trial. Caldwell and its application to Florida is the quintessential example of a legal issue about which reasonable jurists differ. The state and federal courts cannot agree about Caldwell, compare Combs v. State, 525 So. 2d 853, 854 (Fla. 1988)("[W]e refuse to apply the Eleventh Circuit's decisions" . . . applying Caldwell in Florida); Daugherty v. State, supra, 13 F.L.W. 638 ("This Court has determined that Caldwell is inapplicable in Florida."), citing Combs, supra; and Grossman v. State, 525 So. 2d 833 (Fla. 1988)(same), with Mann v. Dugger, supra, 844 F.2d at 1454-55 (". . . the Florida jury plays an important role in the Florida capital sentencing scheme . . . 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 has 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."), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified sub nom.,

Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). Neither can the members of the Florida Supreme Court agree. Compare Combs v. State, supra, 525 So. 2d at 861 (Fla. 1988)(Barkett and Kogan, JJ., concurring in part and dissenting in part)("Caldwell indeed is applicable to Florida's sentencing scheme . . . [and] appellant's Caldwell claim should be sustained under the analysis of Justice O'Connor's concurrence, which constitutes the essential holding on which a majority of the Caldwell court agreed"), with Combs, supra (Overton, J.)(majority opinion)("[W]e refuse to apply" Caldwell to Florida); compare Grossman, supra (majority opinion), with Grossman, 525 So. 2d at 851 (Barkett, J., specially concurring); compare Daugherty, supra (refusing to apply Caldwell to Florida capital sentencing proceedings), with Clark, supra, 13 F.L.W. at 549 (Barkett, J., specially concurring)(Petitioner's case is controlled by Mann v. Dugger). See also Foster v. State, 518 So. 2d 901, 902-03 (Fla. 1987)(Barkett, J., specially concurring)("[T]he Eleventh Circuit has interpreted Caldwell . . . as applicable to Florida's capital sentencing scheme . . . I believe this is correct and cannot join the majority's conclusion to the contrary . . . In Adams, the Eleventh Circuit specifically concluded that Caldwell constituted a fundamental change in the law . . . Although we are not bound by this conclusion, . . . it is nevertheless both persuasive and manifestly correct.")

The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), has determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when, as here, judicial instructions and prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra; see also Adams v. Dugger, supra. In Mr. Lightbourne's case, the judicial and prosecutorial instructions, comments, and argument went far beyond the standard jury instructions. Mr. Lightbourne's case is

thus controlled by and cannot be distinguished from Adams and Mann -- a stay of execution and post-conviction relief are proper.

Because reasonable jurists disagree on the issue, certiorari was granted in Adams. Because reasonable jurists disagree, a stay is warranted here. Because Mann makes Mr. Lightbourne's entitlement to relief clear, the Writ should issue.

Mr. Lightbourne's Caldwell claim falls squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla. 1980), and Downs v. Dugger, supra. In this regard, the Eleventh Circuit has explained:

> We note that statements regarding appellate review such as those involved in Caldwell had been held to be reversible error as a matter of state law by a number of states. Caldwell, 105 S.Ct. at 2642. In fact, several pre-Furman cases in Florida held that remarks by the trial judge or the prosecutor regarding appellate review constituted reversible error. E.g., Pait v. State, 112 So.2d 380, 383-85 (Fla.1959) (prosecutorial statements regarding appellate review held reversible error); Blackwell v. State, 76 Fla. 124, 79 So.2d 731, 735-36 (1918) (prosecutorial comments regarding appellate review approved by trial judge held reversible error). The mere fact a practice may be condemned as a matter of state law, however, does not indicate that the same practice constitutes an Eighth Amendment violation. As the Supreme Court noted in Ramos, "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1014, 103 S.Ct. at 3460.
>
> Further, at the time of Adams' first habeas petition, this Circuit had considered the argument that prosecutorial and judicial comment on the appellate process rendered a petitioner's trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment. E.g., Corn v. Zant, 708 F.2d 549, 557 (11th Cir.1983), cert. denied, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984)(judge's reference to right of automatic appeal did not render trial fundamentally unfair); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir.1983), rev'd on reh'g en banc on other grounds, 721 F.2d 1493 (1983), cert. denied, 466 U.S. 954, 104 S.Ct. 2161, 80 L.Ed.2d 546 (1984) (prosecutor's remark regarding appellate review did not render trial fundamentally unfair). The fact Adams may have had a basis

