IN THE SUPREME COURT OF FLORIDA

NO. 73,904

THOMAS HARRISON PROVENZANO

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, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Provenzano's capital conviction and sentence of death. On July 18, 1984, Mr. Provenzano was sentenced to death. Direct appeal was taken to this Court. The trial court's judgment and sentences were affirmed. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). 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. Wainwrisht, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwrisht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Provenzano to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledse v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. 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: Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and

reliability of Mr. Provenzano's capital conviction and sentence of death, and of this Court's appellate review. Mr. Provenzano'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. Wainwrisht, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwrisht, 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. Provenzano's claims.

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

B. REQUEST FOR STAY OF EXECUTION

Mr. Provenzano's petition includes a request that the Court stay his execution, presently scheduled for May 9, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Harich v. Dugger, (No. 73,931, Fla. March 28, 1989); Lightbourne v. Dusser (No. 73,609, Fla. Jan. 31. 1989); Marek v. Dugger (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwrisht (No. 69,563, Fla., Nov. 3, 1986). See also, Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwrisht, 483 So. 2d 426 (Fla. 1986); cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

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

11. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, 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. In Mr. Provenzano's case, substantial and fundamental errors occurred in both the guilt and penalty phases of trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE PENALTY PHASE JURY INSTRUCTIONS SHIFTING THE BURDEN TO MR. PROVENZANO TO PROVE THAT DEATH WAS INAPPROPRIATE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND DENIED MR. PROVENZANO HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), MILLS V. MARYLAND, 108 S. CT. 1860 (1988), AND ADAMSON V. RICKETTS, 865 F.2d 1011 (9TH CIR. 1988)(EN BANC).

When Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was pending certiorari review before the United States Supreme Court, this Honorable Court recognized that Hitchcock presented issues which would drastically alter the standard of review which the Court had been applying to claims of error in Florida capital sentencing proceedings. Accordingly, during the pendency of

Hitchcock, the court did not hesitate to stay the execution of petitioners presenting similar claims of relief. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).[1]

On March 27, 1989, the United States Supreme Court granted certiorari review in Blystone v. Pennsylvania, 88-6222, in order to determine whether the eighth amendment was violated by a Pennsylvania capital sentencing proceeding in which the jurors were informed that death would be the appropriate penalty unless the petitioner was able to show that the mitigating circumstances proffered overcame the aggravating circumstances. The petitioner in Blystone asserted that the proceeding violated his rights (under Lockett v. Ohio and Hitchcock v. Dugger) to an individualized and reliable capital sentencing determination because the mandatory nature of the statute restricted the jury's "full" consideration of mitigating evidence. See Petition for Writ of Certiorari, Blystone, supra. (Relevant portions of the Blystone certiorari petition are quoted below.)

Mr. Provenzano herein presents similar fifth, sixth, eighth, and fourteenth challenge to the proceedings actually conducted in his case. Blystone thus presents an issue which should affect the disposition of this petitioner's claim and which, like Hitchcock, may drastically alter this Court's previous analysis. As in Riley, a stay of execution is appropriate here.

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[1] In Riley, a successive post-conviction action, the petitioner urged the court to stay his then-scheduled execution in order to afford him full and fair review of the same issue pending before the United States Supreme Court in Hitchcock v. Dugger. In his petition, Mr. Riley quoted from the certiorari petition in Hitchcock. The showing made by the petitioner in Riley was sufficient to demonstrate that Hitchcock would significantly affect his case, and the Florida Supreme Court therefore stayed the petitioner's execution. As discussed below, Mr. Provenzano herein shows that Blystone v. Pennsylvania, 88-6222 (March 27, 1989)(granting certiorari review), will significantly affect his case, and therefore that he is entitled to the same relief as Mr. Riley.

At the penalty phase of Mr. Provenzano's trial, prosecutorial argument and judicial instructions informed the jury that death was the appropriate sentence unless the defense proved **"mitigating** circumstances sufficient to outweigh the aggravating circumstances" (R. **2042-43).** Such instructions, shifting the burden of proving that life is the appropriate sentence to the defendant, violate the principles of Mullaney v. Wilbur, **421** U.S. **684 (1975),** as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, **865** F.2d **1011** (9th Cir. **1988)** (en banc). In Blystone, supra, the United States Supreme Court granted certiorari review to address a similar challenge. There, as here, the proceedings actually conducted created a mandatory presumption of death and restricted the jurors' **"full discretion,"** Petition for Writ of Certiorari, Blystone, supra, in considering mitigation and in assessing whether death was the appropriate penalty. This violated Mr. Provenzano's rights to an individualized and reliable capital sentencing determination. As the relevant portions of the Blystone petition explained:

> 11. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER [WHETHER] THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER [THE] UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.
>
> The decisions of this Court in the capital context have demonstrated a commitment to the principle that the decision to impose the death penalty reflect an individualized assessment of the appropriateness of death for the particular crime and the particular defendant. The principal (sic), that such punishment be directly related to the personal culpability of a criminal defendant, is the corner-stone of this Court's decisions in Lockett vs. Ohio, **438** U.S. **586 (1978),** Eddings vs. Oklahoma, **455** U.S. **104 (1982),** and Hitchcock vs. Dugger, **107** S.Ct. **1821 (1987).** The principals (sic) have also lead this Court to invalid[ate] mandatory death penalty schemes because they fail to give the jury the opportunity to consider the character and individual circumstances of a

> defendant prior to the imposition of a death sentence. Gress vs. Georgia, 428 U.S. 153 (1976).
>
> The Petitioner concedes that the decisions of this Court have allowed the states to structure or guide the jury's determination of the appropriate penalty. This guiding or channeling function has been approved most recently in Franklin vs. Lynaugh, 108 S.Ct. 2320 (1988). The Petitioner asserts that the mandatory nature of the Pennsylvania Death Penalty Statute [goes] beyond said permissible guiding and improperly limits the full discretion the sentencer must constitutionally have in deciding the appropriate penalty.
>
> Pennsylvania Death Penalty Statute provides that if the sentencer finds that an aggravating circumstance exists, and no mitigating circumstance exist, or if the sentencer finds that aggravating circumstances outweigh mitigating circumstances, the verdict must be a sentence of death. 42 Pa. Const. Stat. S9711 (c) (iv) (Emphasis added). In the instance case, the trial court instructed the jury in accordance with this statutory command (A-151-56).

Petition for Writ of Certiorari, Blystone v. Pennsylvania, pp. 13-14.

A similar flaw was found by the en banc Ninth Circuit in Adamson, supra. There, the Court of Appeals held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable capital sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence

of any single statutory aggravating circumstance.

Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (19840("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give

> the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).
>
> Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

As in Adamson, petitioner's sentencing jury was instructed:

> The state and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidnece that you have already herad, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(R. 2042-43).

The State made it clear in its arguments at the penalty phase that by establishing the process by which aggravating and mitigating circumstances were to be weighed, the legislature intended the defendant to have the burden of proving that life was appropriate:

> Now, the legislature has established certain criteria, and the court is going to instruct you that just because someone commits a murder in our society doesn't mean that the ultimate penalty of death should be imposed. Instead there are certain criteria that you have to look at and evaluate.
>
> There are specified aggravating circumstances that you have to evaluate and determine if, in fact, they exist under the facts in the case. And then there are mitigating circumstances that you likewise

can consider to see if they may outweigh the assravatins circumstances and indicate that death would not be appropriate, an appropriate sentence.

(R. 2175-76)(emphasis added).

To further emphasize the legislature's **"intent"**, the State generously sprinkled its closing with comments such as:

Now, the leaislature has enacted these aasravatins factors, and you're going to be instructed as to them.

(R. 2176)(emphasis added).

Now, let me put up a list that **the** lesislature has seen appropriate for you to consider.

(R. 2188)(emphasis added).

Now, these mitigating factors have been laid out by the leaislature just like the assravatinq factors for you to consider . . .

(R. 2188)(emphasis added). By its continued reference to the legislature's **"directions"**, the State virtually gave the jury no choice but to believe the legislature intended the burden to rest on Mr. Provenzano to prove he should live.

In fact, the prosecutor summed it up for the jury:

Now, the question then becomes, is there or are there sufficient mitigating factors to outweish and overcome the aggravating factors?

(R. 2188)(emphasis added). That, of course, is not **the** question but the prosecutor pounded home the improper and misleading notion.

Now, these mitigating factors have been laid out by the legislature just like the aggravating factors for you to consider, to balance, to weigh, to see if, in fact, the assravatins factors are established, and then do the mitigating factors outweigh these aasravatins factors.

Now, if the mitigating factors don't outweish the aggravating factors, assuming you have found those factors exist, **the** recommendation will be death.

(R. 2188)(emphasis added).

In summing up his expectations of the defense's presentation of mitigation:

> The state would submit to you those aren't sufficient circumstances to rise to the level of a mitigating circumstance to outweigh all the five aggravating circumstances that have been presented to you for you to return a recommendation of life.

(R. 2192-93)(emphasis added).

The Court's instructions then solidified the burden-shifting notion. No curative instructions were given. Rather, the court compounded the error:

> Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of death, of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 2226)(emphasis added). The improper standard was then repeated:

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

(R. 2228)(emphasis added).

Petitioner thus bore the burden of persuasion on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Provenzano's due process and eighth amendment rights. See Mullanev v. Wilbur, 421 U.S. 684 (1975). 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. Provenzano's rights to a fundamentally fair, reliable, and individualized capital sentencing determination -- one which is not infected by arbitrary, misleading or capricious factors. See Adamson, supra;

Jackson, supra. Consideration of the mitigating factors was restricted: such factors could not be fully considered unless they outweighed the aggravating circumstances. This violated Lockett and Hitchcock.

The focus of a jury instruction claim is on "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). A reasonable juror could well have understood that petitioner had the ultimate burden to prove that life was the appropriate sentence, and that only those mitigating factors which outweighed the aggravating factors were entitled to consideration. Death was mandated in this case, unless the petitioner overcame the presumption. The prosecutor and court could not have made this clearer. This violated the eighth amendment.

Indeed, the Eleventh Circuit has recognized that the express application of such a presumption of death violates eighth amendment principles:

> 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 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, 1474 (11th** Cir. **1988).** Here, the presumption was clear in the jury instructions, and a reasonable juror would likely have understood the instructions as imposing such a presumption.

In Mills v. Maryland, **108** S. Ct. **1860 (1988),** the Court focused on the special danger created by improper jury instructions in a capital sentencing proceeding, instructions which, as in Mr. Provenzano's case, could result in the sentencers' failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, **see** Godfrev 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),** auoting 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, **108** S. Ct. at **1865** (footnotes omitted). **Cf.** Hitchcock v. Dugger, **107** S. Ct. **1821 (1987).**

In Mills, the 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); Strombers 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, 108 S. Ct. at 1866-67 (footnotes omitted).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in this case. By instructing the jury that mitigating circumstances must outweigh aggravating circumstances, the prosecution and the trial court unconstitutionally skewed the sentencing process.

In this case, the error cannot be deemed harmless. Statutory mitigation was found by the sentencing court. See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1987)(since mitigation was found by sentencing court "[w]e cannot know" whether the result would have been the same, and the error therefore cannot be deemed harmless). Additionally, significant mitigation was before the jury and court. For example, the jury

heard evidence concerning Mr. Provenzano's substantial psychiatric illnesses. Indeed, substantial mental health mitigating evidence came from the mental health experts called by the State, as well as by the experts called by the defense.

Although disagreeing about Thomas Provenzano's legal sanity under the M'Naughten Rule, all of the psychiatrists who testified explained that statutory and nonstatutory mental health mitigation existed in this case. Dr. Gutman, a State witness, testified that on February 17, 1984, Thomas Provenzano had "the same mixed character and behavior disorder, long term pattern of certain features that appear consistently. They were, a paranoid personality, obsessive, compulsive personality, and a passive/aggressive personality... Inadequate handling of adult situations... It appears to me that this man had shown some regression and deterioration in his general ability to handle life stresses, in the period of time coming up to the January 10th incident..." (R. 1752-1753). He described Provenzano as being a "pretty sick guy, mentally" (R. 1776).

Dr. Kirkland, who also testified for the State, said "...I think its probably obvious, Mr. Kunz, there is no doubt in my mind that Mr. Provenzano has severe problems, amongst them being pretty paranoid. No doubt in my mind about that...." (R. 1740). "My opinion remains that Mr. Provenzano is a very disturbed man with many symptoms of emotional disorder, but that he was legally sane on January the 10th, of 1984." (R. 1741).

Dr. Wilder stated that Thomas Provenzano had a paranoid personality (R. 1814). Dr. Lyons testified that he believed that Mr. Provenzano's violent arrest in August of 1983 frightened him out of his mind (R. 1458-1460) "... that Thomas was suffering from severe untreatable paranoia and was legally sane on January 10, 1984" (R. 1462, 1472).

Dr. Pollack examined Mr. Provenzano 10 days after the shooting and testified that he suffers from a paranoid psychosis

(R. 1537) and that Thomas did not understand that his acts were wrong (R. 1533-1535). The doctor also testified that Thomas Provenzano was legally insane on January 10, 1984 (R. 1540-1542). Dr. Mara, a psychologist, conducted testing. Her testing confirmed Dr. Pollack's account. Other mitigation existed as well.

Where a jury recommends a life sentence, the jury recommendation may not be overridden if "valid mitigating factors are discernible from the record." Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987). "When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988). Thus under Florida law the proper analysis is not whether the mitigation outweighs the aggravation, but whether despite the presence of aggravation, the mitigation present affords a reasonable basis for the exercise of mercy and the imposition of a life sentence. See Hall v. State, 14 F.L.W. 101 (Fla. 1989). The death penalty was intended "to be applied 'to only the most aggravated and unmitigated of most serious crimes.'" Holsworth, supra at 355, quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). The instructions in this case provided erroneous and inaccurate information which placed a non-existent burden of proof upon Mr. Provenzano and applied a presumption of death. The jury should have been instructed that the question for it to resolve was whether after weighing the aggravation against the mitigation, it found the aggravation outweighed the mitigation to such an extent that a death sentence should be imposed. Mr. Provenzano's sentence of death was thus imposed in violation of the fifth, sixth, eighth and fourteenth amendments. Here, the jury's consideration of the mitigating factors present in this case was constrained by the trial court's instructions that death

was presumed unless the mitigating factors outweighed the aggravating factors.

In evaluating claims of capital sentencing error, the Florida Supreme Court has ordered resentencing when the record reflects that mitigation was before the sentencer. See Elledae, supra. Cf. Hall v. State, supra, 14 F.L.W. 101. Mitigation was assuredly before the sentencer in this case. Resentencing is proper.

At a minimum, a stay of execution is proper pending the United States Supreme Court's resolution of Blystone. See Riley v. Wainwright, supra.

CLAIM II

MR. PROVENZANO'S DEATH SENTENCE SHOULD BE VACATED DUE TO INSUFFICIENT AND IMPROPER JURY INSTRUCTIONS AND TRIAL COURT FINDINGS ON THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT.

This claim was presented on direct appeal. The court then affirmed Mr. Provenzano's sentence. Recent changes in eighth amendment jurisprudence, however, demonstrate that the court's earlier disposition was error. Relief is now appropriate.

A. THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE CRIME WAS COLD, CALCULATED AND PREMEDITATED

The jury was instructed that they could find that the crime for which the defendant was to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. 2228). Counsel for Mr. Provenzano objected to this instruction (R. 2134). The trial court erred in letting the jury consider this aggravating circumstance, and in improperly instructing the jury on this aggravating factor.

In order to let the jury consider an aggravating circumstance, there must be sufficient evidence to support

heightened premeditation. Rosers v. State, 511 So. 2d 526, 533 (Fla. 1982). This standard was not applied by the court on direct appeal. Mr. Provenzano's only defense was that of insanity and the evidence presented certainly refuted any heightened premeditation. During the guilt phase, there was testimony that Mr. Provenzano suffered from a major mental illness. Dr. Lyons, a defense psychiatrist, testified that Mr. Provenzano suffered from the diseases of paranoia and Kempf's Syndrome (R. 1461, 1462). Dr. Pollack testified that Mr. Provenzano suffered from the disease of Chronic Paranoia (R. 1533). The State's experts did not refute, and indeed confirmed, the fact that Mr. Provenzano suffered from substantial impairments at the time of the offense. See Claim I, supra (discussing testimony); see also Provenzano v. State, 497 So. 2d 1177 (Fla. 1986)(McDonald, CJ., dissenting).

The court's obligation in interpreting statutory language such as that used in the capital sentencing statute is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So. 2d 787, 789 (Fla. 1978). This Court cited the Webster's Third International Dictionary at 315 (1981), definition of the word "calculate" as "[t]o plan the nature beforehand: think out . . . to design, to prepare or adapt by forethought or careful plan." Rosers v. State, 511 So. 2d 526, 533 (Fla. 1987).

Dr. Lyons made it clear that Mr. Provenzano was incapable of forming the heightened premeditation necessary to think out, to design, to prepare or adopt by forethought or carefully plan:

> Q. Now, did you form any sort of opinion as to the thought processes of Thomas Provenzano as he approached the day of January 10th, of 1984?
>
> A. Yes, sir. I thought between the 1st of August and January 10th as the trial approached he became more and more anxious, more and more upset, more tense about what was going to happen to him in court. And I think that during that period of time he was

preparing himself to ward off any particular attack on his person.

Q. And as the day itself arrived did you form any opinion as to his thought processes when the confrontation now was imminent?

A. I think he was in a highly excited state. He even came to the courtroom the day before the trial date by accident. He was confused about the trial date.

Q. What explanation, if any, can you give the jury regarding his arming himself on the 10th of January, 1984?

A. I think he armed himself to defend himself against the possibility of an attack by the Orlando Police Department, because he was going into the court building, to the courtroom where the officers were present. And this was very dangerous to him.

(R. 1458, 1459).

Dr. Pollack also confirmed that Mr. Provenzano's mental illness rendered him incapable of forming the heightened premeditation necessary to design, prepare or adopt by forethought or careful plan:

Q. Do you believe in your professional opinion that this condition caused him to lose his ability to understand or reason accurately?

A. To a degree, yes, sir.

Q. What is that opinion, sir?

A. I do not believe that he understood his acts were wrong at the time because of the defect.

Q. Can you tell me why and what you base that opinion on?

A. Yes, sir. From a diagnostic standpoint, and sort of run backwards, diagnostically I believe that Mr. Provenzano suffers from a, a chronic paranoid state, or chronic paranoia, if you want to loosen the definition up. This is an illness which has matured over time, which has a waxing and waning quality to is, which tends to incorporate rather specific delusions, persecutory delusions, which cause him to act in a rather self-defensive and, in this particular case, rather aggressive and assaultive mode. Looking at his background, his background in this, specifically looking at his behavior, I think it's chronicled by the material provided from August of 1983 until the present, or until January of 1984. Mr.

> Provenzano went from being a rather meticulous, well-organized individual, and at this point his degree and severity of his paranoia was probably in a waning phase. In August, after his confrontation with police officers, he then became obsessed or preoccupied, overly involved with events involving the police. Since he was touched there were questions about his own sexuality. And he then translated this as being a homosexual plot by the police department to get him. He then became more and more involved with this. His paranoia began to develop. The degree of agitation continued to increase. His adherence to his normal personal hygiene disintegrated. In May of '83 he was described as being a rather meticulous, clean, neat individual. By September he was rather disheveled, dirty, often foul-smelling. Individual's method of clothing eventually change from everyday garb to combat type of clothing.
>
> Q. What is the significance of that?
>
> A. He was gearing up for combat. Plainly and simply, he saw himself in a war, which was declared upon him, and his cognitive abilities could not reason their way out. They were disturbed. They were very disturbed by the events around him. They were very disturbed by his inability to distinguish between series of events around him that had nothing to do with him as opposed to series of events that he believed had something to do with him. He continued to get more and more agitated. And I guess there is an old term that used to be used in psychiatry, probably since now, even though it's not used a lot. I think we have gotten away from it, a catathynic (ph) crisis. What that means is an individual who is disturbed with a psychotic illness, gets progressively more and more agitated until there is an explosion, and is then is followed by almost a period of calm and reorganization. I think if we track Mr. Provenzano's behavior he acted as aggressively as he could in a response to the persecution that he felt.

(R. 1533-1535). Not only did these mental health experts find that Mr. Provenzano's mental state before the incident was influenced if not controlled by the flawed logic of mental illness, but the State's psychiatrists, Dr. Kirkland and Dr. Gutman, also both testified that Mr. Provenzano suffered from a mental disorder.

Dr. Kirkland reported:

Q. Dr. Kirkland, you responded with respect to several question of Mr. Edmund with response with, "Yeah, sounds pretty **paranoid."** Can you explain to the members of the jury what you meant by that?

A. Well, I think it's probably obvious, Mr. Kunz, there is no doubt in my mind that Mr. Provenzano has severe problems, amongst them being pretty paranoid. No doubt in my mind about that. And I'd be -- I try to agree with each one of those statements by Mr., questions by Mr. Edmund that suggested that I would agree with that feeling.

Q. Okay. But now, because you would agree with that feeling or you observed that he has those paranoid problems, does that necessarily mean that he was insane.

A. No, sir.

Q. Okay. In fact, when the, Mr. Edmund asked you the question concerning the narrowing of the paranoid feeling, about the conspiracy of **"they"** to the Police Department, does that necessarily mean the person's inability to distinguish between right and wrong?

A. It does not.

Q. Now, based on all those additional facts that Mr. Edmund has brought to your attention or that you have learned subsequent to your initial diagnosis--

A. (Interposing) Yes, sir.

Q. --does that have any significance or affect on your opinion as you indicated today?

A. My opinion remains that Mr. Provenzano is a very disturbed man with many symptoms of emotional disorder, but that he was legally sane on January 10th, of 1984.

Q. Okay. And Doctor, with respect to the numerous instances of conduct of the Defendant in the past 30 years, do those instances necessarily reflect on his sanity on January 10th, 1984?

A. No, sir.

. . .

Q. Now, even though I think you indicated to Mr. Edmund that it's possible that a delusional system may play an important part in an individual's life, does that

necessarily mean that a person would not know the difference between right and wrong?

A. It does not.

(R. 1741-42)(emphasis added). Dr. Kirkland also found Mr. Provenzano to be a very disturbed man operating under a delusional system. It stands to reason that a mentally ill person operating under a delusional system would be unable to form heightened intent.

Dr. Gutman, another psychiatric expert testifying at the behest of the State, found that Mr. Provenzano was suffering from mental disturbance and that prior to the incident had shown some regression and deterioration:

Q. Doctor, with respect to your examination of him on February 17th, 1984, can you tell the jury what your diagnosis would be with respect to what his mental difficulties were, if any, on that date?

A. On that date I felt that he did have some mixed character and behavior disorder, long term pattern of certain features that appear consistently. They were, were a paranoid personality, obsessive, compulsive personality, and a passive/aggressive personality. Passive/aggressive being a person that might act passively in one spot and then come out and may be yelled at by the boss and then on the way home runs a red light or comes home and yells at his wife for not cleaning up the kitchen and kicks the dog. Inadequate handling of adult situations. So he had those same features. I did feel that he was, there was evidence of for a period of time leading up to this event an adjustment reaction and stress reaction that he was under.

Q. Okay. Now, what do you mean by that, Doctor?

A. Well, it appeared to me that this man had shown some regression and deterioration in his general ability to handle life stresses in the, in the period of time coming up to the January 10th incident. And this could be called a stress reaction or an adjustment disorder. With mixed features and exacerbation or an increase in his basic personality features would be probably the most prominent thing.

(R. 1752-1753). Finally, Dr. Wilder, the third and last psychiatrist who testified for the State, stated that Mr.

Provenzano suffered from the mental defect of a paranoid personality (R. 1814).

The record is clear. Every psychiatrist, whether called by the State or the defense, testified at Mr. Provenzano's trial that Mr. Provenzano suffered from a mental disturbance. This Court interprets statutory language by giving ordinary words their plain and ordinary meaning. **See** Tatzel v. State, 356 So. 2d 787, 789 (Fla. 1978). The American Heritage Dictionary of the English Language, Houghton Mifflin Publishing Company at 260 (1973), defines the word **"cold"** as "not affected by emotion; objective: cold logic." Webster's Ninth New Collegiate Dictionary at 258 defines the word **"cold"** as "[n]ot colored or affected by personal feeling or bias: detached, indifferent, . .

giving the word "cold" from "cold, calculated" it's ordinary meaning, it is plain that there must be an objective plan, design, or preparation by forethought or careful plan, uncolored by emotion, personal bias or feeling based in reality in order to justify a finding of heightened premeditation. All five psychiatrists who evaluated Mr. Provenzano found him suffering from a mental infirmity. Three of those experts, Doctors Lyons, Pollack, and Dr. Kirkland, affirmed that Mr. Provenzano's decisions and actions were predicated upon a delusional system not based in reality. Clearly, Mr. Provenzano's mental condition was such that he was unable to form the heightened premeditation necessary for jury consideration regarding this aggravating circumstance or for the trial court to find this aggravating circumstance.

Mr. Provenzano's mental state pre-empted the possibility that he could objectively design a plan based in reality. The fact that the incident occurred in the Orange County Courthouse amidst scores of law enforcement officers also demonstrated that Mr. Provenzano's reasoning was based on delusion rather than reality. Even the State's theory that Mr. Provenzano's motive

was revenge against two police officers who cited him for misdemeanor disorderly conduct shows irrational thought processes.

This Court has held that the aggravating circumstance that the crime was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification, ordinarily applies in murders which are characterized as executions or contract murders. Cannady v. State, 427 So. 2d 723 (1983). Although this is not an all inclusive definition, the patently irrational actions of a man who is mentally infirm is a far cry from a gangland murder motivated by greed.

Indeed, trial counsel objected and stated that the basis for his objection was that Mr. Provenzano's unrefuted mental infirmity rendered him unable to form heightened premeditation:

> MR. BRAWLEY: Finally, Your Honor, I object to paragraph five in the instructions, which provides, "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."
>
> I believe, Your Honor, that the evidence in the trial from all the persons who testified, especially the doctors, state doctors and defense doctors, all indicated that whatever Mr. Provenzano did he believed was justified in his own mind, whether from self-defense, as the defense psychiatrists have indicated, or simply that he was morally justified in removing the people against whom he had this grudge, as has been the general position of the state's doctors.
>
> Your Honor, I suggest there is no evidence in this trial which would suggest that that paragraph should be read to the jury.