for raising a due process claim by analogy to these decisions at the time of his first habeas petition, however, does not indicate that his failure to raise the Eighth Amendment claim he now raises was the result of intentional abandonment or inexcusable neglect. It is clear that not every claim that implicates the fundamental fairness standards embodied in the due process clause necessarily implicates the Eighth Amendment as well. Indeed, although both Corn and McCorquodale were capital cases, neither gives any indication that the Eighth Amendment is implicated by statements regarding appellate review. Both assume that the proper analysis of such a claim is under the fundamental fairness standard of the due process clause as enunciated in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The distinction between claims that implicate the fundamental fairness standards embodied in the due process clause and those that implicate the Eighth Amendment has been recognized from the inception of the Supreme Court's modern Eighth Amendment jurisprudence. The year before the Supreme Court held in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), that Georgia's death penalty statute violated the Eighth Amendment, the Court rejected the contention that discretion in imposing the death penalty violated the fundamental fairness standards embodied in the due process clause of the Fourteenth Amendment. McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). See Lockett v. Ohio, 438 U.S. 586, 599, 98 S.Ct. 2954, 2961, 57 L.Ed.2d 973 (1978)(plurality opinion)("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in McGautha became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in Furman."). In fact, the three dissenting justices in Caldwell argued that the claim involved in that case did not implicate the Eighth Amendment and should have been analyzed instead as a due process claim. Then Justice Rehnquist stated that he found "unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the statements" in Caldwell, and argued that the Court's inquiry should have been the due process inquiry as to "whether the statements rendered the proceedings as a whole fundamentally unfair." 105 S.Ct. at 2650 (Rehnquist, J., dissenting)(joined by Burger, C.J., and White, J.).

Adams v. Dugger, 816 F.2d at 1496 n.2. The claim is before this Court on the merits.

Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.[5] The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. Caldwell is a substantial change in law because it established the eighth amendment principle.

Caldwell also substantially changed the standard of review, cf. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(because Hitchcock v. Dugger changed standard of review, Hitchcock claims cognizable in Florida post-conviction actions), pursuant to which issues must be analyzed: under Caldwell, the State must show that comments such as those provided to Mr. Lightbourne's sentencing jury had "no effect" on their verdict. Id. at 2646. No opinion had so held before Caldwell was announced. Compare Caldwell, supra, at 2646 ("Burden on State under "no effect' standard), with Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (Burden on petitioner under "fundamental unfairness" standard). Cf. Thompson, supra (Hitchcock changed standard of review); Downs v. Dugger, supra (same).

In sum, the legal basis of Mr. Lightbourne's claim was simply not available until Caldwell was decided. See Adams v.

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[5]On this basis alone the merits of Mr. Lightbourne's claim would be properly before this Court. No procedural bar or abuse of writ bar can be applied against Mr. Lightbourne's claim, for the Caldwell errors discussed in this petition "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Ian Lightbourne should have been sentenced to die.]" See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986); see also Moore v. Kemp, 824 F.2d 847, 857 (11th Cir. 1987)(en banc)(under "ends of justice" analysis, merits of claim involving unreliable and "wrongful" death sentence should be heard).

Dugger, supra; See also Potts v. Zant, 638 F.2d 727, 740 (5th Cir.), cert. denied, 454 U.S. 877 (1981)(under "ends of justice" analysis, successive peitioner's claim should be heard given an intervening change in law making the claim viable); Reed v. Ross, 468 U.S. 1 (1984).

Moreover, the "ends of justice" would still require that the merits of Mr. Lightbourne's claim be heard, and that a stay of execution and habeas corpus relief be granted. See Smith v. Murray, 106 S. Ct. 2661 (1986); Moore v. Kemp, 824 F.2d 847, 857 (11th Cir. 1987)(en banc). The "ends of justice" require that the merits of a claim be heard where the claim demonstrates that a sentence of death is fundamentally unreliable or "wrongful", Moore, supra, 824 F.2d at 857, or where the claim "pervert[ed] the jury's deliberations" concerning the petitioner's sentence. Smith v. Murray, supra, 106 S. Ct. at 2668. Mr. Lightbourne's is such a case.

B. MR. LIGHTBOURNE'S ENTITLEMENT TO RELIEF

At all trials there are only a few occasions when jurors learn of their proper role. At voir dire, the prospective jurors are informed by counsel and, on occasion, by the judge about what is expected of them. When lawyers address the jurors at the close of the trial or a segment of the trial, they are allowed to give insights into the jurors' responsibility. Finally, the judge's instructions inform the jury of its duty. In Mr. Lightbourne's case, as in Adams and Mann, at each of those stages, the jurors heard statements from the judge and/or prosecutor which diminished their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform.

Throughout the proceedings, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial

and their nonresponsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who would determine the facts. As to sentencing, however, they were told that the responsibility was not theirs but rested solely with the judge, and that the jurors "just vote[] their own thoughts."

Adams v. Wainwright and Mann v. Dugger make clear that proceedings such as those resulting in Mr. Lightbourne's sentence of death violate Caldwell and the eighth amendment. In Adams, as in Mr. Lightbourne's case, the trial judge told the jury that responsibility for sentencing was his alone, and that only the court decided the sentence. In Mann, as in Mr. Lightbourne's case, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. There also, as here, the comments were then "sanctioned", cf. Caldwell, supra,[6] by the trial court's instructions, instructions which furthered and placed the court's "imprimatur" on the prosecutor's misinformation. See Mann, 844 F.2d at 1458. In Adams, the Eleventh Circuit held:

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[6]The Eleventh Circuit has explained:

> 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).