(R. 2134). On direct appeal, however, applying its pre-Rogers standard, the Court rejected the claim.

It cannot be doubted that his aggravating circumstance must be given a limited construction. Recently, in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the United States Supreme Court explained that a death sentence cannot stand where there

has been a failure to apply a limiting construction of a broadly worded aggravating factor in order to channel and narrow the sentencer's power to impose the death penalty. On its face, the "cold, calculated, and premeditated" aggravating factor is so broad as to encompass, potentially, *any* premeditation. For this reason, as the Florida and United States Supreme Courts have made clear, there must be a "narrowing principle" that will focus and limit the breadth of a factor that would otherwise be unconstitutionally vague and over-broad. Maynard, 108 S. Ct. at 1859; see also Godfrey v. Georgia, 446 U.S. 420 (1980); Rogers, supra.

The point was made by then Justice and now Chief Justice Ehrlich, dissenting in part from the Court's decision in Herring v. State, 446 So. 2d 1049 (Fla. 1984). There, the Chief Justice emphasized that the Court has "gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated" under Florida law. "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." Id. at 1058. As the Court has since acknowledged, it did not "adopt Justice Ehrlich's view," Herring v. State, 528 So. 2d 1176, 1178 (Fla 1988), narrowing this aggravating factor to preserve its constitutionally mandated function at sentencing. Without a limiting construction of this sort, the factor is constitutionally unsound. See Maynard v. Cartwright, infra.

Allowing this aggravating circumstance to stand in Mr. Provenzano's case allows an over-broad construction in violation of the eighth amendment. Without doubt, the "cold, calculated and premeditated" aggravating factor could not be found to apply to a mentally retarded defendant. Applying this factor to a defendant who reasons on a delusional plain is clearly an over-broad construction.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Provenzano'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 not hesitate to correct this error.

Moreover, it is clear under Florida law that if an aggravating circumstance is improperly found and any mitigating circumstances are present, as is the case here, a new sentencing proceeding must be held because it is impossible to know the weight given to the improper aggravator by the jury. Elledge, supra. Here, the sentencing judge identified one mitigating circumstance. Since the death sentence was improperly premised in part upon the "cold, calculated and premeditated" aggravating circumstance, Mr. Provenzano's death sentence is unreliable and therefore constitutionally invalid.

Mr. Provenzano's sentence of death is inherently unreliable and fundamentally unfair. Mr. Provenzano was denied his eighth and fourteenth amendment rights. Resentencing is warranted.

B. NEW LAW: MAYNARD V. CARTWRIGHT; ROGERS V. STATE

Since Mr. Provenzano's direct appeal, this Court has redefined the "cold, calculated and premeditated" aggravating circumstance. Rogers v. State, 511 So. 2d 526 (Fla. 1987). In Rogers, this Court held that "'calculation' consists of a careful plan or prearranged design." **Id.** at 533. As the court recognized, Rosers represented a clear change in law from Herring v. State, 446 So. 2d at 1057, where this Court defined the **"cold calculating"** aggravator in an ad hoc, rather than **"all inclusive,"** manner. **Id.** at 1057. This Court's subsequent decisions have plainly recognized that Rosers is indeed a change in law requiring proof beyond a reasonable doubt of a "careful

plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("We recently defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because he was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, petitioner's sentence violates the eighth and fourteenth amendments. The record in this case establishes that Mr. Provenzano was mentally disturbed and thus his thought processes were based on delusion rather than reality (R. 1458-59, 1533-35, 1741-42, 1752-53). Clearly, a mentally disturbed person is incapable of forming heightened intent. On these facts, the offense committed by Mr. Provenzano simply cannot be characterized as the product of a "careful plan" or "prearranged design."

Since handing down Rogers, this Court has reversed several applications of the "cold, calculated and premeditated" aggravator where there was far more of a "careful plan or prearranged design" than here. See, e.g., Hamblen v. State, 527 So. 2d 800 (Fla. 1988)(defendant forced victim to disrobe, she touched a silent alarm, defendant marched her to another room and shot her): Amoros v. State, 523 So. 2d 1256-1257 (after threatening to kill victim's girlfriend, defendant shot victim three times as victim futilely attempted to escape): Lloyd, 524 So. 2d at 397 (victim and five year old son forced into bathroom, victim shot twice).

In Jackson v. State, 530 So. 2d 269 (Fla. 1988), the sixty four year old victim begged for mercy as the defendant bound, gagged and then choked him with a belt. When the victim regained consciousness, Jackson beat the victim's face with the cast on

his forearm, straddled the victim's body and repeatedly stabbed him in the chest. Id. at 270. This Court reversed the application of the cold, calculated, aggravating circumstance to Jackson's offense. Here, as in Jackson, "the evidence does not establish the heightened degree of prior calculation and planning required by . . . Rogers." Id. at 273.

The "cold, calculating and premeditated" aggravator in this case is also constitutionally defective under the United States Supreme Court's decision in Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988). At the time of petitioner's sentencing, there was no principle limiting application of "cold, calculating and premeditated" as required under Maynard. The trial court never gave the jury a limiting instruction, and never provided one itself: it did precisely what Maynard forbids -- it did no more than recite facts.

No limiting construction was provided to the jury, and absolutely no limiting construction was employed by the sentencing court. The "finding" quoted above is all the judge said. This violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Moreover, Maynard makes clear that this Court's previous affirmance of the cold, calculating circumstance -- without articulating and applying a "narrowing principle" -- could not correct the constitutional infirmity of the sentencing jury's unfettered and unnarrowed discretion. Id. The Maynard court rejected just such a claim, holding, "[the Oklahoma Supreme Court's] conclusion that on these facts the jury's verdict . . . was supportable did not cure the constitutional infirmity of the [insufficiently narrowed] aggravating circumstance." Id. Thus, application of the cold, calculated circumstance to petitioner violates not only Rogers, but also Maynard v. Cartwright and the eighth and fourteenth amendments. A stay of execution and habeas corpus relief are appropriate.

In Mavnard v. Cartwriaht, the court looked to state law to determine the appropriate remedy when an aggravating circumstance has been stricken. 108 S. Ct. at 1860. In Maynard, state law required that a death sentence be set aside when one of several aggravating circumstances was found invalid. Id. Similarly, in Florida, the state high court remands for resentencing when aggravating circumstances are invalidated on direct appeal. See, e.g., Schaefer v. State, ___ So. 2d ___, No. 70,834 (Fla. Jan. 19, 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found): cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). Furthermore, in this case, the trial court did determine that mitigation was present (R. 2354) and substantial additional mitigation was reflected in the record. Thus, the striking of this aggravating factor would certainly have required resentencing under Florida law. See Elledge v. State, 346 So. 2d 998 (Fla. 1977)(resentencing required where mitigation present and aggravating factor struck). As this Court recently made clear in Hall v. State, 14 F.L.W. 101 (Fla. 1989), when capital sentencing error is shown, relief is appropriate when the mitigation proffered by the petitioner provides a reasonable basis for a life recommendation. Mr. Provenzano has demonstrated this, and has demonstrated that the writ should issue.

CLAIM III

THE INSTRUCTIONS GIVEN ON THE ISSUE OF INSANITY, MR. PROVENZANO'S SOLE DEFENSE, WERE CONSTITUTIONALLY IMPROPER AND INADEQUATE, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF FLORIDA AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

The guilt phase instructions given in Mr. Provenzano's case did not adequately, constitutionally, or correctly charge the jury on the substantive law applicable to the burdens of proof on the question of the sanity of the defendant. In fact, the instructions given did not even hint that the State had the burden to prove sanity after the defendant's sanity has been made an issue by the defendant. The following are the instructions pertinent to sanity that were read to the jury and sent into the jury room:

> An issue in this case is whether the defendant was legally insane when the crime allegedly was committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity.
>
> If the defendant was legally insane, he is not guilty. To find him legally insane, these three elements must be shown to the point you have reasonable doubt about his sanity:
>
> 1. The defendant had a mental infirmity, defect or disease.
>
> 2. This condition caused the defendant to lose his ability to understand or reason accurately, and
>
> 3. Because of the loss of these abilities, the defendant:
>
> a. Did not know what he was doing, or
>
> b. Did not know what would result from his actions, or
>
> c. Did not know it was wrong, although he knew what he was doing and its consequences.
>
> In determining the issue of insanity, you may consider the testimony of expert and non-expert witnesses. The question you must answer is not whether the defendant is

> legally insane today, or has always been legally insane, but simply if the defendant was legally insane at the time the crime allegedly was committed.

(R. 3298). This instruction, read to the jury, is wholly inadequate. The Florida Supreme Court has in fact ruled that these instructions do not completely and accurately state the law of Florida. Yohn v. State, **476** So. 2d **123 (1985).** Moreover, the instructions are contradictory on their face: for example, paragraphs **2** and **3** contradict each other. It would have been impossible for a reasonable juror to properly understand, analyze, and evaluate the question of insanity and the relative burdens of proof under the instructions given. Indeed, a reasonable juror would have been unable to discern the meaning of the instruction itself.

The proper burdens were never explained and never even provided, in violation of the fifth, sixth, eighth, and fourteenth amendments. **See** In re Winship, **397** U.S. **358 (1970);** Mullaney v. Wilbur, **421** U.S. **684 (1975);** Sandstrom v. Montana, **442** U.S. **510 (1979);** Yohn v. State, infra.

It is clear that the instructions were inadequate under state and federal constitutional analysis. Allowing a conviction and the ultimate penalty of death to stand based on this grossly deficient instruction is fundamentally unfair. It is clear that a conviction must be proven beyond a reasonable doubt. In re Winship, supra. Mr. Provenzano was entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing a crime. Davis v. United States, **160** U.S. **469, 488 (1895).** The inadequate instuction did not give the jury a basis on which to determine if Mr. Provenzano was guilty beyond a reasonable doubt. Indeed, the instruction deprived Mr. Provenzano of his right to present a defense, and to a fair and reliable verdict in a capital case. **See** Beck v. Alabama, **447** U.S. **625 (1980).** In essence, the infirmities in these instructions caused the jury to

determine if Mr. Provenzano was sane at the time of the offense without knowing whether the State bore the burden to prove that Mr. Provenzano was sane beyond a reasonable doubt or whether Mr. Provenzano had to prove that he was insane. It cannot be said that beyond a reasonable doubt the jury reached its verdict utilizing the correct analytical framework. Sandstrom v. Montana, 442 U.S. 510 (1979), Mills v. Maryland, 108 S. Ct. 1860 (1988). Consequently, it is unknown if this jury found Mr. Provenzano guilty of first degree murder beyond a reasonable doubt. The conviction is thus void. In re Winship, 397 U.S. 358 (1970). The fifth, sixth, eighth, and fourteenth amendments require reversal in this case.

This Court has consistently recognized that a conviction cannot stand on an inadequately instructed jury's verdict. Walsingham v. State, 250 So. 2d 857 (Fla. 1971)(failure to instruct on affirmative offense of unlawful abortion); Rodriquez v. State, 396 So. 2d 798, 800 (Fla. 3d DCA 1981)(failure to instruct on defense of justifiable homicide when counsel failed to object); Bagley v. State, 119 So. 2d 400, 403 (Fla. 1st DCA 1960)(failure to instruct on defense of justifiable homicde when counsel failed to object at trial).

Florida has established the right to the defense of insanity. Yohn v. State, 476 So. 2d 123 (Fla. 1985); Hodge v. State, 26 Fla. 11, 7 So. 593 (1980). Mr. Provenzano had the righ to assert this defense. This right, however, was violated. Equal protection, due process, and the eighth amendment cannot be squared with the proceedings resulting in this capital conviction and death sentence.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Provenzano's capital conviction and 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. Wainwrisht, 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 prejudically ineffective assistance of counsel on direct appeal. This issue involved clear violations of the principles of Florida law and the federal constitution There was no reason for counsel not to raise it. Indeed, it virtually "leaped out upon even a casual reading of **transcript."** Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987).

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

CLAIM IV

CRITICAL PORTIONS OF MR. PROVENZANO'S TRIAL WERE HELD IN HIS ABSENCE, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Prior to trial, on May 1, 1984, a hearing was called on several motions, including a defense motion to dismiss the indictment (R. 2245-48), a defense motion to suppress unlawful search (R. 2248-60), and a motion by the Orlando Sentinel to open

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* This Court's reasoning in Yohn demonstrates that fundamental error occurred in this case. The instructions precluded the development of the facts and **"perverted"** and interfered with the jury's ultimate guilt-innocence and sentencing determinations. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). This Horable Court should now correct these errors.

depositions to the public (R. **2260-95**). It is not apparent from the transcript that Mr. Provenzano was present at this hearing, no mention of him is made in the transcript, and his attorneys talked about him as if he were not there (R. **2295**). It is apparent that he was indeed not at that hearing. However, Mr. Provenzano's right to presence was never waived.