Mann, supra, 844 F.2d at 1456. As shown infra, the misinformation and jury minimizing statements made by the prosecutor in Mr. Lightbourne's case far exceeded what was said in Caldwell and were almost identical (and in many ways more egregious) than what was said in Mann. The trial judge in Mr. Lightbourne's case, as in Mann, not only failed to correct this misinformation, but "expressly put the court's imprimatur on the prosecutor's . . . misleading statements," Mann, 844 F.2d at 1458, through his own comments and instructions.

> Caldwell involved prosecutorial comments during closing argument informing the jury that its decision was not final because it was subject to automatic review by the state supreme court. 105 S.Ct. at 2638. The Supreme Court found that these comments violated the Eighth Amendment because they diminished the reliability of the jury's "determination that death is the appropriate punishment in a specific case" and created a bias in favor of imposition of the death penalty. Id. at 2640. Review of Adams' case in light of the concerns expressed in Caldwell shows that the judge's statements to Adams' jury created a similiar unreliability with regard to the determination that death was the appropriate punishment for Adams.
>
> . . .
>
> As in Caldwell, the real danger exists that the judge's statements caused Adams' jury to abdicate its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. Because in Adams' case the jury's recommended sentence of either life or death would fall within the wide area of deference established by the Tedder standard, Adams might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence were allowed to stand. See Caldwell, 105 S.Ct. at 2641. Therefore, we find that the trial judge's seriously misleading statements regarding the importance and effect of the jury's recommended sentence created an impermissible danger that the recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable, and reverse the district court's denial of Adams' habeas petition.

Id. at 1532-33. In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," id. at 1454, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that 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 has 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. at 1454-55. There is absolutely no principled factual or legal distinction between Mr. Lightbourne's case and Adams and Mann. The comments, argument and judicial instructions provided to Mr. Lightbourne's jurors were as egregious as those in Adams and Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

1. Voir Dire

Here, the trial judge opened voir dire by explaining, as the judge in Adams v. Wainwright explained, that it would be the court's job to determine the sentence, not the jury's:

> In this case the State has indicated, since it is a capital case, that if the Defendant is found guilty of the major charge, to wit: First degree murder, that the State is going to be asking in a second phase that the Jury recommend the death penalty. Now, the way this works in a case such as this is that, first, there's a trial by 12 persons who decide the guilt or innocence of the accused. Now, if he is found guilty of murder in the first degree, the maximum -- maximum punishment for that, the highest punishment, could be death by execution in the Florida electric chair, and there's some other choices. Now, if he is found guilty, that's strictly a Jury question, if found guilty or innocent, but if he is found guilty of that -- of that crime, then the State will ask in a separate proceeding by the same Jury after you determine guilt or innocence of the Defendant to recommend to the Court what penalty should be given, whether it should be death or mercy. Now, I want you to know that the second phase of that trial is just a recommendation by the Jury. The Jury doesn't decide what happens -- whether he gets death or life imprisonment but the Court does. That would be my job at that point, but you do make a recommendation.

(R. 355)(emphasis supplied). Thus, from the very beginning of the trial, the jurors understood that the judge would "decide what happens" -- that sentencing was the judge's "job". This is just what occurred in Adams. See, e.g., 804 F.2d at 1528("You are merely an advisory group to me in Phase Two. . . . [W]hether

or not you're going to put the man to death or not, that is not your decision to make. That's only my decision to make. . . .").

At voir dire, the prosecutor also explained and admonished, as the prosecutor in Mann v. Dugger explained and admonished, that the jurors' role at the penalty phase would be essentially insignificant:

> Okay. Now, did you understand, too, when the Court explained it to you that under the law of Florida if after you've listened to all of the evidence you have an abiding conviction to a moral certainty that this Defendant is guilty beyond a reasonable doubt, all of you would vote, if you felt he was, and all 12 of you would vote to find him guilty of murder in the first degree, that would be what's known as phase one, your finding guilty or not guilty or guilty of some lesser included offense. In phase two, it's not a unanimous verdict but a majority vote, and if seven of you voted life and give of you voted death, you'd make that recommendation to the Court. He could give him life or death, whatever he felt was appropriate.

(R. 413-14)(emphasis supplied). This is just like Mann. See, e.g., Mann, 844 F.2d at 1455("The recommendation you make to Judge Federico in [the sentencing] portion of the trial is simply a recommendation, and he is not bound by it . . .."). In Mr. Lightbourne's case, as in Mann, the effort to minimize the jury's sense of responsibility was persistent:

> Q. And I guess you understand that if you're -- the 12 of you make the decision of guilt or innocence and it's unanimous; all of you have got to agree, and then on phase two of whether it's aggravating where you recommend death or life, everybody just votes their own thoughts. It hasn't got to unanimous; you understand that?
>
> A. Yes.
>
> Q. Okay, and that ultimately rests up to His Honor, the Judge, to make that decision. . . .

(R. 424)(emphasis supplied). Cf. Mann, 844 F.2d at 1455("You understand you do not impose the death penalty; that is not on your shoulders. . . . Again, that decision rests up here with the law, with Judge Federico . . .").