That particular motions hearing was a critical stage of the proceedings for Mr. Provenzano. In the discussion concerning the motion to open depositions to the public, the State argued, even though the defense took no position, that the depositions in this case should be closed in order to protect the "due process right of the defendant" in relation to "adverse pre-trial publicity" **(R. 2266-67).**

The State pointed out that "(t)his is a highly publicized case, and the State is ready to produce into evidence **45** exhibits of newspaper articles in the past several months that have been written about this particular case" (R. **2277**). The State further argued that "the insanity of the defendant should not be litigated with the press **. . ." (R. 2278).** The State also mentioned several times that there had been no change of venue motion filed by the defense **(R. 2277; 2283),** a matter that would become very much at issue later on.

As a result of this hearing being held outside the presence of the defendant himself, Mr. Provenzano was never made aware of the consequences of his attorneys' failure (or refusal) to move for a change of venue. Thus, at the start of voir dire, Mr. Provenzano was confused about venue, and believed that the trial would be held in Orlando, but jurors would be bussed in from other parts of the state (See R. **3-15**). Ironically, there too the proceedings were held in Mr. Provenzano's absence, as the State and defense counsel approached the bench, without Mr. Provenzano, and out of his hearing discussed the manner by which the motion for change of venue should be disposed.

Mr. Provenzano was also absent during critical parts of his capital trial, including the jury instruction conference held in the judge's chambers (R. 1821). During the instruction conference, defense counsel failed to object to any improper instructions and agreed to the giving of improper instructions. Mr. Provenzano, however, did not even have the chance to make his own objections, in the face of counsel's inaction, where counsel was continually waiving his presence.

Finally, Mr. Provenzano was absent for a motion for mistrial made after the State's closing argument in the guilt phase (R. 1966). This motion concerned the recording of the shooting which had been introduced into evidence during the trial. As a dramatic highlight, the prosecution played his tape at the end of his closing argument (R. 1265). When Mr. Edmund made a motion for mistrial, he waived Mr. Provenzano's presence, without a knowing and intelligent waivver on the part of Mr. Provenzano.

The absence of a defendant during these critical stages of his capital trial without an express record waiver was fundamental error implicating constitutional rights. In Francis v. State, 413 So. 2d 1175 (Fla. 1982), the Florida Supreme Court reversed a capital conviction when a defendant was not permitted to be present during the exercise of peremptory challenges. Relying both on Fla. R. Crim. P. 3.180 and the fourteenth amendment, the Court found that defendants have a constitutional right to be present during jury challenges as well as a right created by Florida Rule of Criminal Procedure 3.180(e)(4). Such a right must be knowingly and intelligently waived on the record by the defendant before the defendant can be removed from the courtroom. Reversing the conviction in Francis, the Court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom

> upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustemonte, 412 U.S. 218, 83 S.Ct 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Francis, 413 So. 2d at 1178.

Francis is one of a long line of cases which hold a that a defendant has a sixth and fourteenth amendment right to be present during all critical stages of trial. Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1984); Hall v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). "One of the most basic of rights guaranteed by the Confrontation Clause is the accused's rights to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892).

This issue is cognizable in a petition for post-conviction relief because it involves the denial of a fundamental constitutional right. Illinois v. Allen, 387 U.S. 337, 338 (1970); Proffitt v. Wainwright, 685 F.2d 1227, 1260 n.49; Walker v. State, 284 So.2d 415 (Fla. 2d DCA 1972)(resentencing defendant without defendant's presence constituted fundamental error); Cole v. State, 181 So. 2d n. 698 (Fla. 3d DCA 1966).

As in Francis, there is certainly no record waiver in this case of Mr. Provenzano's right to be present. Waiver of a fundamental constitutional right will not be presumed from a silent record. Lewis v. United States, 146 U.S. 1011 (1897); Cf. Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966). Mr. Provenzano here was absent during several stages of his capital trial and pretrial, and there is no evidence of misconduct which would justify his absence. Henry v. State, 94 Fla. 783, 144 So. 523 (1927). This case is not like State v. Melendez, 244 So. 2d 137 (Fla. 1971), where the

defendant freely and knowingly waived any objection after his absence from the courtroom, and subsequently acquiesced and ratified his counsel's selection of a jury during that absence. In any event, it is extremely doubtful that principles of "acquiescence" and "ratification" even apply to circumstances such as those sub judice, where testimony is taken in the defendant's absence.

As stated above, a defendant has an absolute right to be present at all stages of a capital trial. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Proffitt v. Wainwright, 685 F.2d 1277 (11th Cir. 1982); Fla. R. Crim. P. 3.180. In fact, in Cole v. State, 181 So. 2d 698 (3d DCA 1966), the court held that "if the appellant's right to be present was waived without his knowledge and consent or acquiescence it would be such a denial of appellant's rights under the laws of Florida as to render the judgment vulnerable to collateral attack." Cole, 185 So.2d at 701.

In State v. Melendez, which involved a noncapital trial, this Court

> addressed counsel's waiver of defendant's presence during the jury selection process and said that where a defendant has counsel, constructive knowledge of the proceedings may be imputed to defendant but that this doctrine only applied to those cases in which upon defendant's reappearance at his trial, he acquiesces or ratifies the action taken by his counsel during his absence. In Melendez, we explained that upon Melendez's reappearance, the trial judge carefully questioned him as to his knowledge and understanding of his right to be present, and he freely ratified the actions of his counsel in selecting the jury.

Francis v. State, 413 So. 2d 1175 (Fla. 1982). Here, there is no record waiver by the defendant, no acquiescence, nor any ratification in open court. The judge did not question Mr. Provenzano as to his knowledge and understanding of his right to be present as in Melendez. Waiver was noted in two of the three

instances, but it was only by counsel, and it clearly was not a proper or knowledgeable one by defendant.

This issue was not raised by Mr. Provenzano's appellate counsel. This unreasonable failure to raise the issue is a glaring omission which infected the direct appeal process with unreliability. Obviously there was no timely objection made at trial, because trial counsel was the one to waive Mr. Provenzano's presence. However, as the Eleventh Circuit Court has explained:

> We cannot fault the defendant for failing to assert an objection when his attorney -- the individual on whom he depended to preserve his rights -- arranged for him to be removed from the courtroom.

Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985). This issue involved no technical niceties, but Mr. Provenzano's fundamental right to be present at his own capital trial. Appellate counsel's failure to present this issue simply cannot be deemed in any sense "tactical". See Wilson v. Wianwrisht, supra; Matire v. Wainwright, 817 F.2d 1430 (11th Cir. 1987). The failure was inexcusable.

This Court doubtless would have reversed had appellate counsel presented these errors. The errors leaped out of the record to even a casual reader. Appellate counsel's failure undermines confidence in the appellate review process. Wilson, supra; Johnson, supra. This Court's independent review of the record did not serve to cure the harm. As a consequence, Mr. Provenzano's capital conviction and death sentence was allowed to stand notwithstanding the fact that it was obtained in violation of his rights to a fair and impartial jury trial, and simply cannot be allowed to stand under any standard, much less so under the scrutiny which the eighth amendment mandates in capital cases. The proceedings resulting in this conviction and sentence of death stand in violation of the fifth, sixth, eighth, and

fourteenth amendments, and the Court should therefore now correct the errors and grant habeas corpus relief.

In the case at bar, therefore, Mr. Provenzano's absence during portions of his capital trial constitutes fundamental error. Relief is now appropriate.

CLAIM V

THOMAS PROVENZANO WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN THE COURT FAILED TO PROPERLY ADMONISH THE JURY.

Defense counsel filed a pre-trial motion to sequester the jury during trial due to the pervasiveness of pre-trial and trial publicity. Mr. Provenzano's case was such a high profile case the jury was sequestered during trial.

As the court released the jury from sequestration at the close of trial, it instructed:

> THE COURT: Thank you, ladies and gentlemen.
>
> Ladies and gentlemen, as I informed you before the trial started, by your verdict it is now necessary that I have a second hearing before this same jury for the purpose of the jury determining and recommending to the Court a sentence. Because I'm unable to have that immediately I'm going to release you at this time and allow you to return to your home. You'll be notified by the Court when the second hearing is set here in Orlando.
>
> I'll ask you and instruct you, please, in the interim don't discuss this case or how you arrived at your verdict or anything about the case, or let anyone discuss it with you. You're still, in effect, sitting on a jury. I can't keep you sequestered for it will be a couple of weeks anyway before I can set the thing, before the Court's prepared to hear the second phase of it. You don't have to talk to anybody about this case, the press, or anybody else. You never will have to talk to them. But particularly while the case is still pending, and one phase of the case is pending, a very important phase, please don't discuss this verdict. If anybody approaches you about it tell them that you can't discuss it with them. If they persist please report that fact to me when I reconvene you in the immediate future.

I want to thank you for your patience here, and the attentiveness you've shown to the lawyers and the presentation of the evidence.

I at this time, without further a due, I'll excuse you and ask the bailiff to take charge of you, and see that you're transported back to the hotel you have been sequestered in. The sequestering is lifted. But that still doesn't mean that you cannot, you can talk about the case.

Anybody got any questions that they desire to ask me at this time before I dismiss you?

THE JURY: (No response)

THE COURT: Mr. Bailiff, would you please take the jury out. Thank you, ladies and gentlemen. Have a good day.

(WHEREUPON: the jury left the courtroom at 6:55 p.m. after which the following proceedings were had:)

THE COURT: Ladies and gentlemen, be seated.

Gentlemen, come to the bench.

(WHEREUPON: there was a brief sidebar conference, at the bench, as follows:)

MR. KUNZ: I have no objection.

THE COURT: I'm not going to give the press any damn hearing on that. I think I should do that while the sentencing phase is pending.

MR. KUNZ: I agree, Judge. It's still the second phase of the trial.

(R. **1992-94**). This admonishment not only does not comport with the standard admonishment to the jury but it makes no mention of the absolute necessity to avoid press coverage during the recess.

A correct admonishment to the jury would have been:

In the course of the trial the court (will) take (a recess) during which you will be permitted to separate and go about your personal affairs. During (this recess) you will not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case. If anyone attempts to say anything to you or in your presence about this case, tell him that you are on the jury trying the case and ask him to stop. If he persists, leave him at once and report the matter to the court

immediately upon your return to court. Such conduct on his part would be contempt of court, to be punished as such.

You are instructed not to visit the scene of the alleged crime. Should it be necessary for you to view the scene, you will be taken there as a group under the supervision of the court.

You are instructed not to read, listen to nor watch any news report of this trial. The only evidence which you may lawfully consider is that which is presented to you during the trial proper in the courtroom, free from any outside influence. News reports are not limited to the evidence and may contain material which is of no concern whatsoever to you but which might tend to influence you one way or the other. The case must be tried solely upon the evidence produced in court in the presence of all the jurors, the defendant, the attorneys and the court.

1.01 Preliminary Instruction, Florida Jury Instruction (emphasis added).

This instruction is not unusual. It has been included in the Florida Standard Jury Instruction for many years. It is routinely given even in the most minor of cases. There is no justification for the court's failure to give a proper instruction or for counsel's failure to object.

The original motion for sequestration had been inspired by the extensive media coverage of the murder. The media coverage between the guilt/innocence and the sentencing phases of the trial continued to be intense. On June 20, **1984**, the top headline on the front page of the Orlando Sentinel was "Provenzano sane, guilty of murder" (App. **11**). Within the text were the following comments:

The defense lawyers stood flanking their seated client at (sic) as the verdict was announced about 6:50 p.m.

Provenzano, **36**, directed **"a** little smirk and a little shrug" to defense lawyer Jack Edmund, the attorney said.

. . .

Shortly after the verdict was announced, Provenzano turned toward the audience and

> said to someone, "You happy now?" Dalton's son, Alan, 26, said the comment was to him.
>
> . . .
>
> The victim's bosses, Sheriff Lawson Lamar and sheriff's Capt. Mike Penn, said that the verdict was proper and they look forward to the sentencing.
>
> . . .
>
> In his two-piece suit, defense lawyer Brawley was low-key, almost professorial as he spent much of his speech explaining points of law.
>
> . . .
>
> He split the defense argument with Edmund, who sports Buffalo Bill-style hair and goatee and wore a Western-cut suit and sea-turtle cowboy boots.

(See Motion to Vacate, Provenzano v. State, Cir. Ct., Orange Cty, App. 11). On the same day the Orlando Sentinel also ran an entire article detailing the opinions and sufferings of the victims and their families. Another article detailed plans for increased security. Yet another declared: "Provenzano must live in hell of his making." (Id.)

The preceeding excerpts are just samples from a voluminous amount of information with which the media was saturating the Orlando community. The content of the articles is clearly inappropriate for the consumption of the jurors who had yet to recommend a sentence. Everyone, especially the court, was aware of this publicity. An admonishment, at a minimum, was required.

At no time when the jurors reconvened did the court inquire whether any juror had been intentionally or inadvertently exposed to extra-judicial matters, or improper influences. This issue was not raised on direct appeal, even though it involves an error of fundamental dimensions, and jumps out from even a casual reading of the record. Had this issue been raised, this Court would likely not have accepted the trial court's errors as its own, and would certainly have directed resentencing. Appellate counsel's failure to present this issue cannot be ascribed to any

"strategy" or **"tactic".** See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). It was simply ineffective assistance. See Matire V. Wainwright, 811 F.2d 1430 (11th Cir. 1987).

Accordingly, because Mr. Provenzano was denied his rights under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, relief is appropriate.

CLAIM VI

AGGRAVATING FACTORS WERE APPLIED AGAINST MR. PROVENZANO IN PLAIN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In this case, the sentencing court and jury were urged to rely upon and find, and (in the case of the sentencing court) found five aggravating factors on the basis of unconstitutional considerations which are at stark odds with the eighth amendment. This Court affirmed on direct appeal. The unconstitutional application of an aggravating circumstance mandates relief. See Elledse v. State, 346 So. 2d 998 (Fla. 1977). See also Zant v. Stephens, 462 U.S. 862 (1983). Relief is appropriate in this action. The impropriety of the "cold, calculated, premeditated" aggravating factor was discussed in Claim 11, supra, and that discussion therefore not be repeated again herein.

A. PRIOR CONVICTION

The trial court found that Mr. Provenzano's sentence should be aggravated because the defendant had previously been convicted of another capital felony or of a felony involving the use of threat or violence to the person:

> This aggravating factor is present as to the first count of the indictment because although the defendant's two convictions of attempted murder in the 1st degree were entered contemporaneously with the conviction of 1st degree murder, both were entered previous to sentencing and prior to the jury's consideration of its sentencing recommendation, and are therefore appropriate to be considered as an aggravating circumstance. See Lucas v. State, Fla. 376

So. 2d 1149; King v. State, Fla. 390 So. 2d 315.

(R. 2317).

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 circumstances present is different, and that this difference reasonably justifies "the imposition of a more severe sentence," Zant v. Stephens, 462 U.S. 862 (1983).

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. 1982); 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.

Under Florida's capital sentencing scheme, the trial judge must defer to a jury's recommendation of a life sentence unless the facts suggesting death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). It is axiomatic that a death recommendation must be soundly based on correct and applicable law. This surely cannot occur when the trial judge can effectively determine the outcome, as the judge did in this case, by providing the jury with unsupported aggravating factors to consider. Because the jury recommendation was skewed by having five improper aggravating factors to choose among, the result is unreliable. Had the jury been instructed only on proper aggravating circumstances, the result could have been very different. See Mills v. Maryland, 108 S. Ct. 1860 (1988). The

error is compounded where, as here, improper aggravating factors are relied upon ("found") by the sentencing judge.

At the penalty phase of Mr. Provenzano's trial, the jury was instructed that in determining whether to recommend a death or life sentence, it could consider five aggravating circumstances: 1) prior conviction for a crime of violence; 2) great risk to others; 3) to prevent unlawful arrest; 4) committed to hinder the government function; and 5) the crime was cold and calculated. The trial court found all five aggravating circumstances (R. 2317-22).

New case law clearly shows that the first aggravating circumstance was not properly provided to the jury or found by the court. The prior convictions for a crime of violence were the two convictions for attempted first degree murder that Mr. Provenzano was convicted of contemporaneously with the conviction for first degree murder. The Florida Supreme Court ruled in 1987 that "[u]se of such contemporaneous convictions in aggravation, however, was . . . rejected by this Court in Wasko v. State, 505 So. 2d 1314 (Fla. 1987)." Perry v. State, 522 So. 2d 817 (Fla. 1988).

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

Id. at 820 (emphasis added).

This holding was more recently affirmed in Lamb v. State, 532 So. 2d 1051 (Fla. 1988):

> Lamb challenges the sentence arguing that his contemporaneous conviction for burglary with assault does not support a finding that he has been previously convicted of a violent felony. We agree. We recently held in Perry v. State, 522 So. 2d 817, 820 (Fla. 1988), that it is "improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of a single criminal episode against the single victim of the murder for which the defendant is being sentenced." See also, Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

In Patterson, the court found the same error to have occurred and corrected it even though the defendant had not raised it. See 513 So. 2d at 1263.

A court is not allowed to base an aggravating circumstance on the very murder for which the defendant was sentenced. Cf. Sumner v. Shuman, 107 S. Ct. 2716 (1987). As the Supreme Court recently explained in a far less egregious setting:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gress v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). BY doing so, the jury narrows the class of persons eligible for the death penalty accordins to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme

because the aggravating circumstances did all that the Constitution requires.

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

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

It seems clear to us from this discussion that the narrowing function required for a

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

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

Since this aggravating circumstance must be vacated, Mr. Provenzano's sentence of death must also be vacated. In Johnson v. Mississippi, **108** S. Ct. **1981 (1988),** the United States Supreme Court held that the federal constitution requires a re-examination of a death penalty where it was based in part on a vacated conviction which was used in aggravation. There, a New York conviction for second degree assault with intent to commit first degree rape was used to find the aggravating circumstance of "previously convicted of a felony involving the use or threat of violence to the person of another." The New York conviction was later reversed. The United States Supreme Court, holding that petitioner's death sentence be reversed, said:

> It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances 'one against the other.' **13** Record **2270;** App. **17;** see **13** Record **2282-2287;** App. **26-30.** Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' Gardner v. Florida, **430** U.S. at **359** (plurality opinion).

Likewise, in Mr. Provenzano's case the jury improperly could have found that Mr. Provenzano's contemporaneous conviction for attempted murder could properly be found as aggravating the

conviction of murder. The trial court clearly did so find. Counsel objected. Fundamental changes in the law occurring since the time of Mr. Provenzano's trial demonstrate that relief is appropriate.

B. HINDERING GOVERNMENTAL FUNCTION

The trial court instructed the jury on, and subsequently found, the aggravating circumstance that the murder for which the defendant had been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws:

> This is clearly an aggravating circumstance in this case because the evidence produced at the trial shows that it was unquestionably the intention of the Defendant to kill Officers Paul Shirley and Rick Epperson of the Orlando Police Department, the officers who had arrested him for the crime for which the Defendant was to have appeared in court on January **10, 1984.** This Defendant armed himself to the teeth and entered said courtroom, but by a quirk of fate neither officer was present at that time, although they were scheduled to appear and were on standby.
>
> Having listened to the facts, the Court is convinced that had either officer been present, the Defendant would have undoubtedly attempted to kill them and thus prevented them from testifying against him in his pending case. The Defendant has -- was only prevented from carrying out his plan by the absence of Officers Shirley and Epperson, the intervention of Bailiff Harry J. Dalton and the subsequent shootout in which the Defendant was wounded after he had murdered Bailiff Wilkerson.

(R. 2320-21) (emphasis added).

The court's finding of this aggravating circumstance has no basis in fact and is based entirely on speculation as to what Mr. Provenzano might have done had Officers Shirley and Epperson been present. Contrary to the court's finding, there is no evidence that Bailiff Wilkerson was trying to arrest or detain Mr. Provenzano or that he was killed to disrupt a governmental function.

Aggravating circumstances must be proved beyond reasonable doubt. Without more, mere speculation as to what Mr. Provenzano might have done or what his motivation might have been is insufficient to provide proof beyond a reasonable doubt.

In fact, evidence regarding Mr. Provenzano's mental state and motivation at the time of the offense demonstrates the impropriety of this aggravating factor. **See** Claims I and 11, supra (and discussion presented therein).

Mr. Provenzano was suffering from a major mental illness. His bizarre behavior and paranoia culminated in a senseless shooting spree without any rational thought of consequences. It flies in the face of any rational analysis to say that the act was committed to hinder a governmental function. The record itself demonstrates that this aggravating factor has been improperly found. Resentencing is appropriate

C. PREVENTING LAWFUL ARREST

The trial court found the aggravating circumstance that the murder for which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody:

> This is an aggravating circumstance in this case because the Defendant, Thomas Harrison Provenzano, had previously been charged with an unrelated -- with unrelated crimes. On the day the murder in this case was committed, the Defendant was due in court to answer those charges.
>
> Further, said Defendant did deliberately, by having special pockets sewn in what has variously been described as an army raincoat or trench coat, secrete a shotgun and a 45-caliber assault rifle, both of which he had recently purchased. Further, he carried the above weapons and two handguns hidden under his clothing in the Courtroom, as well as considerable ammunition for all of said weapons, and further, all weapons were fully loaded. The facts show that when the Defendant was approached by Bailiff Harry J. Dalton and informed that he would have to be searched, the Defendant undoubtedly knew that if he submitted to a search, said guns would be discovered and he would be arrested. He

> therefore drew one of his handguns and shot and wounded Bailiff Dalton. He then exited the courtroom, firing at Correction Officer Mark L. Parker and ran through the crowded corridors still firing at Parker, and after shooting Parker, was confronted by Bailiff William Arnold Wilkerson with his gun drawn. In order to avoid what would have been his lawful arrest for his attempted murder of Bailiff Dalton and Correction Officer Parker, he fired his shotgun and murdered Bailiff William Arnold Wilkerson.

(R. 2319-20).

The trial court again indulged in gross speculation as to Mr. Provenzano's possible motivations for killing Bailiff Wilkerson. Surely, if Mr. Provenzano had had the mental capacity to make a rational plan to avoid arrest, he would not have committed his crime in a courthouse filled with armed law enforcement officials.

In fact, the evidence shows that the severely paranoid, mentally ill defendant did not have the mental capacity to formulate an intent to avoid lawful arrest. See supra. Far from forming a rational intent to avoid arrest, Mr. Provenzano believed he was protecting himself from an attack by law enforcement officers. What he believed was based on his mental illness, which the record and all the evidence confirms. Resentencing is appropriate.

D. GREAT RISK OF HARM TO OTHERS

The trial court instructed the jury on, and then found, the aggravating circumstance that the defendant knowingly created a great risk of death to many persons:

> This is an aggravating circumstance because not only did the Defendant murder William Arnold Wilkerson, but because either simultaneously therewith or immediately before he attempted to murder Bailiff Harry J. Dalton and Correction Officer Mark L. Parker on the fourth floor of the Orange County Courthouse, Orlando, Florida. In so doing, the Defendant deliberately came into the courthouse with a shotgun, a 45-caliber assault rifle and two handguns hidden under his clothing. After shooting Bailiff Harry J. Dalton in a crowded courtroom #416, the

> Defendant pursued Correction Officer Mark L. Parker out of said Courtroom #416 down the hallway, firing at him repeatedly with a handgun, and then after shooting Parker, when confronted by Bailiff William Arnold Wilkerson, fired at and killed Bailiff Wilkerson, all of said gunfire having occurred in the fourth floor courtroom, corridors and hallways of Orange County Courthouse at a time when said courtroom, corridors and hallways were literally swarming with school children on tour of the courthouse, attorneys, judges, secretaries, clerks and a large number of the public who were present attempting to go about their normal pursuits.
>
> The Court having heard the testimony of the experts both for the defense and the State in this matter, and having weighed both carefully, finds that the Defendant knowingly committed those acts with which he is charged.

(R. 2318-19).

The court's findings of fact are remarkable for their lack of any evidence that Mr. Provenzano was aware of other persons in the area much less that he had formulated an intent to cause great risk of harm to them.

Far from an intent to create great risk of harm to others, Mr. Provenzano's deranged mind believed he was protecting himself. He reacted like a caged animal. While there is no proof to support a finding of heightened intent, there is substantial evidence that Mr. Provenzano had no intent to create a risk to others. The ferret of the matter is that this aggravating factor was improperly found. Resentencing is appropriate.

E. CONCLUSION

In his state of chronic mental illness exacerbated on this occasion by severe anxiety resulting from his fear of law enforcement officers, Mr. Provenzano was incapable of forming an intent which would sustain the aggravating circumstances found by the court.

A

At the time of trial, Drs. Lyons, Pollack, Kirkland, Mara and Gutman confirmed that Mr. Provenzano's decisions and actions were at least affected by his mental illness. Undeniably, Mr. Provenzano's mental condition was such that he was unable to form the intent necessary for the finding of these aggravating circumstances.

Mr. Provenzano's mental state pre-empted the possibility that he could objectively design a plan based on reality. The fact that the incident occurred in the Orange County Courthouse amidst scores of law enforcement officers itself demonstrates that Mr. Provenzano's reasoning was based on his delusion rather than reality. Even the State's theory that Mr. Provenzano's motive was to kill two police officers who cited him for misdemeanor disorderly conduct shows an irrational thought process.

Defense counsel clearly objected to the instruction of the jury and the finding of the court as to the aggravating circumstances addressed in this claim:

> MR. BRAWLEY: Your Honor, for the record we object to your giving the instruction -- and for the record, the instruction begins, as an aggravating factor, "The defendant has been previously convicted of another capital offense or of a felony involving the use of violence to some person."
>
> Notwithstanding the case authority cited by Mr. Kunz, we believe that the legislature intended and the Constitution requires that consideration be limited to evidence of prior acts of violence, prior to the commission of the murder and not contemporaneous with the murder.
>
> Accordingly, we request that you not give that instruction as an aggravating factor that the jury should consider unless the state is in a position to offer evidence outside the facts of this case.
>
> . . .
>
> MR. BRAWLEY: Your Honor, I believe that the second instruction, the second aggravating factor that's listed in the instructions, that, "The defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of

> death to many persons," would not be appropriate inasmuch as the trial testimony and the testimony at this hearing has indicated that the defendant went at -- at the most, at the worst, was careful in shooting at or attempting to hurt only law enforcement persons, specifically only -- Well, in fact, I believe that there is really no evidence that he knowingly created a risk of death to many persons.
>
> . . .
>
> MR. BRAWLEY: We object to paragraph three in the aggravating circumstances, "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."
>
> I suggest to Your Honor that there has been no facts to establish that instruction to the jury or that portion of the instructions to the jury in this case.
>
> . . .
>
> MR. BRAWLEY: Your Honor, I object to paragraph four in the aggravating --
>
> THE COURT: I'm listening. I've just got to get a cigar.
>
> MR. BRAWLEY: -- circumstances, which reads, "The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws."
>
> Again, Your Honor, I do not believe that the evidence in this case shows that that instruction should apply or should be read to the jury for their consideration.