> Q. A lot was talked about yesterday with regards to capital punishment. The Judge touched on one point. I don't think it got picked up too much and expounded upon very much; so I want to touch on it if I may. Do you understand, ladies and gentlemen, we've talked about a two-phase trial here. The first phase is strictly for the purpose of determining innocence or guilt and if guilt what degree of guilt, and if in that first phase the Jury were to say, yes, this Defendant beyond and to the exclusion of every reasonable doubt is guilty of first degree murder, then there is a second phase. It may be immediately after the trial. There may be a day or two break, but the same Jury is going to come back and hear additional evidence and that evidence is going to consist perhaps of things you didn't hear in the first trial. It will be surrounding mitigating circumstances and aggravating circumstances, and by a majority vote the Jury makes a recommendation to the Court. Now, what I really want to ask you about is: Do you realize that that recommendation with regards to the second phase is not binding upon the Court. Do you understand that?
>
> (Prospective Jurors indicated affirmatively).
>
> Q. I don't know whether anybody caught that. In other words, if the Jury recommends life, the Court can overrule you and sentence the Defendant to death; or if the Jury recommends death the Court, after a further investigation and even taking other matters into consideration, can say, no, I'm going to sentence the Defendant to life. You understand that that is a recommendation only. You understand that?
>
> (Prospective Jurors indicated affirmatively).

(R. 491-92)(emphasis supplied)(See also R. 536 ["You realize that whatever you say is not binding on the Judge."]). Cf. Mann, 844 F.2d at 1455("You . . . understand that the ultimate responsibility rests with the Court; that it's not the jury's responsibility?"); id. at 1456("[The judge] may have the opportunity to learn more before he imposes a sentence."). These and other similar comments set the responsibility-minimizing tone when the jurors were first introduced to the proceedings, on voir dire.

The trial court's own comments and instructions during voir dire, as in Adams, informed the jury in no uncertain terms of the jury's lack of responsibility for sentencing, and as in Mann,

Adams, and Caldwell, sanctioned the prosecutor's efforts. The prosecutor followed up on the court's comments to make sure that the jurors understood themselves to have little or no responsibility for deciding whether Mr. Lightbourne would live or die. He emphasized that the jury's role was only to return an essentially insignificant "recommendation," that the jurors would just vote their "thoughts" at sentencing, and that the sentencing decision was a burden that only the judge would carry.

2. Guilt Phase Instructions and Comments

The responsibility-diminishing theme established in voir dire continued into the guilt phase, where the judge provided comments and instructions to the jurors which emphasized their lack of importance at sentencing. During guilt phase instructions, the court informed the jurors:

> A person who has been convicted of murder in the first degree shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole, or death, as may be determined by the Court at a later proceeding.

(R. 1421)(emphasis supplied).

> If you find the Defendant guilty of murder in the first degree, then at a later proceeding you will render an advisory sentence to the Court recommending that the Defendant by sentenced to life or death. The Court may accept such recommendation and sentence the Defendant as recommended, or it may under certain circumstances reject such recommendation and sentence the Defendant to either life or death.

(R. 1424)(emphasis supplied). Finally, the court instructed the jurors that they were "to disregard the consequences of your verdict" (R. 1429).

After the verdict had been returned and the jurors were being excused for the day, the court informed them that they would have to return for the penalty phase but that the penalty phase "doesn't take that long" because it is not like "a jury trial:"

> BY THE COURT: Members of the Jury, what we're going to do now is have a second phase of this trial and if it's convenient with everybody we'd like to have it next Friday at nine o'clock. Is that convenient? Everybody going to be in town then? Okay. That phase normally doesn't take that long, probably be finished by twelve. It depends on how long you all deliberate but it usually doesn't take that long, the second phase, because we don't have the evidence and so forth that we have in a jury trial.
>
> . . .
>
> I think I told you what that second phase is about, is to hear any aggravating factors and any mitigating factors in connection with your recommendation to the Court, an advisory opinion as to whether death or life. Okay?

(R. 1438-39)(emphasis supplied). Thus, the jurors were sent home knowing that their role at the upcoming penalty phase was insignificant, in contrast to the "jury trial" in which they had just participated.

3. Penalty Phase Argument and Instructions

The prosecutor closed at the penalty phase with an argument designed to impress upon the jurors that Mr. Lightbourne's fate was not in their hands, but in the judge's, and that all the jurors were to do was to provide their "thoughts":

> This has been a -- probably a long six days for all of you and, as you know, you're gathered back here today to make a recommendation only to the Court as to what you, sitting as the voice and conscious of the community, have to say about this crime, our law, and what the facts and circumstances indicate to you ought to be the penalty. I'm sure this has been weighing on your minds the last six days and either today or if not today very shortly is going to be the longest day in that man's life and that man's life because he alone is to decide what Ian Lightbourn's fate is to be. That is not to say, Ladies and Gentlemen, that your recommendation is not very important; it is, because the State of Florida and Judge Swigert need and want to know what Marion County has to say about these things. The State has put on no additional evidence and we rely solely on what you heard about the facts and circumstances of this crime, and in a few moments after I have finished speaking and Mr. Fox has had an opportunity the Judge

> is going to give you some instructions that are a great deal shorter than the instructions you heard before and by a majority vote you must tell us what you think.

(R. 1456-57)(emphasis supplied).

> [I]n a few minutes the Defendant is going to be up here asking you to show mercy for mercy he would not give. He's going to ask you for consideration that he would not show. He's going to suggest to you that you are in a position to pull the switch, push the button. You're not; you're not, and don't let him convince you that you are going to be guilty of anything or that you should be paranoid for any decision you voice, because you shouldn't. Your decision is very important, but that's that man's job, and if any paranoia or guilt should ever fall on anyone's shoulders it would be his, not yours.

(R. 1464)(emphasis supplied). The prosecutor's message was clear: the jury should not feel "guilty" or "paranoid" about its decision because that decision would not count -- sentencing was the judge's "job" and all responsibility fell on "that man's" shoulders. Cf. Mann, 844 F.2d at 1456("What I'm suggesting to you is that the ultimate responsibility for the imposition of the sentence rests with Judge Philip Federico.")

The jury, as if their sentencing determination were but a political straw poll, were told that they were merely a voice of the community, providing a view which could be taken for whatever it was worth by the true sentencing authority who carried the entire responsibility on his shoulders -- the judge.

During instructions at the penalty phase, the jurors were time and again told that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit. At the commencement of the penalty phase, the trial judge instructed the jury as follows:

> Ladies and Gentlemen of the jury, you have found the Defendant guilty of murder. The punishment for this crime is either death or life imprisonment. Final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what

> punishment should be imposed upon the Defendant.

(R. 1452)(emphasis supplied). Cf. Mann, 844 F.2d at 1458(Jurors told that "the final sentencing decision rested 'solely' with the judge of this court." [Emphasis in original].)

At the end of the penalty phase the judge explained:

> Members of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the Defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law, which will now be given to you by the Court and render to the Court an advisory sentence.

(ROA 3198-99)(emphasis supplied). Cf. Mann, 844 F.2d at 1458("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original].)[7] These instructions, and the trial judge's earlier comments, like the instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Id. at 1458.

C. RELIEF SHOULD NOW BE GRANTED

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . 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

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[7]Given the uncorrected prosecutorial misstatements described above there can be no question that here, as in Mann, "when the jurors heard the trial judge say 'as you have been told,' they understood the reference to be the prosecutor's portrayal of their role." Mann, 844 F.2d at 1458 n.14. None of the prosecutor's misleading comments were ever corrected by the judge. To the contrary, the judge took them a step further.

the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Lightbourne's jurors, and condemned in Adams and Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by prosecutor and judge at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the "critical" role of the jury, Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), was substantially minimized.

The prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi. Indeed, there can be little doubt that the egregiousness of the jury-minimizing comments here at issue and of the judge's own comments and instructions surpassed what was condemned in Caldwell.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. See Mann, 844 F.2d at 1456. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Id. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Lightbourne's case, it is obvious that the jury was equally (if not more egregiously) misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements

were not remedied by the trial court. In fact, as in Adams, the trial court expressly told the jurors that they did not "decide what happens" regarding the sentence.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role. See Mann, supra; Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986); see also Tedder v. Sate, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus, the 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. See Mann v. Dugger, 844 F.2d at 1450-55(discussing critical role of jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as a "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, supra, 804 F.2d at 1529. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. Mann, supra; 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. Lightbourne's jury, however, was led to believe that its determination meant very little, as the

judge was free to impose whatever sentence he wished. Cf. Mann v. Dugger.

In Caldwell, 105 S. Ct. 2633, the Court held "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 lies elsewhere," id., 105 S. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645. The same vice is apparent in Mr. Lightbourne's case, and Mr. Lightbourne is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Lightbourne's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640.

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 (emphasis supplied).

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

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

Adams v. Wainwright, 804 F.2d at 1531.

Caldwell, Adams, and Mann teach that, given comments such as those provided by the judge and prosecutor to Mr. Lightbourne's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at

2646. This the State cannot do. Here, as in Adams, the significance of the jury's role was minimized, and the comments at issue "created a danger of bias in favor of the death penalty." Id., 804 F.2d at 1532.

Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the two statutory mitigating factors found by the trial judge were more than a "reasonable basis" which would have precluded an override. See Brookings v. State, supra, 495 So. 2d 135; McCampbell v. State, supra, 421 So. 2d at 1075. The Caldwell violations here assuredly had an effect on the ultimate sentence.

This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict -- mitigating circumstances were present and were found.

Mr. Lightbourne has been denied his eighth amendment rights. His sentence of death is neither "reliable" nor "individualized". The Court should enter a stay, and thereafter grant relief.

CLAIM VII

THE PENALTY PHASE JURY INSTRUCTIONS COULD REASONABLY HAVE BEEN READ AS REQUIRING MITIGATING CIRCUMSTANCES TO BE ESTABLISHED BEYOND A REASONABLE DOUBT, IN VIOLATION OF MILLS V. MARYLAND, HITCHCOCK V. DUGGER, AND THE 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 if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Arango v. State, 411 So. 2d 172, 174 (1982).