(R. 2131-33).

The application of these aggravating circumstances is overbroad, and contrary to the eighth and fourteenth amendments. Aggravating circumstances must be given a limited construction. Recently in Mavnard v. Cartwright, 108 S. Ct. 1853 (1988), the United States Supreme Court explained that a death sentence cannot stand where there has been a failure to apply a limiting construction of a broadly worded aggravating factor in order to channel and narrow the sentencer's power to impose the death penalty. The aggravating factors on which the jury was instructed and which the court found were overbroadly applied,

thus failing to appropriately channel and constitutionally limit the sentencers' consideration. A case such as this is precisely why the United States Supreme Court has required a "narrowing principle" that will focus and limit the breadth of an aggravating factor. Maynard, 108 S. Ct. at 1859; see also Godfrey v. Georgia, 446 U.S. 420 (1980).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Provenzano's trial and death sentence. It is clear under Florida law that if an aggravating circumstance is improperly found and any mitigating circumstances are present, as is the case here, a new sentencing proceeding must be held -- it is impossible in such cases to know the weight given to the improper aggravator by the jury. Elledge, supra. Here, the sentencing judge identified one mitigating circumstance. Much more in mitigation was shown by the record. Since the death sentence was improperly premised in part upon improper aggravating circumstances, Mr. Provenzano's death sentence is inherently unreliable and fundamentally unfair, contrary to the eighth and fourteenth amendments.

CLAIM VII

DURING THE COURSE PENALTY PHASE ARGUMENT, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. PROVENZANO WAS *AN* IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

During the course of the trial, the state and the court informed the jurors chosen to sit on Mr. Provenzano's trial that sympathy was an improper factor for their consideration.

During closing argument for penalty, the prosecutor very clearly told the jury "your advisory recommendation to the court as to the sentence has nothing to do with sympathy. We are not going to decide anything on sympathy, not feeling sorry for someone." (R. 2171). Specifically, he told them they need "not

feel[] sorry for Mr. Provenzano because ten years ago he had some marital problems." (R. 2171).

Later in his argument, the prosecutor informed the jury that they determine the sentence based on the law "not what's the appropriate sentence because you feel sorry for him, feel sorry for Catherine Robinson . . . for his nephew, for his brother in law." (R. 2196).

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the Constitution:

> The clear impact of the [prosecutor's statement's] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that 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") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's

closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985)

In addition, the prosecutor's argument at penalty improperly diminished the jury's sense of responsibility for its recommendation. The prosecutor in essence argued: What can you do, your hands have been tied by the Court. The Court intends that a death recommendation must be returned. You must honor that request, even if it is your own personal belief that mercy should be afforded to Mr. Provenzano. This type of argument is improper under Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). It shifted the responsibility from the jurors to the Court.

Caldwell teaches that, given comments such as those provided by the prosecutor to Mr. Provenzano's capital jury, the state must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646.

The eighth amendment errors in this case denied Mr. Provenzano his rights to an individualized and reliable capital sentencing determination. Under no construction can it be said that the statements at issue had "no effect" on the jury's sentencing verdict. Caldwell, 105 S. Ct. at 2646. The comments and instructions assuredly had an effect. Caldwell, supra; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc). Moreover, the comments "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether in fact [Thomas Provenzano should be sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). Telling the jury that it had to dispel any sympathy they may have had towards the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. Parks v. Brown, No. 86-1400 slip op., ___ F.2d ___, (10th Cir. Oct. 28, 1988)(en banc). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma,

455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to "the jury that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring).

Sympathy is an aspect of the defendant's character that must be considered by the jury during penalty deliberations:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . 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." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
>
> The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).
>
> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.
>
> In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court

stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississimi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial.

The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner

was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723.

. . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

. . .

As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, No. 86-1400, slip op. at 20-26.

The remarks by the prosecutor during closing argument served to constrain the jury in their evaluation of mitigating factors. This prevented them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Provenzano's character required the imposition of a sentence other than death.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation reflected in this record. The court should vacate Mr. Provenzano's unconstitutional sentence of death.

CLAIM VIII

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT AND PENALTY PHASES DENIED MR. PROVENZANO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During closing at penalty phase, the prosecutor made numerous improper inflammatory arguments to the jury. Over objection, the state improperly placed the jurors in the position of the victim.

> Now, the defendant, where does he commit these specific offense? ... He does it in the courthouse, the Orange County Courthouse, a public courthouse, striking at the very fabric of the community where justice is done...

(R-2183-2184). The prosecutor continued:

> The real victim, the real victim in a case like this is society itself -- the fear, the apprehension, the going without that all members of society go through when you have to read and hear about this kind of conduct, this kind of outrageous assault on people by murderers like Thomas Harrison Provenzano.
>
> Society is the one that reacts, ladies and gentlemen, because the State of Florida demands the death penalty because there is a society. The people of our state have been harmed by this criminal episode by this man, the criminal escapade, this rampage of Thomas Harrison Provenzano...

(R. 2198-2199). Since the trial was conducted in Orange County, and the jury was composed of Orange County residents, these can be no doubt but that this argument was "so prejudicial as to invalidate the [penalty proceedings]." Cobb v. State, 376 So. 2d 230, 232 (Fla. 1979). The prosecutor also made such further comments as: "If a collective society can't -- when an innocent person such as Arnie Wilkerson's life is snuffed out, the only way that society can show the respect for the integrity of that innocent person's life is to, through the use of the death penalty, show its outrage that an innocent person in society's [sic] life has been taken", "If we don't have the death penalty

in cases like this, we cheapen the lives of innocent people when they are murdered", and **"We've** got lay the gauntlet down **".**

> Such comments constitute improper argument and are incredibly improper appeals for the jury to consider factors outsiide of the statutory aggravating circumstances set forth in Section 921.141, Fla.Stat. The prosecutor's questioning the defendant about his perceptin of his jurors bias is totally indefensible. (R. 2158-2159).

In Rosso v. State, 505 So. 2d 611, 614 (Fla. DCA 1987), the court defined a proper closing argument:

> The Florida supreme court has summarized the function of closing argument:
>
> > The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Clearly, **"a** prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso v. State, 505 So. 2d 611 (Fla.App.3 Dist. 1987)(quoting, Berser V. United States).

The recommendation of death in this case was by the slimmest of majorities 7 to 5. The improper arguments set forth above cannot be reasonably viewed as not having contributred to such vote, under the circumstances of this case. The prosecutor clearly argued for death based on non-statutory aggravating factors, i.e., those not set out in Section 921.141 Just as a judge cannot sentence a defendant to death based upon non-statutory aggravating factors, Miller v. State, 373 So.2d 882 (Fla. 1979), neither can a jury be implored to recomend death for those same non-statutory factors.

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of weighing hte process in favor of death.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

This issue was presented on direct appeal and there denied. This Court should now revisit this claim, a claim involving fundamental error, as this and the United States Supreme Courts' jurisprudence since the time of Mr. Provenzano's appeal demonstrates that factors such as these urged by the prosecutor in this case have no place in a capital proceeding. See, e.g., Scull v. State, No. 68,919 (Fla. Sept. 8, 1988); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Booth v. Maryland, 107 S. Ct. 2529 (1987); see also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). The argument, made by the prosecution in this case, portions of which were erroneously sanctioned by the trial court in front of the jury, could not but have tipped scales improperly in favor of a death recommendation. This violated Mr. Provenzano's rights to a fair trial and fair and reliable capital sentencing determination as guaranteed by the sixth, eighth and fourteen amendments.

CLAIM IX

MR. PROVENZANO'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIMS' CHARACTER AND VICTIM IMPACT INFORMATION.

Throughout this trial, the jury was subjected to sympathetic information about the victims' characters, their service to the community, extent of their injuries, and their "tragedies". Often this was done subtly but more often it involved a blatant, improper comments that never should have gone to the jury or the ultimate sentencer.

This case was a highly publicized case and received not only printed media and radio coverage but also extensive television coverage as well. From the time of the incident and through the end of trial, filmed accounts showing the victims and their families were virtually a nightly event including the very moving

report of the funeral of Mr. Wilkerson. While this information was outside the courtroom, the mood conveyed in these reports was pervasive throughout in the community and was what the jurors brought with them to the court. With this as a background, the kinds of prejudicial information presented at trial were even more damaging than they would otherwise have been.

From opening statement until sentencing before the trial court, the State insisted on placing before the sentencers information about the impact to the victim and their families. On opening, the state defined what it intended to present:

> The State of Florida will present evidence in this case that will show the human damage that the defendant inflicted on that fateful day back in January here in Orange County. One bailiff murdered from a shotgun blast. One bailiff so severely injured he can't eat. He has lost an eye. Six months after the incident is, portions of his brain has been blown away. He can't go to the bathroom, can't remember the incident. He needs twenty-hour hour nursing care. And a third individual, correctional officer, paralyzed from the shoulder down permanently.

(R-472-473).

From the onset of the trial, family members of Mark Parker, Harry Dalton, and Arnold Wilkerson were seated in the front row of the courtroom. When the State introduced the audio tape of the shooting **(R-508),** the television cameras recorded the highly emotional, not unexpected reaction of the families as they cried and held one another in comfort.

Shortly thereafter, the state offered the testimony of Mark Parker, a victim of the shooting, who was left paraplegic as a result of the incident. **(R.** 581). During his testimony Mr. Parker asked to be turned in his chair since his neck was becoming stiff. **(R. 590).** His injuries were the result of the incidental issue. This was not enough drama for the State, however and Mr. Kunz, the prosecuting attorney, asked:

> Q. Now, Mr. Parker, as a result of the injuries that you sustained to January 10th, **1984,** can you tell the members of the jury what physical injuries you now have?

A. Well, sir, I'm paralyzed from this position down. I have no sensation in any part of my body from here down. (Indicating) My left arm, I have sensation from about here up. I have no use of my left hand. My arm, arm, I have sensation from about mid-bicep down. And I have no usage of my right hand.

Q. Were you hospitalized as a result of your injuries on January 10th.

A. Yes, sir.

Q. From what period of time?

A. Four months, fifteen days.

Q. Okay, sir. Have you been able to return to work?

A. No, sir.

Q. You anticipating being able to return to work as an correctional officer?

A. No, sir.

(R 595-596).

The State then questioned Mr. Parker's physician as to the injuries Mr. Parker had sustained and proceeded to ask about the impact of those injuries on Mr. Parker's future (R. **811).** Defense counsel's objection on relevancy grounds was granted but the question of Mr. Parker's future and the **"impact"** on him was still in the minds of the sentencers. Later, the State evoked testimony with regard to the condition of Bailiff Dalton (R. **856).**

When the State introduced the photos of the body of Mr. Wilkerson, the judge in a sidebar admonished the State to show it carefully.

THE COURT: I have admitted that picture. Now, when y'all are displaying it, for Christ sake don't let the front row see it. That's all the family out there. I don't want to break up the courtroom.

MR. EDMUND: I just as soon we don't show it to anybody.

THE COURT: I know. You could get a re-trial real quick, I believe, if you show that picture to the front row.

(R-696).

An audio cassette tape of the actual shooting was put into the evidence and published to the jury during the tate's case in chief. The audio recording brought out a pronounced reaction by the audience in the courtroom, including members of the respective victims' families. In a newspaper report the audience's reaction was recorded:

> The brief tape brought back Provenzano's shouted, obscene challenges to Dalton followed by gunshots and screaming. Relatives of Parker and Dalton, who made up about half the small audience in the courtroom, wept and embraced one another. They still seemed upset as they stood in the courthouse hallway later.

(Orlando Sentinal, June **13, 1984).** In a video news report members of the audience are captured on film weeping. This type of audience participation has no place in a jury trial.

Defense counsel moved for a mistrial based on the audiences' emotional reaction to the tape:

> MR. EDMUND: Comes now the Defendant and move this Honorable Court declare a mistrial. Ask this record to reflect upon the unexpected playing of the tape of the event of the shooting of the 10th of January, **1984.** Members of the audience became upset and began crying, and in such a manner and fashion as became obvious to the jury to the point that the jury was looking around at them, thus creating an atmosphere immediately prior to their deliberations that would, could only result in their being unable to render a fair and impartial verdict.
>
> THE COURT: You want to respond?
>
> MR. KUNZ: No, sir, Judge. It was not intended for that. And I think it's proper for me to demonstrate the evidence to the jury during the closing.
>
> THE COURT: Motion be denied. The record is preserved. The Court did not observe them crying. I'm not saying they weren't. I was paying attention to the tape, and watching the jury. I did not observe it.
>
> MR. EDMUND: I hope we have a tape in here. We could hear them, Judge, and so could the jury.
>
> MR. BRAWLEY: Record reflect I heard them and saw members of the jury turning around and looking at them.

THE COURT: All right.