Here, the prosecutor stated in his closing:

> The Judge is going to outline for you five or six or seven aggravating circumstances which you can consider. You are to consider only those aggravating circumstances and if in your deliberations you make a determination that there are no aggravating circumstances, then your recommendation should be for life, and it's only if you find that there are aggravating circumstances present that you should then look to see if there are mitigating circumstances, and if you find mitigating circumstances you weigh those, too, and decide if the mitigating circumstances outweigh the aggravating circumstances and if they do your recommendation should be for life, . . .
>
> . . .
>
> Now, if you find that any of those factors are present, Ladies and Gentlemen, you must then look to see if there are mitigating circumstances that outweigh those aggravating circumstances, and as I stand here I'm going to have to admit that one of the mitigating circumstances is that the Defendant has no significant prior criminal history. I will agree with that.

There are a number of factors. One is the age of the Defendant, twenty-one. You decided whether at age twenty-one an individual, who has fathered three children, who has a high school education, is mature enough to face the world as a man and not be given some consideration because of his immaturity or his tender years and age.

That's pretty much what I've got to say to you,

(R. 1458, 1463).

The jury was then instructed:

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the Jury are well satisfied and convinced to the extent of having a fully, firm and abiding conviction that the circumstances have been proved to the exclusion of and beyond a reasonable doubt.

Evidence to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment or to death.

(R. 1491-92).

Certainly the prosecutor's closing and the court's instructions were ambiguous, at best, as to how the jury was to determine the presence of mitigating circumstances. However, no distinction was made between the burden for establishing

aggravating and mitigating circumstances. In fact the prosecutor discussed them as requiring the same level of proof, while the instructions explained that aggravating circumstances had to be proven beyond a reasonable doubt.

A reasonable understanding of the instructions and the prosecutor's argument was that the defense bore the burden of proving mitigating circumstances beyond a reasonable doubt. In fact in the court's "Findings of Fact," it placed a burden of proof upon Mr. Lightbourne: "the defendant, Ian Lightbourne, failed to establish by evidence any other mitigating circumstances." (R. 177).

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 v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005. 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).

Here the jury could reasonably have concluded it could not consider a mitigating circumstance unless it was proven beyond a reasonable doubt. This is the very danger at issue in Mills. Precluding a jury from considering evidence of mitigating circumstances denies a capital defendant the right to an individualized sentencing determination. Moreover, under Florida law mitigation does not have to be proven beyond a reasonable doubt. See Fla. Standard Jury Instr. in Crim. Cases. 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.

The jury could have reasonably believed that it should not consider any evidence as mitigating unless the evidence arose from an affirmative presentation by the defense that convinced the jury of the mitigating circumstances' existance beyond a reasonable doubt. In fact the trial court found that no non-statutory mitigating circumstances existed because the defense failed to establish their presence. A reasonable construction of the prosecutor's argument and the court's instructions demonstrates that they placed on Mr. Lightbourne the burden of proof beyond a reasonable doubt on the issue of whether he should live or die.

The instructions thus violated Mr. Lightbourne's rights under under the eighth amendment. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied 108 S. Ct. 2005 (1988). The argument and instructions were ambiguous and could have been misconstrued, thus violating Mills. The instructions "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Ian Lightbourne should be sentenced to death]." Smith v. Murry, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Reasonable jurors could interpret the instructions as placing a burden on the defense to prove

beyond a reasonable doubt that mitigation existed. Mills v. Maryland, 108 S. Ct. 1860 (1988).

Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Lightbourne's rights to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Jackson, supra; Arango, supra; Dixon, supra. The arguments and instructions did more than shift the burden of proof to Mr. Lightbourne: the arguments and instructions told the jury that they should not consider any evidence as mitigation unless the defense affirmatively presented that evidence at the penalty phase. Thus, the jury was precluded from considering mitigating factors that were before them. This was error. Mills and Hitchcock require consideration at this juncture. As a result Mr. Lightbourne's sentence of death should be vacated.

CLAIM VIII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. LIGHTBOURNE OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

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

Dixon. See Adamson v. Ricketts, __ F.2d __, 44 Cr. L. 2265 (9th Cir. 12/22/88)(en banc).

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

In closing at the penalty phase, the prosecutor explained the burden-shifting that occurred once aggravating circumstances were established:

> The Judge is going to outline for you five or six or seven aggravating circumstances which you can consider. You are to consider only those aggravating circumstances and if in your deliberations you make a determination that there are no aggravating circumstances, then your recommendation should be for life, and it's only if you find that there are aggravating circumstances present that you should then look to see if there are mitigating circumstances, and if you find mitigating circumstances you weigh those, too, and decide if the mitigating circumstances outweigh the aggravating circumstances and if they do your recommendation should be for life . . . .

(R. 1458).

In his instructions before the jury retired to deliberate, the judge explained that once aggravating circumstances were found the jury was to recommend death unless the mitigating circumstances outweighed the aggravating circumstances:

> However, it is your duty to follow the law which will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and <u>whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist</u>.

(R. 1488a)(emphasis added).

> If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(R. 1490)(emphasis added).

> Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

(R. 1492)(emphasis added).

The instructions, and the standard upon which the court based its own determination, violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Lightbourne on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Lightbourne'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). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Lightbourne's rights to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See, Jackson, supra; Arango v. State, 411 So. 2d 172 (Fla. 1982); State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also, Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. Caldwell is new law, and this issue is thus cognizable in the instant proceedings. Cf. Adams v. Dugger, supra. The instructions and argument, and the sentencing court's own application of the improper standard, "perverted [the sentencer's determination] concerning the ultimate question of whether in

fact [Ian Lightbourne should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Under such circumstances, the ends of justice counsel that the merits be entertained, that no procedural bars be applied, and that relief be granted.

The trial court's instructions allowed the jury and the court to sentence Mr. Lightbourne to death without ever requiring the State to prove that death was the appropriate sentence. See Moore v. Kemp, supra, 824 F.2d at 847 (ends of justice permit court to entertain claim challenging wrongful sentence of death). Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption and showed that the mitigating circumstances outweighed the aggravating circumstances. Mr. Lightbourne was deprived of rights which, even in any ordinary misdemeanor, are mandated as a matter of fundamental fairness. See, In re Winship, 397 U.S. 358 eighth and fourteenth amendments.[8]

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[8]As indicated, no procedural bars can be ascribed to Mr. Lightbourne's claim: this constitutional error is of the type which "pervert[ed] the jury's deliberations concerning the ultimate question whether in fact [Ian Lightbourne should have been sentenced to die.]" Smith v. Murray, supra, 106 S. Ct. at 2668 (emphasis in original). Moreover, Mr. Lightbourne's claim is also founded Mills v. Maryland, 108 S. Ct. 1860 (1988), Mills did not exist at the time of Mr. Lightbourne's trial or direct appeal. Mills demonstrate that no procedural or other bar can be applied to Mr. Lightbourne's claim.

The focus of a jury instruction claim is the manner in which a reasonable juror could have interpreted the instructions. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). The gravamen of Mr. Lightbourne's claim is that the jury was told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Lightbourne proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence and that life was a possible penalty while at the same time understanding, based on the instructions, that Mr. Lightbourne had the ultimate burden to prove that life was appropriate.

Affirming indisputable principles regarding the heightened reliability required in capital sentencing proceedings, the Eleventh Circuit has found a presumption such as the one employed here to violate the eighth amendment:

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(1970). Mr. Lightbourne's death sentence resulted from a proceeding at which the "truth-finding function" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). His sentence of death therefore violates the

CLAIM IX

THE PROSECUTOR'S COMMENTS AND THE TRIAL COURT'S INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT HAD TO BE RENDERED BY A MAJORITY OF THE JURY MATERIALLY MISLEAD THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF MR. LIGHTBOURNE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but by a simple majority. If a majority does not vote

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> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions

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for death, the jury's recommendation is life; thus, if the jury's vote is split six to six, the jury has recommended life, and the defendant is entitled to that verdict. During the proceedings resulting in Mr. Lightbourne's sentence of death, the prosecutor's comments and the judge's instructions deprived him of that right.

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> which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F. 2d 1469 (11th Cir.), cert. denied, 43 Cr. L. 4051 (1988).

The Eleventh Circuit's concerns about such a presumption echo the concerns emphasized by the United States Supreme Court in its recent decision in Mills v. Maryland, supra. There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

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

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Beginning at voir dire, the prosecutor emphasized to the jury the differences between the vote they would take at the guilt-innocence phase and the vote at the penalty phase:

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> Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

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

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

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

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). The state court failed to apply that constitutionally mandated standard to Mr. Lightbourne's case.

The effects feared by the Jackson and Mills courts are precisely the effects resulting from the burden-shifting instruction given in Mr. Lightbourne's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating

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> Now, did you understand, too, when the Court exaplined [sic] it to you that under the law of Florida if after you've listened to all of the evidence you have an abiding conviction to a moral certainty that this Defendant is guilty beyond a reasonable doubt, all of you would vote, if you felt he was, and all 12 of you would vote to find him guilty of murder in the first degree, that would be what's known as phase one, your finding guilty or not guilty or guilty of some lesser included offense. In phase two, it's not a unanimous verdict but a majority vote, and if seven of you voted life and five of you voted death, you'd make that recommendation to the Court.

(R. 413-14)(emphasis added).

> And I guess you understand that if you're -- the 12 of you make the decision of guilt or innocence and it's unanimous; all of you have got to agree, and then on phase two of whether it's aggravating where you recommend death or life, everybody just votes their own thoughts. It hasn't got to be unanimous; you understand that?

(R. 424)(emphasis added).

The prosecutor returned to this misstatement of the law in his closing at the penalty phase:

> . . . in a few moments after I have finished speaking and Mr. Fox has had an opportunity the Judge is going to give you some instructions that are a great deal shorter than the instructions you heard before and by a majority vote you must tell us what you think.

(R. 1457).

Finally, at the penalty phase, the jury was instructed:

> In these proceedings it is not necessary that the verdict of the Jury be unanimous, but a verdict may be rendered upon the finding of a majority of the Jury.
>
> The fact that the determination of whether or not a majority of you recommend a

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circumstances. Cf. Mills, supra. Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (1973), in considering the appropriate penalty. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra.

sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring your best judgment upon the sole issue which is submitted to you at this time, whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment.