(R. **1966-1967).**

All of these incidents set the stage for the State to add the finishing touches with the sentencing testimony of Eileen Dalton, the wife of Bailiff Harry Dalton.

> Q. Do you have anything that you'd like to tell the Court with respect to the sentencing or concerning the circumstances of what your husband's currently undergoing as a result of that shooting incident and what the family is going through?

(R-2300).

Defense counsel again objected but the court overruled him. As the prosecutor explained:

> MR. KUNZ: I think the statue entitling the victim's right at the time of sentencing prior to the Court's sentencing to indicate to the Court the impact of the crime upon the family, upon both financially and emotionally, I think it's totally appropriate for Mrs. Dalton to tell this Court about what the attempted murder of Mr. Dalton by the Defendant has done to her and the family.

(R-2300-2301).

The court then permitted Mrs. Dalton's testimony:

> THE WITNESS: For six months, I've watched my husband with his head caved in, not able to eat, not able to drink, not able to use the bathroom, not able to do anything that we take for granted every day. We have worked with him, we have overcome some of these problems: some will never be overcome.
>
> It has caused a very big emotional problem in many of the children . . .
>
> Q Okay. Do you have any recommendation for the Judge with respect to what sentence you think Mr. Provenzano should receive on the attempted 1st degree murder?
>
> A I think it should be the <u>maximum for what we've had to go through and what we will be going throush and what we will be going throush</u>.

(R-2301)(emphasis added)

This is clearly improper evidence for the court to consider since the information "injected irrelevant material into the

sentencing proceedings." Scull v. State, No. 68,919 (Fla. Sept. 8, 1988), (slip op. at 9).

Under Booth v. Maryland, 107 S. Ct. 2529 (1987), the eighth amendment is violated by the presentation of such victim impact information. Part of the rationale used by the United States Supreme Court in this decision was that the jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." Booth, supra at 2532. Cf. Scull v. State, No. 68, 919 (Fla., Sept. 8, 1988).

This issue was not raised on appeal. No "tactical" or "strategic" reason can be ascribed to appellate counsel's failure. Appellate counsel, through ignorance, failed to bring these fundamental errors to the court's attention. These failures resulted in the denial of Mr. Provenzano's right to an individualized and reliable capital sentencing in accord with the eighth and fourteenth amendments. Had appellate counsel brought this issue to the attention of the court, resentencing would have been appropriate. In any event, Mr. Provenzano respectfully submits that Booth represents a substantial change in the law, and that relief is therefore now appropriate. See, e.g., Downs v. Dugger, supra.

CLAIM X

THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). If a reviewing court determines there is insufficient support for the sentencing court's finding that

certain mitigating circumstances are not present, relief is appropriate. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where such a finding is erroneous, the defendant "is entitled to resentencing." Id. at 1450.

The sentencing judge in Mr. Provenzano's case found one mitigating circumstance: no significant criminal history. (R. 2322-2324). No other mitigating circumstances were found. Finding five aggravating circumstances, the court imposed death (R. 2316-2322). The court's conclusion that only one mitigating circumstance was present, however, is unsupported by the record.

Substantial evidence in mitigation had been presented throughout the trial, including evidence of statutory mitigation as well as evidence of non-statutory mitigation. Certainly, the guilt phase testimony (expert and lay, defense and State) regarding Mr. Provenzano's bizarre behavior at the time immediately prior to and at the time of the incident should have been sufficient to establish the statutory mental health mitigating factors and a wealth of non-statutory factors.

On the defense's case in chief, Catherine Robertson, Mr. Provenzano's sister, testified at length about her brother's deteriorating mental state over the years and particularly how paranoid he had become in recent years, believing that she was poisoning his food (R. 1048) and that her husband was an undercover policemen (R. 1049). Mrs. Robinson also discussed their abandonment by their mother when Thomas was only 2 1/2. (R. 992) and how they were left with their grandparents until their father remarried some seven to eight years later. (R. 992). She discussed Thomas' drug use (R. 994) and how she would "pull him through when he'd taken too much." (R. 994) At eighteen Thomas was involved in an automobile accident caused from being under the influence of drugs, "tubinols is what he was taking." (R. 996)

Catherine then discussed how her brother's marriage and the birth of his son completely changed him:

> "It was wonderful. It turned his whole around.
>
> Q: What do you mean by that?
>
> A: He had a purpose. He was--he didn't steal no more. He got off of drugs. He got a job with the railroad. He was doing really good. And he relocated here in Florida. The city, you know, get out of the city, get away from all that, of that crime and corruption. And he was doing really well here.

(R. 992). She told of the break-up of the marriage and the effect on Thomas of losing his son. "He was just very crushed. He was very upset. He didn't want to leave. He didn't want to leave here without his baby." (R. **1006-1007)**

> **Q:** What was the effect of losing custody of his child, on Tommy, if you know?
>
> **A:** Oh, gosh. It was like something left him. Because it was done illegal.
>
> **Q:** Is that what he believed.
>
> **A:** Yes, sir.
>
> **Q:** Did you notice any change in him after that period?
>
> A: Yes, sir.
>
> Q: What what the change you noticed?
>
> **A:** It's like, just, he wasn't Tommy. He wouldn't talk to me. He wouldn't play with my kids no more then. (Witness sobbing.)
>
> **A:** He got real cold, real cold, no feelings... I didn't even know who he was anymore.

(R. 1007-1009)

Through a friend, Frank Hallmeyer, Thomas became obsessed with religion after his marriage dissolved. (R. 1012). His acquaintship with Frank ended on a bitter note when Frank made homosexual advances towards Thomas (R. **1015).**

When he returned from Chicago where he had attended the funeral of a close friend who died of an overdose, Thomas' mental state rapidly deteriorated. Mrs. Robinson became a "witness to

conversation between her brother and his lawyers because he was convinced they were conspiring against him. (R. **1052).** He stopped eating at her house because he believed she was poisoning him (R. **1044)** and he believed her husband was an "undercover **cop."** (R. **1049)** Thomas believed he could heal his nephew of a thyroid problem with "laying on of hands." (R. **1054)**

After these events, Mrs. Robinson inquired about mental treatment for her brother at the Florida Hospital on Rollins Avenue and was told **"he** definitely had a problem that needed taking care of. But, I could not commit him unless they seen him do something out of the extraordinary." (R. **1055)** Catherine believed her brother to be "very, very paranoid" (R. **1068)** and said that he believed the police wanted to put him in jail to have homosexual orgies with him. (R. **1083)**

Don Robertson testified as to his brother-in-law's "one topic conversation" and how he'd "get stuck on one thing", you know (R. **1087)** and how he "thought everybody was out to get him." **(R. 1088)**

Nicholas Welch testified that his uncle Tommy used to warn him about eating out:

> Don't do that. Eat at home. He said 'eat at home. Don't go out to eat,' he said, 'because the people that run the city or rule the world, they put things in your food to try to take your mind over.'

(R. **1104)**

The defense also presented numerous other lay witnesses who testified as to Thomas Provenzano's mental condition in the months leading up to the events of January **10, 1984.** (See **R. 1152-1298, 1357-1417).**

All of this lay testimony was buttressed by the mental health experts, both for the defense and for the state who testified.

Although disagreeing about Thomas Provenzano's legal sanity under the subjective M'Naughten Rule, <u>all</u> of the psychiatrists

testified that Thomas Provenzano is extremely mentally disturbed. Dr. Gutman, a state witness, testified that on February 17, 1984 Thomas Provenzano had "the same mixed character and behavior disorder, long term pattern of features that appear consistently. They were, were a paranoid personality, obsessive, compulsive personality, and a passive/aggressive personality... Inadequate handling of adult situations... It appears to me that this man had shown some regression and deterioration in his general ability to hand life stresses, in the period of time coming up to the January 10th incident..." (R. 1752-1753). He described Provenzano as being "a pretty sick guy, mentally." (R. 1776)

Dr. Kirkland, who also testified for the state, said, "...I think its probably obvious, Mr. Kunz, there is no doubt in my mind that Mr. Provenzano has severe problems, amongst them being pretty paranoid. No doubt in my mind about that...." (R. 1740). "My opinion remains that Mr. Provenzano is a very disturbed man with many symptoms of emotional disorder, but that he was legally sane on January 10th, of 1984." (R. 1741).

Dr. Wilder stated that Thomas Provenzano had a paranoid personality (R. 1814). Dr. Lyons testified that he believed that the violent arrest in August of 1983 by Shirley and Epperson frightened Thomas out of his mind. (R. 1458-1460)and "...that Thomas was suffering from severe untreatable paranoia and was legally insane on January 10, 1984. (R. 1462, 1472).

Dr. Pollack examined Mr. Provenzano 10 days after the shooting and testified that the defendant suffers from a paranoid psychosis (R. 1537) and that Thomas did not understand that his acts were wrong (R. 1533-1535). The doctor testified that Thomas Provenzano was legally insance on January 10, 1984 (R. 1540-1542). His account was confirmed by that of Dr. Mara, a psychologist who conducted testing of Mr. Provenzano.

While the defense presented no mental health mitigation at the sentencing phase, the Court was obliged to consider the

guilt-innocence evidence as it may have related to mitigation. The Court, however, did not find any mitigating factors other than no significant criminal history. In the sentencing hearing, the Court discussed the statutory mitigating circumstances as follows:

> B. The murder for which the Defendant was convicted was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> Although there have been -- there has been some evidence produced at the trial that this Defendant may have been under extreme mental or emotional disturbance, the Court after viewing the entire evidence in this case, finds that any mental or emotional disturbance suffered by this Defendant prior to the murder occurred many years before the murder with which he has been charged, and though he may have been angry at Officers Paul Shirley and Rick Epperson, or upset by the fact that Bailiff Harry J. Dalton had informed him that he would have to be searched while he was in Courtroom #416 of the Orange County Courthouse, any mental or emotional disturbance suffered by the Defendant, either in the past or on the day of the commission of the crime charged, does not rise to the level of a mitigating circumstance.

(R. 232)

and:

> E. The Defendant acted under extreme duress or under the substantial domination of another person.
>
> This is not a mitigating circumstance in this case since the Defendant acted entirely alone and was not under the domination or compulsion by threat of any other person when he committed the murder charged.
>
> F. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Although there is some evidence adduced that the Defendant may have been emotionally disturbed to some degree, the credible evidence in this case shows that this Defendant did know the difference of right from wrong and was able to appreciate the criminality of his conduct, and the Defendant could have conformed his conduct to the requirements of law if it had not been for the fact that the Defendant, by his own admission, has a hot temper and committed

> the murder charged with a total disregard of its consequences.

The Court then concluded:

> There are no other aspects of the Defendant's character on record nor any other circumstance of the offense which would mitigate in favor of the Defendant's -- or his conduct in this matter.

(R. 2326)

The court did not consider the evidence of non-statutory mental health and other mitigation which was shown by the record. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). The testimony presented by mental health experts at the guilt phase clearly established two statutory mitigating circumstances: under the influence of extreme mental or emotional disturbance, and capacity to appreciate the criminality of his conduct or to conform his conduct was substantially impaired. The sentencing court committed eighth amendment error in refusing to find the unrebutted and uncontroverted mitigating circumstances which were clearly testified to at the guilt phase. As to statutory mitigation, the court failed to find facts clearly supported by the record. The sentencing order states, "There are no other aspects of the Defendant's character on record, nor any other circumstances of the offense, which would mitigate in favcor of the Defendant or his conduct in this matter." (R. 3460)(emphasis added). As to non-statutory mitigation, the court simply found none present. As a result, no consideration was given by the court to the fact that Mr. Provenzano was clearly mentally ill, and emotionally and mentally disturbed. The sentencing court's belief that this mitigation could not be considered because it did not arise to the level of statutory mitigation violated the eighth amendment principles embodied in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 106 S. Ct. 1669 (1986).

But, the Court failed to consider other matters in mitigation, such as the fact that an earlier attempt at treatment

had been sought. Instead of receiving help, Mr. Provenzano's sister was told her brother would have to do something "extraordinary" before help would be forth-coming. (R. **1055).**

What this record in no way demonstrates is that the sentencing court considered all of the evidence presented. Despite the presence of clearly mitigating circumstances, the court concluded that only one mitigating circumstance was present. The Florida Supreme Court has recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of difficulties in the defendant's life are mitigating. Here, all of these factors are present, as was statutory and non-statutory mental health mitigation. Other nonstatutory mitigation present in the reocrd but ignored by the sentencing court included: Mr. Provenzano's love, concern, care and consideration for his son and nephew; Mr. Provenzano's turbulent childhood, the early death of his mother, the still-born son, and the divorce from his first wife; Mr. Provenzano's employment history and attainment of a Master-Electrician license, especially in light of his mental problems; Mr. Provenzano's attainment of **35** years of age without having a significant prior criminal history, especially in light of his mental problems.

Also, Mr. Provenzano had a history of substance abuse and head injury, in addition to the other mitigating factors reflected in the record. Still the sentencing court refused to find any of this noncontroverted evidence in mitigation.

In Eddings v. Oklahoma, **455** U.S. **104 (1982),** Justice O'Connor's concurring opinion explained:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. **21,** Section 701.10 **(1980).** Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of

> this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer may not refuse to consider mitigation demonstrated by the record.

Here, that is undeniably what occurred. In the face of overwhelming evidence of statutory and non-statutory mitigation, the judge declared that only one mitigating circumstance was present and no non-statutory mitigation existed.

Under Hitchcock, supra, Eddings, supra, and Magwood, supra, the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing result is constitutionally suspect. The factors should now be properly assessed for Mr. Provenzano's sentence of death is fundamentally unfair and unreliable. Mr. Provenzano's sentence contravenes the eighth and fourteenth amendment. Habeas corpus 850 relief is appropriate.

CLAIM XI

INTRODUCTION OF AN INFLAMMATORY CRIME SCENE PHOTO WAS FUNDAMENTAL ERROR AND VIOLATED MR. PROVENZANO'S RIGHT TO A FAIR JURY TRIAL.

The prosecution indicated prior to trial that it would be introducing into evidence several photographs, including one which was a photograph of the victim, Mr. Wilkerson, taken at the scene but after recessesitative efforts had been unsuccessfully undertaken. Even prior to the State's attempt to introduce the photo, defense counsel vehemently objected thereto. (R. **672).**

Later during the trial, as a State offered to introduce the photograph of Mr. Wilkerson, defense counsel offered to stipulate to the identity of Mr. Wilkerson, as the deceased, in order to obviate the necessity for the photo. (R. **692-3).** The state responded that the photo **"show[ed]** the extent of injuries of Mr. Wilkerson," and argued that was relevant to show premeditation; the state also indicated at that time that it would be calling an expert witness to explain the nature of Mr. Wilkerson's wounds. (R. **693-4).** In opposition, defense counsel argued that the photo did not accurately reflect either the scene or Mr. Wilkerson's injuries:

> "MR. EDMUND: Judge, that certainly can't be a correct reflection of how the scene was when first observed. The bailiff certainly wasn't running down there with his shirt open and coat open, and this particular attachment to his, to his body there, his chest.**"**

(R. **694).**

Ultimately the court allowed the photo into evidence as State's Exhibit **40,** (ROA **694-5)** but cautioned the state, at a sidebar conference, not to allow the family, who were sitting in the front row of the spectator section of the courtroom, to see it.

> "THE COURT: I have admitted that picture. Now, when y'all are displaying it, for Christ sake don't let the front row see

it. That's all the family out there. I don't want to break up the courtroom.

MR. EDMUND: I just as soon we don't show it to anybody.

THE COURT: I know. You could get a re-trial real quick, I believe, if you show that picture to the front row."

(R. 696).

Further into trial, during the Medical Examiners testimony, the State introduced, without objection, additional photographs of Mr. Wilkerson. (R. 745). Thereafter, defense counsel moved the Court to reconsider its ruling as to the inflammatory State's Exhibit 40. Defense counsel argued that the later photos "portray the very same thing the other portrayed without all the gore." (R. 748). This motion was denied. Defense counsel renewed his motion to reconsider the admission of State's Exhibit 40 several times during trial, (ROA 955; 1575; 1920) each time being denied.

Photographs of a crime are usually admitted into evidence when relevant to a matter that is in dispute, such as when they establish the element of intent, or the circumstances of death. See Adams v. State, 412 So.2d 850, 854 (Fla. 1982)(photographs relevant to show crime scene, premeditation and the circumstances of death); Booker v. State, 397 So.2d 910, 914 (photographs relevant to show intent and circumstances of death). In order to establish an exception to the normal rule allowing admission of photographs, the defendant must demonstrate that the admission violated his right to a fair trial.

Photographs must be excluded, however, when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy. Alford v. State, 307 So.2d 433, 441-442 (Fla. 1975) cert. denied, 428 U.S. 912 (1976). Photographs should also be excluded when they are unduly prejudicial or "duplicitous." Alford, supra (admission of photographs was proper when there were no duplications); Adams, supra (exclusion of two additional

photographs was properly based on the trial court's exercise of reasonable judgment to prohibit the introduction of "duplicitious photographs"); see also Mazzarra v. State, 437 So.2d 716, 718-719 (Fla. 1st DCA 1983)(photographs admissible when they are not repetitious).

The photograph presented in this case was not merely repetitive and cumulative, but it was unnecessarily grotesque and inflammatory. The State's use of this photograph distorted the actual evidence against Mr. Provenzano. There was no valid reason to enter this particular photo into evidence. The subject matter of the photo was depicted in other less grotesque photos, and the identity of Mr. Wilkerson was stipulated to by the defense.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Provenzano's trial and 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. Wainwrisht, 474 So.2d 1163 (Fla. 1985), and should now correct this error.

Moreover, this claim was thoroughly preserved at trial. Mr. Provenzano's conviction and sentence of death were imposed in violation of the sixth, eighth and fourteenth amendments. Appellate counsel rendered prejudicially ineffective assistance in failing to urge this claim.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Provenzano of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987).

CLAIM XII

ARGUMENT, INSTRUCTION AND COMMENT BY THE PROSECUTOR AND COURT THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN THOMAS PROVENZANO'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. PROVENZANO'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

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. Provenzano's case, 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 would merely be giving a recommendation to the Court, who bore the ultimate responsibility.

It is clear that proceedings such as those resulting in Mr. Provenzano's sentence of death violate Caldwell v. Mississippi, **472** U.S. **820 (1985)** and the eighth amendment. Mr. Provenzano's

case is very similar to Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, ___ U.S.L.W. ___ (1989). In Mann, as in Mr. Provenzano'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,* 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.

> 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

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* 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. Provenzano'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. Provenzano'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.

> 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. Provenzano's case and Mann. The comments, argument and judicial instructions provided to Mr. Provenzano'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 explained early in voir dire that it would be the court's job to determine the sentence, not the jury's:

> "The penalty for murder in the first degree, the maximum sentence, is death or life imprisonment. If a verdict of guilty of murder in the first degree is rendered by the jury in this case then as soon as practical thereafter evidence will be presented to the same jury as to any matters relating to the sentence, including aggravating and mitigating circumstances.
>
> The State and the Defense will present arguments for or against the sentence of death. Then the jury will render an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment or death.
>
> This advisory sentence, unlike the verdict on the guilt phase of the trial, may be by a majority vote of the jury instead of unanimous vote of the jury. And the jury then sentences the defendant to life imprisonment or death.
>
> The Judge is not required to follow the advice of the jury. Thus, the jury does not impose the punishment. If such a verdict, that is a guilty verdict is rendered, the imposition of punishment is the functions of the Judge of this court, and that's me."

(R. 85) (emphasis supplied). Thus, from the very beginning of the trial, the jurors understood that the judge was not not

required to follow the recommendation of the jury -- that sentencing was the judge's "job".

The judge went on to explain numerous times that he did have to follow the advice of the jury, that "its simply a recommendation."

> "THE COURT: You wouldn't let the fact that the sentence, that you going to have to sit subsequently with the same jury and give a recommendation, quote, recommendation to the Court -- I do not have to follow that recommendation. It's simply a recommendation..."

(R. 90)

*****

> THE COURT: And there will be a two-phase trial. And it would bother you to sit on the sentencing phase and make a recommendation one way or the other to the Court?"

(R. 93)

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:

> The very first part, the jury decides whether or not the defendant is guilty. And the second part, which only occurs if the defendant renders a guilty verdict of first degree murder, then the same jury is asked to review certain evidence and make recommendation to the Court as to the sentence of death of life imprisonment.
>
> Now, only Judge Shepard can impose a life sentence with a minimum of twenty-five years in prison, or the death penalty. Judse Shepard will make the final decision if the defendant's convicted of first degree murder. Do you all understand that?

(R. 163)(emphasis added).

(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.

Provenzano's case, as in Mann, the effort to minimize the jury's sense of responsibility was persistent:

> "[THE PROSECUTOR:] I'm not talking about the recommendation now as to what the sentence should be. But if you return a verdict of guilty as charged, the defendant would be subject under the law in Florida to the death penalty, regardless of what you do later on.

(R - 164)(emphasis added.)

(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 . . .").

The prosecutor referred repeated to the advisory nature of the jury's "recommendation" concerning the sentencing. (R. 178; 179; 180; 181; 271; 272; 273; 274; 329; 408-09; 410; 411). In addition, the judge periodically spoke directly to the venirepanel to impress upon them himself that their vote was not binding on him.

> THE COURT: And that there's a possibility that if the jury should find the defendant guilty there would be a second proceeding by this same jury at a later date to determine a recommendation to the Judge, either the sentence of life or death. And it's only a recommendation which I may or may not follow.

(R. 313)

> "THE COURT: But that the sentencing is up to the Judge. The ultimate decision as to what the sentence will be up to me and not to the jury. The jury does make a recommendation, as you've been told. But I don't have to follow it. You understand that?
>
> *****
>
> THE COURT: You do understand that you don't have to sentence him to death?"

(R. 317)

> THE COURT: Okay. You do understand that the jury doesn't do the actual sentencing?

(R. 321)

"THE COURT: You don't think you could vote a recommendation to the Judge understanding that I do the sentencing?

MR. COOK: Yes, sir.

THE COURT: That I can totally disregard the jury's recommendation, and that's my conscience, not on the jury's. But you don't think you could do that?"

(R. 384).

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, informed the jury in no uncertain terms of the jury's lack of responsibility for sentencing, and as in Mann 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. Provenzano 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:

"I'll now inform you of the maximum and minimal, minimum possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has provided the guilt of the Defendant in accordance with these instructions."

(R. 1981).

> The maximum penalty for the crime of murder in the first degree is death. The minimum penalty for the crime of murder in the first degree is life imprisonment with no parole for **25** years. You have previously been instructed on the manner in which the penalty for a conviction of first dearee murder is determined."

(R - 1982) (emphasis added).

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 "for the purpose of jury determining and recommending to the Court a sentence." **(R. 1992).** 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 Arqument and Instructions

The penalty phase began by the Judge instructing the jury as to their role:

> THE COURT: Ladies and gentlemen of the jury, the defendant has been found guilty of murder in the first degree. Consequently, you will not in these proceedings concern yourselves with the question of his guilt.
>
> The punishment for this crime is either death or life imprisonment without the possibility for parole for twenty-five years. 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 defendant.

(R. 2042) (emphasis added).

After witnesses were presented, the State gave it's closing argument, in which it stressed time and again that the jury's determination was nothing more than a recommendation. (R. **2171; 2172; 2173-74; 2188; 2193; 2196; 2200).**

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. Only once were they told that the Court might give any weight to their recommendation." (R. 2173-4).

During instructions at the penalty phase, the jurors were 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:

> "THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision was to what punishment shall be imposed os the responsibility of the judge; however, it is your duty to follow the law that 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 death, of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon.. .

(R. 2226) (emphasis added)

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:

> "You will now retire and consider your recommendation. When seven or more of you are in agreement to recommend the imposition of the death sentence, or when six or more of you are in agreement to recommend life imprisonment without the possibility of parole for twenty-five years, then the appropriate form for recommendation, which I will furnish for you, should be signed by your foreman and returned to the court.
>
> Ladies and gentlemen, that concludes the court's instruction on this penalty proceeding. I do have an advisory sentence form here, which I am holding in my hand. I think it will be self-explanatory."

(R. 2230-31)(emphasis added)

These instructions, along with the Court's comments in voir dire, and the prosecutor's comments in voir dire and penalty phase closing, left little doubt in the jurors minds that their role was insignificant at best.

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 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. Provenzano's jurors, and condemned in 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, 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. Provenzano's case, it is obvious that the jury was equally misled by the prosecutor, and that the prosecutor's persistent misleading and jury minimizing statements were not remedied by the trial court.

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;; 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. Wainwrisht, 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). 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. Provenzano's jury, however, was never told this, but instead 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. Provenzano's case, and Mr. Provenzano 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. Provenzano'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. Provenzano's case, the Court itself made some of the statements at issue -- the error is thus even more substantial.

Caldwell, Adams, and Mann teach that, given comments such as those provided by the judge and prosecutor to Mr. Provenzano'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, 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."

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 mitigating factors apparent from the record 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 was found by the trial court, and many others were presented in this record.

This issue was not raised in Mr. Provenzano's appeal. No tactical decision can be ascribed to counsel's ailure to urge the claim. Counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Provenzano of the appellate reversal to which he was constitutionally entitled. See, Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

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

CONCLUSION AND RELIEF SOUGHT

A. NEED FOR HEARING

Claims I, 111, IV, V, VI, VII, XI AND XII, set out above, all involve , inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the Sixth Amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional. . . assistance. . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucev, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cased, many with records running to the thousands of pages, is no substitute for the careful,

> partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will recieve adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwrisht, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, 'is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bouds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urfe meitorious claims for relief. Counsel ineffecively and through ignorance of the facts and law simply failed to urge them on direct appeal. As in Matire, Mr. Provenzano is entitled to relief. See also, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Provenzano's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washinston, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Provenzano must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, Mr. Provenzano has.

They are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims

present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Provenzano's capital convictions and sentences of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appel1ate counsel's deficient performance, -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Thomas Harrison Provenzano through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional conviction 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 question of fact, Mr. Provenzano 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 question attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Provenzano urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all 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 a true copy of the foregoing has been furnished by (U.S. MAIL)(HAND DELIVERY) to Richard B. Martell, Assistant Attorney General, Office of the Attorney General, Beck's Building, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 6th day of March, 1989.

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