Should a majority of the Jury determine that the Defendant should be sentenced to death, you should recommend an advisory sentence as follows: A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Ian Lightbourn.

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the Jury determine that the Defendant should not be sentenced to death, then you should render an advisory sentence as follows: A majority of the Jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant, Ian Lightbourn.

The law requires that seven or more members of the Jury agree upon any recommendation advising either the death penalty or life imprisonment.

You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that recommendation should be signed by your Foreman and returned into Court, and you will be given these two forms of advisory sentence that I just outlined to you, and as soon as you reach a verdict knock on the door and let us know.

(R. 1492-94)(emphasis added).

It is clear that the prosecutor's comments and the final penalty instructions regarding the jury's vote misled the jury, giving them the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six. Jurors so instructed could quite logically believe that a tied jury was a hung jury. However, such a belief would be in error as the law in Florida provides that a six-six vote is a recommendation of life.

Florida's post-Furman death penalty statute, Fla. Stat. sec. 921.141, requires a jury recommendation of the sentence to be imposed on the convicted capital defendant, but is silent with respect to whether the recommendation must be unanimous or by majority vote. In Alvord v. State, 322 So. 2d 533 (1975), the Florida Supreme Court established that a recommendation for death by majority vote was permissible.

Under Florida's pre-Furman death penalty statute, a conviction of first-degree murder carried a presumption of death unless a majority of the jury recommended mercy. Thus, a six-six decision was a verdict for death. The current law has reversed the former presumption of death: now, the state must attract at least seven votes before the death penalty can be imposed. If the state cannot attract at least seven votes, it has failed to carry its burden of proof on the appropriateness of death. A six-six vote at sentencing is not a hung jury: it is an indication that the jury has not agreed with the state on the appropriateness of the death penalty.

The Florida Supreme Court first established that a six-six jury recommendation is a recommendation for life in Rose v. State, 425 So. 2d 521 (1982). There, the sentencing jury, after deliberating for some time, advised the court that they were tied six to six and that no one would change their minds, and requested further instruction. The trial judge responded by giving the jury an "Allen charge," and the jury responded by returning a seven-five recommendation for death shortly thereafter. The Supreme Court reversed the death sentence and remanded for resentencing, holding that the proper action for the trial judge when confronted by the jury's request for further instructions would have been to instruct the jury that it was not necessary to have a majority reach a sentencing recommendation, because "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." Id. at 525.

In Patten v. State, 467 So. 2d 975 (1985), the jury interrupted their sentencing deliberations to inform the trial judge that they were deadlocked six-six. Rather than a full blown "Allen charge," demanding a majority for either recommendation and excluding as an acceptable alternative a six-six life recommendation, the trial judge merely encouraged them to deliberate further, instructing them:

> If you can agree on a majority to either life or death, without trying to pressure you, by talking it over one more time and agreeing one way or another, and I'm not suggesting any result, but if after trying one more time you can't agree and it's still six/six, I will instruct you to go ahead and sign that verdict form that includes life imprisonment.

Id. at 980. The jury shortly thereafter returned with a seven-five recommendation of death. The Florida Supreme Court reversed and remanded on the authority of Rose. Patten, supra; see also Harich v. State, 437 So. 2d 1082, 1086 (1983).

A six-six jury vote regarding the sentence to be imposed is a life recommendation. It is error in Florida to refuse to instruct the jury that a majority must vote for life before a life recommendation can be returned.

Mr. Lightbourne respectfully submits that the merits of this issue must be addressed. An integral aspect of the eighth amendment analysis upon which Mr. Lightbourne's claim is founded -- Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) -- represents a substantial change in the law, see Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), as does Mills v. Maryland, 108 S. Ct. 1860 (1988). Moreover, no procedural bar can be ascribed to this claim, under Mills and Caldwell, for it involves eighth amendment error which served to "pervert the jury's deliberations concerning the ultimate question whether in fact [Ian Lightbourne should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) (emphasis in original).

In determining whether an instruction misled the jury, a court must determine how a reasonable juror would have understood

the instruction. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), citing, Francis v. Franklin, 471 U.S. 307 (1985) and Sandstrom v. Montana, 442 U.S. 510 (1979). In the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

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

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

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

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any

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

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

In Mr. Lightbourne's case, more than a "substantial possibility" exists that the jury understood its instructions to require a majority verdict for life. A "substantial possibility" thus exists that the jury relied on its incorrect instructions and was effectively precluded from considering the factors before it calling for a life sentence. Mills, supra. Caldwell and Mills represent significant changes in the law, showing that no procedural bar could be applied to Mr. Lightbourne's claim. Adams v. Dugger, supra. The ends of justice require that Mr. Lightbourne's claim be heard, and that a stay of execution and habeas corpus relief be granted.

CONCLUSION AND RELIEF SOUGHT

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL/HAND DELIVERY, to Richard B. Martell, Assistant Attorney General, Department of Legal Affairs, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 27th day of January, 1989.

_____
Attorney